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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Appellate Case No.: 2021-000977

David Mack Johnson, Sr.....Respondent,

-v-

Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, Brightest Solar, Inc., Sunlight Financial, LLC, Cross River Bank, Great America Services Corporation, and Robert Dodge, Defendants,

Of Whom, Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, Brightest Solar, Inc., Sunlight Financial, LLC, Cross River Bank, and Robert Dodge are the.....Appellants.

RESPONDENT’S MOTION TO DISMISS

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ATTORNEYS FOR RESPONDENT

Under Rule 203(b)(1), SCACR, an appellant is required to serve his notice of appeal within thirty (30) days after receipt of written notice of entry of the order or judgment. However, the time for appeal will be stayed should the appellant make a timely motion to alter or amend the judgment pursuant to Rule 59(e), SCRCF. In this case, Appellants failed to timely make a motion under Rule 59(e), SCRCF, and as a result the time for filing a notice of appeal was not stayed. Appellants were required to file their notice of appeal within thirty days of the Circuit Court's January 8, 2021 Order, but failed to do so until September 7, 2021. Thus, this Court does not possess jurisdiction to review this appeal, necessitating its dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

On or about October 9, 2017, Respondent David Mack Johnson, Sr. contracted with Appellants to purchase a solar panel system for his home. (Ex. A, Am. Compl. ¶ 6). At the time Johnson agreed to purchase the system, it was allegedly represented to him that it would pay for itself in ten years or less and that it would outproduce the daily energy needs for his home, amongst other claims for the system's effectiveness. (*Id.*). Some seven months later, on May 21, 2018, Johnson and Appellants signed a "Solar Installation Agreement – Loan". (Ex. B, Mot. to Compel-Ex. 1). The Installation Agreement also contains an Arbitration Agreement. Following the parties' execution of the Installation Agreement, the system was installed on the roof of Johnson's home in Islandton, South Carolina. (Ex. A, Am. Compl. ¶ 11). The system did not perform as initially represented by Appellants and never reached the energy production levels promised by Appellants

in the pre-installation negotiations. (*Id.*). Johnson filed this action on October 8, 2020. (*See generally* Ex. C, Compl.).

On December 16, 2020, Appellants Palmetto Solar, LLC and Sunlight Financial, LLC moved to compel arbitration and to dismiss or stay under the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 3-4, the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 through -240, and Rule 12 of the South Carolina Rules of Civil Procedure.¹ (Ex. B, Mot. Compel Arbitration). The Circuit Court heard the Appellant’s Motion to Compel on January 6, 2021, and in an Order filed January 8, 2021, the Circuit Court denied Appellant’s motion as being premature, effectively postponing the request for arbitration. (Ex. D, Order, Jan. 8, 2021).

Eleven days later, on January 19, 2021, Appellants Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, Sunlight Financial, LLC, Brightest Solar, Inc., and Robert Dodge filed untimely Motions to Reconsider the Circuit Court’s January 8, 2021 Order. (Ex. E, Mots. to Reconsider). These motions were filed 11 days after electronic notification of the Order and in violation of Rule 59(e), SCRCF. (Ex. F, Email notification). Additionally, there is no evidence that the Circuit Court was ever provided a copy of Brightest Solar, Inc. and Robert Dodge’s motion as required by Rule 59(g), SCRCF. On June 28, 2021, the Circuit Court heard the Motions to Reconsider.

¹ Appellants Brightest Solar, Inc. and Robert Dodge joined in the motion by way of notice filed with the Circuit Court on December 21, 2020.

On August 12, 2021, the Circuit Court denied Appellants' Motions to Reconsider, citing authorities for the proposition that a motion for reconsideration is not a vehicle to re-litigate previously raised issues. (Ex. G, Order, Aug. 12, 2021). Appellants filed their Joint Notice of Appeal on September 7, 2021. (Ex. H, Notice of Appeal).

ARGUMENT

Rule 203, SCACR, states that

A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. **When a timely motion for judgment n.o.v. (Rule 50, SCRCR), motion to alter or amend the judgment (Rules 52 and 59, SCRCR), or a motion for a new trial (Rule 59, SCRCR) has been made, the time for appeal for all parties shall be stayed** and shall run from receipt of written notice of entry of the order granting or denying such motion.

Rule 203(b)(1), SCACR. "The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). Appellate courts do not obtain jurisdiction over a matter until after timely service of the notice of appeal. *See* Rule 205, SCACR. Lack of subject matter jurisdiction cannot be waived and must be taken notice of by the Court. *Johnson v. S.C. Dept. of Probation, Parole, and Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007).

"A motion under Rule 59(e) is timely if it is 'served not later than 10 days after receipt of written notice of the entry of the order.'" *Coward Hund Constr. Co. v.*


Ball Corp., 336 S.C. 1, 3, 518 S.E.2d 56, 57 (Ct. App. 1999). The ten-day deadline in Rule 59(e) is an absolute deadline. *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 433 (2018). An email from the court providing notice of entry of an order or judgment serves as written notice. *See Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 422 S.C. 211, 217, 810 S.E.2d 856, 859 (2018). Thus, if an appellant fails to file a Rule 59 motion within ten days of an email from the court notifying the parties of entry of an order, the time for serving a notice of appeal begins to immediately run from the date of the email. *See Kemp v. Kemp*, 2012–UP–200 (S.C. Ct. App. dated March 21, 2012).

Appellants clearly did not file their Motions to Reconsider within ten days of the Circuit Court’s Order denying the Motion to Compel Arbitration. Therefore, the thirty-day deadline for serving their Notice of Appeal began to run on January 8, 2021, as it was not stayed by the untimely Motions to Reconsider. Appellants did not file their Joint Notice of Appeal until September 7, 2021. Therefore, the Court does not have jurisdiction over this appeal. While Appellants’ failure to timely file their Motions to Reconsider was not raised to the Circuit Court, and may appear to have been waived, the failure deprives this Court of subject matter jurisdiction, cannot be waived, and must be considered by the Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court grant his Motion and dismiss this appeal for lack of subject matter jurisdiction.

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ATTORNEYS FOR THE RESPONDENT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF COLLETON)
)
 DAVID MACK JOHNSON SR.,)
)
 Plaintiff,)
)
 v.)
)
 PALMETTO SOLAR, LLC; PALMETTO)
 SOUTH CAROLINA SOLAR I, LLC,)
 BRIGHTEST SOLAR, INC., SUNLIGHT)
 FINANCIAL, LLC, CROSS RIVER BANK,)
 GREAT AMERICA SERVICES)
 CORPORATION AND ROBERT DODGE,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO.: 2020CP1500604

AMENDED SUMMONS
(Jury Trial Requested)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at P.O. Box 457Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH
 & DETRICK, P.A.

BY: s/ Mark D. Ball
 Mark D. Ball
 SC Bar# 12894
 P.O. Box 457
 Hampton, SC 29924
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ATTORNEYS FOR PLAINTIFF

July 27, 2021
 Hampton, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF COLLETON)	CIVIL ACTION NO.: 2020-CP-15-00604
)	
David Mack Johnson Sr.,)	
)	
Plaintiff,)	
)	
v.)	<u>AMENDED COMPLAINT</u>
)	<i>(Jury Trial Requested)</i>
)	
Palmetto Solar, LLC; Palmetto South Carolina)	
Solar I, LLC, Brightest Solar, Inc., Sunlight)	
Financial, LLC, Cross River Bank, Great)	
America Services Corporation and Robert)	
Dodge,)	
)	
Defendants.)	

The Plaintiff alleges:

1. Plaintiff, David Mack Johnson, Sr., is a citizen and resident of Colleton County, South Carolina. The subject matter of the is lawsuit involves real property and/or fixtures attached to real property that is situated in Colleton County, South Carolina.
2. Upon information and belief, Defendant, Palmetto Solar, LLC, is a domestic corporation organized and existing under the laws of a state other than South Carolina but conducts business and maintains an office and an agent for the transaction of business in South Carolina.
3. Upon information and belief, Defendant, Palmetto South Carolina Solar I, LLC, is a domestic corporation organized and existing under the laws of a state other than South Carolina but conducts business and maintains an office and an agent for the transaction of business in South Carolina.
4. Upon information and belief, Defendant, Brightest Solar, Inc., is a domestic corporation organized and existing under the laws of South Carolina and conducts business and maintains an office and an agent for the transaction of business in South Carolina. Upon information and belief, Defendant, Robert Dodge, is a citizen and resident of Charleston County, South Carolina and is the registered agent

for Brightest Solar, Inc.; that at all times pertinent to this complaint, the defendant, Dodge, was acting within the course and scope of his agency with one or more of the other Defendants;

5. Upon information and belief, Defendant, Sunlight Financial, LLC, Cross River Bank and Great America Services Corporation are corporations organized and existing under the laws of a state other than South Carolina but are conducting regular business within the State of in South Carolina. The Defendants are believed to be the financiers of the solar system purchased by the Plaintiff and are part of a common scheme with the other defendants;

FACTS

6. On or about October 9, 2017, the Plaintiff contracted with the Defendants to install and finance a solar panel system (Hereinafter referred to as "System") on his home; that at the time the Plaintiff agreed to purchase the System, certain representations were made by some or all of the Defendants. The representations made by each individual Defendant included some or all of the following representations:

- a. The System would pay for itself in ten (10) years or less;
- b. The System would produce at least 110% of the daily energy need for the Plaintiff's house;
- c. The Defendants would install the System in compliance with all applicable building codes, methods and customs;
- d. The Defendants would perform all work in a workman like manner with care to make the installation as unnoticeable as possible;
- e. The Defendants agreed to perform other work so as to make the System compatible and work in connection with a battery storage system, install various outlets, make the System compatible with the use of a generator as a backup system and install remote monitoring.

7. At the time the Plaintiff contracted for the System, the Defendants were acting in concert with each other and collectively as a joint enterprise in advertisement, representation, sale, installation and

financing the solar system; that without the participation and representations of each of the Defendants, the sale to the Plaintiff would not have occurred.

FOR THE FIRST CAUSE OF ACTION
(Breach of Warranty)

8. This matter is brought under the statutory and common law of the State of South Carolina.

9. The Plaintiff purchased the System from the local dealer, Brightest Solar, Inc., and Robert Dodge; Upon information and belief, Brightest Solar, Inc. and Robert Dodge engaged Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, and others to construct and install the System; that financing for the System was procured by the Defendants through Sunlight Financial Services, LLC as purchase money financing;

10. At the time the System was purchased, the Defendants warranted by expressed and implied warranties that they would design, install and deliver a system that was free from defects in material and workmanship; that the System would be installed with the “add-on’s” negotiated for by the Plaintiff in a timely manner to incorporate the additional needs of the Plaintiff; that the System would produce the amount of power necessary to operate the Plaintiff’s home and he would be capable of monitoring the System from mobile devices.

11. That the System was defective and/or never properly installed; that after being operated for several months, it became apparent the System would or could not produce the level power necessary to supply the Plaintiff’s home; that the System failed to reach energy production levels necessary for it to pay for itself in less than 10 years as represented by the Defendants; that the Defendants failed to deliver the “add-on” items contracted for as well as failed to deliver and install components that were capable of allowing battery backup or allow remote monitoring; that the Defendants failed to deliver a System that meets the representations, requirements and needs set forth prior to the Plaintiff’s agreement to purchase and finance the System; that the Defendants have breached their warranty and failed to deliver the System they represented, contracted, warranted and attempted to install.

12. That by reason of the Defendants breach of their expressed and implied warranties and representations, the Plaintiff is in possession of a useless System that is not capable of meeting his needs

and expectations nor being utilized for the purpose it was sold.

FOR A SECOND CAUSE OF ACTION

(Fraud)

13. The Plaintiff realleges and incorporates the above allegations as if rewritten.

14. That during the negotiation and purchase process, the Defendants specific representations to the Plaintiff that the System would produce energy in excess of a 110% of the Plaintiff's normal household energy load and pay for itself in less than 10 years. Additionally, the Defendants represented the Plaintiff would be eligible for tax credits and other subsidies from the State and Federal governments which would contribute to the repayment of the System; that the Defendants promised and contracted for certain upgrades to be installed to the System as well as delivering a System that was capable of supporting a battery backup and had remote monitoring.

Many of these representations were not true in that the System has not been capable of producing the quantity of energy promised; that the System as configured is not capable of supporting a battery backup system nor being remotely monitored; that the materials and components used in the system are not capable of generating or delivering the level power represented to run the Plaintiff's home or pay for the System in a 10-year period.

15. At the time the representations were made by the Defendants, the Defendants knew or should have known the representations were plainly false or were speculative at best; that the representations were made to induce the Plaintiff enter into an agreement to purchase and finance the solar system offered for sale by the Defendants; that the Defendants were inter-reliant on each other to make their sales scheme work so that each defendant relied on the others representations to potential customers for business.

16. The Defendants, representations were false and misleading as Defendants failed to install all of the components to the System, that the tax credits were not available, and the System failed to generate enough energy to run the Plaintiff's home and therefore will never pay for itself; that the Plaintiff attempted on several occasions to discuss the above issues with the available Defendants to no avail;

17. That the representations made by Defendants were material to the Plaintiff in that the absence of such representations, he would not have entered into the agreement with the Defendants. The Plaintiff did not know the representations were false or were grounded on unproven speculation of the Defendants. That the Plaintiff had a right to rely on the representations.

18. That the representations by Defendants were fraudulent and were intended to conceal the truth from the Plaintiff who was reliant on the Defendants expertise and representations.

19. That the Plaintiff has suffered damages as a result of the misrepresentations by the Defendants.

FOR A THRID CASUE OF ACTION
(Breach of Contract)

20. The allegations above are incorporated as if rewritten.

21. The Plaintiff entered into an agreement for the purchase of a solar system that would generate enough energy to run his home as well as allow his to bank energy credit with the local power company; that according to the Defendants, the System as installed, would generate enough energy to pay for the System in 10 years or less. As part and parcel of this contract to purchase the System, the Defendants were to include items to allow the Plaintiff to better utilize the System for his power needs; that the Defendants also failed to deliver a System capable of utilizing a battery backup and remote monitoring; that the System as delivered and installed, is not capable of delivering the power levels and

needs as contracted for due to a lack of engineering, failure to supply the proper materials and components and failing to install the equipment contacted for by the Plaintiff.

22. In addition to the installation issues, the Defendants sold, installed and financed a solar system that was to generate more than 110% of the Plaintiff's daily energy needs which would allow for the Plaintiff to earn credit with the local power company for energy consumption when the system was not in operation. The System has not been capable of generating such quantities of power and has cause to the Plaintiff to pay for two competing sources of energy and a much high household cost.

23. In addition to the above breached promises, the Defendants also represented to the Plaintiff that he would be eligible for tax credits and/or payments from the State and Federal governments by installing this System. These representations were not true, and the Plaintiff did not receive such payments.

24. The Plaintiff attempted to discuss the failures of the System and after a lack of effort by the Defendants instituted this action. that the specifications, inclusion of all components and modifications regarding the System as well as the representations made by the Defendants were important and material to the Plaintiff; that without the inclusion of such items, he would not have entered into an agreement with the Defendants to purchase the System.

25. That the Defendants have breached their contract with the Plaintiff by failing to deliver a System as contracted for and represented; that as a result of the Defendants breach, the Plaintiff has suffered significant damages and losses.

WHEREFORE, Plaintiff prays for judgment against the Defendants for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

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ATTORNEYS FOR PLAINTIFF

July 27, 2020

agreements according to their terms” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted).

2. The transaction at issue in this case involves interstate commerce. *See Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 208 n.2, 731 S.E.2d 324, 326 n.2 (Ct. App. 2012).

3. Plaintiff, Palmetto, and Sunlight are bound by a valid, bilateral arbitration agreement, a copy of which is attached as **Exhibit 1**. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001); *see also Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 234–35 (2013). Both Palmetto and Sunlight may enforce the arbitration agreement here. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009); *American Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006).

4. Plaintiff’s claims bear a significant relationship to the contract that contains the arbitration agreement. *See Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117; *Masters*, 431 S.C. at 38 n.7, 846 S.E.2d at 898 n.7.

5. As a result, the claims asserted against Palmetto and Sunlight should be compelled to arbitration and dismissed in this Court. *See Cox v. Assisted Living Concepts, Inc.*, No. CIV.A. 6:13-00747, 2014 WL 1094394, at *3–4, 7 (D.S.C. Mar. 18, 2014) (granting motion to dismiss and compel arbitration based on an analogous rule, Fed. R. Civ. P. 12(b)(1), and holding that “[w]here all claims pled by a plaintiff are subject to an arbitration agreement, the court should dismiss the claims rather than merely stay further judicial proceedings”).

6. Palmetto and Sunlight file this motion in lieu of filing an answer. *See* Rule 12(a), SCRCF (stating that when a defendant files a Rule 12(b) motion, its deadline for filing an answer is tolled until that motion is decided); *see also Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606,

608–09, 571 S.E.2d 711, 713 (Ct. App. 2002) (explaining that defendants filed motion to compel arbitration in lieu of filing an answer to plaintiff’s complaint).

Conclusion

For the reasons set forth above and as detailed in any memorandum of law to be filed in support of the motion, Palmetto and Sunlight move to compel arbitration of Plaintiff’s claims against them. As a result, they also move to dismiss with prejudice or stay those claims.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

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*Attorney for Palmetto Solar, LLC, successor by merger with
Palmetto South Carolina Solar I, LLC, and Sunlight Financial,
LLC*

Columbia, South Carolina
December 16, 2020

Exhibit 1

Solar Installation Agreement

SOLAR INSTALLATION AGREEMENT – LOAN

South Carolina Sales Only: THIS AGREEMENT IS SUBJECT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

Installer License Number(s): G119503/M114156

This INSTALLATION AGREEMENT (the “**Installation Agreement**”) is entered into by and between David Johnson (“**You**,” “**Your**” or “**Homeowner**”) and Palmetto South Carolina Solar I, LLC, whose address is 701 E. Bay Street, Suite 413, Charleston, SC 29403 (“**Installer**”) as of 5/21/2018 .

1. Installation. You and Installer acknowledge and agree that the solar panel system described on **Schedule 1** attached (the “**System**”) to be installed on Your Property (“**Property**”) located at: 1372, Rum Gully Road

Islandton SC 29929

will be designed, procured, constructed, installed, tested and interconnected by Installer or its independent contractors (the “**Installation**”).

2. Contract Price. The price of the System installed under this Installation Agreement (the “**Contract Price**”) shall be 56580 .

3. Your Obligations. You agree to:

- (i) grant Installer and its contractors and agents reasonable access to Your Property and cooperate with Installer for the purpose of the Installation, including installing, using and maintaining electric lines, inverters and meters necessary to interconnect the System to Your electric system;
- (ii) cooperate with Installer and assist in obtaining any permits needed, including any documentation related to net metering;
- (iii) obtain any consent of a third party required for the Installation, such as a homeowners’ association. Installer will provide reasonable assistance to assist You in obtaining any required third party consent; and
- (iv) allow Installer to connect the System to Your local electric utility grid and provide all necessary authorizations for such interconnection.

4. Installer’s Obligations

- (i) **Installation, Insurance and Liability.** Installer agrees to:
 - (a) schedule the Installation of the System at a mutually convenient date and time;
 - (b) construct the System according to written plans You may review;
 - (c) notify You if the System design has to be materially changed so that You can review any such changes;
 - (d) give You reasonable notice when Installer or its independent contractors need to access the System and/or Your Property;
 - (e) keep Your Property reasonably free from waste materials or rubbish caused by Installer or its independent contractors’ activities during the Installation process and remove all of Installer’s or its independent contractor’s tools, construction/installation equipment, machinery, waste materials and rubbish from and around Your Property prior to utility approval of the System;
 - (f) return Your Property to a condition similar to its original condition at the completion of Installation, excluding normal wear and tear (subject to Excluded Services pursuant to Section 5 below);
 - (g) carry adequate commercial general liability, commercial

automobile liability, workers’ compensation and any other insurance required by applicable laws and regulations. You may request from Installer evidence of such insurance coverage; and

(h) be responsible solely for direct damage caused to Your Property, or bodily injury arising directly from the Installation and/or caused by Installer or its agents but only to the extent not caused by the negligence or willful misconduct of You or Your invitees.

(ii) **Conditions to Installation.** Installer’s obligation to install the System is conditioned on the completion of a thorough physical inspection of Your Property and other due diligence to confirm the suitability of Your Property for the construction, installation and operation of the System.

5. Services Not Included in the Installation. This Installation Agreement does not include an obligation of Installer to (collectively, the “**Excluded Services**”):

- (i) remove or dispose of any hazardous substances that currently exist on Your Property;
- (ii) improve the construction of the roof of Your Property to support the System;
- (iii) remove or replace existing rot, rust or insect-infested structures;
- (iv) provide structural framing for any part of Your Property;
- (v) pay for or correct construction errors, omissions or deficiencies by You or Your contractors;
- (vi) pay for, remove or remediate mold, fungus, mildew or organic pathogens;
- (vii) upgrade Your existing electrical service;
- (viii) install any smoke detectors, sprinklers or life safety equipment required by municipal code or inspectors as a result of the System installation;
- (ix) pay for the removal or re-location of equipment, obstacles or vegetation in the vicinity of the System;
- (x) pay for any costs associated with municipal design or architectural review, or other specialty permits (this includes costs to attend any public hearings, notify neighbors or obtain additional drawings required);
- (xi) paint electrical boxes or conduit at Your Property; or
- (xii) move items unassociated with the System around Your Property or otherwise perform repairs of any nature whatsoever to Your Property.

6. Performance of Excluded Services. If an obligation listed as an exclusion in Section 5 must be performed in order to properly complete the installation of the System:

- (i) **Proposal.** Installer will promptly notify You of the necessity of such Excluded Services. If appropriate, Installer will present a proposal of the costs to You for Installer to perform such Excluded Services.
- (ii) **Your Obligation.** You agree to promptly either sign a separate contract for the Excluded Services with Installer, or to cause such Excluded Services to be completed by a separate contractor in accordance with Installer’s Installation schedule. Installer assumes no liability whatsoever for any Excluded Services performed by anyone other than Installer in connection with preparing Your Property for the Installation.

7. Warranties; The only warranties under this Installation Agreement provided by Installer shall be those set forth in **Exhibit A** attached to this Installation Agreement.

8. Deposit; Right To Cancel. Installer may collect a security

deposit of \$ Deposit (the "**Deposit**") which will be fully refunded to You upon completion of the Installation, unless You cancel this Installation Agreement prior to completion of the Installation. Notwithstanding the foregoing, You have a right to cancel this Installation Agreement by delivering a duly executed copy of the written Notice of Cancellation attached as **Exhibit B** within three (3) business days of the date You signed this Installation Agreement and sending a copy of the same to Installer at the address first set forth above, and to receive a refund of the Deposit.

9. Conflicts. In the event of any conflict between the terms of this Installation Agreement and any other agreement between You and Installer, the terms of this Installation Agreement shall control. This Installation Agreement shall replace in its entirety any previous proposals.

10. Maintenance Package. For non-warranty related work, Palmetto South Carolina Solar I, LLC provides ongoing service support at the cost of equipment plus labor, with an additional surcharge of twenty percent (20%) ("**Cost Plus Basis**"). You will be furnished with transparent cost of equipment and labor, should it be required. The first year of service support is free of charge to you. Palmetto South Carolina Solar I, LLC reserves the right to transfer its service support to a related or third party and/or cancel at any time. Palmetto South Carolina Solar I, LLC service support is in addition to any manufacturer and/or financing service support guarantee.

11. Miscellaneous Provisions.

(i) **Property Ownership.** You represent and warrant that You are the owner of the Property.

(ii) **Concealed Conditions.** To the best of Your knowledge, there are no conditions, concealed or otherwise, that would or may impede or delay the Installation or cause the Property to be unsuitable for the Installation, including but not limited to dry rot, termites or mold.

(iii) **Roof Warranty.** If the Installation is to a roof, You acknowledge and accept that any roof penetrations necessary to complete the Installation of a System may void any existing warranty of the roof manufacturer or roof installer.

12. Term and Termination. This Installation Agreement shall continue in full force and effect until the earlier of (i) termination of this Installation Agreement by Installer with or without cause, effective upon written notice to You and (ii) the first anniversary of the date hereof. Upon termination, those obligations which by their nature should survive shall continue, such as (without limitation) Installer's indemnity, removal and clean-up obligations, and Installer's liability for damages as set forth in Section 4(i)(h) of this Installation Agreement.

13. Assignment. Installer may assign its rights or delegate its obligations under this Installation Agreement without Your prior written consent. You may not assign any of Your rights or delegate any of Your obligations under this Installation Agreement without the prior written consent of Installer which consent shall not be unreasonably withheld or delayed. Notwithstanding anything to the contrary in this Section 13, You may delegate Your obligation to pay the Contract Price to a lender providing financing to You for the installation of the System; provided however, that no such delegation shall relieve You of any of Your obligations under this Installation Agreement without the prior written consent of Installer.

14. Arbitration and Class Action Waiver. THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE ANN §15-48-10, ET. SEQ., AS MODIFIED HEREIN.

In the event of a dispute between You and the Installer under or relating to this Installation Agreement, either party may choose to resolve the dispute by binding arbitration, as described below, instead of in court. Any claim (except for a claim challenging the validity or enforceability of this Installation Agreement, including this provision or a Class Action Waiver) may be resolved by binding arbitration if either side requests it. THIS MEANS IF EITHER YOU OR THE INSTALLER CHOOSE ARBITRATION, NEITHER PARTY SHALL HAVE THE RIGHT TO LITIGATE SUCH CLAIM IN COURT OR TO HAVE A TRIAL. ALSO DISCOVERY AND APPEAL RIGHTS ARE LIMITED IN ARBITRATION.

(i) **ARBITRATION MUST BE ON AN INDIVIDUAL BASIS.** THIS MEANS NEITHER YOU NOR THE INSTALLER MAY JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST THE OTHER PARTY, OR LITIGATE IN COURT OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.

(ii) **Class Action Waiver.** Only a court, and not an arbitrator, shall determine the validity and effect of the Class Action Waiver. Even if all parties have opted to litigate a claim in court, You or the Installer may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit. The Installer will not choose to arbitrate any claim You bring in small claims court. However, if such a claim is transferred, removed or appealed to a different court, the Installer may then choose to arbitrate.

(iii) **Governing Law.** This arbitration agreement is governed by the Federal Arbitration Act (FAA). Arbitration must proceed only with the American Arbitration Association (AAA) or JAMS. The rules for the arbitration will be those in this arbitration agreement and the procedures of the chosen arbitration organization, but the rules in this arbitration agreement will be followed if there is disagreement between the agreement and the organization's procedures. If the organization's procedures change after the claim is filed, the procedures in effect when the claim was filed will apply. For a copy of each organization's procedures, to file a claim or for other information, please contact: AAA at 1101 Laurel Oak Rd., Voorhees, NJ 08043, www.adr.org (phone 1-877-495-4185), or JAMS at 620 Eighth Ave., Floor 34, New York, NY 10018, www.jamsadr.com (phone 1-800-352-5267). If both AAA and JAMS are completely unavailable, and if You and the Installer cannot agree on a substitute, then either You or the Installer may request that a court appoint a substitute.

(iv) **Fees.** If You wish to begin an arbitration against the Installer but You cannot afford to pay the organization's or arbitrator's costs, the Installer may advance those costs if requested of it in writing. Any request like this should be sent to Palmetto South Carolina Solar I, LLC, 701 E. Bay Street, Suite 413, Charleston, SC 29403. If You lose the arbitration, the arbitrator will decide whether You must reimburse the Installer for money advanced to You for the arbitration. If You win the arbitration, the Installer will not ask for reimbursement of money advanced to You. Additionally, if You win the arbitration, the arbitrator may decide that You are entitled to be reimbursed Your actual and reasonable attorneys' fees and costs.

(iv) **Procedure.** Arbitration hearings will take place in the federal judicial district for the County of Charleston in the State of South Carolina. A single arbitrator will be appointed. The arbitrator must:

(a) Follow all applicable substantive law, except when

- contradicted by the FAA;
- (b) Follow applicable statutes of limitations;
- (c) Honor valid claims of privilege; and
- (d) Issue a written decision including the reasons for the award. The arbitrator's decision will be final and binding except for any review allowed by the FAA.
- (v) **Enforcement.** Any arbitration award may be enforced (such as through a judgment) in any court with jurisdiction in the County of Charleston in the State of South Carolina.
- (vi) **Application.** In addition to You and the Installer, the rights and duties described in this arbitration agreement apply to the Installer's affiliates and their officers, directors, members, managers, partners, independent contractors, and employees; and any third party co-defendant of a claim subject to this arbitration provision.
- (vii) **Survival.** This arbitration provision shall survive the term of this Installation Agreement.
- (viii) **Limitation.** EXCEPT AS OTHERWISE PROVIDED FOR OBLIGATIONS TO MAKE PAYMENT UNDER THIS INSTALLATION AGREEMENT, FOR DIRECT DAMAGE CAUSED TO YOUR PROPERTY DURING THE COURSE OF INSTALLATION, IN NO EVENT SHALL THE INSTALLER'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS INSTALLATION AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED THE TOTAL FEES DUE AS CALCULATED UNDER SCHEDULE 1 OF THE INSTALLATION AGREEMENT TO YOU PURSUANT TO THIS INSTALLATION AGREEMENT IN THE MONTH PRECEDING THE EVENT GIVING RISE TO THE CLAIM OR ONE THOUSAND AND 00/100 DOLLARS (\$1,000.00). WHICHEVER IS LESS.

15. Notice of Right to Cancel.

YOU, THE BUYER, MAY CANCEL THIS INSTALLATION AGREEMENT AT ANY TIME BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE YOU SIGN THIS INSTALLATION AGREEMENT. SEE EXHIBIT B, THE NOTICE OF CANCELLATION FORM, FOR AN EXPLANATION OF THIS RIGHT.

16. BEST VALUE GUARANTEE. If prior to installation of your System, you receive a qualified written offer from a third-party competitor that provides comparable goods and services, we guarantee that we will either beat that price or we will pay you \$100. An offer will be considered qualified in our sole discretion, but will reasonably be determined based on the purchase price, financed amount, hardware quality, hardware guarantee, hardware provider creditworthiness, hardware production efficiency, customer support, and terms of sale. Sub-standard equipment (as reasonably determined by us) and/or newly formed competitors (less than 36 months of proven operational history) are automatically disqualified from this Best Value Guarantee. If we determine a qualified written offer exists, you have 24 hours to accept our proposed offer (performance of the work at the competitor's price or \$100).

17. Tax and Rebate Disclosures. Homeowner understands and agrees that Installer makes no representation or guaranty that Homeowner will qualify for or receive any federal, state or local tax credit. Homeowner understands that tax credits are subject to many factors including, but not limited to, Homeowner's tax liability and Homeowner may, among other things, be required to

allocate tax credits over a period of years in order to maximize the benefit. For instance, (i) some states limited the amount of the tax credit that can be applied in a given year, and (ii) some homeowners have insufficient taxable income to take full advantage of the federal investment tax credit. Homeowner is encouraged to speak with their tax professional prior to signing this Installation Agreement and has been provided ample opportunity to do so. Additionally, Homeowner understands and agrees that Installer makes no representation or guaranty that Homeowner will qualify for any utility or other local rebate or incentive, as some incentives or rebates are subject to limitations and/or the cessation of such programs are outside the control of Installer. Homeowner is encouraged to speak with their utility or local government to confirm the availability of any rebates or other incentives prior to signing this Installation Agreement and has been encouraged to do so.

18. Homeowner acknowledges and understands that if their local utility electricity consumption rate plan depends on the time of day such electricity is used (e.g., a "Time of Use" rate plan) then the electricity consumption cost savings enjoyed by Homeowner and attributable to the System's energy production will vary depending on the Homeowner's electricity consumption habits and such utility's rate plan.

19. "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

DocuSigned by:
Homeowner's Name: David Johnson
 Signature: _____
4460190063CA4DA...
Name: David Johnson
Date: 5/21/2018

Co-Owner's Name (if any)

Signature: _____
 Name: _____
 Date: _____

DocuSigned by:
Palmetto South Carolina Solar I, LLC:
Tara Torres
 By: _____
101E7200FFA4495...
Name: Tara Torres
Title: Director of Channel Partner Accounts
Date: 5/21/2018

ELECTRONICALLY FILED - 3080 Dec 16 9:02 AM COLLETON - COMMON PLEAS - CASE#2020CP1500604

EXHIBIT A**WORKMANSHIP WARRANTY**

1. **System Information.** This workmanship warranty (this "**Warranty**") applies to the System installed by Installer pursuant to this Installation Agreement.
2. **Installer System Warranty.**
 - (i) Installer warrants to Homeowner that: (a) the System will be free from material defects in workmanship under normal operating conditions for a period of ten (10) years from the date of interconnection of the System (the "**Warranty Period**"); (b) that Installer shall perform, or cause to be performed, the Installation in a professional and workmanlike manner in accordance with generally recognized industry standards for similar services, all federal and state laws, city and county ordinances, codes and regulations (collectively, "**Applicable Laws**"), and the requirements of the warranties of any Third Party Provider (as defined below). Installer makes no representation or warranty, and Homeowner shall seek no recourse from Installer, regarding the warranties of a Third Party Provider that extend beyond the scope of this Section 2.
 - (ii) Installer warrants to Homeowner that any roof penetrations made for the System shall be completely weather-tight for a period of five (5) years from the date of commencement of the Installation (the "**Roof Warranty Period**"). "**Weather-tight**" shall mean that no moisture shall pass through the penetrations made in the roof by Installer, unless arising from (a) acts of God; (b) flood, fire, earthquake or explosion; or (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest (each a "**Force Majeure Event**"). During such Roof Warranty Period, moisture enters through the roof penetrations, Installer shall make repairs promptly to industry standard and pay for any direct damages to the Property, but not its contents.
3. **Warranty Claim.**
 - (i) If a defect or deficiency is discovered within the Warranty Period, Installer shall, upon written notice from Homeowner of a valid warranty claim, at Installer's sole option, promptly repair, replace, and/or correct the applicable installation work or component. If a Force Majeure Event directly prevents Installer from commencing any such warranty repairs, Installer shall promptly notify Homeowner in writing of the Force Majeure Event and commence such warranty repairs as soon as it is safe to do so following the end of such Force Majeure Event.
 - (ii) Installer shall not be liable for a breach of the warranties set forth in Section 2(i) and Section 2(ii) unless: (a) Homeowner reasonably describes the defect in writing to Installer within seventy-two (72) hours of the time Homeowner discovers or ought to have discovered such defect; (b) if applicable, Installer is given reasonable access to the Property to examine the System and perform its warranty obligations; and (c) Installer reasonably verifies Homeowner's claim that Installer's workmanship was/is defective.
4. **Third Party Provider Warranties.**
 - (i) Any warranties procured by Installer from its subcontractors, suppliers and vendors for each System (each a "**Third Party Provider**") shall accrue to Homeowner's benefit. Installer shall install photovoltaic modules with at least a ten (10) year product warranty and a twenty-five (25) year performance warranty provided by a Third Party Provider. Installer shall install inverters with at least a ten (10) year product warranty provided by a Third Party Provider.
 - (ii) Whenever possible, Installer shall cause the Third Party Provider Warranties to be made directly to Homeowner. If the same shall be made to Installer, Installer shall then assign the same to Homeowner. Upon written request from Homeowner, such warranties as may not be assignable shall be enforced (to the extent enforceable) by Installer for the benefit of Homeowner for the Warranty Period. Installer's obligations set forth in this Section 4 and specifically the delivery, assignment and/or enforcement of the foregoing warranties for each System shall be in addition to, and not in limitation of, any other warranty or remedy required by Applicable Laws.
 - (iii) Installer makes no representation or warranty, and Homeowner shall seek no recourse from Installer, unless specifically provided to the contrary regarding the warranties of Third Party Providers that extend beyond the scope of this Warranty, including without limitation, the energy output of the System.
5. **WARRANTY EXCEPTIONS.** This Warranty shall not apply to any defect, damage, malfunction, or degradation of the System or the roof of the Property arising from:
 - (i) Homeowner's failure to follow Installer's oral or written instructions as to the storage, commissioning, use or maintenance of the System;
 - (ii) Any repair, alteration, or replacement of the System or a component thereof without the prior written consent of Installer;
 - (iii) The negligent acts or omissions of any person other than Installer;
 - (iv) Unknown defects with the Property, excepting structures installed by Installer;
 - (v) Normal wear and tear, including expected degradation of electrical output and foreseen and unforeseen weather events (e.g, falling tree limbs or hail or snow damage); or
 - (vi) The defect arises from a Force Majeure Event.
6. **DISCLAIMER. EXCEPT FOR THE WARRANTIES SET FORTH IN SECTIONS 2(i) AND 2(ii), INSTALLER MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE SYSTEM OR THE INSTALLATION, INCLUDING ANY (a) WARRANTY OF MERCHANTABILITY; (b) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; OR (c) WARRANTY OF TITLE; WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE OR OTHERWISE.**

EXHIBIT B

HOME SOLICITATION FORM OF NOTICE OF CANCELLATION

You may CANCEL this Installation Agreement, without any penalty or obligation, within THREE (3) BUSINESS DAYS from the above date.

If You cancel, any property traded in, any payments made by You under the Installation Agreement or sale, and any negotiable instrument executed by You will be returned within TEN (10) BUSINESS DAYS following receipt by the Installer of Your cancellation notice, and any security interest arising out of the Installation Agreement will be canceled.

If You cancel, You must make available to the Installer at Your residence, in substantially as good condition as when received, any goods delivered to You under this Installation Agreement or sale; or You may, if You wish, comply with the instructions of the Installer regarding the return shipment of the goods at the Installer's expense and risk.

If You do make the goods available to the Installer and the Installer does not pick them up within twenty (20) days of the date of Your notice of cancellation, You may retain or dispose of the goods without any further obligation. If You fail to make the goods available to the Installer, or if You agree to return the goods to the Installer and fail to do so, then You remain liable for performance of all obligations under the Installation Agreement.

To cancel this Installation Agreement, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to Palmetto South Carolina Solar I, LLC at 701 E. Bay Street, Suite 413, Charleston, South Carolina 29403. NOT LATER THAN MIDNIGHT OF

(Date)

I HEREBY CANCEL THIS INSTALLATION AGREEMENT.

(Date)

Homeowner's Name:

Signature: _____

Name: _____

Date: _____

Co-Owner's Name (if any)

Signature: _____

Name: _____

Date: _____

EXHIBIT C

HOME SOLICITATION FORM OF NOTICE OF CANCELLATION – Palmetto Copy

You may CANCEL this Installation Agreement, without any penalty or obligation, within THREE (3) BUSINESS DAYS from the above date.

If You cancel, any property traded in, any payments made by You under the Installation Agreement or sale, and any negotiable instrument executed by You will be returned within TEN (10) BUSINESS DAYS following receipt by the Installer of Your cancellation notice, and any security interest arising out of the Installation Agreement will be canceled.

If You cancel, You must make available to the Installer at Your residence, in substantially as good condition as when received, any goods delivered to You under this Installation Agreement or sale; or You may, if You wish, comply with the instructions of the Installer regarding the return shipment of the goods at the Installer's expense and risk.

If You do make the goods available to the Installer and the Installer does not pick them up within twenty (20) days of the date of Your notice of cancellation, You may retain or dispose of the goods without any further obligation. If You fail to make the goods available to the Installer, or if You agree to return the goods to the Installer and fail to do so, then You remain liable for performance of all obligations under the Installation Agreement.

To cancel this Installation Agreement, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to Palmetto South Carolina Solar I, LLC at 701 E. Bay Street, Suite 413, Charleston, South Carolina 29403. NOT LATER THAN MIDNIGHT OF

(Date)

I HEREBY CANCEL THIS INSTALLATION AGREEMENT.

(Date)

Homeowner's Name:

Signature: _____

Name: _____

Date: _____

Co-Owner's Name (if any)

Signature: _____

Name: _____

Date: _____

ELECTRONICALLY FILED - 2020 Dec 16 9:01 AM - COLLETON - COMMON PLEAS - CASE#2020CP1500604

Schedule 1

	Description of System
System Size	13.8
Panel Type	Q.PEAK-G4.1 300
Inverter	SE11400A-US (240v)

Certificate Of Completion

Envelope Id: 67129EE817554F42926948A49DE31C57	Status: Completed
Subject: Please DocuSign: Homeowner Install Agreement - Loan Sale (SC)	
Source Envelope:	
Document Pages: 7	Signatures: 2
Certificate Pages: 5	Initials: 0
AutoNav: Enabled	Envelope Originator:
Envelopeld Stamping: Enabled	Alchemy Palmetto
Time Zone: (UTC-08:00) Pacific Time (US & Canada)	alchemy@palmettoventures.com
	IP Address: 52.34.225.135

Record Tracking

Status: Original 5/21/2018 2:55:54 PM	Holder: Alchemy Palmetto alchemy@palmettoventures.com	Location: DocuSign
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Signer Events

David Johnson
margarethjohnson@gmail.com
Security Level: Email, Account Authentication (None)

Signature

DocuSigned by:
David Johnson
4460190063CA4DA...
Using IP Address: 206.74.173.107

Timestamp

Sent: 5/21/2018 2:56:24 PM
Viewed: 5/21/2018 3:37:08 PM
Signed: 5/21/2018 3:50:27 PM

Electronic Record and Signature Disclosure:
Accepted: 5/21/2018 3:37:08 PM
ID: 9c5998db-88c7-4aca-9313-36fd6d7d0815

Tara Torres
tara.torres@palmetto.com
Director of Channel Partner Accounts
Palmetto Solar, LLC
Security Level: Email, Account Authentication (None)

DocuSigned by:
Tara Torres
181E7206FEA5495...
Using IP Address: 172.58.233.174
Signed using mobile

Sent: 5/21/2018 3:50:29 PM
Viewed: 5/21/2018 3:58:36 PM
Signed: 5/21/2018 3:58:40 PM

Electronic Record and Signature Disclosure:
Not Offered via DocuSign

In Person Signer Events	Signature	Timestamp
Editor Delivery Events	Status	Timestamp
Agent Delivery Events	Status	Timestamp
Intermediary Delivery Events	Status	Timestamp
Certified Delivery Events	Status	Timestamp
Carbon Copy Events	Status	Timestamp
Contract Review contractreview@palmetto.com Security Level: Email, Account Authentication (None)	COPIED	Sent: 5/21/2018 3:58:41 PM
Electronic Record and Signature Disclosure: Not Offered via DocuSign		
Notary Events	Signature	Timestamp
Envelope Summary Events	Status	Timestamps
Envelope Sent	Hashed/Encrypted	5/21/2018 3:58:41 PM

Envelope Summary Events**Status****Timestamps**

Certified Delivered

Security Checked

5/21/2018 3:58:41 PM

Signing Complete

Security Checked

5/21/2018 3:58:41 PM

Completed

Security Checked

5/21/2018 3:58:41 PM

Payment Events**Status****Timestamps****Electronic Record and Signature Disclosure**

ELECTRONIC RECORD AND SIGNATURE DISCLOSURE

From time to time, Palmetto Solar, LLC (we, us or Company) may be required by law to provide to you certain written notices or disclosures. Described below are the terms and conditions for providing to you such notices and disclosures electronically through your DocuSign, Inc. (DocuSign) Express user account. Please read the information below carefully and thoroughly, and if you can access this information electronically to your satisfaction and agree to these terms and conditions, please confirm your agreement by clicking the 'I agree' button at the bottom of this document.

Getting paper copies

At any time, you may request from us a paper copy of any record provided or made available electronically to you by us. For such copies, as long as you are an authorized user of the DocuSign system you will have the ability to download and print any documents we send to you through your DocuSign user account for a limited period of time (usually 30 days) after such documents are first sent to you. After such time, if you wish for us to send you paper copies of any such documents from our office to you, you will be charged a \$0.00 per-page fee. You may request delivery of such paper copies from us by following the procedure described below.

Withdrawing your consent

If you decide to receive notices and disclosures from us electronically, you may at any time change your mind and tell us that thereafter you want to receive required notices and disclosures only in paper format. How you must inform us of your decision to receive future notices and disclosure in paper format and withdraw your consent to receive notices and disclosures electronically is described below.

Consequences of changing your mind

If you elect to receive required notices and disclosures only in paper format, it will slow the speed at which we can complete certain steps in transactions with you and delivering services to you because we will need first to send the required notices or disclosures to you in paper format, and then wait until we receive back from you your acknowledgment of your receipt of such paper notices or disclosures. To indicate to us that you are changing your mind, you must withdraw your consent using the DocuSign 'Withdraw Consent' form on the signing page of your DocuSign account. This will indicate to us that you have withdrawn your consent to receive required notices and disclosures electronically from us and you will no longer be able to use your DocuSign Express user account to receive required notices and consents electronically from us or to sign electronically documents from us.

All notices and disclosures will be sent to you electronically

Unless you tell us otherwise in accordance with the procedures described herein, we will provide electronically to you through your DocuSign user account all required notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you during the course of our relationship with you. To reduce the chance of you inadvertently not receiving any notice or disclosure, we prefer to provide all of the required notices and disclosures to you by the same method and to the same address that you have given us. Thus, you can receive all the disclosures and notices electronically or in paper format through the paper mail delivery system. If you do not agree with this process, please let us know as described below. Please also see the paragraph immediately above that describes the consequences of your electing not to receive delivery of the notices and disclosures electronically from us.

How to contact Palmetto Solar, LLC:

You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:

To contact us by email send messages to: trent.hawthorne@palmetto.com

To advise Palmetto Solar, LLC of your new e-mail address

To let us know of a change in your e-mail address where we should send notices and disclosures electronically to you, you must send an email message to us at trent.hawthorne@palmetto.com and in the body of such request you must state: your previous e-mail address, your new e-mail address. We do not require any other information from you to change your email address..

In addition, you must notify DocuSign, Inc to arrange for your new email address to be reflected in your DocuSign account by following the process for changing e-mail in DocuSign.

To request paper copies from Palmetto Solar, LLC

To request delivery from us of paper copies of the notices and disclosures previously provided by us to you electronically, you must send us an e-mail to trent.hawthorne@palmetto.com and in the body of such request you must state your e-mail address, full name, US Postal address, and telephone number. We will bill you for any fees at that time, if any.

To withdraw your consent with Palmetto Solar, LLC

To inform us that you no longer want to receive future notices and disclosures in electronic format you may:

- i. decline to sign a document from within your DocuSign account, and on the subsequent page, select the check-box indicating you wish to withdraw your consent, or you may;
- ii. send us an e-mail to trent.hawthorne@palmetto.com and in the body of such request you must state your e-mail, full name, IS Postal Address, telephone number, and account number. We do not need any other information from you to withdraw consent.. The consequences of your withdrawing consent for online documents will be that transactions may take a longer time to process..

Required hardware and software

Operating Systems:	Windows2000? or WindowsXP?
Browsers (for SENDERS):	Internet Explorer 6.0? or above
Browsers (for SIGNERS):	Internet Explorer 6.0?, Mozilla FireFox 1.0, NetScape 7.2 (or above)
Email:	Access to a valid email account
Screen Resolution:	800 x 600 minimum
Enabled Security Settings:	<ul style="list-style-type: none"> •Allow per session cookies •Users accessing the internet behind a Proxy Server must enable HTTP 1.1 settings via proxy connection

** These minimum requirements are subject to change. If these requirements change, we will provide you with an email message at the email address we have on file for you at that time providing you with the revised hardware and software requirements, at which time you will have the right to withdraw your consent.

Acknowledging your access and consent to receive materials electronically

To confirm to us that you can access this information electronically, which will be similar to other electronic notices and disclosures that we will provide to you, please verify that you were able to read this electronic disclosure and that you also were able to print on paper or electronically save this page for your future reference and access or that you were able to e-mail this disclosure and consent to an address where you will be able to print on paper or save it for your future reference and access. Further, if you consent to receiving notices and disclosures exclusively in electronic format on the terms and conditions described above, please let us know by clicking the 'I agree' button below.

By checking the 'I Agree' box, I confirm that:

- I can access and read this Electronic CONSENT TO ELECTRONIC RECEIPT OF ELECTRONIC RECORD AND SIGNATURE DISCLOSURES document; and
- I can print on paper the disclosure or save or send the disclosure to a place where I can print it, for future reference and access; and
- Until or unless I notify Palmetto Solar, LLC as described above, I consent to receive from exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to me by Palmetto Solar, LLC during the course of my relationship with you.

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)
)
David Mack Johnson Sr.,)
)
Plaintiff,)
)
v.)
)
Palmetto Solar, LLC; Palmetto South Carolina)
Solar I, LLC, Brightest Solar, Inc., Sunlight)
Financial, LLC, Cross River Bank, Great)
America Services Corporation and Robert)
Dodge,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2020-CP-15-

COMPLAINT
(Jury Trial Requested)

The Plaintiff alleges:

1. Plaintiff, David Mack Johnson, Sr., is a citizen and resident of Colleton County, South Carolina. The subject matter of the is lawsuit involves real property and/or fixtures attached to real property that is situated in Colleton County, South Carolina.
2. Upon information and belief, Defendant, Palmetto Solar, LLC, is a domestic corporation organized and existing under the laws of a state other than South Carolina but conducts business and maintains an office and an agent for the transaction of business in South Carolina.
3. Upon information and belief, Defendant, Palmetto South Carolina Solar I, LLC, is a domestic corporation organized and existing under the laws of a state other than South Carolina but conducts business and maintains an office and an agent for the transaction of business in South Carolina.
4. Upon information and belief, Defendant, Brightest Solar, Inc., is a domestic corporation organized and existing under the laws of South Carolina and conducts business and maintains an office and an agent for the transaction of business in South Carolina. Upon information and belief, Defendant, Robert Dodge, is a citizen and resident of Charleston County, South Carolina and is the registered agent

for Brightest Solar, Inc.; that at all time pertinent to this complaint, the defendant, Dodge, was acting within the course and scope of his agency with one or more of the other Defendants;

5. Upon information and belief, Defendant, Sunlight Financial, LLC, Cross River Bank and Great America Services Corporation are corporations organized and existing under the laws of a state other than South Carolina but are conducting regular business within the State of in South Carolina. The Defendants are believed to be the financiers of the solar system purchased by the Plaintiff and are part of a common scheme with the other defendants;

FACTS

6. On or about October 9, 2017, the Plaintiff contracted with the Defendants to install and finance a solar panel system (Hereinafter referred to as "System") on his home; that at the time the Plaintiff agreed to purchase the System, certain representations were made by some or all of the Defendants. The representations made by each individual Defendant included some or all of the following representations:

- a. The System would pay for itself in ten (10) years or less;
- b. The System would produce at least 110% of the daily energy need of the Plaintiff's house;
- c. The Defendants would install the System in compliance with all applicable building codes, methods and customs;
- d. The Defendants would perform all work in a workman like manner with care to make the installation as unnoticeable as possible;
- e. The Defendants agreed to perform other work to make the System compatible and work in connection with a battery storage system, install various outlets, make the System compatible with the use of a generator as a backup system;

7. That the Defendants acted in concert and as a joint enterprise in representing, selling and financing the solar system to the Plaintiff;

FOR THE FIRST CAUSE OF ACTION
(Breach of Warranty)

8. This matter is brought under the statutory and common law of the State of South Carolina.

9. The Plaintiff purchased the System from the local dealer, Brightest Solar, Inc. and Robert Dodge; Mr. Dodge upon information and belief engaged Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, and others to construct and install the System; that financing for the System was procured by the Defendants through Sunlight Financial Services, LLC as purchase money financing;

10. At the time the System was purchased, the Defendant warranted by expressed and implied warranties that they would deliver a system that was free from defects in material and workmanship; that the System would be installed with the “add-on’s” negotiated for by the Plaintiff in a timely manner.

11. That the System was defective in materials and workmanship, in that after being operated for a period of time it became apparent the System would or could not produce the amount of power that was represented; that at the current levels of energy production the System will not be able to pay for itself or meet the representation of the Defendants; that the Defendants have not delivered on the “add-on” items and have left the Plaintiff with a System that does not and cannot meet the requirements set forth prior to the Plaintiff’s agreement to purchase and finance the System; that the Defendants have breached their warranty and failed to deliver on their representations;

12. That by reason of the Defendants breach of their expressed and implied warranties and representations, the Plaintiff is in possession of a useless System that is not capable of being utilized for the purpose it was sold.

FOR A SECOND CAUSE OF ACTION
(Fraud)

13. The Plaintiff realleges and incorporates the above allegations as if rewritten.

14. That during the negotiation and purchase process, the Defendants specific representations to the Plaintiff that the System would produce energy in excess of a 110% of the Plaintiff’s normal household energy load and pay for itself in less than 10 years. Additionally, the Defendants represented the Plaintiff would be eligible for tax credits and other subsidies from the State SCCA 401 (5/02)

and Federal governments which would contribute to the repayment of the System as well as promises that certain upgrades would be installed on the System. None of these representations were true.

15. At the time the representations were made by the Defendants, the Defendants knew or should have known the representations were plainly false or were speculative at best; that the representations were made to induce the Plaintiff enter into an agreement to purchase and finance the solar system offered for sale by the Defendants; that the Defendants were inter-reliant on each other to make their sales scheme work so that each defendant relied on the others representations to potential customers for business.

16. That the Defendants, representations were false and misleading as Defendants failed to install all of the components to the System, that the tax credits were not available and the System failed to generate enough energy to run the Plaintiff's home and therefore will never pay for itself; that the Plaintiff attempted on several occasions to discuss the above issues with the available Defendants to no avail;

17. That the representations made by Defendants were material to the Plaintiff in that the absence of such representations, he would not have entered into the agreement with the Defendants. The Plaintiff did not know the representations were false or were grounded on unproven speculation of the Defendants. That the Plaintiff had a right to rely on the representations.

18. That the representations by Defendants were fraudulent and were intended to conceal the truth from the Plaintiff who was reliant on the Defendants expertise and representations.

19. That the Plaintiff has suffered damages as a result of the misrepresentations by the Defendants.

FOR A THRID CASUE OF ACTION
(Breach of Contract)

20. The allegations above are incorporated as if rewritten.

21. The Plaintiff entered into an agreement for the purchase of a solar system that would generate enough energy to not only run his home, but bank energy credit with the Power Co. that would ultimately result in the System being paid for in less that 10 years. Additionally, certain items were to be included in the System to allow the Plaintiff to utilize the energy generated from this System which were never delivered or installed.

22. In addition to the installation issues, the Defendants sold, installed and financed a solar system that was to generate more than 110% of the Plaintiff's daily energy needs which would allow for the Plaintiff to earn credit with the local power company for energy consumption when the system was not in operation. The System has not be capable of generating such quantities of power and has cause to the Plaintiff to pay for two competing sources of energy and a much high household cost.

23. In addition to the above breached promises, the Defendants also represented to the Plaintiff that he would be eligible for tax credits and/or payments from the State and Federal governments by installing this System. These representations were not true, and the Plaintiff did not receive such payments.

24. The Plaintiff attempted to discuss the missing or left out items with the Defendants along with the other failings of the System to no avail; that the items and representations were important and material to the Plaintiff and without the inclusion of such items, he would not have entered into an agreement with the Defendants;

25. That the Defendants have breached their contract with the Defendant by failing to deliver on the representations made to the Plaintiff; that as a result of the Defendants breach, the Plaintiff has suffered significant damages.

WHEREFORE, Plaintiff prays for judgment against the Defendants for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: s/Mark D. Ball

Mark D. Ball
SC Bar# 12894
P.O. Box 457
Hampton, SC 29924
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ATTORNEYS FOR PLAINTIFF

October 8, 2020

**STATE OF SOUTH CAROLINA
COUNTY OF Colleton
IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1500604

David Mack Johnson, Sr
PLAINTIFF(S)

Palmetto Solar, Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendant Palmetto Solar, LLC's Motion to compel and enforce arbitration is denied. It is denied as being premature.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/08/2021 .

Cross River Bank
Great America Services Corporation

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Colleton Common Pleas

Case Caption: David Mack Johnson Sr VS Palmetto Solar, Llc , defendant, et al

Case Number: 2020CP1500604

Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON)

David Mack Johnson, Sr.,) Civil Action No. 2020-CP-15-00604
)

Plaintiff,)

vs.)

Palmetto Solar, LLC; Palmetto South
Carolina Solar I, LLC; Brightest Solar, Inc.;
Sunlight Financial, LLC; Cross River
Bank; Great America Services Corporation;
and Robert Dodge,)

Defendants.)

**Defendants Palmetto Solar, LLC and
Sunlight Financial, LLC’s Motion to
Reconsider**

Defendants Palmetto Solar, LLC, successor by merger with Palmetto South Carolina Solar I, LLC (“Palmetto”) and Sunlight Financial, LLC (“Sunlight”) (collectively, “Defendants”) move the Court under Rule 59, SCRCF, to reconsider its January 8, 2021 Order denying their Motion to Compel Arbitration.¹ The Court should compel Plaintiff’s claims to arbitration and dismiss with prejudice under the Federal Arbitration Act, 9 U.S.C. §§ 3–4 (the “FAA”), the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 through -240, and Rules 12(b)(1), (3), and (6), SCRCF.

Background

Palmetto and Plaintiff entered into a Solar Installation Agreement in May 2018. (See Mot. Compel Arbitration, Exhibit 1.) Plaintiff’s counsel conceded as much at the hearing on Defendant’s Motion to Compel Arbitration. The contract’s arbitration clause provides for “binding

¹ Defendant Cross River Bank (“CRB”) also moved to dismiss on separate grounds. It joins the motion for the limited purpose of seeking dismissal under Rule 12(b), SCRCF, but does not make a general appearance in the action because it has not been served with process.

arbitration, as described below, instead of in court.” (*Id.* ¶ 14.) Under the arbitration provision, “[a]ny claim” is to be arbitrated.

Despite this arbitration clause, Plaintiff filed his complaint in October 2020, alleging three breach of warranty, fraud, and breach of contract. (Compl. ¶¶ 8–12, 13–19, 20–25.) All three claims are related to the installation of the solar panel system on his home. (Compl. ¶ 6.) None of Plaintiff’s claims are directed specifically at the arbitration provision, but only at the agreement and the parties’ business relationship as a whole.

In response to the Complaint, Defendants moved to compel arbitration. (Mot. Compel Arbitration, Dec. 16, 2020.) Since then, co-defendants Brightest Solar, Inc. and Robert Dodge have joined in the motion. Plaintiff filed no memorandum in opposition to the motion, nor any affidavits contesting the validity or enforceability of the parties’ agreement. A hearing on the motion was completed on January 6, 2021. Defendants sought to compel arbitration and dismiss on the grounds set forth in the motion. Plaintiff, based solely on the presentation of counsel and not sworn testimony, opposed the motion because wanted discovery and thought the motion was filed too soon. He did not raise any substantive grounds for opposing the motion.

On January 8, 2021, the Court denied the Motion to Compel in a Form 4 Order. The Order states only that “Defendant Palmetto Solar, LLC’s Motion to compel and enforce arbitration is denied. It is denied as being premature.” Defendants timely move the Court to reconsider this order. *See* Rule 59(e), SCRPC.

Standard of Review

A motion under Rule 59(e) has long been viewed as a “motion for reconsideration.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The Supreme Court has clarified that a party may file a motion to reconsider “when she 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, 602 S.E.2d at 780.

Argument

I. **The Court has misapprehended binding precedent requiring arbitration even where a plaintiff brings a claim for fraud.**

The policy of the United States and South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). “To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim.” *Id.* at 597, 553 S.E.2d at 118. Where fraud is asserted, the Court still must compel claims to arbitration unless the fraud is directed at the making of the arbitration provision itself. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *New Hope Baptist v. Paragon*, 667 S.E.2d 1, (Ct. App. 2008). “A party cannot avoid arbitration through rescission of an entire contract when there is no independent challenge to the arbitration clause itself. There must be fraud in the inducement of the arbitration agreement to avoid arbitration of the contract.” *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 550–51, 606 S.E.2d 752, 755 (2004) (citations omitted). Courts routinely compel actions to arbitration where plaintiffs raise contract claims and fraud claims. *See id.*; *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993); *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 5, 791 S.E.2d 128, 130 (2016).

As an initial matter, Plaintiff entered into a valid arbitration agreement with Palmetto. As Johnson’s counsel conceded at the hearing, he entered into the contract with Palmetto that contained the arbitration agreement. That his counsel claims, without the support of any sworn

testimony,² Johnson did not receive a copy of the agreement is immaterial. The agreement containing the arbitration provision was attached to the motion to dismiss. Johnson fails to attack its authenticity, but claims generally that his fraud claim undermines the enforceability of the agreement. This is a misstatement of the law. To the extent the Court's Order denying the motion to compel rests on this argument, the Court should reconsider it.

II. The proposed order signed by the Court also fails to address other arguments made by Defendants in their brief and oral argument.

The Court's Order fails to address several grounds for dismissal Defendants raised in their briefing and at oral argument. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (permitting reconsideration when the court has failed to fully consider, or perhaps failed to rule on an argument or issue).

First, Plaintiff failed to properly support his counsel's claim that he never received a copy of the agreement between the parties containing the arbitration provision. To the extent Plaintiff raises this as a means of challenging the validity of the arbitration agreement, that ground fails to make the arbitration provision unenforceable. Even still, counsel's argument without sworn testimony to support it is insufficient for the Court to consider. *See Harper*, 239 S.C. at 562, 124 S.E.2d at 64 (noting that "statements of counsel in an argument are not evidence."); *Masters*, 431, S.C. at 37, 846 S.E.2d at 897 (placing burden on party resisting arbitration).

Second, the claims are subject to arbitration under the arbitration provision that is properly enforced by Defendants. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 289, 733 S.E.2d 597,

² This argument is not evidence. *Harper v. Bolton*, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962) (noting that "statements of counsel in an argument are not evidence."). By failing to attach any sworn statements supporting any other claims that the agreement is not valid, Plaintiff has failed to carry his burden of proving the agreement was invalid. *See Masters v. KOL, Inc.*, 431, S.C. 28, 37, 846 S.E.2d 893, 897 (Ct. App. 2020) (placing burden on party resisting arbitration).

601 (Ct. App. 2012); *THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011); *American Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 627 (4th Cir. 2006); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396 (4th Cir. 2005). That these claims are all intertwined requires that the Complaint be compelled to arbitration and dismissed with prejudice. *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001). If a court declines to dismiss the complaint, it must stay the action pending arbitration of the arbitrable claims. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999).

Third, CRB moved to dismiss the Complaint on other grounds not addressed by the Court. It has not yet been served with process of the Summons and Complaint, so dismissal of CRB under Rules 12(b)(2)–(6), SCRCP, is also proper.

The Court should reconsider its order to address these issues that were raised, but not ruled upon previously.

III. If there are doubts as to the validity of the arbitration agreement, the proper remedy is not to deny the motion altogether, but to direct the parties to engage in discovery limited to the question of the validity of the arbitration agreement.

The parties' written agreement is legally enforceable given the inclusion of Plaintiff and Palmetto's electronic signatures. *See* S.C. Code Ann. § 2-6-70(D) ("An electronic signature satisfies a law requiring a signature."); *see also* 15 U.S.C. § 7001(a)(1) (establishing authority for enforcement of contract containing electronic signature in interstate commerce). The use of electronic signatures is not a barrier to enforcement of written agreements. *Metro. Reg'l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 722 F.3d 591, 602 (4th Cir. 2013) ("Courts have uniformly applied the E-Sign Act to subsequent interpretations of the FAA's written provision requirement."). But even if the Court has concerns about the facts supporting the validity of the

agreement or the electronic signatures, the proper remedy is to permit discovery solely on this narrow issue and, if necessary, decide that issue prior to the merits of the action as the merits are properly reserved for the arbitrator. *See Moses H. Cone*, 460 U.S. at 22 (permitting only a “restricted inquiry into factual issues” involving the arbitration agreement); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). That discovery, however, is limited. *See Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 511 (7th Cir. 2003). In any event, the party moving to compel arbitration—such as Palmetto and Sunlight here—would reserve the right to move for arbitration again in the future following the limited discovery.

Conclusion

In light of the strong state and federal policies favoring arbitration, and given the existence of a valid and enforceable arbitration agreement covering Plaintiff’s claims, the Court should reconsider its Order denying Defendants’ Motion to Compel Arbitration as premature. It should instead compel Plaintiff’s claims to arbitration and dismiss Plaintiff’s complaint with prejudice.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

Matthew A. Abee

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Columbia, South Carolina
January 19, 2021

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January 19, 2021

Via USPS and E-Filing

The Honorable Bentley Price
100 Broad Street, Suite 432
Charleston, SC 29401

RE: Courtesy Copy of Motion to Reconsider
Johnson v. Palmetto Solar, LLC, et al.
Case No. 2020-CP-15-00604
Our File No. 049307.01543

Dear Judge Price:

As required by Rule 59(g), SCRPC, please find enclosed a copy of Defendants Palmetto Solar, LLC and Sunlight Financial, LLC's Motion to Reconsider the Court's January 8, 2021 Order Denying the Motion to Compel Arbitration. Even though Colleton County has migrated to e-filing, we read Rule 59(g), SCRPC to still require a courtesy copy to be sent to the judge to which it is addressed. So out of an abundance of caution and as required by Rule 59(g), SCRPC, please find a courtesy copy of the motion to reconsider.

By electronically filing this motion and letter, I am serving counsel for the parties with a copy of the motion and am notifying them of my correspondence with the Court.

Respectfully,



Matthew A. Abee
S.C. Bar No. 101100

*Counsel for Defendants Palmetto Solar, LLC and
Sunlight Financial, LLC*

Enclosure

cc: Mark D. Ball, Esquire
William P. Tinkler, Esquire

of their status as either “the Installer’s affiliates and their officers, directors, members, managers, partners, independent contractors, and employees; [or] any third party co-defendant of a claim subject to th[e] arbitration provision” signed by Plaintiff Johnson.

The Court heard the Defendants’ motion on January 6, 2020. At that hearing, Defendants referred to the installation contract signed by Plaintiff Johnson and attached to the Palmetto Solar Defendants’ motion. That installation contract contained an arbitration agreement that is facially compliant with the South Carolina Uniform Arbitration Act. Defendants also argued that any agreement to arbitrate was separate from the installation agreement and that general allegations of fraud were insufficient to invalidate Plaintiff’s specific agreement to arbitrate claims related to the installation contract. *See S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993). Despite these arguments, Plaintiff presented no briefs or affidavits at the hearing. Rather, Plaintiff’s counsel argued that the Court should deny the motion because of the complaint’s general fraud claim, because no discovery had been conducted, and because the contract was a consumer contract that was signed electronically on a computer. On January 8, 2020, the Court issued a Form 4 order denying the motion “as being premature.”

Defendants’ motion was ripe for consideration. The Brightest Solar Defendants seek reconsideration of the ruling because filing motions to compel arbitrations in lieu of responsive pleadings at the outset of an action is a routine and necessary practice when an arbitration agreement exists that is valid on its face. In fact, a movant may waive the right to enforce the agreement by failing to do so timely. *See, e.g., Rhodes v. Benson Chrysler-Plymouth*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007) (finding that a party seeking to compel arbitration waived right by engaging in pre-trial discovery). Here, as argued in the Palmetto Solar Defendants’ motion and December 31, 2020 supporting memorandum (joined by the Brightest Solar Defendants), the

plain language of the arbitration agreement supports a valid agreement signed by Plaintiff Johnson, who provided no evidence or legal argument specifically challenging the arbitration agreement's validity before or at the hearing.

Accordingly, the Brightest Solar Defendants respectfully request that the Court reconsider its ruling and grant the motion to compel arbitration and dismiss or stay the action. *See* S.C. Code Ann. § 15-48-20(a) (“On application of a party showing an agreement described in Section 15-48-10, and the opposing party’s refusal to arbitrate, the court shall order the parties to proceed with arbitration . . .”).

The Brightest Solar Defendants seek a ruling from the Court that enables them to evaluate when a determination of the issue by the Court is appropriate. The Court’s order only states that the motion was denied “as being premature.” In the event the Court declines to reconsider its ruling and grant Defendants’ motion to compel arbitration, the Brightest Solar Defendants respectfully request modification of the Order to the extent the order explains or provides clarity as to why the motion to compel arbitration was in fact premature.

Notably, section 15-48-20(a) states that “if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.” While Plaintiff Johnson does not appear to question the authenticity of the written installation contract submitted and referenced by Defendants, a denial can only be premised on the Court’s apparent inference that Plaintiff Johnson “denies the existence of the agreement to arbitrate.”

Accordingly, the Brightest Solar Defendants respectfully request clarification of how the Court wishes to “proceed summarily to the determination”—that is, whether, for example, holding

the decision in abeyance to permit limited discovery and briefing would better facilitate the summary determination of the existence and validity of the arbitration clause. The Brightest Solar Defendants submit that such relief will promote judicial economy and ensure that Defendants' rights to compel arbitration are preserved. *Cf. New Hope Baptist v. Paragon*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008).

Conclusion

Defendants Brightest Solar, Inc. and Robert Dodge respectfully move for reconsideration of the Court's January 8, 2020 order denying the motion "as being premature." Simply put, Plaintiff David Mack Johnson, Sr. failed to rebut the existence of the written arbitration agreement submitted by Defendants. But to the extent the Court cannot proceed summarily to a determination of the matter, the Brightest Solar Defendants respectfully request appropriate relief to facilitate the determination of this threshold matter and to preserve Defendants' rights to compel arbitration.

Respectfully submitted,

TINKLER LAW FIRM LLC

s/William P. Tinkler

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*Counsel for Brightest Solar, Inc. and Robert
Dodge*

January 19, 2021

New Hope Baptist v. Paragon

379 S.C. 620 (S.C. Ct. App. 2008) · 667 S.E.2d 1
Decided Aug 27, 2008

No. 4433.

Submitted May 1, 2008.

Decided August 27, 2008.

Appeal from the Circuit Court, Lancaster County,
621 Brooks P. Goldsmith, J. *621

James Mixon Griffin, of Columbia, for Appellant.

Philip E. Wright, of Lancaster, for Respondent.

623 *623

THOMAS, J.

Paragon Builders appeals the trial court's denial of its motion to compel arbitration or dismiss the complaint of New Hope Missionary Baptist Church. We reverse.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

FACTS

Paragon Builders, L.L.C. of Orangeburg, South Carolina, signed a contract with New Hope Missionary Baptist Church (Church) on or between September 30 and October 3, 2004. The two-page Contract was entitled a "Construction Management Agreement" wherein Paragon Builders avowed to help bring the construction of a new church facility "online" by working as "the chief construction advisor." Under the Contract, Paragon Builders pledged to work with the Church's architect in North Carolina, appointed

church leaders, state and local building inspectors,
624 local city and county governments, *624 utilities, bankers and others associated with the project.

Article 2 of the Contract, entitled "Time of Completion," contained an arbitration clause stating, "[a] disputes hereunder shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association." The Contract also provided that the Church would pay Paragon Builders twenty-five thousand dollars (\$25,000) but that "if for any reason this project is not constructed by Paragon Builders all money will remain with the contractor" and the Church "will not receive any funds back." Payment of the entire \$25,000 amount was due at the signing of the Contract.

The Contract was signed by Kenny W. Rose and Emoray R. Waiters, allegedly on behalf of the Church.² At some point, a payment of twenty-five thousand dollars was made from Church funds to Paragon Builders. Thereafter, the Church filed a declaratory judgment action asking the court to determine the existence, validity, and enforceability of the Contract.

² In the Record on Appeal, a single page bearing twenty-eight signatures has been attached to the Contract. The page bears no identifying marks or explanation regarding the identity of the twenty-eight signatories or why twenty-eight individuals signed the blank sheet of paper.

The Church's complaint raised numerous issues regarding the validity of the Contract, including the absence of any meeting of the minds, Paragon

Builders' lack of consideration, and the ambiguity of the Contract with regard to Paragon Builders' obligations. The Church asserted the \$25,000 payment and ensuing deposit were not authorized by the Church but was "the misguided action of the church financial secretary acting *ex officio*." The complaint prayed for a refund of the \$25,000 payment.

The complaint contended neither Rose³ nor Waiters was a "trustee[] of the church nor were they authorized by the church to enter into any such contract." Waiters' signature was also claimed to be a forgery. The Church contended the 625 *625 signatures on a blank page attached to the Contract were "simply a list of people who attended a meeting regarding the contract" and did not constitute a signature page which was part of the Contract. The Church asserted the Contract "was not approved by any vote of the church or any authorized committee or organization of the church" and as such does not bind the Church.

³ The Church further explained that although Rose was the pastor when the Contract was signed, there was an ongoing dispute with Rose at that time, and "ninety-nine percent of the activity that related to this Contract took place directly between the pastor and the contractor," without any information being relayed to the Church.

Paragon Builders timely answered denying the Church was entitled to a declaratory judgment or a refund. The Answer also pled an affirmative defense pursuant to Rule 12(b)(6), SCRCF, that the Church failed to state a claim upon which relief can be granted, and that the Church's claims were subject to arbitration under the Contract.

On July 3, 2006, Paragon Builders filed a Motion to Compel Arbitration and Dismiss or Stay the Complaint. The motion was heard on October 9, 2006, and subsequently denied. The trial court held, "[u]nder the Federal Arbitration Act and [S.C. Code Ann. § 15-48-10](#), before arbitration may be compelled, there must be a determination that

there was an agreement between the parties," and this was the very issue the Church contested. The trial court further held, "until there is a determination by the Court as to whether or not the parties had an agreement, arbitration cannot be compelled." Paragon Builders now appeals.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, [346 S.C. 580, 596, 553 S.E.2d 110, 118](#) (2001). Appeal from the denial of a motion to compel arbitration is subject to de novo review. *Chassereau v. Global Sun Pools, Inc.*, [373 S.C. 168, 171, 644 S.E.2d 718, 720](#) (2007). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, [357 S.C. 91, 94, 592 S.E.2d 50, 51](#) (Ct.App. 2003).

LAW/ANALYSIS

Paragon Builders claims the trial court erred in denying its Motion to Compel Arbitration brought 626 pursuant to Section 15-48-20(a) *626 of the South Carolina Code (2005). Specifically, Paragon Builders asserts the Contract's arbitration clause requires disputes arising out of the Contract be resolved through arbitration. Pursuant to *Prima Paint Corp. v. Flood Conklin Mfg. Co.*, [388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270](#) (1967), and *The Housing Authority of City of Columbia v. Cornerstone Housing, L.L.C.*, [356 S.C. 328, 588 S.E.2d 617](#) (Ct.App. 2003), we find the trial court erred in denying Paragon Builders' Motion to Compel Arbitration since the Church failed to specifically challenge the arbitration agreement.

Section 15-48-10(a) of the South Carolina Code (2005) states, "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon

such grounds as exist at law or in equity for the revocation of any contract." The Legislature also provided that:

On application of a party showing an [arbitration] agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

S.C. Code Ann. § 15-48-20(a) (2005). An order denying a motion to compel arbitration⁴ made under Section 15-48-20 is immediately appealable. S.C. Code Ann. § 15-48-200(a)(1) (2005); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842-43 (Ct.App. 1999).

⁴ This court also recently dealt with a motion to compel arbitration in *Partain v. Upstate Automotive Group*, 378 S.C. 152, 662 S.E.2d 426 (2008) (Shearouse Adv. Sh. No. 16 at 69).

As a preliminary note, we find the trial court properly determined the Federal Arbitration Act ("FAA") applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project, Paragon Builders' ⁶²⁷ position as chief construction advisor, and Paragon Builders' affidavit swearing the project will involve businesses and supplies from outside South Carolina. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363 (2001) ("Unless the parties have contracted to the contrary, the FAA applies in federal or state courts to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.");

Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); *Blanton v. Stathos*, 351 S.C. 534, 540-41, 570 S.E.2d 565, 568-69 (Ct.App. 2002) (holding Blanton's affidavit asserting the contract affected interstate commerce, Stathos's failure to dispute the affidavit, and the nature of the construction project were sufficient to uphold the decision of the circuit court that the contract evinces a transaction involving interstate commerce); *Towles*, 338 S.C. at 36, 524 S.E.2d at 843 ("Because interstate commerce is involved, the FAA applies and displaces South Carolina's Uniform Arbitration Act.") (citing *Soil Remediation Co. v. Nu-Way Envtl, Inc.*, 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996)).

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); *Aiken v. World Fin. Corp. of S. C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007). Since the Church contends a valid, enforceable contract does not exist, this is no doubt one reason why the trial court denied Paragon Builders' Motion to Compel Arbitration until the court could determine whether or not the parties had an agreement. However, further examination of case law from the United States Supreme Court and the South Carolina Supreme Court yields the surprising result that when a party argues fraud in the inducement of an entire contract, but not the arbitration agreement itself, ⁶²⁸ arbitration cannot be avoided. *Prima Paint*, ⁶²⁸ 388 U.S. 395, 87 S.Ct. 1801; *S.C. Pub. Sew. Auth. v. Great Western Coal, Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993); *Jackson Mills, Inc. v. BT*

Capital Corp., 312 S.C. 400, 440 S.E.2d 877 (1994); *Cornerstone Hous.*, 356 S.C. 328, 588 S.E.2d 617 (Ct.App. 2003).

In *Prima Paint*, 388 U.S. at 403-04, 87 S.Ct. 1801, the United States Supreme Court held that general allegations of fraud in the inducement of a contract are insufficient to prevent the invocation of a contract's arbitration clause. The court referenced Section 4⁵ of the FAA and concluded that with respect to cases evidencing transactions in commerce:

⁵ Section 4 provides in part, "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . . [i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C.A. § 4 (2008).

if the claim is fraud in the inducement⁶ of the arbitration clause itself — an issue which goes to the "making" of the agreement to arbitrate — the federal court may proceed to adjudicate it . . . [b]ut the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

⁶ The Church's complaint and brief to this court set forth arguments such as, an absence of any meeting of the minds, a lack of the signatories' ability to bind the Church, forgery, and failure of the Church to approve the Contract, all of which deal with fraud in factum, i.e., ineffective assent to the Contract. *Great Western Coal*, 312 S.C. at 562, 437 S.E.2d at 24.

388 U.S. at 403-04, 87 S.Ct. 1801. In *Great Western Coal, Inc.*, 312 S.C. at 562-63, 437 S.E.2d at 24 (emphasis added), the South Carolina

Supreme Court explained how the rule of *Prima Paint* should be applied by our courts:

We join the jurisdictions which have rejected limiting the holding in *Prima Paint*. We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. Fraud as a defense to an arbitration clause must be fraud *629 specifically as to the arbitration clause and not the contract generally.

A party may allege the arbitration agreement was never entered into and "under such circumstances, a challenge to the existence of the arbitration agreement itself becomes a matter to be 'forthwith and summarily tried' by the Court." *Jackson Mills*, 312 S.C. at 404, 440 S.E.2d at 879 (citations omitted).

In its complaint, at the hearing, and in its brief to this court, the Church does not specifically allege the arbitration clause in the Contract is invalid, unenforceable, or does not exist. Instead, the Church argues it has numerous grounds on which *the Contract* is invalid and that "the Contract simply does not exist as a Contract" in part because of Rose's inability to bind the Church.

We acknowledge the United States Supreme Court has identified certain limited circumstances in which "courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of 'clear and unmistakable' evidence to the contrary)." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). These "gateway matters" include whether the parties have a valid arbitration agreement or whether a binding arbitration clause applies to a certain type of controversy. *Id.* However, in the present case we are not confronted with the question of whether an arbitration agreement encompasses a certain dispute⁷ or whether the arbitration agreement is invalid. Instead, we have

been presented with the question of whether arbitration should be compelled when a contract's validity has been challenged.

⁷ "Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract." *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. Whether a particular claim is subject to arbitration has been examined in many cases, including, *Aiken*, 373 S.C. 144, 644 S.E.2d 705; *Chassereau*, 373 S.C. 168, 644 S.E.2d 718; *Zabinski*, 346 S.C. 580, 553 S.E.2d 110; *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993); *Vestry Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 588 S.E.2d 136 (Ct.App. 2003). This issue is not presently before the court.

Common sense implies that if a party challenged the validity of a contract which contained an arbitration clause, ⁶³⁰ the validity of the arbitration clause is also challenged. The courts have found otherwise. "Arbitration clauses are separable⁸ from the contracts in which they are imbedded." *Jackson Mills*, 312 S.C. at 403, 440 S.E.2d at 879 (citing *Prima Paint*, 388 U.S. at 402, 87 S.Ct. 1801). An arbitration clause's validity is distinct from the substantive validity of the contract as a whole. *Cornerstone Hous.*, 356 S.C. at 338, 588 S.E.2d at 622 (citing *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623.

⁸ In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the South Carolina Supreme Court recently noted that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause especially in situations where "illegality pervades the arbitration agreement such that only a

disintegrated fragment would remain after hacking away the unenforceable parts." 373 S.C. at 34, 644 S.E.2d at 673. This situation is not presently before us since the Church has made no claims regarding the unconscionability of its Contract with Paragon Builders. The supreme court emphasized the importance of a case-by-case analysis to address unique circumstances surrounding the evaluation of an arbitration clause for unconscionability and further distinguished *Simpson* from cases such as the one *sub judice* by holding the arbitration clause in *Simpson* is unconscionable due to a multitude of one-sided terms. *Id.* at 36, 644 S.E.2d at 674.

The policies of the United States and this State favor arbitration of disputes. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 610-11, 571 S.E.2d 711, 713-14 (Ct.App. 2002); *Tritech Elec., Inc. v. Frank M. Hall Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct.App. 2000) (citation omitted); *Towles*, 338 S.C. at 37, 524 S.E.2d at 844. "The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (citation omitted). The Church's argument that the entire Contract is invalid can be considered at the arbitration itself. *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623; see *Bazzle*, 539 U.S. 444, 453, 123 S.Ct. 2402 (noting arbitrators are well ⁶³¹ suited to address issues such as contract interpretation and arbitration procedures).

We further acknowledge that "where there has been no agreement to arbitrate, a party cannot be forced into compulsory arbitration." *Hilton Head Resort Four Seasons Ctr. Horizontal Prop. Regime Council v. Resort Inv. Corp.*, 311 S.C. 394, 397-98, 429 S.E.2d 459, 462 (Ct.App. 1993) (citation omitted). Again, precedent forces a distinction to be drawn between disputes in which a party

challenges the arbitration agreement itself and disputes in which only the overall contract is challenged. See *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007) (holding the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract because "[a]lthough the clause specifically stated that arbitration applied to issues involving 'the validity and scope of this contract,' Simpson challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place"); *Cornerstone Hous.*, 356 S.C. at 338-42, 588 S.E.2d at 622-24 (holding because a party did not directly challenge the arbitration agreement in either of the two contracts, the legality and enforceability of the contracts is an issue for the arbitrator to decide). Indeed, even Section 15-48-20(a) of the South Carolina Code (2005) notes when a party presents a court with an arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration unless "the opposing party denies the existence of the *agreement to arbitrate*." S.C. Code Ann. § 15-48-20(a) (2005) (emphasis added). Unlike the cases argued by the Church, the matter presently before us does not raise the issue of whether the arbitration clause in Article 2 of the Contract is invalid. Accordingly, the order of the trial court is

REVERSED.

WILLIAMS, J., concurs.

PIEPER, J., dissents in a separate opinion.

632 *632

PIEPER, J., dissenting.

I respectfully dissent. In my opinion, this case involves more than a situation where a party alleges fraud in the inducement of just the contract itself, as opposed to challenging the arbitration provision of the contract. I believe the Church has

raised a colorable claim that there was no arbitration agreement by alleging the signer of the agreement had neither the authority to agree to the contract itself, nor the authority to agree to the arbitration provision.

I fully support the policy in favor of arbitration and will not resort to citation of the law in this regard. I believe the majority opinion fully recounts the applicable law. However, the majority notes that where there has been no agreement to arbitrate, a party cannot be forced to do so. I believe further clarification of the law in this area is necessary. Based on the facts of this case, I find it very problematic that a person, without authority, may set out to not only bind another to a contract, but also to arbitration without the right to do so, and without a preliminary court determination on the issue of the authority to bind (i.e. the existence of the agreement to arbitrate). Under the facts herein, I respectfully believe this case falls within that type of "gateway matter" ripe for a judicial determination as to the existence of the agreement to arbitrate. See *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (stating where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place); see also 9 U.S.C.A. § 4 (2008) (wherein the Federal Arbitration Act directs the court to summarily determine the existence of the arbitration agreement if it is at issue); accord S.C. Code Ann. § 15-48-20(a) (2005).

Moreover, the circuit court did not rule that arbitration may not eventually result; instead, the court concluded that a preliminary and threshold determination must be made about the existence of an agreement to arbitrate. Once that threshold determination is made, I do not read the court's order as precluding arbitration if the issue as to the authority to enter the agreement to arbitrate is determined adversely to the *633 Church. Therefore, I agree with the assertion by the Church in its brief that the appeal is premature.

633

Accordingly, I would affirm.

 casetext

Ann Simmons

From: efiledonotreply@sccourts.org
Sent: Friday, January 8, 2021 9:47 AM
To: Mark Ball
Cc: Ann Simmons
Subject: [External Email] Courtesy NEF RE: 2020CP1500604

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2020CP1500604

Official File Stamp: 01-08-2021 09:46:38 AM
Court: CIRCUIT COURT
Common Pleas
Colleton
Case Caption: David Mack Johnson Sr VS Palmetto Solar, Llc , defendant, et al
Document(s) Submitted: Order/Electronic Form 4 Order/Electronic Form 4
Filed by or on behalf of: Bentley D. Price

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Mark David Ball for David Mack Johnson, Sr
William P. Tinkler for Robert Dodge, Brightest Solar Inc
Matthew A. Abee for Palmetto Solar, Llc, Sunlight Financial Llc, Palmetto South Carolina Solar I, Llc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Cross River Bank
Great America Services Corporation

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

David Mack Johnson, Sr.,

Plaintiff,

vs.

Palmetto Solar, LLC; Palmetto South Carolina  
Solar I, LLC, Brightest Solar, Inc., Sunlight  
Financial, LLC, Cross River Bank, Great  
America Services Corporation and Robert  
Dodge,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2020-CP-15-00604**ORDER DENYING DEFENDANTS  
BRIGHTEST SOLAR, INC. AND  
ROBERT DODGE'S MOTION TO  
RECONSIDER**

The Defendants Brightest Solar, Inc. and Robert Dodge filed a motion asking this Court to reconsider its January 8, 2021 Order.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent “highly unusual circumstances.” U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court’s ruling will not support Rule 59(e) relief).<sup>1</sup> Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or “to raise argument or present evidence that could have been presented prior to the entry of judgment.” Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, \*2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to

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<sup>1</sup> Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) (“Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”).

the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Defendants’ motion, the Court hereby DENIES Defendants Brightest Solar, Inc. and Robert Dodge’s Motion for Reconsideration.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW



Colleton Common Pleas

**Case Caption:** David Mack Johnson Sr VS Palmetto Solar, Llc , defendant, et al

**Case Number:** 2020CP1500604

**Type:** Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

|                                               |   |                                   |
|-----------------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                       | ) | IN THE COURT OF COMMON PLEAS      |
|                                               | ) | FOURTEENTH JUDICIAL CIRCUIT       |
| COUNTY OF COLLETON                            | ) |                                   |
| <br>David Mack Johnson, Sr.,                  | ) | Civil Action No. 2020-CP-15-00604 |
|                                               | ) |                                   |
|                                               | ) |                                   |
| Plaintiff,                                    | ) |                                   |
|                                               | ) |                                   |
| vs.                                           | ) | <b>Joint Notice of Appeal</b>     |
|                                               | ) |                                   |
| Palmetto Solar, LLC; Palmetto South           | ) |                                   |
| Carolina Solar I, LLC; Brightest Solar, Inc.; | ) |                                   |
| Sunlight Financial, LLC; Cross River          | ) |                                   |
| Bank; Great America Services Corporation;     | ) |                                   |
| and Robert Dodge,                             | ) |                                   |
|                                               | ) |                                   |
| Defendants.                                   | ) |                                   |
|                                               | ) |                                   |

---

Defendants-Appellants Palmetto Solar, LLC, successor by merger with Palmetto South Carolina Solar I, LLC; Brightest Solar, Inc.; Sunlight Financial, LLC; Cross River Bank; and Robert Dodge (“Appellants”) notice their appeal from the January 8, 2021 Form 4 Order Denying Appellants’ Motions to Compel Arbitration and Dismiss, and the August 12, 2021 Order Denying Appellants’ Motions to Reconsider, both filed by the Honorable Bentley Price.<sup>1</sup> Appellants attach the Joint Notice of Appeal filed with the South Carolina Court of Appeals on September 7, 2021, as **Exhibit 1**.

**[Signatures on following page.]**

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<sup>1</sup> Cross River Bank, which has not been served with process and over which the Court does not have personal jurisdiction, joins in the appeal but does not make a general appearance in this matter.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

Matthew A. Abee  
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*Attorney for Appellants Palmetto Solar, LLC, successor by merger with Palmetto South Carolina Solar I, LLC; Sunlight Financial, LLC; and Cross River Bank*

Columbia, South Carolina  
September 7, 2021

TINKLER LAW FIRM LLC

By: /s/ William P. Tinkler

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*Attorney for Appellants Brightest Solar, Inc. and Robert Dodge*

Charleston, South Carolina  
September 7, 2021

# Exhibit 1

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2020-CP-15-00604

David Mack Johnson, Sr..... Plaintiff-Respondent,

v.

Palmetto Solar, LLC; Palmetto South Carolina Solar I, LLC; Brightest Solar, Inc.; Sunlight Financial, LLC; Cross River Bank; Great America Services Corporation; and Robert Dodge.....Defendants,

Of which, Palmetto Solar, LLC; Palmetto South Carolina Solar I, LLC; Brightest Solar, Inc.; Sunlight Financial, LLC; Cross River Bank; and Robert Dodge are..... Appellants.

**Joint Notice of Appeal**

Defendants-Appellants Palmetto Solar, LLC, successor by merger with Palmetto South Carolina Solar I, LLC; Brightest Solar, Inc.; Sunlight Financial, LLC; Cross River Bank; and Robert Dodge (“Appellants”) notice their appeal from the January 8, 2021 Form 4 Order Denying Appellants’ Motions to Compel Arbitration and Dismiss, and the August 12, 2021 Order Denying Appellants’ Motions to Reconsider, both filed by the Honorable Bentley Price. A copy of the orders are attached to this Joint Notice of Appeal. *See* Rule 203(d)(1)(B)(ii), SCACR.

Appellants received notice of the entry of the order denying reconsideration on August 12, 2021. *See* Rule 203(b)(1), SCACR; Rule 203(e)(1)(C), SCACR.

As permitted by paragraph (c) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, Appellate Case No. 2020-000447

(Aug. 25, 2021), Appellants shall mail the required filing fee to the Court within five (5) days of the date of this filing.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

Matthew A. Abee  
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*Attorney for Appellants Palmetto Solar, LLC, successor by merger with Palmetto South Carolina Solar I, LLC; Sunlight Financial, LLC; and Cross River Bank*

Columbia, South Carolina  
September 7, 2021

TINKLER LAW FIRM LLC

By: /s/ William P. Tinkler

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(843) 853-5203

*Attorney for Appellants Brightest Solar, Inc. and Robert Dodge*

Charleston, South Carolina  
September 7, 2021

David Mack Johnson, Sr  
PLAINTIFF(S)

Palmetto Solar, Llc et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

Defendant Palmetto Solar, LLC's Motion to compel and enforce arbitration is denied. It is denied as being premature.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/08/2021 .

Cross River Bank  
Great America Services Corporation

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Colleton Common Pleas

**Case Caption:** David Mack Johnson Sr VS Palmetto Solar, Llc , defendant, et al

**Case Number:** 2020CP1500604

**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

STATE OF SOUTH CAROLINA  
 COUNTY OF COLLETON

David Mack Johnson, Sr.,  
 Plaintiff,  
 vs.

Palmetto Solar, LLC; Palmetto South Carolina  
 Solar I, LLC, Brightest Solar, Inc., Sunlight  
 Financial, LLC, Cross River Bank, Great  
 America Services Corporation and Robert  
 Dodge,  
 Defendants.

IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT  
 CASE NO.: 2020-CP-15-00604

**ORDER DENYING DEFENDANTS  
 BRIGHTEST SOLAR, INC. AND  
 ROBERT DODGE'S MOTION TO  
 RECONSIDER**

The Defendants Brightest Solar, Inc. and Robert Dodge filed a motion asking this Court to reconsider its January 8, 2021 Order.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent “highly unusual circumstances.” U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court’s ruling will not support Rule 59(e) relief).<sup>1</sup> Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or “to raise argument or present evidence that could have been presented prior to the entry of judgment.” Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, \*2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to

<sup>1</sup> Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) (“Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”).

the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Defendants’ motion, the Court hereby DENIES Defendants Brightest Solar, Inc. and Robert Dodge’s Motion for Reconsideration.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW



Colleton Common Pleas

**Case Caption:** David Mack Johnson Sr VS Palmetto Solar, Llc , defendant, et al

**Case Number:** 2020CP1500604

**Type:** Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

RECEIVED

Apr 06 2022

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM COLLETON COUNTY  
Court of Common Pleas

Bentley Price, Circuit Court Judge

Appellate Case No.: 2021-000977

David Mack Johnson, Sr.....Respondent,

-v-

Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, Brightest Solar, Inc., Sunlight Financial, LLC, Cross River Bank, Great America Services Corporation, and Robert Dodge, Defendants,

Of Whom, Palmetto Solar, LLC, Palmetto South Carolina Solar I, LLC, Brightest Solar, Inc., Sunlight Financial, LLC, Cross River Bank, and Robert Dodge are

the.....Appellants.

**CERTIFICATE OF SERVICE**

This is to certify that I, April E. Musser, with Parker Law Group, LLP, Attorney for the Respondent, have this date emailed a true and correct copy of the within *Motion to Dismiss* to:

Matthew A. Abee  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
E-Mail: matt.abee@nelsonmullins.com  
1320 Main Street / 17th Floor  
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Attorney for Appellants Palmetto Solar, LLC, successor by merger with Palmetto South Carolina Solar I, LLC; Sunlight Financial, LLC; and Cross River Bank.

TINKLER LAW FIRM LLC

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Attorney for Appellants Brightest Solar, Inc. and Robert Dodge

BY: \_\_\_\_\_

April E. Musser

April 6, 2022

Hampton, South Carolina

April 6, 2022

**RECEIVED**  
**Apr 06 2022**  
**SC Court of Appeals**

**Via Email Only: ctappfilings@sccourts.org**

The Honorable Jenny Abbott Kitchings  
S.C. Court of Appeals Clerk of Court  
Post Office Box 11629  
Columbia, SC 29211-1629

**Re: *Johnson v. Palmetto Solar, LLC, et al.***  
***Appellate Case No.: 2021-000977***

Dear Ms. Kitchings:

Please find enclosed for filing, Respondent's Motion to Dismiss to be Included in the Record on Appeal in the above-referenced case.

By copy of this letter, Appellant's Initial Brief and Designation of Matter is being served on all counsel of record via email.

With kind regards, I am

Sincerely,



John E. Parker Jr.

JAY/aem  
Enclosures as stated.

cc: Matthew A. Abee, Esquire  
William P. Tinkler, Esquire