

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 21 2015

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE R. KNOX McMAHON
CIRCUIT COURT JUDGE

S.C. Supreme Court

CIVIL ACTION NO. 2012-CP-32-3496

Opinion No. 2015-UP-107 (S.C. Ct. App. filed March 4, 2015)

Roger R. Riemann,

PETITIONER,

versus

Palmetto Gems & Gemological Services, Inc. &
Thomas Shofner, in his individual capacity,

RESPONDENTS.

APPENDIX

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& THOMAS SHOFNER, IN HIS
INDIVIDUAL CAPACITY**

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Roger R. Riemann, Respondent,

V.

Palmetto Gems & Gemological Services, Inc. and
Thomas Shofner, in his individual capacity, Appellants.

Appellate Case No. 2013-001745

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2015-UP-107
Heard December 10, 2014 – Filed March 4, 2015

REVERSED AND REMANDED

Angus H. Macaulay and James Andrew Byars, both of
Nexsen Pruet, LLC, both of Columbia, for Appellants.

Eugene Hamilton Matthews, of Richardson Plowden &
Robinson, PA, of Columbia, for Respondent.

PER CURIAM: Palmetto Gems & Gemological Services, Inc. and Thomas Shofner (collectively "Appellants") appeal the circuit court's denial of their Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration of Roger R. Riemann's claims. Appellants contend the circuit court erred in (1) failing to

enforce the parties' agreement to arbitrate all disputes regarding the arbitrability of particular claims and (2) finding claims under the South Carolina Payment of Wages Act¹ to be unarbitrable as a matter of law. We reverse the order of the circuit court denying Appellants' motion to compel arbitration of Riemann's claims and remand for an order consistent with this opinion, pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the circuit court erred in failing to enforce the parties' agreement to arbitrate all disputes regarding the arbitrability of particular claims, we find the arbitration clause of the parties' agreement clearly and unmistakably provided that questions of arbitrability were to be decided by the arbitrator. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." (alterations in original) (citations omitted)); *id.* at 943 ("[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter."); *id.* ("Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate." (citations omitted)); *id.* ("If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."); *id.* ("These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." (citations omitted)); *id.* at 944-46 (noting the determination of arbitrability is for the arbitrator if the contract, when viewed in light of the ordinary state rules of contract construction, clearly and unmistakably evinces an intent for the arbitrator to make the decision).

2. As to all other issues: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that an appellate court need not review remaining issues on appeal when its determination of a prior issue is dispositive).

For the foregoing reasons, the trial court's denial of the motion to compel arbitration is **REVERSED** and the matter **REMANDED** for an order consistent with this opinion.

¹ S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2014).

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE R. KNOX McMAHON
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2013-001745
CIVIL ACTION NO. 2012-CP-32-3496

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SC Court of Appeals

Opinion No. 2015-UP-107 (S.C. Ct. App. filed March 4, 2015)

Roger R. Riemann,

RESPONDENT,

versus

Palmetto Gems & Gemological Services, Inc. &
Thomas Shofner, in his individual capacity,

APPELLANTS.

PETITION FOR REHEARING

The Respondent, Roger R. Riemann, respectfully petitions the Court for a rehearing of its Opinion No. 2015-UP-107 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

Procedural History

The appeal in this matter stems from a suit brought by Riemann against Appellants Palmetto Gems & Gemological Services, Inc. ("PGGS") and Thomas Shofner ("Shofner"), in his individual capacity (collectively, "Appellants") for (1) violation of the South Carolina Payment of Wages Act, S.C. CODE ANN. § 41-10-10 *et seq.*; (2) a tort

claim for wrongful discharge in violation of South Carolina public policy; (3) a defamation claim based on false statements Shofner made to Riemann's wife that Riemann was a "thief" and had stolen jewelry; and (4) an intentional infliction of emotional distress claim based on the statements Shofner made to Riemann's wife. Appellants moved to dismiss the action, or in the alternative, stay proceedings and compel arbitration.

This matter was heard by the Honorable R. Knox McMahon on February 13, 2013. On June 24, 2013, Judge McMahon issued an Order denying the Appellants' Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration.

Appellants filed their Notice of Appeal on August 1, 2013, and this matter was briefed in accordance with the Appellate Court Rules. This Court heard this matter on December 10, 2014. On March 4, 2015, this Court issued its unpublished opinion reversing the Trial Court's denial of the Appellants' motion to compel arbitration and remanded the case to the Trial Court for an order consistent with this Court's Opinion that the questions of arbitrability in this case were to be decided by the arbitrator rather than the court. This Petition for Rehearing follows.

Relevant Facts

Riemann's Final Brief to this Court enumerates the facts of this matter; however, Riemann offers a brief recitation of the facts to underscore the evidence presented which reasonably supports the Trial Court's findings regarding arbitrability.

Riemann, a gemologist, was hired on August 11, 2006 to work for PGGS. He was terminated by the owner of PGGS, Shofner, on May 21, 2012. (R. p. 21, Complaint, ¶ 1). Prior to his termination, Riemann had made known to Shofner his concerns that he

was not receiving appropriate bonuses under his Shareholder Management Agreement with PGGS. (R. pp. 107-110, Shareholder Management Agreement, attached as Exhibit "A" to the Complaint). Riemann ultimately filed a wage complaint with the South Carolina Department of Labor, Licensing & Regulation ("LLR") on or about February 7, 2012. LLR officially opened the investigation on or about March 14, 2012 and notified Shofner of the complaint in late March 2012. Shortly thereafter, on May 21, 2012, Shofner fired Riemann. (R. pp. 23-24, Complaint, ¶¶ 15-17).

On or about June 4, 2012, LLR completed its Investigative Report concerning Riemann's complaint and (1) issued a citation to PGGS for numerous violations of the S.C. Payment of Wages Act, S.C. CODE ANN. § 41-10-10 *et seq.*; and (2) cited PGGS for its failure to pay Riemann his bonus for 2011. (R. pp. 112-114, LLR Investigative Report, attached as Exhibit "C" to the Complaint). Despite the findings of LLR and Riemann's demand for payment, PGGS and Shofner have continued to refuse to pay Riemann money that is owed and due to him. (R. p. 24, Complaint, ¶¶ 18-21).

Prior to Riemann's termination, while Riemann's wife was visiting PGGS, Shofner confronted her and told her that Riemann was a "thief." He further stated that she "was wearing stolen jewelry." Shofner made these statements not only to Riemann's wife directly, but also within the earshot of other PGGS employees. Shofner made these statements with the full knowledge that they were false. Among other things, Shofner knew that the items had been placed on either a layaway or house account and knew that Riemann had made payments on them. (R. p. 25, Complaint, ¶ 25).

After Riemann filed suit, the Appellants moved to compel arbitration, relying on the "Dispute Resolution" provision of the Shareholder Management Agreement that

purportedly requires settlement of “[a]ny controversy or claim arising out of or related to this Agreement or the breach thereof” by binding arbitration. In denying the Appellants’ motion to compel arbitration, the Trial Court initially found that the Shareholder Management Agreement involved interstate commerce and was subject to the Federal Arbitration Act (“FAA”). The Trial Court also found that the arbitration clause in the contract was not “unconscionable.”

Nevertheless, the Trial Court denied the Appellants’ motion because (1) Riemann’s claim under the South Carolina Payment of Wages Act was not subject to arbitration, pursuant to S.C. CODE ANN. § 41-10-100, and (2) the Appellants failed to provide “clear and unmistakable” evidence that the parties intended for an arbitrator to determine whether the tort claims were arbitrable. The Trial Court further found that tort claims were not “substantially related” to the Shareholder Management Agreement, and that such claims were unforeseeable at the time the contract was formed, relying *inter alia* on *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) and *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007).

Argument

- I. **The arbitration clause of the parties’ Shareholder Management Agreement does not provide “clear and unmistakable” evidence that the parties agreed that question of arbitrability for all disputes between Riemann and the Appellants was to be decided by the arbitrator rather than the court.**

In reversing the Trial Court’s denial of the Appellants’ motion to compel arbitration, this Court held “the arbitration clause of the parties’ agreement clearly and unmistakably provided that questions of arbitrability were to be decided by the arbitrator.” In so holding, this Court relied upon the opinion of the Supreme Court of the

United States in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). The *Kaplan* case, however, does not mandate in this case that the arbitrator, rather than the court, decide whether Riemann's claims against the Appellants are subject to the arbitration clause in the Shareholder Management Agreement.

In *Kaplan*, a clearing firm had a dispute with the Kaplans and their investment company and pursuant to the term of a workout agreement sought arbitration of the dispute by a panel of the Philadelphia stock exchange. *Id.* at 940-41. The Kaplans denied that their disagreement with the clearing firm was arbitrable, and they filed written objections to that effect with the arbitration panel. The arbitrators determined that they had the power to rule on the merits of the parties' dispute and ruled in favor of the clearing firm. The Kaplans requested the federal district court to vacate the arbitration award, but upon motion of the clearing firm to confirm, the district court confirmed the award. The United States Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable and reversed the district court's confirmation of the award. *Id.* at 941.

The Supreme Court of the United States granted certiorari to address who should have the primary power to decide whether the parties agreed to arbitrate a certain dispute. The question considered was a very narrow one with respect to the standard of review applied to an arbitrator's decision about arbitrability because in this case it was the arbitrators that made the decision that the parties' dispute was arbitrable [unlike the instant case where the question was before the Trial Court]. The Court was therefore determining what standard of review by the district court applied to the arbitrators' decision that they had the power to rule on the merits of the suit. Thus, did the power to

decide arbitrability belong primarily to the arbitrators because the courts have to review their arbitrability decision deferentially or did the power belong to the court because the court determines arbitrability independently without any deference to the arbitrators' decision? *Id.* at 941-42.

The Court determined that the answer to the question was fairly simple. The question of who has the power to decide arbitrability "turns upon what the parties agreed about that matter:"

Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. . . . If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.

Id. at 943. The two answers to these questions, the Court observed, flowed "inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but *only* those disputes-that the parties have agreed to submit to arbitration." *Id.* (emphasis added).

The Court then provided brief guidance on how a court should decide whether the parties agreed to submit the arbitrability issue to arbitration, first recognizing that courts should apply ordinary state-law principles that govern the formation of contracts. *Id.* at 944. The Court also directed that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is *clear* and *unmistakable* evidence that they did so." *Id.* (internal citations omitted) (emphasis added).

This Court relied upon this language in *Kaplan* in presumably determining that

the following language in the Shareholder Management Agreement provided the clear and unmistakable evidence that the parties agreed the question of whether Riemann's claims were arbitrable should be decided by the arbitrator: "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as a part of the arbitration proceeding."

This analysis stops short, however, in resolving the question required to be answered by the Supreme Court in *Kaplan* – whether the parties contractually agreed to submit the question of arbitrability of a particular dispute to arbitration no matter the origin of the dispute. *Id.* at 943. In other words, is there clear and unmistakable evidence that Riemann agreed to submit to the arbitrator the question of arbitrability of all potential disputes between him and the Appellant, including claims not arising out of and not related to the Shareholder Management Agreement? Based upon the language of the Shareholder Management Agreement, the *Kaplan* opinion, and upon the precedent of this State's Supreme Court, the answer to this question is no.

By its terms, the Dispute Resolution Clause of the Shareholder Management Agreement only applies to any "controversy or claim arising out of or related to [the Shareholder Management Agreement] or the breach thereof." Therefore, by its terms, the Shareholder Management Agreement does not apply to disputes between the parties which arise outside of their contractual relationship.

Appellants, however, seek to sweep every interaction and dispute between the parties under this arbitration clause without any regard to whether such disputes are connected to the Shareholder Management Agreement by arguing that the one sentence – "Any dispute as to whether a controversy or claim is subject to arbitration shall be

submitted as a part of the arbitration proceeding” - covers every single interaction and removes all ability of the courts to decide whether a certain claim is subject to arbitration even when the claim has no relationship to the Shareholder Management Agreement and does not arise out of or relate to the Agreement to be covered by the Dispute Resolution Clause in the first instance.

This one sentence does not provide the “clear and unmistakable” evidence required by the United States Supreme Court in *Kaplan* that the parties agreed to submit the arbitrability of claims bearing no relationship to the Shareholder Management Agreement to the arbitrator. In fact, in *Kaplan*, the Court ultimately held that Kaplans did not agree to submit the question of arbitrability to arbitration because the agreement was silent or ambiguous on the issue and therefore, there was no clear and unmistakable evidence that the Kaplans agreed to submit such questions to the arbitration. *Kaplan*, 514 U.S. at 944-47.

The same can be said for the Dispute Resolution Clause in this case. The clause is silent, or in the very least, ambiguous, as to whether claims not arising out of or not related to the Shareholder Management Agreement are subject to a delegation clause contained within an agreement between the parties that only governs specific matters. The sentence upon which the Appellants rely does not clearly and unmistakably establish that the parties contractually agreed to submit claims legally distinct from the parties’ contractual relationship to an arbitrator on the question of whether such claims are arbitrable. The Dispute Resolution Clause is much too vague to clearly and unmistakably provide evidence that Riemann and Appellants contractually agreed to have an arbitrator decide the arbitrability of every single potential dispute between them. See *Chassereau*

v. Global-Sun Pools, Inc., 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007) (“[A]rbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate.”).

In the absence of clear and unmistakable evidence to the contrary, the question of the arbitrability of a claim is an issue for judicial determination. *See Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 23, 644 S.E.2d 663, 667-68 (2007) (observing the courts decide 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”); *see also Chassereau*, 373 S.C. at 171, 644 S.E.2d at 720.

Where there was not clear and unmistakable evidence that Riemann agreed otherwise, the question of arbitrability of the claims brought by Riemann against the Appellants was within the power of the Trial Court to decide. Riemann therefore respectfully submits that this Court misapprehended the holding and application of the *Kaplan* opinion to this case. Riemann therefore requests that this Court reverse its opinion and reinstate the Order of the Trial Court denying the Appellants’ motion to compel arbitration.

II. The Trial Court correctly determined that Riemann’s claims against the Appellants were not subject to arbitration.

While this Court did not address the remaining issues, Riemann asserts that the Trial Court correctly decided that Riemann’s claims for violation of the South Carolina Payment of Wages Act, wrongful discharge, defamation, and intention infliction of emotional distress were not subject to arbitration.

A. The South Carolina Payment of Wages Act statutorily bars the Appellants from forcing Riemann to arbitrate his statutory claim under the Act.

The Trial Court also correctly found that the Appellants cannot force Riemann to arbitrate his claim under the South Carolina Payment of Wages Act (the “Act”). To do so would violate S.C. CODE ANN. § 41-10-100, which provides that “No provision of this chapter may be contravened or set aside by a private agreement.” This includes, naturally, the provision in § 41-10-80(C) which provides employees with the right to bring a “civil action” against employers for violations of the Act.

The Appellants’ argument on this issue is not persuasive because it ignores the “cardinal rule of statutory construction” that, to ascertain and effectuate the actual intent of the legislature, “statutes which are part of the same Act must be read together.” *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Further, sections which are part of the same general statutory law of the state must be construed together, and each provision must be given effect, if it can be done by any reasonable construction. *Smalls v. Weed*, 293 S.C. 364, 370 360 S.E.2d 531, 534 (S.C. App. 1987) (quoting *State v. Fidelity & Deposit Co. of Maryland*, 114 S.C. 511, 104 S.E. 182 (1920)). The Appellants’ argument, if accepted, would require the Court to ignore the binding definition of the term “civil action,” ignore the remedial nature of the Act, and frustrate the intent of the legislature as expressed in the statutes.

It is well-established that the South Carolina Payment of Wages Act is “remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld.” *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 194, 463 S.E.2d 641, 645 (Ct. App. 2005). For that reason, our state “refus[es] to allow employers to ignore the

statute by claiming their employees had by contract or custom waived their statutory right to prompt payment of wages.” *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 504, 518 S.E.2d 591, 594 (1999) (quoting *Cato v. Grendel Cotton Mills*, 132 S.C. 454, 456-61, 129 S.E. 203, 205 (1925)). S.C. CODE ANN. § 41-10-100 embodies this policy by affirming that “[n]o provision of this chapter may be contravened or set aside by a private agreement.” (emphasis added).

Most recently, an employer attempted to argue that its failure to pay an employee as agreed had been waived by consent and that he was “estopped from challenging the policy” that he was contesting. In rejecting the employer’s argument, this Court relied on § 41-10-100, noting that “any agreement Ross may have consented to would be void” under § 41-10-100 and “unenforceable against him by Ligand.” *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 473 n. 1, 639 S.E.2d 460, 465 (Ct. App. 2006).

In the instant case, the Trial Court properly found that the language of § 41-10-100 was plain and unambiguous, and that the statute made clear that “[n]o provision of this chapter may be contravened or set aside by private agreement.” That section, read together with § 41-10-80(C), makes it equally clear that Riemann’s claim under the Act cannot be arbitrated. (R. p. 15, Order).

This finding is supported by other “plain and unambiguous” language in the South Carolina Code. The definition of a “civil action,” found in Rule 2 of the South Carolina Rules of Civil Procedure, declares emphatically that “[t]here shall be one form of action to be known as ‘civil action.’” (emphasis added). Moreover, Rule 3, SCRPC, is equally emphatic, defining a “civil action” as commenced only “when the summons and complaint are filed with the clerk of court within the statute of limitations in any manner

prescribed by law, or if actual service is accomplished within one hundred twenty days after filing.”

The Appellants incorrectly argued that the Trial Court “expanded” the Act’s statutory bar on private waivers of the Act’s provisions. To agree with Appellants’ argument, this Court would have to ignore the legislature’s clear definition of a “civil action,” as well as its equally clear directive in § 41-10-100, as well as the remedial nature of the Act itself.

The Appellants also (wrongly) argued that the language of § 41-10-80(C) – which grants an employee the right to bring a civil action – can be contravened or set aside by private agreement because the legislature stated that private citizens “may” bring a civil action. The Appellants compared the grant of this right to other sections of the Act that are directives to LLR, which is the administrative agency in charge of enforcing the Act. These directives are understandably stated in terms mandating that LLR, and its Director, carry out specific bureaucratic duties with regard to the Act, such as investigating claims, assessing penalties, and giving written warnings to violators. *See* S.C. CODE ANN. §§ 41-10-30, 41-10-50 & 41-10-70. By contrast, it would be absurd for the legislature to issue a directive to private citizens “requiring” them to exercise their rights under § 41-10-80(C). Following this argument to its logical conclusion, the Appellants must presume that the legislature could order private citizens to bring civil actions in the same manner that it can order administrative agencies to carry out specific duties of state government. Such a

distinction is absurd should have no bearing on the issues before this Court.¹

For these reasons, it is clear that the Trial Court had ample legal and factual grounds to deny the Appellants' attempt to compel arbitration of Riemann's claim under the South Carolina Payment of Wages Act. Therefore, Riemann respectfully requests this matter be reheard and the trial court's Order affirmed.

- B. Riemann's remaining tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress are not claims that "arise out of or are related to" the Shareholder Management Agreement, and therefore, these claims are not subject to the "Dispute Resolution" provision cited by the Appellants.**

In determining that Riemann's three tort claims were not arbitrable, the Trial Court found that the tort claims did not bear a "significant relationship" to the arbitration provision of the Shareholder Management Agreement. The Trial Court made this determination after examining the Shareholder Management Agreement and the nature of the factual allegations of Riemann's claims for wrongful discharge, defamation, and intentional infliction of emotional distress. Because none of the claims relied on the outcome of the resolution of any issue significantly related to the Shareholder Management Agreement, the Trial Court reasonably ruled that they were not arbitrable under the Shareholder Management Agreement. (R. p. 18, Order).

In reaching its decision, the Trial Court relied on the rulings of the South Carolina

¹ The Appellants also point to one case from the Court of Appeals in which the arbitration of a Payment of Wages Act claim under the Act is referenced. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). While the Appellants cite to the case, and three other cases decided in federal courts, for support for the proposition that arbitration of claims under the Act can be compelled in spite of S.C. CODE ANN. § 41-10-100, a close reading of *Pearson* and the other cases reveals that none of these cases ever addressed the impact of § 41-10-100, or even indicate in any way that the issue was raised by any party. As such, the cases have no bearing on the resolution of the issues presented here.

Supreme Court that were directly on point. In determining whether a dispute between parties is covered under a purported arbitration agreement, our Supreme Court has stated as follows:

[W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Aiken, 373 S.C. at 151, 644 S.E.2d at 709 (2007); *Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720 (“[W]e refuse to interpret an arbitration agreement with similar, though not identical, language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate”).

Under the tests set forth by our Supreme Court, none of the tort claims alleged by Riemann are arbitrable. None of the claims rely on the outcome of the resolution of any issue specifically related to the Shareholder Management Agreement:

- Riemann’s claim for wrongful discharge in violation of public policy does not rely on any issue specifically related to the Shareholder Management Agreement. Instead, the claim is based solely on the allegations that: (1) Riemann filed a wage complaint with LLR, (2) Shofner fired him shortly thereafter, and (3) there is a causal connection between the two, and any attempt by Shofner to justify the termination after the fact is pretextual. Not one of these allegations relies in any way on any issue related to the Shareholder Management Agreement.
- Riemann’s claim for defamation arises wholly outside the Shareholder Management Agreement, and alleges exactly the type of “outrageous conduct” referenced in the Supreme Court’s decisions in *Aiken* and *Chassereau*, *supra*.
- Likewise, Riemann’s claim for intentional infliction of emotional distress, or “outrage,” arises from conduct that is wholly disconnected with any issue related to the Shareholder Management Agreement.

The Trial Court also explicitly ruled that it was “clear from the record before this Court that Riemann’s claims are wholly disconnected with any issue related to the Shareholder Management Agreement.” (R. p. 19, Order). In so holding, the Trial Court had at its disposal a record that included the Shareholder Management Agreement, which did not articulate Riemann’s specific duties or obligations as an employee, or the manner in which Riemann’s employment might be terminated. (R. pp. 107-110, *See* Shareholder Management Agreement). Thus, the Trial Court had ample legal and factual bases to determine that Riemann’s claims were “wholly disconnected with any issue related to the Shareholder Management Agreement.” (R. p. 19, Order).

Indeed, the Appellants abandoned any effort to argue that Riemann’s three tort claims were “significantly related” to the Shareholder Management Agreement. Appellant’s Brief only addresses their argument that the Trial Court should not have addressed the issue of arbitrability at all. Because the issue was not addressed in the Appellants’ Brief, it must be deemed abandoned and is the law of the case. *Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151 (2009); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989).

For these reasons, the Trial Court’s ruling that Riemann’s three tort claims are not subject to arbitration has ample legal and factual support and must be upheld.

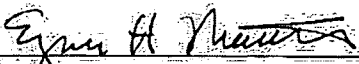
CONCLUSION

For the reasons set forth herein, Respondent Roger R. Riemann respectfully requests that the Court grant his Petition for Rehearing, withdraw the Opinion of the Court, and reinstate the Trial Court’s Order denying the Appellants’ motion to compel.

Dated this the 19th day of March, 2015.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent Roger R. Riemann, do hereby certify that I have this date served the foregoing Petition for Rehearing, dated March 19, 2015, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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Dated: March 19, 2015.

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MAR 19 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 30 2015

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-32-3496

Roger R. Riemann.....Respondent.

v.

Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual
capacity.....Appellants.

APPELLANTS' RETURN TO RESPONDENT'S PETITION FOR REHEARING

Pursuant to S.C.A.C.R. 221(a) and 240(e), Appellants respectfully submit the following Return to Respondent's Petition for Rehearing.

Respondent's Petition should be denied because the Court's March 4, 2015 decision neither "overlooked" nor "misapprehended" any issue of law. The Court correctly held that the United States Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) requires reversal of the trial court's denial of Appellant's motion to compel arbitration, because the parties "clearly and unmistakably" agreed that the arbitrator, and not the court, would resolve any dispute as to whether particular claims were subject to arbitration.

Respondent argues that the Court “misapprehended the holding and application of [*First Options*] to this case.” (Petition, p. 9.) More specifically, Respondent asserts that, regardless of whether there is a “clear and unmistakable” agreement to submit arbitrability disputes to the arbitrator, *First Options* still requires the trial court to first determine “whether the parties contractually agreed to submit the question of arbitrability *of a particular dispute* to arbitration.” (Petition, p. 7.) (emphasis added) Unless the trial court determines that a particular claim is “clearly and unmistakably” within the scope of the arbitration agreement, Respondent believes the arbitrability of that claim must be resolved by the court, and not by the arbitrator.

Respondent’s circular interpretation would overrule *First Options*, because it suggests that a contractual delegation provision operates to submit arbitrability disputes to the arbitrator only if the court first finds that the particular claims are “clearly and unmistakably” within the scope of the arbitration provision. The fallacy in this reasoning is that there would *never* be an arbitrability dispute to submit to the arbitrator if the court has already determined which claims are within the scope of the arbitration agreement. Any agreement to arbitrate disputes as to the arbitrability of particular claims would be meaningless, because the trial court would not honor that agreement unless it first determined that the claims were arbitrable, thus defeating the parties’ express contractual intention to have that issue decided by the arbitrator.

Indeed, Respondent’s argument is the exact opposite of what *First Options* holds. *First Options* holds that the trial court must honor a “clear and unmistakable” agreement to arbitrate disputes as to the arbitrability of particular claims, just as it honors other valid arbitration agreements. See *First Options*, 514 U.S. at 943 (“Just as the arbitrability of

the merits of a dispute depends upon whether the parties agreed to arbitrate the dispute. . . . the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter.”) *First Options* does not require that the trial court first determine whether the parties “clearly and unmistakably” agreed that *particular claims* are within the scope of the arbitration agreement before submitting those claims to arbitration. Such a requirement would both defeat the purpose of the delegation provision altogether, by requiring the court to resolve arbitrability in all cases, and also conflict with long-established federal policy imposing a presumption of arbitrability. *Id.* at 945 (“[A]ny doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration.”). Instead, the “clear and unmistakable” standard applies *only* to the issue of whether the parties agreed to delegate resolution of arbitrability disputes to the arbitrator, not whether particular claims fall within the agreement’s scope.

Respondent combines this flawed interpretation of *First Options* with the self-serving presumption that his particular claims are not “arising out of or related to” the Shareholder Management Agreement (“the Agreement”), such that he contends he did not “clearly and unmistakably” agree to submit the question of their arbitrability to the arbitrator. (See Petition, p. 8 (stating that the delegation provision at issue “does not clearly and unmistakably establish that the parties contractually agreed to submit claims *legally distinct from the parties contractual relationship* to an arbitrator on the question of whether such claims are arbitrable.”) (emphasis added)). Because the parties obviously did not agree that disputes falling *outside* the scope of the arbitration agreement would be submitted to the arbitrator, Respondent believes that the lower court properly ruled on arbitrability and denied Appellants’ motion to compel arbitration.

Of course, if Respondent's presumption that his claims fall outside the scope of the arbitration agreement were an *undisputed fact* as he suggests, the delegation provision would be irrelevant. Appellants would not have filed a motion to compel arbitration, there would be no need for anyone, neither court nor arbitrator, to resolve any issue of arbitrability, and this case would not be before the Court.

But the parties not only agreed to arbitrate claims "arising out of or related to" the Agreement, they also agreed to arbitrate any gateway "dispute as to whether a controversy or claim is subject to arbitration." (R. p. 108.) The parties' "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2777-78 (2010) (citing *First Options* 514 U.S. at 943).

And, despite Respondent's presumption to the contrary, there is a dispute among the parties as to whether Respondent's claims are "arising out of or related to" the Agreement and subject to arbitration. Appellants assert that all of Respondent's claims are arbitrable because they all "arise out of" the business relationship memorialized by the Agreement, while Respondent asserts that none of his claims are arbitrable because they are "legally distinct from the parties' contractual relationship." Respondent's claims are not outside the scope of the Agreement merely because Respondent says so; this is a dispute, and it must be resolved by someone, either the court or the arbitrator.

The parties clearly and unmistakably agreed to submit any such arbitrability dispute "as part of the arbitration proceeding." (R. p. 108.) This is precisely the type of dispute that the delegation provision was designed to address, and this agreement would

be meaningless if, as Respondent suggests, the only disputes referred to the arbitrator were those which the court decided were “arising out of or related to” the Agreement. *First Options* required that the lower court honor the parties’ delegation provision and submit the entire case to arbitration, where the arbitrator will resolve this arbitrability dispute. This clear precedent is the basis of this Court’s reversal of the trial court, and the Court did not “overlook” or “misapprehend” anything in reaching this decision.

Because the Court’s March 4, 2015 decision did not rule upon the remaining issues raised by Respondent—that Respondent’s South Carolina Payment of Wages Act claim is unarbitrable as a matter of law, and that Respondent’s remaining claims are outside the scope of the arbitration agreement—those issues are not proper subjects of Respondent’s Petition for Rehearing, and need not be addressed by Appellants.

For the reasons stated herein, Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner respectfully request that the Court **DENY** Respondent’s Petition for Rehearing and remand this case to the lower court for an order consistent with its March 4, 2015 opinion.

Respectfully submitted,



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March 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-32-3496

Roger R. Riemann Respondent.

v.

Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual
capacity.....Appellants.

PROOF OF SERVICE

I hereby certify that I have served the foregoing Appellants' Return to Respondent's Petition for Rehearing on the Respondent by hand-delivering a copy of the same, on March 30, 2015, addressed to Respondent's Counsel of Record, Eugene H. Matthews, Esq., 1900 Barnwell Street, Columbia, South Carolina 29201.

March 30, 2015



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The South Carolina Court of Appeals

Roger R. Riemann, Respondent,

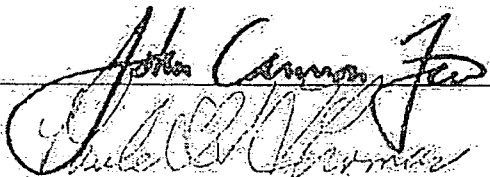
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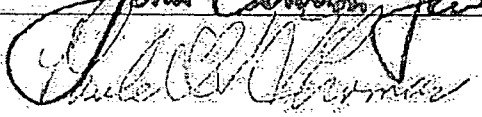
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Thomas Shofner, in his individual capacity, Appellants.

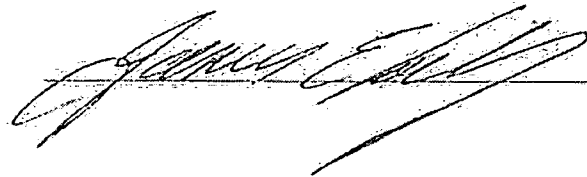
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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


J.


J.

Columbia, South Carolina

cc:

Angus H. Macaulay, Esquire

James Andrew Byars, Esquire

Eugene Hamilton Matthews, Esquire

The Honorable R. Knox McMahon

FILED

April 21, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-32-3496

Roger R. Riemann Respondent.
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Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual
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ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Roger R. Riemann,

Plaintiff,

vs.

Palmetto Gems & Gemological
Services, Inc. and Thomas Shofner, in
his individual capacity,

Defendants

) IN THE COURT OF COMMON PLEAS
) ELEVENTH JUDICIAL CIRCUIT

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) C/A No.: 2012-CP-32-3496

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LEXINGTON, SC

) **ORDER DENYING DEFENDANTS' MOTION**
) **TO DISMISS, OR IN THE ALTERNATIVE,**
) **STAY PROCEEDINGS AND COMPEL**
) **ARBITRATION, AND GRANTING**
) **PLAINTIFF'S MOTION TO AMEND**
) **COMPLAINT AND COMPEL DISCOVERY**

The matter came before this Court on the Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration of Defendants Palmetto Gems & Gemological Services, Inc. (hereinafter "PGGS") and J. Thomas Shofner (hereinafter "Shofner"), in his individual capacity (hereinafter collectively the "Defendants"). Plaintiff Roger R. Riemann (hereinafter "Riemann") also filed a Motion to Amend Complaint to add a cause of action for Intentional Infliction of Emotional Distress and to Compel the Defendants to answer previously filed discovery requests.

For the reasons listed below, this Court DENIES the Defendant's Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration, and GRANTS the motions of the Plaintiff to Amend his Complaint and to Compel Discovery. Further, Plaintiff's Motion to Strike the Affidavit of Defendant Thomas Shofner is DENIED.

SUMMARY OF ALLEGATIONS AND CAUSES OF ACTION

Plaintiff Riemann is a gemologist and a former employee of PGGs. He was hired on August 11, 2006 and was terminated by Shofner on May 21, 2012. (Complaint, ¶ 1).

Riemann alleges that for an extended time prior to his termination, he made known to Shofner his concerns that he was not receiving appropriate bonuses under his written agreement with PGGs. The Defendants failed to address these concerns, and Riemann ultimately filed a wage complaint with the South Carolina Department of Labor, Licensing & Regulation ("LLR") on or about February 7, 2012. LLR officially opened an investigation on or about March 14, 2012, and notified Shofner of the complaint in late March 2012. On May 21, 2012, Shofner fired Riemann. (Complaint, ¶¶ 15-17).

Riemann also alleges on or about June 4, 2012, LLR completed its Investigative Report concerning Riemann's complaint and issued a citation to PGGs for numerous violations of the S.C. Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* With regard to Riemann, LLR cited PGGs for its failure to pay Riemann his bonus for 2011. PGGs did not appeal the citation to the S.C. Administrative Law Court or otherwise appeal the finding of LLR. Despite the findings of LLR and Riemann's demand for payment, the Defendants continued to refuse to pay Riemann money that is owed and due to him. (Complaint, ¶¶ 18-21).

Finally, Riemann alleges that prior to his termination, while his wife was visiting PGGs, Shofner confronted her and told her that Riemann was a "thief." Shofner also allegedly stated that she "was wearing stolen jewelry," that he made these statements not only to Riemann's wife directly but also within the earshot of other PGGs employees, and that he made these statements with the full knowledge that they were false. Among other things, Shofner allegedly knew that



the items had been placed on either a layaway or house account, and knew that Riemann had made payments on them. (Complaint, ¶ 25).

Based on these allegations, Riemann filed this lawsuit alleging three (3) causes of action:

1. A statutory claim for violation of the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et seq.*
2. A tort claim for wrongful discharge in violation of South Carolina public policy.
3. A defamation claim based on Shofner's statements to Riemann's wife.

Riemann has also moved this Court to amend his Complaint to add a fourth cause of action against the Defendants for Intentional Infliction of Emotional Distress based on the statement that Shofner made to Riemann's wife.

DEFENDANTS' MOTION TO DISMISS

On October 29, 2012, Defendants filed and served their Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration. Defendants made their motion pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 (the "FAA"), requesting that this Court compel Riemann to arbitrate each of his claims. Defendants supported their motion with (1) an affidavit¹ from Defendant Shofner describing the Defendants' alleged connections to interstate commerce, and (2) a copy of the Shareholder Management Agreement.

The "Dispute Resolution" provision of the Shareholder Management Agreement purportedly requires settlement of "[a]ny controversy or claim arising out of or related to this Agreement or the breach thereof" by binding arbitration. It also includes a provision demanding

¹ Riemann sought to challenge many of Shofner's statements in his affidavit, stating that they appeared to be false, and timely served his Second Set of Interrogatories and Second Request for Production of Documents to Defendants on December 3, 2012. As detailed in Riemann's Motion to Compel Discovery, Defendants have not answered these requests. Within thirty (30) days of the date of this Order, Defendants must answer all discovery requests previously served by Plaintiff to Defendants.



that the parties engage three (3) arbitrators who must be "a certified public accountant, a lawyer, or a businessman with at least seven (7) years experience as an executive in a closely held corporation." The Dispute Resolution provision is on the middle of the second page of the four page Agreement, is not set out in any way from the other text in the Agreement, and is not entitled as an "Arbitration" provision.

ANALYSIS

A. The Agreement Involves Interstate Commerce and is Subject to the FAA.

Defendants argue that this dispute is subject to arbitration because the Agreement "involves" interstate commerce so as to make the arbitration provision enforceable under the Federal Arbitration Act.

1. The FAA requires that contractual arbitration provisions be honored when the "essential character" of the contract involves interstate commerce.

- (a) The inapplicability of the South Carolina Uniform Arbitration Act is not determinative.

The parties agree that the South Carolina Uniform Arbitration Act cannot provide a basis to order arbitration because notice that the Agreement was subject to arbitration was not printed in underlined, capital letters on the first page of the Agreement. See S.C. CODE § 15-48-10(a). However, the Agreement is still subject to mandatory arbitration if the Federal Arbitration Act ("FAA") applies to the Plaintiff's claims. See *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (holding that an agreement with insufficient notice of the arbitration provision to satisfy state law must be analyzed for compliance with the FAA).

- (b) The FAA applies to transactions "involving" interstate commerce.

The FAA provides that "a written provision in any . . . contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such



contract. . . shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. “Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

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(c) The FAA embodies a presumption in favor of arbitration.

The analysis begins with the “strong presumption in favor of the validity of arbitration provisions because of the strong policy favoring arbitration.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999)). “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) (citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 269 (1995)). This “commerce in fact” standard turns on whether the transaction “in fact” involved interstate commerce, “regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

Determination of whether a transaction involves interstate commerce is, therefore, a fact-specific inquiry. *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117. “The court must examine the Agreement, the complaint, and the surrounding facts” to determine whether the “essential character” of the transaction implicates interstate commerce. *Thornton v. Trident Med. Ctr.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003).

2. The Agreement at issue involves interstate commerce.

In this case, the essential character of the parties’ Agreement implicates interstate commerce because the Agreement created a business which required interstate activities.



(a) The Agreement required interstate travel under *Lucey* analysis.

First, the Agreement involved interstate commerce because Shofner and Riemann's performance under the Agreement required interstate travel. See *Lucey v. Meyer*, 736 S.E.2d 274 (S.C. Ct. App. Oct. 24, 2012). The parties did not and could not carry on the profit-making gemstone business created by the Agreement without traveling outside of South Carolina, and thus Shofner and Riemann in fact entered into the stream of interstate commerce.

In *Lucey*, the underlying agreement was an employment agreement between a law firm and new associate attorney in Charleston. 736 S.E.2d at 277. The agreement provided the terms of the associate's salary and bonus structure, referenced several cases she would handle for the firm, and included a mandatory arbitration provision for any matters arising out of the agreement. *Id.* The parties' relationship deteriorated, and the firm filed a complaint against the associate and moved to compel arbitration. *Id.* at 278. The trial court denied the motion, finding that the associate's work on cases involving out-of-state witnesses and travel was insufficient to establish that the employment relationship was interstate in character when the agreement involved a South Carolina lawyer providing services for a South Carolina law firm. *Id.* at 282.

The Court of Appeals reversed and rejected the trial court's finding that the associate's out-of-state activities were merely incidental to the intra-state transaction and could not be said to affect interstate commerce. *Id.* at 280-283. Instead, the Court of Appeals held that the associate's representation of the firm's out-of-state clients served as a basis for the legal partnership memorialized in the employment agreement, and the associate in fact traveled out-of-state to serve those clients and thus to perform under the agreement. *Id.*, 736 S.E.2d at 282-83. "Considering the liberal application of the Commerce Clause, and recognizing the FAA is to be



construed to the full extent of the Commerce Clause," the Court of Appeals held that the associate's out-of-state travel "involved interstate commerce" and implicated the FAA. *Id.*

In this case, the business relationship created by the Agreement required both Defendant Shofner and Plaintiff to physically enter the stream of interstate commerce to carry out the business of Palmetto Gems. Both partners' responsibilities under the Agreement required travel outside South Carolina in order to purchase and sell Palmetto Gems inventory, purchase supplies, and attend conferences. Shofner Aff. ¶¶ 9-10.

Plaintiff argues that this case is more analogous to *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Cl. App. 2012) because the Agreement here merely involved the hiring of a South Carolina resident to provide gemologist services inside South Carolina. Pl. Opp. Memo pp. 6-7.

The Defendants' affidavit in support of this Motion reflects that both parties entered the stream of interstate commerce as a result of their contractual obligations under the Agreement. Shofner Aff. ¶¶ 5-10. The Agreement named Defendant Shofner and Plaintiff as the sole Executive Officers of Palmetto Gems, and those roles required interstate travel to purchase and sell inventory and equipment for the store. *Id.* The parties' interstate travel to purchase business-related goods made them "persons or things in interstate commerce," and thus the FAA is implicated.

(b) The Agreement involved interstate transactions.

Besides travel, the Agreement involved interstate commerce because the parties used the instrumentalities of interstate commerce to conduct interstate transactions for PGGS and placed items in the stream of interstate commerce for sale and customization.



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The Agreement expressly contemplated that part of PGGS' income would originate from sales outside South Carolina, including sales through PGGS' website. See Shofner Aff. ¶¶ 4-5. More specifically, the Agreement indicates that the salary and profit sharing distributions to which Defendant Shofner and Plaintiff would be entitled pursuant to the Agreement would come from two sources: the PGGS store and its website. See Exhibit B, p. 5. The website advertises PGGS' products and services and is not limited to South Carolina customers. See Shofner Aff. ¶ 5. Because the Agreement provided for sales through PGGS' internet website, performance under the Agreement involved the channels and instrumentalities of interstate commerce, and thus comes within the scope of the FAA.

Moreover, the parties placed items in the stream of interstate commerce. Defendant Shofner testified that PGGS' has one-hundred eighteen (118) out-of-state customers in twenty-nine (29) states that have generated over three hundred (300) sales transactions outside of South Carolina. Shofner Aff. ¶¶ 6-7. But the parties' placement of items into the stream of interstate commerce was not limited to out-of-state sales. PGGS also offered specialization and customization services to customers that were not performed "in house," but were sent out-of-state to contractors who completed the work on PGGS' behalf. Shofner Aff. ¶ 8. This part of PGGS' business affected interstate commerce, as it involved the interstate transport of materials and the provision of services by foreign vendors in order to carry on the profit-making enterprise created by the Agreement. As a result of those interstate transactions, PGGS was affected, the vendors from whom PGGS purchased gems and other products were affected, the vendors from whom PGGS purchased customization services were affected; and the purchasers were affected, none of whom, except PGGS, were limited to South Carolina. Together, these transactions had a substantial effect on interstate commerce. See, e.g. *Towles v. United HealthCare Corp.*, 338 S.C.

29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999) (finding physician's employment agreement implicated interstate commerce when plaintiff participated in teleconferences with out-of-state medical staff, reviewed claims from out-of-state providers, attending out-of-state conferences, participated in out-of-state sales presentations, and worked with national companies to resolve issues).

Because the parties' performance under the Agreement required interstate travel and the placement of goods in the stream of interstate commerce, the Agreement "involved" interstate commerce.

B. The Agreement is Not Unconscionable

Plaintiff argues that the Agreement's arbitration provision is unenforceable because it is unconscionable. Pl. Memo. Opp. pp. 7-10. The Court disagrees.

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Lucey*, 736 S.E.2d at 283 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007)). "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." *Id.* at 283-84 (citing *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668). For an arbitration provision to be unconscionable, the party seeking non-enforcement must demonstrate "both an absence of meaningful choice *and* oppressive, one-sided terms." *Id.* at 284 (emphasis in original) (citing *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669).

1. Plaintiff had a meaningful choice in agreeing to arbitrate.

“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.” *Lucey*, 736 S.E.2d at 284 (citing *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295-96 (4th Cir. 1989)). Factors for courts to consider include “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.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citing *Carlson*, 883 F.2d at 293, 295).

The Court finds that Plaintiff had a meaningful choice in deciding whether to enter the Agreement. The purpose of the Agreement was to form a new business with Shofner and Riemann as its sole Executive Officers and to document the parties' respective rights and responsibilities with respect to the creation of that business. See Shofner Aff. ¶ 2, Exhibit A, p. 1. As one of only two partners, Plaintiff's assent to the terms of the Agreement was necessary to the creation of PGGs. Plaintiff was free to negotiate the terms of the agreement or to walk away without personal or financial repercussion; this is the hallmark of meaningful choice. See, e.g. *Simpson*, 373 S.C. at 25-27, 644 S.E.2d at 669-70 (finding that consumer lacked meaningful choice in agreeing to arbitration provision in automobile sales contract in part because a car is a critically important necessity in today's society and thus consumer could not walk away, regardless of disagreement).

Plaintiff argues that he lacked meaningful choice because the arbitration provision was “hidden in the middle of page 2 of a 4-page agreement and is not even entitled as an ‘Arbitration’ provision.” Pl. Memo. Opp. p. 8. Plaintiff cites *Kumpf v. United Telephone Co. of Carolinas*,



Inc.,² a breach of implied contract case based on an employee handbook, in support of his argument that the Agreement's arbitration provision is inconspicuous as a matter of law because it is not capitalized, bold, underlined, or otherwise distinctive from the other numbered provisions of the Agreement. Pl. Memo. Opp. p. 9. Plaintiff's argument conflates the standard for conspicuous disclaimers of employee handbook contracts with the standard for an arbitration provision enforceable pursuant to the FAA. This is not the law under the FAA or in South Carolina.³ It is well-settled that a person who can read is bound to the terms of a contract he signs. *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (internal citation omitted) (rejecting plaintiffs' argument that arbitration provision was unconscionable because they were not advised that it was included in the contract).

The arbitration provision in this case was written in the same size type face as every other provision of the Agreement, and, regardless of the section's "Dispute Resolution" title, there is little doubt that the provision clearly requires that arbitrable disputes be resolved by arbitration. See *Shofner Aff.* ¶ 2, Exhibit A. Moreover, there is nothing in the Agreement which would preclude Plaintiff from consulting a lawyer prior to executing the Agreement. See *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 600, 281 S.E.2d 121, 123 (1981) (rejecting argument that the plaintiff could evade arbitration agreement based on surprise in part because plaintiff was free to consult an attorney before executing the agreement).

² 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993).

³ As noted previously, the South Carolina Uniform Arbitration Act imposes similar notice requirements as those suggested by Plaintiff, in that notice of the arbitration provision must be in underlined, capital letters on the first page of the Agreement. See S.C. CODE § 15-48-10(a). But both the United States Supreme Court and the South Carolina Supreme Court have expressly held that the FAA displaces heightened state law notice requirements for arbitration provisions, and thus arbitration provisions sought to be enforced under the FAA must be analyzed the same as all other contracts, without specific requirements of notice to enforce the provision. See *Soil Remediation Co. v. Nu-Way Environ., Inc.*, 323 S.C. 454, 459, 476 S.E.2d 149, 151-52 (1996) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)). Thus, the Court rejects any argument that the Agreement's arbitration provision is inconspicuous as a matter of law, simply because the format does not comply with the requirements of unrelated state laws.

Under these circumstances, there is no evidence that the format of the arbitration provision deprived Plaintiff of a meaningful choice in deciding whether to enter the Agreement.

Similarly, there is no evidence, affidavit or otherwise, that Plaintiff was less sophisticated than Shofner at the time of entering the Agreement. Because Plaintiff was not deprived of a meaningful choice in agreeing to arbitrate this dispute, the arbitration provision is not unconscionable.

2. The terms of the arbitration provision were not oppressive or one-sided.

Plaintiff argues that the Agreement's arbitration provision was oppressive because the provision requires three qualified arbitrators and allegedly the cost "would effectively prevent Riemann from seeking any adjudication of his claims." Pl. Memo. Opp. p. 9. "As stated previously, this prong of the test sets forth that we are to review the terms to see if no reasonable person would make them and no fair and honest person would accept them." *Lucey*, 736 S.E.2d at 283 (citing *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668).

Plaintiff has the burden of placing evidence on the record that the costs of arbitration would be prohibitively expensive in order to overcome the liberal policy favoring arbitration. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 71, 90-91 (2000)) (rejecting plaintiff's argument that the cost of arbitration would preclude her from pursuing claims against the defendant as "speculative" when plaintiff failed to place evidence of her costs on the record). Plaintiff failed to submit an affidavit in opposition to Defendants' motion or otherwise place evidence on the record establishing the costs he would incur in arbitration. Therefore, this Court finds that the costs of arbitration would not be prohibitively expensive.

Moreover, the terms of the arbitration provision are not so oppressive that a reasonable person would not make them and no honest person would accept them. The terms of the provision are not one-sided, as they are equally binding on both Plaintiff and Defendant Shofner. The agreement that disputes will be resolved by a panel of three arbitrators—one selected by each party and the third selected by the other two arbitrators—is not unique and has been enforced by courts previously over unconscionability objections.⁴ See *Lucey*, 736 S.E.2d at 285. And, despite Plaintiff's argument to the contrary, the purpose of the three-arbitrator panel provision appears to ensure an "unbiased decision by a neutral decision-maker," the very result that precludes an arbitration provision from being unconscionable. See *Lucey*, 736 S.E.2d at 284 (citing *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668).

Finally, Plaintiff argues that the Agreement violates is oppressive because it provides for the arbitrator's assessment of fees and costs if the parties were found to act in bad faith. Shofner Aff. ¶ 2, Exhibit A, p. 2. Citing *Simpson*, Plaintiff argues that this provision "essentially places [Plaintiff] under a significant financial threat that he would not otherwise face." Pl. Memo. Opp. pp. 9-10. However, the *Simpson* discussion cited by Plaintiff addressed an arbitration provision which precluded the arbitrator's entry of punitive or treble damages that would otherwise be available to the plaintiff for her South Carolina Unfair Trade Practices Act and Dealers' Act claims. 373 S.C. at 28, 644 S.E.2d at 670. The case had nothing to do with the cost of arbitration, but instead invalidated a provision which expressly limited a party's right to pursue

⁴ Even if the Court were to find the requirement of three arbitrators to be unconscionable under these circumstances, the arbitration provision would be enforceable, without the three arbitrator requirement. See S.C. CODE ANN. § 36-2-302(1) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract. . . or it may so limit the application of any unconscionable clause as to avoid any unconscionable result").

statutory remedies. The arbitration provision in this case makes no such limitation, and thus the mutual imposition of penalties for claims made in bad faith is not oppressive.

As such, the Court finds that the Agreement's arbitration provision was not unconscionable because it neither deprived Plaintiff of a meaningful choice nor included oppressive and one-sided terms, and thus the arbitration provision is enforceable against Plaintiff as to arbitrable claims.

C. PLAINTIFF'S SOUTH CAROLINA PAYMENT OF WAGES ACT CLAIM IS NOT SUBJECT TO ARBITRATION

Although the arbitration provision is enforceable under the FAA, Plaintiff's claim against the Defendants for violating of the South Carolina Payment of Wages Act (the "Act") cannot be arbitrated because the "Dispute Resolution" provision in the Shareholder Management Agreement violates S.C. Code Ann. § 41-10-100, which provides that "No provision of this chapter may be contravened or set aside by a private agreement." This includes, pointedly, the provision in S.C. Code Ann. § 41-10-80(C) which provides employees with the right to bring a "civil action" against employers for violations of the Act.⁵

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 147–48, 694 S.E.2d 525, 529 (2010) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees*, 400 S.C. 478, 488,

⁵ Although not dispositive, it should be noted that paragraph 12 of the Agreement is titled "Governing Law" and states that "The construction and interpretation of this Agreement shall at all times and in all respects be governed by the laws of the State of South Carolina."

735 S.E.2d 492, 498 (2012). The determination of legislative intent is a matter of law. *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 459 S.E.2d 841 (1995). *City of Camden v. Brassell*, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997).

Here, the statute's language is plain, unambiguous, and conveys a clear, definite meaning. S.C. Code Ann. § 41-10-100 makes clear that "No provision of this chapter may be contravened or set aside by a private agreement." This Section, coupled with S.C. Code Ann. § 41-10-80(C) (which provides employees with the right to bring a "civil action" against employers for violations of the Act), makes clear that the Plaintiff's claim against the Defendants for violating the South Carolina Payment of Wages Act (the "Act") cannot be arbitrated.

Further, it is well-established that the South Carolina Payment of Wages Act is "remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld." *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 194, 463 S.E.2d 641, 645 (S.C. App. 2005). For that reason, our state "refus[es] to allow employers to ignore the statute by claiming their employees had by contract or custom waived their statutory right to prompt payment of wages." *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 504, 518 S.E.2d 591, 594 (1999) (quoting *Cato v. Grendel Cotton Mills*, 132 S.C. 454, 456-61, 129 S.E. 203, 205 (1925)). S.C. Code Ann. § 41-10-100 embodies this policy by affirming that "No provision of this chapter may be contravened or set aside by a private agreement."

In this remedial scheme, the General Assembly enshrined an employee's right to bring a "civil action" against an employer for violating the Act. In our state, a "civil action" is defined by Rule 2 of the South Carolina Rules of Civil Procedure in clear and unmistakable terms – "There shall be one form of action to be known as a 'civil action.'" It is unavailing to argue that an arbitration satisfies the Act's unmistakable provision of a "civil action" to an employee in



order to vindicate the employee's rights under the Act. Such a finding would violate both the Act's clear provisions and its remedial nature.

Most recently, an employer attempted to argue that its failure to pay an employee as agreed had been waived by consent and that he was "estopped from challenging the policy" that he was contesting. In rejecting the employer's argument, the appellate court relied on S.C. Code Ann. § 41-10-100, noting that "any agreement Ross may have consented to would be void" under S.C. Code § 41-10-100 and "unenforceable against him by Ligand." *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 473 n. 1, 639 S.E.2d 460, 465 (S.C. App. 2006).

As stated above, it is also irrelevant that Defendants seek to enforce the contractual arbitration provision under the FAA. Under *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), even where the FAA applies, "State law remains applicable if the law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally."

For this reason, Defendants' motion with regard to Riemann's claim under the South Carolina Payment of Wages Act must be denied.

D. RIEMANN'S OTHER CLAIMS, INCLUDING THE CLAIM HE SEEKS TO ADD TO HIS COMPLAINT, ARE NOT CLAIMS THAT "ARISE OUT OF OR ARE RELATED TO" THE SHAREHOLDER MANAGEMENT AGREEMENT, AND THEREFORE CANNOT BE SUBJECT TO "DISPUTE RESOLUTION" PROVISION CITED BY DEFENDANTS.

1. The Court is to Determine Which Claims are Subject to Arbitration

Defendants argue that the Court is not to determine which of Plaintiff's claims are within the scope of the Agreement's arbitration provision, because the Agreement states that "any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." This Court disagrees.



The question of who decides whether particular claims are subject to arbitration—the court or the arbitrator—is a matter of contract. *First Options of Chicago, Inc. v. Kaplan*, 415 U.S. 938, 943 (1995). This issue is among the “gateway matters” that courts generally “assume” the parties intended the court to resolve, but only absent “clear and unmistakable” evidence that the parties agreed such matters were to be decided as part of the arbitration proceeding. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003))

This Court finds that the Defendants have not met their burden of providing “clear and unmistakable” evidence that the parties agreed such matters were to be decided as part of the arbitration proceeding. Riemann's causes of action for Wrongful Discharge in Violation of South Carolina Public Policy; Defamation; and Intentional Infliction of Emotional Distress are exactly the types of outrageous and illegal conduct cited in *Aiken* and *Chassereau* that are unforeseeable to the parties at the time the contract was formed. Therefore, the Defendant has failed to establish by “clear and unmistakable” evidence that the parties intended an arbitrator to decide whether they were subject to arbitration.

Further, as discussed above, such a finding would be in direct contravention to the mandates of S.C. Code Ann. § 41-10-100, providing that “No provision of this chapter may be contravened or set aside by a private agreement.” This includes, pointedly, the provision in S.C. Code Ann. § 41-10-80(C) which provides employees with the right to bring a “civil action” against employers for violations of the Act.⁶ See *Simpson*, 373 S.C. 29-30, 644 S.E.2d at 671 (2007) (Holding the general rule is that courts will not enforce a contract which is violative of

⁶ Although not dispositive, it should be noted that paragraph 12 of the Agreement is titled “Governing Law” and states that “The construction and interpretation of this Agreement shall at all times and in all respects be governed by the laws of the State of South Carolina.”

public policy, statutory law, or provisions of the Constitution). As such, this Court must decide which of Riemann's claims are subject to arbitration.

2. Riemann's Claims do not bear a Significant Relationship to the Agreement.

In determining whether a dispute between parties is covered under a purported arbitration agreement, our Supreme Court has stated as follows:

[W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Aiken v. World Finance Corp. of South Carolina, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) (emphasis added); *see also Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007) (“we refuse to interpret an arbitration agreement with similar, though not identical, language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate”); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001) (“test is based on a determination of whether the particular tort claim is so interwoven with the contract that it could not stand alone”).

Under the tests set forth by our Supreme Court, none of the tort claims alleged by Riemann are arbitrable. None of the claims rely on the outcome of the resolution of any issue significantly related to the Shareholder Management Agreement.

Riemann's claim for wrongful discharge in violation of public policy does not rely on any issue specifically related to the Shareholder Management Agreement. Instead, the claim is based

solely on the allegations that: (1) Riemann filed a wage complaint with LLR, (2) Shofner fired him shortly thereafter, and (3) there is a causal connection between the two, and any attempt by Shofner to justify the termination after the fact is pretextual. The allegations made in this cause of action are not factually related or even contemplated by the Shareholder Management Agreement. See *Evans v. Taylor Made Sandwich Co.*, 337 S.C. 95, 522 S.E.2d 350 (S.C. App. 1999), *overruled on other grounds by Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 713 S.E.2d 634 (2011).

Further, all four of Riemann's claims allege precisely the outrageous and illegal conduct referenced in the Supreme Court's decisions in *Aiken* and *Chassereau*, *supra*. It is clear from the record before this Court that Riemann's claims are wholly disconnected with any issue related to the Shareholder Management Agreement. For these reasons, Defendants' motion with regard to Riemann's tort claims is denied.

CONCLUSION

WHEREFORE, for the reasons set forth above, this Court DENIES the motion of the Defendants to dismiss the case, or in the alternative, stay proceedings and compel arbitration, and directs that the case proceed without further delay.

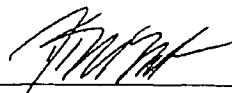
Further, this Court GRANTS the Plaintiff's Motion to Amend Complaint, and also grants the Defendants fifteen (15) days to respond to the Amended Complaint following service as provided by Rule 15(a) of the South Carolina Rules of Civil Procedure.

Further, the Court GRANTS the Plaintiff's Motion to Compel Discovery and permits the Defendants thirty (30) days from the date of this Order to respond fully to the Plaintiff's discovery requests.

Further, the Court DENIES the Plaintiff's Motion to Strike Affidavit of Defendant Thomas Shofner.

IT IS SO ORDERED.

Date: 24 June 13



The Honorable R. Knox McMahon
Presiding Judge
Eleventh Judicial Circuit

FILED
JUN 24 2013
CLERK OF COURT
ELEVENTH JUDICIAL CIRCUIT

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Roger R. Riemann,

Plaintiff,

vs.

Palmetto Gems & Gemological
Services, Inc. and Thomas Shofner, in
his individual capacity,

Defendants

FILED

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2012 AUG 24 P 12:40

C/A No.: 2012-CP-32-0

J. A. GARRIGG

J. A. GARRIGG

COMPLAINT

2012CP3203496

NOW COMES Plaintiff Roger R. Riemann and complains of the Defendants Palmetto Gems & Gemological Services, Inc. and J. Thomas Shofner, in his individual capacity (hereinafter the "Defendants"), as follows:

PARTIES

1. Plaintiff Roger R. Riemann ("Riemann") is an individual and resident of Richland County, South Carolina. From August 11, 2006 until May 21, 2012, Riemann was employed by the Defendant Palmetto Gems & Gemological Services, Inc. ("PGGS") as Vice President and Secretary.

2. Defendant PGGS is corporation organized under the laws of the State of South Carolina and its principal place of business is located in Lexington County.

3. Currently, and at all times relevant to this action, Defendant J. Thomas Shofner ("Shofner") is the President and Treasurer of PGGS. Upon information and belief, he resides and works in Chapin, South Carolina.

JURISDICTION AND VENUE

4. The events that underlie this Complaint occurred in Lexington County, where the Defendants have conducted a substantial and continuing business.

5. As such, jurisdiction and venue are proper in the Court of Common Pleas of Lexington County, and under the laws of the State of South Carolina.

FACTS

6. On August 11, 2006, Riemann and Shofner entered into a Shareholder Management Agreement (the "Agreement") concerning the management of PGGS. (Shareholder Management Agreement attached as Exhibit "A"). The Agreement set forth that Shofner was the President and Treasurer of PGGS, and that Riemann was the Vice-President and Secretary of PGGS. Riemann and Shofner also entered into a "Stock Transfer Restrictions and Buy Out Agreement" on the same date. (Stock Transfer Restrictions and Buy Out Agreement attached as Exhibit "B").

7. The Agreement identified Riemann and Shofner each as "Executive Officers" of PGGS.

8. The Agreement also identified Riemann and Shofner as "Shareholders"

9. The Agreement also provided that it "shall remain in effect until terminated by unanimous written consent of all the Shareholders."

10. The Agreement also provided that it "shall not be modified or amended except by means of a writing signed by each Shareholder."

11. Exhibit "A" to the Agreement addressed "Salary and Profit Sharing Distributions" and established that "Co-Executive and Financial Officers shall receive an annual bonus equal to an equal split of 1/3 of the profits after all salaries and expenses."

12. The Agreement has never been modified or terminated under the terms of its own provisions.

13. On information and belief, PGGGS made a profit in the years 2009, 2010, 2011, and will make a profit in 2012.

14. Despite numerous requests from Riemann to Shofner to pay bonuses as provided by the Agreement, Shofner refused to do so, even though PGGGS was obligated to do so, and Shofner was fully aware of the obligations set forth under the Agreement. Upon information and belief, Shofner also altered financial records to mask or hide the profits of PGGGS in order to avoid paying Riemann bonuses that were owed.

15. In the face of Shofner's continuing and wrongful refusal to pay bonuses as required by the Agreement, Riemann filed a wage complaint with the South Carolina Department of Labor, Licensing & Regulation ("LLR") on or about February 7, 2012. LLR officially opened the investigation on or about March 14, 2012.

16. Upon information and belief, in late March 2012, Shofner became aware of Riemann's LLR complaint, and even referenced the complaint negatively in his later discussions with Riemann. Defendant Shofner continued to refuse to pay any of the bonuses that were due to Riemann.

17. In May 21, 2012, without prior warning or notice, Shofner terminated Riemann's employment with PGGGS over the telephone. Defendant Shofner stated that he was terminating Riemann's employment with PGGGS of unspecified "insubordination," but otherwise refused to state why he was terminating Riemann, and even said that his lawyer advised that he did not have to tell Riemann why he was being fired. Later, on May 30, 2012, Shofner wrote a letter to Riemann "confirm[ing] our telephone conversation on Monday, May 21st, 2012, when you were

notified that your employment with PGGS is terminated for reasons that include but are not limited to your insubordination.”

18. Shortly thereafter, on or about June 4, 2012, LLR completed its Investigative Report concerning Reimann’s complaint. (LLR Investigative Report attached as Exhibit “C”). issued a citation to PGGS for numerous violations of the S.C. Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* With regard to Riemann, LLR cited PGGS for its failure to pay Riemann his bonus for 2011. (LLR Citation attached as Exhibit “D”).

19. Upon information and belief, PGGS did not appeal the citation to the S.C. Administrative Law Court or otherwise appeal the finding of LLR.

20. Despite the findings of LLR, and Riemann’s demand for payment, PGGS and Shofner continue to refuse to pay Riemann money that is owed and due to him.

21. Shortly after PGGS was initially formed in August 2006, Riemann and Shofner agreed that each of them would be able to purchase personal items from the store at cost, or in some cases, at cost plus 10%. While both Riemann and Shofner were working at PGGS, they each could set aside items for personal purchase without seeking permission of the other to do so.

22. Through the years, both Riemann and Shofner actually have set aside items for personal purchase without seeking permission of the other to do so.

23. In 2009, Riemann set aside five items to purchase, and kept the sales tags at his computer as receipts for the items. The total cost of the items was less than \$1,000.00. In 2010, he set aside an additional item, which cost approximately \$1,000.00. Riemann intended to pay for the items when he received the bonuses that were due to him.

24. In 2010, Shofner demanded that Riemann place the items in a layaway or house account and begin making payments immediately on the items. Defendant Shofner continued to wrongfully withhold the bonuses that were due to Riemann. Riemann complied with Shofner's requests and began making payments on the items, even though Shofner continued to withhold the bonuses that were owed to Riemann.

25. In early 2012, while Riemann's wife was visiting PGGG, Shofner confronted her and told her that Riemann was a thief. He further stated that she "was wearing stolen jewelry." Defendant Shofner made these statements not only to Riemann's wife directly, but also within the earshot of other PGGG employees. Defendant Shofner made these statements with the full knowledge that they were false. Among other things, Shofner knew that the items had been placed on either a layaway or house account, and knew that Riemann had made payments on them.

26. Following that incident, Riemann returned the items to Defendant Shofner, indicating that he could not afford to make further payments since Defendant Shofner was withholding Riemann's bonuses. Defendant Shofner accepted all items except one ring, refusing to accept it and demanding full payment for it.

FOR A FIRST CAUSE OF ACTION

(Violation of the South Carolina Payment of Wages Act against
Defendant PGGG and Defendant Shofner in his individual capacity)

27. Plaintiff Riemann incorporates his allegations as set forth in Paragraphs 1 through 26 of his Complaint as if fully set forth herein.

28. The South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.*, provides *inter alia* that "[e]very employer in the State shall pay all wages due at the time and place designated as required by subsection (A) of Section 41-10-30."

29. LLR has determined that PGGS has violated § 41-10-40 of the South Carolina Payment of Wages Act by refusing to pay Riemann compensation that was owed and due.

30. S.C. Code Ann. § 41-10-80(C) provides that, "[i]n case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50, the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due" (emphasis added).

31. Within the past three years, PGGS and Shofner have willfully violated the South Carolina Payment of Wages Act by wrongfully withholding bonuses owed and due to Riemann for the years 2009, 2010, and 2011.

32. Further, Shofner has knowingly permitted PGGS to violate the South Carolina Payment of Wages Act by wrongfully withholding the compensation owed to Riemann. Under South Carolina law, an individual who is an agent or officer of a corporation, and who knowingly permits the corporation to violate the South Carolina Payment of Wages Act, is individually liable under the Act. *See Dumas v. InfoSafe Corp.*, 320 S.C. 188, 195, 463 S.E.2d 641, 645 (S.C. App. 1995). Under these circumstances, Shofner is individually liable for all damages recoverable by Riemann under the South Carolina Payment of Wages Act.

33. Therefore, both PGGS and Shofner are each liable to Riemann for violations of the provisions of the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.*, including S.C. Code Ann. § 41-10-80(C), and is liable to Riemann for the all compensation owed to Riemann, treble damages, and attorney's fees and costs.

FOR A SECOND CAUSE OF ACTION
(Wrongful Discharge in Violation of Public Policy against
Defendant PGGS)

34. Plaintiff Riemann incorporates its allegations as set forth in Paragraphs 1 through 33 of his Complaint as if fully set forth herein.

35. Acting through Shofner, PGGS terminated Riemann because Riemann availed himself of the protections of the South Carolina Payment of Wages Act by filing a wage complaint with LLR against PGGS.

36. Shortly following notice to Shofner and PGGS that Riemann filed a wage complaint with LLR, Shofner and PGGS terminated Riemann for pretextual reasons.

37. The true reason that Shofner and PGGS terminated Riemann's employment was to retaliate against him because Riemann filed a wage complaint with LLR and/or and invoked his rights under the South Carolina Payment of Wages Act.

38. Such a discharge violates the public policy of the State of South Carolina.

39. The South Carolina Payment of Wages Act does not provide Riemann with a statutory remedy in cases of termination in retaliation for filing a wage complaint with LLR and/or invoking rights under the South Carolina Payment of Wages Act.

40. For these reasons, PGGS is liable to Riemann for a wrongful discharge in violation of the public policy of South Carolina, and is liable to Riemann for the resulting damages caused by PGGS's conduct, including back pay, front pay, compensatory damages, damages related to emotional distress and/or pain and suffering, and punitive damages.

FOR A THIRD CAUSE OF ACTION

(Slander against Defendant PGGS and Defendant Shofner in his individual capacity)

41. Plaintiff Riemann incorporates its allegations as set forth in Paragraphs 1 through 40 of his Complaint as if fully set forth herein.

42. As alleged above, Shofner told Riemann's wife that Riemann was a thief and that she "was wearing stolen jewelry." Defendant Shofner made these statements not only to Riemann's wife, but also within the earshot of other PGGS employees. Defendant Shofner made these statements knowing that they were false and defamatory.

43. The statements were not privileged and constituted slander *per se*, in that Shofner's false and defamatory statements charged Riemann with (1) commission of a crime of moral turpitude, and/or (2) unfitness in one's business or profession, in falsely alleging that he stole merchandise from PGGS.

44. Where, as here, the defamatory statement is actionable *per se*, the Defendants are presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.

45. For these reasons, Riemann is entitled to recover compensatory, general, and punitive damages from each of the Defendants as a result of Shofner's defamatory statements.

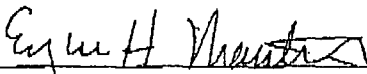
WHEREFORE, having fully set forth his Complaint herein, Plaintiff Roger R. Riemann respectfully requests a trial by jury on all issues so triable, and further requests that the Court:

1. find the Defendant PGGS liable to the Plaintiff for unpaid wages and expenses, to treble damages in the amount permitted under the South Carolina Payment of Wages Act, and to award attorney's fees and costs to the Plaintiff; and

2. find the Defendant Shofner individually liable to the Plaintiff for unpaid wages and expenses, to treble damages in the amount permitted under the South Carolina Payment of Wages Act, and to award attorney's fees and costs to the Plaintiff; and
3. find the Defendant PGGS liable to the Plaintiff for all compensatory and punitive damages, including back pay and front pay, relating to the wrongful discharge of Plaintiff by Defendant PGGS; and
4. find the Defendant PGGS liable, and Defendant Shofner individually liable, for the compensatory, general, and punitive damages related to the defamatory conduct detailed above; and
5. award allowable pre-judgment and post-judgment interest; and
6. grant to Plaintiff such other and further relief as the Court may deem just and proper.

Dated this the 22nd day of August, 2012.

RICHARDSON PLOWDEN & ROBINSON, P.A.


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COUNSEL FOR PLAINTIFF ROGER R. RIEMANN

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JETHA A. CARRIGS
CLERK OF COURT
803-771-4400

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Roger R. Reimann,

Plaintiff,

vs.

Palmetto Gems & Gemological Services, Inc.
and Thomas Shofner, in his individual
capacity,

Defendants.

IN THE CIRCUIT COURT

Case No. 2012-CP-38-03496

FILED

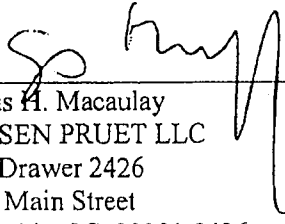
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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

**DEFENDANTS MOTION TO DISMISS
OR IN THE ALTERNATIVE, STAY
PROCEEDINGS AND COMPEL
ARBITRATION**

Defendants Palmetto Gems & Gemological Services, Inc. and Thomas Shofner, (Defendants) by and through their undersigned counsel, and pursuant to Rule 12(b)(1) and 12(b)(2) of the South Carolina Rules of Civil Procedure and to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), hereby moves this Court for an order dismissing Plaintiff Roger D. Riemann's Complaint against the Defendants, or in the alternative, compelling Plaintiff to arbitrate all claims set forth in his Complaint in accordance with the rules of the American Arbitration Association, as required by the Shareholder Management Agreement attached hereto as Exhibit A. Defendants also seek an Order staying the proceedings in this matter pending the completion of arbitration. This Motion is based on any memorandum of law presented prior to or at the hearing on this matter, and the attached affidavit of the Thomas Shofner.

Respectfully submitted,



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Attorneys for Defendants, Palmetto Gems & Gemological
Services, Inc. and Thomas Shofner, in his individual
capacity

October ~~27~~²⁹, 2012
Columbia, South Carolina

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE CIRCUIT COURT

2012 OCT 29 P 4: 06

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Roger R. Reimann,

Case No. 2012-CP-38-03496

Plaintiff,

vs.

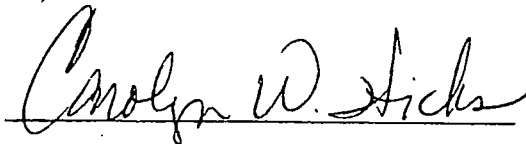
CERTIFICATE OF SERVICE

Palmetto Gems & Gemological Services, Inc.
and Thomas Shofner, in his individual
capacity,

Defendants.

The undersigned hereby certifies she served the foregoing Motion to Dismiss or in the Alternative, Stay Proceedings and Compel Arbitration upon counsel of record by causing a copy of same to be hand delivered this 29th day of October, 2012, addressed as follows:

Eugene H. Matthews, Esquire
RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street
Columbia, SC 29201



STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Roger R. Reimann,

Plaintiff,

vs.

Palmetto Gems & Gemological Services, Inc.
and Thomas Shofner, in his individual
capacity,

Defendants.

FILED

IN THE CIRCUIT COURT 2012 OCT 29 P 4: 06

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC
Case No. 2012-CP-38-03496

AFFIDAVIT OF THOMAS SHOFNER

PERSONALLY APPEARING before me the undersigned, who, first being duly sworn,
deposes and says:

1. I am over the age of 21 and the President and Treasurer of Palmetto Gems & Gemological Services, Inc. ("Palmetto Gems").

2. On or about August 11, 2006, I entered into a Shareholder Management Agreement ("Agreement") with the Plaintiff Roger R. Reimann (copy attached hereto as Exhibit A).

3. Palmetto Gems is located at 130 B. Amicks, Chapin, South Carolina 29036.

4. At the time we started Palmetto Gems and executed the Agreement, Mr. Reimann and I expected and acknowledged that a part of our jewelry and repair sales would be derived from sales outside of South Carolina.

5. As referenced in Exhibit A to the Shareholder Management Agreement, Palmetto Gems has an internet site created to generate sales from outside the state of South Carolina, as well as an education and information tool for customers and prospective customers. The website

R_000033

includes a description of the products and services Palmetto Gems offers, and we have gained customers from outside of South Carolina due in part to our website.

6. I have one hundred eighteen (118) customers in my database with addresses in twenty nine (29) other states other than South Carolina.

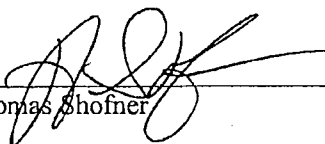
7. The following is a list of sales from outside the state of South Carolina:

North Carolina	5 customers with 6 sales;
Georgia	4 customers with 15 sales;
Tennessee	8 customers with 12 sales;
Texas	5 Customers with 37 sales;
New York	3 Customers with 204 sales;
Illinois	2 Customers with 15 sales;
Florida	4 Customers with 7 sales; and
Maryland	2 Customers with 24 sales.

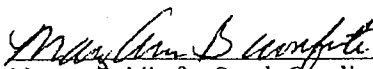
8. Palmetto Gems offers customization, repairs, and other specialized services, among other things. On occasion, our customers' needs require us to send our products to contractors in New York, Georgia, Kentucky, California and Florida to perform those specialized services. We compensate our contractors, and that service is included within the price that Palmetto Gems charges the customers.

9. I have also traveled to St. Petersburg, Florida on seven occasions and Atlanta, Georgia on six occasions to purchase equipment and training as I was outfitting the store during the build-out. I also traveled to Tucson, Arizona in 2003, 2005 and 2009 in order to purchase inventory.

10. While he was employed with Palmetto Gems, Mr. Reimann traveled to Georgia, New York City and Florida to buy and sell jewelry products for the company.


Thomas Shofner

SWORN to before me this 29
day of October, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 7/11/2015

STATE OF SOUTH CAROLINA)
) SHAREHOLDER MANAGEMENT AGREEMENT
COUNTY OF LEXINGTON)

This Agreement made this 11th day of August, 2006, by and between Tom Shofner, and Roger Riemann, (hereafter collectively referred to as the "Shareholders"), the owners of all the issued and outstanding shares of Palmetto Gems and Gemological Services, Inc., a corporation incorporated under the laws of the State of South Carolina (the "Corporation").

WHEREAS, the Shareholders deem it expedient for their best interests and for the welfare of the Corporation to provide a consistent and uniform management for the Corporation; and

WHEREAS, the Shareholders desire to enter into an Agreement which will effectuate the above purposes and will set forth in detail their respective rights and liabilities in connection with the management and control of the Corporation;

NOW, THEREFORE, the Shareholders, in consideration of the mutual undertakings herein set forth, agree as follows:

1. Statutory Authority for Agreement. This Agreement shall be governed by SC Code §33-11-220 et. seq., as amended.

2. Directors. The Corporation shall have no Board of Directors. The managerial functions otherwise required by statute to be performed by a Board of Directors shall be performed by the Shareholders.

3. Executive Officers. The Executive Officers of the Corporation, their principal duties, and their initial salary and other compensation shall be as follows:

Name	Title	Principal Duties	Salary/Other Compensation
Tom Shofner	President and Treasurer		Exhibit A
Roger Riemann	Vice-President and Secretary		Exhibit A

Changes in the title, duties, salary and other compensation of the above named persons as well as their removal from office shall be governed by majority vote, except to the extent such matters are dealt with in any employment agreement by and between the Corporation and any of the above named persons, in which case the employment agreement will control and supercede any inconsistent provisions in this Agreement.

4. Voting Requirements. The majority vote of all Shareholders shall be necessary for approval of all action required by the Act to be approved by either the Directors or Shareholders, unless a higher percentage is required herein. Furthermore, unless otherwise expressly provided herein



Agreement

E 1-3

majority vote shall control all corporate actions.

5. Checks and Other Items of Withdrawal. All checks and other items of withdrawal from any deposit account containing money or securities belonging to the Corporation shall be signed by both Roger Riemann and Tom Shofner, except that the shareholders may agree to set up an account with just one (1) signature required on the checks, but only checks from the two (2) signature account may be deposited into this account.

6. Dispute Resolution. Any controversy or claim arising out of or related to this Agreement or the breach thereof, shall be settled, except as may otherwise be provided herein, by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association; and the arbitration award may be entered as a final judgment in any court having jurisdiction thereon. Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding. Legal costs, attorneys' fees and the fees of expert witnesses may be assessed against any person found to have acted in bad faith. All arbitration proceedings shall be conducted by a panel of three (3) arbitrators. The party requesting arbitration shall have the right to select one (1) arbitrator and the person or persons on the other side of the controversy shall select a second (2nd) arbitrator. The two arbitrators so chosen shall select the third (3rd). To be qualified as an arbitrator, a person must either be a certified public accountant, a lawyer, or a businessman with at least seven (7) years experience as an executive in a closely held corporation, or a person with expertise in the subject matter of the dispute in question, e.g., a professional appraiser of shares of close corporation stock if the dispute concerns the value of the shares of the Corporation.

7. Equitable Relief. The parties acknowledge that it is impossible to measure in money the damages that would result by reason of a party's breach of this Agreement. It is therefore agreed that the provisions of the Agreement shall be enforceable by injunction, specific performance or other equitable relief, without reference to whether or not an adequate remedy at law may be available. It is further agreed that any such equitable relief may be awarded in any arbitration proceedings authorized by this agreement.

8. Termination. This Agreement shall remain in effect until terminated by unanimous written consent of all the Shareholders.

9. Amendment. This Agreement shall not be modified or amended except by means of a writing signed by each Shareholder.

10. Binding Effect. This Agreement shall be binding upon the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

11. Severability. If any provision of this Agreement shall under any circumstances be deemed invalid or inoperative to any extent, it is agreed and understood that such invalidity shall not invalidate the whole Agreement, but the Agreement shall be construed as not to contain the

provision or provisions deemed invalid and inoperative.

12. Governing Law. The construction and interpretation of this Agreement shall at all times and in all respects be governed by the laws of the State of South Carolina.

13. References to Gender and Number Terms. In construing this agreement, feminine or neuter pronouns shall be substituted for those masculine in form and visa versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so requires.

14. Counterparts. This Agreement may be executed and delivered in any number of counterparts, all of which, when executed and delivered, shall have the force and effect of an original.

15. References to the Internal Revenue Codes and Other Statutes.

(a) All references in this Agreement to the Internal Revenue Code means the 1986 Internal Revenue Code, as amended from time to time, and all revisions, recodifications or replacements of such code.

(b) Any reference to any other statute includes any amendment, replacement or recodification of such statute.

16. Notice of this Agreement in Articles of Incorporation and Share Certificates. The articles of incorporation and each share certificate of the Corporation shall contain the following notice:

Pursuant to a Shareholder Management Agreement dated _____, the voting and managerial rights of the Shareholders in this Corporation are materially different from those in most other Corporations. This Agreement, a copy of which may be obtained by a shareholder on written request to the Corporation, specifies who will manage the affairs of the Corporation, the Executive officers, the vote necessary to approve certain specified action, and related matters.

In the event the Corporation has issued uncertificated shares, it shall send each shareholder a written notice containing the above notice within thirty (30) days after the issuance or transfer of any shares.

17. Headings. The paragraph headings in this Agreement are inserted for convenience only and are not part of the Agreement.

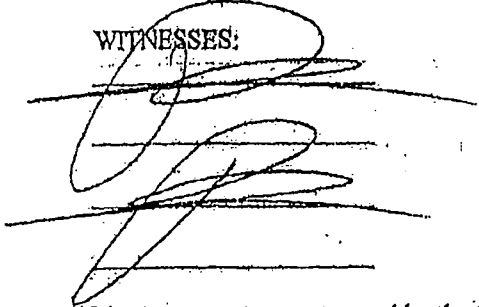
18. Shareholder Loans. Roger Riemann shall open a \$5,000.00 credit line to the Corporation. Tom Shofner shall open a \$245,000.00 credit line to the Corporation. The source of these funds shall be the \$250,000.00 note from Tom Shofner to First Citizens dated August 4, 2006 secured by a mortgage on his residence, of which each advance to the Corporation shall be participated in by Roger Riemann at a 2% rate and Tom Shofner at an 98% rate. The 2% participation by Roger Riemann is secured by a separate note and Mortgage from Roger Riemann to Tom Shofner. If

Roger Riemann ever sells his home securing the mortgage from Roger Riemann to Tom Shofner, then \$5,000 shall be held in trust as cash collateral until there is a new purchase of a residence of equal or greater equity, at which time a new mortgage shall be issued to secure the note.

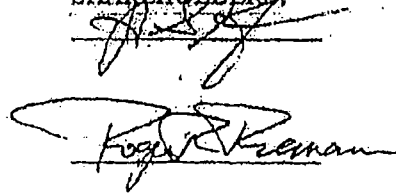
19: Option to Purchase. Roger Riemann shall have an option to purchase from Tom Shofner up to 480 shares at the greater of \$2,500.00 per share or 10 times earnings per share using the most current available annualized income (averaged over the previous two years if the company is more than three years old.)

IN WITNESS WHEREOF, the Shareholders have hereunto affixed their signatures and seals as of the day and year first written on page 1 of this Agreement.

WITNESSES:



SHAREHOLDERS:


Roger Riemann

The Agreement was approved by the Corporation pursuant to a resolution adopted on
August 11, 2007

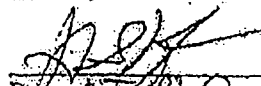

By: J. F. Shofner
Its: President

EXHIBIT A TO SHAREHOLDER MANAGEMENT AGREEMENT
Salary and Profit Sharing Distributions

I. **Palmetto Gems, including PGGS website, --- two categories:**

A. Salary, and

B. Profit sharing/distribution/retained earnings.

A. **Salary** --- each receive an equal salary paid monthly at \$50,000.00 per year. Salary can be paid strictly as salary, or as a combination of salary and a "profit distribution".

B. **Profit sharing** --- this has three categories or payment plans: 1) Bonus, 2) Shares-based allocation for distribution and 3) retained earnings. The default allocation of the profits after all salaries and expenses will be divided; 1/3 to Bonus split equally among the Co-Executive and Financial Officers, 1/3 to Shares-based distribution and 1/3 retained for the business.

i. **Bonus** --- the Co-Executive and Financial Officers shall receive an annual bonus equal to an equal split of 1/3 of the profits after all salaries and expenses.

ii. **Shares-based distribution** --- 1/3 of the profits after all salaries and expenses (computed prior to deducting the bonus in i above) allocated solely on the percentage of shares held by each shareholder (initially 98% to Tom Shofner and 2% to Roger Riemann), but no less than the minimum amount as required by the Stock Transfer Restriction and Buy-out Agreement, and

iii. **Retained for the business** --- 1/3 of the profits after all salaries and expenses shall be retained for the business.

II. **Investor Strategies** --- All transactions through this venue are independent of PGGS and will be accounted separately in the Corporation. If PGGS is able to pay all salaries and expenses then, sales will be assigned to a specific partner and the 75/25 split will apply to the net profit on each item. This split will be applied directly to the sale and will not flow through the Palmetto Gems methodology as listed above. Although not required, this payout can occur in the next pay period after the transaction is completed.

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

Roger R. Riemann,)
)
Plaintiff,)
)
vs.)
)
Palmetto Gems & Gemological)
Services, Inc. and Thomas Shofner, in)
his individual capacity,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

C/A No.: 2012-CP-32-3496

**PLAINTIFF'S
MOTION TO AMEND COMPLAINT**

NOW COMES Plaintiff Roger R. Riemann, by and through counsel, and moves to amend his Complaint against Defendants Palmetto Gems & Gemological Services, Inc. and Thomas Shofner, in his individual capacity (hereinafter the "Defendants"), pursuant to Rule 15, S.C.R. Civ.P., as follows:

1. On August 24, 2012, Plaintiff filed the underlying Complaint in this action against Defendants.
2. Defendants, by and through counsel, requested an extension of time to respond to the Complaint, and were granted additional time to do so.
3. Plaintiff also served discovery on each Defendant on September 28, 2012. To date, Defendants have not responded to discovery.
4. Defendants filed a Motion to Dismiss, or, in the alternative, to Stay Proceedings and Compel Arbitration on October 29, 2012.
5. Defendants' Motion to Dismiss is currently scheduled to be heard on **January 31, 2013**.

6. Plaintiff wishes to amend his pleading under Rule 15(a), S.C.R.Civ.P., which provides that a "party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Plaintiff wishes to add a cause of action for Intentional Infliction of Emotional Distress, which is detailed as the Fourth Cause of Action in the attached proposed First Amended Complaint. (*Exhibit A*).

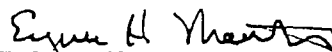
7. There are no reasonable grounds on which any party could object to the Plaintiff's proposed amendments.

8. Defendants do not consent to this Motion to Amend. Therefore, Plaintiff requests that this Motion to Amend be heard contemporaneously with any other motions pending in this case at the motions hearing now scheduled for **January 31, 2013**.

9. Plaintiff reserves the right to respond to any such memorandum of law that Defendants present in opposition to this request.

Dated this the 26th day of December, 2012.

RICHARDSON PLOWDEN & ROBINSON, P.A.



Eugene H. Matthews
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
803-771-4400
Facsimile 803-779-0016
E-mail: gmatthews@RichardsonPlowden.com

COUNSEL FOR PLAINTIFF ROGER R. RIEMANN

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Roger R. Riemann,)
Plaintiff,)

C/A No.: 2012-CP-32-3496

vs.)

FIRST AMENDED COMPLAINT

Palmetto Gems & Gemological)
Services, Inc. and Thomas Shofner, in)
his individual capacity,)
Defendants.)

NOW COMES Plaintiff Roger R. Riemann, pursuant to this Court's Order filed on June 25, 2013 granting his Motion to Amend Complaint, and issues his First Amended Complaint against the Defendants Palmetto Gems & Gemological Services, Inc. and Thomas Shofner, in his individual capacity (hereinafter the "Defendants"), as follows:

PARTIES

1. Plaintiff Roger R. Riemann ("Riemann") is an individual and resident of Richland County, South Carolina. From August 11, 2006 until May 21, 2012, Riemann was employed by the Defendant Palmetto Gems & Gemological Services, Inc. ("PGGS") as Vice President and Secretary.

2. Defendant PGGS is corporation organized under the laws of the State of South Carolina and its principal place of business is located in Lexington County.

3. Currently, and at all times relevant to this action, Defendant Thomas Shofner ("Shofner") is the President and Treasurer of PGGS. Upon information and belief, he resides and works in Chapin, South Carolina.

JURISDICTION AND VENUE

4. The events that underlie this Complaint occurred in Lexington County, where the Defendants have conducted a substantial and continuing business.

5. As such, jurisdiction and venue are proper in the Court of Common Pleas of Lexington County, and under the laws of the State of South Carolina.

FACTS

6. On August 11, 2006, Riemann and Shofner entered into a Shareholder Management Agreement (the "Agreement") concerning the management of PGGS. (Shareholder Management Agreement attached as Exhibit "A"). The Agreement set forth that Shofner was the President and Treasurer of PGGS, and that Riemann was the Vice-President and Secretary of PGGS. Riemann and Shofner also entered into a "Stock Transfer Restrictions and Buy Out Agreement" on the same date. (Stock Transfer Restrictions and Buy Out Agreement attached as Exhibit "B").

7. The Agreement identified Riemann and Shofner each as ""Executive Officers" of PGGS.

8. The Agreement also identified Riemann and Shofner as "Shareholders."

9. The Agreement also provided that it "shall remain in effect until terminated by unanimous written consent of all the Shareholders."

10. The Agreement also provided that it "shall not be modified or amended except by means of a writing signed by each Shareholder."

11. Exhibit "A" to the Agreement addressed "Salary and Profit Sharing Distributions" and established that "Co-Executive and Financial Officers shall receive an annual bonus equal to an equal split of 1/3 of the profits after all salaries and expenses."

12. The Agreement has never been modified or terminated under the terms of its own provisions.

13. On information and belief, PGGS made a profit in the years 2009, 2010, 2011, and will make a profit in 2012.

14. Despite numerous requests from Riemann to Shofner to pay bonuses as provided by the Agreement, Shofner refused to do so, even though PGGS was obligated to do so, and Shofner was fully aware of the obligations set forth under the Agreement. Upon information and belief, Shofner also altered financial records to mask or hide the profits of PGGS in order to avoid paying Riemann bonuses that were owed.

15. In the face of Shofner's continuing and wrongful refusal to pay bonuses as required by the Agreement, Riemann filed a wage complaint with the South Carolina Department of Labor, Licensing & Regulation ("LLR") on or about February 7, 2012. LLR officially opened the investigation on or about March 14, 2012.

16. Upon information and belief, in late March 2012, Shofner became aware of Riemann's LLR complaint, and even referenced the complaint negatively in his later discussions with Riemann. Defendant Shofner continued to refuse to pay any of the bonuses that were due to Riemann.

17. In May 21, 2012, without prior warning or notice, Shofner terminated Riemann's employment with PGGS over the telephone. Defendant Shofner stated that he was terminating Riemann's employment with PGGS of unspecified "insubordination," but otherwise refused to state why he was terminating Riemann, and even said that his lawyer advised that he did not have to tell Riemann why he was being fired. Later, on May 30, 2012, Shofner wrote a letter to Riemann "confirm[ing] our telephone conversation on Monday, May 21st, 2012, when you were

notified that your employment with PGGS is terminated for reasons that include but are not limited to your insubordination.”

18. Shortly thereafter, on or about June 4, 2012, LLR completed its Investigative Report concerning Reimann’s complaint. (LLR Investigative Report attached as Exhibit “C”). LLR issued a citation to PGGS for numerous violations of the S.C. Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* With regard to Riemann, LLR cited PGGS for its failure to pay Riemann his bonus for 2011. (LLR Citation attached as Exhibit “D”).

19. Upon information and belief, PGGS did not appeal the citation to the S.C. Administrative Law Court or otherwise appeal the finding of LLR.

20. Despite the findings of LLR, and Riemann’s demand for payment, PGGS and Shofner continue to refuse to pay Riemann money that is owed and due to him.

21. Shortly after PGGS was initially formed in August 2006, Riemann and Shofner agreed that each of them would be able to purchase personal items from the store at cost, or in some cases, at cost plus 10%. While both Riemann and Shofner were working at PGGS, they each could set aside items for personal purchase without seeking permission of the other to do so.

22. Through the years, both Riemann and Shofner actually have set aside items for personal purchase without seeking permission of the other to do so.

23. In 2009, Riemann set aside five items to purchase, and kept the sales tags at his computer as receipts for the items. The total cost of the items was less than \$1,000.00. In 2010, he set aside an additional item, which cost approximately \$1,000.00. Riemann intended to pay for the items when he received the bonuses that were due to him.

24. In 2010, Shofner demanded that Riemann place the items in a layaway or house account and begin making payments immediately on the items. Defendant Shofner continued to wrongfully withhold the bonuses that were due to Riemann. Riemann complied with Shofner's requests and began making payments on the items, even though Shofner continued to withhold the bonuses that were owed to Riemann.

25. In early 2012, while Riemann's wife was visiting PGGS, Shofner confronted her and told her that Riemann was a thief. He further stated that she "was wearing stolen jewelry." Defendant Shofner made these statements not only to Riemann's wife directly, but also within the earshot of other PGGS employees. Defendant Shofner made these statements with the full knowledge that they were false. Among other things, Shofner knew that the items had been placed on either a layaway or house account, and knew that Riemann had made payments on them.

26. Following that incident, Riemann returned the items to Defendant Shofner, indicating that he could not afford to make further payments since Defendant Shofner was withholding Riemann's bonuses. Defendant Shofner accepted all items except one ring, refusing to accept it and demanding full payment for it.

FOR A FIRST CAUSE OF ACTION

**(Violation of the South Carolina Payment of Wages Act against
Defendant PGGS and Defendant Shofner in his individual capacity)**

27. Plaintiff Riemann incorporates his allegations as set forth in Paragraphs 1 through 26 of his Complaint as if fully set forth herein.

28. The South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.*, provides *inter alia* that "[e]very employer in the State shall pay all wages due at the time and place designated as required by subsection (A) of Section 41-10-30."

29. LLR has determined that PGGS has violated § 41-10-40 of the South Carolina Payment of Wages Act by refusing to pay Riemann compensation that was owed and due.

30. S.C. Code Ann. § 41-10-80(C) provides that, "[i]n case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50, the employee may recover in a civil action an amount equal to **three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow.** Any civil action for the recovery of wages must be commenced within three years after the wages become due" (emphasis added).

31. Within the past three years, PGGS and Shofner have willfully violated the South Carolina Payment of Wages Act by wrongfully withholding bonuses owed and due to Riemann for the years 2009, 2010, and 2011.

32. Further, Shofner has knowingly permitted PGGS to violate the South Carolina Payment of Wages Act by wrongfully withholding the compensation owed to Riemann. Under South Carolina law, an individual who is an agent or officer of a corporation, and who knowingly permits the corporation to violate the South Carolina Payment of Wages Act, is individually liable under the Act. *See Dumas v. InfoSafe Corp.*, 320 S.C. 188, 195, 463 S.E.2d 641, 645 (S.C. App. 1995). Under these circumstances, Shofner is individually liable for all damages recoverable by Riemann under the South Carolina Payment of Wages Act.

33. Therefore, both PGGS and Shofner are each liable to Riemann for violations of the provisions of the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.*, including S.C. Code Ann. § 41-10-80(C), and is liable to Riemann for the all compensation owed to Riemann, treble damages, and attorney's fees and costs.

FOR A SECOND CAUSE OF ACTION
(Wrongful Discharge in Violation of Public Policy against
Defendant PGGS)

34. Plaintiff Riemann incorporates its allegations as set forth in Paragraphs 1 through 33 of his Complaint as if fully set forth herein.

35. Acting through Shofner, PGGS terminated Riemann because Riemann availed himself of the protections of the South Carolina Payment of Wages Act by filing a wage complaint with LLR against PGGS.

36. Shortly following notice to Shofner and PGGS that Riemann filed a wage complaint with LLR, Shofner and PGGS terminated Riemann for pretextual reasons.

37. The true reason that Shofner and PGGS terminated Riemann's employment was to retaliate against him because Riemann filed a wage complaint with LLR and/or and invoked his rights under the South Carolina Payment of Wages Act.

38. Such a discharge violates the public policy of the State of South Carolina.

39. The South Carolina Payment of Wages Act does not provide Riemann with a statutory remedy in cases of termination in retaliation for filing a wage complaint with LLR and/or invoking rights under the South Carolina Payment of Wages Act.

40. For these reasons, PGGS is liable to Riemann for a wrongful discharge in violation of the public policy of South Carolina, and is liable to Riemann for the resulting damages caused by PGGS's conduct, including back pay, front pay, compensatory damages, damages related to emotional distress and/or pain and suffering, and punitive damages.

FOR A THIRD CAUSE OF ACTION

(Slander against Defendant PGGS and Defendant Shofner in his individual capacity)

41. Plaintiff Riemann incorporates its allegations as set forth in Paragraphs 1 through 40 of his Complaint as if fully set forth herein.

42. As alleged above, Shofner told Riemann's wife that Riemann was a thief and that she "was wearing stolen jewelry." Defendant Shofner made these statements not only to Riemann's wife, but also within the earshot of other PGGS employees. Defendant Shofner made these statements knowing that they were false and defamatory.

43. The statements were not privileged and constituted slander *per se*, in that Shofner's false and defamatory statements charged Riemann with (1) commission of a crime of moral turpitude, and/or (2) unfitness in one's business or profession, in falsely alleging that he stole merchandise from PGGS.

44. Where, as here, the defamatory statement is actionable *per se*, the Defendants are presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.

45. For these reasons, Riemann is entitled to recover compensatory, general, and punitive damages from each of the Defendants as a result of Shofner's defamatory statements.

FOR A FOURTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress against Defendant PGGS and Defendant Shofner in his individual capacity)

46. Plaintiff Riemann incorporates its allegations as set forth in Paragraphs 1 through 45 of his Complaint as if fully set forth herein.

47. As alleged above, Shofner told Riemann's wife that Riemann was a thief and that she "was wearing stolen jewelry." Defendant Shofner made these statements not only to

Riemann's wife, but also within the earshot of other PGGs employees. Defendant Shofner made these statements knowing that they were false and, by making them, intentionally or recklessly inflicted emotional harm on Riemann.

48. Defendant Shofner also intentionally and blatantly violated South Carolina law by refusing to pay Riemann compensation owed under the South Carolina Payment of Wages Act. Defendant Shofner has even refused to pay the Riemann the compensation that LLR has already declared that the Defendants owe Riemann. Further, Defendant Shofner has even refused to pay the money owed to Riemann despite having paid the fine levied by LLR rather than complete any appeal of the civil citation levied against Defendants for their blatant violation of the South Carolina Payment of Wages Act.

49. In committing these outrageous and intentional actions, the Defendants intentionally or recklessly inflicted severe emotional distress, or were certain or substantially certain that distress would result from the conduct.

50. The conduct of the Defendants was so extreme and outrageous that it exceeded all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community, specifically Defendant Shofner's outrageous, callous, and knowingly false statements to Riemann's wife accusing Riemann of being a thief, which were intended to injure Riemann and his marriage.

51. The conduct of the Defendants actually caused Riemann emotional distress.

52. The emotional distress suffered by Riemann was of such a nature that no reasonable person could or should be expected to endure it.

53. At the time of these outrageous and intentional actions, Defendant Shofner was the sole stockholder and dominant corporate officer of Defendant PGGs.

54. While an injured worker alleging intentional infliction of emotional distress against an employer is ordinarily confined to an exclusive remedy under the Workers' Compensation Act against the employer, when the tortfeasor/co-employee is the 'alter ego' of the employer, the liability falls outside the scope of the Act. *See, e.g., Dickert v. Metropolitan Life Ins. Co.*, 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993) (applying the "alter ego exception" to "dominant corporate owners and officers").

55. Because Defendant Shofner is the "alter ego" of Defendant PGGS, and because Defendant Shofner's actions were so patently extreme and outrageous that they exceeded all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community, Plaintiff Riemann should be awarded damages against Defendant PGGS and against Defendant Shofner in his individual capacity. These damages should include compensatory damages and punitive damages as allowed under the law.

WHEREFORE, having fully set forth his Complaint herein, Plaintiff Roger R. Riemann respectfully requests a trial by jury on all issues so triable, and further requests that the Court:

1. find the Defendant PGGS liable to the Plaintiff for unpaid wages and expenses, to treble damages in the amount permitted under the South Carolina Payment of Wages Act, and to award attorney's fees and costs to the Plaintiff; and ..

2. find the Defendant Shofner individually liable to the Plaintiff for unpaid wages and expenses, to treble damages in the amount permitted under the South Carolina Payment of Wages Act, and to award attorney's fees and costs to the Plaintiff; and

3. find the Defendant PGGS liable to the Plaintiff for all compensatory and punitive damages, including back pay and front pay, relating to the wrongful discharge of Plaintiff by Defendant PGGS; and

4. find the Defendant PGGS liable, and Defendant Shofner individually liable, for the compensatory, general, and punitive damages related to the defamatory conduct detailed above; and

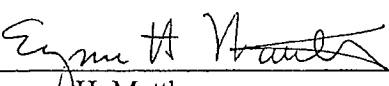
5. find the Defendant PGGS liable, and Defendant Shofner individually liable, for the compensatory, general, and punitive damages related to the Defendants' intentional infliction of emotional distress detailed above; and

6. award allowable pre-judgment and post-judgment interest; and

7. grant to Plaintiff such other and further relief as the Court may deem just and proper.

Dated this the 2nd day of July, 2013.

RICHARDSON PLOWDEN & ROBINSON, P.A.



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COUNSEL FOR PLAINTIFF ROGER R. RIEMANN

1 State of South Carolina)

In the Court
Of Common Pleas

2 County of Lexington)

3
4 Docket No. 2012-CP-32-03496

5 Riemann,)

6 Plaintiff,)

7
8 vs.)

Transcript of Record

9 Palmetto Gems & Gemologica;)
10 Services, Inc. &)

Tom Shofner,)

Defendant.)

11
12 February 13, 2013
13 Lexington, South Carolina

14
15 B E F O R E:

16 The Honorable R. Knox McMahon, Judge.
17

18 A P P E A R A N C E S:

19 Gene Matthew, Esquire
Attorney for the Plaintiff

20 Angus H. MacCauley, Esquire
21 Attorney for the Defendant
22

23
24 Brenda J. Sigwald, Circuit Court Reporter
For the Honorable R. Knox McMahon
25 P.O. Box 206, Jackson, South Carolina 29831

I N D E XPage

Motions Hearing

Certificate of Reporter

E X H I B I T SNO.DESCRIPTIONPAGE

(There were no exhibits
entered during this hearing.)

1 THE COURT: 2012-CP-32-3496, Riemann versus
2 Palmetto Gems.

3 Mr. Matthews?

4 MR. MATTHEWS: Yes, sir, Your Honor.

5 THE COURT: And Mr. McCauley?

6 MR. MACCAULAY: Yes, sir, Your Honor.

7 THE COURT: All right. There are three motions.
8 It looks like the motion to compel arbitration and to stay
9 was filed first; is that correct?

10 MR. MACCAULAY: That is quite correct.

11 MR. MATTHEWS: Yes, sir, Your Honor.

12 THE COURT: Then the motions to compel discovery
13 and --

14 MR. MATTHEWS: Your Honor, we can probably argue
15 them all at the same time.

16 THE COURT: Into the amended complaint?

17 MR. MATTHEWS: Yes, sir.

18 THE COURT: All right. Well, since the defendant
19 filed his motion first, we'll start with the defendant.

20 MR. MACCAULAY: Thanks, Your Honor. May it
21 please -- May it please the Court?

22 My name is Angus MacCaulay and I represent the
23 defendants Palmetto Gems and Gemological Services and Mr.
24 Tom Shofner. We had d hand delivered to Your Honor's
25 chambers, I believe two days ago, a memorandum in support

1 of our motion to dismiss. Did you get a copy of that? If
2 not I have an extra copy of it.

3 THE COURT: I do not have a copy of that.

4 MR. MATTHEWS: We did not get a copy of it.

5 THE COURT: I do not have a copy with me on the
6 bench. It's probably upstairs.

7 MR. MACCAULAY: May I approach?

8 THE COURT: Yes, sir.

9 MR. MACCAULAY: And then before, as I sat down,
10 Mr. Matthews also handed up to me a brief also.

11 Your Honor in 2006, Mr. Shofner and the plaintiff,
12 Mr. Reimann, opened a jewelry store together in Chapin
13 called Palmetto Gems. As part of that business,
14 Mr. Shofner and Mr. Reimann executed a shareholder
15 management agreement to document their responsibilities.

16 That shareholder management agreement is attached
17 to --

18 THE COURT: That's Exhibit B.

19 MR. MACCAULAY: Yes, sir, along with an affidavit
20 of Mr. Shofner. On page two of that agreement is a
21 mandatory arbitration provision which states any
22 controversy or claim arising out of or related to this
23 agreement or the breach thereof shall be settled except as
24 may be otherwise provided herein by binding arbitration in
25 accordance with the commercial arbitration rules and the

1 American Arbitration Association and then provides a method
2 by which arbitrators can be chosen. And the final sentence
3 of that section goes on to state, Your Honor, that any
4 dispute as to whether a verse or claim is subject to
5 arbitration, shall also be submitted as part of the
6 arbitration proceeding.

7 Now, as part of this business, Palmetto Gems
8 maintained a website -- also maintained a website for the
9 sale of jewelry and related items over the internet. The
10 website is specifically noted in Exhibit A to the
11 shareholder agreement.

12 Now, Palmetto Gems is located in Chapin, so much of
13 its business is derived from out-of-state sales, both
14 through the internet, through the mail and out-of-state
15 travels by both Mr. Shofner and by Mr. Reimann. Palmetto
16 Gems is also engaged in interstate commerce by sending its
17 repair orders out of state. And attached to our motion to
18 compel, Your Honor, is Mr. Shofner's affidavit, which
19 outlines the scope of those interstate sales and commerce,
20 the company and then he and Mr. Reimann were engaged in and
21 I'll discuss those further in a minute.

22 Now, unfortunately, Mr. Shofner and Mr. Reimann's
23 business relationship ended in May of 2012. As a result of
24 that termination, Your Honor, of that relationship,
25 Mr. Reimann then filed a compliant against Mr. Shofner and

1 against Palmetto Gems. In August of 2012, in his
2 complaint, Mr. Reimann brought three causes of action
3 against the defendant for violation of the South Carolina
4 Payment of Wages Statute, wrongful discharge in violation
5 of public policy and for slander. In his complaint,
6 Mr. Reimann also attached the Shareholder Agreement and
7 alleged and admitted in paragraph 6 of his complaint --
8 I've got a copy of the complaint if that would be helpful
9 to you.

10 THE COURT: I read it this morning.

11 MR. MCCAULAY: Okay.

12 THE COURT: Yes, sir.

13 MR. MCCAULAY: It alleged in paragraph 6 that the
14 agreement concerned the management of Palmetto Gems. Now,
15 defendants have filed a motion to dismiss Mr. Reimann's
16 claims and/or to compel him to arbitrate his case pursuant
17 to the arbitration clause in that Shareholder Agreement.
18 This motion is based upon the parties, Mr. Reimann and
19 Mr. Shofner, Your Honor. Through their business, Palmetto
20 Gems engaged in interstate commerce, such that the federal
21 arbitration act, we believe, applies here.

22 South Carolina courts have long favored arbitration
23 provisions, Your Honor, and have ordered arbitration when
24 the parties have previously agreed to arbitrate, as we
25 believe they have here; and the parties have engaged in

1 interstate commerce.

2 Now, for the purposes of this motion, Your Honor, I
3 will certainly admit that the arbitration provision in
4 question does not fall within the South Carolina Uniform
5 Arbitration Act, because it doesn't have the conspicuous
6 disclaimer at the top of the agreement that would be
7 required.

8 Now -- however, it's our believe that the
9 arrangement of that the agreement, the business
10 relationship between Mr. Shofner and Mr. Reimann involved
11 interstate commerce such as the Federal Arbitration Act
12 applies. The FAA provides that a written provision in any
13 transaction -- excuse me -- a written provision in any
14 contract evidencing a transaction involving interstate
15 commerce to settle by arbitration, a verse thereafter
16 arising out of that contract is irrevocable, it's valid and
17 enforceable. And what the United States Supreme Court has
18 said, Your Honor, is that the term involves commerce is the
19 equivalent to affecting commerce.

20 It's -- my understanding is that when the courts
21 are trying to determine whether or not a transaction
22 involves commerce within the FAA the Courts will look at
23 the agreement, the complaint and also the surrounding
24 facts.

25 What our own Supreme Court has said, Your Honor, is

1 that a transaction can involve interstate commerce
2 regardless of whether or not the parties contemplated the
3 interstate commerce would be effected when they entered
4 into the agreement.

5 Now, one of the things I assume that Mr. Matthews
6 will allege is that here, Mr. Reimann and Mr. Shofner did
7 not anticipate that they would be engaging in interstate
8 commerce when they signed the shareholder management
9 agreement, but it's our position, Your Honor, their course
10 of dealing and the way they derived funds, their travels,
11 their internet sales and things like that. Regardless of
12 what they intended when they signed the agreement, that
13 course of dealing somehow showed that they were involved in
14 interstate commerce.

15 Now, in our supporting memo, Your Honor, we cited
16 the Thornton versus Trident Medical Center case. In that
17 court -- in that case, the Court of Appeals looked solely
18 at the language of the agreement at issue to determine that
19 the language of that agreement, just the language of the
20 agreement, clearly shows that the parties intended
21 interstate commerce. Likewise, Your Honor, it's our
22 position that the Shareholder Agreement in and of itself
23 indicates a business that was to effect interstate
24 commerce.

25 As I stated earlier, Exhibit A to the Shareholder

1 Agreement specifically says that salary and profit sharing
2 distributions are also to be derived from internet sales;
3 and Palmetto Gems, in fact, had a website. That website,
4 obviously, Your Honor, is accessible to customers
5 throughout the world and would certainly indicate
6 interstate commerce, and I think that Mr. Shofner's
7 affidavit also shows that sales were derived from that
8 website.

9 In our supporting memo, Your Honor, we also cite
10 the Lucy versus Mayo case. That's an exhibit. It's a
11 fairly recent case that's attached to our brief; and in
12 that case, Your Honor, Court of Appeals held that even
13 though Mayo in that case, she was an associate with a law
14 firm. She was a South Carolina lawyer working for a South
15 Carolina law firm and that even though that's what she was
16 doing -- a South Carolina lawyer working for a South
17 Carolina law firm, you know, she was working for
18 out-of-state clients, she was traveling, she was billing
19 those clients for out-of-state work; things such as that.

20 So again, Your Honor, just because -- even though
21 Palmetto Gems is a South Carolina business, even though
22 that Mr. Shofner and Mr. Reimann are South Carolina
23 residents, we believe the surrounding facts here as
24 evidenced by Mr. Shofner's affidavit also indicated that
25 Palmetto Gems effected interstate commerce.

1 Do you have Mr. Shofner's affidavit in front of
2 you, Your Honor?

3 THE COURT: I do.

4 MR. MCCAULAY: Okay. And I don't want to go into
5 the whole thing and read the whole thing out, but I just
6 want to point out that what he says is that Palmetto Gems
7 has sales with customers from several different states. He
8 also says that the business sent products out of state for
9 customization and repair. But he also, I think,
10 importantly said, Your Honor, that both Mr. Shofner and Mr.
11 Reimann made sales calls, went out of state to make sales
12 calls on behalf of Palmetto Gems.

13 So it's our position, Your Honor, is as Palmetto
14 Gems effects interstate commerce; therefore, the
15 arbitration provision in the Shareholder Agreement falls
16 under the Federal Arbitration Act and thus it's our
17 contention that Mr. Reimann's complaint must be dismissed
18 and/or sent to arbitration as the parties agreed.

19 Now, I think I said earlier, Mr. Matthews handed up
20 to me before we started, a brief in opposition to our
21 motion to dismiss. And I only had a minute to go through
22 it --

23 MR. MATTHEWS: You want me to hand this up to the
24 judge?

25 MR. MCCAULAY: Sure, that's fine.

1 MR. MATTHEWS: Your Honor, may I approach?

2 THE COURT: Yes, sir, Mr. Matthews. Thank you.

3 MR. MCCAULAY: Your Honor, I've only had a minute
4 to go through it, but if I may, I'd like to maybe try to
5 address some of the things I was able to glean from Mr.
6 Matthews's brief to maybe help this process go along. One
7 of the things that Mr. Matthews, I assume is going to claim
8 is that -- and this goes to his motion to compel.

9 Mr. Matthews filed a -- or served discovery on me
10 related to Mr. Shofner's affidavit and it was my position
11 that any discovery in this case would be handled by the
12 arbitrators. And I believe that what Mr. Matthews will
13 allege, Your Honor, is that the contentions in Mr.
14 Shofner's affidavit don't show enough interstate commerce.
15 The only thing I think I would point out here, Your Honor,
16 is that Mr. Shofner's affidavit, which you have, stands on
17 its own and provides you with a lot of specific information
18 about the interstate commerce engaged in by Palmetto Gems.
19 I'm not aware that Mr. Reimann has filed any type of
20 affidavit to contradict anything that Mr. Shofner has said.
21 So as far as I'm concerned, I'm not aware of anything out
22 there that would specifically contradict in terms of
23 factual claims -- that would contradict anything that Mr.
24 Shofner has said.

25 The other thing I would point out, Your Honor, is

1 that, you know, it's easy to throw stones at the facts
2 contained in Mr. Shofner's affidavit, but I guess the point
3 that I would like to ask and maybe Mr. Matthews can address
4 this when he appears, Your Honor, is does Mr. Reimann
5 contend that some of the things that Mr. Shofner says is
6 untrue.

7 Is Mr. Reimann saying that Mr. Shofner did not
8 travel out of state for business? Is Mr. Reimann saying
9 that Palmetto Gems did not generate business from out of
10 state sales? And I'd be interested to know that. I think
11 the proper way to do that would be with an affidavit which
12 has not been filed.

13 Now, the only other thing I would say with regard
14 to that perspective, Your Honor, is that -- as a
15 sideline -- is that, you know, I did -- there's a lot of
16 different cases going on involved here between Mr. Shofner
17 including a claim before the Department of Employment Work
18 Force and I did --

19 **THE COURT:** Is that -- that's not the LLR. That's
20 different --

21 **MR. MCCAULAY:** It's now the Department of
22 Employment Work Force that took over from Department of
23 Labor Licensing and Regulation -- no, I'm sorry, took over
24 the Department of the Employment Security -- Employment
25 Security Commission.

1 THE COURT: I'm with you.

2 MR. MCCAULAY: Okay.

3 THE COURT: I'm tracking you.

4 MR. MCCAULAY: Okay. I -- in that hearing, Mr.
5 Reimann himself, at least on one occasion testified under
6 oath -- and I've got the transcript here to show you --
7 acknowledged that at least on one occasion, Mr. Shofner
8 traveled to Florida to make sales for Palmetto Gems. On
9 another occasion in that test --

10 THE COURT: This Labor and Work Force Employment
11 Security, that's for unemployment benefits?

12 MR. MCCAULAY: Yes, sir, it is.

13 THE COURT: That's correct? All right. Thank you.

14 MR. MCCAULAY: But it was -- I'll still contend
15 that, you know, even though that's a different forum, Mr.
16 Reimann was testifying, as I understand it, under oath. He
17 was represented by his attorney, and I was there. And on
18 at least one occasion, Mr. Reimann testified that, in fact,
19 Mr. Shofner had traveled to Florida to make a sale for
20 Palmetto Gems.

21 On a second occasion, Mr. Reimann also testified
22 that he, himself, boxed up a Rolex watch to be shipped out
23 to be repaired. And the presumptions I had was that that
24 was going to be sent out of state; which, again, those two
25 things in my mind indicate that, you know, the voracity of

1 Mr. Shofner's affidavit, which as far as I'm concerned, had
2 not been contradicted in any way, whether by affidavit or
3 anything else.

4 Now, another thing that my friend, Mr. Matthews,
5 I'm sure will get up here and tell you, Your Honor, is that
6 certainly not all of Mr. Reimann's claims fall under the
7 Shareholder Agreement and thus should not be sent to
8 arbitration.

9 THE COURT: For example, defamation.

10 MR. MCCAULAY: For example. Yes, sir, defamation.

11 THE COURT: That's one of this -- yeah, defamation,
12 yes, sir.

13 MR. MCCAULAY: And -- spoken or written slander.
14 But I think in this case it's defamation, it's oral and he
15 might also say that, you know, one of the motions in front
16 of you, Your Honor, is Mr. Matthews's motion to amend his
17 complaint, which includes a claim which adds a new cause of
18 action for intentional infliction of emotional distress
19 outrage. And I'm sure Mr. Matthews would tell Your
20 Honor -- I hate to steal your thunder, my friend -- but I'm
21 sure he would tell Your Honor, that certainly that in and
22 of itself -- those two claims, particularly slander and
23 possible infliction of emotional distress, don't -- also
24 should not be considered as falling under the arbitration
25 provision. And the only thing I would point out in my

1 response to that, Your Honor -- and that's kind of why I
2 read to you the second -- you know, the final paragraph to
3 the final sentence in that arbitration provision, which
4 says, specifically, Any dispute as to whether a verse or
5 claim is subject to arbitration shall be submitted as part
6 of the arbitration provision.

7 So I guess what I'm saying, Your Honor, and with
8 all due respect, is that the determination as to whether or
9 not Mr. Matthews's claim for slander, whether or not Mr.
10 Matthews's claim or intentional infliction of emotional
11 distress, the subject to the arbitration provision is
12 something that has been agreed to by the parties and the
13 parties, when they signed the Shareholder Agreement agreed
14 that it would be the arbitrator would make that
15 determination.

16 Now, one of the things that Mr. Matthews said -- I
17 saw in Mr. Matthews's brief is that it's his contention
18 that if you, Your Honor, should decide to -- that some of
19 the claims should go to arbitration and some of the claims
20 should not go to arbitration, Mr. Matthews has asked that
21 you should allow the claims that you decide to go to -- not
22 to go to arbitration to be moved forward through the court
23 system.

24 And, again, Your Honor, getting back to my original
25 agreement, with all due respect, I think that's a decision

1 by the arbitrator. But the other point that I would make,
2 Your Honor, is that the Federal Arbitration Act -- and I
3 can provide you with a copy of that provision and also a
4 certain case law in South Carolina says that under the
5 circumstances where claims are found to be arbitrable, and
6 some claims not found to be arbitral, the claims that are
7 not found to be arbitrable are to be stayed and held until
8 the Court retains jurisdiction over them, certainly. But
9 are not to be litigated, but to be stayed -- held
10 motionless, if I may say, until the arb -- underlying
11 arbitration claim is decided.

12 Now, the final thing that I'd like to point out to
13 Your Honor is that in Mr. Matthews's brief, he says that --
14 he cites the wage payment statute, which is first cause of
15 action and he sites the statutory provision that says that
16 no provision of the Wage Payment Act may be contravened --
17 if I can find his -- what he says is that no provisions in
18 this chapter may be contravened or set aside by private
19 agreement.

20 In having just glanced at that for 30 seconds
21 before we began, Your Honor, it's my position that by
22 merely sending a case to arbitration does not contravene a
23 party's ability to pursue a claim under the Wage Payment
24 Act. It's my position, Your Honor, that language such as
25 that would arise where, for example, an employee were to

1 leave employment, sign a release and in that release
2 promises that he or she will never sue the employer under
3 the Wage Payment Statute. And so in that case, Your Honor,
4 the employee's ability to pursue a Wage Payment Act is
5 contravened, barring from the statute, such that that
6 language is inapplicable, or is not good for the terms of
7 South Carolina public policy.

8 Here, just because Mr. Reimann's Wage Payment Act
9 claim should go to arbitration doesn't mean it's
10 contravened, it just means he can determine his claim in a
11 different form.

12 For these reasons, Your Honor, it's our position
13 that Mr. Reimann's claim should be dismissed. All three of
14 his claims should be dismissed and that it should be sent
15 to arbitration with regard to Mr. Matthews's motion to
16 compel and asks for discovery, it's our position, Your
17 Honor, that any discovery issues arising out of this case
18 should likewise be determined by the arbitrator.

19 And finally, Your Honor, with regard to Mr.
20 Matthews's motion to compel -- or excuse me, motion to
21 amend his complaint and add the claim for intentional
22 infliction of emotional distress, it's our position, Your
23 Honor, that that, likewise, is a claim that should be
24 decided by the arbitrators as agreed to by the parties when
25 they signed the management agreement.

1 One final statement, if I might point out to Your
2 Honor, is that -- and this is just as an aside -- is the
3 fact that, you know, Mr. Matthews in his brief, I take it,
4 makes much of the fact that Mr. Reimann was asked to
5 arbitrate his claims in the Shareholder Agreement, also
6 attached to his complaint is another agreement, a
7 shareholder buy out agreement also signed by Mr. Reimann
8 and by Mr. Shofner -- also in that agreement, Your Honor,
9 Mr. Reimann agreed to arbitrate his claims. So arbitration
10 is something that Mr. Reimann has agreed to do, not just in
11 the Shareholder Agreement, but in other agreements, in at
12 least one other agreement he entered into when he joined
13 this business with Mr. Shofner and created Palmetto Gems.

14 Thank you very much, Your Honor.

15 **THE COURT:** Thank you, thank you Mr. MacCaulay.

16 Mr. Matthews?

17 **MR. MATTHEWS:** I'm also not happy to argue against
18 my good friend Mr. MacCaulay. I received his brief this
19 morning and it does address some of the issues, but I think
20 unavailingly so. The brief that we submitted this morning,
21 Your Honor, and the case that attaches thereto, set
22 forth -- and if you'll indulge me for just a moment -- Mr.
23 Reimann was hired in 2006, was fired in 2012 as Mr.
24 MacCaulay related. The turn of events and what brings us
25 here today is that for some years there had been a dispute

1 between the parties over whether or not Mr. Reimann was
2 being paid properly and Mr. Reimann was dissatisfied with
3 the response, lack thereof, that he was getting. So
4 ultimately in 2012, he filed a wage payment complaint. I
5 actually happened to be his -- I was formally a state
6 official, but...

7 THE COURT: I'm sorry, I couldn't quite hear.

8 MR. MATTHEWS: Certainly. I'm formally the state
9 official that used to enforce the payment wage act, so I'm
10 somewhat familiar with that statute.

11 THE COURT: How long did you work there, Mr.
12 Matthews?

13 MR. MATTHEWS: I worked there '99 to 2000 as the
14 director.

15 THE COURT: And the LLR is still LLR.

16 MR. MATTHEWS: It is still LLR, yes, sir.

17 THE COURT: Thank you.

18 MR. MATTHEWS: It's been there for 14 years but I
19 understand it's doing quite well.

20 The -- shortly thereafter, however, Mr. Shofner was
21 notified of the complaint, as you might imagine in March of
22 2012; and thereafter, Mr. Shofner fired Mr. Reimann.

23 In June of 2012, the LLR completed it's
24 investigation and found, in fact, that he was in violation
25 of the act and issued him a citation which was not

1 thereafter appealed to pay the fine, but has not paid Mr.
2 Reimann. We filed the complaint -- this is one other thing
3 that forces us in the complaint, which at this stage is
4 simply the facts of the case other than the affidavit which
5 I'll address later.

6 I also would just attract your attention to the
7 defamation claim and the potential infliction claim, which
8 arise from a dispute or statement that we allege Mr.
9 Shofner made to Mr. Reimann's wife about him being a thief.

10 **THE COURT:** About where he had stolen jewelry.

11 **MR. MATTHEWS:** Exactly, yes, sir. And that's on
12 page -- that's all listed out on pages 1 and 2 of our
13 brief.

14 Now, to get to the meat of Mr. MacCaulay's argument
15 and our counter argument, we agree that the South Carolina
16 act does not apply that the agreement is arbitral pursuant
17 to the FAA. We agree, I believe, in fact, we may not agree
18 with this. We think that the Supreme Court's decision of
19 Simpson, that is on the top of page 4, clearly sets out
20 that it is the for you and not the arbitrator to decide
21 whether the arbitration provision is enforceable for the
22 specific claims brought by Mr. Reimann.

23 Our Supreme Court -- that's not me telling you
24 that, that's our Supreme Court saying that. And again,
25 both the Supreme Court and Simpson and again in Bazzle,

1 which is also cited, reached the same conclusion.

2 Now, our arguments are five-fold, and I'll try to
3 run through them because I know there's a bunch of people
4 waiting behind us.

5 THE COURT: You're fine.

6 MR. MATTHEWS: The issue of whether the FAA
7 applies, first turns on whether or not -- it's not
8 whether -- it's not like a 14th Amendment issue, it's
9 whether or not the essential character of the contract
10 sufficiently implicates interstate commerce. And in fact,
11 when you think of that issue and you try to tease it
12 without, the one thing that I found helpful was the -- that
13 the case -- there were two cases cited from 2012, that are
14 applicable to this case. One is the case cited by my
15 friend, Mr. MacCaulay and that's the Lucy case.

16 THE COURT: That's Ms. Lucy and Ms. Meyer.

17 MR. MATTHEWS: Right. Lucy v. Meyer was a law firm
18 case. The other case, also, decided in 2012, was the
19 Flexen (phonetic) case.

20 Now, these two cases came to different conclusions,
21 by the appellate court and that's instructed because when
22 you look at Flexen -- and I'll draw your attention to the
23 top of page 7 of my brief, here's where Flexen, I think,
24 helps guide us, where it states, were this court to hold
25 otherwise -- and it's talking about what's sufficient

1 interstate commerce. And in this case, even though the
2 company dealt with interstate commerce, I believe the
3 company was actually -- the parent was a -- in another
4 state and that, certainly supplies that were used by the
5 company came out from out of state and I don't think you
6 can find a company in South Carolina that doesn't use paper
7 made by -- from Georgia Pacific or just something like
8 that.

9 But here's how the Court answers that question. I
10 think it does pretty well. Were this court to rule
11 otherwise it would equate to a finding that the FAA is
12 applicable to any contract containing an arbitration clause
13 as it could be argued that every contract somehow involves
14 some nexus to interstate commerce. Instead the question is
15 simply whether the contract evidences a transaction
16 involving commerce.

17 Now, Mr. MacCaulay truly has pointed out that there
18 was some provision in an attachment to the agreement that
19 references -- it doesn't reference a website, but talks
20 about the in vector strategies. To our knowledge, that has
21 never come to pass. There was never any sale, any
22 transaction out of the website. So when you -- unless the
23 FAA applies to every single contract there is, which is not
24 the case, then Mr. MacCaulay's argument in that regard is
25 unavailable.

1 Now, Mr. MacCaulay has asked and I think fairly --
2 we have a big problem with the affidavit. We think that
3 until this Court surrenders jurisdiction, it has not
4 surrendered jurisdiction. We believe that many of the
5 claims in Mr. Shofner's affidavit are false. That's why we
6 timely served discovery requests to deal with those issues.
7 It's not for him to decide when he wants to answer that
8 discovery. It's for this Court to decide that. Until the
9 Court surrenders jurisdiction, this is where jurisdiction
10 lays.

11 So, we would ask, Your Honor, and we've included in
12 our brief a request that you strike the affidavit. Now, as
13 to the point that, again Mr. MacCaulay fairly brings up --
14 Are you denying, Mr. Matthews that he ever went out of
15 state?

16 No, we don't deny that. In fact, my understanding
17 from my client is that he -- over a 6 year period, he went
18 out of state three times. Now, compare that to the Court's
19 finding in Lucy, and if you'll look at page -- beginning at
20 the top of page 6, there's an -- I quote from the Lucy case
21 extensively because I want you to compare that to what
22 even Mr. Shofner says is the only connection he had with
23 interstate commerce.

24 Now, if you look at Lucy, it's critical this is not
25 a situation where Myers simply worked in South Carolina on

1 cases that involved out-of-state clients or businesses.
2 The subsequent amendment to the contract was designed for
3 the express purpose of allowing additional compensation
4 with provisions for an Ocean Club Place, a case which
5 involved significant out of state work by her travel
6 extensively to conduct her legal work and build hours for
7 her out-of-state work and traveling. And it lists the
8 places she went on the case. And notably here, moreover,
9 Myers brought this claim to recover 1.7 million dollars for
10 the value of her labor for the Ocean Club Place.
11 Implicating the substantial amount of work and time she
12 spent on this particular case.

13 Now, I would be delighted if this case was worth
14 1.7 million dollars or Mr. Shofner had 1.7 million dollars
15 coming in into the website. The fact is he has, we
16 believe, zero dollars coming through website. So, for the
17 defendant -- I understand Mr. MacCaulay has to represent
18 his client and he does it, typically, and today, extremely
19 well. But it's strange credulity to tell the Court that
20 this is a contract that has a significant, or even frankly
21 much of a passing implication of interstate commerce. If
22 they had wanted that not to be an issue all they had to do
23 was abide by the South Carolina act and they didn't.

24 For that reason alone, Your Honor can with a clean
25 conscience decide that this case is simply not arbitrable.

1 Now, there's another threshold argument that we
2 want to bring to your attention and that begins on our --
3 the bottom of page 7. That's the issue of you
4 uncontribility. The situation in this case is that a
5 company and defendant who the LLR has already found has
6 violated the law, so thereafter fired Mr. Reimann from his
7 livelihood and he has been unable to find short time, part
8 time in one sense that he now remains unemployed. The
9 provisions of this particular -- Number one, the provisions
10 of the dispute resolution provision are -- frankly, you got
11 to hunt for them. The provision itself doesn't even
12 identify itself. The title is not in arbitration. It says
13 dispute resolution. It's in the middle of the contract.
14 Uncontribility requires you to find two things: Absence of
15 meaningful choice; and that the terms are present. The
16 terms are so present a reasonable person would make them a
17 neutral person honestly accepted. And in analyzing -- and
18 this actually comes, again, from Simpson. In analyzing
19 claims on uncontribility, the context of arbitration
20 agreements, court's focus generally on whether the
21 arbitration clause is geared towards achieving an unbiased
22 decision by a neutral decision maker. Our argument is
23 that's not it at all. They want to keep it from being
24 arbitrated. And we explain why in our brief.

25 First of all, when you look again -- and I want to

1 turn your attention, if I may, Your Honor, to page 8.

2 THE COURT: Page 8?

3 MR. MATTHEWS: Page 8, yes, sir. With regards to
4 the absence of meaningful choice, the Courts look at six
5 factors: The nature of the injury suffered, whether the
6 plaintiff was a substantial business concern relative to
7 the disparity of party's bargaining power; the party's
8 relative to sophistication; where there's an element of
9 surprise and any inclusion related to that conspicuousness
10 of the clause.

11 And on page 9, we discuss these factors. And
12 again, I'm sorry, I don't want to read them to you, but
13 clearly, here -- let me draw your attention to the first
14 bullet and that's probably the most telling. Here's a
15 situation where an arbitration provision requires three
16 arbitrators. The three -- each of the arbitrators either
17 has to be a CPA, a lawyer or a businessman with at least 7
18 years experience as an executive in corporation. Your
19 Honor, that means that Mr. Reimann is not qualified to be
20 an arbitrator in this case. He couldn't arbitrate it. He
21 couldn't serve as an arbitrator.

22 What that does say is you will have -- I mediate
23 cases myself. I know what they charge and that's why with
24 great confidence, I can say, in order for Mr. Reimann to
25 invoke arbitration, this out of work man who has been, we

1 have alleged, unlawfully fired by a defendant that LLR has
2 already found in violation of the law, he has to pay
3 arbitrators about 750 to \$1,000 an hour to arbitrate the
4 case in addition, to any charges that AAA has for
5 administrative fees. This arbitration clause is not
6 designed to arbitrate, it's designed to keep people from
7 having their -- their problems adjudicated. That's
8 uncontrivable.

9 And we talk again -- I don't want to tax the
10 Court's time too much, but we set forth that the easy
11 nature of the contract, the fact that -- and I cite -- and
12 this actually comes from an old handbook law, the company
13 United Telephone case is at the top of page 9. That sets
14 forth when a provision is conspicuous or not. And every
15 turn, that -- the provision fails that test.

16 Now, we talked -- again, we explained in page 9
17 that the nature -- the present nature of the terms, there
18 is one thing I do want to bring out and it's at the bottom
19 of page 9. One of the things that court's look for in
20 determining on uncontrivability is whether or not the act
21 requires the employee to surrender any particular right.
22 One of the -- or has some particularly under a clause.

23 One clause I want to bring your attention is the
24 clause that provides, Legal cost of attorney's fees and
25 fees of expert witnesses may be assessed against any person

1 found to be acting in bad faith. Mr. Reimann doesn't face
2 that in this court. Absent some, you know, cause of --
3 malicious application, you are to find that this to be a
4 frivolous action. LLR has already found it to be in
5 violation of the Payment of Wages Act, so we know that's
6 not the case.

7 Now, when you look -- and again, I'm going to
8 still -- to sum that up, I'll direct your attention if I
9 may to page 10, which -- that last paragraph the middle of
10 the page sums up our argument we think on uncontrivability.
11 I'm happy to, of course, address any question you have
12 about that, but I'm also conscious of the Court's time.

13 Now, that has to do with whether or not there's an
14 arbitration that should apply at all. Okay. Then let's
15 look at specific claims. Now, Mr. MacCaulay, rightly,
16 anticipates that I will argue that the arbitration
17 provision as to the Payment of Wages Act claim violates
18 public policy, not because I say so, because the general
19 assembly says so. If you look at the language of
20 41-10-100, it says no provision of this chapter may be
21 contravened or set aside by private agreement. That's
22 pretty sweeping. And it is -- it applies to all contracts.
23 And the reason is clear. When you look at page 11 it's
24 well established -- and I'm quoting now from the appellate
25 court, remedial legislation designed to protect working

1 people and assist them in collecting compensation
2 wrongfully withheld. And the legislature understands just
3 as the federal government understands with the Federal
4 Labor Standards Act. We can't have employers forcing
5 employees to sign away their rights under the act or they
6 will because they have superior bargaining power.

7 Now, in this case, that's exactly what's occurred.
8 The Payment of Wages Act guarantees to employees a civil
9 action. It's 41-1-8(c). Mr. Shofner, with respect, simply
10 overreaches by violating public policy in this instance by
11 asking -- demanding that Mr. Reimann surrender his civil
12 action under the Payment of Wages Act. It's not me that
13 doesn't allow that. The law doesn't allow that.

14 Now, when we look toward the next set, again, Mr.
15 MacCaulay rightly anticipates that we argue the other
16 claims: The wrongful discharge claim, the defamation claim
17 and the claim we would like to add, the intentional
18 affliction claim, have nothing to do with the contract.
19 Specifically, it has nothing to do with whether or not an
20 arbitrator -- or this Court, for that matter -- would find
21 that Mr. Shofner or his company violated the Payment of
22 Wages Act. This is what we mean:

23 Let me take the wrongful discharge claim. Wrongful
24 discharge simply requires us to show not that he had a
25 legitimate claim under the Payment of Wages Act, but simply

1 that he filed a wage complaint with LLR and what the law
2 states and this was the Evans case. It's from Florence.
3 Employers are not allowed to fire employees who exercise
4 their right to walk down to LLR Office of Wage Payment and
5 Child Labor, file a complaint to have LLR investigate it.

6 THE COURT: That was a workman's comp claim?

7 MR. MATTHEWS: No, sir. No, sir, that was the
8 Evans v. Taylor Made Sandwiches. It's a famous case from
9 1999. In that case, some ladies who worked in a sandwich
10 shop called LLR and said we're not being paid enough for
11 making our sandwiches. The guy that went down there, it
12 was a guy named Van Richardson. Nice guy, he's now a
13 magistrate up in Lancaster. He goes in and investigates.
14 The next day or the next time they see these ladies, they
15 say you ratted us out to LLR, I'm -- you're fired.

16 Well, essentially, we argue, that's what happened
17 here, that the reasons that Mr. Shofner had for firing were
18 pretext. He was mad that Mr. Reimann did what he had a
19 right to do. Say, Hey, look, we've got a wage complaint,
20 I'm not getting satisfaction, I'm calling LLR because
21 that's what the general assembly says I get to do. And if
22 you fire me for it, then that violates South Carolina's
23 Wrongful Discharge in violation of public policy. And
24 that's a tort.

25 So it doesn't matter presume -- we don't believe --

1 we don't believe that the public policy action would do
2 this; but presume for the sake of argument that you said,
3 okay, we're going to let an arbitrator arbitrate the
4 Payment of Wages Act claim. Whether the arbitrator decided
5 that Mr. Shofner should or should not have paid Mr. Reimann
6 anything is irrelevant to whether or not Mr. Shofner fired
7 him for filing the claim.

8 So the claims are not interwoven and when you
9 look -- and I'll just direct your attention to the -- that
10 the law that's going to bind the Court here today, there
11 are two South Carolina Supreme Court cases. One is the
12 Agency on Finance and the other is, I'm going to
13 mispronounce, Sashasure (phonetic) -- Shasharo (phonetic)
14 from down, I believe, in the Hampton County area. The
15 difference is this. This is what the Supreme Court tells
16 us, again I'm on page 12. We pronounce the word definitive
17 rule for determining whether a significant relationship
18 exists between those two parties to a contract, an
19 underlying contract, thereby implicating an arbitration
20 agreement. Because even the most broadly worded
21 arbitration agreement would still have limits founded in
22 general principle with contract law. This Court will
23 refuse to interpret any arbitration agreement as applying
24 to outrageous torts that are unforeseeable to a reasonable
25 consumer, the context of their own business dealings.

1 Now, this concerned a consumer relationship, but
2 the same law applies to this case. And I would hazard a
3 guess that Mr. Reimann, when he signed that agreement, no
4 one pointed out to him in this agreement -- no one said
5 let's negotiate the terms; they just said sign the
6 agreement or else. When that happened, even Mr. Reimann
7 did not suggest or believe that Mr. Shofner would in public
8 tell his wife that Mr. Reimann was a thief and had stolen
9 jewelry; or for that matter, that he would fire him because
10 he did what he had a right to do, go to LLR

11 And prior to these cases, I cite Sobinski
12 (phonetic) just for the simple proposition that this is not
13 a new theory. Certainly Aiken and Shasharo were finite for
14 the Court and give us better guidance for how the Court
15 should cite a case. But the test -- even Sobinski says,
16 the test is based on determination whether a particular
17 tort claim is so interwoven to the contract that it could
18 not stand alone. And here, clearly, any tort that we
19 brought in this case, can stand alone. As we talk more
20 about it on page 13. In fact, we address this specific
21 claim on page 13 and differentiate them from the --
22 anything that's attached to the contract.

23 And finally, I always hate to disagree with an
24 attorney as good as Mr. MacCaulay, but I -- I'm afraid I
25 have to at this point again. And that's the last point

1 that has to do with whether or not the defense motion is
2 granted in part but not in part, you should allow our
3 claims on our part to proceed forth. It's not me that says
4 that the Court should allow this to go forward. The claims
5 that are unarbitrable should go forward. This is the U.S.
6 Supreme Court. In the cases that we cite, again at the
7 bottom of page 13 and onto 14 talk -- the Moses Cone case
8 and the Dean Witter case are probably the most famous. And
9 that's where the Court said, Court's generally refuse to
10 stay proceedings of unarbitrable claims when it is
11 feasible to proceed with the litigation.

12 Now, Your Honor, I believe we filed this claim in
13 August. He was fired in May of 2012. It is now February
14 of 2013. And for most of that time, Mr. Reimann has been
15 without a job. We think there's a certain delay here.
16 Justice delayed here is justice denied. That's one point.

17 The second point is, again, if there is a heavy
18 presumption that should arbitration, lawsuit, each proceed
19 in its normal course, because none of the tort claims
20 depend in any way on an arbitration decision regarding any
21 issue related to the Shareholder Agreement. There's
22 absolutely no reason at all to keep Mr. Reimann -- deny Mr.
23 Reimann his right to be heard. Which is essentially the
24 effect of what would happen if you said I'm staying all
25 claims, even those that I find are unarbitrable. And

1 again, the guidance there, we would argue, is from people
2 like Glavin -- Bates which cites the South Carolina courts.
3 The cases on this issue are not often heard, but there are
4 a couple of recent ones, we cite the Clay case from 2004,
5 the Aksa (phonetic) case from 2009; and frankly, sir, we
6 would simply say, we believe that the design and the effect
7 of the arbitration clause was to keep people from suing --
8 having any resolution of any claim brought against the
9 defendants and that can't be done. And it's not the law in
10 fact.

11 If you find -- and we don't believe you should, but
12 if you find that any claim is arbitrable, the ones that you
13 don't find arbitrable, we request that you allow to go
14 forward. There will be no cause for duplication. Mr.
15 MacCaulay is one of our state's most able advocates. He
16 can certainly assist his client in making sure there's no
17 duplication. I have no interest in duplicating anything
18 either, but the claims are different and there's no reason
19 at all for Mr. Reimann to be denied a chance to be heard.
20 And I can accept any questions that you have.

21 THE COURT: Thank you, thank you very much.

22 MR. MATTHEWS: Not at all.

23 MR. MCCAULAY: Your Honor, may it please the Court,
24 may I respond briefly?

25 THE COURT: Yes, sir, let me finish reading one

1 thing and then I will be glad to hear from you.

2 MR. MCCAULAY: Yes, sir and I will be brief.

3 (WHEREUPON there was a pause in the proceedings.)

4 THE COURT: Mr. Matthews, let me make sure I'm
5 tracking correctly.

6 MR. MATTHEWS: Yes, sir, Your Honor.

7 THE COURT: You questioned the voracity of Mr.
8 Shofner's affidavit.

9 MR. MATTHEWS: Yes, sir.

10 THE COURT: And there's not an affidavit that has
11 been presented to the Court of Mr. Reimann.

12 MR. MATTHEWS: Yes, sir, that's correct.

13 THE COURT: And part of your questioning of his
14 affidavit would go to the issue of whether or not Palmetto
15 Gems is engaged in interstate commerce?

16 MR. MATTHEWS: Well, sir, I would phrase the issue
17 like this, that the -- whether the FAA applies to a
18 specific contract requires the agreement to apply to a
19 contract that has some substantial connection to interstate
20 commerce and the actual language is here and I'm quoting
21 now from Bradley Homes which is a local -- a recent 2012
22 Supreme Court case.

23 THE COURT: Okay.

24 MR. MATTHEWS: To ascertain -- and this is at the
25 top of page 5 -- to ascertain whether transaction involves

1 commerce within the meaning of the FAA, the Court must
2 examine the agreement, the complaint and the surrounding
3 facts. And here's the important part, at least in my view,
4 our courts consistently look to the essential character of
5 the contract when applying the FAA -- and if I may again,
6 Your Honor, direct your attention to the top of page 7
7 because the quandary, of course, that faces the Courts and
8 litigants for that matter, is, you know, to the extent that
9 we breathe the air that used to be in North Carolina
10 yesterday or we use a pen that was manufactured in China,
11 we are all involved in interstate commerce.

12 It's also true that the FAA does not preempt, does
13 not -- it's not the universal arbitration provision. It's
14 just not. So the way our courts square that circle is by
15 looking, by doing what the Flexen court did. In other
16 words, when it says, In finding the agreement did not
17 implicate interstate commerce doesn't reflect with South
18 Carolina resident, it was an employer hiring for medical
19 services for a medical practice office located 1010 Medical
20 Center in Hardeeville. And then they said, Look, it's true
21 that -- we're sure the medical center may have had a
22 patient from Georgia. The medical center may have used a
23 syringe made in Pittsburgh. That's not the point. The
24 point is, is this anything other than a local gemologist
25 living in Lexington, working for a one store shop in

1 Lexington. Is that something that is the central character
2 of that contract, somebody does, as in the Lucy case, the
3 lawyer who was traveling here and yon on a case that
4 involves any number of out-of-state clients to the tune of
5 1.7 million dollars. Part of what we believe we would have
6 found if we had been -- if he had answered discovery as the
7 rules required him to, is that the website had no business.

8 So the point we would make there, we've been denied
9 that. We -- and again, I certainly don't think that there
10 was -- I want to be careful the way I choose -- the simple
11 fact that we doubt, number one that my client, as is often
12 the case, tells me that that just isn't true. But the
13 second thing is, Okay, you know, before we proceed, while
14 this Court still has jurisdiction over the case and we
15 believe it will continue to, but certainly it does now,
16 let's use what the rules allow us to do and say, Okay.
17 You've made these complaints under oath or you've made
18 these statements under oath. Let's see your documents.
19 And we are essentially told no -- not, that's beyond the
20 scope of Rule 26; not that's oppressive, not that's --
21 anything other than no.

22 **THE COURT:** Well, discovery is a little bit
23 different to me than perjury. He could have made a false
24 affidavit. I'm not directing it to him personally.

25 **MR. MATTHEWS:** Yes, sir.

1 THE COURT: It's very different to me if a person
2 presents to the Court a false affidavit: I have seen such
3 people and I do on a regular basis, but that's different
4 than just the rules of civil procedure.

5 MR. MATTHEWS: Well, Your Honor --

6 THE COURT: I was trying to get to the point that
7 if there's no voracity -- because all I have before me is
8 Mr. Shofner's uncontroverted, uncontradicted affidavit.

9 MR. MATTHEWS: Well, Your Honor --

10 THE COURT: And just like -- I just reread the
11 complaint of Mr. Reimann.

12 MR. MATTHEWS: Yes, sir.

13 THE COURT: And your voracity is beyond question
14 with me, Mr. Matthews, as is Mr. MacCaulay, but when you
15 say he had a choice of signing the agreement or else. I
16 implicitly agree -- accept that statement from you, but I
17 don't have an affidavit to that effect. What I have is an
18 agreement signed by one gentleman that is president and
19 treasurer, and another gentleman that is vice president and
20 secretary, not -- I mean that's different to me than the
21 boss and the sandwich maker. I understand the principle
22 there --

23 MR. MATTHEWS: Right.

24 THE COURT: -- so, I was --

25 MR. MATTHEWS: Well, Your Honor --

1 THE COURT: -- I was asking the question --

2 MR. MATTHEWS: -- there's a remedy.

3 THE COURT: All right.

4 MR. MATTHEWS: That the Court can take any step
5 that it needs to when certainly with the signing issues of
6 uncontribility to find any facts of which. If the Court
7 would like for Mr. Reimann to provide an affidavit, which
8 we would; of course, serve on opposing counsel, we would be
9 happy to do that. Our concerns frankly was -- we, like
10 you, are cautious about accusing anyone of committing
11 perjury.

12 THE COURT: And I'm not doing that. I don't want
13 either Mr. Shofner or Mr. Reimann to think I'm doing that.
14 I feel like I'm --

15 MR. MATTHEWS: But that's why, Your Honor --
16 forgive me for interrupting you. That's why using the
17 rules of court, we thought, Okay, we don't believe this.
18 My client who was there at the time, disagrees with this.
19 Okay, show us what you got.

20 THE COURT: And so I'm ending up -- I'm asked to
21 make a decision which -- I volunteered for it quite
22 frankly. I worked hard to get it, so I don't have the
23 right to complain.

24 MR. MATTHEWS: Yes, sir.

25 THE COURT: But I'm ending up making a decision

1 that's very important to Mr. Reimann, it's very important
2 to Mr. Shofner. I am in somewhat -- with limited
3 information. I feel that I can make a decision, but I
4 don't know that I have the full and complete information.
5 No fault of the parties, no fault of the lawyers.

6 MR. MATTHEWS: Well, Your Honor --

7 THE COURT: Y'all have done an excellent job. I
8 always enjoy these briefs.

9 MR. MATTHEWS: Well, Your Honor, to allay your
10 concern, Mr. Reimann would be happy to provide you with an
11 affidavit that we would, of course, serve on opposing
12 counsel. Or if you prefer we could conduct deposition on
13 the subject, which we would be happy to do and submit that
14 information to you as well. But what I wouldn't want you
15 to do -- we feel a little hamstrung by it -- by this thing.
16 First of all, we think that you should not consider his
17 affidavit at all because he violated the rules of civil
18 procedure.

19 THE COURT: Because of the discovery?

20 MR. MATTHEWS: Yes, sir. Exactly. And he
21 essentially told us and I appreciate the candor and
22 refreshing honesty, he said we're just not going to do it.
23 Now --

24 THE COURT: Go right ahead.

25 MR. MATTHEWS: Well, sir, actually I was going to

1 make sure I was addressing the question.

2 THE COURT: Well, the next, just to track further
3 down, even given that, even accepting Mr. Shofner's
4 affidavit, you would still say none of the claims are
5 arbitrable --

6 MR. MATTHEWS: Yes, sir.

7 THE COURT: With your argument and the 41-10-100,
8 the wage statute has that specific provision and
9 arbitration would violate that provision.

10 MR. MATTHEWS: It could, sir.

11 THE COURT: That the wrongful discharge, you cited
12 the Evans case and that's against public policy; and then,
13 of course, you would say there'd be no contemplation of
14 defamation or intentional infliction of the emotional
15 distress would ever, ever be arbitrable even if the other
16 two were.

17 MR. MATTHEWS: Absolutely, correct, Your Honor.

18 THE COURT: And if I were to send the other two
19 wage and wrongful to arbitration, defamation and the
20 potential infliction would remain with the Court and under
21 the United States Supreme Court cases, those could proceed.

22 MR. MATTHEWS: Judge, you have the discretion to do
23 so and we would encourage you to exercise that right.

24 THE COURT: That to me, that kind of sums up -- I
25 just wanted to sure I understood your argument.

1 **MR. MATTHEWS:** Remarkably clear, Your Honor.

2 **THE COURT:** And, of course, the wage statute -- is
3 this correct? I'm trying to -- I know you know this -- I
4 know you both know this -- that's a nonjury issue. Isn't
5 it nonjury by statute?

6 **MR. MATTHEWS:** Your Honor, I don't know if it's a
7 case in equity or not.

8 **MR. MCCAULAY:** Now, you put us on the spot, Judge
9 and now we look back.

10 **THE COURT:** I kept wanting to try to answer a
11 question that y'all wouldn't know the answer too.

12 **MR. MATTHEWS:** Well, this will be the only time
13 that will happen today.

14 **THE COURT:** Quite frankly -- the only reason I say
15 that is I happened to hear one this past year in Edgefield
16 County that I had no idea it was an equity and I believe
17 it's a nonjury case, quite frankly.

18 **MR. MATTHEWS:** Well, Your Honor, we would, of
19 course, hasten to note, the wrongful discharge claim is a
20 jury matter, although the judge in Evans was recently --
21 the Supreme Court case that clarified that said that it was
22 the judge, not a jury that decides whether or not that act,
23 that particular act was a violation of public policy. We
24 have no trouble with that and we ask you to direct that
25 one.

1 The second would be a jury trial, defamation,
2 obviously a jury trial; potential infliction, obviously a
3 jury trial.

4 **THE COURT:** But there's something in there,
5 correct, Mr. Matthews, about defamation per se, being a
6 matter of law?

7 **MR. MATTHEWS:** Well, defamation per se applies here
8 because we allege defamation, accused him of a crime, and
9 imputed his profession. What per se defamation requires
10 and again, Mr. MacCaulay could make this statement as well
11 as me, simply that Mr. Reimann is not required to prove any
12 special damages.

13 Now, in this case, we believe we can. But the
14 gravamen of a defamation claims they ruined a reputation.
15 The gravamen of the emotional stress claim is his specific
16 emotional stress. That's why the claims are different and
17 that's why we seek to add the other claim. But germane to
18 this specific argument, we would argue that first, if
19 correct, they are unrelated in any way to the contract.
20 For that reason they can't be arbitrable. Second, if you
21 find any claim arbitrable, we would, of course, ask that
22 you exercise your discretion and allow Mr. Reimann's
23 statement.

24 **THE COURT:** Thank you, thank you very much.

25 **MR. MCCAULAY:** Thank you, Your Honor, may it please

1 the Court, I'll be very be very brief. Mr. Matthews --
2 there's several statements during his presentation that
3 cause me some pause, but I don't like to interrupt people
4 when they're making presentations to the Court.

5 He did say, though, Judge, it bothered me a little
6 bit when he said that the complaint is the facts of the
7 case thus far. I disagree with that, Your Honor. The
8 complaint are allegations in the case and my client will
9 respond to those allegations. No comments about what the
10 LL -- what the Department of Labor Licensing and Regulation
11 found and things like that. That's not the law of the
12 case, Your Honor. Okay. I could go onto say that the
13 Department of Employment and Workforce found that when Mr.
14 Reimann was terminated, there was no -- that Mr. Shofner
15 had every right to do so.

16 So the only point I would make is these comments
17 about what the LL -- what the Department of Labor License
18 and Regulation found, is the determination was wrongful or
19 in retaliation. That is not the facts of the case, Your
20 Honor, and we have every intention of fighting those facts.

21 THE COURT: It may be under 12(b)6 motion.

22 MR. MCCAULAY: That -- possibly so.

23 THE COURT: I understand.

24 MR. MCCAULAY: Yes, sir, I just want to make that
25 point. I didn't want to interrupt my friend Mr. Matthews,

1 but I did want to make that point, Your Honor.

2 You know, the other thing, too, Your Honor, is our
3 allegation, out of all due respect to you, we don't believe
4 this Court has jurisdiction over this case and we timely
5 filed a motion with a supporting affidavit. Now, it's my
6 standard practice when -- the determination of whether or
7 not The Court has jurisdiction until that determination is
8 made, other issues involving discovery and things like that
9 are stayed, pending that determination. So to the extent
10 that there's any implication I was flouting the rules of
11 civil procedure or purposefully violating them, I'm sorry,
12 I respectfully disagree with that and I tell you I made my
13 point and my position very clear to Mr. Matthews and the
14 reason for that. I think -- granted he did attach a
15 letter, but I want to make that clear too.

16 Now, Your Honor, what Mr. Matthews said is he
17 wanted to, I think the word he used, was follow the rules
18 here with regard to discovery. And if the -- the South
19 Carolina Rules do provide a way for Mr. Matthews to get
20 into this issue of whether or not Palmetto Gems dealt with
21 interstate commerce and that's under Rule 6(d) and under
22 Rule 6(d), Your Honor, it says specifically that when a
23 party files a motion that with that motion is to also be
24 filed a supporting affidavit. That's what we did. We
25 filed a motion saying this Court did not have jurisdiction.

1 We filed a supporting affidavit. The Court -- Rule 6(d)
2 goes onto say that any opposing affidavits, which I would
3 contend is what Mr. Matthews should have done, must be
4 filed or may be filed up to two days before the trial --
5 two days before the hearing. Mr. Matthews's client chose
6 not to do that. Okay. So I guess to the extent that Mr.
7 Matthews didn't have a way to -- to, you know, fight what
8 Mr. Shofner has said in his affidavit, he had an avenue to
9 do that. He chose not to do that. Heck, Your Honor, Mr.
10 Matthews could have provided an affidavit today and you
11 could have let it in and I couldn't have argued with that.

12 THE COURT: I probably would have.

13 MR. MCCAULAY: You probably would have. That would
14 look like a fool to say no way. But the bottom line is he
15 didn't do it.

16 THE COURT: I guess I ought to be a little more
17 specific on following the rules, and of course, that's in
18 the record now, so -- but I agree, that happens regularly
19 and many times lawyers don't object to that.

20 MR. MCCAULAY: And I would not have objected to my
21 friend if he had done that, but he chose not to do it and
22 so the you know controverted evidence in this case, before
23 you, on this issue is Mr. Shofner's affidavit. But I would
24 like to go on to point out, Your Honor, that even though
25 Mr. Matthews said that they quote, unquote, disagree with

1 some of the allegations in Mr. Shofner's affidavit, he did
2 allow that his client did admit to traveling out of state
3 on at least three occasions on business for Palmetto Gems.
4 So at least we have some corroboration here.

5 Now, to the degree to which that corroboration was
6 done, you know, I guess that's for you to decide. Now, one
7 of the things that Mr. Matthews's pointed out, Your Honor,
8 was that -- and he sited a case from Court of Appeals that
9 said that you need to look at the language of the agreement
10 to determine whether or not interstate commerce is going to
11 be implicated.

12 With all due respect to the Court of Appeals, Your
13 Honor, I disagree; and what we sited was we sited the
14 Sobinski case; and the Sobinski case is a case in the
15 United States Supreme Court and we cited it on page 5 of
16 our agreement and we said that, you know, that, when you
17 determine whether or not -- determination of whether a
18 transaction involves interstate commerce is therefore a
19 fact specific inquiry. And the Court also goes on to say
20 that sometimes you look at commerce in fact standard and
21 sometimes a transaction in fact may involve commerce
22 regardless of whether or not the parties contemplated an
23 interstate transaction. And this is from the South
24 Carolina Supreme Court, Your Honor.

25 One of the things that Mr. Matthews said in his

1 presentation was that -- that the agreement was pushed in
2 front of Mr. Reimann and he was, I assume, the implication
3 was he was forced to sign it. And I think, Your Honor, you
4 kind of picked up on that.

5 Now, if this isn't a classic employer, employee
6 relationship where someone is forced to sign an agreement,
7 Mr. Reimann had a title on there. I think his title was
8 secretary and treasurer. And the other thing I'd point
9 out, Your Honor is that the agreement has a spot, you know,
10 his signature was witnessed. So the implication that Mr.
11 Reimann is some poor employee forced to sign an agreement,
12 I would respectfully disagree with, notwithstanding our
13 case law, Your Honor, our general case law in South
14 Carolina that someone is held to an agreement they signed.
15 If someone signs an agreement they're going to be held to
16 that agreement.

17 Now, this allegation that the arbitration agreement
18 is buried within the agreement, I think it's only a four
19 page agreement, Your Honor. It says dispute resolution --
20 I'm sure, Your Honor, you've seen plenty of agreements that
21 have that very similar type language. So I would
22 respectfully disagree with that.

23 In terms of Mr. Matthews belief that none of his
24 claims would be covered by the Shareholder Agreement what I
25 would point out, Your Honor is that when -- it's our

1 contention that A, Mr. Reimann was not fired because he
2 filed a claim with the Department of LLR. The facts will
3 show, actually that Mr. Reimann filed a claim with the LLR
4 and he was not terminated from his employment for some time
5 after that. So the investigation and the knowledge that
6 Mr. Shofner had with the complaint with the LLR was going
7 on for quite some time before Mr. Reimann was terminated
8 and was terminated, in our position, for reasons completely
9 unrelated to -- for his claim to the Department of License
10 and Regulation, because if we in fact were going to
11 terminate him for filing a claim with Department of License
12 and Regulation, we would have done it immediately upon
13 learning that he had filed that claim. That's not the
14 case. And I have no doubt because I cross-examined Mr.
15 Reimann on this point at the dispute hearing that he would
16 say that's correct.

17 However, I would like to point out that in this
18 Shareholder Management Agreement, it says right below the
19 executive officers where it lists Mr. Reimann changing in
20 title, duty, salary and other compensation as well as their
21 removal from office shall be governed by a majority vote.
22 Mr. Shofner was a majority shareholder. He terminated Mr.
23 Reimann because he had more shares than Mr. Reimann. In
24 fact, Mr. Reimann didn't have any. Therefore, it's our
25 allegation that if we're talking wrongful discharge, if Mr.

1 Reimann is going to claim that he was terminated because he
2 filed a claim with LLR, it's our allegation that he was
3 fired pursuant to this Shareholder Agreement, therefore
4 this Shareholder Agreement certainly applies to that claim.
5 Thank you Your Honor. I appreciate it.

6 THE COURT: Thank you.

7 Anything in response?

8 MR. MATTHEWS: Only this. In terms of -- I agree
9 that the South Carolina Supreme Court is the place that you
10 should first look for guidance and at the top of page 5 of
11 our brief, the Supreme Court of 2012 set forth the standard
12 that Mr. MacCaulay was addressing. And I quoted to you to
13 ascertain whether a transaction involve commerce is within
14 the FAA, the Court must examine the agreement, the
15 compliant, and the surrounding facts. Our courts
16 consistently look to the essential character of the
17 contract in applying the FAA. That, of course, is the
18 Bradley and Brentwood Homes case decided by our Supreme
19 Court in 2012, this past year, actually cites to a case
20 that Mr. MacCaulay had sited to you earlier, the Thornton
21 case.

22 I only leave you with this, we stand ready to
23 answer any questions you have. We stand by our brief and
24 our argument and we -- if you have any questions' -- unless
25 you have any questions.

1 THE COURT: Thank you, thank you very much.

2 MR. MCCAULAY: I forgot to add one thing.

3 THE COURT: Okay.

4 MR. MCCAULAY: May I? I wanted to hand up to you,
5 if I could, Your Honor, the provisions of the FAA, the
6 Federal Arbitration Act.

7 THE COURT: Okay, sir.

8 MR. MATTHEWS: May I approach?

9 THE COURT: Yes, sir, certainly.

10 MR. MATTHEWS: It says, specifically if any suit or
11 proceeding be brought in any -- and this is Section 3 Title
12 9 of the Federal Arbitration Act. Any suit or proceeding
13 brought in any court in the United States upon the issue --
14 it essentially says that shall on application of one of the
15 parties at trial in the action until such arbitration has
16 been had will be stayed.

17 So, again, this is the basis for our contention
18 that if you were to decide that some of the claims are not
19 arbitrable, it's our position under this section of the
20 FAA, Your Honor, that the case is stayed, held, not tried
21 until after the arbitration is held.

22 THE COURT: You think that stays the discovery
23 also?

24 MR. MCCAULAY: Yes, sir, I do. I think the Court
25 retains jurisdiction, certainly with the stay, but I think

1 that stays discovery.

2 THE COURT: All right. And Mr. Matthews cites the
3 two United States Supreme Court.

4 MR. MCCAULAY: Yes, sir.

5 MR. MATTHEWS: Which was -- which is construing the
6 FAA that he has stated two different --

7 THE COURT: All right. Thank y'all. Would y'all
8 submit proposed orders within 15 days?

9 Is that time enough Mr. MacCaulay and Mr. Matthews?

10 MR. MCCAULAY: 15 business days or 15 days?

11 THE COURT: Y'all know how busy you are.

12 MR. MATTHEWS: We were at the pleasure of the
13 Court, Your Honor.

14 THE COURT: If you need more, just tell me right
15 now so I can --

16 MR. MCCAULAY: 15 works.

17 MR. MATTHEWS: If he needs 15 business days, I'll
18 be all right with that.

19 THE COURT: Just between yourselves and two my law
20 clerk. Thank you, thank you very much.

21 * * * * * END OF TRANSCRIPT * * * * *

22

23

24

25

1 State of South Carolina)

2 County of Aiken)

Certificate of Reporter

3
4
5
6 I, THE UNDERSIGNED, Brenda J. Sigwald,
7 Official Court Reporter for the Fifth Judicial Circuit of
8 the State of South Carolina, do hereby certify that I
9 reported the proceedings in the captioned case in the Court
10 of Common Pleas in and for the State of South Carolina on
11 the 13th day of February, 2013.

12 I FURTHER CERTIFY that the foregoing pages,
13 numbered 1 through 52, constitute a true, accurate and
14 complete transcript of said hearing.

15 I FURTHER CERTIFY that I am neither kin, counsel,
16 nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal at Aiken County, this 26th day of November, 2013.

19
20
21
22
23 Brenda J. Sigwald,
24 Court Reporter and Notary Public
25 For the State of South Carolina
My commission expires
January 4, 2020.

STATE OF SOUTH CAROLINA)
) SHAREHOLDER MANAGEMENT AGREEMENT
 COUNTY OF LEXINGTON)

This Agreement made this 11th day of August, 2006, by and between Tom Shofner, and Roger Riemann, (hereafter collectively referred to as the "Shareholders"), the owners of all the issued and outstanding shares of Palmetto Gems and Gemological Services, Inc., a corporation incorporated under the laws of the State of South Carolina (the "Corporation").

WHEREAS, the Shareholders deem it expedient for their best interests and for the welfare of the Corporation to provide a consistent and uniform management for the Corporation; and

WHEREAS, the Shareholders desire to enter into an Agreement which will effectuate the above purposes and will set forth in detail their respective rights and liabilities in connection with the management and control of the Corporation;

NOW, THEREFORE, the Shareholders, in consideration of the mutual undertakings herein set forth, agree as follows:

1. Statutory Authority for Agreement. This Agreement shall be governed by SC Code §33-11-220 et. seq., as amended.

2. Directors. The Corporation shall have no Board of Directors. The managerial functions otherwise required by statute to be performed by a Board of Directors shall be performed by the Shareholders.

3. Executive Officers. The Executive Officers of the Corporation, their principal duties, and their initial salary and other compensation shall be as follows:

Name	Title	Principal Duties	Salary/Other Compensation
Tom Shofner	President and Treasurer		Exhibit A
Roger Riemann	Vice-President and Secretary		Exhibit A

Changes in the title, duties, salary and other compensation of the above named persons as well as their removal from office shall be governed by majority vote, except to the extent such matters are dealt with in any employment agreement by and between the Corporation and any of the above named persons, in which case the employment agreement will control and supercede any inconsistent provisions in this Agreement.

4. Voting Requirements. The majority vote of all Shareholders shall be necessary for approval of all action required by the Act to be approved by either the Directors or Shareholders, unless a higher percentage is required herein. Furthermore, unless otherwise expressly provided herein

majority vote shall control all corporate actions.

5. Checks and Other Items of Withdrawal. All checks and other items of withdrawal from any deposit account containing money or securities belonging to the Corporation shall be signed by both Roger Riemann and Tom Shofner, except that the shareholders may agree to set up an account with just one (1) signature required on the checks, but only checks from the two (2) signature account may be deposited into this account.

6. Dispute Resolution. Any controversy or claim arising out of or related to this Agreement or the breach thereof, shall be settled, except as may otherwise be provided herein, by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association; and the arbitration award may be entered as a final judgment in any court having jurisdiction thereon. Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding. Legal costs, attorneys' fees and the fees of expert witnesses may be assessed against any person found to have acted in bad faith. All arbitration proceedings shall be conducted by a panel of three (3) arbitrators. The party requesting arbitration shall have the right to select one (1) arbitrator and the person or persons on the other side of the controversy shall select a second (2nd) arbitrator. The two arbitrators so chosen shall select the third (3rd). To be qualified as an arbitrator, a person must either be a certified public accountant, a lawyer, or a businessman with at least seven (7) years experience as an executive in a closely held corporation, or a person with expertise in the subject matter of the dispute in question, e.g., a professional appraiser of shares of close corporation stock if the dispute concerns the value of the shares of the Corporation.

7. Equitable Relief. The parties acknowledge that it is impossible to measure in money the damages that would result by reason of a party's breach of this Agreement. It is therefore agreed that the provisions of the Agreement shall be enforceable by injunction, specific performance or other equitable relief, without reference to whether or not an adequate remedy at law may be available. It is further agreed that any such equitable relief may be awarded in any arbitration proceedings authorized by this agreement.

8. Termination. This Agreement shall remain in effect until terminated by unanimous written consent of all the Shareholders.

9. Amendment. This Agreement shall not be modified or amended except by means of a writing signed by each Shareholder.

10. Binding Effect. This Agreement shall be binding upon the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

11. Severability. If any provision of this Agreement shall under any circumstances be deemed invalid or inoperative to any extent, it is agreed and understood that such invalidity shall not invalidate the whole Agreement, but the Agreement shall be construed as not to contain the

provision or provisions deemed invalid and inoperative.

12. Governing Law. The construction and interpretation of this Agreement shall at all times and in all respects be governed by the laws of the State of South Carolina.

13. References to Gender and Number Terms. In construing this agreement, feminine or neuter pronouns shall be substituted for those masculine in form and visa versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so requires.

14. Counterparts. This Agreement may be executed and delivered in any number of counterparts, all of which, when executed and delivered, shall have the force and effect of an original.

15. References to the Internal Revenue Codes and Other Statutes.

(a) All references in this Agreement to the Internal Revenue Code means the 1986 Internal Revenue Code, as amended from time to time, and all revisions, recodifications or replacements of such code.

(b) Any reference to any other statute includes any amendment, replacement or recodification of such statute.

16. Notice of this Agreement in Articles of Incorporation and Share Certificates. The articles of incorporation and each share certificate of the Corporation shall contain the following notice:

Pursuant to a Shareholder Management Agreement dated _____, the voting and managerial rights of the Shareholders in this Corporation are materially different from those in most other Corporations. This Agreement, a copy of which may be obtained by a shareholder on written request to the Corporation, specifies who will manage the affairs of the Corporation, the Executive officers, the vote necessary to approve certain specified action, and related matters.

In the event the Corporation has issued uncertificated shares, it shall send each shareholder a written notice containing the above notice within thirty (30) days after the issuance or transfer of any shares.

17. Headings. The paragraph headings in this Agreement are inserted for convenience only and are not part of the Agreement.

18. Shareholder Loans. Roger Riemann shall open a \$5,000.00 credit line to the Corporation. Tom Shofner shall open a \$245,000.00 credit line to the Corporation. The source of these funds shall be the \$250,000.00 note from Tom Shofner to First Citizens dated August 4, 2006 secured by a mortgage on his residence, of which each advance to the Corporation shall be participated in by Roger Riemann at a 2% rate and Tom Shofner at an 98% rate. The 2% participation by Roger Riemann is secured by a separate note and Mortgage from Roger Riemann to Tom Shofner. If

Roger Riemann ever sells his home securing the mortgage from Roger Riemann to Tom Shofner, then \$5,000 shall be held in trust as cash collateral until there is a new purchase of a residence of equal or greater equity, at which time a new mortgage shall be issued to secure the note.

19. Option to Purchase. Roger Riemann shall have an option to purchase from Tom Shofner up to 480 shares at the greater of \$2,500.00 per share or 10 times earnings per share using the most current available annualized income (averaged over the previous two years if the company is more than three years old.)

IN WITNESS WHEREOF, the Shareholders have hereunto affixed their signatures and seals as of the day and year first written on page 1 of this Agreement.

WITNESSES:

SHAREHOLDERS:

The Agreement was approved by the Corporation pursuant to a resolution adopted on
August 11, 2006

By: [Signature]
Its: President

EXHIBIT A TO SHAREHOLDER MANAGEMENT AGREEMENT**Salary and Profit Sharing Distributions****I. Palmetto Gems, including PGGS website, --- two categories:****A. Salary, and****B. Profit sharing/distribution/retained earnings.**

A. Salary --- each receive an equal salary paid monthly at \$50,000.00 per year. Salary can be paid strictly as salary, or as a combination of salary and a "profit distribution".

B. Profit sharing --- this has three categories or payment plans: 1) Bonus, 2) Shares-based allocation for distribution and 3) retained earnings. The default allocation of the profits after all salaries and expenses will be divided; 1/3 to Bonus split equally among the Co-Executive and Financial Officers, 1/3 to Shares-based distribution and 1/3 retained for the business.

i. **Bonus** --- the Co-Executive and Financial Officers shall receive an annual bonus equal to an equal split of 1/3 of the profits after all salaries and expenses.

ii. **Shares-based distribution** --- 1/3 of the profits after all salaries and expenses (computed prior to deducting the bonus in i above) allocated solely on the percentage of shares held by each shareholder (initially 98% to Tom Shofner and 2% to Roger Riemaun), but no less than the minimum amount as required by the Stock Transfer Restriction and Buy-out Agreement, and

iii. **Retained for the business** --- 1/3 of the profits after all salaries and expenses shall be retained for the business.

II. Investor Strategies --- All transactions through this venue are independent of PGGS and will be accounted separately in the Corporation. If PGGS is able to pay all salaries and expenses then, sales will be assigned to a specific partner and the 75/25 split will apply to the net profit on each item. This split will be applied directly to the sale and will not flow through the Palmetto Gems methodology as listed above. Although not required, this payout can occur in the next pay period after the transaction is completed.

**S.C. DEPARTMENT OF LABOR, LICENSING AND REGULATION
INVESTIGATIONS AND ENFORCEMENT/OFFICE OF WAGES AND CHILD LABOR
INVESTIGATIVE REPORT**

Case Number: 2012-168Opened 3/14/12Closed 5/30/12

Federal ID #:

Company: Palmetto Gems + Gemological Services Representative: Thomas ShoenerAddress: 130 B. Amicks Position: OwnerCity: Chapin Phone: 803, 407. 6661State: SC Zip: 29036 County: Fax: (803) 407. 6661 SIC Code: Corporate: Representative: bell south netAddress: Position: Ben McCoy - attorneyCity: Phone: (803) 407. 6661 Fax: State: Zip: hmblaw.com**WARNING**

This section of the warning is issued pursuant to 41-10-80, S.C. Code of Laws 1976, as amended, for failure to comply with 41-10-30, S.C. Code of Laws, 1976, as amended.

A) VIOLATION OF 41-10-30 (A)

- ☒ 1) Normal hours
☒ 2) Wages
☒ 3) Time of Payment
☒ 4) Place of Payment
☒ 5) Deductions from wages

- ☐ 6) Changes made in employment terms without a 7 calendar days written notice

B) VIOLATION OF 41-10-30 (B)

- ☐ 1) Name and/or addresses of employees
☐ 2) Wages paid and/or deductions made for all employees each payday.

C) VIOLATIONS OF 41-10-30 (C)

- ☐ 1) Failed to furnish each employee each pay period an itemized statement showing:
☐ Gross pay ☐ Deductions made

You must correct these violations immediately. After receiving an official warning, a civil penalty of not more than \$100 will be assessed for each subsequent offense.

The following section of this warning is issued pursuant to 41-13-25, S.C. Code of Laws, 1976, as amended, for failure to comply with 41-13-20 and its regulations, S.C. Code of Laws, 1976, as amended.

South Carolina Regulations

- ☐ Occupation in a factory, mine or processing establishment
☐ Before 7 a.m. or after 7 p.m. during school session.
☐ Before 7 a.m. or after 9 p.m. during non-school session.
☐ More than 18 hours during a school week.
☐ More than 3 hours on school days
☐ More than 40 hours during non-school week.
☐ More than 8 hours on non-school days
☐ Other

Employees SC: 5 Employees on site: 5VIOLATIONS OF CHILD LABOR Yes ☐ No ☐

HAZARDOUS OCCUPATIONS 14 THROUGH 17 YEARS OLD

Investigator

Date

Company Official

Date

CHILD LABOR Warning: Yes ☐ No ☐ Date: <u></u> Citation: Yes ☐ No ☐ Date: <u></u> Violation Number(s): <u></u> Instance: 1st 2nd 3rd 4th	INVESTIGATIVE REPORT SUMMARY Warning: Yes ☒ No ☐ Date: <u></u> Citation: Yes ☒ No ☐ Date: <u></u> Number of violations alleged: Section(s) 30 <u>5</u> 40 <u>1</u> 50 <u>1</u> Instance <u>1</u> <u>1</u> <u>1</u>	OFFICE USE ONLY Citation is: Yes ☐ No ☒ Date: <u>4/1/12</u> Citation Number: <u>26972, 100</u> Number of violations: Section(s) 30 <u>5</u> 40 <u>1</u> 50 <u>1</u> CL <u></u> Instance <u>1</u> <u>1</u> <u>1</u>
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EXHIBIT C

WCL-1 (Rev. 9/05)

R_000112

Report Number: 2012-168
Company: Palmetto Gems & Gemological Services
Claimant: Roger Riemann
Type of Complaint: Unpaid Wages

Findings:

The claimant filed a complaint with this office alleging non-payment of profit sharing bonus monies and non-payment of agreed wage amount annually since 2006. The claimant attached W-2 forms from 2006 through the present date reflecting a changing annual salary varying from \$41,538.66 in 2006; \$36,923.28 in 2008; \$46,153.92 in 2010 and \$46,153.92 in 2011 (see Exhibit C 1-1). The original Agreement is dated 8/11/06 and reflects a salary of \$50,000 listed under A. Salary (see Exhibit E 1-4). Any changes to this agreement of wage amount are past the Statute of Limitations for violations of the SC Payment of Wage law. The claimant's check stubs from 2006 forward act as written notice for the change of wage amount.

The Agreement also has a provision for Profit Sharing listed under B. Profit Sharing (see Exhibit E 1-4). The payment date for this part of the wages is specified in the Stock Transfer Restriction and Buy-Out Agreement, page 17 (see Exhibit C 2-1). This states that the payout date for the bonus monies is to be paid on March 15 for the previous year's profits. In this case, the claimant is owed for the profits gained in 2011 which are reflected in the Profit/Loss Statement provided by the employer (see Exhibit E 1-5). The division of this profit is as follows (see Exhibit E 1-4) :

- i. Bonus: the Co-Executive and Financial Officers shall receive an annual bonus equal to an equal split of 1/3 of the profits after all salaries and expenses;
- ii. Shares-based distribution: 1/3 of the profits after all salaries and expense allocated solely on the percentage of shares held by each shareholder but no less than the minimum amounts as required by the Stock Transfer Restriction and Buy-out Agreement, and;
- iii. Retained for the business: 1/3 of the profits after all salaries and expenses shall be retained for the business.

Using these terms, the total profit earned by Palmetto Gems for 2011 totals \$30,125.21. It is divided into thirds-one going to the corporation, one third going to the shareholders (Tom Shofner) and one third of is then split 50/50 between the claimant and Tom Shofner. This last third totals \$10,041.74. One half of this figure is \$5,020.87 which is the amount owed to the claimant.

The employer claims that there were no profits to enact the Profit Sharing/Bonus provisions of the Agreement (see Exhibit E 2-1) prior to providing the 2011 Profit/Loss Statement. The employer then claimed that the bonus on the \$30,125.00 profit for 2011 is not owed to the claimant because they claim that he was never a shareholder (see last page of Exhibit E 3-1). The original agreement states that the claimant is a shareholder, an executive officer and vice-president (see Exhibit E 1-3). The Shareholder Management Agreement stated that as a shareholder, the claimant would open a \$5,000 credit line as 2% participation for a shareholder (see Page 3 of Exhibit E 1-3). The claimant fulfilled this requirement (see Exhibit E 1-6). There is also language within the Shareholder Management Agreement which states that written consent is necessary to change any portion of the Agreement; the consent has to be unanimous and in writing and that if any provision of the Agreement becomes invalid, it shall NOT invalidate the whole Agreement (see Page 2 of Exhibit E 1-3). Therefore, whether the claimant is a shareholder or not, the bonus is still owed to the claimant because:

1. Changes to the bonus distribution have never been placed in writing as required by the Agreement;
2. The claimant fulfilled his portion of becoming a shareholder in 2006 by securing the Mortgage Note;
3. The bonus provision is for the shareholders and the executive officers, of which the claimant is listed as both throughout the Shareholder Management Agreement; and
4. No other documents have been drafted since the original document dated August 11, 2006 thereby making this document binding as written.

Cite this Employer for:

5 violations of SC Section 41-10-30-the claimant now has 5 employees and no Terms of Employment.

1 Violation of SC Section 41-10-40 for failing to pay Roger Riemann in the amount of \$5,020.87 on the pay date of March 15, 2012.

S.C. DEPARTMENT OF LABOR, LICENSING AND REGULATION
DIVISION OF INVESTIGATIONS & ENFORCEMENT
OFFICE OF WAGES & CHILD LABOR
PO BOX 11329, COLUMBIA, SC 29211-1329

CITATION AND NOTIFICATION OF PENALTY

Palmetto Gems & Gemological Services

130 B Amicks

Chapin SC 29036

Issuance Date: 6/4/2012

Report #: 2012-168

Employer #: 1

Citation #: 269-2012

This citation describes alleged violation(s) of 41-10-40 & 41-10-30, South Carolina Code of Laws, 1976, as amended. The penalty (ies) listed below are based on the following violations. You must pay the proposed penalty (ies) pursuant to 41-10-80. This citation and/or civil penalty maybe reviewed by requesting, in writing, an Administrative Review. Such requests must be addressed to: Supervisor, South Carolina Department of Labor, Licensing and Regulation, Office of Wages & Child Labor, PO Box 11329, Columbia, SC 29211-1329, and must be mailed within 30 calendar days from receipt of this Citation and Notification of Penalty. To contest this citation before the Administrative Law Court, file your request for a hearing accompanied by the filing fee with the Administrative Law Court, Edgar Brown Building, 1205 Pendleton Street, Suite 224, Columbia SC 29201. This citation concerns application of the South Carolina Payment of Wage Statute and does not necessarily establish all aspects of debts due between the employer and employee.

# OF VIOLATIONS	SECTION (S) VIOLATED	DESCRIPTION	PENALTY
By: <u>Theresa A. Smith</u> Title: <u>Chief Investigator</u> Date: <u>6/12/2012</u> Printed name, title & signature	§41-10-30 (A)	Failed to give written notification as required by law to: as follows:	\$
	§41-10-30 (B)	Failed to keep records of:	\$
	§41-10-30 (C)	Failed to furnish itemized statement to each employee showing:	\$
		A warning was previously issued on	
	§41-10-40 (A)	Employer failed to pay with a negotiable instrument that was not dated for the pay day(s) in the approximate amount of \$	\$
	§41-10-40 (C)	Withheld or diverted from the wages of wages not required or permitted by state or federal law on or about in the approximate amount of \$	\$
1	§41-10-40 (D)	Failed to pay wages due to Roger Riemann in the approximate amount of \$5,020.87 by your regular pay day(s) of 3/15/2012	\$100.00

TOTAL OF PENALTY: \$100.00
Please make check or money order payable to S.C.
Department of Labor, Licensing & Regulation, and
indicate citation number on remittance.

Signature of Chief Investigator

WCL-6 (Rev. 6/09)

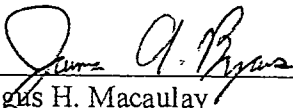
EXHIBIT D

R_000115

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

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May 14, 2014

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

MAY 21 2015

S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-32-3496

Roger R. Riemann Respondent.

v.

Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual
capacity.....Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether the lower court erred in denying Appellant's motion to compel arbitration of Respondent's Payment of Wages Act claim on the grounds that such claims are not arbitrable as a matter of law, when the Payment of Wages Act's prohibition of private agreements setting aside the Act's requirements is not intended to limit parties' ability to contractually agree to a forum to resolve wage disputes, so long as the substantive rights and remedies of the statute are preserved.
- II. Whether the lower court erred in denying Appellant's motion to compel arbitration of Respondent's remaining tort claims due to an alleged absence of substantial relationship with the arbitration contract, when the parties clearly and unmistakably agreed that all disputes regarding the arbitrability of claims were to be submitted as part of the arbitration proceeding.

STATEMENT OF THE CASE

Plaintiff/Respondent Roger Riemann ("Respondent") filed this action against Defendants/Appellants Palmetto Gems & Gemological Services, Inc. ("Palmetto Gems") and Thomas Shofner ("Shofner") (collectively "Appellants") in the Lexington County Court of Common Pleas on August 24, 2012. Respondent's Complaint alleged claims for violation of the South Carolina Payment of Wages Act, wrongful discharge in violation of public policy, and defamation. Respondent later moved to amend his Complaint to add a claim for intentional infliction of emotional distress.

On October 29, 2012, Appellants filed, in lieu of an Answer, a Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration ("the Motion"), based on a mandatory arbitration provision in the Shareholder Management Agreement that Respondent and Shofner executed to form Palmetto Gems.

A hearing on Appellants' Motion was held before Judge McMahon on February 13, 2013. On June 25, 2013, Judge McMahon issued an Order denying Appellants' Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration, on two grounds: first, that claims under the South Carolina Payment of Wages Act cannot be arbitrated as a matter of law, and second, that the remainder of Respondent's claims fell outside the scope of the applicable arbitration agreement. On August 1, 2013, Appellants served a Notice of Appeal on the Respondent. This appeal follows.

STATEMENT OF FACTS

A. Parties Execute Agreement to Form Palmetto Gems

On or about August 11, 2006, Respondent and Shofner executed a Shareholder Management Agreement ("the Agreement") to document their respective rights and responsibilities with respect to the creation of a new business, Palmetto Gems, in Chapin, South Carolina. (R. p. 22; R. p. 33, ¶ 2.) The Agreement appointed Shofner and Respondent as the sole Executive Officers of Palmetto Gems and provided the terms by which they would share the management and the income of the business. (R. p. 22; R. p. 108.) More specifically, Shofner was appointed President and Treasurer of Palmetto Gems, and Respondent was appointed Vice-President and Secretary. (R. p. 107.)

The Agreement contains a mandatory arbitration provision encompassing any disputes that may arise among the parties. The provision states, in pertinent part:

Dispute Resolution. Any controversy or claim arising out of or related to this Agreement or the breach thereof shall be settled, except as may otherwise be provided herein, by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association; and the arbitration award may be entered as a final judgment in any court having jurisdiction thereon. Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding.

(R. p. 108.)

B. The Dispute

On May 21, 2012, Shofner terminated Respondent's employment with Palmetto Gems on grounds of insubordination. (R. pp. 23-24.) On August 24, 2012, Respondent filed an action against Appellants in the Lexington County Court of Common Pleas, asserting claims for: (1) unpaid wages under the South Carolina Payment of Wages Act;

(2) wrongful termination in violation of public policy; and (3) defamation. (R. pp. 25-28.)

Respondent's Payment of Wages claim alleged that he was owed certain unpaid bonuses to which he was allegedly entitled pursuant to the terms of the Agreement. (R. pp. 25-26.) Respondent's wrongful termination claim alleged that he was terminated from Palmetto Gems for filing a wage complaint with the Department of Labor, Licensing, and Regulation ("LLR") related to those alleged unpaid bonuses. (R. p. 27.) Respondent's defamation claim alleged that at some point Shofner told Respondent's wife she was "wearing stolen jewelry." (R. p. 28.) Respondent subsequently moved to amend his Complaint to add a claim for intentional infliction of emotional distress related to the same allegedly defamatory statement. (R. pp. 43-44.)

C. Appellants Move to Compel Arbitration Pursuant to the Agreement

On October 29, 2012, Appellants moved to dismiss Respondent's Complaint pursuant to S.C. R. CIV. P. 12(b)(1) or, alternatively, to stay proceedings and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (R. pp. 30-31.) A hearing was held on Appellants' Motion on February 13, 2013 before The Honorable R. Knox McMahon. (R. p. 54.)

D. Appellants' Motion Denied

On June 24, 2013, Judge McMahon entered an Order denying Appellants' Motion. (R. pp. 14-19.) The court found that the parties' Agreement "involved"

interstate commerce and thus its arbitration provision was enforceable against Respondent under the Federal Arbitration Act.¹ (R. pp. 4-9); *see also* 9 U.S.C. § 2.

Nonetheless, the court denied Appellants' Motion on two grounds. First, the court found that claims under the South Carolina Payment of Wages Act cannot be compelled to arbitration as a matter of law, because the statute provides employees with the right to a "civil action" to remedy alleged violations and further provides that "[n]o provision of this chapter may be contravened or set aside by private agreement." (R. pp. 14-16) (*citing* S.C. Code Ann. § 41-10-100). Second, the court found that Respondent's remaining tort claims did not have a sufficiently "substantial relationship" to the Agreement such that those claims could be compelled to arbitration, despite the Agreement's express language that "any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." (R. pp. 16-19.) Appellants timely appealed.

¹ The court also found that the Agreement's arbitration provision was not unconscionable because Respondent had a meaningful choice in agreement to arbitrate and the provision's terms were not oppressive or one sided. (R. pp. 9-14.)

STANDARD OF REVIEW

Appeal from the denial of a motion to compel arbitration is subject to de novo review. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

ARGUMENT

I. THE LOWER COURT ERRED IN FINDING RESPONDENT'S CLAIM UNDER THE PAYMENT OF WAGES ACT TO BE UNARBITRABLE AS A MATTER OF LAW, BECAUSE ARBITRATION DOES NOT CONTRAVENE OR SET ASIDE THE RIGHTS OR REMEDIES AVAILABLE UNDER THE ACT.

The lower court erred in denying Appellants' Motion to Compel Arbitration of Respondent's claim for unpaid wages under the South Carolina Payment of Wages Act ("SCPWA"), based upon its finding that wage claims under the SCPWA are never arbitrable as a matter of law.² (R. pp. 14-16.) The court's finding is in error, because the SCPWA prohibits private contracts which circumvent its substantive requirements, but does not preclude parties from privately setting arbitration as the forum to resolve wage disputes. Respondent's SCPWA claim is arbitrable,³ and thus Appellant's Motion to Compel Arbitration should have been granted.

² It is undisputed that the parties' Agreement "involves" interstate commerce and is enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. Although Respondent challenged the application of the FAA in the lower court, the court's Order concluded that the Agreement "involved" interstate commerce so as to be enforceable under the FAA, and Respondent failed to appeal that ruling. (R. pp. 5-9.) Therefore, this Court need not address whether the Agreement qualifies as a transaction involving interstate commerce. See *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (stating that an unchallenged ruling, right or wrong, is the law of the case). The question before the Court is solely which of Respondent's claims may proceed to arbitration.

³ Respondent concedes the validity of the Agreement containing the arbitration provision and does not appear to contest that his SCPWA claim falls within the scope of the Agreement's arbitration provision, as the SCPWA claim as plead in his Complaint turns on the compensation Respondent was allegedly promised in the Agreement.

As the trial court noted, it is well-settled that the SCPWA—like its predecessor wage payment statutes—is “remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld.” *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 194, 463 S.E.2d 641, 645 (Ct. App. 2005); *see also Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) (“ . . . [T]he purpose of the Wage Payment Act. . . [is] to protect employees from the unjustified and willful retention of wages by the employer.”). In accordance with the statute’s intended remedial purpose, South Carolina wage payment law historically prohibited employee waiver of statutory wage payment requirements. *See Cato v. Grendel Cotton Mills*, 132 S.C. 454, 456-61, 129 S.E. 203, 205 (1925). The prohibition was grounded in the assumption that, if statutory wage payment rights were waivable by private agreement, then all employers would require employees to do so, and the remedial purpose of the statute would be lost.⁴ *Id.*

When enacted, the SCPWA codified South Carolina’s prohibition of private waivers by providing that “[n]o provision of this chapter may be contravened or set aside by private agreement.” S.C. Code Ann. § 41-10-100. As the *Cato* Court found with interpreting the SCPWA’s predecessor statute, this Court has interpreted this SCPWA language to mean that employees are incapable of contractually waiving the requirements of the SCPWA, regardless of whether the alleged contract is express, implied, or observed by custom. *See, e.g. Ross v. Ligand Pharms., Inc.*, 371 S.C. 464, 473 n.1, 639 S.E.2d 460, 465 n.1 (Ct. App. 2006) (finding that employee’s alleged waiver of the

⁴ “Now, if the object of the statute can be thwarted by custom or contract, then the statute might as well be repealed, because it will not be long before the owner of every factory, mill, or other corporation employing labor, subject to the provisions of the statute, will establish customs and enter into contracts that will completely nullify the statute.” *Cato*, 132 S.C. at 456-61, 129 S.E. at 205.

SCPWA requirement of notice of the date and time of payment was void and unenforceable).

The trial court's ruling in this case expanded the SCPWA's statutory bar on private waivers of the statute's substantive rights found in § 41-10-100 by applying that section to the SCPWA's provision of a private right of action to recover wages alleged to have been wrongfully withheld. *See* S.C. Code Ann. § 41-10-80(C) ("In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee *may recover in a civil action* an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. . .") (emphasis added).

More specifically, the trial court interpreted the SCPWA's use of the term "civil action" in defining the private remedy for alleged violations, combined with the statute's prohibition on contracts which "contravene or set aside" statutory protections, as rendering unenforceable any agreement to arbitrate matters brought pursuant to the SCPWA, on the theory that an otherwise-valid arbitration agreement would deny an employee a "civil action" to remedy alleged wage payment violations. The court concluded that compelling a SCPWA claim to arbitration would "violate both the Act's clear provisions and its remedial nature," such that SCPWA claims are never arbitrable as a matter of law. (R. p. 16.)

Appellants respectfully submit that the language of the SCPWA need not and does not reach so far as to prohibit arbitration of wage disputes in order to achieve its remedial purpose. It is axiomatic that "[t]he primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Gilstrap v. South Carolina Budget*

and Control Bd., 310 S.C. 210, 213, 423 S.E.2d 101 (1992). “In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose.” *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

Contrary to the trial court’s ruling, arbitrating a SCPWA claim is not inconsistent with the statute’s legislative intent. The legislature’s well-recognized purpose for enacting the SCPWA was to require the prompt payment of wages and to provide remedies should those wages be wrongfully withheld. The Agreement’s arbitration provision does not seek to set aside the substantive requirements of the SCPWA or otherwise limit Plaintiff’s civil remedies under the SCPWA or any other law; it simply dictates the forum where disputes must be resolved in a manner that does not alter available substantive remedies. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) (“An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined”) (emphasis in original); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that parties who agree to arbitrate a statutory claim “do not forgo the substantive rights afforded by the statute,” but rather “submit[] to their resolution in an arbitral, rather than a judicial, forum.”) (internal citation omitted). The remedial scheme of the SCPWA is not contravened by arbitration, and thus the trial court’s sweeping interpretation of the statute is unnecessary to effectuate its purpose.⁵

⁵ *See also Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, (2000) (“[E]ven claims arising under a statute designed to further important social policies may be arbitrated because, so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions.”) (internal citation and quotation marks omitted).

Moreover, the trial court's reading of § 41-10-80(C)'s "civil action" language as requiring claims to be brought exclusively in a judicial forum is inconsistent with the provision's plain language and the other remedial directives of the SCPWA. With the exception of § 41-10-80(C), each and every remedial subsection of the SCPWA is couched in mandatory terms:

- "If the Director of the Department of Labor, Licensing, and Regulation or his designee determines that a [SCPWA] violation exists, he *shall* endeavor to resolve all issues by informal methods of mediation and conciliation." S.C. Code Ann. § 41-10-70.
- "Any employer who violates the provisions of Section 41-10-30 *must* be given a written warning by the Director of the Department of Labor, Licensing, and Regulation or his designee for the first offense and must be assessed a civil penalty of not more than one hundred dollars for each subsequent offense." S.C. Code Ann. § 41-10-80(A).
- "Any employer who violates the provisions of Section 41-10-40 *must* be assessed a civil penalty of not more than one hundred dollars for each violation. Each failure to pay constitutes a separate offense." S.C. Code Ann. § 41-10-80(B).

By contrast, § 41-10-80(C) declares the aggrieved employee's pursuit of a private "civil action" to be permissive, not mandatory:

- "In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee *may* recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow." S.C. Code Ann. § 41-10-80(C).

"The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary." *Rice*, 318 S.C. at 98, 456 S.E.2d at 383 (citing *State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980)). There is no language in § 41-10-80(C)—or elsewhere in the SCPWA—that would require SCPWA claims to be brought *exclusively* in a judicial forum. This subsection is intended to define the remedy that is available for violations of the substantive provisions of the SCPWA, not the forum

in which wage payment claims must be initiated. For that reason, the trial court erred in finding that compelling this matter to arbitration in accordance with the Agreement would “contravene” or “set aside” any mandatory provisions of the SCPWA.

Indeed, South Carolina courts, including this Court, have routinely compelled SCPWA claims to arbitration when such claims were within the scope of a valid arbitration provision. *See, e.g. Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) (holding that plaintiff’s claims for violation of the Payment of Wages Act, wrongful discharge, defamation, and breach of contract were subject to mandatory arbitration under the FAA); *see also Ballew v. Cannon’s Funeral Home*, 2013 WL 1566658 (D.S.C. March 12, 2013); *Carter v. MasTec Servs. Co., Inc.*, 2010 WL 500421 (D.S.C. Feb. 5, 2010); *Saldanha v. Pediatrix Medical Group of South Carolina, P.A.*, 2008 WL 4542872 (D.S.C. Oct. 3, 2008).

In total, this is not a case in which the arbitration provision at issue limits statutorily-available remedies or seeks to privately negate the effect of legislation so as to “contravene” or “set aside” the requirements of the SCPWA. The trial court’s interpretation of the SCPWA in this case erroneously deems all arbitration agreements to be unenforceable with respect to the SCPWA, in a manner inconsistent with both the legislative purpose of the statute and the statute’s plain language. Because Respondent is not precluded from asserting a civil claim or obtaining remedies available under the SCPWA, the arbitration provision is not barred by § 41-10-100, and Respondent’s SCPWA claim should be compelled to arbitration.

II. THE LOWER COURT ERRED IN FINDING RESPONDENT'S REMAINING CLAIMS TO BE OUTSIDE THE SCOPE OF THE ARBITRATION AGREEMENT BECAUSE THE PARTIES EXPRESSLY AGREED THAT QUESTIONS OF ARBITRABILITY WERE FOR THE ARBITRATOR AND NOT THE COURT TO DECIDE.

The lower court erred in denying Appellants' Motion to Compel Arbitration of Respondent's remaining claims for wrongful discharge in violation of public policy and defamation on the grounds that they do not bear a "significant relationship" to the Agreement. (R. pp. 16-20.) The lower court did not have jurisdiction to determine which of Respondent's claims were within the scope of the Agreement's arbitration provision, because the parties expressly agreed that the issue was to be submitted to the arbitrator. (R. p. 108) ("Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding").

The question of who decides whether particular claims are subject to arbitration—the court or the arbitrator—is a matter of contract. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). This issue is among the "gateway matters" that courts generally assume the parties intended the court to resolve, unless there is "clear and unmistakable" evidence that the parties agreed that the arbitrability of specific claims was to be decided as part of the arbitration proceeding. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 667-68 (2007)⁶; see, e.g. *Davis v. KB Home of*

⁶ At the hearing on Appellants' Motion, Respondent's counsel cited the *Simpson* case for the proposition that "it is . . . for you and not the arbitrator to decide whether the arbitration provision is enforceable for the specific claims brought by [Respondent]." (R. p. 73, Ins.18-22.) In *Simpson*, the South Carolina Supreme Court held, based on the United States Supreme Court authority cited herein, that the trial court was to determine the application of the arbitration provision to specific claims, but only absent "clear and unmistakable" evidence that the parties agreed that the arbitrator would resolve such issues. 373 S.C. at

South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (holding that such “gateway matters” were properly considered by court because arbitration agreement did not expressly provide that such matters would be submitted to the arbitrator).

When the parties to an arbitration agreement clearly and unmistakably agree that questions or arbitrability are to be decided by the arbitrator, the court must enforce that agreement and refer all claims to arbitration. *See First Options*, 514 U.S. at 943-45.

In this case, there is “clear and unmistakable” evidence that the parties intended that any dispute regarding the scope of the Agreement’s arbitration provision would be submitted to the arbitrator. The arbitration provision expressly states that “[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding.” (R. p. 108.) Any presumption that the parties’ intended the trial court to determine which claims are subject to arbitration is overcome by the express language of the Agreement. Therefore, all of Respondent’s claims must be compelled to arbitration.

In ruling that Respondent’s tort claims did not bear a “significant relationship” to the Agreement’s arbitration provision so as to compel them to arbitration, the trial court erred by conflating the standard for determining *who decides* the question of arbitrability of specific claims with the standard for *which claims* are subject to arbitration. The trial court found that Respondent’s tort claims were “unforeseeable to the parties at the time

23-24, 644 S.E.2d at 667-68. With that law in mind, the *Simpson* Court found that the parties had not clearly and unmistakably agreed to submit the question of arbitrability of claims to the arbitrator, despite a provision stating that the arbitration applied to involving “the validity and scope of the contract,” because the plaintiff had challenged the validity of the provision itself on the basis of unconscionability. *Id.* In this case, Respondent also argued to the trial court that the Agreement’s arbitration provision was unconscionable, but the trial rejected Respondent’s claim and held the arbitration provision to be valid and enforceable. (R. pp. 9-14.) Respondent did not appeal that ruling, and thus it is the law of the case. *See supra* note 2. Therefore, *Simpson* supports Appellants’ contention that the trial court erred by failing to refer all Respondent’s claims to arbitration, as the parties “clearly and unmistakably” agreed to do so.

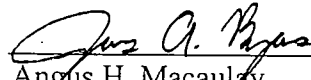
the contract was formed,” such that Appellants failed to establish that the parties “clearly and unmistakably” agreed that those claims were to be decided as part of the arbitration proceeding. (R. p. 17.) Indeed, if the trial court was responsible for determining the arbitrability of specific claims in this case, the “substantial relationship” test would be applicable. *See Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). However, the standard for determining *who decides* the arbitrability of specific claims turns on whether the parties “clearly and unmistakably” agreed to submit arbitrability questions to the arbitrator. The foreseeability of certain claims at the time the parties agreed to arbitrate—or lack thereof—is irrelevant if the parties clearly and unmistakably agreed that the arbitrator was to resolve disputes regarding arbitrability.

In this case, the parties did clearly and unmistakably agree that all disputes regarding arbitrability were to be submitted to the arbitrator, and thus the trial erred by failing to refer all Respondent’s claims to arbitration, regardless of their relationship to the Agreement or foreseeability at the time of its execution.

CONCLUSION

For the reasons stated herein, Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner respectfully request that the Court reverse the trial court’s June 24, 2013 order denying Appellants’ Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration and order that this case be stayed in the lower court pending arbitration of all Respondent Roger Riemann’s claims.

Respectfully submitted,



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June 4, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-32-3496

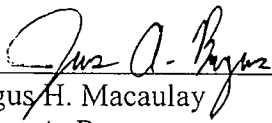
Roger R. Riemann Respondent.
v.

Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual
capacity.....Appellants.

PROOF OF SERVICE

I hereby certify that I have served the foregoing Final Brief of Appellants on the
Respondent by hand-delivering a copy of the same, on June 4, 2014, addressed to
Respondent's Counsel of Record, Eugene H. Matthews, Esq., 1900 Barnwell Street,
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June 4, 2014



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S.C. Supreme Court

Roger R. Riemann..... Respondent,

v.

Palmetto Gems & Gemological Services, Inc. & Thomas Shofner,
in his individual capacity Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Could the trial court properly rule on the issue of arbitrability of the claims brought by the Respondent in this case?
- II. Where the Respondent has brought a civil action against the Appellants under the South Carolina Payment of Wage Act (the "Act") for wrongfully refusing to pay wages due, did the trial court properly rule that the Appellant's attempt to force the Respondent to arbitrate Respondent's claim violated S.C. Code Ann. § 41-10-100, which provides that "[n]o provision of this chapter [the Act] may be contravened or set aside by a private agreement"?
- III. Where the Respondent brought claims that do not bear a significant relationship to a Shareholder Management Agreement with an arbitration provision, such as tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress, did the trial court properly rule that the tort claims do not "arise out of or relate to" the Shareholder Management Agreement and are not subject to its arbitration provision?

STATEMENT OF THE CASE

Plaintiff/Respondent Roger R. Riemann (hereinafter "Respondent" or "Riemann") is a gemologist and a former employee of Defendant/Appellant Palmetto Gems & Gemological Services, Inc. (hereinafter "PGGS"). Riemann was hired on August 11, 2006 and was terminated by the owner of PGGS, Defendant/Appellant J. Thomas Shofner (hereinafter "Shofner"), on May 21, 2012. (R. p. 21, Complaint, ¶ 1).

Riemann had, for an extended time prior to his termination, made known to Shofner his concerns that he was not receiving appropriate bonuses under his Shareholder Management Agreement with PGGS. (R. pp. 107-110, Shareholder Management Agreement, attached as Exhibit "A" to the Complaint). Shofner and PGGS failed to address these concerns, and Riemann ultimately filed a wage complaint with the South Carolina Department of Labor, Licensing & Regulation ("LLR") on or about February 7, 2012. LLR officially opened the investigation on or about March 14, 2012, and notified Shofner of the complaint in late March 2012. Shortly thereafter, on May 21, 2012, Shofner fired Riemann. (R. pp. 23-24, Complaint, ¶¶ 15-17).

On or about June 4, 2012, LLR completed its Investigative Report concerning Riemann's complaint and issued a citation to PGGS for numerous violations of the S.C. Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* (R. pp. 112-114, LLR Investigative Report, attached as Exhibit "C" to the Complaint). With regard to Riemann, LLR cited PGGS for its failure to pay Riemann his bonus for 2011. PGGS did not appeal the citation to the S.C. Administrative Law Court or otherwise appeal the finding of LLR. Nevertheless, despite the findings of LLR, and Riemann's demand for

payment, PGGS and Shofner have continued to refuse to pay Riemann money that is owed and due to him. (R. p. 24, Complaint, ¶¶ 18-21).

Prior to Riemann's termination, while Riemann's wife was visiting PGGS, Shofner confronted her and told her that Riemann was a "thief." He further stated that she "was wearing stolen jewelry." Defendant Shofner made these statements not only to Riemann's wife directly, but also within the earshot of other PGGS employees. Defendant Shofner made these statements with the full knowledge that they were false. Among other things, Shofner knew that the items had been placed on either a layaway or house account, and knew that Riemann had made payments on them. (R. p. 25, Complaint, ¶ 25).

Based on these allegations, Riemann filed this lawsuit alleging three causes of action, and a Motion to Amend the Complaint to add a Fourth Cause of Action:

1. A statutory claim for violation of the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et seq.*
2. A tort claim for wrongful discharge in violation of South Carolina public policy.
3. A defamation claim based on Shofner's statements to Riemann's wife.
4. An Intentional Infliction of Emotional Distress claim based on the statement that Shofner made to Riemann's wife.

On October 29, 2012, Appellants filed and served their Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration. In their motion, the Appellants relied on the "Dispute Resolution" provision of the Shareholder Management Agreement that purportedly requires settlement of "[a]ny controversy or claim arising out of or related to this Agreement or the breach thereof" by binding arbitration. It also

includes, among others, a provision demanding that the parties engage three (3) arbitrators who must be “a certified public accountant, a lawyer, or a businessman with at least seven (7) years experience as an executive in a closely held corporation.” (R. p. 108, Shareholder Management Agreement, ¶ 6).

Riemann opposed the motion. As to the arbitration clause itself, Riemann challenged its enforceability on grounds that (1) the Federal Arbitration Act (FAA) was inapplicable because the underlying contract did not involve interstate commerce, and (2) the arbitration clause was unenforceable because it was unconscionable. With regard to his specific claims, Riemann argued that (1) the claim under the South Carolina Payment of Wages Act was not subject to arbitration, pursuant to S.C. Code Ann. § 41-10-100, and (2) none of his torts claims rely on the outcome of the resolution of any issue specifically related to the Shareholder Management Agreement, and were not subject to arbitration.

The parties appeared by the Honorable R. Knox McMahon, Court of Common Pleas for the County of Lexington, on February 13, 2013 for a hearing on the pending motions.¹

On June 24, 2013, Judge McMahon issued an Order denying the Appellants’ Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration. Judge McMahon initially found that the Shareholder Management Agreement involved interstate commerce and was subject to the FAA. He also found that the arbitration clause in the contract was not “unconscionable.” Nevertheless, he denied the Appellants’ motion on grounds that (1) Riemann’s claim under the South Carolina Payment of Wages Act was not subject to arbitration, pursuant to S.C. Code Ann. § 41-10-100, and (2) the

¹ Judge McMahon heard Appellants’ Motion to Dismiss (R. p. 30), and also heard Respondent’s Motion to Amend Complaint (R. p. 41) and Motion to Compel Discovery.

Appellants failed to provide “clear and unmistakable” evidence that the parties intended for an arbitrator to determine whether the tort claims were arbitrable. The trial court found that tort claims were not “substantially related” to the Shareholder Management Agreement, and that they were unforeseeable at the time the contract was formed, relying *inter alia* on *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007), and *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007).

Judge McMahon also granted the Respondent’s Motion to Amend Complaint and Respondents’ Motion to Compel Discovery.

Appellants filed their Notice of Appeal on August 1, 2013, and their Initial Brief on January 22, 2014. Riemann, as Respondent, now files his Initial Brief.

STANDARD OF REVIEW

The Appellants correctly point out in their brief that an appeal from the denial of a motion to compel arbitration is subject to *de novo* review. *Chassereau*, 373 S.C. at 171, 644 S.E.2d at 720. They did not, however, note that a circuit court’s findings on the issue of arbitrability 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 (S.C. App. 2003).

ARGUMENT

I. AS A THRESHOLD MATTER, THE TRIAL COURT CORRECTLY RULED THAT THE COURT, NOT AN ARBITRATOR, MUST DETERMINE THE ARBITRABILITY OF THE CLAIMS IN THIS CASE.

Appellants argue, in vain, that the trial court had no authority to address whether the claims in this lawsuit are arbitrable. Appellants' argument has already been explicitly rejected by both the South Carolina Supreme Court and by the U.S. Supreme Court.

Under South Carolina law², even where the FAA applies, our Supreme Court has explicitly ruled that a court must determine the question of arbitrability of the claims in question, including circumstances involving “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. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 668 (2007) (emphasis added). The court must find that there must be “clear and unmistakable” evidence that the arbitration provision is valid and that it applies to a certain type of controversy. *Id.*

Notably, Riemann raised both of these issues before the trial court. After weighing the evidence and legal arguments before it, the trial court found that the Appellants failed to meet their burden of providing “clear and unmistakable evidence” that the parties agreed that the particular matters before the court were to be decided as part of an arbitration proceeding. (R. pp. 17-20, Order).

The U.S. Supreme Court has also unequivocally and explicitly ruled that a court must decide the “gateway dispute” of whether an arbitration clause applies to a particular

² By its own terms, the contract in question stated that it was subject to the law of South Carolina. (R. p. 109, Shareholders' Management Agreement, ¶ 12).

type of controversy or claim. See, e.g., *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651-652, 106 S.Ct. 1415, 121 L.R.R.M. (BNA) 3329, 89 L.Ed.2d 648 (1986) (holding that a court should decide whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241-243, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962) (holding that a court should decide whether a clause providing for arbitration of various “grievances” covers claims for damages for breach of a no-strike agreement).

The Appellants mistakenly argue in their brief that the trial court “erred by conflating the standard for determining *who decides* the question of arbitrability of specific claims with the standard for *which claims* are subject to arbitration.” (Appellants’ Initial Brief, p. 13) (emphasis in the original). Such an argument misreads the clear mandate of both the South Carolina Supreme Court and the United State Supreme Court in *Simpson*, *AT&T*, and their progeny. Indeed, the South Carolina Supreme Court and the United State Supreme Court have each made clear that a court must decide whether the arbitration clause applies to the claims at hand. Indeed, to find as the Appellants argue, this Court must ignore entirely these binding precedents that require trial court to determine arbitrability where the “gateway issues” of the validity of the arbitration clause, or whether the arbitration clause applies to a certain type of claim, are raised.

For these reasons, the trial court did not err in deciding that it, rather than an arbitrator, had to determine whether the arbitration provision is enforceable as to the specific claims brought by Riemann.

II. THE SOUTH CAROLINA PAYMENT OF WAGES ACT STATUTORILY BARS APPELLANTS FROM FORCING PLAINTIFF TO ARBITRATE HIS STATUTORY CLAIM UNDER THE ACT.

The trial court also correctly found that the Appellants cannot force Riemann to arbitrate his claim under the South Carolina Payment of Wages Act (the “Act”). To do so would violate S.C. Code Ann. § 41-10-100, which provides that “No provision of this chapter may be contravened or set aside by a private agreement.” This includes, naturally, the provision in S.C. Code Ann. § 41-10-80(C) which provides employees with the right to bring a “civil action” against employers for violations of the Act.

The Appellants’ argument fails because it ignores the “cardinal rule of statutory construction” that, to ascertain and effectuate the actual intent of the legislature, “statutes which are part of the same Act must be read together.” *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Further, sections which are part of the same general statutory law of the state must be construed together, and each provision must be given effect, if it can be done by any reasonable construction. *Smalls v. Weed*, 293 S.C. 364, 370 360 S.E.2d 531, 534 (S.C. App. 1987) (quoting *State v. Fidelity & Deposit Co. of Maryland*, 114 S.C. 511, 104 S.E. 182 (1920)). The Appellants’ argument, if accepted, would require the Court to ignore the binding definition of the term “civil action,” ignore the remedial nature of the Act, and frustrate the intent of the legislature as expressed in the statutes.

As an initial matter, it is well-established that the South Carolina Payment of Wages Act is “remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld.” *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 194, 463 S.E.2d 641, 645 (S.C. App. 2005). For that reason, our state “refus[es] to allow

employers to ignore the statute by claiming their employees had by contract or custom waived their statutory right to prompt payment of wages.” *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 504, 518 S.E.2d 591, 594 (1999) (quoting *Cato v. Grendel Cotton Mills*, 132 S.C. 454, 456-61, 129 S.E. 203, 205 (1925)). S.C. Code Ann. § 41-10-100 embodies this policy by affirming that “[n]o provision of this chapter may be contravened or set aside by a private agreement.” (emphasis added).

Most recently, an employer attempted to argue that its failure to pay an employee as agreed had been waived by consent and that he was “estopped from challenging the policy” that he was contesting. In rejecting the employer’s argument, this Court relied on S.C. Code Ann. § 41-10-100, noting that “any agreement Ross may have consented to would be void” under S.C. Code § 41-10-100 and “unenforceable against him by Ligand.” *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 473 n. 1, 639 S.E.2d 460, 465 (S.C. App. 2006).

In the instant case, the trial court properly found that the language of S.C. Code Ann. § 41-10-100 was plain and unambiguous, and that the statute made clear that “[n]o provision of this chapter may be contravened or set aside by private agreement.” That section, read together with S.C. Code Ann. § 41-10-80(C), made it equally clear that Riemann’s claim under the Act cannot be arbitrated. (R. p. 15, Order).

This finding is supported by other “plain and unambiguous” language in the South Carolina Code. The definition of a “civil action,” found in Rule 2 of the South Carolina Rules of Civil Procedure, declares emphatically that “[t]here shall be one form of action to be known as ‘civil action.’” (emphasis added). Moreover, Rule 3, SCRPC, is equally emphatic, defining a “civil action” as commenced only “when the summons and

complaint are filed with the clerk of court within the statute of limitations in any manner prescribed by law, or if actual service is accomplished within one hundred twenty days after filing.”

The Appellants incorrectly argue that the trial court “expanded” the Act’s statutory bar on private waivers of the Act’s provisions. To agree with Appellants’ argument, this Court would have to ignore the legislature’s clear definition of a “civil action,” as well as its equally clear directive in S.C. Code Ann. § 41-10-100, as well as the remedial nature of the Act itself.

The Appellants also wrongly argue that the language of S.C. Code Ann. § 41-10-80(C) – which grants an employee the right to bring a civil action – can be contravened or set aside by private agreement because the legislature stated that private citizens “may” bring a civil action. Appellants compared the grant of this right to other sections of the Act that are directives to LLR, which is the administrative agency in charge of enforcing the Act. These directives are understandably stated in terms mandating that LLR, and its Director, carry out specific bureaucratic duties with regard to the Act, such as investigating claims, assessing penalties, and giving written warnings to violators. See S.C. Code Ann. §§ 41-10-30, 41-10-50 & 41-10-70. By contrast, it would be absurd for the legislature to issue a directive to private citizens “requiring” them to exercise their rights under S.C. Code Ann. § 41-10-80(C). Following this argument to its logical conclusion, the Appellants must presume that the legislature could order private citizens to bring civil actions in the same manner that it can order administrative agencies to carry

out specific duties of state government. Such a distinction is absurd and has no bearing on the issue currently before this Court.³

For these reasons, it is clear that the trial court had ample legal and factual grounds to deny the Appellants' attempt to compel arbitration of Riemann's claim under the South Carolina Payment of Wages Act.

III. RIEMANN'S OTHER TORT CLAIMS ARE NOT CLAIMS THAT "ARISE OUT OF OR ARE RELATED TO" THE SHAREHOLDER MANAGEMENT AGREEMENT, AND THEREFORE CANNOT BE SUBJECT TO THE "DISPUTE RESOLUTION" PROVISION CITED BY DEFENDANTS.

In determining that Riemann's three tort claims were not arbitrable, the trial court found that the tort claims did bear a "significant relationship" to the arbitration provision of the Shareholder Management Agreement. The trial court made this determination after examining the Shareholder Management Agreement and the nature of the factual allegations of Riemann's claims for wrongful discharge, defamation, and intentional infliction of emotional distress. Because none of the claims relied on the outcome of the resolution of any issue significantly related to the Shareholder Management Agreement, the trial court reasonably ruled that they were not arbitrable under the Shareholder Management Agreement. (R. p. 18, Order).

In reaching its decision, the trial court relied on the rulings of the South Carolina Supreme Court that were directly on point. In determining whether a dispute between

³ The Appellants also point to one case from the Court of Appeals in which the arbitration of a Payment of Wages Act claim under the Act is referenced. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (S.C. App. 2012). While the Appellants cite to the case, and three other cases decided in federal courts, for support for the proposition that arbitration of claims under the Act can be compelled in spite of S.C. Code Ann. § 41-10-100, a close reading of *Pearson* and the other cases reveals that none of these cases ever addressed the impact of S.C. Code Ann. § 41-10-100, or even indicate in any way that the issue was raised by any party. As such, the cases have no bearing on the resolution of the issues presented here.

parties is covered under a purported arbitration agreement, our Supreme Court has stated as follows:

[W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Aiken, 373 S.C. at 151, 644 S.E.2d at 709 (2007); *Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720 (“we refuse to interpret an arbitration agreement with similar, though not identical, language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate”).

Under the tests set forth by our Supreme Court, none of the tort claims alleged by Riemann are arbitrable. None of the claims rely on the outcome of the resolution of any issue specifically related to the Shareholder Management Agreement:

- Riemann’s claim for wrongful discharge in violation of public policy does not rely on any issue specifically related to the Shareholder Management Agreement. Instead, the claim is based solely on the allegations that: (1) Riemann filed a wage complaint with LLR, (2) Shofner fired him shortly thereafter, and (3) there is a causal connection between the two, and any attempt by Shofner to justify the termination after the fact is pretextual. Not one of these allegations relies in any way on any issue related to the Shareholder Management Agreement.
- Riemann’s claim for defamation arises wholly outside the Shareholder Management Agreement, and alleges exactly the type of “outrageous conduct” referenced in the Supreme Court’s decisions in *Aiken* and *Chassereau*, *supra*.
- Likewise, Riemann’s claim for intentional infliction of emotional distress, or “outrage,” arises from conduct that is wholly disconnected with any issue related to the Shareholder Management Agreement.

The trial court also explicitly ruled that it was “clear from the record before this Court that Riemann’s claims are wholly disconnected with any issue related to the Shareholder Management Agreement.” (R. p. 19, Order). In so holding, the trial court had at its disposal a record that included the Shareholder Management Agreement, which did not articulate Riemann’s specific duties or obligations as an employee, or the manner in which Riemann’s employment might be terminated. (R. pp. 107-110, *See* Shareholder Management Agreement). Thus, the trial court had ample legal and factual bases to determine that Riemann’s claims were “wholly disconnected with any issue related to the Shareholder Management Agreement.” (R. p. 19, Order).

Indeed, the Appellants have abandoned any effort to argue that Riemann’s three tort claims were “significantly related” to the Shareholder Management Agreement. In their Initial Brief, the Appellants only address their argument that the trial court should not have addressed the issue of arbitrability at all. As discussed in Section I of this brief, *supra*, that argument is baseless. Appellants’ Initial Brief is otherwise devoid of any argument that Riemann’s three tort claims are within the ambit of the arbitration clause in the Shareholder Management Agreement. In any event, because the issue was not addressed in the Appellants’ Initial Brief, it must be deemed abandoned. *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (S.C. App. 1989).

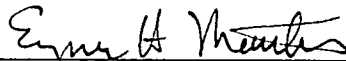
For these reasons, the trial court’s ruling that Riemann’s three tort claims are not subject to arbitration has ample legal and factual support, and must be upheld.

CONCLUSION

WHEREFORE, for the reasons set forth above, Respondent respectfully request that the Court uphold the trial court's opinion of June 24, 2013, return the case forthwith to the trial court, and grant any other such relief to the Respondent as this Court may deem just and proper.

Dated this the 3rd day of June, 2014.

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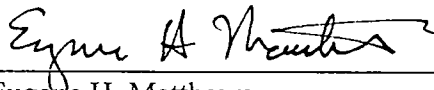
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
SCACR.

Dated this 3rd day of June, 2014.



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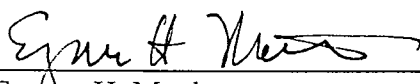
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PROOF OF SERVICE

I certify that I have caused to be served the Final Brief of Respondent on Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual capacity, by depositing a copy of it in the United States mail, postage prepaid, on this 3rd day of June, 2014, addressed to their counsel of record, Angus H. Macaulay, Esquire, Nexsen Pruet, LLC, PO Drawer 2426, Columbia, South Carolina 29201-2426.



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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-32-3496

Roger R. Riemann Respondent.
v.

Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual
capacity.....Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENTS

I. THE LOWER COURT ERRED BY FAILING TO ENFORCE THE PARTIES' AGREEMENT TO ARBITRATE ALL DISPUTES REGARDING THE ARBITRABILITY OF PARTICULAR CLAIMS.

The lower court ruled that the parties' Agreement is a valid and binding contract with an arbitration provision enforceable under the FAA. Respondent does not challenge the validity of the arbitration provision or that he is bound by its terms. The sole question before the lower court, and now before this Court, is who—the court or the arbitrator—is to decide which of Respondent's claims are subject to arbitration.

Respondent argues that the lower court properly denied Appellants' Motion to Compel Arbitration based on its finding that there was not "clear and unmistakable evidence" that Respondents' particular claims were within the scope of the arbitration agreement. (Resp. Brief, pp. 6-8.) In reaching this conclusion, both Respondent and the lower court misapprehend the purpose of the "clear and unmistakable" standard by mistakenly applying that standard to determine *whether* Respondent's particular claims are arbitrable and not to determine *who* decides questions of arbitrability.

The United States Supreme Court has long held that parties are permitted to contractually agree who—the court or the arbitrator—has the authority to determine the arbitrability of a particular claim. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The parties' agreement as to *who decides* arbitrability is separate and distinct from the parties' agreement as to the *scope* of the arbitration provision—that is, which claims are subject to arbitration. *See id.* The Court further held that there are two different standards for answering these two basic questions raised by arbitration agreements. *See First Options*, 514 U.S. at 944-45 ("[T]he law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently

from the way it treats silence or ambiguity about the question ‘whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.’”).

For the first question—who decides arbitrability—“[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” *Id.* at 944. In keeping with the liberal federal policy favoring arbitration, the law reverses this presumption for the second question—which claims are arbitrable—in that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.* at 945 (*quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983)); *accord Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001) (holding, under South Carolina law, that arbitration must be ordered unless a court can say with “positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute”).

The lower court’s ruling and the Respondent’s argument ignore the distinction in the standard between these two questions. The lower court refused to compel arbitration because Appellants allegedly failed to provide “clear and unmistakable evidence” that Respondent’s tort claims were within the scope of the arbitration provision. (R. p. 17.) Similarly, Respondent mistakenly argues that “[t]he court must find that there must be a ‘clear and unmistakable’ evidence that the arbitration provision is valid *and that it applies to a certain type of controversy.*” (See Resp. Brief, p. 6 (emphasis added)). As stated in Appellants’ Initial Brief, this conflates the standard for determining *who* decides the question of arbitrability of specific claims with the standard for *which claims* are subject to arbitration. (See App. Brief, pp. 15-16.)

Contrary to the lower court's ruling and Respondent's argument, the "clear and unmistakable" standard is not used to determine whether the parties intended specific claims to be covered by an arbitration provision,¹ but is instead used to determine the presence of a "delegation provision"—that is, "an agreement to arbitrate threshold issues concerning the arbitration agreement." See *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2777 (2010). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 2777-78. Where, as in this case, the delegation provision consists of the parties' agreement to arbitrate the arbitrability of particular claims, the purpose of requiring "clear and unmistakable evidence" of that agreement is simply to ensure that parties are not forced to arbitrate matters they assumed a judge would decide. See *First Options*, 514 U.S. at 945. Because the parties clearly and unmistakably agreed to arbitrate any disputes as to the arbitrability of particular claims, the court must enforce that agreement.

Despite this clear precedent, the Respondent cites two different United States Supreme Court cases—both predating *First Options*—which allegedly stand for the proposition that a court must always decide the issue of whether an arbitration clause applies to a particular claim. See *AT&T Techs., Inc. v. Comms. Workers of America*, 475 U.S. 643 (1986); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). Neither case is as broad as Respondent suggests or is applicable to the resolution of the issue before the

¹ By applying the "clear and unmistakable" standard to the question of which claims are arbitrable, the lower court essentially applied a presumption *against* arbitrability, when both federal and state law require a presumption *in favor* of arbitrability unless the court can determine with "positive assurance" that the particular claim falls outside the agreement. See *First Options*, 514 U.S. at 945; *Zabinski*, 346 S.C. at 596-97, 553 S.E.2d at 118-19.

Court. Both decisions involved arbitration provisions within collective bargaining agreements, and their holdings were expressly based on policy considerations under the Labor Management Relations Act, which is plainly not at issue in this case. *See AT&T*, 475 U.S. at 650-51; *Atkinson*, 370 U.S. at 241-42. Moreover, contrary to the parenthetical included by Respondent suggesting that arbitrability is *always* a decision for the court (*see* Resp. Brief, p. 7), the *AT&T* Court held that the court and not the arbitrator decides arbitrability, “[u]nless the parties clearly and unmistakably provide otherwise.” 475 U.S. at 649. In fact, *First Options* cited *AT&T* for this proposition, reiterating that the question of who decides arbitrability is a matter of contract. 514 U.S. at 944.

In this case, there is “clear and unmistakable” evidence leaving no question that Respondent agreed to arbitrate the “gateway matter” of the arbitrability of particular claims. The arbitration provision expressly states that “[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding.” (R. p. 108.) Because Respondent now argues that SCPWA claims are not arbitrable as a matter of law and that Respondent’s other claims are outside the scope of the arbitration agreement, this is precisely the sort of “dispute as to whether a controversy or claim is subject to arbitration” that the parties expressly agreed was to be resolved by the arbitrator.

The lower court erred by refusing to enforce the arbitration provision’s plain language and by failing to forward all claims to the arbitrator to determine which were arbitrable. For these reasons, the lower court should be reversed, and this Court should grant Appellants’ Motion and compel all of Respondent’s claims to arbitration.

II. THE LOWER COURT ERRED BY FINDING WAGE CLAIMS TO BE UNARBITRABLE AS A MATTER OF LAW.

Respondent argues that the lower court correctly interpreted the South Carolina Payment of Wages Act's ("SCPWA") statutory bar on private waivers² to render unenforceable as a matter of law any agreement to arbitrate wage disputes.³ See S.C. Code Ann. § 41-10-100. Respondent notes that no South Carolina case compelling a SCPWA claim to arbitration has ever addressed this argument (*see* Resp. Brief, p. 11 n.3); indeed, in the near-century that South Carolina law has prohibited employee waiver of the right to prompt payment of wages, no South Carolina case has ever held that parties are prohibited from contractually agreeing to arbitrate wage disputes.

Appellants agree with Respondent that, in the absence of existing case law interpretation, this Court is bound to apply "[t]he primary rule of statutory construction. . . to ascertain and effectuate the intent of the Legislature." *Gilstrap v. South Carolina Budget and Control Bd.*, 310 S.C. 210, 213, 423 S.E.2d 101 (1992). Therefore, the precise question before the Court is whether the legislative intent of the SCPWA's bar on private waivers would be effectuated by prohibiting parties from agreeing to resolve wage disputes in an arbitration forum.

As discussed more fully in Appellants' Initial Brief, the SCPWA and its predecessor statute historically prohibited private waivers of statutory wage payment requirements on the theory that, if such waivers were permitted, employers would require

² "No provision of this chapter may be contravened or set aside by private agreement." S.C. Code Ann. § 41-10-100.

³ Because the parties expressly agreed that the arbitrator and not the court was to determine the arbitrability of Respondent's particular claims, this Court need not reach the question of whether the lower court erred in refusing to compel the South Carolina Payment of Wages Act claim to arbitration on the grounds that it was unarbitrable as a matter of law. Similarly, this Court need not address Respondent's third argument, regarding whether Respondent's remaining tort claims bear a "significant relationship" to the Agreement, as that too is an issue for the arbitrator.

them of employees as a condition of employment, thus negating the remedial purpose of the statute. (*See* App. Brief, p. 7.) There is no legislative history to suggest that the legislature intended to prohibit parties from contractually choosing to resolve disputes in an arbitration forum if the SCPWA's substantive protections were still served.

Moreover, in determining legislative intent, the Court can be further guided by the fact that the South Carolina legislature has approved of the arbitration of employment-related disputes when certain conditions are met, and has not excluded wage payment claims from the scope of arbitrable matters. The South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. § 15-48-10 *et seq.*, expressly renders enforceable arbitration agreements between employers and employees, so long as the arbitration agreement expressly references the SCUAA. *Id.* § 15-48-10(b)(2). The SCUAA identifies several specific types of employment disputes which are *not* subject to arbitration under any circumstances, regardless of whether the agreement references the SCUAA; the statute provides that any arbitration agreement pertaining to "workmen's compensation claims, unemployment compensation claims and collective bargaining disputes" shall be "null and void." *Id.*

The SCUAA does not apply in this case; the FAA does. However, the SCUAA reflects legislative priorities in the context of arbitration of employment disputes. If the legislature intended for claims under the SCPWA to be unarbitrable as a matter of law, it would have included wage disputes in the list of employment-related disputes that are *not* subject to the SCUAA. The legislature chose not to do so, and this Court has held that *any* claims which are *not* expressly excluded by the SCUAA are properly arbitrable. *Swentor v. Swentor*, 336 S.C. 472, 477-78, 520 S.E.2d 330, 333 (Ct. App. 1999) (holding

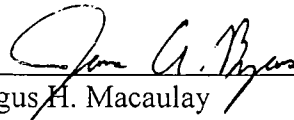
that equitable apportionment claims are arbitrable because they are not expressly excluded by the SCUAA). Therefore, this Court should conclude that the SCPWA's statutory prohibition on private waivers need not be read so broadly as to render unenforceable an arbitration agreement under the FAA, when the legislature expressly *permitted* the arbitration of wage disputes under the SCUAA.

As argued in Appellants' Initial Brief, the Payment of Wages Act does not and need not reach so far as to prohibit arbitration of wage disputes to effectuate the Act's remedial purpose. (*See App. Brief*, pp. 8-11.) The lower court's ruling to the contrary was in error and should be reversed.

CONCLUSION

For the reasons stated herein, Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner respectfully renew their request that the Court reverse the trial court's June 24, 2013 order denying Appellants' Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration and order that this case be stayed in the lower court pending arbitration of all Respondent Roger Riemann's claims.

Respectfully submitted,



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June 4, 2014

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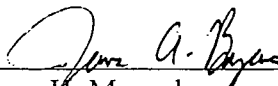
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PROOF OF SERVICE

I hereby certify that I have served the foregoing Final Reply Brief of Appellants
on the Respondent by hand-delivering a copy of the same, on June 4, 2014, addressed to
Respondent's Counsel of Record, Eugene H. Matthews, Esq., 1900 Barnwell Street,
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June 4, 2014



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