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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Presiding Judge

Appellate Case No. 2024-000369

Ralph Dawkins and Michelle Dawkins,
Marcel Franquelin and Patricia Franquelin,
Michael A. Martin and Adriana S. Iaquinto-Martin,
Louis Glavinos and Kimberly Glavinos,
Daniel J. O'Grady and Kaitlyn E. Grigoleit,
Christopher M. Raybon and LaShonda K. Jones Raybon,
Morris K. White and Rebecca A. White,
Paul A. Banker and April D. Banker,
Patrick K. Daly and Brenda Daly, ... Respondents,

v.

Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes,
Eastwood Construction Partners, LLC f/k/a Eastwood Construction LLC
d/b/a Eastwood Homes, and Eastwood Construction, LLC, ... Appellants.

RECORD ON APPEAL VOLUME I

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
	)	CASE NO. 2021-CP-10-2831
	)	CASE NO. 2021-CP-10-2833
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2837
	)	CASE NO. 2021-CP-10-2838
Michael A. Martin and Adriana S. Iaquinto-	)	CASE NO. 2021-CP-10-2840
Martin, Louis Glavinos and Kimberly Glavinos,	)	CASE NO. 2021-CP-10-2844
Daniel J. O'Grady and Kaitlyn E. Grigoleit,	)	CASE NO. 2021-CP-10-2902
Christopher M. Raybon and LaShonda K.	)	CASE NO. 2021-CP-10-3012
Jones Raybon, Morris K. White and Rebecca A.	)	
White, Paul A. Banker and April D. Banker,	)	
Patrick K. Daly and Brenda Daly,	)	
	)	
Plaintiffs,	)	ORDER
	)	
	)	
v.	)	
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

Presiding Judge:	Mikell R. Scarborough
Court Reporter:	Josie Boehm
Counsel for Plaintiffs:	Ross Appel, Esq.
	Michael Thomas Cooper, Esq.
Counsel for Defendants:	James Edward Bradley, Esq.

BACKGROUND AND PROCEDURAL HISTORY

This matter comes before the Court by way of a Consent Order of Reference issued by the Honorable Jennifer B. McCoy, Ninth Judicial Circuit Judge, dated October 9, 2022 (“Consent Order”). The Consent Order provides that “[t]he parties consent to refer Plaintiffs’ declaratory judgment claims *only* to the Master-In-Equity for Charleston County for Trial.” The Consent Order specified, however, “the other claims and counterclaims in the above actions shall not be referred to the Master-in-Equity, shall be stayed until the final disposition of the declaratory judgment claims, and shall remain under the jurisdiction of the Charleston County Court of Common Pleas.”

The Consent Order follows the Order dated March 11, 2022, issued by the Honorable R. Markley Dennis, Jr., Ninth Judicial Circuit Judge. Judge Dennis’s Order set Plaintiffs’ “first cause of action for Declaratory Judgment ... for trial” (the “Declaratory Judgment Action”). It also deferred Eastwood Homes’ motion for summary judgment to a non-jury evidentiary hearing at which the parties are to present evidence from which the Court can rule on the enforceability of the cancellation and limitation of damages clauses. The Order states, “If the contract language is enforceable as written, Eastwood is entitled to summary judgment on all claims.” It goes on to specify that “[t]he matters to be considered by the judge at this hearing and upon which the parties may present evidence [are] whether the contract is unconscionable or in violation of public policy.” Finally, the Order states, “Once the issue of enforceability of the contract language is resolved, the remaining issues will either be moot or can be tried accordingly.”

The Court is authorized to construe the contract at issue and the language therein via the Declaratory Judgment Action. S.C. Code Ann. § 15-53-40 (“A contract may be construed either before or after there has been a breach thereof”).

The matter was set for a date certain trial on May 24 and 25, 2023. Ross Appel and Michael Thomas Cooper appeared for the Plaintiffs. James Edward Bradley appeared for the Defendants.

Having fully considered the filings of record, the parties' briefs, the evidence and testimony at trial, and the arguments of counsel, the Court issues its findings of fact and conclusions of law. For the reasons set forth below, the Court finds in favor of Plaintiffs and concludes that the final sentence of the first paragraph of Paragraph 25¹ and Paragraph 26 in its entirety are unconscionable and violative of public policy. Because these provisions are unconscionable and violate the public policy of the State, the Court orders these provisions stricken from the contract.

STIPULATIONS AND PRE-TRIAL MATTERS

Prior to the commencement of the trial, the Court received pre-trial briefs from Plaintiffs and Eastwood Homes which the Court accepted in lieu of opening and closing arguments at trial.

Plaintiffs and Eastwood Homes stipulated that Plaintiffs Kaitlyn E. Grigoleit and Patricia Franquelin would testify on behalf of themselves and the other Plaintiffs to the limited matters before the Court. Similarly, the parties stipulated that the Grigoleit and Franquelin purchase agreements and termination documents would be used for the purposes of themselves and all Plaintiffs. These stipulations were made to conserve judicial resources and time as the essential elements of both the purchase agreements and the termination documents at the heart of this dispute are essentially identical.

At trial, Plaintiffs introduced eight (8) documents into evidence with no objection from Eastwood Homes. These exhibits include the following:

1. Phase 4 Plat
2. Eastwood Homes New Home Purchase Agreement (Franquelin)

¹ "In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages."

3. Eastwood Homes New Home Purchase Agreement (O'Grady)
4. Mutual Release and Revocation of Prior Agreement (Franquelin)
5. Mutual Release and Revocation of Prior Agreement (O'Grady)
6. Plaintiffs' Right to Cure Letter
7. Phase 4 Deeds
8. Spreadsheet Depicting Closings in Phase 4

Eastwood Homes did not offer any documents into evidence.

Plaintiffs Kaitlyn E. Grigoleit and Patricia Franquelin testified at trial as did Eastwood Homes' division president Dion Matheny. Eastwood Homes' general counsel, Allen Nason, did not appear in person; however, the parties stipulated that his deposition transcript would be entered into the record, pursuant to Rule 32(a), SCRCF.

FINDINGS OF FACT

Based on the evidence presented, including the exhibits and testimony of the witnesses at trial, the Court makes the following findings of fact:

Eastwood Homes is a regional residential homebuilder. It has been in the business of developing and selling semi-custom homes since 1977. It has operations in Virginia, North Carolina, and South Carolina. Eastwood is the developer and builder of Phase 4 in Swygert's Landing located on Johns Island. The Phase 4 development is at the heart of this dispute.

Plaintiffs are residential homebuyers and consumers. Each Plaintiff signed a contract titled "Eastwood Homes New Home Purchase Agreement" (the "Agreement") in connection with the purchase of lots in Phase 4 and construction of semi-custom homes in Swygert's Landing. The Agreement is a boilerplate, form contract drafted and used by Eastwood Homes for all of the

company's residential home sales, including those in Phase 4 and elsewhere throughout the Southeast.²

After entering the Agreement, Plaintiffs worked closely with Eastwood Homes on designing their homes and those custom specifications are incorporated into each Agreement. Plaintiffs intended to close on their respective homes and relied on the closing date specified in their respective Agreement. Each Plaintiff, in their own way, changed their position in reliance on the closing date set forth in the Agreement. Pursuant to the Agreement, Plaintiffs paid Eastwood Homes a \$5,000.00 "nonrefundable binder/earnest money deposit." Plaintiffs also funded additional monies based on certain design selections and/or upgrades. After signing the Agreements, each Plaintiff took actions in reliance thereon including, but not limited to, selling their homes, changing jobs, and making other significant life decisions, all with the goal towards moving into their new home at Swygert's Landing.

The Court finds, for purposes of this Declaratory Judgment Action, that Plaintiffs fully performed their contractual obligations with Eastwood Homes and that the parties entered into a binding contract.

On Friday, June 4, 2021, Eastwood Homes contacted the Plaintiffs by telephone to inform them of the company's decision to unilaterally terminate each Agreement. Eastwood Homes informed Plaintiffs that they would receive a "Mutual Release" document via e-mail on Monday. Eastwood then emailed the "Mutual Release" document which, according to Eastwood's unilateral decision, cancelled the Agreement with Plaintiffs.

² For purposes of this case, the parties agreed to use a single version of the "Eastwood Homes New Home Purchase Agreement," used in Phase 4, for each Plaintiff and each of the above-captioned, consolidated cases.

Eastwood Homes claims it has the authority, pursuant to Paragraphs 25 and 26 of the Agreement, to unilaterally terminate the contract for any reason in its “sole discretion” and restrict Plaintiffs’ remedy to a refund of their deposit, plus liquidated damages in the amount of \$100. Eastwood contends Plaintiffs are intelligent people that read and signed the Agreement. Plaintiffs maintain the cancellation and limitation on damages provisions in Paragraphs 25 and 26 significantly restrict the rights and remedies available to them as residential homebuyers with whom Eastwood Homes contracts.

Eastwood Homes’ basis for unilaterally terminating these Agreements, that Phase 4 was omitted from the Restrictive Covenants, is disputed by the parties. However, the sole issue for this Court, based on Judge Dennis’ March 11, 2022 Order of Reference, is to decide whether Paragraphs 25 and 26 are enforceable as written and applied by Eastwood Homes. Plaintiffs maintain Paragraphs 25 and 26, when read together, are unconscionable, violative of public policy, and severable from the Agreement.

Paragraphs 25 and 26 read, in full, as follows:

25. Buyer in Default; Seller Remedies: Buyer(s) shall be in default if Buyer(s) fail to make full and timely settlement under the terms and conditions set out in this contract. In the event of default the binder money may be retained by the Seller as liquidated damages and not as a penalty, in which event Buyer and Seller shall be relieved from further liability under this contract. In the alternative, and in Seller's sole discretion, Seller may retain the binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer's breach or default. In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.

Buyer acknowledges and agrees that Seller will utilize Seller's standard construction and contract administration processes and procedures in constructing the property and in otherwise performing this New Home Purchase Agreement, including Seller providing notices by email to Buyer. **The Seller's process may include completion of a prequalification form with a Seller approved lender which Seller will evaluate to confirm Buyer's ability to close on the Property**

Buyer(s) agree that he/she/they shall be in default of this Agreement if Buyer engages in specific acts or a course of dealing which materially disrupts Seller's standard and customary construction and contract administration processes and procedures, which includes the Buyer, without limitation: failing to make choices or take other actions required of Buyer within indicated time frames; refusing to work with designated Seller representatives to accomplish certain aspects of the Agreement interfering with Seller and Seller's agents performance of the Agreement, engaging in an abusive, harassing, threatening or in an otherwise offensive manner towards Seller and/or Seller's agents, unreasonably withholding acceptance or approval of work which complies with plans and specifications, or any other acts which have the affect of delaying construction, increasing Seller's cost of performance or otherwise unreasonably impeding Seller's performance.

26. Seller Option to Cancel Prior to Closing: If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing. If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer's damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.

(Bold, Underlined, and Italicized Text in Original).

Plaintiffs and Eastwood Homes offer conflicting interpretations regarding the meaning of Paragraph 26. Particularly, the parties dispute the meaning of the first sentence:

"If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment, prior to closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction the Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing."

Plaintiffs view this language as requiring, at a minimum, a genuine ("bona fide") disagreement ("dispute") between the parties ("between the Buyer and Seller") over a material term of the contract that cannot be resolved with the buyer, despite Eastwood Homes' efforts. Eastwood Homes, on the other hand, interprets this language – and Paragraph 26 generally – as a termination-at-will clause wherein Eastwood has the exclusive, unfettered power to define the

“dispute” and the exclusive, unfettered power to “terminate this Agreement” for any reason it wants or for no reason at all.

Eastwood Homes’ general counsel Allen Nason drafted the Agreement. As Eastwood’s Rule 30(b)(6), SCRCP representative, Mr. Nason testified that a “bona fide dispute,” which is not a defined term in the Agreement, does not mean its common and normal meaning as a “disagreement.” Mr. Nason testified, “[t]here can be a dispute without a disagreement.” (Nason Dep. 80:21-22). Mr. Nason informed Plaintiffs, through their counsel, “[y]our opinion is irrelevant because it’s the seller’s sole judgment, so I don’t really care what your opinion is. It’s only my opinion that matters, period.” (Nason Dep. 114:21-24). Mr. Nason stated that Eastwood’s position is that the company has the ability to define this terms however it likes, regardless of the reasonableness of such definition or interpretation.

At trial, Eastwood Homes division president Dion Matheney testified that, under Paragraph 26, Eastwood Homes could unilaterally terminate the Agreement for any reason it wants. Mr. Matheney testified that Eastwood Homes could unilaterally terminate the Agreement even if it simply wanted a higher sales price or if material costs increased after entering the Agreement. Mr. Matheney also confirmed that the Agreement was a take-it-or-leave-it proposition and that Eastwood Homes would not change or negotiate on any of the terms of the Agreement when contracting with a residential home buyer, including Plaintiffs.

Eastwood Homes ultimately sent Plaintiffs a virtually identical³ document titled “Mutual Release and Revocation of a Prior Agreement to Purchase Real Estate and Right of First Offer” (the “Mutual Release”). The Mutual Release states, as follows:

³ As with the Agreement, the parties have agreed to use a single version of the Mutual Release for each Plaintiff and each of the above-captioned, consolidated cases.

Phase 4 of Swygert's Landing was erroneously left out of the Swygert's Phases 1, 2 and 3 Declaration of Covenants, Conditions and Restrictions by preceding Owner's legal error. No further houses can be closed in Phase 4 until this cloud on title is resolved with the attorneys for the Phases 1, 2 and 3 Declaration, and the existing homeowners in Phase 4. Moreover, lenders require a lender certification at closing which requires disclosure of any homeowner's association issues, which lender requirement cannot be satisfied at this time. Seller has agreed to contact Buyer after the legal issues have been resolved, which will take 4 months or more to legally resolve. Seller cannot cure this issue within the time period of the Contract.

None of the Plaintiffs signed and returned Eastwood Homes' proposed Mutual Release.

Subsequently, Eastwood Homes sent each of the Plaintiffs a purported earnest money refund and a "liquidated damages" check in the amount of one hundred (\$100.00) dollars. None of the Plaintiffs deposited these checks. Thereafter, Eastwood Homes cancelled all design meetings, walkthroughs, and otherwise completely frustrated Plaintiffs' ability to move forward with the purchase of their homes.

On June 10, 2021, the Plaintiffs' counsel sent a letter to Eastwood Homes objecting to the termination of the Agreements and providing Eastwood Homes a right to cure pursuant to Paragraph 18 of the Contract. Eastwood Homes never responded to Plaintiffs' letter. Eastwood Homes has repeatedly refused to commit to honoring the contractually agreed upon purchase price if Plaintiffs were to agree to the proposed "option" to re-contract at a later date. Plaintiffs have continually insisted that Eastwood Homes is bound to honor the original agreed-upon price and to close on their respective homes pursuant to their contractual Agreement.

While not before this Court at this time, Plaintiffs' Complaint disputes the alleged "legal error" prevented and/or prohibited Eastwood Homes from fulfilling its obligation to close under the Agreement. Prior to Eastwood Homes' unilateral termination, the company closed the sale of fourteen (14) separate lots and homes in Phase 4 of Swygert's Landing. Despite the existence of the same "legal error" as Plaintiffs, Eastwood Homes closed the following properties:

OWNER	STREET ADDRESS	DEED	SALE \$	RECORDED
SUPPIN MATTHEW T	2879 Claybrook Street	0982-783	\$537,415.00	20-Apr-21
AYERS MATTHEW D	2885 Claybrook Street	0987-440	\$593,225.00	5-May-21
NELSON GRANT MYRON	1144 Tebalt Drive	0925-739	\$520,755.00	15-Oct-20
ALLIO JOSEPH C	1138 Tebalt Drive	0922-203	\$595,000.00	5-Oct-20
STEWART WILLIAM	1101 Tebalt Drive	0950-914	\$565,525.00	14-Jan-21
WOLPERT DEREK A	2932 Sarnoff Street	0952-340	\$569,200.00	20-Jan-21
ELLER MICHAEL B	2908 Sarnoff Street	0901-690	\$544,300.00	31-Jul-20
SOSA-OLIVER WILLIAM R	2892 Claybrook Street	0921-400	\$599,180.00	2-Oct-20
BRINKER KRISTYN WALKER	2937 Sarnoff Street	0990-813	\$590,280.00	14-May-21
AULTMAN JASON P	2923 Sarnoff Street	0928-223	\$509,610.00	23-Apr-21
STEVENS SAMMY CECIL	2919 Sarnoff Street	0921-787	\$548,860.00	23-Apr-21
KREAMER KARRIE L	1105 Glasson Street	0901-439	\$566,720.00	31-Jul-20
KING EUGENE	2905 Sarnoff Street	0911-159	\$559,175.00	31-Aug-20
MOODY MILLARD G	2880 Claybrook Street	0888-446	\$637,970.00	9-Jun-20

Two (2) of these lots subsequently re-sold for a substantial profit. Specifically, 1105 Glasson Street sold on June 29, 2022 for \$975,000.00 and 2892 Claybrook Street sold on September 15, 2022 for \$960,000.00. The deeds evidencing these Phase 4 conveyances were introduced into evidence at trial without objection from Eastwood Homes. Plaintiff Exhibit 7.

ISSUES BEFORE THE COURT

Determining the Plaintiffs' declaratory judgment against Eastwood Homes requires the Court to first determine the following issues:

1. Whether the language in Paragraph 26 allowing Eastwood Homes to unilaterally terminate upon a "bona fide dispute ... between the Buyer and Seller, in Seller's sole judgment" is unconscionable and violates public policy.
2. Whether the language limiting Plaintiffs' remedies in Paragraph 25 is unconscionable and violative of public policy.
3. Whether the Court may sever the language deemed unconscionable and violative of public policy from the Agreement.

ANALYSIS AND CONCLUSIONS OF LAW

- 1. Paragraph 26 contains a latent ambiguity and this Court may consider extrinsic evidence to ascertain its meaning.**

As a threshold issue, the Court must review the contract to determine whether the plain language of the agreement is clear and unambiguous. Where an agreement is clear on its face and unambiguous, "the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles v. Miles*, 711 S.E.2d 880, 883 (2011). On the other hand, an agreement is ambiguous if "it is susceptible to more than one interpretation or its meaning is unclear." *Smith-Cooper v. Cooper*, 543 S.E.2d 271, 274 (Ct. App. 2001). Whether a contract is ambiguous is a question of law. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 550 S.E.2d 299, 303 (2001).

The Court may consider extrinsic evidence to determine whether a latent ambiguity exists and to construe a contract with such latent ambiguity. *Smith v. Cox*, 191 S.E. 422, 425-26 (1937) (finding parol testimony may be received in construing instrument with latent ambiguity); *Polson v. Craig*, 570 S.E.2d 190, 192 n. 2 (Ct. App. 2002) (noting extrinsic evidence is admissible when there is a latent ambiguity); *Bob Jones Univ. v. Strandell*, 543 S.E.2d 251, 254 (Ct. App. 2001) (“A court may admit extrinsic evidence to determine whether a latent ambiguity exists.”). A latent ambiguity exists when “there is no defect arising on the face of the instrument but arising when attempting to apply the words of the instrument to the object or subject described.” *Smith v. Cox*, 191 S.E. at 425-26. Interpretation of a policy with a latent ambiguity is for the finder of fact. *Wheeler v. Globe & Rutgers Fire Ins. Co.*, 118 S.E. 609, 612 (1923). Where a contract is ambiguous, the Court must determine the true intentions of the parties in light of the “subject matter, the relations of the parties to each other, and the circumstances surrounding the parties when they entered into the agreement.” *Langston v. Niles*, 219 S.E.2d 829, 833 (1975); *Garrett v. Pilot Life Ins. Co.*, 128 S.E.2d 171 (1962). “A court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.” *Duncan v. Little*, 384 S.C. 420, 426, 682 S.E.2d 788, 790 (2009).

Paragraph 26’s cancellation language relied upon by Eastwood to terminate the Agreement states, “If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller’s sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing.” Accordingly, the Court must review how “in Seller’s sole judgment” modifies the cancellation provision because it is set off in commas and “bona fide dispute” is not a defined term in the Agreement. Does “sole judgment” modify whether a dispute exists? Does

“sole judgment” modify how a “bona fide dispute” should be defined? Does “sole judgment” modify some aspect of the following section regarding “mutual satisfaction?”

The Court finds this provision contains latent ambiguities. In one part it appears there must be a “bona fide dispute,” but in another it appears that Eastwood Homes has the sole ability to determine if there is a “bona fide dispute” and how “dispute” should be defined. Applying this contract language, the “bona fide dispute” may not be bona fide at all. The ambiguity is highlighted by the “sole option” to terminate the Agreement. On the one hand, the provision appears to provide mutuality to the dispute resolution process by using the term “mutual satisfaction.” However, only Eastwood Homes as the Seller has authority to terminate the Agreement. The Buyer has no authority to terminate if Buyer is not satisfied. I find the terms of the Agreement, in reality, lack **any** mutuality. (Emphasis added).

There is an internal inconsistency created by the use of “bona fide dispute” on the one hand and the ability of Seller to exercise its “sole judgment” as to whether a dispute exists or how the term should be defined. In *Isle of Palms Pest Control v. Monticello Ins. Co.*, construing an insurance contract, the Court of Appeals stated, “The internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured renders the policy ambiguous” *Isle of Palms Pest Control v. Monticello Ins. Co.*, 319 S.C. 12, 18-19, 459 S.E.2d 318 (Ct. App. 1994). Like the insurance contract in *Isle of Palms*, the internal inconsistency within the cancellation provision in the Agreement renders it ambiguous.

At trial, there was conflicting testimony about the interpretation of Paragraph 26. Plaintiffs testified the language “bona fide dispute ... between the Buyer and Seller, in Seller’s sole judgment” to require, at a minimum, a genuine disagreement between buyer and seller over a material term of the contract that cannot be resolved despite Eastwood Homes’ efforts. Conversely,

Eastwood Homes' general counsel and the division president testified that Paragraph 26 is, essentially, a termination-at-will clause providing exclusive unfettered authority for Defendant to terminate the contract and leave Plaintiffs with no right to challenge Eastwood Homes' decision under any circumstance.

Allen Nason, Eastwood Homes' general counsel, drafted the Agreement. His view is that "in Seller's sole judgment" modifies "a bona fide dispute" and thereby gives Eastwood the authority to define "dispute" and state whether a dispute exists.

Eastwood Homes division president Dion Matheney testified that under Paragraph 26, Eastwood Homes could unilaterally terminate the Agreement for any reason it wants, including if Defendant wanted a higher price from Plaintiffs or if costs increased during performance of the contract. Mr. Matheney also testified that Eastwood Homes could cancel the contract at any time before closing, including the moment the parties are walking into the closing attorney's office. However, he testified that Plaintiffs could not walk away from the contract without suffering consequences.

Plaintiffs aver they had no reason to believe Paragraph 26 would be read and applied by Eastwood Homes as a termination-at-will provision at the time the contracts were executed. Plaintiffs read the use of "bona fide dispute" and "mutual satisfaction" to place limits on Eastwood's authority to unilaterally terminate the contract and impose mutuality to the dispute resolution process. Plaintiffs contend the ability of Eastwood Homes to unilaterally terminate the agreement in its sole discretion was disguised in the wording of the Agreement. It is easy to see how Plaintiffs' reading of this language induced their acquiescence. In reality, it was cold comfort. Eastwood did not interpret its contract to impose any limitation on its ability to terminate and, in fact, did not apply any mutuality to the cancellation process in this case. (Emphasis added).

Given the wording of Paragraph 26 and the different reasonable interpretations by the parties, the Court concludes it may consider extrinsic evidence to interpret the parties' true meaning. Accordingly, the Court may look to the testimony of Defendant's general counsel that drafted the Agreement and the division president that administered the Phase 4 contracts. In light of Eastwood Homes' own interpretation and application of the cancellation provision, the Court finds this provision to be unconscionable and violative of public policy because such interpretation would allow the residential home builder and developer to unilaterally cancel the New Home Purchase Agreement at any time before closing and without consequence and without any ability for Buyers to do the same. Eastwood's interpretation and application of the cancellation provision is one-sided and lacks any mutuality in its application. It essentially means that the Seller is not bound by any contractual terms, while the Buyer must comply with all contractual terms.

2. Paragraph 26, as written, interpreted, and applied by Eastwood Homes, is unconscionable and violates public policy.

Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate contracts or portions of contracts. *See Dr. 's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). In this instance, Plaintiffs allege the cancellation provision and the damages limitation provision are both unconscionable. "At its core, unconscionability is defined 'as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.'" *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (S.C. 2022) (quoting *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 472 S.E.2d 242, 245 (1996)); 17A Am. Jur. 2d *Contracts* § 272 (2016) (characterizing these two prongs as procedural and substantive unconscionability, respectively); *see also id.* § 271 ("Generally, the doctrine of unconscionability protects against

unfair bargains and unfair bargaining practices”). “This general description of unconscionability applies to all contract terms, not merely arbitration provisions.” *Id.* “A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case.” *Id.* When determining whether a purchase agreement between a builder and a residential home purchaser was unconscionable, the Supreme Court “emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.” *Id.* “While we analyze both prongs [of unconscionability], they invite similar proof and often overlap, and if more of one is present, then less of the other is required.” *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020) (internal quotations omitted).

The Supreme Court of South Carolina recently decided a landmark case expounding upon the doctrine of unconscionability in the residential home purchase agreement context. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 597, 879 S.E.2d 746 (2022). This case clarifies and proclaims South Carolina’s unconscionability analysis applied to this special type of “consumer transaction.” *Id.* at 621, 879 S.E.2d at 760. The Court observed, “South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.”. *Id.* As set forth below, *Damico* represents and recognizes “South Carolina[’s] ... extensive history of expanding its common law on contracts so as to protect new homebuyers... .” *Id.* at 624, 879 S.E.2d at 761. Since *Damico*, our appellate courts have expressed severe skepticism regarding oppressive, boilerplate terms in consumer residential home purchase agreements. See *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2023) (severing the “limitation of claims” provision within the arbitration clause because it was “one-sided and oppressive”).

a. Procedural Unconscionability

“The touchstone of the analysis begins with the presence or absence of meaningful choice.” *Damico v. Lennar Carolinas, LLC*, Id. at 612, 879 S.E.2d 746, 755 (2022). “Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process.” *Id.* (citation omitted). “Thus, in determining whether an absence of meaningful choice taints a contract term . . . courts must consider, among all facts and circumstances, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant.” *Id.* at 613, 879 S.E.2d at 755-56 (citations omitted).

An adhesion contract is “a take-it-or-leave-it contract and is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice.” 17A Am. Jur. 2d Contracts § 274; 17 C.J.S. Contracts § 9 & n.9 (2020). However, given that one party to an adhesion contract “has virtually no voice in the formulation of the terms and language” used in the contract, *Lackey*, 498 S.E.2d at 901, courts tend to view adhesive arbitration agreements with “considerable skepticism,” as it remains doubtful “any true agreement ever existed.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669.

Applying the procedural unconscionability test, our Supreme Court held:

[T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions. These factors combine to highlight the significant disparity in the parties’ bargaining power, with Lennar enjoying a much stronger bargaining position than Petitioners. We therefore find Petitioners lacked a meaningful choice in their ability to negotiate the arbitration agreement. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989) (“We have [] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.”).

Damico v. Lennar Carolinas, LLC, 879 S.E.2d 746, 756-57 (2022).

The touchstone of procedural unconscionability is the absence of meaningful choice and this Court finds it to be entirely lacking here from Plaintiffs' perspective. Eastwood Homes, like Lennar, is a sophisticated regional homebuilder with far more sophistication, experience, resources, and bargaining power when compared to Plaintiffs who are consumers and residential homebuyers. While Plaintiffs are educated, can read and write, and are successful in their personal and professional endeavors – at the end of the day, they are consumers in this transaction with a significant bargaining disadvantage. These residential home buyers are “not a substantial business concern to [Eastwood Homes] such that they possessed more bargaining power than any other average homebuyer would.” *Huskins v. Mungo Homes*, supra.

The facts that existed at the time the parties entered into the contract, the Court's focus here, establishes that the Agreement is a standardized form contract with uniform terms presented on a “take it or leave it” basis. The Agreement is an adhesion contract. The only features differentiating each of the Plaintiffs' contracts are the “blanks” contained therein where each buyers' names, property address, price, *etc.* were included. Plaintiffs had no opportunity whatsoever to negotiate the terms of the Agreement, including Paragraphs 25 and 26. Eastwood Homes' division president Dion Maheney testified that if Plaintiffs didn't execute the Agreement they could not do business with Eastwood Homes. He further testified that Plaintiffs could not utilize a purchase agreement of their own choosing and proposed redline alterations would not be considered by Eastwood. The Plaintiffs testified that, when they tried to request changes be made to the contract, they were informed that Eastwood would not consider any proposed changes to the Form Contract.

In light of the testimony of all witnesses and consideration of the evidence presented, the Court concludes procedural unconscionability has been established by Plaintiffs.

b. Substantive Unconscionability

The Court's analysis does not end at the finding of procedural unconscionability. At its core, unconscionability is defined 'as the absence of meaningful choice on the part of one party due to one-sided contract provisions, **together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.**'” *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 754 (2022) (emphasis added).

In *Damico*, the following clause was ruled unconscionable by the Supreme Court: “[Lennar] may, at its sole election, include [Lennar] contractors, subcontractors and insurer as parties in the mediation and arbitration” and “that mediation and arbitration will be limited to the parties specified herein.” *Id.* at 615, 879 S.E.2d at 757 (emphasis in original). The Court observed that “[g]iving Lennar the ‘sole election’ to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle.” *Id.* (citing 17A Am. Jur. 2d Contracts § 272 (“Mutuality is a paramount consideration when assessing the substantive unconscionability of a contract term.”)). The Court concluded that “[t]his creation of a procedural defense to liability for Lennar is wholly unreasonable and oppressive to Petitioners.” *Id.* at 616-17, 879 S.E.2d at 757-58.

Paragraph 26 as drafted, interpreted, and applied by Eastwood Homes allows the company to unilaterally terminate the Agreement for any reason it wants at its sole election. Eastwood has drafted and applied Paragraph 26 to ensure a procedural victory in their favor by contracting their authority to decide, in their “sole judgment,” whether a dispute with the Plaintiffs exists at all.

The Court finds Paragraph 26 is substantively unconscionable for the same reason the Court struck down Lennar's “sole election” language in *Damico*. Paragraph 26 lacks any mutuality

between the parties. Given “South Carolina[’s] ... deeply-rooted and long-standing policy of protecting new home buyers,” *id.* at 621, 879 S.E.2d at 760, granting the seller such unchecked, powerful, and unilateral authority to disregard the Contract is one-sided, oppressive, unreasonable, and unconscionable. Plaintiffs have no corresponding ability to terminate the Contract for any reason they want. The Agreement says, “if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing.” The residential home buyer has no authority to cancel the Agreement. In reality, there is no mutual satisfaction requirement. It is only the satisfaction of the Seller Eastwood that matters. If Eastwood is not satisfied for whatever reason, regardless of how petty or unreasonable, Eastwood has the sole power to walk away from the Agreement.

The Court acknowledges Eastwood Homes’ testimony that they did not terminate the Agreements for any improper purpose or motivation. However, Eastwood Homes’ basis for termination is not before the Court. Since the Court’s review is limited to whether Paragraph 26 is enforceable as written, the Court may only look to the facts that existed at the time of contract formation. This includes how the Agreement is drafted and how it is interpreted by Eastwood Homes.

Paragraph 26 is so one-sided and oppressive that it makes the Agreement unilateral and not mutual. According to Eastwood Homes, the company has the authority to decide, up to the time of closing, whether or not it wants to fulfill its end of the bargain with its residential home buyers. Eastwood Homes’ ability to back out at any time and for any reason whatsoever, including the desire for a higher price, makes the Agreement uniquely one-sided, oppressive, unreasonable, and unconscionable. No reasonable homebuyer would agree to, and no fair and honest person would

accept, such a unilateral and unfettered termination-at-will provision in the context of residential home sales.

The Court also considers “whether there is an element of surprise in the inclusion of the challenged clause and the conspicuousness of the clause.” *Doe v. TCSC, LLC*, 846 S.E.2d 874, 430 S.C. 602, 612 (Ct. App. 2020). It is clear Plaintiffs did not realize or believe they were agreeing to a termination at-will provision on Eastwood’s behalf. They argue they were lulled into a false sense of security by the “bona fide dispute” language. Plaintiffs could not have reasonably known that Eastwood Homes would disregard the “bona fide dispute” language in favor of the expansive and unreasonable interpretation of “in Seller’s sole discretion” as applied in this case. Plaintiffs testified that they did not realize they were agreeing to Eastwood Homes’ cloaked termination-at-will clause, because it is neither clear nor conspicuous based on the language of the Agreement. But that is precisely how Eastwood Homes drafted, interpreted, and applied Paragraph 26 in this case. No reasonable, honest, or fair person would accept such terms that allow the party with superior bargaining power to terminate the agreement at-will and without meaningful consequence.

c. Paragraph 26 violates public policy.

South Carolina courts “will not enforce contracts that violate public policy.” *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 760 (2022) (citing *Carolina Care Plan, Inc.*, 606 S.E.2d at 758). A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. 17A Am. Jur. 2d Contracts § 238 (Supp. 2021) (citation omitted).

Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 601 S.E.2d 342, 345 (2004); see also 17A Am. Jur. 2d Contracts § 238 (2016) (explaining courts may consider, inter alia, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

As previously discussed, “South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.” *Damico v. Lennar Carolinas, LLC* Id. at 621, 879 S.E.2d at 760. If the Court interprets and enforces Paragraph 26 as Eastwood Homes contends, this will enable sophisticated homebuilders like Eastwood Homes to contract away, through adhesion contracts, all consumer protections. Essentially, if Eastwood Homes can terminate its Contract any time prior to closing for any reason in its “sole judgment” with the only consequence being a refund of Plaintiffs’ deposit and liquidated damages of \$100.00, this renders the Agreement illusory and provides no consequence to Eastwood Homes for acting in a manner extremely prejudicial to Plaintiffs and other homebuyers. This illustrates the purpose for the Court’s authority to enable it to determine unconscionability as a matter of public policy.

South Carolina recognizes the illusory coverage doctrine in both the employment and insurance contexts – both areas of the economy populated by boilerplate contracts and massively unequal bargaining power. *Small v. Springs Indus., Inc.*, 357 S.E.2d 452 (1987); *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318, 321 (Ct. App. 1994) (recognizing the illusory coverage doctrine to protect insureds where the terms of the policy exclude from coverage “the very risk contemplated by the parties,” rendering a policy provision “virtually meaningless.”).

The Court finds Paragraph 26 violative of public policy: 1) due to South Carolina’s strong policy of protecting home buyers and 2) the fact that Paragraph 26, as interpreted and applied by

Eastwood Homes, renders the Agreement fundamentally illusory, one-sided, and oppressive beyond basic notions of good faith and fair dealing.

3. The one-sided limitations on Plaintiffs' remedies, contained in Paragraphs 25 and 26, are unconscionable and violate public policy.

Plaintiffs also challenge the limitation on damages provisions set forth within the Agreement. The relevant damages limitation language in Paragraph 26 states:

“[i]f Seller terminates this Agreement, Seller shall return buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00 as a liquidated damages in the event the Seller cancellation constitutes a default under this agreement Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.”

Even though titled “Buyer in Default; Seller Remedies,” Paragraph 25 also limits Plaintiff's damages: “[i]n the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.” The limitation on damages requires Plaintiffs to waive common law rights as well as statutory rights to damages and remedies, including treble damages awardable under the South Carolina Unfair Trade Practices Act. The Court finds these terms unreasonable and oppressive because they eliminate any meaningful consequence for Eastwood Homes' unilateral decision to breach or terminate the Agreement at any time before closing and for any reason it wants.

The limitation on damages is one-sided, however, and only applies to Eastwood Homes' default or breach of the Agreement. Eastwood Homes did not correspondingly limit its remedies against Plaintiffs. The operative portion of Paragraph 25 provides:

Buyer(s) shall be in default if Buyer(s) fail to make full and timely settlement under the terms and conditions set out in this contract. In the event of default the binder money may be retained by the Seller as liquidated damages and not as a penalty, in which event Buyer and Seller shall be relieved from further liability under this contract. In the alternative, and in Seller's sole discretion, Seller may retain the

binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer's breach or default.

Each Plaintiff paid a \$5,000.00 “nonrefundable binder/earnest money deposit” plus additional deposits for certain selections. Allowing Eastwood Homes to keep these funds in the event of Plaintiffs’ default while providing Plaintiffs with a mere \$100.00 in the event of Eastwood Homes’ default is both one-sided and oppressive. Eliminating Plaintiffs’ legal remedies in the event of Eastwood’s default, while providing Eastwood with the full array of “legal and/or equitable remedies,” in addition to the surrender of all earnest money is one-side and oppressive.

The Court finds the limitations on damages provisions found in Paragraphs 25 and 26 unconscionable and unenforceable.

4. The Court may sever the language deemed unconscionable or violative of public policy.

The next issue before the Court, having found these provisions of the Agreement to be unconscionable, is whether they can be severed from the contract. “If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result.”

Damico v. Lennar Carolinas, LLC, 879 S.E.2d 746, 758 (2022)

S.C. Code Ann. 36-2-302(1) of the UCC applies in the home purchase agreement context.

Id. at 758; *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016); *Huskins v. Mungo Homes, LLC*, *supra*. Section 36-2-302(1) provides:

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 refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

S.C. Code Ann. 36-2-302(1).

Unlike Lennar's contract at issue in *Damico*, the Agreement in this matter lacks a severability clause. Therefore, this Court relies on the aforementioned authorities mentioned in *Damico*, including Section 36-2-302(1), to limit the unconscionable application of Paragraphs 25 and 26 while preserving the fundamental meeting of the minds between the parties encompassed in the Contract. Specifically, the agreement to sell a semi-custom home and lot for a set price is otherwise preserved as the mutual intent of the contracting parties.

The Court finds it reasonable and appropriate to sever the unconscionable and violative public policy language of Paragraphs 25 and 26. Severing the offending provisions is fundamentally fair under these circumstances as it is necessary to ensure Plaintiffs' benefit of the bargain does not become a casualty of Eastwood Homes' oppressive and one-sided business practices. Severing these provisions works to put the parties on an equal footing.

CONCLUSION

Accordingly, the Court concludes as a matter of law that Paragraph 26 in its entirety, is unconscionable, violative of public policy, unenforceable, and shall be severed from the Agreement. In addition, the Court concludes the final sentence of the first paragraph of Paragraph 25, which states, "In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages" shall be severed from the Agreement as this provision limiting Plaintiffs' available remedies, is unconscionable, violative of public policy, and unenforceable. This severed language does not render the entire Agreement unenforceable. The other terms of the Agreement not specifically mentioned herein shall remain in full force and effect.

This concludes the matter before this Court, pursuant to the terms of the Consent Order of Reference, and the remaining action shall return to the Court of Common Pleas for further adjudication.

IT IS THEREFORE ORDERED that this matter is hereby remanded to the Circuit Court.

IT IS SO ORDERED!

Mikell R. Scarborough
Master-In-Equity for Charleston County



Charleston Common Pleas

Case Caption: Ralph Dawkins , plaintiff, et al VS Eastwood Homes Of Columbia Llc , defendant, et al

Case Number: 2021CP1002829

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
	)	CASE NO. 2021-CP-10-2831
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2833
Michael A. Martin and Adriana S. Iaquinto-	)	
Martin,	)	CASE NO. 2021-CP-10-2837
Louis Glavinos and Kimberly Glavinos,	)	CASE NO. 2021-CP-10-2838
Daniel J. O'Grady and Kaitlyn E. Grigoleit,	)	CASE NO. 2021-CP-10-2840
Christopher M. Raybon and LaShonda K.	)	
Jones Raybon,	)	CASE NO. 2021-CP-10-2844
Morris K. White and Rebecca A. White,	)	CASE NO. 2021-CP-10-2902
Paul A. Banker and April D. Banker,	)	CASE NO. 2021-CP-10-3012
Patrick K. Daly and Brenda Daly,	)	
	)	
Plaintiffs,	)	
	)	CONSENT ORDER OF REFERENCE
v.	)	(Declaratory Judgment Claims Only)
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction, LLC	)	
d/b/a Eastwood Homes; Eastwood Construction,	)	
LLC,	)	
	)	
Defendants.	)	

It is stipulated, consented, and agreed by the above-named Plaintiffs in this consolidated matter ("Plaintiffs") and the above-named Defendants ("Defendants"), by and through their respective undersigned counsel, that certain claims in this matter are appropriate to be referred to the Honorable Mikell R. Scarborough, as Master-in-Equity for Charleston County, South Carolina, in accordance with Rule 53 of the SCRCF.

On March 11, 2022, Judge Dennis entered an Order in the above cases denying the parties' respective dispositive motions and consolidating these cases for discovery and all pretrial matters.

The Order further directed that Plaintiffs' "first cause of action for Declaratory Judgment should be set for trial."

The Parties consent to refer Plaintiffs' declaratory judgment claims *only* to the Master-in-Equity for Charleston County for trial. The Parties shall cooperate and coordinate with the Master-in-Equity to establish discovery, briefing, trial, and other appropriate deadlines.

IT IS ORDERED that these cases Plaintiffs' declaratory judgment claims *only* be referred to the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, who, pursuant to Rule 53(b) of the SCRCF, shall exercise all power and authority which a circuit court judge sitting without a jury would have, with any appeal from the final judgment being to the Supreme Court or the Court of Appeals as provided by the SCACR. The other claims and counterclaims in the above actions shall not be referred to the Master-in-Equity, shall be stayed until the final disposition of the declaratory judgment claims, and shall remain under the jurisdiction of the Charleston County Court of Common Pleas.

The Reference Fee shall be paid to the Office of the Master-in-Equity for Charleston County within 30 days of the date of this Order or the Master will dismiss the case for non-payment of the Reference Fee without further notice. The Parties agree to split the Master-in-Equity fees equally.

AND IT IS SO ORDERED.

Clerk of Court or Circuit Court Judge
Charleston County

_____, 2022

[SIGNATURES APPEAR ON NEXT PAGE]

WE SO MOVE AND CONSENT:

McCULLOUGH ▪ KHAN ▪ APPEL

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Charleston Common Pleas

Case Caption: Ralph Dawkins , plaintiff, et al VS Eastwood Homes Of Columbia
Llc , defendant, et al
Case Number: 2021CP1002829
Type: Order/Referred to Master or Special Referee

So Ordered

s/Jennifer B. McCoy #2764

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2831
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Paul A. Banker and April D. Banker,	)	
Patrick K. Daly and Brenda Daly,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	ORDER
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants	)	

I. INTRODUCTION

This matter came before the Court on Wednesday, February 2, 2022. Ross Appel appeared on behalf of the Plaintiffs. S. Jahue Moore and James Edward Bradley appeared on behalf of Eastwood. There are three motions pending as follows:

1. Eastwood's motion to consolidate;
2. Eastwood's motion for summary judgment; and
3. The Plaintiffs' motion to dismiss counterclaims.

After review of the materials presented, the Court rules as follows:

1. The motion to consolidate is granted.

2. Eastwood's motion for summary judgment is deferred to a non-jury evidentiary hearing at which the parties are to present evidence from which the Court can rule on the enforceability of the contract language in accordance with this order.
3. The Plaintiffs' motion to dismiss counterclaims is denied as premature.

II. BACKGROUND

These cases arise out of a housing development. The Plaintiffs are prospective purchasers of homes, and Eastwood is a homebuilder. The parties entered similar contracts calling for Eastwood to build and sell homes to the Plaintiffs under certain terms. These contracts are part of the pleadings as they are attached to the complaints and admitted to be copies of the contracts entered between the parties.

Each contract contains language which purports to give Eastwood the right to terminate the contracts before closing. This language is found in Paragraphs 25 and 26 of the contracts.

Paragraph 25 contains the following language:

In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.

Paragraph 26 contains the following language:

26. Seller Option to Cancel Prior to Closing: If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing. If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer's damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.

Eastwood submitted the affidavit of Dion Matheney in support of its motion for summary judgment. This affidavit indicates that the restrictive covenants for the neighborhood were not recorded as they should have been. As a result, Eastwood could not annex homes into the preexisting community which contains common areas, a community pool and other amenities. These amenities were represented as part of the sale of the homes.

Eastwood cancelled the contracts and sent the Plaintiffs' deposits back with \$100 in liquidated damages as indicated by the contracts.

The Plaintiffs then brought these lawsuits alleging the following causes of action:

1. Declaratory Judgment;
2. Specific Performance of Contract;
3. Breach of Contract;
4. Violation of the South Carolina Unfair Practices Act; and
5. Breach of Contract Accompanied by a Fraudulent Act.

Eastwood has moved to consolidate these cases and for summary judgment. The Plaintiffs have moved to dismiss Eastwood's counterclaims.

III. CONSOLIDATION

Circuit courts have the power to consolidate cases in the interest of justice and judicial economy. "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action [, and] it may order all the actions consolidated" Rule 42(a) SCRPC. These actions concern the same housing development, the plaintiffs all signed similar contracts with Eastwood, and the plaintiffs are all represented by the same counsel. The interpretation of the contract language is a threshold issue

in each case. Thus, the Court finds these actions contain common questions of law and fact and consolidates them.

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Eastwood's motion for summary judgment relies upon the language of the contract. The exculpatory clauses allow Eastwood to cancel the contract before closing and limit damages against Eastwood for cancelling the contract. The Plaintiffs contend that this language is unconscionable and that it is in violation of public policy. As a result, they argue this language should not be enforced by the Court.

The contract language and its enforceability are important threshold issues. Courts generally must enforce contracts according to their terms. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). If contract language is capable of only one reasonable interpretation, no construction is required, and the contract terms determine the outcome. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). Thus, when an agreement is capable of legal interpretation, the court interprets its meaning as found in the agreement, and gives effect to it. *Ellie, Inc. v. Miccichi*, 358 S.C.78, 93, 594 S.E.2d 485, 493 (Ct.App.2004) (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct.App.2001)). The construction of a contract is a question of law for the court. *S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001).

If the contract language is enforceable as written, Eastwood is entitled to summary judgment on all claims. The language in the contract is not disputed nor is the fact that the parties signed the contracts. By their terms, the contracts allow Eastwood to send written termination notice, return the Buyers' deposits and tender \$100.00 as liquidated damages prior to closing. *See*, Paragraph 26 of contract. There is no dispute that Eastwood has done so.

The contracts limit damages in several places. Paragraph 25 allows the Buyer to receive all deposits as a result of any breach by Eastwood. It then indicates that “in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.” Likewise, Paragraph 26 limits the plaintiffs’ damages in clear fashion. This Paragraph, entitled “Seller Option to Cancel Prior to Closing,” allows Eastwood in its sole judgment to “terminate this Agreement by written notice prior to closing.” It further provides that Eastwood must return all deposits with \$100.00 as liquidated damages if Eastwood’s “cancellation constitutes a default.” Finally, it specifies that “Buyer shall have no other rights or remedies should Seller [Eastwood] exercise such right of cancellation.” Thus, according to the plain language of the contract, Eastwood is entitled to cancel before closing and limit damages as it did.

The Plaintiffs argue the contracts are unconscionable contracts that violate public policy.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

Limitation of liability and exculpation clauses are routinely entered. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it. *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013) (citing *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748-49 (Tex.App.2005)).

The Plaintiffs contend that the contracts are unconscionable and in violation of public policy. As a result, they contend the Court should not enforce the cancellation and limitation of damages clauses. The Plaintiffs’ first cause of action is for a declaratory judgment action regarding

the enforcement of the contract. As the enforcement of the limitation of liability clause is pivotal to this case, the Court orders that the Plaintiff's first cause of action be set for trial by the Clerk of Court to address these issues.

The matters to be considered by the judge at this hearing and upon which the parties may present evidence whether the contract is unconscionable or in violation of public policy. Once the issue of the enforceability of the contract language is resolved, the remaining issues will either be moot or can be tried accordingly.

V. THE PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS

The Court determines this motion is premature and denies it at this time.

VI. CONCLUSION

The Court orders as follows:

1. These cases are to be consolidated for purposes of discovery and all pretrial matters.
2. The first cause of action for Declaratory Judgment should be set for trial.
3. All pending motions are deferred.

AND IT IS SO ORDERED.



Charleston Common Pleas

Case Caption: Marcel Franquelin , plaintiff, et al VS Eastwood Homes Of Columbia Llc , defendant, et al
Case Number: 2021CP1002831
Type: Order/Other

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060

Electronically signed on 2022-03-11 14:34:36 page 7 of 7

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1002829

Ralph Dawkins et al
PLAINTIFF(S)

Eastwood Homes Of Columbia Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

This matter came before the court February 20, 2024 on Defendant's Motion to Reconsider filed December 28, 2023. The Motion to Reconsider is respectfully DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/20/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Charleston Common Pleas

Case Caption: Ralph Dawkins , plaintiff, et al VS Eastwood Homes Of Columbia Llc , defendant, et al
Case Number: 2021CP1002829
Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2024-02-20 16:19:38 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021-CP-10-2829
CASE NO. 2021-CP-10-2831
CASE NO. 2021-CP-10-2833
CASE NO. 2021-CP-10-2837

CASE NO. 2021-CP-10-2838
CASE NO. 2021-CP-10-2840
CASE NO. 2021-CP-10-2844
CASE NO. 2021-CP-10-2902
CASE NO. 2021-CP-10-3012

Ralph Dawkins and Michelle Dawkins,

Marcel Franquelin and Patricia Franquelin,
Michael A. Martin and Adriana S.
Iaquinto-Martin,
Louis Glavinos and Kimberly Glavinos,
Daniel J. O'Grady and Kaitlyn E. Grigoleit,
Christopher M. Raybon and LaShonda K.
Jones Raybon,
Morris K. White and Rebecca A. White,
Paul A. Banker and April D. Banker,
Patrick K. Daly and Brenda Daly,

Eastwood Homes of Columbia, LLC d/b/a
Eastwood Homes; Eastwood Construction
Partners, LLC f/k/a Eastwood
Construction, LLC d/b/a Eastwood
Homes; Eastwood Construction, LLC,

PLAINTIFFS

DEFENDANTS

Submitted by: Ross A. Appel, Esq.	Attorney for: ☒ Plaintiff ☐ Defendant
	or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☒ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☒ Other Moot per previous rulings. Hearing no longer necessary. See below.
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☒ Statement of Judgment by the Court: Based on the Honorable R. Markley Dennis, Jr.'s Order in this matter dated March 11, 2022 and the Honorable Mikell R. Scarborough's Order in this matter dated December 19, 2023, Eastwood Homes' Motion to Dismiss or for Summary Judgment filed on August 9, 2021 is stricken as moot per information presented to CAJ from attorney.

ORDER INFORMATIONThis order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge_____
Judge Code_____
Date**For Clerk of Court Office Use Only**

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Ross A. Appel, Esq.
McCullough Khan, LLC
2036 eWall Street
Mount Pleasant, SC 29464

James Edward Bradley, Esq.
1700 Sunset Blvd. (29169)
P.O. Box 5709
West Columbia, SC 29171

Michael Thomas Cooper, Esq
Apostolou Law Firm
3443 Rivers Ave.
Charleston, SC 29405

ATTORNEY FOR THE PLAINTIFFS_____
ATTORNEY FOR THE DEFENDANT_____
CLERK OF COURT**Court Reporter:****ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Charleston Common Pleas

Case Caption: Ralph Dawkins , plaintiff, et al VS Eastwood Homes Of Columbia
Llc , defendant, et al
Case Number: 2021CP1002829
Type: Order/Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2024-01-19 11:39:33 page 6 of 6

RECEIVED

Mar 07 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Presiding Judge

Civil Action No. 2021-CP-10-02829

Ralph Dawkins and Michelle Dawkins,
Marcel Franquelin and Patricia Franquelin,
Michael A. Martin and Adriana S. Iaquinto-Martin,
Louis Glavinos and Kimberly Glavinos,
Daniel J. O'Grady and Kaitlyn E. Grigoleit,
Christopher M. Raybon and LaShonda K. Jones Raybon,
Morris K. White and Rebecca A. White,
Paul A. Banker and April D. Banker,
Patrick K. Daly and Brenda Daly, ... Respondents,

v.

Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes,
Eastwood Construction Partners, LLC f/k/a Eastwood Construction LLC
d/b/a Eastwood Homes, and Eastwood Construction, LLC, ... Appellants.

NOTICE OF APPEAL

Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes, Eastwood Construction Partners, LLC f/k/a Eastwood Construction LLC d/b/a Eastwood Homes, and Eastwood Construction, LLC appeal the Order of the Honorable Mikell R. Scarborough dated December 19, 2023, and the Order Denying Defendants' Motion for Reconsideration of the Honorable Mikell R. Scarborough dated February 20, 2024. Appellant received written notice of entry of the Order denying reconsideration on February 20, 2024. Both orders are attached to this notice.

The orders being appealed were issued under matter number 2021-CP-10-02829. Previously, nine lawsuits filed against the referenced appellants were consolidated for discovery and trial purposes under this matter number. The individual matter numbers for the consolidated cases include:

- CASE NO. 2021-CP-10-2829;
- CASE NO. 2021-CP-10-2831;
- CASE NO. 2021-CP-10-2833;
- CASE NO. 2021-CP-10-2837;
- CASE NO. 2021-CP-10-2838;
- CASE NO. 2021-CP-10-2840;
- CASE NO. 2021-CP-10-2844;
- CASE NO. 2021-CP-10-2902; and
- CASE NO. 2021-CP-10-3012.

This notice is submitted for these cases as well as they were consolidated for the purposes of trial and discovery.

March 7, 2024

Respectfully submitted,

s/James Edward Bradley
James Edward Bradley, SC Bar #66130
Moore Bradley Myers Law Firm, PA
1700 Sunset Blvd. (29169)
PO Box 5709
West Columbia, SC 29171
803-796-9160
Ward@mbmlawsc.com
Attorney for Appellant

Other Counsel of Record:

Ross A. Appel, SC Bar #79149
Jamie A. Khan, SC Bar #76685
McCullough Khan Appel
2036 Wall Street
Mt. Pleasant, SC 29464
843-937-0400
Ross@mklawsc.com
Jamie@mklawsc.com

Michael T. Cooper, SC Bar #100053
Apostolou Law Firm, LLC
3443 Rivers Ave.
North Charleston, SC 29405
Phone: (843) 853-3637
michael@apostoloulaw.net
Attorneys for Respondents

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-2831
Marcel Franquelin and Patricia Franquelin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PLAINTIFFS' REPLY TO
	)	DEFENDANTS' COUNTERCLAIMS
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

Plaintiffs Marcel Franquelin and Patricia Franquelin answer the Defendants' counterclaims, contained in Defendants' "Answer and Counterclaim" filed on August 6, 2021, as follows:

FOR A FIRST DEFENSE

1. Upon information and belief, Paragraphs 1 through 69 of the Defendants' Answer and Counterclaim constitute the Defendants' answer and affirmative defenses to Plaintiffs' Complaint. No responses are required from Plaintiffs. To the extent responses are required, Plaintiffs deny the allegations contained in Paragraphs 1 through 69, other than Defendants' admissions, and demand strict proof thereof.

FOR A SECOND DEFENSE

Replying to Defendants' Counterclaims

2. Paragraph 70 is procedural in nature and no responses are required from Plaintiffs. To the extent responses are required, Plaintiffs deny the allegations of Paragraph 70 and demand strict proof thereof.

3. Plaintiffs deny the allegations contained in Paragraph 71.

4. Plaintiffs deny the allegations contained in Paragraph 72.

5. Paragraph 73 is procedural in nature and no responses are required from Plaintiffs.

To the extent responses are required, Plaintiffs deny the allegations of Paragraph 73 and demand strict proof thereof.

6. Responding to Paragraph 74, Plaintiffs admit they filed a lawful *Lis Pendens* in this action. Plaintiffs deny the remaining allegations of Paragraph 74 and demand strict proof thereof.

7. Plaintiffs deny the allegations contained in Paragraph 75.

8. Plaintiffs deny the allegations contained in Paragraph 76.

9. Plaintiffs deny the allegations contained in Paragraph 77.

10. Paragraph 78 is procedural in nature and no responses are required from Plaintiffs.

To the extent responses are required, Plaintiffs deny the allegations of Paragraph 78 and demand strict proof thereof.

11. Responding to Paragraph 79, Plaintiffs admit they filed a lawful *Lis Pendens* in this action. Plaintiffs deny the remaining allegations of Paragraph 79 and demand strict proof thereof.

12. Plaintiffs deny the allegations contained in Paragraph 80.

13. Plaintiffs deny the allegations contained in Paragraph 81.

14. Plaintiffs deny the allegations contained in Paragraph 82.

15. Plaintiffs deny the allegations contained in Paragraph 83.

16. Plaintiffs deny the allegations contained in Paragraph 84.

17. Plaintiffs deny the allegations contained in Paragraph 85.

18. Plaintiffs deny the relief sought in the “Wherefore” clause immediately following Paragraph 85 and demand strict proof thereof.

FOR A THIRD DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Failure to State a Claim)

19. Defendants' counterclaims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to state facts sufficient to constitute a claim against Defendant.

20. The filing of a *Lis Pendens* is absolutely privileged under South Carolina law; therefore, the Defendants' slander of title cause of action fails as a matter of law. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002).

FOR A FOURTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Breach of Contract)

21. Defendants – not the Plaintiffs – breached the contract at issue in this case by failing to perform without legal justification.

FOR A FIFTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(No Ulterior Purpose or Willful Act)

22. Defendants' abuse of process cause of action fails because Plaintiffs lack both "an ulterior purpose" and a "willful act in the use of the process not proper in the conduct of the proceeding."

FOR A SIXTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

23. Defendants have failed to mitigate its damages and, therefore, its claims are barred in whole or part.

FOR A SEVENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Waiver)

24. Defendants' claims are barred in whole or in part by the doctrine of waiver.

FOR AN EIGHTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Laches)

25. Defendants' claims are barred in whole or in part by the doctrine of laches.

FOR A NINTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Estoppel)

26. Defendants' claims are barred in whole or in part by the doctrine of estoppel.

FOR A TENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Unclean Hands)

27. Defendants' claims are barred in whole or in part by the doctrine of unclean hands.

FOR AN ELEVENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Illegality)

28. Defendants' claims are barred in whole or in part by one or more illegal acts including, but not limited to, zoning violations.

FOR A TWELFTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Misrepresentation)

29. Defendants' claims are barred in whole or in part by one or more misrepresentations.

FOR A THIRTEENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Reservation of Defenses)

30. Plaintiffs reserve any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully replied to Defendants' counterclaims, Plaintiffs pray that the Court inquire into these matters, dismiss Defendants' counterclaims and rule in favor of Plaintiffs on the above defenses, award Plaintiffs the relief sought in the Complaint, award Plaintiffs'

attorney's fees and costs, and provide Plaintiffs with such other further relief deemed appropriate by the Court.

Respectfully Submitted,

s/Ross A. Appel

Jamie A. Khan (SC Bar #76685)

Ross A. Appel (SC Bar #79149)

MCCULLOUGH KHAN APPEL, LLC

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Mt. Pleasant, SC 29464

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(843) 937-0706 (fax)

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ross@mklawsc.com

s/Michael T. Cooper

Michael Thomas Cooper, (SC Bar #100053)

McLEOD LAW GROUP, LLC

P.O. Box 21624

Charleston, SC 29413

843-277-6655

Michael@mcleod-lawgroup.com

ATTORNEYS FOR PLAINTIFFS

September 3, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-2838
Daniel J. O’Grady and Kaitlyn E. Grigoleit,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PLAINTIFFS’ REPLY TO
	)	DEFENDANTS’ COUNTERCLAIMS
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

Plaintiffs Daniel J. O’Grady and Kaitlyn E. Grigoleit answer the Defendants’ counterclaims, contained in Defendants’ “Answer and Counterclaim” filed on August 6, 2021, as follows:

FOR A FIRST DEFENSE

1. Upon information and belief, Paragraphs 1 through 69 of the Defendants’ Answer and Counterclaim constitute the Defendants’ answer and affirmative defenses to Plaintiffs’ Complaint. No responses are required from Plaintiffs. To the extent responses are required, Plaintiffs deny the allegations contained in Paragraphs 1 through 69, other than Defendants’ admissions, and demand strict proof thereof.

FOR A SECOND DEFENSE

Replying to Defendants’ Counterclaims

2. Paragraph 70 is procedural in nature and no responses are required from Plaintiffs. To the extent responses are required, Plaintiffs deny the allegations of Paragraph 70 and demand strict proof thereof.

3. Plaintiffs deny the allegations contained in Paragraph 71.

4. Plaintiffs deny the allegations contained in Paragraph 72.

5. Paragraph 73 is procedural in nature and no responses are required from Plaintiffs.

To the extent responses are required, Plaintiffs deny the allegations of Paragraph 73 and demand strict proof thereof.

6. Responding to Paragraph 74, Plaintiffs admit they filed a lawful *Lis Pendens* in this action. Plaintiffs deny the remaining allegations of Paragraph 74 and demand strict proof thereof.

7. Plaintiffs deny the allegations contained in Paragraph 75.

8. Plaintiffs deny the allegations contained in Paragraph 76.

9. Plaintiffs deny the allegations contained in Paragraph 77.

10. Paragraph 78 is procedural in nature and no responses are required from Plaintiffs.

To the extent responses are required, Plaintiffs deny the allegations of Paragraph 78 and demand strict proof thereof.

11. Responding to Paragraph 79, Plaintiffs admit they filed a lawful *Lis Pendens* in this action. Plaintiffs deny the remaining allegations of Paragraph 79 and demand strict proof thereof.

12. Plaintiffs deny the allegations contained in Paragraph 80.

13. Plaintiffs deny the allegations contained in Paragraph 81.

14. Plaintiffs deny the allegations contained in Paragraph 82.

15. Plaintiffs deny the allegations contained in Paragraph 83.

16. Plaintiffs deny the allegations contained in Paragraph 84.

17. Plaintiffs deny the allegations contained in Paragraph 85.

18. Plaintiffs deny the relief sought in the “Wherefore” clause immediately following Paragraph 85 and demand strict proof thereof.

FOR A THIRD DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Failure to State a Claim)

19. Defendants' counterclaims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to state facts sufficient to constitute a claim against Defendant.

20. The filing of a *Lis Pendens* is absolutely privileged under South Carolina law; therefore, the Defendants' slander of title cause of action fails as a matter of law. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002).

FOR A FOURTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Breach of Contract)

21. Defendants – not the Plaintiffs – breached the contract at issue in this case by failing to perform without legal justification.

FOR A FIFTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(No Ulterior Purpose or Willful Act)

22. Defendants' abuse of process cause of action fails because Plaintiffs lack both "an ulterior purpose" and a "willful act in the use of the process not proper in the conduct of the proceeding."

FOR A SIXTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

23. Defendants have failed to mitigate its damages and, therefore, its claims are barred in whole or part.

FOR A SEVENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Waiver)

24. Defendants' claims are barred in whole or in part by the doctrine of waiver.

FOR AN EIGHTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Laches)

25. Defendants' claims are barred in whole or in part by the doctrine of laches.

FOR A NINTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Estoppel)

26. Defendants' claims are barred in whole or in part by the doctrine of estoppel.

FOR A TENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Unclean Hands)

27. Defendants' claims are barred in whole or in part by the doctrine of unclean hands.

FOR AN ELEVENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Illegality)

28. Defendants' claims are barred in whole or in part by one or more illegal acts including, but not limited to, zoning violations.

FOR A TWELFTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Misrepresentation)

29. Defendants' claims are barred in whole or in part by one or more misrepresentations.

FOR A THIRTEENTH DEFENSE AND BY WAY OF AFFIRMATIVE DEFENSE
(Reservation of Defenses)

30. Plaintiffs reserve any additional and further defenses as may be revealed by additional information through the course of discovery and investigation in a manner that is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully replied to Defendants' counterclaims, Plaintiffs pray that the Court inquire into these matters, dismiss Defendants' counterclaims and rule in favor of Plaintiffs on the above defenses, award Plaintiffs the relief sought in the Complaint, award Plaintiffs'

attorney's fees and costs, and provide Plaintiffs with such other further relief deemed appropriate by the Court.

Respectfully Submitted,

s/Ross A. Appel

Jamie A. Khan (SC Bar #76685)

Ross A. Appel (SC Bar #79149)

MCCULLOUGH KHAN APPEL, LLC

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ross@mklawsc.com

s/Michael T. Cooper

Michael Thomas Cooper, (SC Bar #100053)

McLEOD LAW GROUP, LLC

P.O. Box 21624

Charleston, SC 29413

843-277-6655

Michael@mcleod-lawgroup.com

ATTORNEYS FOR PLAINTIFFS

September 3, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-2831
Marcel Franquelin and Patricia Franquelin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ANSWER AND COUNTERCLAIM
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

Defendants Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes; Eastwood Construction Partners, LLC f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes; and Eastwood Construction, LLC, (“Eastwood”) answer the complaint and counterclaim as follows:

AS A FIRST DEFENSE

1. Unless specifically admitted in this answer, the Defendants deny each and every allegation of the Complaint.

AS A SECOND DEFENSE

2. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

3. Upon information and belief, Eastwood admits the allegations of paragraph 1.

4. Eastwood admits the allegations of paragraphs 2, 3 and 4.

5. In response to paragraph 5, no responses is necessary from these Defendants.

6. In response to paragraph 6, Eastwood admits the Court has jurisdiction.

7. In response to paragraph 7, Eastwood admits the venue is proper.

8. In response to paragraph 8, no response is necessary from these Defendants. To the extent a response may be necessary, Eastwood denies the allegations of paragraph 8.

9. Eastwood denies the allegations of paragraph 9.

10. As to the allegations of paragraph 10, Eastwood admits entering the contract attached as Exhibit A to the complaint. Further responding to paragraph 10, Eastwood admits those terms which are consistent with the contract and denies those allegations which are inconsistent with the contract. Eastwood denies the remaining allegations of paragraph 10.

11. Eastwood denies the allegations of paragraph 11.

12. As to the allegations of paragraph 12, Eastwood admits those allegations consistent with the recorded legal description and denies those allegations inconsistent with the recorded legal description.

13. Eastwood denies the allegations of paragraph 13.

14. As to the allegations of paragraph 14, Eastwood admits those allegations consistent with the recorded legal description and denies those allegations inconsistent with the recorded legal description.

15. In response to paragraph 15, Eastwood admits that the Plaintiffs supplied the funds alleged in this paragraph.

16. Eastwood denies the allegations of paragraph 16.

17. In response to paragraph 17, Eastwood admits sending a notice to Plaintiffs. Eastwood denies the remaining allegations of paragraph 17.

18. Eastwood denies the allegations of paragraph 18.

19. Eastwood denies the allegations of paragraphs 19, 20, 21, 22, 23 and 24.

20. In response to paragraph 25, Eastwood admits terminating the contract consistent with its rights under the contract. Eastwood denies the remaining allegations of paragraph 25.

21. In response to paragraph 26, Eastwood admits to sending Plaintiffs a release. Eastwood denies the remaining allegations of paragraph 26.

22. Eastwood denies the allegations of paragraph 27.

23. As to the allegations of paragraph 28, these Defendants have no information to which they can form a response and therefore deny the allegations of paragraph 28.

24. As to the allegations of paragraph 29, Eastwood admits sending Plaintiffs a refund check in the amount of \$100.00 consistent with the contract. Eastwood denies the remaining allegations of paragraph 29.

25. Eastwood denies the allegations of paragraph 30.

26. As to the allegations of paragraph 31, Eastwood admits to cancelling meetings and walkthroughs after termination of the contract. Eastwood denies the remaining allegations of paragraph 31.

27. Eastwood denies the allegations of paragraph 32.

28. As to the allegations of paragraph 33, no response is required from these Defendants. To the extent a response may be necessary, Eastwood denies the allegations.

29. Eastwood denies the allegations of paragraph 34.

30. As to the allegations of paragraph 35, Eastwood admits to receiving the letter attached as Exhibit B. Eastwood denies the remaining allegations of this paragraph.

31. Eastwood denies the allegations of paragraph 36.

32. Eastwood denies the allegations of paragraph 37.

33. Eastwood denies the allegations of paragraph 38.

34. Eastwood denies the allegations of paragraph 39.
35. Eastwood denies the allegations of paragraph 40.
36. In response to paragraph 41, Eastwood realleges its previous allegations and denials.
37. Eastwood denies the allegations of paragraph 42.
38. Eastwood admits the allegations of paragraph 43.
39. Eastwood denies the allegations of paragraph 44.
40. As to the allegations of paragraph 45, Eastwood realleges its previous allegations and denials.
41. Eastwood denies the allegations of paragraphs 46 and 47.
42. Eastwood denies the allegations of paragraph 48.
43. Eastwood denies the allegations of paragraphs 49, 50, 51, 52, 53, and 54.
44. Eastwood denies the Plaintiffs are entitled to the relief sought in paragraph 55.
45. As to the allegations of paragraph 56, Eastwood realleges its previous allegations and denials.
46. Eastwood denies the allegations of paragraph 57 as the contract has been terminated pursuant to its terms.
47. Eastwood denies the allegations of paragraphs 58, 59, 60 and 61.
48. As to the allegations of paragraph 62, Eastwood denies the Plaintiffs are entitled to the relief sought in their Complaint.
49. As to the allegations of paragraph 63, Eastwood realleges its previous allegations and denials.
50. Eastwood denies the allegations of paragraphs 64, 65, 66, 67, 68, 69 and 70.

51. In response to paragraph 71, Eastwood realleges and reasserts its previous allegations and denials.

52. Eastwood denies the allegations of paragraph 72.

53. Eastwood denies the allegations of paragraphs 73 and 74 (including all subparts).

54. In response to paragraph 75, Eastwood denies the Plaintiffs are entitled to the relief sought in their Complaint.

FOR A THIRD DEFENSE

55. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

56. Plaintiffs breached the contract themselves.

57. As a result, the complaint should be dismissed based upon the prior breach of the Plaintiffs.

FOR A FOURTH DEFENSE

58. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

59. The complaint should be dismissed because of the Doctrine of Unclean Hands.

FOR A FIFTH DEFENSE

60. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

61. The complaint should be dismissed because of Plaintiffs' failure to comply with the pre-existing duties in the contract.

FOR A SIXTH DEFENSE

62. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

63. The complaint should be dismissed based on the Doctrine of Laches.

FOR A SEVENTH DEFENSE

64. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

65. The complaint should be dismissed based on the Doctrines of Estoppel and Waiver.

FOR AN EIGHTH DEFENSE

66. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

67. The Complaint should be dismissed for failure to state a claim.

68. In particular, there is not enforceable contract between the parties as the contract was terminated due to the Plaintiffs' demand for prior concessions.

69. As a result, there is no jurisdiction for the claim and no basis upon which to file a Lis Pendens.

FOR A NINTH DEFENSE AND FIRST COUNTERCLAIM

70. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

71. Eastwood properly terminated the contract pursuant to its terms.

72. Thus, the matter should be dismissed with prejudice.

FOR A TENTH DEFENSE AND SECOND COUNTERCLAIM

73. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

74. Plaintiffs have filed a Lis Pendens impairing the sale of the property.

75. The filing of a Lis Pendens in this matter amounts to a slander of title for the following reasons:

- a. Publication: The Lis Pendens has been recorded and published in the public record;
- b. A false statement: Plaintiffs are not entitled to a Lis Pendens as they have no interest in this matter based upon their failure to comply with the contract;
- c. This statement is derogatory to the Title: The Lis Pendens impairs the ability of the Defendant to sell the property;
- d. Malice: Plaintiffs have made this statement with the intent to impair the sale of the property and gain an improper advantage in litigation constituting malice;
- e. Special damages: Defendant has been unable to sell the property and remains unable to sell the property as a result of the Lis Pendens placed upon the property;
- f. Diminished value in the eyes of third parties: The property may not be sold based upon the impairment of the title of the property.

76. As a direct and proximate result of Plaintiffs' slander of title, Defendant has been damaged and has lost the value of its investment, it is unable to sell the property, it has sustained interest, costs and other carrying costs, and in other ways all to its actual damage.

77. Eastwood is entitled to an order of this Court awarding it both actual damages and punitive damages for Plaintiffs' slander of title.

FOR AN ELEVENTH DEFENSE AND THIRD COUNTERCLAIM

78. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

79. Plaintiffs have filed a Lis Pendens which wrongfully clouds the title of the property and prevented Eastwood from conveying the property.

80. Plaintiffs were aware they violated the contract and have no interest in preventing the sale of the property.

81. Plaintiffs do not have a legitimate purpose for using the process of a Lis Pendens to prevent Eastwood from selling the property.

82. Plaintiffs filed the Lis Pendens with the ulterior motive of preventing the sale of the property in order to gain an advantage in this matter.

83. Plaintiffs' use of the Lis Pendens is a willful act to the use of process not proper to the regular conduct of the proceeding.

84. As a result of Plaintiffs' abuse of process, Eastwood has been damaged as alleged above.

85. Eastwood is entitled to an award of this Court as to its actual damages as alleged above and for punitive damages based upon Plaintiffs' abuse of process.

WHEREFORE, Eastwood having responded to the allegations of the complaint and counterclaimed asks that the complaint be dismissed with prejudice and that Eastwood be awarded the relief requested in the counterclaims as well as such other relief as the Court deems fair and equitable.

[Signature block to follow]

MOORE BRADLEY MYERS LAW FIRM, PA

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West Columbia, SC 29171
(803) 796-9160
ward@mbmlawsc.com
Attorney for Defendants

West Columbia, South Carolina

August 6, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-2838
Daniel J. O’Grady and Kaitlyn E. Grigoleit,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ANSWER AND COUNTERCLAIM
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

Defendants Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes; Eastwood Construction Partners, LLC f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes; and Eastwood Construction, LLC, (“Eastwood”) answer the complaint and counterclaim as follows:

AS A FIRST DEFENSE

1. Unless specifically admitted in this answer, the Defendants deny each and every allegation of the Complaint.

AS A SECOND DEFENSE

2. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

3. Upon information and belief, Eastwood admits the allegations of paragraph 1.

4. Eastwood admits the allegations of paragraphs 2, 3 and 4.

5. In response to paragraph 5, no responses is necessary from these Defendants.

6. In response to paragraph 6, Eastwood admits the Court has jurisdiction.

7. In response to paragraph 7, Eastwood admits the venue is proper.

8. In response to paragraph 8, no response is necessary from these Defendants. To the extent a response may be necessary, Eastwood denies the allegations of paragraph 8.

9. Eastwood denies the allegations of paragraph 9.

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- b. A false statement: Plaintiffs are not entitled to a Lis Pendens as they have no interest in this matter based upon their failure to comply with the contract;
- c. This statement is derogatory to the Title: The Lis Pendens impairs the ability of the Defendant to sell the property;
- d. Malice: Plaintiffs have made this statement with the intent to impair the sale of the property and gain an improper advantage in litigation constituting malice;
- e. Special damages: Defendant has been unable to sell the property and remains unable to sell the property as a result of the Lis Pendens placed upon the property;
- f. Diminished value in the eyes of third parties: The property may not be sold based upon the impairment of the title of the property.

76. As a direct and proximate result of Plaintiffs' slander of title, Defendant has been damaged and has lost the value of its investment, it is unable to sell the property, it has sustained interest, costs and other carrying costs, and in other ways all to its actual damage.

77. Eastwood is entitled to an order of this Court awarding it both actual damages and punitive damages for Plaintiffs' slander of title.

FOR AN ELEVENTH DEFENSE AND THIRD COUNTERCLAIM

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81. Plaintiffs do not have a legitimate purpose for using the process of a Lis Pendens to prevent Eastwood from selling the property.

82. Plaintiffs filed the Lis Pendens with the ulterior motive of preventing the sale of the property in order to gain an advantage in this matter.

83. Plaintiffs' use of the Lis Pendens is a willful act to the use of process not proper to the regular conduct of the proceeding.

84. As a result of Plaintiffs' abuse of process, Eastwood has been damaged as alleged above.

85. Eastwood is entitled to an award of this Court as to its actual damages as alleged above and for punitive damages based upon Plaintiffs' abuse of process.

WHEREFORE, Eastwood having responded to the allegations of the complaint and counterclaimed asks that the complaint be dismissed with prejudice and that Eastwood be awarded the relief requested in the counterclaims as well as such other relief as the Court deems fair and equitable.

[Signature block to follow]

MOORE BRADLEY MYERS LAW FIRM, PA

BY: s/James Edward Bradley
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Attorney for Defendants

West Columbia, South Carolina

August 6, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-
Marcel Franquelin and Patricia Franquelin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	SUMMONS
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	(JURY TRIAL DEMANDED)
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your pleading to said Complaint upon the subscribers at their offices at 359 King Street, Suite 200, Charleston, South Carolina 29401, within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for judgment by default for the relief demanded in the Complaint.

Respectfully Submitted,

s/Ross A. Appel
 Jamie A. Khan (SC Bar #76685)
 Ross A. Appel (SC Bar #79149)
MCCULLOUGH KHAN, LLC
 359 King Street, Suite 200
 Charleston, SC 29401
 (843) 937-0400
 (843) 937-0706 (fax)
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s/Michael T. Cooper
Michael Thomas Cooper, (SC Bar #100053)
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ATTORNEYS FOR PLAINTIFFS

June 17, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-
Marcel Franquelin and Patricia Franquelin,	)	
	)	COMPLAINT
Plaintiffs,	)	
	)	<i>Declaratory Judgement</i>
v.	)	<i>Specific Performance of Contract</i>
	)	<i>Breach of Contract</i>
Eastwood Homes of Columbia, LLC d/b/a	)	<i>UTPA Violation</i>
Eastwood Homes; Eastwood Construction	)	<i>Breach of Contract Accompanied by</i>
Partners, LLC f/k/a Eastwood Construction,	)	<i>Fraudulent Act</i>
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	(JURY TRIAL DEMANDED)
	)	
Defendants.	)	

Plaintiffs Marcel Franquelin and Patricia Franquelin, complaining of the Defendants, would respectfully show unto this Court the following:

PARTIES

1. Plaintiffs Marcel Franquelin and Patricia Franquelin ("Plaintiffs") are currently citizens and residents of MonMouth Junction, New Jersey. However, Plaintiffs intend to move to Charleston County, South Carolina and establish residency in this state buy purchasing the home that lies at the heart of the present legal action.

2. Defendant Eastwood Homes of Columbia, LLC is a limited liability company organized and existing under the laws of the State of South Carolina. Eastwood Homes of Columbia, LLC conducts business in South Carolina under the trade name "Eastwood Homes."

3. Defendant Eastwood Construction Partners, LLC is a limited liability company organized and existing under the laws of the State of North Carolina and registered with the South Carolina Secretary of State. Eastwood Construction Partners, LLC also conducts business in South Carolina under the trade name "Eastwood Homes."

4. Eastwood Construction, LLC is a limited liability company organized and existing under the laws of the State of North Carolina and registered with the South Carolina Secretary of State. Eastwood Construction, LLC also conducts business in South Carolina under the trade name “Eastwood Homes.”

5. Defendants Eastwood Homes of Columbia, LLC, Eastwood Construction Partners, LLC, and Eastwood Construction, LLC are referred to collectively herein as “Eastwood Homes” and “Defendants.”

JURISDICTION AND VENUE

6. This court has jurisdiction over the parties and the subject matter of this action.

7. Venue is proper in the Court of Common Pleas for Charleston County pursuant to provisions of South Carolina law to include S.C. Code Ann. §15-7-10 *et seq.* and the subject matter of this action concerns a real estate purchase agreement for real estate located in Charleston County, State of South Carolina.

THE FACTS

8. Plaintiffs bring this action to compel Eastwood Homes to honor its legally binding and enforceable contract to build and sell a semi-custom home in the Swygert’s Landing subdivision on Johns Island.

9. Under the pretext of a “legal error” of Eastwood Homes’ (not Plaintiffs’) making, Eastwood Homes seeks to walk away from its contract with Plaintiffs in the hopes of forcing Plaintiffs to re-negotiate a future contract for the same property at a much higher price.

10. Plaintiffs and Eastwood Homes entered into that certain “Eastwood Homes New Home Purchase Agreement” dated September 9, 2020 (the “Contract”). **See Contract attached hereto as Exhibit A and incorporated herein by reference.**

11. The Contract obligates Eastwood Homes to convey to Plaintiffs Lot 143 in the Swygert's Landing subdivision on Johns Island, 1107 Tebalt Dr., Johns Island, SC 29455 (TMS No. 312-02-00-097) along with a semi-custom home, selected and uniquely customized by Plaintiffs in close coordination with Eastwood Homes and its representatives (the "Property").

12. The Property is currently titled in the name of Eastwood Construction, LLC according to Charleston County's records.

13. Plaintiff's semi-custom home is currently under construction.

14. The Property is more particularly described as follows:

Legal Description

That certain real property owned by Eastwood Construction, LLC, commonly known as 1107 Tebalt Dr., Johns Island, SC 29455, and further defined as Lot 143 on the "Final Subdivision Plat of Phase 4 Swygert's Landing" filed with the Register of Deeds for Charleston County in Plat Book L19, Page 0274 on June 26, 2019.

TMS No: 312-02-00-097

15. Pursuant to the Contract, Plaintiffs paid Eastwood Homes a \$5,000.00 "non-refundable binder/earnest money deposit."

16. Plaintiffs have performed all their obligations under the Contract and are ready willing and able to close on the Property.

17. On or about June 2021, Plaintiffs received notification from Eastwood Homes stating Phase 4 of Swygert's Landing "was erroneously left out of the Swygert's Phases 1, 2, and 3 Declaration of Covenants, Conditions and Restrictions by preceding Owner's legal error." In other words, Phase 4 was supposed to be included in the Swygert's Landing Homeowners Association, but the Covenants and Restrictions to affect the inclusion were not properly recorded.

18. Plaintiffs are not responsible for the aforementioned "legal error" in any way, shape, or form.

19. Plaintiffs' contract with Eastwood Homes is not contingent upon inclusion in the HOA.

20. The aforementioned "legal error" is wholly unrelated to the enforceability or performance of the contract.

21. Upon information and belief, Eastwood Homes is in the process of resolving the aforementioned "legal error" with the existing Swygert's Landing HOA.

22. Subsequent communications with Eastwood Homes revealed the company's desire to terminate the Contract and then offer Plaintiffs the ability to re-contract at "current market value" once the covenants issue was resolved.

23. Plaintiffs are amenable to delaying closing until Eastwood Homes can correct the aforementioned covenants issue. Plaintiffs have offered to assist or facilitate, if possible, Eastwood Homes in their efforts to correct the "legal error."

24. However, Plaintiffs soundly reject the notion that a "legal error," not of their own making, justifies Eastwood Homes' decision to terminate the Contract. There are no genuine disputes between the parties. Nothing in the Contract gives Eastwood Homes the unilateral right to terminate the Contract under these circumstances.

25. Nevertheless, on or about Friday, June 4, 2021, Eastwood Homes by and through its sales representative, Jill Bagwell, telephoned Plaintiffs to inform them that Eastwood intended to cancel the existing contract and would allow Plaintiffs an opportunity to enter a new, separate contract for an increased but yet to be determined price of the home. Eastwood Homes informed Plaintiffs that they would receive a "Mutual Release" document via email on the upcoming Monday.

26. On or about Monday, June 6, 2021, Eastwood Homes sent Plaintiffs a document titled “Mutual Release.”

27. The “Mutual Release” described the nature of the “legal error” and approximated four months to resolve or correct said error.

28. Plaintiffs soundly rejected the “Mutual Release” intending to move forward with closing on their home.

29. Subsequently, Eastwood Homes sent Plaintiffs a purported earnest money refund and a “liquidated damages” check for a measly and unconscionable amount of one hundred dollars (\$100.00).

30. The “Mutual Release” and refund checks are an unlawful repudiation of the Contract by Eastwood Homes. Plaintiffs soundly reject the “Mutual Release” and the earnest money refund and liquidated damages check.

31. Eastwood Homes has also cancelled all design meetings, walkthroughs, and otherwise have completely frustrated Plaintiffs’ ability to move forward with the purchase of their promised home.

32. Upon information and belief, Eastwood Homes unjustly seeks to use the aforementioned “legal error” surrounding its own negligence and failure to record the covenants to its financial advantage by requiring Plaintiffs, and several other similarly situated buyers under contract, to enter a new contract at a future date for an unspecified higher price that Eastwood will unilaterally dictate to Plaintiffs as an “offer.”

33. Real estate values continue to soar in Charleston County and the cost of construction materials has increased as well. Plaintiffs reasonably fear the new price will be much higher than the price previously negotiated and agreed upon by Eastwood in the Contract.

34. Plaintiffs insist Eastwood Homes honor the Contract for the original price and terms negotiated prior to the discovery of the covenants issue.

35. On June 10, 2021, the undersigned counsel for Plaintiffs provided written notice of Eastwood Homes' right to cure pursuant to Paragraph 18 of the Contract. **See Notice of Right to Cure Letter attached as Exhibit B and incorporated herein.**

36. Eastwood Homes has failed to respond to Plaintiffs' notice.

37. Eastwood Homes has defaulted under the Contract and repudiated the existing, binding agreement by mailing the refund and "liquidated damages" checks to Plaintiffs.

38. The semi-custom home specifically selected by Plaintiffs holds unique and special value to the Plaintiffs. Moreover, Plaintiffs have foregone other opportunities and changed their position in reliance on the Contract. There is no adequate remedy at law under the facts of this matter. As such, Plaintiffs are entitled to the remedy of specific performance of Contract.

39. Plaintiffs have been suffering and will continue to suffer additional damages due to the delay in the acquisition of the Property. Eastwood Homes is liable for these damages.

40. In the alternative, if the Court were not to award specific performance of the Contract, which it should, Eastwood Homes is liable to Plaintiffs for all damages and future damages suffered by Plaintiffs due to its breach of the Contract in an amount to be determined by a jury.

FOR A FIRST CAUSE OF ACTION
Declaratory Judgment

41. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

42. For the purpose of determining a question of actual controversy between the parties, Plaintiffs seek a declaration of their contractual and other rights pursuant S.C. Code Ann. § 15-53-30.

43. Under S.C. Code Ann. § 15-53-30, a party whose rights, status, or other legal relations are affected by contract, state statute, municipal ordinance, or other instrument may have those rights determined by a declaratory judgment.

44. Plaintiffs seek a declaratory judgment from this Court that the Contract is enforceable, not revocable by Eastwood Homes on account of the prior owners' "legal error" on the covenants issue, and Eastwood Homes is legally obligated to convey title to the Property to Plaintiffs pursuant to the terms of the Contract including, but not limited to, the agreed upon price not a future "current market value."

FOR A SECOND CAUSE OF ACTION
Specific Performance of Contract

45. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

46. The Contract is clear, definite and certain.

47. The Contract is a legally valid and enforceable contract.

48. The Contract was drafted by Eastwood Homes and offered to Plaintiffs on a take it or leave it basis. Plaintiffs were not permitted to make any changes to the Contract during negotiations regarding the purchase price of their home. The terms, including sales price, of the home were chosen by and dictated by Eastwood Homes who maintained all bargaining power in the exchange. Plaintiffs simply request Eastwood Homes perform the contract upon which it insisted.

49. In reliance on the Contract, Plaintiffs have performed and have carried the performance into execution and is ready, willing and able to continue to perform and purchase and close on the Property.

50. Eastwood Homes has simply decided not to perform without any justification whatsoever due, at least in part, to errors of its own – not Plaintiffs’ – making.

51. Eastwood Homes inequitably seeks to use this purported mistake to its advantage by forcing Plaintiffs to renegotiate a future contract for the sale of the Property at a significantly higher cost.

52. Money damages to Plaintiffs are inadequate as the Property, and the semi-custom home selected by Plaintiffs, is unique to Plaintiffs and their specific investment backed expectations.

53. The granting of the equitable relief of specific performance of the Contract in favor of Plaintiffs is highly favored in this case in the sound judicial discretion of the Court and equity favors the granting of specific performance of the contract in favor of Plaintiffs.

54. Plaintiffs are entitled to an award of equitable relief in the form of an order granting it specific performance of the Contract and an order compelling Eastwood Homes to sell and close on the Property immediately and on the terms set forth in the Contract.

55. Plaintiffs are also entitled to an award of all damages which are suffered by reason of the delay in acquisition of the Property, as well as all attorney’s fees and costs, which are recoverable pursuant to the Contract.

FOR A THIRD CAUSE OF ACTION
Breach of Contract

56. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

57. The Contract is a legally binding contract.

58. Eastwood Homes is in breach of the contract for failing to abide by the terms of the Contract, taking several actions to repudiate the Contract, refusing to sell the Property to the Plaintiffs, and failing to close and deliver title to the Property.

59. Eastwood Homes' breaches have at all times been intentional.

60. Plaintiffs have performed and are ready, willing and able to perform.

61. Plaintiffs are suffering damages and will continue to suffer significant damages.

62. Eastwood Homes is liable for all actual and consequential breach of contract damages, pre-judgement interest, attorney's fees and costs.

FOR A FOURTH CAUSE OF ACTION
South Carolina Unfair Trade Practices Act

63. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

64. Eastwood Homes has committed one or more acts of "[u]nfair methods of competition and unfair or deceptive acts or practices" pursuant to the South Carolina Unfair Trade Practices Act ("UTPA"). S.C. Code Ann. §§ 39-5-10 *et seq.*

65. These violations go beyond merely breaching the Contract. Rather, Eastwood Homes' conduct reveals a coordinated, premediated scheme to force Plaintiffs, and other similarly situated contracted purchasers, to pay substantially more for the same property previously negotiated at a lower price.

66. Eastwood Homes' UTPA violations are "willful," meaning Eastwood Homes at all times relevant knew or should have known that its conduct was a violation of the UTPA.

67. Eastwood Homes' UTPA violations have an impact on the public interest.

68. Eastwood Homes' UTPA violations are not only "capable of repetition," but have actually been suffered by several other contracting parties similarly situated to Plaintiffs.

69. Eastwood Homes' UTPA violations have proximately caused Plaintiffs damages.

70. Eastwood Homes is liable for all actual, special, and consequential damages, treble damages allowed under the UTPA, pre-judgement interest, attorney's fees and costs.

FOR A FIFTH CAUSE OF ACTION
Breach of Contract Accompanied by Fraudulent Act

71. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

72. The Contract attached and incorporated by reference herein constitutes a legally binding contract between Plaintiffs and Eastwood Homes.

73. Eastwood Homes materially breached the Contract as more specifically set forth above.

74. Beyond merely breaching their contract with Plaintiffs, Eastwood Homes did so with fraudulent intent and through one or more fraudulent acts to include:

- a. Falsely and fraudulently stating the existing, binding contract could not be performed and was not binding due to Eastwood Homes' own negligence and "legal error."
- b. Using a collateral, extracontractual event as pretext to gain financial advantage and unilaterally set a new, higher contract price as an "offer" to Plaintiffs.
- c. Threatening without any reasonable justification to breach the contract with Plaintiffs if they complain about any deficiencies in Eastwood Homes' performance or workmanship to gain financial advantage and unilaterally set a new, higher contract price. That is, Eastwood Homes essentially used threats of breaching the

contract with Plaintiffs to get Plaintiffs to acquiesce to faulty workmanship and/or poor build quality regardless of materiality to the agreement and in bad faith.

75. As a direct and proximate result of Eastwood Homes' breach of contract accompanied by fraudulent act(s), Plaintiffs have suffered actual damages as previously described; furthermore, Plaintiffs are entitled to punitive damages due to the intentional and fraudulent nature of Eastwood Homes' conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court issue a declaratory judgment as outlined above, award Plaintiffs specific performance of the Contract, and compel Eastwood Homes to sell, close and deliver title to the Property in accordance with the terms of the Contract, together with any damages suffered by Plaintiffs by reason of the failure of Eastwood Homes to close, to include attorney's fees, costs and prejudgment interest. In the alternative, Plaintiffs pray for an award of damages, treble damages under the UTPA, punitive damages, attorney's fees, costs and prejudgment interest for Eastwood Homes' breach of the contract; plus, such other further relief deemed appropriate in this case.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

s/Ross A. Appel

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Ross A. Appel (SC Bar #79149)
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ATTORNEYS FOR PLAINTIFFS

June 17, 2021
Charleston, South Carolina

EXHIBIT A

Lot/Block
Subdivision143
Swygerts Landing**Eastwood Homes New Home Purchase Agreement**

THIS CONTRACT, made and entered into this **September 09, 2020** between Eastwood Homes (herein referred to as Seller) and **Marcel Franquelin, Patricia Franquelin** hereinafter called Buyer(s). This Agreement cannot be assigned or transferred without the written consent of Seller. The date of sale is the date that Buyer(s) signed this agreement.

WITNESSETH:

That the parties hereto, in exchange for the mutual covenants herein contained, contract and agree with the other as follows:

1. **The Property:** Seller shall sell to Buyer and Buyer shall purchase from Seller all that parcel of land located in **Charleston** County, **SC** known as Lot **143** in **Swygerts Landing** Subdivision which Seller agrees to construct a house as shown on a map or plat thereof which is recorded in the Register of Deeds/Mesne Conveyances/Clerk of Court's Office, according to the Seller's plans and specifications. Seller covenants with Buyer that said plans and specifications meet FHA/VA/HUD requirements for a loan thereon, house to be completed according to said specifications and closed following final inspection (if applicable). The Plan Number/Name is **5090 VanderhorstElevation C** and is built at street address **1107 Tebalt Dr. Johns Island SC29455** together with all improvements thereon and appurtenances thereto (collectively, the "Property").

2. **Authority:** If two or more persons are named as Buyers within this Agreement herein, and after both Buyers execute this New Home Purchase Agreement, any one of them is thereafter authorized to act as agent for the other, with the right and authority to bind all persons named as Buyer, including in modifications to this Agreement and all subsequent Addendums thereto. Hence, the term 'Buyer' shall have the same meaning as 'Buyers' (plural) throughout this Agreement.

3. **Recorded Map Review:** Buyer has reviewed the recorded plat map for The Property; which shows page and plat book number **TMS#312-02-00-097**

4. **Cooperating Broker/Agent:** This New Home Purchase Agreement has X has not been executed with a licensed Realtor in accordance with Eastwood Homes' Cooperating Broker Policy. All Eastwood Homes Sales Specialists ("Sales Representative(s)") are Employees of the Seller and only represent Eastwood Homes' interests. If Buyer has a Realtor agent representing his/her/their interests in this New Home Purchase the Buyer agrees to the following: The Buyer agency form will be signed prior to the original Purchase Agreement, which will detail the cooperating Broker/Agent's name, office, license number and contact information and the Realtor Compensation Addendum will be completed to disclose all compensation to be paid Buyer's agent at closing. Eastwood Homes does not offer Buyer's agents. Furthermore, Sales Representatives, who are compensated by Seller, are required to provide Seller with important Buyer information (i.e. personal, financial or other information) that would assist Seller in the sale of the Property.

5. **Occupancy Disclosure:**

 X Buyer agrees that the Property is being purchased as a principal occupancy for a primary residence. Buyer also agrees the Property is not being purchased for rental purposes and that no such indicator such as "for rent" signage may be placed upon the Property or advertised within twelve (12) months after closing. Buyer understands that Seller has entered into this agreement on the basis of this representation and this provision survives the closing.

 Buyer is purchasing this home as a non-owner occupied and/or investment property and Seller agrees that there will be no holding period placed on the Property. In order to exercise this option a \$ earnest money binder must accompany this Agreement. With investment property, Buyer is aware that Seller will only respond to warranty concerns communicated by the title owners of the home.

6. **No Other Contracts or Documents:** Seller and Buyer agree that all contracts for the purchase of an Eastwood Home must be issued by Eastwood Homes. No other contracts or documents will be accepted, unless they are issued by Eastwood Homes. All correspondence will be facilitated through your Eastwood Homes New Home Specialist (Sales Representative). Buyer is prohibited from recording this Agreement or similar memorandum or pleading, and any attempted recordation shall

Seller  /Buyer(s)  

be declared, at Seller's option, a default by Buyer entitling Seller to exercise all of its remedies at law and/or equity.

7. No Oral Commitments: ALL statements or representations for which the Seller is to be responsible MUST be in writing within the Eastwood Homes New Home Purchase Agreement ("Purchase Agreement") or Addendum thereto, and properly executed by Buyer and Seller. ***Buyer agrees that no Sales Representative or other Seller agent has the authority to make any statements which would modify, amend, change, alter, cancel or supplement this written Purchase Agreement or Addendum(s) thereto, unless statements are in writing and properly executed by Buyer and Seller.***

8. Materials Used and Selected: Buyer agrees that all materials used in the construction of said house upon the above-described real property, shall be chosen from the Seller's suppliers. Seller reserves the right to substitute "like kind" materials at its sole discretion. Color and other design selections, where applicable, must be completed within ten (10) calendar days of date of sale and within normal business hours. No changes can be made to color selections once signed without a \$250.00 nonrefundable change order processing fee. If selections are not completed, Seller may proceed with their own color selections. No changes can be made to the house after ten (10) calendar days after date of sale.

The Parties further agree Seller makes no representation or warranty to Buyer, beyond providing a municipally issued certificate of occupancy certifying each home as acceptable for habitation by each municipality, regarding the existence, presence or absence, of any radon, formaldehyde, toxic materials, hazardous materials or any other substance within any home, water supply, or on any property which is regulated, in whole or in part, by the Occupational Safety and Health Administration or other state or federal agency.

9. Lot Premiums and Community Development: Some of the properties in this community have lot premiums set by Seller. Premiums are determined by a variety of factors and generally define the desirability of a particular lot when compared to other lots in the community or in a geographic area. Premiums do not necessarily indicate a lot with a better view, privacy, topography, lot size or that has any other distinguishing feature. If Buyer purchases a lot perceived as having privacy or a desirable view, Buyer is aware that the privacy or view from the desired lot today is not guaranteed and Seller makes no representations or warranties about the scope or extent of any view or privacy now or in the future. Buyer understands that existing views or privacy may be altered or impaired by future construction by Seller, by other developers, by growth of vegetation and/or trees, by fences and/or by other factors not presently known. Further, Property adjacent to or surrounding the Buyer's Property, which is not owned by Seller, is understood to not be within Seller's control. In addition, the materials, features and amenities described and depicted in the marketing and promotion materials observed by or furnished to Buyer(s) are based upon current development plans, which are subject to change without notice. No guarantee is made that features amenities and facilities depicted by renderings or other description will be provided, or if provided, will be of the same type, size or nature as described.

10. Plans, Drawings, Renderings, Website: Buyer understands and agrees that the size of the Property, the location of sidewalks and driveways, landscaping, drainage patterns, topography, and other similar characteristics will differ from the model home plans, sales brochures, drawings, renderings or any website which Buyer may have examined. Total square footage and/or room size(s) may vary from renderings, sales brochures, blue prints or model home plans. Purchase price may vary depending on lot selection, floor plan selection, options or other Buyer requests. Seller owns all intellectual property rights for its plans, drawings, renderings, name, logo, website and other advertising, and no license is granted or conveyed to Buyer by this Agreement for use of Seller intellectual property. All homes are available on an equal opportunity basis.

11. Seller Paid Closing Costs, Concessions, Prepaids and Prorations: Buyer agrees to use best efforts to procure a loan or perform a cash closing to purchase the Property within the agreed time frames and consistent with this Agreement's requirements. Seller and Lender will pay, as separate consideration for waiver of paragraph 30 warranties, up to **0.00** from Seller and/or lender toward the following closing costs associated with closing a first mortgage only, *provided Buyer utilizes a Seller approved or preferred lender and Seller's designated attorney*. These approved closing costs include loan origination, underwriting and/or processing fee(s), appraisal, credit report, buy down funds and sales price concessions, flood certification, attorney's fee(s), title and recording fee(s), title binder and insurance, courier fees, survey, and state tax/stamp fees/tax impounds/Grantor/Grantee taxes.

Buyer will pay all prepaids, FHA insurance premium, VA funding fees, private mortgage insurance and discount points, if required by the loan. Taxes are prorated as of date of closing. Buyer agrees to pay all state tax/stamp fees/Grantor/Grantee taxes. Buyer agrees to reimburse or pay Seller for costs of the survey which is provided to Buyer at closing, and which shall

enable Buyer to obtain title insurance. Seller, in its sole discretion, may approve application of closing cost assistance to Buyer identified closing costs, prepaids, HOA fees and other closing expenses. At and after closing, Buyer is responsible for Homeowners Association ("HOA") dues and capitalization fees. Such fees are paid at closing, where applicable. Estimated HOA Dues are **\$77.09** per month and the estimated Capitalization Fee is **\$1,250.00**. HOA operations and services are provided by a third party which Eastwood Homes does not own/operate; therefore, HOA fees may change without notice and Buyer holds Seller harmless regarding estimated HOA and Capitalization fees.

12. **Binder Payment:** Buyer agrees to pay to the Seller the sum of **\$5,000** as a non-refundable binder/earnest money deposit ("Binder"), and an additional non-refundable deposit of on or before and to be applied to the purchase price of **\$578,305** of the hereinbefore described real property and the improvements constructed thereon, plus any additions for change orders as may be shown on any addendum which may be attached. Binder money will be placed in an interest-bearing escrow account and Eastwood Homes will retain all interest earned. Cash will not be accepted.

In the event Buyer has not paid the binder funds specified in this paragraph, or in any binder Addendum(s) attached hereto, within thirty (30) days from the date of sale, and/or within thirty (30) days from the date of executed binder Addendum(s), or, Buyer has not provided reasonable written evidence within thirty (30) days from contract to Seller from Buyer's lender evidencing Buyer's ability to borrow sufficient funds or proof of funds to close the sale of house and lot, that in either event, the Seller has certain rights. Seller shall have the absolute right to: 1) cancel this contract and retain earnest monies; or 2) maintain the contract in full force and effect and increase the purchase price of the house and lot one percent (1%), or, 3) maintain the contract in full force and effect and increase the purchase price of the house and lot to that which Eastwood Homes is charging for a comparable house and lot on the thirtieth (30th) day after the date of sale and/or within thirty (30) days from the date of executed binder addendum, or, 4) Seller can assess late fees to Buyer of \$100.00 per day, and in which case an Interest Carry Addendum will be executed and agreed anticipated Interest Carry Costs will be paid to Seller, which payment are nonrefundable and are not part of the purchase price.

Binder, and other transaction monies paid, are nonrefundable upon Buyer, or Buyer's agent, furnishing a lender preapproval letter (or other evidence of financing acceptable to Seller) to Seller. Upon Seller's receipt of the Buyer's lender's preapproval letter Seller shall, in reliance upon Buyer's compliance with all preapproval letter or financing terms, begin or continue construction of Buyer's home and add Buyer selected options to the home as contracted for. The Seller, in addition to the binder money, shall retain the right to pursue all other remedies in law and equity for noncompliance with paragraphs 12 and 13.

13. **Buyer's Loan Application and Approval:** Buyer will make an application for a loan **within five (5) days**. **Buyer will take no action after the signing of the contract to not make loan application or act in any way which will impair Buyer's ability to qualify for and obtain a CASH loan.** Any such action shall constitute a material breach of this contract and a forfeiture of all binder monies paid. Buyer authorizes Seller a limited power of attorney to obtain continuing updates from Buyer's lender and loan officer ("lender representatives") regarding Buyer's loan application and Buyer's progress towards satisfaction of all loan conditions to enable Buyer to close by the Closing Date. Buyer expressly authorizes Seller to communicate with Buyer's lender representatives to effectuate the limited power of attorney granted without need for further authorization being provided to lender representatives. Seller agrees to convey the property described above to the Buyer upon the closing of the loan and the payment of the purchase price as described herein. Time is of the essence in this contract. Conveyance shall be by Special Warranty Deed. Closing shall be upon completion, which is estimated by Seller to be on or about **180 Days from Start of Construction**.

14. **Design Center/Selection Appointments:** Buyer agrees to schedule an appointment with the Seller's Design and Selection Representative within seven (7) calendar days of date of sale. In the event Buyer does not schedule or attend this appointment, Seller at its sole discretion may terminate this Agreement and retain any binder monies held or Seller shall select from its list of standard options. Buyer agree he/she/they shall be required to provide additional nonrefundable deposits in accordance with the Design Center Addendum.

15. **Pre-Closing Orientation:** The pre-closing orientation date and time will be arranged for Buyer and must take place with the Buyer and Eastwood Homes' Builder. All construction meetings and walk-through orientations must be scheduled and take place during normal business hours. Buyer agrees that under no circumstance shall construction of the home stop due to Buyer's inability to attend any construction meetings, orientations or pre-closing appointment(s).

16. **Access to Property Before Closing:** Buyer shall be provided access to the property only with prior reasonable notice to their New Home Sales Specialist or Builder and only when accompanied by an authorized representative of Eastwood Homes. Buyer otherwise is prohibited access of any type prior to closing. Buyer realizes and acknowledges that entry upon the Property prior to closing can be dangerous and that hazards may exist which are not observable; Buyer waives any and all claims against Seller for injury or loss to person or property and Buyer shall hold harmless and indemnify Seller from and against injury, loss, damage or expense to any person or to any Property arising out of any entry on the property prior to closing. Buyer may not perform or contract any work to be performed on the property for any reason until after closing. Only the Seller is authorized to alter, change, or construct on the Property until the closing occurs.

17. **Date and Conditions of Closing:** Upon completion by the Seller as required by this contract, the Buyer will close the purchase. **Any other closing dates in this contract are for the purpose of estimated dates only.** Failure by the Buyer to close the purchase shall constitute a default under the terms of this Agreement and shall result in the Seller declaring the Buyer in default and authorizes Seller to exercise all remedies available at law or equity.

Closing dates and times will be established by the Eastwood Homes Closing Coordinator. Seller will provide advance notice of the closing date to Buyer, however, once a time and date have been set Seller will not be able to make any changes. In the event the closing date is missed due to inability to obtain financing or otherwise on the Buyer's behalf, Seller shall have the absolute right to avail itself of paragraph 12 rights regarding cancellation, purchase price increases, or late fees

Closing will occur at the following approved attorney's office: **Weeks & Irvine, LLC 567 Crowfield Boulevard Goose Creek, SC 29445**

Electric, gas and water utilities ("utilities") will be set by Eastwood Homes. Buyer shall have utility services transferred to his/her/their name no later than the day after closing. Eastwood assumes no responsibility for interrupted service if the agreed transfer does not occur as agreed.

The proration of property taxes will be based on the actual taxes from the previous year on the above referenced property and will usually be provided by the governing municipal entity. The parties acknowledge that the prior year tax rolls may include the property within a larger tract of land, in which case the individual lot value must be prorated from the tax value applicable to the larger tract. The Closing Attorney and Buyer's Lender ("Closing Staff"), pursuant to lending regulations, are required to obtain tax information at least a week in advance of closing. Accordingly, the undersigned hereby agree that the prorations of taxes on the Closing Disclosure and/or settlement statement are final, even in the rare instance where a governing municipal entity provides incorrect tax proration information or provides for reassessment, revaluation, or makes tax changes which were not available to Closing Staff at the time of closing and even where Closing Staff could have used a different methodology to prorate taxes. Buyer understands that certain municipal entities require an application be completed to receive reduced tax treatment for newly purchased property. Failure to apply for reduced tax treatment after closing may increase escrows and taxes due. Buyer further understands that certain municipalities require an application to be submitted by Buyer to obtain a more favorable tax treatment for the property from the municipality. Please inquire with Closing Staff regarding the application process that applies for your property.

At closing Buyer will receive a survey. If that survey demonstrates the community developer or Seller previously installed a fence, retaining wall or other fixture which adjoins or extends from any adjacent property onto Buyer(s) property, Buyer(s) understand and agree that Buyer(s) may have a shared responsibility to maintain, care for, and share in any cost of future replacement. Accordingly, any questions regarding the contents of the survey should be addressed to the Closing Attorney.

18. **Seller's Right to Cure:** Buyer agrees to provide Seller with five (5) business days' notice, in writing and prior to the established closing date, of any alleged defects or perceived violation by Seller of this Agreement. Seller shall have ten (10) calendar days to cure the perceived defect or violation prior to closing, and Buyer agrees the closing date will accordingly be adjusted in the sole discretion of Seller. If Buyer fails to abide by this section Seller shall have the right to exercise all remedies as detailed in paragraph 17.

19. **Closing Attorney:** The closing will be at the office of the Seller approved closing attorney(s). If the Buyer desires to employ an attorney to represent his/her interests, he/she may do so at his/her own expense. However, in all instances, the

closing will occur at the office of Seller's attorney.

20. **Termite Treatment Certification:** Seller agrees to furnish proof to Buyer by letter from a licensed pest control firm that the foundation/house has been treated for termites and other wood destroying organisms.

21. **Affiliated Business Disclosure:** Buyer acknowledges receipt of a copy of a Notice required by the Federal Real Estate Settlement Procedures Act and Regulation X (RESPA Notice) disclosing Eastwood Homes' interest in a title insurance agency, Cardinal Title Center, LLC and the existence of a preferred lender relationship (only applicable for federally-backed mortgage loans requiring a Settlement Statement or Closing Disclosure).

22. **Affiliated Business Election:** Buyer understands and requests the following (check all applicable):

- ☒ Buyer requests that title insurance business be referred to Cardinal Title Center, LLC, and/or Investors Title and the closing attorney be notified accordingly. Buyer requests title insurance reissue credit at closing. Buyer understands that Buyer can contact Cardinal Title Center, LLC at 1-866-772-2297 or Investors Title at 770-781-3000 to obtain or provide additional information concerning title insurance. Buyer further understands that the Lender, if any, requires mortgage loan title insurance and the Lender's policy does not provide Owner's coverage to protect Buyer's equity. Buyer requests Owner's coverage for the purchase price amount.
- ☐ Buyer requests my title insurance business be referred to _____ Please instruct the closing attorney accordingly.
- ☐ Buyer requests that the lending business be referred to Seller's approved or preferred lender(s) and that the closing attorney be notified accordingly. Information regarding Seller's preferred lender(s) is/are available from a Sales Representative.

23. **Documents Expressly Made Part of Contract:** Buyer acknowledges receipt of certain documents, either at or after date of sale, which are properly executed by the Seller and Buyer, which include, but are not limited to, detailing standard specifications, riders, contingencies, and other addendums ("documents"); all of which may be added during construction, and contain other contractual obligations which are incorporated herein by reference and are expressly made a part of this contract.

24. **Entire Agreement of Buyer and Seller:** The parties acknowledge and agree this contract and any properly executed documents attached hereto or attached at a later date, shall represent the entire agreement with respect to its contents and that all prior agreements and correspondence between the parties are totally superseded by the contents hereof, nor may the contents of any prior draft or agreement or other correspondence be used to interpret the intention of the parties with respect to the terms and conditions herein contained. This contract can only be modified in writing, signed and dated by both Buyer and authorized agent of Seller.

25. **Buyer in Default; Seller Remedies:** Buyer(s) shall be in default if Buyer(s) fail to make full and timely settlement under the terms and conditions set out in this contract. In the event of default the binder money may be retained by the Seller as liquidated damages and not as a penalty, in which event Buyer and Seller shall be relieved from further liability under this contract. In the alternative, and in Seller's sole discretion, Seller may retain the binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer's breach or default. In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.

Buyer acknowledges and agrees that Seller will utilize Seller's standard construction and contract administration processes and procedures in constructing the property and in otherwise performing this New Home Purchase Agreement, including Seller providing notices by email to Buyer. **The Seller's process may include completion of a prequalification form with a Seller approved lender which Seller will evaluate to confirm Buyer(s) ability to close on the Property** Buyer(s) agree that he/she/they shall be in default of this Agreement if Buyer engages in specific acts or a course of dealing which materially disrupts Seller's standard and customary construction and contract administration processes and procedures, which includes the Buyer, without limitation: failing to make choices or take other actions required of Buyer within indicated

time frames; refusing to work with designated Seller representatives to accomplish certain aspects of the Agreement, interfering with Seller and Seller's agents performance of the Agreement, engaging in an abusive, harassing, threatening or in an otherwise offensive manner towards Seller and/or Seller's agents, unreasonably withholding acceptance or approval of work which complies with plans and specifications, or any other acts which have the affect of delaying construction, increasing Seller's cost of performance or otherwise unreasonably impeding Seller's performance.

26. Seller Option to Cancel Prior to Closing: If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing. If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer's damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.

27. Notice of Warranty Requests; Dispute Resolution Where Seller Does Not Cancel Prior to Closing; Social Media; Marketing Authorization: Eastwood Homes reputation for excellence has been hard-earned over decades of quality homebuilding and includes providing every homeowner a home warranty and a reliable home warranty process. With the advent of social media home warranty claims are sometimes made outside the Eastwood Homes warranty process, which complicates Seller's ability to provide follow-up service. Accordingly, any warranty claim or dispute between the parties remains confidential and is hereafter not subject to disclosure other than between the parties. Buyers (and Buyer's agents) therefore agree they shall not make or encourage others to make any public statement, through any medium (including Facebook, Yelp, Twitter, or other social media sites whether existing at the time of contract or not) that is intended to, or reasonably could be foreseen to, be false, misleading, libelous or defamatory or be an unauthorized use of Eastwood Homes intellectual property, seek a non-contracted for benefit or otherwise be designed to falsely embarrass, criticize, malign, harass or be otherwise obscene, vulgar or inappropriate regarding Eastwood Homes or its employees. Eastwood Homes has specifically negotiated this provision and has further developed rules of use for various social mediums and its website designed to encourage constructive feedback by its valued customers. To effectuate this section, Seller is hereby authorized by Buyer, and Buyer hereby grants to Seller, an irrevocable limited power of attorney which survives closing which authorizes Seller to remove, or require removal, of content posted in violation of this section from any source, provider, ISP, or social media or website. Further, many states request or require parties to take preliminary steps before any claim or controversy proceeds. Towards that end, if any disputes, including within the first year of your warranty, arise prior to, during, or after closing, initial dispute inquiries should be initially directed to the following areas, according to the agreed process:

Step 1: For construction and warranty issues Buyer agrees to contact the local Division office *in writing* and identify the construction/warranty issue so the matter can reviewed by Seller, see www.eastwoodhomes.com; and

Step 2: For any further matters in which Buyer is unsatisfied, Buyer agrees to contact the Eastwood Corporate Office at (704) 399-4663 and request to speak with the claims administration representative prior to taking any action or making any claim.

Buyer hereby grant to Eastwood Homes or its authorized agents irrevocable authority to utilize our name(s), photograph, likeness, voice, biographical and personal background information, statements or related Buyer-related marketing materials in any medium or embodiment now known or hereafter developed as Eastwood Homes may deem appropriate from time to time, all without additional compensation or notice to me.

28. Risk of Loss: If Between the date of this Agreement and the Closing, the house is damaged by fire, natural disaster or other causality, the risk of loss to the home is assumed by the Seller, but without any obligation to repair or replace the same, except if the Seller elects to repair or replace the improvements. If Seller so elects to repair or replace the improvements, this Agreement shall remain in full force and effect and Seller shall be given a reasonable amount of time within to complete such repairs and replacements. If Seller elects not to repair or replace such improvements, Seller shall give written notice to the Buyer and this agreement shall be deemed canceled and Seller shall refund all deposits.

29. Home and Consumer Product Warranties: Prior to Buyer's closing, Buyer agrees he/she/they has/have been given and has/have read the Eastwood Homes Warranty Program's new home warranty booklet ("Home Warranty") that governs

Buyer's rights regarding warranty coverage. Seller and Buyer agree to be bound by all of the terms, conditions and exclusions of the Home Warranty. Buyer understands the Home Warranty is not an insurance policy and Buyer waives for him/herself, and/ or on behalf of anyone acquiring rights through Buyer, all subrogation or other rights for claims for repair or loss against Seller. The Home Warranty automatically transfers to the subsequent owner of the home; however such transfer does not extend any warranty coverage period.

Consumer products are excluded from coverage under the Home Warranty and pursuant to the Magnuson-Moss Warranty Act (15 USC § 2301, et seq.) Buyer is hereby assigned by Seller, effective after closing, all rights in any consumer product warranties of any consumer products installed in or upon Buyer's property. Seller shall not be liable for any damage to a consumer product or for any damage caused by a consumer project installed in or upon the property. If the consumer product malfunctions/is defective, Buyer will follow the procedures in the applicable manufacturer's warranty documents.

30. **Waiver of Other Warranties:** TO THE FULLEST EXTENT PERMITTED BY LAW ALL WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE PROPERTY, INCLUDING BUT NOT LIMITED TO STATUTORY AND IMPLIED WARRANTIES SUCH AS WARRANTIES OF QUALITY OR FITNESS FOR USE OR PARTICULAR PURPOSE, HABITABILITY, WARRANTIES OF CONSTRUCTION IN A GOOD AND WORKMANLIKE MANNER, AND ALL OTHERS, WITHOUT LIMITATION, ARE HEREBY DISCLAIMED BY SELLER AND WAIVED BY BUYER. IN EXCHANGE FOR THIS AGREEMENT BUYER HAS RECEIVED THE SEPARATE CONSIDERATION IN PARAGRAPH 11.

31. **Privacy Policy and Sharing of Consumer Information** Eastwood Homes does not collect or retain social security numbers. All other communications or materials you provide to us, whether received online, electronically, in person or otherwise collected by or submitted to us, including any data, questions, comments, suggestions or the like, is, and will be treated as, non-confidential and non-proprietary. Anything you submit, transmit or post becomes the property of Eastwood Homes ("Eastwood") and may be used for any purpose, including, but not limited to, reproduction, disclosure, transmission, publication, market research, development of prospect lists, project planning, broadcast, posting and marketing, among other things, as permitted by law. We may disclose nonpublic personal information detailed above about you (either as an existing or former customer) to financial service providers affiliated with Eastwood, such as mortgage bankers and insurance agents, retailers and direct marketers, pest control companies, multiple listing service and as part of the closing process. We may also disclose nonpublic personal information about you to nonaffiliated third parties only as required by law (i.e. to process transactions, maintain accounts, respond to court orders and legal investigations, or report to credit bureaus, if applicable). After closing Eastwood will not share nonpublic information with nonaffiliates except as required by a legal authority, state or federal agency, or by subpoena or other Court order.

32. **Special Provisions (including listing of all Addendums):**

Specifications

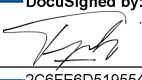
RESPA

Option Addendum

EXECUTION

By signing below, Buyer and Seller agree to be bound by all of the provisions of the Purchase Agreement. This Purchase Agreement shall not become binding upon Seller unless and until it is signed by the Division President, Vice President of Sales, Sales Manager, or other authorized Officer of Seller. Acceptance and deposit of a check prior to this Purchase Agreement being binding on Seller shall be done solely for the security of such payment. If this Purchase Agreement is not signed within ten (10) business days from the date on page one (1), then Seller can refund any payments made by the Buyer without interest and neither Seller nor Buyer shall have any liability hereunder.

Eastwood Construction Partners, LLC /f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes or Eastwood Homes of Raleigh, LLC or Eastwood Homes of Richmond, LLC or Eastwood Homes of Georgia, LLC & Eastwood Homes of Columbia, LLC or their Affiliates d/b/a Eastwood Homes.

DocuSigned by:

Buyer 2C6FE6D51955493... 9/15/2020
Date

DocuSigned by:

Buyer B47B3FB7A0C4C2... 9/15/2020
Date

DocuSigned by:

New Home Specialist 9/9/2020
Date

DocuSigned by:

Corporate Officer 9/17/2020
Date
(Valid only when executed by Officer of Corporation)

Rev. 4.17.2020

Seller  /Buyer(s)  

EXHIBIT B



Direct Dial: 843-277-6655

Email: michael@mcleod-lawgroup.com

June 10, 2021

Via First Class Mail & Email

Dion Matheney
Division President, Eastwood Homes
2265 Clements Ferry Road, Suite 205
Charleston, SC 29492

Re: Eastwood Homes / Swygert's Landing Phase IV Development
New Home Purchase Agreements

Dear Mr. Matheney,

McLeod Law Group, LLC and McCullough Khan, LLC together represent seven (7) Eastwood Homes homebuyers for the Phase 4 portion of Swygert's Landing. Our clients are:

1. Daniel J. O'Grady & Kaitlyn E. Grigoleit
1102 Tebalt Dr., Johns Island, SC 29455
Lot 141
TMS 312-02-00-095
2. Marcel & Patricia Franquelin
1107 Tebalt Dr., Johns Island, SC 29455
Lot 143
TMS 312-02-00-097
3. Louis & Kimberly Glavinos
1108 Tebalt Dr., Johns Island, SC 29455
Lot 140
TMS 312-02-00-094
4. Michelle & Ralph Dawkins
1120 Tebalt Dr., Johns Island, SC 29455
Lot 138
TMS 312-02-00-092
5. Rebecca & Morris White
1132 Tebalt Dr., Johns Island, SC 29455
Lot 136
TMS 312-02-00-090
6. Christopher & LaShonda Raybon
1126 Tebalt Dr., Johns Island, SC 29455
Lot 137
TMS 312-02-00-091

7. Adriana & Michael Martin
2926 Sarnoff Dr., Johns Island, SC 29455
Lot 146
TMS 312-02-00-100

It is our understanding that each of the above-listed homebuyers entered a valid and enforceable fixed-price, new home purchase agreement for the above-listed parcels with Eastwood Homes (Eastwood Construction Partners, LLC, et. al.). Those homes are being built right now for our clients, based on their choices and design selections. It is also our understanding that each of the above-listed homebuyers recently received correspondence and documentation from Eastwood Homes stating Phase 4 of Swygert's Landing "was erroneously left out of the Swygert's Phases 1, 2, and 3 Declaration of Covenants, Conditions and Restrictions by preceding Owner's legal error." Further communication stated that Eastwood would like to terminate these contracts and then offer our clients the ability to re-contract at "current market value" once the issue is resolved. It is also our understanding that Eastwood Homes is currently working to resolve this error regarding the Covenants and Restrictions.

Please note that none of the above-listed homebuyers are in dispute with Eastwood Homes. It appears that the dispute, if any, is between Eastwood Homes and the previous Owner or their legal counsel for the stated "legal error."

The Mission Statement of Eastwood Homes says, "Driven by integrity and our core values, we build homes of exceptional value and outstanding craftsmanship while delivering unparalleled customer service."¹ As you know, integrity is the practice of being honest and showing an uncompromising adherence to strong moral and ethical principles and values. A contract is simply a legally enforceable promise or exchange of promises. Integrity means keeping a promise.

Each of the above-listed homebuyers intends to keep their promise, honor the New Home Purchase Agreements entered with Eastwood Homes, and proceed with closing upon completion of their respective homes. Additionally, each of the above-listed homebuyers expects Eastwood Homes to keep its promise and honor the New Home Purchase Agreements entered with our clients. Integrity means keeping the promises made to these homebuyers.

Any error with regard to the Covenants and Restrictions does not nullify the New Home Purchase Agreements or give rise to a right of termination of them on behalf of Eastwood Homes.

Please let us know what, if anything, is needed from these homebuyers as Eastwood works to correct the legal error made by the previous owner. To the degree necessary, please accept this letter as written notice of your right to cure the problem with the Covenants pursuant to Paragraph 18 of the New Home Purchase Agreements. Our clients have agreed to provide you with the time reasonably needed to correct the stated "legal error." Please let us know how much time Eastwood reasonably needs and where Eastwood stands in the process. Your documentation states that it will take "4 months or more to legally resolve." Clearly, some of our clients are expecting to close soon and this is not welcomed news. Despite such, they value the lots and the houses they have selected and designed which are under contract and being built and they are willing to wait. However, some of our clients are not expected to close until well after your projected timeline for a resolution and therefore, they should not be affected at all. Again, all of our clients are willing to cooperate as needed to fix this problem.

¹ <https://www.eastwoodhomes.com/our-company/our-history>

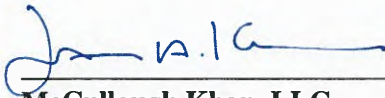
If you have any questions or would like to discuss this matter further, please feel free to call or email. We would be happy to arrange a conference between Mr. Khan, myself, and any necessary stakeholders or decision-makers. We look forward to working with you on this important matter.

With kind regards, I am,

Sincerely,



Michael Thomas Cooper, Esq.
McLeod Law Group, LLC



McCullough Khan, LLC

Jamie A. Khan, Esq.

Ross A. Appel, Esq.

359 King Street, Suite 200

Charleston, SC 29401

P: (843)937-0705

cc: Mark Weeks, Esq.
Closing Attorney
Weeks & Irvine, LLC

Derek Dean
Attorney for Swygert's Landing HOA
Simmons & Dean, Attorneys at Law

Chris Day
Registered Agent
Eastwood Construction Partners, LLC d/b/a Eastwood Homes

Jill Bagwell, Sales Manager
Via Email Only

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-
Daniel J. O'Grady and Kaitlyn E. Grigoleit,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	SUMMONS
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	(JURY TRIAL DEMANDED)
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

TO: THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your pleading to said Complaint upon the subscribers at their offices at 359 King Street, Suite 200, Charleston, South Carolina 29401, within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for judgment by default for the relief demanded in the Complaint.

Respectfully Submitted,

s/Ross A. Appel
 Jamie A. Khan (SC Bar #76685)
 Ross A. Appel (SC Bar #79149)
MCCULLOUGH KHAN, LLC
 359 King Street, Suite 200
 Charleston, SC 29401
 (843) 937-0400
 (843) 937-0706 (fax)
jamie@mklawsc.com
ross@mklawsc.com

s/Michael T. Cooper
Michael Thomas Cooper, (SC Bar #100053)
McLEOD LAW GROUP, LLC
P.O. Box 21624
Charleston, SC 29413
843-277-6655
Michael@mcleod-lawgroup.com

ATTORNEYS FOR PLAINTIFFS

June 17, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-
Daniel J. O’Grady and Kaitlyn E. Grigoleit,	)	
	)	
Plaintiffs,	)	COMPLAINT
	)	
v.	)	<i>Declaratory Judgement</i>
	)	<i>Specific Performance of Contract</i>
Eastwood Homes of Columbia, LLC d/b/a	)	<i>Breach of Contract</i>
Eastwood Homes; Eastwood Construction	)	<i>UTPA Violation</i>
Partners, LLC f/k/a Eastwood Construction,	)	<i>Breach of Contract Accompanied by</i>
LLC d/b/a Eastwood Homes; Eastwood	)	<i>Fraudulent Act</i>
Construction, LLC,	)	
	)	(JURY TRIAL DEMANDED)
Defendants.	)	

Plaintiffs Daniel J. O’Grady and Kaitlyn E. Grigoleit, complaining of the Defendants, would respectfully show unto this Court the following:

PARTIES

1. Plaintiffs Daniel J. O’Grady and Kaitlyn E. Grigoleit (“Plaintiffs”) are citizens and residents of Charleston County, South Carolina.

2. Defendant Eastwood Homes of Columbia, LLC is a limited liability company organized and existing under the laws of the State of South Carolina. Eastwood Homes of Columbia, LLC conducts business in South Carolina under the trade name “Eastwood Homes.”

3. Defendant Eastwood Construction Partners, LLC is a limited liability company organized and existing under the laws of the State of North Carolina and registered with the South Carolina Secretary of State. Eastwood Construction Partners, LLC also conducts business in South Carolina under the trade name “Eastwood Homes.”

4. Eastwood Construction, LLC is a limited liability company organized and existing under the laws of the State of North Carolina and registered with the South Carolina Secretary of

State. Eastwood Construction, LLC also conducts business in South Carolina under the trade name “Eastwood Homes.”

5. Defendants Eastwood Homes of Columbia, LLC, Eastwood Construction Partners, LLC, and Eastwood Construction, LLC are referred to collectively herein as “Eastwood Homes” and “Defendants.”

JURISDICTION AND VENUE

6. This court has jurisdiction over the parties and the subject matter of this action.

7. Venue is proper in the Court of Common Pleas for Charleston County pursuant to provisions of South Carolina law to include S.C. Code Ann. §15-7-10 *et seq.* and the subject matter of this action concerns a real estate purchase agreement for real estate located in Charleston County, State of South Carolina.

THE FACTS

8. Plaintiffs bring this action to compel Eastwood Homes to honor its legally binding and enforceable contract to build and sell a semi-custom home in the Swygert’s Landing subdivision on Johns Island.

9. Under the pretext of a “legal error” of Eastwood Homes’ (not Plaintiffs’) making, Eastwood Homes seeks to walk away from its contract with Plaintiffs in the hopes of forcing Plaintiffs to re-negotiate a future contract for the same property at a much higher price.

10. Plaintiffs and Eastwood Homes entered into that certain “Eastwood Homes New Home Purchase Agreement” dated December 29, 2020 (the “Contract”). **See Contract attached hereto as Exhibit A and incorporated herein by reference.**

11. The Contract obligates Eastwood Homes to convey to Plaintiffs Lot 141 in the Swygert’s Landing subdivision on Johns Island, 1102 Tebalt Dr., Johns Island, SC 29455 (TMS

No. 312-02-00-095) along with a semi-custom home, selected and uniquely customized by Plaintiffs in close coordination with Eastwood Homes and its representatives (the “Property”).

12. The Property is currently titled in the name of Eastwood Construction, LLC according to Charleston County’s records.

13. Plaintiff’s semi-custom home is currently under construction.

14. The Property is more particularly described as follows:

Legal Description

That certain real property owned by Eastwood Construction, LLC, commonly known as 1102 Tebalt Dr., Johns Island, SC 29455, and further defined as Lot 141 on the “Final Subdivision Plat of Phase 4 Swygert’s Landing” filed with the Register of Deeds for Charleston County in Plat Book L19, Page 0274 on June 26, 2019.

TMS No: 312-02-00-095

15. Pursuant to the Contract, Plaintiffs paid Eastwood Homes a \$5,000.00 “non-refundable binder/earnest money deposit.”

16. Plaintiffs have performed all their obligations under the Contract and are ready willing and able to close on the Property.

17. On or about June 2021, Plaintiffs received notification from Eastwood Homes stating Phase 4 of Swygert’s Landing “was erroneously left out of the Swygert’s Phases 1, 2, and 3 Declaration of Covenants, Conditions and Restrictions by preceding Owner’s legal error.” In other words, Phase 4 was supposed to be included in the Swygert’s Landing Homeowners Association, but the Covenants and Restrictions to affect the inclusion were not properly recorded.

18. Plaintiffs are not responsible for the aforementioned “legal error” in any way, shape, or form.

19. Plaintiffs’ contract with Eastwood Homes is not contingent upon inclusion in the HOA.

20. The aforementioned “legal error” is wholly unrelated to the enforceability or performance of the contract.

21. Upon information and belief, Eastwood Homes is in the process of resolving the aforementioned “legal error” with the existing Swygert’s Landing HOA.

22. Subsequent communications with Eastwood Homes revealed the company’s desire to terminate the Contract and then offer Plaintiffs the ability to re-contract at “current market value” once the covenants issue was resolved.

23. Plaintiffs are amenable to delaying closing until Eastwood Homes can correct the aforementioned covenants issue. Plaintiffs have offered to assist or facilitate, if possible, Eastwood Homes in their efforts to correct the “legal error.”

24. However, Plaintiffs soundly reject the notion that a “legal error,” not of their own making, justifies Eastwood Homes’ decision to terminate the Contract. There are no genuine disputes between the parties. Nothing in the Contract gives Eastwood Homes the unilateral right to terminate the Contract under these circumstances.

25. Nevertheless, on or about Friday, June 4, 2021, Eastwood Homes by and through its sales representative, Jill Bagwell, telephoned Plaintiffs to inform them that Eastwood intended to cancel the existing contract and would allow Plaintiffs an opportunity to enter a new, separate contract for an increased but yet to be determined price of the home. Eastwood Homes informed Plaintiffs that they would receive a “Mutual Release” document via email on the upcoming Monday.

26. On or about Monday, June 6, 2021, Eastwood Homes sent Plaintiffs a document titled “Mutual Release.”

27. The “Mutual Release” described the nature of the “legal error” and approximated four months to resolve or correct said error.

28. Plaintiffs soundly rejected the “Mutual Release” intending to move forward with closing on their home.

29. Subsequently, Eastwood Homes sent Plaintiffs a purported earnest money refund and a “liquidated damages” check for a measly and unconscionable amount of one hundred dollars (\$100.00).

30. The “Mutual Release” and refund checks are an unlawful repudiation of the Contract by Eastwood Homes. Plaintiffs soundly reject the “Mutual Release” and the earnest money refund and liquidated damages check.

31. Eastwood Homes has also cancelled all design meetings, walkthroughs, and otherwise have completely frustrated Plaintiffs’ ability to move forward with the purchase of their promised home.

32. Upon information and belief, Eastwood Homes unjustly seeks to use the aforementioned “legal error” surrounding its own negligence and failure to record the covenants to its financial advantage by requiring Plaintiffs, and several other similarly situated buyers under contract, to enter a new contract at a future date for an unspecified higher price that Eastwood will unilaterally dictate to Plaintiffs as an “offer.”

33. Real estate values continue to soar in Charleston County and the cost of construction materials has increased as well. Plaintiffs reasonably fear the new price will be much higher than the price previously negotiated and agreed upon by Eastwood in the Contract.

34. Plaintiffs insist Eastwood Homes honor the Contract for the original price and terms negotiated prior to the discovery of the covenants issue.

35. On June 10, 2021, the undersigned counsel for Plaintiffs provided written notice of Eastwood Homes' right to cure pursuant to Paragraph 18 of the Contract. **See Notice of Right to Cure Letter attached as Exhibit B and incorporated herein.**

36. Eastwood Homes has failed to respond to Plaintiffs' notice.

37. Eastwood Homes has defaulted under the Contract and repudiated the existing, binding agreement by mailing the refund and "liquidated damages" checks to Plaintiffs.

38. The semi-custom home specifically selected by Plaintiffs holds unique and special value to the Plaintiffs. Moreover, Plaintiffs have foregone other opportunities and changed their position in reliance on the Contract. There is no adequate remedy at law under the facts of this matter. As such, Plaintiffs are entitled to the remedy of specific performance of Contract.

39. Plaintiffs have been suffering and will continue to suffer additional damages due to the delay in the acquisition of the Property. Eastwood Homes is liable for these damages.

40. In the alternative, if the Court were not to award specific performance of the Contract, which it should, Eastwood Homes is liable to Plaintiffs for all damages and future damages suffered by Plaintiffs due to its breach of the Contract in an amount to be determined by a jury.

FOR A FIRST CAUSE OF ACTION
Declaratory Judgment

41. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

42. For the purpose of determining a question of actual controversy between the parties, Plaintiffs seek a declaration of their contractual and other rights pursuant S.C. Code Ann. § 15-53-30.

43. Under S.C. Code Ann. § 15-53-30, a party whose rights, status, or other legal relations are affected by contract, state statute, municipal ordinance, or other instrument may have those rights determined by a declaratory judgment.

44. Plaintiffs seek a declaratory judgment from this Court that the Contract is enforceable, not revocable by Eastwood Homes on account of the prior owners' "legal error" on the covenants issue, and Eastwood Homes is legally obligated to convey title to the Property to Plaintiffs pursuant to the terms of the Contract including, but not limited to, the agreed upon price not a future "current market value."

FOR A SECOND CAUSE OF ACTION
Specific Performance of Contract

45. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

46. The Contract is clear, definite and certain.

47. The Contract is a legally valid and enforceable contract.

48. The Contract was drafted by Eastwood Homes and offered to Plaintiffs on a take it or leave it basis. Plaintiffs were not permitted to make any changes to the Contract during negotiations regarding the purchase price of their home. The terms, including sales price, of the home were chosen by and dictated by Eastwood Homes who maintained all bargaining power in the exchange. Plaintiffs simply request Eastwood Homes perform the contract upon which it insisted.

49. In reliance on the Contract, Plaintiffs have performed and have carried the performance into execution and is ready, willing and able to continue to perform and purchase and close on the Property.

50. Eastwood Homes has simply decided not to perform without any justification whatsoever due, at least in part, to errors of its own – not Plaintiffs’ – making.

51. Eastwood Homes inequitably seeks to use this purported mistake to its advantage by forcing Plaintiffs to renegotiate a future contract for the sale of the Property at a significantly higher cost.

52. Money damages to Plaintiffs are inadequate as the Property, and the semi-custom home selected by Plaintiffs, is unique to Plaintiffs and their specific investment backed expectations.

53. The granting of the equitable relief of specific performance of the Contract in favor of Plaintiffs is highly favored in this case in the sound judicial discretion of the Court and equity favors the granting of specific performance of the contract in favor of Plaintiffs.

54. Plaintiffs are entitled to an award of equitable relief in the form of an order granting it specific performance of the Contract and an order compelling Eastwood Homes to sell and close on the Property immediately and on the terms set forth in the Contract.

55. Plaintiffs are also entitled to an award of all damages which are suffered by reason of the delay in acquisition of the Property, as well as all attorney’s fees and costs, which are recoverable pursuant to the Contract.

FOR A THIRD CAUSE OF ACTION
Breach of Contract

56. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

57. The Contract is a legally binding contract.

58. Eastwood Homes is in breach of the contract for failing to abide by the terms of the Contract, taking several actions to repudiate the Contract, refusing to sell the Property to the Plaintiffs, and failing to close and deliver title to the Property.

59. Eastwood Homes' breaches have at all times been intentional.

60. Plaintiffs have performed and are ready, willing and able to perform.

61. Plaintiffs are suffering damages and will continue to suffer significant damages.

62. Eastwood Homes is liable for all actual and consequential breach of contract damages, pre-judgment interest, attorney's fees and costs.

FOR A FOURTH CAUSE OF ACTION
South Carolina Unfair Trade Practices Act

63. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

64. Eastwood Homes has committed one or more acts of "[u]nfair methods of competition and unfair or deceptive acts or practices" pursuant to the South Carolina Unfair Trade Practices Act ("UTPA"). S.C. Code Ann. §§ 39-5-10 *et seq.*

65. These violations go beyond merely breaching the Contract. Rather, Eastwood Homes' conduct reveals a coordinated, premeditated scheme to force Plaintiffs, and other similarly situated contracted purchasers, to pay substantially more for the same property previously negotiated at a lower price.

66. Eastwood Homes' UTPA violations are "willful," meaning Eastwood Homes at all times relevant knew or should have known that its conduct was a violation of the UTPA.

67. Eastwood Homes' UTPA violations have an impact on the public interest.

68. Eastwood Homes' UTPA violations are not only "capable of repetition," but have actually been suffered by several other contracting parties similarly situated to Plaintiffs.

69. Eastwood Homes' UTPA violations have proximately caused Plaintiffs damages.

70. Eastwood Homes is liable for all actual, special, and consequential damages, treble damages allowed under the UTPA, pre-judgement interest, attorney's fees and costs.

FOR A FIFTH CAUSE OF ACTION
Breach of Contract Accompanied by Fraudulent Act

71. Plaintiffs repeat all of the allegations of the above paragraphs as if they were repeated verbatim here.

72. The Contract attached and incorporated by reference herein constitutes a legally binding contract between Plaintiffs and Eastwood Homes.

73. Eastwood Homes materially breached the Contract as more specifically set forth above.

74. Beyond merely breaching their contract with Plaintiffs, Eastwood Homes did so with fraudulent intent and through one or more fraudulent acts to include:

- a. Falsely and fraudulently stating the existing, binding contract could not be performed and was not binding due to Eastwood Homes' own negligence and "legal error."
- b. Using a collateral, extracontractual event as pretext to gain financial advantage and unilaterally set a new, higher contract price as an "offer" to Plaintiffs.
- c. Threatening without any reasonable justification to breach the contract with Plaintiffs if they complain about any deficiencies in Eastwood Homes' performance or workmanship to gain financial advantage and unilaterally set a new, higher contract price. That is, Eastwood Homes essentially used threats of breaching the contract with Plaintiffs to get Plaintiffs to acquiesce to faulty workmanship and/or poor build quality regardless of materiality to the agreement and in bad faith.

75. As a direct and proximate result of Eastwood Homes' breach of contract accompanied by fraudulent act(s), Plaintiffs have suffered actual damages as previously described; furthermore, Plaintiffs are entitled to punitive damages due to the intentional and fraudulent nature of Eastwood Homes' conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court issue a declaratory judgment as outlined above, award Plaintiffs specific performance of the Contract, and compel Eastwood Homes to sell, close and deliver title to the Property in accordance with the terms of the Contract, together with any damages suffered by Plaintiffs by reason of the failure of Eastwood Homes to close, to include attorney's fees, costs and prejudgment interest. In the alternative, Plaintiffs pray for an award of damages, treble damages under the UTPA, punitive damages, attorney's fees, costs and prejudgment interest for Eastwood Homes' breach of the contract; plus, such other further relief deemed appropriate in this case.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

s/Ross A. Appel
Jamie A. Khan (SC Bar #76685)
Ross A. Appel (SC Bar #79149)
MCCULLOUGH KHAN, LLC
359 King Street, Suite 200
Charleston, SC 29401
(843) 937-0400
(843) 937-0706 (fax)
jamie@mklawsc.com
ross@mklawsc.com

s/Michael T. Cooper
Michael Thomas Cooper, (SC Bar #100053)
McLEOD LAW GROUP, LLC
P.O. Box 21624
Charleston, SC 29413
843-277-6655
Michael@mcleod-lawgroup.com

ATTORNEYS FOR PLAINTIFFS

June 17, 2021
Charleston, South Carolina

EXHIBIT A

Lot/Block
Subdivision141
Swygerts Landing**Eastwood Homes New Home Purchase Agreement**

THIS CONTRACT, made and entered into this **December 29, 2020** between Eastwood Homes (herein referred to as Seller) and **Daniel J. O'Grady, Kaitlyn E. Grigoleit** hereinafter called Buyer(s). This Agreement cannot be assigned or transferred without the written consent of Seller. The date of sale is the date that Buyer(s) signed this agreement.

WITNESSETH:

That the parties hereto, in exchange for the mutual covenants herein contained, contract and agree with the other as follows:

1. **The Property:** Seller shall sell to Buyer and Buyer shall purchase from Seller all that parcel of land located in **Charleston County, SC** known as **Lot 141 in Swygerts Landing** Subdivision which Seller agrees to construct a house as shown on a map or plat thereof which is recorded in the Register of Deeds/Mesne Conveyances/Clerk of Court's Office, according to the Seller's plans and specifications. Seller covenants with Buyer that said plans and specifications meet FHA/VA/HUD requirements for a loan thereon, house to be completed according to said specifications and closed following final inspection (if applicable). The Plan Number/Name is **5089 Cosgrove Elevation A** and is built at street address **1102 Tebalt Dr. Johns Island SC 29455** together with all improvements thereon and appurtenances thereto (collectively, the "Property").

2. **Authority:** If two or more persons are named as Buyers within this Agreement herein, and after both Buyers execute this New Home Purchase Agreement, any one of them is thereafter authorized to act as agent for the other, with the right and authority to bind all persons named as Buyer, including in modifications to this Agreement and all subsequent Addendums thereto. Hence, the term 'Buyer' shall have the same meaning as 'Buyers' (plural) throughout this Agreement.

3. **Recorded Map Review:** Buyer has reviewed the recorded plat map for The Property, which shows page and plat book number **TMS#312-02-00-095**

4. **Cooperating Broker/Agent:** This New Home Purchase Agreement has X has not _____ been executed with a licensed Realtor in accordance with Eastwood Homes' Cooperating Broker Policy. All Eastwood Homes Sales Specialists ("Sales Representative(s)") are Employees of the Seller and only represent Eastwood Homes' interests. If Buyer has a Realtor agent representing his/her/their interests in this New Home Purchase the Buyer agrees to the following: The Buyer agency form will be signed prior to the original Purchase Agreement, which will detail the cooperating Broker/Agent's name, office, license number and contact information and the Realtor Compensation Addendum will be completed to disclose all compensation to be paid Buyer's agent at closing. Eastwood Homes does not offer Buyer's agents. Furthermore, Sales Representatives, who are compensated by Seller, are required to provide Seller with important Buyer information (i.e. personal, financial or other information) that would assist Seller in the sale of the Property.

5. Occupancy Disclosure:

 X Buyer agrees that the Property is being purchased as a principal occupancy for a primary residence. Buyer also agrees the Property is not being purchased for rental purposes and that no such indicator such as "for rent" signage may be placed upon the Property or advertised within twelve (12) months after closing. Buyer understands that Seller has entered into this agreement on the basis of this representation and this provision survives the closing.

_____ Buyer is purchasing this home as a non-owner occupied and/or investment property and Seller agrees that there will be no holding period placed on the Property. In order to exercise this option a \$ _____ earnest money binder must accompany this Agreement. With investment property, Buyer is aware that Seller will only respond to warranty concerns communicated by the title owners of the home.

6. **No Other Contracts or Documents:** Seller and Buyer agree that all contracts for the purchase of an Eastwood Home must be issued by Eastwood Homes. No other contracts or documents will be accepted, unless they are issued by Eastwood Homes. All correspondence will be facilitated through your Eastwood Homes New Home Specialist (Sales Representative). Buyer is prohibited from recording this Agreement or similar memorandum or pleading, and any attempted recordation shall

Seller DM /Buyer(s) DO KG

be declared, at Seller's option, a default by Buyer entitling Seller to exercise all of its remedies at law and/or equity.

7. No Oral Commitments: ALL statements or representations for which the Seller is to be responsible MUST be in writing within the Eastwood Homes New Home Purchase Agreement ("Purchase Agreement") or Addendum thereto, and properly executed by Buyer and Seller. **Buyer agrees that no Sales Representative or other Seller agent has the authority to make any statements which would modify, amend, change, alter, cancel or supplement this written Purchase Agreement or Addendum(s) thereto, unless statements are in writing and properly executed by Buyer and Seller.**

8. Materials Used and Selected: Buyer agrees that all materials used in the construction of said house upon the above-described real property, shall be chosen from the Seller's suppliers. Seller reserves the right to substitute "like kind" materials at its sole discretion. Color and other design selections, where applicable, must be completed within ten (10) calendar days of date of sale and within normal business hours. No changes can be made to color selections once signed without a \$250.00 nonrefundable change order processing fee. If selections are not completed, Seller may proceed with their own color selections. No changes can be made to the house after ten (10) calendar days after date of sale.

The Parties further agree Seller makes no representation or warranty to Buyer, beyond providing a municipally issued certificate of occupancy certifying each home as acceptable for habitation by each municipality, regarding the existence, presence or absence, of any radon, formaldehyde, toxic materials, hazardous materials or any other substance within any home, water supply, or on any property which is regulated, in whole or in part, by the Occupational Safety and Health Administration or other state or federal agency.

9. Lot Premiums and Community Development: Some of the properties in this community have lot premiums set by Seller. Premiums are determined by a variety of factors and generally define the desirability of a particular lot when compared to other lots in the community or in a geographic area. Premiums do not necessarily indicate a lot with a better view, privacy, topography, lot size or that has any other distinguishing feature. If Buyer purchases a lot perceived as having privacy or a desirable view, Buyer is aware that the privacy or view from the desired lot today is not guaranteed and Seller makes no representations or warranties about the scope or extent of any view or privacy now or in the future. Buyer understands that existing views or privacy may be altered or impaired by future construction by Seller, by other developers, by growth of vegetation and/or trees, by fences and/or by other factors not presently known. Further, Property adjacent to or surrounding the Buyer's Property, which is not owned by Seller, is understood to not be within Seller's control. In addition, the materials, features and amenities described and depicted in the marketing and promotion materials observed by or furnished to Buyer(s) are based upon current development plans, which are subject to change without notice. No guarantee is made that features amenities and facilities depicted by renderings or other description will be provided, or if provided, will be of the same type, size or nature as described.

10. Plans, Drawings, Renderings, Website: Buyer understands and agrees that the size of the Property, the location of sidewalks and driveways, landscaping, drainage patterns, topography, and other similar characteristics will differ from the model home plans, sales brochures, drawings, renderings or any website which Buyer may have examined. Total square footage and/or room size(s) may vary from renderings, sales brochures, blue prints or model home plans. Purchase price may vary depending on lot selection, floor plan selection, options or other Buyer requests. Seller owns all intellectual property rights for its plans, drawings, renderings, name, logo, website and other advertising, and no license is granted or conveyed to Buyer by this Agreement for use of Seller intellectual property. All homes are available on an equal opportunity basis.

11. Seller Paid Closing Costs, Concessions, Prepaids and Prorations: Buyer agrees to use best efforts to procure a loan or perform a cash closing to purchase the Property within the agreed time frames and consistent with this Agreement's requirements. Seller and Lender will pay, as separate consideration for waiver of paragraph 30 warranties, up to \$4,000 from Seller and/or lender toward the following closing costs associated with closing a first mortgage only, *provided Buyer utilizes a Seller approved or preferred lender and Seller's designated attorney.* These approved closing costs include loan origination, underwriting and/or processing fee(s), appraisal, credit report, buy down funds and sales price concessions, flood certification, attorney's fee(s), title and recording fee(s), title binder and insurance, courier fees, survey, and state tax/stamp fees/tax impounds/Grantor/Grantee taxes.

Buyer will pay all prepaids, FHA insurance premium, VA funding fees, private mortgage insurance and discount points, if required by the loan. Taxes are prorated as of date of closing. Buyer agrees to pay all state tax/stamp fees/Grantor/Grantee taxes. Buyer agrees to reimburse or pay Seller for costs of the survey which is provided to Buyer at closing, and which shall

enable Buyer to obtain title insurance. Seller, in its sole discretion, may approve application of closing cost assistance to Buyer identified closing costs, prepaids, HOA fees and other closing expenses. At and after closing, Buyer is responsible for Homeowners Association ("HOA") dues and capitalization fees. Such fees are paid at closing, where applicable. Estimated HOA Dues are \$77.09 per month and the estimated Capitalization Fee is \$1,250.00. HOA operations and services are provided by a third party which Eastwood Homes does not own/operate; therefore, HOA fees may change without notice and Buyer holds Seller harmless regarding estimated HOA and Capitalization fees.

12. Binder Payment: Buyer agrees to pay to the Seller the sum of \$5,000.00 as a non-refundable binder/earnest money deposit ("Binder"), and an additional non-refundable deposit of on or before and to be applied to the purchase price of \$59,000 of the hereinbefore described real property and the improvements constructed thereon, plus any additions for change orders as may be shown on any addendum which may be attached. Binder money will be placed in an interest-bearing escrow account and Eastwood Homes will retain all interest earned. Cash will not be accepted.

In the event Buyer has not paid the binder funds specified in this paragraph, or in any binder Addendum(s) attached hereto, within thirty (30) days from the date of sale, and/or within thirty (30) days from the date of executed binder Addendum(s), or Buyer has not provided reasonable written evidence within thirty (30) days from contract to Seller from Buyer's lender evidencing Buyer's ability to borrow sufficient funds or proof of funds to close the sale of house and lot, that in either event, the Seller has certain rights. Seller shall have the absolute right to: 1) cancel this contract and retain earnest monies; or 2) maintain the contract in full force and effect and increase the purchase price of the house and lot one percent (1%), or 3) maintain the contract in full force and effect and increase the purchase price of the house and lot to that which Eastwood Homes is charging for a comparable house and lot on the thirtieth (30th) day after the date of sale and/or within thirty (30) days from the date of executed binder addendum, or 4) Seller can assess late fees to Buyer of \$100.00 per day, and in which case an Interest Carry Addendum will be executed and agreed anticipated Interest Carry Costs will be paid to Seller, which payment are nonrefundable and are not part of the purchase price.

Binder, and other transaction monies paid, are nonrefundable upon Buyer, or Buyer's agent, furnishing a lender preapproval letter (or other evidence of financing acceptable to Seller) to Seller. Upon Seller's receipt of the Buyer's lender's preapproval letter Seller shall, in reliance upon Buyer's compliance with all preapproval letter or financing terms, begin or continue construction of Buyer's home and add Buyer selected options to the home as contracted for. The Seller, in addition to the binder money, shall retain the right to pursue all other remedies in law and equity for noncompliance with paragraphs 12 and 13.

13. Buyer's Loan Application and Approval: Buyer will make an application for a loan within five (5) days. Buyer will take no action after the signing of the contract to not make loan application or act in any way which will impair Buyer's ability to qualify for and obtain a Conventional loan. Any such action shall constitute a material breach of this contract and a forfeiture of all binder monies paid. Buyer authorizes Seller a limited power of attorney to obtain continuing updates from Buyer's lender and loan officer ("lender representatives") regarding Buyer's loan application and Buyer's progress towards satisfaction of all loan conditions to enable Buyer to close by the Closing Date. Buyer expressly authorizes Seller to communicate with Buyer's lender representatives to effectuate the limited power of attorney granted without need for further authorization being provided to lender representatives. Seller agrees to convey the property described above to the Buyer upon the closing of the loan and the payment of the purchase price as described herein. Time is of the essence in this contract. Conveyance shall be by Special Warranty Deed. Closing shall be upon completion, which is estimated by Seller to be on or about **180 Days from Start of Construction.**

14. Design Center/Selection Appointments: Buyer agrees to schedule an appointment with the Seller's Design and Selection Representative within seven (7) calendar days of date of sale. In the event Buyer does not schedule or attend this appointment, Seller at its sole discretion may terminate this Agreement and retain any binder monies held or Seller shall select from its list of standard options. Buyer agree he/she/they shall be required to provide additional nonrefundable deposits in accordance with the Design Center Addendum.

15. Pre-Closing Orientation: The pre-closing orientation date and time will be arranged for Buyer and must take place with the Buyer and Eastwood Homes' Builder. All construction meetings and walk-through orientations must be scheduled and take place during normal business hours. Buyer agrees that under no circumstance shall construction of the home stop due to Buyer's inability to attend any construction meetings, orientations or pre-closing appointment(s).

16. Access to Property Before Closing: Buyer shall be provided access to the property only with prior reasonable notice to their New Home Sales Specialist or Builder and only when accompanied by an authorized representative of Eastwood Homes. Buyer otherwise is prohibited access of any type prior to closing. Buyer realizes and acknowledges that entry upon the Property prior to closing can be dangerous and that hazards may exist which are not observable; Buyer waives any and all claims against Seller for injury or loss to person or property and Buyer shall hold harmless and indemnify Seller from and against injury, loss, damage or expense to any person or to any Property arising out of any entry on the property prior to closing. Buyer may not perform or contract any work to be performed on the property for any reason until after closing. Only the Seller is authorized to alter, change, or construct on the Property until the closing occurs.

17. Date and Conditions of Closing: Upon completion by the Seller as required by this contract, the Buyer will close the purchase. **Any other closing dates in this contract are for the purpose of estimated dates only.** Failure by the Buyer to close the purchase shall constitute a default under the terms of this Agreement and shall result in the Seller declaring the Buyer in default and authorizes Seller to exercise all remedies available at law or equity.

Closing dates and times will be established by the Eastwood Homes Closing Coordinator. Seller will provide advance notice of the closing date to Buyer, however, once a time and date have been set Seller will not be able to make any changes. In the event the closing date is missed due to inability to obtain financing or otherwise on the Buyer's behalf, Seller shall have the absolute right to avail itself of paragraph 12 rights regarding cancellation, purchase price increases, or late fees.

Closing will occur at the following approved attorney's office: **Weeks & Irvine, LLC 567 Crowfield Boulevard Goose Creek, SC 29445**

Electric, gas and water utilities ("utilities") will be set by Eastwood Homes. Buyer shall have utility services transferred to his/her/their name no later than the day after closing. Eastwood assumes no responsibility for interrupted service if the agreed transfer does not occur as agreed.

The proration of property taxes will be based on the actual taxes from the previous year on the above referenced property and will usually be provided by the governing municipal entity. The parties acknowledge that the prior year tax rolls may include the property within a larger tract of land, in which case the individual lot value must be prorated from the tax value applicable to the larger tract. The Closing Attorney and Buyer's Lender ("Closing Staff"), pursuant to lending regulations, are required to obtain tax information at least a week in advance of closing. Accordingly, the undersigned hereby agree that the prorations of taxes on the Closing Disclosure and/or settlement statement are final, even in the rare instance where a governing municipal entity provides incorrect tax proration information or provides for reassessment, revaluation, or makes tax changes which were not available to Closing Staff at the time of closing and even where Closing Staff could have used a different methodology to prorate taxes. Buyer understands that certain municipal entities require an application be completed to receive reduced tax treatment for newly purchased property. Failure to apply for reduced tax treatment after closing may increase escrows and taxes due. Buyer further understands that certain municipalities require an application to be submitted by Buyer to obtain a more favorable tax treatment for the property from the municipality. Please inquire with Closing Staff regarding the application process that applies for your property.

At closing Buyer will receive a survey. If that survey demonstrates the community developer or Seller previously installed a fence, retaining wall or other fixture which adjoins or extends from any adjacent property onto Buyer(s) property, Buyer(s) understand and agree that Buyer(s) may have a shared responsibility to maintain, care for, and share in any cost of future replacement. Accordingly, any questions regarding the contents of the survey should be addressed to the Closing Attorney.

18. Seller's Right to Cure: Buyer agrees to provide Seller with five (5) business days' notice, in writing and prior to the established closing date, of any alleged defects or perceived violation by Seller of this Agreement. Seller shall have ten (10) calendar days to cure the perceived defect or violation prior to closing, and Buyer agrees the closing date will accordingly be adjusted in the sole discretion of Seller. If Buyer fails to abide by this section Seller shall have the right to exercise all remedies as detailed in paragraph 17.

19. Closing Attorney: The closing will be at the office of the Seller approved closing attorney(s). If the Buyer desires to employ an attorney to represent his/her interests, he/she may do so at his/her own expense. However, in all instances, the

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Seller DM / Buyer(s) DO KU

closing will occur at the office of Seller's attorney.

20. **Termite Treatment Certification:** Seller agrees to furnish proof to Buyer by letter from a licensed pest control firm that the foundation/house has been treated for termites and other wood destroying organisms.

21. **Affiliated Business Disclosure:** Buyer acknowledges receipt of a copy of a Notice required by the Federal Real Estate Settlement Procedures Act and Regulation X (RESPA Notice) disclosing Eastwood Homes' interest in a title insurance agency, Cardinal Title Center, LLC and the existence of a preferred lender relationship (only applicable for federally-backed mortgage loans requiring a Settlement Statement or Closing Disclosure).

22. **Affiliated Business Election:** Buyer understands and requests the following (check all applicable):

- ☒ Buyer requests that title insurance business be referred to Cardinal Title Center, LLC, and/or Investors Title and the closing attorney be notified accordingly. Buyer requests title insurance reissue credit at closing. Buyer understands that Buyer can contact Cardinal Title Center, LLC at 1-866-772-2297 or Investors Title at 770-781-3000 to obtain or provide additional information concerning title insurance. Buyer further understands that the Lender, if any, requires mortgage loan title insurance and the Lender's policy does not provide Owner's coverage to protect Buyer's equity. Buyer requests Owner's coverage for the purchase price amount.
- ☐ Buyer requests my title insurance business be referred to _____ Please instruct the closing attorney accordingly.
- ☒ Buyer requests that the lending business be referred to Seller's approved or preferred lender(s) and that the closing attorney be notified accordingly. Information regarding Seller's preferred lender(s) is/are available from a Sales Representative.

23. **Documents Expressly Made Part of Contract:** Buyer acknowledges receipt of certain documents, either at or after date of sale, which are properly executed by the Seller and Buyer, which include, but are not limited to, detailing standard specifications, riders, contingencies, and other addendums ("documents"); all of which may be added during construction, and contain other contractual obligations which are incorporated herein by reference and are expressly made a part of this contract.

24. **Entire Agreement of Buyer and Seller:** The parties acknowledge and agree this contract and any properly executed documents attached hereto or attached at a later date, shall represent the entire agreement with respect to its contents and that all prior agreements and correspondence between the parties are totally superseded by the contents hereof, nor may the contents of any prior draft or agreement or other correspondence be used to interpret the intention of the parties with respect to the terms and conditions herein contained. This contract can only be modified in writing, signed and dated by both Buyer and authorized agent of Seller.

25. **Buyer in Default; Seller Remedies:** Buyer(s) shall be in default if Buyer(s) fail to make full and timely settlement under the terms and conditions set out in this contract. In the event of default the binder money may be retained by the Seller as liquidated damages and not as a penalty; in which event Buyer and Seller shall be relieved from further liability under this contract. In the alternative, and in Seller's sole discretion, Seller may retain the binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer's breach or default. In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.

Buyer acknowledges and agrees that Seller will utilize Seller's standard construction and contract administration processes and procedures in constructing the property and in otherwise performing this New Home Purchase Agreement, including Seller providing notices by email to Buyer. The Seller's process may include completion of a prequalification form with a Seller approved lender which Seller will evaluate to confirm Buyer(s) ability to close on the Property. Buyer(s) agree that he/she/they shall be in default of this Agreement if Buyer engages in specific acts or a course of dealing which materially disrupts Seller's standard and customary construction and contract administration processes and procedures, which includes the Buyer, without limitation: failing to make choices or take other actions required of Buyer within indicated

time frames; refusing to work with designated Seller representatives to accomplish certain aspects of the Agreement, interfering with Seller and Seller's agents performance of the Agreement, engaging in an abusive, harassing, threatening or in an otherwise offensive manner towards Seller and/or Seller's agents, unreasonably withholding acceptance or approval of work which complies with plans and specifications, or any other acts which have the affect of delaying construction, increasing Seller's cost of performance or otherwise unreasonably impeding Seller's performance.

26. Seller Option to Cancel Prior to Closing: If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing. If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer's damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.

27. Notice of Warranty Requests; Dispute Resolution Where Seller Does Not Cancel Prior to Closing; Social Media; Marketing Authorization: Eastwood Homes reputation for excellence has been hard-earned over decades of quality homebuilding and includes providing every homeowner a home warranty and a reliable home warranty process. With the advent of social media home warranty claims are sometimes made outside the Eastwood Homes warranty process, which complicates Seller's ability to provide follow-up service. Accordingly, any warranty claim or dispute between the parties remains confidential and is hereafter not subject to disclosure other than between the parties. Buyers (and Buyer's agents) therefore agree they shall not make or encourage others to make any public statement, through any medium (including Facebook, Yelp, Twitter, or other social media sites whether existing at the time of contract or not) that is intended to, or reasonably could be foreseen to, be false, misleading, libelous or defamatory or be an unauthorized use of Eastwood Homes intellectual property, seek a non-contracted for benefit or otherwise be designed to falsely embarrass, criticize, malign, harass or be otherwise obscene, vulgar or inappropriate regarding Eastwood Homes or its employees. Eastwood Homes has specifically negotiated this provision and has further developed rules of use for various social mediums and its website designed to encourage constructive feedback by its valued customers. To effectuate this section, Seller is hereby authorized by Buyer, and Buyer hereby grants to Seller, an irrevocable limited power of attorney which survives closing which authorizes Seller to remove, or require removal, of content posted in violation of this section from any source, provider, ISP, or social media or website. Further, many states request or require parties to take preliminary steps before any claim or controversy proceeds. Towards that end, if any disputes, including within the first year of your warranty, arise prior to, during, or after closing, initial dispute inquiries should be initially directed to the following areas, according to the agreed process:

Step 1: For construction and warranty issues Buyer agrees to contact the local Division office in writing and identify the construction/warranty issue so the matter can reviewed by Seller, see www.eastwoodhomes.com; and

Step 2: For any further matters in which Buyer is unsatisfied, Buyer agrees to contact the Eastwood Corporate Office at (704) 399-4663 and request to speak with the claims administration representative prior to taking any action or making any claim.

Buyer hereby grant to Eastwood Homes or its authorized agents irrevocable authority to utilize our name(s), photograph, likeness, voice, biographical and personal background information, statements or related Buyer-related marketing materials in any medium or embodiment now known or hereafter developed as Eastwood Homes may deem appropriate from time to time, all without additional compensation or notice to me.

28. Risk of Loss: If Between the date of this Agreement and the Closing, the house is damaged by fire, natural disaster or other causality, the risk of loss to the home is assumed by the Seller, but without any obligation to repair or replace the same, except if the Seller elects to repair or replace the improvements. If Seller so elects to repair or replace the improvements, this Agreement shall remain in full force and effect and Seller shall be given a reasonable amount of time within to complete such repairs and replacements. If Seller elects not to repair or replace such improvements, Seller shall give written notice to the Buyer and this agreement shall be deemed canceled and Seller shall refund all deposits.

29. Home and Consumer Product Warranties: Prior to Buyer's closing, Buyer agrees he/she/they has/have been given and has/have read the Eastwood Homes Warranty Program's new home warranty booklet ("Home Warranty") that governs

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Seller  / Buyer(s)  

Buyer's rights regarding warranty coverage. Seller and Buyer agree to be bound by all of the terms, conditions and exclusions of the Home Warranty. Buyer understands the Home Warranty is not an insurance policy and Buyer waives for him/herself, and/ or on behalf of anyone acquiring rights through Buyer, all subrogation or other rights for claims for repair or loss against Seller. The Home Warranty automatically transfers to the subsequent owner of the home; however such transfer does not extend any warranty coverage period.

Consumer products are excluded from coverage under the Home Warranty and pursuant to the Magnuson-Moss Warranty Act (15 USC § 2301, et seq.) Buyer is hereby assigned by Seller, effective after closing, all rights in any consumer product warranties of any consumer products installed in or upon Buyer's property. Seller shall not be liable for any damage to a consumer product or for any damage caused by a consumer product installed in or upon the property. If the consumer product malfunctions/is defective, Buyer will follow the procedures in the applicable manufacturer's warranty documents.

30. Waiver of Other Warranties: TO THE FULLEST EXTENT PERMITTED BY LAW ALL WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE PROPERTY, INCLUDING BUT NOT LIMITED TO STATUTORY AND IMPLIED WARRANTIES SUCH AS WARRANTIES OF QUALITY OR FITNESS FOR USE OR PARTICULAR PURPOSE, HABITABILITY, WARRANTIES OF CONSTRUCTION IN A GOOD AND WORKMANLIKE MANNER, AND ALL OTHERS, WITHOUT LIMITATION, ARE HEREBY DISCLAIMED BY SELLER AND WAIVED BY BUYER. IN EXCHANGE FOR THIS AGREEMENT BUYER HAS RECEIVED THE SEPARATE CONSIDERATION IN PARAGRAPH 11.

31. Privacy Policy and Sharing of Consumer Information. Eastwood Homes does not collect or retain social security numbers. All other communications or materials you provide to us, whether received online, electronically, in person or otherwise collected by or submitted to us, including any data, questions, comments, suggestions or the like, is, and will be treated as, non-confidential and non-proprietary. Anything you submit, transmit or post becomes the property of Eastwood Homes ("Eastwood") and may be used for any purpose, including, but not limited to, reproduction, disclosure, transmission, publication, market research, development of prospect lists, project planning, broadcast, posting and marketing, among other things, as permitted by law. We may disclose nonpublic personal information detailed above about you (either as an existing or former customer) to financial service providers affiliated with Eastwood, such as mortgage bankers and insurance agents, retailers and direct marketers, pest control companies, multiple listing service and as part of the closing process. We may also disclose nonpublic personal information about you to nonaffiliated third parties only as required by law (i.e. to process transactions, maintain accounts, respond to court orders and legal investigations, or report to credit bureaus, if applicable). After closing Eastwood will not share nonpublic information with nonaffiliates except as required by a legal authority, state or federal agency, or by subpoena or other Court order.

32. Special Provisions (including listing of all Addendums):

Specifications

RESPA

Option Addendum

EXECUTION

By signing below, Buyer and Seller agree to be bound by all of the provisions of the Purchase Agreement. This Purchase Agreement shall not become binding upon Seller unless and until it is signed by the Division President, Vice President of Sales, Sales Manager, or other authorized Officer of Seller. Acceptance and deposit of a check prior to this Purchase Agreement being binding on Seller shall be done solely for the security of such payment. If this Purchase Agreement is not signed within ten (10) business days from the date on page one (1), then Seller can refund any payments made by the Buyer without interest and neither Seller nor Buyer shall have any liability hereunder.

Eastwood Construction Partners, LLC /f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes or Eastwood Homes of Raleigh, LLC or Eastwood Homes of Richmond, LLC or Eastwood Homes of Georgia, LLC & Eastwood Homes of Columbia, LLC or their Affiliates d/b/a Eastwood Homes,

DocuSigned by:
David O'Grady 12/30/2020
 Buyer F6303A8880BB425... Date

DocuSigned by:
Kaitlyn Grigoleit 12/30/2020
 Buyer B0218559E684EB... Date

DocuSigned by:
Melissa Guggisberg 12/30/2020
 New Home Specialist Date

DocuSigned by:
Dion Mathoney 12/30/2020
 Corporate Officer Date
 (Valid only when executed by Officer of Corporation)

Rev. 4.17.2020

Seller  /Buyer(s)  

EXHIBIT B



Direct Dial: 843-277-6655

Email: michael@mcleod-lawgroup.com

June 10, 2021

Via First Class Mail & Email

Dion Matheney
Division President, Eastwood Homes
2265 Clements Ferry Road, Suite 205
Charleston, SC 29492

Re: Eastwood Homes / Swygert's Landing Phase IV Development
New Home Purchase Agreements

Dear Mr. Matheney,

McLeod Law Group, LLC and McCullough Khan, LLC together represent seven (7) Eastwood Homes homebuyers for the Phase 4 portion of Swygert's Landing. Our clients are:

1. Daniel J. O'Grady & Kaitlyn E. Grigoleit
1102 Tebalt Dr., Johns Island, SC 29455
Lot 141
TMS 312-02-00-095
2. Marcel & Patricia Franquelin
1107 Tebalt Dr., Johns Island, SC 29455
Lot 143
TMS 312-02-00-097
3. Louis & Kimberly Glavinos
1108 Tebalt Dr., Johns Island, SC 29455
Lot 140
TMS 312-02-00-094
4. Michelle & Ralph Dawkins
1120 Tebalt Dr., Johns Island, SC 29455
Lot 138
TMS 312-02-00-092
5. Rebecca & Morris White
1132 Tebalt Dr., Johns Island, SC 29455
Lot 136
TMS 312-02-00-090
6. Christopher & LaShonda Raybon
1126 Tebalt Dr., Johns Island, SC 29455
Lot 137
TMS 312-02-00-091

7. Adriana & Michael Martin
2926 Sarnoff Dr., Johns Island, SC 29455
Lot 146
TMS 312-02-00-100

It is our understanding that each of the above-listed homebuyers entered a valid and enforceable fixed-price, new home purchase agreement for the above-listed parcels with Eastwood Homes (Eastwood Construction Partners, LLC, et. al.). Those homes are being built right now for our clients, based on their choices and design selections. It is also our understanding that each of the above-listed homebuyers recently received correspondence and documentation from Eastwood Homes stating Phase 4 of Swygert's Landing "was erroneously left out of the Swygert's Phases 1, 2, and 3 Declaration of Covenants, Conditions and Restrictions by preceding Owner's legal error." Further communication stated that Eastwood would like to terminate these contracts and then offer our clients the ability to re-contract at "current market value" once the issue is resolved. It is also our understanding that Eastwood Homes is currently working to resolve this error regarding the Covenants and Restrictions.

Please note that none of the above-listed homebuyers are in dispute with Eastwood Homes. It appears that the dispute, if any, is between Eastwood Homes and the previous Owner or their legal counsel for the stated "legal error."

The Mission Statement of Eastwood Homes says, "Driven by integrity and our core values, we build homes of exceptional value and outstanding craftsmanship while delivering unparalleled customer service."¹ As you know, integrity is the practice of being honest and showing an uncompromising adherence to strong moral and ethical principles and values. A contract is simply a legally enforceable promise or exchange of promises. Integrity means keeping a promise.

Each of the above-listed homebuyers intends to keep their promise, honor the New Home Purchase Agreements entered with Eastwood Homes, and proceed with closing upon completion of their respective homes. Additionally, each of the above-listed homebuyers expects Eastwood Homes to keep its promise and honor the New Home Purchase Agreements entered with our clients. Integrity means keeping the promises made to these homebuyers.

Any error with regard to the Covenants and Restrictions does not nullify the New Home Purchase Agreements or give rise to a right of termination of them on behalf of Eastwood Homes.

Please let us know what, if anything, is needed from these homebuyers as Eastwood works to correct the legal error made by the previous owner. To the degree necessary, please accept this letter as written notice of your right to cure the problem with the Covenants pursuant to Paragraph 18 of the New Home Purchase Agreements. Our clients have agreed to provide you with the time reasonably needed to correct the stated "legal error." Please let us know how much time Eastwood reasonably needs and where Eastwood stands in the process. Your documentation states that it will take "4 months or more to legally resolve." Clearly, some of our clients are expecting to close soon and this is not welcomed news. Despite such, they value the lots and the houses they have selected and designed which are under contract and being built and they are willing to wait. However, some of our clients are not expected to close until well after your projected timeline for a resolution and therefore, they should not be affected at all. Again, all of our clients are willing to cooperate as needed to fix this problem.

¹ <https://www.eastwoodhomes.com/our-company/our-history>

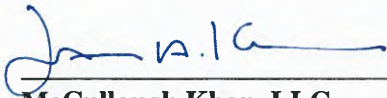
If you have any questions or would like to discuss this matter further, please feel free to call or email. We would be happy to arrange a conference between Mr. Khan, myself, and any necessary stakeholders or decision-makers. We look forward to working with you on this important matter.

With kind regards, I am,

Sincerely,



Michael Thomas Cooper, Esq.
McLeod Law Group, LLC



McCullough Khan, LLC

Jamie A. Khan, Esq.

Ross A. Appel, Esq.

359 King Street, Suite 200

Charleston, SC 29401

P: (843)937-0705

cc: Mark Weeks, Esq.
Closing Attorney
Weeks & Irvine, LLC

Derek Dean
Attorney for Swygert's Landing HOA
Simmons & Dean, Attorneys at Law

Chris Day
Registered Agent
Eastwood Construction Partners, LLC d/b/a Eastwood Homes

Jill Bagwell, Sales Manager
Via Email Only

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-
Marcel Franquelin and Patricia Franquelin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	LIS PENDENS
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

TO: THE DEFENDANTS ABOVE NAMED AND ALL OTHERS CONCERNED:

NOTICE IS HEREBY GIVEN, that pursuant to S.C. Code Ann. § 15-11-10 *et seq.*, an action has or is about to be commenced in the Court of Common Pleas for Charleston County in which the Plaintiffs Marcel Franquelin and Patricia Franquelin (“Plaintiffs”) are bringing an action against the Defendants Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes; Eastwood Construction Partners, LLC f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes; and Eastwood Construction, LLC (“Eastwood Homes”).

Plaintiffs claim an interest in and right to purchase Lot 143 in the Swygert’s Landing subdivision on Johns Island, 1107 Tebalt Dr., Johns Island, SC 29455 (TMS No. 312-02-00-097) along with a semi-custom home, selected and uniquely customized by Plaintiffs in close coordination with Eastwood Homes and its representatives (the “Property”), described in further detail below, based on a written and fully executed contract for sale with Eastwood Homes. Eastwood Homes has defaulted on this contract as described more fully in the Complaint filed herewith.

Plaintiffs hereby file this Lis Pendens on the Property more fully described below:

Legal Description

That certain real property owned by Eastwood Construction, LLC, commonly known as 1107 Tebalt Dr., Johns Island, SC 29455, and further defined as Lot 143 on the “Final Subdivision Plat of Phase 4 Swygert’s Landing” filed with the Register of Deeds for Charleston County in Plat Book L19, Page 0274 on June 26, 2019.

TMS No.: 312-02-00-097

Respectfully Submitted,

s/Ross A. Appel

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Ross A. Appel (SC Bar #79149)
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s/Michael T. Cooper

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ATTORNEYS FOR PLAINTIFFS

June 17, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-
Daniel J. O’Grady and Kaitlyn E. Grigoleit,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	LIS PENDENS
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

TO: THE DEFENDANTS ABOVE NAMED AND ALL OTHERS CONCERNED:

NOTICE IS HEREBY GIVEN, that pursuant to S.C. Code Ann. § 15-11-10 *et seq.*, an action has or is about to be commenced in the Court of Common Pleas for Charleston County in which the Plaintiffs Daniel J. O’Grady and Kaitlyn E. Grigoleit (“Plaintiffs”) are bringing an action against the Defendants Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes; Eastwood Construction Partners, LLC f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes; and Eastwood Construction, LLC (“Eastwood Homes”).

Plaintiffs claim an interest in and right to purchase Lot 141 in the Swygert’s Landing subdivision on Johns Island, 1102 Tebalt Dr., Johns Island, SC 29455 (TMS No. 312-02-00-095) along with a semi-custom home, selected and uniquely customized by Plaintiffs in close coordination with Eastwood Homes and its representatives (the “Property”), described in further detail below, based on a written and fully executed contract for sale with Eastwood Homes. Eastwood Homes has defaulted on this contract as described more fully in the Complaint filed herewith.

Plaintiffs hereby file this Lis Pendens on the Property more fully described below:

Legal Description

That certain real property owned by Eastwood Construction, LLC, commonly known as 1102 Tebalt Dr., Johns Island, SC 29455, and further defined as Lot 141 on the “Final Subdivision Plat of Phase 4 Swygert’s Landing” filed with the Register of Deeds for Charleston County in Plat Book L19, Page 0274 on June 26, 2019.

TMS No: 312-02-00-095

Respectfully Submitted,

s/Ross A. Appel

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ATTORNEYS FOR PLAINTIFFS

June 17, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2831
Michael A. Martin and Adriana S. Iaquinto-	)	CASE NO. 2021-CP-10-2833
Martin,	)	CASE NO. 2021-CP-10-2837
Louis Glavinos and Kimberly Glavinos,	)	CASE NO. 2021-CP-10-2838
Daniel J. O'Grady and Kaitlyn E. Grigoleit,	)	CASE NO. 2021-CP-10-2840
Christopher M. Raybon and LaShonda K.	)	CASE NO. 2021-CP-10-2844
Jones Raybon,	)	CASE NO. 2021-CP-10-2902
Morris K. White and Rebecca A. White,	)	CASE NO. 2021-CP-10-3012
Paul A. Banker and April D. Banker,	)	
Patrick K. Daly and Brenda Daly,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	PLAINTIFFS' RETURN TO
	)	DEFENDANTS 'MOTION TO
	)	RECONSIDER
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants	)	

Plaintiffs, by and through their undersigned attorneys, respectfully submit this Return to Defendant Eastwood Homes' Motion to Reconsider filed on December 28, 2023 (the "Motion"). Defendant's Motion asks the Court to reconsider its substantive twenty-seven page Order filed on December 19, 2023 in the above-captioned consolidated actions (the "Order"). The Order followed a two-day trial beginning May 24, 2023 and a full opportunity for briefing from the parties. Based upon the consent Order of Reference, the sole issue before the Court was whether the "Eastwood Homes New Home Purchase Agreement," (the "Contract") specifically Paragraphs 25 and 26 therein, are unconscionable and violative of public policy.

After hearing all of the testimony and considering the Parties' legal arguments, the Court found Paragraph 26, in its entirety, and the final sentence of the first paragraph of Paragraph 25 are unconscionable, violation of public policy, unenforceable, and severable. Because the Court correctly issued its ruling based upon the facts presented and the law of the state, Defendant's motion must be denied. Defendant fails to present any competent ground to support a reversal of the Court's findings.

BACKGROUND

These consolidated cases involve identical claims by Plaintiffs, who are nine separate homebuyers, against Eastwood Homes. Founded in 1977, Eastwood Homes is a sophisticated residential homebuilder with operations in Virginia, North Carolina, and South Carolina. Irrespective of their educational or professional backgrounds, for the purposes of this litigation, Plaintiffs are homebuyer consumers.

Plaintiffs each signed the Contract, which is Eastwood Homes' standard, boilerplate purchase agreement. Plaintiffs each contracted for a semi-custom home located in Phase 4 of Swygert's Landing on Johns Island. Prior to closing, but after Plaintiffs made earnest money deposits and took various actions in reliance on the contracts (including moving to Charleston, changing jobs, and making other life decisions), Eastwood Homes unilaterally terminated the contracts without any consultation with Plaintiffs. Plaintiffs objected to the termination and informed Eastwood Homes they intended to perform any and all contractual obligations and ultimately close on the purchase of the contracted home. However, Eastwood Homes informed Plaintiffs there was no longer a contract because it was terminated. The present litigation ensued and the question of enforceability of the contract language was referred to this Court.

The Court properly found that Paragraph 26 contains a latent ambiguity and the Court could consider extrinsic evidence to ascertain its meaning. The Court also properly found that Paragraphs 25 and 26 as drafted, interpreted, and applied by Eastwood Homes are unconscionable and violative of public policy.

STANDARD OF REVIEW

While Defendant fails to cite any South Carolina Rule of Civil Procedure, statutory authority, or common law basis for Defendant's Motion to Reconsider, Plaintiff presumes Defendant intended to rely upon Rule 59 of the South Carolina Rules of Civil Procedure. Rule 59 allows a new trial on all or any of the issues "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State." Rule 59(a), SCRCP.

Motions for reconsideration under Rule 59(e) will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court might grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). A motion for reconsideration is not a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, Civ. A. No. 3:10-1036 JFA, 2010 WL 3606829, at *1 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)).

¹ Rule 59 is substantially the same as the Federal Rule. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004); see also Rule 59, SCRCP, Note ("This Rule 59 is substantially the Federal Rule.")

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

In this instance, Defendant fails to raise any ground that might properly support a Rule 59 motion to reconsider. Defendant’s motion must be denied.

ARGUMENT

1. The Court correctly considered extrinsic evidence and found the contract contained latent ambiguities.

Eastwood Homes objects to the Court’s consideration of Defendant’s own witnesses, Allen Nason and Dion Matheney, who gave testimony concerning Defendant’s understanding, intent, and meaning of the contract language. In Eastwood Homes’ view, Paragraph 26 is unambiguous, as a matter of law, and extrinsic evidence should not have been considered. However, Eastwood Homes advanced identical arguments prior to the start of the trial. The Court considered Defendant’s arguments and found the language contained at least one ambiguity that would require extrinsic evidence. Defendant points to no change in the law or discovery of new facts justifying any reconsideration. Defendant simply hopes the Court will change its mind on its well-reasoned and substantive ruling in this case. Because the law does not allow Defendant to simply have a “second bite at the apple” under a Rule 59(e) motion, Defendant’s motion must be denied.

Defendant’s motion alleges the Court “attempts to create an ambiguity where none exists by focusing on how each party to the contract interprets the rights and obligations of the contract.”

However, Plaintiff notes that if the interpretation and enforceability of Paragraphs 25 and 26 were purely a question of law, then its motion for summary judgment would have been ruled upon by the Honorable Markley Dennis, Jr., Circuit Court Judge. His Order provides, “Eastwood’s motion for summary judgment is deferred to a non-jury evidentiary hearing at which the parties are to present evidence from which the Court can rule on the enforceability of the contract language in accordance with this order.” (March 11, 2022 Order, p. 2). Defendant did not object to Judge Dennis’ ruling or move to reconsider it. Such failure to object makes the admissibility of evidence as to the interpretation and enforceability of Paragraphs 25 and 26 the law of the case. In re: Morrison, 321 SC 370, 468 SE2d 651 (1996). Defendant cannot cry foul to what it previously accepted and agreed.

Defendant also failed to object to the admissibility of such extrinsic evidence at the trial of the case. In discussing the presentation of differing interpretations of the contract, Defense Counsel said, “Whatever evidence he wants - I’m not trying to keep him from putting in evidence. So you don’t have to argue if you want to put it in.” (Transcript 1, p. 14-15). In fact, Defendant took a contradictory position at trial to that which Defendant now raises in its motion to reconsider. At trial Defendant said,

“I suppose the place that I would disagree is what does that mean when you are deciding unconscionability. Does it mean you just look at the piece of paper and say unconscionable or not unconscionable for substantive unconscionability? In which case, I guess you don’t need any evidence. Or does it mean what I believe it means, what I believe the case to say . . . that you have to examine the entire transaction, how people were treated and how the contract is written in relationship to everything that happened.”

(Transcript 1, p. 16, ll. 11-22). Defendant went on to cite what it asserted as controlling authority, “really what I’m talking about here, where the Supreme Court is saying a determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case.” (Transcript

1, p. 25, ll. 16-20). To the degree Defendant's motion is based upon other documents admitted into evidence, those exhibits were all admitted without objection. (Transcript p. 36, ll. 14-21). Defendant cannot fairly object via a motion to reconsider to the Court weighing evidence to which Defendant previously consented.

Nevertheless, the Court properly found Paragraph 26 contains latent ambiguities. An agreement is ambiguous if "it is susceptible to more than one interpretation or its meaning is unclear." Smith-Cooper v. Cooper, 543 S.E.2d 271, 274 (Ct. App. 2001). Whether a contract is ambiguous is a question of law. S.C. Dep't of Natural Res. v. Town of McClellanville, 550 S.E.2d 299, 303 (2001). A latent ambiguity exists when "there is no defect arising on the face of the instrument but arising when attempting to apply the words of the instrument to the object or subject described." Smith v. Coxe, 183 S.C. 509, 516, 191 S.E. 422, 425-26 (1937). "A court will construe any doubts and ambiguities in an agreement against the drafter of the agreement." Duncan v. Little, 384 S.C. 420, 426, 682 S.E.2d 788, 790 (2009). "Common sense and good faith are the leading touchstones of construction . . . where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm., 296 S.C 373, 377, 373

Extrinsic evidence can be considered both when construing a contract with a latent ambiguity and to determine whether a latent ambiguity exists. Smith v. Coxe, 191 S.E. 422, 425-26 (1937) (finding parol testimony may be received in construing instrument with latent ambiguity); Polson v. Craig, 570 S.E.2d 190, 192 n. 2 (Ct. App. 2002) (involving a will, and noting extrinsic evidence is admissible when there is a latent ambiguity, not a patent ambiguity); Bob Jones Univ. v. Strandell, 543 S.E.2d 251, 254 (Ct. App. 2001) ("A court may admit extrinsic

evidence to determine whether a latent ambiguity exists.”). Once the Court determines an ambiguity exists, the issue of the parties’ intent is a question of fact. S.C. Dept. of Natural Res. V. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299 (2001).

Plaintiffs and Defendant have conflicting interpretations over the meaning of Paragraph 26 based on Defendant’s wording and use of commas. Plaintiffs view the language “bona fide dispute ... between the Buyer and Seller, in Seller’s sole judgment” to require, at minimum, a **genuine disagreement** between buyer and seller over a material term of the contract that cannot be resolved despite the parties’ best efforts. Beaufort County School Dist. v. United National Ins. Co., 392 S.C. 506, 518, 709 S.E.2d 85 (Ct. App. 2011) (“The term ‘series’ is not defined in the endorsements, so it must be defined according to the usual understanding of the ordinary person.”). Plaintiffs’ interpretation is reasonable and based upon the ordinary use of the words as they are found in the dictionary. Id. at 518-19.

Conversely, Defendant interprets Paragraph 26 as a termination-at-will clause providing Plaintiffs no right to challenge Eastwood Homes’ decision under any circumstances. And Defendants undertook actions in this case consistent with and/or based upon such interpretation. Defendant’s interpretation is demonstrated by the testimony of Allen Nason and Dion Matheney – both of whom testified that Eastwood Homes’ power to unilaterally terminate the contract was limitless and unquestionable. Defendant’s interpretation does not require there to be any dispute, as the term is commonly understood, between the parties because Defendant believes it has the authority to define the meaning of the term “bona fide dispute” and say whether such dispute exists or not.

Mr. Nason, Defendant’s general counsel and its Rule 30(b)(6) designee, drafted the contracts at issue. He testified a “bona fide dispute,” an undefined term, does not mean its usual

and generally-accepted meaning - a “disagreement.”² Mr. Nason testified, “[t]here can be a dispute without a disagreement.” (Nason Dep. p. 80, ll. 21-22) Mr. Nason also testified that “dispute” did not need to be defined in the contract “because in Eastwood’s sole judgment, it decides what a dispute is . . .” (Nason Dep. p. 81, ll. 3-17). When challenged on the absurdity of Defendant’s interpretation, Mr. Nason, as the 30(b)(6) designee, stated “[y]our opinion is irrelevant because it’s the seller’s sole judgment, so I don’t really care what your opinion is. It’s only my opinion that matters, period.” (Nason Dep. p. 114, ll. 21-24).

Plaintiff also questioned Mr. Matheny, the Division President for Eastwood Homes, about the interpretation of the contract at trial. Defendant raised a qualified objection saying, “If he wants to ask Mr. Matheny what his interpretation of the terms are, I think that’s appropriate. He’s asking him what Eastwood’s terms are. That’s the distinction. He never was a 30(b)(6) designee for Eastwood. That was Mr. Nason.” (Transcript 1, p. 228, ll. 3-21). Mr. Matheny then testified he understood that “sole discretion” means Defendant could cancel the contract at any time prior to closing and for any reason it wants. (Transcript 1, pp. 231-235).

On the other hand, at the time they entered their respective contracts, Plaintiffs did not realize or understand Paragraph 26 would be read and applied by Eastwood Homes as a termination-at-will provision because such meaning was disguised in the contract’s ambiguity. (Transcript 1, p.75-78; p. 160-162).

The Court properly considered the testimony of both parties as to the meaning and interpretation of Paragraph 26, as contemplated by Judge Dennis’ Order and the law of this state. Defendant’s motion on this ground should be denied.

² Prior to the May 24 and 25, 2023 trial, Eastwood Homes’ counsel informed Plaintiffs and the Court that Allen Nason will be unable to attend the trial in person. The parties agreed to submit into evidence excerpts from Mr. Nason’s deposition, by way of page/line designation, pursuant to Rule 32(a), SCRPC. The parties further agreed to waive any hearsay or other objections to this testimony.

2. Paragraphs 25 and 26 are unconscionable and violative of public policy.

Defendant does not raise any valid Rule 59 basis to reconsider on this issue. Defendant's motion seeks to raise the same unconscionability and public policy arguments already advanced by Eastwood Homes at trial and already rejected by this Court. The Court has carefully considered these arguments and ruled. Therefore, and on this ground alone, the Court should deny the motion and reaffirm its Order. For the sake of brevity because these issues have already been litigated, Plaintiffs' prior arguments and briefing on these issues are incorporated herein by reference.

This case boils down to whether in the context of an adhesion contract for the purchase of a new home, a *disguised* seller termination-at-will provision coupled with a \$100 liquidated damages as the buyer's sole and exclusive remedy is enforceable between a sophisticated home builder and a residential home buyer. Under the facts and circumstances of this case, the Contract is unconscionable and violative of public policy. Damico v. Lennar Carolinas, LLC, 612, 879 S.E.2d 746, 755 (2022).

a. Procedural Unconscionability

"The touchstone of the analysis begins with the presence or absence of meaningful choice." Damico v. Lennar Carolinas, LLC, 612, 879 S.E.2d 746, 755 (2022). "Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process." Id. (citation omitted). "Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant." Id. at 613, 879 S.E.2d at 755-56 (citations omitted).

An adhesion contract is “a take-it-or-leave-it contract and is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice.” 17A Am. Jur. 2d Contracts § 274; 17 C.J.S. Contracts § 9 & n.9 (2020). Applying the procedural unconscionability test, the Supreme Court in Damico held as follows:

the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions. These factors combine to highlight the significant disparity in the parties’ bargaining power, with Lennar enjoying a much stronger bargaining position than Petitioners. We therefore find Petitioners lacked a meaningful choice in their ability to negotiate the arbitration agreement. See Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989) (“We have [] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.”).

Damico v. Lennar Carolinas, LLC, 879 S.E.2d at 756-57.

This case’s facts mirror those in Damico. Eastwood Homes, like Lennar, is a sophisticated regional homebuilder with far more sophistication, experience, and bargaining power compared to Plaintiffs who are consumers in the homebuying market. Plaintiffs’ educational background, reading comprehension skills, and wealth in no way tip the scales in favor of Eastwood Homes in the procedural unconscionability analysis. In this transaction, Plaintiffs are residential homebuyer consumers. And in this transaction, Defendant held all of the bargaining power.

Plaintiffs testified they had no opportunity whatsoever to negotiate the terms of the Contract, generally, or Paragraph 26, specifically. (Transcript 1, pp. 59-60; pp. 159-161).

Not only did Plaintiffs testify to this, but Eastwood Homes essentially conceded as much. Dion Matheny testified that the contract was a take-it-or-leave-it proposition and that Eastwood Homes would not have made any changes. (Transcript 1, pp. 221-224). Mr. Matheny testified “. . . well, if they’re not willing to sign their contract, then they’re not our buyer . . .” (Transcript p.

223, ll. 9-10). When asked if the contract was take-it-or-leave-it, Mr. Matheny said, “If those are the words you want to use. I mean, if you want to purchase one of our homes, then we require that you use our purchase agreement.” (Transcript 1, p. 223, ll. 17-24).

The Court correctly held that the Contract is procedurally unconscionable.

b. Substantive Unconscionability

In its effort to relitigate substantive unconscionability, Eastwood Homes points to various cases to support the claim that cancellation clauses and damages limitations are reasonable. However, none of these cases involve “disguised” termination at will provisions, in the residential consumer home purchase context, presented on a take it or leave it bases in an adhesion contract. The cases cited by Eastwood Homes either deal with contracts between sophisticated, commercial parties where both had the ability to negotiate terms or consumer transactions not dealing with the purchase of a home, a unique and special transaction recognized under South Carolina law. Despite what Defendants would have the Court believe, Plaintiffs do not dispute the reasonableness of cancellation clauses or limitations on damages in the general sense. Rather, Plaintiff’s action is about the specific and unique facts and circumstances existing at the time their contracts with Eastwood Homes were signed and the enforceability of certain terms of that agreement.

“At its core, unconscionability is defined ‘as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.’” Damico v. Lennar Carolinas, LLC, 879 S.E.2d 746, 754 (2022) (citing Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (1996)). In Damico, the following clause was ruled unconscionable the Supreme Court: “[Lennar] may, **at its sole election**, include [Lennar] contractors, subcontractors and insurer as parties in the mediation and arbitration” and “that

mediation and arbitration will be limited to the parties specified herein.” Id. at 615, 879 S.E.2d at 757 (Emphasis in Original). The Court observed that “[g]iving Lennar the ‘sole election’ to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle.” Id. (citing 17A Am. Jur. 2d Contracts § 272 (“Mutuality [] is a paramount consideration when assessing the substantive unconscionability of a contract term.”)). The Court concluded that “[t]his creation of a procedural defense to liability for Lennar is wholly unreasonable and oppressive to Petitioners.” Id. at 616-17, 879 S.E.2d at 757-58.

Paragraph 26 as drafted, interpreted, and applied by Eastwood Homes would allow Defendant to unilaterally terminate the Contract for any reason it wants, or no reason at all, and at its sole, exclusive election. Eastwood drafted and applied Paragraphs 25 and 26 to ensure a procedural victory in their favor by seizing the authority to decide whether a dispute with the Plaintiffs exists at all “in [Eastwood’s] sole judgment.” This language is substantively unconscionable for the same reason the Court struck down Lennar’s “sole election” language in Damico.

Given “South Carolina[’s] ... deeply-rooted and long-standing policy of protecting new home buyers,” Id. at 621, 879 S.E.2d at 760, granting the seller such unchecked, powerful, and unilateral authority to disregard the Contract is one-sided, oppressive, unreasonable, and unconscionable. The Contract does not grant Plaintiffs the ability to terminate the Contract for any reason they want. It says, “if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing.” There is no mutuality in this arrangement.

Paragraph 26 is unconscionable because it is so one-sided and oppressive that it essentially makes the Contract illusory. According to Eastwood Homes, Defendant has the authority to decide,

up to the minute of closing, whether or not it wants to fulfill its end of the bargain with its consumers. Defendant's ability to back out at any time for any reason whatsoever, including simply the desire for a higher price, makes the Contract uniquely one-sided, oppressive, unreasonable, and ultimately unconscionable.

No reasonable homebuyer would ever knowingly agree to such a unilateral termination-at-will provision absent a complete lack of bargaining power as seen in this case, specifically, and in the residential homebuyer context, generally. Plaintiffs did not realize that is what they were agreeing to. They were deceived into a false sense of security by Defendant's use of "bona fide dispute." Paragraph 26 does not have clear, unambiguous, and express termination-at-will language. At the time they entered the agreement, Plaintiffs did not know that Eastwood Homes would disregard the "bona fide dispute" language in favor of an aggressively expansive and one-sided interpretation of "in Seller's sole discretion." Plaintiffs could not have reasonably understood the use of "sole discretion" to modify "bona fide dispute" whereby Defendant would disregard both the normal use of "bona fide" and the normal use of "dispute" within that provision. BCSD v. United Natl Ins. Co., 392 S.C. at 518, 709 S.E.2d 85. No reasonable, honest, or fair person would accept a term where the party with superior bargaining power to terminate the agreement at is exclusive election, at any time, and without meaningful consequence.³

c. Public Policy

South Carolina courts "will not enforce contracts that violate public policy." Damico v. Lennar Carolinas, LLC, 879 S.E.2d 746, 760 (2022). A refusal to enforce a contract on the grounds

³ Plaintiff Franquelin, for example, the penalty of \$100 for breach by Defendant is 0.017% of the purchase price. While the penalty for breach by the buyer would be the surrender of her \$5,000 deposit plus any and all other deposits plus any consequential or other damages Defendant might choose to seek through litigation or other means. The relative impact for breach is vastly different between the buyer, facing significant impact, and the seller, facing almost none.

of public policy is distinguished from a finding of unconscionability. Rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. 17A Am. Jur. 2d Contracts § 238 (Supp. 2021) (citation omitted).

Public policy may be expressed in constitutional or statutory authority or in judicial decisions. White v. J.M. Brown Amusement Co., 601 S.E.2d 342, 345 (2004); see also 17A Am. Jur. 2d Contracts § 238 (2016) (explaining courts may consider, inter alia, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

South Carolina's Supreme Court recently reminded litigants that "South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers." Damico v. Lennar Carolinas, LLC at 621, 879 S.E.2d at 760. If the Court rules as Eastwood Homes would suggest, it would enable sophisticated homebuilders to force residential homebuyers to contract away, through adhesion contracts, all consumer protections whatsoever in exchange for a pittance. A ruling on these issues in Defendant's favor under this set of facts would have the effect of further tilting the scales of bargaining power in favor of the corporate builder who already enjoys vastly superior bargaining power.

Additionally, South Carolina recognizes the illusory coverage doctrine in the employment and insurance contexts – both areas of the economy populated by boilerplate contracts and massively unequal bargaining power. Small v. Springs Indus., Inc., 357 S.E.2d 452 (1987); Isle of Palms Pest Control Co. v. Monticello Ins. Co., 459 S.E.2d 318, 321 (S.C. Ct. App. 1994) (recognizing the illusory coverage doctrine to protect insureds where the terms of the policy

exclude from coverage “the very risk contemplated by the parties,” rendering a policy provision “virtually meaningless.”).

If Eastwood Homes were allowed terminate its Contract any time prior to closing for any reason in its “sole judgment” with the only consequence being a refund of Plaintiffs’ deposit and liquidated damages of \$100.00, it would turn almost all consumer residential home purchase agreements into illusory contracts. The effect would be to green light illegal builder conduct. Because in response to any consumer objections, builders would be able to simply say, “You don’t like it? Here’s \$100. Get lost.” Which would also incentivize builders to further push what might be acceptable. If \$100 is acceptable, would \$50 be? Would \$10? The everyday consumer can tell the difference between \$10 and \$100, but there is no meaningful difference to a home builder the size of Eastwood. It is merely nominal - de minimus - to Defendant. Given the strong policy of protecting home buyers, contractual language that renders the agreement illusory violates public policy and is unenforceable.

3. Paragraphs 25 and 26 were properly severed from the contracts.

Eastwood Homes seeks also to relitigate its argument that Paragraphs 25 and 26 cannot be severed from the Contract. This Court has already rejected this argument once and should do so again.

“If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result.” Damico v. Lennar Carolinas, LLC, 879 S.E.2d 746, 758 (2022) S.C. Code Ann. 36-2-302(1) applies in the home purchase agreement context. Id. at 758; Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016); Huskins v. Mungo Homes, LLC, No. 5916, 2022 S.C. App. LEXIS 61, at *17-18 (Ct. App. June 1, 2022).

Section 36-2-302(1) reads as follows:

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 refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

However, Defendant essentially conceded this issue by reference to the Uniform Commercial Code at trial presenting a copy of one section to the Court and stating, “So I do understand that the Uniform Commercial Code South Carolina version is not necessarily binding on a home sale, but it is a point of law in South Carolina on how unconscionability is to be addressed. And it has been reference by the appellate courts in reviewing unconscionability in general.” (Transcript 1, p. 27, ll. 8-17). At trial Defendant conceded and argued the Court may rely on the authorities mentioned in Damico to sever portions of the contract to limit the unconscionable application of Paragraphs 25 and 26 while preserving the fundamental meeting of the minds between the parties encompassed in the Contract, specifically to sell a semi-custom home and lot for a set price. The Court applied existing precedent, already conceded by Defendant, to sever the offending provisions of the contract in this case.

4. Eastwood Homes’ reasoning behind its decision to unilaterally terminate the contracts was not before the Court.

The Motion attempts to smuggle in Eastwood Homes’ alleged reason for why it decided to unilaterally terminate the contracts with Plaintiffs. This is done, presumably, to cast Eastwood Homes’ decision as reasonable in the unconscionability analysis. Eastwood’s motivation, which is hotly disputed by Plaintiffs, is not only irrelevant to the unconscionability analysis – it is also outside the issues to be tried under the Consent Order of Reference.

Judge Dennis’ order and the Consent Order of Reference to this Court, limit the evidentiary hearing to whether the Contract is enforceable. The Court ruled Plaintiffs claims against Eastwood

Homes may proceed in the Court of Common Pleas. The parties will litigate whether Eastwood Homes' conduct was reasonable as this case proceeds. However, Eastwood Homes' motivation has no bearing on the enforceability of its one-sided adhesion contract.

5. Eastwood fails to raise any sustaining grounds to reconsider in its objections to the factual findings of the Court.

Defendant raises five objections, labeled A - E, against the Court's findings of fact in its motion to reconsider. None of the factual findings to which Defendant objects are outcome determinative and are non-material objections. However, in each of these objections, Defendant either misrepresents the facts or misconstrues the Court's Order.

A. Defendant objects to the Court's wording "on the closing date set forth in the agreement." Defendant argues the agreement did not specify a certain closing date. This issue is not material to the Court's ruling. Notwithstanding, the contract is clear that it is solely Defendant that can set the closing date without consultation with the buyer and a failure to attend closing by the buyer would subject him/her to significant penalties from raising the purchase price to termination of the contract.⁴ While the contract did not specify a day, month, year for closing. It specified the day, month, year would be solely determined by Defendant and only Plaintiffs would face penalties if the closing did not go forward for any reason. This simply highlights the absolute lack of mutuality in the agreement.

B. Defendant objects to the Court's use of "changing jobs." The testimony was that Ms. Grigoleit's husband did, in fact, have to change his job and her own company made it clear that

⁴ Paragraph 17 states, "Closing dates and times will be established by the Eastwood Homes Closing Coordinator. Seller will provide advance notice of the closing date to Buyer, however, once a date and time have been set Seller will not be able to make any changes. In the event the closing date is missed due to inability to obtain financing or otherwise on the Buyer's behalf, Seller shall have the absolute right to avail itself of paragraph 12 rights regarding cancellation, purchase price increases, or late fees."

her move to Charleston would effect her relationship with the company and her compensation. (Transcript 1, p. 160, ll. 16-23). It is correct that Mrs. Franquelin was retired. However Defendant ignores the fact that she took an early retirement because her husband had stage IV cancer and they were moving to Charleston to be closer to family. (Transcript 1, p. 41, ll. 3-10).

C. Defendant objects to the Court's use of "and applied" arguing its conduct is not relevant to the Court's inquiry. As noted above, this is contrary to the position taken at trial. It also ignores the fact that the Court had to look to extrinsic evidence to determine the latent ambiguity.

D. Defendant objects to the Court's use of its own witnesses' testimony about the meaning of language in the agreement arguing that what Defendant thinks the contract means is not relevant to the question of enforceability. The primary objective in construing a contract is to "give effect to the intentions of the parties." Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526 (1976). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." S.C. Dept. of Natural Res. V. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299 (2001). Defendant either misconstrues the Court's analysis on this point or fails to understand the Court's analytical process and necessary application of the law. This testimony went to the issues of ambiguity and interpretation.

E. Defendant objects to the inclusion of the list of homes sold before and after Defendant alleged it could not close with these Plaintiffs. However, Defendant agreed to the admission of this evidence at trial without objection. Also, Defendant coincidentally argues in its brief that it could not possibly have sold the homes to Plaintiffs and therefore the contract could not have been unconscionable. These sales belie Defendant's argument. Defendant might desire the Court only include those facts that paint Defendant in the best light, but the Court looked at all of the facts and testimony presented and included these facts to which Defendant did not object at trial.

CONCLUSION

Because the Court properly held the contract language at issue is unconscionable and violates public policy and because Defendant fails to raise a sustainable ground under Rule 59, Plaintiffs respectfully request this Court issue an order denying Defendant's Motion.

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFFS

February 9, 2024
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2831
Michael A. Martin and Adriana S. Iaquinto-	)	CASE NO. 2021-CP-10-2833
Martin,	)	
Louis Glavinios and Kimberly Glavinios,	)	CASE NO. 2021-CP-10-2837
Daniel J. O'Grady and Kaitlyn E. Grigoleit,	)	CASE NO. 2021-CP-10-2838
Christopher M. Raybon and LaShonda K.	)	CASE NO. 2021-CP-10-2840
Jones Raybon,	)	
Morris K. White and Rebecca A. White,	)	CASE NO. 2021-CP-10-2844
Paul A. Banker and April D. Banker,	)	CASE NO. 2021-CP-10-2902
Patrick K. Daly and Brenda Daly,	)	CASE NO. 2021-CP-10-3012
	)	
Plaintiffs,	)	
	)	
v.	)	PLAINTIFFS' MEMORANDUM IN
	)	OPPOSITION TO DEFENDANTS'
Eastwood Homes of Columbia, LLC d/b/a	)	MOTION TO DISMISS AND FOR
Eastwood Homes; Eastwood Construction	)	SUMMARY JUDGMENT
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

Background

These nine related cases, consolidated by consent for the purposes of Defendants' Motion to Dismiss and for Summary Judgment (the "Motion"), involve disputes between nine separate homebuyer families (the "Plaintiffs") and Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes; Eastwood Construction Partners, LLC f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes; Eastwood Construction, LLC (collectively "Eastwood Homes"). Founded in 1977, Eastwood Homes is a sophisticated residential homebuilder with operations in Virginia, North Carolina, and South Carolina.

Each case involves the sale of a lot and semi-custom home in Phase 4 of Swygert's Landing subdivision on Johns Island. Each of the Plaintiffs signed a "Eastwood Homes New Home Purchase Agreement" with Eastwood Homes. **Exhibit 1.** These contracts are identical, template contracts used by Eastwood Homes. They are referred to collectively herein as the "Contract."

Each Plaintiff worked closely with Eastwood Homes on designing their home, and those custom specifications are incorporated into each respective Contract. The Plaintiffs relied on the closing date specified in their respective Contract and, in their own unique way, changed their position in reliance on the closing date set forth therein.

Between late 2020 and early 2021, Eastwood Homes sent each of the Plaintiffs an essentially identical document titled "Mutual Release and Revocation of a Prior Agreement to Purchase Real Estate and Right of First Offer" (the "Mutual Release"). **Exhibit 2.** The Mutual Release provides, as follows:

Phase 4 of Swygert's Landing was erroneously left out of the Swygert's Phases 1, 2 and 3 Declaration of Covenants, Conditions and Restrictions by preceding Owner's legal error. No further houses can be closed in Phase 4 until this cloud on title is resolved with the attorneys for the Phases 1, 2 and 3 Declaration, and the existing homeowners in Phase 4. Moreover, lenders require a lender certification at closing which requires disclosure of any homeowner's association issues, which lender requirement cannot be satisfied at this time. Seller has agreed to contact Buyer after the legal issues have been resolved, which will take 4 months or more to legally resolve. Seller cannot cure this issue within the time period of the Contract.

The Declaration of Covenants, Conditions and Restrictions for Swygert's Landing were prepared by the original owner and declarant, CAM Management, LLC ("CAM"), and recorded in the Charleston County Register of Deeds Office on September 17, 2010 in Book 0144, Page 369 (the "CC&R"). **Exhibit 3.** The CC&R establish, among other things, a Board of Directors (the "Board") to manage the common areas and other affairs of the Swygert's Landing Homeowners Association, Inc. (the "Association").

The CC&R applied originally only to Phase 1 of Swygert's Landing. Article I, Section 11 of the CC&R provides for the further inclusion, by the "Developer," of "such other property as may hereafter be made part of these Declarations." Article I, Section 8 provides that "'Developer' shall mean and refer to CAM Management, LLC, as well as its successors and assigns, if Developer shall make an express conveyance of its rights as developer hereunder to such successor or assign." Article VIII, Section 3 governs the duration of the Developer's control over the Association and the Board as follows:

DURATION AND AMENDMENT. Developer reserves the right to amend these Covenants until such time as Developer has either conveyed not less than ninety (90%) percent of the property or four (4) years from the date herein.

(the "Developer Control Period").

CAM subdivided lots and filed declarations for Phases 2A and 3 on May 17, 2013 and April 27, 2015, respectively, thus bringing these phases and their respective subdivided lots into the CC&R. **Exhibit 4.** After each phase was subdivided, CAM sold the entirety of Phases 1, 2A, and 3 to Eastwood Homes. Eastwood Homes, in turn, marketed these lots and semi-custom homes in Swygert's Landing to residential homebuyers – just like Plaintiffs.

In addition to Phases 1, 2A, and 3, CAM sold a parcel of real property constituting Phase 4 to Eastwood Homes by way of deed recorded in the Charleston County Register of Deeds Office on August 11, 2016 in Book 0575, Page 233. **Exhibit 5.** The February 16, 2016 "Contract and Option to Purchase Real Estate" for Phase 4 between CAM and Eastwood Homes (the "Phase 4 Contract") includes, among other things, a "General Assignment" and "Assignment of Declarant Rights." **Exhibit 6, pp. 14-19.** Unlike with Phases 1, 2A, and 3, CAM did not subdivide the Phase 4 real property prior to conveying it to Eastwood Homes. Rather, Eastwood Homes handled the

subdivision and caused to be filed that certain “Final Subdivision Plat of Phase 4 Swygert’s Landing” on June 26, 2019 in Book L19-0274 (the “Phase 4 Plat”). **Exhibit 7.**

At no time did Eastwood Homes ever file a Declaration or other legal action to bring the Phase 4 lots into the CC&R, as CAM had done for Phases 1, 2A, and 3. However, Eastwood’s failure to do so did not stop Eastwood from conveying the following lots and semi-custom homes to consumers situated exactly like the Plaintiffs in this action:

TMS	Address	Owners	Deed Book / Page	Recording Date
312-02-00-096	1101 Tebalt Dr.	William Stewart Kendra Stewart	0950-914	01/14/2021
312-02-00-103	2892 Claybrook St.	William Sosa-Oliver David Oliver	0921-400	10/02/2020
312-02-00-102	2908 Sarnoff St.	Michael Eller Sarah Eller	0901-690	07/31/2020
312-02-00-099	2932 Sarnoff St.	Derek Wolpert Moyca Postrak	0952-340	01/20/2021
312-02-00-088	1144 Tebalt Dr.	Nelson Grant Myron Catherin H Myron	0945-364	12/18/2020
312-02-00-089	1138 Tebalt Dr.	Joseph Allio Jan Allio	0922-203	10/05/2020

Exhibit 8.

Despite Eastwood Homes closing on six lots and semi-custom homes in Phase 4, Eastwood Homes implemented this scheme to cancel the remaining purchase agreements by sending the Mutual Release to each of the Plaintiffs. Plaintiffs refused to sign the proposed Mutual Release. Plaintiffs also rejected Eastwood Homes’ escrow deposit refund and the accompanying \$100.00

liquidated damages check. Thereafter, Eastwood Homes unilaterally cancelled all design meetings, walkthroughs, and otherwise completely frustrated Plaintiffs' ability to move forward with the closing of their semi-custom home under the Contract.

Plaintiffs' subsequently filed suit, asserting the following causes of action against Eastwood Homes: (1) Declaratory Judgment; (2) Specific Performance of Contract; (3) Breach of Contract; (4) Unfair Trade Practices Act; and (5) Breach of Contract Accompanied by Fraudulent Act. Plaintiffs each filed a *Lis Pendens* on their respective properties, as each claims an interest in the real property at issue.

Whether negligence or mere oversight, Eastwood's failure to submit Phase 4 to the CC&R does not nullify or cancel the existing and enforceable Contract. Plaintiffs insist that Eastwood Homes honor the terms of the Contract. Plaintiffs further allege the Mutual Release was motivated, not by a genuine title issue, but rather Eastwood Homes' desire to renegotiate the purchase agreements on Plaintiffs' homes for a higher price in light of soaring real estate prices in Charleston.

On August 6, 2021, Eastwood Homes filed an Answer and Counterclaim in each of the cases. Eastwood Homes has asserted the following counterclaims against the Plaintiffs: (1) slander of title; (2) abuse of process; and (3) breach of contract.

On August 9, 2021, Eastwood Homes filed an identical "Motion to Dismiss or for Summary Judgment" against each of the Plaintiffs (the "Motion"). Eastwood Homes' stated grounds for the Motion are as follows:

The contract alleged in the complaint gives Eastwood the unilateral right to state when a bona fide dispute exists, with no right to challenge that decision by the Plaintiffs. Eastwood determined a dispute existed based on the declarations and covenants governing the community and the lack of incorporation into earlier phases. As a result, Eastwood cancelled the contract in accordance with its right to

do so set forth in the contract. In addition, the contract does not provide for specific performance as demanded by the Plaintiffs.

(Eastwood Homes, Mtn., p. 1).

On July 1, 2021, Plaintiffs served their First Set of Interrogatories and Requests for Production on Eastwood Homes. After multiple extensions, Plaintiffs moved to compel these responses on September 14, 2021. On October 18, 2021, this Court issued an Order Granting Plaintiffs' Motion to Compel Discovery. On November 1, 2021, Eastwood Homes finally served written responses. Plaintiffs have been working through these documents over the holidays and have compiled a list of follow up items for Defendants prior to the taking of depositions.

No depositions have been taken as of this filing. As such, Defendants' motion is premature. Plaintiffs fully expect further discovery in this matter will only further confirm the illegality of Defendants' actions.

Standard of Review

Motion to Dismiss

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). "The trial court . . . must presume all well pled facts to be true." *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988). "[P]leadings in a case should be construed liberally so that substantial justice is done

between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts.” *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citation omitted). The court should not dismiss the complaint merely because there exists doubt that the plaintiff will prevail in the action. *Doe*, 373 S.C. at 395, 645 S.E.2d at 248.

Motion for Summary Judgment

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *see also Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) (“Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a ‘full and fair opportunity to complete discovery.’”).

With the trial court's permission, parties may supplement or oppose affidavits using “depositions, answers to interrogatories, or further affidavits.” Rule 56(e), SCRPC. However:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Id.

In ascertaining whether any triable issue of fact exists, the trial court must view all evidence and all inferences that can be reasonably drawn from it in the light most favorable to the non-moving party. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). “[I]n

cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

Argument

1. Paragraph 26 of the Contract fails to support Eastwood Homes’ Motion as a matter of law.

a. No “bona fide dispute” ever existed – even in “Seller’s sole judgment.”

The Mutual Release references the “prior owner’s” alleged failure to include Phase 4 of Swygert’s Landing in the CC&R. While neither the Mutual Release nor the Motion cite Paragraph 26 of the Contract, presumably Eastwood Homes’ position is firmly grounded in this language.

Paragraph 26 reads as follows:

26. Seller Option to Cancel Prior to Closing: If for any reason, a bona fide dispute should arise between the Buyer and Seller, **in Seller’s sole judgment, prior to Closing**, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing. If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer’s damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.

(Contract, p. 6) (Underlined Text in Original) (Bolded Text Added).

Plaintiffs submit there was never a “bona fide dispute”– even in “Seller’s sole judgment.” While Eastwood Homes would have this Court believe it could terminate the contract for any reason or no reason at all by simply designating something as a “bona fide dispute,” the Contract does not say that.

Initially, it is unclear what constitutes a “bona fide dispute” under the Contract. The Contract does not define the term. “[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.” *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (holding that ambiguous language in a contract should be interpreted strongly in favor of the non-drafting party). The contracts at issue in this case were drafted by Eastwood Homes; therefore, any disputes over what is meant by “bona fide dispute” – an undefined term in the Contract – must be construed in favor of Plaintiffs and against Eastwood Homes.

With those principals of contract interpretation in mind, we turn to the following genuine issues of material fact predominating the “bona fide dispute” issue: (1) whether the failure to include Phase 4 in the CC&R was, in fact, due to the “preceding Owner’s legal error;” (2) whether a condition caused by Eastwood Homes and known to Eastwood Homes at the time of contracting can ever constitute a “bona fide dispute;” (3) whether the Contract even requires Phase 4 to be submitted to the CC&R; (4) whether Eastwood Homes’ actions were really motivated by a desire to re-contract for a higher purchase price; (5) whether Eastwood Homes’ failure to include Phase 4 in the CC&R constitutes a “homeowner’s association issue” that would, in fact, frustrate closing; (6) and whether any of these issues could not be resolved to mutual satisfaction.

Per the Mutual Release, Eastwood Homes blames CAM for not filing a Declaration to include Phase 4 in the CC&R, as CAM had done for Phases 1, 2A, and 3. However, the facts

uncovered so far, viewed in a light most favorable to Plaintiffs, undermine Eastwood Homes' position and reveal that Eastwood Homes *itself* was at fault for failing to incorporate Phase 4 during the Developer Period.

In the Phase 4 Contract, Eastwood Homes purchased raw land – not subdivided lots. This was not the case with Eastwood Homes' acquisition of Phases 1, 2A, and 3 because CAM subdivided the lots and incorporated them into the CC&R before conveying same. The Phase 4 Contract makes no representations regarding the status of Phase 4 and the CC&R. Moreover, the Phase 4 Contract included both a "General Assignment" and "Assignment of Declarant Rights." These assignments coupled with Article I, Sections 8 and 11 of the CC&R, enabled Eastwood Homes to submit Phase 4 to the CC&R, during the Developer Control Period, just as CAM had done with Phases 1, 2A, and 3. Eastwood Homes was also free not to submit Phase 4 to the CC&R, which is what ultimately happened. Eastwood Homes chose that option and never took the necessary steps to bring in Phase 4 even though it possessed this authority – for several years prior to contracting with Plaintiffs.

Eastwood Homes possessed actual or constructive knowledge, at the time it contracted with Plaintiffs, that the Phase 4 lots had not been subjected to the CC&R. *See, Spence v. Spence*, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006) ("[C]onstructive notice or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world.") "Constructive notice is a legal inference, which substitutes for actual notice." *Major v. City of Hartsville*, 410 S.C. 1, 4, 763 S.E.2d 348, 350 (2014) (holding it is for jury to decide whether continual or repetitive condition gives rise to constructive notice). Eastwood Homes is a sophisticated commercial party with operations spanning multiple states.

There is simply no excuse for Eastwood Homes to have been taken by surprise, as it claims, that Phase 4 had not been incorporated into the CC&R. *See e.g., City of Greenville v. Washington Am. League Baseball Club*, 205 S.C. 495, 32 S.E.2s 777, 782 (1945) (“[I]f there are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything that inquiry would certainly disclose.”)

Eastwood Homes chose not to submit the Phase 4 property and lots to the CC&R in the more than four years between August 11, 2016 (when it closed on the Phase 4 Property) and 2020 when it contracted with Plaintiffs. Therefore, it is erroneous, misleading, and certainly not a “bona fide dispute” **with Plaintiffs** for Eastwood Homes to blame CAM for not including Phase 4 in the CC&R and to use this as the alleged basis for terminating the Contract for each of the Plaintiffs. *See, Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (“entering into an agreement, with no intention of keeping such agreement, constitutes fraudulent misrepresentation”). Eastwood Homes may have a dispute with its employee or agent for such failure. Eastwood Homes may have a dispute with its legal counsel for such failure. Eastwood Homes may even have a dispute with CAM for such failure. However, the failure to incorporate Phase 4 into the CC&R ultimately rests with Eastwood Homes. It could have filed a declaration during the Developer Period, as CAM had done. Eastwood Homes failed to do so. There is no “bona fide dispute” over this issue with Plaintiffs.

Additionally, the Mutual Release fails to cite any language in the Contract requiring the lot to be submitted to the CC&R. This is because no such language exists. Plaintiffs dispute there cannot be a “bona fide dispute,” even from Eastwood Homes’ perspective, if the alleged issue does not frustrate any express term of the Contract. “The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of

the contract.” *Gibbs v. G.K.H., Inc.*, 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993); accord *Elliott v. Snyder*, 246 S.C. 186, 191, 143 S.E.2d 374, 375 (1965). “[A] rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties.” *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143-44, 382 S.E.2d 915, 917 (1989). Eastwood Homes’ alleged “bona fide dispute” is tangential, at best, to the Contract and does not support its position taken in the Mutual Release or the Motion.

Plaintiffs further contend that the alleged justification contained in the Mutual Release conceals Eastwood Homes’ true motivation. The Mutual Releases were transmitted during a period of unprecedented real estate appreciation in Charleston County coupled with major COVID-19 induced supply chain disruptions, both of which increased the costs of housing materials and delayed shipping times. These conditions motivated Eastwood Homes to use the alleged Phase 4 issues as a pretext for backing out of the contracts so the company could renegotiate, with the Plaintiffs or others, for a higher price and at a later date. Plaintiffs’ contentions are supported by the fact that Eastwood Homes closed on six lots in Phase 4 prior to sending the Mutual Releases to Plaintiffs. Plaintiffs fully expect Eastwood Homes’ internal decision making on this issue will be exposed as discovery, especially depositions, proceed in these cases. These questions of fact support denying the Motion.

Finally, Plaintiffs dispute the Mutual Releases’ assertion that the alleged Phase 4 issues constitute a “homeowners’ association issue” that would frustrate closing by way of lender representations, or otherwise. As proof, Plaintiffs need only point to the six lots in Phase 4 that already successfully closed and fully conveyed. None of the lenders, closing attorneys, or other parties involved in those transactions took any issue with Eastwood Homes’ newly alleged “homeowners’ association issue.” If they had done so, those six lots would not have closed. The

fact that they did close demonstrates this is mere pretext and calls into question whether a “bona fide dispute” exists, even from Eastwood Homes’ perspective. As discovery proceeds in this case, Plaintiffs intend to show these transactions and the parties involved including, but not limited to, the homebuyers themselves, their mortgage companies, and closing attorneys proceeded to closing without any dispute whatsoever, nevertheless a “bona fide dispute.”

Given the foregoing, there are myriad genuine issues of material fact that call into question Eastwood Homes’ reliance on Paragraph 26 of the Contract and the language in the Mutual Release. Plaintiffs’ categorization of these disputed facts, as alleged in their respective Complaints and further clarified herein, must be accepted as true with all inferences drawn in Plaintiffs’ favor. These issues must be decided by the finder of fact and require further discovery, especially depositions. Therefore, this Court should deny Defendants’ Motion and instruct discovery to proceed forthwith.

b. Genuine issues of material fact exist as to whether Eastwood Homes properly “cancelled” the Contract.

The Motion claims that Eastwood Homes has carte blanche, unquestionable authority to cancel each Contract for any reason it wants up to the minute of closing regardless of whether done in good faith or bad. However, putting aside whether this is a correct as a legal matter (which it is not), the facts viewed in a light most favorable to Plaintiffs reveal that Eastwood Homes *never actually cancelled each Contract*.

The Mutual Release is not cancellation or termination of the Contract, as Eastwood Homes suggests. Rather, by its own terms the Mutual Release is a *settlement offer* from Eastwood Homes, which was rejected by each of the Plaintiffs.

The Mutual Release contains a signature line for each of the Plaintiffs, and its Whereas Clauses state as follows:

After which, both EASTWOOD and BUYER **now agree** to terminate the Sales Agreement and mutually release one another from any further obligations of liabilities thereon;”

...

IT IS AGREED that the said Sales Agreement for the purchase of the said PROPERTY is hereby mutually revoked, cancelled, set aside, and declared to be of no further force and effect, and;

IT IS FURTHER AGREED that EASTWOOD and BUYER hereby mutually and irrevocably release one another from any and all claims and liabilities arising from or in connection with either the Sales Agreement for the purchase of the PROPERTY or this agreement revoking the same.

(Emphasis added).

By its own terms, the Mutual Release is not a unilateral cancellation or termination of the Contract under Paragraph 26. Rather, it is a proposed settlement offer that seeks the Plaintiffs’ consent. The fact that Eastwood Homes felt it had to acquire Plaintiffs’ signatures and obtain a release supports the Plaintiffs’ view that Paragraph 26 does not entitle Eastwood Homes to unilaterally void the Contract under the facts and circumstances presented in this case. Eastwood Homes’ position is untenable. If Eastwood Homes did, in fact, possess such unilateral authority, why did it style the Mutual Release as a bi-lateral contract that smacks of a settlement agreement? This is because, Eastwood Homes, in fact, did not have such authority. This same provision requires Eastwood Homes to work with the purchaser to reach “mutual satisfaction” when a “bona fide dispute” does arise. These questions of fact provide further support for this Court to deny the Motion.

- c. **Assuming Eastwood Homes properly invoked Paragraph 26, which is denied, there are genuine issues of material fact as to whether this language, as applied, is unconscionable.**

South Carolina courts have long refused to enforce unconscionable language in contracts, generally, and contracts for the sale of real property, specifically. *See, Scurry v. Edwards*, 232 S.C. 53, 61, 100 S.E.2d 812, 816-17 (1957). “In South Carolina, unconscionability is defined as

the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)).

The evidence at trial will show that Plaintiffs lacked a meaningful choice regarding the boilerplate terms of the Contract, generally, and Paragraph 26, specifically. The Contract is a form, template contract used by Eastwood Homes. The same form agreement was signed by each of the Plaintiffs. Paragraph 26 appears verbatim in each. The Plaintiffs lacked any ability whatsoever to negotiate the boilerplate terms of the Contract, generally, and Paragraph 26, specifically.

Plaintiffs’ evidence will further show that Paragraph 26 is so one-sided and oppressive that this Court should deem it unconscionable and unenforceable. Perhaps it is reasonable for a new home purchase agreement to contain language authorizing cancellation in the event of a “bona fide dispute” between buyer and seller. However, defining “bona fide dispute” purely on the basis of “Seller’s sole judgment,” renders Paragraph 26 unconscionable. This is so because it purports to enable Eastwood Homes to cancel the Contract for any reason it wants up to the minute of closing, regardless of whether an actual “bona fide dispute” exists. This defeats the entire purpose of the Contract from the buyer’s perspective, especially considering these agreements govern semi-custom homes where Plaintiffs made several customized selections. Plaintiffs intend to introduce at trial evidence supporting their position that no reasonable buyer would ever agree to these terms unless forced to by way of a one-sided, take it or leave it adhesion contract.

Given the foregoing, genuine issues of material fact exist over whether the “Seller’s sole judgment” language in Paragraph 26 is unconscionable and unenforceable. Therefore, since Eastwood Homes’ Motion is grounded entirely on Paragraph 26 and the “Seller’s sole judgment” language, specifically, the Motion should be denied at this early stage.

2. Plaintiffs’ Unfair Trade Practices Act claim survives even if its contract claims fail as a matter of law.

Even if this Court were to conclude that Paragraph 26 authorizes Eastwood Homes to terminate Plaintiffs’ contracts for any reason, including the alleged Phase 4 CC&R issue, this still does not merit dismissal of Plaintiffs Unfair Trade Practices Act (“UTPA”) claim.

The UTPA, S.C. Code Ann. §§ 39-5-10 to -560, declares “unfair or deceptive acts or practices in the conduct of any trade or commerce . . . unlawful.” S.C. Code Ann. § 39-5-20(a) (1976). The terms “trade” and “commerce” “include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code Ann. § 39-5-10(b) (1976). “An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive.” *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005) (citing *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000)).

To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560.

Given the foregoing, this Court's resolution of the Motion does not, in any way, impact Plaintiffs' UTPA claim because said claim is not contract dependent. The Motion only speaks to Eastwood Homes' position on its contractual rights. It does not take issue with any of the UTPA elements. Plaintiffs contend that irrespective of the Contract, Eastwood Homes' business practices are subject to scrutiny under the UTPA elements, as well-pled in Plaintiffs Complaints. Therefore, the Motion should be denied with respect to Plaintiffs' UTPA claim.

Conclusion

Based on the above genuine issues of material fact and disputed legal issues, all of which strike to the core of Plaintiffs' cases, Defendants' Motion should be denied and these cases be allowed to proceed through discovery.

Respectfully Submitted,

s/Ross A. Appel

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Counsel for Plaintiffs

February 1, 2022

Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2831
Michael A. Martin and Adriana S. Iaquinto-	)	CASE NO. 2021-CP-10-2833
Martin,	)	CASE NO. 2021-CP-10-2837
Louis Glavinios and Kimberly Glavinios,	)	CASE NO. 2021-CP-10-2838
Daniel J. O'Grady and Kaitlyn E. Grigolet,	)	CASE NO. 2021-CP-10-2840
Christopher M. Raybon and LaShonda K.	)	CASE NO. 2021-CP-10-2844
Jones Raybon,	)	CASE NO. 2021-CP-10-2902
Morris K. White and Rebecca A. White,	)	CASE NO. 2021-CP-10-3012
Paul A. Banker and April D. Banker,	)	
Patrick K. Daly and Brenda Daly,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MOTION TO RECONSIDER
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants	)	

The Defendants in this matter hereby move the Court to reconsider the Form 4 Order entered January 19, 2024, by the Honorable Jennifer B. McCoy dismissing their motion for summary judgment as moot.

In particular, the January 19, 2024, Order indicates that:

Based on the Honorable R. Markley Dennis, Jr.'s Order in this matter dated March 11, 2022 and the Honorable Mikell R. Scarborough's Order in this matter dated December 19, 2023, Eastwood Homes' Motion to Dismiss or for Summary Judgment filed on August 9, 2021 is stricken as moot per information presented to CAJ from attorney.

In fact, Eastwood's Motion to Dismiss or for Summary Judgment is not moot as Eastwood has properly submitted a Motion to Reconsider to the Honorable Mikell R. Scarborough which is

still pending. With this in mind, Eastwood's Motion to Dismiss or for Summary Judgment is not moot, and Eastwood asks that Judge McCoy withdraw her Order of January 19, 2024.

Respectfully submitted,

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West Columbia, South Carolina
January 26, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2831
Michael A. Martin and Adriana S. Iaquinto-	)	CASE NO. 2021-CP-10-2833
Martin,	)	CASE NO. 2021-CP-10-2837
Louis Glavinos and Kimberly Glavinos,	)	CASE NO. 2021-CP-10-2838
Daniel J. O'Grady and Kaitlyn E. Grigoleit,	)	CASE NO. 2021-CP-10-2840
Christopher M. Raybon and LaShonda K.	)	CASE NO. 2021-CP-10-2844
Jones Raybon,	)	CASE NO. 2021-CP-10-2902
Morris K. White and Rebecca A. White,	)	CASE NO. 2021-CP-10-3012
Paul A. Banker and April D. Banker,	)	
Patrick K. Daly and Brenda Daly,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MOTION TO RECONSIDER
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants	)	

Defendant Eastwood moves the Court to reconsider its ruling of December 19, 2023, as follows:

I. FINDINGS OF FACT

A. “Each Plaintiff in their own way changed their position in reliance on the closing date set forth in the agreement.” (Order Page 5). This finding is not in accord with the record.

The agreement does not contain a closing date, and there was no testimony regarding a closing date as a closing date was never set. Therefore, there is no support in the record for this finding.

B. “After signing the agreement each Plaintiff took actions in reliance thereon including ... changing jobs.” (Order Page 5).

There is no evidence in the record to support this finding. Ms. Franquelin was retired when she signed the agreement and Ms. Grigoleit remained in the same job.

C. “However, the sole issue for this Court, based on Judge Dennis’ March 11, 2022, Order of Reference is to decide whether paragraphs 25 and 26 are enforceable as written and applied by Eastwood Homes.” (Order Page 6).

Judge Dennis’ Order required the Court to determine whether “the contract language is enforceable as written” (Dennis Order Page 4). Eastwood’s application of the contract is not a part of the contract, not a part of unconscionability or public policy analysis, and not a part of the reference to the Master.

D. Inclusion of testimony regarding Eastwood’s General Counsel Allen Nason’s interpretation of the agreement and Dion Matheney’s interpretation of the agreement is not relevant to the written language of the contract and should not be included as a finding of fact in support of legal conclusions. *See, Holler v. Holler*, 612 S.E.2d 469 (2005) (“In determining unconscionability, courts are limited to the facts and circumstances existing when the contract was executed.”)

Likewise, Dion Matheney’s testimony regarding why or why not Eastwood would terminate an agreement as set forth on page 8 of the Order is not relevant to the written language of the agreement and whether it is unconscionable or in violation of public policy.

E. Inclusion of sales of homes before the recording error was discovered is not relevant or within the scope of the reference and should not be included as set out on pages 9, 10, and 11 of the Order.

II. ISSUES

A. The Court does not address or rule on the language of paragraph 26 which allows Eastwood to determine in its “sole judgment” that a dispute cannot be resolved to the parties “mutual satisfaction.”

B. The Court does not address the language in paragraph 26 which allows Eastwood “at its sole option” to terminate the agreement.

C. The Court does not address the language of paragraph 26 that:

If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer’s damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.

III. ANALYSIS

A. The Court inappropriately disregarded the clear language of the contract attempting to create an ambiguity that does not exist. It does so by ignoring language allowing Eastwood to determine a dispute and the remedy set forth in the contract. Instead, the Court focuses on the language of *bona fide* disputes modifying the entire contractual provision including Eastwood’s latitude to cancel the contract and its obligations if it does so.

B. Likewise, the Order inappropriately attempts to create an ambiguity where none exists by focusing on how each party to the contract interprets the rights and obligations of the contract. *See*, Pages 14 and 15 of the Order; *McCord v. Laurens County Health*, 838 S.E.2d 220, 223 (Courts “look first to the language of the contract.”)

C. The Order improperly determines the contract provision at issue are unconscionable and in violation of public policy.

1. The Court makes no analysis or mention of the fact that the Plaintiffs are sophisticated home buyers who had the option to purchase many other homes. In fact, Ms. Franquelin is a retired vice president of a publicly-traded company and Ms. Grigoleit manages compliance for a New York based private equity company. Both Plaintiffs read the contract and understood its terms. They both decided to enter the contract knowing they had other options to purchase homes and they understood the meaning of the contracts.

2. The Court improperly decided that the terms “are so oppressive that no reasonable person would make them...” (Order Page 19). In fact, both Plaintiffs are sophisticated, educated, wealthy, and reasonable people. They both testified they read the terms, they understood the terms, they asked to change the terms, the terms were not changed, and they entered the contract regardless. As a result, two reasonable people agreed to these terms knowing exactly what the terms meant.

3. The Court improperly disregarded the relative investment of the parties and the fact that the challenged clauses put the Plaintiffs in the position they were in before the agreements were signed. The Court makes no mention that Eastwood’s investment in the homes is in the hundreds of thousands of dollars and that the Plaintiffs are only required to deposit a small fraction of the purchase price when contracting. Thus, unlike the Plaintiffs in *Damico v. Lennar*, 879 S.E.2d 746 (2022), who were left with an impaired procedural remedy for defective homes already purchased, the Plaintiffs in this case received their entire deposit pursuant to the terms of the contract. This returned them to their position they were in before entering the agreements.

4. The Court improperly determined the agreements’ limitation on damages violates public policy. The limitation on damages returns to the Plaintiffs their entire deposit. Additionally:

Limitation of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it.

Gladden v. Boykin 402 S.C.140, 739 S.E.2 882 (2013).

Likewise,

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.

Id.

Both Plaintiffs testified they were sophisticated people who understood the agreement they entered and even protested that they did not like the terms they ultimately accepted.

5. The Court's ruling takes no notice of Eastwood's risk of loss before closing. Paragraph 28 of the contract assigns the entire risk of the loss before closing to Eastwood for any reason. The Plaintiffs bear no risk if the home is damaged or destroyed by fire, wind, or any other cause. As a result, the contract reasonably limits the Plaintiffs' damages before closing and sets forth their remedies as the Plaintiffs take no risk at all of damage to the property.

6. The Court improperly severed provisions for the agreement. The agreement by its terms does not allow a severance. There is no severance clause whatsoever in the agreement signed by the parties. Instead, the Court has rewritten the agreement without the terms upon which the parties agreed in violation of South Carolina Law. *See, Lowcountry Open Land Trust v. Charleston Southern University*, 656 S.E.2d 775 (Ct. App. 2008). (Courts do not have the authority to alter contracts or to make new contracts for the parties).

7. The Court improperly found the cancellation and limitation on damages clauses unconscionable and in violation of public policy.

i. Limitations on Consequential Damages are Reasonable Under South Carolina Law

The challenged language in the purchase agreements limits the purchaser's claims for damages incurred as a result of a breach of the purchase agreement. The challenged language in paragraph 25 indicates that "in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages." The language in paragraph 26 indicates that "if Seller terminates this agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100 as liquidated damages in the event the Seller cancellation constitutes a default under this agreement."

These clauses are generally referred to as limitation of liability clauses. Such clauses are routinely entered. *Gladden v. Boykin*, 739 S.E.2d 882, 883 (2013). They have been found commercially reasonable since "they permit the provider to offer the service at a lower price...." *Id.* (quoting *Heed v. US Inspect DFW, Inc.*, 159 S.W.3d 731, 748-49 (Tex.App.2005)) (noting courts uphold limitations of liability in burglar and fire alarm system contracts and finding limitation of liability clause in home inspection contract commercially legitimate.)

In *Gladden v. Boykin*, a home purchaser hired a home inspection company to inspect a home before purchase. After purchasing the home, she sued the home inspection company for negligence in failing to conduct a thorough inspection. The home inspection company moved to dismiss on the basis that the home inspection contract limited its liability to the return of the inspection fee which it returned. The trial judge granted the home inspection company's motion for summary judgment over the home purchaser's arguments that this limitation was unconscionable.

The South Carolina Supreme Court affirmed the trial judge's decision. It found the agreement was not so oppressive that a reasonable person would not enter it and that no fair and honest person would accept it. And, it found the liability limitation did not violate public policy.

Likewise, *Bahringer v. ADT*, 942 F.Supp.2d 585 (2013) (Norton, J.), Judge Norton upheld a limitation on damages. Bahringer purchased an alarm system from ADT. The contract limited damages to \$500 or 10% of the annual service charge. Bahringer alleged that his ADT system failed to alert to a fire at his home and sought recovery for the damage to his home. Judge Norton found that the contract clearly limited ADT's liability. In response to claims of unconscionability, the Court found Bahringer was at liberty to contract with other providers for this service, and that he was not cognitively impaired. Thus, the Court found the parties were on roughly equal footing in bargaining positions. As a result, the Court enforced the limitation of damages.

In *Maybank v. BB&T*, 787 S.E.2d 498 (2016), the South Carolina Supreme Court reversed the trial judge's decision to not enforce a limitation of damages clause. Maybank entered a contract with BB&T for wealth management advice. The contract contained a limitation of punitive and consequential damages. Over BB&T's objection, the trial judge found the limitation unconscionable and submitted these issues to the jury which awarded \$5,000,000 in punitive damages. The Supreme Court reversed. It held that limitations of liability and exculpatory clauses are commercially reasonable and enforceable. *Id.*; *See, Gladden v. Boykin*, 739 S.E.2d 882, 884 (2013) (upholding a limitation of liability provision in a home inspection agreement which confined the liability of the inspection company to "a sum equal to the amount of the fee paid by the client for this inspection," and finding the clause neither unconscionable nor violative of public policy); *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred

by a waiver and release voluntarily signed by plaintiff prior to entering the racetrack); *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (upholding a release which explicitly and unambiguously limited paintball range's liability for negligence); *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 192, 322 S.E.2d 453, 459 (Ct. App. 1984) (enforcing the language of an exculpatory clause in a contract for the sale of a boiler).

As a result, limitations on damages are enforceable. In this case, the Plaintiffs have suffered no monetary loss as their deposits have been refunded to them. Their only potential losses are consequential damages which they knowingly decided to waive.

ii. Cancellation Clauses Are Reasonable under South Carolina Law

Paragraph 26 allows Eastwood to cancel the purchase agreement. “If for any reason, a *bona fide* dispute should arise between the Buyer and Seller, in Seller’s sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement” Eastwood’s vice president Dion Matheny testified that the covenants governing the neighborhood were not recorded such that phase four was not incorporated into phases one, two, and three of the neighborhood as required for zoning approval. As a result, Eastwood could not sell the homes. The Plaintiffs have not put forth any evidence to the contrary. As indicated by filing their lawsuit, the Plaintiffs have insisted Eastwood construct and sell them homes despite the lack of covenants and zoning compliance. Plaintiffs’ counsel argues that this is not a *bona fide* dispute and that Eastwood has cancelled the purchase agreements without justification. The dispute is that Eastwood cannot sell the houses, and that the Plaintiffs insist on purchasing them.

Cancellation clauses in contracts are not unreasonable or unconscionable. In fact, “[i]t is a well-established rule of law that a contract may provide for its termination at the option of one or either of the parties” *Philadelphia Storage Battery v. Mutual Tire Stores*, 159 S.E.2d 825 (1931). In *Glaesner v. Beck/Arnley Corporation*, 790 F.2d 384 (1986), the Fourth Circuit Court of Appeals overturned a breach of contract case on the basis the contract allowed one party to terminate it. Beck/Arnley and Glaesner entered a contract for the distribution of automobile parts. Glaesner was the Charleston distributor of Beck/Arnley parts. The contract provided that “[e]ither party may terminate this Agreement at any time, without cause, upon one (1) month advance written notice.” *Id.* Beck/Arnley exercised its right to terminate the contract, and Glaesner sued. The trial court entered a verdict for Glaesner. But, the Fourth Circuit overturned the judgment because Beck/Arnley had a right to terminate the contract. It held that “[a] termination is not wrongful if it is in accord with the terms of the contract and not contrary to equity and good conscience.” *Id.*

Similarly, in *Williams v. Leventis*, 350 S.E.2d 520 (1986), the City of Columbia cancelled a garbage collection contract within its terms. The South Carolina Court of Appeals affirmed the trial judge holding that “[t]he parties to a contract fairly made and not contrary to equity and good conscience may agree that the contract might terminate at the election of one or the other of them.” *Id.*

As a result, a term allowing for termination is not unreasonable or unconscionable just because it allows a party to terminate an agreement. In addition, the termination clause is integral to the purchase agreement which assigns the pre-closing risk and investment to Eastwood. Eastwood invests approximately \$500,000 in building the home before the closing. And Eastwood assumed the entire risk of damage to the home or other unforeseen circumstances

regarding the construction of the home. On the other hand, Plaintiffs deposited between ten and fifteen thousand dollars. They undertook no risk or further investment in the home before closing. And, their entire deposit has been offered back to them placing them back in the *status quo* before the agreement. This is a proper remedy for a rescission of a contract. *See, Rice & Santos v. Jones*, 305 S.E.2d 74 (1983) (“The fundamental prerequisite for rescission is that the parties be returned to the status quo prior to the contract.”) (*citing* 17A C.J.S., *Contracts* § 438; 17 Am.Jur.2d *Contractions* § 512).

Cancellation clauses and refunds of earnest money claims are common in real estate sale contracts. *See, Preferred Savings Bank v. Elkholy*, 399 S.E.2d 19 (Ct. App. 1990), (affirming damages of earnest money for real estate contract cancellation); *Faulkner v. Miller*, 460 S.E.2d 378 (1995) (affirming refund of earnest money as damages); *Benya v. Gamble*, 321 S.E.2d 57 (Ct. App. 1984) (“The parties to a real estate contract may by express provision stipulate that a particular sum shall be paid by the purchaser to the seller in the event the purchaser fails to perform.”); *Hamilton v. Harborview Development Partners*, 359 S.E.2d 516 (Ct. App. 1987) (allowing retention of deposit as damages for breach of real estate contract.)

Thus, a cancellation clause is not unconscionable. It is reasonable in light of the parties’ relative risk and investment in the sale. And, it returns the Plaintiffs their entire deposit such that they have no monetary loss. As a result, the cancellation clause is not unconscionable.

iii. The Clauses Do Not Violate South Carolina Public Policy

South Carolina’s public policy is to “enforce contracts that are freely entered according to their terms.” *Ellis v. Taylor*, 449 S.E.2d 487 (1994). Here Eastwood seeks to enforce the agreement as written. The Plaintiffs seek to strike provisions from it.

The Plaintiffs point to South Carolina’s common law public policy of protecting new home buyers. South Carolina does extend protection to home buyers. These protections have been extended to home purchases after a sale when a builder disclaims responsibility for defects in the home. In these cases, a home builder has attempted to disclaim responsibility for defects in a home or procedurally block a home buyer’s remedy when a home buyer has already purchased a home. South Carolina has “a deeply-rooted and long-standing policy of protecting new home buyers.” *Damico v. Lennar Carolinas*, 879 S.E.2d 746 (2022) (citing *Kennedy v. Columbia Lumber*, 387 S.E.2d 730 (1989) (rejecting a result in which “a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions;” and explaining that in the past, when the Court is confronted with a new scenario “not properly disposed of by our present set of rules,” it “[o]nce more[] respond[s] by expanding our rules to provide the innocent buyer with protection,” *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976)). And it is “intolerable to allow builders to place defective and inferior construction into the stream of commerce.” *Id.* at 344, 384 S.E.2d at 736 (citing *Rogers v. Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968)).

Thus, South Carolina courts have protected home buyers from defects in homes they have purchased. And, South Carolina courts have invalidated overreaching arbitration provisions in home purchase agreements when those agreements leave a homeowner without a remedy for the purchase of a defective home.

But, that is not the situation for these Plaintiffs. Through a defect in the covenants, the Plaintiffs have not been able to purchase homes and have had their deposits returned to them. The homeowner in *Damico* had purchased a defective home and was deprived of a remedy for the defects through an overreaching arbitration clause. In contrast, these Plaintiffs have not been left

with a defective home. Instead, through a defect in the covenants, they have not been able to purchase a home they had planned to purchase. Unlike homeowners who purchase defective homes, the Plaintiffs have been returned their deposits and are no worse off than when they began. Thus, South Carolina's public policy of protecting home buyers does not invalidate this contract provision the Plaintiffs voluntarily accepted.

The Court's finding concerning public policy disregarded that the contract is for sale of residential property which is heavily regulated by the South Carolina Real Estate Commission. *See*, S.C. Code Ann. §§ 40-57-5 to 40-57-810. These provisions do not prohibit limitations on damages clauses or cancellation of real estate sales contracts.¹ The Court's findings do not address the South Carolina Legislature's extensive statements of public policy which regulate real estate transactions but do not prohibit limitation of damages clauses or cancellation of real estate sales contracts.

8. The Court's order does not address the factors necessary for a finding of unconscionability which include all acts and circumstances of the case. *See*, *S.C. Farm Bureau v. Kennedy*, 730 S.E.2d 862 (2012). In determining whether an absence of choice is meaningful, courts consider, among all facts and circumstances, "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson v. MSA*

¹ In fact, South Carolina Code Section 40-57-350(G)(1) insulates a real estate licensee from liability for truthfully disclosing a known material defect such as the zoning and covenant problems with the lots at issue as follows: "Notwithstanding another provision of law, no cause of action may be brought against a licensee who has truthfully disclosed to a buyer a known material defect." *Id.* A statute of this nature sets forth the public policy of South Carolina regardless of common law principles.

of Myrtle Beach, 644 S.E.2d 663 (2007); See also *Holler v. Holler*, 36 S.C. 256, 269. 612 S.E.2d 469, 476 (Ct. App.2005) (“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.” (quoting 17A Am.Jur.2d *Contracts* § 279 (2004))).

The Court’s order does not address these factors. Additional factors to consider include the following:

[T]he ability of the particular contracting party, in light of education, intelligence or lack thereof, to understand the terms of the contract. Other Factors to be considered include the use of sharp practices or high pressure tactics, the sophistication or wealth of the parties, the relative scarcity of the subject matter of the contract, the age of the parties, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible. It has to do with oppression or surprise.

17A Am.Jur.2d *Contracts* § 272 (cited with approval in *Damico v. Lennar* 879 S.E.2d 749, 755 (2022).

Likewise, the Court’s order improperly concludes that the terms it strikes are substantially unconscionable. Unconscionability requires lack of meaningful choices and oppressive and unreasonable terms so unfair that no reasonable person would agree to them and no reasonable person would attempt to enforce them. *Simpson v. MSA Myrtle Beach*, 644 S.E.2d 661 (2007). In general, courts enforce contracts as written to give each party the benefit of the bargain to which the parties agreed. “The Court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *Ellis v. Taylor*, 449 S.E.2d 487 (1994); See also, *South Carolina Dept. of Transp. v. M & T Enterprises of Mount Pleasant*, 667 S.E.2d 7 (Ct. App. 2008).

In particular, when considering a challenge to a contract by a party who knowingly entered it:

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, 739 S.E.2d 882 (2013).

Ms. Franquelin and Ms. Grigoleit are both sophisticated, experienced, educated people. They possess college degrees, advanced education and experience in the business world. They both agree they are sophisticated people who can read, write and understand the English language on a high level. They both read the provisions of which they complain, expressed their reservation to those provisions, and signed the agreements nevertheless.

The clauses are not obscured in any way. They are in the same print format as the remainder of the purchase agreement. In fact, both Ms. Franquelin and Ms. Grigoleit testified that they read both the limitation of consequential damages clause and the termination provision and understood their meanings. Both women indicated they discussed these terms with their real estate agents. Thus, they not only read the clauses, they understood the clauses, they did not like the clauses, and they consented to the clauses anyway.

IV. CONCLUSION

The Court improperly ruled that the contracts are unconscionable and in violation of public policy and that it has the authority to remove provisions from the contract. As a result, Eastwood asks the Court to reconsider its ruling of December 19, 2023.

Respectfully submitted,

[Signature block to follow]

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West Columbia, South Carolina
December 28, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-2831
Marcel Franquelin and Patricia Franquelin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PLAINTIFFS' MOTION TO DISMISS
	)	DEFENDANTS' COUNTERCLAIMS
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

Plaintiffs Marcel Franquelin and Patricia Franquelin respectfully move, pursuant to Rule 12(b)(6), SCRCF for an Order dismissing each and every one of Defendants' counterclaims contained in Defendants' "Answer and Counterclaim" filed on August 6, 2021. In support of this motion, Plaintiffs offer the following:

- The filing of a *lis pendens* is "absolutely privileged" under South Carolina law. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (cert. denied). Therefore, the Defendants' slander of title counterclaim fails as a matter of law.
- Defendants have failed to sufficiently allege one or more of the necessary elements supporting their abuse of process counterclaim.
- Defendants have failed to sufficiently allege one or more of the necessary elements to support their breach of contract counterclaim.

This motion may be further supported by, among other things, a memorandum of law and the arguments of counsel before or at the hearing on this motion.

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFFS

August 19, 2021
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-2831
Marcel Franquelin and Patricia Franquelin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	NOTICE OF MOTION AND
Eastwood Homes of Columbia, LLC d/b/a	)	MOTION TO DISMISS OR
Eastwood Homes; Eastwood Construction	)	FOR SUMMARY JUDGMENT
Partners, LLC f/k/a Eastwood Construction,	)	
LLC d/b/a Eastwood Homes; Eastwood	)	
Construction, LLC,	)	
	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, DEFENDANTS, by and through their undersigned attorney, will move before the Presiding Judge of the Charleston County Court of Common Pleas dismissing them from the above-captioned action pursuant to Rule 12(b)(1) and (6) or for summary judgment pursuant to Rule 56 of the *South Carolina Rules of Civil Procedure* as the Complaint fails to state a cause of action against Defendants.

The contract alleged in the complaint gives Eastwood the unilateral right to state when a bona fide dispute exists, with no right to challenge that decision by the Plaintiffs. Eastwood determined a dispute existed based on the declarations and covenants governing the community and the lack of incorporation into earlier phases. As a result, Eastwood cancelled the contract in accordance with its right to do so set forth in the contract. In addition, the contract does not provide for specific performance as demanded by the Plaintiffs.

This motion may be based on such memoranda in support or affidavits which may be served on counsel for the Plaintiffs prior to the date of the hearing on this motion.

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West Columbia, South Carolina
August 9, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Ralph Dawkins and Michelle Dawkins,	)	CASE NO. 2021-CP-10-2829
	)	CASE NO. 2021-CP-10-2831
Marcel Franquelin and Patricia Franquelin,	)	CASE NO. 2021-CP-10-2833
Michael A. Martin and Adriana S. Iaquinto-	)	
Martin,	)	CASE NO. 2021-CP-10-2837
Louis Glavinos and Kimberly Glavinos,	)	CASE NO. 2021-CP-10-2838
Daniel J. O’Grady and Kaitlyn E. Grigoleit,	)	CASE NO. 2021-CP-10-2840
Christopher M. Raybon and LaShonda K.	)	
Jones Raybon,	)	CASE NO. 2021-CP-10-2844
Morris K. White and Rebecca A. White,	)	CASE NO. 2021-CP-10-2902
Paul A. Banker and April D. Banker,	)	CASE NO. 2021-CP-10-3012
Patrick K. Daly and Brenda Daly,	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFFS’ PRE-TRIAL BRIEF
v.	)	PURSUANT TO RULE 16(c), SCRCP
	)	
Eastwood Homes of Columbia, LLC d/b/a	)	
Eastwood Homes; Eastwood Construction	)	
Partners, LLC f/k/a Eastwood Construction, LLC	)	
d/b/a Eastwood Homes; Eastwood Construction,	)	
LLC,	)	
	)	
Defendants.	)	

Plaintiffs hereby submit their Pre-Trial Brief (“Brief”), pursuant to Rule 16(c), SCRCP. The purpose of this Brief is to provide the Court with a condensed outline of the facts to be proven at trial, the relevant law, and legal arguments for this Court’s consideration for the trial on the merits of this case scheduled to begin on May 24, 2023.

INTRODUCTION

These consolidated cases involve identical claims by Plaintiffs, who are nine separate families and homebuyers, against Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes; Eastwood Construction Partners, LLC f/k/a Eastwood Construction, LLC d/b/a Eastwood Homes;

Eastwood Construction, LLC (collectively “Eastwood Homes”). Founded in 1977, Eastwood Homes is a sophisticated residential homebuilder with operations in Virginia, North Carolina, and South Carolina.

Plaintiffs each signed Eastwood Homes’ standardized form sales contract for the purchase of a semi-custom home located in Phase 4 of Swygert’s Landing on Johns Island. Prior to closing, but after Plaintiffs made earnest money deposits and took various actions in reliance on the contracts (including moving to Charleston, changing jobs, and making other life decisions), Eastwood Homes unilaterally terminated each of these contracts without any consultation with Plaintiffs whatsoever. Plaintiffs each objected to the termination and informed Eastwood Homes they intended to perform any/all contractual obligations and ultimately close on the purchase of the contracted home. However, Eastwood Homes informed Plaintiffs there was no longer a contract because it was terminated.

Eastwood Homes claims it has the authority, pursuant to Paragraphs 25 and 26 of the contracts, to unilaterally terminate for any reason and in its “sole discretion” and restrict Plaintiffs’ remedies to solely a refund of their deposit and liquidated damages in the amount of \$100. Paragraphs 25 and 26 work together to significantly restrict the rights and remedies available to homebuyers with whom Eastwood Homes contracts.

Eastwood Homes’ purported basis for unilaterally terminating under Paragraphs 25 and 26 is hotly disputed between the parties, but is not directly at issue in this trial before the Master-In-Equity. The sole issue for this Court, based on Judge Dennis’ Order dated March 11, 2022, is to decide whether Paragraphs 25 and 26 are enforceable, as written. Plaintiffs maintain Paragraphs 25 and 26, when read together, are unconscionable, violative of public policy, and severable from the contracts.

Paragraphs 25 and 26 read as follows:

25. Buyer in Default; Seller Remedies: Buyer(s) shall be in default if Buyer(s) fail to make full and timely settlement under the terms and conditions set out in this contract. In the event of default the binder money may be retained by the Seller as liquidated damages and not as a penalty, in which event Buyer and Seller shall be relieved from further liability under this contract. In the alternative, and in Seller's sole discretion, Seller may retain the binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer's breach or default. **In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.**

Buyer acknowledges and agrees that Seller will utilize Seller's standard construction and contract administration processes and procedures in constructing the property and in otherwise performing this New Home Purchase Agreement, including Seller providing notices by email to Buyer. **The Seller's process may include completion of a prequalification form with a Seller approved lender which Seller will evaluate to confirm Buyer's ability to close on the Property** Buyer(s) agree that he/she/they shall be in default of this Agreement if Buyer engages in specific acts or a course of dealing which materially disrupts Seller's standard and customary construction and contract administration processes and procedures, which includes the Buyer, without limitation: failing to make choices or take other actions required of Buyer within indicated time frames; refusing to work with designated Seller representatives to accomplish certain aspects of the Agreement interfering with Seller and Seller's agents performance of the Agreement, engaging in an abusive, harassing, threatening or in an otherwise offensive manner towards Seller and/or Seller's agents, unreasonably withholding acceptance or approval of work which complies with plans and specifications, or any other acts which have the affect of delaying construction, increasing Seller's cost of performance or otherwise unreasonably impeding Seller's performance.

26. Seller Option to Cancel Prior to Closing: If for any reason, **a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment,** prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing. **If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement.** Buyer agrees that such sum is a fair determination of Buyer's damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. **Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.**

(Bold, Underlined, and Italicized Text In Original; Highlighted Emphasis Added).

Plaintiffs and Eastwood Homes have conflicting interpretations over the meaning of Paragraph 26, namely the following language: “bona fide dispute ... between the Buyer and Seller, in Seller’s sole judgment.” Plaintiffs view this language as requiring, at minimum, a genuine (“bona fide”) disagreement (“dispute”) between the parties (“between the Buyer and Seller”) over a material term of the contract that cannot be resolved with the buyer despite Eastwood Homes’ efforts. Eastwood Homes, on the other hand, interprets this language – and Paragraph 26, generally – as a termination-at-will clause where Eastwood has the sole power to define the “dispute” and the sole power to “terminate this Agreement” for any reason it wants, no questions asked.

That interpretation and application by Eastwood Homes, coupled with the extreme and one-sided limitation of buyer’s remedies found in Paragraphs 25 and 26, render these paragraphs unconscionable and violative of public policy.¹

Eastwood Homes’ general counsel Allen Nason drafted the contracts at issue in this case. His view is that a “bona fide dispute,” a phrase undefined in the contracts, does not mean a “disagreement.” He testified, “[t]here can be a dispute without a disagreement.” (Nason Dep. 80:21-22) (emphasis added). When challenged on the absurdity of this interpretation, he stated “[y]our opinion is irrelevant because it’s the seller’s sole judgment, so I don’t really care what your opinion is. It’s only my opinion that matters, period.” (Nason Dep. 114:21-24) (emphasis added).

¹ Plaintiffs direct particular attention to the disparity where Eastwood, as Seller, “may retain the binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer’s breach or default” while, on the other hand, Buyer’s sole remedy is payment of \$100.00 in “liquidated damages.”

When asked whether Eastwood Homes “can terminate these contracts under Paragraph 26 for any reason it wants,” division president Dion Matheney testified “Yes.” (Matheney Dep. 31:14-17). Mr. Matheney went on to confirm that Eastwood Homes could even terminate “because they wanted to get a higher price and wanted to reset the contract” or “because the cost of wood is going up too much.” (Matheney Dep. 31:18 – 32:2).

This testimony leaves no doubt whatsoever that, despite the seemingly clear language and apparent buyer protection of a “bona fide dispute”, Eastwood Homes views Paragraph 26 as a seller’s termination-at-will clause giving it unbridled and unquestioned authority to redefine the meaning of “dispute” however it sees fit and terminate the contracts for any reason – or no reason at all. Plaintiffs submit that such language, in the context of a take-it-or-leave-it, boilerplate home purchase agreement, is unconscionable and violative of public policy, particularly in light of the Supreme Court’s recent resounding decision in *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746 (2022).

STATEMENT OF FACTS

These cases each involve the sale of lots and homes in Phase 4 of Swygert’s Landing subdivision on Johns Island. This subdivision is depicted on the Final Subdivision Plat of Phase 4 Swygert’s Landing dated May 21, 2019 and recorded with the Charleston County Register of Deeds on June 26, 2019 at Book L-19, Page 0276. **Exhibit 1 (Phase 4 Plat)**.

Each Plaintiff signed a “Eastwood Homes New Home Purchase Agreement.” These contracts are identical, boilerplate form contracts drafted and used by Eastwood Homes in Phase 4 and elsewhere throughout the Southeast. For purposes of this case, the parties have agreed to use a single version of the “Eastwood Homes New Home Purchase Agreement,” used in Phase 4,

for each Plaintiff and each of the above-captioned, consolidated cases. They are referred to collectively herein as the “Contract.” **Exhibit 2 (Contract)**.

Plaintiffs worked closely with Eastwood Homes on designing their homes, and those custom specifications are incorporated into each Contract. Plaintiffs relied on the closing date specified in their respective Contract and, in their own unique way, changed their position in reliance on the closing date set forth therein. Pursuant to the Contract, Plaintiffs paid Eastwood Homes a \$5,000.00 “nonrefundable binder/earnest money deposit.” Plaintiffs also funded additional monies based on certain design selections and/or upgrades. Plaintiffs performed these obligations, along with every other obligation under the Contract. Plaintiffs remain ready, willing, and able to close on the respective Properties. Eastwood Homes continues to refuse to sell the Properties to the Plaintiffs for the agreed upon price or otherwise recognize the existence of a purchase agreement for the sale of these homes.

On or about Friday, June 4, 2021, Eastwood Homes, by and through its sales representative Jill Bagwell, telephoned Plaintiffs to inform them that Eastwood Homes intended to cancel the existing contracts. Eastwood Homes informed Plaintiffs that they would receive a “Mutual Release” document via e-mail on the upcoming Monday.

Eastwood Homes subsequently sent each Plaintiff a virtually identical document titled “Mutual Release and Revocation of a Prior Agreement to Purchase Real Estate and Right of First Offer” (the “Mutual Release”). **Exhibit 3 (Mutual Release)**. As with the Contract, the parties have agreed to use a single version of the Mutual Release for each Plaintiff and each of the above-captioned, consolidated cases. The Mutual Release states, as follows:

Phase 4 of Swygert’s Landing was erroneously left out of the Swygert’s Phases 1, 2 and 3 Declaration of Covenants, Conditions and Restrictions by preceding Owner’s legal error. No further houses can be closed in Phase 4 until this cloud on title is resolved with the attorneys for the Phases 1, 2 and 3 Declaration, and the

existing homeowners in Phase 4. Moreover, lenders require a lender certification at closing which requires disclosure of any homeowner's association issues, which lender requirement cannot be satisfied at this time. Seller has agreed to contact Buyer after the legal issues have been resolved, which will take 4 months or more to legally resolve. Seller cannot cure this issue within the time period of the Contract.

None of the Plaintiffs signed and returned Eastwood Homes' proposed Mutual Release.

Subsequently, Eastwood Homes sent each of the Plaintiffs a purported earnest money refund and a "liquidated damages" check in the amount of one hundred (\$100.00) dollars. None of the Plaintiffs deposited any of these checks. Thereafter, Eastwood Homes cancelled all design meetings, walkthroughs, and otherwise completely frustrated Plaintiffs' ability to move forward with the purchase of their homes.

On June 10, 2021, the undersigned counsel for Plaintiffs provided written notice of Eastwood Homes' right to cure pursuant to Paragraph 18 of the Contract. **Exhibit 4 (Notice of Right to Cure Letter)**. Eastwood Homes never responded. Eastwood Homes has repeatedly refused to commit to honoring the originally agreed upon price if Plaintiffs were to agree to the proposed "option" to re-contract at a later date. Plaintiffs have continually insisted that Eastwood Homes is contractually and legally bound to honor the original agreed-upon price and to close on their respective homes.

While not directly before this Court at this time, Plaintiffs dispute the alleged "legal error" prevented and/or prohibited Eastwood Homes from fulfilling its obligation to close under the Contract. Prior to the notice to Plaintiffs of Eastwood Homes' unilateral termination, the company closed the sale of fourteen (14) separate lots and homes in Phase 4 of Swygert's Landing. Despite facing the exact same "legal error" as Plaintiffs the following properties were closed by Eastwood Homes:

OWNER	STREET ADDRESS	DEED	SALE \$	RECORDED
SUPPIN MATTHEW T	2879 Claybrook Street	0982-783	\$537,415.00	20-Apr-21
AYERS MATTHEW D	2885 Claybrook Street	0987-440	\$593,225.00	5-May-21
NELSON GRANT MYRON	1144 Tebalt Drive	0925-739	\$520,755.00	15-Oct-20
ALLIO JOSEPH C	1138 Tebalt Drive	0922-203	\$595,000.00	5-Oct-20
STEWART WILLIAM	1101 Tebalt Drive	0950-914	\$565,525.00	14-Jan-21
WOLPERT DEREK A	2932 Sarnoff Street	0952-340	\$569,200.00	20-Jan-21
ELLER MICHAEL B	2908 Sarnoff Street	0901-690	\$544,300.00	31-Jul-20
SOSA-OLIVER WILLIAM R	2892 Claybrook Street	0921-400	\$599,180.00	2-Oct-20
BRINKER KRISTYN WALKER	2937 Sarnoff Street	0990-813	\$590,280.00	14-May-21
AULTMAN JASON P	2923 Sarnoff Street	0928-223	\$509,610.00	23-Apr-21
STEVENS SAMMY CECIL	2919 Sarnoff Street	0921-787	\$548,860.00	23-Apr-21
KREAMER KARRIE L	1105 Glasson Street	0901-439	\$566,720.00	31-Jul-20
KING EUGENE	2905 Sarnoff Street	0911-159	\$559,175.00	31-Aug-20
MOODY MILLARD G	2880 Claybrook Street	0888-446	\$637,970.00	9-Jun-20

Two (2) of these lots recently sold for substantial profit. Specifically, 1105 Glasson Street sold on June 29, 2022 for \$975,000.00 and 2892 Claybrook Street sold on September 15, 2022 for \$960,000.00. These Phase 4 deeds are attached hereto as **Exhibit 5**. The notion that the alleged “legal error” prevented the sale of the Swygert’s Landing properties is belied by these indisputable facts.

PROCEDURAL POSTURE

Unsuccessful in their attempts at amicable resolution, Plaintiffs filed suit against Eastwood Homes alleging the following causes of action: (1) Declaratory Judgment; (2) Specific Performance of Contract; (3) Breach of Contract; (4) Unfair Trade Practices Act; and (5) Breach of Contract Accompanied by Fraudulent Act. Plaintiffs filed a *Lis Pendens* on their respective properties, as each claims an interest in the real property at issue.

The Complaint alleges the “legal error” cited by Eastwood Homes in the termination was not a “bona fide dispute” under Paragraph 26 because this issue was Eastwood Homes’ own fault and not of Plaintiffs’ making, existed at the time the Contract was executed, the Contract was not contingent upon the properties being subject to the CC&R, and Eastwood Homes had already closed fourteen (14) homes in Phase 4 without any lender underwriting problems or concerns whatsoever. The Complaint further alleges Eastwood Homes used the alleged “legal error” as a pretense to shed its contracts with Plaintiffs so it could renegotiate them at a much greater sales price or re-list the properties to take advantage of the excited real estate market. The summer of 2021 saw unprecedented real estate value appreciation both in the Charleston market and across the United States.

On August 6, 2021, Eastwood Homes filed an Answer and Counterclaim in each of the cases. Eastwood Homes has asserted the following counterclaims against the Plaintiffs: (1) slander of title; (2) abuse of process; and (3) breach of contract.

On August 9, 2021, Eastwood Homes filed a motion to dismiss or motion for summary judgment, claiming the company properly terminated the contracts. Eastwood's theory relies entirely on Paragraphs 25 and 26 of the Contract.

On February 2, 2022, Eastwood Homes' motion to dismiss or motion for summary judgment was heard by the Honorable R. Markley Dennis, Jr.

On March 11, 2022, Judge Dennis issued an order that, among other things, deferred Eastwood Homes' motion for summary judgment to a non-jury evidentiary hearing at which the parties are to present evidence from which the Court can rule on the enforceability of the contract language in accordance with this order. The order states that "[i]f the contract language is enforceable as written, Eastwood is entitled to summary judgment on all claims." (Order, p. 4).² It goes on to specify that "[t]he matters to be considered by the judge at this hearing and upon which the parties may present evidence [are] whether the contract is unconscionable or in violation of public policy." (Order, p. 6).

The Consent Order of Reference provides that "[t]he Parties consent to refer Plaintiffs' declaratory judgment claims *only* to the Master-In-Equity for Charleston County for trial." Only those matters ordered for trial by Judge Dennis are properly before this Court.

² Plaintiffs continue to assert that a factual issue exists regarding whether there was a "bona fide dispute" by which Eastwood Homes might invoke Paragraph 26. However, Judge Dennis found that if Paragraph 26 is enforceable wherein Eastwood Homes has the sole discretion to define "bona fide dispute" and the sole judgment to terminate the contract, summary judgment must be granted for Defendant.

FACTS IN CONTROVERSY

Plaintiffs are under the impression that most of the facts relevant to the narrow issues before the Court are undisputed.

LEGAL ISSUES

1. The Court has authority under the Declaratory Judgment Act (“Act”) to review and interpret disputed language in the Contract.

This Court has authority under the Declaratory Judgment Act (“Act”) to review and interpret disputed language in the Contract and decide whether certain terms are enforceable. The purpose of the Act “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered.” S.C. Code Ann. § 15-53-130 (2005). The Act also provides, as follows:

Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, **contract** or franchise **may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.**

S.C. Code Ann. § 15-53-30 (2005) (emphasis added). Moreover, the Act gives courts of record the power to “declare rights, status and other legal relations whether or not further relief is or could be claimed” and confers on such declarations “the force and effect of a final judgment or decree.” S.C. Code Ann. § 15-53-20 (2005) (emphasis added). The Act also states that the general power conferred on the circuit court under section 15-53-20 “in any proceeding when declaratory relief is sought in which a judgment or decree will terminate the controversy or remove an uncertainty” is not limited by the enumeration of specific powers in sections 15-53-30 to -50. S.C. Code Ann. § 15-53-60 (2005).

There can be no dispute that Plaintiffs and Eastwood Homes entered into valid and enforceable contracts. Under South Carolina law, to have a valid and enforceable contract, “there

must be mutual assent or a “meeting of the minds” between the parties with regards to all essential and material terms of the agreement.” *Player v. Chandler*, 382 S.E.2d 891, 893 (1989). The “meeting of the minds” must be based on “purpose and intention which has been made known or which, from all the circumstances, should be known.” *Id.* In addition, to mutual assent a valid agreement must be “accompanied by valuable consideration.” *Benya v. Gamble*, 321 S.E.2d 57, 60 (Ct. App. 1984). Under South Carolina law, valuable consideration may be “some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.” *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 687 S.E.2d 714 (Ct. App. 2009).

The parties do not dispute the validity of the Contracts. The dispute is over the enforceability of Paragraphs 25 and 26. This Court has the authority under the Act to interpret the Contract, generally, and Paragraphs 25 and 26, specifically to determine whether they are enforceable or not.

2. Paragraph 26 is unconscionable and violative of public policy because it is a disguised, termination-at-will provision in an adhesion, home purchase agreement.

a. Paragraph 26 has latent ambiguities, and the Court may consider extrinsic evidence to ascertain its true meaning intended by Eastwood Homes.

Under South Carolina law, where an agreement that is clear on its face and unambiguous, “the court’s only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.” *Miles v. Miles*, 711 S.E.2d 880, 883 (2011). However, if the agreement is ambiguous, the Court’s duty is to “determine the intent of the parties.” *Id.* A court may do so by “examining extrinsic evidence.” *McKinney v. McKinney*, 261 S.E.2d 526, 527 (1980).

Under South Carolina law, an agreement is ambiguous if “it is susceptible to more than one interpretation or its meaning is unclear.” *Smith–Cooper v. Cooper*, 543 S.E.2d 271, 274 (Ct. App. 2001). Whether a contract is ambiguous is a question of law. *S.C. Dep’t of Natural Res. v.*

Town of McClellanville, 550 S.E.2d 299, 303 (2001). Where a contract is ambiguous, the Court must determine the true intentions of the parties in light of the “subject matter, the relations of the parties to each other, and the circumstances surrounding the parties when they entered into the agreement.” *Langston v. Niles*, 219 S.E.2d 829, 833 (1975); *Garrett v. Pilot Life Ins. Co.*, 128 S.E.2d 171 (1962). “A court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.” *Duncan v. Little*, 384 S.C. 420, 426, 682 S.E.2d 788, 790 (2009).

“Even if an ambiguity exists in a contract, extrinsic evidence may not be considered if the ambiguity is a patent ambiguity.” *Beaufort Cnty. School Dist. v. United Nat. Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). However, a latent ambiguity exists when “there is no defect arising on the face of the instrument but arising when attempting to apply the words of the instrument to the object or subject described.” *Smith v. Cox*, 183 S.C. 509, 516, 191 S.E. 422, 425-26 (1937). Interpretation of a policy with a latent ambiguity is for the jury. *Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 329, 118 S.E. 609, 612 (1923)

Extrinsic evidence can be considered when construing a contract with a latent ambiguity *and to determine whether a latent ambiguity exists*. *Smith v. Cox*, 191 S.E. 422, 425-26 (1937) (finding parol testimony may be received in construing instrument with latent ambiguity); *Polson v. Craig*, 570 S.E.2d 190, 192 n. 2 (Ct. App. 2002) (involving a will, and noting extrinsic evidence is admissible when there is a latent ambiguity, not a patent ambiguity); *Bob Jones Univ. v. Strandell*, 543 S.E.2d 251, 254 (Ct. App. 2001) (“A court may admit extrinsic evidence to determine whether a latent ambiguity exists.”).

Plaintiffs and Eastwood Homes have conflicting interpretations over the meaning of Paragraph 26. Plaintiffs view the language “bona fide dispute ... between the Buyer and Seller, in Seller’s sole judgment” to require, at minimum, a genuine disagreement between buyer and seller

over a material term of the contract that cannot be resolved despite Eastwood Homes' efforts. Eastwood Homes, on the other hand, interprets and applies Paragraph 26 as a termination-at-will clause providing Plaintiffs no right to challenge Eastwood Homes' decision under any circumstances.

At the time they entered the contract, Plaintiffs did not realize or understand Paragraph 26 would be read and applied by Eastwood Homes as a disguised, termination-at-will provision. The manner in which Eastwood Homes has interpreted and applied Paragraph 26 exposes a latent ambiguity, authorizing this Court to consider extrinsic evidence, especially the testimony of Eastwood Homes' general counsel (who drafted the Contract) and the division president (who administered the Phase 4 contracts), to determine the meaning of Paragraph 26.

The Contract does not specifically define the term "bona fide dispute." As such, the Court may consider the dictionary definition of these terms. *Schulmeyer v. State Farm Fire & Cas. Co.*, 579 S.E.2d 132, 134 (2003). "Bona fide" means "made in good faith; without fraud or deceit" and "sincere; genuine." *Black's Law Dictionary* 144 (8th Ed. 2005). "Dispute" means "a conflict or controversy" *Id.* at 398. These definitions support Plaintiffs' view that "bona fide dispute" must involve a genuine disagreement between the parties over their respective rights and obligations under the Contract. In other words, a "bona fide dispute" cannot be something unilaterally manufactured, asserted in bad faith, or belied by the existence of clear, indisputable facts – even if determined in "Seller's sole discretion."

Eastwood Homes does not share Plaintiffs' interpretation of Paragraph 26. According to the Mutual Release, Eastwood Homes invoked Paragraph 26 due to the preceding owner's "legal error." This is not a disagreement with Plaintiffs. Eastwood Homes' general counsel testified that a "dispute" does not mean a "disagreement." He testified "[t]here can be a dispute without a

disagreement.” (Nason Dep. 80:21-22). When pressed, he stated “[y]our opinion is irrelevant because it’s the seller’s sole judgment, so I don’t really care what your opinion is. It’s only my opinion that matters, period.” (Nason Dep. 114:21-24). When asked whether Eastwood Homes “can terminate these contracts under Paragraph 26 for any reason it wants,” division president Dion Matheney testified “Yes.” (Matheney Dep. 31:14-17). Mr. Matheney went on to confirm that Eastwood Homes could even terminate “because they wanted to get a higher price and wanted to reset the contract” or “because the cost of wood is going up too much.” (Matheney Dep. 31:18 – 32:2).

This testimony leaves no doubt whatsoever that, despite the seemingly clear language and apparent buyer protection of a “bona fide dispute”, Eastwood Homes views Paragraph 26 as a seller’s termination-at-will clause giving it unbridled and unquestioned authority to terminate the contracts for any reason – or no reason at all. Put another way, the phrase “in Seller’s sole discretion,” according to Eastwood Homes, entitles it to change the meaning of the phrase “bona fide dispute” to anything it wants – no questions asked. And Eastwood Homes has acted in accordance with its own interpretation of the contract by unilaterally terminating the purchase agreements.

Pursuant to Judge Dennis’ order, this Court must evaluate Eastwood Homes’ interpretation and application of Paragraph 26 and decide whether it is valid and enforceable.

b. Paragraph 26, as written, interpreted, and applied by Eastwood Homes, is unconscionable.

The Supreme Court of South Carolina recently decided a landmark, pro-consumer case expanding the doctrine of unconscionability in the residential home purchase agreement context. *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746 (2022). This case clarifies and proclaims South Carolina’s unconscionability analysis when applied to this special type of “consumer transaction.”

Id. at 621, 879 S.E.2d at 760 (“South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.”). As set forth below, *Damico* represents and recognizes “South Carolina[’s] ... extensive history of expanding its common law on contracts so as to protect new homebuyers... .” *Id.* at 624, 879 S.E.2d at 761. Since *Damico*, our appellate courts have expressed severe skepticism regarding oppressive, boilerplate terms in consumer residential home purchase agreements. *Huskins v. Mungo Homes, LLC*, No.: 2018-000889, 2022 S.C. App. LEXIS 61, 2022 WL 1760628 (Ct. App. 2022) (refusing to enforce contract language that “effectively shortens the statutory period to ninety days and provided and even shorter period of thirty days when the ‘claim, dispute, or matter in question’ arises from either party’s termination of the Purchase Agreement.”).

Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate contracts or portions of contracts. *See Dr. ’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996).

“At its core, unconscionability is defined ‘as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.’” *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 754 (2022) (quoting *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 472 S.E.2d 242, 245 (1996)); 17A Am. Jur. 2d *Contracts* § 272 (2016) (characterizing these two prongs as procedural and substantive unconscionability, respectively); *see also id.* § 271 (“Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices”). “This general description of unconscionability applies to all contract terms, not merely arbitration provisions.” *Id.* “A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case.” *Id.* When determining whether a purchase agreement between a builder

and a residential home purchaser was unconscionable, the Supreme Court “emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.” *Id.*

i. Procedural Unconscionability

“The touchstone of the analysis begins with the presence or absence of meaningful choice.” *Damico v. Lennar Carolinas, LLC*, 612, 879 S.E.2d 746, 755 (2022). “Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process.” *Id.* (citation omitted). “Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant.” *Id.* at 613, 879 S.E.2d at 755-56 (citations omitted).

An adhesion contract is “a take-it-or-leave-it contract and is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice.” 17A Am. Jur. 2d Contracts § 274; 17 C.J.S. Contracts § 9 & n.9 (2020). However, given that one party to an adhesion contract “has virtually no voice in the formulation of the terms and language” used in the contract, *Lackey*, 498 S.E.2d at 901, courts tend to view adhesive arbitration agreements with “considerable skepticism,” as it remains doubtful “any true agreement ever existed.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669.

Applying the procedural unconscionability test, the Supreme Court held as follows:

the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions. These factors combine to highlight the significant disparity in the parties’ bargaining power, with Lennar enjoying a much stronger bargaining position than Petitioners. We therefore find Petitioners

lacked a meaningful choice in their ability to negotiate the arbitration agreement. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989) (“We have [] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.”).

Damico v. Lennar Carolinas, LLC, 879 S.E.2d 746, 756-57 (2022).

The facts going to procedural unconscionability here mirror those in *Damico v. Lennar Carolinas, LLC*. Eastwood Homes, like Lennar, is a sophisticated regional homebuilder with far more sophistication, experience, and bargaining power when compared to Plaintiffs who are consumers in the homebuying market. The Contract is a standard, form contract with uniform terms presented on a “take it or leave it” basis. The only features differentiating each of the Plaintiffs’ contracts are the “blanks” contained therein where each buyers’ names, property address, price, *etc.* were included. Plaintiffs had no opportunity whatsoever to negotiate the terms of the Contract, generally, and Paragraph 26, specifically.

Eastwood Homes has essentially conceded this point. When asked what would happen if a purchaser didn’t want to agree to Paragraph 26, Dion Matheny (Eastwood Homes’ Division President) testified, “I mean it’s our company-wide contract, so I mean, if you don’t want to sign it, you have to – we can’t sell you the home.” (Matheny Dep. 39:10-13). Mr. Matheny answered “no” when asked whether Eastwood Homes provides plaintiffs with an opportunity to present a purchase agreement of their own. (Matheny Dep. 36:18-21). Finally, Mr. Matheny confirmed that purchasers were required to use Eastwood Homes’ form contract as presented. (Matheny Dep. 36:22-25).

Given the above, there is no reasonable dispute that Plaintiffs satisfy the procedural unconscionability test.

ii. Substantive Unconscionability

“At its core, unconscionability is defined ‘as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.’” *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 754 (2022) (citing *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 472 S.E.2d 242, 245 (1996)).

In *Damico*, the following clause was ruled unconscionable the Supreme Court: “[Lennar] may, **at its sole election**, include [Lennar] contractors, subcontractors and insurer as parties in the mediation and arbitration” and “that mediation and arbitration will be limited to the parties specified herein.” *Id.* at 615, 879 S.E.2d at 757 (Emphasis in Original). The Court observed that “[g]iving Lennar the ‘sole election’ to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle.” *Id.* (citing 17A Am. Jur. 2d Contracts § 272 (“Mutuality [] is a paramount consideration when assessing the substantive unconscionability of a contract term.”)). The Court concluded that “[t]his creation of a procedural defense to liability for Lennar is wholly unreasonable and oppressive to Petitioners.” *Id.* at 616-17, 879 S.E.2d at 757-58.

Paragraph 26 as drafted, interpreted, and applied by Eastwood Homes allows the company to unilaterally terminate the Contract for any reason it wants and at its sole election. Eastwood has drafted and applied Paragraphs 25 and 26 to ensure a *procedural victory* in their favor by contracting their authority to decide whether a dispute with the Plaintiffs exists at all “in [Eastwood’s] sole judgment”. This language is substantively unconscionable for the same reason the Court struck down Lennar’s “sole election” language in *Damico*. Given “South Carolina[’s] ... deeply-rooted and long-standing policy of protecting new home buyers,” *id.* at 621, 879 S.E.2d at 760, granting the seller such unchecked, powerful, and unilateral authority to disregard the

Contract is one-sided, oppressive, unreasonable, and unconscionable. The Contract does not grant Plaintiffs the ability to terminate the Contract for any reason they want. It says, “if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing.”

Paragraph 26 is unconscionable because it is so one-sided and oppressive that it essentially makes the Contract illusory. According to Eastwood Homes, Defendant has the authority to decide, up to the minute of closing, whether or not it wants to fulfill its end of the bargain with its consumers. Defendant’s ability to back out at any time for any reason whatsoever, including simply the desire for a higher price, makes the Contract uniquely one-sided, oppressive, unreasonable, and ultimately unconscionable.

No reasonable homebuyer would ever knowingly agree to such a unilateral termination-at-will provision. Plaintiffs did not realize that is what they were agreeing to. They were lulled into a false sense of security by the “bona fide dispute” language. Paragraph 26 does not have express termination-at-will language. Little did Plaintiffs know that Eastwood Homes would disregard the “bona fide dispute” language in favor of an aggressively expansive and unreasonable interpretation of “in Seller’s sole discretion.” Plaintiffs did not realize they were agreeing to Defendant’s cloaked termination-at-will clause, but that is precisely how Eastwood Homes drafted, interpreted, and applied Paragraph 26 in this case. No reasonable, honest, or fair person would accept such terms allowing the party with superior bargaining power to terminate the agreement at-will and without meaningful consequence.

c. Paragraph 26 violates public policy.

South Carolina courts “will not enforce contracts that violate public policy.” *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 760 (2022) (citing *Carolina Care Plan, Inc.*, 606 S.E.2d at 758).

A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. 17A Am. Jur. 2d Contracts § 238 (Supp. 2021) (citation omitted).

Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 601 S.E.2d 342, 345 (2004); see also 17A Am. Jur. 2d Contracts § 238 (2016) (explaining courts may consider, inter alia, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

As previously discussed, “South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.” *Damico v. Lennar Carolinas, LLC* at 621, 879 S.E.2d at 760. If **this Court interprets and enforces Paragraphs 25 and 26 as Eastwood Homes proposes, this would essentially enable sophisticated homebuilders to contract away, through adhesion contracts, all consumer protections whatsoever.** Put another way, if Eastwood Homes can terminate its Contract any time prior to closing for any reason in its “sole judgment” with the only consequence being a refund of Plaintiffs’ deposit and liquidated damages of \$100.00, this would render all consumer residential home purchase agreements illusory.

South Carolina recognizes the illusory coverage doctrine in the employment and insurance contexts – both areas of the economy populated by boilerplate contracts and massively unequal bargaining power. *Small v. Springs Indus., Inc.*, 357 S.E.2d 452 (1987); *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318, 321 (S.C. Ct. App. 1994) (recognizing the illusory coverage doctrine to protect insureds where the terms of the policy exclude from coverage “the

very risk contemplated by the parties,” rendering a policy provision “virtually meaningless.”). Given the strong policy of protecting home buyers, contractual language rendering the agreement illusory is violative of public policy and unenforceable.

Enforcing Paragraphs 25 and 26 would mean that despite signing a contract for a semi-custom home and funding a deposit, a homebuyer consumer really does not have a true agreement with the builder, that is, unless the builder ultimately decides, again in its “sole judgment,” to honor it many months later at closing. This is simply repugnant to South Carolina’s “deeply-rooted and long-standing policy of protecting new home buyers” and violative of public policy.

3. The limitation on buyers’ remedies in Paragraph 25 and 26 is unconscionable and violative of public policy when viewed in conjunction with the termination-at-will language in Paragraph 26.

The Contract’s limitation on buyer’s remedies is similarly substantively unconscionable and violative of public policy when viewed next to the disguised termination-at-will language in Paragraph 26.

The relevant language in Paragraph 26 reads as follows: “[i]f Seller terminates this Agreement, Seller shall return buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00 as a liquidated damages in the event the Seller cancellation constitutes a default under this agreement.” Paragraph 25 goes on to provide that “[i]n the event of a breach for this Agreement by Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.” These terms are unreasonable and oppressive because they eliminate any *consequences* for Eastwood Homes’ breach.

Plaintiffs’ remedies for Eastwood Homes’ default are also severely one-sided when compared to Eastwood Homes’ remedies in the event of Plaintiffs’ default. Paragraph 25 provides as follows:

Buyer(s) shall be in default if Buyer(s) fail to make full and timely settlement under the terms and conditions set out in this contract. In the event of default the binder money may be retained by the Seller as liquidated damages and not as a penalty, in which event Buyer and Seller shall be relieved from further liability under this contract. In the alternative, and in Seller's sole discretion, Seller may retain the binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer's breach or default.

Each Plaintiff funded a \$5,000.00 “nonrefundable binder/earnest money deposit” plus additional deposits for certain selections. Allowing Eastwood Homes to keep these funds in the event of Plaintiffs’ default while providing Plaintiffs with a mere \$100.00 in the event of Eastwood Homes’ default is clearly one-sided and oppressive. Moreover, attempting to eliminate Plaintiffs’ legal remedies in the event of default, but providing Eastwood Homes with the full array of its legal remedies, again in its “sole discretion,” is equally one-side and oppressive.

Eastwood Homes’ interpretation of Paragraphs 25 and 26 to allow it to unilaterally terminate the Contract, for any reason in its “sole judgment” and limit Plaintiffs’ remedies to a return of their deposit and a liquidated damages sum of \$100 is the epitome of substantive unconscionability.

4. The Court may sever the language deemed unconscionable or violative of public policy.

“If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result.” *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 758 (2022)

S.C. Code Ann. 36-2-302(1) applies in the home purchase agreement context. *Id.* at 758; *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016); *Huskins v. Mungo Homes, LLC*, No. 5916, 2022 S.C. App. LEXIS 61, at *17-18 (Ct. App. June 1, 2022).

Section 36-2-302(1) reads as follows:

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 refuse to enforce the

contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Unlike Lennar's contract at issue in *Damico*, the Contract lacks a severability clause. However, this Court may rely on the aforementioned authorities mentioned in *Damico*, including Section 36-2-302(1), to limit the unconscionable application of Paragraphs 25 and 26 while preserving the fundamental meeting of the minds between the parties encompassed in the Contract, specifically to sell a semi-custom home and lot for a set price.

Conclusion

Given the foregoing, Plaintiffs respectfully request this Court deem Paragraphs 25 and 26 unconscionable, violative of public policy, unenforceable, and severable from the Contract. This determination will not end the case. Rather, it will just enable the remainder of Plaintiffs' claims and Eastwood Homes' counterclaims to proceed through litigation. However, if the Court finds Paragraphs 25 and 26 to be enforceable, according to Judge Dennis' order, summary judgment must be granted in favor of Eastwood Homes. That would be a most unfair and unfortunate outcome under the unique facts and circumstances of this case.

EXHIBIT LIST

1. Phase 4 Plat
2. Eastwood Homes New Home Purchase Agreement
3. Mutual Release and Revocation of a Prior Agreement to Purchase Real Estate and Right of First Offer
4. Plaintiffs' Right to Cure Letter
5. Phase 4 Deeds

EVIDENTIARY ISSUES

1. Allen Nason's deposition testimony is admissible.

Eastwood Homes' counsel has informed the undersigned that Allen Nason will be unable to attend the trial in person on May 24th and 25th. Both parties have agreed to submit into evidence excerpts from Mr. Nason's deposition, by way of page/line designation, pursuant to Rule 32(a), SCRCP. The parties have further agreed to waive any hearsay or other objections to this testimony.

Mr. Nason is Eastwood Homes' general counsel and the drafter of the Contract. Mr. Nason's testimony is relevant, as he testified, among other things, to drafting the Contract and the Contract's meaning (including, specifically, the meaning of Paragraph 26). Rule 401, SCRE ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

2. Extrinsic evidence is admissible to determine the meaning of Paragraph 26.

Plaintiffs intend to introduce extrinsic evidence including, but not limited to, the testimony of Eastwood Homes' witnesses (Allen Nason and Dion Matheney) and Plaintiffs' representations as well as the Phase 4 plat and deeds, to aid in the Court's interpretation of Paragraph 26. As discussed above, Plaintiffs contend Paragraph 26 contains one or more latent ambiguities. Put simply, Plaintiffs read Paragraph 26 to require a genuine, disagreement between the parties over a material term of the Contract that cannot be resolved; however, Eastwood Homes views Paragraph 26 as a termination at will provision based on the "sole discretion" language. Plaintiffs do not believe the "sole discretion" language allows Eastwood Homes to determine and redefine the meaning of a "bona fide dispute" however it wants with no questions asked.

Extrinsic evidence can be considered when construing a contract with a latent ambiguity. *Smith v. Coxe*, 191 S.E. 422, 425-26 (1937) (finding parol testimony may be received in construing

instrument with latent ambiguity); *Polson v. Craig*, 570 S.E.2d 190, 192 n. 2 (Ct. App. 2002) (involving a will, and noting extrinsic evidence is admissible when there is a latent ambiguity, not a patent ambiguity); *Bob Jones Univ. v. Strandell*, 543 S.E.2d 251, 254 (Ct. App. 2001) (“A court may admit extrinsic evidence to determine whether a latent ambiguity exists.”).

Therefore, to resolve the interpretive dispute over Paragraph 26 so the Court can determine whether it is unconscionable and violative against public policy as drafted, the aforementioned testimony and documents in the public records are admissible as extrinsic evidence to resolve latent ambiguities in Paragraph 26.

3. Facts going to support or contest the basis for Eastwood Homes’ termination are not relevant and inadmissible given the narrow legal issues before the Court.

The sole issue before this Court is whether the Contract, specifically Paragraphs 25 and 26, is enforceable as written under the doctrines of unconscionability and public policy. Neither of these affirmative defenses implicate Eastwood Homes’ claimed basis for termination, which Plaintiffs contest. Moreover, the reasoning and basis for Eastwood Homes’ termination is similarly not at issue in this case. Those issues are to be litigated only if the Court determines that Paragraphs 25 and 26 are unenforceable, pursuant to Judge Dennis’ order.

On March 11, 2022, Judge Dennis issued an order that, among other things, deferred Eastwood Homes’ motion for summary judgment to a non-jury evidentiary hearing at which the parties are to present evidence from which the Court can rule on the enforceability of the contract language in accordance with this order. The order states that “[i]f the contract language is enforceable as written, Eastwood is entitled to summary judgment on all claims.” (Order, p. 4). It goes on to specify that “[t]he matters to be considered by the judge at this hearing and upon which the parties may present evidence [are] whether the contract is unconscionable or in violation of public policy.” (Order, p. 6).

Therefore, Eastwood Homes' reasoning behind its decision to terminate the Contracts is not at issue in this case. Plaintiffs object to Eastwood Homes' introduction of any evidence regarding the alleged rationale behind the decision to terminate the Contracts with Plaintiffs.

4. The Phase 4 plat and deeds are relevant, self-authenticating, and subject to judicial notice.

Plaintiffs seek to introduce the plat of record for Phase 4 and the deeds of record evidencing sales of lots in Phase 4 prior to and after Eastwood Homes' termination of each Plaintiffs' Contract. The plat is relevant to orient the Court on the specific properties at issue in this case. The deeds are relevant, as extrinsic evidence, to further support Eastwood Homes' interpretation of Paragraph 26. They show that Eastwood Homes decided to honor some contracts with lot owners in Phase 4, but not Plaintiffs'. This supports Plaintiffs' argument that Eastwood Homes' views Paragraph 26 as a termination at will provision, leaving it up to Eastwood Homes – in its “sole discretion” – whether to honor the contracts or not. The fact that some contracts were honored, while others were not, supports Plaintiffs' argument.

A court may take judicial notice of public records. *Wise v. Wise*, 394 S.C. 591, 601, 716 S.E. 2d 117, 122 (Ct. App. 2011) (public records are subject to judicial notice); “Judicial notice may be taken at any stage of the proceeding.” Rule 201(f), SCRE.

“Rule 902 of the South Carolina Rules of Evidence allows admission of deed and mortgage documents as self-authenticating documents.” *Robinson v. Robinson*, 2005 S.C. App. Unpub. LEIX 389, at *7 (March 15, 2005). The deed and other documents are those documents authorized by law to be recorded in a public office, and therefore, fall within the purview of Rule 902, SCRCF. See S.C. Code § 30-9-30 (Supp. 2004); Rule 803 (14), SCRE.

The admission of the Phase 4 plat and deeds is proper under both concepts of judicial notice and self-authenticating documents.

Judicial notice is proper at any stage in the proceeding, and the Phase 4 plat and deeds are matters of public record, filed with the Register of Deeds office and available to the general public. Therefore, this Court may properly consider the Phase 4 Deeds pursuant to *Wise* and Rule 201(f), SCRE. In addition, *Robinson* expressly allows the admission of deeds as self-authenticated under both Rules 902 and 803 (14), SCRCP.

SETTLEMENT DISCUSSIONS

Eastwood Homes has refused to mediate these disputes until the Court rules on the enforceability of the Contract.

Respectfully Submitted,

s/Ross A. Appel

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ATTORNEYS FOR PLAINTIFFS

May 17, 2023
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
 COUNTY OF CHARLESTON)

Ralph Dawkins and Michelle Dawkins,) CASE NO. 2021-CP-10-2829
 Marcel Franquelin and Patricia Franquelin,) CASE NO. 2021-CP-10-2831
 Michael A. Martin and Adriana S.) CASE NO. 2021-CP-10-2833
 Iaquinto-Martin,) CASE NO. 2021-CP-10-2837
 Louis Glavinos and Kimberly Glavinos,) CASE NO. 2021-CP-10-2838
 Daniel J. O'Grady and Kaitlyn E. Grigoleit,) CASE NO. 2021-CP-10-2840
 Christopher M. Raybon and LaShonda K.) CASE NO. 2021-CP-10-2844
 Jones Raybon,) CASE NO. 2021-CP-10-2902
 Morris K. White and Rebecca A. White,) CASE NO. 2021-CP-10-3012
 Paul A. Banker and April D. Banker,)
 Patrick K. Daly and Brenda Daly,)

Plaintiffs,)

v.)

PRE-TRIAL BRIEF

Eastwood Homes of Columbia, LLC d/b/a)
 Eastwood Homes; Eastwood Construction)
 Partners, LLC f/k/a Eastwood Construction, LLC)
 d/b/a Eastwood Homes; Eastwood Construction,)
 LLC,)

Defendants.)

Pursuant to Rule 16(c) of the South Carolina Rules of Civil Procedure, James Edward Bradley as attorney for the Defendants submits this Pretrial Brief as follows:

1. A concise, non-argumentative statement of the facts of the case.

This case involves nine related cases that were previously consolidated by consent for the purposes of judicial efficiency. Each case involves the sale of a lot and home in Phase 4 of the Swygert's Landing subdivision on Johns Island in Charleston County.

The Plaintiffs each entered purchase agreements to homes in Phase 4. Before the homes were constructed, Eastwood learned that the restrictive covenants for the neighborhood were not

properly recorded such that the homes at issue and others could not be incorporated into the development with attending amenities. As a result, Eastwood exercised its rights under the purchase agreements to terminate the agreements, return the deposits, and pay the liquidated damages of \$100 set forth in the Purchase Agreement.

The Plaintiffs sued Eastwood attempting to force Eastwood to complete the homes and sell them to the Plaintiffs. Eastwood moved for Summary Judgment on the basis that the Purchase Agreements allowed it to terminate, return deposits, and pay liquidated damages which it had done. The Plaintiffs responded that the termination was unconscionable and should not be allowed on that basis.

Judge Markley Dennis heard Eastwood's Motion for Summary Judgment but declined to grant it in full as the Plaintiffs claimed unconscionability. Instead, he ordered that a subsequent non-jury hearing be held to determine if Eastwood's termination of the purchase agreement and the provisions that allow it are unconscionable or if Eastwood is entitled to Summary Judgment.

Each of the Plaintiffs signed an "Eastwood Homes New Home Purchase Agreement" with Eastwood Homes. These contracts are identical. Specifically, Paragraph 25 states the following:

In the event of a breach of this Agreement by the Seller, Buyer may recover the deposit, however, in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.

Likewise, Paragraph 26 Seller Option to Cancel Prior to Closing, states:

If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing. If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer's damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.

Eastwood cancelled the purchase agreements because Phase 4 of Swygert's landing was left out of Swygert's Phases 1, 2, and 3 Declaration of Covenants, Conditions and Restrictions as a result of the previous owner's legal error. Therefore, Eastwood could not annex homes into the preexisting community which contains common areas, a community pool, and other amenities. These amenities were represented as part of the sale of the homes.

Eastwood sent Plaintiffs a Mutual Release along with a refund of their earnest money and a liquidated damages check for \$100.00. Consequently, Plaintiffs sued alleging declaratory judgment, specific performance of contract, breach of contract, breach of contract accompanied by fraudulent act, and violation of the South Carolina Unfair Trade Practices Act.

2. An objective statement of the facts in controversy.

Plaintiffs are seeking a declaratory judgment from the Court as to whether Paragraphs 25 and 26 of the Purchase Agreement, which allows Eastwood Defendants to unilaterally terminate the purchase agreements, are unconscionable and against public policy. Plaintiffs also contend that Eastwood is legally obligated to convey title to the Property pursuant to the terms of the contract. However, under Paragraph 26, the Purchase Agreement states:

If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer's damages in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. *Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.* (Emphasis added).

3. The legal issues involved. This includes the law applicable to the cause of action and the defense.

Plaintiffs sued Eastwood seeking declaratory judgment, specific performance of contract, breach of contract, breach of contract accompanied by fraudulent act, and violation of the South

Carolina Unfair Trade Practices Act. All these claims rely upon Eastwood's termination of the purchase agreements. The purchase agreements allow Eastwood to cancel the purchase agreements before closing by returning the Plaintiffs' deposits and tendering liquidated damages of \$100. Though this is more than their investment in the Property. The Plaintiffs argue that the language of these clauses should not be enforced because it is unconscionable and in violation of public policy. Courts generally must enforce contracts according to their terms. *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994). If contract language is capable of only one reasonable interpretation, no construction is required, and the contract terms determine the outcome. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). The construction of a contract is a question of law for the court. *S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001).

If the Court decides to enforce the purchase agreements as written, Eastwood is entitled to summary judgement on all claims. The language in the purchase agreement is not disputed nor is the fact that the parties signed the purchase agreements. By their terms, the purchase agreements allow Eastwood to send written termination notice, return the buyers' deposits and tender \$100.00 as liquidated damages prior to closing. *See*, paragraph 26 of purchase agreement. There is no dispute that Eastwood has done so. The contracts limit damages as depicted in paragraph 25, which refunds the Plaintiffs all deposits as a result of any breach by Eastwood. The purchase agreements also indicate that Eastwood will not be liable for consequential damages or for damages or delays, and the buyers release and waive any claims for such damages. Likewise, Paragraph 26 limits the plaintiffs' damages, allowing Eastwood in its sole judgment to terminate the purchase agreement by written notice prior to closing. Finally, the purchase agreements specify that Buyer shall have no other rights or remedies should Eastwood exercise their right of cancellation. Thus, according

to the plain language of the purchase agreements, Eastwood is entitled to terminate the sale before closing by returning the Plaintiffs' deposits and liquidated damages which it did.

The Plaintiffs argue the contracts are unconscionable contracts that violate public policy. Unconscionability 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." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

When a contract is entered freely and voluntarily, contractual limitations are normally enforced. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). This Court has generally upheld limitations of liability and exculpatory clauses, finding they are commercially reasonable. *See, e.g., Gladden v. Boykin*, 402 S.C. 140, 144-45, 739 S.E.2d 882, 884 (2013) (upholding a limitation of liability provision in a home inspection agreement which confined the liability of the inspection company to "a sum equal to the amount of the fee paid by the client for this inspection," and finding the clause neither unconscionable nor violative of public policy); *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by a waiver and release voluntarily signed by plaintiff prior to entering the racetrack); *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (upholding a release which explicitly and unambiguously limited paintball range's liability for negligence); *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 192, 322 S.E.2d 453, 459 (Ct. App. 1984) (enforcing the language of an exculpatory clause in a contract for the sale of a boiler).

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); *See Williams v. Walker–Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965). Nevertheless, a court's ultimate duty is confined to interpreting the contractual provisions agreed to by the parties—regardless of their wisdom or folly, apparent unreasonableness, or any failure of the parties to guard their interests carefully. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999).

4. A listing of exhibits, indicating those to which there is a disagreement and listing of witnesses who may be called and, if available, their address and phone number.

Exhibits:

- a) Eastwood Homes New Home Purchase Agreement
- b) Affidavit of Dion Matheney
- c) Summons and Complaint
- d) Itemization of Check for Purposes of Cancellation
- e) Realtor Compensation Disclosure Addendum
- f) Mutual Release and Revocation of a Prior Agreement to Purchase Real Estate and Right of First Offer
- g) Swygert's Landing Declarations of Covenants, Conditions, and Restrictions
- h) Swygert's Landing Declarations of Covenants, Conditions, and Restrictions Phase 2A
- i) Swygert's Landing Phase 4 contract
- j) Phase 4 Closing Acknowledgment
- k) Phase 4 Plat

Witnesses:

- a) Dion Matheney, Eastwood Homes' Charleston Market Manager
- b) Allen Nason, General Counsel to Eastwood Homes
- c) Weeks & Irvine, LLC, closing attorneys

- d) Jill Bagwell, Eastwood Homes' Charleston Sales Manager
- e) Derek F. Dean, Counsel to Swygert's Landing Homeowner's Association
- f) Kaitlyn E. Grigoleit O' Grady
- g) Patricia A. Franquelin

5. **Any unusual problems relating to evidence to be introduced, such as "Business Records as Evidence Act," hearsay, use of depositions, etc.**

None.

6. **Any unusual question or matter which should be brought to the attention of the court.**

None.

7. **A statement that settlement negotiations were attempted before the date of the pre-trial hearing and the status of settlement negotiations.**

The parties have deferred settlement negotiations until the Court's Declaratory Judgment as to whether the contract is enforceable.

Respectfully Submitted,

MOORE BRADLEY MYERS LAW FIRM, P.A.

By: s/James Edward Bradley
James Edward Bradley, SC Bar # 66130
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West Columbia, South Carolina
May 17, 2023

State of South Carolina) County of Charleston) Ralph Dawkins and Michelle) Dawkins, Marcel Franquelin) and Patricia Franquelin,) Michael A. Martin and) Adriana S. Iaquinto-Martin,) Louis Glavinos and Kimberly) Glavinos, Daniel J. O'Grady) and Kaitlyn E. Grigoleit,) Christopher M. Raybon and) LaShonda K. Jones Raybon,) Morris K. White and Rebecca) A. White, Paul A. Banker) and April D. Banker,) Patrick K. Daly and Brenda) Daly,) Plaintiffs,) v.) Eastwood Homes of Columbia,) LLC d/b/a Eastwood Homes;) Eastwood Construction) Partners, LLC f/k/a) Eastwood Construction LLC) d/b/a Eastwood Homes;) Eastwood Construction, LLC,) Defendants.) Date: February 20, 2024 Time: 3:18 p.m. Location: Charleston County Judicial Center, 100 Broad Street, Courtroom 2A, Charleston, South Carolina Reported by Miranda Brown Page 1	PROCEEDINGS THE COURT: All right. So we're here -- this is the "Dawkins v. Eastwood Homes of Columbia, LLC" case. There are a number of case numbers, but it starts with 2021-CP-10-2829. This Court issued its order December 19th of 2023 after a two-day trial in May of last year. I then received from Mr. Bradley -- his motion to reconsider was filed December the 28th. And I did receive, in response to that, the plaintiffs' return to defendant's motion to reconsider, which was filed February 9th. I have had the chance to review my order and, at length, reviewed the memorandum that y'all have submitted, and we're here today to make a record. And the result of the ruling basically was that I had found the language in the contract -- the real estate contract for sale to be unconscionable and in violation of public policy, which was, as I saw it, the issue that was sent to me by Judge Dennis's court, and remanded the case back over to circuit court. I guess that's where y'all would go, but there may be an elevating appeal. I don't -- we'll figure that one out. So, Mr. Bradley, you have the floor, sir. MR. BRADLEY: Thank you, Judge. And thank you for your Page 3
APPEARANCES Presiding: The Honorable Mikell R. Scarborough Charleston County Charleston, South Carolina For the Plaintiffs Ralph Dawkins and) Michelle Dawkins:) Ross A. Appel, Esq.) McCullough Khan Appel) Mount Pleasant, South Carolina) Michael T. Cooper, Esq.) Apostolou Law Firm) North Charleston, South Carolina) For the Defendants: James E. "Ward" Bradley, Esq.) Moore Bradley Myers Law Firm, PA) West Columbia, South Carolina) INDEX Proceeding: 3 By Mr. Bradley: OPENING STATEMENT 7 By Mr. Appel: 23 EXHIBITS No exhibits were marked during the course of this hearing Page 2	time. I appreciate -- THE COURT: Certainly. MR. BRADLEY: -- you hearing from us. It's rare. THE COURT: I don't -- I don't even read these hearings if I don't think there's a merit to it, so I'm happy to hear from you. MR. BRADLEY: Thank you. Before I begin, is there any questions on the written materials we're submitted? I know you've read it. I just wanted to ask if you had any questions -- THE COURT: No -- MR. BRADLEY: -- I can answer for you. THE COURT: No questions per se. I'm not sure I'm convinced yet, and I'll take you to the parts of my order, if you'd like -- MR. BRADLEY: Yes, sir. THE COURT: -- and explain it to you. There was -- there was a version in there -- I think it was the second section. The Issues A, B, and C on Page 3 of your memoranda: "The Court does not address," "The Court does not address," "The Court does not address." So I'm happy to sort of point those out to you if you'd like. Issue A is, "The Court does not address the rule on the language of Paragraph 26, so how does Page 4

Page 5 1 Eastwood determine its 'sole judgment' that a 2 dispute cannot be resolved to the parties 'mutual 3 satisfaction?'" 4 I can turn directly to Page 14 of my order, 5 and on through Page 17, where I talked about 6 procedural unconscionability and cited the "Damico 7 v. Lennar" case. B, "Does not address Paragraph 8 26," which allows Eastwood the sole option to 9 terminate the agreement, I cite to the substantive 10 unconscionability argument in Pages 19 and 20. And 11 finally, C, "The Court does not address language in 12 Paragraph 26," which talks about the return of the 13 deposit plus a hundred dollars. And I would cite 14 you to Page 21, which is Section C of the 15 (inaudible) part of the order and Page 23, which is 16 Numeral 3 in my order. That -- that was just kind 17 of what I did to look through it. Page 21, 18 Paragraph C -- Paragraph 26 violates public policy. 19 And Page 23, the heading, Item Number 3 is, "One- 20 sided limitations on plaintiffs' remedies contained 21 in this paragraph are unconscionable and violate 22 public policy." And I think that's one of the 23 issues that you certainly have a right to challenge 24 on a motion to reconsider, if the Court has not 25 ruled on something. I just want to make sure that,	Page 7 1 MR. BRADLEY: So, anyway, I'll move straight into what 2 I'd planned to say then. 3 THE COURT: Sure. Thank you. 4 OPENING STATEMENT 5 BY MR. BRADLEY: The first thing I want us to talk about 6 is the actual test for unconscionability, and the 7 case I'd like to use is "Gladden v. Boykin." May I 8 approach, Judge? 9 THE COURT: Certainly. Certainly. Matter of 10 fact, I've -- I've got a copy that you can have, if 11 you want one. Yours is probably a better read one 12 than mine is. 13 MR. BRADLEY: Thank you, Judge. I -- I don't know about 14 that, but that's the one I have there. 15 THE COURT: Okay. 16 MR. BRADLEY: All right. And so this case is a fairly 17 recent case from the South Carolina Supreme Court. 18 What happened in this case was a person bought a 19 house. It was a homebuying transactions, and they 20 had the house inspected before they bought the 21 house, by a home inspector. When they bought the 22 house, they found that there were defects in the 23 house the home inspector did not find. 24 THE COURT: Right. 25 MR. BRADLEY: So they sued the home inspector, and the
Page 6 1 from my perspective, I think I did rule on that. 2 You may not agree with me on it. 3 MR. BRADLEY: Yes, sir. 4 THE COURT: I'll say that, but I think I did rule on it. 5 That's my -- that's my only point in pointing that 6 out, okay? 7 MR. BRADLEY: Understood, Judge. 8 THE COURT: So it's entered into the record. But let me 9 hear from you. 10 MR. BRADLEY: And before I move into the substantive 11 arguments, I -- I know this wouldn't matter to you, 12 but, you know, in order to appeal, we have to make 13 sure we've raised everything. 14 THE COURT: Sure. 15 MR. BRADLEY: And since we didn't have closing arguments 16 -- 17 THE COURT: Okay. 18 MR. BRADLEY: -- I felt like we needed to raise 19 everything here since -- and I'm not questioning 20 your decision not to have closing arguments, but it 21 didn't give me an opportunity to raise some of the 22 matters -- 23 THE COURT: Okay. 24 MR. BRADLEY: -- after we'd finished. 25 THE COURT: Okay.	Page 8 1 home inspector said, "Well, the contract we signed 2 says that your remedy if I make a mistake is that I 3 return you the money you paid me, so here it is," 4 and they moved for summary judgment. So Judge Lee, 5 circuit judge in Richland County, South Carolina -- 6 THE COURT: Uh-huh. 7 MR. BRADLEY: -- said, "Yes. You signed this contract. 8 That's what it says, and I'm going to enforce it as 9 it's written." 10 They appealed on the unconscionability 11 argument, and the South Carolina Supreme Court 12 affirmed. The test there -- and it's the first 13 tag. It's highlighted. It just sets out what the 14 test it. 15 THE COURT: A summary -- she granted a summary judgment, 16 did she not? 17 MR. BRADLEY: Yes, sir, Judge. 18 THE COURT: Okay. 19 MR. BRADLEY: She found that the contract controlled, 20 and in response to the plaintiff's arguments that 21 the contract violated public policy and that it was 22 unconscionable, she said, "Well, I don't find that 23 it is. I find that it's enforceable as written." 24 And so the issue that really went up to the Supreme 25 Court was: Does this limited liability provision

Page 9 1 violate public policy, or is it unconscionable? 2 And the South Carolina Supreme Court said, 3 "No." And in saying that, they started out there 4 there on Page 2, and I've highlighted the language, 5 giving the general sort of hornbook test for 6 unconscionability, "Terms are so oppressive that no 7 reasonable person would make them, and no fair and 8 honest person would accept them." So that's the 9 general hornbook. It's where you start from, 10 right? 11 So the first thing we need to look at is: 12 Were there reasonable people who actually made 13 these? And I think it's pretty clear from the 14 record and the testimony that was taken, that both 15 the plaintiffs who testified, Ms. Grigoleit and Ms. 16 Franquelin, were not only reasonable people, but 17 incredibly sophisticated people. Ms. Grigoleit is 18 a certified public accountant with a bachelor's 19 degree. She is actually a comptroller of some sort 20 for a privately traded equity fund responsible for 21 complying with the Securities and Exchange 22 Commission's requirements in New York. So I think 23 just that shows -- she's also a high net worth 24 individual and has a high salary. She's certainly 25 reasonable. She's certainly sophisticated.	Page 11 1 there, Page 3 of the opinion -- puts down what the 2 policy is for these kinds of contracts. "Courts 3 should not refuse to enforce a contract on the 4 grounds of unconscionability even when the 5 substance of the terms appear grossly unreasonable 6 unless the circumstances surrounding its formation 7 present such an extreme inequality of bargaining 8 power together" -- together, so you got to have 9 inequality plus the next thing -- "factors such as 10 lack of basic reading ability and the drafter's 11 evident attempt to obscure the term that the party 12 against whom enforcement is sought cannot be said 13 to have consented to the contract." So it clearly 14 wasn't obscure. They knew about it. They asked to 15 change it. They testified to that. They were told 16 no, and they can read, and they're reasonable 17 people. So when we just start with the basic 18 hornbook definition in the "Gladden v. Boykin" 19 case, these terms aren't unconscionable. This 20 transaction is not unconscionable. It's not 21 violating public policy. 22 The second thing I want to talk about is 23 factors that we believe the Court should look at in 24 addition to that basic test. And the first one is: 25 What are the damages we're looking at here?
Page 10 1 Likewise, Ms. Franquelin was a vice president for 2 what I think is the largest cosmetics company in 3 the world, supervised 200 people, negotiated \$20 4 million deals, studied at Harvard and France. 5 She's certainly a very sophisticated person. I 6 don't think there's any question about that in the 7 record. 8 So there's no question, also, that both these 9 ladies testified that they read the whole contract, 10 that they read these provisions that the Court has 11 stricken, that they didn't like these provisions, 12 that they pointed out to Eastwood that they didn't 13 like these provisions, that Eastwood said, "Well, 14 we're sorry you don't like it, but we are not going 15 to change it," and that they signed the contract 16 anyway, knowing they were signing a contract with 17 these provisions, entering it anyway, with their 18 eyes wide open. So reasonable people -- these 19 people are by definition as reasonable as you can 20 get -- entered this contract. The very definition 21 from "Gladden v. Boykin" in this case is reasonable 22 people entered it. 23 Now, to top it off, what they did and what 24 they said, the Court in "Gladden v. Boykin" -- and 25 the quote on the second page -- it's highlighted	Page 12 1 Because neither one of these plaintiffs testified 2 to any monetary damages. They didn't put a number 3 on any damage that they have whatsoever. They did 4 say that it was an inconvenience to them. Ms. 5 Franquelin just moved into one of the other houses. 6 She has several houses, and she just moved into 7 another one that she had. So she didn't testify to 8 monetary damage. She just moved into a house, and 9 then she testified she didn't even know if she 10 wanted to move to Charleston now. So she wasn't 11 planning to move to Charleston, and she didn't even 12 say that she would buy the house if she won this 13 case. 14 Ms. Grigoleit bought another house in 15 Charleston, and there's no testimony to any 16 damages. And why is that important? The Court 17 needs to look at the whole transaction here, and it 18 goes back -- and you even said this. I think we 19 were on the record. You talked about the "Damico" 20 -- or the "Damico v. Lennar." I think I'll say 21 Damico. I'm not quite sure how it's supposed to be 22 said. But in that case, what happened was this: 23 Lennar was selling houses and sold houses to this 24 group of people. It was more than one person. 25 They got sued for saying they had defective houses.

Page 13 1 After the houses had already been bought, the 2 people had paid for them and, I'm assuming, entered 3 notes for them unless they paid cash. It doesn't 4 say in the opinion, but a very large transaction. 5 In fact, as the Court points out and as Courts have 6 pointed out, one of the largest transactions most 7 people ever make. For many people, their house is 8 their greatest source of wealth. And the Court 9 even says, "That's why we protect these 10 transactions." 11 THE COURT: Right. 12 MR. BRADLEY: So what happened was they bought these 13 houses, and they found something defective in them. 14 It doesn't really go into what it is. And Lennar 15 said, "Too bad. You can't sue us. We have an 16 arbitration clause." 17 And the Court said, "Yes, arbitration clauses 18 are generally enforceable, but this one is so 19 rotten that we're not going to enforce it, 20 basically." And the Court said, "Here's why." The 21 basic reason Judge Kittredge said was this: "Your 22 arbitration clause says if they file for 23 arbitration, you get to decide who's in the 24 arbitration. You can bring in the subcontractors, 25 or you can tell them that they cannot bring in the	Page 15 1 what you paid for it," I don't think that would be 2 unconscionable. How would it be unconscionable to 3 say, "We'll buy the house back from you if you 4 don't like it"? The people would not be out 5 anything except their time and inconvenience to get 6 another house. And that's more similar to what's 7 going on here, which is, "We've put you back in the 8 condition you were before we got into this deal." 9 So Damico -- the damage to the people in Damico was 10 much greater. They had no remedy for a defective 11 house they'd already purchased. Here, Eastwood has 12 said to these people, "We'll put you back in the 13 exact position you were before we signed it, the 14 status quo," which actually for a rescission of a 15 contract, is the test. If you rescind a contract, 16 you have to put the other party back in the status 17 quo ante, the -- the position they were before. 18 THE COURT: Right. 19 MR. BRADLEY: And it's even in some cases that we cited 20 in out memorandum. 21 THE COURT: Okay. 22 MR. BRADLEY: So the damages is important, and that's an 23 important distinction from Damico because these 24 people are not damaged in the way that Damico was. 25 And that's an important consideration for the Court
Page 14 1 subcontractors." And then the second thing it says 2 is, "Whatever happens in arbitration can't be res 3 judicata later, so you've created a procedural 4 block to someone getting a remedy to which they're 5 entitled assuming their house is defective because 6 they could bring it against you, lose, have you 7 blame it on, for instance, the framer who's not a 8 party to the arbitration. And then they have to go 9 into court. Now they can't sue you; they have to 10 sue the framer, and the framer can blame it on you. 11 And there's nothing they can do to bring everybody 12 together. And we find that is so procedurally 13 unconscionable that we're going to get rid of it. 14 We're going to kick the whole thing." And that's 15 basically what happened in Damico. 16 Here, and this is important, these homebuyers 17 were put exactly in the position they were before 18 they signed the agreements to buy the house. They 19 were offered to get their deposits back. Every bit 20 of money that they invested, they were offered to 21 get back, right? 22 In Damico, I would guess, and it would have to 23 be a guess, if -- if Lennar said, "Here's the 24 deal." Their contract says, "If you don't like 25 your house, we'll buy it back from you at exactly	Page 16 1 to review. 2 Second, the risk that the parties took here is 3 much different. And what I mean by that is this: 4 These plaintiffs deposited between ten and fifteen 5 thousand dollars on this house. These houses sell 6 for probably between -- I can't remember the exact 7 number. We testified to it -- three hundred to 8 five hundred thousand dollars. In order for this 9 house to be built, Eastwood has to invest what it 10 costs to build the house, which is in the hundreds 11 of thousands of dollars. Whatever investment these 12 people had, which they've been offered all of it 13 back, is miniscule compared to the investment that 14 Eastwood has. It's at least a tenth of what's in 15 there, maybe even a fifth, or 2 percent, of what 16 Eastwood's putting up in this transaction. 17 And so when you look at all the factors of the 18 transaction, the relative risk that each side is 19 going into is important in deciding whether it's 20 unconscionable, unreasonable, or in violation of 21 public policy. The plaintiffs are taking very 22 little risk. They're investing very little money 23 with a promise that, "If something goes wrong, 24 we'll give it back to you." Whereas, Eastwood's 25 investing a large -- ten, twenty, or thirty times

Page 17 1 what the plaintiffs are investing into this 2 property. That's important when you're looking at 3 the transaction because Eastwood's offered to put 4 them back in the same situation they were. And if 5 something goes wrong in this deal, if there's a 6 hurricane, which there can be in Charleston, if 7 there's a fire, if there's a problem with zoning, 8 if there's a problem with recording the covenants 9 as there was in this situation, Eastwood who takes 10 the loss, and they're entitled to get back 11 everything they put into it. So we don't think 12 that's unconscionable to have the risk allocated in 13 that way. That's a reasonable way to allocate risk 14 based on what people have invested into a 15 transaction. 16 Finally, on this topic of the factors -- 17 THE COURT: Yeah. 18 MR. BRADLEY: -- there's no surprise here. These people 19 read this agreement, they knew what it said. They 20 even testified they read it. They testified they 21 went over it with a real estate agent who was a 22 competent real estate agent. They testified that 23 they understand contracts, they know how to read 24 contracts, they went over it with a real estate 25 agent, they asked to change it, Eastwood said, "We	Page 19 1 That's the quick, shortest way to say it. So he 2 sued them. They had a trial, and during the trial, 3 one of the things that Mr. Maybank was seeking was 4 punitive damages and consequential damages. He had 5 signed an agreement that said, "You won't seek 6 punitive or consequential damages against BB&T." 7 So Judge -- what judge it was -- 8 THE COURT: Trial judge was Ned Miller. 9 MR. BRADLEY: Ned -- Ned Miller. 10 THE COURT: Yeah. 11 MR. BRADLEY: Judge Miller. I kept wanting to say 12 Nicholson, but that's a lawyer in Columbia. Ned 13 Miller. Ned Miller said, "No. I'm going to let 14 the jury decide whether to enforce this." And he 15 sent everything to the jury. The jury came back 16 with \$5 million in punitive damages, and the total 17 verdict was \$17 million. 18 On appeal, the South Carolina Supreme Court 19 said, "Well, we're going to allow everything to 20 stand, but we're not going to allow the punitive 21 damages to stand because he signed an agreement 22 that said you're not going to seek punitive 23 damages." So they overturned Judge Miller on that 24 issue, sending it back down saying, "You can't 25 recover punitive damages when you've waived it."
Page 18 1 won't change it." In fact, Ms. Franquelin 2 testified she called a lawyer about it. So they 3 went in there with their eyes open. There's no 4 surprise here. There's nothing that's being hidden 5 from them about the language of this contract. 6 So to start with, under the basic 7 unconscionability definition set out in the 8 "Gladden v. Boykin" case, we don't think this 9 qualifies. Second, under the additional factors, 10 the damages, like in the Damico, the risk, and the 11 surprise, we think all weigh in favor of this being 12 not unconscionable. I hate double negatives, but 13 that's the best way to say it -- 14 THE COURT: Okay. 15 MR. BRADLEY: -- and not in violation of public policy. 16 And then last topic of what I want to say is 17 based on the Maybank case. May I approach, Judge? 18 THE COURT: Sure. BB&T, right? 19 MR. BRADLEY: Yes, sir. 20 THE COURT: Yep. 21 MR. BRADLEY: So this is a fairly recent case dealing 22 with unconscionability and public policy analysis 23 in a consumer transaction, which is why we bring it 24 to your attention. And in the Maybank case, Mr. 25 Maybank felt that BB&T had mismanaged his money.	Page 20 1 And the -- the relative language there is on -- 2 however the numbers came out. I think it's Page 3 11, but I've got it tagged with a yellow sticky. 4 They talk about this actual clause and actually 5 print it in the opinion. And it says, "Limitation 6 of liability. In no event shall the bank be liable 7 for any incidental, indirect, special, 8 consequential, or punitive damages," which is 9 similar, not word for word, but is similar to the 10 language you've ordered to be stricken, especially 11 out of Paragraph 25, Judge. 12 And I've highlighted just some of the 13 pertinent things. Over the bank's objection, Judge 14 Miller sent that to the jury, and the judge -- the 15 Court says, "We think that's wrong. You shouldn't 16 have done that." And then they go through and -- 17 and recite some of the standard contract language. 18 "When you enter a contract freely and voluntarily, 19 we're going to enforce what it has to say." 20 And then it goes on -- we've cited a bunch of 21 these cases. And the second column there on Page 22 11 talks about limitations of liability, and it 23 lists sort of a string cite of a bunch of cases 24 where the Supreme Court has said, "Yeah. We think 25 that's great. You can limit liability." The

Page 21 1 "Gladden v. Boykin" case is the first one. 2 THE COURT: Uh-huh. 3 MR. BRADLEY: And there are four or five other ones 4 where -- for different reasons, okay? 5 So they go on -- I've got it highlighted down 6 there -- "We're going to look at what the contract 7 says." And then he says, "The trial Court's sole 8 basis for finding it violated public policy was 9 they were not in equal bargaining position," which 10 is another argument that has been made in this 11 case, is that, "Well, you're a big homebuilder and 12 we're not, so we're not equal bargaining positions, 13 so that means it violates." 14 And the Court says, "No. That's not right. 15 We -- we don't think that can be enough." 16 So on the next page, they go on and say -- 17 I've highlighted it there, Page 12 -- "Only in rare 18 circumstances has an appellate court invalidated a 19 contract on the basis of unconscionability." And 20 then they go through and list some of the other 21 ones. And the reason I've highlighted language 22 below that, Judge, is it's very similar to the 23 "Gladden v. Boykin" case. It's a -- it's actually 24 a domestic case. But it says, "Courts may consider 25 whether party asserting unconscionability spoke	Page 23 1 they're -- they receive back their entire 2 investment, and it's in accord with the other cases 3 talking about reasonable people entering contracts, 4 that understand what they're doing. In that 5 situation, it's not unconscionable or a violation 6 of public policy. And that's the reason we believe 7 the Court should consider reversing its previous 8 ruling. 9 Thanks for your patience, Judge. 10 THE COURT: Very good. Thank you. All right. Mr. 11 Appel, brief me. 12 OPENING STATEMENT 13 BY MR. APPEL: Sure. Good afternoon, Your Honor. Ross 14 Appel and Michael Cooper here on behalf of the 15 plaintiffs. And, your Honor, I just wanted to 16 first start off by referring to the standard of 17 review on a Rule 59 motion. 18 THE COURT: Okay. 19 MR. APPEL: These issues have all been extensively 20 briefed, argued. Your Honor held a two-day trial. 21 We submitted a proposed order. Your Honor did not 22 just sign the order that we presented. Your Honor 23 took -- 24 THE COURT: I worked on it for a while. 25 MR. APPEL: You did. You took your time reviewing the
Page 22 1 English." Okay. So we've got people here who 2 could probably teach English, so they certainly can 3 speak English. That's what the Court's saying, 4 That can make it unconscionable if you can't speak 5 English -- "and the ability to consult an 6 attorney," which they both admitted they had, "or 7 other circumstances that made it grossly 8 inequitable." 9 So the next column just says, "The cardinal 10 rule is to give the party's intentions to the 11 contract. When it's clear, the language alone 12 determines its force and effect." I think that's 13 the last thing. 14 All right. The last tag is where they rule, 15 and they say -- they overturned Judge Miller and 16 say, "You didn't have enough to kick out this 17 limitation on damage, so we're overturning your 18 rule." We think this case -- that case is similar 19 to what we have here in that you've got 20 sophisticated parties entering into an agreement 21 that clearly says there are limitations on 22 liability. The limitations on liability have an 23 adequate basis in that there's no surprise. It has 24 to do with the allocation of risk in this 25 transaction. The damages are low in the sense that	Page 24 1 case law. You wanted to make sure you got it 2 right. And, respectfully, we submit that you did 3 get it right, so a lot of these issues have already 4 been raised and ruled upon, as you mentioned 5 earlier today. 6 And a Rule 59 motion is not an opportunity to 7 get a second bite at the apple. It's really pretty 8 limited circumstances under which a Rule 59 motion 9 can be granted, and we cite to it in our brief. 10 It's, number one, to accommodate an intervening 11 change in the law. We've heard nothing about that. 12 Number two, to account for new evidence not 13 available at trial. Nothing on that. And three, 14 to correct a clear error of law or to prevent 15 manifest injustice. And, respectfully, we don't 16 believe that has taken place, as well. I -- I did 17 my best to jot down all the issues that Mr. Bradley 18 raised. I'm going to do my best to address them 19 efficiently here. So we've -- we've -- he brought 20 up the Gladden case, which is a home inspector case 21 -- 22 THE COURT: Right. 23 MR. APPEL: -- and the Maybank case, which is an 24 investment services fiduciary duties case. Neither 25 of these cases involve the sale of a home by a

Page 25 1 sophisticated commercial homebuilder to a consumer. 2 THE COURT: Uh-huh. 3 MR. APPEL: That is key because our case, and we would 4 submit that the Damico case, which is more recent 5 than the Gladden case, more recent than the Maybank 6 case, provides a really important milestone in 7 South Carolina law on the special scrutiny that's 8 applied to home purchase agreements under the 9 unconscionability and public policy analysis. 10 We do not dispute, and our argument has 11 never been, that damages limitations in contracts 12 are per se unconscionable. Okay. When you're 13 dealing with the sale of a toaster or a home 14 inspection you pay \$500 for -- and in this case, 15 the Gladden case, the Court refers to the home 16 inspector as someone who was operating out of his 17 home and had no significantly greater bargaining 18 power or more sophistication than a real estate 19 agent. These are different contexts. Mr. Maybank 20 himself was a trust adviser. And the Damico case 21 says in its analysis of procedural 22 unconscionability, "Just because you're an adhesion 23 contract, doesn't make you automatically 24 unconscionable." So -- and -- and that's what 25 these other cases stand for. I mean, just because	Page 27 1 a disguised termination at will provision with a 2 hundred dollar liquidated damages provision for the 3 buyer is unconscionable. And we talked a lot about 4 this at the trial, and I think it's important to 5 point out the contract in Paragraph 26 does not say 6 Eastwood homes can terminate the contract for any 7 -- any time it wants and for any reason it wants. 8 I still think it would be unconscionable if they 9 did that. But it's much more nefarious here. 10 Mr. Bradley talked a lot about how our clients 11 are smart people and they read the contract. And 12 they did read the contract. What they read was 13 that the contract could only be terminated if there 14 was a bona fide dispute between the buyer and the 15 seller, and after attempts at resolving that 16 dispute were unsuccessful, Eastwood would 17 ultimately have the decision to make the final 18 judgment. That is not what happened in this case, 19 and it's not what Eastwood's general counsel 20 testified the meaning of Paragraph 26 is. This is 21 when Mr. Nason told me that a dispute is not a 22 disagreement and that he doesn't care what our 23 clients have to say about -- I'll read the quote. 24 Quote, "Your opinion is irrelevant because it's the 25 seller's sole judgment, so I don't really care what
Page 26 1 you've got unequal bargaining power, the contract's 2 presented on a take-it-or-leave-it basis, it 3 doesn't necessarily mean you're unconscionable. 4 What you have to look at is all of the facts and 5 circumstances surrounding the particular 6 transaction. And when you view all of the facts 7 and circumstances in this case, it supports Your 8 Honor's decision that Eastwood's specific contract 9 in this case is both procedurally and substantively 10 unconscionable and also violative of public policy. 11 Mr. Bradley has not pointed to, because he 12 cannot point to, a South Carolina case upholding a 13 damages limitation provision or a termination at 14 will provision in the context of a home purchase 15 agreement. And that's really what this case is 16 about, to sum it all up, is -- because this is very 17 important. And you mentioned it earlier, Your 18 Honor. We didn't try the whole case in front of 19 you. We tried very specific issues under a 20 declaratory judgment cause of action that was 21 referred over to you by Judge Dennis. 22 The sole issues before this Court are: Is the 23 contract unconscionable and violative of public 24 policy or not? 25 The question presented in this case is whether	Page 28 1 your opinion in. It's only my opinion that 2 matters." Our folks did not -- 3 THE COURT: It's fairly unilateral, is it not? 4 MR. APPEL: It's extremely unilateral, and it's the same 5 type of unilateral builder gets to call all the 6 shots that the Supreme Court in Damico found so 7 repulsive. Yes, the Damico case had to do with an 8 arbitration provision. 9 THE COURT: Right. 10 MR. APPEL: But I think what laid at the core of the 11 finding of unconscionability there was that the 12 party in the power position, with all the 13 bargaining power in this transaction -- in this 14 transaction, our folks are residential homebuyers 15 no matter what they did at L'oreal or what they do 16 for a living. In this relationship, Eastwood had 17 all the bargaining power. They drafted the 18 contract, take-it-or-leave-it basis, etc. 19 Disguise -- no -- no mutuality, that's key 20 here. We couldn't walk away for any reason we 21 want. We signed a contract. They locked us in. 22 Eastwood does not build spec homes where they 23 assume the risk. These are semi-custom homes where 24 our folks were brought into the sales center. 25 We're picking out trim. We're designing various

Page 29 1 features. We're making various, you know, 2 selections. 3 THE COURT: These aren't -- these aren't trailers, and 4 they're not -- they're not spec homes. They're 5 custom-built homes, are they not? They're from -- 6 from a source of, "You pick this -- this look or 7 that look or whatever you want to look." 8 MR. APPEL: Exactly. 9 THE COURT: But you're -- you're involved with the 10 process of building your own home, are you not? 11 MR. APPEL: Absolutely. And that's -- that's 12 significant because after going through -- after 13 signing the contract, going through all of that 14 ordeal where we're making those selections and 15 doing everything, if any of our clients had found a 16 different home that they liked better and we 17 decided, "Hey, we don't want to be part of this 18 contract anymore," we don't get to terminate at 19 will. Our remedies to Eastwood is not a check for 20 a hundred dollars. There's no mutuality there, and 21 that's another important factor here. Eastwood 22 essentially held all the cards up to the minute of 23 closing. When I -- when I deposed Dion Matheney, 24 the president, who was here in person -- Allen 25 Nason wasn't here in person. We submitted his	Page 31 1 closing, once there's that significant financial 2 investment. So that's Eastwood's attempt to try to 3 cleave us off of the Damico case and push us more 4 into Gladden and Maybank and things of that nature. 5 There's no case law support for that. The Damico 6 case and then all the other cases that recognize 7 this special transaction, this special 8 relationship, refer to the home purchasing process, 9 and that's what we're in in this case. 10 Yeah. In each of those cases that we've 11 talked about, the Damico case, it examines the 12 contract on its face, just like we're doing here. 13 And, again, you know, the unconscionability 14 analysis is not based on a single factor. It's a 15 totality of all the circumstances that were before 16 this Court, to address both the procedural and 17 substantive unconscionability tests. 18 But, again, I just want to emphasize -- and 19 what really makes this contract so pernicious is 20 the fact that it's a disguised termination at will 21 provision. The average person when they read 22 through Paragraph 26 will not come away with the 23 impression that Eastwood can terminate the contract 24 for any reason it wants, whenever it wants. Allen 25 Nason testified in his deposition, Dion Matheney
Page 30 1 30(b)(6) transcript for the record. 2 THE COURT: Right. 3 MR. APPEL: I asked Allen if Eastwood could terminate 4 the contract on the day of closing as the 5 homebuyers was walking into the closing attorney's 6 office, and he testified, "Yes." That is having 7 all the power, all the cards, so much so that it 8 renders all of these contracts essentially elusive. 9 They're just options that Eastwood can decide 10 whether or not they want to honor or not. 11 Mr. Bradley talked about damages. Damages 12 were never before this Court. There's a lot of 13 assumptions that we heard from Eastwood today and 14 through the trial that, "Oh, no big deal. You 15 know, we're the ones that assumed all the risk. 16 You haven't been damaged. Here's your deposit 17 back." These issues were not litigated, but people 18 move in reliance on these contracts. They change 19 jobs. They make an -- an enormous amount of 20 different -- they forgo other opportunities. This 21 idea that it's just no harm, no foul is -- is 22 inaccurate. 23 There's an indication that Damico and the 24 special unconscionability and public policy 25 concerns are only implicated once there's a	Page 32 1 testified in the deposition, they could terminate 2 the contract because they didn't like the price or 3 the cost of materials went up. That may have been 4 -- that might've been what happened in this case. 5 We don't know that. We haven't litigated that 6 issue yet. We're in a departure here on these -- 7 on these affirmative defenses. But that is what 8 makes this contract as written. We're not into the 9 reasons for Eastwood's determination and what we 10 have to say about that. That's for a later date. 11 We're just looking at the contract as written. 12 And lastly, just want to put a -- put a bow on 13 it by saying Mr. Nason and Mr. Matheney's testimony 14 is admissible in this case because we're dealing 15 with a latent ambiguity in the contract. And the 16 case law that we cite in our brief is clear that 17 Your honor can take testimony, can take evidence 18 when it comes to a latent ambiguity to determine 19 the meaning of the contract. And Judge Dennis in 20 his order acknowledged the need for a trial. 21 That's why he didn't rule on these various legal 22 issues that were presented. If he thought that the 23 -- 24 THE COURT: Well, I think his thought was if it's not 25 unconscionable, then he's probably going to grant

Page 33 1 summary judgment. That's kind of what I read into 2 his order. 3 MR. APPEL: Certainly. 4 THE COURT: But if it is, then it probably should go to 5 a jury. And that's -- that's about where I'm about 6 to give y'all a ruling right now, okay? So I'm 7 ready to rule. 8 MR. APPEL: All right. Thank you. 9 THE COURT: Let me -- let me tell you: This is -- I 10 believe this is a close call, okay? And that's why 11 I spent as much time working on this order as I 12 did. And one of the factors that influenced the 13 Court's decision is it is in a homebuying context 14 that makes the long history of protecting people. 15 And frankly, Mr. Bradley, your memoranda does an 16 excellent job of discussing that. "Lane v. 17 Trenholm Builders," "Kennedy v. Columbia Lumber 18 Company," all that kind of stuff. 19 So one of the things that -- and let me sort 20 of emphasize -- and I'm actually getting a lot of 21 this this out of your memo, which is not going to 22 make you happy, but in the "Bahringer v. ADT" case, 23 Judge Norton talks about -- and that case was a 24 \$500 alarm system, and the Court found Bahringer 25 was at liberty to contract with other providers	Page 35 1 mutual satisfaction," that can only mean that they 2 have to communicate with one another. That didn't 3 happen in this case. What happened in this case 4 was they sent a notice of termination and said, 5 "Hey, sign this document, then we'll send you your 6 money back and a hundred bucks." But there was 7 just absolutely no communication here, and the 8 seller did, at its sole option, terminate the 9 agreement. 10 My question, and I think these become jury 11 questions -- let me just throw this out to you, and 12 then I'm going to talk to you about another -- 13 another couple of cases. There was discussion we 14 didn't have the right zoning approval. My 15 questions are: Did they try? Did they ask the 16 buyers if they would buy regardless? Could they do 17 something to put it under the restrictive 18 covenants? Did they seek an agreement? Did they 19 seek approval? You know, what was done? I think 20 those become jury issues, and that's where the 21 Court sort of found this process going. 22 The next case, again, cited in your memoranda 23 "Glaesner v. Beck/Arnley," which is a Fourth 24 Circuit 1986 case, the Fourth Circuit overturned 25 the judgment because they said they had a right to
Page 34 1 and, therefore -- and that he was not cognitively 2 impaired. 3 I don't think anybody here believes that these 4 plaintiffs who testified are illiterate or not -- 5 or cognitively impaired. Clearly, they're pretty 6 sharp people. The Court found that the parties 7 were on roughly equal footing and bargaining 8 position. As a result, the Court enforced the 9 limitation of damages. I'm not sure that that's 10 the case in this particular instance. 11 Here's where I sort of put my focus. While 12 they could get their money back plus a hundred 13 dollars, they're trying to buy custom homes that 14 they're getting into. Under the language of 15 Paragraph 26 -- and this is what Mr. Appel was just 16 going into -- "if for any reason a bona fide 17 dispute should arise between the buyer and seller" 18 -- so I'm looking for the bona fide dispute, and I 19 think that's kind of what I was looking at -- "in 20 seller's sole judgment" -- and that question 21 becomes how do you emphasize that. Is it seller's 22 sole judgment to determine if it's a bona fide 23 dispute? Or is it the seller's sole judgment -- 24 what -- what is that? So, "Prior to closing, if 25 such bona fide dispute cannot be resolved to their	Page 36 1 terminate the contract, held that the termination 2 is not wrongful if it's in accord with the terms of 3 the contract and not contrary to equity and good 4 conscience. And this Court found otherwise in this 5 particular case. It's sort of the equity and good 6 conscious argument that would allow these people to 7 close on these loans, at least have a opportunity 8 to argue that they should be able to. 9 And finally, the other case that -- I looked 10 at the -- I was familiar with the Maybank case 11 because I know Mr. Maybank. I read that case when 12 it came out. And the other one, the "Gladden v. 13 Boykin" case, I -- I reviewed prior to coming out 14 here today. But the other case I saw that I found 15 interesting and kind of where I'm coming on this 16 was another one you cited. That was "Benya v. 17 Gamble." That's 282-SC-624. That's an older case, 18 1984. And it says, "The parties to a real estate 19 contract may by express provision stipulate a 20 particular sum to be paid in case the purchaser 21 fails to perform." But in that case, they decided 22 it was a question -- my recollection, it was a 23 question for a jury to determine. And that's kind 24 of where I think y'all are going with this thing. 25 I think -- I don't think this answers the full

Page 37 1 case. I think what this does is go back to remand 2 and decide whether or not you're going to go to a 3 trial to get this thing done. That's my -- that's 4 my thought process. So it's somewhat similar to 5 denial of summary judgment, but that -- that's my 6 thing. 7 It is an interesting case because I don't know 8 of any case right on point. It's somewhat 9 historical, and the Court was clearly influenced, 10 as you can see in the order, by the Damico case, 11 and I've acknowledged that's an arbitration 12 decision. Damico and then what was the other one? 13 The Mungo Homes case -- "Huskins v. Mungo Homes" 14 was another one. The ones that I kept close to me 15 were those two, "Doe v. TCSC" and "Smith v. D.R. 16 Horton." They were all cited in the order. 17 But it's on that basis then that I'm going to 18 deny your -- your motion. I do think it's a close 19 call, but I think I'm going to deny the motion. 20 And I'll just do a Form 4 unless y'all want 21 something more than that. 22 MR. BRADLEY: That's okay, Judge. 23 THE COURT: All right. 24 MR. BRADLEY: I always know when a judge says I have a 25 good memo, it means I'm probably going to lose.	Page 39 STATE OF SOUTH CAROLINA } COUNTY OF LEXINGTON } CERTIFICATE Be it known that Miranda Brown took the foregoing proceeding and hereby attests: that I was then and there a notary public in and for the State of South Carolina-at-large and that by virtue thereof I was duly authorized to administer an oath; that the deponent/witness, if any, was first duly sworn to testify to the truth, the whole truth, and nothing but the truth, concerning the matter in the controversy aforesaid; that the foregoing transcript represents a true, accurate, and complete transcription of the testimony so given at the time and place aforesaid to the best of my skill and ability; that I am neither a relative nor an employee of any of the parties hereto, nor of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action; that, if a recording of an event was supplied by another party for purposes of transcription and I was not present during that event, the foregoing pages were transcribed to the best of my skill and ability; additionally, any identifications of speakers were provided to me by the party supplying the recording; that, in the event of a nonappearance by the witness, the foregoing details for the nonappearance are accurate. In witness thereof, I have hereunto affixed my signature and title. Miranda Brown Date: 3/4/2024 Notary public for South Carolina My commission expires January 20, 2033 *Unless otherwise noted, this notary public administered the oath. Please refer to the transcript for any exceptions.
Page 38 1 But I appreciate your kindness. 2 THE COURT: I hope that's not the case. 3 MR. BRADLEY: I can tell you some stories about that. 4 THE COURT: Uh-huh. 5 MR. BRADLEY: And I'll tell you when we go off the 6 record. 7 THE COURT: Oh, we'll have that -- we'll have that 8 another day. 9 MR. APPEL: Thank you, Your Honor. 10 THE COURT: Buy, gentlemen. Good to see y'all. 11 MR. APPEL: Yes, sir. 12 MR. BRADLEY: Nice to see you. 13 THE COURT: Y'all take care. 14 MR. BRADLEY: Thank you for your time, Judge. 15 THE COURT: Well, thank you for making me think. And 16 thank you, Madam Court Reporter. 17 THE COURT REPORTER: Thank you. 18 THE COURT: Good to see you. 19 THE COURT REPORTER: You, too. 20 (Whereupon the within hearing was 21 concluded at 4:00 p.m.) 22 (*This transcript may contain quoted material. 23 Such material is reproduced as read or quoted 24 by the speaker.) 25	

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1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON FOR THE NINTH JUDICIAL CIRCUIT
3 CASE NUMBER 2021-CP-10-2829
4

5 Ralph Dawkins and)
6 Michelle Dawkins, et al,)
7 Plaintiffs,)
8) May 24th, 2023
9 vs.) Trial
10 Eastwood Homes of Columbia, LLC,) Volume I
11 et al,)
12 Defendants.)
13
14
15

16 Hearing before the Honorable Mikell R.
17 Scarborough, reported by Josie Allen Boehm, Registered
18 Professional Reporter and Notary Public, at 100 Broad
19 Street, Courtroom 2A, Charleston, South Carolina, May
20 24th, 2023 commencing at 9:42 a.m.
21
22
23
24
25

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Summary of Deed Information	

1 THE COURT: All right, folks. I'm Mikell
2 Scarborough, Master in Equity. This case was referred
3 to me by the consent of the parties for a limited
4 determination, and that determination was an issue of
5 whether the contract as presented to the plaintiffs --
6 and there are nine separate plaintiffs -- is
7 unconscionable or in violation of public policy.

8 And once that issue of the enforceability of
9 the contract language is resolved, the remaining
10 issues are either going to be moot pursuant to Judge
11 Markley Dennis's order of March of '22.

12 He would grant summary judgement if the
13 language is valid. And if not, it would then go to be
14 tried on the remaining issues.

15 I think there were five separate causes of
16 action, including basically this declaratory judgement
17 action which y'all sent to me.

18 So the case caption -- the first case,
19 they've been consolidated, is *Dawkins vs. Eastwood*
20 *Homes*, and that's 2021-CP-10-2829.

21 Present today for the plaintiffs, Mr. Ross
22 Appel and Mr. Michael Cooper, and for the defendants
23 is Mr. Ward Bradley.

24 And, Mr. Bradley, have you associated any
25 other counsel with you today, or is it just you?

1 MR. BRADLEY: Yes, sir. Well, I'm the lawyer
2 that's going to be talking mostly, Judge.

3 Sam Velasquez, who is a lawyer, but a recent
4 lawyer, is with me today. And in addition, Dion
5 Matheney, who works for Eastwood is also here.

6 THE COURT: Good morning.

7 All right. So in preparation for this trial
8 that we've had scheduled for a while now -- we've got
9 it scheduled for two days. We're here on day one.

10 Both plaintiff and defendant have submitted
11 their pretrial briefs. I've had a chance to review
12 those pretrial briefs. They're excellent. And thank
13 y'all for doing that. It helps me a lot.

14 And then I went back. And based on that, I
15 reread Judge Dennis's order and then the consent order
16 of reference. So we're here for the purpose that I
17 just stated on the record right out the shoot.

18 And then I've been doing a little legal
19 research in the meanwhile so I can get myself up to
20 speed on the law that y'all are going to be presenting
21 to me today.

22 We're going to run until -- I typically break
23 for lunch somewhere between 12:30 and 1 just depending
24 on how the testimony is going. We're going to go
25 until just before 5 today because my court reporter

1 has some family issues she's got to take care of today
2 at 5 o'clock. So we'll go until 5 today is what we'll
3 do.

4 I'm hopeful, I don't know if we will, but I'm
5 hopeful we can get through a large part of the
6 plaintiffs' case today, if not all of it, and we can
7 come back tomorrow, same time.

8 We should be able to finish, I would think.
9 Depends on what we do.

10 I did note that there were some motions in
11 limine that Mr. Appel had filed. I'll take those up.
12 I would rather do that in lieu of an opening
13 statement. I'm pretty familiar with what we're doing
14 here at this point in time. I would like to sort of
15 get to the testimony as best we can.

16 But Mr. Appel, you've got a motion to include
17 and a motion to exclude in your motions in limine. So
18 let me hear from you there, and I'll certainly hear
19 from Mr. Bradley on what his position is on those.

20 MR. APPEL: Yes, sir, Your Honor. And thank
21 you for the opportunity. Ross Appel here on behalf of
22 the plaintiffs, many of whom are with us today.

23 And the reason we filed this motion in
24 limine, Your Honor, is because it's critical before we
25 start getting into the testimony for us to agree on or

1 at least rule on the scope of the issues that are
2 being tried today.

3 And Your Honor already provided some good
4 general background that's all accurate as to how we
5 got here. But we want to outline our position and how
6 Judge Dennis's order really helped shape what
7 evidentiary matters are relevant and which ones are
8 not.

9 And, of course, that order is Judge Dennis's
10 order dated March 11th, 2022.

11 Just some brief background, after Eastwood
12 Homes unilaterally terminated each of the plaintiffs'
13 contracts around the same time and our attempts at
14 resolution failed, we brought a lawsuit against
15 Eastwood Homes asserting five separate causes of
16 action: One for declaratory judgement, two for
17 specific performance, three for breach of contract,
18 four for violation of the South Carolina Unfair Trade
19 Practices Act, and five and lastly the breach of
20 contract accompanied by a fraudulent act.

21 Very shortly thereafter, Eastwood Homes moved
22 for summary judgement. And the basis of their summary
23 judgement motion was very simple.

24 Paragraph 26 of the form contract that each
25 of our plaintiffs signed allowed Eastwood Homes to

1 terminate the contract for any reason that they want
2 and in the seller's sole discretion, and the only
3 buyer's remedy is a check for \$100 per the contract.

4 We had --

5 THE COURT: They did get returned their
6 earnest money, did they not?

7 MR. APPEL: That's correct. The earnest
8 money was refunded. Yes, sir.

9 We strongly opposed that motion for summary
10 judgement, and we did it on the basis of a variety of
11 factual issues.

12 We dispute that there was an issue with
13 bringing phase four into the association. We pointed
14 to the fact that 14 homes were sold in phase four
15 prior to terminating our contracts.

16 All of the issues associated with phase four,
17 to the extent there are issues -- again, which we
18 disputed -- existed in 2016, approximately five years
19 before the contracts with our clients were entered
20 into.

21 These are all the types of factual arguments
22 that we made to contest Eastwood's ability to invoke
23 paragraph 26, which requires a bona fide dispute
24 between the buyer and seller, et cetera.

25 We took the position that 26 had not even

1 been invoked.

2 In ruling, Judge Dennis's order essentially
3 says none of those factual matters that we came
4 forward with are relevant at all.

5 And we all know how -- it's very hard to get
6 summary judgement in front of Judge Dennis. He is
7 notoriously well-suited to find a scintilla summary.

8 But here, he viewed paragraph 26 the same way
9 Eastwood views paragraph 26, which is essentially,
10 despite what the language says, we will get into that
11 some more, it's a seller's termination at-will
12 provision. They can terminate the contract for any
13 reason they want, no questions asked, here's your \$100
14 in your earnest money.

15 So that's why the factual issues that we
16 tried -- that we did get before Judge Dennis were
17 deemed to be irrelevant whatsoever.

18 And Judge Dennis's order states on page 4:
19 If the contract language is enforceable as written,
20 Eastwood is entitled to summary judgment.

21 So in other words, if it's enforceable in
22 South Carolina, that in an adhesion form contract by a
23 sophisticated home buyer is enforceable, then the case
24 is over.

25 Judge Dennis did view that there were

1 sufficient facts going to the issue of
2 unconscionability and violation of public policy, and
3 that's the limited issue that is in front of you
4 today.

5 So it's our position today that any evidence,
6 any testimony, any documents that go to why Eastwood
7 terminated, were they justified, was there a dispute,
8 was there not a dispute, none of those issues are
9 before the Court today because Judge Dennis has
10 already said they don't matter.

11 They don't matter. The only thing that
12 matters and the only thing before this Court is
13 whether or not paragraph 26 is enforceable.

14 Now, it's important for us to dig into the
15 law of unconscionability here. And since this case
16 was filed, the South Carolina Supreme Court issued
17 what I would refer to as a landmark decision in the
18 *Damico vs. Lennar* case that provides a lot of good
19 content regarding the doctrine of unconscionability
20 and public policy violations in the context of a
21 consumer home purchase agreement just like we have
22 here.

23 So the issue when you're setting the elements
24 of unconscionability is not whether Eastwood Homes
25 acted unconscionably or they had justification or they

1 were reasonable for what they did. The sole focus
2 with unconscionability is two prongs: procedural
3 unconscionability and substantive unconscionability.

4 So procedural unconscionability goes to
5 questions like was it an adhesion contract; could it
6 be negotiated; was it a take it or leave it contract.

7 It looks to the relative sophistication of
8 the parties. That's the only evidence that's relevant
9 for the purposes of procedural unconscionability.

10 As far as substantive unconscionability goes,
11 that's where you get into the nature of the terms of
12 the contract.

13 Are the terms of the contract one-sided? Are
14 the terms of the contract oppressive so that no
15 reasonable person would accept them?

16 And it's very important to confirm the scope
17 of the substantive unconscionability analysis. It's
18 only an analysis of the contract as written and as
19 interpreted by the drafting party. So it doesn't go
20 to the question of why was the action taken under
21 these certain circumstances.

22 Now, there is a case that you might hear from
23 today from Mr. Bradley and it's some language that
24 appears in the *Simpson vs. MSA* case. It derives from
25 the *Holler vs. Holler* case. It's a 2015 -- I'm sorry,

1 2005 decision.

2 And there's a citation from CJS contracts
3 that says: The determination of unconscionability is
4 a fact specific and the totality of the circumstances
5 must be assessed.

6 Eastwood is going to try and say that the
7 facts and circumstances here implicate why Eastwood
8 did what they did.

9 Our position is is that the consideration of
10 the facts in the unconscionability analysis, it's not
11 open-ended. It has to be within the framework of that
12 procedural and substantive unconscionability test that
13 I just talked about.

14 And that Holler decision that I mentioned
15 when that language first appears in the line of
16 unconscionability cases, there's another important
17 quotation, and it says -- and it's from the *Hardy vs.*
18 *Hardy* case, which is a 2001 court of appeals decision.
19 It says: In determining unconscionability, courts are
20 limited to considering facts and circumstances
21 existing when the contract was entered -- I'm sorry --
22 was executed.

23 Right? So you don't get into the conduct of
24 the parties. The conduct of the parties, that's
25 relevant to our claims that are sitting on the other

1 side of the courthouse, breach of contract, violation
2 of unfair trade practices, things of that nature.

3 So the sole focus today, Your Honor, we would
4 submit, is whether the contract is unconscionable and
5 in violation of public policy, and the only facts that
6 are relevant are those that go specifically to those
7 affirmative defenses, not just more broadly.

8 And so let me start getting into a little bit
9 of how that plays out with the evidence that's, you
10 know, going to be before you today.

11 Eastwood's general counsel, Allen Nason, is
12 not here today. We have known for months that he had
13 prior travel arrangements. And the parties all
14 agreed, and I think Your Honor even corresponded with
15 us, that we would proceed by way of deposition
16 testimony from Mr. Nason.

17 And we submitted designations yesterday, same
18 as counsel for Eastwood. There are some areas of
19 overlap where we agree, but there are also some
20 page/line designations from the defendants that we
21 think stray out of that evidentiary boundary that we
22 just talked about. And we have those specific
23 objections listed in our page/line designation. So we
24 designated our page/lines, and then we included our
25 specific objections.

1 In summary, all of our objections are to the
2 fact that that testimony they designated gets to why
3 Eastwood did what they did, who was responsible for
4 this alleged phase four issue, why it was reasonable
5 for what Eastwood did, et cetera, et cetera.

6 Those are all issues we hotly debated and
7 hotly contested before Judge Dennis and those are all
8 factual issues that Judge Dennis said didn't matter at
9 all given paragraph 26, which is a seller's
10 termination at will provision.

11 So that's why this motion in limine is
12 relevant. That's an example of how there are certain
13 types of evidence that are tempting to be brought
14 forward that we don't think is relevant for Your
15 Honor.

16 But that's not to say that we don't think any
17 evidence is relevant in this case because we think
18 there is evidence that is relevant. And Judge
19 Dennis's order acknowledges that.

20 So on page 6 of his order, he says: The
21 matters to be considered by the judge at this hearing
22 and upon which the parties may present evidence are
23 whether the contract is unconscionable or in violation
24 of public policy.

25 We submit that extrinsic evidence is relevant

1 to establishing the true meaning of paragraph 26.
2 Because you will hear testimony today from our client
3 representatives, as well as Eastwood, that there was a
4 different view of what paragraph 26 meant at the time
5 of execution.

6 Our clients are going to --

7 MR. BRADLEY: I was just going to say, I'm
8 not trying to keep any of his evidence out. I'm just
9 speeding things up. And I apologize. I really
10 hesitated to say it, but that's fine.

11 If they want to put the evidence in, that's
12 okay. So you can skip that if you want; or if you
13 want to make arguments, fine. I apologize. I didn't
14 want to sit here and have him make the argument and
15 say, well, I agree to it, and you say, Bradley, why
16 didn't you say that earlier. That's fine. He can --

17 THE COURT: He is sort of moving into opening
18 statements.

19 MR. BRADLEY: Whatever evidence he wants --
20 I'm not trying to keep him from putting in evidence.
21 So you don't have to argue if you want to put it in.

22 THE COURT: Let me ask this question.

23 MR. BRADLEY: I will consent to that.

24 THE COURT: Let me ask this question while
25 you're up, Mr. Bradley. Do you agree that the issue

1 before the Court is the language in the contract at
2 the time that the parties entered into the agreement?

3 MR. BRADLEY: I will agree that's the
4 decision for the Court to make, but I will -- also
5 believe that unconscionability doesn't just rely on
6 that.

7 It's an entire analysis of the situation
8 based on the law as I understand it. So I do agree
9 that those are the issues to be decided on
10 conscionability.

11 I suppose the place that I would disagree is
12 what does that mean when you are deciding
13 unconscionability. Does it mean you just look at the
14 piece of paper and say unconscionable or not
15 unconscionable for substantive unconscionability?

16 In which case, I guess you don't need any
17 evidence. Or does it mean what I believe it means,
18 what I believe the case to say, which I will hand to
19 you at my time, that you have to examine the entire
20 transaction, how people were treated and how the
21 contract is written in relationship to everything that
22 happened.

23 And in addition, I think to make an
24 intelligent reasoned decision, you need to know all
25 the facts that underlie this transaction in order to

1 decide if the transaction and the language is
2 unconscionable.

3 So I tried to compress that into a short
4 answer, Judge.

5 THE COURT: All right. Okay. My thought
6 process coming in today is -- and based on the reading
7 that I have done, okay? And let me just tell you.

8 At the time Judge Dennis issued his order in
9 March of '22, he had recently had the opinion in the
10 *Doe vs. TCSC* case, which was his case, in which
11 ultimately he was affirmed, this had to do with, as
12 most of these cases do, with arbitration. Okay?

13 The cite on that is 430 S.C. 602, *Doe vs.*
14 *TCSC*. That's where the woman didn't buy -- didn't buy
15 a new car and the car salesman decided to put her into
16 some sexually explicit website of some sort and
17 whether or not that was subject -- that became subject
18 to arbitration. Interesting facts, factual case.

19 But in that case, Judge Hill, who had been on
20 the court of appeals, now on the Supreme Court, found
21 that it was unconscionable and did not enforce the
22 arbitration agreement. That was a separate one-page
23 arbitration agreement that I would imagine was in
24 Judge Dennis's ear at the time y'all argued this case.

25 Since then, we have had two cases which I

1 found of significance. One is the Damico case that
2 you referred to. That came out in September of last
3 year. *Damico vs. Lennar*, 437 S.C. 596. And then also
4 last year was *Huskins vs. Mungo Homes, LLC* case, which
5 is withdrawn, substituted and refiled February 15 of
6 2023. So that's very current.

7 And, again, it talked about -- in this
8 instance, it talked about a contract and what it is.
9 Theirs is a contract similar to Lennar, similar to
10 Mungo and similar to the D.R. Horton case. It
11 involves purchases of homes by individual plaintiffs.

12 So those are the cases I've been looking at
13 and I'll certainly be looking at more.
14 Notwithstanding, *Smith vs. DR Horton*, if I didn't
15 mention that one. Okay? So those are all the cases
16 I've been looking into.

17 It would appear to me to be that the issue is
18 whether or not the language of the contract at the
19 time that the parties entered into it is
20 unconscionable, is it a contract of adhesion, is it so
21 one-sided that it shouldn't have been entered into.

22 What happened after the fact, I tend to agree
23 with you, those are -- those are under the other four
24 elements, is it an unfair trade practice, it is a
25 breach of contract, what it is. Okay? I would tend

1 to agree with that. And to the extent we can keep
2 that focus, I think this case will move fairly
3 rapidly. To the extent we don't, we will try this
4 case twice.

5 MR. APPEL: Exactly. Because otherwise, Your
6 Honor, this would have been multiple cases within a
7 case where we would have had to have arguments about
8 what you need to do to bring phases of subdivisions
9 into covenants. We're not prepared to get into any of
10 that.

11 Because Judge Dennis has said it's
12 irrelevant. And we disagree with Ward's view that you
13 have to take this global look. But even if that was
14 the law, all things being equal in this case, as this
15 case is presented to Your Honor, based on how Judge
16 Dennis ruled, the fact issues are irrelevant.

17 Because Judge Dennis has interpreted
18 paragraph 26 as a seller's termination at will
19 provision because the facts don't matter. The facts
20 don't matter.

21 And so that's not to say that no facts are
22 relevant. We have to get into some evidence.
23 Procedural unconscionability talks about evidence of
24 sophistication of the parties, the ability to
25 negotiate. We are going to get into all that.

1 As far as substantive unconscionability goes,
2 we do need to introduce some extrinsic evidence that
3 goes to the interpretation of paragraph 26 so that the
4 Court can make a proper legal determination as to what
5 it means.

6 Now, Judge Dennis has already indicated it is
7 a termination at will provision.

8 When our clients signed these contracts, they
9 did not think they were signing a termination at will
10 provision because the language doesn't say termination
11 at will. It says bona fide dispute. It does say in
12 seller's sole discretion, but it also talks about the
13 need to have a dispute resolution process, where after
14 attempts to work the issue out are unsuccessful,
15 Eastwood then has the sole discretion to part ways.

16 When I took Mr. Nason's deposition, when I
17 took Mr. Matheney's deposition, it became abundantly
18 clear they do not view it that way. And this is all
19 noted in our briefs.

20 Your Honor, Mr. Nason testified that a
21 dispute does not mean a disagreement. He refused to
22 agree with me that a dispute had to be between two
23 parties. He refused to agree with me that a dispute
24 had to even be with these people. It could be a
25 dispute with Weeks and Irvine. It could be a dispute

1 with Cam Management. It could be a dispute with who
2 knows who.

3 When pressed, Mr. Nason testified -- he said
4 to me, your opinion is irrelevant because it's the
5 seller's sole judgement, so I don't really care what
6 your opinion is, it's only my opinion that matters,
7 period, end quote.

8 I asked Mr. Matheney in his deposition, could
9 Eastwood terminate because they wanted a higher price?
10 He testified yes. Could Eastwood terminate because
11 the price of lumber went up in the summer of 2021,
12 which it did? The answer was yes.

13 In terms of timing, I asked Mr. Matheney
14 whether Eastwood could terminate the contract as these
15 people were walking through the door for the closing,
16 and he said yes, it's a seller's termination at will
17 provision.

18 That's the relevant evidence, is the
19 testimony that I just said. It's in the deposition.
20 We're going to get that testimony on the stand. We
21 have those designations in Mr. Nason's deposition.
22 That's relevant because it goes to -- it's
23 extrinsic -- it's extrinsic evidence that goes to
24 resolving an ambiguity in the contract.

25 Because we thought -- we did not think we

1 were signing a termination at will provision. It says
2 bona fide dispute, all this other stuff. They had a
3 different interpretation all along. It's a disguised
4 termination at will provision. That's what makes it
5 so unconscionable, one-sided, et cetera. That's what
6 we're going to get with our -- with our arguments on
7 unconscionability.

8 So that's our position. Exactly. So that's
9 our position on what's in and what's out based on the
10 law of unconscionability and public policy and how
11 Judge Dennis ruled.

12 We have our objections noted in our
13 designation that was sent yesterday. We're happy to
14 go through each one of those right now if the Court --

15 THE COURT: If you want to do it now.

16 MR. APPEL: -- if you want. But that's the
17 general position that we have.

18 Just a couple other brief, you know, comments
19 on some evidentiary matters.

20 We don't have a ton of exhibits here. We do
21 have copies of deeds of record for phase four. These
22 include the 14 homes that closed in phase four despite
23 this alleged issue before terminating our contracts.

24 And we also have deeds showing two subsequent
25 resales of homes that have taken place since this

1 lawsuit has been filed for sales prices about \$400,000
2 more than they were sold for in the summer of 2021.

3 So we think that information, number one,
4 it's public record, filed downstairs, but it goes
5 to -- it's extrinsic evidence that goes to prove that
6 Eastwood views 26 as a termination at will provision.

7 Sometimes they decide to honor their
8 contract, sometimes they don't, for the same phase,
9 for properties next door to these homes that these
10 folks are supposed to buy. And it's consistent with
11 the testimony that we can terminate when we don't like
12 the price, we can terminate when the cost of wood goes
13 up.

14 It's consistent with the testimony that their
15 general counsel, who wrote this contract, doesn't care
16 what our opinion about a dispute means. Because it's
17 really not about a dispute. It's a seller's sole
18 termination -- sole discretion termination provision.

19 So that's why we have got the deeds. And
20 that's really the basis for our motion in limine. We
21 have got some stipulations we talked about between the
22 plaintiffs and the defendants. We're happy to get
23 into that at the appropriate time, but that's not
24 really part of our motion in limine, so I think we
25 have covered --

1 THE COURT: Yeah, I will want to get to that
2 before we start, that stipulation.

3 MR. APPEL: Sure.

4 THE COURT: Mr. Bradley, let me hear from
5 you.

6 MR. BRADLEY: Thank you, Judge.

7 I'm not going to argue about the evidence
8 they want to put in. It's okay with me. I trust your
9 discretion on deciding what's relevant and what's not
10 relevant as you see the law, as it's not a jury trial
11 at all.

12 And really what I think we're arguing about
13 are certain excerpts from Mr. Nason's deposition they
14 want to put in and then certain excerpts that they
15 don't want us to put in. I think that's where this is
16 all centered.

17 And so our position is you should examine the
18 entire transaction for unconscionability. And that's
19 the reason that the remaining sections are important,
20 not necessarily to go beyond what Judge Dennis said,
21 but so that you can make a reasoned and fair decision
22 based on all the evidence of the transaction.

23 And the basis for that really is the law, as
24 I see it, and I refer you first to a case that you
25 just mentioned and Mr. Appel mentioned as well.

1 I have a copy here, Judge, for you and for
2 your law clerk, if that would be helpful.

3 THE COURT: And this is the Damico?

4 MR. BRADLEY: Yes, sir.

5 THE COURT: Damico? I'm not sure how you say
6 it.

7 MR. BRADLEY: I'm not either. I've always
8 said Damico and then everyone said Damico.

9 THE COURT: When it's Italian, it's Damico;
10 when it's American, it's Damico.

11 MR. BRADLEY: I don't know Ms. Patricia
12 Damico, so I wouldn't know how to say it.

13 So as you know, this is an arbitration
14 clause, which is the same sort of unconscionability
15 analysis.

16 But as you see, it's more -- really what I'm
17 talking about here, where the Supreme Court is saying
18 a determination of whether a contract is
19 unconscionable depends upon all the facts and
20 circumstances of the case.

21 And so I don't know want to spend several
22 days going through everything, but I do think it's
23 important for the Court to know why the contracts were
24 terminated and what happened.

25 For instance, Mr. Appel has mentioned several

1 times that there were several other houses that were
2 sold in the neighborhood and the idea that this
3 bolsters his case.

4 Obviously, that's outside of what he's trying
5 to limit. But he thinks that's useful to him so he
6 wants to put it in.

7 If he's going to do things of that nature, we
8 think the entire transaction should come in.

9 And in response to that, there were houses in
10 this phase that were sold before Eastwood learned that
11 the covenants weren't recorded and could it
12 appropriately sell the houses under the zoning
13 ordinances and the covenants that had already recorded
14 for the other phases of the neighborhood.

15 So it's not as if Eastwood singled these
16 people out and said we don't like you, we're going to
17 take these houses and sell them to somebody else. It
18 was when Eastwood realized that there was a problem.

19 Those other houses, they're a potential
20 problem too, but they're a problem Eastwood didn't
21 know about when it made the decision. So in a way,
22 Mr. Appel has made my argument for me because he's
23 introduced significant evidence through his opening
24 statement that's not what's on the piece of paper.

25 So if they're going to approach the case in

1 such a way to say this additional information, such as
2 you sold these other houses before you learned about
3 the problem, and then another house in this
4 neighborhood was sold after you learned about the
5 problem, not by us but by someone we sold the house
6 to, I think the entire scenario needs to at least be
7 fleshed out so the Court can review it.

8 And then the other authority I have relied
9 on, Judge, if I may approach, it's a section of the
10 code. I may have handed you mine that I marked up.

11 So I do understand that the Uniform
12 Commercial Code South Carolina version is not
13 necessarily binding on a home sale, but it is a point
14 of law in South Carolina on how unconscionability is
15 to be addressed. And it has been referenced by the
16 appellate courts in reviewing unconscionability in
17 general.

18 And the part I have highlighted there goes to
19 what we're saying, which is a reasonable opportunity
20 to present evidence as to its commercial setting,
21 okay, purpose and effect to aid the Court in making
22 the determination.

23 And that's just common sense, Judge. If
24 you're going to decide that Eastwood has done
25 something that's so unfair that no reasonable person

1 would ever ask for it to be done and no reasonable
2 person would ever accept it and it's so unfair that
3 you're going to throw out what the parties agreed to,
4 it's important for you as the judge to know what are
5 the circumstances surrounding this transaction.

6 And at least Mr. Appel implicitly recognizes
7 that because in his opening he's referenced all sort
8 of facts that he thinks are useful to him.

9 And I'm not knocking him for doing it.
10 That's his job. But it makes my point that we ought
11 to be able to, not in a longwinded way, really we are
12 just -- it's the question of do you read the
13 deposition testimony to see what the entire
14 transaction was. So that's the legal presentation.

15 And finally, it's this, Judge: My experience
16 in nonjury settings, the Court is certainly qualified
17 to decide what is relevant to the inquiry and what is
18 not relevant to the inquiry. And I always feel a
19 little bit like we're saying how many angels can dance
20 on the head of a pin.

21 Because in order to decide if it's not
22 relevant, you have to read it in the first place.
23 It's not like we're going to not give it to a jury.

24 So my position is on all of these let's let
25 the evidence in that we have. We're not going to be

1 longwinded. It's just a question of whether you read
2 some additional deposition excerpts.

3 If you decide it's not relevant to find of an
4 analysis, fine. But you have to see it to determine
5 if it's relevant to start with. So I feel like we're
6 kind of arguing about something -- and once again,
7 it's in your discretion how you want to move things
8 along. But you have to look at it anyway.

9 So why don't we present it all and then you
10 can decide, hey, Bradley, you're out, I don't like
11 this. And at some point, it's not like we're going to
12 spend days and days doing it. It's just a question of
13 additional deposition excerpts, Judge.

14 THE COURT: Thank you, Mr. Bradley.

15 Let me tell y'all how I generally handle
16 these things. Because I am nonjury. And in order to
17 make a finding of relevance, it is just really sort of
18 an argument, because here the Court has got to review
19 it.

20 But in any event, then pretty much every case
21 I get, I'm going to allow the evidence into the
22 record. If it's not admissible evidence in the
23 record, it's going to be proffered into the record.
24 And the whole purpose behind that is so that an
25 appellate court can review the entire record and they

1 can vote up or down and not send it back for a remand
2 and be back to relitigate the case another three to
3 five years down the road, the same issues.

4 If there is anything I hate -- I don't -- I
5 don't mind being affirmed. I don't mind being
6 reversed, but I'd hate to get remanded and have to try
7 the same thing over again with different rules. So
8 that's just sort of my philosophy on being a nonjury
9 judge.

10 And so based upon that, what I would do,
11 rather than ruling on the motion in limine at this
12 time, what I want you to do is when we get to that
13 part of the evidence in the trial, then the objection
14 should be made as to relevance as to whether or not
15 it's admissible or not and I'll give you a ruling at
16 that time if need be or I'll say whether we are going
17 to proffer it and put it in the record for appellate
18 review, for the appellate court to review whether or
19 not the gatekeeper of the evidence was correct in
20 keeping it out. Okay? So that's just how I do that.

21 The other thing I typically do is I tell
22 lawyers that I do know how to read and so I can
23 actually read the thing. I don't have to have
24 somebody come testify from the witness stand unless
25 y'all are dying to have that done. I would hope not.

1 Okay? I do a lot of reading at night at home.

2 MR. COOPER: Thank you, Judge, because I was
3 going to have to pretend to be a witness.

4 THE COURT: No, no, no. We don't want you to
5 do that. No lawyer I know wants to sit in that chair.
6 I don't care who they are.

7 All right. So with that, did y'all have -- I
8 wanted to make that point as well.

9 Did you have some stipulations to place in
10 the record before we start?

11 MR. APPEL: Yes, Your Honor. Despite some of
12 the disagreements we may have just had, I think there
13 are some agreements here.

14 First off, we have nine separate plaintiffs.
15 We have two plaintiffs' representatives here to
16 testify today.

17 THE COURT: Okay.

18 MR. APPEL: We have Ms. Kaitlyn -- what's
19 your name now?

20 THE WITNESS: O'Grady now.

21 MR. APPEL: O'Grady now. That's how long
22 this case has been going on.

23 And then we've got Patricia Franquelin over
24 here.

25 THE COURT: Okay.

1 MR. APPEL: We have agreed -- Ward has only
2 taken these two women's depositions. They're here to
3 testify, for the purposes of this limited trial, on
4 behalf of everybody. It's the same contract. It's
5 the same negotiation process, all that kind of stuff.

6 THE COURT: Okay.

7 MR. APPEL: So we want to make sure the
8 record is clear that their testimony is here today on
9 behalf of nine separate plaintiffs.

10 Similarly, in the binder that we have for
11 Your Honor, we have got our plaintiffs' exhibits
12 premarked. May I approach?

13 THE COURT: Yes.

14 MR. APPEL: Thank you. I appreciate it.

15 We have got several exhibits here.

16 So exhibit -- so if you look at Plaintiffs'
17 Exhibits 2 and 3, these are copies of the Eastwood
18 Homes new home purchase agreement associated with
19 Ms. Franquelin and associated with Ms. O'Grady.

20 THE COURT: Okay.

21 MR. APPEL: These contracts are being offered
22 for the purposes of everybody as it relates to the
23 interpretation of paragraph 26 and 25 and the
24 unconscionability analysis.

25 And similarly, exhibits 4 and 5, these are

1 the termination documents that Eastwood sent. They
2 are identical documents that were sent to all nine.
3 So the agreement between the parties is that these
4 contracts and these terminations that are in the
5 record pertain to all cases, all plaintiffs in these
6 consolidated cases, so we don't have to go through
7 nine separate versions of everything.

8 Those are what I would call the stipulations
9 to get to sort of moving this case along a little bit.

10 THE COURT: All right.

11 MR. APPEL: The other matter I would speak
12 to -- and you know, Ward -- we spoke briefly before we
13 got started here today. I understand that there's no
14 objection to the admissibility of plaintiffs'
15 exhibits, the plat, the agreement, the termination,
16 the deeds, things of that nature?

17 MR. BRADLEY: Is it my turn? Yes, sir. I'm
18 happy to answer the question. We're fine with them
19 putting all these exhibits into evidence.

20 We agreed, for the purpose -- actually, the
21 convenience, I suppose, of Mr. Appel's clients. I
22 guess I would have gotten paid to depose all the other
23 seven of them. But for the purposes that the issues
24 are similar, the contracts are similar, they picked
25 two plaintiffs to be their testifying witnesses, which

1 I deposed.

2 And I am assuming they're going to call them
3 today and they're not going to call anyone else. And
4 those two people's testimony, as well as those two
5 people's contracts, would be agreed between the two of
6 us to control the entire case as to all -- I think
7 there are nine sets of plaintiffs. There might be
8 like 18 plaintiffs. There is -- are couples.

9 THE COURT: Couples?

10 MR. BRADLEY: There are couples, yeah.

11 THE COURT: Okay. I'm with you. All right.
12 Very good.

13 MR. APPEL: Well stated.

14 THE COURT: That will help us a lot.

15 MR. APPEL: Great. Thank you, Your Honor.
16 And I think that does it.

17 THE COURT: And then just so y'all know,
18 another streamline move I usually do, documents that
19 are offered are in evidence unless I hear an
20 objection. Okay? So the opposite of what you get in
21 front of a jury. All right? Sometimes I remember to
22 tell y'all that, sometimes I don't. Okay? But it
23 just keeps the process moving along.

24 MR. BRADLEY: Yes, sir. Thank you, Judge.

25 THE COURT: Anything further then from the

1 plaintiffs or defendant?

2 MR. APPEL: That's all we have, Your Honor.
3 Thank you.

4 THE COURT: All right.

5 MR. BRADLEY: Yes, sir, Judge. We're ready
6 to get started.

7 THE COURT: Do y'all want to start? Are
8 y'all ready start?

9 Okay. Let's go ahead and get started. All
10 right. I'm ready for your first witness.

11 MR. COOPER: Your Honor, may it please the
12 Court, Michael Cooper on behalf of the consolidated
13 plaintiffs. Our first witness, Your Honor, is
14 Patricia Franquelin.

15 THE COURT: Ms. Franquelin, come on up. Come
16 on through there. Come around here and watch your
17 step on that ramp. It's designed to trip up lawyers.
18 Lawyers, that's your cue. It happens about one in
19 five trials.

20 PATRICIA FRANQUELIN, having been duly sworn
21 to tell the truth, the whole truth, and nothing but
22 the truth, was examined and testified as follows:

23 THE COURT: Thank you very much.

24 And if you would, give us your full name for
25 the record and your address.

1 THE WITNESS: Sure. It's Patricia
2 A. Franquelin. And it's 24936 Sawyer Mills Court,
3 Aldie, Virginia 20105.

4 THE COURT: Two things. Spell your last
5 name.

6 THE WITNESS: Sure. It's
7 F-R-A-N-Q-U-E-L-I-N.

8 THE COURT: And in Virginia, what's the name
9 of the town again?

10 THE WITNESS: Aldie, A-L-D-I-E.

11 THE COURT: Aldie, Virginia. Okay. Very
12 good. Thank you, ma'am.

13 Mr. Cooper, your witness.

14 MR. COOPER: Thank you, Your Honor. At this
15 time, plaintiff seeks to admit Plaintiffs' Exhibits 1,
16 2, 3, 4, 5, 6, 7, and 8, as I understand are without
17 objection.

18 THE COURT: All right. Without objection?

19 MR. BRADLEY: Yes, sir, Judge.

20 THE COURT: Very good. In evidence.

21 (EXHIBIT NUMBERS 1 through 8 WERE RECEIVED.)

22 MR. COOPER: And Your Honor, procedurally for
23 the court reporter, is a binder okay or would the
24 court reporter rather lose copies?

25 THE COURT: Well, let me tell you how we're

1 going to handle this. All right? This is another
2 little trick you will need to know in this courtroom.

3 We don't have -- this Court doesn't have the
4 ability to upload exhibits. So I suggest you keep
5 your -- I've got the binder. We know what they are.
6 If you've got a list -- I think you had a list of
7 exhibits for the court reporter already, so she knows
8 what we're referencing. At the end of the trial, I
9 give all the exhibits back to the respective lawyers
10 and they get to have their staff upload them into the
11 record.

12 MR. COOPER: So the court reporter has no
13 preference?

14 THE COURT: Well, you can ask her, but I can
15 tell you right now that's how we handle it.

16 MR. COOPER: Thank you, Judge.

17 THE COURT: The preference is, yes, she loves
18 to give them back to y'all so she's not responsible.
19 I can assure you that.

20 MR. COOPER: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. COOPER:

23 Q. Okay. Pat, you have introduced yourself to
24 the Court. Is that right?

25 A. Yes.

1 Q. Okay. If you will for me, give verbal
2 responses to my questions so that way the court
3 reporter can hear and take down everything that we're
4 saying. Okay?

5 A. Yes.

6 Q. And your current address is in -- is where?

7 A. It's 24936 Sawyer Mills Court, Aldie,
8 Virginia.

9 Q. In Virginia?

10 A. Uh-huh.

11 Q. And how long have you lived at that address?

12 A. Just a year.

13 Q. All right. And where did you live prior to
14 Virginia?

15 A. I lived in New Turkey Island Road in Monmouth
16 Junction, New Jersey.

17 Q. Okay. And were you living in New Jersey at
18 the time you entered into the new home purchase
19 agreement with Eastwood Construction?

20 A. Yes, I was.

21 Q. Okay. And what do you do for a living?

22 A. I'm retired currently.

23 Q. And what are you retired from doing?

24 A. I was an e-commerce -- I managed e-commerce
25 for the luxury division for L'Oreal Lancome.

1 Q. Okay. And how long did you work for L'Oreal?

2 A. I worked 37 years.

3 Q. All right. And so I assume you didn't start
4 as managing the luxury e-commerce division?

5 A. I didn't. I started at an entry level
6 position and traversed through the organization,
7 having many responsibilities. And finally, my last
8 job was managing the e-commerce division.

9 Q. Okay. Have you ever worked as a real estate
10 developer?

11 A. Never.

12 Q. Okay. Are you currently married?

13 A. I'm currently married.

14 Q. And what is your husband's name?

15 A. My husband's name is Marcel Franquelin.

16 Q. And does Marcel work?

17 A. Marcel is semiretired. He is an artist.

18 Q. Okay. And how does he earn a living?

19 A. Currently, he teaches art and he sells to,
20 you know, galleries and people.

21 Q. Do you know how many paintings he sells
22 annually?

23 A. It depends on the year. Some years nothing,
24 some years one or two or five or ten. It depends on
25 the year.

1 Q. Okay. Would it be fair to say that most of
2 his income is derived from teaching?

3 A. Yes. I would say that is his mainstay of
4 income.

5 Q. Okay. And he teaches art?

6 A. He teaches -- yes.

7 Q. And is that art technique or art history?

8 A. He teaches art technique. So teaches all the
9 different -- he is -- he's been trained by the masters
10 and he teaches individuals how to paint or draw,
11 whatever.

12 Q. Okay. Has Marcel ever been a real estate
13 developer?

14 A. No.

15 Q. Do y'all have children?

16 A. We have two boys.

17 Q. And where do they live?

18 A. One lives in Lille, France, and one lives in
19 Aldie, Virginia.

20 Q. Okay. And I assume you're not from
21 Charleston originally?

22 A. I'm not, no.

23 Q. Do you have family in Charleston?

24 A. I do. I have a sister and my niece.

25 Q. All right. And when you were living in New

1 Jersey and contracted with Eastwood to buy a house,
2 was it your plan to move to Charleston?

3 A. So giving context, my husband had stage four
4 cancer and we decided to change our life. We wanted
5 to go to something that was more -- less stressful.

6 I retired early so we could spend time. My
7 sister lived in South Carolina. It was a great way of
8 life. We loved the area. We frequented here. We
9 thought we could live a lifestyle without stress and
10 decided we were moving to Charleston.

11 Q. Okay. Had you been to Charleston before
12 deciding to move here?

13 A. Yes.

14 Q. And that was for vacation?

15 A. Well, we would visit my sister, vacations, et
16 cetera.

17 Q. Okay. And what time period was this that you
18 were looking to move to Charleston?

19 A. The timeframe I was looking for residence was
20 September of 2020.

21 And just to kind of -- again, I want to put
22 context into this. We were six months into a
23 pandemic. It was a crazy time. And people were
24 paranoid. They were very squeamish. Houses for sale.
25 Although there might have been some, it was the lowest

1 inventory point. And the ones that were for sale were
2 not of the best quality.

3 There was some builders that were building, but
4 it wasn't of significant quantity. And you know, I
5 had this mission to get out of dodge and get a better
6 life for my husband, you know. We were looking to
7 reduce stress.

8 And when we came down to look in the
9 Charleston area, I had a realtor and we were looking
10 in areas and we were looking to be close to my sister
11 who lives in Johns Island. And so through driving
12 around, we found and ran into the Swygerts Landing
13 office and we located the new building there.

14 Q. Okay. So I was about to ask you, how did you
15 find out about the Swygerts Landing development?

16 A. It was really driving through Johns Island,
17 looking for new builders, because the houses available
18 were not of our liking.

19 Q. And Pat, you have a binder of the exhibits
20 that have been admitted into evidence.

21 A. Uh-huh.

22 Q. Looking at what has been admitted as
23 Plaintiffs' Exhibit Number 1 --

24 A. Is it this?

25 Q. Yes, ma'am. And that document is a plat of

1 the Swygerts Landing development that you were looking
2 at?

3 A. Yes.

4 Q. Okay. And so you said that you had a realtor
5 who was helping you find properties?

6 A. Yes. Jan Snook.

7 Q. And did she tell you about Swygerts Landing?

8 A. I really found it. And then I informed her
9 and asked her about the builder and if he was one of
10 quality. And she then came -- we visited the location
11 and we came back and set up an appointment with her.

12 Q. Okay. And so you said you saw Swygerts
13 Landing driving around. Is that right?

14 A. Yes. We saw the signs for new builds and the
15 model.

16 Q. Okay. And is that -- was that location close
17 to your family or like what -- why --

18 A. It was perfect. It was centrally located
19 exactly where we wanted to be. It was four miles from
20 my sister's house. It had everything that we were
21 looking for.

22 Most importantly was the location. And the
23 second thing was like the size of the lot because we
24 were looking to build a pool. And then the design of
25 the home. So I mean, it really checked all of the

1 boxes that we were looking for. And thought we had a
2 home run.

3 Q. Okay. And you were looking to buy something
4 that was new construction. Is that right?

5 A. Well, yes, we were. Because everything that
6 we saw was -- again, you know, going back to September
7 2020, there wasn't a plethora of houses on the market.
8 The ones that were on the market were not of great
9 quality. It was -- you know, people were concerned --
10 they were scared of what was happening in our lives.

11 Q. And you said you were represented by Jan
12 Snook as your realtor?

13 A. Yes.

14 Q. And what was Jan's role in dealing with
15 Eastwood Construction or Eastwood Homes?

16 A. So I mean, she even knew Melissa and they had
17 a previous relationship. And so she really assisted
18 me and guided me, you know, is this a good contractor,
19 do they build a quality home, are they a fair partner,
20 you know, giving me all this kind of background like
21 this is a good builder, he builds a very high quality
22 home at a very fair price and, you know, lots of
23 people have been very happy with him.

24 Q. Okay. And was part of Jan's role to
25 communicate on your behalf with Eastwood's

1 representatives?

2 A. Yes.

3 Q. All right. And did Eastwood Homes have a
4 sales representative?

5 A. It was Melissa Guggisberg. And I'm sorry if
6 I pronounced it wrong.

7 Q. Okay. And so Melissa Guggisberg was
8 Eastwood's --

9 A. She was the new home sales representative.

10 Q. Okay. So she was essentially like their real
11 estate agent?

12 A. Yes.

13 Q. And did you ever meet Ms. Guggisberg?

14 A. Many times. We would meet very frequently,
15 and -- yes.

16 Q. And your meetings with Ms. Guggisberg, where
17 did they take place?

18 A. They were all at the model home. And you
19 know, she was completely -- she was pleasant,
20 professional. She was a very clear communicator.

21 Q. At the time that you are having these
22 meetings with Ms. Guggisberg at the model home in
23 Charleston, were you still living in New Jersey?

24 A. Still living in New Jersey.

25 Q. Okay. And so would you travel from New

1 Jersey to Charleston for these meetings?

2 A. Yes, I did.

3 Q. And what were those meetings about?

4 A. Well, to kind of give you a chronology, so
5 we -- I don't know if you want -- I mean, after we
6 did -- have some assurances on --

7 Q. We'll get into that.

8 A. Okay. So, basically, we signed the contract.
9 We then had to go -- at the end of September, fly back
10 down to do options and such with their team. And
11 then --

12 Q. When you say "options," these are like design
13 choices?

14 A. Design choices to be very specific to our
15 build. And then with -- the month of October and
16 November, we would go back and forth and finalize
17 drawings and drafts and make sure everything was
18 incorporated and we agreed on pricing. And then I
19 would say by the -- it was October/November. By the
20 end of November, we were locked into what our house
21 would be and the cost.

22 Q. Okay. So let's -- I want to talk a little
23 bit about that process of entering the contract --

24 A. Okay.

25 Q. -- with Eastwood.

1 When you met with Eastwood's representatives,
2 were all of those meetings at Eastwood's property or
3 at their office?

4 A. It was -- they were all at their office.

5 Q. Okay. And those meetings were all with
6 Melissa Guggisberg?

7 A. Yes.

8 Q. Okay. And when you were -- when -- when you
9 were at Eastwood's sales office, were there ever other
10 potential home buyers there waiting to do meetings or
11 things like that?

12 A. Every time we were there. And I was there
13 four days, different days. There were people lined up
14 behind me and her phone was ringing. And there was a
15 great sense of velocity going on in that -- in that
16 model home and sales.

17 There was no question that they were busy.
18 And she even stated there was two other home buyers
19 specifically looking at the lot that we were looking
20 at and that one was ready to sign, so creating a great
21 sense of urgency. Because the home that we wanted and
22 the lot that we wanted, we did not want it to be gone.

23 Q. Okay. Based on the conditions that you were
24 dealing with at the time with Eastwood, did you feel
25 pressure to enter into that contract with Eastwood?

1 A. Absolutely. And from September 4th to
2 September 8th, like I said, there was lots of people
3 behind me, there were phone calls happening. And even
4 from that date of the 4th to 8th, the price of the
5 house went up \$17,500. So just in the four days that
6 I was there, I had a price increase.

7 Q. And it was relayed to you by Eastwood's
8 representatives that if you did not sign the contract
9 that they would move on to the next person?

10 A. That's right. If -- you know, you need to
11 take the contract as it's written -- you know, again,
12 Melissa very good and she was very clear. She said
13 there is -- you either take the contract as it is --
14 and I, being from New Jersey, I was like, what, I
15 can't have a lawyer review this, I can't have them
16 make any modifications?

17 She says, no, it is a boilerplate, you take it as
18 it is, there's no modification, there's nothing, you
19 take it as it is. And I'm like, well, I'm used to,
20 when I purchase a house, that I have some type of
21 representation in a contract.

22 She said, no, you take it as it is. And I'm
23 like, well, I don't really like these paragraphs,
24 17 --

25 Q. And we'll get into the specifics of that.

1 A. Okay.

2 Q. But --

3 A. And she said that it was a boilerplate, you
4 take it as it is.

5 Q. Okay. Specifically, with respect to the
6 price of the home, were you able to negotiate the
7 price of the home at all?

8 A. No.

9 Q. Who set the price of the home?

10 A. Eastwood.

11 Q. And as I understand it, between your one
12 meeting with Eastwood Homes and a subsequent meeting,
13 the house -- price of the house increased?

14 A. \$17,500 within four days.

15 Q. Within four days?

16 A. Uh-huh.

17 Q. And that price was set by Eastwood?

18 A. Yes.

19 Q. And did you ask whether or not you could
20 negotiate on the price of the house?

21 A. Yes. And she said that the prices were going
22 up and it was reflected in the pricing.

23 Q. So you were told -- fair to say that you were
24 told that you -- that they were not going to negotiate
25 on the price?

1 A. Absolutely not. The price is what the price
2 is.

3 Q. And just to be clear, when you were dealing
4 with Eastwood Homes, you were entering into a new home
5 purchase agreement as an individual residential home
6 buyer. Is that right?

7 A. Yes.

8 Q. You weren't acting on behalf of another
9 builder or any other commercial enterprise?

10 A. No. No.

11 Q. Okay. And at the time that you were dealing
12 with Eastwood Homes, were you trying to buy a house
13 that you and your husband were going to live in as
14 your primary residence?

15 A. Absolutely, yes.

16 Q. Prior to the Swygerts Landing house, had you
17 ever purchased a home before?

18 A. Yes, we had.

19 Q. And how many times had you purchased a home
20 prior to entering into the Eastwood Homes contract?

21 A. Five. All of which, I -- again, they were
22 new builds. They always let me negotiate and make
23 modifications to the contract. There was an exchange
24 of things that were uncomfortable and that they would
25 receive as, okay, I understand, we need to have better

1 representation. And it was always a negotiation.

2 Where Eastwood was like take it or leave it.

3 Q. Okay. And so with the -- you indicated that
4 in addition to the price of the home there were
5 certain parts of the contract that you attempted to
6 negotiate. Is that right?

7 A. When I read the contract, when Melissa gave
8 it to me, I went to her. We were sitting across the
9 table and I said, Melissa, I said, these two
10 paragraphs 25 and 26, are one-sided and I feel very
11 uncomfortable signing this and I feel like I have no
12 representation.

13 And she's like, "Pat, it's a boilerplate. They
14 will not make any modifications. If you won't sign
15 it, there's someone right behind you that will. And I
16 have to tell you, in all the years I worked with
17 Eastwood, I have never seen them invoke any of these,"
18 you know.

19 And I -- that gave me a little bit of an
20 assurance. But I went to my realtor and I told my
21 realtor that I wasn't thrilled about signing these
22 contracts, I felt, again, those three paragraphs were
23 cited specifically.

24 She said, you know, "Pat, I do know working in
25 the Charleston area that they -- these builders have

1 boilerplates that they use and they won't make any
2 modifications." I said, "Well, don't you think I
3 should get a lawyer?" She goes, "Well, you can get a
4 lawyer, but it won't make any difference because
5 they're not going to change it." I said, "Well, I
6 just don't feel comfortable signing this."

7 And so she gave me -- she goes, "Well, I have
8 someone that's a lawyer that you could speak to,"
9 and --

10 Q. And so who was the lawyer that you were
11 referred to by the realtor?

12 A. Mark Weeks. He is the closing attorney for
13 Eastwood Homes.

14 Q. And at the -- did you reach out to Mark
15 Weeks?

16 A. I did.

17 Q. And at the time that you reached out to
18 Mr. Weeks, did you know that he was the closing
19 attorney for Eastwood Homes?

20 A. I didn't.

21 Q. Okay. And did you ever speak to Mr. Weeks?

22 A. I did.

23 Q. Okay. And when you spoke to Mr. Weeks, what
24 did he tell you?

25 A. Well, we started our conversation. He was

1 very polite and accommodating. I was talking about
2 the contract I was reviewing and I had a great deal of
3 uneasiness. And he said, "Well, what home are you
4 buying?" And I said, "Eastwood Homes." He goes,
5 "Oh," he goes, "I represent Eastwood Homes," and I --

6 Q. He told you that he represented them?

7 A. Yes.

8 Q. Is that right?

9 A. Yes.

10 Q. Okay. And then what else did he tell you?

11 A. And I said, "Well, I'm just very concerned,
12 you know, this is a very unprecedented time and I'm
13 worry about supply issues and, you know, will they be
14 able to build my house, and they might miss things."
15 And I said, "I really feel very uncomfortable about
16 these three paragraphs. They feel very one-sided."
17 And he goes, "I'm telling you, I have been with them
18 for more than 20-plus years. I mean, they've been in
19 business 40-plus years. They are a -- such a customer
20 centric home builder. They really do right by the
21 customer. It's a boilerplate. They won't change it.
22 But they -- you know, they are a customer-centric
23 builder."

24 So with that assurance, I mean, like I'm
25 talking to him and I am thinking, well, I'm just a

1 very paranoid northerner, and that, you know, this is
2 how they manage things in the south. And with that
3 assurance, I talked to him on the 14th. I signed the
4 contract on the 15th.

5 Q. And prior to talking to Mr. Weeks, my
6 understanding is you had talked to Ms. Guggisberg as
7 well?

8 A. Well, again, she gave me assurances too that,
9 you know, "Pat, in the years I have worked with
10 Eastwood, I have never seen them invoke any of these
11 provisions that you're worried about," and -- "but
12 they will not change the contract." She was emphatic.

13 Q. Okay. It was -- it was clear to you that
14 Eastwood Homes would not negotiate or change any terms
15 of the contract whatsoever?

16 A. Crystal clear.

17 Q. Okay. And the contract was presented to you
18 as a take it or leave it option?

19 A. Yes.

20 Q. And did you ultimately sign the new home
21 purchase agreement with Eastwood Homes?

22 A. Based on the assurances from Mark Weeks and
23 Jill feeling that this would never happen, yes, I did.

24 Q. Okay. And if you look at the binder that's
25 in front of you, what's been introduced as Plaintiffs'

1 Exhibit 2, is that the new home purchase agreement
2 that you entered?

3 A. Yes.

4 Q. Okay. And you read the contract before you
5 signed it, right?

6 A. Absolutely, yes.

7 Q. Okay. And based off your reading of the
8 contract, you raised concerns with paragraph 17,
9 paragraph 25, and paragraph 26 with Eastwood's
10 representatives?

11 A. Yes.

12 Q. All right. And it was communicated to you by
13 Eastwood's representatives that they would not make
14 any changes to any of these paragraphs whatsoever?

15 A. That's correct.

16 Q. With paragraph 17 --

17 A. That's really because I was moving from New
18 Jersey and I was worried about the very strictness --

19 Q. So let's look at the contract real quick.
20 What is paragraph 17?

21 A. I don't have my glasses, so . . .

22 (Discussion off record.)

23 A. Do you want me to read it?

24 Q. Yes.

25 A. "Upon completion by seller, as required by

1 this contract, the buyer will close the purchase. Any
2 other closing dates in this contract are for the
3 purpose of an estimate date only."

4 So I was worried about estimate dates because
5 I was moving from New Jersey and they wouldn't lock
6 into a date. That was the first thing.

7 "Failure by the buyer to close the purchase
8 shall constitute a default under the terms of this
9 agreement and shall result in the sellers declaring
10 the buyer in default and authorizes the seller to
11 exercise all remedies available at law or equity."

12 So that was the first thing. I was trying to
13 get a date that I could work with to plan my move.
14 Because I had to sell a house and move here.

15 And then the second thing was the closing
16 date. They would be established by Eastwood. There
17 was no negotiation with me.

18 "Closing dates and times will be established
19 by Eastwood Homes closing coordinators. Seller will
20 provide advanced notice of the closing date to the
21 buyer. However, once the time and date has been set
22 by the seller, will not be able to make any changes.
23 In the event the closing date is missed due to
24 inability to obtain financing," which I was paying
25 cash, so it didn't matter, "or otherwise on the

1 buyer's behalf, seller shall have the absolute right
2 to avail itself of paragraph 12 rights regarding
3 cancellation."

4 So I was worried because I was moving a
5 home from the north to the south and I was
6 coordinating the sale of my home and I felt that they
7 would be dictating dates and I wouldn't be able to
8 work with their dates.

9 So I was, you know, sharing with Eastwood and
10 Melissa that I was very concerned, you know, that this
11 could impact me. But when I signed it, I consciously
12 said that we would do anything and everything, and I
13 worked things out so I could support this, but I did
14 feel that it was unfair and one-sided.

15 Q. You were -- you were worried of a scenario
16 where if you're in New Jersey and there might be a
17 situation where you might not make a flight or might
18 not be able to get a flight or for some reason you
19 wouldn't be able to travel to Charleston to close on
20 the date that Eastwood set?

21 A. Exactly.

22 Q. And you were worried that might have
23 consequences --

24 A. Exactly.

25 Q. -- to you?

1 A. Exactly, yes.

2 Q. And those consequences are internally
3 referenced based off of paragraph 12. Is that right?

4 A. Yes.

5 Q. Okay. And an example of the type of
6 consequence could be that Eastwood Homes would choose
7 to terminate the contract completely. Is that right?

8 A. Yes.

9 Q. Or they could increase the price of the home
10 even?

11 A. Yes. Or they could even cancel it.

12 In the event the buyer has not paid -- hang
13 on.

14 Let's see here. Buyer has certain rights --
15 seller has certain rights. "Seller shall have the
16 absolute right to cancel this contract and retain
17 earnest money or to maintain the contract in full
18 force and effect and increase the purchase price of
19 the house and lot by 1 percent; or (3), maintain the
20 contract in full force and effect an increase of the
21 purchase price of the house and lot to that which
22 Eastwood Homes is charging for a comparable house and
23 lot on the 30th day after the date of sale."

24 Basically what it was saying is that they
25 could impose fees, I could get penalties. There's all

1 sorts of fees that they could levy on me if I was
2 late.

3 Q. And you asked that changes be made to
4 paragraph 17. Is that right?

5 A. Yes.

6 Q. And were you told that any changes could be
7 made to paragraph 17?

8 A. No.

9 Q. And then, as I understand it, you raised
10 concerns about paragraph 25 as well?

11 A. Yes.

12 Q. And did Eastwood say whether or not they
13 would agree to any changes to paragraph 25?

14 A. No changes. Absolutely no changes. Take it
15 or leave it.

16 Q. Okay. And paragraph 26, did you raise
17 concerns about paragraph 26 to Eastwood?

18 A. Yes, I did.

19 Q. And did Eastwood say if they would make any
20 changes to paragraph 26?

21 A. They said no changes.

22 Q. Okay. They said sign it as it is or don't
23 sign it and we'll --

24 A. Yes, either you sign it as is or you take it
25 or leave it.

1 Q. Okay. In entering this new home purchase
2 with Eastwood, did you feel like you had any
3 bargaining power in that negotiation?

4 A. I mean, again, I keep on going back to the
5 time. It was in the middle of a pandemic and there
6 wasn't a lot of quality houses on the market and there
7 wasn't a lot of building going on.

8 And I felt that -- I felt pressured that if I
9 didn't take this home at this time I wouldn't get a
10 home that was what I was looking for. There was just
11 not a lot of activity going on as far as quality
12 homes. There were things that were not, but not
13 quality.

14 Q. Okay. And so I guess my question is,
15 Eastwood wouldn't change the price of the house?

16 A. No.

17 Q. Eastwood wouldn't change -- Eastwood wouldn't
18 change any of the terms of the contract?

19 A. No.

20 Q. And so did you have any bargaining power with
21 Eastwood in entering this contract?

22 A. No. It was a take it or leave it.

23 Q. But in the end, you did sign the contract,
24 right?

25 A. I did. Again, with the assurances that I was

1 given by people that worked with Eastwood and my
2 realtor saying that it's a boilerplate. Yes.

3 Q. Okay. And as I understand it, your realtor
4 was friends with Ms. Guggisberg, who is the --

5 A. I would say that she is a -- she had crossed
6 paths in working with her. I don't know that they
7 were friends but definitely they know each other
8 because of the industry, yes.

9 Q. Okay. And the things that your realtor told
10 you, were they -- was that information that was
11 relayed by -- excuse me. Let me ask a coherent
12 question.

13 When you spoke with your realtor, was the
14 information that she told you relayed from --

15 MR. BRADLEY: I'm going to object.

16 THE COURT: It calls for hearsay?

17 MR. BRADLEY: Yes, explicitly.

18 THE COURT: Do you want to restate your
19 question?

20 MR. COOPER: Your Honor, it would go to the
21 effect on the listener and not to the truth of the
22 matter asserted, and so it's not hearsay.

23 THE COURT: Restate the question.

24 BY MR. COOPER:

25 Q. Okay. You told me part of your assurances

1 came from your realtor. Is that right?

2 A. My assurances really came from Eastwood. I
3 mean, my realtor told me that all builders in this
4 area have templates and that that's what it is.
5 That's what her reference was. But my assurances with
6 the contract from Eastwood really came from the
7 discussion of Melissa and Mark.

8 Q. Okay. And did Melissa's representations to
9 you weigh into your decision whether or not you were
10 going to enter this contract with Eastwood?

11 A. It did weigh in.

12 Q. Okay.

13 A. But Mark's weighed more.

14 Q. Okay. And Mark's information to you was as
15 Eastwood's attorney. Is that right?

16 A. Well, he had been doing business with them
17 for 20 years. And that definitely gave me a good
18 perspective of the kind of builder they were.

19 Q. Okay. What was the agreed-upon -- you picked
20 out a floor plan?

21 A. We did, picked out a floor plan, yes.

22 Q. All right. And there was a price set based
23 off of the floor plan that you chose?

24 A. Yes.

25 Q. And was there a price based off of the lot

1 that you chose?

2 A. We had a premium, yes.

3 Q. Okay. And did you have to fund a deposit
4 with Eastwood Homes when you entered the contract?

5 A. Yes. I had to put a deposit down for the
6 house and then a deposit down for the upgrades and
7 then a proof of funds that I had the funds to pay cash
8 for the house.

9 Q. Okay. Prior to -- prior to Eastwood entering
10 the contract with you, did they vet you as a buyer and
11 whether or not you have the financial ability to close
12 on the home?

13 A. Absolutely. And I had to have a letter from
14 my bank showing proof of funds that I could purchase
15 the home.

16 Q. And that was before Eastwood entered the
17 contract with you?

18 A. That was done before they signed, yes.

19 Q. Okay. And in addition to your deposit, you
20 had to pay additional money just based off of design
21 choices?

22 A. Yes.

23 Q. And when you signed the contract and funded
24 those deposits, what were your expectations regarding
25 Eastwood Homes's obligations?

1 A. I mean, at that point, I thought we were
2 locked and loaded. But we had a contract. I was --
3 we were -- I was building my dream home and we were
4 now -- it's a matter of like when it would be
5 complete, so . . .

6 Q. Okay. And when you signed the contract with
7 Eastwood, what actions did you and your husband take
8 after signing?

9 A. I mean, basically, what we did is we
10 regrouped. I mean, we had to work on doctors to get
11 him down in the area. We had to put a timeline
12 together of selling our home and moving our lives from
13 New Jersey to Charleston.

14 Q. Did you rely on the contract with Eastwood
15 Homes?

16 A. Absolutely.

17 Q. In specifically what ways?

18 A. I used that as a commitment that they were
19 building my home and we were working together to close
20 on the house.

21 Q. Did you sell your house in New Jersey?

22 A. Yes. We sold our house in New Jersey,
23 and I -- I mean, do you want me to elaborate what?

24 Q. So when did you sell your house in New
25 Jersey?

1 A. Well, I sold the house after we went through
2 a preconstruction walk-through -- it was kind of like
3 a preclosing walk-through. But it wasn't. It was in
4 mid May. But we had sold the house. Not closed on
5 it. But because my house was almost built and we were
6 working and defining a date, we locked into a closing
7 date.

8 It was July 11th. Because we were supposed
9 to move into our house the first of -- the last week
10 of June or the first week of July. So I was closing
11 on my house the week after we were closing with the
12 Eastwood house.

13 Q. Okay. So you had sort of scheduled the
14 closing of your house to give you time to be able to
15 move to Charleston and have your house in the
16 meantime?

17 A. Basically, I was closing in Charleston so I
18 could move all my contents from my house closing to
19 the house in Charleston, so I could make one move.

20 Q. Okay. And did you end up closing on the home
21 that Eastwood contracted to build and sell to you?

22 A. No. On June 4th, I got that phone call at
23 4 p.m.

24 Q. And why did you not close on the home?

25 A. So it's June 4th. I'm like three weeks away

1 from thinking I'm closing on my house. I'm packing my
2 stuff. I have movers coming to put things in
3 trailers.

4 And I get a phone call. And it's Jill Bagwell.
5 And she identifies -- I had never spoken to her
6 before. She identifies herself as the sales manager
7 of Eastwood. And she says, "I have some unfortunate
8 news."

9 And my -- I just went whoop. And she said that
10 they have found that Eastwood had an issue with the
11 HOA covenants and that phase four was not included in
12 it and because they're not sure of the duration of
13 time that was going to take place to remedy this issue
14 that they were canceling my contract. And --

15 Q. So did they -- was there any discussion about
16 what you might be able to do to avoid Eastwood
17 terminating the contract?

18 A. I said -- I did -- I did say like, I said,
19 "You can't do this. Like can't we do something?" She
20 goes, "No, there's nothing that can be done. We don't
21 know how long this is going to take. That because of
22 that, we'll come back to you when it is resolved and
23 offer -- you'll be the first person that we offer it
24 to at the new fair market value and you can choose to
25 purchase the home if you'd like."

1 And I'm like, "How can you do this to me? I'm
2 like three weeks away, like my life is packed up in
3 bags. I've sold my house. What are you doing?"

4 Q. Did Eastwood send you any type of document
5 that you understood to cancel or attempt to cancel the
6 contract?

7 A. Well, on that Friday afternoon, no. But on
8 Monday morning -- oh, I know, she said, on that day,
9 she goes, "We'll be issuing a mutual release." I
10 said, "But it's not a mutual release." She said,
11 "Well, we will be issuing the mutual release on
12 Monday." And that was it. And I received that on
13 Monday night very late.

14 Q. And that mutual release has been admitted as
15 Plaintiffs' Exhibit Number 4, which is titled Mutual
16 Release and Revocation?

17 A. Yes.

18 Q. Okay.

19 A. This is it.

20 Q. At that time, did you communicate your
21 intention to move forward with purchase of the house
22 to Eastwood's agent?

23 A. Yeah. I'm like, "I don't want to cancel
24 this. I mean, you can't do this. I don't want to
25 cancel this." And she's like, "Well, we're" -- it was

1 just a matter of -- it wasn't a discussion, this is
2 what we're doing, and that was it.

3 Q. Did you have any choice in the matter?

4 A. None.

5 Q. Was there any sort of process to resolve --
6 was there any sort of like, you know, resolution
7 process or anything like that?

8 A. None. I was being talked at, this is it,
9 period.

10 Q. Okay. At some point, did you have a letter
11 sent to Eastwood Homes indicating that you intended to
12 close on the house?

13 A. Yes. Yes.

14 Q. Okay. And that you would do whatever was in
15 your power to help facilitate whatever issue they
16 might have?

17 A. Yes.

18 Q. Okay. And that document has been introduced
19 as Plaintiffs' Exhibit Number 6, the Plaintiffs' Right
20 to Cure Letter. Do you see that?

21 A. Yes.

22 Q. Okay. Is that the letter that you sent?

23 A. Yes.

24 Q. Were you the only home buyer under contract
25 with Eastwood Homes to purchase a house in Swygerts

1 Landing whose contract was unilaterally terminated?

2 A. No.

3 Q. And to your knowledge, how many other buyers
4 like you had their new home purchase agreements
5 canceled by Eastwood?

6 A. Well, I know of the eight others besides
7 myself in this room, but I think there was another
8 person and I'm not sure. I think they didn't -- they
9 canceled. But I think there's eight in the room and
10 another family.

11 Q. Okay. And are you aware of whether or not
12 Eastwood Homes sold other homes within the same phase
13 as Swygerts Landing before the company terminated your
14 contract?

15 A. Yes.

16 Q. Okay. And how do you know that?

17 A. Just from going and looking at the lot and
18 meeting the neighbors that did close on it and
19 talking. It was an exciting time. I mean, we were
20 going to move into a new neighborhood and everyone
21 wanted to know each other. And, you know, we all
22 talked about, you know, how happy they were and a
23 great neighborhood. So just going to the house -- the
24 lot.

25 Q. Okay. Ultimately, did you obtain records of

1 those sales?

2 A. Yes.

3 Q. All right. And in addition to finding out
4 that homes were sold before your contract was
5 terminated, did you find out whether or not some of
6 those homes that were sold were subsequently sold
7 again to a different buyer after Eastwood terminated
8 your contract?

9 A. Yes. And we were told that they couldn't be
10 resold because of the outstanding HOA issue. And in
11 fact, even though that the HOA issue was still
12 unresolved, that they could not sell their houses.
13 And in fact, they did sell.

14 Q. Okay. And did you obtain records --

15 A. Yes.

16 Q. -- to document those sales?

17 A. Yes.

18 Q. All right. And those documents and records
19 are -- have been admitted as Plaintiffs' Exhibit
20 Number 7, the phase four deeds and title to real
21 estate?

22 THE COURT: Let me stop you there. In our
23 book, Exhibit 7 was the noticed Right to Cure Letter
24 and Exhibit 6 may be what you're talking about. So
25 they may be out of some type of order. Just want to

1 make sure we're on the same page.

2 THE WITNESS: I show -- I'm correct. I think
3 yours is flipped.

4 THE COURT: We can fix that. We can fix it.

5 MR. COOPER: Your Honor, I'm just going by
6 the exhibit list.

7 THE COURT: The exhibit list?

8 MR. COOPER: Yes.

9 THE COURT: Okay. Well, then we'll just flip
10 it. Let's just make sure we're on the same page. But
11 that's just --

12 MR. COOPER: Your Honor, do you have a copy
13 of our exhibit list?

14 THE COURT: I don't. But I can get that. We
15 made a copy, right? It's in here, isn't it? Yeah,
16 we've got it.

17 MR. COOPER: Okay.

18 THE COURT: All right. I just wanted to make
19 y'all aware.

20 MR. COOPER: So for purposes of our
21 organization, we'll follow the numbers that have --

22 THE COURT: Stick with the list?

23 MR. COOPER: Yes.

24 THE COURT: Stick with the list.

25 MR. COOPER: Okay. Thank you, Judge.

1 BY MR. COOPER:

2 Q. And so, Pat, those documents and those
3 records that document the transactions are contained
4 within Plaintiffs' Exhibit 7. Is that correct?

5 A. I think I might be out of sync too.

6 Q. Yes. Okay. So we'll --

7 A. Flip them around?

8 THE COURT: Which lot number was she
9 purchasing?

10 THE WITNESS: I was 143.

11 THE COURT: Lot 143?

12 THE WITNESS: Yes.

13 THE COURT: All right. Let's take five
14 minutes right now. Y'all go ahead and look through
15 what y'all are looking through and I'll be right back.
16 Okay?

17 MR. COOPER: Thanks, Your Honor.

18 THE COURT: Do you want to take a restroom
19 break or get some water? Let's do that.

20 (Recess taken at 11:08 a.m.)

21 THE COURT: Back on the record.

22 MR. COOPER: The Court had a question about
23 the lot number for Ms. Franquelin.

24 THE COURT: She was lot 143, she told me.

25 MR. COOPER: Yes, sir.

1 THE COURT: Is that confirmed? Okay. All
2 right.

3 MR. COOPER: And before we went off the
4 record, we provided a copy of an additional exhibit to
5 Mr. Bradley. That is a document that summarizes the
6 material -- the information that is contained within
7 the deeds.

8 THE COURT: Just a summary of information?

9 MR. COOPER: Yes, sir.

10 THE COURT: Mr. Bradley, any objection to
11 that one?

12 MR. BRADLEY: No. I'll take on the
13 representation that it's in the deeds, that they're
14 already admitting.

15 THE COURT: Fair and accurate depiction of
16 what they show?

17 MR. BRADLEY: If Mr. Cooper tells me that it
18 is, I trust him. I have no way to check it now. But
19 I trust him on that.

20 THE COURT: Rule 1001 compilation?

21 MR. COOPER: Yes, sir.

22 THE COURT: All right. I'll allow it.

23 MR. COOPER: All right. Your Honor, at this
24 time, we would seek to admit Plaintiffs' Exhibit
25 Number 9.

1 THE COURT: Okay.

2 (EXHIBIT NUMBER 9 WAS RECEIVED.)

3 BY MR. COOPER:

4 Q. Okay. Pat, based off of what you found in
5 the deeds, or what we found in the deeds, the -- did
6 the homes that were sold, subsequent to Eastwood's
7 terminating the contract with you, sell for more or
8 less money than the original contract price?

9 A. More.

10 Q. More. And do you know approximately how much
11 more money those homes sold for on the subsequent
12 sale?

13 A. Like around \$400,000 more.

14 Q. Okay. And that information specifically
15 would be contained within the deeds?

16 A. Uh-huh.

17 Q. All right. We talked about how you raised
18 concern about paragraph 25 and 26. Correct?

19 A. Yes.

20 Q. And we've already established that Eastwood
21 would not agree to change any of these terms?

22 A. They would not agree.

23 Q. All right. Let's read paragraph 26 of the
24 contract. I understand this is one of the provisions
25 that you asked to have changed and Eastwood said no.

1 Is that right?

2 A. Uh-huh.

3 Q. Is that a yes?

4 A. Yes, it is.

5 Q. Okay. And will you read the first sentence
6 of paragraph 26 into the record for me?

7 A. Sure.

8 "Seller's option to cancel prior to closing.
9 If for any reason a bona fide dispute should arise
10 between the buyer and the seller and the seller's sole
11 judgement prior to closing and if such bona fide
12 dispute cannot be resolved to the mutual satisfaction,
13 then seller at its sole option may terminate this
14 agreement by written notice to the buyer prior to
15 closing."

16 Q. Okay. When you read that provision within
17 the contract, did you understand that to mean that
18 Eastwood could cancel the contract with you at any
19 time they wanted?

20 A. No.

21 Q. Okay. At the time that you entered this
22 contract, were you aware that Eastwood Homes intended
23 that provision of the contract to mean that they could
24 terminate or cancel the contract with you at any time?

25 A. Absolutely not. I wouldn't have signed it.

1 Q. Okay. What is -- when you read that
2 provision within paragraph 26, what was your
3 understanding of the meaning of that provision?

4 A. I thought it was a dispute with me personally
5 having a dispute with Eastwood on maybe the way things
6 were being constructed, something that was going on
7 between our, you know, correspondence back and forth,
8 that -- I mean, to the point that we made sure that we
9 always maintained a good relationship with them. We
10 weren't looking to be in conflict at all. We were
11 very careful just about that.

12 Because I called that particular paragraph out as
13 a concern, we navigated that paragraph very gingerly
14 because I didn't want to get into a dispute with them.

15 So there were certain things that we weren't
16 particularly happy, but I'm like, look, it's not worth
17 it, I don't want to get into a dispute with them,
18 let's just, you know, move on. So --

19 Q. Did anybody from Eastwood Homes relay to you
20 the company's understanding of what that provision
21 meant?

22 A. No.

23 Q. Okay. Did anybody from Eastwood Homes give
24 you any sort of reassurances specifically with regard
25 to that provision in paragraph 26?

1 A. Again, just the conversation with Mark Weeks
2 and Jill, that in the years that they have worked with
3 or for Eastwood they have never invoked this
4 paragraph.

5 Q. And you said Jill, you meant Melissa
6 Guggisberg?

7 A. Excuse me. Melissa.

8 Q. As we sit here today, what is your
9 understanding as to how Eastwood Homes reads paragraph
10 26?

11 A. It's a terminate at will for any reason.

12 Q. When you read paragraph 26, did you have an
13 understanding about what a bona fide dispute meant?

14 A. Bona fide, so I thought it was a good
15 dispute. Something -- a real disagreement between two
16 parties, meaning me and Eastwood. So, and that's how
17 I interpreted it and that's why we navigated it the
18 way we did.

19 Q. When you read paragraph 26, did you imagine
20 it could ever mean that Eastwood had the sole option
21 to terminate the contract at any time?

22 A. Absolutely not.

23 Q. If paragraph 26 was written so that it was
24 clear that it authorized the seller, Eastwood Homes,
25 to terminate the contract at will, would you have

1 signed the new home purchase agreement with Eastwood?

2 A. Absolutely not.

3 Q. Why not?

4 A. Because it means that I could have changed
5 all my life and be in the closing hours of the
6 purchase, just like I was, and they could cancel the
7 contract.

8 Q. Also within paragraph 26 is a provision that
9 provides that if Eastwood does choose to terminate
10 pursuant to that provision that your remedy is a
11 return of the earnest money plus \$100 as liquidated
12 damages. Is that correct?

13 A. Yes.

14 Q. And that's only if such a termination is
15 considered a default under the contract?

16 MR. BRADLEY: Judge, I'm going to object to
17 Mr. Cooper testifying as to what the contract means
18 and his interpretation of it by leading the witness
19 into that.

20 THE COURT: See if you can restate the
21 question.

22 MR. COOPER: Yes, Your Honor. I was
23 attempting to lay a foundation.

24 THE COURT: Okay.

25 BY MR. COOPER:

1 Q. As you read the contract, what is your
2 understanding of what it specifically says as to your
3 remedies if Eastwood invokes that provision in
4 paragraph 26?

5 A. It means that how -- I'm sorry. I'm not sure
6 I'm clear on what you're asking.

7 Q. Does paragraph 26 specify what your remedy
8 is?

9 A. Yes, it does. It says --

10 Q. And what is that?

11 A. My earnest money, my deposit and a menial
12 \$100.

13 Q. Okay. Did you ask that -- did you ask that
14 the \$100 provision be changed?

15 A. I asked that this whole section be changed.
16 Everything about it was very one-sided. So yes.

17 Q. Okay. At the time that you entered into this
18 contract, you were moving from New Jersey to
19 Charleston. Is that right?

20 A. Yes.

21 Q. All right. And so if Eastwood were to
22 terminate the contract on the eve of closing, would
23 \$100 be a fair representation of what your damages
24 might be?

25 A. Absolutely not.

1 Q. Okay. And let's look at paragraph 25 for a
2 moment, too. This is, as I understand it, one of the
3 provisions that you raised concerns about?

4 A. Yes.

5 Q. And, again, Eastwood would not negotiate any
6 of those terms. Is that right?

7 A. That's correct.

8 Q. Okay. There's part of 25 that's -- that's
9 sort of bolded such that it would be like called out
10 to the reader. Do you see that?

11 A. Yes. The seller's process?

12 Q. Yes. What does that say?

13 A. "The seller's process may include completion
14 of a prequalification form with a seller-approved
15 lender which seller will evaluate to confirm buyer's
16 ability to close on property."

17 Q. Okay. Within paragraph 25, is there any
18 other text that's bolded or underlined that's called
19 out at all?

20 A. No.

21 Q. Okay. What was your concern about paragraph
22 25?

23 A. Just, again, you know, the whole -- I don't
24 have any -- I don't have any leverage here. This is
25 not equitable. It's not equitable. It's all on the

1 side of Eastwood. Eastwood has everything on their
2 side. I have no balance in equity. I was concerned
3 of not having representation.

4 Q. Okay.

5 A. I mean, everything was like we had to follow
6 their lines of like their schedule. We couldn't
7 default in any way and they could cancel the contract
8 if we did. I just felt it was very one-sided.

9 Q. In paragraph 25, it says -- it specifies what
10 Eastwood's remedies would be against you if you were
11 to breach the contract.

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. And according to the language in paragraph
16 25, what is -- what would Eastwood's remedies be
17 against you if you were to breach the contract?

18 A. They could do anything. There -- there was
19 no limits. They could -- they could withhold my
20 monies of deposit and retainers and they could -- they
21 could then go further with damages. So they had any
22 recourse they wanted and I had none.

23 Q. Okay. And when you say "you had none" --

24 A. "Seller may retain the buyer's payment of
25 damages and pursue such other and further legal and

1 equity remedies the seller may have by reason of the
2 buyer's breach or default."

3 So he could pursue whatever he needed or they
4 felt was warranted and I had nothing.

5 Q. Okay. And when you say you have nothing,
6 point that -- point to the contract.

7 A. Okay --

8 Q. Where that is.

9 A. Okay. "In the event" -- give me a second.
10 Sorry, Michael.

11 Q. That's okay. I'll give you a hint. It's the
12 last sentence of the first paragraph of provisions --
13 of paragraph 25.

14 A. Okay. "Buyer may recover the deposit;
15 however, in no event will seller be liable for
16 consequential damages or for damages or delays, and
17 buyer hereby releases and waives any claims for such
18 damages."

19 Q. Okay. And what do you understand that to
20 mean?

21 A. It means that I get my \$100 and my -- and my
22 deposit back and that's it.

23 Q. Okay. So actually, though, this provision
24 doesn't mention the \$100, does it?

25 A. No. But it says it in the next one, that is

1 why I assumed that it would be there.

2 Q. Right. As we sit here today, do you think
3 it's one-sided and unfair to allow a residential home
4 buyer like Eastwood to unilaterally terminate a new
5 home purchase agreement for any reason it wants?

6 A. Yes, I do.

7 Q. And do you think it's unreasonable to allow a
8 company like Eastwood to unilaterally terminate a new
9 home purchase agreement for any reason it wants?

10 A. Absolutely.

11 Q. Did Eastwood send you anything after it
12 claimed to terminate the contract?

13 A. Just the mutual release.

14 Q. Did they send you money?

15 A. They sent -- they refunded me my earnest
16 money and deposit and a \$100 check.

17 Q. Okay. And did you negotiate the refund of
18 the earnest money and \$100?

19 A. They wouldn't talk to us.

20 Q. I mean, did you cash the check?

21 A. No, I did not.

22 Q. Okay. Do you think that was reasonable for
23 Eastwood to return your earnest money and only \$100?

24 A. No. I mean, I had incurred so many expenses
25 and I was up in the throws of moving.

1 Q. One moment.

2 Do you believe that it's fair and reasonable
3 to allow Eastwood Homes to terminate the contract at
4 any time up until the moment of closing?

5 A. No. I mean, it's ridiculous.

6 Q. All right. Ms. Franquelin, I appreciate your
7 time. Mr. Bradley is going to have cross-examination
8 for you.

9 A. Okay.

10 THE COURT: Mr. Bradley?

11 MR. BRADLEY: Thank you, Judge.

12 CROSS-EXAMINATION

13 BY MR. BRADLEY:

14 Q. Ms. Franquelin, you live in Virginia?

15 A. Currently, yes.

16 Q. You've lived there since February of last
17 year?

18 A. Yes.

19 Q. And you moved there because you had a second
20 home already in Virginia?

21 A. I had a home that I purchased for my son and
22 that he just purchased another home. So we moved into
23 that place because we had nowhere to go, yes.

24 Q. You had an empty house in Virginia that you
25 owned?

1 A. Yes.

2 Q. So you went to the house you already owned in
3 Virginia near your son?

4 A. Yes. But we planned on selling it and we had
5 to delay that.

6 Q. Yes, ma'am. But you had a house to go to, it
7 was in Virginia?

8 A. Yes.

9 Q. Which is what you did?

10 A. Yes.

11 Q. And then you sold that house and moved into
12 another house in Virginia?

13 A. Yes, I did, because this wasn't working out.

14 Q. Okay. And you're not planning to move to
15 Charleston now?

16 A. I don't know that. I didn't say that I was
17 not planning to move. I don't know. I have to see
18 how this works out.

19 Q. And do you remember I asked you if you were
20 planning to move to Charleston and you said you didn't
21 know?

22 A. Yes. And I still feel the same way. I
23 cannot tell you yes or no.

24 Q. Okay. You don't even know if Eastwood were
25 to sell you the house right now through some magical

1 transaction whether you would move into it?

2 A. I don't know. I think that that's fair
3 because I don't know what's going on with the time
4 frame. My husband has stage four and we're dealing
5 with that.

6 Q. Yes, ma'am. And I certainly understand
7 that's a horrible thing. But that's not the question
8 I asked you.

9 A. Yeah, but you're asking me to give you an
10 answer if I plan on moving there. And I'm letting you
11 know, I have variables in my life that at this point,
12 if you want me to give you an answer, I cannot.

13 Q. Okay. If you were going to even buy this
14 house, you would use it as a vacation house?

15 A. No. I don't know. I said -- I said I don't
16 know. I said maybe I would use it as a vacation
17 house. And you said did you realize that you signed
18 this as a permanent house. And I said I did. I said
19 but I don't know based on what's going on. So I don't
20 know.

21 Q. All right. Didn't you say it might become a
22 vacation home?

23 A. Yeah, the operative word is "might."

24 Q. I see. So you're just not sure whether you
25 would use it as a vacation home?

1 A. That's correct.

2 Q. All right.

3 A. It might be a permanent residence. I have --
4 like I said, I have some health issues going on and we
5 need to work those out before a decision can be made.

6 Q. Are you even in a position to buy the house
7 right now?

8 A. Yes, I am.

9 Q. So you would -- you would commit to buying it
10 right now in court under oath?

11 A. I don't know.

12 Q. Okay.

13 A. I mean, you're asking me --

14 Q. Okay.

15 MR. COOPER: Excuse me one second. Your
16 Honor, I don't know what relevance this has to the
17 conscionability of the contract the Court is deciding.

18 THE COURT: It's been asked and answered.
19 She has answered the question. You can move on,
20 Counsel.

21 MR. BRADLEY: Thank you, Judge.

22 BY MR. BRADLEY:

23 Q. So you retired from L'Oreal.

24 A. Yes.

25 Q. That's the international cosmetics company

1 L'Oreal?

2 A. Yes, it is.

3 Q. It's a publicly traded company?

4 A. On the bourse, yes, it is.

5 Q. The bourse being the French stock exchange?

6 A. That's correct.

7 Q. And you were a vice president of L'Oreal?

8 A. I was.

9 Q. You managed e-commerce for L'Oreal?

10 A. I did.

11 Q. And logistics for L'Oreal?

12 A. Which encompassed that, yes.

13 Q. And integration and customer service for

14 L'Oreal?

15 A. Which encompassed that, yes.

16 Q. And an entire division of L'Oreal?

17 A. An entire commercial sale division of

18 L'Oreal, yes, not an entire division.

19 Q. All right. And you supervised approximately
20 200 people in that job?

21 A. I supervise -- I had direct reports of five
22 who then had people they oversaw, yes.

23 Q. Which would be about 200 people?

24 A. They had subcontractors that they oversaw,
25 yes.

1 Q. So on the chain, there were approximately 200
2 people subject to your supervision?

3 A. Yes.

4 Q. And you reported to the senior vice president
5 of L'Oreal, the international publicly traded
6 cosmetics company?

7 A. Yes, I did.

8 Q. And your base salary was \$225,000 a year?

9 A. Yes.

10 Q. And you received \$150,000 of bonuses?

11 A. On the year you specified, yes.

12 Q. That would be the year you signed the
13 contract?

14 A. That's right.

15 Q. Okay. So your total compensation was
16 \$375,000 a year?

17 A. Yes.

18 Q. All right. And your husband worked as an art
19 instructor as well?

20 A. Yes.

21 Q. He has two masters degrees?

22 A. A double masters, yes.

23 Q. And he made, what, \$150,000 a year?

24 A. That year with teaching, he did, yes.

25 Q. So your combined household income was over a

1 half million dollars a year?

2 A. That year, yes.

3 Q. Okay. All right. And when you were vice
4 president of L'Oreal, you knew the process to take a
5 product idea from market, develop it and sell it.

6 A. Yes.

7 Q. All right. And you graduated from the New
8 York state school system, Cortland College.

9 A. Yes, SUNY.

10 Q. And you have attended Harvard college?

11 A. Yes.

12 Q. Where you received a certificate in business?

13 A. Yes.

14 Q. And you have a bachelor's degree in
15 economics?

16 A. That's correct.

17 Q. And a minor in business?

18 A. Uh-huh.

19 Q. Is that a yes, ma'am?

20 A. Yes.

21 Q. And you took continuing education classes at
22 L'Oreal?

23 A. Yes, I did.

24 Q. In fact, L'Oreal sent you to France to take
25 continuing education classes?

1 A. Yes.

2 Q. All right. And you could speak French?

3 A. Not fluently, but I can.

4 Q. Okay.

5 A. My husband is French.

6 Q. All right. And you took marketing strategy
7 classes in France to prepare for your senior
8 management position which you held. Is that true?

9 A. Yes, it is.

10 Q. All right. As vice president of L'Oreal, the
11 international publicly traded cosmetics company, you
12 reviewed contracts?

13 A. Yes, I did.

14 Q. You reviewed well more than 50 contracts
15 during your career?

16 A. Yes, I did.

17 Q. And you're competent to review a contract?

18 A. I -- again, I want to make sure that we put
19 context here. I am competent based on the assurances.
20 I'm not solely responsible for reviewing a contract.
21 My competency lies in an area that is in that
22 contract. And we have a process that these contracts
23 go through.

24 So I am -- I rely on these different parties to
25 review a contract. I review for the content of the

1 specific area that that contract is in. I am not
2 reviewing all the other legal jargon because, I have
3 to be honest, I am not proficient in that area. And
4 that's why there's processes for these different
5 people to review. And they tell me, based on their
6 area of competence, that this contract is good. I
7 was -- and that's how I read contracts.

8 Q. Ma'am, I just asked you if you're competent
9 to review a contract. Are you?

10 A. Well, I want to caveat with where my area of
11 competence is.

12 Q. Ma'am, when I asked you that question in your
13 deposition, you just said that you were, right?

14 Are you competent?

15 MR. COOPER: I don't think she's providing
16 different testimony here today. I don't really know
17 the rule of impeachment.

18 THE COURT: I don't think he's gotten there
19 yet.

20 MR. BRADLEY: I'm not impeaching. I'm just
21 asking questions to establish the facts --

22 THE WITNESS: Yes, I'm competent -- I'm
23 competent to review, but I just --

24 MR. BRADLEY: -- Ms. Franquelin's education,
25 expertise, sophistication, which are all important to

1 procedural unconscionability.

2 THE WITNESS: So I'm competent to review a
3 contract in the areas that I'm proficient in.

4 BY MR. BRADLEY:

5 Q. And you have reviewed contracts that were in
6 excess of \$25,000,000 when you worked for L'Oreal, the
7 international publicly traded cosmetic company?

8 A. Yes.

9 Q. You mentioned several times, I think, that
10 you couldn't have a lawyer.

11 Did anyone from Eastwood tell you you could
12 not have a lawyer?

13 A. I was told from Eastwood I could get a lawyer
14 but that it wouldn't change what the contract would be
15 written.

16 I was told that there was -- under no
17 circumstance could any modification to be made. So
18 that's when I went to my realtor and I said, "Jan, I
19 don't feel comfortable." And she's like, "Well, Pat,
20 you know, you can get a lawyer, but it's not going to
21 make a difference." And that's when she referred me
22 to Mark. She goes, "Why don't you speak to Mark."

23 So the advisement I had was that there was no
24 need to get a lawyer because there was no change that
25 was going to be made to the contract, no negotiation.

1 Q. My question was just this: Did anyone at
2 Eastwood tell you you couldn't have a lawyer?

3 A. They said -- they said -- no, they did not
4 tell me I could not.

5 Q. In fact, the contract you've been testifying
6 about says: "If the buyer desires to employ an
7 attorney to represent his or her interests, he or she
8 may do so at his or her expense," doesn't it?

9 A. Yes.

10 Q. The actual written contract you signed says
11 you can have a lawyer if you want one?

12 A. I'd have to tell you --

13 Q. Take a look at it. It's there. You were
14 talking about it with your lawyer. Take a look at
15 paragraph 19.

16 A. Bear with me.

17 Q. Take your time.

18 A. I'm sorry? And where are you citing?

19 Q. Paragraph 19. It says in big bold underline
20 "closing attorney."

21 A. Yep.

22 Q. And it says: "If the buyer desires to employ
23 an attorney to represent his or her interests, he or
24 she may do so at his or her own expense."

25 A. But that says closing attorney. It doesn't

1 say -- that says closing attorney, so -- and that's
2 what I was planning on doing. But this wasn't a
3 closing attorney. This was me signing a contract.

4 It says: "Closing attorney. The closing
5 will be at the office of the seller approved by the
6 closing attorney. If the buyer desires to employ an
7 attorney to represent his or her interests, he or she
8 may do so at his or her own expense; however, the
9 incident -- the closing will occur at the seller's
10 attorney."

11 So it had nothing to do with review of the
12 contract.

13 Q. Ma'am, where does it say that? You just made
14 that up.

15 A. I did not. I read it right here, 12, closing
16 attorney. It says --

17 Q. It says if you desire to hire an attorney,
18 you can do so.

19 A. It says the closing will be -- it references,
20 it's captioned and highlighted, 19, closing attorney.
21 And then it goes on to say that blurb that you just
22 cited. But it doesn't say for a review of the
23 contract. It talks about the closing attorney.

24 Q. I see. So you think this language here is
25 not clear to you whether or not you can hire your own

1 attorney?

2 A. That's right.

3 Q. Okay. Now, the five other houses that you
4 had built in New Jersey, you hired an attorney every
5 time you did that?

6 A. Absolutely.

7 Q. I see.

8 A. I am not versed in real estate. I am a home
9 buyer. I might be versed in my business, but I am not
10 a real estate attorney. I am not a commercial buyer.
11 I buy homes to live in. I don't look at that kind of
12 information. I hire someone to.

13 Q. Ma'am, I just asked if you hired lawyers five
14 times before --

15 A. Well, I feel that I need to put context in
16 it.

17 Q. Yes, ma'am. Is there anything else you want
18 to say about that?

19 A. No, I'm good.

20 Q. All right. So there was no one at Eastwood
21 who forbade you from hiring an attorney, was there?

22 MR. COOPER: Judge, I think we have answered
23 that at this point.

24 BY MR. BRADLEY:

25 Q. Was there?

1 A. They did not. But they did convey that there
2 was no negotiation on these different paragraphs that
3 I had exception.

4 Q. Okay.

5 A. So it was like -- and that's why they
6 referenced me to call Mark Weeks. My -- my realtor
7 referenced -- she is like, "Look, why don't you get
8 peace of mind. Call Mark Weeks." Because I wasn't
9 comfortable. I wanted assurance.

10 Q. Your realtor told you to call Mark Weeks who
11 is an attorney?

12 A. He's an attorney that was giving me context
13 of the environment for building boilerplates -- for
14 new build boilerplates in this area. She's like,
15 "Pat, I think you're just a little, you know,
16 hypersensitive. Down here no one really uses an
17 attorney for new builds, you know. Let me give you a
18 contact to talk to someone. He does a lot of new
19 build closings." And that's what happened.

20 Q. Okay. So your hobbies are wine, traveling,
21 art and art?

22 A. I mean, when you asked me -- and family. I
23 mean, that's at the core of it. That's why, you know,
24 we exist.

25 Q. You like to travel to Europe and to other

1 islands around?

2 A. I have family in Europe. As I mentioned, my
3 son lives in Lille, France.

4 Q. Okay. And at L'Oreal you were responsible
5 for working within a corporate environment and
6 managing people at a very high level?

7 A. I worked with that, yes.

8 Q. Do you consider yourself to be an intelligent
9 person?

10 A. I do.

11 Q. You certainly understand and can read and
12 write the English language at a very high level?

13 A. I do.

14 Q. Your net worth is between four and a half to
15 \$5,000,000?

16 A. Yes.

17 Q. And you had bought and sold five other houses
18 before this one?

19 A. Yes.

20 Q. All right. Before you decided to enter into
21 a purchase agreement with Eastwood, you went to look
22 at 30 other houses?

23 A. We reviewed with our realtor 30 houses. We
24 didn't look at 30, but we did look at many. And as
25 mentioned, those houses were moldy, small lots,

1 disgusting.

2 Q. Right. So you looked at perhaps 30 other
3 houses for sale with your realtor?

4 A. Between on paper and in person, we reviewed
5 30 houses, yes.

6 Q. And then you looked at another 50 houses
7 online before you agreed to enter this purchase
8 agreement?

9 A. That's right.

10 Q. So all told, somewhere around 80 houses that
11 you looked at in some way that were on sale at the
12 time you entered the purchase agreement with Eastwood?

13 A. Well, you didn't ask the context of over what
14 period I looked at that. So that was over a period of
15 months. It wasn't just that timeframe.

16 So I -- I did look at all those houses, but that
17 was not in the month of September. You didn't ask a
18 time frame of from when did I start looking to when I
19 completed my looking, how many houses did I look at.
20 And I did look at that many houses, but it wasn't in
21 the month of September.

22 Q. Ma'am, can we agree that you looked at almost
23 80 houses before you entered this purchase agreement?

24 A. From March to September, yes.

25 Q. So there were at least 80 other houses for

1 sale, you just didn't like them?

2 A. If I found a house that I liked, that was
3 good, it sold in six seconds. Like I said, there was
4 low inventory. Good quality houses went in seconds.
5 There was -- it was not a buyer's market. It was a
6 seller's market. It was very clear.

7 Q. And you had a realtor to represent you?

8 A. I did.

9 Q. What's the realtor's name?

10 A. Jan Snook with Keller.

11 Q. Jan Snook is a very good realtor?

12 A. I believe she is.

13 Q. And you relied on Jan Snook's expertise to
14 make your decisions?

15 A. I used that as one -- one point of reference,
16 yes.

17 Q. All right. I think you said before you think
18 this contract is very one-sided?

19 A. I do.

20 Q. And you read the contract yourself before you
21 agreed to enter it?

22 A. I did.

23 Q. And you went over it with your real estate
24 agent Jan Snook?

25 A. I did.

1 Q. And you also even called a lawyer about it
2 because you were concerned about it?

3 A. I did.

4 Q. All right. And you knew whatever was in the
5 contract to date was the same thing that was in the
6 contract when you signed it?

7 A. I knew that. But, again, you know, there is
8 a path that we need to go by. You're taking things
9 very singularly.

10 And as mentioned before, we were in a very
11 uncertain time. I felt pressure from your sales
12 person that the house that we finally found, after
13 looking at all those houses, was going to be
14 evaporated.

15 I was working on a time line to get a house. It
16 wasn't coming to fruition. There was very little good
17 quality houses on the market.

18 I had assurances from Mark and Jill that in
19 fact the invoking of these paragraphs were very
20 unlikely that -- because that's what they said, in
21 their years of service with Eastwood, they were very
22 customer -- he's a very customer-centric builder and
23 he would not impose that. To me, that gave me a sense
24 of assurance. I'm talking to someone that's worked
25 with them for 20 years.

1 Q. And what he told you was true. They had
2 never invoked it in 20 years.

3 MR. COOPER: Calls for hearsay, Judge. We
4 don't know if that's the truth or not.

5 MR. BRADLEY: She opened the door to the
6 hearsay, Judge. She's talking about what he talked
7 about.

8 THE COURT: He's on cross. I'm going to give
9 him some leeway.

10 BY MR. BRADLEY:

11 Q. What they said was true, Eastwood had never
12 invoked it. It was absolutely completely 100
13 accurate. Right?

14 A. I have no idea.

15 Q. Do you have any evidence anywhere, other than
16 this lawsuit and the Button lawsuit that we are
17 talking about later, that Eastwood has ever invoked
18 this provision?

19 MR. COOPER: And Judge, I think this is at
20 this point outside the scope of what the Court is
21 reviewing.

22 THE COURT: Absolutely.

23 MR. COOPER: I think she has answered this
24 question, Judge --

25 THE COURT: Go ahead and answer that and then

1 let's see if we can't get back on track. We've been
2 way outside of where we need to be, all right, all
3 day.

4 A. I don't know. I honestly don't know.
5 Because they may have.

6 Q. Let's get to where we need to be, which I
7 believe is paragraph 26. Do you have that there? You
8 were talking about it earlier.

9 A. Yes.

10 Q. All right. And you read this paragraph
11 before you signed the agreement?

12 A. Read and with great concern.

13 Q. You didn't like it at the time?

14 A. I did not, no. I wanted to change it.

15 Q. And Eastwood said we won't change it?

16 A. Eastwood said they will not change it, it's a
17 boilerplate, they will not make any modifications to
18 their contract. No negotiation.

19 Q. So you agreed to it?

20 A. With assurances. And I'm going to keep on
21 going back to it. I agreed to it with assurances that
22 it wouldn't be an issue.

23 Q. From Jan Snook?

24 A. No, from Jill and from Mark Weeks.

25 Jan Snook said that you were a quality

1 builder. But the assurances that weighed heavily in
2 my decision were Eastwood employees or Eastwood people
3 that were the coworkers that they worked with.

4 Q. And what they said was Eastwood hadn't
5 canceled a contract before this?

6 A. They're like, this is a boilerplate, this
7 is -- you don't have to worry about this. I mean,
8 like this is a boilerplate, I've never seen anything
9 happen.

10 So this was to me assurance like I was a
11 northerner that was very skeptical of things and that,
12 you know, the south operated this way. I had never
13 purchased a house in South Carolina.

14 Q. Well, ma'am, you read paragraph 7 of the
15 contract that said there's no oral commitments in this
16 contract?

17 A. I'm sorry. I have to go back to that. I
18 don't recall that.

19 Q. It's on page 2.

20 A. Yes.

21 Q. All statements or representations for which
22 the seller is to be responsible must be in writing.
23 Do you see that?

24 A. I do.

25 Q. You knew that at the time too, didn't you?

1 A. Again, I am talking to you about the fact
2 that they wouldn't make any kind of changes to the
3 contract. So that's very clear to me.

4 But what was not clear to me and what gave me
5 assurances was the fact that I talked to two employees
6 that said -- they gave me assurances.

7 With those assurances and the circumstances
8 that were going on in the environment in this market,
9 I felt that, hey, I haven't been able to find
10 anything, I've looked at 80 houses, there's not great
11 things out there, and that's when I signed.

12 Q. Ma'am, I just asked you if you knew about the
13 provision in the contract that said everything -- all
14 changes had to be in writing. Did you know about it?

15 A. Yes, I was aware of that.

16 Q. Okay. Good. And this assurance that you
17 received was that Eastwood had never canceled a
18 contract before?

19 A. And that they were a good customer-centric
20 builder. They were --

21 Q. So my question is, do you have any evidence
22 that those assurances were untrue at all that you
23 testified to?

24 A. I -- I don't.

25 Q. All right. All right. Okay.

1 Now, in paragraph 26, it says: "If seller
2 terminates this agreement, seller shall return the
3 buyer all deposits, whether refundable or not, and pay
4 the buyer an additional amount of \$100 as liquidated
5 damages in the event the seller cancellation
6 constitutes a default under this agreement," doesn't
7 it?

8 A. Yes, I do recall that's the verbiage.

9 Q. And you knew that paragraph 26 contained that
10 damage limitation when you signed the contract?

11 A. Yes.

12 Q. No one hid it from you?

13 A. No.

14 Q. In fact, you didn't like it?

15 A. I didn't like it and I wanted it -- I wanted
16 it changed.

17 Q. But Eastwood said, no, we're not going to
18 change it?

19 A. They were emphatic. They wouldn't even
20 consider it. They wouldn't discuss it. No changes.

21 Q. Right. So -- but you -- so you agreed to it?

22 A. I agreed based on the assurances that I had
23 with two Eastwood employees or direct working
24 relationships with Eastwood.

25 Q. But you agreed that in the event Eastwood

1 terminated the contract, the damages would be limited
2 to a refund of your deposit plus \$100, didn't you?

3 A. I did, yes.

4 Q. All right. And that's exactly what Eastwood
5 did, exactly what you agreed they could do, when you
6 signed this agreement?

7 A. Yes, they did. But they also said it was a
8 mutual dispute, and I didn't have a dispute.

9 Q. But it doesn't say that. It says if seller
10 terminates whether it's a breach or not.

11 A. I know, but the previous -- there's a
12 previous paragraph that says that we have to have a
13 dispute for them to terminate the contract, which I
14 didn't have a dispute. So one kind of precedes the
15 other. And I didn't have a dispute.

16 Q. All right. Well, didn't you want to buy the
17 house?

18 A. They terminated my contract before I --

19 Q. My question was, didn't you want to buy the
20 house? That's the question.

21 A. I absolutely wanted to buy the house.

22 Q. All right. And Eastwood felt that it could
23 not sell you the house, right?

24 MR. COOPER: Objection. My client can't
25 testify as to what Eastwood felt or how they --

1 BY MR. BRADLEY:

2 Q. All right. Well, clearly Eastwood did not
3 want to sell you the house for whatever reason, right?
4 That's why we're here.

5 A. Look, clearly, they canceled my --

6 Q. Isn't that a dispute?

7 A. No. They canceled --

8 Q. It's not a dispute?

9 A. It's not a dispute. They canceled my
10 contract. The dispute didn't take place. They just
11 canceled my contract. I had no dispute.

12 Q. Okay. But you knew Eastwood was reserving
13 the right to terminate the contract before you signed
14 it?

15 A. I'm sorry. Could you repeat that?

16 Q. Yes, ma'am. You knew Eastwood was reserving
17 the right to terminate the contract before you signed
18 the contract?

19 A. I read paragraph 6, which I did not agree
20 with, that I knew that there could be a possibility
21 that they could terminate the contract. Not at three
22 weeks before I was closing. I was thinking the early
23 stages, something like that. But three weeks before I
24 was closing on a house, no, I had no idea. No idea.

25 Q. All right.

1 A. A terminate at will to happen like that.

2 Q. Right. So you did know Eastwood could
3 terminate the contract when you signed it?

4 A. Not at will. I thought they had to have a
5 dispute with me and that that dispute could then
6 result in terminating the contract. And made great
7 efforts to make sure that we didn't have a dispute.

8 Q. Do you remember when I asked you in your
9 deposition whether you knew Eastwood had the right to
10 terminate the contract before you signed it and you
11 said yes?

12 A. Well, I'm saying the same thing. But I
13 didn't know -- I'm getting more elaborate with my
14 response, so --

15 Q. I agree with that.

16 A. Okay.

17 Q. But my question is just didn't I ask you if
18 you knew Eastwood had the right to terminate the
19 contract, and you said yes?

20 A. In the context of your question, I answered
21 it correctly. My response to you is also leading back
22 to you that it also pre -- it prestated that I had to
23 have a dispute for them to terminate it.

24 Q. But Eastwood was always up front with you,
25 we're not going to change the terms of this contract.

1 They never deceived you, did they?

2 A. Yes, they did.

3 Q. Oh.

4 A. They did deceive me. They said that I --

5 Q. What did Eastwood do to deceive you?

6 A. They said I had to be in a dispute with them.
7 I wasn't in a dispute with them.

8 Q. Who said you had to be in dispute with them?

9 A. The contract said. The contract said I had
10 to be in a dispute with them. I had no dispute.

11 Q. Doesn't the contract say buyer shall have no
12 other rights to remedies should the seller exercise
13 such right to cancellation prior to closing?

14 A. But it says, how this contract is written
15 before, that a dispute had to arise that we both
16 couldn't mutually resolve. I didn't have any dispute
17 with you. We had no conversations. All you did was
18 call on a Friday afternoon three weeks before I'm
19 going to close and you tell me you're canceling my
20 home.

21 Q. Right. But you wanted to buy the house,
22 right?

23 A. I desperately wanted to buy that house.

24 Q. And Eastwood couldn't sell it to you, right?

25 A. I don't know that.

1 Q. Well, it's definitely a dispute, isn't it?

2 A. Well, it wasn't because you canceled the
3 contract.

4 MR. COOPER: Judge, again --

5 THE COURT: Overruled. Sit down.

6 BY MR. BRADLEY:

7 Q. Okay.

8 A. I'm sorry, I'm passionate about this.

9 Q. Yes, ma'am, I believe you.

10 When you were a vice president of the
11 international cosmetics company L'Oreal, which is
12 publicly traded, you negotiated contracts with other
13 parties, didn't you, on behalf of the company?

14 A. With a team of additional people, yes, I did,
15 negotiated contracts.

16 Q. And when you did that, you had the right to
17 tell other sides we won't agree to this or we insist
18 on certain terms?

19 A. We did. As mentioned in the deposition,
20 there was a discussion. And we had negotiations. And
21 we would sit around and we would agree that we
22 couldn't agree, or we agreed to disagree or we agreed
23 that, okay, your point is well. That never took
24 place.

25 Q. But before you as the vice president of

1 L'Oreal would obligate that company, there were
2 certain things you might not agree to that the other
3 side might want?

4 A. But we discussed it.

5 Q. Yes, ma'am. But that doesn't mean you have
6 to agree to it, does it?

7 A. No. But that's my point. We can have a
8 discussion to agree we disagree. There was no
9 discussion.

10 Q. So the problem is Eastwood wouldn't discuss
11 changing it with you and they just said we won't
12 change it?

13 A. They didn't talk to me at all. I was just a
14 peon. I was just a disregarded person and a piece of
15 paper that they decided for whatever reason, and I'm
16 not going to say it wasn't warranted or not, I can't
17 really tell you that, but they decided to cancel the
18 contract with no conversation at all.

19 It was just we are canceling this. Nothing. And
20 then when we reached out to have a conversation with
21 you, we wanted to be a partner to resolve if there was
22 an issue you had, but we were totally disregarded
23 again. Not even entertained, not even responded to,
24 just completely dismissed.

25 Q. Right. As a vice president of L'Oreal, if

1 you signed a contract on behalf of the company, would
2 you expect the company to honor the terms of that
3 contract?

4 A. You know, I would, because --

5 MR. COOPER: Judge, I'm sorry I keep on
6 cutting in. I don't think that Ms. Franquelin's
7 actions on behalf of L'Oreal are relevant to the
8 proceeding in front of the Court. We are talking
9 about --

10 THE COURT: Overruled. Objection is
11 overruled. Okay. Go ahead. She's doing a great job,
12 Counsel. Just keep it up.

13 BY MR. BRADLEY:

14 Q. As a vice president of L'Oreal, would you
15 expect L'Oreal to honor the obligations in a contract
16 you entered on its behalf?

17 A. You know, because we have a negotiation and
18 we sit across the table and we talk about gives and
19 takes and what we agree upon, yes, I would.

20 Q. Okay. So the contracts that you would honor
21 would be ones that are negotiated; but contracts which
22 are not negotiated, you wouldn't have honored them?

23 A. Well, that's the beauty of it. We negotiated
24 all our contracts, so we honored them all.

25 Q. So if you don't like what the other side

1 says, you just accept it, you don't negotiate it, and
2 then when you don't like the way it went, you bring a
3 lawsuit?

4 A. No. What happened is, it's kind of like in
5 any contract, you might lose a battle on something,
6 but in total you win the war. So we did -- it's
7 called give and take.

8 Q. Okay. So your position is Eastwood was
9 required to negotiate with you?

10 A. That's right.

11 Q. Okay. All right. So instead of negotiating,
12 you just signed the contract, which you did not intend
13 to honor, even though you didn't like it?

14 A. I, in good faith, based on the reputation
15 that Eastwood had, the assurances that I was given,
16 the circumstances of what was going -- what was going
17 on in the market, felt that it was a very small risk.
18 And then I thought I was being too paranoid being a
19 northerner.

20 I felt that, honestly, with everyone that I
21 had in contact -- and I mean this, and I say this to
22 Dion. I mean, they were very professional people and
23 I really felt like they were customer centric and that
24 this was a good partnership, good contract. But it
25 was like the behavior wasn't consistent with the

1 presentation.

2 Q. You knew about the risk and you decided to
3 enter it anyway because you wanted the house?

4 A. And based on assurances.

5 Q. Okay. You knew the risk of termination and
6 you decided I'm going to sign the contract anyway
7 because it's a low risk?

8 A. I knew the risks.

9 Q. Okay.

10 A. Based on assurances.

11 Q. Okay. The contract, it wasn't too
12 complicated for you to understand, was it? You
13 understood it.

14 A. There were certain parts that were not clear
15 to me. Yes, there was. And I had discussions with
16 Jan that I wasn't really clear on.

17 I'm not a proficient -- I don't buy real
18 estate as a hobby. As you can see, you asked me how
19 many homes I bought. They were purchases for
20 personal. I didn't do it as investment properties. I
21 bought homes. I'm not -- I'm not a legal professional
22 to review contracts.

23 Q. Yes, ma'am. Do you remember when I asked you
24 if the contract was too complicated for you to
25 understand and you said no?

1 A. I mean, in -- well, let me put it this way.

2 Q. Would it help to see your testimony?

3 A. Okay. Can I remind you that bona fide
4 disputes --

5 MR. BRADLEY: May I approach?

6 THE COURT: One second. One second. One at
7 a time. One a time, okay?

8 MR. BRADLEY: Your Honor, may I give the
9 witness a copy of her deposition?

10 THE COURT: You don't need to yet. She's
11 trying to respond to your question.

12 BY MR. BRADLEY:

13 Q. Go ahead, ma'am.

14 A. Again, in the context that you provided, I
15 said that I could understand the contract. But in
16 fact, as we're finding how this is unfolding, there
17 are things at face value that are not apparent on how
18 you're behaving.

19 A bona fide dispute, I thought a bona fide
20 dispute is that you needed to have a dispute with me.
21 Well, lo and behold, we had no dispute and the
22 contract was canceled.

23 So in my laymen's term, I thought I could
24 understand the contract. But apparently, it's very
25 clear I didn't because my definition of bona fide

1 dispute and your definition of bona fide dispute is
2 very different.

3 I did not know it was a terminate --
4 terminate at will contract. I would have never signed
5 a terminate at will contract.

6 MR. BRADLEY: Your Honor, may I present the
7 witness with a copy of her deposition?

8 THE COURT: You may.

9 BY MR. BRADLEY:

10 Q. Here's a copy of your deposition.

11 A. Thank you.

12 Q. Look on page 57. Just let me know when
13 you're there.

14 A. Okay. I'm there.

15 Q. At line 6, I asked you this question: "Do
16 you think the contract was too complicated for you to
17 understand?"

18 And you answered: "No."

19 Is that what you answered under oath on
20 November 11th, 2022?

21 A. Yes.

22 Q. All right.

23 A. And --

24 Q. Thank you.

25 MR. COOPER: Your Honor, I would ask that the

1 Court would allow my client to explain her response to
2 that.

3 THE COURT: Go ahead.

4 A. Okay. Again, you asked me a very
5 straightforward question. I gave you an answer, but,
6 again, I'm going to qualify.

7 Interpretation, as you can plainly see, what
8 I thought it meant is not what it meant. So,
9 obviously, I didn't know what the contract was
10 reading.

11 And again, I say to you I'm not a
12 professional real estate person. I read it as a home
13 owner looking at a contract, being told that I
14 couldn't make any changes to the contract, talking to
15 different people getting assurances and I made a
16 decision. But I thought a bona fide dispute, and we
17 didn't have a dispute, could cancel the contract.

18 Q. No one used any high-pressure sales tactics
19 on you, did they?

20 A. Well, as I said, it's not like they told me
21 that they were holding a gun to my head, but there
22 were people at the door. She told me she had two
23 buyers that were looking to purchase my house. She
24 told me if I didn't sign it, someone was ready to sign
25 right behind me.

1 I mean, every time I was there, there were people
2 at the door. It was busy. There wasn't a lot of new
3 builds going on.

4 Q. Yes, ma'am. If you would look at page 59 in
5 your deposition, please. Tell me when you're there.

6 A. I'm there.

7 Q. At line 3, I asked you this question: "Did
8 anyone use anything you would call high-pressure sales
9 tactics on you?"

10 And your answer was --

11 A. She didn't --

12 Q. "No, she was a very -- she was not like that.
13 No."

14 A. And that's what I'm saying to you.

15 Q. Is that what you said?

16 A. I did. Melissa did not apply high-pleasure
17 tactics.

18 Q. Good.

19 A. She shared with me what was going on in the
20 environment.

21 So did she say you better sign, you better
22 sign? No, there was none of that.

23 But did she share with me -- there's no
24 high-pressure tactics. But did she share with me
25 there was two people that were interested? I

1 observed. It was nothing to do with Melissa. I
2 observed the people behind me.

3 Q. Right.

4 A. So there was no tactics. But I'm not -- I
5 knew my environment. I could see what was going on.

6 Q. But no one from Eastwood used any
7 high-pressure sales tactics on you, did they?

8 A. She said that there was someone else to buy.
9 She did not use high-pressure tactics, but she told me
10 there was someone else looking to buy.

11 Q. So we can agree no high-pressure sales
12 tactics were used on you?

13 A. Yes.

14 Q. But you were told the truth, there were other
15 people who were interested in buying the property?

16 A. Yes.

17 Q. Okay. Do you think there's anything wrong
18 with telling you the truth, that there are other
19 people interested in buying the property?

20 A. No, I don't.

21 Q. Was anyone dishonest with you in signing this
22 contract?

23 A. Well, only by the fact that I feel the
24 contract reads different than what it actually -- what
25 we're going through right now.

1 So at the time in the circumstances, based on
2 what was happening, I felt, with the assurances and
3 everything, I felt like it was reasonable. But now to
4 see the behavior that your -- you're managing our
5 whole dismissal, no, I think it's not reasonable at
6 all. I think it's very unreasonable.

7 Q. Ma'am, if you would look at page 60 of your
8 deposition, please.

9 A. Okay.

10 Q. At line 3, I asked you this question: "In
11 the signing of the contract, was anyone dishonest with
12 you?"

13 You said: "No."

14 A. Well, I don't feel that Melissa was dishonest
15 with me. I think she was very factual.

16 Q. Is that still what you need to say? Do you
17 still agree that Melissa was dishonest?

18 A. I don't think that Melissa was dishonest, no.

19 Q. Was there anyone else who was dishonest with
20 you in signing the contract?

21 A. Well, I don't know. But I mean, I was given
22 assurances. So I'm thinking that they were honest.
23 But I would think, yes, they were all honest.

24 Q. As far as you know sitting here today,
25 everybody at Eastwood was honest with you?

1 A. I think so, yes.

2 Q. All right. You were free to walk away from
3 this deal at any time. No one made you come in and
4 sign this for the house.

5 A. No.

6 Q. All right. Maybe I asked that question
7 poorly.

8 Was there any restriction on you walking away
9 from this deal? Could you have walked away?

10 A. You know, Ward, I keep on going back to the
11 same thing. I could have walked away. But you know,
12 we're like really forgetting what that timeframe was.
13 I mean, we're almost three years past that point. So
14 let's just -- we were in the middle of COVID.
15 Everyone was freaking out. We didn't know how long it
16 was going to last. There was -- there was just so
17 much going on.

18 So did I feel a sense of urgency? Did I feel
19 anyone gave me pressure? The time that we were in
20 gave me pressure. My husband was sick. I needed to
21 build a house. I -- I felt that I had to because the
22 timeframe worked with the purchasing of this house and
23 it checked every box, so --

24 Q. So if you look at page 60 of your deposition
25 for me, ma'am.

1 A. 67?

2 Q. 61.

3 THE COURT: Let me interject here. I hate
4 trial by deposition. So if she testifies materially
5 different today than when she testified in her
6 deposition, it is proper to use that deposition for
7 impeachment. But just to go through the deposition, I
8 don't need for you to go there. Okay?

9 MR. BRADLEY: I understand. I just want to
10 get --

11 THE COURT: So I'm objecting to that.

12 MR. BRADLEY: I just want to clear answers to
13 my questions which I think are important for analyzing
14 procedural unconscionability. One of them is having
15 to do with --

16 THE COURT: I'm with you. I'm with you. But
17 the way we do that is you ask her a question. If she
18 testifies materially differently than what she
19 testified to in black and white on that paper, then
20 you take her to that page and that line and you ask
21 her that question again.

22 And then my job is to figure out whether or
23 not she's testifying differently today than she did
24 then. But that's not -- I'm not hearing that so far
25 today. But go ahead.

1 MR. BRADLEY: Let me try again.

2 THE COURT: All Right.

3 BY MR. BRADLEY:

4 Q. Page 60.

5 THE COURT: First ask her the question.

6 What's the question?

7 MR. BRADLEY: I asked her if she was free to
8 walk away from the transaction. She said a lot, but I
9 don't think she answered the question.

10 A. Yes, I was free. But again, there --

11 BY MR. BRADLEY:

12 Q. Okay.

13 A. -- were market circumstances that I felt
14 compelled I had to stay in.

15 Q. All right. No one at Eastwood made you stay
16 in, you could always leave?

17 A. That's true.

18 Q. All right. The only concern was you would
19 lose your earnest money?

20 A. My concern is that I wouldn't find a house
21 for us in that time. It was market circumstances.

22 Q. You could have bought a house from another
23 seller, couldn't you?

24 A. You know, again, we saw 80 houses. We looked
25 everywhere. There wasn't very much out there. So

1 maybe, but not in that timeframe.

2 Q. You just didn't find a house that you liked
3 out of the other 80 houses that you saw?

4 A. For a myriad of reasons.

5 Q. Right. But there are other houses for sale?

6 A. There are -- there were other houses.

7 Q. Right. And no one hid anything from you when
8 you're signing these contracts?

9 A. No one hid anything from me; what do you mean
10 by that?

11 Q. I'm just asking, did anyone hide anything
12 from you when you're signing the contract?

13 A. You know, the contract is a contract.
14 Nothing was hid. I just think they didn't -- I had to
15 review the contract. There was nothing hidden. I
16 mean, other than the fact that they wouldn't negotiate
17 the contract. Nothing was hidden, but they wouldn't
18 negotiate it.

19 Q. They were completely up front with you about
20 the contract?

21 A. Very. No negotiations. Take it or leave it.

22 Q. All right. And did Eastwood promise you
23 anything different than from what's in that contract?

24 A. I feel, yes.

25 Q. Okay.

1 A. They -- we were supposed to get in a dispute.
2 And if we get into a dispute, we would try to resolve
3 it. And that didn't take place. To me, that's the
4 crux of this whole thing. Like we didn't get in a
5 dispute. We had no discussions. We were just -- it
6 was just dismissed.

7 Q. All right. So on page 63, I asked you: "Did
8 Eastwood promise you something that wasn't in the
9 written contract or something different than was in
10 the written contract?"

11 And you said: "No. I mean, just really the
12 interpretation of the contract, but no." Right?

13 A. Well, and that's what I'm saying now, right?

14 Q. Okay. Good.

15 A. So I'm consistent.

16 THE COURT: That's why I'm sitting up here.

17 MR. BRADLEY: Understood.

18 THE COURT: I understand that.

19 BY MR. BRADLEY:

20 Q. All right. And Eastwood did refund the money
21 you deposited?

22 A. They did.

23 Q. All right. This contract gave Eastwood the
24 option to walk away and refund your deposit, right?

25 A. This contract gave -- can you repeat that,

1 please?

2 Q. Sure. It gave Eastwood the right to walk
3 away and refund your deposit?

4 A. Yes, uh-huh.

5 Q. And you believe that to be one-sided?

6 A. Well, just because, if the tables were
7 turned, you know, it wouldn't be the same. But yes, I
8 do feel it's one-sided. Yes.

9 Q. But you knew about it when you signed it?

10 A. I absolutely did.

11 Q. All right. All right. Paragraph 28 of the
12 contract. We haven't looked at that yet. Can you
13 take a look at that, ma'am?

14 A. Sure. Okay.

15 Q. That paragraph says that if this house was
16 damaged or burns down or vandalized or anything goes
17 wrong with it before the sale, Eastwood is responsible
18 for the entire loss, right?

19 A. Yes.

20 Q. Whether it's a lightening bolt, hurricane,
21 anything, Eastwood eats the whole loss?

22 A. Absolutely.

23 Q. And you think that's fair, that Eastwood
24 would have to pay the entire loss?

25 A. I do, only because Eastwood and a builder

1 would have insurance to -- and it would be built on
2 the cost of goods for building that house. So if they
3 did have that kind of situation, you could rebuild and
4 you have the insurance to cover you.

5 Q. But the contract allocated that risk to
6 Eastwood?

7 A. Well, again, that's about the only thing
8 that's in there. But you have it covered. You have
9 insurance for these kind of things.

10 Q. I didn't ask you that. I just asked if the
11 contract allocates the risk of loss to Eastwood.

12 A. It does, yes.

13 Q. All right. And you invested about \$14,000 in
14 this deal, right?

15 A. Yes.

16 Q. Do you know how much Eastwood had invested in
17 the deal?

18 A. I don't. We went down this before. I don't.

19 Q. You have no idea?

20 A. I have no idea.

21 Q. Would it be reasonable that at least \$150,000
22 to buy the lot and build the house?

23 A. I don't know.

24 Q. You have no idea?

25 A. I really don't.

1 Q. Would you agree that the investment from
2 Eastwood to purchase the land, build the neighborhood,
3 permit the house, buy the materials, put the house
4 together would be significantly more than you
5 invested?

6 MR. COOPER: Objection, Your Honor.
7 Eastwood's cost of goods sold has nothing to do with
8 the unconscionability of the contract.

9 THE COURT: Relevance? Is that your
10 objection?

11 MR. COOPER: Yes, Your Honor.

12 THE COURT: I'm going to sustain that.

13 MR. BRADLEY: Judge, if I could be heard,
14 please.

15 THE COURT: We will get into how much the
16 house cost to build and what they contracted to buy it
17 for. I don't know even know if the house ever got
18 constructed at this point and then later sold, but I
19 assume it did.

20 MR. BRADLEY: It's not been sold. It's still
21 sitting there.

22 THE COURT: I know Eastwood is in the
23 business of making money. They build houses for a
24 profit. That's what they do.

25 MR. BRADLEY: The purpose of this testimony

1 and the reason we believe it's relevant is this: One
2 of the factors of unconscionability is the risk
3 allocated to each side. This is a factor for
4 substantive unconscionability.

5 If the risk to her is \$14,000 and the
6 risk to Eastwood is \$500,000, then it would be more
7 reasonable to allocate who can terminate the contract
8 and how they can terminate it, since one of the
9 inquiries here is, is this substantively unfair such
10 that no reasonable person would agree to it and no
11 reasonable person would ever try to enforce it.

12 And relative risks and investments are
13 important for the Court to hear so that you can
14 evaluate.

15 Eastwood has put \$500,000 in the deal. She
16 has put \$14,000 in the deal, which she receives back.
17 Is that a reasonable allocation of risk or is it
18 unreasonable? That's one of the factors to consider
19 whether it's substantively unconscionable.

20 Like if she had already bought the
21 house, like in the Damico case, she's invested
22 \$600,000, then the risk is on her. That's what
23 happened in Damico. That's not what's happened here.

24 THE COURT: Right. But this is a terminate
25 contract which is -- to my knowledge, has never arisen

1 up until now, correct?

2 MR. BRADLEY: Yes.

3 THE COURT: Your point is, we have -- we have
4 the cost of doing business. We have to stay in
5 business. All right? But there's been no fire. What
6 I'm looking for is a dispute. Okay?

7 This lady testified they had no dispute.
8 They had no dispute. They had no discussion. That's
9 her testimony so far.

10 The way I read the contract, that's within
11 the clause -- I think that's in 26. I think that's
12 where we have been spending most of the time.

13 I understand there's a risk of loss in the
14 event of fire.

15 MR. BRADLEY: Right.

16 THE COURT: There's no testimony there's been
17 a fire out there.

18 MR. BRADLEY: Right. There is not testimony,
19 but the whole contract as to where the risks are
20 allocated is important. Because the question is, is
21 it unreasonable to allocate an ability for Eastwood to
22 terminate the contract based upon who has invested the
23 most into the deal, the risk. That's one of the
24 factors of substantive unconscionability.

25 MR. COOPER: Your Honor, he can argue that,

1 but I don't think she's in a position to testify to
2 that.

3 MR. BRADLEY: My question is this, Judge:
4 Would you agree that Eastwood has invested
5 substantially more money into this deal than you did?

6 THE COURT: If they built the house, I would
7 imagine so far.

8 MR. BRADLEY: So she knows that. That's why
9 I'm asking the question.

10 THE COURT: You can ask her that question,
11 but I don't know where we are going with this fire
12 situation.

13 MR. BRADLEY: Just where the risk is
14 allocated, Judge, that Eastwood had the risk for that
15 and she had the risk of Eastwood terminating.

16 MR. COOPER: My objection is as to the
17 relevance to this line of questioning. One, the
18 Damico case speaks nothing about risk of loss in the
19 new home purchase agreement scenario. So I don't know
20 where this factor comes in.

21 My research of these factors, I don't see the
22 relative investment having much weight if ever listed
23 in these factors.

24 Also, this isn't the appropriate witness to
25 testify about Eastwood's relative investment in

1 whatever house that they intended or didn't intend to
2 sell. So she doesn't have -- there's been no
3 foundation for her knowledge about this line of
4 questioning. She said she doesn't know. We can ask
5 her 15 different types of scenarios, but she's not
6 going to know. She's not the appropriate witness for
7 this.

8 THE COURT: Okay. Do you have somebody later
9 that's going to address that? That's not y'all's
10 burden. That's theirs.

11 MR. COOPER: That needs to be something
12 Mr. Bradley wants to prove.

13 THE COURT: I'll allow a couple more
14 questions. And let's move on.

15 BY MR. BRADLEY:

16 Q. Would you agree that Eastwood invested
17 substantially more in this transaction?

18 A. I think that we need to really look at the
19 financials that you have received. But there were
20 additional moneys and emotional investment that I did.

21 So I had moved my house. I had hired an interior
22 decorator. I had expenses incurred for things that
23 were going in that house. I had a pool that deposits
24 were putting in on. I had so many expenses that I had
25 incurred, and then additionally incurred as the

1 cancellation took place.

2 So you have talked about your expenses with
3 you. But the fact that I was three weeks from closing
4 my house, there's a whole list of expenses that I
5 could add. And then what's the ratio of expense to
6 you and your -- your total business and my total
7 business of life?

8 I mean, you took me out of the market when I
9 could have bought a house a year earlier at a far less
10 expensive price. So there is also the opportunity of
11 that expense for me now to go back in. So let's add
12 that to my balance sheet. So let's not just take your
13 \$14,000.

14 I have -- a year later, I'm back in the market.
15 The same house I wanted to buy is \$700,000 more I
16 found in that area. I mean, all these expenses I
17 incurred with moving my home, putting it into storage,
18 paying off my decorator because I had to cancel
19 everything and we couldn't get things canceled. I had
20 a pool deposit down. I was -- we were in the thick of
21 it. I was three weeks away. So it's not just
22 \$14,000.

23 Q. Would you take a look at paragraph 25 that
24 you testified to earlier with your lawyer?

25 A. 25?

1 Q. Yes, ma'am. Whenever you're ready to talk
2 about it.

3 A. I'm there.

4 Q. Thank you. You read this paragraph as well
5 before you agreed to it?

6 A. I did.

7 Q. And you even said that you noticed you didn't
8 like it but you agreed to it anyway?

9 A. Yes. There was a provision I didn't like,
10 yes.

11 Q. And it said: "In the event of a breach of
12 this agreement by the seller" -- you know what that
13 means?

14 A. I do.

15 Q. It means if Eastwood does something it's not
16 supposed to do, right?

17 A. That's correct.

18 Q. -- "the buyer may recover the deposit;
19 however, in no event will seller be liable for
20 consequential damages or for damages or delays and
21 buyer hereby releases and waives any claims for such
22 damages."

23 A. I do read that.

24 Q. But you agreed to do that when you signed the
25 contract?

1 A. But what you are referencing, the financial
2 burden of you versus me and my response to you was in
3 response -- you can't just take the monies that I
4 deposited with Eastwood, that there are a lot of
5 external factors that need to be included. I did read
6 this.

7 Q. I just asked you if you agreed with the
8 damage limitation in paragraph 25. Did you?

9 A. I mean, did I agree? Did I sign the
10 contract? I did.

11 Q. All right. Good. Good. All right.

12 Now, earlier you said that a house had sold
13 after your purchase agreement was canceled. Do you
14 recall that?

15 A. I do.

16 Q. This was a sale from a private individual in
17 that neighborhood, right?

18 A. That's correct.

19 Q. Who had already bought a house before the
20 problem came up with the covenants, right?

21 A. But still existing in phase four, correct.

22 Q. Yes.

23 A. Uh-huh.

24 Q. And this was somebody, a private person, who
25 had the right to buy or sell their house as they

1 wished. Is that correct?

2 A. Yes.

3 Q. Not Eastwood?

4 A. That's right. But we were told by Eastwood
5 in a deposition that -- in fact, the HOA issue was so
6 severe that even the people that had purchased the
7 houses would have an issue because they couldn't get
8 title. And because they couldn't get title, they
9 couldn't resell it.

10 And because of that, to see it sold, was that --
11 and just one step further. I was paying cash for my
12 house. So I could have purchased that house and I
13 could have been talked to to take the risk.

14 No one talked to me. I could have said I'll take
15 the risk at purchasing the house. But there wasn't a
16 negotiation.

17 Q. Right. But perhaps Eastwood didn't want to
18 take the risk of selling you a house that wasn't
19 properly permitted or within --

20 A. But you had 14 houses prior --

21 MR. COOPER: Excuse me. I'm sorry. The
22 objection is that it lacks foundation and personal
23 knowledge of this witness.

24 Again, Mr. Bradley is asking Ms. Franquelin
25 to testify to what Eastwood's intentions or thoughts

1 were. They have witnesses that can present that
2 testimony.

3 MR. BRADLEY: I'm happy to present that
4 testimony. I will, Judge.

5 THE COURT: Okay.

6 BY MR. BRADLEY:

7 Q. My question is this: You were willing to
8 take that risk, but perhaps Eastwood wasn't. Is that
9 reasonable?

10 A. I would have liked the discussion. There was
11 no discussion.

12 Q. Right. I didn't ask you about discussion. I
13 asked you would it be reasonable for Eastwood to not
14 be willing to take that risk?

15 A. I don't know.

16 All right. So you would agree, though, that
17 after your purchase agreement was canceled Eastwood
18 had not sold a single house in this neighbor?

19 A. From my knowledge, they have not sold a
20 single unit.

21 Q. And after your purchase agreement was
22 canceled, they haven't built a single house in this
23 neighborhood?

24 A. I think they have. They've been building.

25 Q. In this neighborhood?

1 A. Yes, they have. They have been building
2 houses.

3 Q. Which one?

4 A. Several houses. They've been building.

5 Q. In this neighborhood?

6 A. Yes, they have.

7 Q. Can you tell me the address?

8 A. I'd like to -- I don't know the numbers. I
9 don't have -- but I can provide it to you. They have
10 been building and completing houses, yes.

11 Q. In phase four?

12 A. In phase four. They've been -- there were
13 houses that when we went in dispute that were frozen.
14 But then they have since then been building the
15 houses. They haven't put them up for sale, but
16 they've been building them.

17 Q. No houses have been sold in phase four after
18 your purchase agreement was canceled?

19 A. That's correct.

20 Q. All right.

21 A. Except for resale.

22 Q. Right, by Eastwood. Eastwood hasn't sold a
23 single house, correct?

24 A. No, they have not.

25 Q. And Eastwood offered you the opportunity to

1 have a right of first refusal when the problem with
2 the covenants was fixed?

3 A. At fair market price, yes.

4 Q. Okay. But you didn't want that?

5 A. Well, again, it wasn't an offer. It was like
6 here's your mutual release, sign. It wasn't a
7 discussion. That was the package they presented.

8 Q. But you didn't want it. You rejected it.

9 A. I didn't sign it.

10 Q. So would you agree that is a rejection?

11 A. I didn't feel it was fair. I didn't sign it.

12 Q. So you rejected it because you didn't think
13 it was fair?

14 A. Again, there are -- yes.

15 Q. Okay. Thank you.

16 THE COURT: Redirect, Mr. Cooper?

17 MR. COOPER: Just a little bit, Your Honor.
18 I will do my best to just a little bit.

19 THE COURT: Just don't say two questions. I
20 know better than that.

21 MR. COOPER: And I've learned not to promise
22 time either. Ten minutes can sometimes be a lot
23 longer.

24 THE COURT: I'll limit your time after a
25 minute. Go ahead. Redirect, though, just what he

1 covered.

2 MR. COOPER: Yes, Judge.

3 REDIRECT EXAMINATION

4 BY MR. COOPER:

5 Q. Ms. Franquelin, you were asked questions
6 about the risk of loss provision within the contract.
7 Do you remember that?

8 A. Yes.

9 Q. At the time that you signed the contract with
10 Eastwood, did you own any title to the lot or anything
11 like that?

12 A. No, I did not.

13 Q. Was the house built at all?

14 A. No.

15 Q. Did you have any insurable interest in the
16 property?

17 A. No. No.

18 Q. At the time you signed this contract,
19 Eastwood owned the property?

20 A. Yes, they did.

21 Q. It was owned wholly and completely?

22 A. Yes.

23 Q. Okay. And while we're talking about risk of
24 loss, Eastwood specifically chose to lock you in at a
25 purchase price on this contract for a future-built

1 house. Is that right?

2 A. That's correct.

3 Q. So you signed the contract in September of
4 2020 expecting to close on a house that's going to be
5 built at some point?

6 A. July of 2021.

7 Q. Okay. And instead of locking you in at a
8 purchase price, Eastwood could have chosen to build
9 the house without locking anybody in --

10 MR. BRADLEY: Your Honor, I object. He's
11 just leading her to agree with whatever it is he's
12 saying.

13 THE COURT: You are leading. Go ahead.
14 Restate it. Go ahead.

15 BY MR. COOPER:

16 Q. Instead of locking you into a contract, could
17 Eastwood have chosen to build the house and list it
18 for whatever the fair market value would have been at
19 the time of closing?

20 A. Yes, they could have.

21 Q. Instead of doing that, they locked you in at
22 a purchase price?

23 A. That's right.

24 Q. And by doing so --

25 A. Took me out of the market.

1 Q. -- there is no risk?

2 A. Yes.

3 Q. When you entered into contracts in your role
4 as L'Oreal, those -- were those contracts with other
5 commercial enterprises?

6 A. When you say commercial, can you --

7 Q. You weren't contracted with specific
8 individuals who were going to be purchasing L'Oreal
9 products, were you?

10 A. Or shipping, like customer service shipping
11 things. Yes, I interacted with those individuals.

12 Q. Okay. When you were doing contracts at
13 L'Oreal, as I understand it there was a process that
14 the company employed to review a contract and
15 negotiate it and -- but there's a process.

16 A. Yeah, exactly. So L'Oreal is a very big
17 behemoth. And no one person can review and sign up on
18 a -- on a contact.

19 There are core competencies in certain
20 individuals that are -- it's a task force. You come
21 together and we go and we pick out contracts.

22 So me solely signing that contract is I'm
23 just one piece of that puzzle. There are
24 representatives from each area of core competence that
25 review and then everyone brings forward and a decision

1 is made. So it is not me solely reviewing and
2 approving a contract.

3 Q. And at the risk of stating the obvious, you
4 didn't enter the contract with Eastwood on behalf of
5 L'Oreal, did you?

6 A. No.

7 Q. And when you entered the contract with
8 Eastwood, you did so as a consumer of the home that
9 they were going to be building for you?

10 A. Yes, that's correct.

11 Q. And Mr. Bradley asked you a question about
12 whether or not anything was hidden from you in the
13 process of contracting with Eastwood Homes?

14 A. Yes.

15 Q. And was the -- was Eastwood's intention about
16 what the company meant in paragraph 26 -- or what
17 Eastwood intended paragraph 26 to mean, was that
18 hidden from you at the time you entered into the
19 contract?

20 A. Yes. Yes.

21 Q. All right. Thank you, ma'am.

22 MR. COOPER: Your Honor, may the witness be
23 excused?

24 THE COURT: I've got a couple of questions
25 for her.

1 THE WITNESS: Okay.

2 THE COURT: All right. Ms. Franquelin, I
3 think you covered this, as far as the dispute goes,
4 you never had a discussion or any determination, any
5 type of discussion at all prior to the termination of
6 the contract. Is that right?

7 THE WITNESS: Nothing. Nothing.

8 THE COURT: So there was no dispute between
9 you and Eastwood related to the termination?

10 THE WITNESS: With their team, all on good
11 terms. Nothing.

12 THE COURT: Okay. And so there was no
13 attempt to resolve any dispute. Is that what your
14 testimony is?

15 THE WITNESS: Yes, it is.

16 THE COURT: All right. So let me go back a
17 little bit to your history. You have bought several
18 houses over time. I assume you bought them in New
19 York or New Jersey.

20 THE WITNESS: Uh-huh, new Jersey.

21 THE COURT: Typically, y'all up there have
22 multiple parties at the closing table, do you not?

23 THE WITNESS: We definitely do.

24 THE COURT: The buyer has got a lawyer, the
25 seller has got a lawyer. The mortgage company has got

1 a lawyer.

2 THE WITNESS: Yes.

3 THE COURT: The real estate agent might have
4 a lawyer there?

5 THE WITNESS: Well, usually it's a realtor,
6 everyone who's buying and selling has a lawyer and the
7 title company.

8 THE COURT: Okay. And in those instances,
9 everybody is negotiating the con -- typically is
10 negotiating the terms of the contract.

11 THE WITNESS: Yes. So before I would sign, I
12 would get a contract. I would send it to my lawyer.
13 They would review it and they work with the seller.
14 And they would go back and forth, resolve, we both
15 sign, and then all was good. And you know, my lawyer
16 looked out for my interests.

17 THE COURT: Okay. And here, what gave you
18 comfort to the contract was that based on agents --
19 seller's agents' experience, they had never invoked
20 that clause, that termination clause.

21 THE WITNESS: That's right.

22 THE COURT: So you felt confident you were
23 putting your money down, going to the closing table
24 and buying a house. What was your closing date
25 supposed to be?

1 THE WITNESS: It was June. So I got to June
2 4th and I had a preclose walk-through that was
3 supposed to happen in three weeks, and it was like the
4 first week of -- like the last week of June or first
5 week of July.

6 THE COURT: Okay. And when did you sell your
7 house?

8 THE WITNESS: I sold it in April, but we were
9 closing on it the week after I was going to close on
10 the house in -- at Eastwood so that I could buy the
11 house and then move all my belongings from our house
12 to South Carolina.

13 THE COURT: Okay. So your plan was to close
14 on this house before you sold that one?

15 THE WITNESS: Yes.

16 THE COURT: That didn't happen?

17 THE WITNESS: That didn't happen.

18 THE COURT: I assume you sold your house in
19 Jersey?

20 THE WITNESS: Yeah. I couldn't get out of
21 the contract. It was sold.

22 THE COURT: That's when you went to Virginia?

23 THE WITNESS: That's when I went to Virginia.

24 THE COURT: Okay. Thank you. That's all the
25 questions I have. If y'all have got any follow-up,

1 you can ask. Okay?

2 MR. BRADLEY: No, sir. Thank you.

3 THE COURT: Very good. Ms. Franquelin, you
4 may step down. Thank you, ma'am.

5 THE WITNESS: Thank you. Thank you.

6 THE COURT: All right. Folks, we've gone a
7 little far afield of where I thought we were going to
8 go today and this is taking longer than I thought it
9 would. I know y'all have got at least one more
10 plaintiff you want to put forward. I suggest we go
11 ahead and break now for lunch. Let's come back --
12 let's try and get back here -- if we can get back here
13 at a quarter to one, we can. It is hard to find lunch
14 here within the hour. So let's try to get back here
15 at 1:45. We'll start at 2. Okay? Like I said, we're
16 only going to 5 today.

17 MR. BRADLEY: Thank you, Your Honor.

18 THE COURT: All right. Very good.

19 (Recess was taken at 12:40 p.m.)

20 THE COURT: I hope y'all got lunch. I was
21 reading a little bit over lunch and I wanted to kind
22 of see if we can refocus a little bit, because I -- if
23 not, we're going to be here for -- we are trying much
24 more case than I think we need to.

25 So it sort of jumped out at me. I wanted to

1 bring this to y'all's attention because I think this
2 is important.

3 Looking at the case that Mr. Bradley handed
4 up, *Damico vs. Lennar* case, and which was also cited
5 by the plaintiffs in their brief, and it does say a
6 determination of whether a contract is unconscionable
7 depends upon all the facts and circumstances of the
8 case, but I think those facts and circumstances come
9 at the time of the entry into the contract.

10 The Fourth Circuit, in that same paragraph,
11 there needs to be a case-by-case analysis to address
12 the unique circumstances inherent in the various types
13 of consumer transactions, they cite. And then they go
14 to the Fourth Circuit has instructed courts to focus
15 generally on whether the arbitration clause is geared
16 towards achieving an unbiased decision by a neutral
17 decision-maker.

18 They cite the Simpson case, which is *Simpson*
19 *vs. MSA* and then *Hooters of America vs. Phillips*,
20 which was a Fourth Circuit case from 1999. And then
21 to go on, the touchstone of analysis of
22 unconscionability begins with the presence or absence
23 of meaningful choice, and then it goes on to cite the
24 *D.R. Horton* case, whether one party lacks a meaningful
25 choice, typically speaks to fundamental fairness of

1 the bargaining process.

2 I want to make sure we focus on the creation
3 of the contract. Thus, in determining whether an
4 absence of meaningful choice taints a contract term,
5 in this instance an arbitration, the courts must
6 consider all facts and circumstances, one, the
7 relative disparity in the parties' bargaining power;
8 two, the parties' relative sophistication; and three,
9 whether the plaintiffs are a substantial business
10 concern of the defendant.

11 So those are some of the factors to look at.
12 I just think we just need to make sure we stay focused
13 on that. There is plenty of opportunity to try this
14 case another day on other issues, but I just want to
15 make sure we stay focused on where we are. Okay?
16 That we get to that point. All right?

17 So with that, any comments? Are y'all ready
18 to proceed?

19 MR. BRADLEY: Just a question, if I may.

20 THE COURT: Sure.

21 MR. BRADLEY: It's my understanding that that
22 goes to procedural unconscionability, and there are
23 two procedures. So the other things that I was
24 talking about go to substantive, which is the entire
25 presentation, is the contract fair as a whole, which

1 of course is what substantive unconscionability is all
2 about.

3 I believe what you just read was procedural.
4 And my understanding of how the two doctrines work is
5 it's sort of a balancing test between the two,
6 although they focus on different aspects, procedural
7 focuses on how the contract was entered. Substantive
8 focuses on what's actually in the contract and what's
9 happened. So that's my analysis of it. I don't -- I
10 just don't want to run -- I'd like to put that to you,
11 Judge, because I think it goes beyond what you just
12 said. Since you asked me if I had a comment, I did.
13 Thank you.

14 THE COURT: I think one of the balancing
15 tests is like a sliding scale.

16 MR. BRADLEY: Yes.

17 THE COURT: One may outbalance the other.
18 Like anything else, you have 100 percent of one and
19 zero of the other, you've got 50/50, you've got 95/5,
20 however it goes back and forth.

21 From that standpoint, yes, it's balancing,
22 but I think it's more of a sliding -- it's not one in
23 favor of the other. There are two factors under that
24 analysis and you've talked about that.

25 MR. COOPER: Yeah. The only thing I would

1 say to that, Your Honor, and we completely agree with
2 the way you laid out the law there, is that the facts
3 and circumstances that are relevant in an
4 unconscionability determination go to the procedural
5 side of the equation, the bargaining power, the
6 sophistication of the parties, the things you
7 mentioned.

8 But when you shift over to the substantive
9 unconscionability piece, the examination is over the
10 terms of the agreement, not over what happened, as
11 Mr. Bradley just said. And that's why in our motion
12 in limine we talked about whether phase four was
13 incorporated or not, whether it was an impediment to
14 closing or not.

15 None of that stuff is relevant. Because
16 Judge Dennis has already ruled those facts mattered --
17 they are completely irrelevant.

18 THE COURT: They matter not.

19 MR. COOPER: They matter not. And so that's
20 why interpreting these terms as written is the focus
21 on substantive unconscionability. And we just -- we
22 would renew our position that the facts and
23 circumstances just don't -- it's just not an unbounded
24 analysis. And we're going to try to keep everything
25 as focused as possible moving forward.

1 THE COURT: Very good. Are the plaintiffs
2 ready to proceed?

3 MR. COOPER: Yes, Your Honor.

4 THE COURT: All right. Call your next
5 witness.

6 MR. COOPER: Your Honor, the plaintiff calls
7 Kaitlyn O'Grady.

8 THE COURT: All right. Ms. O'Grady, come on
9 up.

10 KAITLYN O'GRADY, having been duly sworn to
11 tell the truth, the whole truth, and nothing but the
12 truth, was examined and testified as follows:

13 THE COURT: Give me your full name.

14 THE WITNESS: Kaitlyn Elizabeth O'Grady. I
15 live at 38 Bogard Street, Charleston, South Carolina,
16 29403.

17 THE COURT: How do you spell Kaitlyn?

18 THE WITNESS: K-A-I-T-L-Y-N.

19 THE COURT: Thank you.

20 MR. COOPER: Thank you, Judge. May it please
21 the Court.

22 DIRECT EXAMINATION

23 BY MR. COOPER:

24 Q. Ms. O'Grady, you have introduced yourself to
25 the Court. Where do you currently live again?

1 A. I live at 38 Bogard Street in Charleston.

2 Q. And how long have you lived there?

3 A. I've lived there since not this past February
4 but February of 2022.

5 Q. Okay. At the time that you entered the
6 contract with Eastwood Homes, where were you living?

7 A. I was living in Jersey City.

8 Q. Okay. And what do you do for a living?

9 A. I'm an accountant.

10 Q. Did you go to college?

11 A. I did.

12 Q. Did you get a masters in accounting?

13 A. I did not get a masters. I have a BA in
14 accounting.

15 Q. Okay. And you passed all of your accounting
16 exams to be a certified accountant?

17 A. Yes. I'm a CPA and licensed in New York.

18 Q. Okay. And do you work as an accountant?

19 A. I do. I'm the assistant controller at a fund
20 right now.

21 Q. And when you say a fund, what do you mean?

22 A. So it's called a business development
23 company. We invest in credit, so loans. I market
24 companies.

25 Q. Okay. And what does a controller do?

1 A. So I maintain the books for the company. I
2 do, you know -- I produce statistics for, you know,
3 investor presentations.

4 But mainly, you know, it's general ledger
5 maintenance, creating financial statements. And for
6 our public funds, creating financial statements that
7 get submitted to the SEC.

8 Q. Okay. Have you ever worked as a real estate
9 developer?

10 A. I have not.

11 Q. Are you a real estate developer?

12 A. No.

13 Q. At the time that you entered into the
14 contract with Eastwood Homes, did you enter into that
15 contract as an individual home buyer?

16 A. Yes.

17 Q. And so in your contract with Eastwood Homes,
18 were you a consumer of their building product?

19 A. Yes.

20 Q. Are you married?

21 A. Yes.

22 Q. Is your husband present?

23 A. Yes.

24 Q. And what does he do for a living?

25 A. He's a property manager.

1 Q. Okay. What made you guys decide to move to
2 Charleston?

3 A. So my college roommate lived here. We
4 visited her a number of times. We really enjoyed
5 living -- visiting her here. And then my sister and
6 brother-in-law moved here. And we visited them kind
7 of in the middle of the pandemic and stayed with them
8 for a little bit more of an extended amount of time.

9 And we really viewed this as somewhere that we
10 could grow our family. We didn't have children at the
11 time. We have subsequently had a child. But we
12 really viewed this as somewhere that we could provide
13 a better life for him and hopefully more children and
14 a place where we could afford to have our family come
15 visit us and, you know, host people, which was, you
16 know, a big part of buying this particular house. Our
17 whole families were in New York.

18 Q. How did you hear about Swygerts Landing?

19 A. The same friend I just referenced actually
20 lived in a different phase in Swygerts Landing.

21 Q. Okay. And the house that you were looking to
22 buy in Swygerts Landing, was it unique to you in any
23 way?

24 A. Yeah. It was customizable for us. So it was
25 one of the only homes we looked at that we were going

1 to be able to make to our specifications, which was
2 important to us.

3 I was going to be working fully remote. And
4 like I said, we were expecting to have family come
5 visit often since our family doesn't live here.

6 Q. Okay. You were present in the courtroom for
7 the testimony that was provided by Ms. Pat Franquelin.
8 Is that right?

9 A. Correct.

10 Q. Was your experience surrounding the formation
11 of the contract with Eastwood Homes similar to that of
12 Ms. Franquelin's?

13 A. Yes, very similar. We had the similar
14 experience of marking up the contract, bringing it to
15 them, asking if certain things can be changed or
16 struck or edited in any way, especially given we were
17 moving in a similar manner. And we were told nothing
18 could be changed, you know. She kind of laughed at
19 me, not in a malicious way, but laughed and was like,
20 that's cute, but we don't change these.

21 Q. Okay. And so in terms of the process
22 surrounding the formation of the contract with
23 Eastwood Homes, did you ask that the company make
24 changes to the new home purchase agreement?

25 A. Yes. Yes.

1 Q. And did they make any changes to the new home
2 purchase agreement?

3 A. No.

4 Q. Did they tell you whether they would consider
5 making any changes to the new home purchase agreement?

6 A. They told us they would not consider it.

7 Q. Okay. Did they tell you whether or not that
8 that contract was a form contract?

9 A. They said, what they said exactly, this is a
10 form contract, we don't edit these for anyone, they
11 are as they stand.

12 Q. And who are you communicating with on behalf
13 of Eastwood Homes?

14 A. Melissa Guggisberg as well.

15 Q. What's your understanding of what her role
16 was?

17 A. My understanding was she was their sales
18 representative for their new model homes.

19 Q. Okay. Prior to entering into the contract
20 with Eastwood Homes, had you ever purchased a home
21 before?

22 A. No.

23 Q. So the house that you were going to be buying
24 from Eastwood Homes, was that your first home?

25 A. Correct.

1 Q. Okay. And did y'all have a realtor?

2 A. We did.

3 Q. Okay. And what is your understanding of what
4 your realtor's role was in the process?

5 A. So she came with us to the showing. She
6 reviewed the contract with us. And she kind of gave
7 us advice on, you know, who Eastwood was as a company,
8 their representation of the region, and how builder
9 homes work, you know.

10 We had a number of friends that have
11 purchased homes and none of them were build homes and
12 so we didn't really know the process and how, you
13 know, it seems very different than buying a house from
14 a private buyer. So she kind of guided us in that
15 process.

16 Q. Okay. Did you pick a specific lot to
17 purchase?

18 A. We did.

19 Q. Okay. And did you pick a specific floor plan
20 to purchase?

21 A. We did.

22 Q. All right. And was there a price that was
23 set for the house that you were going to be buying?

24 A. Yes.

25 Q. And who set the price?

1 A. Eastwood did.

2 Q. Did you attempt to negotiate the price at
3 all?

4 A. We did.

5 Q. And did Eastwood negotiate on the price?

6 A. No.

7 Q. You said that you requested changes to
8 provisions within the contract?

9 A. Yes.

10 Q. Do you remember which provisions you
11 requested that there be changes made to?

12 A. For 25 and 26, specifically relating to
13 damages and dispute resolution.

14 Q. Okay. And why did you request those changes
15 be made?

16 A. The damages of \$100 to me seemed kind of
17 egregious. We're moving. Moving costs a lot of
18 money. My husband was changing his job. And he was
19 probably going to take a pay cut. I was taking -- I
20 was negotiating with my job. And they basically, you
21 know, said you're moving to a different cost of
22 living, you won't be in the office, your future --
23 your future wages will probably reflect that.

24 You know, we're moving away from our family.
25 Future children, that means child care is going to be

1 different. We were weighing a lot of different
2 things. So in my mind, the \$100 really wouldn't
3 cover, you know, even a fraction of that.

4 Q. So in your mind, the \$100 was not a fair
5 approximation of what your damages might be?

6 A. Correct.

7 Q. Okay.

8 A. And the other section, you know, the bona
9 fide dispute, I was very confused about what that
10 meant.

11 Q. So let's talk about that real quick.

12 A. Okay, sure.

13 Q. You asked questions about paragraph 26?

14 A. I did.

15 Q. Okay. And in paragraph 26, it is a provision
16 that contains the bona fide dispute language?

17 A. Correct.

18 Q. All right. And what was your understanding
19 at the time that you entered the contract that that
20 provision meant?

21 A. When I entered into the contract, I
22 specifically asked Melissa about it. I said, "What is
23 a bona fide dispute? What does this clause mean?"

24 And she said, "Well, you know, if you, in the
25 middle of the process, decide you want to change some

1 of your options, you know, if you're going back and
2 forth, if you're holding up construction, we can
3 decide that, you know, this maybe isn't working for
4 the both of us. And if that negotiation doesn't go
5 anywhere, it seems like it's holding up the process,
6 then we can part ways."

7 So that was my understanding, that there
8 would be a process, there would be a discussion, there
9 would be some sort of mutual, you know, arrangement
10 that -- before this bona fide dispute becomes
11 determined.

12 Q. Okay. And did you have an understanding of
13 who that bona fide dispute had to be between?

14 A. Me -- myself, my husband and Eastwood.

15 Q. Okay. And so at the time that you entered
16 into the contract, was it your understanding that any
17 bona fide dispute had to be a dispute that was between
18 you and Eastwood, the seller of the home?

19 A. Yes.

20 Q. All right. At the time that you entered into
21 the contract, did you understand provision -- the
22 provision in paragraph 26 to authorize Eastwood Homes
23 to terminate and cancel the contract at any time?

24 A. 100 percent no.

25 MR. BRADLEY: I just object to what her

1 understanding of the contract was. I don't know how
2 that's relevant at all as to what she understood the
3 contract to mean. What's relevant is, as Mr. Cooper
4 and Mr. Appel have argued, what's in the contract. I
5 don't know why he keeps asking her that. But I don't
6 think it's relevant. That's my objection.

7 MR. COOPER: The relevance, Your Honor, is
8 that one of the factors the Court must weigh is
9 whether the offensive provision is conspicuous or if
10 it could be hidden or if it's plain in its meaning.

11 And so the way that paragraph -- the way the
12 provision operates in paragraph 26, it says, bona fide
13 dispute and seller's sole discretion, between buyer
14 and seller, and that bona fide dispute can't be
15 resolved.

16 So the way that my client understood the
17 paragraph is relevant for whether or not Eastwood's
18 true intention that this operates as a terminate at
19 will provision is hidden.

20 THE COURT: All right. Go ahead.

21 BY MR. COOPER:

22 Q. All right. Okay. At the time that you
23 entered the contract, did you understand paragraph 26
24 to authorize Eastwood Homes to terminate the contract
25 at any time for any reason?

1 A. Definitely not.

2 Q. At the time you entered the contract, were
3 representations made to you by an agent at Eastwood
4 Homes as to what that paragraph meant?

5 A. Yes. Melissa gave -- similar to Pat, gave me
6 assurances that that clause, that that paragraph, that
7 has never been invoked in her career at Eastwood and
8 that it was like an end of the world type of thing.

9 Q. Okay. And so what do you mean that she said
10 it's an end of the world type of thing?

11 A. She meant it -- like she made it sound like
12 it was something they never invoked, that it had to be
13 the most extreme of circumstances for them -- for that
14 to be, you know, invoked and that we really shouldn't
15 worry about it.

16 Q. Okay. Did you rely upon those assurances
17 made by an Eastwood Homes' agent in deciding to enter
18 the contract?

19 A. I did.

20 Q. And did her assurances or her representations
21 to you comfort you in any worry that you might have
22 about what this might mean?

23 A. They did. To your point about termination at
24 will, it made me feel like I had a say in, you know,
25 determining, you know, any sort of resolution here.

1 And that was not the case.

2 Q. And even though you had concerns about
3 provisions within the contract, you ultimately went
4 forward and signed the contract. Is that right?

5 A. Correct.

6 Q. Okay. And at the time that you signed the
7 contract, what was your understanding as to Eastwood
8 Homes' obligations under that contract?

9 A. My understanding was they were --

10 MR. BRADLEY: Once again, Judge, they argue
11 at one point the only thing that's important is the
12 contract and now we're going into her understanding of
13 the contract.

14 I'm okay with blowing this out more, but it's
15 inconsistent if they're going to take the position
16 that it's not relevant. That's our -- that's my
17 objection.

18 THE COURT: Noted. Go ahead. Go ahead.

19 MR. COOPER: I apologize. I don't remember
20 the question. Madam Court Reporter, would you read it
21 back to me? I'm sorry. My ADD got the best of me
22 there.

23 (Record read.)

24 A. My understanding was that they -- that we
25 were -- that they were obligated to sell us this house

1 as long as there was no dispute amongst the two --
2 amongst the two of us.

3 Q. Okay. And was there ever a dispute between
4 you and Eastwood Homes prior to their terminating the
5 contract?

6 A. No. I mean, we were still e-mailing with
7 them to schedule preconstruction in May before we got
8 the termination notice in June.

9 Q. How did you find out about Eastwood's
10 intention of termination of the contract?

11 A. We just received the termination contract.
12 Unlike Pat, I did not receive a phone call or any sort
13 of heads-up. We were actually in the car moving to
14 Charleston when we got it.

15 Q. You say you just received the termination.
16 How did you receive it?

17 A. Via e-mail.

18 Q. Okay. And who was it that e-mailed you?

19 A. I believe it was Jill Bagwell. But we got
20 absolutely no context on -- into why it was happening
21 and what was going on, nothing. We didn't get a phone
22 call.

23 Q. So prior to receiving the document that's the
24 purported mutual release document that's been admitted
25 into evidence, no one from Eastwood Homes reached out

1 to you to alert you that there was a dispute of any
2 kind?

3 A. No. We actually had to reach out again to
4 see if our preconstruction meeting was canceled
5 because we still thought that that was scheduled as
6 normal because nobody reached out to us to tell us
7 there was any sort of issue. We just received this
8 document with no context.

9 Q. And at the time that you received that notice
10 of termination document, was it your intention to
11 close and purchase the home that was being built for
12 you by Eastwood?

13 A. Yes, of course.

14 Q. Was your design meeting canceled?

15 A. We had our design meeting in February. It
16 was the preconstruction meeting, like the
17 preconstruction walk-through that -- yes, it was
18 eventually canceled after we had received the release.

19 They confirmed -- I mean, it took a while to get
20 even a response from someone. But they eventually
21 confirmed and said your contracts were terminated so
22 your meeting has been canceled.

23 Q. Okay. And you actually had to reach out to
24 Eastwood Homes to get that information?

25 A. Yes.

1 Q. And who was it that you reached out to?

2 A. So I was reaching out to Melissa Guggisberg.
3 She was not responding. I eventually got Jill Bagwell
4 because I think at that point Melissa was no longer
5 with the company.

6 Q. Okay. Did you have a lawyer review the
7 contract?

8 A. We did not.

9 Q. Okay. Is there any reason why you did not
10 have a lawyer review the contract?

11 A. We were basically just told it was a form
12 contract. We asked if we could have a lawyer review
13 it and they said that we could but in the time that it
14 would take for it to go through the process they may
15 sell the lot to someone else.

16 Q. Okay. So, in other words, you were told if
17 you took the time to have a lawyer review the
18 contract, then they were just going to go ahead and
19 sell the house out from underneath you?

20 A. Pretty much, yes.

21 Q. Okay. Did you have meetings with Eastwood
22 Homes representatives during the formation of the
23 contract process?

24 A. Yes.

25 Q. And where did those meetings take place?

1 A. At the Eastwood model home.

2 Q. Okay. And were you traveling from New York
3 for these meetings?

4 A. Yes.

5 Q. And who was it that you met with?

6 A. Melissa Guggisberg.

7 Q. Okay. And when you had these meetings prior
8 to closing, were there other people at the model home?

9 A. Yes.

10 Q. Okay. And what were those other people
11 doing?

12 A. They were looking at lots. They were looking
13 at homes. Melissa, you know, told us when we were
14 asking about having a lawyer review the contract and,
15 you know, thinking it over, she did tell us the people
16 behind us, it was another family with two children,
17 she said that they were interested in our lot because
18 they were wanting the same floor plan and that was the
19 only lot that could accommodate that floor plan.

20 Q. So when you say that they were behind you,
21 were they like physically in the building?

22 A. Yeah, like physically in the hallway of the
23 room that we were speaking to her in, like no doors,
24 they could hear us.

25 Q. Did you feel pressure to sign the contract

1 based off of the conditions that you were presented
2 with at the time?

3 A. Yes. I mean, you know, to kind of reiterate
4 Pat's point, you know, we had a -- we have a lot of
5 friends that have young children and they were looking
6 for homes in New York and they were getting outbid,
7 you know, left and right.

8 And we definitely felt like the real estate
9 market was, you know, getting hotter in South
10 Carolina, but I don't know if it had gotten to the
11 level that it was up north at the time.

12 And we really felt like it was going to spread
13 and we didn't want to be, you know, in a position
14 where we're starting a family and can't find a home
15 that we feel comfortable with.

16 Q. Was the -- was the Eastwood Homes contract
17 presented to you as a take it or leave it scenario?

18 A. Yes.

19 Q. Did you feel like you had any bargaining
20 power in the formation of the contract with Eastwood
21 Homes?

22 A. Absolutely not. I mean, you know, like I
23 mentioned before, I came to them with comments that I
24 had struck things out and, you know, like I said, she
25 kind of laughed at me and was like, yeah, we don't do

1 that, you know, this is -- this is what it is and
2 there's nothing we can really do about it.

3 Q. One last question, Ms. O'Grady. At the time
4 that you entered the contract with Eastwood Homes, did
5 you understand at all that it was -- that it would
6 operate as a termination at will contract?

7 A. Absolutely not.

8 Q. Those are all the questions I have for you.
9 Mr. Bradley likely has questions. If you would,
10 please answer his.

11 A. Sure.

12 CROSS-EXAMINATION

13 BY MR. BRADLEY:

14 Q. Okay. All right. So, Ms. O'Grady, you
15 changed your name since you signed the contract,
16 right?

17 A. Yes, I did.

18 Q. Okay. So it was Grigoleit before and now
19 it's O'Grady?

20 A. Correct.

21 Q. Okay. And you live at 38 Bogard Street here
22 in Charleston?

23 A. Correct.

24 Q. You have lived there for over a year now?

25 A. Correct.

1 Q. So you were able to find a house in
2 Charleston?

3 A. I was.

4 Q. Okay. And you lived there from June of '21
5 until this year when you bought the house, right?

6 A. Correct. I lived in an apartment.

7 Q. Okay. All right. So when you moved from New
8 Jersey, you rented a house to start with before
9 Eastwood canceled the contract, right?

10 A. Correct. We rented an apartment because our
11 home wasn't going to be finished.

12 Q. So you had already sold your house and moved
13 into the apartment before you knew the contract was
14 going to be canceled, right?

15 A. No. So -- well, so we were renting in Jersey
16 City. So we didn't sell anything. There was no
17 contingent sale. And we moved literally, I guess,
18 concurrent with the cancellation. So we were
19 literally in the car moving when we received the
20 cancellation.

21 Q. I asked that poorly. You were planning to
22 rent the apartment anyway because you were planning to
23 move here before the house was finished, right?

24 A. We were planning to move here knowing that
25 our home was being built.

1 Q. And that it wouldn't be finished when you got
2 here?

3 A. We knew it would not be finished when we got
4 here, correct.

5 Q. Okay. All right. So no matter happened,
6 whether the contract got canceled or not, you were
7 going to have to move to an apartment in Charleston?

8 A. Correct.

9 Q. All right. And so you moved from that
10 apartment when you bought that substitute house at
11 Bogard Street?

12 A. Correct.

13 Q. All right. And you have lived there for over
14 a year on Bogard Street?

15 A. Yes.

16 Q. And you are an accountant?

17 A. Correct.

18 Q. And a certified public accountant?

19 A. Correct.

20 Q. You graduated from the University of
21 Delaware?

22 A. Yes.

23 Q. With a bachelors in accounting degree?

24 A. Correct.

25 Q. And you took the four parts of the CPA exam

1 and passed each one?

2 A. Correct.

3 Q. So you work for a public accounting firm?

4 A. No. So I work for a private equity company
5 in their credit strategy.

6 Q. You never worked for a public accounting firm
7 at all?

8 A. I did. I worked for a public accounting firm
9 for the three years after I graduated college.

10 Q. Right. So you worked for a public accounting
11 firm because you're required to do that to get a CPA,
12 right?

13 A. You're required to have industry experience.
14 It doesn't necessarily have to be at a public
15 accounting firm.

16 Q. Which public accounting firm did you work
17 for?

18 A. It was called Conrad Nick.

19 Q. All right. And at the time you signed the
20 purchase agreement, you were a CPA, right?

21 A. Correct.

22 Q. And the company you worked for is New
23 Mountain Capital?

24 A. Correct.

25 Q. Which is a private equity company?

1 A. Correct.

2 Q. And you work in private strategy?

3 A. Private credit.

4 Q. As the assistant controller for the business
5 development credit funds?

6 A. Correct.

7 Q. So you manage multiple funds?

8 A. Yes.

9 Q. And the main fund is called New Mountain
10 Finance Corporation?

11 A. Correct. That's their registered traded
12 fund.

13 Q. You manage the money for investors?

14 A. I account for the money to investors. I do
15 not manage it.

16 Q. It's a publicly traded fund?

17 A. The main fund is.

18 Q. Okay. So you manage three private funds?

19 A. Yes. We just launched our fourth this week,
20 actually.

21 Q. Okay. And they're registered with the
22 Securities and Exchange Commission?

23 A. Correct.

24 Q. So you manage three SEC-registered investment
25 funds?

1 A. Correct.

2 MR. COOPER: Judge, I'm going to object.
3 Just to be clear, Ms. O'Grady doesn't manage the
4 funds.

5 THE COURT: She's an accountant.

6 MR. COOPER: The company --

7 THE COURT: She manages the finance --

8 MR. COOPER: We're using the word "you" a
9 lot. We need to be clear about what she does.

10 THE COURT: I got it. I'm with you. I think
11 she testified that way, but --

12 MR. BRADLEY: Obviously, you can hear what
13 she says.

14 THE COURT: I did.

15 BY MR. BRADLEY:

16 Q. All right. So when you signed the purchase
17 agreement, you were managing SEC-registered investment
18 funds?

19 A. Correct. I was managing the books for the
20 SEC-registered funds.

21 Q. And you have to comply with the Securities
22 and Exchange Commission's regulations to do that?

23 A. Correct.

24 Q. Do you know how to comply with Securities and
25 Exchange Commission regulations?

1 A. Yes.

2 Q. Which that's part of your job, is to make
3 sure what you do complies with the Securities and
4 Exchange Commission regulations?

5 A. Yes. The accounting -- I know how to comply
6 our -- the accounting firm finances with the
7 Securities and Exchange Commission.

8 Q. And you're competent to understand the
9 Securities and Exchange Commission's regulations for
10 accounting of publicly traded companies?

11 A. Yes. And I will pause, because we do have an
12 entire department that is in charge of this. We have
13 a compliance department and we have multiple legal
14 counsels that also aid in the process of compliance.

15 Q. All right. But you're qualified yourself to
16 do it?

17 A. I wouldn't say me alone. So I do not sign
18 off on our financial statements.

19 Q. Right. But part of your job is to read the
20 Securities and Exchange Commission regulations and
21 make sure you comply with them?

22 A. Yes, from an accounting standpoint.

23 Q. All right. And you're competent to do that?

24 A. Yes.

25 Q. Okay. Your husband Dan is a regional

1 property manager for Pegasus Realty?

2 A. Correct.

3 Q. He manages apartment complexes?

4 A. Correct.

5 Q. Somewhere between five and 15 apartment
6 complexes?

7 A. Correct.

8 Q. And he has a bachelor's degree from Hobart
9 College?

10 A. Correct.

11 Q. He makes about \$185,000 a year?

12 A. I think less than that with the pay
13 adjustment from New York.

14 Q. Do you remember telling me in our deposition
15 he makes \$185,000 a year?

16 A. I do. I subsequently asked him how much he
17 makes because I did not know for sure.

18 Q. So you want to change what you said before.
19 What it is, then?

20 A. When I asked him, he said \$155,000.

21 Q. Okay. So that was just a mistake in the
22 deposition?

23 A. Yes.

24 Q. All right. All right. And you make \$175,000
25 a year?

1 A. Since the deposition, I got a \$5,000 raise,
2 so I now make \$185,000.

3 Q. And then you receive \$175,000 a year in
4 bonuses?

5 A. Yes.

6 Q. So your pay is roughly \$330,000 a year?

7 A. Correct.

8 Q. So between you and your husband, your
9 household income is almost a half million dollars a
10 year?

11 A. Correct.

12 Q. So you can read and write English at a high
13 level?

14 A. Yes.

15 Q. So can your husband?

16 A. Yes.

17 Q. He's an intelligent person?

18 A. Yes.

19 Q. And so are you?

20 A. Yes.

21 Q. And your net worth is roughly a half million?

22 A. About, yes.

23 Q. Is it more than that? Is that wrong?

24 A. A guesstimate, yes.

25 Q. We don't have to comply with the SEC

1 regulations here, just trying to figure it out.

2 A. It's the accountant in me.

3 Q. Yes, ma'am. I understand. You've bought a
4 house since the cancellation of this contract, right?

5 A. Correct.

6 Q. So you were able to find a house within
7 Charleston?

8 A. A very different house, but yes.

9 Q. Okay. All right. And so when you were
10 looking for the house, you explored different areas
11 around Charleston?

12 A. We did.

13 Q. And you looked at a lot of homes that were
14 already built?

15 A. Correct.

16 Q. In different communities?

17 A. Correct.

18 Q. You actually looked at three different
19 communities?

20 A. Correct. Probably more, but yeah.

21 Q. Okay. More than three. And you looked at --
22 up to a dozen houses before you signed the purchase
23 agreement with Eastwood Homes?

24 A. Correct.

25 Q. So there were lots of other houses to look

1 at?

2 A. Very different houses. There were houses --
3 they were houses, but not ones that --

4 Q. You didn't like them as much as this house,
5 which was part of the purchase agreement?

6 A. Yes. I mean, Dan didn't fit in some of them.
7 He's very tall.

8 Q. You guys hired a real estate agent to help
9 you?

10 A. Yes.

11 Q. That's Ashley Towns?

12 A. Yes.

13 Q. And Ashley Towns is a good real estate agent?

14 A. I believe so.

15 Q. And you consulted Ashley Towns for advice and
16 guidance on buying a house?

17 A. Yes.

18 Q. And she was representing you when you signed
19 the purchase agreement?

20 A. Yes.

21 Q. Okay. And you're satisfied with the home you
22 have at 38 Bogard?

23 A. Yes. I think there's definitely things that
24 are -- that are not -- that are not satisfying that I
25 do believe, you know, we are going to outgrow this

1 house extremely quickly.

2 Our son is one years old. Out family was just
3 here to visit. We could only house my parents, which
4 was a big concern of ours. But yes, we do -- we do
5 like the house.

6 Q. All right. When I asked you in your
7 deposition, you just said you were satisfied with it,
8 right?

9 A. Yes. I mean, there's -- there's levels of
10 satisfaction, so...

11 Q. Okay. All right. So I think you testified
12 that you think that this clause is unfair, paragraph
13 26?

14 A. Yes.

15 Q. And your lawyer said that this is a
16 termination at will clause. Do you remember that?

17 A. Yes.

18 Q. You said you thought it was unfair.

19 Do you know if Eastwood ever terminated this
20 just on a whim?

21 A. I don't know.

22 Q. Okay. All right. But you were refunded all
23 the money you invested plus \$100?

24 A. Yes, I received a check for that.

25 Q. But you just decided not to cash it?

1 A. Yes. I didn't want to cancel the contract.

2 Q. I understand. But you were offered every
3 penny you invested in this home plus \$100?

4 A. Yes.

5 Q. All right. All right. When you -- when you
6 entered this purchase agreement, you were in South
7 Carolina visiting your brother-in-law?

8 A. Correct.

9 Q. All right. And it's an electronically signed
10 contract, right?

11 A. Correct.

12 Q. But you're comfortable doing business with
13 electronic contracts, right?

14 A. Yes. I work remotely now, so...

15 Q. You weren't intimidated by the process at
16 all, were you?

17 A. No.

18 Q. No one pushed you into signing this contract,
19 did they?

20 A. I wouldn't say anybody pushed me. I will say
21 there was a sense of urgency in the situation.

22 Q. So when I asked you in your deposition did
23 anyone push you into signing the contract, you said
24 just no. Is that correct?

25 A. Yes. I mean, I think it's -- you know,

1 again, qualification of the fact that nobody -- no,
2 nobody pushed me, but there was a sense of urgency.

3 Q. Because you wanted to buy this house over the
4 other houses you looked at?

5 A. Correct.

6 Q. All right. But Eastwood didn't create that.
7 That was something you wanted.

8 A. I think they contributed to creating it.

9 Q. How did Eastwood create your urgency to buy
10 this house?

11 A. By giving us the information that, you know,
12 there's somebody else literally standing here that,
13 you know, wants your lot and wants the same floor plan
14 as you. Information like that I think created
15 urgency.

16 Q. Do you think that information was true or not
17 true?

18 A. I think it was true.

19 Q. All right. Would you rather them just not
20 tell you the true information? Would that be better?

21 A. No.

22 Q. Okay. Did Eastwood do anything wrong by
23 telling you there were other people interested in the
24 lot?

25 A. That's what I mean. I don't think -- that's

1 why I think I said I don't think they were creating --
2 there was a high-pressure tactic. I think they were
3 creating urgency, but I don't think it was necessarily
4 malicious intent.

5 Q. All right. But no one forced you and pushed
6 you into signing this contract at all?

7 A. No.

8 Q. Okay. And no one threatened any financial
9 penalty for signing or not signing the contract?

10 A. No.

11 Q. And the contract said you had a real estate
12 agent because you did?

13 A. Yes.

14 Q. All right. And that real estate reviewed the
15 contract with you?

16 A. Yes.

17 Q. And you read the entire contract?

18 A. Yes.

19 Q. So did your husband Dan who is a professional
20 property manager?

21 A. Yes.

22 Q. All right. And you both read the whole
23 contract and then you signed it?

24 A. Yes.

25 Q. And you knew that paragraph 26 was there and

1 you knew exactly what was in paragraph 26 when you
2 agreed to abide by that paragraph?

3 A. I did not know exactly what was in there.
4 Because there's clearly --

5 Q. Did you read it?

6 A. I did.

7 Q. Has anyone changed what's in there now
8 between the time you read it and today?

9 A. The language has not changed. But the
10 execution is very different from what I believe it
11 says.

12 Q. You just don't think that Eastwood followed
13 the provisions of what's written in paragraph 26?

14 A. Correct.

15 Q. All right. But paragraph 26, as we sit here
16 today, and according to the evidence in your contract,
17 is exactly the way it was when you signed it?

18 A. Yes, the language has not changed.

19 Q. And you read every bit of it?

20 A. Yes, I read it.

21 Q. And you agreed to be bound by it?

22 A. Yes, I agreed to the contract.

23 Q. Okay. And you even asked about the
24 provisions yourself?

25 A. Yes. And, again, the assurances that Melissa

1 gave me, the example she gave me, none of that has
2 really stood up to what has actually transpired.

3 Q. Well, Ms. Guggisberg told you that they had
4 not canceled contracts in the past, right?

5 A. Correct.

6 Q. That's true, isn't it?

7 A. Maybe. I don't know.

8 Q. Do you have any reason to believe it's not
9 true?

10 A. I believe there was a lawsuit that was
11 brought where they did.

12 Q. Right. There's one other. But that happened
13 after this, right?

14 A. Correct.

15 Q. Okay. So now, do you know of any reason to
16 believe that when Ms. Guggisberg told you she knew of
17 no time that Eastwood had ever canceled a contract,
18 that that was incorrect in any way?

19 A. At the time, there is no reason I can believe
20 it. I can't affirm it, though.

21 Q. I'm not asking you -- I'm asking you if you
22 have any evidence that what she said was untrue?

23 A. No.

24 Q. All right. So since you have no evidence it
25 was untrue, can we agree that it was true or you're

1 not willing to do that?

2 MR. COOPER: Asked and answered, Judge.

3 THE COURT: I'll sustain that.

4 BY MR. BRADLEY:

5 Q. All right. So what Ms. Guggisberg reassured
6 you was true. What else -- was there anything that
7 Eastwood did to reassure you about the contract?

8 A. Yes. She gave me an example of what could be
9 a bona fide dispute and it involved a process of
10 negotiation, of discussion, of remediation. And to
11 me, that seemed like something that I could handle.

12 Q. Okay. Did anybody at Eastwood tell you
13 anything untrue in the process of entering this
14 contract?

15 A. I'm not sure I can answer that because
16 clearly this paragraph is not reading true to what
17 I -- what was communicated to me.

18 Q. Well, what was communicated to you was that
19 it had never been canceled before, right?

20 A. Was that it hadn't ever been canceled before
21 and this was something that really is not invoked and
22 that it's an end of the world kind of provision.

23 Q. Right. Such as if you have a problem with
24 zoning or covenants or some reason that it wasn't
25 legal to sell the house?

1 A. I wouldn't say that's an end of the world
2 provision.

3 Q. So what would you say, Armageddon, a volcano
4 eruption? What is an end of the world provision?

5 A. I would say, you know, fire, something --

6 Q. Well, that's in the contract, that if it
7 catches on fire, Eastwood would have to pay for it,
8 right?

9 A. Correct.

10 Q. Okay. So that's not necessary. That's not
11 part of paragraph 26, right?

12 MR. COOPER: Object to the form.

13 BY MR. BRADLEY:

14 Q. What would be the end of the world scenario
15 that you think you were told about?

16 A. I mean, even just -- a perfect -- she gave me
17 a perfect example where you go through a process of
18 negotiation. That's not an end of the world
19 provision. But to me, I was like, end of the world,
20 okay, something happens to the -- like, there's like
21 an earthquake, or like, you know, there is, you know,
22 some sort of -- you know, is there was a mass fire on
23 Johns Island. I know you said fire, like consider --
24 these are the things that I'm thinking, things that
25 are, you know, unnatural acts of God, like not things

1 that are just normal way of life.

2 Q. Okay. It doesn't say anything in that
3 provision about acts of God or anything of that
4 nature, does it?

5 A. No.

6 Q. And you understand, because you have entered
7 lots of contracts before, that when a written contract
8 says you're bound by the writing, things that are
9 spoken don't bind you?

10 A. Yes, I understand that.

11 Q. You have done it before in your job as a CPA?

12 A. I have not -- I do not sign contracts.

13 Q. Well, you've read contracts, haven't you?

14 A. I have read contracts with a team of lawyers
15 and experts in the field.

16 Q. Fairly sophisticated contracts controlled by
17 the United States Securities and Exchange Commission,
18 right?

19 A. The financial statements I create are not
20 contracts.

21 Q. I didn't ask that. I said when you're
22 reading contracts in your job, aren't they regulated
23 by the Securities and Exchange Commission?

24 A. I guess. I don't know that I really -- I
25 don't -- I feel like I can't opine on that. I don't

1 know that our contracts fall under the purview of the
2 SEC.

3 Q. So when you and your husband, who is a real
4 estate manager himself, read this contract, you saw
5 paragraph 7, which says in bold underlined letters
6 that no oral changes to the contract will be
7 effective, right?

8 A. Yes, I understood that. And I do also want
9 to quality that my husband works for the apartments
10 and the leases, not with home buying.

11 Q. He manages real estate for a living, doesn't
12 he?

13 A. Yes. He manages the people that live there.
14 He manages budgets. He doesn't negotiating like the
15 home -- the home purchasing contracts.

16 Q. Do they have leases?

17 A. They have leases.

18 Q. Do they allow the tenants to dictate what the
19 terms of the leases are; do you know?

20 A. I don't know.

21 Q. Do they have a form lease that they give to
22 every tenant that says you have to pay this much in
23 rent?

24 A. Yes.

25 Q. Do you think that's unfair?

1 A. To have a form -- to have a form lease?

2 Q. Yeah, that you say this is our lease, you
3 have to comply with this lease and pay this amount of
4 rent to rent our apartment.

5 A. I think that's fair as a proposal to start.

6 Q. But then the landlord would be obligated to
7 change it if the tenant wanted to?

8 A. I wouldn't say they were obligated, but I
9 think it's fair to open that -- open that conversation
10 up.

11 Q. Would it be unfair for the landlord to say,
12 no, if you want to rent our apartment, this is our
13 lease and this is how much it costs?

14 A. Yes.

15 Q. It would be? Okay.

16 When you signed this purchase agreement that
17 you knew was unfair at the time, you were free to
18 enter a contract with any other builder in the area
19 you wanted to, right?

20 A. Yes.

21 Q. You could have easily walked away from this
22 deal if you had wanted to?

23 A. It depends on how you define easily. I mean,
24 yes, we could walk away, but then we would have to
25 find another home.

1 Q. You remember when I asked you in your
2 deposition if you could easily walk away from the deal
3 and you said yes, right?

4 A. Yes. It's just -- it's the simple answer,
5 yes.

6 Q. Okay, good.

7 So you knew about this provision, but you
8 wanted the house so you took the risk about this
9 provision when you signed the agreement?

10 A. With the understanding that after -- after
11 digging in and getting what I thought was a better
12 understanding of what it would mean, yes.

13 Q. Okay. But you have read it all. You were
14 concerned about it. You brought it up. And when you
15 were told, no, we won't change it, you decided, well,
16 I will just sign it anyway because I really like this
17 house.

18 A. Yes, after talking to multiple people and
19 asking -- getting an understanding of what I thought
20 these provisions could mean for us and what we thought
21 they would realistically -- could eventually be.

22 Q. And you thought that was a reasonable
23 decision at the time?

24 A. At the time, with the understanding that I
25 had then, yes.

1 Q. Okay. So at the time you entered the
2 contract, you thought it was a reasonable decision to
3 enter the contract knowing everything that was in it?

4 A. Knowing what I thought the terms were, yes.
5 Now, knowing the way things have played out, I would
6 not say it would have been a reasonable -- a
7 reasonable decision. If I had known that Eastwood
8 could terminate at any point, I would not have made
9 that same decision.

10 Q. Right. If you would have known the contract
11 would be terminated because of the problems Eastwood
12 had, you might not have signed the contract?

13 A. Yes. If I had known that they could
14 terminate for whatever reason they want and not tell
15 me about it, not contact me, just send me a random
16 piece of paper, no, I would not have signed that.

17 Q. What about the part that says your damages
18 are limited to a refund of your deposit plus \$100, did
19 you read that part too?

20 A. Yes, I did.

21 Q. So you knew that if Eastwood Homes were to
22 terminate the contract that its obligation would be to
23 refund your deposit plus \$100?

24 A. Yes. I understand that that was their
25 obligation. I did not think that that -- I don't

1 think that that should minimize that I was taking
2 other risks. That was my understanding.

3 Q. Okay. And you thought that was a reasonable
4 risk to take when you entered the contract?

5 MR. COOPER: Asked and answered.

6 BY MR. BRADLEY:

7 Q. Is that true, ma'am?

8 A. That what was a reasonable risk?

9 Q. That if the contract -- if Eastwood
10 terminated the contract, you would be refunded your
11 deposit plus \$100?

12 A. And that I would just be foregoing anything
13 else?

14 Q. Yes, ma'am, like the contract says.

15 A. That was what -- yes, that was what I was
16 understanding.

17 Q. Right. And so you made the decision to do it
18 anyway even though you didn't like it?

19 A. Yes.

20 Q. Which you thought was reasonable at the time?

21 A. Yes. Because I thought there was other
22 protections in remediation of any sort of
23 disagreement.

24 Q. Okay. All right. And your total investment
25 in the house was \$10,283, right?

1 A. That's my monetary investment to Eastwood. I
2 wouldn't say that's my investment in the property,
3 in -- not the property, in the decision overall.

4 Q. Did you invest any other money with Eastwood?

5 A. Not with Eastwood. I'm saying that my
6 investment in moving to this home -- like I said, my
7 husband took a pay cut. I had spoken to my job that
8 my wages were going to be adjusted. These were all
9 other things that are part of my investment in the
10 move, but not my investment with Eastwood.

11 Q. Okay. But you would have -- all those things
12 would have happened whether you bought the house from
13 Eastwood or anyone else on the planet. It doesn't
14 have anything to do with Eastwood, that you had to
15 take a pay cut or your husband took a pay cut to move
16 from New York to Charleston?

17 A. Correct. But we didn't -- we didn't finalize
18 our decision to move until we signed our contract
19 because we knew we had a home.

20 Q. All right. And when I asked you in your
21 deposition your total investment was \$10,283, you said
22 just "yes." Do you still agree with that?

23 A. Again, that's the simple answer. Like, yes.

24 Q. Okay. All right.

25 A. That's the investment with Eastwood. That is

1 not the investment in the decision.

2 Q. And Eastwood sent you a check for that much
3 money plus \$100?

4 A. Correct.

5 Q. Which you did not cash?

6 A. Correct.

7 Q. So you made the decision not to accept that
8 solution that Eastwood proffered to you?

9 A. It was not proposed as a solution. It was
10 just our money back with no explanation other than the
11 mutual release.

12 Q. And an opportunity for you to buy the house
13 or right of first refusal when the problems were
14 resolved?

15 A. At fair market value, which I was very
16 acutely aware was significantly higher than what we
17 were contracted to pay.

18 Q. Maybe or maybe not, right, because the
19 problems aren't resolved now.

20 A. The homes have been resold.

21 Q. Well, I'm just saying. I mean, it hasn't
22 been fixed yet, right?

23 A. To my knowledge, no.

24 Q. Okay. So --

25 MR. COOPER: Your Honor, I think we're

1 getting pretty far afield of what we're doing here
2 today.

3 THE COURT: We are.

4 MR. BRADLEY: I understand, Judge. She just
5 brought up the fact that it was a fair market value.
6 I'm furthering that inquiry, but I'll move on. Okay?

7 THE COURT: Let's come back to our contract.

8 BY MR. BRADLEY:

9 Q. All right. And so when you signed it, you
10 knew that there was a provision that gave Eastwood the
11 right to cancel, right?

12 A. Yes.

13 Q. And but you don't know -- you know how much
14 money you invested, which was \$10,283, right?

15 A. Yes.

16 Q. But you don't know how much Eastwood
17 invested?

18 A. No.

19 Q. But you would agree it's a lot more than you
20 invested?

21 A. I don't know.

22 Q. You don't know whether it cost more than
23 \$10,000 to build a house and buy a lot?

24 A. I don't know lot prices. And my -- my home
25 is just a lot right now. So I don't know how much

1 they have invested in.

2 Q. I didn't ask you how much. I just asked you
3 if it was more than 10,000?

4 A. I don't know how much lot prices are here. I
5 have never bought a home. I have never bought a lot.

6 Q. Okay. You can't say whether or not it cost
7 more than \$10,000 to buy a lot and build a house in
8 this neighborhood?

9 MR. COOPER: Judge, I think it's been asked
10 and answered at this point. I think we addressed this
11 with Ms. Franquelin. It is outside the scope of what
12 the Court's decidings are.

13 THE COURT: I think she's answered the
14 question.

15 MR. BRADLEY: Yes, sir.

16 THE COURT: Go ahead.

17 MR. BRADLEY: I think it goes to credibility,
18 Judge.

19 THE COURT: Okay.

20 BY MR. BRADLEY:

21 Q. All right. So you read paragraph 25 before
22 you signed the purchase agreement too, right?

23 A. Yes.

24 Q. And paragraph 25 --

25 A. Do you have a copy of that I can look at?

1 Q. Whenever you're ready, Ms. O'Grady.

2 A. You said 25?

3 Q. Yes, ma'am.

4 A. Okay.

5 Q. Whenever you're ready, Ms. O'Grady.

6 A. I'm with you.

7 Q. Okay. You see in the last sentence where it
8 says: "In the event of a breach of this agreement by
9 seller, buyer may recover the deposit; however, in no
10 event will seller be liable for consequential damages
11 or for damages or delays and buyer hereby releases and
12 waives any claims for such damages."

13 A. Yes, I see it.

14 Q. And you saw it when you signed the contract?

15 A. Yes, I did.

16 Q. And you know what a breach means. It's like
17 if Eastwood did something wrong.

18 A. Correct.

19 Q. Okay. So you agreed when you signed the
20 contract that if Eastwood did something wrong in the
21 contract that you were entitled to receive your
22 deposit back?

23 A. Correct. I guess.

24 Q. And you thought you didn't like it but you
25 signed it anyway?

1 A. Yes. I was told I can't change anything in
2 here, so...

3 Q. But you made the reasonable decision to sign
4 anyway because you wanted the house?

5 A. I would say I made the decision. I wouldn't
6 say I made a reasonable decision at this point.

7 Q. Well, at the time did you think it was
8 reasonable with all of the information you have?

9 A. Yes, with the -- with the information that I
10 had and the -- you know, the examples that I had been
11 given, yes, I thought it was reasonable at the time.

12 Q. All right. Okay. And on paragraph 28 -- do
13 you have that there in front of you?

14 A. Yes.

15 Q. Do you see at the bottom, it says, "Buyer
16 shall have no other rights or remedies should the
17 seller exercise such right of cancellation prior to
18 closing"?

19 A. Yes.

20 Q. Did you read that before you signed it as
21 well?

22 A. Yes. And that was another thing that I
23 thought was unfair to the buyer.

24 Q. But you signed it anyway even though you
25 didn't think it was fair?

1 A. I was not allowed to make any edits or
2 changes.

3 Q. But you didn't have to buy the house. You
4 could have bought another house.

5 A. Not the same house and not with the same
6 comforts and, you know --

7 Q. You couldn't have bought a house from
8 Eastwood this way, but you could have bought a house
9 from someone else?

10 A. What do you mean, this way?

11 Q. Well, I think what you testified to was you
12 knew that the contract contained a waiver of damages
13 clause but you wanted the house so you signed the
14 contract because this house was the house being sold
15 by Eastwood, right?

16 A. Yes. This house was being sold by Eastwood.

17 Q. Right.

18 A. And I could have purchased another home. But
19 it wouldn't be the home that had all the things that I
20 wanted for our family.

21 Q. Right. Right. It would have just been a
22 house -- you wanted to do it because you liked this
23 house the best out of all the other ones that you
24 could have bought.

25 A. Yes.

1 Q. Okay. All right. You said something about
2 that someone said you couldn't have a contract
3 reviewed by the lawyer or you shouldn't have a
4 contract reviewed by the lawyer? Did you say
5 something like that?

6 A. No. I said that they said we could have a
7 lawyer review the contract. But in that process, we
8 may lose the house because there are a number of
9 families already willing -- already willing to sign
10 the contract as is.

11 Q. Is it fair for Eastwood to sign a contract
12 with the first person who is able to purchase the
13 house and wants to purchase it?

14 A. Yes.

15 Q. Okay. Did anyone at Eastwood prohibit you
16 from having a lawyer review the contract?

17 A. No.

18 Q. And you -- so there's really no reason you
19 didn't have a lawyer review it, is there?

20 A. Yes, it was timing. I didn't want to lose
21 the house, so -- and -- and frankly, they -- it didn't
22 seem like it was going to get anywhere anyway, you
23 know. They -- they were pretty explicit about the
24 fact they couldn't strike anything, you know.

25 I even asked if we could change the 100 to a

1 thousand and they wouldn't even do that. So for
2 something as small as that, you know, \$900 to Eastwood
3 means nothing. If they wouldn't even change it for
4 \$900, what was I going to get a lawyer for?

5 Q. All right. I asked you this question. It
6 was if there was any reason you didn't have a lawyer
7 review it. And you said no in your deposition.

8 Is that still what your testimony is or does
9 it need to be different today?

10 Would you like to see your deposition?

11 A. No. I just -- I guess I just don't really
12 know the difference in my answer. It's not like we
13 just are kind of like, no, we don't feel like getting
14 a lawyer.

15 Q. Well, the difference is I asked you if there
16 was any reason you didn't have a lawyer review it.
17 And you said no before. And today you said it was
18 because you were in a hurry to get it done. So that's
19 a difference.

20 A. Okay.

21 Q. That's why I'm asking you the question.
22 Would you like to see your deposition? I want to make
23 sure you --

24 A. No. I understand that my answer was no. I
25 think maybe at the time I didn't understand what you

1 were asking, because --

2 Q. Well, ma'am, let's make sure I go over it. I
3 want to be clear.

4 MR. BRADLEY: Judge, may I give her a copy?

5 THE COURT: Yes.

6 Q. If you look at page 55 of your sworn
7 testimony, Ms. O'Grady, just let me know when you're
8 ready.

9 A. Okay. I think I am there, where it says
10 pages 54 to 57.

11 Q. Yes, ma'am. If there's four to a page, it
12 will be in the bottom left-hand corner.

13 A. Yes, I see.

14 Q. And I asked you this question: "All right.
15 Was there any reason you didn't have a lawyer review
16 it."

17 And you said, "No," right?

18 A. Correct.

19 Q. But today you say it's because you were in a
20 hurry, right?

21 A. Yes.

22 Q. Okay. So you need to change that answer from
23 before?

24 A. Yeah. I would just say that at the time,
25 like when you asked, I gave you the simple answer of

1 no. But it's not like we just didn't feel like
2 getting a lawyer.

3 Again, we were first-time home buyers. It's
4 not like, you know, we were doing a lot of these
5 things intentionally. We were going with the process
6 that was in front of us.

7 Q. All right. But you knew everything that was
8 in the contract and decided to go forward anyway. No
9 one put any high-pressure sales tactics on you, did
10 they?

11 A. Again, there was a creation of urgency.
12 There was no -- I wouldn't say there were
13 high-pressure tactics. I don't think there was
14 malintent.

15 Q. No one was pushing you to do this. They just
16 said, if you don't want to buy it, we'll sell it to
17 someone else?

18 A. Correct, if we don't buy it, they'll sell it
19 to someone else.

20 Q. Do you think that's unfair?

21 A. No. I think that she was being truthful in
22 telling us that.

23 Q. Okay. All right. You could have walked away
24 from this deal yourself, right?

25 A. Yes, we could have walked away.

1 Q. All right. Do you think that's unfair that
2 you could have walked away from the deal?

3 A. No.

4 Q. All right. Okay. When you signed this
5 purchase agreement, you picked out the kind of house
6 you wanted, right?

7 A. Correct.

8 Q. And you picked out the trims and the finishes
9 that were going to go in the house?

10 A. Correct.

11 Q. All right. So one of the reasons that you
12 would want this purchase agreement is you could get
13 the house customized rather than like if Eastwood had
14 a house sitting around that you were buying?

15 A. Correct.

16 Q. So there was some value to you to signing a
17 purchase agreement for a house that had not yet been
18 built?

19 A. Correct.

20 Q. Because then you could specify, hey, I want
21 purple counters or whatever makes you happy?

22 A. Yes. I wouldn't want purple counters.

23 Q. Maybe not purple counters, but maybe granite
24 counters.

25 A. Correct.

1 Q. Okay. Fair enough. So there was some
2 advantage to you in buying a house essentially that
3 hadn't yet been built?

4 A. Correct. There was -- yes, there was, you
5 know, layouts to pick, there were, you know,
6 elevations, you know. You're able to keep some of
7 those things within your control that you are not in a
8 resale.

9 Q. All right. So the contract wasn't long or
10 confusing, was it?

11 A. It wasn't long. I wouldn't say it wasn't
12 confusing. Yes.

13 Q. You do think it was confusing?

14 A. I don't think it was confusing now. In
15 looking back, I feel like it was confusing in the way
16 it was executed.

17 Q. Okay. All right. So if you look at just
18 page 62 of your deposition, whenever you're ready,
19 ma'am, at line 7.

20 A. Okay.

21 Q. And it says: "The contract is seven pages
22 long. Do you consider that to be unreasonably long or
23 confusing?"

24 And your answer was: "In length, I don't
25 believe it to be long or confusing."

1 Right?

2 A. Yes, that's correct.

3 Q. Do you believe it to be long or confusing
4 now?

5 A. I think my -- my response stands. In length,
6 I don't believe it to be long or confusing.

7 Q. Okay. All right. And I think you said
8 Ms. Guggisberg said that all the times she worked for
9 Eastwood, Eastwood hadn't canceled any contracts?

10 A. Correct.

11 Q. And as far as you know, that's true?

12 A. As far as I know, in her career, they did not
13 cancel any contracts.

14 Q. So she -- what she told you was true as far
15 as we know here today?

16 A. As far as I know, yes.

17 Q. All right. And you read contracts for your
18 job? I think we've gone over that.

19 A. Yes.

20 Q. And you're familiar with contracts that say
21 they can't be modified by oral representations when
22 they're signed.

23 A. Yes.

24 Q. Just like this contract?

25 A. Yes. I have never seen contracts that do not

1 get negotiated, though.

2 Q. Right. But after they're written down, the
3 contract itself is what's important, not the
4 negotiations that came before, right? That's what
5 binds the parties.

6 A. Yes. Because you're mutually agreeing to
7 terms that you both agree are fair.

8 Q. Well, you mutually agreed to all these terms.
9 You agreed to them, right?

10 A. I signed the contract. I did not think they
11 were fair. And I don't feel like I had a part in
12 creating what the terms were.

13 Q. When you signed the contract and represented
14 to Eastwood that you were agreeing to it, did you tell
15 them I'm signing this but I'm not agreeing to follow
16 what I'm signing?

17 A. No. I said I'm agreeing to this contract. I
18 don't think this is fair, but I'd like this house.

19 Q. But I'm agreeing to it anyway, right?

20 A. Yes.

21 Q. So now you don't want to enforce the
22 provisions you agreed to before?

23 A. Yes. I don't want them to enforce provisions
24 that I don't think were stated clearly. I think that
25 the way that this -- the way this has been executed

1 and the way it's been terminated was not clear at all.
2 I think that's not what that provision was read to me
3 as.

4 Q. What about the provision that says your
5 damages are a return of your deposit plus a hundred
6 dollars, you understood what that meant, didn't you?

7 A. Yes, I understood that.

8 Q. And you have received that?

9 A. Yes, I received that.

10 Q. But you brought the lawsuit anyway?

11 A. Yes.

12 Q. Because you don't want to honor the contract
13 that you agreed to with Eastwood?

14 A. Because I don't -- because I think that they
15 have not held up their end of the contract.

16 Q. I see. Even though you agreed in writing
17 that that would be the damages?

18 A. I agreed that would be the damages if there
19 was a bona fide dispute.

20 Q. Ma'am, it doesn't say that in paragraph 25
21 anywhere, does it?

22 A. That's what I thought it said.

23 Q. Okay. Can we agree that the damages
24 limitation doesn't say anything about a bona fide
25 dispute?

1 A. I just said that's not how I read it.

2 Q. Well, why don't you look at paragraph 25.

3 A. Sure.

4 Q. Explain to me where it says bona fide
5 dispute. Just point it out. I'd like to see.

6 A. It does not. But in paragraph 26, it goes
7 into that. So I was taking this contract as a whole.
8 I'm not dissecting each sentence as its own standalone
9 situation.

10 Q. Right. Okay. Thank you.

11 THE COURT: Mr. Cooper?

12 MR. COOPER: We don't have any redirect,
13 Judge. May the witness be excused?

14 THE COURT: Yes, ma'am. Thank you very much.
15 You may step down.

16 THE WITNESS: Thank you.

17 MR. COOPER: Your Honor, for our next
18 witness, we'd like to call Dion Matheney.

19 THE COURT: All right. Mr. Matheney, come on
20 up.

21 DION MATHENEY, having been duly sworn to tell
22 the truth, the whole truth, and nothing but the truth,
23 was examined and testified as follows:

24 THE COURT: And Mr. Matheney, give me your
25 full name and address, please, sir.

