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 RECONSIDERATION**
Renu Energy Solutions, LLC,	)	
Defendant.	)	

This matter is before the Court on Defendant's motion for reconsideration of the Court's order denying Defendant's motion to compel arbitration. A hearing was held on January 8, 2024, at 10:30 AM before the Honorable Michael S. Holt, Circuit Judge. Andrew M. Connor, Esq., appeared at the hearing on behalf of Plaintiff and 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 reasons that follow:

DISCUSSION

I. Defendant Has Had Its Opportunity To Respond.

In its motion, Defendant argued that this Court considered and included references to evidence submitted after the hearing on the original motion to compel arbitration. This Court set the present motion for a hearing and allowed Defendant to contest the evidence and submit its own evidence in support of its position. Defendant has, thus, had its opportunity to respond. Having reconsidered the original evidence in light of Defendant's response, evidence, and arguments, this Court reaches the same conclusion and, therefore, denies Defendant's motion for reconsideration.

II. Evidence Considered By The Court Was Admissible.

In its motion, Defendant objected to the Court's consideration of the evidence offered by Plaintiff on the subject of the cost of arbitration on the grounds that it was hearsay. Defendant's motion does not specify which statements it believes constitute inadmissible hearsay. *See Foster v. S.C. Dep't of Highways & Pub. Transp.*, 306 S.C. 519, 523, 413 S.E.2d 31, 34 (1992) ("[W]here evidence is objected to in its entirety, some portion of which is admissible, such objection is not well taken, even though some portions of the evidence are in fact inadmissible."); *State v. Byers*, 392 S.C. 438, 710 S.E.2d 55 (2011) (objections must be made "with sufficient specificity to inform the circuit court judge of the point being urged by the objector..."); *see also* 88 C.J.S. Trial § 229 (2001) ("A general objection to evidence... will not... avail if any part of the evidence objected to is admissible.").

The evidence submitted regarding the projected costs of arbitration was in the form of an affidavit of Plaintiff's counsel analyzing arbitration cost data published by the American Arbitration Association ("AAA"). To the extent, Defendant's hearsay objection is based on the reliance on such data—rather than personal experience or knowledge—Defendant's objection is overruled. The data relied upon are collected by the AAA pursuant to various state law requirements and would constitute records of regularly conducted activity—an exception to the hearsay rule. *See* S.C.R.Evid. 803(6). Accordingly, Defendant's motion is denied.

III. Plaintiff Carried His Burden In Proving Projected Costs Of Arbitration.

Defendant argues that the AAA Consumer Rules—rather than the more costly Construction Rules—would apply to this dispute. Plaintiff, however, provided direct evidence for this Court's consideration of multiple instances of the AAA applying its more costly Construction Industry Arbitration Rules in arbitrations between consumer purchasers of solar panels and the sellers and installers of those panels—the exact situation presented in this case. Consequently, Plaintiff has

carried its burden on proving which set of rules the AAA would apply in this case as well as the projected costs of arbitration. Defendant's motion is denied.

IV. Non-Mutual Arbitration Provisions, On Their Own, Not Unconscionable.

Defendant argues that lack of mutuality does not make an arbitration agreement unenforceable. This Court agrees. As the Supreme Court has stated, "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson v. Msa of Myrtle Beach, Inc.*, 644 S.E.2d 663, 672, 373 S.C. 14 (2007). But, as stated in this Court's previous order, it is the lack of mutuality **coupled with** prohibitively expensive arbitration costs for Plaintiff but not for Defendant which makes this particular arbitration clause unconscionable.

V. The Venue Provision Requiring Arbitration Outside South Carolina Is Unconscionable And Against Public Policy.

Defendant argues that it would agree to venue for the arbitration at a place of Plaintiff's choosing. This concession after the time of contracting does not save the arbitration provision. "Unconscionability is gauged at the time the contract was made." *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020); *see also* S.C. Code § 37-5-108(1)(b) (unconscionability of contract term determined "at the time it was made"). The terms of the venue provision, as written, were unconscionable and against public policy at the time the contract was made. Defendant's motion is denied.

VI. Defendant Waived Its Right To Compel Arbitration.

Regardless of the costs involved, Defendant waived its right to compel arbitration. Under the generally applicable doctrine of waiver, "[a] waiver is an intentional relinquishment of a known right." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158, 355 S.E.2d 282, 285 (Ct. App. 1987) (citing *Bonnette v. State*, 277 S.C. 17, 282 S.E.2d 597 (1981)); *see also Morgan v. Sundance, Inc.,* No. 21-328, 596

U.S. ___ , at *6 (Sup. Ct. May 23, 2022) ("Waiver, we have said, is the intentional relinquishment or abandonment of a known right."). "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." *Id.* (citing *Pitts v. New York Life Insurance Company*, 247 S.C. 545, 148 S.E.2d 369 (1966)). "To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party." *Morgan v. Sundance*, at *6.

In the present case, Defendant has proceeded to engage in discovery with the service of requests to admit on Plaintiff on January 24, 2023. As such, Defendant availed itself of litigation procedures in this Court which would be unavailable in arbitration. By litigating in this Court and actively propounding discovery requests to Plaintiff, Defendant has taken advantage of the discovery mechanisms under the rules of procedure which would not otherwise be available in arbitration and, thus, has waived its right to compel arbitration. *See Davis v. KB Home of S.C., Inc.*, 713 S.E.2d 799 (S.C. Ct. App. 2011) (waiver after "extensive discovery," including producing documents, responding to interrogatories, noticing and rescheduling depositions, and so forth); *Evans v. Accent Manufactured Homes, Inc.*, 575 S.E.2d 74 (S.C. Ct. App. 2003) (finding waiver when the defendant "availed itself of discovery tools unavailable in arbitration," thus "obtaining information from [plaintiff] it might not have been able to otherwise obtain," and also necessitating plaintiff's own costly pursuit of discovery); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (finding waiver when moving party presented no plausible reason for waiting until after discovery to move for arbitration); *Freaner v. Valle*, 966 F. Supp. 2d 1068, 1085–1086 (S.D. Cal. 2013) (active participation in discovery process supported waiver ruling); *Riverbend Capital, L.L.C. v. M/V Caitlin*, 2013 WL 1992037, at *10 (E.D. La. May 13, 2013) (fact

that defendants "fully engaged in the discovery process" before seeking arbitration supported waiver ruling); *Sacks v. DJA Auto.*, 2013 WL 210248, at *6 (E.D. Pa. Jan. 18, 2013) (defendant's participation in discovery supported waiver ruling); *Smith v. IMG Worldwide, Inc.*, 360 F. Supp. 2d 681, 687 (E.D. Pa. 2005) (waiver found when party engaged in extensive motions practice, assented to court orders, requested and provided discovery, and obtained discovery not available in arbitration); *Chan v. Glendale Auto Properties*, 2010 WL 3156755 (Cal. Ct. App. Aug. 11, 2010) (defendant sought more far-reaching discovery than would have been allowed in arbitration, which was inconsistent with demand for arbitration); *Wright v. Direct Capital Sec., Inc.*, 2010 WL 659073 (Cal. Ct. App. Feb. 14, 2010) (defendant "engaged in judicial discovery methods not available in arbitration proceeding" and moved to compel arbitration only days before trial); *Sobremonte v. Super. Ct.*, 72 Cal. Rptr. 2d 43 (Cal. Ct. App. 1998) (finding waiver when moving party enjoyed the "advantage of judicial discovery procedures not available in arbitration"); *Lion Gables Realty Ltd. v. Randall Mech., Inc.*, 65 So. 3d 1098, 1100 (Fla. Dist. Ct. App. 2011) ("Florida's appellate courts have consistently found waiver where a party participates in discovery on the merits before moving to compel arbitration."); *Green Tree Servicing, L.L.C. v. McLeod*, 15 So. 3d 682, 694 (Fla. Dist. Ct. App. 2009) ("[A] party's participation in discovery related to the merits of the pending litigation is activity that is generally inconsistent with arbitration. Such activity—considered under the totality of the circumstances—will generally be sufficient to support a finding of waiver of a party's right to arbitration."); *Nussbaum v. Fogel*, 2012 WL 6554250 (N.Y. App. Term. Dec. 7, 2012) (fact that defendants served discovery demands and received responses supported waiver ruling); *Moose v. Versailles Condo. Ass'n*, 614 S.E.2d 418, 422–423 (N.C. Ct. App. 2005) (waiver found when defendant obtained discovery and then moved to compel arbitration in order to prevent plaintiff from receiving any discovery); *Liberty Credit*

Services Assignee v. Yonker, 2013 WL 5221219, at *5 (Ohio Ct. App. Sept. 16, 2013) (participation in discovery supported waiver ruling); *Academic Support Services, L.L.C. v. Cleveland Metro. Sch. Dist.*, 2013 WL 1501653, at *3 (Ohio Ct. App. Apr. 11, 2013) (participation in discovery supported waiver ruling).

Defendant's motion is denied.

CONCLUSION

For all of the foregoing reasons, Defendant's motion for reconsideration is hereby denied.

_____
Hon. Michael S. Holt
Circuit Judge
4th Judicial Circuit

Darlington, South Carolina
_____, 2024

Darlington Common Pleas

Case Caption: Joshua Phillips VS Renu Energy Solutions, Llc

Case Number: 2022CP1601053

Type: Order/Other

So Ordered

s/ Michael S. Holt, 2772