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SC Court of Appeals

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

Frank Perrelli, Jr., Appellant,

v.

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

AND

Peter Skoler and Patricia Skoler, Appellants,

v.

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

RECORD ON APPEAL - Volume II

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2024-CP-10-04606
FRANK PERRELLI, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANTS' AMENDED
	)	MEMORANDUM IN SUPPORT OF
VACATION INSPIRATIONS,	)	MOTION TO COMPEL ARBITRATION
DESTINATION TRAVEL, LLC, JOSEPH	)	AND STAY PROCEEDINGS
SHIRLEY, RANDY GARDNER, AND	)	
JEFFREY PUMILIA,	)	
	)	
Defendants.	)	
	)	

Defendants by and through their undersigned counsel, hereby file their Memorandum in support of their Motion to Compel Arbitration and Stay Proceedings, as follows:

SHORT FACTUAL BACKGROUND AND LITIGATION HISTORY

On or about October 8, 2022, Plaintiff purchased a Vacation Inspirations Membership in Charleston, South Carolina. Plaintiff is a resident of the State of Connecticut. Defendants are all residents of the State of South Carolina. A copy of the Purchase Agreement (Vacation Inspirations Membership) (the "Purchase Agreement") is attached to the pending Motion as an Exhibit. The Purchase Agreement contemplates the use of telephones, faxes and emails to book travel and cruises outside the State of South Carolina, all in and affecting interstate commerce. Additionally, Defendants attach the affidavit of Randy Gardner which conclusively shows that the matters at issue in Plaintiff's complaint involve interstate commerce.

On September 13, 2024, Plaintiff filed his Complaint containing numerous counts and allegations. On November 4, 2024, Defendants filed their Answer and Affirmative Defenses.

On November 12, 2024, Defendants filed the within Motion to Compel Arbitration and Stay Proceedings, all to enforce that portion of the Purchase Agreement clearly providing for arbitration (rather than litigation) in the Dispute Resolution section therein.

Defendants rely upon the provisions of the Federal Arbitration Act (“FAA”), the affidavit of Randy Gardner attached as an Exhibit hereto, and all other applicable laws in support of their Motion.

ARGUMENT AND CITATION OF AUTHORITY

I. ONLY THE ARBITRATOR HAS JURISDICTION TO DECIDE ISSUES OF ARBITRABILITY

Defendants’ Motion to Compel Arbitration specifically relies upon all applicable law, including, but not limited to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the “FAA”), as well as the terms of the arbitration requirement contained in the Purchase (Membership) Agreement. The arbitration paragraph includes the following provision:

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].

See Agreement attached to Defendants’ Motion to Compel Arbitration at Para. VIII.

Pursuant to the FAA and the Commercial Arbitration Rules of the AAA and agreed to by Plaintiff, and the citations below, the question of arbitrability is to be determined and decided by the arbitrator, and respectfully, not the Court.

Rule R-7(a) and (b) of the Commercial Rules provide as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

See FAA, Rule R-7(a) and (b). Therefore, the Court must defer to the arbitrator all issues and the Court should grant the pending Motion to Compel Arbitration.

This issue has been decided by the United States Supreme Court in the case of Henry Schein, Inc. vs. Archer & White Sales, Inc., 586 U.S. 63, 139 S. Ct. 524, (2019). In that case the arbitration provision provided that any dispute [with unrelated exceptions] **“shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [AAA]. The place of arbitration shall be in Charlotte, North Carolina.”** See Schein, Inc., 586 U.S. at 66, 139 S. Ct. at 528 (internal citations omitted) (emphasis added).

The United States Supreme Court held the requirement the arbitration be conducted in accordance with the Arbitration Rules of the American Arbitration Association means that only the arbitrator and not the trial Court could decide the arbitrability question.

The Schein Supreme Court decision goes on to state the following:

When the parties’ contract delegates the arbitrability question to the arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. *Id* at 529. When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Schein, Inc., 586 U.S. at 68, 139 S. Ct. at 529. The Court also stated:

When the parties; contract delegates the arbitrability question to the arbitrator, the courts must respect the partes’ decision as embodied in the contract.

Id. at 71, 139 S. Ct. 524 at 531. In the arbitration provision herein, the Purchase Agreement clearly and unequivocally invoked the Commercial Arbitration Rules of the AAA. As noted below, the AAA Commercial Rules specifically provide for such delegation to the arbitrator.

The Purchase Agreement and the arbitration clause have the required nexus to interstate commerce as set forth in the Gardner Affidavit to invoke the arbitration provisions of the FAA. See generally, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995). Therefore, under the Federal Arbitration Act, the Court may not decide whether an arbitration agreement applies to the instant dispute if the parties clearly and unmistakably delegated the question to an arbitrator. See also Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893, 894 (Ct. App. 2020).

Moreover, under any circumstance, arbitration should be required under the FAA. "[The FAA applies . . . to any arbitration agreement regarding a transaction that in fact involves interstate commerce." See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). So long as interstate commerce is involved, the FAA controls arbitration. Mr. Gardner's affidavit provides clear evidence of the necessary involvement with interstate commerce. The arbitration should be conducted under the AAA Commercial Rules and in accordance with the FAA with any issues regarding arbitrability decided by the arbitrator. The Motion to Compel Arbitration and Stay Proceedings should be granted and any issues regarding arbitrability should be decided by the arbitrator.

II. PLAINTIFF IS PRESUMED TO HAVE READ, UNDERSTOOD AND AGREED TO THE TERMS OF THE PURCHASE AGREEMENT, INCLUDING THE ARBITRATION PROVISION

Alternatively, regardless of the decision maker, the ultimate question of arbitrability "is a matter of contract interpretation." See Am. Recovery Corp. v. Computerized Thermal Imaging, 96

F.3d 88, 92 (4th Cir. 1996) (internal citations omitted). It is virtually black letter law that anyone who can read is presumed to have read any agreement that person signs. “[One] who has signed a contract is presumed to have read, understood and assented to its terms.” Gibson v. Epting, 426 S.C. 346, 352 827 S.E.2d 178, 181 (Ct. App. 2019) (internal citations omitted). “A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.” Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003).

The arbitration provision herein is governed by the FAA and cannot be set aside on the ground that the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it. See Munoz, 343 S.C. 531 at 541 n.6, 542 S.E.2d at 365.

In addition, the South Carolina Supreme Court noted the following:

“In these circumstances, we are constrained to hold that her conduct, in failing to employ the opportunity and means given her to acquaint herself with the contents of the policy, was clearly a conscious and reckless disregard of her duty in the premises and was a proximate cause of her alleged injury or damage.”

See Hood v. Life & Cas. Ins. Co. of Tennessee, 173 S.C. 139, 146, 175 S.E. 76 (S.C. 1934).

Plaintiff therefore cannot argue that he did not read or understand the Purchase Agreement and all of its terms, including the arbitration provision before signing the Purchase Agreement. And as noted below, Plaintiff had the choice and opportunity to alter or otherwise modify the arbitration provision. He simply chose not to do so before signing the Purchase Agreement. Plaintiff had a meaningful choice and he accepted the terms of the Purchase Agreement, including the arbitration provision.

The Motion to Compel Arbitration and Stay Proceedings should be granted.

III. THE ARBITRATION PROVISION IS NOT UNCONSCIONABLE.

Neither the Purchase Agreement nor the arbitration provision therein is on a “take -it-or-leave-it basis with no negotiable terms and that its evident from the agreement itself. Plaintiff failed to make any effort to negotiate the arbitration provision, even though he had the opportunity to do so and in fact, did negotiate several matters as noted below. Plaintiff had meaningful choices, he just did not choose to make any of those choices regarding the arbitration provision.

The Purchase Agreement includes an Addendum/Exception (attached as an Exhibit to the pending Motion), which provided Plaintiff an opportunity to alter or amend the arbitration provision. In fact, as seen on the Addendum/Exception, there are four (4) such handwritten items. None of the four (4) exceptions handwritten involve or address the arbitration provision. Plaintiff signed the handwritten page with the exceptions. Plaintiff had a meaningful choice, but he chose not to raise any questions at the time of the Purchase Agreement regarding the arbitration provision and. Plaintiff cannot now be permitted to claim otherwise.

Furthermore, the Plaintiff’s other arguments regarding unconscionability are based on unsubstantiated or irrelevant allegations and cannot be summarily decided by this court. The FAA provides in relevant part 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. See 9 U.S.C. § 4. In making such a decision, the court is obliged to conduct a trial when a party unequivocally denies that an arbitration agreement exists, and shows sufficient facts in support thereof. Berkeley Cty. Sch. Dist. v. Hub Int’l. Ltd., 944 F.3d 225, 227 (4th Cir. 2019). This is yet another reason why the Court should grant the Defendants’ motion and refer this matter to

arbitration so that the arbitrator can conduct an evidentiary hearing on the issue of arbitrability if he or she deems that necessary.

An example of such an unsubstantiated allegation is the Plaintiff claim that the agreement is unconscionable because he was supposedly subjected to high pressure sales tactics. However, item number 10 of the Vacations Inspirations Membership Acknowledgment of the Agreement specifically asks if decision to purchase was “based on any high pressure sales tactics” and Plaintiff responded “no.” Plaintiff also signed that page.

As for the contention that Plaintiff did not have equal bargaining power, it is noteworthy that this purchase was a travel club membership. It is not an essential purchase such as shelter or even a core consumer purchase such as an automobile. Under any circumstance, Plaintiff could have said “no thank you” and left at any time without signing the Purchase Agreement. It is not unusual for those who listen to the Defendants’ sales presentation to do only that and then decline to purchase.

The request for participants in the sales presentation to turn off their cell phones is not a high pressure sales tactic. Instead, that request is made prior to the sales presentation because of the expectation that cell phone usage will be a constant distraction during the presentation.

It is irrelevant that Plaintiff did not “travel with any legal counsel” or that he did not consult with an attorney prior to signing the Agreement. Plaintiff cites no support for the idea that a contract is unconscionable unless the parties first have an opportunity to consult with counsel. Also, Defendants did not have any duty to advise Plaintiff to seek legal counsel.

IV. THE AAA COMMERCIAL RULES OF ARBITRATION PROVIDE THE METHOD FOR APPOINTING A FAIR ARBITRATOR. THE ARBITRATION PROVISION IN THE PURCHASE AGREEMENT COMPLIES WITH THAT METHOD AND MUST BE FOLLOWED

Plaintiff also argues that arbitration should not be compelled because the arbitration agreement that he signed does not provide a fair, unbiased forum. However, an examination of the applicable rule conclusively refutes that claim. Rule R-14 of the AAA Commercial Arbitration Rules states in part as follows:

- (a) If the agreement of the parties names an arbitrator **or specifies a method of appointment of an arbitrator**, that designation or method shall be followed. (Emphasis added).

See FAA, Rule R-14 attached hereto as Exhibit B. Moreover, Rule R-19(a) states in part as follows:

An arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

- (i) Partiality or lack of independence.

See FAA, Rule R-19(a) attached hereto as Exhibit C. While Rule R-19(b) permits appointment of a “non-neutral” arbitrator, that is not the case here. The arbitration clause challenged by the Plaintiff merely allows Defendant Vacation Inspirations to choose the arbitrator, but it does not relieve the arbitrator selected of his or her obligations under the AAA Commercial Rules to be “impartial and independent”. Moreover South Carolina ADR Rule 13(d) has a similar provision. Contrary to Plaintiff’s arguments, the arbitration provision invoking the Commercial Rules of the American Arbitration Association fully and completely complies with and is accordance with the foregoing Rules and provides a forum for resolving this dispute by an unbiased arbitrator.

V. **THE CONSUMER ARBITRATION RULES DO NOT APPLY**

Defendants also note that Plaintiff’s argument that the AAA Consumer Rules as cited by and relied upon by Plaintiff is simply a “red herring” and a distraction from the actual facts. The

arbitration provision clearly invoked the AAA Commercial Rules. The AAA Consumer Rules are not in any way relevant to any issue herein.

VI. RULE 11 MATTER

Plaintiff was not and is not desirous of participating in arbitration (even though he agreed to do so). Any effort to consult with Plaintiff's counsel before filing the within motion would have been futile, as can be seen from Plaintiff's response to the motion. The Rule 11 aspect of Plaintiff's response cannot negate the actual issues presented herein.

CONCLUSION

The parties agreed to the arbitration procedure in this case. Based on all of the above argument and citation of authority, the Motion to Compel Arbitration and Stay Proceedings should be granted.

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CHARLESTON, SC

March 26, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
PETER SKOLER and PATRICIA	)	Civil Action No. 2024-CP-10-02646
SKOLER,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	[PROPOSED] ORDER DENYING
	)	DEFENDANTS' MOTION
VACATION INSPIRATIONS,	)	TO COMPEL ARBITRATION AND
DESTINATION TRAVEL, LLC,	)	STAY PROCEEDINGS
JOSEPH SHIRLEY, RANDY	)	
GARDNER, and JEFFREY PUMILIA,	)	
	)	
DEFENDANTS.	)	
	)	

THIS MATTER came before the Court on November 12, 2024 upon Defendants’ Motion to Compel Arbitration & Stay Proceedings. Following oral argument on March 27, 2025, the Court took Defendants’ Motion under advisement. After consideration of the parties’ memoranda, oral arguments and applicable law, this Court denies Defendants’ Motion to Compel Arbitration and finds further, as follows:

FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

On May 21, 2024, Plaintiffs filed this action, by and through their Attorneys David D. Wolf and Abigail Edwards Saunders, against Vacation Inspirations (hereinafter “VI”); Destination Travel; LLC (hereinafter “DT”); Joseph Shirley (hereinafter “Shirley”); Randy Gardner (hereinafter “Gardner”); and Jeffrey Pumilia (hereinafter “Pumilia”) (hereinafter collectively referred to as the “Defendants”). This case involves the Defendants’ sale of Vacation Inspirations Travel Memberships to Plaintiffs, by and through a Purchase Agreement (the “Agreement”) entered into by

Defendants and Plaintiffs under certain circumstances which allegedly: (1) violated South Carolina's Unfair Trade Practices Act ("SCUTPA"); and/or (2) was the result of either negligent or fraudulent misrepresentations by the Defendants, while seeking: 1) declaratory judgment that the arbitration clause is unenforceable because its terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them; 2) injunctive relief pursuant to S.C. Code Ann. § 39-5-38(D)(1) ("A court of this State may issue a temporary or permanent injunction for a violation or attempted violation of this chapter where the court believes an injunction would best serve the public interest"); and 3) rescission of the contract.

On July 3, 2024, Defendants filed their Answer to the Complaint and requested a Jury Trial. On November 12, 2024, Defendants filed their "Notice of Motion and Defendants' Motion to Compel Arbitration and Stay Proceedings in this Case Until Completion of Arbitration" without memorandum of law and without either (i) communicating with opposing counsel in a good faith attempt to resolve the matter or (ii) a certification that consultation would serve no useful purpose or could not be timely held. On March 13, 2025, Plaintiffs filed their memorandum in opposition to the subject motion. On March 25, Defendants filed their memorandum in support of their motion. Plaintiffs filed a surreply two days later.

Defendants move to compel arbitration. Opposing Defendants' Motion, Plaintiffs assert there was no legally binding agreement between the parties to arbitrate a dispute under the Agreement because the arbitration provision was unconscionable.

STANDARD OF REVIEW

Section 2 of the Federal Arbitration Act (the "FAA") provides that:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing

controversy arising out of such a contract, transaction or refusal, shall be valid, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . .

9 U.S.C. § 2. 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 where the dispute at issue concerns contract formation, the dispute is generally for the courts to decide.” *Id.* (citing *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) (“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 v. Savannah Highway Automotive Co.*, 440 S.C. 377, 388 (2023) (citing *Granite Rock Co.* at 299).

To be sure, “parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties’ agreement does so by ‘clear and unmistakable’ evidence.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (citations omitted). But this is not the first question. “[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” *Id.* (citing 9 U.S.C. § 2). This means the question of arbitrability is only before an arbitrator if the Court first determines “a valid agreement exists,” and second, “the agreement delegates the arbitrability issue to an arbitrator.” *Id.* Following *Henry Schein*, the Court of Appeals of South Carolina has crystalized a court’s initial role: “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.” *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 530 (Ct. App. 2024) (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24 (2007)).

In accordance with the United States Supreme Court’s decision in *Prima Paint Corp. v. Flood v. Conklin Mfg. Co.*, 388 U.S. 395 (1967), a court’s analysis of the validity or existence of an agreement to arbitrate should be limited to the express terms of the arbitration provision and not the contract as a whole. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42 (2016). 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.*, 405 S.C. 67,78 (2013) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593 (2001) (referencing *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681 (1996))).

ANALYSIS

I. THIS COURT DECIDES WHETHER THE ARBITRATION PROVISION IS UNCONSCIONABLE

The parties disagree as to the question of who should resolve the claims at issue—an arbitrator or this Court. Defendants argue the arbitration provision delegated the question of arbitrability to the arbitrator through its inclusion of the AAA Commercial Rules. Plaintiffs argue that this Court is to decide the question of an arbitration provision’s validity because it was challenged on the grounds of unconscionability.

A recent decision of the Court of Appeals of South Carolina answered this question and it is incumbent upon this Court to apply the precedent of the higher courts in South Carolina. “[I]n 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*, 444 S.C. at 530, reh’g denied (Nov. 13, 2024) (citing *Simpson*, 373 S.C. at 23–24). While Defendants correctly identified the application of the South Carolina Uniform Arbitration Act in *315 Corley*, rather than the FAA, Defendants’ argument that *Corley*’s declaration does not apply to FAA matters is eroded by the Supreme Court of South Carolina’s recent application of the same standard in a matter involving the FAA. See *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 609 (2022) (“The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator.”) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006)). Additionally, the other cases relied upon by the Defendants involve outdated opinions while our appellate courts were still developing the framework for analyzing arbitration clauses in conjunction with the public policy of “*caveat venditor*” which culminated in *Damico*. For the avoidance of doubt, this approach whereby the courts hear the threshold issue of arbitration clause validity is consistent with the United States Supreme Court’s decision in *Henry Schein* that stated, with clear language, “before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” 586 U.S. at 69 (citations omitted).

Thus, the question of invalidity on the grounds of unconscionability is validly before this Court.

II. THE ARBITRATION PROVISION IS UNCONSCIONABLE UNDER *DAMICO*

The Court now turns to the question of unconscionability itself. The recent and on point *Damico* opinion, authored by Chief Justice Kittredge, spells out the applicable procedure for a trial court to make the required determination whether there exists a valid arbitration agreement.

[T]he same principles of unconscionability apply to contract terms and arbitration provisions alike. The touchstone of the analysis begins with the presence or

absence of meaningful choice. Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process. Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts 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.

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 612-13 (2022) (quoting *Fanning* at 403; *D.R. Horton* at 49; and *Simpson* at 25; also referencing 17A AM. JUR. *Contracts* § 272; 17 C.J.S. *Contracts* § 10).

“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 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 (citing *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403 (1996); 17A AM. JUR. 2d *Contracts* § 272 (2016) (characterizing the two prongs as procedural and substantive unconscionability, respectively); and *id.* § 271 (“Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices . . .”)). A determination of whether a contract is unconscionable depends upon all of the facts and circumstances of the case. *Id.* at 611, 755 (citing *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614 (2012)). 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.* While considering guidance from the United States Court of Appeals for the Fourth Circuit, the *Damico* Court reiterated 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.* at 612, 755 (quoting *Simpson*, 373 S.C. at 24–25 (citing *Hooters of Am., Inc. v. Phillips*, 173 F. 3d 933, 938–40 (4th Cir. 1999))).

“Although procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, both need not be present to the same degree; the agreement may be judged on a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. 17A AM. JUR. 2d *Contracts* § 272. “In an exceptional case, however, a court may find that a contract provision is so outrageous as to warrant holding it unenforceable on the grounds of substantive unconscionability alone.” *Id.*

A. THE ARBITRATION PROVISION IS PROCEDURALLY UNCONSCIONABLE

“A take-it-or-leave-it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice.” *Id.* (referencing 17A AM. JUR. 2d *Contracts* §274; 17 C.J.S. *Contracts* § 9 & n.9 (2020)). Additionally, “the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Id.* (quoting *Fanning* at 403).

“Parties frequently claim they lack a meaningful choice when a contract of adhesion is involved.” *Id.* at 613 (citing *D.R. Horton* at 49). “Because contracts of adhesion are non-negotiable, ‘[a]n offeree faced with such a contract has two choices: complete adherence or outright rejection.’” *Id.* at 613 (citing *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394 (Ct. App. 1998). “Adhesion contracts are not per se unconscionable. However, given that one party to an adhesion contract ‘has virtually no voice in the formulation of the [] terms and language’ used in the contract, courts tend to view adhesive arbitration agreement with ‘considerable skepticism,’ as it remains doubtful ‘any true agreement ever existed to submit the disputes to arbitration.’” *Id.* (citing *Simpson* at 26, and *Lackey* at 394; also referencing 17A AM. JUR. *Contracts* § 274 (noting

that “[c]ontracts of adhesion are enforceable unless they are unconscionable,” but “[n]evertheless, the fact that a contract is one of adhesion is a strong indicator that [there was] an absence of meaningful choice”; and 17 C.J.S. *Contracts* §9 (“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.”). “The distinction between a contract of adhesion and unconscionability is worth emphasizing; *adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed.*” *Id.* at 614, 756.

In *Damico*, the South Carolina Supreme Court was tasked with: 1) identifying what portions of two agreements (a purchase and sale agreement and a limited home warranty agreement), each of which incorporated the other agreement by reference, constituted the arbitration agreement as required by *Prima Paint*; and 2) determining whether that arbitration agreement validly existed or was unconscionable. After finding the relevant arbitration provisions, which used identical language in each instance, were standalone provisions within the respective agreements, the Court found that the validity determination should be limited solely to each respective provision in the agreement and that the cross-references to the other agreement provided no additional substance to the scope or procedure of the arbitration proceedings. The Court then shifted its analysis to whether any “contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate the arbitration agreements without contravening 9 U.S.C. § 2. *Id.* at 611 (quoting *Casarotto* at 687). The Plaintiffs in *Damico* asserted that the arbitration provision (along with the two agreements as a whole) were unconscionable and, therefore, invalid necessitating a review of the two prongs of unconscionability by the Court.

Before recognizing that the *Damico* agreements were contracts of adhesion, the Court stressed that while “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”, “unconscionability requires a finding of a lack of meaningful choice coupled with unreasonably oppressive terms.” *Id.* at 614. Further stating that, “an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter’s case. *Id.* The Court then recognized the relevant agreements as contracts of adhesion because Lennar provided the same purchase and sale agreement to all of the homebuyers in the development after their respective names, property address and purchase price were written into the blanks provided for that information in the form. *Id.* It was also recognized that the terms of the agreement of particular interest to the defendant were non-negotiable, as they were preprinted, even though some of the terms did not apply to all homebuyers. *Id.* Next, after considering “the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar,” and that “Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their lifetime,” the Court found Lennar was “significantly more sophisticated than Petitioners in home buying transactions.” *Id.* at 614-15, 756. Because the factors combined to “highlight the significant disparity in the parties’ bargaining power, with Lennar enjoying a much stronger bargaining position” the court found the homebuyers “lacked a meaningful choice in their ability to negotiate the arbitration agreement.” *Id.* A similarly large disparity exists here.

B. THE ARBITRATION PROVISION IS AN ADHESION CONTRACT

The Vacation Inspirations Membership Purchase Agreement Distributed by Destination Travel, LLC (the “Agreement”) is a preprinted form with empty blanks for: 1) the date; 2) the

name, address, email address and phone number of the “Client”; 3) the Membership Purchase Price and total after adding the required Documentation Fee of Three Hundred Ninety-Nine and 00/100 Dollars (\$399.00) and first year dues of One Hundred Ninety-Nine and 00/100 Dollars (\$199.00); 4) Federal Truth-in-Lending Act Disclosures, if applicable; and 5) signature blanks for the Client/Purchasers, a Sales Representative and Manager. The recitals of the Agreement define Vacation Inspirations as “VI,” Destination Travel as “DT,” and the purchasers as “Client,” for convenient reference thereafter. Of the six ‘carbon-copy’ style, multiple copy, forms that compose the Agreement, five of them require the Clients to sign their name. The only page that does not have this requirement is the only page that contains the relevant arbitration language: the Membership Terms and Conditions page (“Terms and Conditions”). The first sentence of the Terms and Conditions provides “[t]hese Terms and Conditions are part of the Membership Agreement”. Paragraph VIII, at the bottom of the page, is entitled “Dispute Resolution” and provides that:

“[a]ny 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 in Charleston, S.C. at the Charleston County Courthouse or other location determined by VI.”

This is the only reference to arbitration or dispute resolution in the Agreement. There is no severability clause contained within the arbitration provision, or the broader Agreement.

Defendants contend this is not an adhesion contract because “Plaintiffs had the choice and opportunity to alter or otherwise modify the arbitration provision.” (Defs.’ Mem. in Supp. of Mot. to Compel Arbitration and Stay Proceedings at 5). They point to the “Addendum/Exception to Contract,” which includes some handwritten contract terms. *Id.* at 6. As an initial matter, these

handwritten contract terms were wholly unrelated to arbitration. Further, and more importantly, there is no authority that indicates an agreement that had one handwritten page is precluded from being considered an adhesion contract. In fact, any form contract is capable of having handwritten modifications made by the parties at the time of contracting, but the potential of doing so does not remove the subject agreement from being considered a contract of adhesion or there would never be a contract of adhesion and our appellate courts' jurisprudence considering whether arbitration clauses constitute a contract of adhesion would have been wholly unnecessary because each clause was capable of being modified in the margin or any other available space. Rather, it is the existence or absence of meaningful choice to negotiate the arbitration agreement that is determinative. This is especially relevant considering the context and consumer nature of this agreement which belies the significant disparity in negotiating power between Plaintiffs and Defendants.

Therefore, the arbitration provision is a contract of adhesion.

C. PLAINTIFFS LACKED MEANINGFUL CHOICE

While the arbitration provision is not *per se* unconscionable simply because it is adhesive in nature, when inspected with the “considerable skepticism” referenced by the *Damico* and *Simpson* Courts, it is clear the agreement is unconscionable. The unfair nature of the contract's formation, its status as a consumer transaction, and the lack of mutuality all weigh in favor of unconscionability.

In accordance with *Damico* and its forebears, Paragraph VIII reflects the entire arbitration clause to be considered by this Court for determining if a valid arbitration agreement exists in accordance with the *Prima Paint* doctrine. The arbitration clause contained in Paragraph VIII is not “geared towards achieving an unbiased decision by a neutral decision maker.” It can be initially noted that the terms of the Agreement of particular interest to the Defendants were non-negotiable,

as they were preprinted, although some of the terms did not apply to all Plaintiffs upon whom they would be used, just like in *Damico*. The Agreement is a take-it-or-leave it form that Plaintiffs could only accept as written with conditions that VI selects the arbitrator and the location for the arbitration, if not held at the Charleston County Courthouse, and that the non-prevailing party is required to pay the arbitrator's fees and all costs of the arbitration. Plaintiffs were permitted no input into the terms of the Agreement, not even a right of consent as in the *Lackey* case. The relative disparity in the parties' bargaining power and sophistication in this context is stark. Plaintiffs were individuals in their late 60s at the time 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). (Compl. ¶¶ 12–41).

In contrast, Defendants 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. As in *Damico*, just because the Plaintiffs could afford to purchase the membership, much like a home purchaser, their bargaining position was substantially inferior to the Defendants' business enterprise which works daily to sell such memberships to the innocent visitors of the County and City of Charleston, South Carolina. Plaintiffs did not have any opportunity to consider their decision, either by engaging legal counsel or by checking their phone. (Compl. ¶¶ 35, 37).

Furthermore, Plaintiffs lost more than Five Thousand Dollars (\$5,000.00) as a result of Defendants' deceptive sales tactics, which included placing the arbitration provision at the bottom of the Terms and Conditions page, which required no signature so that it could easily be

overlooked—and was—as Defendants’ representatives directed the Plaintiffs in the completion of their forms. (Compl. ¶ 34).

It is also worth noting that Defendants’ restriction on the use of cell phones served to prevent Plaintiffs from seeking assistance and maintained the isolation Defendants’ high-pressure sales procedures cultivated. (Compl. ¶¶ 22–25). The procedural abuses (elucidated in the Complaint, which is verified by the Plaintiffs), including deceptive practices and refusal to bargain over the terms of the Agreement are reinforced by the no opt out provision in the Agreement. (Compl. ¶ 41). Each of the facts set forth above and presented in the Plaintiffs’ verified Complaint combine to illustrate the “significant disparity in the parties’ bargaining power” *Damico*. at 615, leaving but one conclusion that “there is no conceivable potential for bargaining power on the part of [the Plaintiffs] whom the provisions purport to bind.” *315 Corley CW LLC*, 444 S.C. at 532. As a result, Plaintiffs had no meaningful choice as to the terms of the arbitration provision.

The Court is also cognizant of the Supreme Court of South Carolina’s guidance to be mindful of the context of consumer contracts. In *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50 (2016), which resulted from a new home purchase like *Damico*, the South Carolina Supreme Court referenced its shift “from following the doctrine of *caveat emptor* (‘let the buyer beware’) to the doctrine of *caveat venditor* (‘let the seller beware’), which expresses the public policy to protect consumers in various contexts, which would include the one here. Recently, the South Carolina Supreme Court provided further guidance in *Huskins*, which involved an arbitration provision that limited the claims period to ninety (90) days after the claim arose, by stating that “We have been steadfast in protecting [consumers] from unscrupulous and overreaching terms.” *Huskins* at 597.

D. THE TERMS OF THE ARBITRATION PROVISION ARE UNCONSCIONABLE

The terms of the arbitration provisions are so oppressive that it is patent that no reasonable person would make them and no fair and honest person would accept them, i.e., they are substantively unconscionable. When confronted with a similar scenario of one-sided arbitration provisions, the Fourth Circuit Court of Appeals found them “so one sided the that their only purpose is to undermine the neutrality of the proceeding. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). *Phillips* involved an employee of Hooters restaurants who alleged she had been sexually harassed and pursued a Title VII complaint. When Phillips would not agree to arbitrate the matter pursuant to the terms of an “Agreement to arbitrate employment-related disputes,” Hooters initiated a suit to compel arbitration. The federal district “court found that there was no meeting of the minds on all of the material terms of the agreement and, even if there were, Hooters’ promise to arbitrate was illusory.” *Id.* at 936. Upon appeal, the Fourth Circuit Court of Appeals found rules requiring the employee to select one arbitrator from a list provided by Hooters was crafted by Hooters “to ensure a biased decisionmaker.” *Id.* at 938. The Fourth Circuit found:

[t]his gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.

Id. at 939. Based upon these concerns, along with others related to Hooters’ ability to change the arbitration rules at any time (and possibly during the arbitration), as well as the ability to cancel the agreement to arbitrate with thirty (30) days notice, the court found “the promulgation of so

many biased rules – especially the scheme whereby one party to the proceeding so controls the arbitral panel . . . creat[es] a sham system unworthy even of the name of arbitration.” *Id.* at 940.

1. UNILATERAL SELECTION OF ARBITRATOR IS UNCONSCIONABLE

Defendants say the arbitration provision conferring them with the unilateral appointment of an arbitrator is reasonable because the arbitration provision “merely allows Defendant Vacation Inspirations to choose the arbitrator, but it does not relieve the arbitrator selected of his or her obligations under the AAA Commercial Rules to be impartial and independent.”

VI’s control over the single arbitrator in the present case constitutes an even more substantial exercise of control than Hooters’ ability to control the names on the panel, since the employee still has some amount of input to the selection of one of the three panelist in Hooters.

2. UNILATERAL SELECTION OF ARBITRATION LOCATION IS UNCONSCIONABLE

In addition to the fundamentally unfair grant of authority that VI selects the arbitrator, VI’s authority to select the location of the arbitration is similarly unconscionable when considered in tandem with the requirement that the non-prevailing party pays all of the costs of the arbitration, including the arbitrator’s fees, and the location of the arbitration. This is because a consumer noting that the arbitrator is selected by VI, may also see the selection of the location as another indication that arbitration will be an expensive undertaking, thus chilling a consumer’s will to pursue a dispute with the Defendants.

3. THE WAY THE AAA RULES ARE INCORPORATED IS UNCONSCIONABLE

The arbitration provision’s requirement that the arbitration be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association, but not under the auspices of the American Arbitration Association suggests the transaction was of a commercial nature, rather than involving a business and consumers. This incongruity further discourages

consumers from pursuing dispute resolution against Defendants, who are each involved in a commercial concern and deal with such proceedings more regularly than the clients.

In any event, the way the AAA rules are written in the arbitration provision adds further confusion to a consumer as to what arbitration rules would apply. Rule R-1(a)(4) of the AAA Consumer Arbitration Rules provides that the Consumer Arbitration rules apply to any dispute where the parties' agreement selects AAA to administer the dispute and the arbitration agreement is contained in a consumer agreement, even if the agreement specifies a particular set of rules other than the Consumer Arbitration Rules. *See, e.g., Graham v. Mascio*, 6 Wash. App. 2d 1028 n.2 (2018). This is further corroborated by the AAA Commercial Rules themselves. Footnote of Rule R-1 of the AAA Commercial Arbitration Rules states "the Consumer Arbitration Rules apply to any dispute where the parties' agreement selects AAA to administer the dispute and the arbitration agreement is contained in a 'consumer agreement,' even if the agreement specifies a particular set of rules other than the Consumer Arbitration Rules." Therefore, assuming *arguendo* that the arbitration clause was valid, different AAA rules would apply than what an ordinary consumer might believe, further making the arbitration provision unconscionable.

While Defendants would have this Court believe the Plaintiffs agreed that the "Commercial Arbitration Rules of the American Arbitration Association (the "AAA") (however, not under the auspices of AAA)," means the Plaintiffs agreed to the Commercial Arbitration Rules regardless of whether the AAA would apply those same rules if it were administering the proceedings, this Court finds this interpretation to be absurd, factually incorrect, and grossly oppressive, just as Lennar's terms were in *Damico*. Our courts have clearly and consistently announced that, as a matter of public policy, consumers are to be protected when they have "virtually no voice in the formation of the[] terms and language" used in a contract. *Damico* at 613 (citing *Lackey* at 394).

For the foregoing reasons, the arbitration provision contains multiple unconscionable terms.

E. DEFENDANTS WAIVED ANY SEVERABILITY ARGUMENTS

For the avoidance of doubt, the Court declines to sever the unconscionable portions of the arbitration provision for four reasons. *First*, Defendants makes no arguments in their memorandum regarding severability so it is deemed waived. *State v. Colf*, 332 S.C. 313, 322 (Ct. App. 1998), *aff'd* as modified and remanded, 337 S.C. 622 (2000) (“An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal.” (citing *First Sav. Bank v. McLean*, 314 S.C. 361 (1994))). *Second*, the arbitration provision “does not include a severability clause or any hint that the parties intended for the arbitration agreement to stand if any part of it fell.” *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 594 (2024), *reh’g* denied (Jan. 16, 2025). *Third*, any severing would lead to impermissible “blue penciling” the Agreement. Without a severability clause in the arbitration clause, the *Huskins* Court found that the facts and circumstances did not illustrate any indication that the parties intend for the provision to be severable and refused to sever the unconscionable portions from the remainder of the arbitration provision. Like *Huskins*, there are no facts or circumstances in the instant matter which manifest an intent of the parties to sever any unenforceable provisions from the enforceable ones. As with *Huskins*, the Defendants “insisted upon an adhesion contract so its terms could not be varied and would stick. [The Defendants are] stuck with [their] choice. Were we to hold otherwise, parties who impose standard form adhesion 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.” *Id.*

Fourth and finally, even if severance were permitted in the present case, after considering the unscrupulous and overreaching terms of the Dispute Resolution provision, there would be no arbitration provision left to apply in the instant case. The first sentence requires that “[a]ny 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.” Membership Terms and Conditions ¶ VIII. Applying Commercial Arbitration Rules to a consumer transaction in order to avoid the procedural protections offered to consumers by the AAA in such transactions is unscrupulous and overreaching. Affording one party the sole right to select the arbitrator, as the Dispute Resolution provision grants to the Defendants is also unscrupulous and overreaching. In fact, the AAA’s Consumer Due Process Protocol Statement of Principles expressly prohibits one party having such superior authority to direct the proceedings as the Defendants have awarded themselves through the Dispute Resolution provision. While the award of attorneys’ fees and costs to the prevailing party is ordinarily even-handed, when one party is granted the selection of the arbitrator, at the very least the appearance that a biased neutral may award such fees and costs creates an *in terrorem* effect on the consumer, just as acknowledged in the *Damico* and *Huskins* decisions. See *Damico* at 623 (“Moreover, we do not doubt that ‘for 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.’”) (citation omitted). Similarly, the location selection rights are tainted with the same flaw as the grant of attorney’s fees and costs such that no portion of the arbitration provision is immune in the event of severance. For the foregoing reasons, the Court declines to sever the unconscionable arbitration provisions.

III. RULE 11

Rule 11(a) of the South Carolina Rules of Civil Procedure states, in pertinent part:

All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held.

If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

As the rule expressly states, the appropriate sanctions for noncompliance include striking the motion, unless compliance is effectuated after the omission is brought to the movant's attention. In their Plaintiffs' Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Stay Proceedings, which was filed on March 13, 2025, an objection was raised to Defendants' failure to either consult with Plaintiffs' counsel or certify such consultation would serve no useful purpose or could not be timely held (Pls. Mem. In Opp'n to Defs. Mot. To Compel Arbitration and Stay Proceedings at 19). Defendants' Motion to Compel Arbitration and Stay Proceedings does not fall within the class of motions in which the duty to consult is excused under Rule 11 ("There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants."). Therefore, Defendants had a duty to affirm their consultation or certify such consultation would serve no useful purpose or could not be timely held.

While Defendants assert that Plaintiffs' argument is a matter of 'form over function', this failure on the parts of Defendants and their counsel prior to filing the motion clearly resulted in unnecessary waste in judicial resources and time, as well as fees, for the parties. In the Defendants' Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, Defendants felt it necessary to argue the applicability of the FAA because "[t]he Purchase Agreement and arbitration clause have the required nexus to interstate commerce as set forth in the Gardner Affidavit to invoke the arbitration provisions of the FAA. See generally, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)." Defendants' counsel had to prepare, with the assistance of at least Randy Gardner, the Affidavit of Randy Gardner. This Court and Plaintiffs' counsel each had to review the Affidavit of Randy Gardner in preparation for the motion hearing in this matter on March 27, 2025 at 1:30 pm. Additionally, Defendants' counsel felt compelled to argue at the outset of his time that the instant transaction involved interstate commerce in order to eliminate the consideration of the South Carolina Uniform Arbitration Act, which this Court specifically inquired about by asking Plaintiffs' counsel's position on the applicability of the FAA, to which Plaintiffs' counsel stipulated to the FAA's applicability.

Although, the "penalty for noncompliance is to strike the motion unless the attorney promptly amends the document to comply with the rule," *Jackson v. Speed*, 326 S.C. 289, 310 (1997), this Court "may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." Rule 11, SCRPC. "The Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Ex parte Wilson*, 367 S.C. 7, 15 (2005) (citing Rule 1, SCRPC)). Despite having the issue of a Rule 11

violation brought to their attention on March 13, 2025, when Plaintiffs' counsel filed their memorandum in opposition, Defendants counsel did not "promptly amend the document to comply with the rule." *Id.* As a result of Defendants' counsel's failure to amend or consult with Plaintiffs' counsel valuable time of this Court, counsel and the parties' resources were unnecessarily wasted with having to address the nexus the instant transaction had with interstate commerce and required consideration of the Gardner Affidavit when Plaintiffs both stipulated to the FAAs applicability at the motion hearing and acknowledged its applicability in the March 13, 2025 memorandum filed in opposition to the motion at issue herein.

Given all of these facts, the Court exercises its discretion not to strike the Motion to Compel in response to Defendants' counsel's noncompliance, despite finding that the consultation or certification would not have been 'pointless' as in *Jackson*, but instead finds that a sanction of One Hundred Fifty and 00/100 Dollars (\$150.00) paid by Defendants to Plaintiffs to compensate for the unnecessary time spent reviewing, evaluating the materials which were borne from the noncompliance is more appropriate. The Court recognizes that this sum is nominal and even considered the prospect of not imposing sanctions, but ultimately concludes that it is necessary. After all, our Rules of Civil Procedure exist for a reason and if this noncompliance were glossed over it could appear as if the Court is condoning it. Compliance would have taken a materially less amount of the Court's and opposing counsels' time than it took to address and resolve the noncompliance. As such, the amount of the sanction is tied to the amount of time and resources wasted. Since the amount of unnecessary effort was fairly limited, the Court has imposed a fairly limited sanction amount to equate to approximately one half of one hour (recognizing that Plaintiffs' counsel represent multiple parties in a similar position so that the reasonable sum of an

hour's worth of time may be spread over the multiple matters to total the sum deemed reasonable in the Court's discretion).

CONCLUSION

In conclusion, the Court denies Defendants' Motion to Compel Arbitration based on the unconscionability of the arbitration provision and awards a One Hundred Fifty and 00/100 Dollars (\$150.00) sanction for the Defendants' counsel's violation of Rule 11(a).

AND IT IS SO ORDERED.

April _____. 2025

Charleston, South Carolina

The Honorable Deadra L. Jefferson

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2024-CP-10-2646
PETER SKOLER AND PATRICIA	)	
SKOLER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PROPOSED ORDER
	)	
VACATION INSPIRATIONS,	)	
DESTINATION TRAVEL, LLC, JOSEPH	)	
SHIRLEY, RANDY GARDNER, AND	)	
JEFFREY PUMILIA,	)	
	)	
Defendants.	)	
	)	

This matter came before the Honorable Deadra L. Jefferson for a hearing on March 27, 2025, on Defendants’ motion to compel arbitration and stay proceedings. After consideration of the parties’ memoranda and argument of counsel, the Court hereby GRANTS Defendants’ Motion and orders that all proceedings are stayed pending the outcome of arbitration. The Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the South Carolina Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiffs purchased a Vacation Inspirations (“VI”) Membership (“the Membership”) distributed by Destination Travel, LLC in March 2022 in Charleston, South Carolina by Purchase Agreement, which is the subject of this action (the “Purchase Agreement”). The Purchase Agreement includes the following arbitration provision:

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.

On May 21, 2024, Plaintiffs filed a lawsuit against Defendants in the Charleston County Court of Common Pleas, alleging among other things, that the Purchase Agreement (including the arbitration provision) was unconscionable and seeking injunctive and equitable relief. Defendants answered, denying these allegations, and later filed a motion to compel arbitration on November 12, 2024 pursuant to the arbitration provision in the Purchase Agreement.

CONCLUSIONS OF LAW

I find the arbitration paragraph has the required nexus to interstate commerce to invoke the provisions of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the “FAA”), to govern the issues herein. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); see also Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). This is further supported by the Affidavit of Randy Gardner filed in support of Defendants’ motion, which shows that the subject transaction involved and affected interstate commerce as contemplated by the FAA. Counsel for Plaintiffs acknowledged during the hearing that the FAA governs the issues before the Court.

Pursuant 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. See e.g. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 68 139 S. Ct. 524, 529 (2019) (“When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract...”). The parties specifically incorporated the Commercial Arbitration Rules into the Purchase Agreement.

Rule R-7(a) and (b) of the Commercial Rules provide as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

See AAA Commercial Arbitration Rules R-7(a) and (b). Here, the parties clearly and unmistakably delegated the question of arbitrability to the arbitrator by invoking the Commercial Arbitration Rules of the American Arbitration Association. Plaintiffs argue that they should not be required to arbitrate because they challenge the Purchase Agreement as unconscionable and claim that the Court must decide the issues of unconscionability before the case can be referred to arbitration. However, the Purchase Agreement also designated the arbitrator to decide questions about the existence or validity of a contract of which the arbitration provision forms a part. Under the Federal Arbitration Act, the Court may not decide whether an arbitration agreement applies to the instant dispute or issues about the enforceability of the contract of which the arbitration agreement forms a part if the parties clearly and unmistakably delegated those questions to an arbitrator. See also Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893, 894 (Ct. App. 2020). In Masters, the purchaser of a car challenged the Dealer's claim for arbitration on grounds that execution of subsequent agreements rendered the original agreement "moot and unenforceable". The Court held that questions about whether the agreement was moot or unenforceable were for the arbitrator, not the Court. Specifically, the Court stated "While it is the default procedure for the court to decide the issues of whether a valid agreement to arbitrate exists and whether the specific dispute falls within the agreement's scope, the parties may delegate this determination to the arbitrator if

they clearly and unmistakably do so.” I conclude as a matter of law that the parties agreed to delegate issues regarding the enforceability of the Purchase Agreement itself to the arbitrator. Therefore, the Court must refer this matter to arbitration for the arbitrator to decide all such issues.

Alternatively, regardless of the decision maker, the ultimate question of arbitrability “is a matter of contract interpretation.” See Am. Recovery Corp. v. Computerized Thermal Imaging, 96 F.3d 88, 92 (4th Cir. 1996) (internal citations omitted). The record is clear, however, that Plaintiffs signed the Purchase Agreement and is therefore presumed to have read and understood the document they signed. Plaintiffs presented no evidence to the contrary so I conclude that any claim that Plaintiffs did not read or understand the Purchase Agreement before signing it is without merit. See generally, Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019); see also Region Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003).

Additionally, I conclude as a matter of law that the Purchase Agreement was not a contract of adhesion. The agreement itself shows that Plaintiffs not only had the opportunity and meaningful choice to alter or amend the Purchase Agreement, including the arbitration provision, but 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. While there were alterations made in handwriting in the Addendum/Exceptions portion of the Purchase Agreement, none of those alterations involved the arbitration provision. In addition, the very front page of the Purchase Agreement leaves blanks for the parties to fill in regarding the final negotiated purchase price and other matters. Accordingly, the Purchase Agreement was not a “take or leave it” situation and again, not an adhesion contract.

It is ORDERED, ADJUDGED AND DECREED, as follows:

1. All questions regarding arbitrability and other arbitration matters such as claims of unconscionability shall be determined and decided by the arbitrator appointed pursuant to the FAA and the arbitration provision in the Purchase Agreement; and
2. All proceedings in the within two cases are hereby stayed pending arbitration.

AND IT IS SO ORDERED.

The Honorable Deadra L. Jefferson

This ___ day of April, 2025.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
FRANK PERRELLI, JR.,	)	Civil Action No. 2024-CP-10-04606
	)	
PLAINTIFF,	)	
	)	
vs.	)	[PROPOSED] ORDER DENYING
	)	DEFENDANTS’ MOTION
VACATION INSPIRATIONS,	)	TO COMPEL ARBITRATION AND
DESTINATION TRAVEL, LLC,	)	STAY PROCEEDINGS
JOSEPH SHIRLEY, RANDY	)	
GARDNER, and JEFFREY PUMILIA,	)	
	)	
DEFENDANTS.	)	
	)	

THIS MATTER came before the Court on November 12, 2024 upon Defendants’ Motion to Compel Arbitration & Stay Proceedings. Following oral argument on March 27, 2025, the Court took Defendants’ Motion under advisement. After consideration of the parties’ memoranda, oral arguments and applicable law, this Court denies Defendants’ Motion to Compel Arbitration and finds further, as follows:

FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

On September 13, 2024, Plaintiff filed this action, by and through his Attorneys David D. Wolf and Abigail Edwards Saunders, against Vacation Inspirations (hereinafter “VI”); Destination Travel; LLC (hereinafter “DT”); Joseph Shirley (hereinafter “Shirley”); Randy Gardner (hereinafter “Gardner”); and Jeffrey Pumilia (hereinafter “Pumilia”) (hereinafter collectively referred to as the “Defendants”). This case involves the Defendants’ sale of Vacation Inspirations Travel Memberships to Plaintiff, by and through a Purchase Agreement (the “Agreement”) entered into by Defendants and Plaintiffs under certain circumstances which allegedly: (1) violated South

Carolina's Unfair Trade Practices Act ("SCUTPA"); and/or (2) was the result of either negligent or fraudulent misrepresentations by the Defendants, while seeking: 1) declaratory judgment that the arbitration clause is unenforceable because its terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them; 2) injunctive relief pursuant to S.C. Code Ann. § 39-5-38(D)(1) ("A court of this State may issue a temporary or permanent injunction for a violation or attempted violation of this chapter where the court believes an injunction would best serve the public interest"); and 3) rescission of the contract.

On November 4, 2024, Defendants filed their Answer to the Complaint. On November 12, 2024, Defendants filed their "Notice of Motion and Defendants' Motion to Compel Arbitration and Stay Proceedings in this Case Until Completion of Arbitration" without memorandum of law and without either (i) communicating with opposing counsel in a good faith attempt to resolve the matter or (ii) a certification that consultation would serve no useful purpose or could not be timely held. On March 13, 2025, Plaintiff filed his memorandum in opposition to the subject motion. On March 25, Defendants filed their memorandum in support of their motion. Plaintiff filed a surreply two days later.

Defendants move to compel arbitration. Opposing Defendants' Motion, Plaintiff asserts there was no legally binding agreement between the parties to arbitrate a dispute under the Agreement because the arbitration provision was unconscionable.

STANDARD OF REVIEW

Section 2 of the Federal Arbitration Act (the "FAA") provides that:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . .

9 U.S.C. § 2. 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 where the dispute at issue concerns contract formation, the dispute is generally for the courts to decide.” *Id.* (citing *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) (“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 v. Savannah Highway Automotive Co.*, 440 S.C. 377, 388 (2023) (citing *Granite Rock Co.* at 299).

To be sure, “parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties’ agreement does so by ‘clear and unmistakable’ evidence.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (citations omitted). But this is not the first question. “[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” *Id.* (citing 9 U.S.C. § 2). This means the question of arbitrability is only before an arbitrator if the Court first determines “a valid agreement exists,” and second, “the agreement delegates the arbitrability issue to an arbitrator.” *Id.* Following *Henry Schein*, the Court of Appeals of South Carolina has crystalized a court’s initial role: “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.” 315 *Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 530 (Ct. App. 2024) (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24 (2007)).

In accordance with the United States Supreme Court’s decision in *Prima Paint Corp. v. Flood v. Conklin Mfg. Co.*, 388 U.S. 395 (1967), a court’s analysis of the validity or existence of an agreement to arbitrate should be limited to the express terms of the arbitration provision and not the contract as a whole. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42 (2016). 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.*, 405 S.C. 67,78 (2013) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593 (2001) (referencing *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681 (1996))).

ANALYSIS

I. THIS COURT DECIDES WHETHER THE ARBITRATION PROVISION IS UNCONSCIONABLE

The parties disagree as to the question of who should resolve the claims at issue—an arbitrator or this Court. Defendants argue the arbitration provision delegated the question of arbitrability to the arbitrator through its inclusion of the AAA Commercial Rules. Plaintiff argues that this Court is to decide the question of an arbitration provision’s validity because it was challenged on the grounds of unconscionability.

A recent decision of the Court of Appeals of South Carolina answered this question and it is incumbent upon this Court to apply the precedent of the higher courts in South Carolina. “[I]n 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*, 444 S.C. at 530, reh’g denied (Nov. 13, 2024) (citing *Simpson*, 373 S.C. at 23–24). While Defendants correctly identified the application of the South Carolina Uniform Arbitration Act in *315 Corley*, rather than the FAA, Defendants’ argument that *Corley*’s declaration does not apply to FAA matters is eroded by the Supreme Court of South Carolina’s recent application of the same standard in a matter involving the FAA. See *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 609 (2022) (“The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator.”) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006)). Additionally, the other cases relied upon by the Defendants involve outdated opinions while our appellate courts were still developing the framework for analyzing arbitration clauses in conjunction with the public policy of “*caveat venditor*” which culminated in *Damico*. For the avoidance of doubt, this approach whereby the courts hear the threshold issue of arbitration clause validity is consistent with the United States Supreme Court’s decision in *Henry Schein* that stated, with clear language, “before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.” 586 U.S. at 69 (citations omitted).

Thus, the question of invalidity on the grounds of unconscionability is validly before this Court.

II. THE ARBITRATION PROVISION IS UNCONSCIONABLE UNDER *DAMICO*

The Court now turns to the question of unconscionability itself. The recent and on point *Damico* opinion, authored by Chief Justice Kittredge, spells out the applicable procedure for a trial court to make the required determination whether there exists a valid arbitration agreement.

[T]he same principles of unconscionability apply to contract terms and arbitration provisions alike. The touchstone of the analysis begins with the presence or absence of meaningful choice. Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process. Thus, in

determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts 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.

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 612-13 (2022) (quoting *Fanning* at 403; *D.R. Horton* at 49; and *Simpson* at 25; also referencing 17A AM. JUR. *Contracts* § 272; 17 C.J.S. *Contracts* § 10).

“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 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 (citing *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403 (1996); 17A AM. JUR. 2d *Contracts* § 272 (2016) (characterizing the two prongs as procedural and substantive unconscionability, respectively); and *id.* § 271 (“Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices . . .”)). A determination of whether a contract is unconscionable depends upon all of the facts and circumstances of the case. *Id.* at 611, 755 (citing *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614 (2012)). 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.* While considering guidance from the United States Court of Appeals for the Fourth Circuit, the *Damico* Court reiterated 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.* at 612, 755 (quoting *Simpson*, 373 S.C. at 24–25 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999))).

“Although procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, both need not be present to the same degree; the agreement may be judged on a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. 17A AM. JUR. 2d *Contracts* § 272. “In an exceptional case, however, a court may find that a contract provision is so outrageous as to warrant holding it unenforceable on the grounds of substantive unconscionability alone.” *Id.*

A. THE ARBITRATION PROVISION IS PROCEDURALLY UNCONSCIONABLE

“A take-it-or-leave-it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice.” *Id.* (referencing 17A AM. JUR. 2d *Contracts* §274; 17 C.J.S. *Contracts* § 9 & n.9 (2020)). Additionally, “the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Id.* (quoting *Fanning* at 403).

“Parties frequently claim they lack a meaningful choice when a contract of adhesion is involved.” *Id.* at 613 (citing *D.R. Horton* at 49). “Because contracts of adhesion are non-negotiable, ‘[a]n offeree faced with such a contract has two choices: complete adherence or outright rejection.’” *Id.* at 613 (citing *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394 (Ct. App. 1998). “Adhesion contracts are not per se unconscionable. However, given that one party to an adhesion contract ‘has virtually no voice in the formulation of the [] terms and language’ used in the contract, courts tend to view adhesive arbitration agreement with ‘considerable skepticism,’ as it remains doubtful ‘any true agreement ever existed to submit the disputes to arbitration.’” *Id.* (citing *Simpson* at 26, and *Lackey* at 394; also referencing 17A AM. JUR. *Contracts* § 274 (noting

that “[c]ontracts of adhesion are enforceable unless they are unconscionable,” but “[n]evertheless, the fact that a contract is one of adhesion is a strong indicator that [there was] an absence of meaningful choice”; and 17 C.J.S. *Contracts* §9 (“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.”). “The distinction between a contract of adhesion and unconscionability is worth emphasizing; *adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed.*” *Id.* at 614, 756.

In *Damico*, the South Carolina Supreme Court was tasked with: 1) identifying what portions of two agreements (a purchase and sale agreement and a limited home warranty agreement), each of which incorporated the other agreement by reference, constituted the arbitration agreement as required by *Prima Paint*; and 2) determining whether that arbitration agreement validly existed or was unconscionable. After finding the relevant arbitration provisions, which used identical language in each instance, were standalone provisions within the respective agreements, the Court found that the validity determination should be limited solely to each respective provision in the agreement and that the cross-references to the other agreement provided no additional substance to the scope or procedure of the arbitration proceedings. The Court then shifted its analysis to whether any “contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate the arbitration agreements without contravening 9 U.S.C. § 2. *Id.* at 611 (quoting *Casarotto* at 687). The Plaintiffs in *Damico* asserted that the arbitration provision (along with the two agreements as a whole) were unconscionable and, therefore, invalid necessitating a review of the two prongs of unconscionability by the Court.

Before recognizing that the *Damico* agreements were contracts of adhesion, the Court stressed that while “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”, “unconscionability requires a finding of a lack of meaningful choice coupled with unreasonably oppressive terms.” *Id.* at 614. Further stating that, “an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter’s case. *Id.* The Court then recognized the relevant agreements as contracts of adhesion because Lennar provided the same purchase and sale agreement to all of the homebuyers in the development after their respective names, property address and purchase price were written into the blanks provided for that information in the form. *Id.* It was also recognized that the terms of the agreement of particular interest to the defendant were non-negotiable, as they were preprinted, even though some of the terms did not apply to all homebuyers. *Id.* Next, after considering “the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar,” and that “Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their lifetime,” the Court found Lennar was “significantly more sophisticated than Petitioners in home buying transactions.” *Id.* at 614-15, 756. Because the factors combined to “highlight the significant disparity in the parties’ bargaining power, with Lennar enjoying a much stronger bargaining position” the court found the homebuyers “lacked a meaningful choice in their ability to negotiate the arbitration agreement.” *Id.* A similarly large disparity exists here.

B. THE ARBITRATION PROVISION IS AN ADHESION CONTRACT

The Vacation Inspirations Membership Purchase Agreement Distributed by Destination Travel, LLC (the “Agreement”) is a preprinted form with empty blanks for: 1) the date; 2) the

name, address, email address and phone number of the “Client”; 3) the Membership Purchase Price and total after adding the required Documentation Fee of Three Hundred Ninety-Nine and 00/100 Dollars (\$399.00) and first year dues of One Hundred Ninety-Nine and 00/100 Dollars (\$199.00); 4) Federal Truth-in-Lending Act Disclosures, if applicable; and 5) signature blanks for the Client/Purchasers, a Sales Representative and Manager. The recitals of the Agreement define Vacation Inspirations as “VI,” Destination Travel as “DT,” and the purchasers as “Client,” for convenient reference thereafter. Of the six ‘carbon-copy’ style, multiple copy, forms that compose the Agreement, five of them require the Clients to sign their name. The only page that does not have this requirement is the only page that contains the relevant arbitration language: the Membership Terms and Conditions page (“Terms and Conditions”). The first sentence of the Terms and Conditions provides “[t]hese Terms and Conditions are part of the Membership Agreement”. Paragraph VIII, at the bottom of the page, is entitled “Dispute Resolution” and provides that:

“[a]ny 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 in Charleston, S.C. at the Charleston County Courthouse or other location determined by VI.”

This is the only reference to arbitration or dispute resolution in the Agreement. There is no severability clause contained within the arbitration provision, or the broader Agreement.

Defendants contend this is not an adhesion contract because “Plaintiff had the choice and opportunity to alter or otherwise modify the arbitration provision.” (Defs.’ Mem. in Supp. of Mot. to Compel Arbitration and Stay Proceedings at 5). They point to the “Addendum/Exception to Contract,” which includes some handwritten contract terms. *Id.* at 6. As an initial matter, these

handwritten contract terms were wholly unrelated to arbitration. Further, and more importantly, there is no authority that indicates an agreement that had one handwritten page is precluded from being considered an adhesion contract. In fact, any form contract is capable of having handwritten modifications made by the parties at the time of contracting, but the potential of doing so does not remove the subject agreement from being considered a contract of adhesion or there would never be a contract of adhesion and our appellate courts' jurisprudence considering whether arbitration clauses constitute a contract of adhesion would have been wholly unnecessary because each clause was capable of being modified in the margin or any other available space. Rather, it is the existence or absence of meaningful choice to negotiate the arbitration agreement that is determinative. This is especially relevant considering the context and consumer nature of this agreement which belies the significant disparity in negotiating power between Plaintiff and Defendants.

Therefore, the arbitration provision is a contract of adhesion.

C. PLAINTIFF LACKED MEANINGFUL CHOICE

While the arbitration provision is not *per se* unconscionable simply because it is adhesive in nature, when inspected with the “considerable skepticism” referenced by the *Damico* and *Simpson* Courts, it is clear the agreement is unconscionable. The unfair nature of the contract's formation, its status as a consumer transaction, and the lack of mutuality all weigh in favor of unconscionability.

In accordance with *Damico* and its forebears, Paragraph VIII reflects the entire arbitration clause to be considered by this Court for determining if a valid arbitration agreement exists in accordance with the *Prima Paint* doctrine. The arbitration clause contained in Paragraph VIII is not “geared towards achieving an unbiased decision by a neutral decision maker.” It can be initially noted that the terms of the Agreement of particular interest to the Defendants were non-negotiable,

as they were preprinted, although some of the terms did not apply to all plaintiffs upon whom they would be used, just like in *Damico*. The Agreement is a take-it-or-leave it form that Plaintiff could only accept as written with conditions that VI selects the arbitrator and the location for the arbitration, if not held at the Charleston County Courthouse, and that the non-prevailing party is required to pay the arbitrator's fees and all costs of the arbitration. Plaintiff was permitted no input into the terms of the Agreement, not even a right of consent as in the *Lackey* case. The relative disparity in the parties' bargaining power and sophistication in this context is stark. Plaintiff is an individual in his late 60s at the time who traveled to South Carolina for the first time and has 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). (Compl. ¶¶ 12–33).

In contrast, Defendants 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. As in *Damico*, just because the Plaintiff could afford to purchase the membership, much like a home purchaser, his bargaining position was substantially inferior to the Defendants' business enterprise which works daily to sell such memberships to the innocent visitors of the County and City of Charleston, South Carolina. Plaintiff did not have any opportunity to consider his decision, either by engaging legal counsel or by checking their phone. (Compl. ¶¶ 35, 37).

Furthermore, Plaintiff lost almost Six Thousand Dollars (\$6,000.00) as a result of Defendants' deceptive sales tactics, which included placing the arbitration provision at the bottom of the Terms and Conditions page, which required no signature so that it could easily be

overlooked—and was—as Defendants’ representatives directed the Plaintiff in the completion of his forms. (Compl. ¶ 28).

It is also worth noting that Defendants’ restriction on the use of cell phones served to prevent Plaintiffs from seeking assistance and maintained the isolation Defendants’ high-pressure sales procedures cultivated. (Compl. ¶¶ 12–14). The procedural abuses (elucidated in the Complaint, which is verified by the Plaintiff), including deceptive practices and refusal to bargain over the terms of the Agreement are reinforced by the no opt out provision in the Agreement. (Compl. ¶ 51). Each of the facts set forth above and presented in the Plaintiff’s verified Complaint combine to illustrate the “significant disparity in the parties’ bargaining power” *Damico*. at 615, leaving but one conclusion that “there is no conceivable potential for bargaining power on the part of [the Plaintiffs] whom the provisions purport to bind.” *315 Corley CW LLC*, 444 S.C. at 532. As a result, Plaintiff had no meaningful choice as to the terms of the arbitration provision.

The Court is also cognizant of the Supreme Court of South Carolina’s guidance to be mindful of the context of consumer contracts. In *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50 (2016), which resulted from a new home purchase like *Damico*, the South Carolina Supreme Court referenced its shift “from following the doctrine of *caveat emptor* (‘let the buyer beware’) to the doctrine of *caveat venditor* (‘let the seller beware’), which expresses the public policy to protect consumers in various contexts, which would include the one here. Recently, the South Carolina Supreme Court provided further guidance in *Huskins*, which involved an arbitration provision that limited the claims period to ninety (90) days after the claim arose, by stating that “We have been steadfast in protecting [consumers] from unscrupulous and overreaching terms.” *Huskins* at 597.

D. THE TERMS OF THE ARBITRATION PROVISION ARE UNCONSCIONABLE

The terms of the arbitration provisions are so oppressive that it is patent that no reasonable person would make them and no fair and honest person would accept them, i.e., they are substantively unconscionable. When confronted with a similar scenario of one-sided arbitration provisions, the Fourth Circuit Court of Appeals found them “so one sided the that their only purpose is to undermine the neutrality of the proceeding. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). *Phillips* involved an employee of Hooters restaurants who alleged she had been sexually harassed and pursued a Title VII complaint. When Phillips would not agree to arbitrate the matter pursuant to the terms of an “Agreement to arbitrate employment-related disputes,” Hooters initiated a suit to compel arbitration. The federal district “court found that there was no meeting of the minds on all of the material terms of the agreement and, even if there were, Hooters’ promise to arbitrate was illusory.” *Id.* at 936. Upon appeal, the Fourth Circuit Court of Appeals found rules requiring the employee to select one arbitrator from a list provided by Hooters was crafted by Hooters “to ensure a biased decisionmaker.” *Id.* at 938. The Fourth Circuit found:

[t]his gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.

Id. at 939. Based upon these concerns, along with others related to Hooters’ ability to change the arbitration rules at any time (and possibly during the arbitration), as well as the ability to cancel the agreement to arbitrate with thirty (30) days notice, the court found “the promulgation of so

many biased rules – especially the scheme whereby one party to the proceeding so controls the arbitral panel . . . creat[es] a sham system unworthy even of the name of arbitration.” *Id.* at 940.

1. UNILATERAL SELECTION OF ARBITRATOR IS UNCONSCIONABLE

Defendants say the arbitration provision conferring them with the unilateral appointment of an arbitrator is reasonable because the arbitration provision “merely allows Defendant Vacation Inspirations to choose the arbitrator, but it does not relieve the arbitrator selected of his or her obligations under the AAA Commercial Rules to be impartial and independent.”

VI’s control over the single arbitrator in the present case constitutes an even more substantial exercise of control than Hooters’ ability to control the names on the panel, since the employee still has some amount of input to the selection of one of the three panelist in Hooters.

2. UNILATERAL SELECTION OF ARBITRATION LOCATION IS UNCONSCIONABLE

In addition to the fundamentally unfair grant of authority that VI selects the arbitrator, VI’s authority to select the location of the arbitration is similarly unconscionable when considered in tandem with the requirement that the non-prevailing party pays all of the costs of the arbitration, including the arbitrator’s fees, and the location of the arbitration. This is because a consumer noting that the arbitrator is selected by VI, may also see the selection of the location as another indication that arbitration will be an expensive undertaking, thus chilling a consumer’s will to pursue a dispute with the Defendants.

3. THE WAY THE AAA RULES ARE INCORPORATED IS UNCONSCIONABLE

The arbitration provision’s requirement that the arbitration be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association, but not under the auspices of the American Arbitration Association suggests the transaction was of a commercial nature, rather than involving a business and consumers. This incongruity further discourages

consumers from pursuing dispute resolution against Defendants, who are each involved in a commercial concern and deal with such proceedings more regularly than the clients.

In any event, the way the AAA rules are written in the arbitration provision adds further confusion to a consumer as to what arbitration rules would apply. Rule R-1(a)(4) of the AAA Consumer Arbitration Rules provides that the Consumer Arbitration rules apply to any dispute where the parties' agreement selects AAA to administer the dispute and the arbitration agreement is contained in a consumer agreement, even if the agreement specifies a particular set of rules other than the Consumer Arbitration Rules. *See, e.g., Graham v. Mascio*, 6 Wash. App. 2d 1028 n.2 (2018). This is further corroborated by the AAA Commercial Rules themselves. Footnote of Rule R-1 of the AAA Commercial Arbitration Rules states "the Consumer Arbitration Rules apply to any dispute where the parties' agreement selects AAA to administer the dispute and the arbitration agreement is contained in a 'consumer agreement,' even if the agreement specifies a particular set of rules other than the Consumer Arbitration Rules." Therefore, assuming *arguendo* that the arbitration clause was valid, different AAA rules would apply than what an ordinary consumer might believe, further making the arbitration provision unconscionable.

While Defendants would have this Court believe the Plaintiff agreed that the "Commercial Arbitration Rules of the American Arbitration Association (the "AAA") (however, not under the auspices of AAA)," means the Plaintiff agreed to the Commercial Arbitration Rules regardless of whether the AAA would apply those same rules if it were administering the proceedings, this Court finds this interpretation to be absurd, factually incorrect, and grossly oppressive, just as Lennar's terms were in *Damico*. Our courts have clearly and consistently announced that, as a matter of public policy, consumers are to be protected when they have "virtually no voice in the formation of the[] terms and language" used in a contract. *Damico* at 613 (citing *Lackey* at 394).

For the foregoing reasons, the arbitration provision contains multiple unconscionable terms.

E. DEFENDANTS WAIVED ANY SEVERABILITY ARGUMENTS

For the avoidance of doubt, the Court declines to sever the unconscionable portions of the arbitration provision for four reasons. *First*, Defendants makes no arguments in their memorandum regarding severability so it is deemed waived. *State v. Colf*, 332 S.C. 313, 322 (Ct. App. 1998), *aff'd* as modified and remanded, 337 S.C. 622 (2000) (“An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal.” (citing *First Sav. Bank v. McLean*, 314 S.C. 361 (1994))). *Second*, the arbitration provision “does not include a severability clause or any hint that the parties intended for the arbitration agreement to stand if any part of it fell.” *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 594 (2024), *reh’g* denied (Jan. 16, 2025). *Third*, any severing would lead to impermissible “blue penciling” the Agreement. Without a severability clause in the arbitration clause, the *Huskins* Court found that the facts and circumstances did not illustrate any indication that the parties intend for the provision to be severable and refused to sever the unconscionable portions from the remainder of the arbitration provision. Like *Huskins*, there are no facts or circumstances in the instant matter which manifest an intent of the parties to sever any unenforceable provisions from the enforceable ones. As with *Huskins*, the Defendants “insisted upon an adhesion contract so its terms could not be varied and would stick. [The Defendants are] stuck with [their] choice. Were we to hold otherwise, parties who impose standard form adhesion 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.” *Id.*

Fourth and finally, even if severance were permitted in the present case, after considering the unscrupulous and overreaching terms of the Dispute Resolution provision, there would be no arbitration provision left to apply in the instant case. The first sentence requires that “[a]ny 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.” Membership Terms and Conditions ¶ VIII. Applying Commercial Arbitration Rules to a consumer transaction in order to avoid the procedural protections offered to consumers by the AAA in such transactions is unscrupulous and overreaching. Affording one party the sole right to select the arbitrator, as the Dispute Resolution provision grants to the Defendants is also unscrupulous and overreaching. In fact, the AAA’s Consumer Due Process Protocol Statement of Principles expressly prohibits one party having such superior authority to direct the proceedings as the Defendants have awarded themselves through the Dispute Resolution provision. While the award of attorneys’ fees and costs to the prevailing party is ordinarily even-handed, when one party is granted the selection of the arbitrator, at the very least the appearance that a biased neutral may award such fees and costs creates an *in terrorem* effect on the consumer, just as acknowledged in the *Damico* and *Huskins* decisions. See *Damico* at 623 (“Moreover, we do not doubt that ‘for 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.’”) (citation omitted). Similarly, the location selection rights are tainted with the same flaw as the grant of attorney’s fees and costs such that no portion of the arbitration provision is immune in the event of severance. For the foregoing reasons, the Court declines to sever the unconscionable arbitration provisions.

III. RULE 11

Rule 11(a) of the South Carolina Rules of Civil Procedure states, in pertinent part:

All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held.

If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

As the rule expressly states, the appropriate sanctions for noncompliance include striking the motion, unless compliance is effectuated after the omission is brought to the movant's attention. In his Plaintiff's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Stay Proceedings, which was filed on March 13, 2025, an objection was raised to Defendants' failure to either consult with Plaintiff's counsel or certify such consultation would serve no useful purpose or could not be timely held (Pls. Mem. In Opp'n to Defs. Mot. To Compel Arbitration and Stay Proceedings at 19). Defendants' Motion to Compel Arbitration and Stay Proceedings does not fall within the class of motions in which the duty to consult is excused under Rule 11 ("There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants."). Therefore, Defendants had a duty to affirm their consultation or certify such consultation would serve no useful purpose or could not be timely held.

While Defendants assert that Plaintiff's argument is a matter of 'form over function', this failure on the parts of Defendants and their counsel prior to filing the motion clearly resulted in unnecessary waste in judicial resources and time, as well as fees, for the parties. In the Defendants' Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, Defendants felt it necessary to argue the applicability of the FAA because "[t]he Purchase Agreement and arbitration clause have the required nexus to interstate commerce as set forth in the Gardner Affidavit to invoke the arbitration provisions of the FAA. See generally, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)." Defendants' counsel had to prepare, with the assistance of at least Randy Gardner, the Affidavit of Randy Gardner. This Court and Plaintiff's counsel each had to review the Affidavit of Randy Gardner in preparation for the motion hearing in this matter on March 27, 2025 at 1:30 pm. Additionally, Defendants' counsel felt compelled to argue at the outset of his time that the instant transaction involved interstate commerce in order to eliminate the consideration of the South Carolina Uniform Arbitration Act, which this Court specifically inquired about by asking Plaintiff's counsel's position on the applicability of the FAA, to which Plaintiff's counsel stipulated to the FAA's applicability.

Although, the "penalty for noncompliance is to strike the motion unless the attorney promptly amends the document to comply with the rule," *Jackson v. Speed*, 326 S.C. 289, 310 (1997), this Court "may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." Rule 11, SCRPC. "The Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Ex parte Wilson*, 367 S.C. 7, 15 (2005) (citing Rule 1, SCRPC)). Despite having the issue of a Rule 11

violation brought to their attention on March 13, 2025, when Plaintiff's counsel filed their memorandum in opposition, Defendants counsel did not "promptly amend the document to comply with the rule." *Id.* As a result of Defendants' counsel's failure to amend or consult with Plaintiff's counsel, the valuable time of this Court, counsel and the parties' resources were unnecessarily wasted with having to address the nexus the instant transaction had with interstate commerce and required consideration of the Gardner Affidavit when Plaintiff both stipulated to the FAAs applicability at the motion hearing and acknowledged its applicability in the March 13, 2025 memorandum filed in opposition to the motion at issue herein.

Given all of these facts, the Court exercises its discretion not to strike the Motion to Compel in response to Defendants' counsel's noncompliance, despite finding that the consultation or certification would not have been 'pointless' as in *Jackson*, but instead finds that a sanction of One Hundred Fifty and 00/100 Dollars (\$150.00) paid by Defendants to Plaintiff to compensate for the unnecessary time spent reviewing, evaluating the materials which were borne from the noncompliance is more appropriate. The Court recognizes that this sum is nominal and even considered the prospect of not imposing sanctions, but ultimately concludes that it is necessary. After all, our Rules of Civil Procedure exist for a reason and if this noncompliance were glossed over it could appear as if the Court is condoning it. Compliance would have taken a materially less amount of the Court's and opposing counsels' time than it took to address and resolve the noncompliance. As such, the amount of the sanction is tied to the amount of time and resources wasted. Since the amount of unnecessary effort was fairly limited, the Court has imposed a fairly limited sanction amount to equate to approximately one half of one hour (recognizing that Plaintiffs' counsel represent multiple parties in a similar position so that the reasonable sum of an

hour's worth of time may be spread over the multiple matters to total the sum deemed reasonable in the Court's discretion).

CONCLUSION

In conclusion, the Court denies Defendants' Motion to Compel Arbitration based on the unconscionability of the arbitration provision and awards a One Hundred Fifty and 00/100 Dollars (\$150.00) sanction for the Defendants' counsel's violation of Rule 11(a).

AND IT IS SO ORDERED.

April _____. 2025

Charleston, South Carolina

The Honorable Deadra L. Jefferson

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2024-CP-10-04606

FRANK PERRELLI, JR.,	)
	)
Plaintiff,	)

v.

VACATION INSPIRATIONS,	)
DESTINATION TRAVEL, LLC, JOSEPH	)
SHIRLEY, RANDY GARDNER, AND	)
JEFFREY PUMILIA,	)
	)
Defendants.	)

PROPOSED ORDER

This matter came before the Honorable Deadra L. Jefferson for a hearing on March 27, 2025, on Defendants’ motion to compel arbitration and stay proceedings. After consideration of the parties’ memoranda and argument of counsel, the Court hereby GRANTS Defendants’ Motion and orders that all proceedings are stayed pending the outcome of arbitration. The Court makes the following findings of fact and conclusions of law pursuant to Rule 52 of the South Carolina Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiff purchased a Vacation Inspirations (“VI”) Membership (“the Membership”) distributed by Destination Travel, LLC in October 2022 in Charleston, South Carolina by Purchase Agreement, which is the subject of this action (the “Purchase Agreement”). The Purchase Agreement includes the following arbitration provision:

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.

On September 13, 2023, Plaintiff filed a lawsuit against Defendants in the Charleston County Court of Common Pleas, alleging among other things, that the Purchase Agreement (including the arbitration provision) was unconscionable and seeking injunctive and equitable relief. Defendants answered, denying these allegations, and later filed a motion to compel arbitration on November 12, 2024 pursuant to the arbitration provision in the Purchase Agreement.

CONCLUSIONS OF LAW

I find the arbitration paragraph has the required nexus to interstate commerce to invoke the provisions of the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the “FAA”), to govern the issues herein. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); see also Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). This is further supported by the Affidavit of Randy Gardner filed in support of Defendants’ motion, which shows that the subject transaction involved and affected interstate commerce as contemplated by the FAA. Counsel for Plaintiff acknowledged during the hearing that the FAA governs the issues before the Court.

Pursuant 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. See e.g. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 68 139 S. Ct. 524, 529 (2019) (“When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract...”). The parties specifically incorporated the Commercial Arbitration Rules into the Purchase Agreement. Rule R-7(a) and (b) of the Commercial Rules provide as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

See AAA Commercial Arbitration Rules R-7(a) and (b). Here, the parties clearly and unmistakably delegated the question of arbitrability to the arbitrator by invoking the Commercial Arbitration Rules of the American Arbitration Association. Plaintiff argues that he should not be required to arbitrate because he challenges the Purchase Agreement as unconscionable and claims that the Court must decide the issues of unconscionability before the case can be referred to arbitration. However, the Purchase Agreement also designated the arbitrator to decide questions about the existence or validity of a contract of which the arbitration provision forms a part. Under the Federal Arbitration Act, the Court may not decide whether an arbitration agreement applies to the instant dispute or issues about the enforceability of the contract of which the arbitration agreement forms a part if the parties clearly and unmistakably delegated those questions to an arbitrator. See also Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893, 894 (Ct. App. 2020). In Masters, the purchaser of a car challenged the Dealer's claim for arbitration on grounds that execution of subsequent agreements rendered the original agreement "moot and unenforceable". The Court held that questions about whether the agreement was moot or unenforceable were for the arbitrator, not the Court. Specifically, the Court stated "While it is the default procedure for the court to decide the issues of whether a valid agreement to arbitrate exists and whether the specific dispute falls within the agreements scope, the parties may delegate this determination to the arbitrator if they clearly and unmistakably do so." I conclude as a matter of law that the parties agreed to

delegate issues regarding the enforceability of the Purchase Agreement itself to the arbitrator. Therefore, the Court must refer this matter to arbitration for the arbitrator to decide all such issues.

Alternatively, regardless of the decision maker, the ultimate question of arbitrability “is a matter of contract interpretation.” See Am. Recovery Corp. v. Computerized Thermal Imaging, 96 F.3d 88, 92 (4th Cir. 1996) (internal citations omitted). The record is clear, however, that Plaintiff signed the Purchase Agreement and is therefore presumed to have read and understood the document he signed. Plaintiff presented no evidence to the contrary so I conclude that any claim that Plaintiff did not read or understand the Purchase Agreement before signing it is without merit. See generally, Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019); see also Region Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003).

Additionally, I conclude as a matter of law that the Purchase Agreement was not a contract of adhesion. The agreement itself shows that Plaintiff not only had the opportunity and meaningful choice to alter or amend the Purchase Agreement, including the arbitration provision, but Plaintiff in fact requested changes to the standard Purchase Agreement which were included in the Addendum/Exception to Contract as part of the Purchase Agreement. While there were alterations made in handwriting in the Addendum/Exceptions portion of the Purchase Agreement, none of those alterations involved the arbitration provision. In addition, the very front page of the Purchase Agreement leaves blanks for the parties to fill in regarding the final negotiated purchase price and other matters. Accordingly, the Purchase Agreement was not a “take or leave it” situation and again, not an adhesion contract.

It is ORDERED, ADJUDGED AND DECREED, as follows:

1. All questions regarding arbitrability and other arbitration matters such as claims of unconscionability shall be determined and decided by the arbitrator appointed pursuant to the FAA and the arbitration provision in the Purchase Agreement; and
2. All proceedings in the within two cases are hereby stayed pending arbitration.

AND IT IS SO ORDERED.

The Honorable Deadra L. Jefferson

This ___ day of April, 2025.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
PETER SKOLER and PATRICIA	)	Civil Action No. 2024-CP-10-02646
SKOLER,	)	
PLAINTIFFS,	)	
	)	
vs.	)	MOTION TO RECONSIDER THE
	)	COURT’S ORDER COMPELLING
VACATION INSPIRATIONS,	)	ARBITRATION AND STAYING
DESTINATION TRAVEL, LLC,	)	PROCEEDINGS UNDER RULES 52(b)
JOSEPH SHIRLEY, RANDY	)	AND 59(e)
GARDNER, and JEFFREY PUMILIA,	)	
	)	
DEFENDANTS.	)	
	)	

Plaintiffs submit this Memorandum in Support of its Motion for Reconsideration of the Court’s July 25, 2025 Order Compelling Arbitration and Staying the Proceedings.

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SUMMARY OF ARGUMENTS

Plaintiffs respectfully submit that this Court's Order should be reconsidered on two primary grounds:

First, the Court applied the wrong legal standard. It is well-settled that motions to compel arbitration under the FAA are decided under the same standard as motions for summary judgment pursuant to Rule 56. The Verified Complaint—treated as evidence at this stage—sets out detailed, sworn facts showing material disputes over contract formation, assent, and unconscionability. Defendants, by contrast, submitted no evidence at all to rebut Plaintiffs' sworn allegations or to create any evidentiary dispute. With no competing evidence and discovery still outstanding due to Defendants' refusal to respond, the record was insufficient to compel arbitration.

Second, the Court's Conclusions of Law must be remediated. The Court assumed a valid contract without resolving threshold formation challenges and misapplied *Henry Schein* and *Masters*, both of which require a court to decide formation disputes before delegating issues to an arbitrator. The Court further erred in concluding that the parties clearly and unmistakably delegated arbitrability—an untenable conclusion where elderly, unsophisticated consumers signed a rushed, non-negotiable contract with buried terms, including a one-party arbitrator selection and no-cancellation clause. These provisions, coupled with Defendants' high-pressure sales tactics make reconsideration necessary.

STANDARD OF REVIEW

Plaintiffs respectfully submit this Motion pursuant to South Carolina Rules of Civil Procedure 52(b) and 59(e). The Supreme Court of South Carolina recognizes that Rule 59(e) serves “as a vehicle to seek ‘reconsideration’ of issues and arguments.” *Elam v. S.C. Dep’t of Transp.*, 361

S.C. 9, 21–22 (2004) (acknowledging the South Carolina rule is “practically identical” with the federal rule) (citation omitted). Rule 59(e) is proper when a party “believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Id.* at 24. The motion “shall be served not later than 10 days after receipt of written notice of the entry of the order.” SCRCP 59(e). Rule 52(b) provides a similar mechanism relating to requesting reconsideration of a court’s findings. *See* SCRCP 59(b); *accord Doe v. Howe*, 367 S.C. 432, 440 n.4 (Ct. App. 2005).

PROCEDURAL BACKGROUND

Plaintiffs filed the Summons and Verified Complaint on May 21, 2024. Defendants were served on June 5, 2024. Defendants answered on July 3, 2024. Plaintiffs served discovery requests, including document requests and interrogatories on November 5, 2024. On November 12, 2024, Defendants filed the Motion to Compel Arbitration and Stay Proceedings with no accompanying brief in support or memorandum of law. On November 22, 2024, Defendants’ counsel notified Plaintiffs’ counsel that Defendants would not be responding to the discovery requests. By Notice dated February 28, 2025, the parties were informed that hearing on the Defendants’ motion was scheduled for oral arguments to take place on March 27, 2025. Without the benefit of a moving brief from Defendants, Plaintiffs filed their Opposition Brief on March 13, 2025. Defendants then filed a Memorandum in Support of their Motion two days before the oral arguments on March 25, 2025. Plaintiffs filed a surreply the next day. The Court held oral arguments on March 27, 2025. On July 25, 2025, the Court electronically filed and entered its Order granting the Motion to Compel Arbitration and Stay Proceedings.

FACTUAL SUMMARY

The Plaintiffs respectfully incorporate the comprehensive set of facts put forth in their Complaint and their Opposition Brief as well as highlights the pertinent facts in this Motion.

While visiting Charleston, Plaintiffs—elderly, out-of-state consumers—were drawn into Defendants’ inconspicuous sales facility. Prohibited from using their phones, they could not discover the extensive negative reviews or prior enforcement actions against Defendants’ principals for similar schemes.

In a controlled, high-pressure setting, Plaintiffs were steered into a take-it-or-leave-it form contract (with no ability to cancel), and rushed to sign without meaningful review or explanation. Buried in the document was an arbitration clause allowing Defendants alone to choose the arbitrator, set the venue, and impose fees on the non-prevailing party—terms that were neither understood nor explained.

These facts, combined with Defendants’ refusal to answer discovery directly relevant to formation and fairness, leave disputed material issues regarding assent, validity, and unconscionability unresolved—making reconsideration of the July 25, 2025 Order necessary.

ARGUMENT

A. THE COURT DID NOT APPLY THE PROPER STANDARD FOR MOTIONS TO COMPEL ARBITRATION UNDER THE FEDERAL ARBITRATION ACT

“Using the proper standard of review is critical to determine the proper outcome.” *Barrett v. Charleston Cnty. Sch. Dist.*, 348 S.C. 426, 431 (Ct. App. 2001); *see also Davenport v. Summer*, 269 S.C. 382, 385 (1977) (Reversing the decision because “the lower court erred by failing to apply the correct legal standard”). The Court did not employ the proper standard in its Order. Thus, it is appropriate to reconsider the decision under the correct standard. If the Court does not correct

its decision on reconsideration, it must be corrected on appeal. *See Carrier v. State*, 441 S.C. 547, 557 (Ct. App. 2023) (“[W]e will reverse the lower court’s decision if it is controlled by an error of law.” (quoting *Milledge v. State*, 422 S.C. 366, 374 (2018))).

If a motion to compel arbitration “can be decided ‘based on the face of a complaint, and documents relied upon in the complaint,’ a motion-to-dismiss standard should be used; otherwise, the summary judgment standard should be applied.” *Adler v. Gruma Corp.*, 135 F.4th 55, 63 (3d Cir. 2025) (quoting *Guidotti v. Legal Helpers Debt Resol., LLC*, 716 F.3d 764, 776 (3d Cir. 2013)). In the first instance, Plaintiffs posit that the Court should have applied a motion-to-dismiss standard because the Court decided the motion without the benefit of *any* discovery. In fact, Plaintiffs sent formal discovery requests to Defendants in November 2024 but never received the discovery requested. Therefore, given the posture, the Court should have applied the motion-to-dismiss standard and taken all allegations in the Complaint as true for the purposes of deciding the motion to compel arbitration. *See Fabian v. Lindsay*, 410 S.C. 475, 481 (2014) (recognizing that the motion-to-dismiss standard “must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true”). Further, under this standard, all the alleged facts must be viewed “in the light most favorable to the [plaintiff] and presume those facts to be true.” *Id.*

Plaintiffs’ Verified Complaint specifically alleges that the arbitration provision: 1) lacks mutuality; 2) introduces doubt as to the fairness and impartiality of the arbitration process; 3) inhibits a party from seeking dispute resolution; 4) undermines the neutrality of any potential arbitration proceeding and violates federal and state law; 5) is not enforceable since it is fundamentally unfair; 6) was not negotiable and Plaintiffs lacked a meaningful choice of entering into it; 7) terms are so oppressive that no reasonable person would make them and no fair and

honest person would accept them; and utilizes *in terrorem* effect *i.e.*, provisions designed to deter consumer victims from pursuing their legal rights. Compl. ¶¶ 45 – 56. Had the Court applied the motion-to-dismiss standard set by *Fabian* and taken all allegations in the Complaint as true for the purposes of deciding the motion to compel arbitration, it could have only properly denied the Defendants’ motion. The Court should have viewed Plaintiffs’ allegations in the light most favorable to them.

Given that the Court did not take all allegations in the Complaint as true and view them in the light most favorable to the Plaintiffs, the only other possible standard is a summary judgment standard. The Court did not apply this standard either and thus redetermination by the Court under the proper standard is required. *See Karl Sitte Plumbing Co. v. Darby Dev. Co. of Columbia*, 295 S.C. 70, 77 (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.”).

1. It Is Well-Established that the Summary Judgment Standard Must be Applied

“It 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). Federal and state courts alike recognize that the summary judgment standard is appropriate on motions to compel arbitration in general and particularly those, as here, under the FAA. The Plaintiffs provide a *sampling* below of authorities but emphasize that there are *innumerable other examples*:

- **South Carolina Courts:** *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:** *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”). “Most other circuits apply the summary judgment standard to motions under § 4.” *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).

- ***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.”)
- ***Courts in Fourth Circuit:*** *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. CV 2:21-2733-RMG, 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).

As evidenced by the case law *supra*, the overwhelming authority indicates that the summary judgment standard is appropriate on a motion to compel arbitration. In doing so, the Court should have applied the South Carolina summary judgment standard, including the critical principles as laid out below.

2. South Carolina Summary Judgment Standard

Although it is unclear exactly what standard the Court applied in its Order, it is not sufficiently close to the summary judgment standard.

a) *All Reasonable Inferences Must Favor Non-Moving Party*

“When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing 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.”). “The 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). “At the summary judgment stage of litigation, 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); *see also Hansen v. DHL Lab’ys, Inc.*, 316 S.C. 505, 513, (Ct. App. 1994), *cert. granted, decision aff’d*, 319 S.C. 79 (1995)(“[Q]uestions of credibility can make summary judgment inappropriate.”) “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). At a minimum, the Court’s Order was an improper weighing of Defendants’ denials in their Answer (which is not treated as evidence) over Plaintiffs’ evidence in its Verified Complaint.

3. The Court did not Properly Review the Verified Complaint

The Court did not take all reasonable inferences in the Verified Complaint in favor of the non-moving party nor did it recognize the disputed material facts precluding compelling arbitration.

a) *The Verified Complaint is Summary Judgment Evidence*

The Supreme Court of South Carolina recognizes that “a verified complaint is equivalent of an affidavit” for the purposes of a summary judgment standard under South Carolina law. *Dawkins v. Fields*, 354 S.C. 58, 67 (2003) (aligning with federal courts and “numerous state courts” and holding that a verified complaint is akin to an affidavit). The Verified Complaint would still

need to comply with Rule 56(e) in that it be based on personal knowledge, set forth facts that would be admissible in evidence, and show that the “affiant” is competent to testify. *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 224 (Ct. App. 2013) (citing *Dawkins*, 354 S.C. at 64). Those requirements are easily met here: The Verified Complaint is not made up of allegations made “upon information and belief” or conclusory allegations. Rather, it largely involves a recounting of the circumstances leading up to the purported formation of the agreement at issue here. (*See generally* Verified Complaint.) Thus, the total lack of applying the appropriate consideration to the Verified Complaint provides sufficient reason to reverse on its own.

b) Defendants did not put forth Competing Evidence

Defendants submitted no evidence to refute the weight of the evidence in the Verified Complaint.¹ This alone is reason to deny the motion to compel arbitration. Even if the Court were to somehow treat all of Defendants’ pleadings, including its Answer, Motion, and Memorandum in Support of its Motion as evidence (which would be totally contrary to basic law), it would still not result in a grant of the motion to compel arbitration because the Verified Complaint (which is evidence under Rule 56(e)) at an absolute minimum, creates a dispute of material fact.²

c) Disputed Material Facts Preclude Compelling Arbitration

Plaintiffs’ Verified Complaint provides ample evidence precluding granting the motion. If “[g]enuine issues of material fact exist, [it] preclud[es] summary judgment.” *Bluestein v. Town of Sullivan’s Island*, 429 S.C. 458, 464 (2020). “Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the

¹ Plaintiffs acknowledge that at 6:11PM the day before the March 27, 2025 hearing, Defendants filed an Amended Memo in Support of their Motion. It included three excerpts of the AAA Commercial rules as exhibits. Even if these were to be considered evidence at this juncture, they clearly have no bearing on the material facts and are not something that the Court could have already taken judicial notice of. They are of no consequence.

² For the avoidance of doubt, Plaintiffs are not suggesting that the Court should treat Defendants’ pleadings and briefs as evidence.

parties did or did not enter into such an agreement" *Briody*, No. 2009-CP-23-6381, 2010 WL 9935409, at *4. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452 (2001). "A jury trial on the existence of an arbitration agreement is warranted when there are genuine issues of material fact regarding the parties' agreement." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 38, 524 S.E.2d 839, 844 (Ct. App. 1999). Importantly, "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362 (2002).

As discussed, even if there were competing evidence, the Court would not be able to grant a motion to compel arbitration on those grounds as it is well-settled that it cannot weigh conflicting evidence. *See John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 435 (Ct. App. 2024) ("At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." (citation omitted)).

While Plaintiffs are not seeking a jury trial as to the issue of the arbitration agreement, they posit that the grant of the motion to compel at this stage was improper.

4. Plaintiffs did not have the Benefit of Discovery

a) *Plaintiffs Sought Discovery from Defendants That Would Have Aided the Decision on the Motion to Compel Arbitration*

Plaintiffs served Discovery Requests on all Defendants on November 5, 2024. Defendants declined to answer the requests, responding 17 days later declining to respond to all discovery served upon Defendants.

It is well-established that "[a] party served with written discovery has a **duty to answer it**, unless the party objects based on a stated reason or moves for a protective order." *Richardson on*

Behalf of 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry, 430 S.C. 594, 598 (Ct. App. 2020) (emphasis added) (citing Rules 26(c), 33(a), 34, and *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 83 (2011)).

Plaintiffs sought discovery from Defendants regarding the circumstances of the Purchase Agreement's formation, Defendants' standard practices, and other issues relevant to unconscionability before Defendants' motion to compel arbitration was filed and decided. This discovery was necessary to sufficiently develop the factual record required to decide the motion to compel. Courts in South Carolina have long recognized the need to conduct limited discovery prior to deciding a motion to compel arbitration. *See 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.").

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, an affirmance of a denial of a motion to compel arbitration, is instructive here on the issue of discovery before deciding a motion to compel arbitration. 422 S.C. 544 (Ct. App. 2018). Our case stands in stark contrast to the facts in *Hodge*, where the Court of Appeals affirmed a Circuit Court's denial of *further* discovery for a motion to compel arbitration where (a) "the facts material to the court's decision [were] not contested"; (b) and "because the parties submitted, without objection, all documents that they wished the court to consider." *Id.* at 576. The *Hodge* Court concluded that further discovery "would not provide any additional material facts that would be helpful to the court in reaching its decision." *Id.* Here, we have the total opposite situation: the material facts *are* in dispute and Plaintiffs were

never given an opportunity to engage in discovery because Defendants obstructed. In another case examining *Hodge*, the Court of Appeals noted that the trial court “rejected [] request for leave to conduct discovery” because it found the party had “opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration.” *Est. of Solesbee by Bayne v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 645 (Ct. App. 2023). The Court of Appeals concurred with the trial court and declined to allow for further discovery because “the record does not contain any discovery requests [plaintiff] ignored or any subpoenas to which she objected.” *Id.* at 650. Here, Defendants *did* ignore discovery requests and Plaintiffs were denied an opportunity to gather appropriate evidence.³

Plaintiffs request that the Court first vacate the July 25, 2025 Order and analyze the issues under the proper standard. Then in doing so, the Court should deny the Defendants’ Motion to Compel Arbitration and Stay Proceedings in this Case Until Completion of Arbitration. Plaintiffs respectfully further request that the Court instruct Defendants to respond to Plaintiffs’ discovery requests—**served on Defendants over eight months ago**—or otherwise allow Plaintiffs to move to compel discovery. *See Richardson*, 430 S.C. at 598 (“If no answer, objection, or motion is received, the discovering party may—but is not required to—move for a court order compelling discovery.”)⁴

³ In lieu of discovery, an evidentiary hearing was never conducted nor were the parties ever provided an opportunity to present any evidence.

⁴ The Supreme Court of North Carolina acknowledges another option for the Court at this posture: “an intermediate option we could have pursued in this case was remanding to the trial court, where any disputed facts revealed by the record could have been addressed in an evidentiary hearing with the opportunity to test statements through cross-examination; this Court has remanded for such hearings in a variety of contexts.” *Tillman v. Com. Credit Loans, Inc.*, 362 N.C. 93, 118 (N.C. 2008) (collecting cases).

b) *Factual Record was not Sufficiently Developed*

Given the timing of the moving brief two days before oral arguments and the failure of Defendants to respond to Plaintiffs' discovery requests, Plaintiffs were not in a fair and just position to present further evidence for the motion to compel arbitration. Where, as here, there are unresolved questions of fact, the South Carolina Supreme Court mandates that trial courts "must engage in a full inquiry" into the circumstances surrounding the purported formation of the arbitration agreement "prior to any attempt to enforce the Agreement." *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388 n.13 (2014). Without discovery, the Court has not met its obligation, imposed by the FAA and envisioned by *Dean*, to conduct a full inquiry into the facts surrounding the formation of the agreement.

In cases, such as this, "with no factual record . . . summary judgment [i]s premature." *Baxter v. Pilgrim's Pride Corp.*, 443 S.C. 463, 467 (Ct. App. 2024). Granting a motion on a summary judgment standard is a "drastic remedy" and necessitates that the motion "must not be granted until the opposing party has had a full and fair opportunity to complete discovery" on the contested issue.⁵ *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 (1991) (collecting authorities). To grant a motion under a summary-judgment standard, "it must be shown that further inquiry into the facts is not needed to clarify the application of the law." *Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 478 (Ct. App. 1995); *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362 (2002) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.").

Additionally, allowing for discovery prior to ruling on the motion to compel arbitration should have been required in the case *sub judice*. "Plaintiffs have demonstrated a likelihood that

⁵ For the avoidance of doubt, Plaintiffs are certainly not positing that all discovery should be conducted, rather, limited discovery to the issues regarding the motion to compel arbitration is proper.

further discovery will uncover additional evidence relevant to the issue[s] of [the case].” *Baughman*, 306 S.C. at 112. As indicated by the allegations in the Complaint, Plaintiffs will put forth evidence, at a minimum, evidencing genuine issues of material facts as to whether the contract was properly formed, whether there was mutual assent to the terms, and whether the agreement was unconscionable. *Second*, “Plaintiffs were not dilatory in seeking discovery” as made clear by their still-pending November 2024 discovery requests. *Baughman*, 306 S.C. at 113. In *Baughman*, the Supreme Court of South Carolina reversed the grant of summary judgment until “Plaintiffs have been afforded an adequate opportunity to complete discovery on the issue of [contract formation].” *Id.* at 114.

Finally, discovery on these issues is particularly important as discussed in more detail *infra* because the issues raised by Plaintiffs, including contract formation, validity, assent, unconscionability are fact-intensive under South Carolina law.⁶ *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25 (2007) (“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.”); *Hardee v. Hardee*, 348 S.C. 84, 95–96 (Ct. App. 2001) (“In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed.” (citing Restatement (Second) of Contracts § 208 (1981))), *aff’d as modified*, 355 S.C. 382 (2003). “Both state and federal law supports plaintiffs’ limited discovery request to develop their claim that the arbitration clause is unconscionable.” *Dunlap v. Green Tree Servicing, LLC*, No. CIV.A. 2:05-0311, 2005 WL 3178593, at *2 (S.D.W. Va. Nov. 28, 2005) (collecting cases).

⁶ For the avoidance of doubt, even though the Motion to Compel Arbitration is brought under the FAA, contract issues are still considered under South Carolina law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 (2001) (“General contract principles of state law apply to arbitration clauses governed by the FAA.”).

5. Next Steps

As an initial matter, the Court's July 25, 2025 Order should be reversed given the overwhelming evidence in the Verified Complaint and the total lack of evidence put forth by Defendants. If the Court feels it more appropriate to vacate and proceed with limited discovery before deciding the motion, then Plaintiffs should be authorized to file a motion to compel discovery from Defendants on the issues that go to issues in the motion to compel arbitration.⁷

B. THE COURT'S CONCLUSIONS OF LAW ARE ERRONEOUS

All the following issues are rendered moot if the Court vacates its July 25, 2025 Order. However, at the very least to preserve these issues for appeal, Plaintiffs respectfully submit the following arguments.

1. Plaintiffs Dispute the Contract on Formation Grounds not Enforceability

As a threshold matter, Plaintiffs posit that Defendants' and the Court' mischaracterization of Plaintiffs' arguments as disputing the *enforceability* and *arbitrability* (rather than formation and validity) of the agreement is the impetus for what it views as an erroneous ruling. "There is a difference between disputes over arbitrability and disputes over contract formation." *Rowland*, 993 F.3d at 258. Plaintiffs here, in fact, contest the contract formation and related issues such as assent in invoking the purported agreement's unconscionability. *See Meadows v. Cebridge Acquisition, LLC*, 132 F.4th 716, 730 (4th Cir. 2025) ("Procedural *unconscionability* is concerned with inequities, improprieties, or unfairness in the bargaining process and *formation of the contract*." (emphasis added)).

Again, the Court should apply South Carolina law to the contract issues. *See* n.6. The law of our State recognizes challenges to "the arbitration provision on grounds of unconscionability,

⁷ If needed, the Court should hold an evidentiary hearing, if there are disputed material issues relating to the motion to compel arbitration that reasonably be resolved in such a forum.

bringing into question whether an arbitration agreement even existed in the first place.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23 (2007). “[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 v. Savannah Highway Auto. Co.*, 440 S.C. 377, 388 (2023).

As will be illuminated in the following sections, this issue is outcome determinative in the Court’s analysis.

2. The Court’s Order Misapplied *Henry Schein*

The Court overlooked a crucial fact: unlike in *Henry Schein*, no valid agreement exists here. Plaintiffs dispute whether any contract was ever formed.

The Court’s Order quoted *Henry Schein, Inc. v. Archer & White Sales, Inc.*: “When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract...” (Order at 3 (citing 586 U.S. 63, 68, 139 S. Ct. 524, 529 (2019).) That statement was made in connection with the Supreme Court’s rejection of the “wholly groundless” exception, not at issue here. *See Henry Schein*, 586 U.S. at 71. In any event, this quote does not fully capture the rule the Supreme Court set in that case. Instead, the Supreme Court set this analytical framework for this Court to consider: “[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Henry Schein*, 586 U.S. at 69 (internal citation omitted).

In other words, the rule is that a Court is to decide an arbitrability issue *unless* two conditions are satisfied: (a) a valid agreement exists and (b) agreement delegates the arbitrability issue to an arbitrator. Both conditions are required. The Court in its Order here decided (b) before and without deciding (a). And decided (a) summarily without engaging in the fact-intensive unconscionability analysis and without discovery or evidence submitted.

As stated, the Court's decision assumed the parties reached an agreement: "The parties specifically incorporated the Commercial Arbitration Rules into the Purchase Agreement." (Order at 3.) Plaintiffs specifically dispute whether the parties came to a meeting of the minds. Thus, the analysis excluded the critical first step.

3. Masters' Facts are so Distinct Rendering it Ineffective

Masters involved a **post-formation** breach of contract dispute. It is therefore clearly distinct from the present case, which specifically contests formation and related issues.

As stated in the Court's Order, "In *Masters*, the purchaser of a car challenged the Dealer's claim for arbitration on grounds that execution of subsequent agreements rendered the original agreement 'moot and unenforceable.'" (Order at 3 (citing *Masters v. KOL, Inc.*, 431 S.C. 28 (S.C. Ct. App. 2020).) *Masters* involved totally inapposite facts.

First, *Masters* does not involve any questions as to whether there were any contracts formed between the parties. The plaintiffs in *Masters* did not dispute that they entered into the Purchase Order. Rather they asserted, among other claims, "breach of contract" causes of action, which, in and of itself, acknowledges that a contract was formed as it is a post-formation issue. *Id.* at 32. In contrast, Plaintiffs specifically dispute formation and related issues.

Second, the facts in *Masters* are unique and not to be broadly applied. Unlike our case, *Masters* involved "execution of subsequent contracts" and the contract principle of "novation." *Id.* at 34, 35. The circuit court found that subsequent contracts rendered an earlier contract "moot and unenforceable." *Id.* at 36. The Court of Appeals reversed the circuit court's finding of a novation, "substitution of a new obligation between the parties with the intent to extinguish the old obligation." *Id.* at 35, 36. (citing *Moore v. Weinberg*, 373 S.C. 209, 217 (Ct. App. 2007).) That case and its invocation of novation is nothing like the situation here.

4. The Court Erred in its Conclusion that the Agreement “Clearly and Unmistakably” Delegated the Question of Arbitrability to the Arbitrator

The Court’s Order stated summarily, without analysis, that it “concludes as a matter of law that the parties agreed to delegate issues regarding the enforceability of the Purchase Agreement to the arbitrator.” (Order at 4.) The Order provided no case citation, authority, or analysis for this crucial conclusion of law as to “clear and unmistakable” delegation. In any event, the conclusion of law should be reversed.

As an initial matter, Plaintiffs maintain that they never entered into *any* contract, including the entire agreement, the arbitration agreement, or the delegation provision. As such, a “challenge to formation of that agreement, however, applies equally to the whole [agreement].” *Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd.*, 130 F.4th 396, 402 (4th Cir. 2025) (“*Berkeley II*”) (“Provisions requiring the arbitration of arbitrability questions do not . . . preclude a court from deciding that a party never made an agreement to arbitrate any issue (which would necessarily encompass an arbitrability issue) (citing *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024) and *Berkeley County School District v. Hub International Limited*, 944 F.3d 225, 234 n.9 (4th Cir. 2019) (“*Berkeley I*”).) This would necessarily preclude any finding that the parties “clearly and unmistakably” agreed to anything, including the delegation provision.

Given the clear dispute between the parties as to whether the delegation clause was intended by each to require the arbitration of arbitrability, there was no factual basis for the Court’s conclusion “as a matter of law” the parties “clearly and unmistakably” agreed to the purported delegation provision. The Court’s conclusion the agreement’s language that “[a]ny controversy . . . 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)” delegates anything to the Arbitrator

(Agreement at 4.) is unsupported by the facts and falls short of the standard for showing a valid delegation.

“The 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). In the Fourth Circuit’s decision in *Simply Wireless, Inc. V. T-Mobile US, Inc.*, involving two competing providers of cellular telephone services, the Court held “in the context of a **commercial contract** between **sophisticated parties**, the explicit incorporation of JAMS Rules serves as ‘clear and unmistakable’ evidence of the parties’ intent to arbitrate arbitrability.” *Simply Wireless, Inc v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017) (emphasis added), *abrogated on other grounds by Henry Schein, Inc.*, 586 U.S. 63. The Fourth Circuit, later in its Opinion, confirmed that its decision should be cabined: “In sum, we hold that when, as here, **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.” *Id.* at 529 (emphasis added). It is axiomatic that Plaintiffs here—with their lack of sophistication as, among other things, out-of-town elderly consumers—cannot be analogized to the cell phone providers at issue in *Simply Wireless*.

Courts applying *Simply Wireless* have recognized this. In *Gordon v. Zeroed-In Tech.*, the Court stated “this Court, like Judge Hollander, is **skeptical** that a cross-reference to the JAMS Rules provides “clear and unmistakable” evidence of the parties’ intent to arbitrate arbitrability, given that **one party is unsophisticated.**” *Gordon v. Zeroed-In Tech., LLC*, No. CV 23-3284-BAH, 2025 WL 941365, at *23 (D. Md. Mar. 26, 2025) (citing *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 555 (D. Md. 2019)); *accord Collins v. Discover Fin. Servs.*, No. CV PX-17-03011,

2018 WL 6434503, at *3 (D. Md. Dec. 7, 2018) (same). As *Stone* stated aptly, “[i]t strains credulity to believe that the consumer knew—much less intended—that the cross-reference directed an arbitrator to decide arbitrability. To treat the Agreement as evidencing clear and unmistakable evidence of plaintiff’s intent would be to take a good joke too far.” *Stone*, 361 F. Supp. 3d at 555 (citation omitted); see *Barmby v. Ourisman Chevrolet, Co.*, No. CV DLB-22-2312, 2023 WL 4549739, at *9 n.5 (D. Md. July 14, 2023) (indicating the unsophistication of the party in *Stone* “weighed heavily in this court’s analysis” on clear and unmistakable evidence). In fact, *In re Little*, a case cited in *Masters* for the rule on the very topic of *clear and unmistakable evidence* “concur[ed]] with the reasoning in *Stone*.” 610 B.R. 558, 568 (Bankr. D.S.C. 2020). *In re Little*, stated the obvious: “how unlikely it would be that an unsophisticated party would know what a set of arbitration rules were, and even less so, the specific contents of a particular rule within that set.” *Id.*

In examining disputed material facts and in taking all reasonable inferences in Plaintiffs’ favor, it is unclear how the agreement’s invocation of the AAA rules could provide the requisite “clear and unmistakable” evidence. Unsophisticated consumers, such as the Plaintiffs, have no understanding of the AAA Commercial rules. They are especially unlikely to know that AAA rules purportedly delegates arbitrability of disputes to the arbitrator.⁸

In all, the agreement under the facts in the Verified Complaint, even if it were to be properly formed (which Plaintiffs dispute), does not “clearly and unmistakably” delegate validity and arbitrability to the arbitrator.⁹

⁸ Moreover, all the evidence in the Verified Complaint (and in the publicly-available complaints) surrounding the high-pressure conditions that the agreement was purportedly formed under, casts doubt on this even more.

⁹ If needed, because this is such a critical and dispositive issue here, Plaintiffs would welcome supplemental briefing on this issue (and any issues as the Court wishes).

5. The Court of Appeals for the Fourth Circuit, in Analyzing *Henry Schein* Under Similar Facts, Confirms Plaintiffs' Position

South Carolina courts frequently look to the Fourth Circuit for guidance on interpreting law, especially in the context of a federal law, such as the Federal Arbitration Act here. The Fourth Circuit's decision in *Berkeley I* interpreted the Supreme Court's precedent on the Federal Arbitration Act. 944 F.3d at 234 n.9. That case began by recounting the same principle from *Henry Schein*: "[P]arties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability." *Id.* (citing *Henry Schein, Inc.*, 586 U.S. at 67–68). Further, it dealt with an analogous purported delegation clause: "[T]he Arbitration Clauses incorporate the Commercial Rules of the American Arbitration Association, which provide that an arbitrator has the power to rule on arbitrability issues." *Id.*

Critically at this step, the Fourth Circuit came to an opposite conclusion as this Court did in its Order. The Fourth Circuit stated: "Such provisions requiring the arbitration of arbitrability questions do not, however, undermine § 4 of Title 9 and ***preclude a court from deciding that a party never made an agreement to arbitrate any issue (which would necessarily encompass an arbitrability issue)***." *Id.* (emphasis added) (citing sources). This is precisely the situation here: Plaintiffs contest that they ever made an agreement at all: neither the Purchase Agreement, or the Arbitration provision in it, or the purported delegation clause within that. The Fourth Circuit reaffirmed this position in a recent decision in the same underlying dispute. *See Berkeley II* ("***The challenge to formation of that agreement, however, applies equally to the whole [agreement]***." 130 F.4th at 402 (citing *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024) and *Berkeley I*, 944 F.3d at 234 n.9) (emphasis added). It reaffirmed that "Provisions requiring the arbitration of arbitrability questions do not . . . preclude a court from deciding that a party never made an agreement to

arbitrate any issue (which would necessarily encompass an arbitrability issue).” *Id.* (quoting *Berkeley I*).

For the avoidance of doubt this is consistent with the Supreme Court’s 2024 decision in *Coinbase*. 602 U.S. at 151. Again, it applied the same principle from *Henry Schein*: “Before referring a dispute to an arbitrator, therefore, the court determines whether a valid arbitration agreement exists.” *Id.* (quoting *Henry Schein*, 586 U.S. at 69) (internal quotations omitted). And just like the *Berkeley* decisions, the Supreme Court stated “Where a ***challenge applies ‘equally’ to the whole contract*** and to an arbitration or delegation provision, a court must address that challenge.” *Id.* (citation omitted) (emphasis added).

6. The Court’s Purported Unconscionability Analysis was Devoid of any Mention of it and Was an Improper Advisory Opinion as Written

Despite purportedly finding that “the Court must refer this matter to arbitration for the arbitrator to decide all such issues,” the Court went on to analyze contract formation and whether it was an adhesion contract. (Order at 3.) Under the Court’s own conclusions of law, these would be improper advisory opinions. In any event, Plaintiffs posit that the limited analysis as to these issues was erroneous.

As any initial matter, there is no mention here of unconscionability—the core argument Plaintiffs raise. The Court’s analysis starts and concludes with the presumption that one is to have read and understood the document he signs. (Order at 4.) Plaintiffs do not disagree with this general proposition of law. However, the detailed Verified Complaint, the reasonable inferences viewed in favor of the Plaintiffs, and the fact-intensive inquiry required for unconscionability determinations belies resting on this presumption. As stated above, at an absolute minimum, Plaintiffs should be

afforded time to gather and present evidence on this issue.¹⁰ *See Naimoli v. Pro-Football, Inc.*, 120 F.4th 380, 390 (4th Cir. 2024) (“[C]ourt may resolve the relevant factual disputes by, as necessary, affording targeted discovery, conducting an evidentiary hearing, conducting a summary trial, making findings of fact and conclusions of law, all as necessary and appropriate to resolve the motion.”).

The Court’s Order contained no discussion of procedural or substantive unconscionability in contravention of the well-established principle that alleged unconscionable arbitration clauses necessitate “a case-by-case analysis . . . to address the unique circumstances inherent in the various types of consumer transactions.” *One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 62 (Ct. App. 2016) (citation omitted). Plaintiffs reemphasize the need to engage in the unconscionability analysis under South Carolina contract law as discussed in *Damico v. Lennar Carolinas, LLC* and its progeny. 437 S.C. 596 (2022). In *Damico*, the Court explained the “touchstone of the analysis begins with the presence or absence of meaningful choice.” *Id.* at 612. “Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts 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.* at 613 (citing authorities).

Indeed, the Court’s Order did discuss adhesion contracts, which is not dispositive on unconscionability. In any event, the Court’s analysis of adhesion contract was flawed and again,

¹⁰ Relevant discovery to the motion to compel arbitration that Plaintiffs seek includes, among other things: Defendants’ training materials to sales staff generally and the specific presenter in Plaintiffs’ case, its practice on presenting the arbitration clauses and the customer’s right to have the agreement reviewed by counsel, other consumer complaints and disputes, as well as any Defendants’ dealings with the Texas Attorney General and Georgia Attorney General in its resolutions regarding similar conduct alleged in the Complaint.

did not give all reasonable inferences to the Plaintiffs. (Order at 4.) As an initial matter, this section in the Court's Order finds no support in the Court's factual findings. The statement, without citation, that "Plaintiff in fact requested changes to the standard Purchase Agreement which were included in the Addendum/Exception to Contract as part of the Purchase Agreement" is belied by the record. In fact, the Addendum/Exception to the Contract did not include any sort of changes requested by Plaintiffs, instead it included terms that Defendants decided to include in this point of the contract. Nevertheless, all inferences must be viewed in the light most favorable to Plaintiffs. *See Russell*, 370 S.C. at 15. This is not what the Court did in its Order. Moreover, the Court improperly concluded that the agreement, both the agreement as a whole and the arbitration agreement contained therein, were not "take it or leave it" contracts without engaging in *Damico's* fact-intensive analysis and without making inferences in the light most favorable to Plaintiffs.

C. ONE-PARTY ARBITRATOR SELECTION

As a final point, to the extent, an arbitration is compelled, the Court cannot do so without striking the arbitration selection procedure in the agreement. The agreement states: "The arbitrator shall be selected by VI." (Agreement at 4.) In analyzing claims of unconscionability in the context of arbitration agreements, the focus is on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *See Simpson*, 373 S.C. at 25, 69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

The *Hooters* decision struck down an arbitration clause because it gave "Hooters control over the entire [arbitrator] panel." 173 F.3d at 939. The Fourth Circuit said these rules were so "warped" and did not comport with "minimum due process standards and thus any arbitration under them would have been a "sham." *Hooters*, 173 F.3d at 940. Thus, in connection with

Hooters and in the interest of justice, the arbitration selection procedure, which allows only Defendants to select the arbitrator, must be stricken. Otherwise, any arbitration is a total “sham.”

CONCLUSION AND PRAYER FOR RELIEF

When taking all reasonable inferences in the Verified Complaint in favor of Plaintiffs, it is clear that, at a minimum, the disputes of material facts indicate the Motion to Compel Arbitration must be denied. In accordance with Rule 11, undersigned counsel certify that consultation would serve no useful purpose and could not be timely held.

For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court:

1. GRANT this Motion Under South Carolina Rules of Civil Procedure 52(b) and 59(e);
2. VACATE the Order Granting Motion to Compel Arbitration and Stay Proceedings;
3. DENY the Motion to Compel Arbitration;
4. LIFT the stay of proceedings;
5. ORDER the case to proceed;
6. AUTHORIZE Plaintiffs’ Motion to Compel Discovery;
7. STRIKE the Agreement’s Arbitrator Selection Procedure as void as a matter of law and against public policy;
8. GRANT such other and further relief as this Court deems just and proper.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
FRANK PERRELLI, JR.,	)	Civil Action No. 2024-CP-10-04606
	)	
PLAINTIFF,	)	
	)	
vs.	)	MOTION TO RECONSIDER THE
	)	COURT’S ORDER COMPELLING
VACATION INSPIRATIONS,	)	ARBITRATION AND STAYING
DESTINATION TRAVEL, LLC,	)	PROCEEDINGS UNDER RULES 52(b)
JOSEPH SHIRLEY, RANDY	)	AND 59(e)
GARDNER, and JEFFREY PUMILIA,	)	
	)	
DEFENDANTS.	)	
_____	)	

Plaintiff submits this Memorandum in Support of his Motion for Reconsideration of the Court’s July 23, 2025 Order Compelling Arbitration and Staying the Proceedings.

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SUMMARY OF ARGUMENTS

Plaintiff respectfully submits that this Court's Order should be reconsidered on two primary grounds:

First, the Court applied the wrong legal standard. It is well-settled that motions to compel arbitration under the FAA are decided under the same standard as motions for summary judgment pursuant to Rule 56. The Verified Complaint—treated as evidence at this stage—sets out detailed, sworn facts showing material disputes over contract formation, assent, and unconscionability. Defendants, by contrast, submitted no evidence at all to rebut Plaintiff's sworn allegations or to create any evidentiary dispute. With no competing evidence and discovery still outstanding due to Defendants' refusal to respond, the record was insufficient to compel arbitration.

Second, the Court's Conclusions of Law must be remediated. The Court assumed a valid contract without resolving threshold formation challenges and misapplied *Henry Schein* and *Masters*, both of which require a court to decide formation disputes before delegating issues to an arbitrator. The Court further erred in concluding that the parties clearly and unmistakably delegated arbitrability—an untenable conclusion where an elderly, unsophisticated consumer signed a rushed, non-negotiable contract with buried terms, including a one-party arbitrator selection and no-cancellation clause. These provisions, coupled with Defendants' high-pressure sales tactics make reconsideration necessary.

STANDARD OF REVIEW

Plaintiff respectfully submits this Motion pursuant to South Carolina Rules of Civil Procedure 52(b) and 59(e). The Supreme Court of South Carolina recognizes that Rule 59(e) serves “as a vehicle to seek ‘reconsideration’ of issues and arguments.” *Elam v. S.C. Dep't of Transp.*, 361

S.C. 9, 21–22 (2004) (acknowledging the South Carolina rule is “practically identical” with the federal rule) (citation omitted). Rule 59(e) is proper when a party “believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Id.* at 24. The motion “shall be served not later than 10 days after receipt of written notice of the entry of the order.” SCRCPP 59(e). Rule 52(b) provides a similar mechanism relating to requesting reconsideration of a court’s findings. *See* SCRCPP 59(b); *accord Doe v. Howe*, 367 S.C. 432, 440 n.4 (Ct. App. 2005).

PROCEDURAL BACKGROUND

Plaintiff filed the Summons and Verified Complaint on September 13, 2024. Defendants were served on September 23, 2024. Defendants answered on November 4, 2024. Plaintiff served discovery requests, including document requests and interrogatories on November 5, 2024. On November 12, 2024, Defendants filed the Motion to Compel Arbitration and Stay Proceedings with no accompanying brief in support or memorandum of law. On November 22, 2024, Defendants’ counsel notified Plaintiff’s counsel that Defendants would not be responding to the discovery requests. By Notice dated February 28, 2025, the parties were informed that hearing on the Defendants’ motion was scheduled for oral arguments to take place on March 27, 2025. Without the benefit of a moving brief from Defendants, Plaintiff filed his Opposition Brief on March 13, 2025. Defendants then filed a Memorandum in Support of their Motion two days before the oral arguments on March 25, 2025. Plaintiff filed a surreply the next day. The Court held oral arguments on March 27, 2025. On July 23, 2025, the Court electronically filed and entered its Order granting the Motion to Compel Arbitration and Stay Proceedings.

FACTUAL SUMMARY

The Plaintiff respectfully incorporates the comprehensive set of facts put forth in his Complaint and his Opposition Brief as well as highlights the pertinent facts in this Motion.

While visiting Charleston, Plaintiff—elderly, out-of-state consumer—was drawn into Defendants’ inconspicuous sales facility. Prohibited from using his phone to discover the extensive negative reviews or prior enforcement actions against Defendants’ principals for similar schemes.

In a controlled, high-pressure setting, Plaintiff was steered into a take-it-or-leave-it form contract (with no ability to cancel), and rushed to sign without meaningful review or explanation. Buried in the document was an arbitration clause allowing Defendants alone to choose the arbitrator, set the venue, and impose fees on the non-prevailing party—terms that were neither understood nor explained.

These facts, combined with Defendants’ refusal to answer discovery directly relevant to formation and fairness, leave disputed material issues regarding assent, validity, and unconscionability unresolved—making reconsideration of the July 23, 2025 Order necessary.

ARGUMENT

A. THE COURT DID NOT APPLY THE PROPER STANDARD FOR MOTIONS TO COMPEL ARBITRATION UNDER THE FEDERAL ARBITRATION ACT

“Using the proper standard of review is critical to determine the proper outcome.” *Barrett v. Charleston Cnty. Sch. Dist.*, 348 S.C. 426, 431 (Ct. App. 2001); *see also Davenport v. Summer*, 269 S.C. 382, 385 (1977) (Reversing the decision because “the lower court erred by failing to apply the correct legal standard”). The Court did not employ the proper standard in its Order. Thus, it is appropriate to reconsider the decision under the correct standard. If the Court does not correct its decision on reconsideration, it must be corrected on appeal. *See Carrier v. State*, 441 S.C. 547,

557 (Ct. App. 2023) (“[W]e will reverse the lower court’s decision if it is controlled by an error of law.” (quoting *Milledge v. State*, 422 S.C. 366, 374 (2018))).

If a motion to compel arbitration “can be decided ‘based on the face of a complaint, and documents relied upon in the complaint,’ a motion-to-dismiss standard should be used; otherwise, the summary judgment standard should be applied.” *Adler v. Gruma Corp.*, 135 F.4th 55, 63 (3d Cir. 2025) (quoting *Guidotti v. Legal Helpers Debt Resol., LLC*, 716 F.3d 764, 776 (3d Cir. 2013)). In the first instance, Plaintiff posits that the Court should have applied a motion-to-dismiss standard because the Court decided the motion without the benefit of *any* discovery. In fact, Plaintiff sent formal discovery requests to Defendants in November 2024 but never received the discovery requested. Therefore, given the posture, the Court should have applied the motion-to-dismiss standard and taken all allegations in the Complaint as true for the purposes of deciding the motion to compel arbitration. *See Fabian v. Lindsay*, 410 S.C. 475, 481 (2014) (recognizing that the motion-to-dismiss standard “must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true”). Further, under this standard, all the alleged facts must be viewed “in the light most favorable to the [plaintiff] and presume those facts to be true.” *Id.*

Plaintiff’s Verified Complaint specifically alleges that the arbitration provision: 1) lacks mutuality; 2) introduces doubt as to the fairness and impartiality of the arbitration process; 3) inhibits a party from seeking dispute resolution; 4) undermines the neutrality of any potential arbitration proceeding and violates federal and state law; 5) is not enforceable since it is fundamentally unfair; 6) was not negotiable and Plaintiff lacked a meaningful choice of entering into it; 7) terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them; and utilizes *in terrorem* effect *i.e.*, provisions designed to deter

consumer victims from pursuing their legal rights. Compl. ¶¶ 45 – 56. Had the Court applied the motion-to-dismiss standard set by *Fabian* and taken all allegations in the Complaint as true for the purposes of deciding the motion to compel arbitration, it could have only properly denied the Defendants’ motion. The Court should have viewed Plaintiff’s allegations in the light most favorable to him.

Given that the Court did not take all allegations in the Complaint as true and view them in the light most favorable to the Plaintiff, the only other possible standard is a summary judgment standard. The Court did not apply this standard either and thus redetermination by the Court under the proper standard is required. *See Karl Sitte Plumbing Co. v. Darby Dev. Co. of Columbia*, 295 S.C. 70, 77 (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.”).

1. It Is Well-Established that the Summary Judgment Standard Must be Applied

“It 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). Federal and state courts alike recognize that the summary judgment standard is appropriate on motions to compel arbitration in general and particularly those, as here, under the FAA. The Plaintiff provides a *sampling* below of authorities but emphasize that there are *innumerable other examples*:

- ***South Carolina Courts:*** *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:*** *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”). “Most other circuits apply the summary judgment standard to

motions under § 4.” *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).

- ***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.”)
- ***Courts in Fourth Circuit:*** *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. CV 2:21-2733-RMG, 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).

As evidenced by the case law *supra*, the overwhelming authority indicates that the summary judgment standard is appropriate on a motion to compel arbitration. In doing so, the Court should have applied the South Carolina summary judgment standard, including the critical principles as laid out below.

2. South Carolina Summary Judgment Standard

Although it is unclear exactly what standard the Court applied in its Order, it is not sufficiently close to the summary judgment standard.

a) *All Reasonable Inferences Must Favor Non-Moving Party*

“When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing 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.”). “The 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). “At the summary judgment stage of litigation, 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); *see also Hansen v. DHL Lab’ys, Inc.*, 316 S.C. 505, 513, (Ct. App. 1994), *cert. granted, decision aff’d*, 319 S.C. 79 (1995)(“[Q]uestions of credibility can make summary judgment inappropriate.”) “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). At a minimum, the Court’s Order was an improper weighing of Defendants’ denials in their Answer (which is not treated as evidence) over Plaintiff’s evidence in his Verified Complaint.

3. The Court did not Properly Review the Verified Complaint

The Court did not take all reasonable inferences in the Verified Complaint in favor of the non-moving party nor did it recognize the disputed material facts precluding compelling arbitration.

a) The Verified Complaint is Summary Judgment Evidence

The Supreme Court of South Carolina recognizes that “a verified complaint is equivalent of an affidavit” for the purposes of a summary judgment standard under South Carolina law. *Dawkins v. Fields*, 354 S.C. 58, 67 (2003) (aligning with federal courts and “numerous state courts” and holding that a verified complaint is akin to an affidavit). The Verified Complaint would still need to comply with Rule 56(e) in that it be based on personal knowledge, set forth facts that

would be admissible in evidence, and show that the “affiant” is competent to testify. *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 224 (Ct. App. 2013) (citing *Dawkins*, 354 S.C. at 64). Those requirements are easily met here: The Verified Complaint is not made up of allegations made “upon information and belief” or conclusory allegations. Rather, it largely involves a recounting of the circumstances leading up to the purported formation of the agreement at issue here. (*See generally* Verified Complaint.) Thus, the total lack of applying the appropriate consideration to the Verified Complaint provides sufficient reason to reverse on its own.

b) Defendants did not put forth Competing Evidence

Defendants submitted no evidence to refute the weight of the evidence in the Verified Complaint.¹ This alone is reason to deny the motion to compel arbitration. Even if the Court were to somehow treat all of Defendants’ pleadings, including its Answer, Motion, and Memorandum in Support of its Motion as evidence (which would be totally contrary to basic law), it would still not result in a grant of the motion to compel arbitration because the Verified Complaint (which is evidence under Rule 56(e)) at an absolute minimum, creates a dispute of material fact.²

c) Disputed Material Facts Preclude Compelling Arbitration

Plaintiff’s Verified Complaint provides ample evidence precluding granting the motion. If “[g]enuine issues of material fact exist, [it] preclud[es] summary judgment.” *Bluestein v. Town of Sullivan’s Island*, 429 S.C. 458, 464 (2020). “Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement” *Briody*, No. 2009-CP-23-6381, 2010 WL

¹ Plaintiff acknowledges that at 6:11PM the day before the March 27, 2025 hearing, Defendants filed an Amended Memo in Support of their Motion. It included three excerpts of the AAA Commercial rules as exhibits. Even if these were to be considered evidence at this juncture, they clearly have no bearing on the material facts and are not something that the Court could have already taken judicial notice of. They are of no consequence.

² For the avoidance of doubt, Plaintiff is not suggesting that the Court should treat Defendants’ pleadings and briefs as evidence.

9935409, at *4. “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452 (2001). “A jury trial on the existence of an arbitration agreement is warranted when there are genuine issues of material fact regarding the parties’ agreement.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 38, 524 S.E.2d 839, 844 (Ct. App. 1999). Importantly, “[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362 (2002).

As discussed, even if there were competing evidence, the Court would not be able to grant a motion to compel arbitration on those grounds as it is well-settled that it cannot weigh conflicting evidence. *See John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 435 (Ct. App. 2024) (“At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” (citation omitted)).

While Plaintiff is not seeking a jury trial as to the issue of the arbitration agreement, Plaintiff posits that the grant of the motion to compel at this stage was improper.

4. Plaintiff did not have the Benefit of Discovery

a) *Plaintiff Sought Discovery from Defendants That Would Have Aided the Decision on the Motion to Compel Arbitration*

Plaintiff served Discovery Requests on all Defendants on November 5, 2024. Defendants declined to answer the requests, responding 17 days later declining to respond to all discovery served upon Defendants.

It is well-established that “[a] party served with written discovery has a **duty to answer it**, unless the party objects based on a stated reason or moves for a protective order.” *Richardson on Behalf of 15th Cir. Drug Enf’t Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S.*

Currency & Various Jewelry, 430 S.C. 594, 598 (Ct. App. 2020) (emphasis added) (citing Rules 26(c), 33(a), 34, and *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 83 (2011)).

Plaintiff sought discovery from Defendants regarding the circumstances of the Purchase Agreement's formation, Defendants' standard practices, and other issues relevant to unconscionability before Defendants' motion to compel arbitration was filed and decided. This discovery was necessary to sufficiently develop the factual record required to decide the motion to compel. Courts in South Carolina have long recognized the need to conduct limited discovery prior to deciding a motion to compel arbitration. *See 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.").

Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, an affirmance of a denial of a motion to compel arbitration, is instructive here on the issue of discovery before deciding a motion to compel arbitration. 422 S.C. 544 (Ct. App. 2018). Plaintiff's case stands in stark contrast to the facts in *Hodge*, where the Court of Appeals affirmed a Circuit Court's denial of *further* discovery for a motion to compel arbitration where (a) "the facts material to the court's decision [were] not contested"; (b) and "because the parties submitted, without objection, all documents that they wished the court to consider." *Id.* at 576. The *Hodge* Court concluded that further discovery "would not provide any additional material facts that would be helpful to the court in reaching its decision." *Id.* Here, we have the total opposite situation: the material facts *are* in dispute and Plaintiff was never given an opportunity to engage in discovery because Defendants obstructed. In another case

examining *Hodge*, the Court of Appeals noted that the trial court “rejected [] request for leave to conduct discovery” because it found the party had “opportunity to use the South Carolina Rules of Civil Procedure to conduct discovery related to arbitration.” *Est. of Solesbee by Bayne v. Fundamental Clinical & Operational Servs., LLC*, 438 S.C. 638, 645 (Ct. App. 2023). The Court of Appeals concurred with the trial court and declined to allow for further discovery because “the record does not contain any discovery requests [plaintiff] ignored or any subpoenas to which she objected.” *Id.* at 650. Here, Defendants *did* ignore discovery requests and Plaintiff was denied an opportunity to gather appropriate evidence.³

Plaintiff requests that the Court first vacate the July 23, 2025 Order and analyze the issues under the proper standard. Then in doing so, the Court should deny the Defendants’ Motion to Compel Arbitration and Stay Proceedings in this Case Until Completion of Arbitration. Plaintiff respectfully further requests that the Court instruct Defendants to respond to Plaintiff’s discovery requests—**served on Defendants over eight months ago**—or otherwise allow Plaintiff to move to compel discovery. *See Richardson*, 430 S.C. at 598 (“If no answer, objection, or motion is received, the discovering party may—but is not required to—move for a court order compelling discovery.”)⁴

b) Factual Record was not Sufficiently Developed

Given the timing of the moving brief two days before oral arguments and the failure of Defendants to respond to Plaintiff’s discovery requests, Plaintiff was not in a fair and just position

³ In lieu of discovery, an evidentiary hearing was never conducted nor were the parties ever provided an opportunity to present any evidence.

⁴ The Supreme Court of North Carolina acknowledges another option for the Court at this posture: “an intermediate option we could have pursued in this case was remanding to the trial court, where any disputed facts revealed by the record could have been addressed in an evidentiary hearing with the opportunity to test statements through cross-examination; this Court has remanded for such hearings in a variety of contexts.” *Tillman v. Com. Credit Loans, Inc.*, 362 N.C. 93, 118 (N.C. 2008) (collecting cases).

to present further evidence for the motion to compel arbitration. Where, as here, there are unresolved questions of fact, the South Carolina Supreme Court mandates that trial courts “must engage in a full inquiry” into the circumstances surrounding the purported formation of the arbitration agreement “prior to any attempt to enforce the Agreement.” *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388 n.13 (2014). Without discovery, the Court has not met its obligation, imposed by the FAA and envisioned by *Dean*, to conduct a full inquiry into the facts surrounding the formation of the agreement.

In cases, such as this, “with no factual record . . . summary judgment [i]s premature.” *Baxter v. Pilgrim’s Pride Corp.*, 443 S.C. 463, 467 (Ct. App. 2024). Granting a motion on a summary judgment standard is a “drastic remedy” and necessitates that the motion “must not be granted until the opposing party has had a full and fair opportunity to complete discovery” on the contested issue.⁵ *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112 (1991) (collecting authorities). To grant a motion under a summary-judgment standard, “it must be shown that further inquiry into the facts is not needed to clarify the application of the law.” *Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 478 (Ct. App. 1995); *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362 (2002) (“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.”).

Additionally, allowing for discovery prior to ruling on the motion to compel arbitration should have been required in the case *sub judice*. “Plaintiff has demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue[s] of [the case].” *Baughman*, 306 S.C. at 112. As indicated by the allegations in the Complaint, Plaintiff will put

⁵ For the avoidance of doubt, Plaintiff is certainly not positing that all discovery should be conducted, rather, limited discovery to the issues regarding the motion to compel arbitration is proper.

forth evidence, at a minimum, evidencing genuine issues of material facts as to whether the contract was properly formed, whether there was mutual assent to the terms, and whether the agreement was unconscionable. *Second*, “Plaintiff was not dilatory in seeking discovery” as made clear by his still-pending November 2024 discovery requests. *Baughman*, 306 S.C. at 113. In *Baughman*, the Supreme Court of South Carolina reversed the grant of summary judgment until “Plaintiffs have been afforded an adequate opportunity to complete discovery on the issue of [contract formation].” *Id.* at 114.

Finally, discovery on these issues is particularly important as discussed in more detail *infra* because the issues raised by Plaintiff, including contract formation, validity, assent, unconscionability are fact-intensive under South Carolina law.⁶ *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25 (2007) (“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.”); *Hardee v. Hardee*, 348 S.C. 84, 95–96 (Ct. App. 2001) (“In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed.” (citing Restatement (Second) of Contracts § 208 (1981))), *aff’d as modified*, 355 S.C. 382 (2003). “Both state and federal law supports plaintiffs’ limited discovery request to develop their claim that the arbitration clause is unconscionable.” *Dunlap v. Green Tree Servicing, LLC*, No. CIV.A. 2:05-0311, 2005 WL 3178593, at *2 (S.D.W. Va. Nov. 28, 2005) (collecting cases).

5. Next Steps

As an initial matter, the Court’s July 25, 2025 Order should be reversed given the overwhelming evidence in the Verified Complaint and the total lack of evidence put forth by

⁶ For the avoidance of doubt, even though the Motion to Compel Arbitration is brought under the FAA, contract issues are still considered under South Carolina law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 (2001) (“General contract principles of state law apply to arbitration clauses governed by the FAA.”).

Defendants. If the Court feels it more appropriate to vacate and proceed with limited discovery before deciding the motion, then Plaintiff should be authorized to file a motion to compel discovery from Defendants on the issues that go to issues in the motion to compel arbitration.⁷

B. THE COURT’S CONCLUSIONS OF LAW ARE ERRONEOUS

All the following issues are rendered moot if the Court vacates its July 25, 2025 Order. However, at the very least to preserve these issues for appeal, Plaintiff respectfully submits the following arguments.

1. Plaintiff Disputes the Contract on Formation Grounds not Enforceability

As a threshold matter, Plaintiff posits that Defendants’ and the Court’ mischaracterization of Plaintiff’s arguments as disputing the *enforceability* and *arbitrability* (rather than formation and validity) of the agreement is the impetus for what it views as an erroneous ruling. “There is a difference between disputes over arbitrability and disputes over contract formation.” *Rowland*, 993 F.3d at 258. Plaintiff here, in fact, contests the contract formation and related issues such as assent in invoking the purported agreement’s unconscionability. *See Meadows v. Cebridge Acquisition, LLC*, 132 F.4th 716, 730 (4th Cir. 2025) (“Procedural *unconscionability* is concerned with inequities, improprieties, or unfairness in the bargaining process and *formation of the contract*.” (emphasis added)).

Again, the Court should apply South Carolina law to the contract issues. *See* n.6. 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 v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23 (2007). “[I]ssues of contract formation necessarily

⁷ If needed, the Court should hold an evidentiary hearing, if there are disputed material issues relating to the motion to compel arbitration that reasonably be resolved in such a forum.

raise the question of whether an arbitration agreement was ever created, such issues are for the court to decide.” *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 388 (2023).

As will be illuminated in the following sections, this issue is outcome determinative in the Court’s analysis.

2. The Court’s Order Misapplied *Henry Schein*

The Court overlooked a crucial fact: unlike in *Henry Schein*, no valid agreement exists here. Plaintiff disputes whether any contract was ever formed.

The Court’s Order quoted *Henry Schein, Inc. v. Archer & White Sales, Inc.*: “When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract...” (Order at 3 (citing 586 U.S. 63, 68, 139 S. Ct. 524, 529 (2019).) That statement was made in connection with the Supreme Court’s rejection of the “wholly groundless” exception, not at issue here. *See Henry Schein*, 586 U.S. at 71. In any event, this quote does not fully capture the rule the Supreme Court set in that case. Instead, the Supreme Court set this analytical framework for this Court to consider: “[B]efore referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Henry Schein*, 586 U.S. at 69 (internal citation omitted).

In other words, the rule is that a Court is to decide an arbitrability issue *unless* two conditions are satisfied: (a) a valid agreement exists and (b) agreement delegates the arbitrability issue to an arbitrator. Both conditions are required. The Court in its Order here decided (b) before and without deciding (a). And decided (a) summarily without engaging in the fact-intensive unconscionability analysis and without discovery or evidence submitted.

As stated, the Court’s decision assumed the parties reached an agreement: “The parties specifically incorporated the Commercial Arbitration Rules into the Purchase Agreement.” (Order

at 3.) Plaintiff specifically disputes whether the parties came to a meeting of the minds. Thus, the analysis excluded the critical first step.

3. Masters' Facts are so Distinct Rendering it Ineffective

Masters involved a **post-formation** breach of contract dispute. It is therefore clearly distinct from the present case, which specifically contests formation and related issues.

As stated in the Court's Order, "In *Masters*, the purchaser of a car challenged the Dealer's claim for arbitration on grounds that execution of subsequent agreements rendered the original agreement 'moot and unenforceable.'" (Order at 3 (citing *Masters v. KOL, Inc.*, 431 S.C. 28 (S.C. Ct. App. 2020).) *Masters* involved totally inapposite facts.

First, *Masters* does not involve any questions as to whether there were any contracts formed between the parties. The plaintiffs in *Masters* did not dispute that they entered into the Purchase Order. Rather they asserted, among other claims, "breach of contract" causes of action, which, in and of itself, acknowledges that a contract was formed as it is a post-formation issue. *Id.* at 32. In contrast, Plaintiff specifically disputes formation and related issues.

Second, the facts in *Masters* are unique and not to be broadly applied. Unlike our case, *Masters* involved "execution of subsequent contracts" and the contract principle of "novation." *Id.* at 34, 35. The circuit court found that subsequent contracts rendered an earlier contract "moot and unenforceable." *Id.* at 36. The Court of Appeals reversed the circuit court's finding of a novation, "substitution of a new obligation between the parties with the intent to extinguish the old obligation." *Id.* at 35, 36. (citing *Moore v. Weinberg*, 373 S.C. 209, 217 (Ct. App. 2007). That case and its invocation of novation is nothing like the situation here.

4. The Court Erred in its Conclusion that the Agreement “Clearly and Unmistakably” Delegated the Question of Arbitrability to the Arbitrator

The Court’s Order stated summarily, without analysis, that it “concludes as a matter of law that the parties agreed to delegate issues regarding the enforceability of the Purchase Agreement to the arbitrator.” (Order at 4.) The Order provided no case citation, authority, or analysis for this crucial conclusion of law as to “clear and unmistakable” delegation. In any event, the conclusion of law should be reversed.

As an initial matter, Plaintiff maintains that he never entered into *any* contract, including the entire agreement, the arbitration agreement, or the delegation provision. As such, a “challenge to formation of that agreement, however, applies equally to the whole [agreement].” *Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd.*, 130 F.4th 396, 402 (4th Cir. 2025) (“*Berkeley II*”) (“Provisions requiring the arbitration of arbitrability questions do not . . . preclude a court from deciding that a party never made an agreement to arbitrate any issue (which would necessarily encompass an arbitrability issue) (citing *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024) and *Berkeley County School District v. Hub International Limited*, 944 F.3d 225, 234 n.9 (4th Cir. 2019) (“*Berkeley I*”).) This would necessarily preclude any finding that the parties “clearly and unmistakably” agreed to anything, including the delegation provision.

Given the clear dispute between the parties as to whether the delegation clause was intended by each to require the arbitration of arbitrability, there was no factual basis for the Court’s conclusion “as a matter of law” the parties “clearly and unmistakably” agreed to the purported delegation provision. The Court’s conclusion the agreement’s language that “[a]ny controversy . . . 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)” delegates anything to the Arbitrator

(Agreement at 4.) is unsupported by the facts and falls short of the standard for showing a valid delegation.

“The 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). In the Fourth Circuit’s decision in *Simply Wireless, Inc. V. T-Mobile US, Inc.*, involving two competing providers of cellular telephone services, the Court held “in the context of a **commercial contract** between **sophisticated parties**, the explicit incorporation of JAMS Rules serves as ‘clear and unmistakable’ evidence of the parties’ intent to arbitrate arbitrability.” *Simply Wireless, Inc v. T-Mobile US, Inc.*, 877 F.3d 522, 528 (4th Cir. 2017) (emphasis added), *abrogated on other grounds by Henry Schein, Inc.*, 586 U.S. 63. The Fourth Circuit, later in its Opinion, confirmed that its decision should be cabined: “In sum, we hold that when, as here, **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.” *Id.* at 529 (emphasis added). It is axiomatic that Plaintiff here—with his lack of sophistication as, among other things, out-of-town elderly consumer—cannot be analogized to the cell phone providers at issue in *Simply Wireless*.

Courts applying *Simply Wireless* have recognized this. In *Gordon v. Zeroed-In Tech.*, the Court stated “this Court, like Judge Hollander, is **skeptical** that a cross-reference to the JAMS Rules provides “clear and unmistakable” evidence of the parties’ intent to arbitrate arbitrability, given that **one party is unsophisticated.**” *Gordon v. Zeroed-In Tech., LLC*, No. CV 23-3284-BAH, 2025 WL 941365, at *23 (D. Md. Mar. 26, 2025) (citing *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 555 (D. Md. 2019)); *accord Collins v. Discover Fin. Servs.*, No. CV PX-17-03011,

2018 WL 6434503, at *3 (D. Md. Dec. 7, 2018) (same). As *Stone* stated aptly, “[i]t strains credulity to believe that the consumer knew—much less intended—that the cross-reference directed an arbitrator to decide arbitrability. To treat the Agreement as evidencing clear and unmistakable evidence of plaintiff’s intent would be to take a good joke too far.” *Stone*, 361 F. Supp. 3d at 555 (citation omitted); see *Barmby v. Ourisman Chevrolet, Co.*, No. CV DLB-22-2312, 2023 WL 4549739, at *9 n.5 (D. Md. July 14, 2023) (indicating the unsophistication of the party in *Stone* “weighed heavily in this court’s analysis” on clear and unmistakable evidence). In fact, *In re Little*, a case cited in *Masters* for the rule on the very topic of *clear and unmistakable evidence* “concur[ed]] with the reasoning in *Stone*.” 610 B.R. 558, 568 (Bankr. D.S.C. 2020). *In re Little*, stated the obvious: “how unlikely it would be that an unsophisticated party would know what a set of arbitration rules were, and even less so, the specific contents of a particular rule within that set.” *Id.*

In examining disputed material facts and in taking all reasonable inferences in Plaintiff’s favor, it is unclear how the agreement’s invocation of the AAA rules could provide the requisite “clear and unmistakable” evidence. An unsophisticated consumer, such as the Plaintiff, will have no understanding of the AAA Commercial rules. They are especially unlikely to know that AAA rules purportedly delegates arbitrability of disputes to the arbitrator.⁸

In all, the agreement under the facts in the Verified Complaint, even if it were to be properly formed (which Plaintiff disputes), does not “clearly and unmistakably” delegate validity and arbitrability to the arbitrator.⁹

⁸ Moreover, all the evidence in the Verified Complaint (and in the publicly-available complaints) surrounding the high-pressure conditions that the agreement was purportedly formed under, casts doubt on this even more.

⁹ If needed, because this is such a critical and dispositive issue here, Plaintiff would welcome supplemental briefing on this issue (and any issues as the Court wishes).

5. The Court of Appeals for the Fourth Circuit, in Analyzing *Henry Schein* Under Similar Facts, Confirms Plaintiff's Position

South Carolina courts frequently look to the Fourth Circuit for guidance on interpreting law, especially in the context of a federal law, such as the Federal Arbitration Act here. The Fourth Circuit's decision in *Berkeley I* interpreted the Supreme Court's precedent on the Federal Arbitration Act. 944 F.3d at 234 n.9. That case began by recounting the same principle from *Henry Schein*: "[P]arties may agree to have an arbitrator decide not only the merits of a particular dispute but also gateway questions of arbitrability." *Id.* (citing *Henry Schein, Inc.*, 586 U.S. at 67–68). Further, it dealt with an analogous purported delegation clause: "[T]he Arbitration Clauses incorporate the Commercial Rules of the American Arbitration Association, which provide that an arbitrator has the power to rule on arbitrability issues." *Id.*

Critically at this step, the Fourth Circuit came to an opposite conclusion as this Court did in its Order. The Fourth Circuit stated: "Such provisions requiring the arbitration of arbitrability questions do not, however, undermine § 4 of Title 9 and ***preclude a court from deciding that a party never made an agreement to arbitrate any issue (which would necessarily encompass an arbitrability issue)***." *Id.* (emphasis added) (citing sources). This is precisely the situation here: Plaintiff contests that he ever made an agreement at all: neither the Purchase Agreement, or the Arbitration provision in it, or the purported delegation clause within that. The Fourth Circuit reaffirmed this position in a recent decision in the same underlying dispute. *See Berkeley II* ("***The challenge to formation of that agreement, however, applies equally to the whole [agreement]***." 130 F.4th at 402 (citing *Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024) and *Berkeley I*, 944 F.3d at 234 n.9) (emphasis added). It reaffirmed that "Provisions requiring the arbitration of arbitrability questions do not . . . preclude a court from deciding that a party never made an agreement to

arbitrate any issue (which would necessarily encompass an arbitrability issue).” *Id.* (quoting *Berkeley I*).

For the avoidance of doubt this is consistent with the Supreme Court’s 2024 decision in *Coinbase*. 602 U.S. at 151. Again, it applied the same principle from *Henry Schein*: “Before referring a dispute to an arbitrator, therefore, the court determines whether a valid arbitration agreement exists.” *Id.* (quoting *Henry Schein*, 586 U.S. at 69) (internal quotations omitted). And just like the *Berkeley* decisions, the Supreme Court stated “Where a ***challenge applies ‘equally’ to the whole contract*** and to an arbitration or delegation provision, a court must address that challenge.” *Id.* (citation omitted) (emphasis added).

6. The Court’s Purported Unconscionability Analysis was Devoid of any Mention of it and Was an Improper Advisory Opinion as Written

Despite purportedly finding that “the Court must refer this matter to arbitration for the arbitrator to decide all such issues,” the Court went on to analyze contract formation and whether it was an adhesion contract. (Order at 3.) Under the Court’s own conclusions of law, these would be improper advisory opinions. In any event, Plaintiff posits that the limited analysis as to these issues was erroneous.

As any initial matter, there is no mention here of unconscionability—the core argument Plaintiff raises. The Court’s analysis starts and concludes with the presumption that one is to have read and understood the document he signs. (Order at 4.) Plaintiff does not disagree with this general proposition of law. However, the detailed Verified Complaint, the reasonable inferences viewed in favor of the Plaintiff, and the fact-intensive inquiry required for unconscionability determinations belies resting on this presumption. As stated above, at an absolute minimum,

Plaintiff should be afforded time to gather and present evidence on this issue.¹⁰ See *Naimoli v. Pro-Football, Inc.*, 120 F.4th 380, 390 (4th Cir. 2024) (“[C]ourt may resolve the relevant factual disputes by, as necessary, affording targeted discovery, conducting an evidentiary hearing, conducting a summary trial, making findings of fact and conclusions of law, all as necessary and appropriate to resolve the motion.”).

The Court’s Order contained no discussion of procedural or substantive unconscionability in contravention of the well-established principle that alleged unconscionable arbitration clauses necessitate “a case-by-case analysis . . . to address the unique circumstances inherent in the various types of consumer transactions.” *One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 62 (Ct. App. 2016) (citation omitted). Plaintiff reemphasizes the need to engage in the unconscionability analysis under South Carolina contract law as discussed in *Damico v. Lennar Carolinas, LLC* and its progeny. 437 S.C. 596 (2022). In *Damico*, the Court explained the “touchstone of the analysis begins with the presence or absence of meaningful choice.” *Id.* at 612. “Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts 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.* at 613 (citing authorities).

Indeed, the Court’s Order did discuss adhesion contracts, which is not dispositive on unconscionability. In any event, the Court’s analysis of adhesion contract was flawed and again,

¹⁰ Relevant discovery to the motion to compel arbitration that Plaintiff seeks includes, among other things: Defendants’ training materials to sales staff generally and the specific presenter in Plaintiff’s case, its practice on presenting the arbitration clauses and the customer’s right to have the agreement reviewed by counsel, other consumer complaints and disputes, as well as any Defendants’ dealings with the Texas Attorney General and Georgia Attorney General in its resolutions regarding similar conduct alleged in the Complaint.

did not give all reasonable inferences to the Plaintiff. (Order at 4.) As an initial matter, this section in the Court's Order finds no support in the Court's factual findings. The statement, without citation, that "Plaintiff in fact requested changes to the standard Purchase Agreement which were included in the Addendum/Exception to Contract as part of the Purchase Agreement" is belied by the record. In fact, the Addendum/Exception to the Contract did not include any sort of changes requested by Plaintiff, instead it included terms that Defendants decided to include in this point of the contract. Nevertheless, all inferences must be viewed in the light most favorable to Plaintiff. *See Russell*, 370 S.C. at 15. This is not what the Court did in its Order. Moreover, the Court improperly concluded that the agreement, both the agreement as a whole and the arbitration agreement contained therein, were not "take it or leave it" contracts without engaging in *Damico's* fact-intensive analysis and without making inferences in the light most favorable to Plaintiff.

C. ONE-PARTY ARBITRATOR SELECTION

As a final point, to the extent, an arbitration is compelled, the Court cannot do so without striking the arbitration selection procedure in the agreement. The agreement states: "The arbitrator shall be selected by VI." (Agreement at 4.) In analyzing claims of unconscionability in the context of arbitration agreements, the focus is on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *See Simpson*, 373 S.C. at 25, 69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

The *Hooters* decision struck down an arbitration clause because it gave "Hooters control over the entire [arbitrator] panel." 173 F.3d at 939. The Fourth Circuit said these rules were so "warped" and did not comport with "minimum due process standards and thus any arbitration under them would have been a "sham." *Hooters*, 173 F.3d at 940. Thus, in connection with

Hooters and in the interest of justice, the arbitration selection procedure, which allows only Defendants to select the arbitrator, must be stricken. Otherwise, any arbitration is a total “sham.”

CONCLUSION AND PRAYER FOR RELIEF

When taking all reasonable inferences in the Verified Complaint in favor of Plaintiff, it is clear that, at a minimum, the disputes of material facts indicate the Motion to Compel Arbitration must be denied. In accordance with Rule 11, undersigned counsel certify that consultation would serve no useful purpose and could not be timely held.

For the foregoing reasons, Plaintiff respectfully request that this Honorable Court:

1. GRANT this Motion Under South Carolina Rules of Civil Procedure 52(b) and 59(e);
2. VACATE the Order Granting Motion to Compel Arbitration and Stay Proceedings;
3. DENY the Motion to Compel Arbitration;
4. LIFT the stay of proceedings;
5. ORDER the case to proceed;
6. AUTHORIZE Plaintiff’s Motion to Compel Discovery;
7. STRIKE the Agreement’s Arbitrator Selection Procedure as void as a matter of law and against public policy;
8. GRANT such other and further relief as this Court deems just and proper.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2024-CP-10-02646
PETER SKOLER AND PATRICIA	)	
SKOLER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	DEFENDANTS' MEMORANDUM
	)	IN OPPOSITION TO PLAINTIFFS'
VACATION INSPIRATIONS,	)	MOTION TO RECONSIDER
DESTINATION TRAVEL, LLC, JOSEPH	)	ORDER COMPELLING
SHIRLEY, RANDY GARDNER, AND	)	ARBITRATION AND STAY
JEFFREY PUMILIA,	)	PROCEEDINGS
	)	
Defendants.	)	
	)	

Defendants by and through their undersigned counsel, submit the following Memorandum in Opposition to Plaintiffs' Motion for Reconsideration of the Court's Order Granting Defendants' Motion to Compel Arbitration and Stay Proceedings, as follows:

I. ADOPTION AND INCORPORATION OF DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS FILED HEREIN ON MARCH 25, 2025

Defendants adopt and incorporate their Notice of Motion and Defendants' Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration with exhibits filed herein on November 12, 2024, Defendants' Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed herein on March 25, 2025 and their Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed on March 26, 2025.

II. PROCEDURAL BACKGROUND

On November 12, 2024, Defendants filed a motion to compel the Plaintiffs to arbitrate this dispute as they agreed to do when Plaintiffs purchased their Vacation Inspirations Membership in March, 2022. Attached to that motion were the following documents all signed by the Plaintiffs: the Vacation Inspirations Membership Purchase Agreement with Membership Terms and Conditions; an Addendum/Exception to Contract; and a Vacation Inspirations Membership Acknowledgement with a series of questions answered by the Plaintiffs. The issues were briefed extensively before the hearing on the motion. Plaintiffs filed a memorandum in opposition to the motion. Defendants filed a supporting memorandum and an amended supporting memorandum in support of the motion. Thereafter, Plaintiffs filed a sur-reply memorandum to respond to the Defendants' supporting memorandum. The Court heard oral argument by counsel for Plaintiffs and Defendants on March 27, 2025. After due consideration of all issues and matters, on July 25, 2025, the Court entered its Order granting Defendants' Motion to Compel Arbitration and Stay Proceedings. In that Order, and pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, the Court made specific Findings of Fact and Conclusions of Law and granted Defendants' motion in full. Thereafter on August 2, 2025, Plaintiffs filed their Motion for Reconsideration.

III. THE COURT APPLIED THE CORRECT STANDARD AND REACHED THE CORRECT LEGAL CONCLUSION IN GRANTING THE MOTION TO COMPEL ARBITRATION

Defendants' Motion to Compel Arbitration specifically relies upon all applicable law, including, but not limited to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), as well as the terms of the arbitration requirement contained in the Purchase (Membership) Agreement. Plaintiffs' counsel acknowledged during the hearing that the FAA governs the issues before the Court. Now that the Court has decided to send the case to arbitration, the Plaintiffs attempt to

recast this motion to compel arbitration as a motion for summary judgement in an apparent effort to confuse the issues, but the Court should not be distracted by those arguments.

The issue before the Court has been conclusively decided by the United States Supreme Court in the case of Henry Schein, Inc. vs. Archer & White Sales, Inc., 586 U.S. 63, 139 S. Ct. 524, (2019). In that case the arbitration provision stated that any dispute [with unrelated exceptions] **“shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [AAA]. The place of arbitration shall be in Charlotte, North Carolina.”** See Schein, Inc., 586 U.S. at 66, 139 S. Ct. at 528 (internal citations omitted) (emphasis added).

The United States Supreme Court held the requirement the arbitration be conducted in accordance with the Arbitration Rules of the American Arbitration Association means that only the arbitrator, and not the trial Court, could decide the arbitrability question. Specifically, the Schein decision states the following:

When the parties’ contract delegates the arbitrability question to the arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. *Id* at 529. When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Schein, Inc., 586 U.S. at 68, 139 S. Ct. at 529. Further, the Court also held that

When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Id. at 71, 139 S. Ct. 524 at 531.

Although not decided by the Fourth Circuit Court of Appeals, that Court noted in a recent decision that “other circuits have held that an arbitration provision's incorporation of the AAA commercial rules is a clear and unmistakable expression of the parties' intent to reserve the

question of arbitrability for the arbitrator and not the court.” Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd., 130 F.4th 396, 403 (4th Cir. 2025). That opinion cites several cases in which other federal appellate courts have included that by incorporating the AAA Commercial Rules into their agreement that delegate the issue of arbitrability to the arbitrator, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid. *See, e.g., Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); Terminix Int’l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005).

Plaintiffs incorrectly argue that this Court failed to consider their Verified Complaint as evidence that an agreement to arbitrate was not formed. Plaintiffs’ argument about the Verified Complaint is wrong and does not justify reconsideration or amendment of the Court’s order for several reasons. First, in paragraph 32 of the Complaint the Plaintiffs admit that they entered into a contract with Defendant Vacation Inspirations. Second, the arguments offered by the Plaintiffs as to why that contract should not be enforced are not facts alleged, but legal arguments which do not create any issue about whether Plaintiffs agreed that disputes would be decided by an arbitrator.

Additionally, Plaintiffs incorrectly argue that the Defendants did not submit “competing evidence” in support of the motion to compel arbitration. However, that argument ignores the evidence that was submitted with the Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration filed on November 12, 2024. Specifically, a copy of the Purchase Agreement Vacation Inspirations Membership signed by the Plaintiffs was attached to the pending Motion. Additionally, the Defendants submitted the ADDEDUM/EXCEPTION TO CONTRACT which has hand-written changes/addenda to the Agreement requested and received

by the Plaintiffs. Lastly, along with the Motion to Compel Arbitration the Defendants submitted a document signed by the Plaintiffs titled Vacation Inspirations Membership Acknowledgement which contains a list of questions answered at time of purchase. One of the questions is whether decision was based on high pressure sales tactics. The Plaintiffs answered “N.”

The arbitration paragraph in the Agreement signed by the Plaintiffs clearly and unequivocally delegates the decision about arbitrability to the arbitrator as provided in the AAA Commercial Arbitration Rules. Specifically, it includes the following provision:

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].

See Agreement attached to Defendants’ Motion to Compel Arbitration at Para. VIII.

Pursuant to the FAA and the Commercial Arbitration Rules of the AAA and agreed to by Plaintiffs, and the citations below, the question of arbitrability is to be determined and decided by the arbitrator, and respectfully, not the Court. Rule R-7(a) and (b) of the Commercial Rules provide as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

See AAA, Rule R-7(a) and (b). In the arbitration provision herein, the Purchase Agreement clearly and unequivocally invoked the Commercial Arbitration Rules of the AAA. As noted below, the

AAA Commercial Rules specifically provide for such delegation to the arbitrator. Therefore, the Court properly decided to follow the clear and unmistakable agreement of the parties and send all issues to the arbitrator.

Moreover, the Plaintiffs' motion ignores the affidavit of Mr. Randy Gardner filed along with the Motion to Compel Arbitration which proved, without contradiction, that the Purchase Agreement and the arbitration clause have the required nexus to interstate commerce sufficient to invoke the arbitration provisions of the FAA. See generally, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995). Therefore, under the Federal Arbitration Act, the Court properly determined that it could not decide whether an arbitration agreement applies to the instant dispute since the parties clearly and unmistakably delegated the question to an arbitrator. There are no disputed facts to be decided on that issue.

See also Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893, 894 (Ct. App. 2020).

Moreover, under any circumstance, arbitration should be required under the FAA. "[The FAA applies . . . to any arbitration agreement regarding a transaction that in fact involves interstate commerce." See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

So long as interstate commerce is involved, which was undisputed by the Plaintiffs, the FAA controls arbitration. Mr. Gardner's affidavit provides clear evidence of the necessary involvement with interstate commerce. The arbitration should be conducted under the AAA Commercial Rules and in accordance with the FAA with any issues regarding arbitrability decided by the arbitrator. The Motion to Compel Arbitration and Stay Proceedings was properly granted and the Plaintiffs' motion to reconsider that decision must be denied.

IV. DISCOVERY

Plaintiffs also miss the mark in making the argument that the motion should not have been decided because Defendants had not answered discovery. This issue was not raised prior to or

during the hearing on the motion to compel arbitration and so Plaintiffs cannot raise it for the first time in a motion to reconsider or to alter or amend judgment. See Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); see also McGee v. Bruce Hosp Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial).

In making this argument Plaintiffs failed to advise the Court that on November 22, 2024, Defendants' counsel sent Plaintiffs' counsel an email as follows:

As noted in our motions to compel arbitration in the three cases that have been filed, we have also asked for a stay of the proceedings as there is law in South Carolina that the right to arbitrate may be waived by participating in the proceedings. As such, we cannot answer the discovery you have sent us in the three cases.

Defendants did not ignore the Plaintiffs' discovery requests. Instead, Defendants set forth an appropriate stated reason for not responding to the discovery. See e.g. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. App. 1999). The Defendants' motion to compel arbitration included a request to stay all discovery. If Plaintiffs were not satisfied with the stated reason, Plaintiffs could have moved at any time to compel Defendants to respond. Plaintiffs chose not to file any such motion or even further discuss the matter in the briefs or at the hearing but instead waited until after the Court granted Defendants' motion to compel arbitration on July 25, 2025, to, for the first time, raise an issue regarding discovery. Having failed to act and having lost the motion to compel arbitration and stay proceedings, Plaintiffs are not proceeding in good faith in their position to the Court on discovery matters.

V. THE AGREEMENT IS NOT UNCONSCIONABLE OR A CONTRACT OF ADHESION

Neither the Purchase Agreement nor the arbitration provision therein were signed on a “take-it-or-leave-it” basis with no negotiable terms and that its evident from the agreement itself. Plaintiffs failed to make any effort to negotiate the arbitration provision, even though they had the opportunity to do so and in fact, did negotiate several matters as noted below. Plaintiffs had meaningful choices, they just did not choose to make any of those choices regarding the arbitration provision.

The Purchase Agreement includes an Addendum/Exception (attached as an Exhibit to the motion to compel arbitration), which provided Plaintiffs an opportunity to alter or amend the arbitration provision. In fact, as seen on the Addendum/Exception, there are four (4) such handwritten items. None of the four (4) exceptions handwritten involve or address the arbitration provision. Plaintiffs signed the handwritten page with the exceptions. Plaintiffs undisputably had a meaningful choice, but chose not to raise any questions at the time of the Purchase Agreement regarding the arbitration provision and Plaintiffs should not now be permitted to claim otherwise.

The claims of unconscionability were unsubstantiated and do not justify reconsideration of the order compelling arbitration. An example of such an unsubstantiated allegation is the Plaintiffs’ claim that the agreement is unconscionable because they were supposedly subjected to high pressure sales tactics. Item number 10 of the Vacations Inspirations Membership Acknowledgment of the Agreement conclusively refutes that claim. That question asks if decision to purchase was “based on any high pressure sales tactics” and Plaintiffs responded “N.” Plaintiffs also signed that page.

As for the contention that Plaintiffs did not have equal bargaining power, it is noteworthy that this purchase was a travel club membership. It is not an essential purchase such as shelter or even a core consumer purchase such as an automobile. Under any circumstance, Plaintiffs could

have said “no” and left at any time without signing the Purchase Agreement. It is not unusual for those who listen to the Defendants’ sales presentation to do only that and then decline to purchase.

The request for participants in the sales presentation to put away their cell phones is not a high pressure sales tactic. Instead, that request is made prior to the sales presentation because of the expectation that cell phone usage will be a constant distraction during the presentation. It is irrelevant that Plaintiffs did not have access to legal counsel or that they did not consult with an attorney prior to signing the Agreement. Plaintiffs cite no support for the idea that a contract is unconscionable unless the parties first have an opportunity to consult with counsel. Also, Defendants did not have any duty to advise Plaintiffs to seek legal counsel.

VI. THE AAA COMMERCIAL RULES OF ARBITRATION PROVIDE THE METHOD FOR APPOINTING A FAIR ARBITRATOR. THE ARBITRATION PROVISION IN THE PURCHASE AGREEMENT COMPLIES WITH THAT METHOD AND MUST BE FOLLOWED

Plaintiffs also argue that arbitration should not be compelled because the arbitration agreement that they signed does not provide a fair, unbiased forum. However, the applicable rule conclusively refutes that claim. Rule R-14 of the AAA Commercial Arbitration Rules states in part as follows:

- (a) If the agreement of the parties names an arbitrator **or specifies a method of appointment of an arbitrator**, that designation or method shall be followed. (Emphasis added).

See AAA, Rule R-14 previously attached to Defendants’ Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit A. Moreover, Rule R-19(a) states in part as follows:

An arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

- (i) Partiality or lack of independence.

See AAA, Rule R-19(a) previously attached to Defendants' Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit B.

While Rule R-19(b) permits appointment of a "non-neutral" arbitrator, that is not the case here. The arbitration clause challenged by the Plaintiffs merely allows Defendant Vacation Inspirations to choose the arbitrator, but it does not relieve the arbitrator selected of his or her obligations under the AAA Commercial Rules to be impartial and independent. Moreover, South Carolina ADR Rule 13(d) has a similar provision.

The arbitration provision does not put any limits on arbitrator's decision-making authority. No claims are excluded or waived. The arbitration agreement does not include any limits on damages. Contrary to Plaintiffs' arguments, the arbitration provision invoking the Commercial Rules of the American Arbitration Association fully and completely complies with and is in accordance with the foregoing Rules and provides a forum for resolving this dispute by an unbiased arbitrator.

Plaintiffs are attempting to raise issues that could have and should have been raised in their Memoranda in Opposition to Defendants' motion to compel arbitration and/or at the hearing and oral argument. Plaintiffs' motion does not raise any new information that was not available to the Court when the Court made its ruling on July 25, 2025. Plaintiff urged the Court to rule and the Court did rule; just not in Plaintiffs' favor.

VII. CONCLUSION

For all the reasons set forth above, the motion to reconsider should be denied.

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ATTORNEYS FOR DEFENDANTS

CHARLESTON, SC

August 15, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2024-CP-10-04606
FRANK PERRELLI, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANTS' MEMORANDUM
	)	IN OPPOSITION TO PLAINTIFF'S
VACATION INSPIRATIONS,	)	MOTION TO RECONSIDER THE
DESTINATION TRAVEL, LLC, JOSEPH	)	COURT'S ORDER GRANTING
SHIRLEY, RANDY GARDNER, AND	)	DEFENDANTS' MOTION TO
JEFFREY PUMILIA,	)	COMPEL ARBITRATION AND
	)	STAY PROCEEDINGS
Defendants.	)	
	)	

Defendants by and through their undersigned counsel, submit the following Memorandum in Opposition to Plaintiff's Motion for Reconsideration of the Court's Order Granting Defendants' Motion to Compel Arbitration and Stay Proceedings, as follows:

I. ADOPTION AND INCORPORATION OF DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS FILED HEREIN ON MARCH 25, 2025

Defendants adopt and incorporate their Notice of Motion and Defendants' Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration with exhibits filed herein on November 12, 2024, Defendants' Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed herein on March 25, 2025 and their Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed on March 26, 2025.

II. PROCEDURAL BACKGROUND

On November 12, 2024, Defendants filed a motion to compel the Plaintiff to arbitrate this dispute as he agreed to do when Plaintiff purchased his Vacation Inspirations Membership in October, 2022. Attached to that motion were the following documents all signed by the Plaintiff: the Vacation Inspirations Membership Purchase Agreement with Membership Terms and Conditions; an Addendum/Exception to Contract; and a Vacation Inspirations Membership Acknowledgement with a series of questions answered by the Plaintiff. The issues were briefed extensively before the hearing on the motion. Plaintiff filed a memorandum in opposition to the motion. Defendants filed a supporting memorandum and an amended supporting memorandum in support of the motion. Thereafter, Plaintiff filed a sur-reply memorandum to respond to the Defendants' supporting memorandum. The Court heard oral argument by counsel for Plaintiff and Defendants on March 27, 2025. After due consideration of all issues and matters, on July 23, 2025, the Court entered its Order granting Defendants' Motion to Compel Arbitration and Stay Proceedings. In that Order, and pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, the Court made specific Findings of Fact and Conclusions of Law and granted Defendants' motion in full. Thereafter on August 2, 2025, Plaintiff filed his Motion for Reconsideration.

III. THE COURT APPLIED THE CORRECT STANDARD AND REACHED THE CORRECT LEGAL CONCLUSION IN GRANTING THE MOTION TO COMPEL ARBITRATION

Defendants' Motion to Compel Arbitration specifically relies upon all applicable law, including, but not limited to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), as well as the terms of the arbitration requirement contained in the Purchase (Membership) Agreement. Plaintiff's counsel acknowledged during the hearing that the FAA governs the issues before the Court. Now that the Court has decided to send the case to arbitration, the Plaintiff attempts to

recast this motion to compel arbitration as a motion for summary judgement in an apparent effort to confuse the issues, but the Court should not be distracted by those arguments.

The issue before the Court has been conclusively decided by the United States Supreme Court in the case of Henry Schein, Inc. vs. Archer & White Sales, Inc., 586 U.S. 63, 139 S. Ct. 524, (2019). In that case the arbitration provision stated that any dispute [with unrelated exceptions] **“shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [AAA]. The place of arbitration shall be in Charlotte, North Carolina.”** See Schein, Inc., 586 U.S. at 66, 139 S. Ct. at 528 (internal citations omitted) (emphasis added).

The United States Supreme Court held the requirement the arbitration be conducted in accordance with the Arbitration Rules of the American Arbitration Association means that only the arbitrator, and not the trial Court, could decide the arbitrability question. Specifically, the Schein decision states the following:

When the parties’ contract delegates the arbitrability question to the arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. *Id* at 529. When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Schein, Inc., 586 U.S. at 68, 139 S. Ct. at 529. Further, the Court also held that

When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Id. at 71, 139 S. Ct. 524 at 531.

Although not decided by the Fourth Circuit Court of Appeals, that Court noted in a recent decision that “other circuits have held that an arbitration provision's incorporation of the AAA commercial rules is a clear and unmistakable expression of the parties' intent to reserve the

question of arbitrability for the arbitrator and not the court.” Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd., 130 F.4th 396, 403 (4th Cir. 2025). That opinion cites several cases in which other federal appellate courts have included that by incorporating the AAA Commercial Rules into their agreement that delegate the issue of arbitrability to the arbitrator, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid. *See, e.g., Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); Terminix Int'l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005).

Plaintiff incorrectly argues that this Court failed to consider his Verified Complaint as evidence that an agreement to arbitrate was not formed. Plaintiff's argument about the Verified Complaint is wrong and does not justify reconsideration or amendment of the Court's order for several reasons. First, in paragraphs 26 through 33 of the Complaint the Plaintiff admits that he entered into a contract with Defendant Vacation Inspirations. Second, the arguments offered by the Plaintiff as to why that contract should not be enforced are not facts alleged, but legal arguments which do not create any issue about whether Plaintiff agreed that disputes would be decided by an arbitrator.

Additionally, Plaintiff incorrectly argues that the Defendants did not submit “competing evidence” in support of the motion to compel arbitration. However, that argument ignores the evidence that was submitted with the Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration filed on November 12, 2024. Specifically, a copy of the Purchase Agreement Vacation Inspirations Membership signed by the Plaintiff was attached to the pending Motion. Additionally, the Defendants submitted the ADDEDUM/EXCEPTION TO CONTRACT which has four hand-written changes/addenda to the Agreement requested and

received by the Plaintiff. Lastly, along with the Motion to Compel Arbitration the Defendant submitted a document signed by the Plaintiff titled Vacation Inspirations Membership Acknowledgement which contains a list of questions answered at time of purchase. One of the questions is whether decision was based on high pressure sales tactics. The Plaintiff answered “no.”

The arbitration paragraph in the Agreement signed by the Plaintiff clearly and unequivocally delegates the decision about arbitrability to the arbitrator as provided in the AAA Commercial Arbitration Rules. Specifically, it includes the following provision:

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].

See Agreement attached to Defendants’ Motion to Compel Arbitration at Para. VIII.

Pursuant to the FAA and the Commercial Arbitration Rules of the AAA and agreed to by Plaintiff, and the citations below, the question of arbitrability is to be determined and decided by the arbitrator, and respectfully, not the Court. Rule R-7(a) and (b) of the Commercial Rules provide as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

See AAA, Rule R-7(a) and (b). In the arbitration provision herein, the Purchase Agreement clearly and unequivocally invoked the Commercial Arbitration Rules of the AAA. As noted below, the AAA Commercial Rules specifically provide for such delegation to the arbitrator. Therefore, the Court properly decided to follow the clear and unmistakable agreement of the parties and send all issues to the arbitrator.

Moreover, the Plaintiff's motion ignores the affidavit of Mr. Randy Gardner filed along with the Motion to Compel Arbitration which proved, without contradiction, that the Purchase Agreement and the arbitration clause have the required nexus to interstate commerce sufficient to invoke the arbitration provisions of the FAA. See generally, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995). Therefore, under the Federal Arbitration Act, the Court properly determined that it could not decide whether an arbitration agreement applies to the instant dispute since the parties clearly and unmistakably delegated the question to an arbitrator. There are no disputed facts to be decided on that issue.

See also Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893, 894 (Ct. App. 2020).

Moreover, under any circumstance, arbitration should be required under the FAA. "[The FAA applies . . . to any arbitration agreement regarding a transaction that in fact involves interstate commerce." See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

So long as interstate commerce is involved, which was undisputed by the Plaintiff, the FAA controls arbitration. Mr. Gardner's affidavit provides clear evidence of the necessary involvement with interstate commerce. The arbitration should be conducted under the AAA Commercial Rules and in accordance with the FAA with any issues regarding arbitrability decided by the arbitrator. The Motion to Compel Arbitration and Stay Proceedings was properly granted and the Plaintiff's motion to reconsider that decision must be denied.

IV. DISCOVERY

Plaintiff also misses the mark in making the argument that the motion should not have been decided because Defendants had not answered discovery. This issue was not raised prior to or during the hearing on the motion to compel arbitration and so Plaintiff cannot raise it for the first time in a motion to reconsider or to alter or amend judgment. See Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); see also McGee v. Bruce Hosp Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial).

In making this argument Plaintiff failed to inform the Court that on November 22, 2024, Defendants' counsel sent Plaintiff's counsel an email as follows:

As noted in our motions to compel arbitration in the three cases that have been filed, we have also asked for a stay of the proceedings as there is law in South Carolina that the right to arbitrate may be waived by participating in the proceedings. As such, we cannot answer the discovery you have sent us in the three cases.

Defendants did not ignore the Plaintiff's discovery requests. Instead, Defendants set forth an appropriate stated reason for not responding to the discovery. See e.g. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. App. 1999). The motion to compel arbitration also included a request to stay discovery pending arbitration. If Plaintiff was not satisfied with the stated reason, Plaintiff could have moved at any time to compel Defendants to respond. Plaintiff chose not to file any such motion or even further discuss the matter in the briefs or at the hearing, but instead waited until after the Court granted Defendants' motion to compel arbitration on July 23, 2025, to, for the first time, raise an issue regarding discovery. Having failed to act and having

lost the motion to compel arbitration and stay proceedings, Plaintiff cannot complain about discovery matters now.

V. THE AGREEMENT IS NOT UNCONSCIONABLE OR A CONTRACT OF ADHESION

Neither the Purchase Agreement nor the arbitration provision therein is on a “take-it-or-leave-it” basis with no negotiable terms and that its evident from the agreement itself. Plaintiff failed to make any effort to negotiate the arbitration provision, even though he had the opportunity to do so and in fact, did negotiate several matters as noted below. Plaintiff had meaningful choices, he just did not choose to make any of those choices regarding the arbitration provision.

The Purchase Agreement includes an Addendum/Exception (attached as an Exhibit to the motion to compel arbitration), which provided Plaintiff an opportunity to alter or amend the arbitration provision. In fact, as seen on the Addendum/Exception, there are four (4) such handwritten items. None of the four (4) exceptions handwritten involve or address the arbitration provision. Plaintiff signed the handwritten page with the exceptions. Plaintiff undisputably had a meaningful choice, but chose not to raise any questions at the time of the Purchase Agreement regarding the arbitration provision and Plaintiff cannot now be permitted to claim otherwise.

The claims of unconscionability were unsubstantiated and do not justify reconsideration of the order compelling arbitration. An example of such an unsubstantiated allegation is the Plaintiff’s claim that the agreement is unconscionable because he was supposedly subjected to high pressure sales tactics. Item number 10 of the Vacations Inspirations Membership Acknowledgment of the Agreement conclusively refutes that claim. That question asks if decision to purchase was “based on any high pressure sales tactics” and Plaintiff responded “no.” Plaintiff also signed that page.

As for the contention that Plaintiff did not have equal bargaining power, it is noteworthy that this purchase was a travel club membership. It is not an essential purchase such as shelter or

even a core consumer purchase such as an automobile. Under any circumstance, Plaintiff could have said “no” and left at any time without signing the Purchase Agreement. It is not unusual for those who listen to the Defendants’ sales presentation to do only that and then decline to purchase.

The request for participants in the sales presentation to turn off their cell phones is not a high pressure sales tactic. Instead, that request is made prior to the sales presentation because of the expectation that cell phone usage will be a constant distraction during the presentation. It is irrelevant that Plaintiff did not travel with legal counsel or that he did not consult with an attorney prior to signing the Agreement. Plaintiff cites no support for the idea that a contract is unconscionable unless the parties first have an opportunity to consult with counsel. Also, Defendants did not have any duty to advise Plaintiff to seek legal counsel.

VI. THE AAA COMMERCIAL RULES OF ARBITRATION PROVIDE THE METHOD FOR APPOINTING A FAIR ARBITRATOR. THE ARBITRATION PROVISION IN THE PURCHASE AGREEMENT COMPLIES WITH THAT METHOD AND MUST BE FOLLOWED

Plaintiff also argues that arbitration should not be compelled because the arbitration agreement that he signed does not provide a fair, unbiased forum. However, the applicable rule conclusively refutes that claim. Rule R-14 of the AAA Commercial Arbitration Rules states in part as follows:

- (a) If the agreement of the parties names an arbitrator **or specifies a method of appointment of an arbitrator**, that designation or method shall be followed. (Emphasis added).

See AAA, Rule R-14 previously attached to Defendants’ Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit A. Moreover, Rule R-19(a) states in part as follows:

An arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

- (i) Partiality or lack of independence.

See AAA, Rule R-19(a) previously attached to Defendants’ Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit B.

While Rule R-19(b) permits appointment of a “non-neutral” arbitrator, that is not the case here. The arbitration clause challenged by the Plaintiff merely allows Defendant Vacation Inspirations to choose the arbitrator, but it does not relieve the arbitrator selected of his or her obligations under the AAA Commercial Rules to be impartial and independent. Moreover South Carolina ADR Rule 13(d) has a similar provision.

The arbitration provision does not put any limits on arbitrator’s decision-making authority. No claims are excluded or waived. The arbitration agreement does not include any limits on damages. Contrary to Plaintiff’s arguments, the arbitration provision invoking the Commercial Rules of the American Arbitration Association fully and completely complies with and is in accordance with the foregoing Rules and provides a forum for resolving this dispute by an unbiased arbitrator.

Plaintiff is attempting to raise issues that could have and should have been raised in his Memoranda in Opposition to Defendants’ motion to compel arbitration and/or at the hearing and oral argument. Plaintiff’s motion does not raise any new information that was not available to the Court when the Court made its ruling on July 23, 2025. Plaintiff urged the Court to rule and the Court did rule; just not in Plaintiff’s favor.

VII. CONCLUSION

For all the reasons set forth above, the motion to reconsider should be denied.

s/John A. Massalon
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ATTORNEYS FOR DEFENDANTS

CHARLESTON, SC

August 15, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2024-CP-10-02646
PETER SKOLER AND PATRICIA	)	
SKOLER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	DEFENDANTS' AMENDED
	)	MEMORANDUM IN OPPOSITION
VACATION INSPIRATIONS,	)	TO PLAINTIFFS' MOTION TO
DESTINATION TRAVEL, LLC, JOSEPH	)	RECONSIDER ORDER
SHIRLEY, RANDY GARDNER, AND	)	COMPELLING ARBITRATION
JEFFREY PUMILIA,	)	AND STAY PROCEEDINGS
	)	
Defendants.	)	
	)	

Defendants by and through their undersigned counsel, submit the following Memorandum in Opposition to Plaintiffs' Motion for Reconsideration of the Court's Order Granting Defendants' Motion to Compel Arbitration and Stay Proceedings, as follows:

I. ADOPTION AND INCORPORATION OF DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS FILED HEREIN ON MARCH 25, 2025

Defendants adopt and incorporate their Notice of Motion and Defendants' Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration with exhibits filed herein on November 12, 2024, Defendants' Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed herein on March 25, 2025 and their Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed on March 26, 2025.

II. PROCEDURAL BACKGROUND

On November 12, 2024, Defendants filed a motion to compel the Plaintiffs to arbitrate this dispute as they agreed to do when Plaintiffs purchased their Vacation Inspirations Membership in March, 2022. Attached to that motion were the following documents all signed by the Plaintiffs: the Vacation Inspirations Membership Purchase Agreement with Membership Terms and Conditions; an Addendum/Exception to Contract; and a Vacation Inspirations Membership Acknowledgement with a series of questions answered by the Plaintiffs. The issues were briefed extensively before the hearing on the motion. Plaintiffs filed a memorandum in opposition to the motion. Defendants filed a supporting memorandum and an amended supporting memorandum in support of the motion. Thereafter, Plaintiffs filed a sur-reply memorandum to respond to the Defendants' supporting memorandum. The Court heard oral argument by counsel for Plaintiffs and Defendants on March 27, 2025. After due consideration of all issues and matters, on July 25, 2025, the Court entered its Order granting Defendants' Motion to Compel Arbitration and Stay Proceedings. In that Order, and pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, the Court made specific Findings of Fact and Conclusions of Law and granted Defendants' motion in full. Thereafter on August 2, 2025, Plaintiffs filed their Motion for Reconsideration.

III. THE COURT APPLIED THE CORRECT STANDARD AND REACHED THE CORRECT LEGAL CONCLUSION IN GRANTING THE MOTION TO COMPEL ARBITRATION

Defendants' Motion to Compel Arbitration specifically relies upon all applicable law, including, but not limited to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), as well as the terms of the arbitration requirement contained in the Purchase (Membership) Agreement. Plaintiffs' counsel acknowledged during the hearing that the FAA governs the issues before the Court. Now that the Court has decided to send the case to arbitration, the Plaintiffs attempt to

recast this motion to compel arbitration as a motion for summary judgement in an apparent effort to confuse the issues, but the Court should not be distracted by those arguments.

The issue before the Court has been conclusively decided by the United States Supreme Court in the case of Henry Schein, Inc. vs. Archer & White Sales, Inc., 586 U.S. 63, 139 S. Ct. 524, (2019). In that case the arbitration provision stated that any dispute [with unrelated exceptions] **“shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [AAA]. The place of arbitration shall be in Charlotte, North Carolina.”** See Schein, Inc., 586 U.S. at 66, 139 S. Ct. at 528 (internal citations omitted) (emphasis added).

The United States Supreme Court held the requirement the arbitration be conducted in accordance with the Arbitration Rules of the American Arbitration Association means that only the arbitrator, and not the trial Court, could decide the arbitrability question. Specifically, the Schein decision states the following:

When the parties’ contract delegates the arbitrability question to the arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. *Id* at 529. When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Schein, Inc., 586 U.S. at 68, 139 S. Ct. at 529. Further, the Court also held that

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Although not decided by the Fourth Circuit Court of Appeals, that Court noted in a recent decision that “other circuits have held that an arbitration provision's incorporation of the AAA commercial rules is a clear and unmistakable expression of the parties' intent to reserve the

question of arbitrability for the arbitrator and not the court.” Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd., 130 F.4th 396, 403 (4th Cir. 2025). That opinion cites several cases in which other federal appellate courts have included that by incorporating the AAA Commercial Rules into their agreement that delegate the issue of arbitrability to the arbitrator, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid. *See, e.g., Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); Terminix Int’l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005).

Plaintiffs incorrectly argue that this Court failed to consider their Verified Complaint as evidence that an agreement to arbitrate was not formed. Plaintiffs’ argument about the Verified Complaint is wrong and does not justify reconsideration or amendment of the Court’s order for several reasons. First, in paragraph 32 of the Complaint the Plaintiffs admit that they entered into a contract with Defendant Vacation Inspirations. Second, the arguments offered by the Plaintiffs as to why that contract should not be enforced are not facts alleged, but legal arguments which do not create any issue about whether Plaintiffs agreed that disputes would be decided by an arbitrator.

Additionally, Plaintiffs incorrectly argue that the Defendants did not submit “competing evidence” in support of the motion to compel arbitration. However, that argument ignores the evidence that was submitted with the Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration filed on November 12, 2024. Specifically, a copy of the Purchase Agreement Vacation Inspirations Membership signed by the Plaintiffs was attached to the pending Motion. Lastly, along with the Motion to Compel Arbitration the Defendants submitted a document signed by the Plaintiffs titled Vacation Inspirations Membership

Acknowledgement which contains a list of questions answered at time of purchase. One of the questions is whether decision was based on high pressure sales tactics. The Plaintiffs answered “N.”

The arbitration paragraph in the Agreement signed by the Plaintiffs clearly and unequivocally delegates the decision about arbitrability to the arbitrator as provided in the AAA Commercial Arbitration Rules. Specifically, it includes the following provision:

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].

See Agreement attached to Defendants’ Motion to Compel Arbitration at Para. VIII.

Pursuant to the FAA and the Commercial Arbitration Rules of the AAA and agreed to by Plaintiffs, and the citations below, the question of arbitrability is to be determined and decided by the arbitrator, and respectfully, not the Court. Rule R-7(a) and (b) of the Commercial Rules provide as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

See AAA, Rule R-7(a) and (b). In the arbitration provision herein, the Purchase Agreement clearly and unequivocally invoked the Commercial Arbitration Rules of the AAA. As noted below, the AAA Commercial Rules specifically provide for such delegation to the arbitrator. Therefore, the

Court properly decided to follow the clear and unmistakable agreement of the parties and send all issues to the arbitrator.

Moreover, the Plaintiffs' motion ignores the affidavit of Mr. Randy Gardner filed along with the Motion to Compel Arbitration which proved, without contradiction, that the Purchase Agreement and the arbitration clause have the required nexus to interstate commerce sufficient to invoke the arbitration provisions of the FAA. See generally, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995). Therefore, under the Federal Arbitration Act, the Court properly determined that it could not decide whether an arbitration agreement applies to the instant dispute since the parties clearly and unmistakably delegated the question to an arbitrator. There are no disputed facts to be decided on that issue.

See also Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893, 894 (Ct. App. 2020).

Moreover, under any circumstance, arbitration should be required under the FAA. "[The FAA applies . . . to any arbitration agreement regarding a transaction that in fact involves interstate commerce." See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

So long as interstate commerce is involved, which was undisputed by the Plaintiffs, the FAA controls arbitration. Mr. Gardner's affidavit provides clear evidence of the necessary involvement with interstate commerce. The arbitration should be conducted under the AAA Commercial Rules and in accordance with the FAA with any issues regarding arbitrability decided by the arbitrator. The Motion to Compel Arbitration and Stay Proceedings was properly granted and the Plaintiffs' motion to reconsider that decision must be denied.

IV. DISCOVERY

Plaintiffs also miss the mark in making the argument that the motion should not have been decided because Defendants had not answered discovery. This issue was not raised prior to or during the hearing on the motion to compel arbitration and so Plaintiffs cannot raise it for the first

time in a motion to reconsider or to alter or amend judgment. See Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); see also McGee v. Bruce Hosp Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial).

In making this argument Plaintiffs failed to advise the Court that on November 22, 2024, Defendants' counsel sent Plaintiffs' counsel an email as follows:

As noted in our motions to compel arbitration in the three cases that have been filed, we have also asked for a stay of the proceedings as there is law in South Carolina that the right to arbitrate may be waived by participating in the proceedings. As such, we cannot answer the discovery you have sent us in the three cases.

Defendants did not ignore the Plaintiffs' discovery requests. Instead, Defendants set forth an appropriate stated reason for not responding to the discovery. See e.g. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. App. 1999). The Defendants' motion to compel arbitration included a request to stay all discovery. If Plaintiffs were not satisfied with the stated reason, Plaintiffs could have moved at any time to compel Defendants to respond. Plaintiffs chose not to file any such motion or even further discuss the matter in the briefs or at the hearing but instead waited until after the Court granted Defendants' motion to compel arbitration on July 25, 2025, to, for the first time, raise an issue regarding discovery. Having failed to act and having lost the motion to compel arbitration and stay proceedings, Plaintiffs are not proceeding in good faith in their position to the Court on discovery matters.

V. THE AGREEMENT IS NOT UNCONSCIONABLE OR A CONTRACT OF ADHESION

Neither the Purchase Agreement nor the arbitration provision therein were signed on a “take-it-or-leave-it” basis with no negotiable terms and that its evident from the agreement itself. Plaintiffs failed to make any effort to negotiate the arbitration provision, even though they had the opportunity to do so and in fact, did negotiate several matters as noted below. Plaintiffs had meaningful choices, they just did not choose to make any of those choices regarding the arbitration provision.

The Purchase Agreement includes an Addendum/Exception (attached as an Exhibit to the motion to compel arbitration), which provided Plaintiffs an opportunity to alter or amend the arbitration provision. In fact, as seen on the Addendum/Exception, there are four (4) such handwritten items. None of the four (4) exceptions handwritten involve or address the arbitration provision. Plaintiffs signed the handwritten page with the exceptions. Plaintiffs undisputably had a meaningful choice, but chose not to raise any questions at the time of the Purchase Agreement regarding the arbitration provision and Plaintiffs should not now be permitted to claim otherwise.

The claims of unconscionability were unsubstantiated and do not justify reconsideration of the order compelling arbitration. An example of such an unsubstantiated allegation is the Plaintiffs’ claim that the agreement is unconscionable because they were supposedly subjected to high pressure sales tactics. Item number 10 of the Vacations Inspirations Membership Acknowledgment of the Agreement conclusively refutes that claim. That question asks if decision to purchase was “based on any high pressure sales tactics” and Plaintiffs responded “N.” Plaintiffs also signed that page.

As for the contention that Plaintiffs did not have equal bargaining power, it is noteworthy that this purchase was a travel club membership. It is not an essential purchase such as shelter or even a core consumer purchase such as an automobile. Under any circumstance, Plaintiffs could

have said “no” and left at any time without signing the Purchase Agreement. It is not unusual for those who listen to the Defendants’ sales presentation to do only that and then decline to purchase.

The request for participants in the sales presentation to put away their cell phones is not a high pressure sales tactic. Instead, that request is made prior to the sales presentation because of the expectation that cell phone usage will be a constant distraction during the presentation. It is irrelevant that Plaintiffs did not have access to legal counsel or that they did not consult with an attorney prior to signing the Agreement. Plaintiffs cite no support for the idea that a contract is unconscionable unless the parties first have an opportunity to consult with counsel. Also, Defendants did not have any duty to advise Plaintiffs to seek legal counsel.

VI. THE AAA COMMERCIAL RULES OF ARBITRATION PROVIDE THE METHOD FOR APPOINTING A FAIR ARBITRATOR. THE ARBITRATION PROVISION IN THE PURCHASE AGREEMENT COMPLIES WITH THAT METHOD AND MUST BE FOLLOWED

Plaintiffs also argue that arbitration should not be compelled because the arbitration agreement that they signed does not provide a fair, unbiased forum. However, the applicable rule conclusively refutes that claim. Rule R-14 of the AAA Commercial Arbitration Rules states in part as follows:

- (a) If the agreement of the parties names an arbitrator **or specifies a method of appointment of an arbitrator**, that designation or method shall be followed. (Emphasis added).

See AAA, Rule R-14 previously attached to Defendants’ Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit A. Moreover, Rule R-19(a) states in part as follows:

An arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

- (i) Partiality or lack of independence.

See AAA, Rule R-19(a) previously attached to Defendants’ Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit B.

While Rule R-19(b) permits appointment of a “non-neutral” arbitrator, that is not the case here. The arbitration clause challenged by the Plaintiffs merely allows Defendant Vacation Inspirations to choose the arbitrator, but it does not relieve the arbitrator selected of his or her obligations under the AAA Commercial Rules to be impartial and independent. Moreover, South Carolina ADR Rule 13(d) has a similar provision.

The arbitration provision does not put any limits on arbitrator’s decision-making authority. No claims are excluded or waived. The arbitration agreement does not include any limits on damages. Contrary to Plaintiffs’ arguments, the arbitration provision invoking the Commercial Rules of the American Arbitration Association fully and completely complies with and is in accordance with the foregoing Rules and provides a forum for resolving this dispute by an unbiased arbitrator.

Plaintiffs are attempting to raise issues that could have and should have been raised in their Memoranda in Opposition to Defendants’ motion to compel arbitration and/or at the hearing and oral argument. Plaintiffs’ motion does not raise any new information that was not available to the Court when the Court made its ruling on July 25, 2025. Plaintiff urged the Court to rule and the Court did rule; just not in Plaintiffs’ favor.

VII. CONCLUSION

For all the reasons set forth above, the motion to reconsider should be denied.

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ATTORNEYS FOR DEFENDANTS

CHARLESTON, SC

September 4, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2024-CP-10-04606
FRANK PERRELLI, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANTS' AMENDED
	)	MEMORANDUM IN OPPOSITION
VACATION INSPIRATIONS,	)	TO PLAINTIFF'S MOTION TO
DESTINATION TRAVEL, LLC, JOSEPH	)	RECONSIDER THE COURT'S
SHIRLEY, RANDY GARDNER, AND	)	ORDER GRANTING
JEFFREY PUMILIA,	)	DEFENDANTS' MOTION TO
	)	COMPEL ARBITRATION AND
Defendants.	)	STAY PROCEEDINGS
	)	

Defendants by and through their undersigned counsel, submit the following Memorandum in Opposition to Plaintiff's Motion for Reconsideration of the Court's Order Granting Defendants' Motion to Compel Arbitration and Stay Proceedings, as follows:

I. ADOPTION AND INCORPORATION OF DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS FILED HEREIN ON MARCH 25, 2025

Defendants adopt and incorporate their Notice of Motion and Defendants' Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration with exhibits filed herein on November 12, 2024, Defendants' Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed herein on March 25, 2025 and their Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings filed on March 26, 2025.

II. PROCEDURAL BACKGROUND

On November 12, 2024, Defendants filed a motion to compel the Plaintiff to arbitrate this dispute as he agreed to do when Plaintiff purchased his Vacation Inspirations Membership in October, 2022. Attached to that motion were the following documents all signed by the Plaintiff: the Vacation Inspirations Membership Purchase Agreement with Membership Terms and Conditions; an Addendum/Exception to Contract; and a Vacation Inspirations Membership Acknowledgement with a series of questions answered by the Plaintiff. The issues were briefed extensively before the hearing on the motion. Plaintiff filed a memorandum in opposition to the motion. Defendants filed a supporting memorandum and an amended supporting memorandum in support of the motion. Thereafter, Plaintiff filed a sur-reply memorandum to respond to the Defendants' supporting memorandum. The Court heard oral argument by counsel for Plaintiff and Defendants on March 27, 2025. After due consideration of all issues and matters, on July 23, 2025, the Court entered its Order granting Defendants' Motion to Compel Arbitration and Stay Proceedings. In that Order, and pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, the Court made specific Findings of Fact and Conclusions of Law and granted Defendants' motion in full. Thereafter on August 2, 2025, Plaintiff filed his Motion for Reconsideration.

III. THE COURT APPLIED THE CORRECT STANDARD AND REACHED THE CORRECT LEGAL CONCLUSION IN GRANTING THE MOTION TO COMPEL ARBITRATION

Defendants' Motion to Compel Arbitration specifically relies upon all applicable law, including, but not limited to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), as well as the terms of the arbitration requirement contained in the Purchase (Membership) Agreement. Plaintiff's counsel acknowledged during the hearing that the FAA governs the issues before the Court. Now that the Court has decided to send the case to arbitration, the Plaintiff attempts to

recast this motion to compel arbitration as a motion for summary judgement in an apparent effort to confuse the issues, but the Court should not be distracted by those arguments.

The issue before the Court has been conclusively decided by the United States Supreme Court in the case of Henry Schein, Inc. vs. Archer & White Sales, Inc., 586 U.S. 63, 139 S. Ct. 524, (2019). In that case the arbitration provision stated that any dispute [with unrelated exceptions] **“shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [AAA]. The place of arbitration shall be in Charlotte, North Carolina.”** See Schein, Inc., 586 U.S. at 66, 139 S. Ct. at 528 (internal citations omitted) (emphasis added).

The United States Supreme Court held the requirement the arbitration be conducted in accordance with the Arbitration Rules of the American Arbitration Association means that only the arbitrator, and not the trial Court, could decide the arbitrability question. Specifically, the Schein decision states the following:

When the parties’ contract delegates the arbitrability question to the arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. *Id* at 529. When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Schein, Inc., 586 U.S. at 68, 139 S. Ct. at 529. Further, the Court also held that

When the parties’ contract delegates the arbitrability question to the arbitrator, the courts must respect the parties’ decision as embodied in the contract.

Id. at 71, 139 S. Ct. 524 at 531.

Although not decided by the Fourth Circuit Court of Appeals, that Court noted in a recent decision that “other circuits have held that an arbitration provision's incorporation of the AAA commercial rules is a clear and unmistakable expression of the parties' intent to reserve the

question of arbitrability for the arbitrator and not the court.” Berkeley Cnty. Sch. Dist. v. Hub Int’l Ltd., 130 F.4th 396, 403 (4th Cir. 2025). That opinion cites several cases in which other federal appellate courts have included that by incorporating the AAA Commercial Rules into their agreement that delegate the issue of arbitrability to the arbitrator, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid. *See, e.g., Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); Terminix Int’l Co. v. Palmer Ranch LP, 432 F.3d 1327, 1332 (11th Cir. 2005); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005).

Plaintiff incorrectly argues that this Court failed to consider his Verified Complaint as evidence that an agreement to arbitrate was not formed. Plaintiff’s argument about the Verified Complaint is wrong and does not justify reconsideration or amendment of the Court’s order for several reasons. First, in paragraphs 26 through 33 of the Complaint the Plaintiff admits that he entered into a contract with Defendant Vacation Inspirations. Second, the arguments offered by the Plaintiff as to why that contract should not be enforced are not facts alleged, but legal arguments which do not create any issue about whether Plaintiff agreed that disputes would be decided by an arbitrator.

Additionally, Plaintiff incorrectly argues that the Defendants did not submit “competing evidence” in support of the motion to compel arbitration. However, that argument ignores the evidence that was submitted with the Motion to Compel Arbitration and Stay Proceedings in This Case Until Completion of Arbitration filed on November 12, 2024. Specifically, a copy of the Purchase Agreement Vacation Inspirations Membership signed by the Plaintiff was attached to the pending Motion. Lastly, along with the Motion to Compel Arbitration the Defendant submitted a document signed by the Plaintiff titled Vacation Inspirations Membership Acknowledgement

which contains a list of questions answered at time of purchase. One of the questions is whether decision was based on high pressure sales tactics. The Plaintiff answered “no.”

The arbitration paragraph in the Agreement signed by the Plaintiff clearly and unequivocally delegates the decision about arbitrability to the arbitrator as provided in the AAA Commercial Arbitration Rules. Specifically, it includes the following provision:

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].

See Agreement attached to Defendants’ Motion to Compel Arbitration at Para. VIII.

Pursuant to the FAA and the Commercial Arbitration Rules of the AAA and agreed to by Plaintiff, and the citations below, the question of arbitrability is to be determined and decided by the arbitrator, and respectfully, not the Court. Rule R-7(a) and (b) of the Commercial Rules provide as follows:

The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

See AAA, Rule R-7(a) and (b). In the arbitration provision herein, the Purchase Agreement clearly and unequivocally invoked the Commercial Arbitration Rules of the AAA. As noted below, the AAA Commercial Rules specifically provide for such delegation to the arbitrator. Therefore, the

Court properly decided to follow the clear and unmistakable agreement of the parties and send all issues to the arbitrator.

Moreover, the Plaintiff's motion ignores the affidavit of Mr. Randy Gardner filed along with the Motion to Compel Arbitration which proved, without contradiction, that the Purchase Agreement and the arbitration clause have the required nexus to interstate commerce sufficient to invoke the arbitration provisions of the FAA. See generally, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995). Therefore, under the Federal Arbitration Act, the Court properly determined that it could not decide whether an arbitration agreement applies to the instant dispute since the parties clearly and unmistakably delegated the question to an arbitrator. There are no disputed facts to be decided on that issue.

See also Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893, 894 (Ct. App. 2020).

Moreover, under any circumstance, arbitration should be required under the FAA. "[The FAA applies . . . to any arbitration agreement regarding a transaction that in fact involves interstate commerce." See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

So long as interstate commerce is involved, which was undisputed by the Plaintiff, the FAA controls arbitration. Mr. Gardner's affidavit provides clear evidence of the necessary involvement with interstate commerce. The arbitration should be conducted under the AAA Commercial Rules and in accordance with the FAA with any issues regarding arbitrability decided by the arbitrator. The Motion to Compel Arbitration and Stay Proceedings was properly granted and the Plaintiff's motion to reconsider that decision must be denied.

IV. DISCOVERY

Plaintiff also misses the mark in making the argument that the motion should not have been decided because Defendants had not answered discovery. This issue was not raised prior to or

during the hearing on the motion to compel arbitration and so Plaintiff cannot raise it for the first time in a motion to reconsider or to alter or amend judgment. See Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); see also McGee v. Bruce Hosp Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial).

In making this argument Plaintiff failed to inform the Court that on November 22, 2024, Defendants' counsel sent Plaintiff's counsel an email as follows:

As noted in our motions to compel arbitration in the three cases that have been filed, we have also asked for a stay of the proceedings as there is law in South Carolina that the right to arbitrate may be waived by participating in the proceedings. As such, we cannot answer the discovery you have sent us in the three cases.

Defendants did not ignore the Plaintiff's discovery requests. Instead, Defendants set forth an appropriate stated reason for not responding to the discovery. See e.g. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (S.C. App. 1999). The motion to compel arbitration also included a request to stay discovery pending arbitration. If Plaintiff was not satisfied with the stated reason, Plaintiff could have moved at any time to compel Defendants to respond. Plaintiff chose not to file any such motion or even further discuss the matter in the briefs or at the hearing, but instead waited until after the Court granted Defendants' motion to compel arbitration on July 23, 2025, to, for the first time, raise an issue regarding discovery. Having failed to act and having lost the motion to compel arbitration and stay proceedings, Plaintiff cannot complain about discovery matters now.

V. THE AGREEMENT IS NOT UNCONSCIONABLE OR A CONTRACT OF ADHESION

Neither the Purchase Agreement nor the arbitration provision therein is on a “take-it-or-leave-it” basis with no negotiable terms and that its evident from the agreement itself. Plaintiff failed to make any effort to negotiate the arbitration provision, even though he had the opportunity to do so and in fact, did negotiate several matters as noted below. Plaintiff had meaningful choices, he just did not choose to make any of those choices regarding the arbitration provision.

The Purchase Agreement includes an Addendum/Exception (attached as an Exhibit to the motion to compel arbitration), which provided Plaintiff an opportunity to alter or amend the arbitration provision. In fact, as seen on the Addendum/Exception, there are four (4) such handwritten items. None of the four (4) exceptions handwritten involve or address the arbitration provision. Plaintiff signed the handwritten page with the exceptions. Plaintiff undisputably had a meaningful choice, but chose not to raise any questions at the time of the Purchase Agreement regarding the arbitration provision and Plaintiff cannot now be permitted to claim otherwise.

The claims of unconscionability were unsubstantiated and do not justify reconsideration of the order compelling arbitration. An example of such an unsubstantiated allegation is the Plaintiff’s claim that the agreement is unconscionable because he was supposedly subjected to high pressure sales tactics. Item number 10 of the Vacations Inspirations Membership Acknowledgment of the Agreement conclusively refutes that claim. That question asks if decision to purchase was “based on any high pressure sales tactics” and Plaintiff responded “no.” Plaintiff also signed that page.

As for the contention that Plaintiff did not have equal bargaining power, it is noteworthy that this purchase was a travel club membership. It is not an essential purchase such as shelter or even a core consumer purchase such as an automobile. Under any circumstance, Plaintiff could have said “no” and left at any time without signing the Purchase Agreement. It is not unusual for those who listen to the Defendants’ sales presentation to do only that and then decline to purchase.

The request for participants in the sales presentation to turn off their cell phones is not a high pressure sales tactic. Instead, that request is made prior to the sales presentation because of the expectation that cell phone usage will be a constant distraction during the presentation. It is irrelevant that Plaintiff did not travel with legal counsel or that he did not consult with an attorney prior to signing the Agreement. Plaintiff cites no support for the idea that a contract is unconscionable unless the parties first have an opportunity to consult with counsel. Also, Defendants did not have any duty to advise Plaintiff to seek legal counsel.

VI. THE AAA COMMERCIAL RULES OF ARBITRATION PROVIDE THE METHOD FOR APPOINTING A FAIR ARBITRATOR. THE ARBITRATION PROVISION IN THE PURCHASE AGREEMENT COMPLIES WITH THAT METHOD AND MUST BE FOLLOWED

Plaintiff also argues that arbitration should not be compelled because the arbitration agreement that he signed does not provide a fair, unbiased forum. However, the applicable rule conclusively refutes that claim. Rule R-14 of the AAA Commercial Arbitration Rules states in part as follows:

- (a) If the agreement of the parties names an arbitrator **or specifies a method of appointment of an arbitrator**, that designation or method shall be followed. (Emphasis added).

See AAA, Rule R-14 previously attached to Defendants' Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit A. Moreover, Rule R-19(a) states in part as follows:

An arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

- (i) Partiality or lack of independence.

See AAA, Rule R-19(a) previously attached to Defendants' Amended Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings, an additional copy of which is attached as Exhibit B.

While Rule R-19(b) permits appointment of a “non-neutral” arbitrator, that is not the case here. The arbitration clause challenged by the Plaintiff merely allows Defendant Vacation Inspirations to choose the arbitrator, but it does not relieve the arbitrator selected of his or her obligations under the AAA Commercial Rules to be impartial and independent. Moreover South Carolina ADR Rule 13(d) has a similar provision.

The arbitration provision does not put any limits on arbitrator’s decision-making authority. No claims are excluded or waived. The arbitration agreement does not include any limits on damages. Contrary to Plaintiff’s arguments, the arbitration provision invoking the Commercial Rules of the American Arbitration Association fully and completely complies with and is in accordance with the foregoing Rules and provides a forum for resolving this dispute by an unbiased arbitrator.

Plaintiff is attempting to raise issues that could have and should have been raised in his Memoranda in Opposition to Defendants’ motion to compel arbitration and/or at the hearing and oral argument. Plaintiff’s motion does not raise any new information that was not available to the Court when the Court made its ruling on July 23, 2025. Plaintiff urged the Court to rule and the Court did rule; just not in Plaintiff’s favor.

VII. CONCLUSION

For all the reasons set forth above, the motion to reconsider should be denied.

s/John A. Massalon
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ATTORNEYS FOR DEFENDANTS

CHARLESTON, SC

September 4, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
PETER SKOLER and PATRICIA	)	Civil Action No. 2024-CP-10-02646
SKOLER,	)	
PLAINTIFFS,	)	
	)	
vs.	)	REPLY TO DEFENDANTS' MEMORANDUM
	)	IN OPPOSITION TO PLAINTIFFS' MOTION
VACATION INSPIRATIONS,	)	TO RECONSIDER ORDER COMPELLING
DESTINATION TRAVEL, LLC,	)	ARBITRATION AND STAYING
JOSEPH SHIRLEY, RANDY	)	PROCEEDINGS UNDER RULES 52(b)
GARDNER, and JEFFREY PUMILIA,	)	AND 59(e)
	)	
DEFENDANTS.	)	
_____	)	

Plaintiffs submit this Reply Memorandum in Support of its Motion for Reconsideration of the Court's July 25, 2025 Order Compelling Arbitration and Staying the Proceedings.

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SUMMARY OF ARGUMENTS

On reconsideration, the Court should do the following:

First, reconsider the motion to compel arbitration under the proper summary judgment standard—taking all inferences in Plaintiffs’ favor and recognizing the genuine disputes of material fact that preclude summary judgment.

Second, follow *Henry Schein* and *Coinbase*, which mandate that courts *always* decide whether a contract was formed. This threshold question belongs here.

Third, even assuming *arguendo* that the parties could delegate such a question to the arbitrator, the text of the arbitration provision which purports to incorporate AAA rules does not meet the “exacting” standard to “clearly and unmistakably” delegate such question in putative agreements involving unsophisticated senior citizen consumers.

Fourth, at a minimum, Plaintiffs raise genuine disputes of material facts as to whether a valid contract was formed and whether the arbitration provision is unconscionable (as well as the rest of the agreement). The Court must examine the totality of circumstances—not just whether a signature appears. Contract formation, validity, and unconscionability demand meaningful review, especially given the allegations of unfair and deceptive practices here.

Fifth, while Plaintiffs maintain that it is proper to deny the motion to compel arbitration without discovery, Plaintiffs indeed sought discovery before the motion to compel arbitration was ever filed. In raising a lack of discovery, Plaintiffs assert that it is impossible to find for Defendants on such a record, when the only evidence they’ve put forth that has any relevance at all is the putative agreement itself.

Sixth, the Court should strike arbitrator selection provision as overtly unconscionable and against public policy. In so deciding, the Court should consider the totality of the circumstances,

the underlying allegations on the merits, and how Defendants’ brazen attempt to maintain a one-sided arbitrator goes against the clear holding in the Fourth Circuit’s *Hooters* decision. The Court should reject this attempt to rig the forum.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD

While the facts and precedent applicable to this case were extensively briefed prior to and during the hearing on the motion, the legal standard that applies to that motion was ignored by Defendants and disregarded by the Court when it adopted, in large part, the proposed order submitted by Defendants’ counsel. Similarly, while the order entered by the Court did include purported findings of fact, those findings contravened the applicable legal standard requiring that the Court consider all facts in the light most favorable to the non-moving party. As a result, Plaintiffs filed the Motion to Reconsider to address these oversights in the order.

In their Memorandum in Opposition Defendants do not contest that the summary judgment standard should apply nor do they put forth an alternative standard. (*See* Defs’ Opp at 2–3.) Ironically, it is Defendants who seek to “confuse the issues” by purporting that the FAA is somehow in conflict with the summary judgment standard. (*See id.* at 3.) Not so. Plaintiffs do not dispute that the FAA governs and, in fact, it is the FAA that necessitates the summary judgment standard. *See 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) (“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.”); *see also Austin v. Experian Info. Sols., Inc.*, No. 23-2301, 2025 WL 2177331 (4th Cir. Aug. 1, 2025) (“A party’s burden . . . [on] a motion to compel arbitration under Federal Arbitration

Act (FAA), is akin to the burden on summary judgment.”). The law is clear: under the FAA, courts have no discretion and must employ the summary judgment standard.

B. DEFENDANTS CONTINUE TO MISREPRESENT THE HOLDING IN *HENRY SCHEIN*

Defendants obfuscate the holding in *Henry Schein* and current jurisprudence in this area. A plain reading of *Henry Schein* aligns with Plaintiffs’ position, as well as other decisions interpreting and applying *Henry Schein*.

Notably, Defendants do not address Plaintiffs’ arguments about *Henry Schein* head on. (*Compare* Pls’ Recon. Mtn. at 17–18, 22–23, *with* Defs’ Opp. at 3.). Rather, Defendants are more hopeful that quoting sections of *Henry Schein* out of context can win the day. Defendants point to sections of *Henry Schein*, which involve the “wholly groundless” exception at issue, which has no application here (and has never been raised by Plaintiffs).

The Fourth Circuit in *Gibbs v. Haynes Investments, LLC* refuted the position of similarly positioned defendants as Defendants’ here:

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Henry Schein states clearly: “To be sure, *before referring a dispute to an arbitrator*, the court determines whether a valid arbitration agreement exists. But *if a valid agreement exists*, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (citing 9 U.S.C. § 2) (emphasis added); accord *Coinbase, Inc. v. Suski*, 602 U.S. 143, 149 (2024) (“Before referring a dispute to an arbitrator, therefore, the court determines whether a valid arbitration agreement exists.” (quoting *Henry Schein*, 586 U.S., at 69) (internal quotation marks omitted)).

In other words, a Court can consider the question of delegation of arbitrability *only after* the Court determines a valid arbitration agreement exists. See *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 258 (4th Cir. 2021) (“Thus the incorporation of the rules of the American Arbitration Association . . . does not obviate the need for courts to decide the threshold issue of contract formation.”)

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1. “Exacting Standard”

The *clear and unmistakable* standard is not something that may just be summarily decided without analysis. Rather, “[t]he ‘clear and unmistakable’ standard is exacting, and the presence of an expansive arbitration clause, without more, will not suffice.” *Peabody Holding Co., LLC v. United Mine Workers of Am., Int’l Union*, 665 F.3d 96, 102 (4th Cir. 2012).

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As Plaintiffs explained in their Motion, there are numerous courts that have held “in context of an ***unsophisticated*** party entering an adhesion contract that includes an arbitration agreement, the incorporation of a set of arbitration rules ***does not alone create clear and unmistakable*** evidence of an intent for an arbitrator to determine threshold arbitration issues.” *In re Little*, 610

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In contending that the “Plaintiffs’ argument about the Verified Complaint is wrong,” Defendants assert that “the arguments offered by the Plaintiffs as to why that contract should not be enforced are not facts alleged, but legal arguments which do not create any issue about whether Plaintiffs agreed that disputes would be decided by an arbitrator.” (*See* Defs’ Opp. at 4.) This statement is nonsensical and is inconsistent with basic legal principles.

First, it is not “arguments” but the facts in the Verified Complaint that serve as Plaintiffs’ evidence for its motion to compel arbitration. *Dawkins v. Fields*, 354 S.C. 58, 67 (2003) (citing S.C. R. Civ. P. 56(e)) (recognizing that a verified complaint is akin to an affidavit for evidentiary purposes).

Second, Defendants’ suggestion that the Verified Complaint consists of legal arguments is contradicted by their own Answer. Of the Verified Complaint’s many paragraphs, Defendants objected to only three on the ground that they stated legal conclusions. Even disregarding those three paragraphs, however, would have no effect on the outcome, as they are immaterial to the issues before the Court.¹

¹ The three paragraphs in the Verified Complaint that Defendants assert in the Answer were legal conclusions are: (1): “South Carolina law requires arbitration agreements to be ‘geared towards achieving an unbiased decision by a neutral decision maker’”; (2) “‘The arbitration clause requiring that arbitration be held ‘not under the auspices of [American Arbitration Association]’ introduces further doubt about the arbitration process’s fairness and impartiality’”; and (3) “The practical implication of a majority of the arbitration provision is to grant VI unfair control over the process and

2. Defendants' Purported Competing Evidence

Defendants' position is by the mere presence of Plaintiffs' signature on a putative agreement, they win on all issues. Their position completely ignores long-standing South Carolina principles of contract formation, contract validity, and unconscionability. As evidenced by the Verified Complaint, Plaintiffs have never disputed that there exists a putative agreement with Plaintiffs' signature; rather, Plaintiffs contend that it was not properly formed, is invalid, and is unconscionable.²

Defendants contend that the putative agreement's boilerplate "acknowledgment"—in which Plaintiffs were required to state that no high-pressure tactics were used—conclusively resolves the question of whether such tactics occurred. That contention is extraordinary.

First, a party cannot disclaim away contract defenses in an agreement. *See Allen-Parker Co. v. Lollis*, 257 S.C. 266, 272–73 (1971) (“Even specific provisions or stipulations in a contract providing in effect for immunity from or nullification or waiver of preliminary or extraneous misrepresentations in connection with the contract are generally ineffective, and do not prevent a subsequent assertion of the misrepresentations as a basis for fraud.”); *see also* 17A C.J.S. Contracts § 280 (“[T]he law will not give effect to an agreement intended to grant immunity to iniquity and fraud[;] [s]uch a stipulation contravenes public policy.”)

Second, Defendants' inclusion of this provision in the agreement and now using it offensively are in and of itself evidence of high-pressure tactics and an attempt to manufacture facts. This is not a common term nor it is something that would need to be included in a properly formed contract. This comes as no surprise from individuals who previously operated a

expenses of the arbitration proceedings so as to inhibit a Member from seeking dispute resolution and to permit a biased result from an arbitrator who may not be neutral.” (Verified Complaint ¶¶ 43, 48, 49.)

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substantially similar vacation business, one that was forced to settle with the Attorneys General of Texas and Georgia for consumer protection violations nearly identical to those alleged here.

Third, Defendants’ reliance on this argument underscores their recognition that high-pressure tactics constitute a critical consideration in the unconscionability inquiry. *See* § 188. Merchant’s conduct—Generally, 1 Consumer Law Sales Practices and Credit Regulation (“Courts have often pointed out that unconscionability may be shown by evidence of deceptive sales practices including specific misrepresentations and high pressure sales tactics.”); *see also Ashford v. PricewaterhouseCoopers LLP*, 954 F.3d 678, 684 (4th Cir. 2020) (considering, among other things, “whether deceptive or high-pressure tactics were employed”) (citation omitted).

3. Discovery

a) Discovery is not Necessary to find for Plaintiffs

Importantly, the motion to compel arbitration should be denied even without discovery. However, given how fact intensive the inquiry is and the number of disputes of material fact, Plaintiffs assert that limited discovery could be fruitful. In any event, without discovery, Plaintiffs’ Verified Complaint serves as sufficient evidence to deny the motion to compel arbitration.

b) Waiver

Defendants cite to two cases that hold parties cannot raise issues for the first time post-trial. (*See* Defs’ Opp at 7.) The key distinction is that those cases addressed issues raised years into the litigation and after trial. The early case posture here is entirely different. Moreover, Defendants concede that Plaintiffs raised the issue and sought discovery at the outset, before the motion to compel arbitration was filed.

Defendants cannot have their cake and eat it too. Either the Verified Complaint serves as sufficient evidence to deny the motion to compel arbitration or there is an insufficient record warranting discovery.

E. UNCONSCIONABILITY

The Verified Complaint, at a minimum, creates a genuine dispute of material fact as to unconscionability. Under South Carolina law, unconscionability is a fact-intensive inquiry. *Holler v. Holler*, 364 S.C. 256, 269 (Ct. App. 2005). Every argument that Defendants make in their Opposition Brief involves an issue that, at a minimum, involves a dispute of material fact precluding a grant of the motion to compel arbitration.³

Beyond the points regarding meaningful choice and high-pressure sales tactics addressed above, Defendants are incorrect about a few other points. Defendants seem to contest the relative bargaining position. (*See* Defs’ Opp. at 8–9.) Defendants’ assertion that it is “not an essential purchase” appears to argue that the Court should not enforce South Carolina’s doctrine of *caveat venditor* (“let the seller beware”). *See Dixon v. Pattee*, 442 S.C. 233, 262 (Ct. App. 2023) (in considering whether an agreement is an adhesion contract, noting that “South Carolina’s courts have shifted from following the doctrine of *caveat emptor* (let the buyer beware) to the doctrine of *caveat venditor* (let the seller beware)” (internal quotation marks and citation omitted)).

³ After the filing of Defendants’ original Memorandum in Opposition to Plaintiffs’ Motion to Reconsider Order Compelling Arbitration and Stay Proceedings, Plaintiffs’ counsel sought to confer with Defendants’ counsel regarding factual representations that Plaintiffs viewed as overtly false. Following a conference, Defendants counsel voluntarily amended their Opposition Brief. While Plaintiffs appreciate Defendants’ counsel’s amendment, the inclusion of such a demonstrably false statement (that any terms were “requested [] by the Plaintiffs”) in the first instance underscores precisely why the Court must apply the summary judgment standard and view the evidence in the light most favorable to Plaintiffs and engage in no weighing of evidence. *See, e.g., West v. Gladney*, 341 S.C. 127, 135 (Ct. App. 2000) (on summary judgment, “this court ordinarily will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists”). Factual disputes at best, and outright inaccuracies at worst, pervade Defendants’ submissions, demonstrating the danger of crediting their characterization of the record without careful scrutiny. This episode is not an isolated misstep but emblematic of the broader misleading and unfair tactics alleged in the Verified Complaint. Viewed properly, these disputes confirm that the purported agreement was an adhesion contract and unconscionable, and further show why Defendants’ attempt to compel arbitration cannot withstand meaningful judicial review. Plaintiffs’ position as to Defendants’ amendment in no way serves as a waiver as to any other disputes of fact.

For transparency purposes, the sentence removed as part of the Amended Memorandum in Opposition, which appeared on pages 4–5 of Defendants’ original Memorandum in Opposition, stated: “Additionally, the Defendants submitted the ADDENDUM/EXCEPTION TO CONTRACT which has hand-written changes/addenda to the Agreement *requested and received by the Plaintiffs*.” (emphasis added).

Defendants fail to explain how this point bears on the Court’s decision or ameliorates the failure to follow South Carolina’s expressed public policy to protect consumers from just this sort of contract.

Defendants also assert that “it is irrelevant that Plaintiffs did not have access to legal counsel or that they did not consult with an attorney prior to signing the Agreement.” (*See* Defs’ Opp. at 9.) This does not accurately reflect South Carolina law. The Supreme Court of South Carolina has instructed courts to, when considering whether an agreement is unconscionable, look at “whether the party asserting unconscionability . . . had the *ability to consult an attorney*, or faced other circumstances that made signing the contract in a particular instance grossly inequitable.” *Maybank v. BB&T Corp.*, 416 S.C. 541, 575 (2016) (emphasis added). Ability to engage legal counsel is certainly a factor in the unconscionability analysis under South Carolina law.

F. VI’S SOLE AUTHORITY TO SELECT ARBITRATOR

Defendants argue that their unfettered discretion to select the arbitrator is permissible solely because the AAA rules purport to ensure impartiality. By Defendants’ logic, nothing would prevent them from naming their own in-house lawyer, David Levine, or even their outside counsel as an arbitrator—so long as that individual “pledged” impartiality. Such a result underscores the untenable nature of their position. As stated, on numerous occasions in Plaintiffs’ briefing, *Hooters of America, Inc. v. Phillips* completely invalidates their theory. 173 F.3d 933, 940 (4th Cir. 1999). *Hooters* makes clear that the process of selection must be neutral, not just the arbitrator’s subjective pledge of impartiality. Importantly, Defendants never address or otherwise contend with *Hooters* head on.

CONCLUSION AND PRAYER FOR RELIEF

For the Court's ruling in the prior Order Granting Motion to Compel Arbitration and Stay Proceedings to comport with *Schein*, the Court has to make the following findings of fact:

1. The existence of a purported agreement containing Plaintiffs' signature providing for Arbitration (which was acknowledged by Plaintiffs' counsel at the hearing on the Motion to Compel on March 27, 2025);
2. Factual determination that the contract is valid and enforceable and is not subject to any defenses under South Carolina law, that would make the contract revocable (*i.e.*, fraud, duress or unconscionability), just as the Federal Arbitration Act requires. See 9 U.S.C § 2; *York v. Dodgeland of Columbia, Inc.*, 405 S.C. 67, 78 (2013) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593 (2001) (referencing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996)) (emphasis added); and
3. The contract, if valid, clearly and unmistakably delegates threshold arbitrability questions to the Arbitrator.

Only with all three of these findings affirmatively made would the Court be able to order the Plaintiffs to be compelled to arbitrate the present dispute and stay the proceedings. If the proper legal standard were applied and the Court drew all reasonable inferences from the Verified Complaint in Plaintiffs' favor, no affirmative finding could be made for items 2 and 3 above. Furthermore, the existence of material factual disputes requires denial of the Motion to Compel Arbitration. For the foregoing reasons, Plaintiffs respectfully request that this Honorable Court grant the full relief requested in the Motion's moving brief.

Respectfully submitted,

s/David W. Wolf

David W. Wolf (S.C. Bar No. 17041)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
FRANK PERRELLI, JR.,	)	Civil Action No. 2024-CP-10-04606
	)	
PLAINTIFF,	)	
	)	
vs.	)	REPLY TO DEFENDANTS' MEMORANDUM
	)	IN OPPOSITION TO PLAINTIFF'S MOTION
VACATION INSPIRATIONS,	)	TO RECONSIDER ORDER COMPELLING
DESTINATION TRAVEL, LLC,	)	ARBITRATION AND STAYING PROCEEDINGS
JOSEPH SHIRLEY, RANDY	)	UNDER RULES 52(b) AND 59(e)
GARDNER, and JEFFREY PUMILIA,	)	
	)	
DEFENDANTS.	)	
_____	)	

Plaintiff submits this Reply Memorandum in Support of his Motion for Reconsideration of the Court's July 23, 2025 Order Compelling Arbitration and Staying the Proceedings.

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SUMMARY OF ARGUMENTS

On reconsideration, the Court should do the following:

First, reconsider the motion to compel arbitration under the proper summary judgment standard—taking all inferences in Plaintiff’s favor and recognizing the genuine disputes of material fact that preclude summary judgment.

Second, follow *Henry Schein* and *Coinbase*, which mandate that courts *always* decide whether a contract was formed. This threshold question belongs here.

Third, even assuming *arguendo* that the parties could delegate such a question to the arbitrator, the text of the arbitration provision which purports to incorporate AAA rules does not meet the “exacting” standard to “clearly and unmistakably” delegate such question in putative agreements involving unsophisticated senior citizen consumers.

Fourth, at a minimum, Plaintiff raises genuine disputes of material facts as to whether a valid contract was formed and whether the arbitration provision is unconscionable (as well as the rest of the agreement). The Court must examine the totality of circumstances—not just whether a signature appears. Contract formation, validity, and unconscionability demand meaningful review, especially given the allegations of unfair and deceptive practices here.

Fifth, while Plaintiff maintains that it is proper to deny the motion to compel arbitration without discovery, Plaintiff indeed sought discovery before the motion to compel arbitration was ever filed. In raising a lack of discovery, Plaintiff asserts that it is impossible to find for Defendants on such a record, when the only evidence they’ve put forth that has any relevance at all is the putative agreement itself.

Sixth, the Court should strike arbitrator selection provision as overtly unconscionable and against public policy. In so deciding, the Court should consider the totality of the circumstances,

the underlying allegations on the merits, and how Defendants' brazen attempt to maintain a one-sided arbitrator goes against the clear holding in the Fourth Circuit's *Hooters* decision. The Court should reject this attempt to rig the forum.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD

While the facts and precedent applicable to this case were extensively briefed prior to and during the hearing on the motion, the legal standard that applies to that motion was ignored by Defendants and disregarded by the Court when it adopted, in large part, the proposed order submitted by Defendants' counsel. Similarly, while the order entered by the Court did include purported findings of fact, those findings contravened the applicable legal standard requiring that the Court consider all facts in the light most favorable to the non-moving party. As a result, Plaintiff filed the Motion to Reconsider to address these oversights in the order.

In their Memorandum in Opposition Defendants do not contest that the summary judgment standard should apply nor do they put forth an alternative standard. (*See* Defs' Opp at 2–3.) Ironically, it is Defendants who seek to “confuse the issues” by purporting that the FAA is somehow in conflict with the summary judgment standard. (*See id.* at 3.) Not so. Plaintiff does not dispute that the FAA governs and, in fact, it is the FAA that necessitates the summary judgment standard. *See 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) (“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.”); *see also Austin v. Experian Info. Sols., Inc.*, No. 23-2301, 2025 WL 2177331 (4th Cir. Aug. 1, 2025) (“A party’s burden . . . [on] a motion to compel arbitration under Federal Arbitration

Act (FAA), is akin to the burden on summary judgment.”). The law is clear: under the FAA, courts have no discretion and must employ the summary judgment standard.

B. DEFENDANTS CONTINUE TO MISREPRESENT THE HOLDING IN *HENRY SCHEIN*

Defendants obfuscate the holding in *Henry Schein* and current jurisprudence in this area. A plain reading of *Henry Schein* aligns with Plaintiff’s position, as well as other decisions interpreting and applying *Henry Schein*.

Notably, Defendants do not address Plaintiff’s arguments about *Henry Schein* head on. (*Compare* Pls’ Recon. Mtn. at 17–18, 22–23, *with* Defs’ Opp. at 3.). Rather, Defendants are more hopeful that quoting sections of *Henry Schein* out of context can win the day. Defendants point to sections of *Henry Schein*, which involve the “wholly groundless” exception at issue, which has no application here (and has never been raised by Plaintiff).

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² Plaintiff recognizes the affidavit of Randy Gardner, but as Defendants admit, it only served the purpose of evidencing what Plaintiff does not dispute: that the FAA applies to this action.

substantially similar vacation business, one that was forced to settle with the Attorneys General of Texas and Georgia for consumer protection violations nearly identical to those alleged here.

Third, Defendants’ reliance on this argument underscores their recognition that high-pressure tactics constitute a critical consideration in the unconscionability inquiry. *See* § 188. Merchant’s conduct—Generally, 1 Consumer Law Sales Practices and Credit Regulation (“Courts have often pointed out that unconscionability may be shown by evidence of deceptive sales practices including specific misrepresentations and high pressure sales tactics.”); *see also Ashford v. PricewaterhouseCoopers LLP*, 954 F.3d 678, 684 (4th Cir. 2020) (considering, among other things, “whether deceptive or high-pressure tactics were employed”) (citation omitted).

3. Discovery

a) *Discovery is not Necessary to find for Plaintiff*

Importantly, the motion to compel arbitration should be denied even without discovery. However, given how fact intensive the inquiry is and the number of disputes of material fact, Plaintiff asserts that limited discovery could be fruitful. In any event, without discovery, Plaintiff’s Verified Complaint serves as sufficient evidence to deny the motion to compel arbitration.

b) *Waiver*

Defendants cite to two cases that hold parties cannot raise issues for the first time post-trial. (*See* Defs’ Opp at 7.) The key distinction is that those cases addressed issues raised years into the litigation and after trial. The early case posture here is entirely different. Moreover, Defendants concede that Plaintiff raised the issue and sought discovery at the outset, before the motion to compel arbitration was filed.

Defendants cannot have their cake and eat it too. Either the Verified Complaint serves as sufficient evidence to deny the motion to compel arbitration or there is an insufficient record warranting discovery.

E. UNCONSCIONABILITY

The Verified Complaint, at a minimum, creates a genuine dispute of material fact as to unconscionability. Under South Carolina law, unconscionability is a fact-intensive inquiry. *Holler v. Holler*, 364 S.C. 256, 269 (Ct. App. 2005). Every argument that Defendants make in their Opposition Brief involves an issue that, at a minimum, involves a dispute of material fact precluding a grant of the motion to compel arbitration.³

Beyond the points regarding meaningful choice and high-pressure sales tactics addressed above, Defendants are incorrect about a few other points. Defendants seem to contest the relative bargaining position. (*See* Defs’ Opp. at 8–9.) Defendants’ assertion that it is “not an essential purchase” appears to argue that the Court should not enforce South Carolina’s doctrine of *caveat venditor* (“let the seller beware”). *See Dixon v. Pattee*, 442 S.C. 233, 262 (Ct. App. 2023) (in considering whether an agreement is an adhesion contract, noting that “South Carolina’s courts have shifted from following the doctrine of *caveat emptor* (let the buyer beware) to the doctrine of *caveat venditor* (let the seller beware)” (internal quotation marks and citation omitted)).

³ After the filing of Defendants’ original Memorandum in Opposition to Plaintiff’s Motion to Reconsider Order Compelling Arbitration and Stay Proceedings, Plaintiff’s counsel sought to confer with Defendants’ counsel regarding factual representations that Plaintiff viewed as overtly false. Following a conference, Defendants counsel voluntarily amended their Opposition Brief. While Plaintiff appreciates Defendants’ counsel’s amendment, the inclusion of such a demonstrably false statement (that any terms were “requested [] by the Plaintiff”) in the first instance underscores precisely why the Court must apply the summary judgment standard and view the evidence in the light most favorable to Plaintiff and engage in no weighing of evidence. *See, e.g., West v. Gladney*, 341 S.C. 127, 135 (Ct. App. 2000) (on summary judgment, “this court ordinarily will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists”). Factual disputes at best, and outright inaccuracies at worst, pervade Defendants’ submissions, demonstrating the danger of crediting their characterization of the record without careful scrutiny. This episode is not an isolated misstep but emblematic of the broader misleading and unfair tactics alleged in the Verified Complaint. Viewed properly, these disputes confirm that the purported agreement was an adhesion contract and unconscionable, and further show why Defendants’ attempt to compel arbitration cannot withstand meaningful judicial review. Plaintiff’s position as to Defendants’ amendment in no way serves as a waiver as to any other disputes of fact.

For transparency purposes, the sentence removed as part of the Amended Memorandum in Opposition, which appeared on pages 4–5 of Defendants’ original Memorandum in Opposition, stated: “Additionally, the Defendants submitted the ADDENDUM/EXCEPTION TO CONTRACT which has hand-written changes/addenda to the Agreement *requested and received by the Plaintiff*.” (emphasis added).

Defendants fail to explain how this point bears on the Court's decision or ameliorates the failure to follow South Carolina's expressed public policy to protect consumers from just this sort of contract.

Defendants also assert that "it is irrelevant that Plaintiff did not travel with legal counsel or that he did not consult with an attorney prior to signing the Agreement." (*See* Defs' Opp. at 9.) This does not accurately reflect South Carolina law. The Supreme Court of South Carolina has instructed courts to, when considering whether an agreement is unconscionable, look at "whether the party asserting unconscionability . . . had the *ability to consult an attorney*, or faced other circumstances that made signing the contract in a particular instance grossly inequitable." *Maybank v. BB&T Corp.*, 416 S.C. 541, 575 (2016) (emphasis added). Ability to engage legal counsel is certainly a factor in the unconscionability analysis under South Carolina law.

F. VI'S SOLE AUTHORITY TO SELECT ARBITRATOR

Defendants argue that their unfettered discretion to select the arbitrator is permissible solely because the AAA rules purport to ensure impartiality. By Defendants' logic, nothing would prevent them from naming their own in-house lawyer, David Levine, or even their outside counsel as an arbitrator—so long as that individual "pledged" impartiality. Such a result underscores the untenable nature of their position. As stated, on numerous occasions in Plaintiff's briefing, *Hooters of America, Inc. v. Phillips* completely invalidates their theory. 173 F.3d 933, 940 (4th Cir. 1999). *Hooters* makes clear that the process of selection must be neutral, not just the arbitrator's subjective pledge of impartiality. Importantly, Defendants never address or otherwise contend with *Hooters* head on.

CONCLUSION AND PRAYER FOR RELIEF

For the Court's ruling in the prior Order Granting Motion to Compel Arbitration and Stay Proceedings to comport with *Schein*, the Court has to make the following findings of fact:

1. The existence of a purported agreement containing Plaintiff's signature providing for Arbitration (which was acknowledged by Plaintiff's counsel at the hearing on the Motion to Compel on March 27, 2025);
2. Factual determination that the contract is valid and enforceable and is not subject to any defenses under South Carolina law, that would make the contract revocable (*i.e.*, fraud, duress or unconscionability), just as the Federal Arbitration Act requires. See 9 U.S.C § 2; *York v. Dodgeland of Columbia, Inc.*, 405 S.C. 67, 78 (2013) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593 (2001) (referencing *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996)) (emphasis added); and
3. The contract, if valid, clearly and unmistakably delegates threshold arbitrability questions to the Arbitrator.

Only with all three of these findings affirmatively made would the Court be able to order the Plaintiff to be compelled to arbitrate the present dispute and stay the proceedings. If the proper legal standard were applied and the Court drew all reasonable inferences from the Verified Complaint in Plaintiff's favor, no affirmative finding could be made for items 2 and 3 above. Furthermore, the existence of material factual disputes requires denial of the Motion to Compel Arbitration. For the foregoing reasons, Plaintiff respectfully requests that this Honorable Court grant the full relief requested in the Motion's moving brief.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
	)	
CHRISTOPHER SAWYER and TERESE SAWYER,	)	Civil Action No. 2024-CP-10-_____
	)	
PLAINTIFFS,	)	
	)	
vs.	)	COMPLAINT
	)	
VACATION INSPIRATIONS,	)	
DESTINATION TRAVEL, LLC, JOSEPH SHIRLEY, RANDY GARDNER, and	)	
JEFFREY PUMILIA,	)	
	)	
DEFENDANTS.	)	
	)	

COME NOW Plaintiffs Christopher Sawyer and Terese Sawyer (hereinafter “Plaintiffs”) complaining of the above-named Defendants, Vacation Inspirations (hereinafter “VI”); Destination Travel, LLC (hereinafter “DT”); Joseph Shirley (hereinafter “Shirley”); Randy Gardner (hereinafter “Gardner”); and Jeffrey Pumilia (hereinafter “Pumilia”)(collectively, VI, DT, Shirley, Gardner, and Pumilia shall hereinafter be referred to as the “Defendants”), alleging and saying as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs are residents and citizens of the State of Pennsylvania;
2. Defendant VI is, upon information and belief, an unincorporated business association operating in Charleston County, South Carolina;
3. Defendant DT is a South Carolina limited liability company operating in Charleston County, South Carolina;

4. Defendant Shirley is, upon information and belief, the President of VI and a resident and citizen of Charleston County, South Carolina;

5. Defendant Gardner is, upon information and belief, the CEO and "Customer Contact" of VI and a resident and citizen of Charleston County, South Carolina;

6. Defendant Pumilia, the Director of Member Services for VI, is a resident and citizen of Charleston County, South Carolina;

7. The facts and circumstances which are the subject matter of this lawsuit occurred in Charleston County, South Carolina;

8. This Honorable Court has personal and subject matter jurisdiction over the parties because the Defendants committed statutory violations and tortious acts in whole or in part in the State of South Carolina, County of Charleston.

9. Venue is proper in Charleston County pursuant to S.C. Code Ann. § 15-7-30(A)(10) & (B) because: 1) VI's and DT's sales activities occur in Charleston County; and 2) each of the individual defendants are residents of Charleston County;

FACTS

10. Plaintiffs visited the County and City of Charleston, South Carolina from May 25, 2021 to May 27, 2021;

11. On or about May 26, 2021, the Plaintiffs entered Defendants VI and DT's storefront located at 229 Meeting Street, Charleston, South Carolina 29401 and were called up to the counter and offered free tickets to a couple of sightseeing events if Plaintiffs attended a sales presentation the following morning;

12. The counter clerk required a Twenty Dollar (\$20.00) reservation fee, which was to be refunded upon appearance at the presentation at 30 Vendue Range, Charleston, South Carolina 29401;

13. Plaintiffs arrived at 30 Vendue Range the following morning at 10:00 am and were refunded the Twenty Dollar (\$20.00) fee;

14. When Plaintiffs arrived to the sales presentation, they were directed to another room with five tables, a TV presentation screen and two other couples;

15. After a short wait, the participants were introduced to Greg (Last name unknown) ("Greg"), who instructed them that no one should be using their cell phone and to turn off their cell phones because his boss instructed him that if a phone rang during the presentation he would have to start the presentation over;

16. The sales presentation was for a VI travel membership and travel related services, as distributed by DT (the "Membership") and that VI had such great offers that it had the ability to choose who they would allow to be members;

17. Greg specifically instructed Plaintiff Terese Sawyer at this point, who was holding her cell phone in her hand, if she touched her cell phone the Plaintiffs would not be permitted to sign up;

18. All three couples turned off their cell phones;

19. The public scolding regarding the use of cell phones served to prevent either of the Plaintiffs and other couples from vetting the sales persons' representations about the VI services and Membership;

20. A Google search would have notified Plaintiffs of a substantial number of negative reviews online;

21. Greg made a presentation with photos of locations and vistas on the large screen monitor and explained that VI was a “wholesaler” of vacation packages and could provide their members with packages far below those offered by travel agencies;

22. Greg explained that resorts and cruise lines could only make money if their rooms were filled, so wholesaling unfilled rooms benefitted the industry by contributing to overhead expenses and generating additional income from on-site service and add-on activity sales;

23. Greg also explained that, as one of only few wholesalers world-wide, VI could obtain travel packages far below the retail price, which VI would then sell to their members;

24. Greg further explained that VI could sell a hotel night for less than if it was booked directly through the hotel because wholesaler’s buy in bulk, which brings a lot of buying power to the wholesaler from booking a block of rooms from the hotel;

25. Greg likened VI’s Membership to that of a Costco or Netflix membership, but that it was like booking sites such as Kayak or Expedia, just that it grants access to wholesale travel pricing, which are bottom line prices without significant mark up;

26. Greg stated that VI has been the recipient of awards from cruise lines based upon the amount of business it had generated through the sale cruise line packages to its membership and displayed images of such awards;

27. Greg described how he had generated so much business that he had been gifted a trip to a Five (5) star hotel in Hawaii for approximately ten percent (~10%) of the advertised cost, including airfare;

28. The final graphic of Greg’s presentation described the Platinum Membership benefits, which Greg explained was only available the day of the presentation at that location;

29. At the conclusion of his presentation, Greg offered a One Thousand and 00/100 Dollar (\$1,000.00) discount to the first couple that signed up, reducing the Membership from Seven Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$7,995.00) to Six Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$6,995.00);

30. A couple immediately raised their hand and represented they would purchase a membership, but Plaintiffs are uncertain whether they were legitimate buyers or plants of VI to give the impression of a desired opportunity missed;

31. Plaintiffs were next approached by Lindsay (last name unknown) ("Lindsay"), while other representatives met with the two other couples;

32. Lindsay introduced herself and explained that she had been an employee of DT for seven (7) or eight (8) years;

33. Lindsay represented to the Plaintiffs that the employees of DT and VI were family and that each was a family-owned company;

34. The conversation between Plaintiffs and Lindsay steered towards Plaintiff Christopher Sawyer's military service and Lindsay advised that her boyfriend was with the police;

35. Lindsay stated that she understood the burdens of first responders and that Defendants would not provide a membership product that could not be useful to such individuals and their families;

36. Lindsay represented to the Plaintiffs that because of Plaintiff Christopher Sawyer's military service and Lindsay's long tenure with DT, she offered to match the discounted Membership price of Six Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$6,995.00);

37. The Plaintiffs remained hesitant to purchase a Membership, so Lindsay explained that she did not need to get permission because of her tenure and that the second presentation for

the day had been cancelled, so she offered an additional discount to Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00);

38. Given all of the representations made through Greg's presentation and Lindsay's discounts, Plaintiffs appreciated that they were being offered a further discount and agreed to purchase a Membership;

39. Lindsay produced a Purchase Agreement (the "Agreement") and filled in its blanks with the date, Plaintiff Christopher Sawyer's information, the purchase price of Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00), and reflected that the Documentation Fee of Three Hundred Ninety-Nine and 00/100 Dollars (\$399.00) and first year dues of One Hundred Ninety-Nine and 00/100 Dollars (\$199) were waived for a grand total of Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00).

40. Lindsay had Plaintiffs sign the Agreement and instructed Plaintiff Christopher Sawyer how to complete the responses to the Vacation Inspirations Membership Acknowledgment (the "Acknowledgment"), which was "yes to everything, except no to #10 and N/A to #11, before having Plaintiffs sign it;

41. Upon Plaintiff Christopher Sawyer's question about the term "right of rescission," Lindsay stated that it dealt with real estate and since the Plaintiffs were not buying a timeshare it did not relate or pertain to the Membership;

42. Lindsay also represented to the Plaintiffs that VI's primary source of revenue was from the annual dues and not the Member Purchase Price payments;

43. After running Plaintiff Christopher Sawyer's credit card, Lindsay compiled the signed paperwork, including the Agreement and the Acknowledgment, and provided to the Plaintiffs;

44. Lindsay then recommended that the Plaintiffs call and use the services at their earliest opportunity and described how VI was a reputable organization and that the real estate owners of the very prestigious Vendue Range shopping district would not allow them to operate at that locale if they were not;

45. Lindsay also stated to Plaintiffs, "Don't be alarmed if we are not here later in the day, it doesn't mean we ran off with your money," before providing a Fifty and 00/100 Dollars (\$50.00) gift check and one gift certificate each to Patriots Point and Magnolia Plantation and one of Defendant Jeff Pumilia's business cards;

46. As Plaintiffs were escorted to the door to leave, Greg stated to Plaintiffs, "Welcome to the family;"

47. As Plaintiffs drove past Defendants' storefront approximately five minutes later, they noticed Greg and Lindsay locking up for the day;

48. Shortly thereafter, Plaintiffs began to reconsider the decision to purchase the Membership and attempted to contact DT and/or VI in order to cancel the purchase and were unsuccessful;

49. Plaintiffs discovered substantially all of the online reviews regarding the Membership sold by the Defendants were negative and complained about the deceptive tactics employed by the Defendants and the poor quality of the services offered by VI for owners of a Membership;

50. Defendants target individuals who are visiting the City of Charleston and would be more receptive to their deceptive sales tactics;

51. During the presentation, Plaintiffs were subjected to high pressure and deceptive sales tactics, including:

- a. A ban on cellphone usage which prevented Plaintiff's from researching Defendants and reviewing online reviews prior to purchasing a Membership;
 - b. Rushed contracting in order to create anxiety through the fear of missing out on Defendant VI's travel membership and travel related services, which was described as a "Once in a lifetime opportunity;"
 - c. Rushed contracting in order to create anxiety through the representation that the discounted Memberships were only available on the day of the presentation and would not be available afterwards;
 - d. Presented deceptive claims regarding awards presented to Defendant VI by cruise lines with regard to the services provided to consumers through the Membership;
 - e. Utilized coercive sales tactics that prevented Plaintiffs from making a free and informed choice;
 - f. Ingratiating themselves with attendees by telling an attendee who purchased a Membership "Welcome to the family;"
 - g. Representing to attendees with a military background that their significant other is in law enforcement and that they understand the burdens of first responders and that they would not provide a membership product that could not be useful to such individuals and their families;
 - h. Representing that DT and VI were family-owned businesses that employed family members in order to imply it was trustworthy and reliable when it was not;
 - i. Fostered an environment that created the impression that the Defendants' business was a City of Charleston operated location, like a visitor's bureau;
 - j. Creating the appearance of scarcity of discounted Memberships in order to incentivize purchases;
 - k. Creating an incentive for participants to purchase a Membership in order to escape the undue influence that Defendants' sales tactics generated;
 - l. Upon information belief, planting imposter presentation participants to announce they desire to purchase a Membership in order to encourage the other attendees to purchase a Membership as well;
52. The Agreement was a form contract in which a representative of Defendants VI and DT filled in the blanks with information provided by the Plaintiffs;
53. The Agreement provided that:

- a. Plaintiffs were entitled “to request up to two week(s) of condominium accommodations per year provided by VI” after originally being advised that they would receive four weeks in the Platinum Membership.
- b. “THE UNDERSIGNED MEMBER ACKNOWLEDGES **THIS IS A NON-CANCELABLE CONTRACT**. THIS IS NOT A TIMESHARE, HEALTH CLUB, BUYERS CLUB, NOR DOOR TO DOOR SALES CONTRACT AGREEMENT. PLEASE MAKE YOUR DECISION ACCORDINGLY.”
- c. “Client acknowledges that this agreement is not subject to any “right of rescission” and may not be cancelled.”
- d. “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.”

54. Plaintiffs never cashed the gift check, never utilized the gift certificates Defendants provided; and never activated the membership;

55. As a result of Plaintiffs’ inability to reach the Defendants, they called their credit card company and explained the situation to an agent;

56. Given the options of waiting for the charge to proceed and challenging it in the grievance process and cancelling the credit card, Plaintiffs authorized the cancellation of the credit card;

57. Despite the cancellation of the credit card, Defendants’ charge was processed on Plaintiffs’ new card;

58. Plaintiffs contacted Defendants at their memberservices@vacationinspirations.com explaining the cancellation of the prior card and requesting a follow up;

59. Plaintiffs conversed with Jeff Pumilia on several occasions, but Pumilia denied he had authority to authorize a full refund and offered a further discount, but declined when requested to provide the offer in writing;

60. VI and DT refused to release the Plaintiffs from the Purchase Agreement.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Declaratory Judgment)

61. The Plaintiffs reaffirm and reiterate all of the allegations in Paragraphs 1 through 60 as if fully repeated and incorporated herein verbatim;

62. South Carolina law requires arbitration agreements to be ‘geared towards achieving an unbiased decision by a neutral decision maker;’

63. The Agreement’s Terms and Conditions contains an arbitration clause buried in its final article inconspicuously titled “Dispute Resolution”;

64. The arbitration clause contains no differentiated font in order to call attention to its terms nor did the sales presentation or any salesperson explain there was an arbitration agreement included;

65. The terms of the arbitration clause lack mutuality, by granting VI the rights to select the arbitrator and the location of the arbitration, should it not occur at the Charleston County Courthouse;

66. The arbitration clause also requires that the “arbitrator compensation and cost of the location shall be paid by the non-prevailing party;”

67. The arbitration clause requiring that arbitration be held “not under the auspices of [American Arbitration Association]” introduces further doubt about the arbitration process’s fairness and impartiality;

68. The practical implication of a majority of the arbitration provision is to grant VI unfair control over the process and expenses of the arbitration proceedings so as to inhibit a Member from seeking dispute resolution and to permit a biased result from an arbitrator who may not be neutral;

69. The one sided arbitration clauses contained in the "Dispute Resolution" provision have an *in terrorem* effect because Members may decline to exert their rights when the only path is an unfair and potentially costly unknown out-of-court process;

70. The arbitration clause as a whole undermines the neutrality of any potential arbitration proceeding and violates federal and state law;

71. Whether pursuant to S.C. Code Ann. § 15-48-10, the Federal Arbitration Act, or under its own terms, the arbitration clause is not enforceable and the Agreement is not subject to mandatory arbitration since it is fundamentally unfair for lack of mutuality and fails to promote a neutral and unbiased arbitral forum;

72. The Agreement, including the arbitration provisions contained within, is a form contract which was completed at the conclusion of Defendants' presentation and was presented on a "take it or leave it" basis;

73. The Agreement's terms were not negotiable such that Plaintiffs lacked a meaningful choice of entering into the contract;

74. Application of the arbitration clause's terms create a substantial lack of mutuality between the parties and allow Defendant VI to both discourage members from seeking dispute resolution by manipulating the expenses to the detriment of the opposing party, while also securing a biased decision from a biased arbitrator;

75. The arbitration clause's terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them;

76. Pursuant to S.C. Code Ann. § 15-53-10, et. seq., Plaintiffs are entitled to a declaratory judgment that the arbitration clause in the Agreement is invalid and unenforceable due to its unconscionable terms and Plaintiffs' inability to realize an unbiased decision by a neutral arbitrator;

77. Pursuant to Rule 57, SCRCP, the Plaintiffs request a speedy hearing of this action;

FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Unfair Trade Practices)

78. Plaintiffs incorporate the allegations of Paragraphs 1 through 60 as if restated verbatim herein;

79. Defendants VI and DT, through the actions of their agents, violated S.C. Code Ann. § 39-5-20 of the South Carolina Unfair Trade Practices Act (the "Act"), as a result of the utilization or employment of unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce;

80. Defendants Shirley, Gardner, and Pumilia, each violated the Act as a result of their commission, participation, training, directing or authorizing the utilization or employment of the unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce;

81. Defendants Shirley and Gardner were individually named defendants in a State of Georgia enforcement action (No. 2012CV211716) for similar unfair and deceptive conduct;

82. The Assurance of Voluntary Compliance in the State of Georgia action stated "Gardner and Shirley manage and direct the business activities" of a similar entity in which they assume materially the same directorial roles;

83. Defendants Shirley and Gardner were also named in connection with a State of Texas enforcement action (No. 2017CI11368) for similar unfair and deceptive conduct;

84. Defendant Pumilia is the Director of Member Services at VI and; as indicated by his title and his statements to the media; is training, directing or authorizing the unfair and deceptive sales practices;

85. The Membership materials also contained a letter "From [VI's] Board of Directors" indicating their authorization, at a minimum, of the sales process and tactics used;

86. Plaintiffs were misled by the Defendants' representations and other practices utilized to entice them to purchase an inferior travel membership that no reasonable person would purchase without the representations and practices employed or authorized by the Defendants;

87. As evidenced, in the first instance, by the record of victims, Defendants' unfair and deceptive acts have been repeated on numerous occasions in the past and are capable of continuing to be repeated in the future such that they affect the public interest;

88. Defendants' actions, in large part relating to their high pressure and deceptive sales tactics, are a violation of the Act because these actions are immoral, unethical, oppressive, and offensive to public policy;

89. As a result of Defendants' unfair and deceptive acts, Plaintiffs have suffered monetary losses;

90. The deceptive representations and unfair practices employed on the Plaintiffs were unconscionable and materially prevented the discovery of the true nature of the purported travel membership, past victims, and its public perception, such that Plaintiffs were unable to avoid the injuries that resulted from the Defendants' conduct;

91. The unfair methods of competition and unfair and deceptive acts or practices in the conduct of commerce by the Defendants and/or their directing or authorizing such acts and practices proximately caused the Plaintiffs injury;

92. Plaintiffs have been damaged in the amount of Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00) as a result of the Defendants violations of the Act;

93. Defendants have willfully or knowingly employed the unfair and deceptive acts or practices;

94. Defendants knew or should have known that their oppressive and high-pressure sales tactics violated the Act given the centrality of Defendants sales process to their business and the connectiveness to two prior state enforcement actions for similar conduct against the same or related individuals and entities;

95. Plaintiffs are therefore entitled to actual and treble damages, as well as attorneys' fees and costs for this Cause of Action;

FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Injunctive Relief Pursuant to §39-5-38(D)(1))

96. Plaintiffs incorporate the allegations of Paragraphs 1 through 60 as if restated verbatim herein;

97. Through Defendants' actions targeting visitors to the City of Charleston by the unfair and deceptive practices previously outlined, there exist conditions of ongoing violations or attempted violations of the Chapter 5 of Title 39, the South Carolina Unfair Trade Practices Act;

98. Defendants have and will continue to employ these unfair and deceptive tactics if not stopped;

99. Other participants will be subjected to irreparable harm if Defendants are permitted to continue their predatory practices upon visitors to Charleston;

100. The City of Charleston and State of South Carolina will realize continued reputational diminishment as a result of Defendants' predatory practices upon visitors to Charleston;

101. Upon information and belief, the Plaintiffs believe an injunction of Defendants' actions would best serve the public interest and would petition the Court for an injunction against the Defendants pursuant to S.C. Code Ann. § 39-5-38(D)(1);

FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Equitable Relief – Rescission)

102. Plaintiffs incorporate the allegations of Paragraphs 1 through 60 as if restated verbatim herein;

103. Plaintiffs entered into the Agreement based upon a mistake of fact;

104. That the Defendants' representations with regard to the scarcity of discounted memberships, quality of reviews, industry awards, services that meet participant's expectations were false;

105. The misrepresentations were each material in that they were significant, essential to, and of such a nature that knowledge of their falsity would have reasonably affected the Plaintiffs' decision to enter into the Agreement with VI and DT;

106. That Defendants fraudulently misrepresented to Plaintiffs, the scarcity of discounted memberships, quality of reviews, their receipt of industry awards, and their ability to provide services that meet participants' expectations, all with knowledge of each representation's falsity or a reckless disregard for the truth or falsity of Defendants' statements;

107. Defendants made the misrepresentations to Plaintiffs, with the intent that Plaintiffs would act upon that information in deciding whether or not to purchase a Membership for Five Thousand Five Hundred Ninety-Five and 00/100 Dollars (\$5,595.00);

108. That Plaintiffs were without knowledge that the representations outlined above were false;

109. That Plaintiffs relied on the representations outlined above in proceeding with the purchase of the Membership;

110. Plaintiffs' reliance on Defendants' representations was reasonable under the circumstances, and based on the fundamental principles of good faith and fair dealing to which both parties are subject;

111. Defendants made the representations without intention of being able to honor them when Plaintiffs purchased a Membership;

112. Over the period since the Agreement was executed, the Plaintiffs have discovered the falsity of Defendants' representations regarding the scarcity of discounted memberships, the quality of other members' reviews of Defendants' services, Defendants' receipt of industry awards for the quality of the services Defendants provide; and the quality of the services Defendants provide to members were false and have been directly and proximately injured in the following respects:

113. That Plaintiffs were induced to purchase the Membership from VI and DT based upon Defendants' fraud, deceit, misrepresentations and concealment;

114. That Plaintiffs were not negligent in entering into the Agreement;

115. Plaintiffs are entitled to the equitable remedy of rescission of the Agreement and compensate them for their related court costs;

FOR A FIFTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

116. Plaintiffs incorporate the allegations of Paragraphs 1 through 60 as if restated verbatim herein;

117. That the Defendants' representations with regard to the scarcity of discounted memberships, industry awards, services that meet participant's expectations were false;

118. The misrepresentations were each material in that they were significant, essential to, and of such a nature that knowledge of their falsity would have reasonably affected the Plaintiffs' decision to enter into the Agreement with VI and DT;

119. That Defendants fraudulently misrepresented to Plaintiffs, the scarcity of discounted memberships, their receipt of industry awards, and their ability to provide services that meet participants' expectations, all with knowledge of each representation's falsity or a reckless disregard for the truth or falsity of Defendants' statements;

120. Defendants made the misrepresentations to Plaintiffs, with the intent that Plaintiffs would act upon that information in deciding whether or not to purchase a Membership for Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,595.00);

121. That Plaintiffs were without knowledge that the representations outlined above were false;

122. That Plaintiffs relied on the representations outlined above in proceeding with the purchase of the Membership;

123. Plaintiffs' reliance on Defendants' representations was reasonable under the circumstances, and based on the fundamental principles of good faith and fair dealing to which both parties are subject;

124. Over the period since the Agreement was executed, the Plaintiffs have discovered the falsity of Defendants' representations regarding the scarcity of discounted memberships, Defendants' receipt of industry awards for the quality of the services Defendants provide; and the

quality of the services Defendants provide to members were false and have been directly and proximately injured in the following respects:

- a. Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00) in actual damages, and,
- b. The costs of bringing this action, including court costs, expenses and legal fees;

FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligent Misrepresentation)

125. Plaintiffs reaffirm and reiterate all of the allegations in Paragraph 1 through 60 as if fully repeated and incorporated herein verbatim;

126. That Defendants made false representations to the Plaintiffs in stating that: 1) discounted memberships were scarce; 2) Defendants had received industry awards based upon the quality of the services provided, and 3) Defendants were able to provide services that meet participants' expectations;

127. The Defendants had a pecuniary interest in making the false representations to Plaintiffs because these facts, either considered in isolation or as a whole, supported the asking price for the discounted Membership presented to Plaintiffs and without such circumstances the Plaintiffs would not have paid the asking price or purchased the Membership;

128. That Defendants owed a duty of care to the Plaintiffs, to see that they communicated truthful information to the Plaintiffs while attempting to maximize the sales price of a Membership;

129. That Defendants breached that duty of care to the Plaintiffs when they communicated false information or otherwise recklessly disregarded the truth in their dealings with the Plaintiffs with regard to the scarcity of discounted membership, quality of purchaser reviews, receipt of industry awards, and their ability to provide services that meet participants' expectations;

130. That Plaintiffs, having no other reliable information related to the scarcity of discounted memberships, Defendants' receipt of industry awards for their services, or Defendants'

ability to provide the services to purchasers as outlined in their presentation to Plaintiffs, justifiably relied on the false information communicated by the Defendants prior to executing the Agreement;

131. That as a result of the Defendants' negligent misrepresentations, the Plaintiffs would not have purchased a Membership, which proximately and consequently caused the following damages:

- a. Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00) from the purchase of the Membership, and,
- b. The costs of bringing this action, including court costs, expenses and legal fees;

WHEREFORE, the Plaintiffs request that this Court enter its judgment:

- (1) declaring that the arbitration clause contained in the Agreement is invalid and unenforceable;
- (2) ruling that Defendants have willfully violated the South Carolina Unfair Trade Practices Act and Plaintiffs are entitled to trebled damages, based upon their actual damages of Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00) from the purchase of the Membership, and their reasonable attorneys' fees;
- (3) ruling that Defendants are committing ongoing violations or attempted violations of Chapter 5 of Title 39, the South Carolina Unfair Trade Practices Act and issue an injunction against Defendants from acting in violation of the Act;
- (4) ruling that Defendants induced Plaintiffs to enter into the Agreement by way of fraudulent representations which they did not intend to perform and that Plaintiffs are entitled to rescind the Agreement;
- (5) ruling that Defendants fraudulently misrepresented their program and services to be provided under the Agreement and award Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00) actual damages from the purchase of the Membership, plus punitive damages and attorneys' fees to Plaintiffs;
- (6) ruling that Defendants negligently misrepresented their program and services to be provided under the Agreement and award Five Thousand Nine Hundred Ninety-Five and 00/100 Dollars (\$5,995.00) actual damages from the purchase of the Membership, plus punitive damages and attorneys' fees to Plaintiffs;
- (7) such other and further relief as the Court may deem appropriate.

Respectfully submitted,

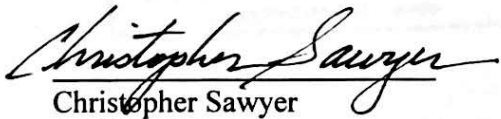
s/David W. Wolf
David W. Wolf (S.C. Bar No.: 17041)
David W. Wolf, P.A.
748-D St. Andrews Boulevard
Charleston, South Carolina 29407
Telephone: (843) 853-9000
Facsimile: (843) 853-9002
E-mail: david@wolflaw.com
Attorney for Plaintiff

s/Abby Edwards Saunders
Abby Edwards Saunders (S.C. Bar No. 17234)
Law Office of Abigail Edwards Saunders, LLC
1021 Sea Mountain Highway, Suite B2
North Myrtle Beach, South Carolina 29582
Tel. (843) 491-9770
Fax (843) 491-9760
Email: abigail@abbysaunderslaw.com
Attorney for Plaintiff

May 21, 2024
Charleston, South Carolina

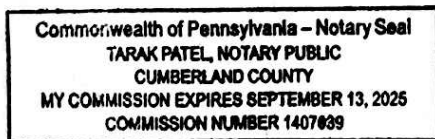
VERIFICATION OF COMPLAINT

I, Christopher Sawyer, being first duly sworn, depose and say that I have read the foregoing Verified Complaint and know the contents thereof, and that the information is true and correct to the best of my knowledge, except as to those matters and things alleged upon information and belief, and as to those things, I believe them to be true.


Christopher Sawyer

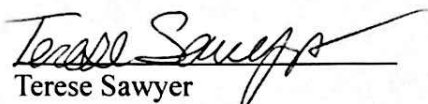
Sworn to before me this 17th day of May, 2024.


Notary Public for the State of Pennsylvania
My Commission Expires: 09/13/2025

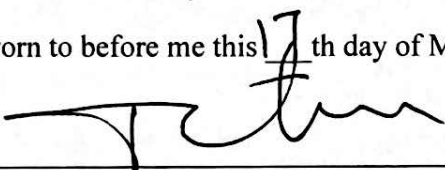


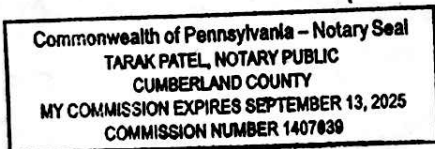
VERIFICATION OF COMPLAINT

I, Terese Sawyer, being first duly sworn, depose and say that I have read the foregoing Verified Complaint and know the contents thereof, and that the information is true and correct to the best of my knowledge, except as to those matters and things alleged upon information and belief, and as to those things, I believe them to be true.


Terese Sawyer

Sworn to before me this 17th day of May, 2024.


Notary Public for the State of Pennsylvania
My Commission Expires: 09/13/2025



Vacation Inspirations Membership**PURCHASE AGREEMENT**

MEMBER # [REDACTED]

Distributed by Destination Travel, LLC

This agreement, made and entered into this 27 day of May, 2021, by and between Vacation Inspirations (hereinafter referred as VI), and Destination Travel, LLC (hereinafter referred as DT), and:

Name: Last Sawyer First Christopher Spouse Terese Polcha

E-Mail: [REDACTED]

Address: [REDACTED]

City: Mechanicsburg State: PA Zip Code 17055

Phone: (C): [REDACTED] (C): [REDACTED]

hereinafter referred to as Client.

By this agreement the Client shall be entitled to all rights and benefits of the Vacation Inspirations Travel Membership, and allowed to request up to four week(s) of condominium accommodations per year provided by VI. The location and week(s) shall be determined by using the reservation procedures as set forth in VI Membership materials.

The Term of usage of this agreement will be for 12 months.

Client can elect to engage in a new contract each 12 month period after the end of the initial contract term by using the VI Draft Authorization. Member will only be required to pay dues annually to renew the membership agreement.

This agreement does not convey any interest or ownership in real estate or resort property.

Membership Purchase Price is \$ 995, Documentation Fee is \$399; first year dues is \$199, for a total of \$ (waived)

In the event that VI extends credit to the client for the purchase price, the terms of credit are set forth in the "Federal Truth in Lending Act Disclosure" printed below.

FEDERAL TRUTH-IN-LENDING ACT DISCLOSURE

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS	TOTAL SALE PRICE
The cost of your credit as a yearly rate:	The dollar amount the credit will cost you:	The amount of credit provided to you or on your behalf:	The amount you will have paid if you have made all payments as scheduled:	The total cost of your purchase on credit, including your down payment of:
<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>	\$ _____ \$ _____

Your payment schedule will consist of, and Client agrees to pay VI a total of _____ payments, in the amount of \$ _____ per month (P&I) with the first payment to be made on the 1st day of _____, 20____ and succeeding payments to be made on the same day of each month thereafter. Client shall have the option of the direct draft option offered by VI.

LATE CHARGE: For each payment made ten (10) days after the due date there will be a late charge of FIVE PERCENT (5%) of the payment amount or \$15.00, whichever is greater.

Membership must be paid in full to be eligible for Rewards. PREPAYMENT: There is no prepayment penalty.

NOTICE TO BUYER: THE UNDERSIGNED MEMBER ACKNOWLEDGES THIS IS A NON-CANCELABLE CONTRACT. THIS IS NOT A TIMESHARE, HEALTH CLUB, BUYERS CLUB, NOR DOOR TO DOOR SALES CONTRACT AGREEMENT. PLEASE MAKE YOUR DECISION ACCORDINGLY.

[Signature]
Client/Purchaser

[Signature]
Client/Purchaser

[Signature]
Sales Representative

[Signature]
Manager

MEMBERSHIP TERMS AND CONDITIONS

These Terms and Conditions are part of the Membership Agreement

I. ANNUAL MEMBERSHIP FEE (AMF) and Term of the Contract:

Additional to the contract with Vacation Inspirations, the client will pay VI an Annual Membership Fee of \$199.00. Payment of the AMF will be due and payable each year according to the annual draft acknowledgment. Failure to pay AMF will result in loss of privileges.

II. VS RESERVATION SYSTEM:

1. A vacation week is an 8 day/ 7 night condominium in venues normally considered a vacation venue, and may be booked using a Vacation Voucher.
2. A Vacation Voucher is used to request a Vacation Week and must be completely filled out in writing and mailed to VI no earlier than 360 days prior to and no less than 60 days prior to the vacation week. To greatly increase confirmation allow 90 days notice for a prime season week, or 180 days for a Holiday or Special Event week.
3. Reservation request, as to the location of the vacation, shall be an area designated as a vacation venue by VI. Destinations are listed as a reference to help determine Prime Season and Swing Seasons and may change from time to time as client demands change, and shall be defined as a venue normally utilized as a vacation area.
4. All reservations are handled on a first come first serve basis, and VI makes no warranties or guarantees as to the availability in any particular resort or destination. Accommodations are based on wholesale availability. Confirmation for accommodations will be mailed to client. No more than two weeks can be booked consecutively or concurrently at any one location without special permission.

III. USE AND OCCUPANCY:

Purchaser agrees that the purchase of the vacation week(s) is for personal use, and shall be used by the purchaser, their immediate family or their guests providing the occupancy limits are not exceeded. Purchaser agrees to be responsible for damages by those utilizing the accommodations as the result of this agreement, and also to abide by all rules and regulations established by any resort. None of the monies collected by VI shall be used for any personal charges incurred by purchaser, including fees such as cleaning fees, gratuities, state, local or national taxes, energy surcharges, foreign departure fees, etc.

IV. CANCELLATION OF ACCOMODATION:

In the event a confirmed reservation must be cancelled by purchaser, a credit on a future vacation will be issued only if VI can resell the accommodations, and if the cancellation is in writing 30 days prior to the vacation date.

V. DELAY OR IMPOSSIBILITY OF PERFORMANCE:

Where the delay or impossibility of performance due to circumstances beyond the control of VI occur (other than the act or omission by purchaser), VI will have the sole and absolute discretion to offer the following: (1) Provide an alternative accommodation the same year space available, (2) Provide additional accommodations in subsequent year or years provided said accommodation does not occur after the termination of this agreement, (3) Refund any fees paid by purchaser for the accommodations. Should the purchaser not use the vacation week allotted by this agreement, due to no act by VI, VI is not obligated to refund or provide alternative week.

VI. RIGHT OF ASSIGNMENT:

VI retains the absolute privilege to assign the rights and delegate any or all of the duties imposed upon VI by the terms of this agreement or to assign the entire agreement to others, provided that no such transfer shall affect any rights of the purchaser. (2) Purchaser shall have the privilege to assign their rights under this agreement with the prior written consent of VI, which shall not be unreasonably withheld. Purchaser shall not assign this agreement for a consideration that exceeds the consideration paid by the purchaser.

VII. BINDING NATURE AND MODIFICATION:

The terms and conditions of this agreement and any other document executed in conjunction herewith are intended to bind the parties' hereto and represent the entire agreement. The parties further agree this agreement may not be amended or modified other than in writing and duly executed by both parties, and that this agreement will be in full force and effect from date of its execution. Client acknowledges that this agreement is not subject to any "right of rescission" and may not be cancelled.

VIII. DISPUTE RESOLUTION

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.

VACATION INSPIRATIONS

ADDENDUM/EXCEPTION TO CONTRACT

THIS ADDENDUM/EXCEPTION IS PART OF THE MEMBERSHIP AGREEMENT

MEMBER NUMBER

The member number in the box above shall be entitled to the following exceptions for the Vacation Inspirations membership:

Annual dues frozen \$199 forever

(6) Friend/Family plans w/no dues & 5% back on cruises

Primary members 10% back on cruises

Client

Date

5/27/2021

Sales Representative

Date

5/27/2021

Client

Date

5/27/2021

Manager

Date

5/27/2021

Vacation Inspirations Membership Acknowledgment

This Acknowledgement is part of the Membership Agreement

I have purchased a Membership from Destination Travel, LLC who is a distributor of the Vacation Inspirations Membership. # Please answer YES or NO to the following:

1. Do you understand this is a purchase of a travel membership and travel related services, and that this agreement does not convey any interest in real estate or timeshare? 1) YES
2. Do you understand Vacation Inspirations may add new benefits at any time, and may replace current suppliers, or benefits as needed? 2) YES
3. Do you understand the membership you are purchasing may be sold or transferred by the member with prior written consent of Vacation Inspirations? Such consent will not be unreasonably withheld. If a transfer is made, the new member must pay annual membership fees. 3) YES
4. Do you understand the membership fee is \$199.00 per year? I/We understand this membership is a one year membership that may be renewed each year for the lifetime of the membership on the draft date. 4) YES
5. Do you understand when requesting condo reservations you must allow a minimum 90 day notice for prime season and a 180 day notice for holiday/special event weeks? All reservations are made on a wholesale, space available, first come basis and Vacation Inspirations makes no guarantees as to space availability in any particular resort or area. 5) YES
6. Do you understand this agreement will be in full force and in effect from the date of its execution and this agreement is not subject to any "right of rescission" under the laws of South Carolina? 6) YES
7. Do you understand all bookings made by Vacation Inspirations are booked at the lowest available rate and there are no discounts and/or rewards on individual airfare? 7) YES
8. Do you understand Vacation Inspirations website is a search engine only? As a member you must call, email or fax to receive your special member rates? 8) YES
9. Do you understand your savings on Cruises, All-Inclusives, Land/Air Packages, Tours, and Hotel stays come from direct discounts and/or rewards? 9) YES
10. Was your decision to make this purchase based on any type of high pressure sales tactics? 10) NO
11. Do you feel a monthly payment of \$ 0 will cause any financial hardship for you as the purchaser for the duration of the financing? 11) N/A
12. Do you understand all representations, either oral or written, that are not contained in the original written contract documents will not be upheld by Vacation Inspirations? (see addendum, if applicable) 12) YES
13. Do you understand only members are eligible for rewards, and do not apply to family, friends or guests of Vacation Inspirations members? All members have unlimited access to Hot Weeks (condo vacations booked 60 days or less), but do not receive rewards (see addendum, if applicable) 13) YES

Signed in South Carolina this

27

day of

May

2021

Purchaser

Purchaser

Sales Representative

Manager

VACATION INSPIRATIONS

AUTHORIZATION TO DRAFT DUES
THIS AUTHORIZATION IS PART OF THE MEMBERSHIP AGREEMENT

Date of Purchase

MEMBER NUMBER

METHOD OF PAYMENT

- ☐ VISA
☐ MASTERCARD
☐ AMERICAN EXPRESS
☐ DISCOVER

CARD NUMBER:

EXPIRATION DATE:

SECURITY CODE:

BILLING ADDRESS

NAME AS IT APPEARS ON CARD:

BILLING ADDRESS:

CITY: STATE ZIP CODE:

Member phone #

By signing below, I authorize Vacation Inspirations or its assigns, to collect payment of annual dues by means of a preauthorized debit in the amount of \$199 per year. The first payment will be drafted on or about the 1st of July, 2022 and will continue annually on or about the same date.

CHRISTOPHER SAWYER

Date

5/27/2021

Signature

Date

5/27/2021

Name as it appears on Card (Printed)

FROM OUR BOARD OF DIRECTORS

HELP US KEEP OUR PROMISE TO HELP YOU

Thank you and congratulations on your purchase of a Vacation Inspirations Membership. We are very excited to be able to provide you and your family with all your future vacation and travel needs.

We are here to help you maximize the benefits of your Membership. We want you to be happy with the decision you made to become part of our vacation and travel family. That is our goal and promise to you.

Please be assured that we have the experience, resources, and the team to provide you with the benefits of Membership that you have purchased. If you ever have any concerns or questions about your Membership, call us at the number below and give us the opportunity to work with you to answer your questions and resolve any issues that you might have. We promise to do our very best to make you happy. We need your help in order to keep our promise to you.

In return, you agree to contact us at the telephone number listed below prior to asserting any dispute with your credit card company or consumer agency in order to give us the opportunity to keep our promise. We truly appreciate the opportunity to serve you.

Thank you.

Telephone Number to call: (843) 708-8416
Or email to: membersliaison@vacationinspirations.com

[Redacted Signature]

Member Number

[Signature]

Member

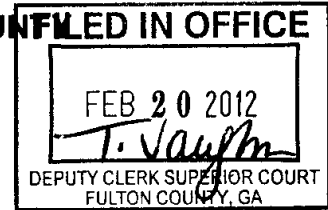
[Signature]

Member

2

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA



JOHN D. SOURS, ADMINISTRATOR
FAIR BUSINESS PRACTICES ACT,

COMPLAINANT,

v.

THE VACATION STATION, LLC,
D/B/A C.T.A VACATIONS,
RANDY GARDNER, INDIVIDUALLY
AND
JOSEPH SHIRLEY, INDIVIDUALLY

RESPONDENTS.

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CIVIL ACTION FILE

NO. 2012CV211716

ASSURANCE OF VOLUNTARY COMPLIANCE

Pursuant to O.C.G.A. § 10-1-390 *et seq.*, the Fair Business Practices Act ("FBPA"), John D. Sours, Administrator of the FBPA ("Administrator"), has initiated an investigation and examination of certain acts or practices of the Vacation Station, LLC, d/b/a C.T.A Vacations (hereinafter "the Company" or "Vacation Station"), Randy Gardner ("Gardner") individually and Joseph Shirley ("Shirley") individually (herein "Respondents"). Respondents are willing to enter into an Assurance of Voluntary Compliance, pursuant to O.C.G.A. § 10-1-402. It is therefore stipulated and agreed as follows:

I.

Respondents are now and have been for a period of time engaged in consumer transactions or consumer acts or practices in the conduct of trade or commerce in part or wholly within the State of Georgia, as defined in O.C.G.A. § 10-1-392.

II.

Respondent Vacation Station is a South Carolina corporation that sells travel club memberships in Georgia as C.T.A. Vacations. Its current Georgia place of business is at 425 E. River Street in Savannah, Georgia. Vacation Station also sold travel club memberships between December 2010 and August 2011 in Brunswick, Georgia and Atlanta, Georgia. Respondents Gardner and Shirley, along with their wives, Laura Gardner and Linda Shirley, are the owners of the two entities which own Vacation Station. Respondents Gardner and Shirley manage and direct the business activities of Respondent Vacation Station. Respondents may be served through their attorney, David Levine, Esq. at 6400 Powers Ferry Road, Suite 220, Atlanta, Georgia 30339.

III.

The parties acknowledge that jurisdiction is proper in the Superior Court of Fulton County.

IV.

The parties acknowledge that venue is proper in this Honorable Court.

V.

The Administrator alleges that the Respondents have used, are using, or are 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.* Specifically, the Administrator alleges that Respondents have committed the following acts or practices:

- A. You operated an unlicensed buying service or club in violation of the FBPA's general prohibition on unfair and deceptive practices, O.C.G.A. § 10-1-393(a) and

O.C.G.A. § 10-1-593, which requires buying services or buying clubs in the State of Georgia to be licensed with the Governor's Office of Consumer Protection ("OCP").

- B. You failed to maintain the bond required of a buying service or club in the State of Georgia in violation of O.C.G.A. §§ 10-1-393(a) and 10-1-593 which require a buying service or club in the State of Georgia to maintain a \$25,000 bond on each location it operates within the State of Georgia.
- C. Your promotional materials failed to contain your name and address in violation of O.C.G.A. §§ 10-1-393(a) and 10-1-393(b)(16)(B), which require that a promotion notice shall contain the name and address of the promoter and/or of the sponsor.
- D. You required consumers to pay money in order to receive their prizes in violation of O.C.G.A. §§ 10-1-393(a) and 10-1-393(b)(16)(C), which prohibits consumers paying any money to receive any prize, including, but not limited to, payments for service fees, mailing fees, or handling fees payable to the sponsor or seller to receive any prize.
- E. You failed to disclose to consumers that they will be required to attend a sales presentation on your written notice in violation of O.C.G.A. §§ 10-1-393(a) and 10-1-393(b)(16)(F), which requires that any requirement or invitation to attend a sales presentation must be conspicuously disclosed to consumers in the written notice.
- F. You failed to notify consumers of the additional fees associated with your prizes, in violation of O.C.G.A. §§ 10-1-393(a) and 10-1-393(b)(16)(G), which require

that prize promotions must disclose in writing any additional fees necessary to receive the prize, in each place the prize is listed.

- G. Your promotional notice failed to conspicuously identify on its face that it is a commercial solicitation in violation of §§ 10-1-393(a) and 10-1-393(b)(27) which requires that any notice mailed to consumers regarding winning or receiving any prize in a promotion must conspicuously identify on its face that it is a commercial solicitation.
- H. You failed to allow consumers to cancel their contracts and/or refuse to honor consumers' refund requests in, violation of O.C.G.A. §§ 10-1-393(a) and 10-1-393(b)(16)(P), which provides that consumers may void within the ten day period following the receipt of their prize any promotion contracts that violate the FBPA. This is also a violation of O.C.G.A. § 10-1-597, which provide that consumers who join a buying service or club may cancel their membership by giving written notice of cancellation any time before midnight of the third business day following the date on which membership was purchased.

VI.

Respondents deny these allegations. However, pursuant to O.C.G.A. § 10-1-402, which provides that an assurance of voluntary compliance shall not be considered an admission of violation of the FBPA and the Georgia's Buying Club Services Act ("BSA") O.C.G.A. § 10-1-590 *et seq.* for any purpose, Respondents hereby enter into this Assurance of Voluntary Compliance ("Assurance") in order to resolve this matter without the necessity of formal legal action.

VII.

By accepting this Assurance, the Administrator agrees not to request the initiation of legal action against Respondents concerning the matters covered herein, subject, however, to the provisions of O.C.G.A. § 10-1-402.

VIII.

Upon breach of any of the provisions of this Assurance by the Respondents, the Administrator reserves the right to pursue formal legal action against the Respondents concerning the subject matter of this Assurance.

IX.

Respondents hereby acknowledge the receipt of a copy of the FBPA and the BSA. Respondents further acknowledge that they have knowledge of these laws and their provisions.

X.

Respondents further agree that, effective with the date of execution of this Assurance, Respondents, its officers, agents, employees or representatives, servants, and all persons acting in concert with the Respondents shall:

- A. Make every reasonable effort to act in full compliance with the FBPA;
- B. Bring Vacation Station in full compliance with the BSA, including but not limited to, by;
 - 1. Applying, within thirty (30) days from the execution of this Assurance, for a license for all Vacation Station's Georgia locations from the Administrator of the Governor's Office of Consumer Protection ("OCP") in compliance with O.C.G.A. §§ 10-1-592, 10-1-593 and 10-1-594;

2. Obtaining a \$25,000 bond with a surety company authorized to do business in this state payable to the Governor of Georgia for all Vacation Station's Georgia locations in compliance with O.C.G.A. § 10-1-593;
3. Submitting, within three (3) days of the date the execution of this Assurance, all contracts of membership to be used by Respondents to the Administrator of OCP for their approval prior to use by Respondents in compliance with O.C.G.A. §§ 10-1-596 ~~et seq~~;
4. Ensuring that all Vacation Station's contracts of membership contain notices of cancellation which clearly and conspicuously disclose in boldface type of a minimum size of fourteen (14) points the consumer's right to cancel the contract by the midnight of the third business after the consumer signs the contract in compliance with O.C.G.A. § 10-1-598;
5. Providing to all consumers who cancel their contracts under the provisions of O.C.G.A. § 10-1-598 a total refund of their monies within ten (10) days of the date of the consumer's cancellation in compliance with O.C.G.A. § 10-1-598;
6. Ensuring that all Vacation Station's contracts of membership are valid for a term of eighteen (18) months or less from the date upon which the contract is signed and disclose the duration of the contract clearly and conspicuously in boldface type of a minimum size of fourteen (14) points in compliance with O.C.G.A. § 10-1-599;
7. Maintaining all consumer records in compliance with O.C.G.A. § 10-1-600;

C. Refrain from misrepresenting any aspect of the cost and nature of Vacation Station's

services including but not limited to:

1. Misrepresenting that your services and/or contracts are “lifetime” and/or “inheritable” or may be “willed” to your children at any sales presentations or promotional materials; and
2. Misrepresenting your cancellation and/or refund policy in violation of O.C.G.A. §10-1-393(a).

- D. Refrain from misrepresenting and/or causing confusion or actual misunderstanding as to the source, sponsorship, approval or certification of your services by using the name, trademark, service mark and/or logo of any airline company, travel company, cruise company and/or hotel company in any advertisements, sales materials, promotion notices and sales presentations.
- E. Respondents further represent that no Georgia Vacation Station location currently utilizes promotion or prize notice or engages in promotions as defined by O.C.G.A. §§ 10-1-393(b)16. Respondents further agree that in the event that Vacation Station elects to use any promotions in the future, it will notify the Administrator of OCP and submit and obtain the Administrator’s approval of any promotion or prize notices as defined by the FBPA sixty (60) days prior to mailing of any promotion or prize notices.

XI.

As evidence of good faith efforts to comply with and carry out the terms of this Assurance, and in consideration of acceptance by the Administrator of this Assurance, Respondents further acknowledge and agree that each will observe the following policies and procedures:

- A. Simultaneous with the execution of this Assurance Respondents shall comply with the

following provisions:

1. Respondents shall provide a copy of this Order to Laura Gardner and Linda Shirley. Respondents shall further, within thirty (30) days from the execution of this Order, provide to OCP a notice of acknowledgement of receipt of this Order from Laura Gardner and Linda Shirley and containing their signatures. All notices required by this subparagraph shall be sent by mail to Shibani Bakshi, Staff Attorney, Georgia Governor's Office of Consumer Affairs, 2 Martin Luther King, Jr. Drive, SE, Suite 356, Atlanta, Georgia 30334.
2. Respondents, and their successors and assigns, shall notify the Administrator at least thirty (30) days prior to any change that may affect compliance obligations arising under this Assurance, including but not limited to any change in ownership interest of Respondent Vacation Station, the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company or corporation; the proposed filing of a bankruptcy petition; or a change in the name(s) or alias(es) of Respondent Vacation Station. Provided, however, that, with respect to any proposed change about which the Respondents learn less than thirty (30) days prior to the date such action is to take place, Respondents shall notify the Administrator as soon as is practicable after obtaining such knowledge. All notices required by this subparagraph shall be sent by mail to Shibani Bakshi, Staff Attorney, Georgia Governor's Office of Consumer

Affairs, 2 Martin Luther King, Jr. Drive, SE, Suite 356, Atlanta, Georgia
30334.

3. Consumer complaints

- a) Within thirty (30) days of the execution date of this Assurance, Respondents shall establish policies that are designed to ensure timely responses to consumer complaints, in compliance with this Assurance; and;
- b) For a period of twelve (12) months following the date of execution of this Assurance, Respondents shall create and retain records of all requests for refunds. The records shall be in the form of a log and must identify each consumer by name, address (including state), and telephone number; state the date on which the consumer's refund request was received by the Respondents; state the date of the refund request; and state the dates and details of responses to each refund request by either of the Respondents, or the Respondents' employees and/or agents; and the results of those responses. Respondents shall produce this log to the OCP at the quarterly intervals outlined below. Respondents understand and agree that OCP may, in the interim and any time thereafter, require that this log be produced for inspection and review by the Administrator or his designees; upon such a request by OCP, Respondents must produce the log to this Office no later than five (5) business days after Respondents receive the request. Failure to keep these records, or to timely produce them to OCP, will place

Respondents in default of this Assurance. The reports must be provided to OCP on a quarterly basis as follows:

January 2012 -March 2012	May 1, 2012
April 2012- June 2012	August 1, 2012
July 2012 – September 2012	November 1, 2012
October 2012- December 2012	February 1, 2013

4. Sales practices and materials

a) Following the execution date of this Assurance, Respondents will update language in sales receipts, brochures and training manuals and/or policies as necessary to reflect any alterations made as a result of the execution of this Assurance. Copies of these updated materials are to be delivered to OCP within sixty (60) days of the execution of this Assurance.

b) In connection with the training manual and/or policies instituted, established and/or used by Vacation Station, Respondents will ensure that all future employees, agents, and/or independent contractors who may engage in the solicitation and/or sale of goods and/or services to consumers receive a copy of the training manual and/or policies, which shall contain a statement of the applicable laws and regulations, as well as the requirement that all sales presentations comply with all aspects of those applicable laws and regulations

c) Ensure that all current and future employees, agents, and/or independent contractors sign a receipt acknowledging that they have

read the training manual and/or policies and will abide by them as a condition of their continued performance of services for the Company. Copies of these acknowledgements shall be maintained by the Company and will be made available for inspection by the Administrator or his designee upon request.

5. Monitoring

- a) For a period of twelve (12) months after the execution of this Assurance, OCP reserves the right to test shop Respondents' travel services sales presentations for the purpose of confirming compliance with this Assurance and state law and the test shoppers are not required to disclose that they are representatives of OCP when making contact with Respondents or their representatives;
- b) OCP may record any and all aspects of such solicitations or visits in audio or video form without notice to Respondents, and any sale that is commenced by a test shopper shall be voided by Respondents at the conclusion of the sale upon notification that said transaction was test shopping operation conducted by OCP; and
- c) Respondents will respond in a reasonably timely manner, but in no case to exceed five (5) business days to all inquiries made by OCP regarding the monitoring of Respondents' compliance with the applicable laws and advertising guidelines.

XII.

Respondents shall pay the following, simultaneous with the execution of this Assurance:

- A. A filing fee in the amount of **ONE HUNDRED FOUR AND 50/100 DOLLARS (\$104.50)** which shall be paid by certified check or money order made payable to “Clerk, Superior Court of Fulton County” and which shall be delivered to OCP.
- B. A civil penalty in the amount of **ONE HUNDRED THOUSAND AND 00/100 DOLLARS (\$100,00.00)**. The civil penalty shall be paid as following:
1. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before February 15, 2012;
 2. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before March 15, 2012;
 3. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before April 15, 2012;
 4. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before May 15, 2012;
 5. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before June 15, 2012;
 6. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before July 15, 2012;
 7. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before August 15, 2012;
 8. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before September 15, 2012;
 9. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before October 15, 2012;

10. Ten Thousand and 00/100 dollars (\$10,000) to be paid on or before November 15, 2012;

Each payment shall be made by cashier's check or certified money order made payable to the "Governor's Office of Consumer Protection." In the event, Respondents fail to make any of the payments by their due date, any and all remaining payments of the civil penalty as shall become immediately due and owing to the Administrator

- C. Restitution in the amount of **EIGHTY SEVEN THOUSAND TWO HUNDRED SIXTY FIVE AND 29/100 DOLLARS (\$87,265.29):**

1. Payment shall be made directly to the consumers identified in Exhibit "A", within thirty (30) days of execution of this Order, attached hereto and in the amounts set forth therein. Respondents shall send such payments in any manner that can be traced, including but not limited to, by certified mail or with delivery confirmation. . For consumers in Exhibit "A" who have received restitution from Respondent Vacation Station prior to the execution of this Order, Respondents will provide proof of restitution to these consumers to OCP within thirty (30) days of execution of this Order.
2. Respondents shall send or cause to be sent a letter to each consumer listed in Exhibit "A" notifying that consumer of the restitution (s)he will receive and that their contract with Vacation Station has been cancelled. A copy of each letter shall be sent to OCP by no later than thirty (30) days after mailing.
3. Copies of each cancelled check showing payment to each consumer identified in Exhibit "A" shall be sent to OCP by no later than April 30,

2012. If a given restitution check is not cancelled on or before April 30, 2012, then a copy of the document(s) that reflect the traceable mailing method outlined in Paragraph XII(C)(1), accompanying a copy of the restitution check may be sent to OCP in lieu of a copy of a cancelled check. For consumers listed in Exhibit "A" who received credit card chargebacks from their credit card company or whose credit cards payments to Vacation Station were reversed, Respondents shall provide a copy of the undisputed or uncontested reversal of all credit cards to OCP by no later than April 30, 2012.

4. If any payment to an affected consumer is returned as undeliverable, Respondents shall take or cause reasonable steps to be taken to locate that affected consumer. If, thereafter, the affected consumer still is not located by June 1, 2012, any funds payable under this Paragraph or due to such affected consumer whose last known address is in the State of Georgia but not deliverable, pursuant to this Assurance, shall be delivered to the Georgia Commissioner of Revenue pursuant to the provisions of the "Disposition of Unclaimed Property Act," O.C.G.A. § 44-12-190, *et seq.*, to be processed as set forth in that Act. Respondents shall provide whatever available information is requested by the Commissioner to handle the funds as unclaimed property. Respondents shall deliver a report to OCP by July 1, 2012, which details the amount that was delivered to the Commissioner for treatment as unclaimed property under the above referenced statute.

5. In the event, Respondents fail to make any payments as described herein or fail to timely provide proof of any such payments to OCP, all unpaid amounts shall become immediately due and owing to the Administrator to be distributed to those consumers who have not yet received the restitution called for herein. If the Administrator receives payment of less than the total that remains due hereunder, the payment shall be distributed to the remainder of consumers in the order and amount solely within the Administrator's discretion.

XIII.

Respondents shall provide compensatory relief to all consumers, excluding those identified in Exhibit "A" and those who cancelled their membership contracts with Vacation Station and/or accepted refunds from Company prior to the date of execution of this Assurance, according to the terms set forth in this Paragraph:

- A. Respondents will cancel the membership contracts and provide a full refund of all monies paid by consumers to Vacation Station to any consumers:
 1. Who entered into a membership contract within the state of Georgia with Vacation Station in the time period between December 1, 2010 and the date of execution of this Assurance,
 2. Who did not purchase from Vacation Station any travel services, including, but limited to airline tickets, cruises, hotel rooms and vacation packages in the time period between the date the consumers entered a membership contract with Vacation Services and the date of execution of this Assurance;

3. Who request a refund or cancellation of their membership contract with Vacation Station during the six (6) month time period after the execution date of this Assurance; and

4. Who submit their refund or cancellation requests in writing to Vacation Station or OCP.

B. Respondents will cancel the membership contracts of any consumers and provide a 50% refund of the full membership contract price to any consumers:

1. Who entered into a membership contract within the state of Georgia with Vacation Station in the time period between December 1, 2010 and the date of execution of this Assurance,

2. Who purchased from Vacation Services any travel services, including, but limited to airline tickets, cruises, hotel rooms and vacation packages in the time period between the date the consumers entered a membership contract with Vacation Services and the date of execution of this Assurance; and

3. Who request a refund or cancellation of their membership contract with Vacation Station or OCP during the six (6) month time period after the execution date of this Assurance; and

4. Who submit their refund or cancellation requests in writing to Vacation Station or OCP.

XIV.

The parties agree that the obligations imposed in Paragraph XII represent an administrative resolution and the agreed upon obligation of Respondents. Therefore, the

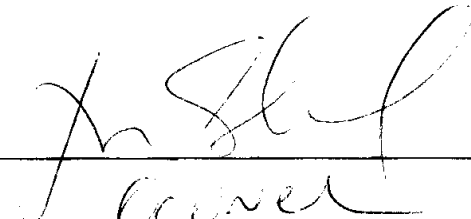
obligations are not subject to be discharged or set aside in any proceeding filed or held pursuant to Title 11 of the United States Code.

XV.

This Assurance, when accepted by the Administrator, will bind the Respondents and Respondents successors and/or assigns who take with notice of the terms and provisions of this Assurance. Respondents hereby agree to give notice of this Assurance to Respondents successors and/or assigns.

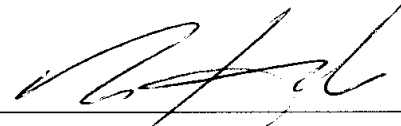
This Assurance, made and entered into by and between the undersigned parties, is effective upon the date of acceptance by the Administrator.

Proposed, consented and agreed to by:

By: 

Title

SIGNATURES CONTINUED ON FOLLOWING PAGE

By: 
Olwen
Title
INDIVIDUALLY AND ON BEHALF OF
THE VACATION STATION, LLC.

Sworn to and subscribed before me, this
30th day of January, 2012.


NOTARY PUBLIC
My commission expires: _____

My Commission Expires August 28, 2016

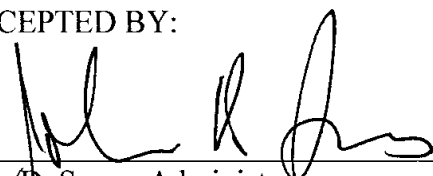
ACCEPTED BY:

John D. Sours, Administrator
Date: 15 February 2012

Exhibit A

	Consumer	Member number or contact information	Refund
1.	Alan and Christine Reddick	51736	\$4394.00
2.	Arthur and Jeannie Feinstein	80797-A	\$5593.00
3.	Coleman and Annette Green	51754	\$2995.00
4.	Gary and Shawndra Russell	51569	\$3500.00
5.	Hederick and Princess Barlay	80887A	\$600.00
6.	Hussian and Valerie Kareem	80973A	\$2995.00
7.	James and Edith Houg	51747	\$1124.79
8.	James and Patricia Mitchell	90176LR	\$6593.00
9.	Joseph and Linda Dotter	51552	\$3495.00
10.	Maarif and Reema Husgrin	80,936-A	\$1688.50
11.	Neil and Yvette Sperry	51571	\$2000.00
12.	Norman and Ruby Zanders	90207LR	\$5593.00
13.	Ntungwa and Arnetia Maasha	51676	\$2495.00
14.	Ronald and Janice Stover	51737-LR	\$3500.00
15.	Russell and Paula Denton	90165LR	\$3995.00
16.	Russell and Sharon Clostio	90206LR	\$5593.00
17.	Stephen and Judy Davis	51526	\$2500.00
18.	Thomas and Jackie Horton	51659	\$2995.00
19.	Tom and Anne Peckerd	51646	\$6394.00
20.	Wade and Dana Taylor	51602	\$1675.00
21.	Robert Junko	43551	\$625.00
22.	Angelia Hills	77 Perry Drive Midway, Georgia 31320 angiehills@live.com	\$4994.00
23.	Robert Fuller	(912)312-2393 185 Reese Drive Richmond Hill, Georgia 31324 Macarter85@bellsouth.net	\$1000.00
24.	Cindy Vodila	274 Kirk Lake Road Little Mountain, South Carolina 29075 vodilaharley@yahoo.	\$1141.00
25.	Jimmy Rice	90331LR	\$5593.00
26.	Gloria Harracksingh	80796A	\$3694.00

Total: \$87,265.29



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AG PAXTON REACHES \$74K AGREEMENT WITH SAN ANTONIO-BASED BUSINESS

June 22, 2017 | Press Release

AG Paxton Reaches \$74K Agreement with San Antonio-Based Business

SHARE THIS:

Texas Attorney General Ken Paxton today reached an agreement with Joseph Brandon Shirley and Randy Lee Gardner over allegations that their travel service operations violated the Texas Deceptive Trade Practices Act and other Texas statutes. The State alleged that Respondents offered travel promotions that were unavailable in order to get consumers to purchase memberships, misrepresented the savings promised to consumers for services, and refused requests to cancel memberships, among several other complaints.

Businesses named in the agreement are Exciting Travel Destinations LLC, Alamo Guest Services, and Vacation Inspirations, LLC. All three entities operated from offices in San Antonio. Respondents have agreed to pay \$74,995 in consumer restitution, civil penalties, and attorneys' fees in favor of the State of Texas.

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