

STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

CERTIFICATION OF QUESTIONS OF LAW
United States District Court for the District of South Carolina

The Honorable Timothy M. Cain

Appellate Case No. 2020-001195

Curt O. Hall..... Plaintiff,

v.

UBS Financial Services, Inc. and Mary Lucy Reid,..... Defendants.

DEFENDANTS' FINAL BRIEF

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Pursuant to South Carolina Appellate Court Rule 244, Defendants UBS FINANCIAL SERVICES, INC. (UBS) and MARY LUCY REID (Reid) respectfully file a joint Final Brief in response to the Certified Questions raised in this matter.

I. STATEMENT OF ISSUES ON APPEAL

This Final Brief is filed on behalf of Defendants UBS and Reid, jointly, in association with the certification of three questions to the Supreme Court of South Carolina. In addition to the Certified Questions raised, Defendants UBS and Reid raise the issue of ripeness of the Certified Questions to the Supreme Court at this stage in the litigation. The Certified Questions presented are:

Certified Question 1: Are terminable-at-will employment relationships contractual in nature as a matter of law?

Certified Question 2: Does the implied covenant of good faith and fair dealing arise in the context of terminable at-will employment relationships, and can an employer's termination of an at-will employee constitute a breach of the relationship such that it may give rise to a claim by the former employee against the employer for breach of the implied covenant of good faith and fair dealing?

Certified Question 3: Can an employer's termination of an at-will employee, which results from a third-party employee's report to the employer, constitute a breach of the relationship such that it may give rise to a claim by the former employee against the third-party employee for tortious interference with a contractual relationship?

Defendants assert each Certified Question is to be answered in the negative.

II. STATEMENT OF THE CASE

Plaintiff Hall, a former branch manager and at-will employee of UBS, invited subordinate Reid and other co-workers for happy hour drinks and dinner after work on September 1, 2017. Plaintiff asserts that, throughout the evening, Reid mentioned she was having issues with her

boyfriend. At the end of the evening, after sharing a ride, Hall kissed Reid on the cheek. Hall subsequently sent Reid a text message that evening asking if she would like to stay with him overnight; an offer which was declined. Order of Certification at 2-3, ECF No. 36. Subsequently, Reid reported the events of September 1, 2017 to human resources for UBS. Human resources for UBS conducted an investigation into the allegations of perceived, unwanted sexual advances. In his Complaint, Hall admits the events in question did in fact occur. UBS subsequently terminated Hall. Order of Certification at 2-3.

As a result of the termination, Hall filed a lawsuit against both UBS and Reid.¹ The claim at issue filed against UBS is a claim for an implied duty of good faith and fair dealing. As part of that claim, the Certifying Court asks if at-will employment gives rise to an employment contract such that a duty of good faith and fair dealing exists.

Hall also filed a claim against Reid for tortious interference with contract as a result of her report to human resources of perceived, unwanted sexual advances. The Certifying Court similarly asks if a tortious interference claim exists against Reid in her individual capacity when Hall was an at-will employee.

Defendants assert that the answer to each Certified Question is no. South Carolina law is clear. At-will employment is presumed unless otherwise pled. At-will employment does not create a contract of employment and a breach of a contract claim is not cognizable, absent special circumstance or alteration to the employment relationship not present in this matter. As such, there can be no cause of action for intentional interference with a contract. A prerequisite to such a claim is the existence of a contract. Further, such a claim is the antitheses of at-will employment which

¹ Hall also filed the lawsuit against Ryan McLaughlin. The sole claim against McLaughlin, civil conspiracy, has been dismissed. Order of Certification at fn. 1-2.

allows an employer to terminate an employee for a good reason or a bad reason. There is no requirement that the reason be “fair” or made in “good faith.”

As stated in the Certified Question, Hall in his Complaint asserts that Reid submitted an internal report to her employer regarding Hall’s admitted inappropriate conduct. Hall also alleges that Reid was an employee of UBS at all relevant times set forth in his Complaint. A report to human resources by an employee regarding perceived, unwanted sexual advances by a supervisor does not meet the requirements to establish a tortious interference claim. First, because Hall’s employment with UBS was at-will, there is no contract that Reid could have induced UBS to breach. Further, there is only one party in this stance, UBS. Reid was not a third party or “stranger” to the at-will relationship and she had a “justifiable reason” for making her complaint to human resources – perceived, unwanted sexual advances by Hall. Such communications to human resources are intra-corporate communications and are subject to a qualified privilege. Moreover, it is inconsistent with public policy, which encourages employees to report discriminatory, harassing or otherwise unlawful conduct, to impose personal liability on an employee submitting a report of inappropriate conduct in good faith. Permitting a tortious interference claim under the circumstances alleged herein is likely to impair an employer’s ability to identify and address discriminatory or otherwise unlawful conduct.

Therefore, Defendants assert that no claim for tortious interference is cognizable under the facts presented.

III. STANDARD OF REVIEW

“In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.”

O'Neill v. Smith, 388 S.C. 246, 249, 695 S.E.2d 531, 532 (2010), citing *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

IV. ARGUMENT

A. Certified Question 1: Are terminable-at-will employment relationships contractual in nature as a matter of law?

No.² At-will employment relationships in South Carolina do not create a contract as a matter of law and do not allow for a cause of action to be brought by an employee against an employer on matters that arise out of termination of the at-will employment relationship. South Carolina follows the doctrine of employment at-will. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773, 778 (S.C. 2010).³ At-will employment is terminable at any time by either party, for any reason or for no reason at all. *Ross v. Life Ins. Co. of Va.*, 273 S.C. 764, 765, 259 S.E.2d 814, 815 (S.C. 1979) (claim by at-will employee for civil conspiracy and tortious interference not allowed); *Prescott v. Farmers Tel. Coop., Inc.*, 516 S.E.2d 923, 925 (S.C. 1999) (“The termination of an at-will employee normally does not give rise to a cause of action for breach of contract”). At-will employees may be terminated with or without cause. *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 516 S.E.2d 449, 450 (S.C. 1999).

It has long been held that an at-will employee does not have a contractual relationship with their employer. “The general rule is that under ordinary circumstances a contract to furnish employment permanently, or so long as the employee’s services shall be properly performed, or for a similar indefinite period, is no more than an indefinite hiring, terminable at the will of either party, and is therefore unenforcible [sic] as to its duration.” *Orsini v. Trojan Steel Corp.*, 219 S.C.

² UBS and Mary Lucy Reid note that an affirmative response to this Question is not required to answer the remaining Questions below.

³ There is a presumption in South Carolina that employees are at-will. See *Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 516, 618 S.E.2d 881, 883 (S.C. 2005).

272, 276, 64 S.E.2d 878, 879 (S.C. 1951).⁴ The “general rule of at-will employment of an indefinite duration” is only altered if “valuable consideration independent of and ‘in addition to the services rendered,’” is provided via an employment agreement. *Weaver v. John Lucas Tree Expert Co.*, No. 2:13-CV-01698-PMD, 2013 U.S. Dist. LEXIS 146435, at *18 n.10 (D.S.C. Oct. 10, 2013). “The at-will employment doctrine is essentially an economic incentive that provides critically needed flexibility in the marketplace.” *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 19-20 (Ct. App. 2006), quoting *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 334-35, 516 S.E.2d 923, 925 (1999).

As to the issue of the creation of a contract, this Court has repeatedly held:

**absent some alteration in the at-will employment status, there is
no contract.**

See Allegro, Inc. v. Scully, 418 S.C. 24, 35 791 S.E.2d 140, 146 (S.C. 2015) (Emphasis added).

Neither the allegations before the Court nor the Certified Questions contain factual assertions or evidence of something other than an at-will relationship. To argue the creation of a

⁴ *Clardy v. Bodolosky*, 383 S.C. 418, 425, 676 S.E.2d 527, 530 (Ct. App. 2009), cited by Plaintiff, is a general contract case unrelated to employment. Thus, it is not applicable to the Certified Question before the Court. Similarly, *Glover v. Lockheed Corp.*, 772 F. Supp. 898 (D.S.C. 1991), which has been misquoted by Plaintiff, is also inapplicable. The *Glover* case involves race discrimination and promissory estoppel claims stemming from Glover’s demotion. There were no allegations regarding the termination of an at-will employment relationship as a result of an internal report of plaintiff’s sexually harassing conduct. As such, the *Glover* case is factually dissimilar and the claims asserted are not claims which are subject to the Certified Questions in the case at bar. A promissory estoppel claim is not allowed in an at-will employment relationship as a method to avoid and get around the bar to suit against an employer for termination for any reason, good or bad, absent certain circumstances, in an at-will employment relationship. Similarly, *Sellers v. S.C. Autism Soc., Inc.*, 861 F. Supp. 2d 692 (D.S.C. 2012) is limited to the application of a federal §1981 claim; dismissal of the tortious interference claim was granted. One exception to at-will employment is a prohibition against illegal discrimination. *See Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 19 (Ct. App. 2006). Hall has not alleged that he was subjected to illegal discrimination in this action but he apparently wishes to flip anti-discrimination law on its head to bring a tortious interference claim against the subordinate employee who reported sexually harassing conduct to human resources.

“contract,” the existence of something *more than* at-will employment must be present.⁵ See *Allegro, Inc.*, 418 S.C. at 35, 791 S.E.2d at 146 (“there is nothing to suggest this was anything other than an at-will relationship” citing *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 310, 698 S.E.2d 773, 778 (2010) (“In South Carolina, employment at-will is presumed *absent* the creation of a specific contract of employment.”); *Prescott v. Farmers Tel. Co-op, Inc.*, 335 S.C. 330, 335, 516 S.E.2d 923, 925 (1999) (“an employer and employee may *choose to contractually alter* the general rule of employment at-will and restrict their freedom to discharge without cause or to resign with impunity”). See also, *Brailsford v. Fresenius Med. Ctr. CNA Kidney Ctrs. LLC*, No. 2:15-CV-00289-DCN, 2015 U.S. Dist. LEXIS 94391, at *7 (D.S.C. July 21, 2015) (unpublished) (citing *Weaver v. John Lucas Tree Expert Co.*, No. 2:13-CV-01698-PMD, 2013 U.S. Dist. LEXIS 146435, 2013 WL 5587854, at *4 (D.S.C. Oct. 10, 2013) (unpublished)) (“Because employment is presumed to be at-will, in order to survive a motion to dismiss on a claim for breach of contract of employment, a plaintiff must plead sufficient factual allegations to establish the existence of an employment contract *beyond* the at-will relationship.”); *King v. Marriott Int’l, Inc.*, 520 F. Supp. 2d 748, 756 (D.S.C. 2007) (dismissing the plaintiff’s claim for breach of contract and finding that the employer’s policy statements against discrimination and recrimination *did not create a contract* or otherwise alter the plaintiff’s at-will status).

The Certified Question identifies multiple cases where there is an implication that at-will employment may be contractual. The cases discussed by the Certifying Court are inapplicable to the fact scenario presented in the Certified Question. In many of the cases cited, the fact scenarios

⁵ As shown in the Certified Question, Plaintiff did not plead the existence of a contract. As such, at-will employment is presumed. See *Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 516, 618 S.E.2d 881, 883 (S.C. 2005) (There is a presumption in South Carolina that employees are at-will.). See Order of Certification at 3.

presented included or contemplated the existence of a written contract of employment in some form which contained definite terms that modified the at-will relationship. That is not the fact scenario before this Court. The Certified Question before the Court is specific and based on the fact that the employment of the Plaintiff was at-will and no written contract existed. *See* Order of Certification at 3. For example, in *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 332, 516 S.E.2d 923, 924 (1999), the language that concerned the certifying court is a quote from *Shealy v. Fowler*, 182, S.C. 81, 188 S.E. 499 (S.C. 1936). In *Shealy*, the employee was hired under a written contract which contained mutually agreed upon termination language that provided for termination at-will by either party. Shealy filed suit against his former employer and its agents after his termination. In *Shealy*, the plaintiff conceded “that a contract for permanent employment, or for so long as the employee gives satisfactory service, resting on no other consideration except the agreement to serve; is revocable at the will of either party. [Plaintiff sought] to take this case out of the general rule by showing that he gave up certain rights and gave other consideration for his employment in addition to his agreement to serve.” *Id* at. 502. The question in *Shealy* was whether the execution of a contract for the sale of real property represented additional consideration and a fraudulent inducement which altered the nature of Shealy’s at-will employment contract such that Shealy’s termination constituted a breach of contract. The trial court granted defendants’ motion for directed verdict and the Court of Appeals affirmed. Likewise, the South Carolina Supreme Court affirmed the directed verdict in favor of defendants, finding no fraud and further that it “clearly appear[ed] defendant company had a contract of employment for an indefinite term, that the plaintiff’s service was satisfactory and mutually profitable, and that he fulfilled his part of the agreement in attending to the defendant’s business at Prosperity did not prevent the defendant company from terminating the contract. The contract under which plaintiff acted as subagent was

for an indefinite time, and could be terminated at the will of either party.” *Id.* at 503. The *Shealy* case demonstrates that an at-will employment relationship, even if memorialized in writing, is revocable at the will of either party except when parties’ agreement includes additional terms or consideration which alter the at-will relationship. Likewise, when one reads *Prescott* as a whole, it is clear that the *Prescott* court expressed its continued favor with the policy of employment at-will. The court recognized that in *Prescott*, the parties were able to *alter* the at-will employment and *create* a definite contract of employment if they adhered to all of the elements of a contract. This is a recognition that in order to create a contractual relationship imposing obligations greater than the conditions of at-will employment, the at-will employment relationship must be altered.

The Certified Question in this case is specific to an at-will employment relationship where no contract has been alleged to modify the at-will relationship. There is no aspect of the Complaint or Certified Question that requires the Court to review or consider any exception to the at-will doctrine. As such, no claim based on contract can arise from an at-will relationship and at-will employment does not create a contract in South Carolina. In South Carolina, employment claims based on contract are not cognizable when the employment relationship in question is simply an employment-at-will relationship.

B. Certified Question 2: Does the implied covenant of good faith and fair dealing arise in the context of terminable at-will employment relationships, and can an employer’s termination of an at-will employee constitute a breach of the relationship such that it may give rise to a claim by the former employee against the employer for breach of the implied covenant of good faith and fair dealing?

No. As discussed above, terminable-at-will employment relationships are not contractual such that a termination generally gives rise to a cause of action against the employer. The very essence of an employment-at-will relationship is that employment may be terminated by either party for any reason or for no reason at all. Therefore, there can be no breach of an implied duty

of good faith and fair dealing for terminating an at-will employment relationship when the express condition of an at-will employment relationship is that it can be terminated at any time for any lawful reason.

Courts in South Carolina have long held that the termination of an at-will employee does not give rise to a cause of action for breach of contract. *Hudson v. Zenith Engraving Co., Inc.*, 273 S.C. 766, 259 S.E.2d 812 (1979). A contract claim is not cognizable when the relationship between the parties is at-will. At-will employment may be terminated for good cause, no cause, or even a cause that is morally wrong. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 221-222, 337 S.E. 2d 213, 214 (S.C. 1985).⁶ Termination of an at-will employee does not give rise to a cause of action for breach of contract against the employer. Only when the at-will status of the employee is altered, thereby *creating* a contractual employment relationship, may a cause of action for wrongful discharge based on a contract claim arise. *See Smith v. Palmetto Denture Care, P.A.*, No. 7:17-cv-1043-AMQ-KFM, 2018 U.S. Dist. LEXIS 125715, at *12-13 (D.S.C. July 27, 2018) (The court has already addressed Plaintiff's arguments regarding the existence of a contract and found that Plaintiff has failed to state a claim. Therefore, this defect necessarily is fatal to Plaintiff's breach of contract with fraudulent intent claim).

⁶ Although, in South Carolina, an at-will employee may be discharged for any reason, "South Carolina courts have carved out exceptions to the at-will employment doctrine. *See Small v. Springs Indus., Inc.*, 300 S.C. 481, 388 S.E.2d 808 (1990) (*Small II*); *Davis v. Orangeburg-Calhoun Law Enforcement Comm'n*, 344 S.C. 240, 542 S.E.2d 755 (Ct. App. 2001). First, an employee has recourse against an employer for termination in violation of public policy. *Small II*, 300 S.C. at 484, 388 S.E.2d at 810; *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E.2d 213 (1985). Second, an at-will employee may not be terminated for exercising constitutional rights. *Prescott*, 335 S.C. at 335 n.3, 516 S.E.2d at 925 n.3; *Moshtaghi v. The Citadel*, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994). In addition, at-will employment does not interfere with the prohibition against illegal discrimination. *See Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 19 (Ct. App. 2006). None of the exceptions to at-will employment are presented in the Certified Question and none have been raised by the Plaintiff in the Complaint.

A breach of the implied covenant of good faith and fair dealing is a claim that arises out of an existing contractual relationship. *Williams v. Riedman*, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000). As a result, a breach of the implied covenant of good faith and fair dealing cannot survive when the basis of the claim is an at-will employment relationship. The Certifying Court discusses a myriad of cases in which the breach of the implied covenant of good faith and fair dealing claim was dismissed against the employer when the employment in question is at-will. Neither the Certifying Court nor Plaintiff point to any South Carolina case where a different result is reached. Defendants are also aware of no such ruling. *See Weaver v. John Lucas Tree Expert Co.*, No. 2:13-CV-01698-PMD, 2013 U.S. Dist. LEXIS 146435, at *34 (D.S.C. Oct. 10, 2013) ("no South Carolina court has held that an implied covenant of good faith and fair dealing exists in an at-will employment relationship.").

The South Carolina Court of Appeals has addressed the exact issue raised by the second Certified Question on at least three occasions. The Court has acknowledged that "[a]lthough implied covenants are not favored in the law, . . . there exists in every contract an implied covenant of good faith and fair dealing." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366-67, 147 S.E.2d 481, 484 (1966). As a result, a breach of this covenant has been recognized as a cause of action in select employment contexts in South Carolina. The application of the cause of action is *limited*, however, to situations in which the employee's at-will employment has been altered and a contract, beyond at-will employment, created. *See Williams v. Riedman*, 339 S.C. 251, 267, 529 S.E.2d 28, 36 (Ct. App. 2000).

Importantly, in all three instances where an implied covenant of good faith and fair dealing has been addressed, the Court of Appeals has held there is no claim against an employer for breach of the duty of good faith and fair dealing when employment is at-will. *See Williams v. Riedman*,

339 S.C. 251, 256, 529 S.E.2d 28, 30 (Ct. App. 2000) (the Court of Appeals held a breach of the covenant of good faith and fair dealing claim only applies to employment contracts that *alter* the employee's at-will status); *Keiger v. Citgo Coastal Petroleum, Inc.*, 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997) (the South Carolina Court of Appeals affirmed a trial court's dismissal of the cause of action for breach of the implied covenant of good faith and fair dealing where the employment in question was at-will); *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 91, 459 S.E.2d 851, 857 (Ct. App. 1995), *aff'd*, 325 S.C. 248, 481 S.E.2d 706 (1997) (holding the implied covenant of good faith and fair dealing is only applicable to employment contracts *that alter* the employee's at-will status."). Again, neither the Certified Questions nor the underlying pleadings contain factual allegations which demonstrate that any employment relationship other than an at-will exists in this case.

The rulings from the Court of Appeals are consistent with past precedent from this Court. In *Allegro, Inc.*, 418 S.C. 24, 791 S.E.2d 140 (S.C. 2015) this Court

declined to apply [the] covenant [of good faith and fair dealing] to the employment at-will situation where no contract exists.

See Id., 418 S.C. at 35, 791 S.E.2d at 146, citing *Keiger v. Citgo, Coastal Petroleum, Inc.*, 326 S.C. 369, 374, 482 S.E.2d 792, 794 (Ct. App. 1997) (“[T]he implied duty of good faith and fair dealing that is implied in every contract applies to employment contracts *that alter* the at-will employment status.”); *See also, Weaver v. John Lucas Tree Expert Co.*, No. 2:13-CV-01698-PMD, 2013 U.S. Dist. LEXIS 146435, at *28-29 (D.S.C. Oct. 10, 2013) (“no South Carolina court has held that an implied covenant of good faith and fair dealing exists in an at-will employment relationship.”); *First Nat. Bank v. First Nat. Bank of the S.*, No. 6:07-2182-HMH, 2007 U.S. Dist. LEXIS 81332 (D.S.C. Oct. 31, 2007) (interpreting and applying South Carolina law in disposing of the claim based on an implied covenant of good faith and fair dealing in an at-will employment

relationship); *Johnson v. Dillard's, Inc.*, No. 3:03-3445-MBS, 2007 U.S. Dist. LEXIS 71176 at *17 (D.S.C. Sept. 24, 2007); *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 226 (D.S.C. 1996) (same), *aff'd*, 133 F.3d 915 (4th Cir. 1997); *Witt v. Am. Trucking Ass'ns*, 860 F. Supp. 295, 306 (D.S.C. 1994) (same); *Grooms v. Mobay Chem. Corp.*, 861 F. Supp. 497, 506 (D.S.C. 1991) (same), *aff'd*, 993 F.2d 1537 (4th Cir.) (*per curiam*) (unpublished), *cert. denied*, 510 U.S. 996, 114 S. Ct. 561, 126 L. Ed. 2d 461 (1993).

Similarly, in *Horton v. Darby Elec. Co., Inc*, 360 S.C. 58, 64-68, 599 S.E.2d 456, 459-61(2004), the South Carolina Supreme Court ruled that summary judgment on a breach of an implied contract of employment was proper on the basis there was no contract altering appellant's at-will status. The court relied on the general proposition in South Carolina that an employer may terminate an at-will employee for any reason or no reason and will not be subjected to a breach of employment contract claim. *See also, Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002).

To hold otherwise would be illogical. To allow an implied covenant of good faith and fair dealing claim to survive would essentially require just cause in every termination of an at-will employee and would allow virtually every termination decision by an employer to be challenged by an employee and reviewed by the courts. This goes against the very nature of at-will employment which stands for the proposition that “[a]n at-will employee may be terminated at any time for any reason or for no reason, with or without cause.” *Barron v. Labor Finders of S.C.*, 269 Ga. 604, 393 S.C. 609, 614, 713 S.E.2d 634, 636 (S.C. 2011).

In the context of [at-will employment] it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination. The parties may by express agreement limit or restrict the employer's right of discharge, but to imply such a limitation from

the existence of an unrestricted right would be internally inconsistent.

Weaver v. John Lucas Tree Expert Co., No. 2:13-CV-01698-PMD, 2013 U.S. Dist. LEXIS 146435, at *30 (D.S.C. Oct. 10, 2013), quoting *Satterfield v. Lockheed Missiles & Space Co.*, 617 F. Supp. 1359, 1364 (D.S.C. 1985). Succinctly stated, "the concept of at-will employee/employer relations . . . is antithetical to the concept of an implied covenant of good faith and fair dealing."

Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1364 (D.S.C. 1985).⁷

As a result, the answer to the second Certified Question is no, an implied covenant of good faith and fair dealing does not exist in the context of at-will employment in South Carolina.

C. Certified Question 3: Can an employer's termination of an at-will employee, which results from a third-party employee's report to the employer, constitute a breach of the relationship such that it may give rise to a claim by the former employee against the third-party employee for tortious interference with a contractual relationship?

Question three (3) is the crux of the three part Certified Question addressed herein. As written, the question frames the issue as one "which results from a third-party employee's report to the employer." Upon closer review of the facts provided in the Certified Question, it is clear that the question at issue is better phrased as "can an employee's report to the employer's human resources department of perceived, unwanted sexual advances by a supervisor, employed at-will, be the grounds for the supervisor to sue the subordinate in their individual capacity for tortious interference?" This answer must be "no" for multiple reasons.

⁷ In addition, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004). Instead, the implied covenant of good faith and fair dealing should be viewed "as merely another term of the contract at issue." *Id.* at 884 (citing *Boddie-Noell Props., Inc. v. 42 Magnolia P'ship*, 352 S.C. 437, 574 S.E.2d 726, 730 (S.C. 2002)). Accordingly, to the extent a plaintiff seeks to maintain a separate cause of action for breach of the implied covenant of good faith and fair dealing, a motion to dismiss is appropriate and should be granted. See *Weaver v. John Lucas Tree Expert Co.*, No. 2:13-CV-01698-PMD, 2013 U.S. Dist. LEXIS 146435, at *28-29 (D.S.C. Oct. 10, 2013).

“The element of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.”⁸ *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E. 2d 304, 305(1993); *DeBerry v. McCain*, 275 S.C. 569, 274 S.E.2d 293, 296 (1981). In addition, as a prerequisite to reaching the causes of action, the person “interfering” must be a third party to the alleged contract. *Ross*, 273 S.C. at 766, 259 S.E.2d at 815 (“South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract.”).

1. There Is No Contract to Support Plaintiff’s Interference With Contract Claim.

In keeping with the current state of the law in South Carolina, in order for an individual to state a cause of action for intentional interference with contract, one of the prerequisites for that claim is the existence of a contractual relationship.⁹ *Coves Darden, LLC v. Ibañez*, No. 2106-UP-402, 216 S.C. App. unpub. LEXIS 475 (Ct. App. Aug. 17, 2016). In the absence of a contract, there is nothing with which an alleged third party has the ability to interfere. *Id.* For that reason,

⁸ A clear question exists as to what damages could be returned under the scenario presented. At-will employment is not guaranteed and cannot be presumed. Whether and for how long an at-will employee may have continued to work without the alleged interference is a matter of speculation. If in fact, the damages alleged are emotional distress or other related damages, the exclusive provisions of workers compensation would apply and prevent any such lawsuit. Workers’ Compensation is the exclusive remedy for an employee’s work-related accident or injury, and the exclusivity provision precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. *Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863, 867-68 (S.C. Ct. App. 2004). The South Carolina General Assembly has vested the South Carolina Workers’ Compensation Commission with exclusive original jurisdiction over an employee’s work-related injuries. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231, 234 (S.C. 2002).

⁹ It is not necessary for this Court to reach a conclusion as to the impact an at-will relationship has on a tortious interference claim when Hall cannot meet the other elements of a tortious interference claim. *See* Sections IV.C.2-4.

and consistent with the above analysis, there can be no cause of action for interference with contract regarding an at-will employee, as there is no underlying contract. *See Marino v. Vunk*, 39 A.D.3d 339, 340-41 (N.Y. App. Div. 2007) (“Plaintiff cannot be allowed to evade the employment at-will rule by recasting her cause of action in the garb of tortious interference with her employment”).

As discussed above in response to Certified Question 1, it is well-established that South Carolina recognizes the doctrine of employment at-will. *Prescott v. Farmers Tel. Co-op., Inc.*, 516 S.E.2d 923, 925 (S.C. 1999); *Ludwick*, 287 S.C. at 221, 337 S.E.2d 213, 216. Under that doctrine, “[a]n at-will employee may be terminated at any time for any reason or for no reason, with or without cause.” *Barron*, 393 S.C. at 614, 713 S.E.2d at 636. Additionally, the “termination of an at-will employee normally does not give rise to a cause of action for breach of contract.” *Prescott*, 516 S.E.2d at 925.

The facts presented in the Certified Questions before the Court fail to establish the first element of his intentional interference claim – that a contract existed between Plaintiff and UBS. The issue raised in Certified Question 3 was directly addressed by the Court of Appeals in *Coves Darden, LLC v. Ibañez*, No. 2016-UP-402, 216, S.C. App. unpub. LEXIS 475 (Ct. App. Aug. 17, 2016). In *Coves Darden*, the Court of Appeals held that the plaintiff could not succeed on his breach of contract claim because the plaintiff “had only an agreement for employment at-will,” which could not be breached as a matter of law. *Id.* (citing *Grant v. Mount Vernon Mills, Inc.*, 634 S.E.2d 15, 19 (S.C. Ct. App. 2006) (“South Carolina has long recognized the doctrine of employment at-will. This doctrine allows either party to terminate the employment for any reason or no reason without being subject to a claim for breach of contract, subject to narrow exceptions and prohibitions against illegal discrimination”). In turn, the *Coves Darden* court held that the

plaintiff's tortious interference with contract claim was also subject to dismissal because the plaintiff's at-will employment was not a contract capable of being breached his employer. *Id.* ("Because we find [the plaintiff] cannot demonstrate a breach of contract, we find summary judgment was proper as to the tortious interference with a contract claim"). Therefore, dismissal of the tortious inference claim is appropriate when the employment relationship is nothing more than at-will. *See, e.g., Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 642 S.E.2d 726, 732 (S.C. 2007) ("An essential element to the cause of action for tortious interference with contractual relations requires the intentional procurement of the contract's breach. Where there is no breach of the contract, there can be no recovery.")

Simply put, in the absence of something more than an employment-at-will relationship, Plaintiff's cause of action for interference with contract cannot be sustained, as there is no underlying contract with which to interfere. Further, even if a contract did exist, a tortious interference claim cannot be sustained between co-workers based on a report by a subordinate of perceived unwanted sexual advances by a supervisor.

2. There is no Third Party to the Employment Relationship in the Facts Alleged

"It is settled beyond dispute that an action for intentional interference with contractual relations will not lie against one who is a party to the contract." *Ross*, 273 S.C. at 766, 259 S.E.2d at 815; *Threlkeld v. Christoph*, 280 S.C. 225, 226; 312 S.E.2d 14 (Ct. App. 1984); *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872 (S.D. Ga. 1983); *George A. Davis, Inc. v. Camp Trails Co.*, 447 F. Supp. 1304 (E.D. Pa. 1978); RESTATEMENT (SECOND) OF TORTS SECTION 766 (1979). The facts behind the Certified Question indicate that there is no third party to the alleged employment relationship in the scenario presented. *See* Order of Certification at 2-3.

The certifying court relies on *Todd v. S.C. Farm Bureau Mut. Ins. Co., et al.*, 283 S.C. 155, 165, 321 S.E.2d 602, 608 (Ct. App. 1984) but the factual background in *Todd* is clearly distinguishable from the facts in the case at bar. In *Todd*, plaintiff was hired as an insurance agent for the Mutual, Casualty and Life companies in March, 1970, and was subject to *written employment agreements*, terminable without cause, with each Farm Bureau company. *Id.* at 160. After an allegation of misconduct, the Farm Bureau companies engaged a third party, Equifax, to conduct an investigation. *Id.* In *Todd*, the court explained that where a third party induces an employee who is working under a contract terminable without cause, a cause of action may arise in favor of the employee against the third person.” *Id.* at 163-164. The *Todd* case is distinguishable because in the instant case, the facts alleged by Hall do not establish the existence of a written contract and, further, there is no third party. *Todd* involved a situation where a written contract with terms that altered employment at-will existed. The report which Hall contends led to his termination was an internal report by Reid, another employee of UBS, while Reid was acting as an employee and within the scope of her employment with UBS.

Based on the facts presented in the Certified Question, the intra-corporate doctrine applies, Reid was not a “stranger” to the employment relationship between Hall and UBS, and Reid was acting within the scope of her employment. *See Threlkeld*, 280 S.C. at 225; 312 S.E.2d at 14 (cause of action for tortious interference with contract did not lie against a party to the contract, or to that party’s agents who were acting solely on its behalf. Specifically, the court found that the employer and the supervisors were not outsiders to the contract at issue or that their conduct in any way induced the Company to act); *See also, BCD, LLC v. BMW Mfg. Co., LLC*, No. 6:05-CV-2152-GRA, 2007 U.S. Dist. LEXIS 2852, at *6 (D.S.C. Jan. 12, 2007) (South Carolina law on tortious interference consistently provided protection to all third parties within the business relationship

from the tort. This protection extends to parties engaging in legitimate business activity.); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 862 (D.S.C. 2015) (addressing state law claims for "tortious interference with contractual relations [and] interference with prospective contractual relations" and observing "though South Carolina has not adopted the 'Stranger Doctrine' in name, the law as it exists provides comparable protection to that of the 'Stranger Doctrine'"); *See also Atlanta Market Ctr. Mgmt. v. McLane*, 503 S.E.2d 278, 283 (Ga. 1998) ("to be liable for tortious interference with contractual relations the defendant must be a stranger to both the contract *and* the business relationships." Because co-workers are part of the job scene, they are within the relevant relationship, and not third parties.); *Ross*, 273 S.C. at 766, 259 S.E.2d at 815, *supra*; *Muller v. Stromberg Carlson Corp.*, 427 So. (2d) 266 (Fla. App. 1983) (holding it is clear that a corporate employer is a party to the contract of its employee, and an officer or agent of the corporation acting for or on behalf of the corporation is also not a third party).

This is consistent with the result that was reached in *Todd*. In *Todd*, the tortious interference claim *based on the actions of Farm Bureau's employees* were dismissed for lack of a third party. *Todd*, 283 S.C. at 164, 321 S.E.2d at 607-08 (intentional interference claim brought against Farm Bureau based on the actions of its employees was dismissed. The decision to terminate Todd was held to be the "actions . . . of a first party, not those of a stranger to the contract."). It was the actions of Equifax, a third party entity hired by Farm Bureau to investigate Todd, that were the basis of the tortious interference claim. *Id.* Reid and Hall shared an employer, UBS. Reid was acting within the scope of her employment with UBS when she complained to human resources regarding Hall's actions. Reid's direct employment with UBS is distinguishable from the relationship between Equifax and Farm Bureau.

The scenario presented in the Certified Question is also directly analogous to cases on other employment based torts, such as civil conspiracy,¹⁰ in which the intra-corporate doctrine is applied. There is no actionable civil conspiracy claim between co-workers in South Carolina because all persons involved are considered to be the same party. In South Carolina, a civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *Lawson v. S.C. Dept. of Corrections*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000). “However, a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities.” *McMillan v. Oconee Mem’l Hosp., Inc.*, 367 S.C. 559, 564-65, 626 S.E.2d 884, 886-87 (2006), citing, *Perk v. Vector Res. Grp, LTD*, 253 Va. 310, 485 S.E.2d 140, 144 (Va. 1997). A civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, conspiring with the corporation. *See Goble v. Am. Ry. Express Co., et al.*, 124 S.C. 19, 26-27, 115 S.E. 900, 903 (1923); *See also* 16 Am. Jur. 2d Conspiracy § 56 (2005) (stating “ a corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction, and control of the corporate affairs, where the individuals are acting only for the corporation and not for any personal purpose of their own”).

[N]o conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment.

McMillan., 367 S.C. at 565, 626 S.E.2d at 887. *See also Anvar v. Greenville Hosp. Sys.*, No. 2007-UP-004, 2007 S.C. App. Unpub. LEXIS 76, at *9 (Ct. App. Jan. 10, 2007) (A corporation can act

¹⁰ A civil conspiracy claim in this matter was also filed against Defendant Reid and Defendant McLaughlin. *See* Complaint, ECF No. 01-1. Defendant McLaughlin was dismissed based on Motion to Dismiss and Fraudulent Joinder. ECF No. 25. The claim against Reid has not yet been ruled upon.

only through its directors, officers, agents, and employees. Thus, because the actions of the Hospital's agents and employees were all performed while acting within the course and scope of their authority, Dr. Anvar's claim is barred by the intra-corporate conspiracy doctrine); *see also Cameron v. Church*, 253 F. Supp. 2d 611, 623 (S.D.N.Y. 2003) (stating "[t]he intra-corporate conspiracy doctrine provides that the officers, agents and employees of a single corporate or municipal entity, each acting within the scope of his or her employment, legally are incapable of conspiring together" and holding the plaintiff's claim of a civil conspiracy was barred by the intra-corporate conspiracy doctrine where the individual defendants were all acting within the scope of their employment for the County of Westchester and thus no actionable conspiracy existed as a matter of law). A civil conspiracy claim is also not cognizable when the claim is based on the termination of an at-will employment relationship. *Mills v. Leath*, 709 F. Supp. 671, 675 (D.S.C. 1988) (an at-will employee cannot maintain an action against a former employer for civil conspiracy that resulted in the employee's termination).

There is also, generally, no third party in defamation cases when the individuals involved are all within the same company. Defamation claims can arise when one employee makes an alleged false internal complaint against another employee. As long as the complaint is made within the proper channels and to the proper parties, as was done in this matter per the facts presented, there is no third party and the communications are subject to a conditional privilege. *See Harris v. Tietex Int'l Ltd.*, 417 S.C. 533, 790 S.E.2d 411, 415 (S.C. Ct. App. 2016) (Elements of conditional privilege include, among others, "publication in a proper manner and to proper parties." Simply alleging in a conclusory fashion that the alleged defamatory statements were made with "malice, mean-spirit, and without justification." is not enough. Such legal conclusions are insufficient as a matter of law and cannot be the basis on which a claim survives a motion to dismiss).

The same proposition holds true for a tortious interference claim. There is no logical argument that a tortious interference claim should be treated differently by the court than the analogous torts of civil conspiracy and defamation. The Supreme Court has made a comparable holding in a non-employment case. The court held managers of an LLC, acting within the scope of their employment, cannot be held personally liable for a tortious interference with contract claim. “It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation acting on behalf of the corporation and within the scope of his employment, the inducement is privileged and is not actionable.” *Dutch Fork Dev. Group II, LLC v. Sel Props., LLC*, 406 S.C 596, 603, 753 S.E. 2d 840, 843 (2012) citing *Bradburn v. Colonial Stores, Inc.*, 273 S.C. 186,188, 255 S.E. 2d 453, 455 (1979).

An internal report by an employee to human resources representatives of the employee’s employer regarding a supervisor’s inappropriate conduct including perceived unwanted sexual advances are not the action of a third party. They are the actions of an employee of the company and are thus one entity with the company for the purpose of employment-based torts. It is also an action taken that is clearly within the scope of the reporting employee’s job duties. Without a third party, a claim for tortious interference must fail.

3. Reporting Perceived, Unwanted Sexual Advances by a Supervisor to Human Resources is a Reasonable Justification

The allegations before the Court are that Reid contacted human resources to report conduct which a reasonable person would have perceived as unwanted sexual advances. According to the Certified Question, Hall kissed Reid on the cheek and offered for her to stay overnight at his home more than once on the evening of September 1, 2017. The existence of such inappropriate conduct by a member of management, Hall, is a “reasonable justification” to submit an internal complaint to human resources and, conversely, is not an improper purpose which would establish a claim for

tortious interference. As noted by the Certifying Court in the parentheses to footnotes 5-7, even in those states where the intentional interference cause of action is allowed in an at-will relationship, there must be an improper purpose alleged outside of the scope of the interfering employee's official job duties. *See Gaillard v. Fleet Mortg. Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995) (acknowledging "[i]nterference with a contract is justified when it is motivated by legitimate business purposes"). Here it is alleged Reid exaggerated her complaint to human resources of perceived unwanted sexual advances, despite Hall's admission that the events of September 1, 2017 did in fact occur. *See Order of Certification* at 3. This is not enough to meet the burden for a tortious interference claim.

Under South Carolina law, communications between employees, business associates, officers, or agents of the same corporation enjoy a qualified privilege. The elements of this qualified privilege are as follows:

Good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Bell v. Evening Post Publ'g Co., 318 S.C. 558, 560-61, 459 S.E.2d 315, 317 (Ct. App. 1995), quoting *Prentiss v. Nationwide Mut. Ins. Co.*, 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971). *See also, Rodgers v. Wise*, 193 S.C. 5, 7 S.E.2d 517 (1940).

Reid is an employee of UBS. *See Order of Certification* at 2-3. There are no substantive facts or allegations in the record that demonstrate that UBS failed to act in good faith in investigating Reid's allegations of perceived unwanted sexual advances. Further, because sexual discrimination/harassment in the workplace is proscribed by law, UBS undoubtedly had an interest in investigating allegations of perceived unwanted sexual advances made against one of its

supervisory personnel. S.C. Code Ann. § 1-13-80(a)(1) (A) (It is an unlawful employment practice for an employer: (1) to fail or refuse to hire, bar, discharge from employment, or otherwise discriminate against an individual with respect to the individual's compensation or terms, conditions, or privileges of employment because of the individual's race, religion, color, sex, age, national origin, or disability.); *see also* 42 U.S.C. § 2000e-2(a)(1). According to the facts before the Court, UBS and Reid properly limited in scope of the complaint and subsequent investigation to determine whether improper conduct in violation of the firm's policies had occurred. *See Weeks v. Union Camp Corp.*, No. 98-2814, No. 98-2815, 2000 U.S. App. LEXIS 12549, at *25 (4th Cir. June 7, 2000) (Union Camp's statement to its employees regarding the termination of Webster and Weeks was conditionally privileged because it occurred within the context of a communication between agents of the same corporation; there is no evidence that anyone outside of Union Camp was present when Union Camp informed its employees of Webster and Weeks's termination. Moreover, there was a common interest to be upheld because rumors were emerging among the employees that Union Camp needed to quell.); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) (“qualified privilege exists when the publication has occurred in a proper manner and to proper parties only”).

Accordingly, it is clear that because Reid is an employee of UBS, the intracorporate communications described herein are subject to a qualified privilege and are not actionable. Further, in accordance with the court's analysis in the *Todd* case, Reid's internal report did not constitute interference which coerced Hall's termination and there was a reasonable basis for submitting same. In *Todd*, the alleged actions of the third party, Equifax, were not enough to meet the burden of “procurement” of the alleged breach even though Equifax presented false

information to Farm Bureau at the conclusion of the investigation. In doing so, the Court of Appeals did acknowledge the ramifications of their decision, stating:

[o]f course we grasp the significance of the argument made by Todd that Equifax's actions set in motion a chain of events which ultimately led to his dismissal. The legal requirement, however, is evidence which supports a reasonable inference that Equifax's actions induced or coerced the Farm Bureau companies to discharge Todd.

Todd, 283 S.C. at 165, 321 S.E.2d at 508. Unlike Equifax, Reid was not a third party and her internal report about Hall to human resources does not meet this burden. Once a reasonable justification for an alleged interference is established, the claim for tortious interference cannot survive.

4. Allowing an Intentional Interference with a Contract Claim Against an Employee Reporting Another Employee's Bad Acts is Against Well-Established Public Policy Interests

Modern employment protections derive primarily from statutes that aim to deter discrimination, harassment, unlawful and unethical acts and regulatory violations. If an employer fails to deter these types of activities, employers may face liability for certain conduct by its employees of which it knew or should have known. In order to facilitate employers' ability to identify and address such violations, there is a strong policy interest in encouraging employees to report unlawful, unethical and discriminatory acts and providing protections for employees submitting those reports. For example, anti-discrimination statutes often spell out prohibited employment actions and identify the entities and/or individuals that can be held liable. Employment liability is most often limited to the employer, and in some occasions, the employee engaging in harassing or unlawful conduct. We are not aware of relevant statutes that impose liability on the recipient of admitted unwanted sexual advances for reporting said conduct, as Plaintiff seeks to do in this case.

Such a holding would be inconsistent with employment laws related to retaliation. *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543 (4th Cir. 2003) (“A plaintiff can prove illegal retaliation under Title VII or § 1981 if he shows that ‘(1) he engaged in protected activity, (2) he suffered an adverse employment action at the hands of [his employer]; and (3) [the employer] took the adverse action because of the protected activity.’”). An employee raising a discrimination claim is protected by federal law from retaliation for making said complaint. *Id.* at 543 (“Employees are thus guaranteed the right to complain to their superiors about suspected violations of Title VII”). Similarly, there are anti-retaliation statutes which provide a cause of action for individuals who have engaged in protected activity under S.C. Code Ann. § 1-13-80(F) of the South Carolina Human Affairs Law, to whistleblowers pursuant to S.C. Code Ann. § 8-27-30, public employees reporting wrongdoing in good faith under S.C. Code Ann. § 8-27-20, and employees who have initiated Worker’s Compensation Claims under S.C. Code Ann. § 41-1-80. In short, public policy supports the right of an employee such as Reid to submit an internal complaint to her employer without facing reprisals in the form of an adverse employment action or personal liability in a tort claim.

Moreover, it is the express policy of the state of South Carolina that “discrimination is unlawful and in conflict with the ideals of South Carolina and the nation, as this discrimination interferes with opportunities of the individual to receive employment and to develop according to the individual’s own ability and is degrading to human dignity.” S.C. Code Ann. § 1-13-20. That cannot be reconciled with allowing one at-will employee to state an actionable claim against another at-will employee for tortious interference with a contract in connection with an internal report made in good faith regarding the first employee’s harassing and inappropriate actions. Protections by employers against workplace discrimination, harassment and unlawful conduct

cannot be effectively afforded to employees if employees are fearful of individual lawsuits with potential individual liability resulting from reporting bad behavior. A company cannot protect employees from actions that it does not know are occurring. Without open door and other reporting methods, the legal protections against discrimination in the workplace will fail.

D. The Certified Questions Are Not Ripe for Review Pursuant to Rule 244 (a), SCACR

Finally, Defendants submit that the Supreme Court has discretion to answer questions of law certified to it by any federal court of the United States. Rule 244(a), SCACR. Certification is available upon request from the Certifying Court “if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.” *Id.*

In this matter, there is currently no motion pending on which to base the Certified Question before the Certifying Court. The Certified Questions were sent to the Supreme Court by the District Court following the filing of individual Motions to Dismiss on behalf of UBS and Reid. However, prior to the filing of the certified questions, the Defendants withdrew the pending Motions to Dismiss and moved to compel arbitration.

The Supreme Court has discretion to rescind its decision to answer a certified question. Rule 244(f), SCACR. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. . . . If there is no actual controversy, the Supreme Court of South Carolina will not decide moot or academic questions.”) (citations omitted); *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 261, 562 S.E.2d 633, 639 (2002) (declining to answer certified questions where questions “assume a dispute which may never arise” because this Court

will not issue advisory opinions). *See also Sangamo Weston, Inc. v. Nat'l Sur. Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992) (even when answering questions on certification, this Court will not issue advisory opinions).

V. CONCLUSION

Each of the three Certified Questions must be answered in the negative. When an employee enters into an at-will employment relationship no contract is created. As such, there can be no claim for a tortious interference with contract or breach of the duty of loyalty and good faith, a claim also based solely in contract.

Dated this 22nd day of January 2021.

Respectfully submitted,

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