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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
R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate 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, as set forth herein, ...Respondents/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; John Does 1-25, ... Appellants/Respondents.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

Almost simultaneously, Plaintiffs sued in Circuit Court and initiated arbitration, asserting claims challenging the legal structure, governance, and management of the Palmetto Bluff Club. But Plaintiffs backed out of the arbitration they started.

The question presented is whether the Circuit Court should have compelled Plaintiffs to arbitrate their claims in accord with their arbitration agreements. In particular,

A. Whether the Federal Arbitration Act applies to the arbitration agreements.

B. Whether the delegation clause in the arbitration agreements precluded the Circuit Court from ruling on issues of substantive arbitrability.

C. Whether binding arbitration agreements exist for the disputes at issue here

   1. For the Plaintiffs who signed arbitration agreements;

   2. For the LLC and trust Plaintiffs whose principals, agents, or trustees signed arbitration agreements;

   3. For nonsignatory Plaintiffs under principles of equitable estoppel;

   4. As to nonsignatory Defendants because the claims against them are closely intertwined with, and similar to and dependent upon, the claims against signatory Defendants; and

   5. As to all claims on the ground that they "relat[e] directly or indirectly to, or aris[e] directly or indirectly from" the arbitration agreements.

D. Whether the arbitration agreements are invalid, unlawful, and unenforceable.

INTRODUCTION

This case was brought by a small group of property owners in the Palmetto Bluff luxury resort community who seek to enhance their short-term rental businesses by commercializing their memberships in the private Palmetto Bluff Club. The Club owns and operates amenities that include swimming pools, fitness centers, and dining facilities open to Club members and their guests. All Palmetto Bluff owners agree to join the Club when they purchase their property.

Respondents/Appellants ("Plaintiffs"), at least eight of whom hail from out of state, sued the Club and various other entities and individuals connected to the Club, the Appellants/Respondents here ("Defendants"). But this case belongs in arbitration, not in court. When they joined the Club, these wealthy and sophisticated Plaintiffs agreed that they would arbitrate "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from" the Club Membership Agreement or the Club Membership Plan.

All of Plaintiffs' 16 causes of action arise from or are related to Club membership and operations. They challenge the structure and governance of the Club, the requirement to join the Club, and various Club policies and access rules.

Yet the Circuit Court refused to hold Plaintiffs to their bargain, relying on multiple erroneous grounds. These include (but are by no means limited to) refusing to apply the Federal Arbitration Act; refusing to enforce the parties' delegation to the arbitrators to decide "the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim"; refusing to enforce arbitration agreements signed by

individuals when they bought into Palmetto Bluff against the Plaintiff LLCs that took title to property; and holding the agreements unconscionable as applied to the sophisticated, luxury second-home owners at issue here.

The Circuit Court's decision reflects the judicial hostility to arbitration that the Federal Arbitration Act and the South Carolina Uniform Arbitration Act were designed to overcome. This Court should reverse the orders under appeal and remand with instructions to compel arbitration.

STATEMENT OF THE CASE

This appeal arises from the Circuit Court's refusal to enforce arbitration agreements contained in governing documents for the Palmetto Bluff community. Plaintiffs own residential property within Palmetto Bluff and assert individual, derivative, and class claims relating to the creation, development, governance, and operation of the Palmetto Bluff Club ("Club"). (R. 90-95, 126-152 (Compl. at ¶¶ 1-17, 133-253) (Plaintiffs do not in fact assert any claim derivatively on behalf of any other entity).) The Club's Membership Agreement ("Agreement") and Membership Plan ("Plan") require the parties to arbitrate "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from" the Agreement and Plan. (R. 284-285; 376-377 (Plan, 15-16; Agreement ¶ VII).) Defendants include the developer, other entities and individuals connected with the community, and a separate entity that operates a hotel in the community. (R. 95-98 (Compl. ¶¶ 18-26).)

A. Factual Background

The Palmetto Bluff community is a premier high-end residential/resort development in Beaufort County. (R. 100 (*Id.* at ¶ 36).) Its 20,000 acres include 4,000 home sites, protected natural areas, restaurants, shops, the Montage Palmetto Bluff Hotel, and the private Palmetto Bluff Club. (R. 77-81 (*Id.* at 6-10).) 800 homes have been built, with 400 more under construction. (*Id.*)

The purchase prices in the record reflect Palmetto Bluff's luxury status. Recent transactions ranged from $1,125,000 to $2,375,000. (R. 593, 611, 704, 710, 782 (Mem. in Support of Defs.' MTC, Exs. B.5, B.8, B.26, B.27; Pls.' MPSJ, Ex. 1).) Current property listings for completed homes seek between $1.7 and $5.95 million. *See* www.palmettobluff.com/live/home-listings# (visited Jan. 26, 2023). Many purchasers come from out of state, including Plaintiffs Live Oak Assets, LLC; Matthew and Barbara Lynch; Salt Works, LLC; R. Jeffrey Kimball and Deborah Kimball; MKM 22 West, LLC; TTJR, LLC; Dylan Skye Hart and Anne Bolser; and One Rumford Lane, LLC. (R. 522-523 (Ferguson Aff. ¶ 14).)

Palmetto Bluff was established in 2003 as a planned community. (R. 74 (Compl. at 3).) Several entities, Defendants here, are involved in the development and operation of Palmetto Bluff. Palmetto Bluff Development, LLC is the developer of Palmetto Bluff; South Street Partners LLC (actually South Street Partners NC, LLC) is the manager of Palmetto Bluff Development. (R. 76, 80 (*Id.* at 5, 9).) Palmetto Bluff Club, LLC owns and operates the Palmetto Bluff Club. (R. 77 (*Id.* at 6).) Palmetto Bluff Real Estate Company, LLC markets real estate in Palmetto Bluff. (R. 78 (*Id.* at 7).) PBLH, LLC owns the Montage

Palmetto Bluff hotel. (*Id.*) Palmetto Bluff Preservation Trust, Inc. is the community's homeowners' association; Defendants Jordan Phillips, Mark Polites, Gray Ferguson, and Henry Armistead serve on the Trust's Board of Stewards. (R. 76, 31 (*Id*. at 5, ¶ 45).) Montage Palmetto Bluff, LLC operates and manages the hotel. (R. 79 (*Id*. at 8).)

As a planned community, Palmetto Bluff is subject to covenants, restrictions, and governing documents. (R. 100 (*Id*. at ¶ 37).) The Community Charter is recorded in the Office of the Beaufort County Register of Deeds and provides, among other things, for the establishment of the Palmetto Bluff Club. (R. 101; 518; 218 (*Id*. at ¶ 41; Ferguson Aff. ¶ 4; Charter § 19).) The Charter states: "By acceptance of a deed, each Owner shall automatically become a member of the Palmetto Bluff Club and shall automatically assume and agree to be bound by all of the terms and conditions of the Palmetto Bluff Club Documents, which terms and conditions are incorporated herein by reference." (R. 218 (Charter § 19).)

Upon becoming a member of the Palmetto Bluff Club, the owner executes a Palmetto Bluff Club Membership Agreement ("Membership Agreement"). (R. 273; 520 (Plan at 4; Ferguson Aff. ¶ 10).) The Membership Agreement contains an arbitration clause, which provides, in relevant part:

> Subject to the provisions of subparagraph (b) below, **any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from this Membership Agreement,** including, but not limited to, the breach or alleged breach of this Membership Agreement, **shall be resolved by mandatory arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association** (the "Rules") then in effect (unless Member [and/ or any person exercising such member's membership rights] and Palmetto

> Bluff Club, LLC, mutually agree otherwise), applying the substantive laws of South Carolina.

(R. 376; 524 (Agreement § VII(a) (emphasis added); Ferguson Aff. ¶ 16).) Each Membership Agreement also states that each member acknowledges receipt of the Membership Plan and agrees to be bound by all of its respective terms and conditions, as they may be amended from time to time. (R. 375 (Agreement § V).)

The Palmetto Bluff Club operates pursuant to the Membership Plan. (R. 236 (Plan at 7).) It contains the following arbitration clause, in relevant part:

> Subject to the provisions of the below paragraph, **any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from this Membership Plan,** including, but not limited to, the breach or alleged breach of this Membership Plan, **shall be resolved by mandatory arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association** (the "Rules") then in effect (unless the member [and/ or any person exercising such members membership rights] and Palmetto Bluff Club, LLC mutually agree otherwise), applying the substantive laws of South Carolina. The arbitration shall take place in Charleston, South Carolina, before a panel of three arbitrators selected in accordance with the Rules.

(R. 284-285 (*Id*. at 15-16 (emphasis added)).) Plaintiffs attached the Membership Plan as an exhibit to the Complaint. (R. 265-285 (Compl., Ex. 4).)

Plaintiffs own residential property within Palmetto Bluff. (R. 90-95 (*Id*. at ¶¶ 1-17).) They include individuals, closely held family LLCs, and a family trust. (*See id*.) One set of related plaintiffs—the Bridge Charleston Investments LLCs—owns four Palmetto Bluff properties. (R. 91-92 (*Id*. at ¶¶ 4-7).) Publicly available information confirms Plaintiffs' wealth and sophistication. For example,

- Plaintiff Block owns a real estate investment and development company that touts its acquisition of a 147,000-square-foot office building in New Jersey.
- Plaintiff Albero is the senior vice-president of an investment management company specializing in real estate investments.
- Plaintiffs Chris and Sebrina Leigh-Jones (also principals of the Bridge Charleston Investment LLCs) co-founded Luxury Simplified, a vertically integrated real estate, construction, and luxury rental firm with more than $75 million in assets.
- One of the principals of Plaintiff TTJR, LLC, Todd Kugler, is the CFO of Nationwide Title Clearing, LLC.
- One of the principals of Plaintiff 315 Corley CW, LLC, Courtland Williams, is an executive with financial services firm Raymond James & Associates.
- Plaintiff R. Jeffrey Kimball is the former CEO of a 500-person engineering and architectural firm.
- The principals of Plaintiff MKM 22 West, LLC, Dave and Darby Mingey, are experienced corporate executives.
- The principals of Plaintiff Salt Works, LLC, Robert O'Keefe and Lynn Ann Casey, have their own management and technology consulting firm.
- One of the principals of Plaintiff Live Oak Assets, LLC, Mike McGuire, is president of an engineering firm.
- And one of the principals of Plaintiff 368 Mount Pelia, LLC, Michael Addy, owns a Myrtle Beach auto dealer whose arbitration clause was held unconscionable in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2 663 (2007).

(R. 524-525; 576, 580, 588, 600, 620-624, 640, 648, 667-672, 686-692, 719, 731 (Ferguson Aff.; Mem. in Support of Defs.' MTC, Ex. B).)

Some of the Plaintiffs were among a group that complained to some of the Defendants in July 2020 about actions taken or contemplated under the Membership Plan that Plaintiffs maintained were "intended … to suppress the STR [short-term rental]

activity" of the complainants. (R. 293 (Compl., Ex. 5).) An overlapping group incorporated that letter by reference in raising similar complaints in an October 2021 letter complaining that Defendants asserted that Plaintiffs' and other complainants' "right to use [Club] facilities can be restricted to exclude any use by their short-term rental guests and tenants." (R. 287 (*Id*.).) The parties conducted another unsuccessful mediation after the October 2021 letter. (R. 16, 49 (Arb. Orders, 16).)

B. Procedural History

Plaintiffs sued Defendants on April 12, 2022, in the Court of Common Pleas for the County of Beaufort, asserting 16 causes of action that largely duplicated those in the October 2021 letter.[1] (R. 134-152 (Complaint).) Two days later, Plaintiffs filed a Demand

[1] The causes of action are: (1) declaratory judgment (S.C. Code Ann. § 15-53-10, *et seq*.) – all Plaintiffs vs. all Defendants; (2) violation of the South Carolina Homeowners Association Act (S.C. Code Ann. § 27-30-110, *et seq*.) – all Plaintiffs vs. Palmetto Bluff Development LLC, Palmetto Bluff Club, LLC, Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards; (3) South Carolina Unfair Trade Practices Act (S.C. Code Ann. § 39-5-10, *et seq*.) – individual Plaintiffs vs. all Defendants; (4) breach of fiduciary duty – all Plaintiffs vs. Palmetto Bluff Development, LLC, Palmetto Bluff Club, LLC, Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards; (5) interference with contractual relationships – STR class and individual Plaintiffs vs. all Defendants; (6) civil conspiracy – all Plaintiffs vs. all Defendants; (7) negligent misrepresentation – all Plaintiffs vs. all Defendants; (8) quantum meruit and unjust enrichment – all Plaintiffs vs. all Defendants; (9) promissory estoppel – STR class and individual Plaintiffs vs. Palmetto Bluff Development, LLC, Palmetto Bluff Club, LLC, PBLH, LLC, and Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards; (10) in the alternative, equitable title in common – all Plaintiffs vs. Palmetto Bluff Development, LLC and Palmetto Bluff Club, LLC; (11) in the alternative, equitable common interest – all Plaintiffs vs. Palmetto Bluff Development, LLC and Palmetto Bluff Club, LLC; (12) in the alternative, equitable easement appurtenant – all Plaintiffs vs. Palmetto Bluff Development, LLC and Palmetto Bluff Club, LLC; (13) money had and received and conversion – all Plaintiffs vs. all Defendants; (14) constructive fraud – all Plaintiffs vs. all Defendants; (15) fraud and misrepresentation – all Plaintiffs and all Defendants; and (16) in the alternative, breach of

for Arbitration with the American Arbitration Association ("AAA"), attaching their Circuit Court Complaint. (R. 354-362 (Defs.' Arb. Mot., Ex. A).) Defendants answered the Demand on May 16, and filed a timely Counter-Demand with the AAA on May 23 and a Counterclaim on June 7, seeking resolution of the same issues raised in Plaintiffs' Demand. (R. 363-370 (*Id.* at Exs. B-C; Defs.' Mem. in Support of MTD, Ex. A).) *See* American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule R-5(b) ("A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set for in Rule R-6 [applicable only after appointment of an arbitrator].")

In the Circuit Court, Plaintiffs filed a Motion to Stay Arbitration and a Motion for Summary Proceedings on the Invalidity of the Purported Arbitration Clause ("Plaintiffs' Arbitration Motion") on May 10, 2022. (R. 347-350.) On May 24, 2022, Defendants moved to dismiss the Circuit Court action pursuant to Rule 12(b)(8), SCRCP ("Defendants' MTD") or, in the alternative, to compel arbitration and stay the Circuit Court action ("Defendants' MTC") (together, "Defendants' Arbitration Motion"). (R. 351-353.) Three Plaintiffs filed a Motion for Partial Summary Judgment on June 9, 2022, which the remaining Plaintiffs joined on July 17. (R. 481-483, 855-856.) On June 15, 2022, Plaintiffs filed a Motion to Disqualify Nexsen Pruet LLC as Counsel for Defendants. The parties submitted supporting and opposing memoranda.

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contract – all Plaintiffs vs. Palmetto Bluff Development, LLC, Palmetto Bluff Club, LLC, and Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards.

All motions came before the Circuit Court for hearing on July 20, 2022. (R. 1-2 (Sept. 15 Order, 1-2).) On September 15, 2022, the Circuit Court entered an Order granting Plaintiffs' Motion to Stay Arbitration; denying Defendants' Motion to Compel Arbitration and Motion to Dismiss; and holding that Plaintiffs' Motion for Partial Summary Judgment and Motion to Disqualify were not ripe for determination. (R. 1-33.) On the arbitration issues, the court stated "[b]ecause the motions currently before the Court present questions of law, **the Court is not making findings of fact in [these] Order[s].**" (R. 2 (emphasis added).) The court then held that (1) the Federal Arbitration Act does not apply; (2) no arbitration agreement exists as to 15 Plaintiffs or 11 Defendants; (3) the non-signatory Plaintiffs are not bound by the arbitration agreements; (4) the arbitration agreements are invalid, unlawful, and unenforceable; and (5) claims in the Complaint do not "relat[e] directly or indirectly to, or aris[e] directly or indirectly from [the Palmetto Bluff Club] Membership Plan," and thus are outside the scope of the arbitration agreements. (R. 28-30.)

Defendants timely moved to Alter or Amend the September 15 Order. (R. 863-890.) On November 2, 2022, the Circuit Court entered an Amended Order that was identical to the September 15 Order except for the date and title. (R. 34-66.) We refer to the September 15 and November 2 Orders collectively as the "Arbitration Orders." On November 8, 2022, the Circuit Court entered a Form 4 Order clarifying that the November 2 Order "was entered in relation to Defendants' Motion to Alter or Amend pursuant to Rule 59(e), SCRCP" (the "Form 4 Order"). (R. 67-69.)

Defendants timely appealed the Arbitration Orders and Form 4 Order on November 15, 2022 (R. 959-960.) Plaintiffs cross-appealed on December 5, 2022. (R. 961-963.)

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d. 663, 667 (2007) (*citing Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). Factual findings "will not be overruled if there is any evidence reasonably supporting them." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999). The Circuit Court stated, however, that it was "not making findings of fact." Accordingly, there are no findings of fact that require deference from this Court.

ARGUMENT

The Federal Arbitration Act ("FAA") and the South Carolina Uniform Arbitration Act ("SCUAA") implement "[t]he policy of the United States and South Carolina … to favor arbitration of disputes." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Both statutes were enacted to overcome "widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); Thad H. Westbrook & A. Mattison Bogan, *Arbitration: Alive and Delivering Results in S.C.*, S. C. Lawyer 31 (Sept. 2008) (noting South Carolina's "shift in public policy from a negative view of arbitration to one that favors the enforceability of arbitration agreements").

Doubts about whether a dispute is arbitrable are resolved in favor of arbitration. *See, e.g., AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *Landers v.*

FDIC, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). "[A]s a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." *Landers*, 402 S.C. at 108, 739 S.E.2d at 213 (citation omitted). Therefore, "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration must generally be ordered." *Id.* at 109, 739 S.E.2d at 213.

In addition, "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG, LLP v. Cocchi*, 565 U.S. 18, 19 (2011). "[A] trial court may not refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy." *Wellman*, 366 S.C. at 71, 620 S.E.2d at 91. Arbitration agreements must be enforced as to the claims and parties within their scope.

A. The Federal Arbitration Act Applies to the Arbitration Agreements

Section 2 of the FAA provides that a "written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013). "Unless the parties have contracted to the contrary, the FAA applies in Federal or State Court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Moreover, "involving commerce" is broadly construed because it covers more than "only persons or activities within the flow of interstate

commerce"; rather, "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-77 (1995). Indeed, "the smallest connection of an arbitration agreement with interstate commerce is sufficient to bring the agreement within the FAA." *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 13 (Ala. 1998).

The Circuit Court held that "[t]he development of real property does not involve interstate commerce," and applied the SCUAA. (R. 6, 39 (Arb. Orders at 6).) But the development of real estate is not the fulcrum of this case, which turns on Plaintiffs' claims that various Palmetto Bluff governing documents are being used to restrict access to Palmetto Bluff Club amenities by short-term renters. (R. 293 (Compl., Ex. 5).) The renters include persons from outside South Carolina, as Plaintiffs market their properties to renters nationwide, on VRBO.com, stayinpalmettobluff.com, Airbnb.com, luxurysimplifiedretreats.com, palmettobluffluxuryrental.com, hometogo.com and propertyconciergeofbluffton.net. (R. 523 (Ferguson Aff. ¶ 15).) Plaintiffs complain, not about their real estate purchases, but about how the Club's operation hurts their rental businesses. The eight out-of-state Plaintiffs, (R. 522 (*Id.* at ¶ 14)), show that the Club serves out-of-state customers, and thus its operation involves interstate commerce. *See United States v. Rivera-Rivera*, 555 F.3d 277, 286 (7th Cir. 2009) (collecting cases); *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 67 (2d Cir. 1997); *cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573-74 (1997). That is enough to apply the FAA here.

The Complaint also makes clear that Plaintiffs' rental businesses—including rental guests' access to Club amenities—and the alleged effects of Club governance and policies on those businesses, are at the core of the dispute. The Complaint's "preamble" frames the issues in terms of short-term renters' rights. (R. 78, 86-89 (Compl. at 7, 15-18).) Four causes of action (1, 3, 5, 6) specifically refer to rental issues; all the rest incorporate by reference the allegations regarding the effects on Plaintiffs' rental businesses and tenants; two (5 and 9) are asserted on behalf of a short-term rental class. (R. 132-152 (Compl. ¶¶ 160-253).) The remaining causes of action attack Club ownership, operations, and policies, generally with specific reference to access limitations and fees imposed on short-term renters' use of Club facilities. (*See, e.g.*, *id.* (2d COA (challenging Club "rules regulations, guidelines (including purported 'access guidelines'), and fee schedules"); 8th and 12th COAs (seeking refund of Club dues and fees); 9th COA (claiming Club dues and fees as damages); 10th and 11th COAs (seeking Plaintiff ownership of Club; 12th COA (seeking gratis equitable easement over Club property); 16th COA (seeking damages or rescission of Club membership contracts).) The pre-suit claims letters – which identify meaningfully identical causes of action – put short-term rental guests' access to Club facilities at the center of the dispute. (R. 286-295 (*Id*. at Ex. 5).)

In contrast, no cause of action complains about the fact that Plaintiffs bought property in Palmetto Bluff. Instead, Plaintiffs seek relief to enhance their ability to commercialize their properties and their Club membership—which they advertise to a national audience on national rental platforms.

The United States Supreme Court held long ago that "[t]he rental of real estate is unquestionably … an activity [affecting interstate commerce]." *Russell v. United States*, 471 U.S. 858, 862 (1985); *see also Groome Res. Ltd., LLC v. Jefferson Parish*, 234 F.3d 192, 209-10 (5th Cir. 2000) ("discriminatory actions in the purchase, sale, or rental of housing" affect "the interstate market for housing"); *Cho v. Casnak LLC*, 2022 WL 16894869, at *3 (N.D. Cal. Sept. 7, 2022) (enforcing arbitration agreement). The Court made clear that rental activity involves interstate commerce whether or not landlord and tenant come from different states. The Court did "not rely on the connection between the market for residential units and 'the interstate movement of people,'" but instead "recognize[d] that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Russell*, 471 U.S. at 862; *see also United States v. Medeiros*, 897 F.2d 13, 16 (1st Cir. 1990) ("*Russell* … holds that rental property is *per se* property used in an activity affecting interstate commerce."). As noted above, the FAA's "word 'involving' … is indeed the functional equivalent of 'affecting,'" the term at issue in *Russell*. *Allied-Bruce Terminix*, 513 U.S. at 263-74. The interstate character of the online vacation rental market merely underscores that the issues here involve interstate commerce.

The Circuit Court acknowledged *Russell*, and recognized that Plaintiffs have alleged "Defendants' acts interfere with Plaintiffs' short-term rental of their properties." (R. 6, 39 (Arb. Orders at 6).) Yet instead of reaching the conclusion compelled by *Russell*—that the FAA applies here—the Circuit Court reached the opposite conclusion.

Even if the Circuit Court were correct that this case focuses on "[t]he development of real property," (*Id.*), the FAA would apply here. The development of Palmetto Bluff

involves interstate commerce, as the eight out-of-State Plaintiff property owners attest. (R. 522 (Ferguson Aff. ¶ 14).) Just as their purchases were specific, concrete interstate transactions, the creation of the Palmetto Bluff community, and the sale of property in it, are activities involving interstate commerce even though "a piece of real estate being sold in interstate commerce does not itself pass across state lines." *United States v. Romer*, 148 F.3d 359, 367 (4th Cir. 1998).

The Circuit Court relied on *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), for the proposition that real estate development does not involve interstate commerce. (R. 6, 39 (Arb. Orders at 6).) *Bradley* is inconsistent with the U.S. Supreme Court's decision in *Russell.* If the *rental* of residential real estate to a necessarily *in-state* tenant nonetheless affects or involves interstate commerce, the *sale* of property to *out-of-state* buyers—actual interstate commercial transactions—must do so as well. "[I]f renting real estate is an activity which unquestionably affects interstate commerce, one need not make a leap of faith to conclude that a business engaged in real estate markets also has, at least, a minimal effect on interstate commerce." *United States v. Leslie*, 103 F.3d 1093, 1102 (2d Cir. 1997). Contrary to the suggestion in *Bradley*—supported only by a pair of federal district court decisions from other circuits, *see* 398 S.C. at 456-58, 730 S.E.2d at 316-18—interstate sales of real estate are not categorically exempted from the scope of Congress's Commerce Power. On the contrary, "transactions related to real estate do 'affect' interstate commerce." *United States v. Nerone*, 563 F.2d 836, 850-51 (7th Cir. 1977). And "transactions occurring across state lines" *are* "interstate commerce." *Edgar v. MITE Corp.*, 457 U.S. 624, 641–42 (1982).

Were the law otherwise, the Fair Housing Act would be invalid; in that statute, Congress exercised its Commerce Power precisely to address residential housing transactions regardless of their financing or additional links to interstate commerce. Court after court has sustained the reach of the Commerce Clause to residential housing sales. Thus, the Eleventh Circuit rejected the "argument that, because the real estate market involves private intrastate transactions, no interstate commerce is involved in residential sales and rentals." *Seniors C.L. Ass'n, Inc. v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992); *see also Morgan v. Secy of Hous. & Urb. Dev.*, 985 F.2d 1451, 1455 (10th Cir. 1993).

Accordingly, *Bradley* should be limited to its facts: a transaction "strictly for the purchase of a completed residential dwelling." 398 S.C. at 457, 730 S.E.2d at 317. In contrast, the transaction at issue here encompassed the Club documents and a Community Charter that were designed "to facilitate the creation and governance" of a community comprising hundreds of homes and including the Trust and the Club, which provides "amenities that protect the purchasers' investments and expectations." *U.S. Home Corp. v. Michael Ballesteros Trust*, 415 P.3d 32, 39 (Nev. 2018) (distinguishing *Bradley* as involving only the purchase of a single residence). Transactions in the interstate market for homes in luxury resort communities, like Plaintiffs' purchases here, clearly "involv[e] interstate commerce" within the meaning of the FAA, 9 U.S.C. § 2.

B. The Delegation Clause in the Arbitration Agreement Precluded the Circuit Court From Ruling on Issues of Substantive Arbitrability

The Circuit Court decided multiple issues of substantive arbitrability that the arbitration agreements expressly delegated to the arbitration panel. These issues include

the court's holdings that no arbitration agreement exists as to 15 Plaintiffs or 11 Defendants, that the nonsignatory Plaintiffs are not bound by the arbitration agreements, that the agreements are invalid, unlawful, and unenforceable, and that some claims in the Complaint fall outside the scope of the agreements. (R. 8-30, 41-63 (Arb. Orders at 8-30).)

Those rulings were improper. The arbitration clauses require disputes to be resolved "in accordance with the Commercial Arbitration Rules of the American Arbitration Association." Rule R-7(a) provides that the arbitrator, not the court, is to decide "his or her jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." Under AAA Rule R-7(b), "[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."

Parties to a contract may set the rules of arbitration by reference to "the rules of a particular association" such as the AAA. *First Baptist Church v. Creed & Sons, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 122-23 (1981). "By incorporating the AAA Rules into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005).

Plaintiffs contended in the Circuit Court that S.C. Code Ann. § 15-48-20—which provides that "if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised"—requires

the court, rather than the arbitration panel, to decide the arbitrability question in all circumstances. The Circuit Court did not address delegation, but implicitly adopted Plaintiffs' argument by deciding the arbitrability issues.

If AAA Rule R-7 conflicts with S.C. Code Ann. § 15-48-20, however, the FAA resolves the conflict in favor of Rule R-7. The FAA preempts state laws that "invalidate arbitration agreements under state laws applicable only to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), or that would "stand as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 563 U.S. at 341-42.

The United States Supreme Court has held that the FAA allows parties to agree to have an arbitrator decide "whether the parties have agreed to arbitrate," including through the "delegation provision" in the AAA rules. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). The Court addressed whether a court may "decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to an arbitrator." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 65 (2010). Unless the party claiming unconscionability "challenged the delegation provision specifically," the Court held, a court must "treat [the delegation provision] as valid … and must enforce it[,] … leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id*. at 72; *accord Henry Schein*, 139 S. Ct. at 528.

Here, Plaintiffs did not specifically challenge the delegation provisions. The Arbitration Orders neither addressed the delegation provision in the AAA Rules, nor acknowledged Plaintiffs' failure to challenge it. Under *Henry Schein* and *Rent-A-Center*,

however, because Plaintiffs did not specifically challenge the delegation provisions, the arbitrator, not a court, must decide the validity of Plaintiffs' agreement to arbitrate.

Even if the FAA did not apply, the delegation provision should be enforced under South Carolina law. The parallel provision of the FAA contains language almost identical to Section 15-48-20: "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. As explained above, the U.S. Supreme Court has made clear that a delegation provision displaces a court notwithstanding the court's powers in the absence of such a provision. This Court should construe Section 15-48-20 to accord with the definitive interpretation of 9 U.S.C. § 4. *See Crouch Const. Co. v. Causey*, 405 S.C. 155, 166, 747 S.E.2d 482, 488 (2013) (meaning of parallel FAA provision provides "guidance" in absence of binding interpretation of SCUAA provision).

The Arbitration Orders relied on three cases for the proposition that challenges to the existence or validity of an arbitration agreement are properly decided by the trial court. Two of those cases do not involve a delegation clause. *See Housing Auth. v. Cornerstone Housing*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003); *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 609 (D.S.C. 1998). And *Hooters* lacks authority to the extent it conflicts with the Supreme Court's later decisions in *Rent-A-Center* and *Henry Schein*.

In the third case, the court declined to apply a delegation clause covering the "validity and scope of [the] contract" where the party resisting arbitration called into question "whether an arbitration agreement even existed in the first place," and there

was no "clear and unmistakable evidence" the parties agreed to arbitrate that issue. *Simpson*, 373 S.C. at 23-24, 644 S.E.2d at 668.

Simpson does not control here. To begin with, in contrast to the language at issue in *Simpson*, the AAA Rules' delegation provision, incorporated in the arbitration agreements at issue here, is "clear and unmistakable" in delegating to the arbitrator "any objections with respect to the *existence*, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Rule R-7(a); *see Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the [AAA's] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.") (collecting cases); *Airbnb, Inc. v. Doe*, 336 So.3d 698, 704 (Fla. 2022).

Simpson acknowledged that "[t]he question of the arbitrability of a claim is an issue for judicial determination, *unless the parties provide otherwise*." 373 S.C. at 23, 644 S.E.2d at 667 (quoting *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118) (emphasis added). Both *Simpson* and *Zabinski* relied on the U.S. Supreme Court's decision in *AT&T Technologies*. *See Simpson*, 373 S.C. at 23, 644 S.E.2d at 667; *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. *Rent-A-Center* and *Henry Schein* make clear that, under *AT&T Technologies*, broad delegation provisions should be enforced. And as this Court recently acknowledged, a court "retains the right and duty to determine whether the delegation is valid and enforceable" only "as long as the party resisting arbitration has made a direct and discreet challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole." *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App.

2020). Plaintiffs here made no such "challenge to the validity and enforceability of the delegation clause specifically."

In sum, whether or not the FAA applies, the Circuit Court should have left to the arbitration panel all issues concerning arbitrability, including questions as to the existence of the agreement and the validity of the arbitration provisions.

C. Binding Arbitration Agreements Cover The Disputes At Issue Here.

1. The Circuit Court Erred in holding No Arbitration Agreement Exists as to 15 Plaintiffs

The Circuit Court's ruling that "fifteen (15) of the Plaintiffs have never signed any agreement to arbitrate any dispute with any of the Defendants, whatsoever," conflicts with undisputed evidence in the record. (R. 9, 42 (Arb. Orders at 9).) To the contrary, the record evidence establishes that for at least 16 of the 20 named Plaintiffs, there are signed Membership Agreements that contain the following notice on the first page ("Arbitration Notice"):[2]

THIS MEMBERSHIP AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO SOUTH CAROLINA CODE SECTION 15-48-10, ET. SEQ.

- Six individual Plaintiffs: Matthew N. Lynch and Barbara A. Lynch, R. Jeffrey Kimball and Deborah S. Kimball, and Sebrina Leigh-Jones and Chris Leigh-Jones.[3] (R. 379-386, 396-404 (Defs.' MTD, Ex. D at 9-16, 26-34).)

[2] Appendix A to this brief references the signed arbitration agreements as to each Plaintiff in tabular form, citing the appropriate parts of the record in the Circuit Court.

[3] As the owners of Charleston Bridge Investments C LLC and Charleston Bridge Investments H LLC, Sebrina Leigh-Jones and Chris Leigh-Jones have Membership Agreements for 852 Old Moreland Road and 8 Hannah Lane, respectively. (R. 433-450 (Defs.' MTD, Ex. D at 63-80).) Both Agreements are signed by Chris but list Sebrina as the "Primary Member" and Chris as the "Spouse," showing intent to bin both owners. (*Id.*)

- Nine LLC Plaintiffs with Membership Agreements signed by the LLCs' members or shareholders: Live Oak Assets LLC, Salt Works LLC, MKM 22 West LLC, TTJR LLC, One Rumford Lane LLC, Bridge Charleston Investments C LLC, Bridge Charleston Investments H LLC, 368 Mount Pelia LLC,[4] and 315 Corley CW LLC.[5] (R. 372-378, 387-395, 405-414, 415-423, 433-440, 441-450, 451-459, 460-465, Defs.' MTD, Ex. D at 2-8, 17-25, 35-44, 45-53, 63-70, 71-80, 81-89, 90-95).) There is no dispute that the individual signatories own and control the LLCs.

- The Trustee Plaintiffs, Anne Bosler and Dylan Hard, with a Membership Agreement they signed. (R. 424-432 (Defs.' MTD, Ex. D at 54-62).)

The Palmetto Bluff Club has been unable to locate signed Membership Agreements for Bridge Charleston Investments B LLC, or Bridge Charleston Investments E LLC, although they are all Club members and must have agreed to become members at some point. (R. 91-92 (Compl. ¶¶ 4, 6).) In addition, Geoffrey J. Block and Jennifer Albero signed an older version of the Membership Agreement that did not contain an arbitration provision, and Bridge Charleston Investments B, LLC joined the Club before the arbitration provision was added to the Membership Agreement in June 2017. (R. 528-553 (Ferguson Aff. Exs. A-C).) Bridge Charleston Investments B, LLC signed a Purchase and Sale

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As an owner of Charleston Bridge Investments B LLC, Sebrina Leigh-Jones signed a Purchase and Sale Agreement containing an arbitration clause, and the Arbitration Notice on the first page. (R. 524, 534-553 (Ferguson Aff. ¶ 17, Exs. B-C).)

[4] The Palmetto Bluff Club has been unable to locate the first page of the Membership Agreement for 368 Mount Pelia LLC. Based on the date its agreement was signed, as well as the version number in the bottom left hand of each page, the first page of their Membership Agreement would have contained the Notice. (R. 521 (Ferguson Aff. ¶ 12).)

[5] Courtland and Kaitlyn Williams, owners of 315 Corley CW, LLC, signed their Membership Agreement, containing the Arbitration Notice on the first page, on March 26, 2019, for 22 North Drayton Street (Lot 42) in Palmetto Bluff. (R. 467-472 (Defs.' MTD, Ex. D at 97-102).) The Williamses subsequently sold 22 North Drayton Street and purchased 315 Corley Street (Lot 5556). (R. 521-522 (Ferguson Aff. ¶ 13).) On January 13 and 14, 2022, they transferred their Palmetto Bluff Club membership to 315 Corley Street. (R. 473-480 (Defs.' MTD, Ex. D at 103-110).)

Agreement containing an arbitration provision, however, as well as an arbitration notice on the first page.[6] (R. 534 (Ferguson Aff. Ex. B).) Additionally, the four Bridge Charleston Investments entities (B, C, H, and E) have the same principals—namely, Sebrina and Chris Leigh-Jones. The Membership Agreements for C and H are in the Leigh-Jones' names and contain arbitration agreements. In addition, the LinkedIn profile for Mr. Leigh-Jones states that he is the owner of "Bridge Charleston Investments LLC." (R. 600 (Mem. in Support of Defs.' MTC., Ex. B.6).) Thus, because the principals of E have already agreed to arbitrate the identical claims brought by C, and H, and by themselves individually, E should be bound by the arbitration agreements of C and H, as well.

In any event, as discussed below in Section C.3, under the doctrine of equitable estoppel, any Plaintiff who is not a signatory to an arbitration agreement is nonetheless compelled to arbitrate the claims here.

2. The Plaintiff Entities Are Bound by Arbitration Agreements Signed by Their Individual Principals, Agents, or Trustees

The Arbitration Orders hold that certain LLC and Trust Plaintiffs cannot be bound by the arbitration agreements that were signed by the LLC members or shareholders because Defendants did not offer "proof sufficient to pierce the corporate veil." But veil

[6] The Purchase and Sale Agreement contains a scrivener's error and lists the purchaser of Lot 5512 as Bridge Charleston Investments A, LLC, but General Warranty Deed for Lot 5512 conveys the property to Bridge Charleston Investments B, LLC as the purchaser. (R. 549-553 (Ferguson Aff. Ex. C).) The arbitration provision in the Purchase and Sale Agreement encompasses "[a]ny controversy, dispute or claim arising out of this Agreement." (R. 534-547 (*Id*. at Ex. B).) The Lynch Plaintiffs signed a similar agreement that added "relating directly or indirectly to" language. (R. 555-571 (*Id*. at Ex. D).)

piercing is not at issue here. Rather, the LLC and Trust Plaintiffs are bound by the arbitration agreements directly, under agency principles, or as assignees.

Plaintiffs do not dispute that the Plaintiff entities are owned and controlled by the underlying individuals, but pick and choose when they want the Plaintiff entities and the individuals to be viewed together, and when they want them to be viewed separately. When individuals rather than the Plaintiff entities bought property, paid joining fees, or paid Club dues, Plaintiffs want the individuals to be treated as indistinguishable from their closely held entities. When it comes to arbitration, however, Plaintiffs want to separate the individuals from the entities. The Circuit Court allowed the entity Plaintiffs to claim the benefit of every part of every agreement they wished, and reject every part they wished. Under governing legal principles, Plaintiffs cannot have it both ways.

a. The Nonsignatory Plaintiffs Are Bound by the Express Terms of the Membership Agreement and its Arbitration Provisions

The LLC and Trust Plaintiffs are bound by the express terms of the arbitration provisions in the Membership Agreements and Membership Plan. The Plan provides that "A MEMBERSHIP MAY BE HELD IN THE NAME OF AN ENTITY," and instructs that, "[i]f a residence or homesite is held in the name of a partnership, company, trust or other form of multiple ownership ("Entity"), the Entity must designate one individual ("Entity Member") who will have the right to use the Club Facilities" (and up to three additional users. (R. 277 (Plan at 8).) The Plan also makes clear that the entity is bound by the contract, and is "jointly and severally liable for all amounts due" to the Club. (*Id.*)

In addition, the arbitration provisions apply to disputes brought, not merely by members, but by anyone "exercising such member's membership rights." Plaintiffs' lawsuit seeks relief based in part on Plaintiffs' purported rights under the Membership Agreements. And in their efforts to bestow their membership privileges on short-term renters, the nonsignatory plaintiffs are exercising the membership rights that are appurtenant to the property they own. In addition, seven nonsignatory Plaintiffs—Live Oak Assets, LLC, Salt Works, LLC, MKM 22 West, LLC, TTJR, LLC, One Rumford Lane, LLC, 368 Mount Pelia, LLC, and 315 Corley CW, LLC—spent money using Club amenities in 2022. (R. 524-525 (Ferguson Aff. ¶ 19).) Plaintiffs cannot exercise their membership rights, yet avoid their obligations to arbitrate their disputes.

b. The Nonsignatory Plaintiffs Are Bound by the Arbitration Provisions Under Agency Law

It is well-established that a nonsignatory may be bound to an arbitration agreement under traditional agency principles. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288-97, 733 S.E.2d 597, 600-05 (Ct. App. 2012). Accordingly, where an LLC Plaintiff purchased (or now owns) the property, but the membership documents containing the arbitration provisions were signed by principals or agents of the LLC, the LLC Plaintiff is bound by the arbitration agreements that its agents signed. That is especially clear here, where the documents containing the arbitration agreements run with the land owned by the LLC Plaintiffs. (R. 218; 271 (Charter § 19; Agreement § II; Plan at 2).)

The Circuit Court recognized that the LLC Plaintiffs "appear to be limited liability companies *formed by the signatories* to one or more of the agreements to arbitrate." (R. 9,

42 (Arb. Orders at 9 (emphasis added)).) Based on the relationship of the signatories to the nonsignatory LLC Plaintiffs, the signatories had actual or apparent authority to bind the respective LLC Plaintiffs to the arbitration agreements. *See Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) ("A true agency relationship may be established by showing evidence of apparent or implied authority … .").

The individuals who signed the arbitration agreements plainly have actual authority to bind the LLCs, which can act only through their owners or managers. *See* S.C. Code Ann. § 33-44-301(a)(1), (b); *see also Hofer v. St. Clair*, 298 S.C. 503, 510, 381 S.E.2d 736, 740 (S.C. 1989) ("if a partner has the actual authority to bind the partnership, that partner's acts will bind the partnership"). Reinforcing the relationship is the individual principals' indisputable "*right to control* the conduct of" the LLCs. *Fernander*, 278 S.C. at 144, 293 S.E.2d at 426. Where there is a close relationship between the signatory, the nonsignatory, and the claims at issue, the nonsignatory party is bound by the arbitration agreement. *See Hinson v. Jusco Co., Ltd.*, 868 F. Supp. 145, 149 (D.S.C. 1994) (nonsignatory parent to signatory bound by arbitration agreement); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (nonsignatory agents and employees bound).

The nonsignatory LLC Plaintiffs are also bound to the arbitration provision because of their relationship to Defendants and to the Club as the property owner to which Club membership is appurtenant. The Membership Agreements are prefaced by the statement that "I hereby understand that by my acceptance of a deed for property within Palmetto Bluff I became a 'Community Member' of the Palmetto Bluff Club…." (R. 375 (Agreement § II).) Thus, the Agreements' plain language represents that they have

been signed by the deed holder. The nonsignatory LLC Plaintiffs, in having their principals or agents sign the agreements, placed the individuals in a position to contractually bind the LLC property owner. *See Fernander*, 278 S.C. at 143, 293 S.E.2d at 426 ("agency … may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal").

Furthermore, the agency relationship is apparent from Plaintiffs' own central allegation that "all prospective purchasers [are required] to execute a purported 'Membership Agreement' as a condition of closing." (R. 110 (Compl. ¶ 89).) The LLC Plaintiffs are the purchasers and property owners, so that Plaintiffs themselves allege that the LLC Plaintiffs executed the Membership Agreements. Thus, an individual principal or agent of the LLC Plaintiffs who signed a Membership Agreement necessarily did so on behalf of the purchaser LLC Plaintiff. In addition, even if an agent lacked actual or apparent authority to enter into a transaction on behalf of the principal, the principal's conduct in retaining its benefits ratifies the transaction. *See Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). The LLC Plaintiffs retained benefits under the Membership Agreements; indeed, the whole dispute here arises out of the desire of those Plaintiffs, and the other Plaintiffs, to commercialize their Club memberships to enhance their short-term rental businesses. Thus, the LLC Plaintiffs ratified the execution of the Membership Agreements by their principals or agents on their behalf.

Plaintiffs Bosler and Hart signed the Membership Agreement, yet the Circuit Court held that they were not bound by it because they are named in the Complaint as

trustees for the Bosler Trust. (R. 11, 44 (Arb. Orders at 11).) But the Trust is bound by the agreement that its trustees signed. *See* S.C. Code Ann. § 62-7-303(4). A trust may be contractually bound to an arbitration agreement signed by a trustee, even without a trustee designation, if it can be "inferred from the circumstances that such was the intent." *Godwin v. Gallagher*, 892 F.2d 74 (4th Cir. 1989). Here, the trustees signed the Membership Agreement to comply with the Trust's obligation to join the Club upon purchase. As with the LLCs, the Membership Agreement for the Bosler property recited that it was signed by the person who "accept[ed] a deed for property within Palmetto Bluff," that is, the property owner. That is clear evidence of intent to bind the Bosler Trust.

The entity Plaintiffs' stake in this controversy rests on their status as property owners, and the execution of the Membership Plan and Agreements are purported "conditions of closing" required of the purchasers. Thus, the individuals entered into the Membership Agreements on behalf of Plaintiff entities. Just as a plaintiff cannot "avoid an arbitration agreement by naming … signatory parties in their individual capacity" as defendants, *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993), plaintiffs cannot "nullify the rule requiring arbitration" by choosing to name as plaintiffs closely held entities owned and controlled by signatories who allegedly signed arbitration agreements in their individual capacity.

c. The Nonsignatory Plaintiffs Are Bound as Assignees

To the extent some of the properties were purchased by individuals, and subsequently transferred to entity Plaintiffs, the entity Plaintiffs are bound as assignees of the signatories to the membership documents containing the arbitration provisions.

See, e.g., (R. 610-618, 703-717 (Mem. in Support of Defs.' MTC, Exs. B.8-B.9, B.26-B.28).) As an initial matter, the governing documents set forth that, by acceptance of a deed, each owner assumes and agrees to be bound by all of the terms and conditions of the Palmetto Bluff Club Documents, including the Membership Agreements and Membership Plan. Thus, the arbitration provisions are made applicable to and binding upon the LLC Plaintiffs by virtue of their ownership of their respective properties.

Arbitration provisions transfer with, and become binding upon, assignees of contracts containing such provisions. *See PTA-FLA, Inc. v. Huawei Techs. USA, Inc.*, 2014 WL 3100458, at *10 (D.S.C. Jul. 2, 2014). As a New York court explained more than a century ago, "[i]f the arbitration clause of an assignable contract of sale is not available, except as to the parties to such a contract, it would then be a simple matter, if either party sought to escape the effect of such a clause, to assign the contract to a third party." *Id.* (quoting *In re Lowenthal*, 199 A.D. 39, 191 N.Y.S. 282, 285 (1921)). As the subsequent property owners, the entity Plaintiffs assumed the rights and obligations set forth in the Membership Agreements and Membership Plan, including the arbitration provisions. Accordingly, entity Plaintiffs that signatories formed and to which they transferred their properties are bound by the arbitration provisions.

3. All Remaining Plaintiffs Are Bound by the Arbitration Agreements Under Principles of Equitable Estoppel

"Well-established common law principles dictate that in an appropriate case a nonsignatory can … be bound by… an arbitration provision within a contract executed by other parties." *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600 (quoting *Int'l Paper Co. v.*

Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000)). The *Pearson* court discussed these principles at length. *See* 400 S.C. at 287-97, 733 S.E.2d at 599-605 (reversing Circuit Court's denial of motion to compel arbitration).

As most relevant here, a nonsignatory can be bound to an arbitration agreement through the doctrine of equitable estoppel. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (citing *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014)); *see also Campbell v. Anesthesia Mgmt. Sols., LLC*, 2021 WL 4691692, at *4 (D.S.C. July 14, 2021). The doctrine of equitable estoppel compels a nonsignatory to arbitrate in two situations: (1) when the nonsignatory's claims arise out of and relate directly to the written agreement containing the arbitration provision, or (2) when the nonsignatory receives—or asserts entitlement to receive—a direct benefit from a contract containing an arbitration provision. *See Pearson*, 400 S.C. at 290-97, 733 S.E.2d at 601-05; *see also Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 626-30 (4th Cir. 2006). Both situations are present here.

a. Plaintiffs' Claims Arise Out of and Relate to the Documents Containing the Arbitration Provisions

The nonsignatory Plaintiffs bring claims based upon an alleged coordinated scheme by all Defendants, allegedly injuring all Plaintiffs, and arising from the governing documents and associated contracts including the Palmetto Bluff Club Documents. They cannot base their claims on those documents, yet ignore the same documents in determining arbitrability of those issues.

"[A] nonsignatory should be estopped from denying it is bound by an arbitration clause when its claims against the signatory arise from the contract containing the arbitration clause." *Am. Bankers*, 453 F.3d at 628 (internal quotation marks omitted). And there is a "clear policy in favor of arbitrating claims against non-parties to an arbitration agreement if those claims are based on the same alleged facts underlying claims against a party to the agreement." *Hinson*, 868 F. Supp. at 149.

Here, the crux of all of Plaintiffs' claims is that Defendants purportedly created a "scheme" to mandate all property owners become members of the Club and pay fees for Defendants' own profit, (R. 75-76, 108, 142, 144 (Compl. at 4-5, ¶¶ 80, 197-98, 208-09)), and that the Club Membership Agreement, Membership Plan, and "associated documents" are purportedly unlawful and invalid, (R.134 (*Id*. at ¶ 166.4)). These claims rely upon the existence of the Palmetto Bluff Club documents and require reference to those documents, which contain arbitration provisions.

Plaintiff's Complaint attached the Membership Plan as Exhibit 4, and pleaded the Plan's central significance at length. (R. 113-118 (*Id*. at ¶¶ 104-127).) That makes crystal clear that *all* Plaintiffs, including the three who joined the Club before the arbitration clause came into effect (*see* § C.1, *supra*), rely on and benefit from the current Plan. Because the Complaint treats the Plaintiffs as a unified group—even proposing class certification—without differentiating their claims or circumstances, all Plaintiffs can and should be compelled to arbitrate here.

The Arbitration Order adopted Plaintiffs' contention that the principles adopted in *Pearson* do not apply because *Pearson* involved only three parties bringing claims under

different sources of law. (R. 9, 42 (Arb. Orders at 9 n.1).) But neither *Pearson* nor any other identified authority limits equitable estoppel to a certain number of parties or to certain types of claims. All Plaintiffs may properly be compelled to arbitration.

b. Plaintiffs Directly Benefit from the Documents Containing the Arbitration Provisions

"When a signatory seeks to enforce an arbitration agreement against a nonsignatory, [the nonsignatory is estopped] from claiming that [it] is not bound to the arbitration agreement when [it] receives a direct benefit from a contract containing an arbitration clause." *Pearson*, 400 S.C. at 295, 733 S.E.2d at 604 (citation omitted). That reasoning applies to "non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *Id.* at 291, 733 S.E.2d at 602 (cleaned up). And "courts have applied equitable estoppel" specifically "where plaintiffs sue and seek relief based on contracts containing arbitration clauses." *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. The reason is clear: "To allow [a plaintiff] to claim the benefit of [a] contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying" the FAA. *Int'l Paper*, 206 F.3d at 418 (citation omitted).

Here, the Palmetto Bluff Club Documents are the foundation of every claim asserted by the nonsignatory Plaintiffs. And Plaintiffs seek damages based on dues and fees payable under those documents, along with other remedies relating to obligations under those documents including the obligation of membership itself. The nonsignatory Plaintiffs even bring a cause of action for breach of the Membership Agreement,

Membership Plan, and associated documents. Thus, the nonsignatory Plaintiffs seek to directly benefit from the existence of documents containing arbitration provisions. These Plaintiffs include, at a minimum, all entity plaintiffs whose principals signed arbitration agreements, Sebrina Leigh-Jones, and Bridge Charleston Investments E, which joined the Club after the arbitration clause was in effect. Plaintiffs cannot, on the one hand, receive a benefit from those documents yet, on the other, avoid the documents' requirement to arbitrate disputes. *See Pearson*, 400 S.C. at 297, 733 S.E.2d at 605.

All nonsignatory Plaintiffs have received, and continue to receive, benefits under those contracts in the form of Palmetto Bluff Club membership privileges, which Plaintiffs not only use but which run with the land and thus benefit any nonsignatory entity Plaintiffs with title to Palmetto Bluff property. Indeed, Plaintiffs claim in their Complaint that they are unable to use the Club facilities as much as they wish. Having embraced the benefits they received under the contracts providing them use of the Palmetto Bluff Club (and demanded even more benefits), the nonsignatory Plaintiffs cannot rely on their nonsignatory status to repudiate the arbitration clauses in those very contracts. *See id.* at 297, 733 S.E.2d at 605.

4. The Claims Against Nonsignatory Defendants Are Arbitrable

As a matter of law, all Defendants may rely upon and enforce the arbitration provisions in the Membership Agreements and Membership Plan even though only the Palmetto Bluff Club is a signatory to those documents. "[A] party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint ... because this would nullify the rule requiring arbitration." *S.C. Pub. Serv. Auth.*, 312 S.C.

at 563, 437 S.E.2d at 24. Under agency and contract principles, a nonsignatory defendant may rely on an arbitration agreement to which it is not a party where the facts and claims against it and the signatories are "closely intertwined," and the claims against the nonsignatory defendant are "similar to and dependent upon" the arbitrable claims. *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001). That principle applies here.

Here, Plaintiffs' Complaint alleges that the Palmetto Bluff entities are an "amalgamated single business enterprise," and that the remaining Defendants have joined in an alleged "conspiracy" based on alleged misuse of Palmetto Bluff Club agreements. (R. 79, 97-98, 108, 109, 121-122, 127, 129, 142 (Compl. at 8, ¶¶ 25, 80, 82, 129.22, 137, 145, 196-199).) In particular, the Complaint alleges that "[t]here is an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities, including, inter alia, intertwining of the operations of the entities and a failure to strictly comply with corporate formalities." (R. 97-98 (*Id*. at ¶ 25.1).) The Complaint also alleges that Palmetto Bluff Development, LLC, Palmetto Bluff Preservation Trust, Inc., Palmetto Bluff Club, PBLH, LLC, and Palmetto Bluff Real Estate Company, LLC "are likely just an amalgamated single business enterprise." (R. 76-79 (*Id*. at 5-8 (listing entities).) The Complaint more confidently alleges that "Defendants Founder [*i.e.*, Palmetto Bluff Development, LLC], Trust, Club, the Real Estate Company, PBLH, and South Street Partners *are* a single business enterprise and/or are amalgamated," (R. 97 (*Id*. at ¶ 25) (emphasis added)), and identifies all these parties as a singular "Developer" at least 19 times. (R. 89, 121, 122, 123, 124, 127, 131, 132, 133, 137, 140, 149, 151 (*Id*. at 18, ¶¶ 129.20, 129.21, 129.22.1, 129.22.3.1, 129.24, 130, 130.1, 130.3,

130.4, 137, 153, 154, 159, 165, 179.1, 179.3, 187.3, 231, 244).) Indeed, Plaintiffs allege that "justice, equity, and fundamental fairness require that accountability be placed on the single business enterprise." (R. 98 (*Id.* at ¶ 25.3).) And Plaintiffs make clear that this single enterprise includes entities beyond the "Developer," as the Complaint accuses Defendants of "[p]utting the interests of the Developer *and its amalgamated entities* above that of the Owners in Palmetto Bluff." (R. 121 (*Id.* at ¶ 129.20) (emphasis added).)

The claims against the individual defendants single them out based on their roles on the Board of Stewards of Defendant Palmetto Bluff Preservation Trust—part of the "amalgamated business enterprise" that Plaintiffs dub the "Developer." Because the Trust may arbitrate its claims, its officers or agents may arbitrate as well when sued for acts in their official role. To hold otherwise would allow a party to "avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity," and thus "would nullify the rule requiring arbitration." *S.C. Pub. Serv. Auth.*, 312 S.C. at 563, 437 S.E.2d at 24.

The Complaint also intertwines Defendant Montage Palmetto Bluff with the single amalgamated business enterprise, accusing South Street Partners—part of the "Developer"—of "puppeteering" Montage, and accuses Montage of "conspiring" with the other Defendants. (R. 88, 121 (Compl. at 17, ¶ 129.22).) The Complaint further alleges that the Founder (Palmetto Bluff Development, LLC) delegated its duties and obligations to Montage Palmetto Bluff, LLC. (R. 79 (*Id.* at 8).)

Plaintiffs' Complaint could not be clearer that the Defendants all act as one. Plaintiffs' claims against the nonsignatory defendants are thus "closely intertwined" with

the claims against the Palmetto Bluff Club. *Long*, 248 F.3d at 320. And the claims are identical, not merely "similar to and dependent upon" those claims against the Club. *Id.*

Equitable estoppel principles set forth in *Pearson* require the same result. In *Pearson*, this Court held that a defendant who was not a signatory to an arbitration agreement with the plaintiff could invoke arbitration provisions where the claims against both defendants arose from the same set of facts and the plaintiff did not distinguish between the defendants. *See* 400 S.C. at 297, 733 S.E.2d at 605. Here, all Plaintiffs' claims arise from the same set of facts centered around the Club, and Plaintiffs treat all the Defendants as a single enterprise, including the "puppeteer[ed]" Montage.

Thus, not only do Plaintiffs lump all of the Palmetto Bluff entities together, but Plaintiffs' claims against all Defendants arise under and are intertwined with the Club and the Club agreements. Accordingly, all Defendants may invoke the arbitration provisions in the Palmetto Bluff Club Documents.

5. Plaintiffs' Claims Are Within the Scope of the Arbitration Agreements

The Circuit Court recognized that Plaintiffs make "numerous allegations and Claims related to access to the Club," but held that "many allegations in the Complaint are not related to the Membership Plan or Agreement," and are thus outside the scope of their arbitration provisions. (R. 28, 61 (Arb. Orders at 28).) The Circuit Court should have addressed this issue; as explained above in Section B, the arbitration agreement delegated to the arbitration panel all issues as to the scope of the arbitration agreement as well the existence of an agreement.

And the Circuit Court also was wrong on the merits. The arbitration clauses at issue are broad in scope and apply to "*any and all* controversies, disputes or claims *relating directly or indirectly* to, or *arising directly or indirectly from*," the Membership Agreement or Membership Plan. "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly and is capable of an expansive reach." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 95, 749 S.E.2d 139, 153-54 (Ct. App. 2013). "Thus, a claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement." *Id.* at 95, 749 S.E.2d at 154. The clause here is even broader, as it encompasses all indirect relationships.

All claims here relate directly or indirectly to the Membership Agreement or Membership Plan; indeed, all or almost all relate to the "relationship between the Club and its member." The Complaint advances "[a]llegations against non-Club entities," (*Id.*), but those allegations are all related at least indirectly to the non-Club entities' actions with respect to the Club – indeed, the Club is named as a defendant to all sixteen causes of action in the Complaint. All the "[a]llegations regarding the Community Charter and the Declaration of Recreational Covenant," "the Founder's breach of fiduciary duty," and "the Trust and Board of Stewards' breach of fiduciary duty, (R. 29, 62 (Arb. Orders at 29)), relate to mandatory Club membership, Club structure, and Club governance. *See, e.g.*, (R. 139-140, 146-148 (Compl. ¶¶ 185-89, 216-26)). All allegations relating to "unfair and unlawful competition," (R. 29, 62 (Arb. Orders at 29)), relate to Club rules and regulations as well as Club membership, Club structure, and Club governance (R. 78-79, 88, 90

(Compl. at 7-8, 17, 19)). "Allegations that the Club is a homeowners' association," (R. 29, 62 (Arb. Orders at 29)), relate to Club structure and governance (R. 85, 124 (Compl. at 14, ¶ 131)). And the civil conspiracy allegations, (R. 30, 63 (Arb. Orders at 30)), all relate to Club rules and regulations, Club membership, Club structure, and Club governance (R. 108, 121, 142 (Compl. ¶¶ 80, 129.22, 197-99)).[7]

The Circuit Court erred in denying arbitration to claims based on common law or statutes. *See* (R. 28-30, 61-63 (Arb. Orders at 28-30).) The arbitration provision is not limited to issues regarding contract interpretation or contractual obligations, but encompasses "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from" the Membership Agreement or Membership Plan, whether the claims rely on tort, contract, statutory, or fiduciary duties. *See Landers*, 402 S.C. at 109–13, 739 S.E.2d at 214–15 ("[A] tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause."); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988) (alleging "conspiracy" … does not remove the dispute from the scope of arbitration").

[7] In addition, the causes of action all "arise from" the Plaintiff Bridge Charleston B's Purchase and Sale Agreement and "relat[e] to" or "aris[e] from" the Lynch Plaintiffs' Purchase and Sale Agreement. Page 2 of each Agreement contains a commitment to join and maintain membership in the Club, an acknowledgement that Club membership is mandatory, and an agreement to comply with the Club Plan. (R. 535, 556 (Ferguson Aff., Exs. B and D at 2).)

So long as there is a "significant relationship" with the agreement, the claims are arbitrable. *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. And the relationship between the claims and agreements here is close.

Plaintiffs' claims reduce to contentions that the Club is improperly structured, that Club membership should not run with the land, and the Club should be managed differently. Plaintiffs attached the Membership Plan, including its arbitration provision, as an exhibit to their Complaint, and the allegations in the Complaint demonstrate that the Palmetto Bluff Club is at the core of Plaintiffs' claims.

A dispute about the scope of an arbitration agreement must be resolved in favor of arbitration "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute." *Id.* at 109, 739 S.E.2d at 213. Yet rather than resolving doubts in favor of arbitration, the Arbitration Orders bent over backward to narrow the arbitration provision nearly into inexistence. Properly construed, the arbitration provision covers all claims at issue here. At a minimum, because the Circuit Court conceded that many of Plaintiffs' claims relate to the Palmetto Bluff Club, at least those claims should be referred to arbitration.

D. The Arbitration Agreements Are Valid, Lawful, and Unenforceable

"There is a strong presumption in favor of the validity of arbitration agreements … ." *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). That "presumption is strengthened when an arbitration clause is broadly written." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213. The Circuit Court relied on legally inadequate grounds to refuse enforcement here.

1. The SCUAA's Conspicuous Notice Requirements Are Preempted and in any Event Are Satisfied Here

As explained above, the FAA governs the arbitration issues. Under the FAA, "[c]ourts many not … invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687. That "federal policy favoring arbitration … is binding on state courts and supersedes inconsistent state law and statutes that invalidate arbitration agreements." *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584 (2003).

As the South Carolina Supreme Court has held, the FAA preempts the SCUAA's conspicuous notice provisions (S.C. Code Ann. § 15-48-10(a).) *See Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 459, 476 S.E.2d 149, 152 (1996). And *Doctor's Associates* is directly on point. That case addressed a Montana statute that required "'[n]otice that [the] contract is subject to arbitration'" to be "'typed in underlined capital letters on the first page of the contract.'" 517 U.S. at 683 (quoting Montana statute). The Supreme Court held that the FAA preempted that requirement and any other "threshold limitations placed specifically and solely on arbitration provisions." *Id.* at 688.

But even if the SCUAA's conspicuous notice requirements applied, the Membership Agreement, which specifically refers to and incorporates the Membership Plan, complies with those requirements. The Circuit Court acknowledged that "Defendants have produced Membership Agreements with this Notice on the first page," but nonetheless held that the notice did not comply with the SCUAA because the contract

at issue was "buried within hundreds of pages of real estate closing documents." (R. 17, 50 (Arb. Orders at 17).)

The Circuit Court improperly imposed requirements beyond those in the SCUAA. The SCUAA does not require that the notice appear on the first page of the first document or contract exchanged in a complex transaction; the notice need only appear on the first page of the contract containing the arbitration provision. The Circuit Court's extra-textual requirement contradicts the strong State policy favoring the enforceability of arbitration agreements. Under that policy, restrictions on arbitration agreements should not be construed to become traps for the unwary, especially not in the context of six- or seven-figure transactions between sophisticated parties. And the spurious additional requirement makes especially little sense here because Plaintiffs actually signed the Membership Agreements under the cover page with conspicuous notice, precluding any contention that the notice was "buried" and thus undiscoverable.

2. The Arbitration Agreements Are Not Unconscionable

The Arbitration Orders also held that the arbitration agreements are unconscionable. (R. 18-26, 51-59 (Arb. Orders at 18-26).) They are not. "[U]nconscionability is 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." *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (paraphrasing *Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996)). *Accord Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. Neither element is satisfied here.

a. Plaintiffs Did Not Lack Meaningful Choice

The Circuit Court's Arbitration Orders held that the arbitration agreements are contracts of adhesion because Plaintiffs lacked meaningful choice. (R. 19-22, 52-55 (Arb. Orders at 19-22).) It is well-established under South Carolina law, however, that "[t]he fact that a contract is one of adhesion does not make it unconscionable." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E. 898, 901 (Ct. App. 1998).

While the Arbitration Orders recognize that "modern real estate developments are filled with mandatory covenants, including covenants that require payments of fees, charges, and assessments," they appear to suggest that the "adhesive" nature of the arbitration agreements is exacerbated by the number of supplements and amendments to the Community Charter. (R. 19-20, 52-53 (Arb. Orders at 19-20).) But the arbitration provisions at issue are in the Membership Plan and Membership Agreement, not the Community Charter. And the Arbitration Orders recognize that "Plaintiffs have produced no evidence these supplements and amendments impact Plaintiffs' claims." (R. 20, 53 (*Id.* at 20).)

Plaintiffs could not possibly do so because, when determining the validity and enforceability of an arbitration provision, a court may only consider the arbitration provision itself. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)); *see also One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016). Any challenges to other provisions of a contract that are not part of the arbitration clause are irrelevant to the validity and enforceability of the arbitration clause.

In any event, the sophisticated buyers of six- and seven-figure vacation properties did not suffer from an absence of meaningful choice. Whether there was an absence of meaningful choice depends on (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the clause. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. Further, a finding of unconscionability should be made only in extreme circumstances:

> Courts should not refuse to enforce a contract on grounds of unconscionability even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882, 884-85 (2013).

Analysis of the factors in *Simpson* and *Gladden* makes clear that Plaintiffs did not lack meaningful choice here. Plaintiffs' only alleged injuries are economic. Plaintiffs may not be substantial business enterprises, but some of them operate such enterprises, and all are successful business people (or entities owned and controlled by such people) who have amassed considerable wealth as a result of their business acumen. The parties have equivalent sophistication and bargaining power. Luxury second-home properties in Palmetto Bluff are not necessities, like medical care, phones, employment, or a basic automobile. And similar properties are available from other sellers, including in the Lowcountry. If Plaintiffs did not want to agree to the arbitration provisions, they did not

need to buy a property in Palmetto Bluff. And 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 (in contrast, for example, with some bulky consumer contracts). "Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). These sophisticated Plaintiffs undoubtedly read the documents they signed.

There was "no extreme inequality of bargaining power," no "lack of basic reading ability," and no "evident intent to obscure" the conspicuously labeled arbitration provision. *Gladden*, 402 S.C. at 145, 739 S.E.2d at 884-85. This agreement to join an exclusive club in a luxury development was not a contract of adhesion.

b. The Terms of the Arbitration Agreement Are Not Oppressive or One-Sided

The Arbitration Orders concluded that the arbitration agreements are oppressive and one-sided because they "strip[] members of statutory remedies, purport[] to alter the statute of limitations, and [are] capable of unilateral amendment in the Club's 'sole and absolute discretion.'" (R. 22, 55 (Arb. Orders at 22).) Again, the Circuit Court was wrong.

First, a (perceived) limitation on remedies available pursuant to state statutes (such as Plaintiffs' claims under the South Carolina Unfair Trade Practices Act and South Carolina Declaratory Judgment Act) does not provide a ground to invalidate an arbitration provision. "[I]n cases where it is uncertain how the arbitrator will construe remedial limitations, the proper course is to compel arbitration." *Rowe v. AT&T, Inc.*, 2014 WL 172510, at *11 (D.S.C. Jan. 15, 2014) (citing *Pacificare Health Sys., Inc. v. Book*, 538 U.S.

401 (2003)). The plaintiff in *Rowe* made the same argument advanced by Plaintiffs here, similarly relying on *Simpson*. But the district court refused to "speculate that the arbitration agreement deprives Plaintiff of all remedies or creates illusory remedies," and instead required that the plaintiff "first pursue her remedies through arbitration." *Id.* That was the proper course for the Circuit Court in this case.

Even if the limitation on remedies were unconscionable, it could and should be severed and the agreement to arbitrate enforced. A court may sever an unconscionable provision from an arbitration clause, even if the arbitration clause does not contain a severability provision. *See Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 370, 887 S.E.2d 534, 542 (Ct. App. 2022). Indeed, South Carolina provides this power with regard to any contract: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court … may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result." S.C. Code Ann. § 36-2-302(1).

Nor does a perceived alteration to the statute of limitations invalidate the arbitration provisions because, as the Circuit Court recognized, "the record does not support a conclusion that a potential claimant would be barred from bringing a claim after sixty days" had elapsed following the contractually required mediation. (R. 24-25, 57-58 (Arb. Orders at 24-25).) Moreover, the 60-day provision was not at issue here, as Plaintiffs filed their arbitration demand within the 60-day limit. Nonetheless, the Circuit Court held that the 60-day limitations language "provide[d] further grounds for [its] decision." (*Id.*)

Similarly, while the Arbitration Orders suggest that the arbitration agreement is unconscionable because the Club may unilaterally amend the "Membership Plan and Rules and Regulations," (R. 24, 57 (*Id*. at 24)), that is insufficient to find the *arbitration agreement* unconscionable. "Most courts hold that companies can unilaterally amend any procedural term if the underlying contract includes a change-of-terms clause." David Horton, *The Shadow Terms: Contract Procedure And Unilateral Amendments*, 57 UCLA L. Rev. 605, 649 (2010). Moreover, multiple courts have held that a provision allowing one party the unilateral right to amend a contract does not invalidate an arbitration provision where the right to amend is not contained within, or specific to, the arbitration provision itself. *See Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 (4th Cir. 2005); *Hicks v. Brookdale Senior Living Communities, Inc.*, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018); *see also Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016) (also noting that "the implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable"); *Hall v. UBS Fin. Servs., Inc.*, 435 S.C. 75, 85, 866 S.E.2d 337, 342 (2021) (holding that "[t]here exists in every contract an implied covenant of good faith and fair dealing"). A court may only look to the four corners of the arbitration provision in determining its validity. *Hill*, 412 F.3d at 544. *Accord Noffz v. Austin Maint. & Const., Inc.*, 2016 WL 4385872, at *4 (D.S.C. Jul. 25, 2016). The arbitration agreement insulated changes from affecting the fairness of the process by selecting the AAA Commercial Rules to govern all procedural aspects. *See One Belle Hall*, 418 S.C. at 65, 791 S.E.2d at 294. And there is no evidence to suggest that the

Club has exercised this power to amend the arbitration provision at all, let alone in an oppressive or one-sided manner.

The Arbitration Orders also imply that the arbitration provision may be oppressive or one-sided because "the Club frequently pursues collection of dues and charges from its members outside of arbitration." (R. 22, 55 (Arb. Orders at 22).) But that does not invalidate the arbitration provisions, which do not remove these disputes from the scope of arbitration. Even if they did, "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672 (citing *Munoz*, 343 S.C. at 542, 542 S.E.2d at 365). As the Arbitration Orders acknowledge, "[t]here is no evidence that a property owner ever demanded these collection actions be arbitrated"—let alone evidence that the arbitration provision would not be enforced in the face of such a demand. (R. 22, 55 (Arb. Orders at 22).)

Thus, there is no evidence to support the Circuit Court's conclusion that the arbitration provisions are oppressive or one-sided, or that they have been enforced in an oppressive or one-sided manner. No evidence overcomes the strong presumption of the validity of arbitration agreements. *See Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466. The arbitration agreement is enforceable and should be enforced.

3. Arbitration Is Not Barred by the Agreements' Limitations Period

Although Plaintiffs submitted a demand for arbitration within the contractual 60-day period, and Defendants' counterclaims addressing only the issues Plaintiffs raised were indisputably timely under the AAA Rules, the Circuit Court also held that

Defendants "have waived arbitration of their claims" because they did not assert their *counterclaim* within the 60-day limitation period. (R. 16, 49 (Arb. Orders at 16).) Yet the Circuit Court acknowledged that "the record does not support a conclusion" that the limitations period would bar a potential claimant who brought "a claim after sixty days." (R. 24, 57 (*Id.* at 24).) Moreover, Plaintiffs had already commenced arbitration between the parties by filing their demand for arbitration within 60 days of mediation. Nothing required Defendants to make a like demand where a demand had already been made.

Whether the arbitration was untimely was an issue for the arbitrator, not the Circuit Court. *See* Section B, *supra*. And because "arbitration agreements are liberally construed in favor of arbitrability," *Landers*, 402 S.C. at 108, 739 S.E.2d at 213, any doubt as to whether a claimant would be barred from bringing a claim for arbitration after the 60-day period, or as to whether Plaintiffs' arbitration demand satisfied the 60-day limitation for both parties, must be resolved in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

4. The Community Charter Does Not Invalidate the Arbitration Provisions in the Membership Plan and Membership Agreements

The Community Charter's dispute resolution provision provides that, if the parties are unable to settle a claim at mediation, "[t]he Claimant shall thereafter be entitled to file suit or to initiate administrative proceedings on the Claim, *as appropriate*." The Circuit Court held that this provision conflicted with and thus nullified the arbitration provisions of the Membership Agreements and Membership Plan. (R. 12-14, 45-47 (Arb. Orders at 12-14).) But there is no conflict.

Under fundamental principles of contract interpretation, provisions in related documents should be read so as to give effect to all of their provisions and to be consistent with each other, such that none is rendered meaningless. *See, e.g.*, *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008). That principle has added force in the arbitration context, where arbitration agreements are presumptively valid and enforceable, and arbitration should generally be ordered unless no interpretation of the arbitration clause covers the asserted dispute. *See Landers*, 402 S.C. at 109, 739 S.E.2d at 213; *Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466.

The dispute resolution provisions of the Community Charter and the arbitration provisions of the Membership Plan and Agreements are easily harmonized. The Community Charter provision authorizes (but does not compel) litigation in court "as appropriate." The Membership Plan and Agreements carve out a defined subset of disputes to be resolved by mandatory arbitration. Under the arbitration provisions in the Membership Agreements and Membership Plan, arbitration is the "appropriate" mechanism for resolution of the subset of claims that directly or indirectly arise from, or are directly or indirectly related to those documents. Disputes relating to the Community Charter, but that have nothing to do with the Club, can proceed to court.

CONCLUSION

The Arbitration Orders and Form 4 Order should be reversed and remanded with instructions to enter an order compelling Plaintiffs to arbitrate their claims against Defendants.

Respectfully submitted,

s/Val H. Stieglitz

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July 20, 2023

Attorneys for Appellants/Respondents

APPENDIX 1

Entity	Lot #	Signatory	Date Signed	Evidence of relationship	Exhibit*	Sophistication*
315 Corley CW, LLC	42 then 5556	Roger Courtland & Kaitlyn Williams	3/26/2019 then 1/3/2022	Lot no. in Intent to Transfer; Complaint Para. 1; Affidavit of Gray Ferguson pp. 4-5	B.12; B.15; Ex D	Exs. B.12, B.13, B.14
368 Mount Pelia LLC		Michael & Lynn Addy	2/4/2018	Membership Agreement says they own 368 Mt. Pelia; Affidavit of Gray Ferguson pp. 4-5	B.30	Exs. B.30, B.31
Bridge Charleston Investments C, LLC	5513	Chris Leigh- Jones	10/26/2020	Affidavit of Gray Ferguson pp. 4-5; Membership Agreement signed by Chris Leigh-Jones same address in Complaint (para. 5) for LLC	Ex. D	Exs. B.4, B.6, B.7
Bridge Charleston Investments H, LLC	5527	Chris Leigh- Jones	10/26/2020	Affidavit of Gray Ferguson pp. 4-5; Membership Agreement signed by Chris Leigh-Jones same address in Complaint (para. 7) for LLC	Ex. D	Exs. B.4, B.6, B.7
Live Oak Assets, LLC	5500	Michael and Jennifer McGuire	1/1/2018	Deed for no consideration from McGuire to Live Oak Assets; Affidavit of Gray Ferguson pp. 4-5; Membership Agreement	B.28; Ex. D.	B.29,
MKM 22 West, LLC	5005	Dave & Darby Mingey	2/12/2020	Address in Complaint (para. 14) same as address in Membership Agreement	Ex. D; Ex. B.18	B.18, B.19, B.20
One Rumford Lane, LLC	5044	Douglas & Patricia Locke	7/24/2020	Address in Complaint (para. 15) same as address in Membership Agreement	Ex. D	
Salt Works, LLC	5540	Lynn Ann Casey & Robert O'Keefe	10/18/2019	Address in Complaint (para. 17) same as address in Membership Agreement; Affidavit of Gray Ferguson pp. 4-5	Ex. D; B.21	B.21, B.22, B.23
TTJR, LLC	37	Todd and Beth Kugler	9/27/2020	Deed for no consideration from Kugler to TTJR ; Membership Agreement	B.9; Ex D	B.10, B.11

*B ex. cites are to Defs.' MTC
*D ex. cites are to Defs.' MTD

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Jul 20 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr. , Circuit Court Judge

Appellate Case No. 2022-001587

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, as set forth herein, ...Respondents/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; John Does 1-25, ... Appellants/Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

July 20, 2023

s/Kirsten Small

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