

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2026-000058

Case No. 2024-CP-10-02646

Peter Skoler and Patricia Skoler, Appellants,
v.

Vacation Inspirations, Destination Travel, LLC, Joseph Shirley, Randy Gardner, and Jeffrey
Pumilia Respondents,

APPELLANTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER AN ORDER COMPELLING AN ARBITRAL PROCESS LACKING MINIMUM DUE PROCESS GUARANTEES AFFECTS A CONSUMER'S SUBSTANTIAL RIGHT BY DEPRIVING THE CONSUMER ACCESS TO A NEUTRAL ADJUDICATIVE FORUM.
- II. WHETHER THE PROPER LEGAL STANDARD FOR MOTIONS TO COMPEL ARBITRATION UNDER THE FAA IS AN ISSUE CAPABLE OF REPETITION.
- III. WHETHER A UNILATERAL ARBITRATOR-SELECTION PROVISION IN A CONSUMER CONTRACT IS FUNDAMENTALLY UNFAIR AND INVALID UNDER THE FAA.
- IV. WHETHER A UNILATERAL ARBITRATOR-SELECTION PROVISION IN A CONSUMER CONTRACT IS INVALID AS A MATTER OF SOUTH CAROLINA LAW.
- V. WHETHER THE LEGAL STANDARD ON MOTIONS TO COMPEL ARBITRATION UNDER THE FAA IS AKIN TO A SUMMARY JUDGMENT STANDARD.
- VI. WHETHER AN ARBITRATION CLAUSE CHALLENGED AS UNCONSCIONABLE BY A CONSUMER "CLEARLY AND UNMISTAKABLY" DELEGATES QUESTIONS OF ITS OWN VALIDITY TO THE ARBITRATOR BY INCORPORATING THE AAA COMMERCIAL RULES.
- VII. WHETHER THE CIRCUIT COURT ERRED BY FAILING TO CONDUCT THE FACT-INTENSIVE INQUIRY REQUIRED WHEN AN ARBITRATION PROVISION IS CHALLENGED AS UNCONSCIONABLE.
- VIII. WHETHER A CONSUMER ARBITRATION PROVISION INVALIDATED UNDER BOTH THE FAA AND SOUTH CAROLINA LAW CAN NEVERTHELESS BE SEVERED

STATEMENT OF THE CASE

This action arises out of two Court of Common Pleas' Orders. The first granting Respondents' Vacation Inspirations, Destination Travel, LLC, Joseph Shirley, Randy Gardner, and Jeffrey Pumilia (the "Respondents") Motion to Compel Arbitration and Stay the Case under the Federal Arbitration Act (the "FAA") and the second declining reconsideration.

The action was commenced on May 21, 2024, when Appellants Peter and Patricia Skoler (the "Appellants") filed a Summons and Verified Complaint in the Charleston County Court of Common Pleas. (R. _("Compl.").)

The Verified Complaint brings claims under the South Carolina Unfair Trade Practices Act ("SCUTPA"), South Carolina contract claims, and other common law claims arising from Appellants' signing of a document titled "Purchase Agreement" containing a "Dispute Resolution" provision (the "Arbitration Provision") as follows:

Any controversy, claim or dispute arising out of or relating to this Purchase Agreement, shall be resolved and decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "AAA") (however, not under the auspices of AAA) and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator shall be selected by VI. Upon final award, arbitrator compensation and cost of the location shall be paid by the non-prevailing party. The arbitration shall take place in Charleston, S.C. at the Charleston County Courthouse or other location determined by VI.

(R. _). Counsel for the Respondents Vacation Inspirations ("VI"), Destination Travel, LLC, Joseph Shirley, Randy Gardner, and Jeffrey Pumilia (the "Respondents") signed an Acceptance of Service on June 5, 2024, and filed their Answer on July 3, 2024. On November 5, 2024, Appellants served written discovery requests on Respondents. Respondents filed a Motion to Compel Arbitration and Stay Proceedings on November 12, 2024. (R. _). By email dated November 22, 2024, Respondents declined to respond to Appellants' discovery requests. (R. _). By notice dated February 28, 2025, the circuit court scheduled oral arguments on the motion for March 27, 2025. Appellants filed a memorandum in opposition on March 13, 2025. (R. _); Respondents filed a memorandum in support on March 25, 2025. (R. _); prior to Appellants' surreply on March 26, 2025. (R. _). Oral

arguments were held before the Honorable Deadra L. Jefferson on March 27, 2025. (R. _). No trial was held on any issue. On April 3, 2025, Respondents filed a proposed order that was requested by the circuit court at oral arguments. (R. _ (“R’s Prop. Order”).). Appellants filed their own proposed order. (R. _).

On July 25, 2025, the circuit court entered an order granting Respondents’ motion to compel arbitration and staying the proceedings pending arbitration. (R. _ (“Arb. Order”).) On August 2, 2025, Appellants filed a motion for reconsideration. (R. _). On August 15, 2025, Respondents filed an opposition to reconsideration. (R. _ (“R’s Recon. Memo”).) On September 4, 2025, Respondents filed an amended opposition to reconsideration. (R. _ (“R’s Am. Recon. Memo”).) On September 10, 2025, Appellants filed a reply in support of reconsideration. (R. _). Appellants’ motion for reconsideration was denied on December 12, 2025. (R. _ (“Recon Order”).)

Appellants filed a Notice of Appeal on January 8, 2026. Twelve days later, the Court of Appeals entered an Order of Dismissal. Then on February 3, 2026, Appellants filed a Petition for Rehearing. On April 1, 2026, the Court of Appeals granted Appellants’ Petition for Rehearing and reinstated the Appeal. On April 9, Appellants moved to consolidate this appeal with a similar appeal, extend the time to file their initial brief and designation of matter, be permitted to file an enlarged brief.

INTRODUCTION

This case concerns an Arbitration Provision that lacks even basic due process guarantees and is therefore invalid under the Federal Arbitration Act (“FAA”) and South Carolina law. The agreement is a consumer contract containing multiple one-sided and oppressive terms, including granting Respondents unilateral authority to select the arbitrator. Appellants signed the agreement in a high-pressure sales environment.

The FAA recognizes arbitration as a legitimate alternative to in court dispute resolution, so long as it provides certain minimum guarantees of due process. Due process is guaranteed by both the United States Constitution and the South Carolina Constitution regardless of whether a dispute is resolved in court or through a different “mode of trial,” such as arbitration. A core tenet of due

process is adjudication before an impartial forum. Where an arbitration process lacks neutrality, litigants are deprived of one of the most fundamental “substantial rights”: due process itself.

Although orders compelling arbitration are ordinarily not immediately appealable, this is an extraordinary case in which Appellants’ substantial rights are directly implicated. The trial court’s orders oust Appellants from a neutral judicial forum; compel them to submit to an arbitration scheme that lacks an impartial decisionmaker; and fails to otherwise provide even minimal due-process protections.

The dispute resolution process devised by Respondents and compelled by the trial court amounts to a *sham* process—one so *warped* and void of due process that it cannot serve as a legitimate substitute for adjudication in a court of law. The central defect rendering this process devoid of minimum due process protections—and therefore outside the scope of the Federal Arbitration Act—is Respondents’ unilateral power to select the arbitrator. The Arbitration Provision’s operative language is undisputed: “The arbitrator shall be selected by [Vacation Inspirations].” A one-party arbitrator-selection mechanism of this kind is “fundamentally unfair, substantively unconscionable, unenforceable and void” and it “undermine[s] neutrality and *must fail*.” 1 Oehmke, Commercial Arbitration § 54:5 (emphasis added); *see also id.* § 10:37 (“When one party exercises exclusive control over the pool from which the arbitrator is selected, the selection process is fundamentally unfair and lacks neutrality, preventing arbitration from being an effective substitute for a judicial forum.”); *see also Flores v. New York Football Giants, Inc.*, 150 F.4th 172, 185 (2d Cir. 2025) (“[W]e additionally find persuasive some of the reasoning of the Fourth and Sixth Circuits, respectively, which refused to enforce arbitration provisions because of the *unilateral selection of arbitrators*.” (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939–40 (4th Cir. 1999) & *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493–94 (6th Cir. 2004))) (emphasis added).

Because such an arbitral scheme necessarily deprives parties of “a fair hearing before a legally constituted impartial tribunal,” it lacks “[p]rocedural due process” and therefore affects substantial rights. *See State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016). Where, as here,

an order implicates the fundamental substantial right of due process, S.C. Code Ann. § 14-3-330(2) provides that the order is immediately appealable.

Immediate appeal is not only permitted but required here. Under South Carolina law, “failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.” *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (collecting cases). Courts applying the Federal Arbitration Act likewise recognize that “[t]he general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair.” *Walker v. Ryan’s Fam. Steak Houses, Inc.*, 400 F.3d 370, 385 (6th Cir. 2005) (citing *McMullen*, 355 F.3d 485, 494 n. 7). In other words, “‘the arbitral forum is not an effective substitute for a judicial forum,’ and, therefore, the party need not arbitrate first and then allege bias through post-arbitration judicial review.” *Id.* (quoting *McMullen*, 355 F.3d at 494 n. 7); *see also Hooters*, 173 F.3d at 941 (same).

STATEMENT OF FACTS

The Arbitration Provision is conspicuously embedded within a broader consumer agreement that Appellants allege in their Verified Complaint is unconscionable and contrary to the FAA. The Arbitration Provision empowers the Respondents—unilaterally and without constraint—to select the arbitrator and venue, impose commercial arbitration rules on unsophisticated consumers, bypass any reputable administering body, and, after an inevitably adverse award issued by its hand-picked decision-maker, saddle the consumer with the full costs of the proceeding.

A. APPELLANTS’ HIGH-PRESSURE SALES EXPERIENCE

Appellants Peter and Patricia Skoler are residents and citizens of Massachusetts. (R. ___ (Compl. ¶ 1).) In March 2022, Appellants traveled to Charleston, South Carolina as visitors. (R. ___ (*Id.* ¶ 10).) While walking on a Charleston street on March 21, 2022, Appellants were approached and told they could receive free sightseeing tickets if they attended a sales presentation. (R. ___ (*Id.* ¶ 11).) Appellants later learned the presentation was for a Vacation Inspirations travel membership, distributed by Respondent Destination Travel, LLC. (R. ___ (*Id.* ¶ 12).)

When Appellants arrived at what appeared to be a legitimate Charleston visitor bureau location, they were directed upstairs to a medium-sized room where six or seven mostly older couples were seated at small tables. (R. _ (*Id.* ¶ 13).) Each couple, including Appellants, met individually with a Destination Travel salesperson for approximately 15 minutes. (R. _ (*Id.* ¶ 14).) The salesperson rapidly flipped through a notebook that he claimed contained numerous favorable reviews from prior members, but did so at a pace that prevented Appellants from reading, evaluating, or authenticating the reviews. (R. _ (*Id.* ¶¶ 15–16).) When Appellants attempted to examine the notebook themselves, the salesperson immediately removed it. (R. _ (*Id.* ¶ 17).)

The salesperson asked Appellants about their travel preferences and future plans. (R. _ (*Id.* ¶¶ 18–19).) Based on Appellants’ responses, the salesperson represented that Appellants could expect to save 40–60% on travel costs through the Vacation Inspirations membership. (R. _ (*Id.* ¶ 19).) Throughout the discussion, the salesperson provided affirming responses designed to convey that the membership was uniquely suited to Appellants’ travel goals. (R. _ (*Id.* ¶ 20).)

Following the individual meetings, Appellants were subjected to a 45-minute group PowerPoint presentation. (R. _ (*Id.* ¶ 21).) At the outset, the salesperson stated that attendees were not permitted to use their cell phones and threatened to restart the presentation if phones were used. (R. _ (*Id.* ¶ 22).) When one Appellant briefly took out his phone to conduct a Google search, the salesperson publicly scolded him and demanded that the phone be put away. (R. _ (*Id.* ¶¶ 23–24).)

Appellants later learned that, had they been permitted to use their phones, they would have discovered numerous negative online reviews of Respondents on platforms including the South Carolina Department of Consumer Affairs, Yelp, TripAdvisor, and the Better Business Bureau. (R. _ (*Id.* ¶ 25).) During the presentation, Respondents compared their services to booking platforms such as Expedia and Travelocity, claiming a simpler booking process and superior travel experiences for members. (R. _ (*Id.* ¶ 26).)

At the conclusion of the group presentation, the salesperson offered a \$2,000 discount to the first couple who raised their hands to purchase a membership. (R. _ (*Id.* ¶ 27).) Another couple responded almost immediately, creating the impression of a fleeting opportunity. (R. _ (*Id.* ¶ 28).)

Appellants were then approached by a husband-and-wife sales team, escorted into an office, and offered the same \$2,000 “limited opportunity” discount. (R._ (*Id.* ¶¶ 29–30).)

The sales team escalated pressure, namely extending favorable terms, monopolizing the conversation, and discussing aspirational travel experiences until Appellants—worn down by the tactics—agreed to purchase a membership. (R._ (*Id.* ¶¶ 31–32).) The sales representative took out a Purchase Agreement and told Appellants they needed to sign quickly, in stark contrast to the protracted sales pitch. (R._ (*Id.* ¶ 33).)

Appellants were instructed how to complete a Vacation Inspirations Membership Acknowledgment, including being told to answer “yes to everything except no to #10.” (R._ (*Id.* ¶ 34).) Appellants were pressured to sign the Purchase Agreement without an opportunity to read the documents, consult counsel, or meaningfully consider the terms. (R._ (*Id.* ¶ 35).)

Throughout the ordeal, Appellants were subjected to high-pressure and deceptive sales tactics, including a cellphone ban, rushed contracting, representations that the opportunity was available only that day, false claims regarding customer satisfaction, coercive conduct preventing informed choice, and the manufactured appearance of scarcity. (R._ (*Id.* ¶¶ 36–37).)

The Purchase Agreement was a form contract, completed by Respondents using Appellants’ information in select areas. (R._ (*Id.* ¶ 40).) The Agreement contained a buried arbitration clause requiring all disputes to be resolved through binding arbitration under the AAA Commercial Arbitration Rules, but not under the “auspices” of the AAA. (R._ (*Id.* ¶ 41(d)).) The clause granted Respondents the exclusive right to select the arbitrator, choose the arbitration location (if not held at the Charleston County Courthouse), and require that the non-prevailing party pay all arbitrator compensation and location costs. (R._ (*Id.* ¶ 41(d)).)

The Arbitration Provision was not highlighted, used no differentiated font, and was never explained during the sales presentation. (R._ (*Id.* ¶¶ 44–45).) The practical effect of the arbitration clause was to grant Respondents unilateral control over the forum, decisionmaker, and costs. The Arbitration Provision also created an *in terrorem* effect that discourages members from pursuing

disputes, and if they do, to subject them to a process structurally predisposed toward a biased outcome. (R. _ (*Id.* ¶¶ 46–50).)

After exiting the facility, Appellants later discovered that the overwhelming majority of online reviews concerning the membership were negative and described the same deceptive tactics, poor service, and substantial shortcomings in promised savings. (R. _ (*Id.* ¶¶ 38–39).)

B. RESPONDENTS’ BROADER SCHEME

The dispute here and the arbitral scheme at issue in this appeal do not exist in isolation. They are part of a broader, multi-state scheme that has ensnared hundreds of consumers over more than a decade. Although Appellants are among some of the first to seek redress in South Carolina, they are merely the latest victims of practices that have drawn repeated scrutiny from state enforcement authorities nationwide, including Texas and Georgia. (R. _) Indeed, there are two other ongoing cases against Respondent with similar allegations in South Carolina courts. *See Perrelli v. Vacation Inspirations*, No. 2024-CP-1004606 (S.C.Com.Pl.), *on appeal*, *Perrelli v. Vacation Inspirations*, No. 2026-000043 (Ct. App.); *Sawyer v. Vacation Inspirations*, No. 2024-CP-1002642 (S.C.Com.Pl.) *on appeal*, *Sawyer v. Vacation Inspirations*, No. 2026-000910 (Ct. App.). (R. _)

In 2012, Respondents Randy Gardner and Joseph Shirley settled with the Georgia Governor’s Office of Consumer Protection resolving allegations they “ha[ve] used, are using, or [were] about to use unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce as declared unlawful by O.C.G.A. § 10-1-390 *et seq.*” (R. _). The settlement required the payment of consumer restitution and a \$100,000 civil penalty. (R. _)

Five years later, the Texas Attorney General reached a separate agreement with Respondent Shirley and Respondent Gardner following allegations that their travel-service operations violated the Texas Deceptive Trade Practices Act and other Texas statutes. Under that agreement, individuals and entities—many of whom overlap with Respondents here—were required to pay substantial consumer restitution, civil penalties, and attorneys’ fees. (R. _)

South Carolina consumers have fared no better. According to the South Carolina Department of Consumer Affairs, the agency has received at least 130 complaints concerning Respondents’ allegedly deceptive practices since 2014. (R. _)

Vacation Inspirations’ “business model” follows a familiar pattern: unsuspecting consumers are lured to a venue in the Charleston area with promises of “free” gifts in exchange for attending a purported travel presentation—only to discover that those promises come at a price.

This pattern has been publicly documented. In a November 2022 report by WCSC-TV in Charleston, “Customer” complaints with the South Carolina Department of Consumer Affairs accuse the business of a high-pressure sales situation where they were told how to fill out forms, including checking ‘no’ when asked on the forms if they were pressured into the deal. The same “high-pressure sales situation” described in that report is precisely what the Appellants experienced here. (R. _)

ARGUMENT

Before addressing the merits, Appellants set forth two independent bases for immediate appellate review. *First*, under S.C. Code Ann. § 14-3-330, the order is immediately appealable because it compels Appellants to submit to “arbitration in name only,” a scheme without minimum due process and therefore affecting a substantial right. *See Flores*, 150 F.4th at 187 (an agreement for arbitration that “lacks the requisite independence between parties and arbitrator that is fundamental to the FAA’s conception of arbitration” is “arbitration in name only”).

Second, under *Toler’s Cove*, because the issues presented, including such fundamental ones such as the legal standard on motions to compel arbitration under the Federal Arbitration Act, are “capable of repetition” and “need to be addressed.” *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 581, 585 (2003) (recognizing that appellate review is appropriate where issues are “capable of repetition and need to be addressed,” even if the order is not otherwise immediately appealable).

I. THE ORDER DENIES APPELLANTS THEIR DUE PROCESS RIGHT TO A DECISION BEFORE A NEUTRAL DECISIONMAKER RENDERING THE ORDER IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330

As a threshold matter, Appellants do not contend that orders compelling arbitration are categorically or even routinely appealable. Nor do Appellants dispute that arbitration frequently serves as an acceptable alternative to judicial adjudication where it provides a fair and neutral forum.

This case is different. The order below compels Appellants into a process that lacks neutrality at its core and therefore fails to provide even minimal due-process protections required by law. That process is not arbitration at all—it is a “sham.” And where a litigant is forced into such a forum, immediate appellate review is required because a substantial right is irretrievably lost.

A. ORDERS AFFECTING A SUBSTANTIAL RIGHT ARE IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330(2)

The order compelling arbitration is immediately appealable under S.C. Code Ann. § 14-3-330 because it affects Appellants’ rights to have their dispute adjudicated by a neutral decisionmaker—a substantial right. *See Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 425, 887 S.E.2d 153, 156 (Ct. App. 2023) (“An interlocutory order is not immediately appealable *unless* it involves the merits of the case or *affects a substantial right*.” (citation omitted) (emphasis added)). Section 14-3-330(2) of the South Carolina Code provides that an order is immediately appealable where it “affects a substantial right.” *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005).

One basis for immediate appeal is “to preserve a party’s constitutional rights that would otherwise be lost.” *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004). Interlocutory appeals are also “allowed in situations where the substantial right could not be vindicated on appeal after the case.” *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). As Black’s Law Dictionary explains, a “substantial right” as “[a]n essential right that potentially affects the outcome of a lawsuit and is capable of legal enforcement and

protection, as distinguished from a mere technical or procedural right.” RIGHT, Black’s Law Dictionary (12th ed. 2024).

The critical substantial right here is Appellants’ right to due process—specifically, the right to adjudication before a fair and impartial decisionmaker. *In re Murchison*, 349 U.S. 133, 135–36 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process” and is “required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States”). Indeed, “[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (S.C. Ct. App. 1996) (“It is axiomatic that the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process embodied in the United States Constitution.”)¹ The Supreme Court has confirmed that the “elementary requirements of impartiality taken for granted in every judicial proceeding” apply equally to arbitration. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 145, 150 (1968). In fact, the Supreme Court went a step further and stated that “we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.” *Id.* at 149.

An adjudicative process that is so “infected [] with [] unfairness” amounts to “a denial of due process.” *State v. Rudd*, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003). “[P]rocedural due process requires . . . proper standards for adjudication,” *Whitehurst v. Town of Sullivan’s Island*, 446 S.C. 137, 149, 919 S.E.2d 402, 409 (2025) (quoting *State v. Michau*, 355 S.C. 73, 76–77, 583 S.E.2d 756, 758 (2003)), and “a fair hearing before a legally constituted impartial tribunal,” *Legg*, 416 S.C. at 13, 785 S.E.2d at 371. “Due process, in arbitration, means satisfying ‘minimal requirements of fairness’ . . . [achieved] when parties have had adequate notice

¹ For the avoidance of doubt, “South Carolina courts interpret the state constitutional guarantees of due process and equal protection as coextensive with their federal counterparts.” *MBSC Prop. S., LLC v. City of Myrtle Beach, S.C.*, 25-CV-1475, 2025 WL 2484183, at *10 (D.S.C. Aug. 28, 2025) (citing *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002)).

and opportunity to be *heard by unbiased decision makers.*” *McMahan & Co. v. Dunn Newfund I, Ltd.*, 230 A.D.2d 1, 4 (N.Y. Sup. Ct. 1st Dep’t 1997) (emphasis added). Critically for the subject dispute, arbitration can satisfy “constitutional minimums . . . so long as the arbitrator’s selection did not represent [one party’s] unrestricted choice.” *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 308 n. 21 (1986).

The order here strips Appellants of adjudication before a South Carolina jury and compels them into a structurally fraught arbitral scheme. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007) (“The loss of the right to a jury trial is an obvious result of arbitration.”). The South Carolina Supreme Court has recognized that even far less consequential changes—such as referral to a master—are immediately appealable. *Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985) (holding a referral to a master-in-equity “should have been appealed immediately because it affected the mode of trial, a substantial right”).

Where, as here, an order “affect[s] the mode of trial[,]” it “affect[s] substantial rights under S.C. Code Ann. § 14–3–330(2) and must, therefore, be appealed immediately.” *Lester*, 327 S.C. at 266, 491 S.E.2d at 241. “Failure to immediately appeal such an order forever bars appellate review.” *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Immediate appeal of the arbitration order here under S.C. Code Ann. § 14-3-330(2) is not only justified but required.

B. THE CIRCUIT COURT’S ORDER SUBJECTS APPELLANTS TO A STRUCTURALLY BIASED PROCESS THAT ELIMINATES NEUTRAL ADJUDICATION AND ALTERS THE MODE OF TRIAL

The Arbitration Provision at issue contains facial and structural defects that go to the heart of adjudicative fairness. The Arbitration Provision’s language is undisputed:

Any controversy, claim or dispute arising out of or relating to this Purchase Agreement, shall be resolved and decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the “AAA”) (however, not under the auspices of AAA) and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The arbitrator shall be selected by [Vacation Inspirations]. Upon final award, arbitrator compensation and cost of the location shall be paid by the non-prevailing party. The arbitration shall take place in Charleston, S.C. at the Charleston County Courthouse or other location determined by Vacation Inspirations.

By its express terms, the provision disclaims administration by any reputable arbitral organization, imposes commercial arbitration rules (rather than rules made for consumer disputes) on unsophisticated consumers, and shifts the full costs of the proceeding onto the consumer if they lose under such a scheme. Most critically, it eliminates neutrality altogether by granting the drafting party unilateral authority to select the arbitrator: “The arbitrator shall be selected by [Vacation Inspirations].”

The arbitral scheme imposed by Respondents is fundamentally unfair and “‘unworthy even of the name of arbitration’ and thus falls outside of the FAA’s protection.” *Flores*, 150 F.4th at 183 (quoting *Hooters*, 173 F.3d at 940). Such a scheme cannot plausibly function as a fair substitute for judicial adjudication. “The Supreme Court has recognized that arbitration must be a fair forum.” *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 618 (D.S.C. 1998), *aff’d*, 173 F.3d. As courts have long recognized, “[a]ny tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias.” *Flores*, 150 F.4th at 183 (quoting *Commonwealth Coatings*, 393 U.S. at 148).

Neutrality and an impartial decisionmaker are the minimum prerequisites of any adjudicative forum, whether judicial or arbitral. “In the context of arbitration agreements, courts should ‘focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.’” *Bennett v. ACS Primary Care Physicians-Se. P.C.*, 444 S.C. 458, 486, 908 S.E.2d 110, 125 (Ct. App. 2024) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668). Where the process vests one party with exclusive control over the selection of the decisionmaker and strips away institutional safeguards designed to ensure independence and fairness, the resulting forum lacks even the baseline procedural protections required by due process. *E.g.*, *Hooters*, 173 F.3d at 940 (noting that arbitration is “a system whereby disputes are fairly resolved by an impartial third party” and that a “scheme whereby one party to the proceeding so controls the arbitral panel” is not arbitration, but rather “a sham system”).

The defects are evident on the face of the Arbitration Provision. Its structure guarantees a lack of neutrality and creates an inherent risk of bias. By compelling Appellants into this process,

the circuit court’s order deprives them of their substantial right to a fair and impartial forum. Immediate appeal is therefore required under S.C. Code Ann. § 14-3-330(2).

C. STRUCTURAL UNFAIRNESS PERVADES THE ARBITRATION PROVISION AND FAILS AS A LEGITIMATE ARBITRAL MECHANISM

The lack of fairness does not end with the unilateral arbitrator-selection provision; it pervades the entire Arbitration Provision. Compounding that defect, the scheme empowers the same unilaterally selected arbitrator to decide whether his own appointment mechanism, and the remainder of the Arbitration Provision, is valid or unconscionable. Respondents have constructed a deliberately one-sided dispute-resolution scheme designed to evade scrutiny of their unfair and deceptive practices—practices that have previously resulted in enforcement actions, settlements, monetary penalties, and victim restitution imposed by the Texas Attorney General and the Georgia Attorney General. (R. _)

In addition to the unilateral arbitrator selection provision, Respondents have provided that the dispute “shall be resolved and decided by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the ‘AAA’) (however, not under the auspices of AAA).” (R. _ (Compl. ¶ 41(d).)

First, Respondents drafted the Arbitration Provision to incorporate the AAA Commercial Rules, which purport to allow a unilaterally selected arbitrator to decide the validity of the arbitration provision—including the very unilateral-selection mechanism by which that arbitrator was appointed. Such a result is untenable.

Second, Respondents deliberately drafted the Arbitration Provision to evade administration by a neutral arbitral forum, specifying that arbitration would proceed “not under the auspices of AAA.” That drafting choice must be understood in light of AAA Consumer Rule R-1(a), which provides that consumer arbitration agreements invoking the AAA are governed by the Consumer Rules, regardless of whether other AAA rules are referenced. Without the administration of the arbitration by the AAA, Respondents knew there was no body ensuring the arbitrator uses the proper arbitral rules (or that the arbitrator was in fact neutral and fair).

Chavarria v. Ralphs Grocery Co. explained that the “preclusion of institutional arbitration administrators, namely AAA or JAMS, which have established rules and procedures to select a neutral arbitrator” contributes to a policy “that ‘lacks any semblance of fairness and eviscerates the right to seek civil redress.’” 733 F.3d 916, 923 (9th Cir. 2013) (quoting *Chavarria v. Ralphs Grocery Co.*, 812 F. Supp. 2d 1079, 1089 (C.D. Cal. 2011)). The Ninth Circuit echoed the reasoning of the district court: “To condone such a policy would be a disservice to the legitimate practice of arbitration and a stain on the credibility of our justice system.” *Id.* (citation omitted).

Third, Respondents’ deliberate avoidance of the AAA Consumer Rules is unsurprising in light of the consumer protections those rules impose—protections that are facially incompatible with their scheme. The Consumer Rules limit a consumer’s financial exposure by requiring that the consumer pay only a filing fee while the business bears the remaining arbitration costs. *See* AAA Consumer Arbitration Rules R-1(c), R-12; Administrative Fee Schedule. They also require that the arbitration “substantially and materially complies with the due process standards of the Consumer Due Process Protocol.” AAA Consumer Arbitration Rules R-1(c). By structuring the agreement to avoid these requirements, Respondents seek to eliminate the very safeguards that render consumer arbitration fair.²

The Consumer Due Process Protocol, among other things, requires that consumers have “an equal voice in the selection of Neutrals” and that proceedings occur in a “reasonably convenient” location. AAA Consumer Due Process Protocol. By excluding AAA administration, Respondents stripped away these core protections. The result is a process that lacks even the minimum fairness and neutrality required of a legitimate arbitral forum.

Fourth, Respondents needed to avoid the “auspices” of the AAA because the AAA will administer consumer arbitrations only where the process is fundamentally fair and complies with its Consumer Due Process Protocol. The Arbitration Provision does neither. Beyond the fact that

² This reflects the reality that most consumer contracts are contracts of adhesion. If the more sophisticated party could draft an arbitration provision to evade the AAA Consumer Rules, those protections would be rendered meaningless. That cannot be the law, and the AAA’s framework reflects precisely that principle.

Appellants have no say in the selection of an arbitrator, the Arbitration Provision shifts all costs to the losing party and allows Respondents to dictate the location—terms that directly conflict with the AAA’s consumer protections. As drafted, the provision would almost certainly be rejected by the AAA. That is no accident: Respondents structured the process to avoid neutral administration and its attendant safeguards.

Collectively, these features expose a system that is not arbitration at all, one that is structurally incapable of providing a fair and neutral forum. Each component—unilateral arbitrator selection, evasion of institutional oversight, asymmetric cost allocation, and unilateral venue control—undermines core procedural safeguards. They strip the process of the essential characteristics of arbitration recognized under the FAA. Accordingly, these provisions further confirm the invalidity of an arbitration scheme that fails to provide even minimal due process protections.

D. GUIDED BY *HOOTERS, MCMULLEN, AND WALKER*, PRE-ARBITRATION APPEAL IS NECESSARY HERE

While interlocutory appeals are generally disfavored to avoid piecemeal litigation, that principle presumes the underlying proceeding is capable of resolving the dispute. *Breland*, 339 S.C. at 94, 529 S.E.2d at 13 (“The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted.”). That assumption does not hold here. Forcing the parties to proceed through a structurally defective arbitration risks producing an unenforceable award, necessitating further proceedings and undermining, rather than promoting, efficiency. Immediate appellate review prevents that result.

Judicial efficiency favors addressing the structural defect now, *before* arbitration proceeds. The “system of warped rules” promulgated by Respondents is “so skewed in its favor that [Appellants] ha[ve] been denied arbitration in any meaningful sense of the word.” *Hooters*, 173 F.3d at 941. “To uphold the promulgation of [an] aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute

resolution.” *Id.* Immediate review avoids forcing the parties through a process that cannot produce a valid or enforceable result.

Numerous federal courts applying the Federal Arbitration Act have likewise recognized that structural defects apparent at the outset—most notably, unilateral arbitrator-selection provisions—should be addressed before arbitration is compelled. In *Walker*, the Sixth Circuit Court of Appeals explained that “the general rule prohibiting pre-arbitration challenges to an allegedly biased arbitration panel does not extend to an allegation that the arbitrator-selection process itself is fundamentally unfair.” 400 F.3d at 385 (citing *McMullen*, 355 F.3d at 494 n.7.) In such a case, “‘the arbitral forum is not an effective substitute for a judicial forum,’ and, therefore, the party need not arbitrate first and then allege bias through post-arbitration judicial review.” *Id.* (quoting *McMullen*, 355 F.3d at 494 n. 7.)

Indeed, as “[t]he *Hooters* court and the *Floss* court both recognized that procedural unfairness inherent in an arbitration agreement may be challenged before the arbitration.” *McMullen*, 355 F.3d at 494 n.7 (*Hooters*, 173 F.3d & *Floss v. Ryan’s Fam. Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000)). Requiring parties to proceed through a structurally unfair arbitration only to challenge its validity later would defeat both efficiency and the fundamental purpose of arbitration as a fair alternative to judicial adjudication. As in *Flores*, the Arbitration Provision here “contractually provides for no independent arbitral forum” and “[i]t would make little sense if the [FAA] nonetheless required the courts to compel parties to arbitrate their claims in a forum that is indisputably partial.” 150 F.4th at 183–84. Accordingly, because the arbitral forum is fundamentally defective at its core, this Court should intervene now and reverse the order compelling arbitration.

II. THE CIRCUIT COURT’S ORDER IS IMMEDIATELY APPEALABLE UNDER *TOLER’S COVE* BECAUSE THE ISSUES ARE “CAPABLE OF REPETITION” AND “NEED TO BE ADDRESSED”

South Carolina’s “capable of repetition” doctrine provides an additional, independent basis for appellate jurisdiction. Although *Toler’s Cove* observed that an order compelling arbitration is ordinarily not appealable, the Supreme Court of South Carolina nevertheless reached the merits

“because appellant’s issues are capable of repetition and need to be addressed.” *Toler’s Cove*, 355 S.C. at 611, 586 S.E.2d at 585.

Appellants submit that the issues presented here are likewise capable of repetition warranting immediate appellate review. The challenged Arbitration Provision is not unique to this case: it has already been invoked in multiple actions against Respondents pending in South Carolina courts, each arising under the same form contract and identical dispute-resolution language. *See Perrelli v. Vacation Inspirations*, No. 2024-CP-1004606 (S.C.Com.Pl.), *on appeal*, *Perrelli v. Vacation Inspirations*, No. 2026-000043 (Ct. App.); *Sawyer v. Vacation Inspirations*, No. 2024-CP-1002642 (S.C.Com.Pl.), *on appeal*, *Sawyer v. Vacation Inspirations*, No. 2026-000910 (Ct. App.). (R.) In addition, numerous consumer complaints filed with the South Carolina Department of Consumer Affairs allege the same high-pressure sales practices and the same one-sided arbitration scheme reflected in the Verified Complaint here. (R.)

Absent appellate guidance, the same issues will continue to recur while evading meaningful review. Consumers will be compelled into arbitration under the same structurally biased provision before courts have the opportunity to address its validity. Immediate review is therefore warranted to ensure that the application of the Federal Arbitration Act in South Carolina courts is consistent with its application nationwide and does not permit enforcement of arbitration schemes that federal appellate courts have repeatedly found unenforceable due to structural unfairness.

Apart from the underlying substantive allegations of deceptive practices in violation of SCUTPA—which Appellants submit are themselves recurring—this appeal presents additional issues that are likewise “capable of repetition and need to be addressed.” These include: (i) the validity of unilateral arbitrator-selection provisions, particularly in consumer arbitration agreements; (ii) the legal standard governing motions to compel arbitration under the Federal Arbitration Act; (iii) whether a consumer arbitration provision can establish “clear and unmistakable” delegation of arbitrability merely by invoking the AAA Commercial Rules, particularly where the provision itself is challenged as unconscionable; and (iv) the proper application of binding Supreme Court of South Carolina precedent—namely *Damico* and

Simpson—by circuit courts. Although Appellants briefly address these issues here, they are discussed more fulsome *infra*.

First, it is well settled that “[w]hen it comes to arbitrator appointment, the rule is clearly that a party may not reserve unto itself the power to name the sole arbitrator, a majority of a panel of arbitrators, or all of the panel members. Such an arbitration scheme is fundamentally unfair and void.” 97 Am. Jur. Trials 319 (Originally published in 2005). Numerous federal courts have reached the same conclusion that unilateral arbitrator selection are invalid. *E.g.*, *Flores*, 150 F.4th at 185 (aligning the Second Circuit with the “Fourth and Sixth Circuits [] which refused to enforce arbitration provisions because of the unilateral selection of arbitrators.” (citing *Hooters*, 173 F.3d at 939–40 & *McMullen*, 355 F.3d at 493–94)).³ Despite this authority, the circuit court compelled arbitration without addressing—let alone analyzing—the unilateral arbitrator-selection provision in either of its orders, constituting reversible legal error.

Second, “[i]t is well settled that a motion to compel arbitration is analogous to a motion for summary judgment.” *Ex parte Greenstreet, Inc.*, 806 So. 2d 1203, 1208 (Ala. 2001); *see also Air-Con, Inc. v. Daikin Applied Latin Am., LLC*, 21 F.4th 168, 174 (1st Cir. 2021) (collecting Federal Court of Appeals cases indicating that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. all apply the summary-judgment standard to motions to compel arbitration); *see also Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021) (recognizing in “resolv[ing] the parties’ dispute over whether they agreed to arbitrate . . . the district court must employ the summary judgment standard”).⁴ Here, the circuit

³ Binding South Carolina case law directly addresses validity of arbitrator selections. In *Lackey v. Green Tree Financial Corp.*, the Court of Appeals held that a party’s “veto” power over an arbitrator selection constituted “enough control over the selection process to assure the appointment of a neutral arbitrator.” 330 S.C. 388, 400 (Ct. App. 1998). As the court explained, “[w]ithout their agreement, no arbitrator can be selected by [defendants].” *Id.* This juxtaposes the Arbitration Provision in this suit involving no such veto or consent requirement. The circuit court therefore erred by failing to apply and distinguish *Lackey* as binding precedent and by enforcing an arbitrator-selection clause that lacks the neutrality protections *Lackey* deemed essential.

⁴ The FAA’s summary-judgment framework applies with equal force in state and federal court. As the Supreme Court has made clear, “[t]he Federal Arbitration Act is a law of the United States,” and “[c]onsequently, the judges of every State must follow it.” *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015). Because state courts are “most frequently called upon to apply the Federal Arbitration Act,” it is therefore “a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation.” *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17–18 (2012). The South Carolina Supreme Court has expressly echoed that command, emphasizing *Nitro-Lift*’s instruction

court erred by failing to apply a summary-judgment-like standard or even any identifiable standard when ruling on the motion to compel arbitration.

Third, the circuit court disregarded two binding South Carolina decisions holding that there can be no “clear and unmistakable” delegation of arbitrability where an Arbitration Provision is challenged as unconscionable. In *Simpson*, the Supreme Court of South Carolina held that where a consumer “has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no ‘clear and unmistakable’ evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause’s validity.” *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (emphasis added).

More recently—and even more directly—the South Carolina Court of Appeals reaffirmed that “in South Carolina, if an arbitration provision is challenged on grounds of unconscionability, the question of the clause’s validity is for courts to decide, even if the clause delegates issues of validity by incorporating the AAA’s Commercial Arbitration Rules.” *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 530, 908 S.E.2d 892, 896 (Ct. App. 2024). The circuit court’s delegation ruling cannot be squared with that binding authority—especially given that the provision here invokes the same arbitral rules.

Fourth, the circuit court’s arbitration and reconsideration orders are devoid of any reference to *Damico* or *Simpson* and in fact contain no analysis of unconscionability. South Carolina law requires courts to engage in a fact-specific, case-by-case analysis of unconscionability before enforcing an arbitration clause. *Damico*, 437 S.C. at 611, 879 S.E.2d at 755 (“A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case.”); *Simpson*, 373 S.C. at 19, 644 S.E.2d at 666 (describing the doctrine as requiring “case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.”) The threshold requirement, therefore, is that the court

“that state supreme courts must adhere to United States Supreme Court’s interpretations of the FAA.” *Parsons v. John Wieland Homes & Neighborhoods, Inc.*, 418 S.C. 1, 10, 791 S.E.2d 128, 132 (2016).

actually examine the specific circumstances of the challenged arbitration clause as alleged in a complaint—something the orders below do not do.

This appeal fits squarely within South Carolina’s “capable of repetition and need to be addressed” doctrine. The same Arbitration Provision has already been invoked in multiple cases, presents recurring legal errors of substantial importance, and will continue to evade review absent immediate appellate intervention. Because the issues recur in consumer arbitration disputes, implicate the proper application of controlling South Carolina law and the Federal Arbitration Act, and require appellate guidance to prevent continued enforcement of structurally unfair arbitration schemes, the circuit court’s order is immediately appealable under *Toler’s Cove*.

This Court has appellate jurisdiction under S.C. Code Ann. § 14-3-330 because the circuit court’s orders deny Appellants their substantial right to due process, and independently under *Toler’s Cove* because the issues presented are capable of repetition and warrant appellate guidance. A contrary determination would leave Appellants without any meaningful opportunity for a fair hearing before a neutral decisionmaker and would leave recurring arbitration issues of significant importance unresolved.

III. UNILATERAL ARBITRATOR SELECTION CLAUSES IN CONSUMER CONTRACTS ARE INVALID UNDER THE FEDERAL ARBITRATION ACT

The Arbitration Provision at issue provides that any dispute relating to the Purchase Agreement shall be resolved in arbitration where “[t]he arbitrator shall be selected by VI.” (R. __.) What is unenforceable on its own becomes even more egregious here, where it appears in a consumer contract alongside other one-sided, oppressive terms and in a high-pressure sales setting. This unilateral arbitrator selection provision is unenforceable both under the FAA and South Carolina contract law.

Standard of Review. “The Federal law governs in the interpretation of Federal statutes, even though the case is in a state court.” *Lee v. DeBerry*, 219 S.C. 382, 388, 65 S.E.2d 775, 778 (1951). Interpreting a statute, such as the FAA here, is a question of law. *Aiken v. S.C. Dep’t of Revenue*, 429 S.C. 414, 419, 839 S.E.2d 96, 98 (2020). The Court of Appeals of South Carolina

“decide[s] questions of law *de novo* with no particular deference to the trial court.” *E. Cherry Grove Co., LLC v. State*, 443 S.C. 617, 627, 905 S.E.2d 421, 427 (Ct. App. 2024). This is a question of law where material facts (the terms of the arbitration provision) are not in dispute. As such, the Court reviews this question of law *de novo*.

A. THE FEDERAL ARBITRATION ACT

As a threshold matter, the parties and the circuit court agreed that the motion to compel arbitration is brought under the FAA rather than the South Carolina Arbitration Act (“SCUAA”).⁵ (R. __ (Arb. Ord. at 2–3 n.1).) Under the Federal Arbitration Act,

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

Sanders v. Savannah Highway Auto. Co., 440 S.C. 377, 383, 892 S.E.2d 112, 115 (2023) (quoting 9 U.S.C. § 2). “The FAA recognizes arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Id.* (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010)) (internal quotation marks omitted).

“When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties.” *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 14, 742 S.E.2d 37, 40 (Ct. App. 2013), *aff’d*, 417 S.C. 42, 790 S.E.2d 1 (2016). At the same time, where a federal statute such as the FAA governs, the Supreme Court of South Carolina has long held that it is “governed [] by the federal decisions interpreting that act.” *Shiver v. Atl. Coast Line R. Co.*, 155 S.C. 531, 152 S.E. 717, 720 (1930). Indeed, the Supreme Court of the

⁵ As the circuit court judge correctly recognized, the arbitration could not be compelled under the South Carolina Arbitration Act, S.C. Code Ann. § 15-48-10, because it requires a conspicuous arbitration agreement, which is absent here. (R. __ (Arb. Order 2-3 n.1).) (“[T]he parties concede that the arbitration provision at issue does not comply with the requirements of the South Carolina Arbitration Act. S.C. Code Ann. § 15-48-10 (1978).”); *Damico*, 437 S.C. at 607 n.5, 879 S.E.2d 52 n.5 (explaining that a contract must have “Notice that a contract is subject to arbitration pursuant to [the SCUAA] shall be typed in underlined capital letters . . . on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration [pursuant to the SCUAA]” (quoting S.C. Code Ann. § 15-48-10(a)) (alterations in original)).

United States has stated that because “[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA)[,] . . . [i]t is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.” *Nitro-Lift*, 568 U.S. at 17–18. Where, as here, “lower federal courts are uniform on their interpretation of a federal statute, this court, in the interest of preserving unity, will give *considerable weight* to those courts’ interpretations of federal law and find them to be highly persuasive.” *Limehouse v. Hulsey*, 404 S.C. 93, 109, 744 S.E.2d 566, 575 (2013) (italics in original). Thus, South Carolina courts should conform their FAA analysis to the prevailing federal approach.

1. An “Independent Arbitral Forum . . . is Fundamental to the FAA’s Conception of Arbitration”

“The Supreme Court has recently reiterated that the FAA’s mandate is limited to the enforcement of actual ‘arbitration agreements.’” *Flores*, 150 F.4th at 18 (quoting *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022)). The enforcement of arbitration agreements under the FAA “presume[s] ‘traditional arbitral practice.’” *Id.* (quoting *Viking River Cruises*, 596 U.S. at 658). In other words, “‘the FAA requires only the enforcement of provisions to settle a controversy by arbitration’—means that agreements beyond the scope of this tenet are unprotected by the FAA and potentially vulnerable to invalidation.” *Id.* (quoting *Viking River Cruises*, 596 U.S. at 653 n.5). Importantly, “simply labeling something as ‘arbitration’ does not automatically bring it within the ambit of the FAA’s protection.” *Id.* at 183 (internal quotation marks and citation omitted). In arbitration, parties “**do not** agree to forego their right to have their dispute fairly resolved by an impartial third party.” *Murray v. United Food & Com. Workers Int’l Union*, 289 F.3d 297, 303 (4th Cir. 2002) (emphasis added).

One of the key tenets of arbitration is “an independent arbitral forum for bilateral dispute resolution,” in other words, “an *independent* forum that is separate from the parties to the dispute.” *Flores*, 150 F.4th at 183 (citing *Viking River*, 596 U.S. at 657–58). Structurally, “independence between parties and arbitrator [] is fundamental to the FAA’s conception of arbitration.” *Id.* With limited grounds to vacate an arbitration award at the end of the arbitration, “[i]t would make little

sense if the same statute nonetheless required the courts to compel parties to arbitrate their claims in a forum that is indisputably partial.” *Id.* (citations omitted). “Because the FAA’s mandate is limited to the enforcement of *actual* ‘arbitration agreements,’” arrangements unlike any traditional arbitration provision fall outside of the Act’s protection. *Id.* (emphasis added). Accordingly, the FAA is unavailable to compel parties to resolve disputes outside of court where the purported arbitration is fundamentally unfair and fails to satisfy the minimum requirements of “arbitration,” such as a neutral decisionmaker, under federal law.

2. The Unilateral Arbitrator Selection Provision Brings the Arbitration Agreement Outside the Ambit of the FAA

Here, the unilateral selection of the single arbitrator, on its own, puts the arbitration provision outside the protections of the FAA as it “set[s] up a dispute resolution process utterly lacking in the rudiments of even-handedness.” *Hooters*, 173 F.3d at 935. The law on this is not murky: unilateral arbitrator selection provisions fail under the FAA. This Court cannot condone the circuit court’s expansion of the mandate under the FAA, especially in the face of FAA decisions of multiple federal court of appeals, such as *Hooters* and *McMullen*.

In *Hooters*⁶, the Fourth Circuit invalidated an arbitrator selection scheme far less egregious than the one at issue here. There, the agreement provided for a three-member panel, with both the employee and the employer each selecting an arbitrator and those two selecting a third. *Id.* at 938. Critically, however, both the employee’s arbitrator and the third arbitrator were required to be “selected from a list of arbitrators created exclusively by [the employer].” *Id.* at 938–39. The Fourth Circuit condemned this arrangement as a “scheme whereby one party to the proceeding so controls the arbitral panel,” rendering it “a sham system unworthy even of the name of arbitration.” *Id.* at 940. On that basis, the court concluded the “suit to compel arbitration must fail” and “permit[ted] [the employee] to cancel the agreement,” finding the scheme “hardly recognizable as

⁶ *Hooters* arose in the context of a suit to compel arbitration under the FAA, with the underlying agreement governed by South Carolina contract law. 39 F. Supp. 2d at 610, *aff’d*, 173 F.3d. The Fourth Circuit’s decision in *Hooters* has been cited by the South Carolina Supreme Court at least four times, the South Carolina Court of Appeals at least seven times, and enumerable times by South Carolina trial courts. In addition to South Carolina state courts, it has been cited in state courts of at least fourteen other states and over 400 times in federal courts.

arbitration at all.” *Id.* Whereas *Hooters* involved a modicum of employer control over all three arbitrators in an employment context, the scheme here is more extreme: it grants one party unilateral control over the sole arbitrator in a consumer arbitration, eliminating any possible appearance of neutrality.

Similarly, in *McMullen*, the Sixth Circuit invalidated an arbitration agreement that allowed the employer to unilaterally select an initial pool of five arbitrator candidates, even though that pool was subject to neutrality safeguards, including attorney status, lack of affiliation, recognized as a neutral, and inclusion on established arbitral rosters. *Id.* at 488. Even these protections could not cure the defect: the Sixth Circuit held the agreement failed to provide “an effective substitute for a judicial forum” because of the “risk of bias inherent in [the arbitrator selection] procedure.” *Id.* at 494.

And just recently, the Second Circuit’s decision in *Flores* expressly endorsed *Hooters* and *McMullen* on this issue. There, the Second Circuit found “persuasive some of the reasoning of the Fourth and Sixth Circuits, respectively, which refused to enforce arbitration provisions because of the unilateral selection of arbitrators.” *Flores*, 150 F.4th at 185 n. 62 (*Hooters*, 173 F.3d at 939 & *McMullen*, 355 F.3d at 493–94).

A leading arbitration treatise—regularly cited by the Supreme Court—leaves no room for doubt: “[w]hen one party exercises exclusive control over the pool from which the arbitrator is selected, the selection process is fundamentally unfair and lacks neutrality, preventing arbitration from being an effective substitute for a judicial forum.” 2 Domke, *Commercial Arbitration* § 10:37 (3d ed. 2025). It further provides that “[t]he arbitrator appointment process must be fundamentally fair,” and that no party may “reserve the power to control the appointment of all or a majority of the arbitrators.” *Id.* § 54:5. Accordingly, “[i]t is substantively unconscionable” to reserve the right to name the sole arbitrator or a majority of the panel, and such schemes are “fundamentally unfair, substantively unconscionable, unenforceable and void” because they “undermine neutrality and must fail.” *Id.*

Therefore, the unilateral arbitrator selection procedure is unenforceable and renders the entire arbitration provision unenforceable. The Court must reverse the order compelling arbitration on this ground alone.

3. The Arbitration Clause’s Other Terms Further Demonstrate it is not Protected by the FAA

Even setting aside the unilateral arbitrator-selection provision, the remaining terms independently confirm that the Arbitration Provision falls outside the protections of the Federal Arbitration Act. Together, they demonstrate that the process Respondents designed is “arbitration in name only.” *See Flores*, 150 F.4th at 187 (“arbitration in name only . . . lacks the protection of the FAA”). As the Fourth Circuit explained, “[t]o uphold the promulgation of [an] aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution.” *Hooters*, 173 F.3d at 941.

As detailed throughout, the Arbitration Provision is not a collection of isolated defects, but a coordinated scheme. It grants Respondents control over venue, shifts costs to deter claims, invokes AAA Commercial Rules in a consumer transaction, and simultaneously avoids AAA administration.

Collectively, these provisions render the agreement “unworthy even of the name of arbitration.” *Flores*, 150 F.4th at 183. This is not an arbitral forum—it is a mechanism for control. Because the FAA does not compel participation in such a process, the order must be reversed.

IV. THE UNILATERAL SELECTION PROVISION IS ALSO UNENFORCEABLE UNDER SOUTH CAROLINA STATE LAW

Independent of the FAA, there are separate state law grounds to invalidate the unilateral arbitrator selection provision. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (“General contract principles of state law apply to arbitration clauses governed by the FAA.”).⁷

⁷ As discussed *infra*, there is no “clear and unmistakable” delegation of arbitrability here. But even if there were, the arbitrator-selection mechanism cannot validate itself. It is axiomatic that an arbitrator appointed under a challenged process cannot decide the legitimacy of that very process. *See Dist. No. 1, Pac. Coast Dist., Marine Engineers’ Beneficial Ass’n, AFL-CIO v. Liberty Mar. Corp.*, 998 F.3d 449, 460 (D.C. Cir. 2021) (“[W]hen the issue is whether an arbitrator was validly appointed . . . , parties would likely expect resolution by a court, not by the challenged

Standard of Review. Whether a unilateral arbitration provision is illegal and unenforceable as a matter of South Carolina law is a question of law subjecting it to *de novo* review. *See Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 452, 818 S.E.2d 724, 729 (2018) (“Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court.” (quoting *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012))); *see also Lackey*, 330 S.C. at 393–94, 498 S.E.2d at 901 (“The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law.”).

Under South Carolina law, when assessing a unilateral arbitrator-selection provision, courts must consider whether it is “oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker.” *Simpson*, 373 S.C. at 30, 644 S.E.2d at 671. Despite Appellants’ repeated challenges to the unilateral arbitrator-selection provision, the circuit court failed to address the issue in either its arbitration order or its reconsideration order. A court’s failure to consider and rule on a dispositive argument constitutes reversible error.

Notwithstanding the overwhelming authority outside South Carolina holding that unilateral arbitration selection clauses are *per se* unenforceable, *see supra* § III, binding South Carolina precedent independently compels the same result. In *Lackey*, this Court held that a party’s “veto” power over an arbitrator selection constituted “enough control over the selection process to assure the appointment of a neutral arbitrator.” 330 S.C. at 400. As the Court explained, “[w]ithout their agreement, no arbitrator can be selected by [Respondents].” *Id.* Here, there is no such veto, no consent, and no shared control—only unilateral authority. Under *Lackey*’s reasoning, the arbitrator-selection clause cannot stand.

arbitrator herself.”). As the D.C. Circuit further explained, “[n]either party presumably would want to risk being put in a position in which an arbitrator whom it believes has been unilaterally imposed upon it by the opposing party is nonetheless given power to decide for herself whether she can act as the final arbiter of disputes between them.” *Id.* at 458. The same principle applies here. A self-validating mechanism is inherently defective and cannot be enforced as a matter of law. *See Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994) (“The arbitrator is not the judge of his own authority.”) (internal quotations and citation omitted); *see also AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 651 (1986) (stating that an arbitrator should not be given “the power to determine his own jurisdiction”) (internal quotations omitted).

A fulsome unconscionability analysis would yield the same result, but it is unnecessary given the blatant invalidity of the arbitrator-selection provision. Nor can that provision be severed from the remainder of the Arbitration Provision. *See infra* § VIII. Accordingly, this Court should reverse the circuit court’s order and hold the arbitration provision invalid in its entirety under both the FAA and South Carolina law.

V. THE CIRCUIT COURT ERRED BY NOT APPLYING THE SUMMARY JUDGMENT STANDARD GOVERNING MOTIONS TO COMPEL ARBITRATION UNDER THE FAA

The circuit court also erred by not applying a standard akin to summary judgment in evaluating whether arbitration can be compelled under the FAA. Although the invalidity of the arbitrator-selection provision independently requires reversal—and thus the Court need not reach this issue—remand would otherwise be required for application of the proper standard.

Standard of Review. The applicable standard of review in examining whether the lower court applied the proper legal standard is *de novo*. *See Brawley v. Richland Cnty.*, 445 S.C. 80, 89, 911 S.E.2d 156, 161 (Ct. App. 2025).

A. THE CIRCUIT COURT’S ORDER

It is not entirely clear what legal standard the circuit court employed on the motion to compel arbitration. When Appellants urged reconsideration under the appropriate summary-judgment standard, the circuit court responded that “Plaintiff’s counsel conceded . . . that *the applicable standard . . . is the FAA*. Therefore, the correct standard was applied.” (R. (Recon. Order at 3 n.2).) (emphasis added). While both parties did indeed agree that the FAA governs the motion to compel arbitration, the circuit court’s statement reflects a fundamental conflation of the governing statute with the applicable adjudicative standard. That error warrants correction and guidance to ensure consistent application by circuit courts.

It is undisputed that the FAA, rather than the South Carolina Arbitration Act, governs the motion to compel arbitration. But *the FAA is not itself a standard*. Rather, it provides that “[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.” 9 U.S.C. § 4. Courts overwhelmingly

have interpreted this language to require application of a summary-judgment standard when deciding whether arbitration may be compelled.

B. THE FAA REQUIRES THAT SOUTH CAROLINA COURTS MUST APPLY A SUMMARY-JUDGMENT STANDARD IN DECIDING A MOTION TO COMPEL ARBITRATION

The FAA’s summary-judgment framework applies with equal force in state and federal court. As the Supreme Court has made clear, “[t]he Federal Arbitration Act is a law of the United States,” and “[c]onsequently, the judges of every State must follow it.” *DIRECTV*, 577 U.S. at 53.

Because state courts are “most frequently called upon to apply the Federal Arbitration Act,” it is therefore “a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation.” *Nitro-Lift*, 568 U.S. at 17–18. The South Carolina Supreme Court has expressly echoed that command, emphasizing *Nitro-Lift*’s instruction “that state supreme courts must adhere to United States Supreme Court’s interpretations of the FAA.” *Parsons*, 418 S.C. at 10, 791 S.E.2d at 132; *see also Dewan v. Walia*, 544 F. App’x 240, 244 (4th Cir. 2013) (“The FAA ‘supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration.’” (quoting *Preston v. Ferrer*, 552 U.S. 346, 349 (2008))).

“It is well settled that a motion to compel arbitration is analogous to a motion for summary judgment.” *Greenstreet*, 806 So. 2d at 1208. Consistent with that principle, federal and state courts alike recognize that motions to compel arbitration under the FAA are evaluated under a summary judgment–like standard. The authorities below are merely illustrative; the rule is ubiquitous:

- **South Carolina Courts:** *Towles v. United HealthCare Corp.*, 338 S.C. 29, 38 n.3, 524 S.E.2d 839, 844 n.3 (Ct. App. 1999) (under the FAA, “[a] jury trial on the existence of an arbitration agreement is warranted when there are **genuine issues of material fact** regarding the parties’ agreement” (emphasis added)); *Briody v. THI of South Carolina at Magnolia Place at Greenville, LLC*, No. 2009-CP-23-6381, 2010 WL 9935409, at *4 (S.C.Com.Pl. July 13, 2010) (“When ruling on a motion to compel arbitration, the court uses a standard analogous to the summary judgment standard.”); *Floyd v. SSC Sumter East Operating Co., LLC*, No. 2022-CP-43-00355, 2022 WL 22592977, at *2 (S.C.Com.Pl. Oct. 4, 2022) (“A motion to compel arbitration pursuant to the FAA is ‘akin to the burden on summary judgment.’”).
- **Federal Appellate Courts:** *Austin v. Experian Info. Sols., Inc.*, 148 F.4th 194, 202 (4th Cir. 2025) (recognizing that a circuit court “must employ the summary judgment standard as a gatekeeper” in “determining whether parties agreed to arbitrate a given dispute”). “Most other circuits apply the

summary judgment standard to motions under § 4.” *Air-Con*, 21 F.4th at 174 (collecting Federal Court of Appeals cases indicating that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. all apply the summary-judgment standard to motions to compel arbitration).

As the authorities⁸ discussed *supra* demonstrate overwhelming precedent holds that a summary-judgment standard governs motions to compel arbitration. South Carolina law likewise makes clear that “using the proper standard of review is critical to determine the proper outcome.” *Barrett v. Charleston Cnty. Sch. Dist.*, 348 S.C. 426, 431, 559 S.E.2d 365, 368 (Ct. App. 2001). When a circuit court fails to apply the correct standard, reversal is required. *E.g.*, *Davenport v. Summer*, 269 S.C. 382, 385, 237 S.E.2d 494, 496 (1977) (reversing because “the lower court erred by failing to apply the correct legal standard”); *Karl Sitte Plumbing Co. v. Darby Dev. Co. of Columbia*, 295 S.C. 70, 77, 367 S.E.2d 162, 166 (Ct. App. 1988) (“Because the circuit court applied the wrong standard of review, the judgment below is reversed and the case is remanded for redetermination by the circuit court.”). Accordingly, the circuit court erred by failing to apply the summary-judgment standard embodied in South Carolina Rule of Civil Procedure 56, and the order compelling arbitration must be vacated.

⁸ State appellate courts and courts in the Fourth Circuit likewise recognize the summary judgment-like standard:

- **State Appellate Courts:** *Brown v. Child Advocs., Inc.*, No. 14-24-00012-CV, 2025 WL 1107095, at *3 (Tex. App. Apr. 15, 2025) (“[A] motion to compel arbitration is procedurally akin to a motion for summary judgment and is subject to the same evidentiary standards”); *Oaks v. Parkerson Constr., LLC*, 303 So. 3d 1141, 1144 (Ala. 2020) (“A motion to compel arbitration is analogous to a motion for summary judgment.”); *Inoue v. Harbor Legal Grp.*, 149 Haw. 197, 485 P.3d 91 (Ct. App. 2021) (“The standard for appellate review of a motion to compel arbitration is the same as a motion for summary judgment.”, *as corrected* (June 4, 2021)).
- **Courts in Fourth Circuit:** *Green v. Progressive Cas. Ins. Co.*, 25-CV-12529, 2025 WL 3906480, at *3 (D.S.C. Nov. 5, 2025), (“In ruling on a motion to compel arbitration in which the parties dispute the validity of an arbitration agreement, the Court employs the same standard as when ruling on a motion for summary judgment.”), *report and recommendation adopted*, 25-CV-12529, 2025 WL 3527164 (D.S.C. Dec. 9, 2025); *Marshall v. Georgetown Mem’l Hosp.*, No. 221CV02733RMGJDA, 2022 WL 5434226, at *4 (D.S.C. July 7, 2022) (“When ruling on a motion to compel arbitration, courts employ the summary judgment standard.” (citing *Rowland*, 993 F.3d at 258)), *report and recommendation adopted*, No. 21-2733, 2022 WL 4078024 (D.S.C. Sept. 6, 2022), *aff’d*, 112 F.4th 211 (4th Cir. 2024); *Wolford v. United Coal Co. LLC*, 764 F. Supp. 3d 329, 334 (W.D. Va. 2025) (“The standard for deciding a motion to compel arbitration brought under the FAA . . . is similar to the standard applicable to a motion for summary judgment.” (quoting *Ayers v. Markiewicz*, 733 F. Supp. 3d 435, 441 (E.D.N.C. 2024))), *aff’d*, No. 24-1541, 2024 WL 4490699 (4th Cir. Oct. 15, 2024)).

1. A Summary-Judgment Standard Prescribes How a Circuit Court Must Evaluate the Evidence

As explained above, this Court may reverse solely on the ground that the arbitration provision falls outside the protections of the FAA or is invalid as a matter of South Carolina law. But if the Court were to remand for application of the summary judgment–like standard in determining whether arbitration may be compelled, it is critical that the Court ensures that the circuit court apply the correct framework in evaluating whether arbitration may be compelled.

Under this framework, the circuit court must, among other things: (1) treat the verified complaint as evidence; (2) give Appellants the benefit of all reasonable inferences and doubts; (3) refrain from weighing conflicting evidence or resolving disputed issues of material fact; (4) refrain from treating parties’ arguments as evidence; (5) where genuine disputes of material fact exist, further develop the record through limited discovery on arbitrability and/or an evidentiary hearing with witness testimony, culminating in a trial on the disputed questions of arbitrability as required by the FAA. Under the summary-judgment standard, a court “neither makes factual determinations nor considers the merits of competing testimony.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

2. Significant Harm Flowed from the Circuit Court’s Failure to Apply the Required Procedure on the Motion to Compel Arbitration

The circuit court’s failure to apply the appropriate legal standard resulted in significant harm to Appellants.

First, the circuit court failed to engage with the allegations of unconscionability in the Complaint, much less properly consider the Verified Complaint as evidence. The Supreme Court of South Carolina recognizes that “a verified complaint is the equivalent of an affidavit” for the purposes of a summary judgment standard under South Carolina law. *Dawkins v. Fields*, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003) (aligning with federal courts and “numerous state courts” holding that a verified complaint is akin to an affidavit). The circuit court’s failure to consider the Appellants’ averments in the Verified Complaint as evidence was therefore error.

Second, the circuit court failed to afford Appellants—as the non-moving party—“the benefit of all reasonable doubts and inferences that may arise.” *Estate of Clinkscales v. Fundamental Clinical and Operational Services, LLC*, No. 2018-CP-23-05088, 2019 WL 9573826, at *2 (S.C.Com.Pl. Feb. 05, 2019); *Acevedo v. Hunt Valley Holdings, LLC*, No. 2018-CP-42-03421, 2020 WL 12919238, at *1 (S.C.Com.Pl. July 10, 2020) (same); *Rowland*, 993 F.3d at 257 (“[I]n reviewing the district court’s denial of a motion to compel arbitration, we accept as true the allegations of the . . . Complaint that relate to the underlying dispute between the parties.”). Instead, the circuit court disregarded the settled rule that “[t]he evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 15 (2006).⁹

Fourth, “[i]t is well established that counsel’s statements regarding the facts of a case and counsel’s arguments are not admissible evidence.” *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). Yet the circuit court adopted—verbatim from Respondents’ proposed order no less—a factual finding (although not appearing in the “Finding of Fact” section) that “***Plaintiffs in fact requested changes*** to the standard Purchase Agreement which were included in the Addendum/Exception to Contract as part of the Purchase Agreement.” (R. _(Arb. Order at 5).) (emphasis added). There is no support for that assertion; the Purchase Agreement itself reflects the opposite.

This error is even more stark because Respondents themselves abandoned this assertion—initially repeated this assertion in opposing reconsideration, but later amended their opposition to remove it. (R._(R’s Am. Recon. Memo. at 4–5).) By adopting a disputed—and ultimately

⁹ In failing to give Appellants’ averments the appropriate deference, the circuit court impermissibly weighed Respondents’ Answer and arguments in their briefing. Indeed, “the court does not weigh conflicting evidence with respect to a disputed material fact.” *Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 11 (Ct. App. 2019). And “[a] court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250 (2006). The purpose of such a standard is to “to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452 (2001). At a minimum, the circuit court’s orders amounted to an improper weighing of Respondents’ denials in their unverified Answer and arguments in their briefing—which are not treated as evidence—over Appellants’ evidence in their Verified Complaint.

abandoned—contention as fact, the circuit court improperly adopted a proposed order and otherwise elevated argument to evidence. That error requires reversal.

Fifth, if the circuit court believed material facts were in dispute, it was required to develop the record—not resolve those disputes against Appellants without discovery. Appellants sought discovery from Respondents regarding the circumstances of the Purchase Agreement’s formation, Respondents’ standard practices, and other issues relevant to unconscionability before Respondents’ motion to compel arbitration was filed and decided. There was no reasonable basis to grant the motion to compel arbitration before discovery was conducted.¹⁰ While the Arbitration Provision and the Verified Complaint provided a sufficient basis to deny the motion to compel, the record was wholly insufficient to support granting it.

VI. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE PARTIES AGREED TO DELEGATE ISSUES AS TO THE ENFORCEABILITY AND VALIDITY OF THE ARBITRATION PROVISION TO THE ARBITRATOR

The circuit court erred in concluding that “as a matter of law that the parties agreed to delegate issues regarding the enforceability of the Purchase Agreement to the arbitrator.” (R._(Arb. Order at 4).) The circuit court held that “[p]ursuant to the FAA and the Commercial Arbitration Rules 7(a) and (b), the arbitrator and not the Court determines all issues of arbitrability and the enforceability of the Purchase Agreement.” *Id.* at 3. In reaching the conclusion that the parties “clearly and unmistakably” delegated questions of arbitrability, the circuit court committed multiple errors. *First*, the court failed to apply binding South Carolina precedent, including *Simpson* and *315 Corley*. *Second*, it failed to apply the “clear and unmistakable” standard as the heightened standard it is, especially in the consumer context.

¹⁰ Courts in South Carolina have long recognized the propriety to conduct limited discovery prior to deciding a motion to compel arbitration. *See, e.g., Rich v. Walsh*, 357 S.C. 64, 67 (Ct. App. 2003) (“Limited discovery was conducted in the interval between the filing of the complaint and the motion to compel arbitration.”); *see also Casale v. Stivers Chrysler-Jeep, Inc.*, No. 2006-UP- 074, 2006 WL 7285736, at *1 (Ct. App. Feb. 9, 2006) (“[T]he court permitted the parties to conduct further discovery on the limited issue of whether [plaintiff] accepted the arbitration agreement.”).

Standard of Review. “The question of who decides arbitrability—the court or the arbitrator—is one we review *de novo*.” *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 337 (4th Cir. 2020). So too are issues ruled on *as a matter of law*.

A. THE CIRCUIT COURT ERRED BY FAILING TO APPLY CONTROLLING DECISIONS IN *SIMPSON* AND *315 CORLEY*

The circuit court failed to apply binding South Carolina precedent governing delegation in the face of an unconscionability challenge.¹¹ In its Findings of Fact, the circuit court expressly acknowledged that the Verified Complaint “alleges among other things, that the Purchase Agreement (***including the arbitration provision***) ***was unconscionable***.” (R. (Arb. Order at 2).) (emphasis added). Yet having recognized that challenge, the court failed to apply controlling authority that resolves delegations where arbitration provisions are alleged to be unconscionable.

First, in *Simpson*, the Supreme Court of South Carolina held that where a consumer “has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no ‘clear and unmistakable’ evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause’s validity.” *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. The circuit court’s conclusion that arbitrability was delegated here cannot be reconciled with that holding.

Second—and even more explicitly—this Court recently reaffirmed that “in South Carolina, if an arbitration provision is challenged on grounds of unconscionability, the question of the clause’s validity is for courts to decide, even if the clause delegates issues of validity by incorporating the AAA’s Commercial Arbitration Rules.” *315 Corley*, 444 S.C. at 530, 908 S.E.2d at 896.

In all, the binding South Carolina precedent establishes that there can be no “clear and unmistakable” delegation where, as here, the arbitration provision is challenged on grounds of unconscionability. The Court need not go further on the issue of delegation.

¹¹ These decisions control whether the motion to compel arbitration is brought under the FAA or the SCUAA. *One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (“General contract principles of state law apply to arbitration clauses governed by the FAA.”).

B. THE CIRCUIT COURT MISAPPLIED THE “CLEAR AND UNMISTAKABLE” EVIDENCE STANDARD IN THE CONSUMER CONTEXT

The Supreme Court of the United States confirms the framework under which *Simpson* and *315 Corley* were decided. Courts may not “assume that the parties agreed to arbitrate arbitrability” absent “clear and unmistakable” evidence. *Rent-A-Ctr.*, 561 U.S. at 69 n.1. This is a “heightened” standard—one that cannot be applied reflexively or without meaningful analysis in the consumer context.

1. Supreme Court has Emphasized that this a “Heightened Standard”

The Supreme Court of the United States has stated explicitly that this is a “heightened standard.” *Rent-A-Ctr.*, 561 U.S. at 69 n.1; *see also id.* at 79 (J. Stevens, dissenting) (explaining that the “clear and unmistakable” standard is “a more rigorous standard”). “Justice BREYER’s unanimous opinion for the Court described this standard as a type of reverse presumption—one in favor of a judicial, rather than an arbitral, forum.” *Id.* at 79 (J. Stevens, dissenting) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S. Ct. 1920, 1924 (1995)) (internal quotation marks omitted). As the Fourth Circuit recently reaffirmed, “[t]he clear and unmistakable standard is exacting, and the presence of an expansive arbitration clause, without more, will not suffice to show a valid delegation.” *Mod. Perfection, LLC v. Bank of Am., N.A.*, 126 F.4th 235, 241 (4th Cir. 2025) (citation omitted).

2. Courts Are Skeptical That Incorporation of Arbitral Rules in Consumer Agreements Reflects “Clear and Unmistakable” Intent to Delegate Arbitrability

The Fourth Circuit concluded that when “two *sophisticated* parties expressly incorporate into a contract JAMS Rules that delegate questions of arbitrability to an arbitrator, then that incorporation constitutes the parties’ clear and unmistakable intent to let an arbitrator determine the scope of arbitrability.” *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 527 (4th Cir. 2017) (emphasis added).

Courts applying *Simply Wireless* have recognized this limitation. In *Stone*, the court emphasized that the Fourth Circuit “twice stated in *Simply Wireless* that its holding applied to

agreements between *sophisticated actors*.” *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 554 (D. Md. 2019) (citing *Simply Wireless*, 877 F.3d at 528, 529) (italics in original).

Accordingly, the court rejected the argument that incorporation of AAA rules in a consumer contract establishes delegation, explaining that such a conclusion “would be to take a good joke too far.” *Id.* at 555 (internal quotation marks and citation omitted). Indeed, “[i]t strains credulity to believe that the consumer knew—much less intended—that the cross-reference directed an arbitrator to decide arbitrability.” *Id.*

Courts have rejected outright the idea that incorporation of arbitral rules can satisfy the “clear and unmistakable” standard in consumer contracts. As *Ashworth* put it, “[i]ncorporation by reference of an obscure body of rules to show a clear and unmistakable intent to adhere to one rule specifically is preposterous.” *Ashworth v. Five Guys Operations, LLC*, No. 16-cv-06646, 2016 WL 7422679, at *3 (S.D.W. Va. Dec. 22, 2016). It is “bordering on the absurd that an unsophisticated party . . . would know what the AAA is, much less the contents of its governing rules.” *Id.*

Such incorporation reflects only the intent of the drafter—not the consumer. For the latter, the supposed delegation is “obfuscated, possibly intentionally,” “unless the [consumer] happens to know the AAA rules, a ridiculous assumption, or takes the time to read the rules and specifically notices, among all the other rules, the rule permitting the arbitrator to determine gateway issues.” *Id.* The court recognized that delegation on that basis would require ignoring the “true meanings” of “clear” and “unmistakable.” *Id.* As here, where consumers challenge an arbitration agreement as unconscionable, a reference to arbitral rules cannot satisfy the clear and unmistakable standard for delegation arbitrability.

VII. THE ENTIRE ARBITRATION PROVISION IS UNCONSCIONABLE¹²

Standard of Review. While factual findings usually involve a more deferential standard, “the construction of a clear and unambiguous contract is a matter of law for the court, we review the trial court’s findings of law *de novo*.” *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394,

¹² For the avoidance of the doubt, Appellants assert that the entire Purchase Agreement is unconscionable and void, but this issue is not presently before the Court.

397 (2014). Indeed, “[t]he validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law.” *D.R. Horton*, 403 S.C. at 13, 742 S.E.2d at 39, *aff’d*, 417 S.C., 790 S.E.2d (citation omitted). Questions of law are always reviewed *de novo*. *Ziegler v. Dorchester County*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019).

A. THE CIRCUIT COURT’S ANALYSIS CONTAINS A MULTITUDE OF ERRORS

The circuit court’s unconscionability analysis was flawed and incomplete, focused on the wrong inquiry, and rested on legal error and clearly erroneous factual findings. The circuit court’s Order’s Findings of Fact do accurately state that “The Complaint alleges among other things, that the Purchase Agreement (including *the arbitration provision*) *was unconscionable* and seeking injunctive and equitable relief.” (R. (Arb. Order at 2).) (emphasis added). Despite this acknowledgment, the circuit court made no specific factual findings addressing the unconscionability allegations set out in the Verified Complaint, apart from quoting the Arbitration Provision in full. *Id.*

Later in the arbitration order, the circuit court stated “[t]he record is clear, however, that Plaintiff signed the Purchase Agreement and is therefore presumed to have read and understood the document he signed.” (R. (Arb. Order at 5).) From that premise, the circuit court concluded that “[p]laintiff presented no evidence to the contrary so this Court finds that any claim that Plaintiff did not read or understand the Purchase Agreement before signing it is without merit.” *Id.* While it is true that contract law generally presumes a signatory has read and understood an agreement, that presumption does not permit a court to bypass or truncate the unconscionability inquiry—particularly where unconscionability is pleaded in a verified complaint, supported by specific factual allegations, and evident from the face of the arbitration agreement.

1. The Circuit Court Erred by Concluding that the Entire Agreement (not just the Arbitration Provision) was not an Adhesion Contract

The circuit court then concluded, “as a matter of law” that “the Purchase Agreement was not an adhesion contract” and that there is “no actual support that the Purchase Agreement was a ‘take or leave it’ situation thereby failing to establish the requisite elements of an adhesion

contract.” (R. _ (Arb. Order at 5).) But the analysis for the motion to compel arbitration should have focused on the Arbitration Provision rather than the entire Purchase Agreement.

In concluding that there was not an adhesion contract, the circuit court relied, in part, on the presence of blank spaces on the front page of the Purchase Agreement for terms such as purchase price.¹³ *Id.* But a few blank spaces to fill in, such as party names and purchase price is not enough to remove an agreement from adhesion-contract status. *See Damico*, 437 S.C. at 614, 879 S.E.2d at 756 (“Here, we find it manifest that the purchase and sale agreement **is a contract of adhesion** given by Lennar to all of the homebuyers in the Abbey, with **only a few blank spaces to fill in**, including the buyer’s name, the relevant property address, and the purchase price.” (emphasis added)). Here, the circuit court’s observations do not establish that any terms were meaningfully negotiated, nor do they demonstrate that Appellants had a meaningful opportunity to negotiate—or even focus on—the arbitration provision itself. Most importantly, they do not serve as a substitute for the required fact-intensive, provision-specific unconscionability analysis.

Notwithstanding that the unconscionability analysis needs to be properly considered under the summary-judgment standard, there are three other errors. *First*, the circuit court erred by examining whether the Purchase Agreement as a whole rather than the Arbitration Provision itself was an adhesion contract. *Second*, the circuit court failed to undertake the required fact-intensive and case-by-case analysis required in unconscionability claims. The cursory adhesion-contract analysis conducted by the circuit court, even if fulsome, only addresses a part of unconscionability, which is neither sufficient to establish unconscionability nor sufficient, standing alone, to defeat

¹³Also in reaching its conclusion, the circuit court erroneously stated that “Plaintiffs in fact requested changes to the standard Purchase Agreement” citing handwritten terms—outside the Arbitration Provision and having nothing to do with arbitration—in the “Addendum/Exceptions” portion of the Purchase Agreement. *Id.* This erroneous conclusion—discussed further *infra* § VII.A.4—formed the basis for the circuit court’s further determination that Appellants had “meaningful choice” and an opportunity to alter or amend the Purchase Agreement, notwithstanding that the circuit court’s express acknowledgement that none of the handwritten terms involved the arbitration provision. *Id.*

it.¹⁴ *Third*, the court’s order contains additional errors, most notably its wholesale adoption of a factual finding from Respondents’ proposed order—one that Respondents later abandoned.

2. The Circuit Court’s Unconscionability Analysis Should Have Focused Exclusively on the Arbitration Provision

Throughout the circuit court’s analysis, it examined the Purchase Agreement rather than the Arbitration Provision. (R. _ (Arb. Order at 5).) (“[T]his Court finds as a matter of law that the *Purchase Agreement* was not an adhesion contract.”) (emphasis added.) The circuit court pointed to an Addendum/Exception as well as the “front page of the Purchase Agreement,” neither containing any terms relating to arbitration. The circuit court’s inquiry to the entire Purchase Agreement contravenes the Supreme Court’s *Prima Paint* doctrine, which requires that the “validity of an arbitration agreement is considered separately from the substantive validity of the contract in which the arbitration provision is found; the court does not consider unconscionable terms outside of the arbitration provision” *Mart v. Great S. Homes, Inc.*, 441 S.C. 304, 314, 893 S.E.2d 360, 365 (Ct. App. 2023) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967)). The circuit court’s consideration of the entire Purchase Agreement, rather than the Arbitration Provision alone, was legal error subject to *de novo* review.¹⁵

3. The Circuit Court Erred in Not Undertaking the Unconscionability Analysis as Set Forth by the South Carolina Supreme Court in *Damico*

Whether a party has agreed to submit a dispute to arbitration is an issue for judicial determination. *Granite Rock Co. v. Int’l Bhd. Of Teamsters et al.*, 561 U.S. 287 (2010) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (“It is well settled in both commercial and labor cases that whether parties have agreed to ‘submi[t] a particular dispute to arbitration’ is typically an ‘issue for judicial determination.’”). “It is similarly well settled that

¹⁴ Even if the trial court did engage in something closer to the required unconscionability analysis as laid out in *Damico* and other South Carolina Supreme Court decisions, the fact-specific analysis would, nevertheless, still need to be revisited under the proper summary judgment standard.

¹⁵ Even so, *proper* consideration of the contract as a whole would only further bolster Appellants’ position because “unconscionability pervades the various agreements between the parties,” and the contract terms are “absurd, factually incorrect, and grossly oppressive.” *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 617–18, 879 S.E.2d 746, 758 (2022).

where the dispute at issue concerns contract formation, the dispute is generally for the courts to decide.” *Id.* (citing *First Options*, 514 U.S. at 944 (“When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary . . . principles that govern the formation of contracts”). In its interpretation and application of such federal jurisprudence, our state Supreme Court has stated, “[t]he rationale of these decisions is obvious – arbitration is a matter of consent, and courts can only order arbitration when they are satisfied the parties agreed to arbitrate a dispute.” *Sanders*, 440 S.C. at 388; 892 S.E.2d at 118 (citing *Granite Rock Co.* at 299). However, in accordance with the United States Supreme Court’s decision in *Prima Paint*, a court’s analysis of the existence of an agreement to arbitrate should be limited to the express terms of the arbitration provision and not the contract as a whole. *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4.

To determine whether a valid arbitration agreement exists, “trial courts consider ‘general contract defenses’ to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of fraud, duress, [or] **unconscionability**.” *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 145 (2013) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001)) (emphasis added).

a. The Unconscionability Standard

“At its core, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with the terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Damico*, 437 S.C. at 611, 879 S.E.2d at 754 (internal quotation marks and citations omitted). A determination of whether a contract is unconscionable depends upon all of the facts and circumstances of the case. *Id.* at 611, 879 S.E.2d at 755 (citation omitted). Our courts have “emphasized the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.” *Id.* *Damico* has instructed that “[i]n analyzing claims of unconscionability in the context of arbitration agreements,” the focus should be on “whether the arbitration clause is geared towards achieving an unbiased decision by

a neutral decision maker.” *Id.* 437 S.C. at 612, 879 S.E.2d at 755 (quoting *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668–69).

The law of our State recognizes challenges to “the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place.” *Simpson*, 373 S.C. at 23, 644 S.E.2d at 668. “[I]ssues of contract formation necessarily raise the question of whether an arbitration agreement was ever created, such issues are for the court to decide.” *Sanders*, 440 S.C. at 380, 892 S.E.2d at 113.

i. Procedural Unconscionability

Under South Carolina law, the “touchstone of the analysis begins with the presence or absence of meaningful choice,” *i.e.*, procedural unconscionability. *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. “[C]ourts **must consider**, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant.” *Id.*, 437 S.C. at 613, 879 S.E.2d at 755 (*Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 & 17A Am Jur. 2d *Contracts* § 272 & 17 C.J.S. *Contracts* § 10); *Maybank v. BB&T Corp.*, 416 S.C. 541, 575, 787 S.E.2d 498, 515–16 (2016) (“In analyzing the absence of meaningful choice, courts should consider, *inter alia*, the nature of the injuries, any disparity in the parties' bargaining power, the level of sophistication of the parties, whether there is an element of surprise in the challenged clause, and the conspicuousness of the clause.”) “Other factors to be considered include the use of **sharp practices or high pressure tactics**, 17A Am. Jur. 2d *Contracts* § 272 (emphasis added), whether a contract was signed “hastily,” *Doe v. TCSC, LLC*, 430 S.C. 602, 613, 846 S.E.2d 874, 879 (Ct. App. 2020), “whether the parties were represented by independent counsel, and whether ““the plaintiff is a substantial business concern,”” *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669).

While not *per se* unconscionable, an adhesion contract, which is a “standard form contract[] offered on a take-it or leave-it basis with terms that are not negotiable,” “is a strong indicator that there was an absence of meaningful choice.” *Id.*, 437 S.C. at 613–14, 879 S.E.2d at 756 (quoting 17A Am. Jur. 2d *Contracts* § 274). Adhesion contracts are viewed with

“considerable skepticism” as it is doubtful “any true agreement ever existed to submit disputes to arbitration.” *Id.* (quoting *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669). As here, “[a] consumer transaction which is essentially a contract of adhesion may be examined by the courts with *special scrutiny* to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting.” *Id.* (quoting 17 C.J.S. *Contracts* § 9).

ii. Substantive Unconscionability

The second part of an unconscionability analysis is substantive unconscionability—whether the terms are “one-sided,” “unreasonable” or “oppressive.” *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 616, 879 S.E.2d 746, 756, 757 (2022). “A term may also be said to be substantively suspect if, viewed at the time the contract was formed, it reallocates the risks of the bargain in an objectively unreasonable or unexpected way.” 17A Am. Jur. 2d *Contracts* § 272.

b. The Arbitration Provision is an Unconscionable Adhesion Contract

i. The Arbitration Provision is Procedurally Unconscionable

The Arbitration Provision here is not the product of agreement—it is the product of imposition. It reflects a classic adhesion contract: drafted entirely by Respondents, presented on a take-it-or-leave-it basis, and imposed on consumers with no meaningful opportunity to negotiate or understand its terms. South Carolina law condemns such arrangements where, as here, they are coupled with unequal bargaining power, inconspicuous, lack of counsel, and high-pressure sales tactics. *Damico*, 437 S.C. at 613, 879 S.E.2d at 755. Under these circumstances, the Arbitration Provision is procedurally unconscionable and unenforceable.

First, there is a pronounced disparity in bargaining power and sophistication.¹⁶ Here, the arbitration provision was drafted by a sophisticated business and imposed on individual consumers with no ability to negotiate its terms. The relative disparity in the parties’ bargaining power and

¹⁶ Underlying the entire dispute, is that the entire contract, including the arbitration provision involves a consumer transaction. The circuit court wholly failed to address the consumer nature of the transaction in contravention of *Damico*’s directive to view them with “considerable skepticism . . . due to the disparity in bargaining position of the parties. 437 S.C. at 620, 879 S.E.2d at 760 (quoting *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669). Failure to consider the consumer nature of the transaction and thus, among other factors, the disparity in bargaining position, the relative sophistication, and various other related factors is legal error.

sophistication in this context is stark. Appellants are middle-aged individuals who traveled to South Carolina for the first time and have not been subject to similar high-pressure sales operations (e.g., sending multiple sales representatives to alternate efforts to sell the service – which is exactly what SCUTPA is designed to protect against). In contrast, Respondents are involved in the sale of hundreds or thousands of these memberships on an annual basis (using the same or similar sales tactics) and are part of a substantial business concern which had sole control over the terms of the Agreement.¹⁷

Second, the arbitration provision was inconspicuous and embedded within a broader adhesive agreement that functioned to strip consumers of significant rights. As *Simpson* makes clear, courts “cannot . . . ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available.” 373 S.C. at 28, 644 S.E.2d at 670. That concern is directly implicated here, where the arbitration provision was neither meaningfully highlighted nor explained, despite its sweeping consequences.

Third, the absence of legal counsel weighs heavily in favor of procedural unconscionability. South Carolina courts consider whether the consumer “did not have a lawyer present to provide any assistance.” *Id.* Appellants did not travel with any legal counsel and did not have an opportunity, nor were advised by Respondents, to seek out counsel to review the Agreement, while the Agreement was drafted by sophisticated counsel to create a substantial advantage for the Respondents. Thus, Appellants, like the consumer in *Simpson*, had no legal assistance and no realistic ability to understand the legal consequences of the arbitration provision.

Fourth, the contract formation process reflects the very hallmarks of procedural unconscionability: high-pressure tactics, lack of meaningful review, and limited opportunity for deliberation. “Procedural unconscionability focuses on such things as high pressure sales tactics.”

¹⁷ As in *Damico*, just because the Appellants could afford to purchase the membership, much like a home purchaser, their bargaining position was substantially inferior to the Respondents’ business enterprise which works daily to sell such memberships to the innocent visitors of the County and City of Charleston, South Carolina. See 437 S.C. at 614–15, 879 S.E.2d at 756 (finding consumers’ sophistication “pales in comparison” to a repeat-player seller).

State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. 2006); 1 Consumer Law Sales Practices and Credit Regulation § 186 (“Procedural unconscionability has to do with lack of fairness in the formation of the contract, such as the use of high pressure sales tactics”). Courts likewise recognize that “deceptive sales practices” and “high pressure sales tactics” are classic indicators of unconscionability. 1 Consumer Law Sales Practices and Credit Regulation § 188. Here, the agreement was presented in a manner that did not allow for meaningful review—indeed, *Simpson* specifically identified the “hastily” presented nature of a contract as a key indicator of procedural unfairness. 373 S.C. at 14.

Taken together, these factors demonstrate that Appellants lacked any meaningful opportunity to understand, negotiate, or reject the arbitration provision. The agreement was imposed through unequal bargaining power, without counsel, through an inconspicuous and rushed presentation, and in a manner that obscured its consequences. Under South Carolina law and broader consumer contract principles, the arbitration provision is procedurally unconscionable.

ii. The Arbitration Provision is Substantively Unconscionable

The Arbitration Provision contains four distinct sentences, each independently unconscionable and all the more so when considered together. As discussed throughout, the most glaring defect is the provision that “[t]he arbitrator shall be selected by Vacation Inspirations.”

First, such a unilateral arbitration-selection provision is universally rejected as unconscionable. *See supra* § III.¹⁸

Second, the Arbitration Provision requires the non-prevailing party to pay the arbitrator’s compensation and the cost of the arbitration location.¹⁹ This exposes consumers to potentially substantial and unpredictable expenses that far exceed ordinary court costs. Such cost-shifting

¹⁸ By granting Vacation Inspirations unilateral authority to select the arbitrator, the clause embeds repeat-player bias into the arbitration process. Vacation Inspirations is a repeat user of arbitration, while consumers are one-time participants, creating a structural incentive for arbitrators to rule in favor of the party that controls future selections. This imbalance undermines the neutrality that is essential to a fair arbitral forum.

¹⁹ The Arbitration Provision specifies that arbitration is to occur in Charleston or at any other location chosen by Vacation Inspirations. This unilateral authority allows the company to control the convenience and cost of the forum. Such one-sided control over venue further tilts the arbitration process in favor of the drafting party.

makes access to the arbitral forum financially risky and deters the assertion of even meritorious claims.

Third, the arbitration clause allocates procedural power to the company and financial risk to the consumer. Vacation Inspirations controls arbitrator selection and venue, while the consumer bears the risk of paying all arbitration costs if unsuccessful—even though SCUTPA affirmatively authorizes prevailing consumers to recover attorneys’ fees. This undercutting of the statutory attorney’s fees scheme and this lack of mutuality is a hallmark of substantive unconscionability.

Fourth, the clause attempts to oust the AAA Consumer Arbitration Rules and the Consumer Due Process Protocol, which exist to ensure neutrality and protect consumers from excessive costs and biased procedures. By excluding AAA administration while retaining company control over the arbitrator and forum, the clause eliminates these basic safeguards. The result is a process that lacks the minimum procedural fairness associated with enforceable consumer arbitration.

Fifth, by excluding AAA administration, the clause provides no neutral mechanism to enforce the arbitration rules or resolve procedural disputes. There is no defined process for ensuring compliance, neutrality, or fairness in the arbitration. Any ambiguity created by this structure operates solely to the drafter’s advantage.

Sixth, taken together, the terms concentrate control over the decisionmaker, forum, and costs in the company. This structure exposes consumers to disproportionate risk while denying them the basic protections associated with neutral adjudication. The cumulative effect is a dispute-resolution process that is fundamentally one-sided.

Seventh, the arbitration clause operates with a powerful *in terrorem* effect that deters consumers from ever asserting their rights. Faced with a process controlled by the company, the risk of paying substantial arbitration costs, and the absence of neutral oversight, a reasonable consumer would be discouraged from pursuing even meritorious claims. As the South Carolina Supreme Court has recognized, arbitration provisions like this exert an overwhelming deterrent

effect on consumers, most of whom comply rather than challenge them—precisely why courts must guard against overreaching in dispute-resolution clauses.

4. Many of the Errors Stem from the Circuit Court’s Rubber-Stamping of Respondents’ Proposed Order

Many of the circuit court’s errors discussed in this brief appear to stem from its adoption of Respondents’ proposed order with little independent analysis. The circuit court’s order was materially and substantively the same—the changes from Respondents’ proposed order almost exclusively involved grammatical and stylistic changes. As such, it does not meaningfully address Appellants’ arguments or the factual allegations in the Verified Complaint. As a result, the Order reflects Respondents’ framing of the issues rather than an independent application under the governing legal standards. The most glaring error is discussed below.

Handwritten items appearing in the Addendum/Exceptions were written in by Vacation Inspirations in the agreement and were not requested or negotiated by Appellants. This is apparent both from the nature of the terms themselves and from their repetitive appearance across multiple agreements. The circuit court’s suggestion that these insertions demonstrate negotiability—let alone that the Arbitration Provision could have been negotiated when Appellants were not even aware of its existence at the time of signing—constitutes legal error.

As an initial matter, this error arose only because the circuit court virtually rubber-stamped Vacation Inspirations’ proposed order. There were no handwritten modifications to the Arbitration Provision and no negotiations or discussions concerning arbitration, yet Vacation Inspirations nevertheless insisted the agreement at issue was not adhesive. *Damico* recognized this precise tactic, observing that “it is common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue.” *Damico*, 437 S.C. at 614, 879 S.E.2d at 756. Here, however, Respondents went further by inserting unsupported factual assertions into their proposed order. These assertions that were adopted wholesale by the circuit court and now form the basis of a flawed adhesion analysis.

It is useful to examine what transpired. In its memorandum supporting its motion to compel arbitration, Respondents argued that “[t]he Purchase Agreement includes an Addendum/Exception (attached as an Exhibit to the pending Motion), which provided Plaintiffs an opportunity to alter or amend the arbitration provision.” (R. _(R’s Arb. Memo at 6).) While that is a facially legitimate legal argument, Appellants explained why it fails as a matter of law. The Addendum, at most, reflects additional terms drafted by Respondents—not negotiated by Appellants. A few inserted terms do not transform a boilerplate contract into a negotiated one. Critically, the dispute was never about whether Appellants “*requested changes* to the standard Purchase Agreement,” but whether the existence of handwritten or additional terms defeats a finding of adhesion. Those are distinct issues, and the circuit court’s conflation of them was error.

Notwithstanding its prior argument, Respondents’ proposed order asserted that “Plaintiffs in fact requested changes to the standard Purchase Agreement which were included in the Addendum/Exception to Contract as part of the Purchase Agreement.” (R. _(R’s Prop. Order at 4).) The same exact phrase appeared in the circuit court’s final order: “Plaintiffs in fact requested changes to the standard Purchase Agreement which were included in the Addendum/Exception to Contract as part of the Purchase Agreement.” (R. _(Arb. Order at 5).)

Before even turning to the record that shows this assertion is demonstrably false, the threshold problem is that the language adopted by the circuit court was never alleged in the Answer or even argued by Respondents. It appears only in its proposed order. That matters.

If treated as a legal argument, it is waived; if treated as a factual finding, it is clearly erroneous. This misstep highlights why the correct standard—and limited discovery—are essential in this context. Under the governing summary judgment–like framework, all inferences must be drawn in Appellants’ favor. *Russell*, 370 S.C. at 15. The circuit court did the opposite here.

There is no evidence—and no allegation—that Appellants requested or negotiated these terms. Even if they had, it would not matter: a consumer contract would still be adhesive even with the inclusion of minor negotiated or fill-in provisions. *Damico*, 437 S.C. at 614, 879 S.E.2d at 756 (recognizing that contracts may be adhesive even where they contain “blank spaces to fill in”).

The Court should take judicial notice²⁰ of filings in two other proceedings in the circuit court (now on appeal) brought by different victims against the same Respondents and with identical counsel representing the parties across all three actions. The text of the purported “negotiated” terms for each of the three matters pending on appeal, as reflected in the below chart, confirms their standardized nature. The addendums provide the following handwritten terms:

Skoler	Perrelli	Sawyer
Annual dues frozen \$199 forever	Annual dues frozen \$199 for lifetime	Annual dues frozen \$199 forever
4 Friend/family plans w/no dues & 5% back on cruises	4 family + friends included; no dues	6 family + friends w/no dues & 5% back on cruises
Primary members 10% back on cruises	5% rewards on friends + family cruising	Primary members 10% back on cruises
Members may choose to upgrade condo weeks @\$1000 for each week	10% rewards on members cruising	

(R._(Skoler Purchase Agreement at 3); R._(Perrelli Purchase Agreement at 3); R._(Sawyer Purchase Agreement at 3).) The pattern is as clear as the addenda are substantively identical. The only difference is the number of included users—six versus four. That minor variation in wording and numbers confirm the point: these are standardized, pre-set terms, not the product of individualized negotiation. These terms do not cure adhesion—they underscore it. Even if requested, such trivial variation cannot transform an adhesive arbitration provision into a negotiated one, especially not the Arbitration Provision, to which they are unrelated.

In fact, in opposing reconsideration, Respondents initially claimed the handwritten terms were “requested and received by Plaintiffs.” (R. _(R’s Recon. Memo at 4–5).) After a discussion among counsel, Respondents filed an amended opposition removing that language entirely. (R._(R’s. Am. Recon. Memo at 8).) That retreat speaks for itself. Yet the circuit court ignored it

²⁰ See *State v. Odom*, 412 S.C. 253, 271–72, 772 S.E.2d 149, 158 (2015) (“[A] fact properly judicially noticed is any fact ‘not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’” (quoting Rule 201(b), SCRE)); see also *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (“‘It is not error for a judge to take judicial notice of what was stated in a former opinion in a prior action of the same case.’” (citation omitted)).

and denied reconsideration without addressing the issue. In all, the circuit court erred in finding that Appellants requested identical terms and in using that finding to reject adhesion. That determination is both factually unsupported and legally incorrect, and it warrants reversal.

VIII. THE ARBITRATION PROVISION CANNOT BE SEVERED

Whether invalid under the FAA or South Carolina law, the Arbitration Provision is unenforceable in its entirety, and its unconscionable terms cannot be severed because the provision as a whole is unconscionable. *See Damico*, 437 S.C. at 620, 879 S.E.2d at 759 (“Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.”). Even if the Court were to conclude that only certain provisions are unconscionable, severance would still be inappropriate in light of the overall structure and context of the agreement.

All factors identified by the South Carolina Supreme Court for determining whether to sever an arbitration agreement weigh against severance. *See Damico*, 437 S.C. at 604, 618–21, 879 S.E.2d at 751, 758–60.²¹

First, severing the unconscionable terms “would encourage sophisticated parties to intentionally insert unconscionable terms—that often go unchallenged—throughout their contracts, believing the courts would step in and rescue the party from its gross overreach.” *Id.*, 437 S.C. at 604, 879 S.E.2d at 751. “This smacks of having one’s employee’s cake, and eating it too.” *Id.*, 437 S.C. at 623, 879 S.E.2d at 761 (internal quotation marks and citation omitted). “We have been steadfast in protecting [consumers] from unscrupulous and overreaching terms, and applying severance here would erode that laudable public policy.” *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 597, 910 S.E.2d 474, 477 (2024).²²

²¹ Although not dispositive if a severability clause is included in an agreement, a lack of such clause indicates “the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement.” *D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 (citing *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673).

²² “[F]or every arbitration agreement that finds its way to court, there are thousands that exercise an *in terrorem* effect on [consumers] who respect their contractual obligations.” *Damico*, 437 S.C. at 623, 879 S.E.2d at 761 (citation omitted). Thus, where the more sophisticated party “furnishe[s] a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause,” the Supreme Court of South Carolina “refuse[s] to reward such misconduct.” *Damico*, 437 S.C. at 624, 879 S.E.2d at 762; *Huskins*, 444 S.C. at 598, 910 S.E.2d at 478 (if a court were to sever unconscionable clauses, “parties who impose standard form adhesion

Second, where, as here, “the less sophisticated and less powerful party(s) [] had no hand in drafting or negotiating any of the language of the arbitration agreement,” it is ““considerably doubtful”” any true agreement ever existed to sever any oppression provisions from the arbitration agreement.” *Damico*, 437 S.C. at 621, 879 S.E.2d at 760.

Third, the Arbitration Provision arose in the context of a consumer contract, in which courts are even more hesitant to sever unconscionable clauses because “applying severance here would erode that laudable public policy.” *Huskins*, 444 S.C. at 597, 910 S.E.2d at 477.

For example, in *Simpson*, the Supreme Court of South Carolina declined to sever unconscionable arbitration clauses in favor of invalidating the entire arbitration provision for three reasons. *First*, because the arbitration provision contained more than one unconscionable provision. *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9. *Second*, because some of the unconscionable provisions implicated consumer protection law. *Id.* *Third*, “the sheer magnitude of unconscionability present” which served to “prevent[] a party from vindicating the party’s statutory rights” necessitates giving “significant consideration to a remedy in this situation that best serves the interests of public policy.” *Id.* Indeed, severance is inappropriate when the entire arbitration clause represents an ‘integrated scheme to contravene public policy.’” *Id.* (citation omitted)).²³

CONCLUSION

“Our legal institutions depend on legitimate process and the real possibility for redress.” *Chavarria*, 812 F. Supp. 2d at 1088 (declining to enforce unconscionable arbitration process;

contracts on weaker parties would have no downside to throwing in blatantly illegal terms betting they will go unchallenged or, at worst, that courts will throw them out and enforce the rest.”).

²³ Here, as in *Simpson*, the Arbitration Provision is “wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause.” *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674; *see also D.R. Horton*, 403 S.C. at 17, 742 S.E.2d at 41, *aff’d*, 417 S.C., 790 S.E.2d (“rescission [is] the appropriate remedy where [the sophisticated party] promulgated so many biased arbitration rules that the contract created ‘a sham system unworthy even of the name of arbitration.’” (quoting *Hooters*, 173 F.3d at 940)). Where, as here, “illegality pervades the entire agreement,” “courts are reluctant to sever the unconscionable provisions.” *Damico*, 437 S.C. at 618, 879 S.E.2d at 758. This is because in such cases, “judicial severing ‘looks more like rewriting the contract than fulfilling the intent of the parties.’” *Id.* (quoting *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673).

affirmed by the Ninth Circuit on appeal). An arbitration process that authorizes, among other things, unilateral appointment of an arbitrator by the sophisticated party, and excludes neutral oversight by a legitimate arbitration administrator, “lacks any semblance of fairness and eviscerates the right to seek civil redress, rendering it a right that exists in name only.” *Id.* Allowing such a process to proceed “would be a disservice to the legitimate practice of arbitration and a stain on the credibility of our system of justice.” *Id.*

Accordingly, Appellants respectfully request that the Court reverse the circuit court’s order and invalidate the entire Arbitration Provision and direct the circuit court to proceed to the merits of the dispute. In the alternative, Appellants request that the Court vacate the circuit court’s order and direct the circuit court to consider the motion to compel under the appropriate summary judgment-like standard, treat the allegations in the Verified Complaint as evidence, and undertake the fact-intensive unconscionability analysis required by *Damico*.