WALKER GRESSETTE LINTON LLC

G. Trenholm Walker
Thomas P. Gressette, Jr.
John P. Linton, Jr.
Charles P. Summerall, IV
Jennifer S. Ivey
James W. Clement

JOHN P. LINTON, JR.
Direct: 843.727.2252
Email: Linton@WGLFIRM.com



February 15, 2023

Via Email and U.S. Mail

V. Claire Allen
Chief Deputy Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: Melissa Dixon v. Weekley Homes, LLC
Appellate Case No. 2020-000384
WGL File 7087.001

Dear Ms. Allen:

In response to your request, Appellant Weekley Homes, LLC f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes (hereinafter "David Weekley") hereby submits this memorandum addressing the impact of *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) ("*Damico*") on this appeal. This case is distinguishable from *Damico* for the following reasons:

1. Respondents have not identified a single term within the subject arbitration provision that they contend is unreasonable, oppressive, or one-sided; and
2. The terms of the subject arbitration provision are, in fact, not unconscionable;
3. Unlike in *Damico*, the homebuyer-parties in this case are not stripped of the ability to name the parties against whom they are asserting claims in the arbitration proceeding; and
4. Unlike the homebuilder in *Damico*, David Weekley does not benefit from a contractually created procedural defense to liability.

**Summary**

The *Damico* case stands for the proposition that South Carolina courts will not enforce unconscionable terms within an arbitration agreement and will not sever unenforceable terms from the agreement where there are a number of unenforceable terms and when doing so would require the Court to rewrite material terms of the agreement.

As this Court has affirmed, as recently as today, *Damico* does not render all arbitration agreements unenforceable. *See, e.g.*, *Huskins v. Mungo Homes, LLC*, No. 2018-000889, Opinion No. 5916 (Ct. App. filed Feb. 15, 2023). It only renders arbitration agreements—even those found in contracts of adhesion—unenforceable when its terms are unconscionable, and the unconscionable terms cannot be severed from the remainder of the terms.

Under *Damico*, this arbitration agreement is valid and enforceable because the terms of this arbitration agreement run directly contrary to the offensive terms found in the Lennar arbitration agreement.

Here, the is no prohibition on either party bringing claims against each other or subcontractors, suppliers, manufacturers, affiliated companies, the developer of the property, or other providers of goods or serves in connection with the property or the purchase and sale agreement. The homebuyers are not faced with the theoretical or actual dilemma of having to sue different parties in different forums and the possibility of inconsistent results. The terms of this arbitration clause are even-handed, reasonable, and not oppressive to the homebuyer-parties, and there is no risk of an unfair result when the terms are applied.

This memorandum proceeds with a detailed discussion of *Damico* and then compares the terms of the arbitration clause here to those before the Supreme Court in *Damico*. That comparison shows the offensive terms found within the Lennar arbitration provision are not absent from this arbitration provision.

The arbitration clause before the Court in this case is a valid arbitration clause and must be enforced as such.

## I. The *Damico* Decision

In *Damico*, the South Carolina Supreme Court evaluated arbitration provisions found within residential homebuilder, Lennar Carolina, LLC's ("Lennar"), standard form purchase and sale agreement. 437 S.C. at 605, 879 S.E.2d at 751.

The Supreme Court found certain terms within the Lennar arbitration provision to be oppressive and one-sided, in Lennar's favor. *See id.* at 604, 751 ("[W]e . . . find the arbitration provisions—standing alone—contain a number of oppressive and one-sided terms, thereby rendering the provisions unconscionable and unenforceable under South Carolina law.").

Of particular concern to the Supreme Court were the terms that had the effect of stripping the homeowners of the right to control who would be parties to the arbitration, thereby creating a procedural defense for Lennar. *Id.* at 624, 762. Having deemed those terms unconscionable and unenforceable as a matter of law, the Supreme Court then went on to analyze whether the offensive terms could be severed from the remainder of the arbitration provision. *Id.* at 618-24,

758-61. The Supreme Court ultimately declined to sever the offensive terms, thereby negating Lennar's ability to compel arbitration as against various homeowners. *Id.*

*Damico*, therefore, represents a current and valid expression of South Carolina law on the issue of unconscionability in the context of arbitration agreements. It also informs analysis of blue-penciling of contracts, but only in instances where a court finds contractual provision(s) to be unenforceable.

While this appeal, like *Damico*, is procedurally postured as an appeal of an order denying a motion to compel arbitration, the issues involved in this arbitration case and the terms of the arbitration agreements are entirely different from those addressed in *Damico*.

This case presents questions of: (i) whether the parties agreed the Federal Arbitration Act would apply to any disputes arising out of the contract or relating to the construction, purchase and sale of the home; (ii) whether the transaction involved interstate commerce in fact, thereby further implicating the Federal Arbitration Act; and (iii) whether the Respondents' claims against David Weekley come within the scope of the arbitration agreement. *See generally* App. Br., Resp. Br., and App. Reply. The Respondents participating in this appeal[1] did not argue the arbitration provision was unconscionable at the trial court level, and while they raise the issue on appeal as an additional sustaining ground for the trial court's decision, they only argue the David Weekley agreement, in general, was a contract of adhesion. *See* Resp. Final Br. at 5-6.

It is a basic premise of contract law and reaffirmed by the Supreme Court again in *Damico* that "[a]dhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed." *Id.* at 614, 756.[2]

---

[1] The Respondents in this appeal are designated as Plaintiffs Willard and Melissa Dixon and Defendants/Third-Party Plaintiffs Lansing and Stephanie Pattee. The briefing schedule has concluded and the only Respondents who have submitted briefs to the Court of Appeals are Plaintiffs Willard and Melissa Dixon. *See generally* C-Track/ACMS Docket. References to the "Respondents" in this memorandum shall, therefore, refer to Plaintiffs Willard and Melissa Dixon.

[2] The Respondents acknowledge this principle in their response brief, stating that the determination of whether a contract was one of adhesion is merely a "starting point" in determining unconscionability. *See* Resp. Final Br. at 5. The Respondents then present facts supporting their argument that this contract was one of adhesion and in the final sentence of this section of their argument reference, vaguely and in conclusory terms to "one-sided and oppressive terms of the agreement." *See* Resp. Final Br. at 6.

David Weekley reserves all rights to argue that the purchase and sale agreement is not a contract of adhesion, but for the purposes of this memorandum, shows that even if the agreement is considered a contract of adhesion, it is nonetheless enforceable.

The Respondents do not cite to a *single* term within the subject arbitration provision in this case that they contend is unreasonable, oppressive, or one-sided. *See* Resp. Final Br. at 5-6. There are no such one-sided or oppressive terms. The terms of the subject arbitration provision in this case are reasonable, fair, and even-handed.

A careful comparison of the arbitration provisions shows that the terms the Supreme Court took issue with in *Damico* are not found in this arbitration provision. The arbitration agreement provides the parties and their successors equal rights to control who can be made party to the arbitration proceeding. The *Damico* opinion, therefore, further supports enforcement of this arbitration agreement. Detailed analysis of the arbitration provisions follows.[3]

## A. The Arbitration Provision at Issue in *Damico*:

The arbitration provisions addressed in *Damico* are found in Section 16 of Lennar's purchase and sale agreement. *Id.* at 605, 751. The terms of the Lennar arbitration provision are stated below, with italicized emphasis placed on the terms the Supreme Court found to be unconscionable and one-sided in *Damico*:

> 16. **Mediation / Arbitration of Disputes**.
>
> 16.1 The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Aviation Act (9 U.S.C. §§ 1 et seq.) and not by or in a court of law or equity. "**Disputes**" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this Agreement, the Property, the Community or any dealings between Buyer and Seller; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Seller or Seller's representative; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the

---

[3] While the Respondents broad-brush many of their arguments, case law is clear that the unconscionability analysis must be confined to the contents of the arbitration provision where the matter is governed by the Federal Arbitration Act. *See Damico*, 437 S.C. at 603-04, 879 S.E.2d at 750-51 (citing to *Prima Paint Corp. v. Flood & Conklin Manuf. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967)); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016); *Huskins v. Mungo Homes, LLC*, No. 2018-000889, Opinion No. 5916 at n. 6 (Ct. App. filed Feb. 15, 2023). As in these cases, the analysis of the question of whether the arbitration agreement is enforceable should be limited to a review of the terms of the arbitration provision.

Property, or in the Community. Buyer has executed this Agreement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby. Any Dispute shall be submitted for binding arbitration within a reasonable time after such dispute has arisen. Nothing herein shall extend the time period by which a claim or cause of action may be asserted under the applicable statute of limitations or statute of repose, and in no event shall the Dispute be submitted for arbitration after the date when institution of a legal or equitable proceeding based on the underlying claims in such Dispute would be barred by the applicable statute of limitations or statute of repose.

16.2 Any and all mediations commenced by any of the parties to this Agreement shall be filed with and administered by the American Arbitration Association or any successor thereto ("AAA") in accordance with the AAA's Home Construction Mediation Procedures in effect on the date of the request. If there are no Home Construction Mediation Procedures currently in effect, then the AAA's Construction Industry Mediation Rules in effect on the date of such request shall be utilized. Any party who will be relying upon an expert report or repair estimate at the mediation shall provide the mediator and the other parties with a copy of the reports. If one or more issues directly or indirectly relate to the alleged deficiencies in design, materials or construction, all parties and their experts shall be allowed to inspect, document (by photograph, videotape or otherwise) and test the alleged deficiencies prior to mediation. Unless mutually waived in writing by the parties, submission to mediation is a condition precedent to either party taking further action with regard to any other matter covered hereunder.

16.3 If the Dispute is not fully resolved by mediation, the Dispute shall be submitted to binding arbitration and administered by the AAA in accordance with the AAA's Home Construction Arbitration Rules in effect on the date of the request. If there are no Home Construction Arbitration Rules currently in effect, then the AAA's Construction Industry Arbitration Rules in effect on the date of such request shall be utilized. Any judgment upon the award rendered by the arbitrator may be entered in and enforced by any court having jurisdiction over such Dispute. If the claimed amount exceeds $250,000.000 or includes a demand for punitive damages, the Dispute shall be heard and determined by one arbitrator. Arbitrators shall have expertise in the area(s) of Dispute, which may include legal expertise if legal issues are involved. All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s). At the request of any party, the award of the arbitrator(s) shall be accompanied by detailed written findings of fact and conclusions of law. Except as may be required by law or for confirmation of an award, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

16.4 The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section. Buyer and Seller further agree (1) that any Dispute involving Seller's affiliates, directors, officers, employees and agents shall also be subject to mediation and arbitration as set forth herein, and shall not be pursued in a court of law or equity; (2) that *Sellers may, at its sole election, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration*; and (3) *that the mediation and arbitration will be limited to the parties specified herein.*

16.5 To the fullest extent permitted by applicable law, *Buyer and Seller agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any other arbitration, judicial, or similar proceeding shall be given preclusive or collateral estoppel effect in any arbitration hereunder unless there is mutuality of parties. In addition, Buyer and Seller further agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any arbitration hereunder shall be given preclusive or collateral estoppel effect in any other arbitration, judicial, or similar proceeding unless there is a mutuality of parties.*

16.6 Unless otherwise recoverable by law or statute, each party shall bear its own costs and expenses, including attorneys' fees and paraprofessional fees, for any mediation and arbitration. Notwithstanding the foregoing, if a party unsuccessfully contests the validity or scope of arbitration in a court of law or equity, the noncontesting party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in defending such contest, including such fees and costs associated with any appellate proceedings. In addition, if a party fails to abide by the terms of a mediation settlement or arbitration award, the other party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in enforcing such settlement or award.

16.7 Buyer may obtain additional information concerning the rules of the AAA by visiting its website at www.adr.org or by writing the AAA at 335 Madison Avenue, New York, New York 10017.

16.8 Sellers supports the principles set forth in the Consumer Due Process Protocol developed by the National Consumer Dispute Advisory Committee and agrees to the following:

16.8.1 Notwithstanding the requirements of arbitration stated in Section 16.3 of this Agreement, Buyer shall have the option, after pursuing mediation as provided herein, to seek relief in a small claims court for disputes or

> claims within the scope of the court's jurisdiction in lieu of proceeding to arbitration. This option does not apply to any appeal from a decision by a small claims court.
>
> 16.8.2 Seller agrees to pay for one (1) day of mediation (mediator fees plus any administrative fees relating to the mediation). Any mediator and associated administrative fees incurred thereafter shall be shared equally by the parties.
>
> 16.8.3 The fees for any claim pursued by arbitration in an amount of $10,000.00 or less shall be apportioned as provided in the Home Construction Arbitration Rules of the AAA or other applicable rules.
>
> 16.9 Notwithstanding the foregoing, if either Seller or Buyer seeks injunctive relief, and not monetary damages, from a court because irreparable damage or harm would otherwise be suffered by either party before mediation or arbitration could be conducted, such actions shall not be interpreted to indicate that either party has waived the right to mediate or arbitrate. The right to mediate and arbitrate should also not be considered waived by the filing of a counterclaim by either party once a claim for injective relief had been filed with a court.
>
> 16.10 Buyer and Seller specifically agree that notwithstanding anything to the contrary, the rights and obligations set forth in this Section 16 shall survive (1) Closing and the delivery of the Deed; and (2) the termination of this Agreement by either party; or (2) the default of this Agreement by either party.

*See* Pet. for Writ of Certiorari, Responses, and App'x, COA Record on Appeal, Vol. I, at pp. 432-434, filed on July 31, 2020 in Patricia Damico v. Lennar Carolinas, Appellate Case No. 2020-001048 (bold and underline emphasis in original; italics emphasis added).

The Supreme Court focused its analysis on two terms contained within the Lennar arbitration provision: (1) the language found within Section 16.4 that strips the Petitioners of controlling who they can include in the arbitration; and (2) the procedural defense to liability created by the interplay terms in Sections 16.4 and 16.5. *See Damico*, 437 S.C. at 616-24, 879 S.E.2d at 757-62 (emphasis in opinion).

The first issue arises from the following term contained within Section 16.4: "Seller may, *at its sole election*, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and . . . the mediation and arbitration will be limited to the parties specified herein." *Id.* at 616, 757 (emphasis in opinion). As per the Supreme Court, "[g]iving Lennar the 'sole election' to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle" (i.e., that litigations are the master of their own complaint and may

choose who to sue or not sue). *Id.* This Supreme Court found this term to be the most egregious. *Id.* at 624, 762 ("[T[here are several unconscionable provisions within Section 16, the most egregious of which strips Petitioners of their ability to name the parties against whom they are asserting their claims in the arbitration proceeding.") (emphasis added).

The Supreme Court also took issue with the fact that Section 16.4 of the arbitration section of the purchase and sale agreement, tied in with Section 16.5 that follows "creates the possibility of inconsistent factual findings that would preclude Petitioners from recovery on a purely procedural (rather than a merit) basis—a legal defense to which neither Lennar nor the other Responses are entitled." *Id.* The Supreme Court further explained this issue as follows:

> [P]aragraph 5 states the parties agree no factual or legal finding made in an arbitration is binding in any other arbitral or judicial proceeding 'unless there is a mutuality of parties.' However, Lennar can ensure there is never a 'mutuality of parties' by exercising its 'sole election' in paragraph 4 to choose the parties to the arbitration. Suppose Lennar is unable to or—of more concern—unwilling to compel the other named defendants to arbitrate, instead forcing Petitioners to litigate with the remaining defendants in circuit court. In that case, it is possible for the arbitration defendants to blame the remaining circuit-court defendants for Petitioners' damages, and vice versa. Were the respective fact finders to agree with the defendants' arguments to that effect, Petitioners could lose in both forums merely because the fact finder believes the absent defendants to be at fault, and, critically, *it is not Petitioners' choice that those defendants are absent.* Compounding the problem, paragraph 5 prevents any findings of fact or conclusions of law in the arbitration to be binding in any subsequent arbitral or judicial proceeding instituted by Petitioners to recover their damages fully. Thus, Petitioners could not even use the fact that the arbitrator had found Lennar was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa.

*Id.*

In the Supreme Court's words, Lennar created "a procedural defense to liability," which the Court viewed as wholly unreasonable, inherently unfair, and oppressive to its contractual counterparties. *Id.* The Court emphasized that the procedural defense concern was not theoretical, but probable, given the facts at hand in that case. *See id.* at 616-17, 757-58. ("We say this because, as it stands now, Spring Grove and a significant number of the subcontractors are not required to arbitrate with Lennar and Petitioners because either (1) their contracts with Lennar do not contain an arbitration provision; or (2) their contracts with Lennar (including the arbitration agreements therein) were executed after Petitioners filed their lawsuit, i.e., after the subcontractors had completed the work on Petitioners' homes the Abbey in general; or (3) they did not have a contract with Lennar at all—much less an arbitration agreement.").

The Supreme Court declined to exercise its discretion to limit the application of Section 16.4 of the arbitration provisions so as to avoid the unconscionable result of inconsistent findings. *See id.* at 618-24, 758-61. According to the Court, the portion of Section 16.4 that deals with who the proper parties to the arbitration proceeding are is a material term of the arbitration agreement, reasoning that if it were to sever the offensive language from the arbitration agreement, the Court "would be materially rewriting the contract by controlling who will—or will not—participate in mediation" and if the term were severed, there would, essentially be nothing left to the arbitration agreement. *Id.* at 619-20, 759. The Court further supported its decision to not exercise its discretion to sever such terms from the arbitration agreement by its findings that that the Lennar purchase and sale agreement was a contract of adhesion and a consumer transaction.

## I. The Arbitration Provisions at Issue in this Case:

The arbitration agreement found in the Respondents and David Weekley's contract documents is very different from the arbitration agreement in the Lennar purchase and sale agreement. Unlike the circumstances present in *Damico*, the homebuyer-parties in this case are not stripped of the ability to name the parties against whom they are asserting claims in the arbitration proceeding. There is no risk of inconsistent findings and David Weekley does not benefit from a contractually created procedural defense to liability.

The arbitration agreement in this case is contained in Section 9 of the subject purchase and sale agreement. It provides as follows:

> **9 DISPUTE RESOLUTION: ANY CLAIM, DISPUTE OR CAUSE OF ACTION INVOLVING SELLER OR PURCHASER (INCLUDING ANY CLAIM OR CAUSE OF ACTION BROUGHT BY EITHER PARTY AGAINST SUBCONTRACTORS, SUPPLIERS, MANUFACTURERS, AFFILIATED COMPANIES, THE DEVELOPER OF THE PROPERTY, OR ANY OTHER PROVIDER OF GOODS OR SERVICES IN CONNECTION WITH THE PROPERTY OR THIS AGREEMENT, SHALL BE RESOLVED BY BINDING ARBITRATION, IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT (TITLE 9, U.S. CODE) OR THE APPLICABLE STATE ARBITRATION STATUTE, IF THE FEDERAL ARBITRATION ACT DOES NOT APPLY.**
>
> **a <u>Scope of Arbitration</u>. The Arbitration provisions of this Agreement apply to all claims brought by through or under Purchaser, their dependents or other occupants of the Property, whether sounding in contract, tort, or otherwise, including claims for emergency or interim relief. The claims, disputes or causes of action within the scope of arbitration include, but are not limited to, those arising in connection with: (i) this Agreement, including the negotiation, formation, subject matter, breach, cancellation or termination hereof; (ii) the**

**development, design, construction, preparation, maintenance or repair, of improvements to the Property; (iii) marketing or sale of the Property; (iv) any representations or warranties, express or implied, relating to the Agreement or the Property; (v) any transaction, event or relationship between Purchaser and Seller, including any subsequent agreement or alleged agreement between Purchaser and Seller; (vi) any violations of any statute including, but not limited to, consumer protection, disclosure, or similar statutes or regulations; (vii) any personal injury or property damage claim; and/or (viii) any other agreement, transaction, occurrence or event giving rise to a dispute over breach of legal duties, rights or obligations which involve Purchaser and Seller ("the Dispute"). This arbitration provision shall survive closing, breach or termination of this Agreement and shall not be superseded by the doctrines of merger or waiver.**

b **Mediation. At any time after a demand for arbitration is made, prior to the final arbitration hearing, any party may require that the Dispute be submitted to mediation. If the Dispute is not resolved by mediation, then the arbitration proceeding shall continue to conclusion.**

c **Administration of Mediation and Arbitration. If the Dispute arises in connection with an alleged construction defect, the arbitration may be initiated and administered in accordance with the provisions of the Home Warranty instead of this Agreement. Unless the parties to the dispute agree otherwise, all arbitration proceedings pursuant to this Agreement shall be administered in accordance with the rules of the American Arbitration Association ("AAA"), applying the AAA rules, procedures, and protocols determined by the arbitrator to be most applicable to the nature of the Dispute, including, where applicable, the Supplementary Rules for Residential Construction Disputes, the AAA Consumer Due Process Protocol, and Supplemental Procedures for Consumer-Related Disputes. If the Dispute is within the jurisdictional limits of small claims court, the claiming party may bring the Dispute in small claims court as an alternative to arbitration; if the claim is subsequently amended to an amount in excess of applicable small claims court jurisdiction, the Dispute must be resolved by binding arbitration, as set forth herein. If Purchaser elects to submit a Dispute to arbitration that would otherwise be within the jurisdiction of small claims court, Seller will pay that portion of the filing fees which exceeds published court costs for filing a claim in small claims court. Consolidation of claims is not permitted except where otherwise required by law. In any case involving multiple parties or consolidated claims, any party may require that a**

**panel of 3 arbitrators decide the case, including all preliminary and procedural issues. The party making the request for additional arbitrators agrees to pay the entire cost associated with additional arbitrators.**

d **Costs of Arbitration and Mediation. If the amount in controversy exceeds applicable small claims court jurisdiction, Purchaser will pay the first $375 in filing fees to initiate arbitration; Seller will then pay the portion of filing fees which exceeds $375 for claims up to the amount of the Purchase Prices (if the claim asserted exceeds the Purchase Price, Purchaser will pay the filing fees associated with the excess amount). Purchaser and Seller shall each pay one-half of any mediator's compensation. Purchaser shall pay one-half of a single arbitrator's compensation, such one-half not to exceed $750. Seller shall pay all other arbitrator compensation, expenses and fees of arbitration, for an arbitration conducted by a single arbitrator. Except as provided above with regard to multiple party or consolidated cases, arbitration shall be conducted by a single arbitrator; however, a party may request a panel of 3 arbitrators if that party agrees to pay the entire cost associated with the additional arbitrators. All mediation and arbitration fees and expenses are subject to being awarded by the arbitrator to the prevailing party, to the same extent that court costs may be awarded under applicable law.**

e **Appeal. The arbitration award or decision is final and may be confirmed, entered and enforced as a judgment in a court having jurisdiction, subject to appeal only in the event of the arbitrator's manifest disregard of the law, no evidence to support the award, or such other grounds for appeal of arbitration awards that exist by statute, common law or the applicable rules of the administrative agency.**

f **Limitations. ANY CLAIM, DISPUTE OR CAUSE OF ACTION BETWEEN PURCHASER AND SELLER MUST BE BROUGHT BY PURCHASER NO LATER THAN TWO (2) YEARS AFTER THE DATE THE CAUSE OF ACTION ACCRUES, unless applicable law requires application of a different period of limitations (i.e., prevents a contractual two-year limitations period). Unless proven otherwise, it shall be resumed that any such cause of action accrued on the Closing Date; or, if no closing occurs, on the Acceptance Date. Any longer periods of limitations are hereby expressly WAIVED by the parties. An unsuccessful motion or action to stay an arbitration proceeding based on the position that it has been commenced after expiration of limitations shall not waive any party's right to have the underlying dispute resolved by arbitration.**

> **g** **Forum. Any mediation or arbitration shall be administered by the office of the administrator that is closest to the Property, and the mediation and arbitration proceedings shall be conducted in the locale where the Property is located. Any arbitrator or mediator must have a least five (5) years of experience serving as an arbitrator or mediator and shall have technical expertise and knowledge appropriate to the subject matter of the Dispute.**
>
> **h** **Waiver of Subrogation. Purchaser and Seller waive any and all claims, demands and causes of action against each other to the extent that damages or costs of repair therefore are covered and actually paid under any insurance policy or warranty program, or paid by any other third party that could claim subrogation rights against Purchaser or Seller. Seller's warranty obligations exclude any costs or damages paid by Purchaser's insurance company or any other third party.**

R. pp. 201-202 (emphasis in original).

While the Respondents do not present any specific unconscionability arguments to this Court, it is worth noting that the terms of this arbitration provision do not run afoul of *Damico*, the above-cited terms shown these terms run directly contrary to the offensive terms contained within the Lennar arbitration provision.

Here, *either party* can bring claims against each other and subcontractors, suppliers, manufacturers, affiliated companies, the developer of the property, or other providers of goods or serves in connection with the property or the purchase and sale agreement. *See* R. p. 201 ("Dispute Resolution"). The terms of this arbitration agreement are even-handed and fair. Because the homeowners have the right to bring claims against such parties, the procedural defense that was present in *Damico* is absent here. The homeowners are not faced with the theoretical or actual dilemma of having to sue different parties in different forums and the possibility of inconsistent results. The terms are not unconscionable, oppressive to the homebuyers or owners in and of themselves, and there is no risk of an unconscionable result when the terms are enforced.

The parties' right to assert claims in arbitration is even-handed is critical to the analysis. *See Damico* at 614, 756 ("The distinction between a contract of adhesion and unconscionability is worth emphasizing: *adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***."). As the Supreme Court made clear in *Damico*: "unconscionability requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms. Thus, an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter's case." *Id.*

## II. Other Aspects of the Court's Ruling in *Damico* Affecting this Appeal

The *Damico* decision mainly deals with unconscionability within the context of arbitration agreements. This case does not involve questions of unconscionability. As introduced at the outset of this memorandum, this case involves questions of whether the FAA governs and whether the claims asserted against David Weekley come within the scope of the arbitration agreement. The *Damico* decision further supports enforcement of this arbitration agreement in that it affirms the application of the FAA.

Respondents' primary argument against arbitration is that the Uniform Arbitration Act, codified in Chapter 48 of Title 15, applies (the "SCUAA"), not the Federal Arbitration Act (the "FAA"). Respondents' argument fails for two reasons: (1) the parties agreed the FAA would apply to the resolution of any claim, dispute, or cause of action involving the agreement; and (2) the transaction involved interstate commerce as a matter of fact, thereby implicating the FAA. *See* App. Final Br. at 10-17.

These were the same arguments Petitioners made in *Damico*. The Court of Appeals rejected those arguments, and the Supreme Court affirmed that aspect of its ruling. The same analysis should apply here.

First, David Weekley's agreement, like Lennar's, sets out that the parties agreed the transaction between them involved interstate commerce and that the FAA would apply. *See* App. Final Br. at 12 (citing to R. p. 201 and 223) ("Any claim, dispute, or cause of action . . . shall be resolved by binding arbitration, in accordance with the Federal Arbitration Act); *c.f. Damico*, 437 S.C. at 606, 879 S.E.2d at 752 ("'The parties to this [purchase and sale a]greement specifically that this transaction involves interstate commerce and that any Dispute . . . shall first be submitted to . . . binding arbitration as provided by the Federal Arbitration Act. . . .").

Second, the agreement in which the arbitration provision is contained was an agreement for the purchase and sale of new construction. *See* App. Final Br. at 14-17; *c.f. Damico*, 437 S.C. at 605, 879 S.E.2d at 751.

When this Court considered the *Damico* case, it held that the FAA applied for these same two reasons:

> We first consider whether the FAA applies. We hold it does, for two reasons. First, the PA provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce). Second, the transaction involved commerce in fact.

*See Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020).

The Supreme Court affirmed this portion of this Court's ruling in *Damico*. 437 S.C. at 608, 879 S.E.2d at 753 ("As an initial matter, Petitioners argue the contracts at issue do not involve interstate commerce, and therefore Lennar cannot compel Petitioners to arbitrate federal law, namely, the FAA. We disagree. The transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes."). There is no doubt, particularly in light of the *Damico* decision, that the FAA applies here.

## Conclusion

The Court of Appeals should compel arbitration in this case with respect to the claims that are asserted against David Weekley because such claims come within the scope of the arbitration provision and the FAA applies based upon the agreement it would apply and the undisputed facts that this transaction, the construction of a new home, involved interstate commerce. Enforcement of the arbitration provision is further warranted because its terms are reasonable, fair, and even-handed, unlike those terms before the Court in *Damico*.

Respectfully Submitted,

**WALKER GRESSETTE & LINTON, LLC**

John P. Linton, Jr.
Jennifer S. Ivey

*Attorneys for Appellant Weekley Homes, LLC f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes*

c: Hon. Gregory L. Hyland
Steven L. Smith
Zachary J. Closser
William K. Kalivas