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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Circuit Court Case No. 2022-CP-07-00632
Court of Appeals Case No. 2022-001587

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315 Corley CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives……..……Respondents/Cross-Appellants,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PBLH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners LLC; and John Does 1-25 .....Appellants/Cross-Respondents.

RESPONSE BRIEF
of RESPONDENTS/CROSS-APPELLANTS

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INTRODUCTION

This case is about the development of real property in Beaufort County, South Carolina—particularly the validity and enforceability of covenants and restrictions which were imposed on that real property by the developer in the course of development. On one side of the caption are "Homeowners" (Respondents, here). On the other side of the caption are a plethora of development entities, referred to herein collectively (for simplicity's sake) as "Developers" (Appellants, here).

This appeal involves the question of arbitrability. Arbitration is a matter of contract: is there a contract? or isn't there? Not to spoil the ending to the Developers' lengthy briefing, but **there is <u>not</u> an arbitration contract between the vast majority of the parties to this litigation**.

Developers' factual arguments are untethered from the reality that is the Record on Appeal. Developer's legal arguments are untethered from the reality that is the law. This Court should affirm the circuit court's decision, which correctly applied binding precedent to the facts of this case.

COUNTER-STATEMENT OF THE CASE

Palmetto Bluff is indeed "a premier high-end residential/resort development in Beaufort County," and the Homeowners indeed invested millions of dollars in their homes. (*See* App. Br. p. 4). Homeowners undertook this investment—one of the biggest in their lifetimes—based on a master plan promoted by the Developer: extensive first-class infrastructure in a community that included luxury amenities. (*See* R. pp. 73–90, Compl. pp. 2–19, "The Palmetto Bluff Hoax"). The Homeowners have filed suit because

the real estate development plan—particularly covenants and restrictions imposed on Homeowners' property—is unlawful. This is an action pertaining to title to real estate, and therefore the plaintiffs are the record title holders of the real property in question.

Many of the allegations within the "Factual Background" in Developers' Initial Brief are speculative and unproven, including complete guesswork by Developers about people who may or may not be principals of the corporate plaintiffs. (Ap. Br. pp. 6–7; 24–30). As Developers themselves point out (in bold), the circuit court stated that it was "not making findings of fact in its Order." (Ap. Br. pp. 10–11). This knocks out, for example, the Developers' entire argument about agency and apparent authority (Ap. Br. pp. 24–30), which would be fact-intensive, as well as their repeated refrain on the purported sophistication of the parties, including Developers' lengthy and unproven bullet-point postulation on certain individuals' "wealth" found on pages 6–7 and 43–44. The circuit court decided the question of arbitrability as a matter of law, and this Court should affirm. (Order, R. p. 34).

THE ONLY FACTS THAT MATTER
Which Are Undisputed

For the purpose of this appeal, there is no need to wade into the personalities of individual people (who are not named parties), nor their relative sophistication. All that really matters about Homeowners, in this dispute over whether they can be contractually compelled to surrender their right to a jury trial in court, is whether they signed an agreement to arbitrate, and with whom. Here is what the Record bears out:

A. No agreements to arbitrate exist

No arbitration contract ***whatsoever*** exists between any Plaintiff and any of these eleven defendants:

1. Defendant Palmetto Bluff Development LLC
2. Defendant Palmetto Bluff Real Estate Company
3. Defendant PBLH LLC
4. Defendant Montage Palmetto Bluff LLC
5. Defendant Palmetto Bluff Preservation Trust, Inc.
6. Defendant Palmetto Bluff Preservation Trust Board of Stewards
7. Defendant Jordan Phillips
8. Defendant Mark Polites
9. Defendant Gray Ferguson
10. Defendant Henry Armistead
11. Defendant South Street Partners NC, LLC

Put another way, not a one of the above-listed Defendants has a contract with any Plaintiff that contains an arbitration clause. Put yet another way, just to make the point, **not a single one of the Homeowners has ever agreed to waive their rights to jury trials as to a single one of the above-named Defendants.** The circuit court decided that such contracts did not exist, as a matter of law, quite simply because not one of the above-listed Defendants came forward with a contract to support their motion to compel arbitration (which was their burden).

B. Same as it ever was.

So, how did we get here, this Court might ask? The answer is that one defendant, Palmetto Bluff Club LLC (the "Club"), moved to compel arbitration because 7 out of the 21 Homeowner plaintiffs signed a (mandatory) Club "membership" agreement which does contain a purported arbitration provision. As discussed herein, that arbitration

provision is invalid and not binding . . . but it does exist, so here we are. Developers are attempting to bootstrap numerous individual, class, and derivative claims—against numerous different parties—into arbitration, based on that solitary defendant's arbitration clause, which is buried in an "agreement" that was not ever signed by the vast majority of the plaintiffs.

The third-grade math problem at the heart of this appeal: If 7 out of 21 Homeowners have a contract with the Club, then what do the other 14 Homeowners have? Nothing. The other 14 Homeowners have no agreement with the Club that contains an arbitration clause.

Similarly: if 1 out 12 Defendants has a contract with 7 out of the 21 Homeowners, then what do the 11 other Defendants have? Again, Nothing. The other 11 Defendants have no agreement with the 21 Plaintiffs that contains an arbitration clause.

C. A hidden clause

A brief factual[1] discussion about the ostensible "arbitration agreement" at issue here for seven Homeowners with one Defendant: The Palmetto Bluff Community has literally thousands of pages of "Governing Documents," which are all under the umbrella of a recorded Community Charter (which has been amended and supplemented more than *seventy* times) containing the covenants and restrictions for the community. (R. p. 166, Charter p. 3). In addition to the Charter, the community has a separate Recreational

[1] These facts pertain to unambiguous written instruments, which can be construed by this Court as a matter of law, as the circuit court correctly did. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014) (the construction of a clear and unambiguous contract is a matter of law for the court.); *S.C. Dep't. of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("the construction of a clear and unambiguous deed is a question of law for the court.").

Covenant (which has been amended and supplemented over *sixty* times).[2] (R. p. 255). Palmetto Bluff also has copious rules, by-laws, guidelines, restrictions, fee schedules, policies, procedures, and other parameters, all of which the Developers contend that they can alter, modify, or amend unilaterally, at any time, without consent of the Homeowners. (*See, e.g.,* R. p. 218, Charter p. 55). According to Developers, a Homeowner accepts his title subject to these *thousands* of pages of fine print. As Homeowners point out in their Cross-Appeal, a void covenant would not be binding, and it would never attach to title.

Notably, the arbitration clause at issue is buried in what Developers themselves describe as low-level governing documents—the Club Membership Plan, Membership Agreement, and related documents (the "Club Documents"). (*See* R. p. 166, Charter p. 3, Table). The Club Documents have not ever been recorded with the register of deeds. Notwithstanding the Developers' failure to record them, Developers claim they are incorporated by reference within the Community Charter, which states that it runs with the land. (*Id.*)

The Club Documents are subservient to the Community Charter, which contain a conflicting ADR provision expressly allowing "suit in any court" after mandatory *mediation.* (R. p. 215, *Id.* p. 52 § 18.1(a)). The Developer included a conflict resolution

[2] As discussed in Homeowners' cross-appeal, which is incorporated herein, these documents contain numerous provisions which *per se* unreasonably restrain the alienability of Homeowners' title, and which unlawfully attempt to compel mandatory, automatic "membership" in Developers' for-profit business. Homeowners filed this lawsuit for the purpose of reforming the Developers' unlawful development practices which affect their property.

clause within the covenants which states that provisions in the higher-level documents prevail over those in subservient documents. (R. p. 167, Charter p. 4). In other words, under the documents themselves, which were drafted by Developer, the "suit in any court" provision trumps over the conflicting arbitration clause buried in a low-level document. (R. p. 167, Charter, p. 4 § 1.3; 52–53 § 18.2).

A MORE ACCURATE PROCEDURAL HISTORY

Homeowners filed this lawsuit on April 12, 2022, in the Beaufort County Court of Common Pleas, seeking declaratory judgments as to the unlawfulness of certain real covenants, as well as damages for the improper actions of development entities in the development, operation, and maintenance of the community. (R. p. 70). On May 10, 2022, Homeowners filed a Motion pursuant to South Carolina Code § 15-48-20, for Summary Proceedings on the Invalidity of a Purported Arbitration Clause. (R. p. 347).

Before filing suit, the Homeowners participated in two mediations with Developers, as required under the ADR provision of the Community Charter for Palmetto Bluff, which "establishes a procedure for the overall development, administration, maintenance, protection, conservation and preservation of the Community." (R. pp. 165, 215, Charter p. 2; p. 52 "Dispute Resolution"). The Charter expressly states that after mediation a party "shall thereafter be entitled to file suit." (R. p. 216, Charter p. 53). Homeowners filed suit shortly after the second mediation was declared an impasse.

Developers' description of "arbitration filings" is not forthright. Homeowners did not ever demand arbitration with the AAA, and this Court should review the Record

rather than relying on arguments of counsel. (*See* R. pp. 754, 355, 358, Pl. Memo. in Opp. to Def. Mtn. Dismiss; Ex. A to Defendants' Motion to Dismiss).[3] To be accurate, Homeowners sent a letter to the American Arbitration Association ("AAA"), enclosing the civil Complaint and stating that the circuit court for Beaufort County, South Carolina had jurisdiction over the dispute. The letter was in response to claims by Developers that an ADR provision within lower-level governing documents requires arbitration and imposes a 60-day statute of limitations on Homeowners' claims. Although counsel for Homeowners disagreed with Developers' position, they sent the letter to the AAA (after filing the lawsuit) to foreclose an argument by Developers that the alleged 60-day limitations period had run.

In circuit court, on May 24, 2022, Developers filed a Motion to Dismiss or in the Alternative to Compel Arbitration. (R. p. 351). On June 9, 2022, Homeowners filed a Motion for Partial Summary Judgment, seeking declaratory judgments on the construction of unambiguous covenants and restrictions. These judgments are the

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[3] Certain Homeowners were concerned about a provision within the Club Membership Plan imposing a truncated 60-day statute of limitations. (The unlawfulness of which is discussed herein, Section III.D.2 (pp. 28–31)). Out of an abundance of legal caution, some Homeowners communicated with the AAA, attaching their already-filed lawsuit and stating:

> The South Carolina Court of Common Pleas, Beaufort County, has jurisdiction over the matters set forth in the lawsuit and over all parties and their property.
>
> Please note, as further explained within the enclosed form, that my clients are filing this "Demand for Arbitration" form with AAA out of an abundance of legal caution, for the purpose of preserving and not waiving my clients' rights and claims. My clients deny that arbitration is required, and they deny that AAA or an arbitrator has jurisdiction over the parties and the disputes.
>
> We request that the matter be put on hold while the lawsuit is pending.

R. p. 355, Letter from Ian S. Ford, Esq., to American Arbitration Association dated April 14, 2022 (emphasis in original).

subject of Homeowners' Cross-Appeal.

The parties filed supporting memoranda for their motions. (R. pp. 484–857).

All motions came before the Honorable R. Ferrell Cothran, Jr., for a hearing on July 20, 2022.[4] On September 15, 2022, the circuit court entered its Order, which is the subject of this appeal and cross-appeal. (R. p. 1). Developers answered the Complaint on October 5, 2022. (R. p. 299). Developers moved to alter or amend the Order, arguing—as they do on appeal—that the Federal Arbitration Act ("FAA") applies because some homes in the community are sometimes used for short-term rentals. The circuit court amended its order to include additional language rejecting this argument, stating: "The fact that some of the homes within the development are used for short-term rentals does not transform the development into one which involves interstate commerce." (R. p. 40, Amended Order p. 7). Otherwise, the Order remained unchanged.

Developers appealed on November 15, 2022. Homeowners cross-appealed on December 5, 2022. (R. pp. 959, 961).

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

"Arbitration is a matter of contract, and **a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.**" *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001) (emphasis added).

The threshold question for this Court is: Does an agreement to arbitrate exist? The circuit court found that there is not an arbitration agreement as to numerous parties, as a

[4] The hearing lasted for most of the day. Unfortunately, the court reporter experienced a technological error, and no transcript of the hearing could be made.

matter of law. There is no need to decide any other issue put forward by the Developers in the absence of agreements to arbitrate. By starting their Brief with the question of whether the FAA applies and whether a delegation clause covers the dispute, Developers put the cart before the horse—the primary question is whether the circuit court correctly found that agreements to arbitrate do not exist.

Homeowners therefore respectfully re-arrange and re-state the issues on appeal, in order of priority:

I. Did the circuit court correctly find that agreements to arbitrate do not exist?

II. Did the circuit court correctly find that South Carolina's Uniform Arbitration Act applies to this dispute over encumbrances to South Carolina real estate?

III. Did the circuit court correctly find as a matter of law that those few arbitration agreements that do exist are invalid, unlawful, and unconscionable?

IV. Did the circuit court correctly find that non-signatory Homeowners cannot be forced to give up their rights to jury trials, including against non-signatory defendants, based on non-existent arbitration agreements?

V. Did the circuit court have authority to decide these issues under the statute specifying that a court decides these issues?

STANDARD OF REVIEW

Developers are wrong about the standard of review, which is not *de novo* but is instead limited to the correction of errors of law and of factual findings that are not supported by "any evidence." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Developers themselves point out that the lower court heard and decided the issues before it as matters of law—based on the undisputed facts and unambiguous language of the covenants and contracts; as such, Developers note, the court "did not make findings

of fact."[5] (Ap. Brief pp. 10–11). **The standard of review is therefore that of an action at law tried by a judge**. *Lackey*, 330 S.C. at 393–394 ("In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence.").

"Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014). Moreover, the construction of a clear and unambiguous contract is a matter of law for the court. *Lee*, 407 S.C. at 512, 757 S.E.2d at 394. "The construction of a clear and unambiguous deed is a question of law for the court." *S.C. Dep't. of Nat. Res.*, 345 S.C. at 623, 550 S.E.2d at 302. "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." *Lackey*, 330 S.C. at 393–394.

The lower court made the following decisions of law, which this Court should review for error of law under an "any evidence" standard:

I. There is no agreement to arbitrate as between numerous parties.
   a. No agreement whatsoever exists as to fifteen (15) plaintiffs.
   b. No agreement to arbitrate exists between plaintiffs and eleven (11) defendants.

II. The Club's arbitration clause is invalid, unlawful, and unenforceable.
   a. Plaintiff the Bosler-Hart Trust is not bound.
   b. The arbitration provision is eclipsed by the Community Charter which allows filing "in any court."
   c. The purported arbitration clause excludes members before June 19, 2017.
   d. The purported arbitration clause is unenforceable and invalid on its face.

[5] Perhaps ironically, it was Developers who insisted the Order include the holding: "Because the motions currently before the Court present questions of law, the Court is not making findings of fact in this Order." (R. p. 928, Ex. 1, track changes, to Pl. Opp. Mtn. Reconsider). Developers asked for this language to be included in the Order, and they are bound by it.

i. Defendants are outside the limitations period of their own "agreement."
ii. The contract fails the conspicuous notice requirement of the South Carolina Uniform Arbitration Act.
iii. The purported agreement to arbitrate is unconscionable and invalid.
    1. The Club documents are contracts of adhesion.
    2. The terms are oppressive and one-sided.

III. No arbitration by non-signatories.

IV. Claims in the Complaint are outside the scope of the purported arbitration agreement.

This Court should affirm the circuit court, which correctly decided the above questions as a matter of law.

Moreover, when it reviews the circuit court's decision not to sever unconscionable terms, this Court should do so under an "abuse of discretion" standard. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746, 759 (2022) ("courts have discretion to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive") (cleaned up). In addition, as discussed in Section IV.D below, this Court should review the circuit court's ruling on equitable estoppel under an "abuse of discretion" standard.

ARGUMENT

All told, Developers itemize eleven issues on appeal (including subparts). This is because the circuit court's decision was based on numerous independent grounds, each of which sustains the Order's denial of arbitration. Notably, for this Court to reverse the circuit court, it would need to find that the Order was wrong as a matter of law on each of the independent rulings of law identified in the Standard of Review section above.

Developers' arguments on appeal revolve around their repeated contention that public policy "favors" arbitration. This argument would have the Court misunderstand the law, which does not "favor" arbitration at all:

> Our courts' statements that the law 'favors' arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions. *See* Richard Frankel, *The Arbitration Clause As Super Contract*, 91 Wash. U. L. Rev. 531, 533 (2014) ("Much of this arbitration favoritism is attributable to lower-court misinterpretation of thirty-year-old dicta . . . .") . . . Therefore, when considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. **There is, however, no public policy—federal or state—"favoring" arbitration.**

Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 638–639, 856 S.E.2d 150, 152–153 (2021) (cleaned up) (emphasis added).

Because arbitration is entirely a creature of contract, the threshold question is whether an agreement to arbitrate exists. Homeowners discuss this issue first, because in the absence of an agreement there is no need to delve into questions about interstate commerce, delegation clauses, scope, or agency. Each defendant moving to compel arbitration had the burden to produce contracts, signed by each plaintiff, in which each plaintiff had agreed to arbitrate their claims against each defendant. Quite simply, as the

Record shows and as the circuit court correctly found, eleven of the Developer defendants did not meet their burden at all as to **any** of the Homeowners. Moreover, the circuit court correctly found that the few signed contracts mustered by a single defendant were unenforceable as a matter of law for multiple, independent reasons.

I. The circuit court correctly found that no agreement to arbitrate exists as between numerous parties, as a matter of law.[6]

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski*, 346 S.C. at 596. Arbitration must be "predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019). When Developers moved to compel arbitration, the Homeowners contended that they had never agreed to arbitrate. The circuit court held:

> Here, there appears to be no agreement to arbitrate between the vast majority of the parties to this litigation. **This Court cannot enforce contracts that do not exist**, and nor will it require parties to surrender access to the courts when they have never agreed to do so . . . fifteen of the Plaintiffs have never signed any agreement to arbitrate any dispute with any of the Defendants, whatsoever . . . [the arbitration] is hereby STAYED as to the demands made against the fifteen Plaintiff for whom no arbitration agreement exists whatsoever . . . Defendants have not produced any contract in which any Plaintiff has agreed to arbitrate any dispute with the following eleven Defendants . . . [listing] . . . those eleven Defendants have failed to demonstrate an agreement to arbitrate with any Plaintiff . . .

(R. pp. 41–43, Order p. 8–10).

Importantly, in moving to compel arbitration, the Developers had the burden to come forward with valid, enforceable arbitration agreements. *Landbank Fund VII, LLC v.*

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6 This argument addresses Section C-1 of Developers' Brief.

Dickerson, 632 S.E.2d 882, 369 S.C. 621 (Ct. App. 2006) ("The burden is on a party pleading a fact to prove it."). They failed to meet their burden, and the circuit court decided the question of the (non)existence of such agreements as a matter of law. Developers tried to confuse the issue before the trial court by attaching various club membership agreements to their motion; but—as the circuit court held—most of those agreements are not signed by any plaintiff to this litigation.[7] Developers' arguments on appeal (and in the circuit court) hinge on disputed and tenuous factual assertions about the supposed relationship between corporate plaintiffs and the individuals who signed club membership agreements.[8] The circuit court, in the best position to weigh and evaluate the evidence, discarded Developers' evidentiary theories and found as a matter of law that the Plaintiffs had not contractually agreed to arbitrate with the Defendants.

On appeal, Developers mislead this Court with the repeated refrain that "[d]oubts about whether a dispute is arbitrable are resolved in favor of arbitration." (*See, e.g.*, App. Br. p. 11). Developers are wrong, as the South Carolina Supreme Court recently held:

> [T]he presumption in favor of arbitration . . . **does <u>not</u> apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement.** . . . Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so.

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[7] This appellate Court should note that Developers' arguments about (i) whether and (ii) how the few agreements they assert are (iii) actually linked to the Plaintiffs in this litigation are fact and evidentiary arguments. The circuit court heard these factual arguments at length, in a hearing lasting for most of a day, and it decided that agreements to arbitrate, as to the particular parties to this litigation, simply do not exist. This Court should affirm the circuit court's fact and evidentiary findings, particularly because the court found the "evidence" to be so absent as to enable it to rule as a matter of law.

[8] Appendix 1 to Developers' Brief exemplifies the sort of unsubstantiated factual "evidence" that the circuit court found was not credible or compelling.

Wilson, 426 S.C. at 337 (cleaned up; emphasis added).

Under the applicable standard of review, this brief and this appeal should end here, with affirmance of the circuit court's findings on this issue—which findings are supported by the evidence (or lack thereof). "In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Lackey*, 330 S.C. at 393394. This Court should affirm the circuit court's decision that no arbitration agreement whatsoever exists between the vast majority of the parties, here.

II. South Carolina law applies to South Carolina land.[9]

The question of whether the Federal Arbitration Act applies is much less complicated than Developers make it out to be. The FAA only applies to arbitration agreements within contracts involving interstate commerce. The circuit court correctly found that the contracts at issue here—real property covenants which expressly state that they run with land located in Beaufort County, South Carolina—are uniquely **intrastate**. *Pressl v. Appalachian Power Co.*, 842 F.3d 299 (4th Cir. 2016) ("the interpretation of a state conveyance is a quintessential question of state property law."). South Carolina law therefore applies, and not the FAA.

This is a dispute about real estate development.[10] Real estate development is

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9 This argument addresses Section A of Developers' Brief.

10 Developers' description of the subject matter of the Complaint does not coincide with the actual words on the page, and Homeowners respectfully request that this Court would take some time to read it. (R. pp. 73–90, Complaint). What this Court will notice is that this is a real property dispute, concerned with covenants and restrictions imposed on real property by the Developer as instruments of development. The Complaint is not about the construction of houses. It is not about the rental of houses. It is not about "commercializing" property. The gravamen of the Complaint is about the validity and enforceability of covenants that purport to encumber Homeowners' title, and which

accomplished by subjecting land and its title to covenants, restrictions, easements, and other servitudes, and then conveying the land. For this reason, our South Carolina Supreme Court holds that "the development of real estate is an inherently intrastate transaction." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012).

The arbitrations agreements asserted by Developers are embedded in the real property that is Palmetto Bluff. Developers themselves chose to bind their contracts to real estate located in South Carolina. The Community Charter (the covenants which control the Palmetto Bluff Development) makes clear that this is about South Carolina land:

> [Developer] hereby declares that all of the property [in Palmetto Bluff] . . . **shall be held, sold, used, and conveyed subject to the following** easements, restrictions, covenants, and conditions, **which shall run with the title to the real property** subjected to this Charter. This Charter shall be binding on upon all parties having any right, title, or interest in any portion of the Community, their heirs, successors, successors-in-title, and assigns, and **shall inure to the benefit of each Owner of any portion of the Community.**

(R. p. 165, Charter p. 2) (emphasis added).

The Community Charter states that it incorporates by reference the "Palmetto Bluff Club Documents." (R. p. 166, Charter p. 3). The Palmetto Bluff Club Documents include the membership agreement, which contains the arbitration clause at issue here.[11]

Developers claim run with land that is indisputably located in Beaufort County, South Carolina. (*Id.*).

[11] The question of whether a developer can impose in one set of covenants an obligation to pay money to a separate, for-profit business (on a separate parcel *not* subject to those covenants), is the subject of Homeowners' Cross-Appeal and motion for summary judgment, below. This Court can affirm the circuit court's order on arbitration on the grounds that these covenants are void and without effect, pursuant to Rule 220(c), SCACR ("Affirmance on Any Ground Appearing in the Record") (*see* R. pp. 754, 821, Plaintiffs' Memorandum in Support of Motion for Summary Judgment; Plaintiffs' Memorandum in Support of Motion to Stay and in Opposition to Motion to Compel Arbitration).

Therefore, for the purpose of analyzing whether the contract at issue involves interstate commerce, the answer is an easy "No." The contract at issue has as its subject South Carolina land, and it ostensibly runs with title to South Carolina real property; **by its own device, the alleged arbitration clause is rooted in South Carolina and cannot leave it.**

Real covenants are intrastate; they cannot not flow to other states. A host of cases—both Federal and State—support this conclusion. *See, e.g., Barnhill v. Johnson*, 503 U.S. 393, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."); *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), *superseded by statute* ("Property interests are created and defined by state law."); *Reconstruction Finance Corporation v. Beaver County, Pa,* 328 U.S. 204, 66 S.Ct. 992, 90 L.Ed. 1172 (1946) ("Concepts of real property are deeply rooted in state traditions, customs, habits, and laws."); *Pressl*, 842 F.3d at 299 (remanding easement dispute to state court because "the interpretation of a state conveyance is a quintessential question of state property law."); *Bradley*, 398 S.C. at 447 ("the development of real estate is an inherently intrastate transaction.").

Developers introduce a sheerly conjectural argument about which law might apply to hypothetical short-term rental agreements.[12] To do this, they use a combination of (1) unproven assertions about hypothetical short-term rentals, and (2) Alabama law[13]

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12 There is no evidence in the Record of short-term rental agreements.

13 We will see Developers' Alabama law, and raise them some law from Kentucky, which was quoted with approval of the South Carolina Supreme Court:

> Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on **a commodity—the land—which is firmly planted in one particular state.** The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those

to argue against the clear precedent of the South Carolina Supreme Court. (*See* App. Br. pp. 12–17, *citing* the Alabama case of *Med. Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998) and arguing that the *Bradley* Court was wrong). First, this argument is a red herring: this is not a dispute between parties to a short-term rental contract—it is a dispute between (certain) parties to real property covenants, restrictions, and governing documents.[14] In deciding whether to apply the FAA, this Court should look to the document that contains the alleged arbitration clause (here, real property instruments encumbering South Carolina titles to Beaufort County real property) and not to (imaginary) short-term rental agreements that are not in the Record. Second, there is no connection between the covenants at issue and interstate commerce—our South Carolina Supreme Court has dispositively decided this question based on the overwhelming weight of authority on the "historical intrastate character of real estate transactions." *See Bradley*, 398 S.C. at 447; *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1993); *Zabinski*, 346 S.C. at 592. Further, our Supreme Court has expressly rejected Developers' arguments about the

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> movements are not part of the transaction itself. **All of the legal relationships concerning the land are bound by state law principles**. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce.
>
> To characterize a residential real estate [transaction] as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.

Bradley, 730 S.E.2d at 317, *quoting Saneii v. Robards,* 289 F.Supp.2d 855, 858-859 (W.D.Ky. 2003) (emphasis added).

[14] As a reminder, most parties to this litigation do not have a contractual relationship at all—let alone one that contains an arbitration clause.

import of some plaintiffs being out-of-state residents. *Mathews*, 312 S.C. at 404, *overruled on other grounds by Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001) ("In the present case, **the object of the contract was . . . real estate situated in South Carolina**. Although the contracting parties are domiciled outside of South Carolina and transactions incident to the sale were conducted in foreign jurisdictions, there is no evidence in the record that the express terms of the contract involved interstate commerce.") (emphasis added).

This Court should not veer from established precedent. The circuit court was correct that the SCUAA applies to this dispute about the development of real property. Even the Developers rely on the covenants that were imposed on the real property—embedded in South Carolina dirt—when they argue in favor of arbitration. This Court should affirm the circuit court's holding that the SCUAA applies to an alleged arbitration clause buried in documents which purport to run with South Carolina land.

As discussed in Section III, below, the alleged arbitration clause is invalid under the SCUAA.

III. The scant few arbitration "agreements" that a single Appellant put forth are unenforceable and unconscionable as a matter of law.[15]

The circuit court correctly found that the few arbitration agreements[16] asserted by one Defendant (the Club) "are invalid, for all or any one of [numerous] reasons." (R. p.

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15 This argument addresses Section D of Developers' Brief.

16 The Club produced Club "membership" agreements signed by the following plaintiffs (most of whom are husband/wife pairs): Anne Bosler and Dylan Hart; R. Jeffrey Kimball and Deborah S. Kimball; Chris Leigh-Jones; and Matthew N. Lynch and Barbara A. Lynch. The invalidity of mandatory "memberships" in a for-profit business is the subject of Homeowners' cross-appeal and additional grounds to strike the arbitration agreements.

44, Order p. 11). "Trial by jury is a substantial right and any waiver thereof must be strictly construed." *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 416 S.E.2d 637, 307 S.C. 533 (1992). This Court should affirm the circuit court's rulings that (1) the arbitration provision is eclipsed by the Community Charter, which allows filing "in any court"; (2) the purported arbitration clause expressly excludes buyers before June 19, 2017; (3) the purported arbitration clause is unenforceable on its face; (4) the purported agreement to arbitrate is unconscionable and invalid. (R. p. 45–60, Order pp. 12–26).

Notably, after arguing for the first 30 pages of their Brief that the Club's arbitration provisions, buried at the bottom of a stack of covenants, "run with the land" and should therefore bind non-signatory Plaintiffs six ways to Sunday, the Developers contend in Section D that the provision was conspicuous, could have been negotiated, and is not oppressive. In addition to affirming the circuit court's reasoning (discussed below), this Court should heed a recent opinion on this argument, by the South Carolina Supreme Court:

> This is not even to mention the fact that Lennar [the developer] attempted to insert an arbitration agreement in Petitioners' deeds, characterizing the arbitration agreement as an "equitable servitude" that runs with the land in perpetuity. **We find these and other terms of the contracts to be absurd, factually incorrect, and grossly oppressive.**

Damico, 879 S.E.2d at 758 (emphasis added).

A. The alleged arbitration provision in a low-level document is eclipsed by the Community Charter.

The circuit court correctly found that the Club's purported arbitration provision, which is found within low-level documents called the "Palmetto Bluff Club Documents,"

is superseded by the dispute resolution procedures in a superior, recorded instrument, the Community Charter for Palmetto Bluff. The governing documents themselves say that the Community Charter controls over the Palmetto Bluff Club Documents. The construction of a clear and unambiguous contract is a matter of law for the court. *Lee*, 407 S.C. at 512.

The Community Charter, recorded with the Beaufort County Register of Deeds, is the core governing document at Palmetto Bluff, and it is the founding document of the Palmetto Bluff Community. (R. p. 158, Charter). The Community Charter "is intended to serve as a framework for community governance" at Palmetto Bluff. (R. p. 164, Charter, pp. 1–3). The Charter has a table identifying the various "Governing Documents" within the Palmetto Bluff community:

TABLE 1.1

GOVERNING DOCUMENTS	
Community Charter: (recorded or to be recorded)	this Community Charter for Palmetto Bluff, which creates obligations that are binding upon the Trust and all present and future Owners of property in Palmetto Bluff
Supplement: (to be recorded)	a recorded Supplement to this Charter, which may submit Additional Property to this Charter, create easements over the property described in the Supplement, impose additional obligations or restrictions on such property, designate Neighborhoods as described in Chapter 4 or any of the foregoing
Articles of Incorporation: (filed with Secretary of State)	the Articles of Incorporation of Palmetto Bluff Preservation Trust, Inc., as they may be amended, which establish the Trust as a nonprofit corporation under South Carolina law
By-Laws: (attached as **Exhibit "D"**)	the By-Laws of Palmetto Bluff Preservation Trust, Inc. adopted by its Board of Stewards, as they may be amended, which govern the Trust's internal affairs, such as voting, elections and meetings
Design Guidelines: (Founder adopts)	the design standards and architectural and aesthetics guidelines adopted pursuant to Chapter 10, as they may be amended, which govern new construction and modifications to Units, including structures, landscaping, and other items on Units
Rules: (initial set attached as **Exhibit "E"**)	the rules of the Trust adopted pursuant to Chapter 11, which regulate use of property, activities, and conduct within the Community
Board Resolutions: (Board adopts)	the resolutions which the Board adopts to establish rules, policies, and procedures for internal governance and Trust activities and to regulate the operation and use of property which the Trust owns or controls
Palmetto Bluff Club Documents: (Palmetto Bluff Club Owner adopts)	the Membership Plan and related documents, as amended from time to time, which obligate all present and future Owners to be members of the Palmetto Bluff Club

(R. p. 166, Charter, p. 3). Listed last are the "Palmetto Bluff Club Documents," which include the "Membership Plan and related documents" which the Developers contend compel arbitration. The Community Charter identifies the "Palmetto Bluff Club Documents" as hierarchically subservient to the Community Charter, specifically stating that **the Charter controls** among the Governing Documents:

> 1.3 Conflicts. If there are conflicts between any of the Governing Documents and South Carolina law, South Carolina law shall control. **If there are conflicts between or among any of the Governing Documents, then the Charter**, the Articles, and the By-Laws (in that order) **shall control**.

(R. p. 167, Charter) (emphasis added). The Membership Plan and related documents are identified as subservient documents. (R. p. 166, *id.* at p. 3, Table 1.1).

Importantly, the Community Charter has its own dispute resolution provision, which controls over that contained within the Club documents. The Charter's provision requires mediation before a lawsuit may be filed in court, but after that the Charter explicitly allows a party to "to file suit in any court":

> Accordingly, each Bound Party agrees not **to file suit in any court** with respect to a Claim described in subsection (b), **unless and until** it has first submitted such Claim to the alternative dispute resolution procedures set forth in Section 18.2 [non-binding mediation] in a good faith effort to resolve such Claim. . . .
>
> . . . The Claimant **shall thereafter be entitled to file suit** . . . .

(R. p. 215, Charter p. 52 § 18.1(a); § 18.2(c) (emphasis added)). Here, parties mediated the dispute in conformance with this provision. As such, the Community Charter allows filing "in any court." The circuit court correctly found, as a matter of law and clear contract construction, that the conflicting language pertaining to arbitration within the Club Documents is inapplicable in the face of the explicit Dispute Resolution provision

of the controlling Charter.

B. The purported arbitration clause excludes home-buyers before June 19, 2017.

By its own terms, the Club's purported arbitration clause does not apply to members who bought before June 19, 2017. (R. p. 284, Compl. Ex. 4, p. 15) ("This 'Arbitration/Mediation' provision shall apply only to members who acquire their membership on or after June 19, 2017."). This language specifically excludes Plaintiffs Bridge Charleston Investments B LLC ("Bridge B"), Geoffrey J. Block, and Jennifer Albero from its scope.[17] As such, the circuit court correctly found that the clear language of the Club's clause excludes them from mandatory arbitration, as a matter of law. Developers do not challenge this ruling on appeal, and it is the law of the case.

C. The purported arbitration clause is unenforceable on its face.

The circuit court correctly found that the South Carolina Uniform Arbitration Act ("SCUAA") applies to this real property dispute over land located in South Carolina and its encumbrances and appurtenances in South Carolina. The SCUAA requires that a contract provide conspicuous notice on its first page—in UNDERLINED CAPITAL LETTERS—that it is subject to arbitration.[18] S.C. Code § 15-48-10(a). Developers argue that they produced membership agreements with this notice "on the first page." (App. Br. p. 41). This argument does not tell the whole truth. In fact, a solitary defendant (the

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[17] Bridge B acquired its Club membership in 2015; Jennifer Albero acquired her membership on June 5, 2017; and Geoffrey J. Block acquired his membership in 2016—all before June 19, 2017. (R. pp. 782–793, Memo in Supp. Mtn to Stay, Exhibit 1 (deeds)).

[18] **This discussion feels a bit absurd, considering that there is actually no contract at all containing an arbitration clause, as between eleven of the Defendants and any of the Plaintiffs**, on which a notice might or might not be furnished.

Club) produced four "Club Membership Agreements" signed by a few plaintiffs to this action[19] with notice on what the Club claims to be the first page. But the circuit court was correct that these "membership" agreements are but one component of a vast constellation of purported "Governing Documents" for the Palmetto Bluff Community. (*See supra* Issue III.A; R. p. 166, Charter p. 3). The Club Documents (of which the "membership agreements" are a part) are designated as subservient to other community documents, including the Community Charter—they are expressly identified by the Appellants themselves as being at the bottom of a stack of hundreds of pages of covenants and restrictions purportedly binding the Homeowners' property. (*Id.*) (*See infra* p. 22). In other words, the ostensible "first page" of the membership agreement is—in reality—hundreds of pages into the "various documents that have a legal and binding effect on all Owners and occupants of property in the Community." (R. p. 166, *Id.* § 1.1).

In this litigation, Homeowners seek to invalidate provisions of the community's chief governing documents, the Community Charter and the Recreational Covenant. (R. pp. 132–135, Complaint) (*see also* Homeowners' Cross-Appeal). The Charter and the Recreational Covenant do not contain any arbitration clause at all—indeed they have a different ADR provision permitting "suit in any court." (R. p. 216, Charter p. 53). But, in a "flea wags the dog" argument, the Developers wrongly urge this Court to find that an alleged arbitration clause in an expressly subservient document, to which a tiny fraction of litigants are parties, could drive into arbitration a dispute about superior documents.

[19] As discussed above, the Club produced membership agreements by non-parties to this action, which are completely irrelevant, and it is disingenuous for Appellants to argue about whatever words might appear on the first pages of those agreements.

The circuit court correctly discarded this argument.

For Developers to compel arbitration of disputes about the validity and enforceability of the Community Charter and Covenants, those instruments must conform to the SCUAA. **The SCUAA requires:**

> Notice that the contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

S.C. Code § 15-48-10. Neither the Community Charter nor the Recreational Covenant (nor the numerous other superior community governing documents) contain any arbitration provision whatsoever, let alone on the first page. This Court should affirm the circuit court's ruling that the arbitration clause here, buried in hundreds of pages of closing documents, fails to give the conspicuous notice required by the SCUAA.

D. The purported agreement to arbitrate is unconscionable and invalid.

The circuit court correctly found that the alleged arbitration "agreement" is unconscionable, oppressive, and adhesive: the few plaintiffs to whom it might apply were deprived of any meaningful choice, and the terms of the contract itself are oppressive and one-sided. "Arbitration is a matter of contract and controlled by contract law." *Smith v. D.R. Horton, Inc.,* 417 S.C. 42, 790 S.E.2d 1 (2016) (citation omitted). As such, arbitration agreements may be stricken "upon such grounds as exist at law or in equity for the revocation of any contract." S.C. Code § 15-48-10.[20] Courts in South Carolina do not enforce unconscionable contracts, or those that violate public policy.

[20] The SCUAA applies here. However, the FAA contains an identical provision and requires a similar analysis. *See Damico,* 879 S.E.2d at 754.

Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).

The test for determining whether an arbitration agreement is unconscionable has two prongs. *Damico*, 437 S.C. at 610, 879 S.E.2d at 754 (this case has a thorough discussion of the history of this test, in contract law and arbitration specifically). Courts must decide (1) whether there is an absence of meaningful choice, and (2) whether the terms are oppressive and one-sided. *Id.*; *see also Smith,* 790 S.E.2d at 4 ("In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."). The circuit court correctly analyzed both prongs.

1. The Club documents are contracts of adhesion.

The Club's membership agreement is a classic example of a "take-it or leave-it" contract with terms that are not negotiable. *See Smith*, 417 S.C. at 49–50, 790 S.E.2d at 4. According to Developers, mere "acceptance of a deed for property within Palmetto Bluff" ostensibly means that a person is "**automatically** assumed and agreed to be bound by all the terms and conditions of the Membership Plan." (R. pp. 265, 271, 275, Def. Ex. D, p. 3, § II) (emphasis added). Importantly, **Developers have never recorded with the register of deeds** the Club Membership Plan containing the ostensible arbitration clause, which they claim is binding "upon the acceptance of a deed." Yet Developers dissonantly argue here, "If Plaintiffs did not want to agree to arbitration provisions, they did not need to buy a property in Palmetto Bluff . . . *there was no element of surprise* in this conspicuous arbitration clause contained in documents for high-dollar transactions that reasonable

people read thoroughly and carefully." (App. Br. p. 44) (emphasis added). To the contrary, there is a great deal of surprise in hidden, unrecorded provisions that claim to mandate arbitration and which are "automatic" "on acceptance of a deed."

There is no opportunity whatsoever to negotiate these ostensibly "automatic" provisions, and the circuit court was right that the Club Documents are contracts of adhesion. (*See* R. pp. 21, 54, Order p. 21, bulleted list of adhesive, non-negotiable terms, which pervade the documents). There is no conceivable potential for bargaining power on the part of those whom the "automatic" and "mandatory" provisions purport to bind.

Developers incorrectly emphasize the purported "sophistication" of certain people, some of whom are plaintiffs. (App. Br. pp. 43–45). This argument is wrong for two reasons: first, the "facts" Developers argue were never proven, which was their burden. Second, the South Carolina Supreme Court in *Damico* has put this issue to bed in the developer/homebuyer context, and this Court should again reject the argument:

> [T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions.

Damico, 437 S.C. at 614–615, 879 S.E.2d at 756. Similarly, Palmetto Bluff's Development Plan with the Town of Bluffton calls for approximately 4,000 residential lots, almost 1,000 of which have already been sold by the Developer.

The circuit court correctly found that the Club's asserted arbitration provision, buried in documents that are "mandatory" and "automatic" "upon acceptance of a deed" is a classic contract of adhesion under South Carolina law.

2. The Club's terms are oppressive and one-sided.

The second prong of the unconscionability analysis is a determination of whether the arbitration agreement contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 667 (2007). Unconscionable, oppressive terms include lack of mutuality, violation of public policy, and limitation on statutory remedies. *Id.* Here, the circuit court correctly found that the arbitration clause asserted by the Club strips members of statutory remedies, purports to alter the statute of limitations, and it is capable of unilateral amendment in the Club's "sole and absolute discretion"—all of which are oppressive, one-sided contract terms.

Among other things, the circuit court properly followed South Carolina precedent when it examined the arbitration clause, here. It is telling that Developers resort[21] to a law review article and federal law in their Brief on this point. This is wrong: "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Id.*, 644 S.E.2d at 667.

(a) Five indicia of oppression and one-sidedness.

First, the circuit court adhered to *Simpson* to find that the Club's limitation on damages clause—nearly identical to the one in *Simpson*—"violates statutory law because it prevents [Homeowners] from receiving the mandatory statutory remedies to which [they] may be entitled in underlying SCUTPA" claims. *See* 644 S.E.2d at 670–672; R. p. 376, Def. Ex. D, p. 4 ("Any arbitration shall be limited to a party's actual, out-of-pocket,

[21] (Pun intended).

compensatory damages only."). The *Simpson* Court included strong language against such limiting terms in an adhesion contract:

> Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.

644 S.E.2d at 671. This Court should hold that the Club's attempt to strip its members of statutory remedies within a "mandatory" and "automatic" "agreement" renders the provision unconscionable.

Second, the circuit also found that the Club's "arbitration agreement" is oppressive and unreasonable because it contains a one-sided provision allowing unfettered, unilateral amendment by the Club. (R. p. 376, Def. Ex. D, p. 4, "The Company reserves the right **in its sole and absolute discretion**, from time to time, **to modify** the Membership Plan and Rules and Regulations [of which the purported arbitration clause is a part] . . . **and to make any other changes** to the Membership Documents . . . .") (emphasis added). In defense of this provision, Developers cite a law review article for the basic proposition that all the cool companies are doing it, so it must be okay. (App. Br. pp. 46–47). This is wrong according to your dad, and also under South Carolina law. *See Lee*, 407 S.C. 512, 757 S.E.2d 394 (noting that once a contractual bargain is formed, and the obligations are set, that the contract can only be altered by mutual agreement and for further consideration), *citing* 17A Am.Jur.2d Contracts § 507 ("[O]ne party to a contract may not unilaterally alter its terms."); *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161 (2003) ("We cannot find anything in *Fleming* or elsewhere that allows a party to alter the terms of a bilateral contract by unilateral modification. It is well established

that '[a] written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract,'" *quoting Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)).

Third, the asserted arbitration clause purports to inflict a draconian 60-day statute of limitations period, which violates South Carolina law:

> The party demanding arbitration of any controversy, dispute or claim hereunder shall give written notice of such demand to the other party and shall file the same with the American Arbitration Association. Such written notice shall be given **no later than sixty (60) calendar days after the conclusion of the mediation** . . . of the controversy, dispute, or claim which is the subject of the notice.

(R. p. 376, Def. Ex. D, p. 4) (emphasis added). This attempted short-circuit of South Carolina law is *per se* invalid and unlawful. *See* S.C. Code § 15-3-140 ("Contract provision shortening statutory period: No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action . . ."). The circuit court correctly found that the presence of such an oppressive provision within an adhesion contract renders the alleged arbitration clause unconscionable. *See Simpson*, 644 S.E.2d at 670–672 ("The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.").

Fourth, the circuit court found indicia of one-sidedness in Homeowners' evidence that the Club itself ignores the provision at its whim, by filing liens and foreclosures

rather than taking its fee disputes to arbitration. (*See* R. p. 794, Pl. Memo, Ex. 2); *see also* R. p. 257, Recreational Covenant § 3.3, Lien for Membership Fees) (Club "may enforce such lien . . . by suit, judgment, and foreclosure."). The court found that such a one-sided "requirement" for arbitration (which the Club ignores when it chooses) would be deemed objectively unfair and oppressive by a reasonable person.

Fifth, the purported arbitration clause improperly purports to divest Homeowners of their statutory right to have a court determine legal rights under South Carolina's Declaratory Judgment Act, S.C. Code § 15-30-10 *et seq*. That statute states that "**Courts of record** within their respective jurisdictions **shall have power** to declare rights, status and other legal relations . . . ." including "under a deed, will, written contract or other writings constituting a contract . . ." *Id.* §§ 15-33-20, -30 (emphasis added). Here, the circuit court found the Club's attempt to strip members of this statutory right is unconscionable and unlawful.

(b) Severing terms is not the answer.

Developers attempt to argue that this Court should just re-write the parties' contract to sever the unconscionable terms. (App. Br. p. 46). The circuit court was right to reject this idea, and this Court should affirm its proper exercise of discretion. *See Damico,* 879 S.E.2d at 759 (courts have discretion to sever—or not—offending terms).

Importantly, neither the Membership Plan nor the membership agreements—both of which the Club drafted—contain a severability provision. The Court would have to blue-pencil a severability provision ***into*** the agreement, in order to blue-pencil ***out*** unconscionable terms. South Carolina's Supreme Court meticulously explained its

reasoning when it declined to sever unconscionable provisions in the *Damico* case:

> We further decline to sever the unconscionable terms from the remainder of the arbitration provisions for two reasons. First, doing so would require us to blue-pencil the agreement regarding a material term of the contract, a result strongly disfavored in contract disputes. Second, as a matter of policy, we find severing terms from an unconscionable contract of adhesion (in this case, an arbitration provision) discourages fair, arms-length transactions.
>
> . . .
>
> Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically concerned that honoring the severability clause here creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer.

Id., 879 S.E.2d at 751, 760–761. Space does not permit us to quote the Court's thorough reasoning in its entirety, but the same potential for abuse and over-reach is present in the massive Palmetto Bluff development of 4,000 homes. This Court should affirm the circuit court's decision not to sever unconscionable terms—which was a proper exercise of its discretion.

E. The circuit court was right: Developers are outside of the limitations period in their own "agreement."

As discussed above, the Club's arbitration clause contains a provision imposing a 60-day statute of limitations for filing claims, which the circuit court found unconscionable. (R. pp. 57–58, Order pp. 24–25, quoting the provision). The circuit court also found that Developers—who waited **98 days** to file claims in arbitration against Homeowners—breached their own limitations provision. (R. p. 49, Order p. 16).

Developers want this Court to find that they are not bound by the 60-day limitations provision (which they drafted), but they also don't want this Court to find the provision is invalid or oppressive. (App. Br. pp. 46, 48–49). This is a rock and a hard place, for sure.

Developers are wrong that purported public policy "favoring" arbitration permits them to evade their own limitations period. *See Palmetto Constr. Grp.*, 856 S.E.2d at 152–153 ("our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions.").

This Court should affirm the circuit court, which correctly construed the plain and unambiguous 60-day provision against the drafter. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178, 183 (2013) ("the contract's language determines the instrument's force and effect."); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."). This Court should also note that this short, three-paragraph-long issue is alone sufficient to affirm the circuit court's decision to deny Developers' Motion to Compel Arbitration: even if every other argument in this Brief fails, Developers missed their own, self-imposed window—a window that they doubtlessly would have tried to use to bar Homeowners' claims, had Homeowners not taken the extra precaution of notifying AAA. (*See supra* pp. 6–7 and fn. 3).

IV. Plaintiffs are not bound by agreements to which they are not parties.

In Sections C.2–5 of their Brief, the Developers argue that the LLC Plaintiffs—which never signed arbitration agreements—are nonetheless bound by country club

agreements signed by individual people whom Developers believe might be principals of the corporations in some capacity. This is an odd and inconsistent position for Developers, which themselves operate under murky layers of LLC entities designed to insulate their owners from personal liability. Under the Developers' argument, every gym membership, credit card application, school field trip form, and other obligation that the Developers' individual owners have ever personally signed are binding on all of the Developer corporations (and *vice versa*).

Cognitive dissonance aside, it was the *Developers'* burden to prove that each of what they call the "nonsignatory Plaintiffs" did in fact enter into arbitration agreements—*and the Developers entirely failed to do so*. Importantly, the corporate composition of the numerous corporate Plaintiffs is not in this Record. The Record is silent as to who their members are and what connection or authority (if any) the members might have as to the few signatories to Club documents. The circuit court, in the best position to judge and weigh the evidence (or lack thereof) found:

> Defendants argued that certain corporate Plaintiffs should be bound by Club Membership Agreements apparently signed by some of the corporation's members or shareholders. The Court finds that Defendants' arguments **lacked adequate evidentiary or factual basis**. . . . The Court finds that Defendants have **failed to offer evidence sufficient to overcome the presumption against arbitration by non-signatories** to a written agreement to arbitrate.

(R. p. 60, Order p. 27) (emphasis added). This Court should affirm the circuit court's evidentiary findings, under the applicable standard of review. *Lackey*, 330 S.C. at 393–394 ("In an action at law, the appellate court's jurisdiction is limited to the correction of . . . factual findings which are unsupported by any evidence.").

Lacking concrete evidence of corporate composition, the Developers' Brief relies on hollow phrases such as "*plainly* have actual authority" and "*inferred* from the circumstances." (App. Br. pp. 26–28) (emphasis added).[22] The circuit court ruled as a matter of law on this question because there was no basis for a ruling that non-signatory plaintiffs somehow agreed to be bound by non-existent arbitration agreements. (*See* R. p. 60, Am. Order p. 27). Under an "any evidence" standard, there are simply not facts sufficient to reverse the circuit court's determination that the Developers did not muster evidence sufficient to support their claim. (*See* R. pp. 38, 44, 60, Order pp. 5, 11, 27).

Second, the Developers' current version of events is a textbook example of how a purported arbitration provision should *not* be handled in a development in South Carolina. Under the Developers' story, the Palmetto Bluff Developers truly and earnestly intended to require mandatory arbitration for all sorts of entities and persons—very few of whom the Developers ever bothered to have sign an actual arbitration agreement. Frankly, Developers are asking this Court to step through the Looking Glass into an upside-down world where people who have never signed an arbitration agreement can be forced into arbitration against other people—who are <u>also</u> not subject to an arbitration

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[22] The Developer did submit an affidavit of Gray Ferguson on certain points, which is simply incorrect even on the face of the documents it references. As just one example, the affidavit ¶ 10(a) states that "Plaintiff Live Oak Assets, LLC: Signed by Michael and Jennifer McGuire." But the referenced Membership Agreement (signed 1/1/2018) has no mention whatsoever of Live Oak Assets, LLC. (R. pp. 516, 373, Aff. of G. Ferguson ¶ 10(a); Membership Agreement signed by Michael and Jennifer McGuire). Similarly false is ¶ 10(c): "Plaintiff Salt Works, LLC: Signed by Robert O'Keefe and Lynn Ann Casey." But the referenced Membership Agreement (signed 10/18/2019) has no mention whatsoever of Salt Works, LLC. *See id.* The list goes on, and similar purely conjectural misstatements are made regarding other LLCs and entities.

Similarly, Developer's Appendix 1 is as weak as what it cites, which is, again, Mr. Ferguson's inaccurate affidavit and Developers' speculation, unsupported by actual direct evidence.

agreement—based on sheer conjecture. Developers resort to acrobatics about scrivener errors, equitable estoppel, implied authority, inferences, etc., to cover what (if true) most charitably could be called gross sloppiness in forgetting to put arbitration agreements in place. The law and this Court should not reward such a position or practices. Moreover, under these circumstances, a ruling in favor of the Developers would be interpreted to mean that, in South Carolina, *any* developer *always* can compel arbitration—if it can come up with some unlikely, unproven *post hoc* story about arbitration once a lawsuit is filed. *See Damico*, 879 S.E.2d at 760–763 (refusing, based on public policy, to sever unconscionable provisions from alleged arbitration agreement; "South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.").

Developers' arguments in this section are all the more surreal because the non-signatory Plaintiffs (who are the record owners of the real property that is the subject of this litigation) actually do have contracts with the non-signatory Defendants, including the Community Charter and the Recreational Covenant. **And those contracts—which Developer drafted—indisputably do not contain arbitration clauses**. In fact, the Community Charter contemplates *litigation*, expressly allowing a party to "file suit in any court." (R. p. 215, Charter p. 52 § 18.1(a)).

In other words, the non-signatory Plaintiffs entered into contracts expressly permitting litigation in court with the non-signatory Defendants. Developers are wrong to suggest to this Court that it should use equitable doctrines to supplant express contractual provisions. It is hornbook law that the equitable doctrines propounded by Defendants do not apply in the face of a contractual remedy. "The court will reserve its

equitable powers for situations when there is no adequate remedy at law." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); *see also Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003) ("The function of equity is to supplement the law, not to displace it."); *see also Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250, 251 (1939) ("The basis for granting equitable relief is the impracticability of obtaining full and adequate [relief] at law.").

As discussed below, each of Developers' arguments in Sections C.2–5 fails. The predicate law is that corporations are separate from their owners: "It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders . . . ." *Mid-South Mgmt. v. Sherwood Dev.*, 649 S.E.2d 135, 139, 374 S.C. 588 (Ct. App. 2007) (internal citations omitted). An agreement signed by a person individually does not bind a separate company; the agreement must be explicitly signed on behalf of the company. Similarly, if individuals used the Club pool or restaurant at times for their personal enjoyment, that cannot be used as an estoppel or "benefit" argument against the separate, non-member limited-liability company to force the company into arbitration under an agreement the company never signed.

A. The "express terms" do not bind nonsignatories.

Developers argue that the language of the Membership Plan automatically binds non-signatories. This is wrong. The Plan states that other designated users *also* must submit a Membership Agreement, which is subject to approval by the Club. (R. p. 277, Plan p. 8). That process, and requirement, would not be necessary if everyone

automatically was bound. Nor have the Developers submitted evidence that that process was followed for each nonsignatory Plaintiff (it was not). The fact is that Developers cannot force people and entities into arbitration if they have not signed an agreement to do so.

Also wrong is Developers' argument that under the Plan it can bind anyone "exercising such member's membership rights." That Plan language actually is from an *exception* to the arbitration provision: "(unless the member [and/or any person exercising such member's membership rights] and Palmetto Bluff Club, LLC mutually agree otherwise)". (R. p. 285, Plan p. 16). The Plan provision clearly limits its application:

> This "Arbitration/Mediation" provision shall apply [1] **only** to [2] **members** who [3] **acquire their membership** [4] on or after June 19, 2017.

(R. p. 284, Plan p. 15 (emphasis added, bracketed numbers added)). Under no lawful interpretation can that include people or entities (nonsignatory Plaintiffs) who have never signed or agreed to the purported arbitration agreement.

B. Agency law does not bind non-signatories to arbitrate.

Developers argue that nonsignatories are bound to the purported arbitration agreement by agency law, because the "relationship" shows "actual or apparent authority." As an initial matter, each of those assertions would require a highly fact-specific[23] conclusion which (a) the circuit court did not make, and (b) Developers did not

[23] For example, the elements required to prove apparent authority are very fact-specific: "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment. . . ." *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004) (internal citations and quotations omitted).

prove. Moreover, it does not appear that these arguments were preserved for appeal.[24] In the circuit court, the Developers did not raise the issues except in cursory fashion, nor support them with any evidence. The unpreserved discussion of agency can end here.

Addressing the specific arguments, Developers assert that the individual signatories "plainly" had authority to bind the corporate nonsignatories. In support of this vague but complex assertion, the Developers offer . . . no . . . actual facts . . . of any substance. Instead, Developers reference broad principles of agency law and leave it at that. Even the cases cited by Developers show that their arguments fail. In *Fernander v. Thigpen*, for example, the question of agency was supported by the testimony of numerous witnesses and documents, and the court held it was not appropriate for summary judgment—it was a jury question. 278 S.C. 140, 143, 293 S.E.2d 424 (1982). Similarly, *Hofer v. St. Clair* involved complex factual inquiries, such as whether or not the partner had authority to bind the partnership to the specific contract at issue.[25] 381 S.E.2d 736, 298 S.C. 503, 506 (1989). Here, Developers have not even tried to prove those factual

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[24] Developers raised these arguments for the first time in their Motion to Reconsider. (*See* R. p. 918, Pl. Opp. to Defendants' Rule 59 Motion, p. 21). In their original filings with the circuit court, the Developers made a single statement that the Plaintiffs are agents or assigns of signatories, which they did not support with any evidence other than speculation. (*See* R. p. 507, Def. Mem. Supp. Mot. to Compel, p. 18). That cursory, unsupported argument did not preserve the question for review.

[25] In *Hofer*, the issues of agency and partner authority were highly fact-specific: "The questions on appeal [were] whether a partnership existed between the defendants; whether the actions of one partner were sufficient to bind the partnership; whether valid contracts for the sale of land existed; whether the defendants breached such contracts; and whether plaintiff was damaged and in what amount as a result of this breach." 381 S.E.2d 736, 298 S.C. 503, 506 (S.C. 1989). "The evidence showed that in the course of this transaction St. Clair made counteroffers, signed a listing agreement and a management agreement on behalf of both of the partners. In the past, St. Clair had alone executed contracts for the sale of partnership property and other partnership contracts on behalf of both partners." *Id.* at 510.

issues for each party. In sum, Developers have the burden of proof on their agency argument—a highly fact-specific inquiry that it must satisfy as to *each party*—and they each have failed to carry that burden.

Next, Developers argue that nonsignatory LLCs are property owners, and therefore they are automatically bound to the arbitration provisions of the Club. As an initial matter, this is the subject of Homeowners' cross-appeal: Developers' position violates South Carolina law, because (*inter alia*) it purports to tie to the land a mandatory "membership" in Developer's separate for-profit Club business. Homeowners refer to the arguments in their cross-appeal, and request that this Court hold that the alleged obligations to pay dues and fees to a for-profit business, purportedly tied to the land, is unlawful.

Moreover, (as discussed *supra*) Palmetto Bluff property owners are subject to the Community Charter for Palmetto Bluff, which has its own dispute resolution provisions. The Charter's provision explicitly allows a party to "to file suit in any court." (R. p. 215, Community Charter, p. 52 § 18.1(a)). This higher-level document supersedes any purported arbitration clause in a different document that the party never signed.

Finally, Developers' ratification argument was not preserved for appeal, and in any event would require a highly fact-intensive showing[26] which the Developers never

[26] Each of the elements of ratification requires a highly fact-intensive showing: "(1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements." *Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E.2d 801, 803, 300 S.C. 188 (Ct. App. 1989).

made.[27]

In sum, the circuit court found that Developers entirely failed to carry their burden to prove that non-signatories are bound by the purported arbitration agreement. This Court should affirm.

C. Developers' assignee argument fails.

Developers' assignee argument was not preserved and is waived. To the extent the Court still wishes to consider it, Developers' allegations about binding non-signatory assignees fail for the reasons discussed above, including that Developers did not carry their burden of proof in the circuit court and have not made an adequate showing here.

D. Equitable estoppel does not bind "all remaining Plaintiffs."

Developers soldier on, in Section C.3 of their Brief, in their attempt to justify forcing nonsignatories to lose their rights to a trial. Their next "spaghetti against the wall" argument is based on equitable estoppel. (App. Br. pp. 30–34). The wall against which Developers throw is the rule that "a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." *Wilson*, 426 S.C. at 337 (emphasis in original).

The South Carolina Supreme Court has emphasized that "[e]quitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345 (*citing* 28 Am. Jur. 2d Estoppel and Waiver § 29 (2011), stating equitable estoppel should be used with restraint and only in exceptional circumstances).

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[27] Developers also argue that the Bosler-Hart Trust is bound to an arbitration agreement it never signed because it can be "inferred from the circumstances." This fails for the same reasons as apply to the other non-signatories.

Moreover, a lower court's decision on this issue is reviewed for abuse of discretion:

> When, however, the district court's decision is based on principles of equitable estoppel, we review the district court's decision for abuse of discretion. . . .

American Bankers Ins. Group, Inc. v. Long, 453 F.3d 623, 629 (4th Cir. 2006).

Developers divide their argument into two sections (arise out of/relate to, and direct benefit) but the arguments really are the same—that the "Club documents are the foundation [or 'crux'] of every claim" and have provided benefits, and therefore the arbitration provision binds anyone Developers choose, whenever Developers choose. (App. Br. pp. 32–33).

As an initial matter, Developers' argument mis-portrays Homeowners' claims. The gravamen of the Complaint (the "foundation," the "crux") is the overall unlawful structure that the Developers have imposed on the Palmetto Bluff community and on Homeowners, particularly in the Community Charter—which is, literally, Exhibit 1 to the Complaint. (*See, e.g.*, R. p. 101, Compl. ¶ 42: "The Charter sets forth the Founder's vision for Palmetto Bluff, and it 'is intended to serve as a framework for community governance.'"; *see also* R. pp. 101–104, *id.* ¶¶ 43–58 (discussing Charter)). The lower-level Club documents are a prodrome of *some* of the problems caused by that overarching unlawful structure. The overarching structure, and interplay of the governing documents, is depicted in the Charter's Table 1.1. (R. p. 158, Charter p. 3) (*see supra* p. 21). The Developers' Table defines the Club documents as the lowest in the hierarchy. So low, they are not even of record.[28] Instead, the "foundation," the "crux," is the Community

[28] R. p. 104, Compl. ¶ 59: "The Palmetto Bluff Club documents have never been recorded with the Beaufort County Register of Deeds." R. p. 317, Ans. ¶ 59: "The allegations of Paragraph 59 are

Charter (Exhibit 1 to Complaint) which eclipses the Club documents and allows a Homeowner "to file suit in any court." (R. p. 215). As was argued at the hearing before the circuit court, allowing the lowest-level document to control this entire lawsuit would be more than a "tail wags dog" situation, it would be "flea wags dog."

Moreover, Homeowners are not seeking to enforce or benefit from the low-level Club documents; they are claiming that—as one example of a by-product of Developers' overall unlawful scheme—those purported obligations are unlawful and void. It is simply inaccurate for Developers now to claim that the lowest-level document is the "foundation" or "crux" of this lawsuit. Instead, the Club documents are one symptom of the disease.

Developers also complain about the circuit court's analysis of Developers' primary case, *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). The circuit court noted that *Pearson* involved only three parties, in a different situation, with different types of issues. (R. p. 42, Am. Order p. 9 n.1). But Developers cite no case—none at all—even remotely similar to the Developers' demand here that *dozens* of non-signatories (15 plaintiffs, 11 defendants) be forced into arbitration with each other based on equitable estoppel. Indeed, the cases on which Developers rely involve just a few parties, and they cannot be reasonably construed to lasso in a huge herd of non-signatories. For that reason, the circuit court soundly concluded:

> *Pearson's* very different circumstances cannot be compared with Defendants' attempt in this case to force numerous nonsignatory litigants—who never signed arbitration agreements with each other—into an arbitration.

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admitted . . ."

(R. p. 42, Am. Order p. 9 n.1). When viewed under the "abuse of discretion" standard for equitable estoppel (or any other standard) the circuit court's decision should be affirmed.

Indeed, the Developers' demand here would, for both legal precedent purposes and practical purposes, expand the doctrine of equitable estoppel to dominate over the contract law requirement that a developer actually obtain a signed agreement to arbitrate. *Wilson*, 426 S.C. at 337 (arbitration must be "predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts."). Developers throughout South Carolina would interpret a reversal here as justifying any other tenuous scenario they can concoct, regardless of whether or not homeowners sign an agreement. Homeowners here respectfully request that this Court follow South Carolina legal precedent and its presumption *against* mandating arbitration as to non-signatories. *See id*.

E. Non-signatory defendants cannot compel arbitration.

Continuing, Developers argue that the eleven (11) defendants who indisputably never signed an arbitration agreement nonetheless are entitled to compel arbitration. Developers base this on "agency and contract principles" which have been covered previously (*see supra*).

In addition, Developers argue that arbitration can be compelled by non-signatory defendants because the Complaint alleges conspiracy and amalgamation. Of note, in their pleadings Developers categorically deny all conspiracy and amalgamation claims. (*See, e.g.*, R. pp. 313–329, Answer ¶ 25 ("denied"), ¶ 80 ("denied"), ¶ 82 ("denied"), ¶ 129 ("denied"), ¶ 197 ("denied")). Developers further deny that there are common questions

of law or fact for the multiple defendants. (*See, e.g., id.* ¶ 137 ("denied"), ¶ 145 ("denied")). Having taken that position repeatedly in their pleadings, Developers cannot argue the opposite here, and yet clearly intend to pivot again (later in this litigation) and categorically deny conspiracy and amalgamation. Moreover, for purposes of Developers' motion to compel arbitration, it was the **Developers' burden** to prove the nonsignatories are amalgamated.

In any event, in this section Developers admit that "only the Palmetto Bluff Club is a signatory to those documents" that contain arbitration provision. Developers never bothered to have the eleven other defendants sign those documents and cannot now spackle over that decision based on allegations that Developers vehemently deny. Arbitration is a matter of contract. Contract is a decision of the parties. Given Developers' decisions to avoid contracts, it would be unlawful, and absurd, and inequitable, to allow eleven nonsignatory defendants to compel arbitration with twenty-one plaintiffs with whom they have no arbitration agreement whatsoever.

F. Plaintiffs' claims are not all subject to the alleged arbitration agreement.

Developers' final sub-section in Section C of their Brief largely repeats their previous points. Developers again go through their "flea wags dog" argument: that every single claim within sixteen causes of action among twenty-one (21) plaintiffs and twelve (12) defendants is swallowed by the arbitration clause contained only in the lowest-level Club documents signed by only one (1) defendant and seven (7) plaintiffs.

As discussed above, Homeowners' actual claims are much larger, and different, than portrayed by Developer. The circuit court specifically identified numerous

examples in its Order at pages 28–30. (R. pp. 61–63). The circuit court also noted that "These are selected examples; the 83-page Complaint contains numerous others. In sum, many of the claims in this lawsuit are not controversies relating to the Club Membership Plan—which mainly involves members' use of the social club, such as pools, fitness centers, etc.—and therefore are outside of the scope of the purported arbitration clause." (R. p. 63, Am. Order p. 30). This conclusion is consistent with the allegations in the Complaint, which involve the overall Palmetto Bluff community and numerous entities. The Club, and its low-level documents, are only a small part of that. In sum, the circuit court correctly held that "[e]ven if a valid arbitration clause existed, claims in the Complaint are outside of its scope." (R. p. 61, Am. Order p. 28).

V. The Developers' delegation clause argument falls flat.

In Section B of their Brief, the Developers make two broad arguments. First, the Developers argue that by simply ***saying*** a dispute is subject to arbitration, they can always—*always*—force that dispute to an arbitrator for all rulings of every kind. *Es muss sein*, even if there is no signed agreement among parties. It Must Be. Second, the Developers argue that if—as here—South Carolina law is contrary to the Developers' position, South Carolina law must be changed or ignored. The law must comply with the Developers. As this Court knows, it's the other way around—South Carolina Code § 15-48-20 and *Simpson v. MSA of Myrtle Beach, Inc.* control here, and the circuit court properly followed those precedents.

First, the Developers argue that because they invoke the mere claim of arbitrability, *all* parties must be swept away to an arbitration to determine if the

Developer's invocation is true. But the law does not vest the Developer with such limitless power. Here, there is no dispute that Homeowners have never entered into any arbitration agreement whatsoever with 11 Defendants. (R. pp. 10, 43). There also is no dispute that 15 of the Homeowners have no arbitration agreement whatsoever with the Club, or with any Defendant at all. (R. pp. 9, 42). Any dispute over arbitration is solely between (a) the Club, alone, and (b) the few Homeowners for which the Club has produced an alleged agreement to arbitrate. Those are the only parties to whom a purported "delegation clause" claim is even arguably applicable.

Turning to the "delegation clause," the Developers base nearly all of their arguments on their puzzling misapprehension that "Here, [Homeowners] did not specifically challenge the delegation provisions" and "because [Homeowners] did not specifically challenge the delegation provisions, the arbitrator, not a court, must decide the validity of Plaintiffs' agreement to arbitrate.'" (App. Br. pp. 19, 21). To put this misrepresentation to rest, Homeowners did indeed challenge the delegation provision:

> To be clear, Plaintiffs challenge the arbitration provision as a whole as well as its individual parts, including the so-called "delegation provision" which purports to give the arbitrator(s) the authority to decide whether the arbitration clause is valid. Under South Carolina law—including S.C. Code § 15-48-20 and *Simpson*—the Court decides whether an arbitration clause is valid.

(R. p. 757: Pl. Memo. to Stay Arb., p. 4 n.1) (emphasis in original). Because the Developers' foundation is faulty, their arguments based on that foundation collapse as well.

Importantly, the purported arbitration provision itself contains no "delegation clause" on its face. Instead, it references—in a vague and ambiguous manner—the Commercial Arbitration Rules of the American Arbitration Association. (R. p. 285).

Those rules indicate that an arbitrator has power to rule on jurisdiction and other matters, but the rules do not state that the arbitrator has exclusive power to do so. This is very different from other cases where the arbitration provisions were explicit on their face that the arbitrator had "exclusive authority to resolve" any such disputes. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (focusing on the specific language of the agreement at issue, which provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." (emphasis added)). For example, in *Rent-A-Center*, the United States Supreme Court repeatedly focused on the specific contractual wording "exclusive authority." In contrast, here the Developers' self-authored document contains no such "exclusive" language, and instead deliberately omits such restrictions.[29] That is a critical omission in South Carolina, where our Legislature has given the circuit court authority to rule on this issue, as specifically required by South Carolina statute, S.C. Code § 15-48-20.

This leads to the Developers' second argument in this section: South Carolina law must be ignored, or limited, to comply with Developers' wishes. Developers argue that its flawed and ambiguous contract should "displace" South Carolina law, and that South

[29] The Developer's drafting omission was either purposeful and supports Homeowners' position, or it was careless and supports Homeowners' position. "Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *Ecclesiastes Prod. Ministries v. Outparcel*, 374 S.C. 483, 649 S.E.2d 494, 502 (Ct. App. 2007).

Carolina Supreme Court law "does not control here." But South Carolina's statute is clear that a court "shall" have authority to deny an application for arbitration:

> if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

S.C. Code § 15-48-20 (emphasis added). And the South Carolina Supreme Court has reinforced this authority:

> where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place.

Simpson, 373 S.C. at 14 (emphasis added); *see also Housing Authority v. Cornerstone Housing*, 356 S.C. 328, 333, 588 S.E.2d 617 (Ct. App. 2003) (citing to S.C. Code § 15-48-20, the trial court ruled on arbitrability regarding an arbitration clause that (like here) stated it was subject to the Commercial Arbitration Rules of the American Arbitration Association—the same purported "delegation clause" as here); *Hooters of America v. Phillips*, 39 F. Supp. 2d 582, 609 (D.S.C. 1998) (holding that issues of "substantive arbitrability" are properly before the trial court and these issues are whether "a valid arbitration agreement exists between the parties and . . . [whether] the specific dispute falls within the substantive scope of the agreement") (*quoting Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997)). South Carolina's controlling case—*Simpson*, quoted above—is directly on point here, and involved an arbitration clause that (like here) referenced "Commercial Arbitration Rules of the American Arbitration Association" (the same purported "delegation clause" as here). *Simpson*, 644 S.E.2d at 666. The Developer's verbal acrobatics notwithstanding, South Carolina law is clear that the circuit court "shall" and

"must immediately" make this decision. Here, the circuit court got it right and this Court should affirm.

CONCLUSION

The circuit court was right to deny Developers' Motion to Compel Arbitration. For each of the reasons discussed above, this Court should affirm the Order. Homeowners respectfully request that this Court would make the rulings requested in Homeowners' Cross-Appeal, and remand this case for the jury trial to which Homeowners are entitled.

Respectfully submitted,

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