STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON)	FOURTH JUDICIAL CIRCUIT
Joshua Phillips,)	Civil Action No. 2022-CP-16-01053
Plaintiff,)	
vs.)	**ORDER DENYING DEFENDANT'S MOTION FOR DISMISSAL AND TO COMPEL ARBITRATION**
Renu Energy Solutions, LLC,)	
Defendant.)	

This matter is before the Court on Defendant's motion for dismissal and to compel arbitration. A hearing was held on February 22, 2023. Andrew M. Connor, Esq., appeared at the hearing on behalf of Plaintiff; James Edward Bradley, Esq., appeared on behalf of the Defendant. Upon consideration of the submissions of the parties and arguments of counsel, the Court denies Defendant's motion for the following reasons:

INTRODUCTION

This case involves allegations of fraud and deceptive sales practices in the sale of a home solar panel system to Plaintiff for a price of $65,000. The purchase agreement contains an arbitration clause that states:

> 6. ARBITRATION
> With the exception of 1) suits or claims for money owed by Purchaser under this Agreement, 2) those suits or claims which deal with repossession of equipment and parts subject to this Agreement, 3) and those disputes which, by law, may not be submitted to Arbitration but must be determined by a judicial tribunal, any and all disputes arising out of or in connection with the Agreement shall, at the option of either party, be submitted to a panel of three arbitrators in the City of Charlotte, North Carolina, one to be appointed by each party, and the third by the two so chosen. If the parties agree, the dispute may be submitted to one arbitrator mutually agreeable to both parties. If there is a failure to select arbitrator(s) in this manner, then the arbitrator(s) shall be selected in accordance with the Rules of the American Arbitration Association. The decision of the arbitrator, or in the case of three

> arbitrators, of any two of them, shall be binding and final. The arbitration shall be held in accordance with the Rules of the American Arbitration Association. Judgment upon the award rendered may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order for enforcement as the case may be.

Based on this clause, Defendant moved this Court to compel Plaintiff to arbitrate his claims. Plaintiff opposed and argued that the clause is unconscionable because of the prohibitively expensive arbitration costs imposed on Plaintiff as arbitration would be mandated upon Plaintiff in accordance with the arbitration clause in this contract as well as the American Arbitration Association rules applicable to the dispute. After consideration, the Court finds that the arbitration clause is unconscionable and unenforceable because it imposes prohibitively expensive arbitration costs and fees on Plaintiff. Accordingly, Defendant's motion is denied.

LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), agreements to arbitrate disputes may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract[.]" 9 U.S.C. § 2. Unconscionability is among such generally applicable contract principles for invalidating arbitration clauses. *See Simpson v. Msa of Myrtle Beach, Inc.*, 644 S.E.2d 663, 373 S.C. 14 (2007) (invalidating arbitration clause as unconscionable).

DISCUSSION

I. The Arbitration Provision Is Unconscionable, Unenforceable, and Not Severable.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 644 S.E.2d at 668. "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the

unconscionable clause, or so limit its application so as to avoid any unconscionable result." *Id.* (citing S.C.Code § 36-2-302(1)). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir.1999)).

a. Plaintiff lacked any 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." *Id.* (citing *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir.1989)). Our Supreme Court has set out factors to consider in determining whether a contract was tainted by an absence of meaningful choice, including: "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* at 669.

Here, Plaintiff is an individual, not a substantial business concern, while Defendant is a corporate entity engaged in the business of selling and installing solar panels. Our Supreme Court has adopted the view of other courts that "sales agreements between consumers and retailers are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Id.* (internal quotations omitted). Consequently, there is great disparity in the Parties' bargaining power and sophistication. Moreover, the Plaintiff is a consumer who was presented with a non-negotiable form contract by Defendant on a take-it-or-leave-it basis. Thus, the contract in which the arbitration clause at issue in this case is embedded is an adhesion contract about which "there arises considerable doubt that any true agreement ever existed to submit disputes to

arbitration." *Simpson*, 644 S.E.2d at 669; *see also Damico v. Lennar Carolinas, LLC*, No. 28114, App. Case No. 2020-001048, (S.C. Sept. 14, 2022) (form contract given to all homebuyers with only a few, minor blank spaces to fill was a contract of adhesion).

Furthermore, as detailed in Plaintiff's affidavit filed with this Court, the Plaintiff did not possess the business judgment necessary to make him aware of the implications of the arbitration clause, the Plaintiff did not have a lawyer present to provide assistance in the matter, and the contract was hastily presented to Plaintiff for his signature after enduring lengthy, high-pressured sales tactics of the Defendant.

The inconspicuousness of the arbitration clause also plays a significant role in this analysis. While certain other provisions of the contract contain bolded or all-capitalized lettering, the arbitration provision in its entirety was written in the standard small print and embedded in paragraph six (6) of eighteen (18) total paragraphs. Thus, the arbitration provision was inconspicuous in light of its consequences. In *Simpson*, our Supreme Court, analyzing an arbitration clause under nearly identical circumstances, held that the plaintiff had no meaningful choice in agreeing to arbitration. *Simpson*, 644 S.E.2d at 669. So too, Plaintiff in this case had no meaningful choice.

b. The arbitration provision contains oppressive and one-sided terms.

i. Excessive Fees and Costs

Under the arbitration agreement Defendant is seeking to enforce, arbitration would proceed under the rules of the American Arbitration Association (AAA) before a panel of three arbitrators. Because the arbitration agreement is contained within an agreement for the purchase and installation of a solar panel system on Plaintiff's home, the AAA would apply its construction rules to the arbitration. *See* R-1, AAA Construction Industry Arbitration Rules

(https://adr.org/sites/default/files/Construction_Rules_Web.pdf). Under those rules, cases with three arbitrators are "subject to a minimum Initial Filing fee of $4,400" which is "payable in full by a filing party when a claim . . . is filed." *See* AAA Construction Industry Arbitration Rules Administrative Fee Schedules (https://go.adr.org/constructionfeeschedule). Thus, to file this case in arbitration, Plaintiff would be required to pay at least the minimum filing fee of $4,400. This is more than ten times the filing fee for federal court and more than twenty times the filing fee for state court in South Carolina.

In addition to the initial filing fee, the Plaintiff would be required to pay his share of a final fee of $3,850 prior to any final hearing on the matter. *See* AAA Construction Industry Rules, Administrative Fee Schedules (https://www.adr.org/sites/default/files/Construction_Arbitration_Fee_Schedule_0.pdf).

Moreover, under the AAA construction rules, Plaintiff would be required to "share equally in the compensation of the arbitrator" and would very likely be required to make an advance deposit toward that compensation prior to any hearing on the matter. *See* R-57(b) and R-58, AAA Construction Industry Arbitration Rules. The AAA does not publish rate information for its arbitrators. Nor is it possible for any consumer—whether before or after a dispute has arisen—to know how much arbitrator time would be necessary to reach a final decision on the matter. Arbitrator time is also affected by the actions of the litigants. This makes it possible for one of the parties to the arbitration, to waste arbitrator resources and drive upfront arbitration costs for the other party higher and higher with no cap. In all, these factors make it impossible for consumers like Plaintiff, plaintiffs' attorneys, or this Court to determine, in advance, the actual cost of arbitration.

According to the American Bar Association ("ABA"), AAA arbitrators' rates can vary wildly with compensation as low as $300 per hour to over $1,000 per hour.[1] It is not uncommon for a single arbitrator's fees to exceed $35,000 through a final hearing.[2] In the case of a three-arbitrator panel, such fees would be automatically tripled. Also, according to the ABA, such fee estimates are in line with the AAA's own statistics for three-arbitrator panel arbitrations placing the median fees for three-arbitrator panels at $124,029.[3] If the Plaintiff were required to shoulder the full filing fee and 50% of the arbitrator fees, it could cost the Plaintiff $56,900 or more to arbitrate this case. When compared to the solar panel purchase and installation agreement amount of $65,000, arbitration of any dispute under the solar panel agreement is prohibitively expensive.

Laws enacted in several states require the AAA to make certain consumer arbitration statistics publicly available. *See* California Code of Civil Procedure §1281.96, Maryland Commercial Law §§ 14-3901 to 3905 and New Jersey Statutes § 2A:23B-1 et seq. Those statistics are publicly available on the AAA's website at: https://www.adr.org/consumer. Plaintiff's counsel submitted an affidavit to this Court analyzing these statistics and concluding that the average total arbitrator's fee for a consumer construction dispute administered by the AAA is $13,000.94. Because three arbitrators are required under the arbitration clause, these fees are tripled. When added to the initial filing fee and 50% of the final fee, Plaintiff's exposure to the costs of arbitration under the arbitration clause, on average, is $25,826.41. Plaintiff submitted his own affidavit

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[1] Rothman, Deborah, "Trends in Arbitrator Compensation" ABA Dispute Resolution Magazine (Spring 2017) (https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/spring2017/3_rothman_trends_in_arbitrator.authcheckdam.pdf).

[2] *See* "Employment Arbitration: A Practical Assessment of Advantages and Disadvantages," New York Law Journal (Nov. 27, 2017); Testimony of Laura MacCleery before Congress, p. 7 (Oct. 25, 2007) (https://www.citizen.org/wp-content/uploads/finaltestimony.pdf).

[3] Levin, Howard, "Stiffing the Arbitrators and the Respondents: Arbitration Rule Changes Are Needed to Combat the Pay-Only-If-I'm-Winning Strategy of Claimants" ABA Dispute Resolution Magazine (Summer 2017) (https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/summer2017/3_summer_2017_levin.pdf).

indicating that such costs would be prohibitively expensive, and he would not be able to pursue his case if forced to pay them. Moreover, these average expected arbitration costs are close to half of the solar panel contract amount and are prohibitively expensive for that reason as well.

A significant number of federal courts, including in South Carolina, consider high arbitration fees as a factor in finding an arbitration agreement unconscionable. *See, e.g.*, *Knox v. Joe Gibson's Autoworld, Inc.*, 2008 WL 2077361, at *3 (D.S.C. May 8, 2008) (arbitration clause in car sale contract that imposed half of the costs of arbitration on the consumer was unconscionable, because it makes it likely that the consumer would not receive a full recovery under the deceptive trade practices act); *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013); *Gray v. Rent-A-Center W., Inc.*, 314 Fed. Appx. 15 (9th Cir. 2008) (fee-splitting provision unconscionable in light of plaintiff's uncontradicted testimony that he could not afford anticipated $7500 in expenses); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 269–270 (3d Cir. 2003) (requiring employee to pay costs ranging from $800 to $1000 a day for arbitration "effectively denied [the employees] for recompense for the [employer's] alleged misconduct"; "We therefore must find that the 'loser pays' provision is unconscionable as to these particular plaintiffs."); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *Kauffman v. U-Haul Int'l, Inc.*, 2018 WL 4094959, at *7 (E.D. Pa. Aug. 28, 2018); *Mantooth v. Bavaria Inn Rest., Inc.*, 2018 WL 2241130, at *7 (D. Colo. May 16, 2018); *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1165 (N.D. Cal. 2012) ("this Court finds that the arbitration clause is substantively unconscionable because Mr. Mance has shown that the fees required to initiate the arbitral process are unaffordable and that the arbitration agreement fails to provide him with an effective opportunity to seek a fee waiver"); *Simmons v. Morgan Stanley Smith Barney, L.L.C.*, 872 F. Supp. 2d 1002 (S.D. Cal. 2012) (FINRA rules requiring employee to

pay arbitration fees in excess of what he would pay to bring his action against former employer in court were substantively unconscionable under California law); *James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020 (S.D. Tex. 2012) (provision requiring employee to pay half of arbitration fees unconscionable under California law); *Antonelli v. Finish Line, Inc.*, 2012 WL 525538 (N.D. Cal. Feb. 16, 2012) (provision requiring individual to split arbitration fees and pay in advance is substantively unconscionable); *Horton v. Cal. Credit Corp.*, 2009 WL 2488031 (S.D. Cal. Aug. 13, 2009) (cost-splitting provision substantively unconscionable); *Wernett v. Serv. Phoenix, L.L.C.*, 2009 WL 1955612, at *7 (D. Ariz. July 6, 2009) (fee-splitting provision contributed to unconscionability); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 609–610 (E.D. Pa. 2007) (when shared costs of arbitration impose costs greater than filing a complaint in state or federal court upon the consumer, agreement is rendered substantively unconscionable); *Jones v. Household Realty Corp.*, 2003 WL 23750601 (S.D. Ohio Dec. 17, 2003) (when arbitration clause would require low-income plaintiffs to pay between $3000 and $4000 to have their claims heard, it is unenforceable because it "would deter a substantial number of similarly situated persons from attempting to vindicate their statutory rights in the arbitral forum"); *Torrance v. AAMES Funding Corp.*, 242 F. Supp. 2d 862 (D. Or. 2002); *Camacho v. Holiday Homes, Inc.*, 187 F. Supp. 2d 892 (W.D. Va. 2001) (arbitration fees under AAA Commercial Rules would effectively prevent plaintiff from vindicating her rights); *In re Knepp*, 229 B.R. 821 (Bankr. N.D. Ala. 1999) (arbitration unconscionable when it would cost the consumer initially anywhere from $500 to $7000, plus daily costs of hundreds of dollars, to arbitrate a dispute and the consumer, being in bankruptcy, could not afford that amount). *See also Ozormoor v. T-Mobile USA, Inc.*, 2008 WL 2518549, at *5 (E.D. Mich. June 19, 2008) ("The cost-splitting requirements are substantively unreasonable because imposing fees would deter Ozormoor and other similarly situated potential

litigants from pursuing their claims."), *aff'd*, 354 Fed. Appx. 972 (6th Cir. 2009); *Gelow v. Cent. Pac. Mortg. Corp.*, 560 F. Supp. 2d 972 (E.D. Cal. 2008) (cost-splitting provisions "have uniformly been found to be unconscionable, as they plainly favor the employer and discourage the employee from bringing his claims"); *Contorno v. Wiline Networks, Inc.*, 2008 WL 1944825 (D.N.J. May 1, 2008) (plaintiff employee proved that it would be prohibitively expensive to pay half the costs of arbitration); *AT&T Mobility II, L.L.C. v. Pestano*, 2008 WL 682523, at *6 (N.D. Cal. Mar. 7, 2008) (fee-splitting provision is unconscionable); *McManigal v. Medicis Pharm. Corp.*, 2008 WL 618909, at *4 (N.D. Cal. Mar. 3, 2008) (provision of arbitration clause requiring employee to pay half of the costs of arbitration is unconscionable).

A large number of state courts have arrived at the same conclusion. *See, e.g.*, *Brunke v. Ohio State Home Services, Inc.*, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008) (arbitration fees under AAA construction industry rules unconscionable under Ohio law); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 (Cal. 2003) (arbitration clause requiring employee to pay half of fees was unconscionable); *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993); *Gabriel v. Island Pac. Acad., Inc.*, 400 P.3d 526, 539–540 (Haw. 2017); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003) (arbitration clause requiring insured to pay at least $2500 to have a claim heard was unconscionable; it "is an expensive alternative to litigation that precludes the Murphys from pursuing the claim"); *Caplin Enterprises, Inc. v. Arrington*, 145 So. 3d 608 (Miss. 2014) (en banc); *D.R. Horton, Inc. v. Green*, 96 P.3d 1159 (Nev. 2004) ("[T]he district court properly considered Horton's failure to disclose potential arbitration costs in examining the asymmetrical effects of the provision. We . . . conclude that the arbitration provision was also substantively unconscionable."); *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) ($4000 fee, only $2000 of which would be refunded if the consumer prevailed); *Licitra*

v. Gateway, Inc., 734 N.Y.S.2d 389 (N.Y. Civ. Ct. 2001) (outlining the National Arbitration Forum's arbitration fees and concluding that "[i]t is obvious that these costs can make arbitration not a viable alternative for many consumers"); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859 (Ohio 1998); *Rude v. NUCO Educ. Corp.*, 2011 WL 6931516 (Ohio Ct. App. Dec. 30, 2011) (arbitration clause in nursing school enrollment contract was unconscionably expensive when students would have to pay a minimum of $1850 to file an arbitration claim and another $750 once the claim proceeded to an initial hearing); *O'Donoghue v. Smythe, Cramer Co.*, 2002 WL 145074 (Ohio Ct. App. July 3, 2002) (when limitation of liability clause limits recovery to $265 and arbitration fees are at least $500, clause is unconscionable); *Myers v. Terminix Int'l Co.*, 697 N.E.2d 277 (Ohio Ct. Com. Pl. 1998) (fees not only excessive, but not disclosed to the consumer in the original arbitration agreement); *Glassford v. BrickKicker*, 35 A.3d 1044 (Vt. 2011) (requirement that home buyer pay initial arbitration fee of $1350 plus $450 per day after first day of hearings, was exculpatory and void as against public policy); *Hill v. Garda CL NW, Inc.*, 308 P.3d 635 (Wash. 2013); *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197 (Wash. 2013) (when plaintiff submitted affidavit testimony establishing that cost of arbitration would exceed her claim this was sufficient to show that arbitration clause was prohibitively expensive and therefore unconscionable); *Gibson v. Nye Frontier Ford, Inc.*, 205 P.3d 1091, 1099–1101 (Alaska 2009) (holding fee-splitting provision unenforceable, even though costs that plaintiff would have to pay were uncertain, because requiring employee-plaintiff to pay half of arbitration costs was inconsistent with policy underlying state statute); *Ontiveros v. DHL Express (USA), Inc.*, 79 Cal. Rptr. 3d 471, 485 (Cal. Ct. App. 2008) ("Because an employee may not be required to pay fees unique to arbitration, the provision in the agreement requiring such payment is unlawful and hence substantively unconscionable."); *Liebrand v. Brinker Rest. Corp.*, 2008 WL 2445544 (Cal. Ct.

App. June 18, 2008) (cost-splitting provision unconscionable); *Brady v. Williams Capital Grp., L.P.*, 878 N.Y.S.2d 693, 699–702 (N.Y. App. Div. 2009) (holding fee-splitting provision unenforceable, without unconscionability analysis, because prohibitive costs would discourage plaintiff from vindicating her federal and state statutory rights), *aff'd*, 928 N.E.2d 383 (N.Y. 2010); *Hill v. NHC HealthCare/Nashville, L.L.C.*, 2008 WL 1901198, at *16 (Tenn. Ct. App. Apr. 30, 2008) ("The proof shows that the likely costs to simply initiate an arbitration under the agreement are very high, perhaps reaching $18,000. We, like the trial court, find this troubling. . . . [It] calls into question the enforcement of the agreement.").

According to Plaintiff's affidavits, Plaintiff makes $57,000 per year. Plaintiff's projected arbitration costs may range from $25,826.41 to $56,900, or more. Such fees and costs for arbitration are prohibitively expensive. Moreover, the likely arbitration costs imposed by Defendant's contract would affect all of Defendant's customers in South Carolina. Such arbitration costs are nearly as much as the median income in South Carolina of $28,569 as determined by the U.S. Census Bureau. Not only can Plaintiff not afford the likely arbitration fees for this case, but most South Carolinians cannot afford to pursue arbitration under the terms of Defendant's contract. As the drafter of its own form contracts, Defendant could have designated application of the AAA's consumer rules to this dispute which would cap Plaintiff's arbitration fees and costs at $225—barely more than the state court filing fee. *See* AAA Consumer Arbitration Rules Costs of Arbitration (https://adr.org/sites/default/files/Consumer_Fee-Schedule.pdf). Defendant, however, did not.

Courts considering the costs imposed on consumers by the AAA's construction industry rules have found such rules and the arbitration clauses requiring them to be unconscionable. *Brunke v. Ohio State Home Services, Inc.*, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008)

(arbitration fees imposed on consumers under AAA construction industry rules unconscionable). Furthermore, South Carolina's federal district court has recognized that requiring a consumer to split the exorbitant costs of arbitration is unconscionable because it offsets a plaintiff's recovery and plaintiff "could be denied full recovery otherwise available in the instant action should this case proceed to arbitration." *Knox v. Joe Gibson's Autoworld, Inc.*, 2008 WL 2077361, at *3 (D.S.C. May 8, 2008) (arbitration clause in car sale contract that imposed half of the costs of arbitration on the consumer was unconscionable, because it makes it likely that the consumer would not receive a full recovery under the deceptive trade practices act). Indeed, Rules 56 and 57 of the AAA's construction rules are nearly identical to the arbitration fee splitting provision in the clause at issue in *Knox*.[4] Just as in *Knox*, Plaintiff's award in this case is at risk of being subsumed by the costs of arbitration making it likely that Plaintiff would not receive full recovery on his statutory claims should this case proceed to arbitration. Accordingly, the arbitration provision is unconscionable and unenforceable.

The likely arbitration costs in this case are prohibitively expensive both in terms of the contract amount for the solar panels as well as Plaintiff's (and other similarly situated consumers') ability to pay. The costs would also offset a significant portion of the damages recoverable by Plaintiff thereby denying Plaintiff full recovery for his statutory claims. Moreover, the costs are far in excess of the costs for Plaintiff to litigate in this Court or what any reasonable, fair, and honest person would require or accept. Thus, the arbitration provision and its terms are oppressive and one-sided and, thus, unconscionable and unenforceable.

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[4] The agreement in *Knox* provided that "[t]he parties agree to bear the costs of arbitration equally, which costs shall be apportioned and awarded by the arbitrator at the time of his decision[.]" *Knox*, 2008 WL 2077361, at *3. Rule 56 of the AAA's construction rules provides, in part, that the "expenses of the arbitration . . . shall be borne equally by the parties . . . unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties." R-56, AAA Construction Industry Rules (https://adr.org/sites/default/files/Construction_Rules_Web.pdf). Rule 57 of the same rules provides that "each party shall share equally in the compensation of the arbitrator, subject to reapportionment in the final award." R-57, AAA Construction Industry Rules.

ii. Non-mutual Arbitration Protects Defendant at Plaintiff's Expense

To avoid paying high arbitration fees and costs itself, Defendant's arbitration clause specifically carves out the only conceivable claims it might bring against Plaintiff. The clause excepts "suits or claims for money owed by Purchaser under this Agreement" and "suits or claims which deal with repossession of equipment and parts subject to this Agreement" from any arbitration requirement. Because payment is Plaintiff's primary obligation under the agreement and payment is secured by the equipment, these two exceptions constitute all of the likely claims Defendant might bring against a purchaser such as Plaintiff. Thus, while Plaintiff faces prohibitively expensive arbitration costs for bringing his claims, Defendant can avail itself of the minimal costs of proceeding with its claims in court.

The "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson*, 644 S.E.2d at 672. Yet, the lack of mutuality coupled with prohibitively expensive arbitration costs for Plaintiff but not for Defendant makes this particular arbitration clause especially troubling. By drafting such an agreement, Defendant favors its own claims while insulating itself, through prohibitively expensive arbitration costs, from any potential claims. This dynamic deprives the Plaintiff of any remedy while preserving all of Defendant's potential remedies. For this additional reason, the arbitration provision is oppressive, one-sided, and does not promote a neutral and unbiased arbitral forum. Accordingly, the arbitration provision is unconscionable and unenforceable.

iii. Venue Provision Unconscionable and Against Public Policy

While no appellate court in South Carolina has addressed this issue, federal courts in South Carolina have recognized that S.C. Code § 15-7-120 embodies a strong public policy disfavoring

venue and forum selection clauses.[5] *See Insurance Products Marketing v. Indianapolis Life*, 176 F.Supp.2d 544, 550 (D.S.C. 2001) ("[T]he fact that the statute is applicable to all civil cases across the board . . . leads the court to conclude that the legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect."); *Consolidated Insured Benefits v. Conseco Medical*, 370 F.Supp.2d 397, 401 (D.S.C. 2004) ("[T]he court reaffirms its conclusion that South Carolina has a strong policy disfavoring forum selection clauses. While the legislators may not have declared the state policy in the text of the statute, the statute embodies South Carolina's policy against forum selection clauses through what it expressly allows.").

Here, the arbitration provision in question calls for the arbitration to take place in Charlotte, North Carolina, despite the fact that the contract was the result of a solicitation at Plaintiff's home in Darlington County and for the purchase and installation of a solar panel system in Darlington County. This venue provision favors Defendant as Defendant is headquartered in Charlotte, North Carolina, and adds to the disproportionate and prohibitively expensive arbitration costs to be borne by Plaintiff under the arbitration clause. Such a provision is oppressive, one-sided, and contrary to the public policy of South Carolina. As a result, the arbitration provision is unconscionable and unenforceable.

c. The arbitration provision is not severable.

Our Supreme Court's recent ruling in *Damico v. Lennar Carolinas, LLC*, summarizes the law on severability of arbitration clauses:

[5] Defendant may rely on *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010), in support of the opposite conclusion. That decision, however, relied on the absence of controlling South Carolina appellate authority. Indeed, this issue has never been squarely decided by our Supreme Court. As some district court opinions have noted, "the court . . . finds it more suitable for . . . the South Carolina courts to espouse such a policy." T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc., C/A No. 3:10-2250-JFA, *7 (D.S.C. Nov. 17, 2010). This Court espouses such a policy.

> If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003); *Lackey*, 330 S.C. at 397, 498 S.E.2d at 903; 17A Am. Jur. 2d Contracts § 313. However, severability is not always appropriate to remedy unconscionable contractual provisions. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673; 17A Am Jur. 2d Contracts § 314. In particular, courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement "such that only a disintegrated fragment would remain after hacking away the unenforceable parts." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); see also 17A Am Jur. 2d Contracts § 314. In those cases, judicial severing "look[s] more like rewriting the contract than fulfilling the intent of the parties." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); see also 17A Am Jur. 2d Contracts § 313.
>
> Thus, "[c]ourts have discretion [] to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." *Doe v. TCSC, L.L.C.*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020); *see also Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (noting there is no specific set of factual circumstances indicating when complete invalidation of the contract is a better option than merely excising the offending clauses). In exercising their discretion, courts should be guided by the parties' intent. *Doe*, 430 S.C. at 615, 846 S.E.2d at 880; 17A Am. Jur. 2d Contracts §§ 313-14; see also 17A Am. Jur. 2d Contracts § 273 ("To assess whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract.").

Damico v. Lennar Carolinas, LLC, No. 28114, Appellate Case No. 2020-001048 (S.C. Sept. 14, 2022).

Here, because of the "multitude of one-sided terms" present in the arbitration clause, this Court will sever the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions. *Simpson*, 644 S.E.2d at 674. Otherwise, if this Court were to sever the multiple unenforceable provisions, "there is essentially nothing left." *Damico*, at *18. Moreover, because the agreement is an adhesion contract, it is "considerably doubtful any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) ([Plaintiff]) had no hand in drafting or negotiating any of the language of the arbitration agreement." *Id.* Finally, South

Carolina has a public policy to protect consumers in the construction context. *Id.* Allowing companies, like Defendant, to overreach by inserting unenforceable arbitration provisions in their contracts to carry out their intended *in terrorem* effect on consumers while only substituting narrower terms when those provisions are challenged would simply incentivize Defendant and others to continue. Thus, enforcement of the severability clause in this context would contravene public policy. *Id.* at 21. For these reasons, this Court declines to enforce the arbitration clause, as a whole, as unconscionable and against public policy.

CONCLUSION

For all of the foregoing reasons, Defendant's motion to dismiss and compel arbitration is hereby denied.

SIGNATURE PAGE TO FOLLOW

Darlington Common Pleas

Case Caption: Joshua Phillips VS Renu Energy Solutions, Llc

Case Number: 2022CP1601053

Type: Order/Alternative Dispute Resolution

So Ordered

s/ Michael S. Holt, 2772