EXHIBIT A

to

Petitioners Return to Lennar's Petition for Rehearing

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO: 2014-CP-08-02424
)
)
Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,

Plaintiffs,

vs.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental, and Rick Bryant, individually.

Defendants.

Lennar Carolinas, LLC,

Third-Party Plaintiff,

vs.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC,

ORDER GRANTING PLAINTIFFS' MOTION TO LIFT AUTOMATIC STAY FOR PURPOSES OF DISCOVERY

Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource – Southeast Group, LLC, and Low Country Renovations and Siding, LLP,

Third-Party Defendants.

Décor Corporation,

Fourth Party Plaintiff,

vs.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Enmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez Son, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aparecido Corgosinho, Ricardo Chiche, Cebs Construction, Bayshore Siding and Flooring, Sebastio Luiz De Araujo, and John Does 1 – 4,

Fourth-Party Defendants.

Alpha Omega Construction Group, Inc.

Fourth-Party Plaintiff,

Vs.

Garcia Roofing, LLC, Juan Garza Ramos, Jose Vera, and Espino Roofing, LLC,

Fourth-Party Defendants.

DVS, Inc.,

Fourth-Party Plaintiff,

Vs.

Sousa Construction, LLC, Lima Construction, LLC, N&B Construction, LLC, Itatiaia Construction, LLC and JC Contractors, LLC

Fourth-Party Defendants.

South Carolina Exteriors, LLC

Fourth-Party Plaintiff,

Vs.

Juan Garza Ramos, d/b/a Juan Constructors,

Fourth-Party Defendant.

Guaranteed Framing, LLC

Fourth-Party Plaintiff,

Vs.

First Construction, LLC, JC Contractors, LLC, Jessica Marroquin d/b/a Marroquin Construction, and Unique Framing, LLC,

Fourth Party Defendants.

This matter came before the Court on April 11, 2018 for a hearing upon Plaintiffs' Patricia Damico, et al. ("Plaintiffs") Motion to Lift Automatic Stay pursuant to Rule 241(c)(1), SCACR. Present for Plaintiffs was John Hayes, IV, Esq. and present for Defendant Lennar Carolinas, LLC was James Werner, Esq. Upon review of the memoranda and materials presented, oral arguments, and the applicable rules and case law, Plaintiffs' Motion to Lift the Automatic Stay is granted solely for discovery purposes.

FACTUAL AND PROCEDURAL BACKGROUND

The case involves allegations of construction defects in multiple homes located in The Abbey at Spring Grove in Moncks Corner, South Carolina. The development consists of sixty-nine (69) single-family homes constructed between 2010 and 2016 that were originally started by Defendant Spring Grove Plantation Development. In 2011, the development was sold to Defendant Lennar Carolinas, LLC, hereinafter "Lennar", who took over the control, construction, management, and sale of the homes at The Abbey.

Plaintiffs filed this lawsuit on October 30, 2014 against multiple defendants, including Lennar alleging causes of action for Negligence, Negligent Misrepresentation, Breach of Warranties, Breach of Fiduciary Duties, and Unfair Trade Practices. Plaintiffs subsequently moved for class certification and filed an Amended Complaint on March 24, 2016. On March 30, 2016 Lennar filed a Motion to Compel Arbitration pursuant to their Arbitration Agreements with some but not all of the Plaintiffs. The Motion to Compel Arbitration was denied and Lennar appealed the decision. The appeal prompted an automatic stay, which gave rise to Plaintiffs' Motion to Lift the Automatic Stay for purposes of discovery. Plaintiffs argued the parties should

be permitted to conduct discovery while the appeal is pending because discovery is not affected by the appeal. Lennar argued the automatic stay should not be lifted.

STANDARD OF REVIEW

Pursuant to Rule 205, SCACR, the entire case is not stayed during the pendency of the appeal. This allows the lower court to retain jurisdiction over matters not affected by the appeal. The Rules also allow any party to move the Court to lift the automatic stay imposed by an appeal. SCACR 241(C)(1). The moving party bears the burden of demonstrating that the automatic stay should be lifted. Rule 241(c)(1) states that the court may consider issues such as mootness and jurisdiction when deciding whether to lift an automatic stay. However, these issues are not exhaustive and the Court can act on its own discretion when removing the stay.

In *Cousar v. New London Engineering Co., Inc.*, the Supreme Court held that retaining jurisdiction over discovery matters during pendency of appeal from order denying motion to amend answer and third-party complaint was not an abuse of discretion because discovery was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Further, under *Williams v. Borden's Inc.*, this Court has the power to control its order of business and safeguard the rights of the litigants before it. *Williams v. Borden's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980).

ANALYSIS

I. THE COURT CAN PROCEED WITH MATTERS NOT AFFECTED BY THE APPEAL.

Plaintiffs have multiple claims against subcontractors that are not subject to any arbitration agreements. Pursuant to Rule 205, SCACR, "nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." Rule 205, SCACR. The

Supreme Court has held that retention of jurisdiction over discovery matters by the trial court was not an abuse of discretion and that discovery in that case was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Based on the Appellate Court Rules and Supreme Court precedent presented by the Plaintiffs, it is within the powers of this court to retain jurisdiction over discovery matters and allow the case to progress.

Accordingly, this Court finds that matters relating to the claims against subcontractors are not affected by the appeal. There are no contracts or binding arbitration agreements between the subcontractor Defendants and the Plaintiffs. In addition, any Homeowner Plaintiff who is not an original purchaser from Lennar has no arbitration agreement with Lennar. Therefore, the decision that has been appealed bears no relation to the claims between the subcontractors and the Plaintiffs. As a result, Plaintiffs are free to conduct discovery and move their case forward as to the subcontractors.

II. THE AUTOMATIC STAY IS LIFTED FOR PURPOSES OF DISCOVERY

During the pendency of an appeal, a party may move the Court to lift the automatic stay for any purpose. SCACR 241(c)(1). While Rule 241 states the court should consider issues relating to jurisdiction and mootness, this list is not exhaustive and the Court has broad discretion in deciding such matters. SCACR(c)(2); *Cousar*, 306 S.C., 410 S.E.2d.

Lennar cites to a federal case in an attempt to show the lifting of the stay is improper because the appeal is not "frivolous". *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). The issue before the Court is not whether the appeal is frivolous but whether the Automatic Stay should be lifted to allow discovery to continue. The Court agrees with Defendant that there is an automatic stay placed on the case

and it will remain until the Court of Appeals renders a decision. However, as allowed by the Appellate Court Rules, any party may move the court to lift the automatic stay and Plaintiffs have brought their motion accordingly.

Plaintiffs assert that discovery is not affected by the appeal, that Plaintiffs would be prejudiced by a delay in discovery, and that regardless of which forum the Court of Appeals choses for this matter, some form of discovery is allowed to take place. The Court finds it compelling that under the arbitration rules, discovery still needs to take place. The agreement between Plaintiffs and Lennar contains an Arbitration Clause that incorporates the AAA Residential Construction Arbitration Rules. The AAA rules allow for the exchange of documents and interviews. ARB-22. This equates to what is commonly known in litigation as discovery and depositions. The AAA rules further allow for expert reports and the exchange the any expert reports and estimates. *Id.* In the event that the Appellate Court enforces the arbitration agreements between the parties, there will be discovery conducted. The Court sees no reason to needlessly delay events that would occur eventually, regardless of the forum.

Lennar's argument relies heavily on a 2006 Circuit Court Order in *Chassereau* that states that allowing discovery during the appeal was improper in that case. The Court in *Chassereau* decided that "[p]ermitting discovery to proceed while an appellate court has jurisdiction of the case may, in some circumstances, affect the mode of trial of the case. If the rules of the applicable arbitration do not provide for discovery as part of the arbitration process, the granting of discovery to either of the parties affects the mode of trial between the parties. *In this case the arbitration agreement does not provide for discovery between the parties.*" *Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626. The basis for the Court's decision in

Chassereau was emphasized by the Court, and that basis was that there was no arbitration agreement providing for discovery. Here, we have the opposite set of facts and the underlying arbitration agreement in this case *does* address discovery and even provides the applicable rules. In addition, there are no arbitration agreements between the Plaintiffs and Subcontractor Defendants. The Supreme Court decision in *Cousar* outweighs the trial court order in *Chassereau*. Although *Chassereau* is persuasive, it is not binding upon the Court and the pertinent facts in this case differ from *Chassereau*.

Plaintiffs also argued that as time passes by in this case, which was filed in 2014, witnesses' memories will lapse, the hazardous conditions present at the Abbey will worsen, properties will continue to deteriorate, insurance coverage will diminish, and Plaintiffs will be prejudiced as a result. The passing of time and rising expenses make it clear that allowing discovery to move forward in this case would promote the interests of judicial economy and equity. Plaintiffs have sufficiently shown that there will be no prejudicial effect against either party by lifting the stay for discovery. Alternatively, the Court finds that delaying discovery would prejudice Plaintiffs. Accordingly, the Court hereby lifts the stay solely for purposes of discovery.

CONCLUSION

Based on the foregoing and it being within the sound discretion of the Court to control its order of business and safeguard the rights of the litigants before it, this Court finds there is sufficient evidence demonstrating the need for discovery to continue and that the automatic stay imposed by SCACR 205 should be lifted solely for discovery.

THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' Motion to Lift the Automatic Stay is granted for discovery to take place.

2. Plaintiffs and Defendants are entitled to engage in discovery in the above-captioned matter.

3. The Stay shall remain in place otherwise for matters affected by the appeal.

AND IT IS SO ORDERED.

The Honorable J. C. Nicholson, Jr.
Ninth Judicial Circuit

May 29, 2018
Moncks Corner, South Carolina

EXHIBIT B

to

Petitioners Return to Lennar's Petition for Rehearing

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

APPELLANT LENNAR CAROLINAS, LLC'S PETITION TO REVIEW THE CIRCUIT COURT'S ORDER LIFTING THE AUTOMATIC STAY

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INTRODUCTION

Appellant Lennar Carolinas, LLC ("Lennar"), by and through undersigned counsel, hereby petitions this Court pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules to review and reverse the circuit court's order lifting the automatic stay in the captioned case while the issue of whether the entire action is subject to arbitration is pending on appeal.

The circuit court's order lifting the automatic stay is error and constitutes an abuse of discretion. While Rule 241(a), SCACR, allows that a lower court retains jurisdiction over matters not affected by the appeal, when the appeal involves the fundamental question of whether the case is subject to arbitration (and not civil litigation in the court), there are no matters in the case not affected by the appeal. In short, nothing in this matter is unaffected by Lennar's appeal of the circuit court's order denying its Motion to Compel Arbitration. Furthermore, the circuit court's unprecedented order lifting the automatic stay, and allowing discovery to proceed, while the validity of the entire action in the circuit court is pending on appeal undermines the very basis of Lennar's appeal.

Review of South Carolina authorities does not reveal any precedent for a circuit court to lift an automatic stay of a matter pending appeal in a case like this one, and the circuit court's order contains no valid basis for such an action in this case. The circuit court's order improperly lifted the automatic stay, and Lennar petitions the Court to issue an order reversing the circuit court and reinstating the automatic stay of the entire action.

FACTUAL BACKGROUND

Patricia Damico, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the "Owners")

purchased homes in a community known as The Abbey at Spring Grove Plantation ("The Abbey") which is located in Berkeley County, South Carolina.

The Owners filed this lawsuit against Lennar and others alleging the right to proceed as a class action on claims of alleged construction defects. Lennar asserted cross-claims against co-defendants and third-party claims against other subcontractors. Lennar also filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling all of the parities in this action to arbitration pursuant to various applicable documents and agreements.

The circuit court held a hearing on Lennar's Motion to Compel Arbitration and denied Lennar's Motion.

Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, the Owners attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Thus, Lennar was forced to submit a Motion to Enforce the Automatic Stay pursuant to Rule 205 to the Court of Appeals. On December 19, 2016, the Court of Appeals issued an Order enforcing the automatic stay of proceedings in the circuit court.

At this time, the appeal has been fully briefed to the Court of Appeals, and the parties are awaiting notice as to whether the above-captioned case will be set for oral argument.

On February, 27, 2018, Patricia Damico and Lenna Lucas ("Plaintiffs") filed a Motion to Lift the Automatic Stay. On April 11, 2018, the circuit court held a hearing on Plaintiffs' Motion to Lift the Automatic Stay. On May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

Lennar submits this Petition requesting the Court reverse the circuit court's order and reinstate the stay of the entire action during the pendency of the appeal.

ARGUMENT

Rule 241(c)(2) establishes the standard which should be applied by the circuit court in determining whether an order lifting an automatic stay should issue. Specifically, the court "should consider whether such an order [lifting the stay] is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241, SCACR. In this case, the circuit court did not address – and, in fact, refused to consider – these determining factors. Instead, the circuit court ignored them and stated, without authority, that it may consider other issues and may "act on its own discretion when removing the stay."

As justification for its decision to lift the automatic stay, the circuit court espoused the notion that Rule 205, SCACR, allows that "nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." However, the circuit court failed to recognize that the appeal in this case affects the very existence of the case in the circuit court. Lennar's appeal seeks to compel the case to arbitration under arbitration agreements which provide that any and all controversies, disputes or claims arising under or related to (a) the agreements by which Plaintiffs acquired the houses in issue, (b) the property itself, or (c) relating to any personal injury or property damage alleged by Plaintiffs are to be submitted to binding arbitration. Thus, regardless of whether Plaintiffs make claim against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case are subject to arbitration because all of the claims arise under and are related to the property and Plaintiffs'

claimed injuries and damages sustained because of alleged defects in the properties. There are no claims in the case which are not affected by and at issue in the decision to compel arbitration.[1]

It has been well recognized by other courts addressing similar issues to those in this case that Lennar's appeal of the circuit court's denial of the Motion to Compel Arbitration is a challenge to the continuation of any proceeding before the circuit court on the underlying claims. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264-65 (4th Cir. 2011). These same courts have further recognized that discovery in the action should not proceed while the issue of arbitration is being decided. "Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the [circuit] court lacks jurisdiction." *Id.* Arbitration affects the mode of trial and, therefore, discovery is automatically stayed when an arbitrability issue is appealed. *See Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) (holding that "preparation for trial must be suspended until the court of appeals renders a decision" on an appeal from a denial of a motion to compel arbitration). In its appeal, Lennar asserts the circuit court erred in not compelling each and every party to this action to arbitration. Therefore, the entire action was removed from the circuit court's jurisdiction and automatically stayed for the duration of Lennar's appeal.

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[1] The circuit court's order purports to find that matters relating to the claims against the subcontractor defendants are not affected by the appeal. The seventh issue in Lennar's statement of issues on appeal is "[w]hether the circuit court erred in failing to perform any analysis of the arbitration agreement(s) applicable to Spring Grove Development and the Subcontractors." The circuit court's finding that the matters relating to the claims against the subcontractors are not affected by the appeal is patently false and a wholly inappropriate basis for lifting the automatic stay and permitting discovery related to the subcontractors to proceed.

Additionally, all of the Owners' claims are affected by Lennar's appeal of the arbitrability issues. Lennar appealed the circuit court's erroneous refusal to compel the Owners (including the subsequent purchaser Owners) to arbitration pursuant to the arbitration agreements in the purchase and sale agreements, the Lennar Limited Warranty, the covenants, and the deeds for the Owners' respective properties.

The circuit court's reliance on the decision in *Cousar v. New London Engineering Company*, 306 S.C. 37, 410 S.E.2d 243 (1991), as justification for its decision to lift the stay in this case is completely misplaced. In *Cousar*, the circuit court did not lift an automatic stay of discovery. In *Cousar*, the issue on appeal was the circuit court's order denying a motion to amend a complaint, which amendment would assert claims against third-parties that had previously been dismissed from the action. *Cousar*, 306 S.C. at 39, 410 S.E.2d at 244. The Supreme Court found that the circuit court retained jurisdiction over the proceedings between the plaintiff and defendant because the issues between those parties were not affected by the appeal of the denial of a motion to amend a third-party complaint to assert claims against third-party defendants. *Id.* at 40, 410 S.E.2d at 245. The court in *Cousar* did not conduct an analysis of whether the automatic stay could or should be lifted. In *Cousar*, it was clear that the issue on appeal did not affect the case below between plaintiff and defendant. Thus, there were matters in the case unaffected by the appeal over which the circuit court properly retained jurisdiction. The situation in *Cousar* is markedly distinguishable from the case at bar because in the case at bar, the entire action is affected by the appeal. The case at bar must be stayed pending the Court's ruling on the arbitration issues.

The appeal in the case at bar involves a Motion to Compel Arbitration. When such a motion is appealed, the entire action is stayed and discovery is not permitted because arbitration fundamentally affects the mode of trial. Thus, discovery should not be permitted to proceed while the Court reviews whether the entire action is subject to arbitration.

While sitting on the circuit court, Justice Few had reason to analyze whether the circuit court should grant a motion to lift the automatic stay and to permit discovery to proceed while an appeal of arbitrability issues was pending with the Court of Appeals. *See Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626, *1 (S.C. Com.Pl. March 29, 2006). In *Chassereau*, then

Judge Few found that permitting discovery to proceed while an appellate court has jurisdiction of the case affects the mode of trial. 2006 WL 6087626, *1. He recognized that differences in discovery available in arbitration versus those allowed in civil litigation under the South Carolina Rules of Civil Procedure would mean that the granting of discovery to either of the parties while the issue of arbitration was open would affect the mode of trial between the parties. *Id.* In analyzing whether to lift the automatic stay and allow discovery to proceed, then Judge Few noted that there is a "very clear possibility of prejudice and a tactical advantage being enjoyed by one of the parties to an action when it is given access to discovery which would not otherwise be authorized." *Id.*

The circuit court's order erroneously found that Justice Few's order in *Chassereau* was distinguishable from the present case because the arbitration agreement in the present case provides for discovery. The circuit court has no basis for such a conclusion when the issue of whether and under what agreement the arbitration will proceed is a matter pending on appeal. While the circuit court's order references the AAA's Home Construction Arbitration Rules as its basis for finding that regardless of the outcome of the appeal discovery will be conducted, there is no basis for such finding at this time. In fact, even if such Arbitration Rules are ultimately determined to apply (a question by no means resolved at this point), the circuit court failed to recognize that the AAA's Home Construction Arbitration Rules (cited by the circuit court as ARB-22) do not provide parties with the same discovery that is permitted by the South Carolina Rules of Civil Procedure. Among other things, the AAA's Home Construction Arbitration Rules differ from the Rules of Civil Procedure with respect to the right to serve interrogatories and requests to admit and third-party discovery. If the automatic stay is not reinstated, then Plaintiffs will have access to discovery that would not otherwise be authorized if the action is compelled to arbitration. This access provides Plaintiffs with a clear tactical advantage and prejudices Lennar.

In addition to providing a tactical advantage by providing unauthorized discovery, the lift of the automatic stay prejudices Lennar by eroding the benefits of arbitration. Arbitration is favored in this state because it provides "a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings." *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104-05, 333 S.E.2d 781, 785 (1985) (citation omitted). "Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially." *Bradford-Scott Data Corp.*, 128 F.3d at 506. The circuit court's order lifting the automatic stay erodes the benefits of arbitration and prejudices Lennar by forcing Lennar to engage in unauthorized and expensive discovery.

Additionally, the circuit court's order noticeably omitted any analysis of the prejudicial effect of moving forward with the case in the circuit court while the appeal of the arbitrability issues is pending with the Court of Appeals. The authority is well established that Plaintiffs will be barred from proceeding with this matter as a class action if they are compelled to arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) (holding that a party may not be compelled to submit to class arbitration when an arbitration clause is silent on the issue); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 872 (4th Cir. 2016). Plaintiffs' Complaint alleges the existence of a class. If discovery is allowed to proceed in the circuit court, then discovery related to the class claims would be costly, time consuming, and a waste of judicial resources if the Court ultimately compels this action to arbitration. Therefore, the Court should grant Lennar's Petition and reinstate the automatic stay of the entire action until the Court issues its ruling on the pending appeal.

CONCLUSION

The circuit court's unprecedented order lifting the automatic stay of proceedings while the appeal is pending must be reversed. Otherwise, Lennar will be unduly prejudiced and the discovery that the circuit court has granted Plaintiffs access to will provide Plaintiffs an unjustified tactical advantage in the litigation. Lennar respectfully requests the Court issue an order reinstating the automatic stay of the entire action, so that it is not unduly prejudiced.

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June 5, 2018
Columbia, South Carolina

EXHIBIT C

to

Petitioners Return to Lennar's Petition for Rehearing

91400

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J.C. NICHOLSON, JR.
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2016-2339
CIVIL ACTION NO. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,

RESPONDENTS,

versus

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,

DEFENDANTS,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are the

RESPONDENTS.

And

Lennar Carolinas, LLC,

APPELLANT,

versus

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators, Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP,

THIRD-PARTY DEFENDANTS,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc. A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators, Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC are also the

RESPONDENTS.

And

Décor Corporation,

FOURTH PARTY PLAINTIFF,

versus

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4,

FOURTH-PARTY DEFENDANTS.

JOINT MOTION FOR LIMITED REMAND TO THE CIRCUIT COURT FOR APPROVAL OF PARTIAL SETTLEMENT AND LIMITED CLASS CERTIFICATION FOR THE SOLE PURPOSE OF SETTLEMENT APPROVAL

Plaintiffs-Respondents in the above-captioned action [Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia

Camara, and Matthew Collins], Manale Landscaping, LLC ("Manale"), and Décor Corporation ("Décor") hereby move this Court for a limited remand to the Circuit Court of Berkeley County for approval of the partial settlements between Plaintiffs and Manale, as well as between Plaintiffs and Décor. The parties also will seek certification of the Class pursuant to Rule 23, SCRCP before the Circuit Court for the sole purpose of approval of the partial settlements.

FACTUAL AND PROCEDURAL BACKGROUND

This is a construction defect case that involves alleged defects in multiple homes located in the Abbey at Spring Grove in Moncks Corner, South Carolina. The Abbey consists of sixty-nine (69) single-family homes constructed between 2010 and 2016. Since the construction of the homes at The Abbey, Plaintiffs have discovered alleged defects in their homes.

Plaintiffs filed this lawsuit on October 30, 2014, alleging causes of action for negligence, negligent misrepresentation, breach of warranties, breach of fiduciary duties, and unfair trade practices against multiple defendants, including Lennar Carolinas, LLC ("Lennar"). Plaintiffs filed an Amended Complaint on March 24, 2016, and subsequently moved for class certification.

On March 30, 2016, Lennar filed a Motion to Compel Arbitration pursuant to alleged arbitration agreements it had with some but not all of the Plaintiffs and its subcontractors. On or about September 19, 2016, Lennar's Motion to Compel Arbitration was denied. On or about November 16, 2016, Lennar served a Notice of Appeal of the Trial Court's order denying its Motion to Compel Arbitration. Plaintiffs, Lennar, and multiple subcontractor respondents, including Manale and Décor who also

oppose arbitration, have all filed final briefs with this Court which were each primarily filed in September 2017.

Partial Settlements Between Plaintiffs, Manale, and Décor

Plaintiffs, Manale, and Décor have tentatively settled the construction defect claims relating to Manale and Décor's work and desire to seek certification from the lower court of the Class for the sole purpose of the preliminary settlement approval and the associated approval of the settlements pursuant to Rule 23, SCRCP as set forth in the Motion For Preliminary Approval of a Partial Settlement attached hereto as Exhibit "A." While the parties believe that the settlements for which they seek approval from the Circuit Court will not affect the matters on appeal, out of an abundance of caution, the parties seek a ruling from this Court permitting a limited remand to the Circuit Court for approval of the partial settlements and the corresponding Class certification which will be limited for settlement approval only. See Rule 241(a), SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.").

The Supreme Court has instructed that when a matter is pending on appeal, a lower court may not take action on a settlement, except with regard to matters not affected by the appeal, unless the parties have requested the appellate court to have the matter remanded to the lower court. See Lancaster v. Georgia-Pacific Corp., 403 S.C. 136, 138, 742 S.E.2d 867, 868 (2013); see also Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.").

Accordingly, pursuant to the Supreme Court's guidance in Lancaster and acting out of utmost prudence, Plaintiffs, Manale, and Décor request this Court for a limited remand to the Circuit Court for the narrow purpose of the Circuit Court's approval of the partial settlements between Plaintiffs, Manale, and Décor and the limited corresponding Class certification.

Respectfully submitted,

Carmen V. Ganjehsani
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and

James H. Elliott, Jr.
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ATTORNEYS FOR RESPONDENTS MANALE LANDSCAPING, LLC AND DÉCOR CORPORATION

John C. Hayes, IV
Nina E. Meola
HAYES LAW FIRM, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
(843)805-7003
ATTORNEYS FOR PLAINTIFFS

November 8, 2019.

EXHIBIT "A"

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO: 2014-CP-08-02424
Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Plaintiffs, vs. Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental, and Rick Bryant, individually. Defendants.	)	**NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF A PARTIAL SETTLEMENT**
Lennar Carolinas, LLC, Third-Party Plaintiff, vs. The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC,	)	

Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource – Southeast Group, LLC, and Low Country Renovations and Siding, LLP,

Third-Party Defendants.

Décor Corporation,

Fourth Party Plaintiff,

vs.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Enmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez Son, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aparecido Corgosinho, Ricardo Chiche, Cebs Construction, Bayshore Siding and Flooring, Sebastio Luiz De Araujo, and John Does 1 – 4,

Fourth-Party Defendants.

Alpha Omega Construction Group, Inc.

Fourth-Party Plaintiff,

Vs.

Garcia Roofing, LLC, Juan Garza Ramos, Jose Vera, and Espino Roofing, LLC,

Fourth-Party Defendants.

__DVS, Inc.,

Fourth-Party Plaintiff,

Vs.

Sousa Construction, LLC, Lima Construction, LLC, N&B Construction, LLC, Itatiaia Construction, LLC and JC Contractors, LLC

Fourth-Party Defendants.

___South Carolina Exteriors, LLC

Fourth-Party Plaintiff,

Vs.

Juan Garza Ramos, d/b/a Juan Constructors,

Fourth-Party Defendant.

___
Guaranteed Framing, LLC

Fourth-Party Plaintiff,

Vs.

First Construction, LLC, JC Contractors, LLC, Jessica Marroquin d/b/a Marroquin Construction, and Unique Framing, LLC,

Fourth Party Defendants.

TO: THE ABOVE-NAMED PARTIES AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel, pursuant to Rule 23 SCRCP, will move before this Honorable Court ten (10) days from the date of this notice, or as soon thereafter as the Court may schedule, at the Berkeley County Judicial Center located at 300-B California Avenue, for a Preliminary Approval of a Partial Settlement certifying the following Class in the above-captioned matter:

> **All persons and/or entities owning, in whole or in part, any homes/property within The Abbey in Spring Grove Plantation.**

The elements of Rule 23 SCRCP are satisfied in this matter. (1) The class is composed of in excess of roughly sixty-nine (69) homeowners of individual homes and/or property, such that joinder is impractical; (2) all of the questions of law and fact are common to the class members; (3) the claims of the representative parties are typical of the claims of the class members; (4) the representative party will fairly and adequately protect the interests of the class; and (5) the amount in controversy exceeds $100.00 for each member of the class.

Plaintiffs further move that:

1. Patricia Damico be designated as Class Representative;

2. That a proposed Notice of Class Action, Partial Settlement, and Final Hearing (the "Notice") to be submitted prior to the hearing be approved;

3. That a proposed Exclusion Request Form to be submitted prior to the hearing be approved;

4. Class counsel be authorized to mail the Notice and Exclusion Request Form to all class members at their last known address at The Abbey at Spring Grove Plantation.

Plaintiffs move that the Court preliminarily approve the terms of the settlements reached by and amongst the Plaintiffs certain parties as follows:

SETTLING DEFENDANT	GROSS SETTLEMENT AMOUNT
Manale Landscaping, LLC	$28,000.00
Décor Corporation	$42,000.00
TOTAL	**$70,000.00**

The Plaintiffs may move for such other orders regarding the Class as may be appropriate.

This motion will be supported by the evidence thus far in this matter, affidavits, a memorandum of law, arguments of counsel and any other material the Court may receive.

Respectfully Submitted,

HAYES LAW FIRM, LLC

s/ John C. Hayes, IV
John C. Hayes, IV, Esquire
Nina E. Meola, Esquire
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: (843) 805-7003
jhayes@hayeslaw.org

ATTORNEYS FOR PLAINTIFFS

August 15, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent Manale Landscaping, LLC and Décor Corporation, do hereby certify that I have this date served the foregoing Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification for the Sole Purpose of Settlement Approval, dated November 8, 2019, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

James Lynn Werner, Esquire
Jenna K. McGee, Esquire
Katon E. Dawson, Jr., Esquire
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Charleston, SC 29401
jimwerner@parkerpoe.com
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Attorneys for Appellant

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Columbia, South Carolina 29202
(803) 771-4400
ATTORNEYS FOR RESPONDENT DÉCOR CORPORATION AND MANALE LANDSCAPING, LLC

Dated: November 8, 2019.

EXHIBIT D

to

Petitioners Return to Lennar's Petition for Rehearing

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
NOV 18 2019
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

APPELLANT LENNAR CAROLINAS, LLC'S RETURN TO RESPONDENTS' JOINT MOTION FOR LIMITED REMAND AND APPROVAL OF PARTIAL SETTLEMENT AND LIMITED CLASS CERTIFICATION

James Lynn Werner
Jenna K. McGee
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

Appellant Lennar Carolinas, LLC ("Lennar"), by and through undersigned counsel, respectfully submits this Return to the Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification For the Sole Purpose of Settlement Approval filed by Respondents Patricia Damico, Joshua and Brettany Beutow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the "Owners"), Manale Landscaping, LLC ("Manale") and Décor Corporation ("Décor") (collectively, "Respondents").

FACTUAL BACKGROUND

The Owners purchased homes in a community known as The Abbey at Spring Grove Plantation ("The Abbey") which is located in Berkeley County, South Carolina.

The Owners filed this lawsuit against Lennar and others alleging the right to proceed as a class action on claims of alleged construction defects. Lennar asserted cross-claims against co-defendants and third-party claims against other subcontractors. Lennar also filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling all of the parities in this action to arbitration pursuant to various applicable documents and agreements.

The circuit court held a hearing on Lennar's Motion to Compel Arbitration and denied Lennar's Motion. Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, the Owners attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Lennar was forced to submit a Motion to Enforce the Automatic Stay pursuant to Rule 205 to the Court of Appeals. On December 19, 2016, the Court of Appeals issued the first order enforcing the automatic stay of proceedings in the circuit court.

On February, 27, 2018, Patricia Damico and Lenna Lucas filed a Motion to Lift the Automatic Stay. On April 11, 2018, the circuit court held a hearing on the Motion to Lift the Automatic Stay. On May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

On June 5, 2018, Lennar filed a Petition pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules requesting the Court reverse the circuit court's order and reinstate the stay of the entire action during the pendency of the appeal. On July 30, 2018, the Court issued the second order granting Lennar's Petition and reinstating the automatic stay for the duration of the appeal. On August 14, 2018, the Owners filed a Petition for Full Appellate Court Review, and the Court issued an order denying the Petition for Full Appellate Court Review on November 13, 2018.

At this time, the appeal has been fully briefed to the Court of Appeals, and oral argument is scheduled for December 10, 2019.

On November 8, 2019, Respondents filed a Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification For the Sole Purpose of Settlement Approval (the "Motion"). Lennar submits this Return to the Motion and requests the Court deny the Motion.

ARGUMENT

I. Respondents' Motion does not comply with Rule 241, SCACR, and is improper.

A. Respondents' Motion fails to meet the basic requirements of Rule 241(d)(1), SCACR, and should be denied.

Respondents' Motion is merely a veiled request for the Court to issue an order lifting the stay of the case so that the circuit court may rule on class certification issues while Lennar's appeal of the order denying its Motion to Compel Arbitration is pending before the Court.

Rule 241(d)(1), SCACR, states that only in extraordinary circumstances may a party file a motion to lift the stay without first making the motion to lift the stay to the lower court. Respondents failed to meet the requirements of Rule 241(d)(1) because:

1. Respondents did not file a motion to lift the stay with the circuit court[1]; and

2. Respondents' Motion sets for no basis for the Court to find that extraordinary circumstances exist for the Court to lift the stay prior to the Respondents' filing a motion with the circuit court.

Respondents clearly failed to comply with the basic requirements of Rule 241(d)(1), SCACR. Respondents' Motion contains no argument through which the Court may find that it is appropriate for the stay to be lifted without Respondents first satisfying the plain and unambiguous requirements of Rule 241(d)(1), SCACR. Accordingly, the Court should deny Respondents' Motion.

B. Respondents' Motion does not comply with the requirements for obtaining a lift of a stay as set forth in Rule 241(d)(3), SCACR.

Rule 241(d)(3) of the South Carolina Appellate Court Rules requires:

> A person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition and verification, the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal and a copy of the notice of appeal with its proof of service.

Respondents' Motion is not verified by any of the Respondents. Additionally, Respondents did not contemporaneously file a certified copy of the order, judgment, decree or decision of the circuit court or a copy of the notice of appeal with its proof of service with the

[1] Respondents previously filed a Motion for Partial Settlement Approval with the circuit court; however, that motion did not request the circuit court lift the automatic stay of the case. The circuit court has not issued a ruling on the Respondents' prior Motion for Partial Settlement Approval and, in fact, cannot issue a ruling on the Motion for Partial Settlement Approval until the stay of the entire case is lifted.

Motion. Therefore, the Motion fails to satisfy the Rule 241(d)(3) requirements for obtaining a lift of the stay of the case. Accordingly, Respondents' failure to comply with the plain and unambiguous requirements of Rule 241(d)(3), SCACR, necessitates that the Court deny the Motion.

II. Respondents' Motion should be denied because it seeks to have the Court partially remand the matter to the circuit court so that the circuit court may rule on issues—including certain class certification issues—that are directly affected by Lennar's appeal.

The Court should not lift the stay of the case for the circuit court to consider the Respondents' Motion for Approval of Partial Settlement and Limited Class Certification because the Court's ruling on Lennar's pending appeal will directly affect whether this matter may proceed as a class action.

At no point in this litigation has the circuit court considered a motion for class certification. Through the Motion pending before the Court, the Owners are attempting to circumvent the procedural process for certification of a putative class while an appeal that may render the entire issue moot is pending before the Court. If on appeal the Court finds that this matter must be compelled to arbitration, then there is no possibility of a certifiable class because the arbitration agreements at issue do not permit or contemplate classwide arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) (finding classwide arbitration is improper when an arbitration agreement is silent on the issue); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

Oral argument on the pending appeal is currently scheduled for December 10, 2019, and to remand the case to the circuit court and permit the circuit court to make premature findings related to class certification would be inappropriate prior to a ruling by this Court. Furthermore, it is unnecessary to permit the circuit court to make findings related to class certification issues

when the appeal may render all class certification issues moot. *See* Rule 241(c)(2), SCACR (stating that the Court should consider whether an order lifting the stay is necessary to prevent a contested issue from becoming moot).

Additionally, Lennar has cross-claims pending against Manale and third-party claims pending against Décor, and the approval of a settlement agreement between Manale, Décor, and the Owners would not end the litigation for either Manale or Décor. Therefore, The approval of a settlement between the Manale, Décor, and the Owners does not favor judicial economy and only places an extra burden on the circuit court.

Accordingly, the Court should deny the Respondents' Motion because (1) the Respondents have not followed the proper procedure for moving the Court to lift the stay and (2) consideration of any issue directly affected by the appeal—including limited class certification—while the appeal is pending is improper.

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PO Box 1509
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(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

November 18, 2019
Columbia, South Carolina

EXHIBIT E

to

Petitioners Return to Lennar's Petition for Rehearing

The South Carolina Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC,

Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

Appellate Case No. 2016-002339

The Honorable J. C. Nicholson, Jr.
Berkeley County

Trial Court Case No. 2014CP0802424

ORDER

Respondents' Manale Landscaping, LLC and Bryan Camara filed a Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification for the Sole Purpose of Settlement Approval. A return and a reply were filed. Upon review by the Court, the motion is Denied.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:
Jenna Brooke Kiziah McGee, Esquire
Michael J. Jordan, Esquire
Catherine Dunn Meehan, Esquire
John Calvin Hayes, IV, Esquire
R. Patrick Flynn, Esquire
Michael Wade Allen, Jr., Esquire
Bachman S. Smith, IV, Esquire
James H. Elliott, Jr., Esquire
Samia Hanafi Nettles, Esquire
David Shuler Black, Esquire
Shanna Milcetich Stephens, Esquire
Stephen Lynwood Brown, Esquire
Catherine Holland Chase, Esquire
Preston Bruce Dawkins, Jr., Esquire
Stephen P. Hughes, Esquire
Kathy Aboe Carlsten, Esquire
N. Keith Emge, Jr., Esquire
Brent Morris Boyd, Esquire
David Starr Cobb, Esquire

FILED
Nov. 27, 2019

Sidney Markey Stubbs, Esquire
Derek Michael Newberry, Esquire
Christine Companion Varnado, Esquire
Alan Ross Belcher, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Erin DuBose Dean, Esquire
Thomas Frank Dougall, Esquire
William Ansel Collins, Jr., Esquire
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Ronald G. Tate, Jr., Esquire
Robert Batten Farrar, Esquire
Michael Edward Wright, Esquire
James Lynn Werner, Esquire
David Cooper Cleveland, Esquire
Rogers Edward Harrell, III, Esquire
Carmen Vaughn Ganjehsani, Esquire
Trey Matthew Nicolette, Esquire
Timothy J. Newton, Esquire
Katon Edwards Dawson, Jr., Esquire
John Adam Ribock, Esquire
Francis Heyward Grimball, Esquire
Wade Coleman Lawrimore, Esquire
Jesse Sanchez, Esquire
Everett Augustus Kendall, II, Esquire
Brian Lincoln Craven, Esquire
Edward Dengg
Sylvia Dengg
Anthony Ray
Stacey Ray

EXHIBIT F

to

Petitioners Return to Lennar's Petition for Rehearing

RECEIVED

Mar 10 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2020-001048
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Plaintiffs.

Of whom Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins are
Petitioners,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Respondent,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed

Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

LENNAR CAROLINAS, LLC'S
RETURN TO THE PETITION TO LIFT THE STAY
AS TO DISCOVERY AND SUBCONTRACTOR CLAIMS

Respondent Lennar Carolinas, LLC ("Lennar") respectfully submits the following Return to the Petition to Lift the Stay As to Discovery and Subcontractor Claims.

INTRODUCTION

Plaintiffs petition the Court to lift the stay and allow them "to conduct discovery as to the Subcontractor Defendants and pursue those claims." The Petition should be denied and the stay

of the underlying litigation should continue until the Motion to Compel Arbitration is finally resolved.

The underlying case has been, and continues to be stayed because the Court of Appeals properly found that the entire case is "affected" by the pending appeal, and the South Carolina Appellate Court Rules ("SCACR") require the stay of all matters affected by the pending appeal. *See* Rule 205, SCACR; Rule 241(a), SCACR; *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533, 787 S.E.2d 485, 493 (2016); *see also Black's Law Dictionary*, AFFECT (11th ed. 2019) (defining "affect" as "to produce an effect on; to influence in some way").

Plaintiffs' Petition to Lift the Stay is based upon an incorrect conflation of two separate issues. Those separate and unrelated issues are (1) whether the entire case should be stayed because the entire case is affected by the appeal, and (2) whether Plaintiffs are required to arbitrate their primary and direct claims against subcontractors whom they have sued on such primary and direct claims. The suggestion that Lennar has taken inconsistent positions on the need for and appropriateness of a stay of the underlying litigation pending resolution of the appeal is utterly incorrect. So too is the suggestion that Lennar, by agreeing that it could not force Plaintiffs to litigate their primary claims against subcontractors in the arbitration forum when there is no arbitration agreement between Plaintiffs and the subcontractors, has conceded that Lennar is not entitled to the stay pending conclusion of the appeal in this case.

In this case, Plaintiffs sued Lennar and a limited group of six (6) subcontractors on thirteen (13) collective causes of action. That is to say, Plaintiffs made no specific or targeted allegations against Lennar, or any subcontractor, and instead merely alleged everything and every claim against "Defendants" as an indistinguishable and collective lot. In each claim, Plaintiffs assert that Lennar and all of the subcontractors are jointly and severally liable for construction defects. Plaintiffs never asserted direct or primary claims against any more than the six (6)

subcontractors—despite the fact that Lennar identified and asserted third-party claims against the full set of subcontractors involved in the work which Plaintiffs allege to be defective. Thus, Plaintiffs have never sued or asserted primary claims against most of the subcontractors.

The automatic stay pending appeal in this case remains proper because Lennar moved to compel Plaintiffs to arbitrate their claims pursuant to express arbitration agreements between Plaintiffs and Lennar, and to compel arbitration of Lennar's cross-claims or third-party claims against each of the subcontractors pursuant to the express arbitration agreements in the contracts between Lennar and each subcontractor. In other words, every party in the case is subject to an arbitration agreement and every cause of action in the case will be part of the arbitration. The allegations and claims presented by Plaintiffs all involve Lennar. Furthermore, all issues—whether related to Plaintiffs' claims against Lennar, Plaintiffs' claims against subcontractors or Lennar's claims against each of the subcontractors—are intertwined and inherently and fundamentally affect each other. Thus, allowing Plaintiffs to conduct discovery or to proceed with claims in the case against the subcontractors—against many of whom it has asserted no direct or primary claim—would undeniably affect Lennar (and the other subcontractors).

At issue in this appeal is the fundamental question of whether Plaintiffs will ever be entitled to pursue civil litigation of the claims against Lennar in the courts, and using the discovery provisions of the Rules of Civil Procedure. So too at issue is whether Lennar's third-party claims against the subcontractors will ever proceed in civil litigation in the courts, and using the discovery provisions of the Rules of Civil Procedure. Thus, to allow Plaintiffs, in the meantime while the appeal that will decide these fundamental issues is pending, to use the circuit court and the discovery mechanisms of the Rules of Civil Procedure to gain advantage and very likely to pursue wasteful discovery would be to frustrate the very purpose of the Rules establishing the stay pending

appeal.[1] Avoidance of such circumstances is the precise reason the stay under Rule 241, SCACR, exists. Furthermore, this is precisely why the current Petition to Lift the Stay should be denied. Efforts to lift the stay have been rejected three times previously by the Court of Appeals and, respectfully, the current Petition should be rejected again.

FACTUAL AND PROCEDURAL BACKGROUND

On December 12, 2014, Plaintiffs filed a Complaint against Lennar, Spring Grove Development, Inc., and two of Lennar's subcontractors (Volkmar Consulting Services, LLC and Manale Landscaping, LLC) based upon alleged construction defects in the houses. In response to the Complaint, Lennar filed its Answer, Cross-Claims, and a Third-Party Complaint in which Lennar asserted cross-claims and/or third-party claims against six (6) of its subcontractors. Lennar subsequently filed a Motion to Compel Arbitration addressing Plaintiffs' obligations to arbitrate their claims against Lennar and the subcontractors' obligations to arbitrate Lennar's third-party claims against them.

On November 23, 2015, Plaintiffs filed their Amended Complaint (the "Amended Complaint") in which they asserted direct claims against four (4) additional Lennar Subcontractors. In response, Lennar answered the Plaintiffs' Amended Complaint and asserted

[1] By way of illustration, while Lennar is convinced that the Motion to Compel Arbitration should and will ultimately be granted, an example of why the stay of discovery and other litigation activity is necessary in the meantime is that Lennar is hamstrung in its ability to pursue and participate in discovery because it cannot risk being found to have waived its right to arbitrate by purposefully availing itself of the courts and the civil litigation process. Thus, Lennar is clearly disadvantaged by allowing Plaintiff the use of civil process and discovery which is foreclosed to Lennar. Additionally, if Lennar were to be denied the right to enforce its arbitration agreements it would be back in the civil action where discovery without it has been proceeding. It would be necessary for Lennar to be allowed the discovery foreclosed to it while the appeal was pending and such discovery would necessarily be reopened and repeated at great waste, expense, and disadvantage to perhaps all parties.

additional third-party claims against nineteen (19) more of its subcontractors. Plaintiffs never asserted direct claims against any more than the six (6) subcontractors.

On March 30, 2016, Lennar amended its Motion to Compel Arbitration. The circuit court held a hearing on Lennar's Motion to Compel Arbitration and denied Lennar's Motion.

Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, Plaintiffs attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Thus, Lennar filed a Motion to Enforce the Automatic Stay with the Court of Appeals pursuant to Rule 205, SCACR.

On December 19, 2016, the Court of Appeals issued an Order enforcing the automatic stay of proceedings in the circuit court.

More than a year later and after all final briefs were filed in the appeal with the Court of Appeals—on February, 27, 2018—Plaintiffs filed a Motion to Lift the Automatic Stay with the circuit court. On April 11, 2018, the circuit court held a hearing on Plaintiffs' Motion to Lift the Automatic Stay and on May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

On June 5, 2018, Lennar filed a Petition to Enforce Stay of the Case with the Court of Appeals. On July 30, 2018, the Court of Appeals issued an order reinstating the automatic stay of the case. Thereafter, Plaintiffs petitioned for a Full Appellate Court Review which was denied on November 13, 2018.

Nearly a year later, while the appeal was still pending and awaiting argument at the Court of Appeals, Plaintiffs filed a "Motion for Preliminary Approval of a Settlement" on August 15, 2019 with the circuit court. The purpose of this Motion was to have the circuit court issue an order

approving a class action settlement between Plaintiffs and two subcontractors. There had been no class certification, Plaintiffs did not even have a direct or primary claim against one of the subcontractors, but Lennar did have a pending third-party claim against that subcontractor which was the subject of the appeal which sought to enforce Lennar's right to arbitrate its claims with that subcontractor. After the circuit court refused to schedule a hearing on the Motion (because the Court of Appeals had issued two orders enforcing the automatic stay of the case), Plaintiffs filed a Motion for Limited Remand for Partial Settlement on November 8, 2019. Lennar filed a Return to the Plaintiffs' Motion on November 18, 2019. On November 27, 2019, the Court of Appeals denied Plaintiffs' Motion for Partial Remand.

On February 19, 2020, the Court of Appeals held oral argument on Lennar's appeal, and issued its order on June 10, 2020, reversing the circuit court's denial of the motion to compel the Plaintiffs to arbitration and remanding the issue of whether the subcontractors must be compelled to arbitration to the circuit court. Thereafter, the Plaintiffs filed their Petition for a Writ of Certiorari with the Court.

On May 28, 2021, this Court issued an order granting Plaintiffs' Petition for a Writ of Certiorari. After completing the briefing process, the Court held oral argument on February 1, 2022.

Following oral argument, on February 28, 2022, Plaintiffs filed a new Petition with the Court to lift the stay so that they may pursue discovery while the appeal is pending.

ARGUMENTS

I. Plaintiffs failed to comply with the Rule 241, SCACR, requirements for filing a Petition to Lift the Stay of a Case.

A. Plaintiffs' Petition should be denied on the grounds that it was not first filed with the circuit court and it is not verified by the individual Plaintiffs.

As a preliminary matter, Plaintiffs' Petition to the Supreme Court is defective and should be denied because Plaintiffs failed to comply with the requirements to obtain a lifting of the stay while the appeal is pending as set forth in Rule 241, SCACR.

Leaving aside that Plaintiffs did not satisfy the requirement of Rule 241(d)(1), SCACR, that states that "**[e]xcept where extraordinary circumstances make it impracticable**, an application for an order lifting the automatic stay . . . **must first be made to the lower court or administrative tribunal which entered the order or decision on appeal**," (emphasis added), Plaintiffs did not satisfy the other Rule 241(d)(3), SCACR, requirement that a petition requesting an order lifting a stay be "**verified by the client**." (emphasis added). Plaintiffs' Petition, is not verified by the clients and is facially defective. Accordingly, Plaintiffs' Petition should be denied based upon their failure to comply with the procedural requirements of Rule 241.

B. Plaintiffs provide no justification, and fail to satisfy the applicable standard for lifting the automatic stay under Rule 241(c)(2), SCACR; because they provide no basis to conclude that lifting the stay is necessary (a) to preserve jurisdiction or (b) to prevent a contested issue from becoming moot.

In reviewing a Motion to Lift the Automatic Stay pursuant to Rule 241, SCACR, "the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR.

Plaintiffs present no justification for lifting the stay under these factors. In fact, Plaintiffs' Petition does not even address these considerations. There are no current issues (outside of whether the case should be compelled to arbitration) related to the preservation of a court's

jurisdiction. Additionally, there is no risk that issues in this action will become moot if the automatic stay remains in place. Plaintiffs provide no basis, or even arguments, to lift the automatic stay based upon the considerations expressly stated in Rule 241(c)(2). Therefore, the Court should deny Plaintiffs' Petition.

II. Plaintiffs' Petition ignores why the stay exists in the first place and attempts to mischaracterize Lennar's prior arguments justifying the automatic stay of the case under Rule 205, SCACR; namely, the stay was and is appropriate because all issues and causes of action in the case are affected by the appeal.

In June 2018 when Lennar argued against the prior circuit court order purporting to allow the automatic stay pending appeal to be lifted—so that Plaintiffs could pursue discovery from subcontractors while Lennar's appeal was pending—it argued that the appeal affected all of the other causes of action in the case. *See* Rule 205, SCACR; Rule 241(a), SCACR (providing that "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal" and "[t]his automatic stay continues in effect for the duration of the appeal . . ."). At that time, Plaintiffs had alleged thirteen (13) causes of action against Lennar and only six (6) subcontractors in a purely collective fashion. In turn, Lennar had asserted cross-claims or third-party claims against all subcontractors whose work or materials were implicated in Plaintiffs' non-specific, collective claims and allegations of defects in the properties.

At that time, Lennar had already moved to compel arbitration of Plaintiffs' claims against it and to compel arbitration of its claims against the various subcontractors. Lennar argued that all of the claims in the case were (and would be) affected by the appeal and the arbitration decision. Given Plaintiffs' pleading choices—not having separately and directly sued all of the subcontractors and having made all allegations and claims in a purely collective fashion—this conclusion and argument was absolutely true and correct then and it is now. Lennar stated in its argument that "the circuit court erred in not compelling <u>each and every party</u> to this action to

arbitration." Lennar did not state that each and every claim by each and every party against each and every other party was subject to arbitration. Plaintiffs' claims against Lennar, alleged in a collective fashion against Lennar and six subcontractors, would be arbitrated as would Lennar's claims against all of the subcontractors derived from Plaintiffs' collective allegations and causes of action. The issue was that each party (Plaintiffs, Lennar and subcontractors) would be required to be in the arbitration. Additionally, all of the allegations and all of the claims in the case were entwined and clearly affected the other allegations and claims in the case. This fact is the driving factor requiring the stay in the first place.

On February 1, 2022, at oral argument before the Supreme Court, there was no question about whether a stay of the litigation was appropriate for all of the reasons argued in June 2018. The question which Plaintiffs now seek to fabricate into an inconsistency, and a concession that the case involving the subcontractors should not remain stayed, was merely a question of whether Lennar could force Plaintiffs to bring and pursue separate primary claims against subcontractors in arbitration. Lennar candidly answered that hypothetical question in the negative. However, in the case actually before the Court, Plaintiffs did not allege separate primary claims against the subcontractors. Plaintiffs made only nonspecific collective allegations against both Lennar and just six subcontractors. All of Plaintiffs allegations and causes of action in its Amended Complaint are utterly intertwined—with no separation or delineation of the claims against Lennar and Lennar's claims against the subcontractors. Thus, while this does not mean Plaintiffs are forced to pursue any separate and direct, primary claims they may have against subcontractors in the arbitral forum, it does not mean that the entwined and collective claims should not be released from the stay while the arbitration issues are decided.

III. The continuation of the circuit court proceedings—including any discovery—while the parties await the Court's decision on the arbitration issue defeats the purpose of the appeal and erodes the benefits of arbitration.

It has been well recognized by other courts that the appeal of an order denying a Motion to Compel Arbitration is a challenge to the continuation of any proceeding before the lower court on the underlying claims. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264-65 (4th Cir. 2011); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). These same courts have further recognized that discovery in an action should not proceed while the issue of arbitration is being decided by an appellate court. *See id.*; *Bradford-Scott Data Corp.*, 128 F.3d at 506 (holding that "preparation for trial must be suspended until the court of appeals renders a decision" on an appeal from a denial of a motion to compel arbitration).

The stay of discovery while an appeal of an order denying a motion to compel arbitration is pending is necessary because "allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration." *Id*. Additionally, allowing discovery to proceed while an appeal is pending "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter." *Id*. If the Court holds that the claims against Lennar "are indeed subject to mandatory arbitration, the parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process." *Id*.[2]

[2] Although not binding precedent, in *Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626, *1 (S.C. Com.Pl. March 29, 2006), then circuit court judge, now Justice Few had reason to analyze and decide whether the circuit court should permit discovery to proceed while an appeal of arbitrability issues was pending at the Supreme Court. In analyzing whether, and deciding not to allow discovery to proceed pending appeal, then Judge Few noted that there is a "very clear possibility of prejudice and a tactical advantage being enjoyed by one of the parties to an action when it is given access to discovery which would not otherwise be authorized." *Id*.

The ultimate resolution of the appeal and the decision with respect to compelling arbitration of claims will affect the discovery that may be available to the parties in this case. It would prejudice Lennar, and erode the benefits of arbitration, to allow Plaintiffs to engage in discovery with the subcontractor defendants (including the 19 subcontractor defendants against whom Plaintiffs have asserted no claim), when such discovery may not be available or allowed as a result of the resolution of the pending appeal. Accordingly, the Court should deny Plaintiffs' Petition and refuse to lift the stay of the case while the parties await the Court's decision on the arbitration issue.

CONCLUSION

Based on the foregoing, the Court should DENY the Petition to Lift the stay As to Discovery and Subcontractor Claims.

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