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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-001587

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

v.

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

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INTRODUCTION

Plaintiffs insist that opposites are true depending on the argument they are making at the moment. As Plaintiffs would have it, the entity Plaintiffs can complain that they are forced to be Club members, can complain about Club governance and management, and complain that they are impeded from commercializing their Club membership—yet they insist that they are not bound by the Club membership agreements that their principals signed on their behalf. Like Schrödinger's Cat, the entity Plaintiffs want to be members and nonmembers simultaneously. But they are members, and they are bound by the Membership Agreements' and Membership Plan's arbitration provisions.

Plaintiffs also assert that, although the Circuit Court denied making any factual findings, this Court should defer to findings *not* made so long as there is any evidence to support those unmade findings. But there were no findings of fact, so no basis for deference rather than the *de novo* review that properly applies here. If further factual development is necessary, the case should be remanded for an evidentiary hearing.

Almost all Plaintiffs or their principals signed binding arbitration agreements that cover this dispute over the governance and operations of a Club operating in interstate commerce, and Plaintiffs' efforts to rent their properties in interstate commerce. The remaining Plaintiffs are bound to arbitrate under principles of equitable estoppel. The Circuit Court was wrong to disregard the delegation provisions and wrong to consider these contracts between luxury second-home owners and a private Club to be unconscionable and insusceptible to severance of any offending provisions.

The Arbitration Orders should be reversed and arbitration ordered.

ARGUMENT

Plaintiffs try to escape the *de novo* review that, under established law, applies to orders denying motions to compel arbitration. *See, e.g.*, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 620 S.E.2d 86 (Ct. App. 2005)); *Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 645, 885 S.E.2d 144, 147-48 (Ct. App. 2023) (addressing enforcement against nonsignatory). But the record here forecloses Plaintiffs' effort to supplant that standard with deference to "any evidence" supporting the denial. Contrary to Plaintiffs' contentions, Resp. Br. 9-11, there was no trial here, so Plaintiffs' authorities are inapposite—and abrogated by the South Carolina Supreme Court.[1] The Circuit Court made clear that it was "not making findings of fact," (R. 2, 35 (Arb. Orders at 2)), that could be subject to deferential review. Rather, the Circuit Court ruled as a matter of law, underscoring that *de novo* review applies, without deference. *See, e.g.*, *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

Plaintiffs also incorrectly assert, Resp. Br. 12, that this Court can reverse only if it finds that each of the Circuit Court's rulings is wrong as a matter of law. Not every ruling independently sustains the Arbitration Orders. This Court can and should reverse in part

[1] The South Carolina Supreme Court abrogated Plaintiffs' lead authority, *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976), in *Matter of Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018). *Townes* concerned the standard of review where a master made findings of fact and conclusions of law that were concurred in by the circuit court, *see* 266 S.C. at 87, 816 S.E.2d at 776. *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998), applied *Townes* before its abrogation.

if it does not reverse in full. Even if not all claims are arbitrable or not all parties may be compelled to arbitrate, all arbitrable claims and parties must be sent to arbitration. *See KPMG, LLP v. Cocchi*, 565 U.S. 18, 19 (2011); *Wellman*, 366 S.C. at 71, 620 S.E.2d at 91.

Citing *Palmetto Construction Group, LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), Plaintiffs question what it means to "favor" arbitration, Resp. Br. 12, but the meaning of "favor" is beside the point. As post-*Palmetto* precedent makes clear, the specific rules of construction governing this appeal remain in place. "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, including the construction of the contract itself." *Davis v. ISCO Indus., Inc.*, 434 S.C. 488, 494, 864 S.E.2d 391, 394 (Ct. App. 2021) (internal quotation marks omitted). "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Id.* (quoting *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999)).

A. The Federal Arbitration Act Applies

Plaintiffs try to repackage their Complaint to sidestep precedent holding that "[t]he rental of real estate is unquestionably … an activity" affecting interstate commerce, *Russell v. United States*, 471 U.S. 858, 862 (1985), and that disputes over activities affecting interstate commerce fall within the Federal Arbitration Act, *e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-77 (1995). But this case is not about real estate development or land. Plaintiffs' lead authority, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), therefore does not apply, as that decision was (and should be) limited to the context of an agreement "strictly for the purchase of a completed residential dwelling."

Id. at 457, 730 S.E.2d at 317; *cf. Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022) (characterizing *Bradley* as applying only to "the purchase of pre-existing homes"). Plaintiffs' complaint is that something more was at issue—Club membership came with the purchase of raw land or a second-hand second home.

Plaintiffs' claims all relate to the creation, governance, and operation of the Club—which indisputably serves out-of-state members and guests including eight Plaintiffs, *see* Br. 13. And the Complaint makes clear where Palmetto Bluff's governing documents fit: Plaintiffs specifically allege a plan or conspiracy by Defendants to "end amenity access" by homeowners' short-term renters by "weaponizing the community's governing documents." (R. 89 (Compl. at 18).) Plaintiffs claim various harms from the access changes and allege that Defendants are trying to eliminate resident-owned short-term rentals because they compete with the Defendant-owned hotel and rental program. (*Id.*; (R. 125, 126, 141 (Compl. ¶¶ 132.11.5, 132.14, 190-195).)

There is nothing "hypothetical" about the "short-term rentals" at the core of this case. Resp. Br. 17. Each named Plaintiff owns property in the Designated Rental Area for short-term rentals in Palmetto Bluff and is a member of the Short-Term Renter Class. (R. 128-130 (Compl. ¶¶ 141-148).) Plaintiffs' 2020 and 2021 demand letters to Defendants (R. 286-295 (Compl., Ex. 5))—which sought mediation as a contractual prerequisite to litigation—make clear that the dispute over short-term renter access to the Club underlies the various causes of action. Plaintiffs maintain that this does not matter because the arbitration provision is not in a short-term rental contract. Resp. Br. 18. But the arbitration

agreements are in the Agreement and Plan, which govern how and whether Plaintiffs can give their short-term renters access to the Club.

The Agreement and Plan thus involve interstate commerce in at least two ways pertinent here. They affect the rental of real estate at the core of this dispute, and they govern the operation of the Club with respect to its out-of-state members and guests. The FAA therefore applies.

B. The Delegation Clause Precluded the Circuit Court's Rulings on Substantive Arbitrability

The Circuit Court should not have ruled on issues of substantive arbitrability that the arbitration agreements expressly delegated to the arbitration panel. Plaintiffs claim that the delegation provision applies only to the Club and the signatory Plaintiffs because Plaintiffs disputed the existence of an arbitration agreement as to the remaining parties. Resp. Br. 47, 49. But *that* question is delegated: the AAA Rules' delegation provision, incorporated into the arbitration agreements, delegates to the arbitrator "any objections with respect to the *existence*, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Rule R-7(a) (emphasis added). Incorporation of the AAA Rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate such gateway issues. *See Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013); *Airbnb, Inc. v. Doe*, 336 So.3d 698, 704 (Fla. 2022).

While the effect of the delegation provision is clear under federal law, Plaintiffs argue that South Carolina law controls and compels a different result. But South Carolina law also recognizes that gateway issues, such as the existence of an arbitration agreement,

may be delegated to arbitration. *See Simpson*, 373 S.C. at 23, 644 S.E.2d at 667; *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). And as the opening brief explained, Br. 17-21, under those decisions the delegation provision here should be enforced.

Plaintiffs also insist that they nullified the delegation provision by challenging it. But "none of [Plaintiffs'] substantive unconscionability challenges was specific to the delegation provision." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 73 (2010). Merely challenging the arbitration agreement "as a whole as well as its individual subparts, including the so-called 'delegation provision,'" Resp. Br. 47, does not constitute a specific challenge to the delegation clause.

Finally, Plaintiffs claim, Resp. Br. 48, that the delegation provision at issue contains a "critical omission in South Carolina" because it does not state that the arbitrator has the "exclusive" power to rule on "jurisdiction and other matters." But that is not the law in South Carolina. Rather, consistent with *Rent-A-Center*, where a delegation clause clearly and unmistakably commits certain types of disputes to the arbitrator, a court must leave resolution of those issues to the arbitrator. *See Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020).

C. Binding Arbitration Agreements Cover This Dispute

The existence of arbitration agreements is a fact-intensive determination. Yet, in ruling that arbitration agreements covered only 7 of the 21 Plaintiffs, the Circuit Court

did not make any findings of fact.[2] Despite acknowledging that the LLC Plaintiffs "appear to be limited liability companies formed by the signatories to one or more of the agreements to arbitrate," (R. 9, 42 (Arb. Orders at 9)), the Circuit Court failed to consider the factually unrebutted evidence establishing that at least 16 Plaintiffs signed Membership Agreements.[3] These undisputed facts require reversal here.[4]

In the Circuit Court, Plaintiffs did not dispute that individual signatories of Agreements are members or owners who control the entity Plaintiffs, or that the signatories had authority to sign the Agreements, *see* Br. 22-23. (R. 374-378, 387-395, 405-423, 433-465 (Defs.' Arb. Mot., Ex. D at 2-8, 17-25, 35-53, 63-95).) Nor did Plaintiffs dispute the showing regarding the various Bridge Charleston Plaintiffs and their common owners, *see* Br. 23-24. (R. 433-450; 524, 533-553 (Defs.' Arb. Mot., Ex. D at 63-80; Ferguson Aff. ¶ 17, Exs. B-C).)

Plaintiffs now claim that the Circuit Court found this evidence "not credible or compelling," Resp. Br. 14 n.8, yet the court made no such finding, and neither "credible" nor "compelling" appears in the orders. On the contrary, the Circuit Court did not consider the undisputed evidence properly, concluding only that the evidence was not

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[2] In stating that 15 rather than 14 Plaintiffs lacked arbitration agreements, the Circuit Court improperly included the Trust as a Plaintiff separate from the Trustee Plaintiffs, who, the court acknowledged, signed arbitration agreements. (R. 9, 42 (Arb. Orders at 9).)

[3] If the two Trustees are Plaintiffs, rather than the Trust itself, then arbitration agreements exist for at least 17 of the 21 named Plaintiffs. As explained below and at Br. 22-24, the remaining Plaintiffs are nonetheless bound to the arbitration agreements.

[4] In a footnote to their brief in this Court, Resp. Br. 35 n.22, Plaintiffs contend for the first time that there are unspecified inaccuracies in the Ferguson Affidavit. Plaintiffs did not dispute the affidavit in the Circuit Court, and have waived any factual dispute here.

"sufficient to pierce a corporate veil." (R. 27, 60 (Arb. Orders at 27).) But veil-piercing is not at issue here. Rather, the evidence establishes that members or owners of the Plaintiff LLCs signed Agreements that bind the LLCs, so that arbitration agreements were established as to at least 16 Plaintiffs. At a minimum, the Circuit Court should have conducted an evidentiary hearing after arbitration-related discovery.

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

At its core, this case is about Plaintiffs' complaints that they were forced to become Club members when they bought their properties, and that the Club is mistreating them by not according short-term renters the same access rights as Club members or their noncommercial guests. Yet to avoid arbitration, Plaintiffs claim that they are not members at all and thus are not bound by the arbitration agreements their individual principals signed when buying Palmetto Bluff property. Plaintiffs cannot have it both ways. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295, 733 S.E.2d 597, 604 (Ct. App. 2012). They are members, and they are bound by the arbitration agreements that cover all disputes relating to the Club.

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

The Plan expressly provides that a membership may be held in the name of an entity, and that the entity must designate an individual to use the Club facilities pursuant to the membership. (R. 277 (Plan at 8).) Plaintiffs argue the nonsignatory Plaintiffs cannot be "automatically bound" because the Plan provides that designated users "also" must

submit an Agreement. Resp. Br. 37. But that is not what the Plan says. Rather, it says "[e]ach designated user must submit a Membership Agreement." (R. 277 (Plan at 8).) There is no requirement that there be a separate Agreement for a designated user in addition to an Agreement for the entity. Indeed, the Plan expressly provides that the entity and designated user "are jointly and severally liable" under the Agreement. (*Id.*)

Moreover, the arbitration provisions in the Agreement and Plan expressly apply both to members and to those exercising the members' membership rights. The provisions state that any and all disputes arising directly or indirectly from the Agreement or Plan "shall be resolved by mandatory arbitration … (unless the member [and/or any person exercising such member's membership rights] and Palmetto Bluff Club, LLC mutually agree otherwise) ." (R. 285; 376 (Plan at 16; Agreement at 4).) Thus, the arbitration provisions expressly apply to anyone exercising the membership rights. Having exercised their membership rights pursuant to the Agreement and Plan, the nonsignatory Plaintiffs cannot now disclaim the arbitration provisions in those very same agreements.

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

Plaintiffs maintain, Resp. Br. 39, that arguments based on agency and assignment, Br. 26-29, were not preserved for appeal. Plaintiffs are mistaken. Defendants' initial briefing to the Circuit Court argued that "the Plaintiff LLCs are … agents, beneficiaries, and/or successors or assigns of the individuals who signed the agreements." (R. 507 (Mem. in Support of Defs.' MTC at 18).) Defendants provided supporting argument and

legal citation, submitted the Affidavit of Gray Ferguson and supporting public records, and again argued on reconsideration that the arbitration agreements were signed by agents of the nonsignatory entities Plaintiffs. (R. 507; 520-524; 572-731; 882-885 (*Id.*; Ferguson Aff.; Mem. in Support of Defs.' MTC, Ex. B; Defs.' Mot. to Alter or Amend at 20-23).) That is enough for preservation, and Plaintiffs provide no contrary authority.

Plaintiffs are also wrong to contend that Defendants' ratification argument was not preserved. Resp. Br. 40. "Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). Defendants argued to the Circuit Court that the nonsignatory Plaintiffs retained the benefits of the Club documents containing the arbitration agreements, and bring claims pursuant to those documents. (R. 505-507; 880-881 (Defs.' MTC at 16-18; Defs.' Mot. to Alter or Amend at 18-19).) That preserved the ratification argument.

Plaintiffs also maintain that Defendants failed to offer facts sufficient to establish an agency relationship between the nonsignatory LLC Plaintiffs and the individuals who signed the arbitration agreements.[5] Again, the record reflects ample support for that

[5] Plaintiffs assert, Resp. Br. 41, that the Circuit Court found that Defendants "entirely failed to carry their burden" to prove that the nonsignatories are bound to the arbitration agreements under agency principles. As noted above, the Circuit Court made no factual findings, and held only that Defendants had not offered "proof sufficient to pierce a corporate veil." (R. 27, 60 (Arb. Orders at 27).) Although Defendants' Rule 59(e) Motion pointed out that the court had not addressed agency (R. 882-883 (Defs.' Mot. to Alter or Amend at 19-20)), the Circuit Court never explicitly ruled on Defendants' agency arguments.

relationship. Indeed, Plaintiffs did not contest (let alone with evidence) that the signatories were the members of the entity Plaintiffs. It is well-established that "agency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982). Here, the signatories at issue executed agreements as purported "legal owner[s]" pursuant to "[their] acceptance of a deed for property within Palmetto Bluff." (R. 375, 382, 391, 400, 409, 419, 428, 445, 455, 462, 469 (Agreements).) The nonsignatory Plaintiffs have received benefits of and performed obligations under those agreements, using Club amenities, spending money at the Club, and paying Club dues. That is enough to bind them to arbitrate.

c. The Assignee Argument Is Preserved and Meaningfully Undisputed

In their sole response to the demonstration that the entity Plaintiffs are bound as assignees to the arbitration agreements, Br. 29-30, Plaintiffs claim, Resp. Br. 41, that the argument was not preserved for appeal. Plaintiffs again are mistaken. Defendants' initial Circuit Court briefing argued that "the Plaintiff LLCs are … assigns of the individuals who signed the agreements," and Defendants argued this again on reconsideration. (R. 507; 882-883 (Defs.' Mem. in Support of MTC; Defs.' Mot. to Alter or Amend at 22-23).) For the reasons explained in the opening brief, Br. 29-30, the entity Plaintiffs are bound by the arbitration agreements as the assignees of the signatory individuals.

2. Principles of Equitable Estoppel Bind the Remaining Plaintiffs

Plaintiffs argue that the nonsignatory Plaintiffs are not bound by principles of equitable estoppel because the Agreement and Plan are the direct basis of only some of their claims. Resp. Br. 42. On the contrary, *all* of Plaintiffs' claims involve the Club, and thus arise from or relate directly or indirectly to Club membership. Nonetheless, equitable estoppel may apply even if a plaintiff's claims do not arise *solely* from the documents containing the arbitration provisions. *Cf. Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 630 (4th Cir. 2006) (holding that whether a plaintiff is equitably estopped from avoiding arbitration and whether a plaintiff's claims fall within the scope of the arbitration agreement are separate issues). Plaintiffs do not dispute that they bring claims pursuant to the Agreement and Plan, and attach the Plan as an exhibit to the Complaint. (R. 264-285 (Compl., Ex. 4).) Those claims thus arise from and relate to agreements containing mandatory arbitration provisions. Because the nonsignatory Plaintiffs also receive direct benefits from the contracts containing arbitration provisions, equitable estoppel principles bind them to those provisions to the same extent as the signatory Plaintiffs. *See Pearson*, 400 S.C. at 290-97, 733 S.E.2d at 601-05.

Plaintiffs further contend, Resp. Br. 43, without support, that the application of equitable estoppel should be limited to instances where there are a small number of parties. No equitable estoppel precedent relies on a headcount. The application of equitable estoppel does not depend on the *number* of nonsignatories, but on the *claims* made by nonsignatories. All nonsignatory Plaintiffs bring claims pursuant to documents

containing the arbitration agreements; it does not matter how many nonsignatory Plaintiffs followed that course.

3. The Nonsignatory Defendants May Enforce the Arbitration Agreements

The nature of Plaintiffs' claims also determines whether claims against nonsignatory *defendants* should be arbitrated. A nonsignatory defendant may compel arbitration where the claims against it are "closely intertwined" with the claims against the signatories, and where the claims against the nonsignatory defendant are "similar to and dependent upon" the arbitrable claims. *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001); *Goer v. Jasco Indus., Inc.*, 395 F. Supp. 2d 308, 313-15 (D.S.C. 2005). Plaintiffs maintain that the nature of their own pleaded claims does not matter unless Defendants prove *Plaintiffs'* pleaded claims that the Defendants are a single, amalgamated business enterprise. Resp. Br. 44-45. Defendants do not have to prove *Plaintiffs'* claims in order to compel arbitration. The point of arbitration is to have a forum other than a court determine the merits of a dispute. And it is the claims in the Complaint that determine the arbitrability of the dispute. *See Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 492-93, 689 S.E.2d 602, 604 (2010); *Timmons v. Starkey*, 380 S.C. 590, 596, 671 S.E.2d 101, 105 (Ct. App. 2008); *Zandford v. Prudential-Bache Secs., Inc.*, 112 F.3d 723, 729 (4th Cir. 1997). Plaintiffs cannot base their Complaint on claims that Defendants are a single business enterprise acting as one, but avoid arbitration by saying that the very claims they seek to adjudicate are false.

4. Plaintiffs' Claims Are Within the Scope of the Arbitration Agreements Because All Claims Concern the Club.

The Agreement and Plan govern Club membership and membership rights—and require that all directly and indirectly related disputes be sent to mandatory arbitration. All of Plaintiffs' claims relate to the Club, its structure and governance, and Club membership, and the Club is a Defendant to each of Plaintiffs' 16 causes of action. Both Plaintiff classes are based on Club membership and access to Club facilities. Plaintiffs attached the Plan as an exhibit to the Complaint, and their very first cause of action seeks a declaratory judgment that the "[Plan], [Agreement], and associated documents are unlawful, invalid, unconscionable, and void." (R. 113, 132-135 (Compl. at ¶¶ 104, 160-67).)

Each other cause of action ("COA") rests on claims about Club membership, Club governance, and use of Club facilities: that the "Club's governing documents" are unenforceable (2nd COA); that Defendants mislead Plaintiffs into paying dues for "mandatory" membership in the Club and deceived them about Club amenities (3rd COA); that required membership in the Club is unlawful (4th COA); that Defendants improperly interfered with Plaintiffs' short-term rental contracts by restricting access to Club amenities (5th COA); that Defendants conspired to unlawfully require mandatory Club membership and dues payments, and to eliminate short-term rental access (6th COA); that Defendants misrepresented membership in the Club, including the price and requirement of membership and sufficiency of Club amenities (7th COA); that Defendants have benefited from the Club dues and fees paid by Plaintiffs (8th COA); that

Plaintiffs relied on Defendants' promises in paying Club dues and fees (9th COA); that Plaintiffs are entitled to equitable title in common to Club property and amenities (10th COA); that Plaintiffs are entitled to an equitable common interest in Club property and amenities, including the right to control Club access and dues (11th COA); that Plaintiffs are entitled to an equitable easement appurtenant over Club property (12th COA); that Plaintiffs are entitled to repayment of their Club dues and fees (13th COA); that Plaintiffs were improperly induced to join the Club and to pay Club dues and fees (14th COA); that Defendants made false representations regarding the Club membership requirement (15th COA); and that Defendants breached their duties to Plaintiffs by overcharging for Club membership and failing to provide adequate facilities (16th COA). (R. 135-152 (Compl. ¶¶ 168-253).) Plaintiffs' representation, Resp. Br. 46, that the Club and Club documents "are only a small part" of the allegations in their Complaint is absurd.

These Club-centered causes action fall well within the broad arbitration agreements that encompass "any and all" disputes or claims "relating directly or indirectly to, or arising directly or indirectly from," the Agreement or Plan, which govern the Club, Club Membership, and member benefits and obligations. (R. 284-285; 376-377 (Plan at 15-16; Agreement ¶ VII).) The Circuit Court incorrectly narrowed the terms of the arbitration provision in holding that it was limited to claims that were "based on" the Plan. (R. 28-30, 61-63 (Arb. Orders at 28-30).) But South Carolina law recognizes that "[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Zabinski*, 346 S.C. at 598,

553 S.E.2d at 119 (citation omitted). "Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract." *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 214 (2013) (cleaned up). Although these determinations were properly for the arbitrator, Br. 17-21, the Club agreements have a "significant relationship" with all claims here.

D. The Arbitration Agreements Are Enforceable

1. Although Preempted, The SCUAA's Conspicuous Notice Requirements Are Satisfied

There is no dispute that, if the FAA applies, the SCUAA's conspicuous notice requirements are preempted. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Even if the SCUAA applied, however, Plaintiffs concede that the following Plaintiffs signed Agreements satisfying the conspicuous notice requirements: Anne Bosler and Dylan Hart; R. Jeffrey Kimball and Deborah S. Kimball; Chris Leigh-Jones; and Matthew N. Lynch and Barbara A. Lynch. Resp. Br. 19 n.16. Yet they argue that, even though the notice appears on the first page of the Agreement, that first page is not the "first page" under the SCUAA. Resp. Br. 23-24. Neither Plaintiffs nor the Arbitration Orders cite to any authority for that position. The Circuit Court's holding that the conspicuous notice requirement is not satisfied because there are other documents relevant to Club membership is unfounded and unprecedented.

Nor is the arbitration clause "buried" in "hundreds of pages" of documents. Plaintiffs specifically signed the Agreement. The Agreement is a separate document and is the document by which Plaintiffs acquire membership and obtain membership

privileges in the Club. The Club is hardly an afterthought in the purchase of property in a gated community that to a large extent is organized around the Club and its amenities. And there is no evidence regarding how the Agreement was presented to the Plaintiffs in relation to other documents related to their purchases of property in Palmetto Bluff. The notice was attached to the relevant agreement. That is enough to comply with the SCUAA.

2. The Arbitration Agreements Are Not Unconscionable

a. Plaintiffs Did Not Lack Meaningful Choice of Luxury Homesites

Unconscionability requires the "absence of meaningful choice" by one party "*together* with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them" *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (paraphrasing *Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996)) (emphasis added). Under established South Carolina law, "[t]he fact that a contract is one of adhesion does not make it unconscionable." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901 (Ct. App. 1998). Rather, a "take-it-or-leave-it contract" at most "*may* indicate one party lacked meaningful choice." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755 (emphasis added). Because the form nature of the contract is all Plaintiffs offer about choice, Plaintiffs' argument fails at the threshold.

Plaintiffs argue that, as a matter of law, the sophistication of the Plaintiffs is not relevant to the unconscionability analysis in the developer/homebuyer context. Resp. Br. 27. Plaintiffs' lead authority, *Damico*, does not support that categorical approach. On the

contrary, the *Damico* Court specifically "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." *Damico*, 437 S.C. at 611, 879 S.E.2d at 755. Indeed, "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 parties' relative sophistication*." *Id.* at 613, 879 S.E.2d at 755 (emphasis added).

The multimillionaire Plaintiffs here are nothing like the "innocent, inexperienced homebuyer" in *Damico*. *Id.* at 622, 879 S.E.2d at 761. Plaintiffs have not disputed their own sophistication or the supporting evidence in the record. Moreover, the properties at issue in *Damico* were primary homes, lived in by the plaintiffs, who were all individuals. *See* First Am. Compl., *Damico v. Lennar Carolinas, LLC*, No. 2014CP0802424, 2015 WL 13780350 (S.C. Com. Pl. Nov. 23, 2015). In contrast, the homes at issue here are luxury second homes, often for out-of-state purchasers, often held by limited liability companies, and often used for rental business. *See* Br. 4, 6-8, 13-15. Indeed, some Plaintiffs had previously bought property in Palmetto Bluff. *See* Br. 23-24.

Under the facts of *this* case, Plaintiffs' undisputed sophistication—along with the indisputable facts that vacation homes are not necessities, and that there are many competing sources of luxury homes in the Lowcountry and elsewhere—compels the conclusion that Plaintiffs did not lack meaningful choice in the transactions. Accordingly, the arbitration provisions are not unconscionable.

b. The Arbitration Agreements Are Neither Oppressive Nor One-Sided

Because Plaintiffs had ample, meaningful choice, the Court need not address the allegedly oppressive terms of the arbitration agreements. Notably, although the analysis of "unconscionability in the context of arbitration agreements" focuses "on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker," *Damico*, 437 S.C. at 612, 759 S.E.2d at 755 (citing *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69, and *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999)), Plaintiffs do not (and could not credibly) dispute that, by providing for arbitration before the AAA under the AAA Commercial Rules, the arbitration clause at issue here "is geared towards achieving an unbiased decision by a neutral decision-maker."

Rather, Plaintiffs rely on the provision requiring that arbitration be commenced within 60 days after a contractually required mediation, a remedies limitation, a unilateral amendment provision that is part of the contract as a whole rather than the arbitration provision, the fact that some prior disputes were litigated in court, and the supposed preclusion of arbitration by the South Carolina Declaratory Judgment Act.

The Circuit Court determined that none of those had *in fact* affected Plaintiffs' rights. (R. 24-25, 57-58 (Arb. Orders at 24-25).) Indeed, the Circuit Court recognized that it was unclear whether the perceived alteration to the statute of limitations would bar a different potential claimant from bringing a claim. (*Id.*) And it is difficult to see how a bar could apply. The 60-day period runs from the conclusion of the contractual mediation, not from the accrual of a cause of action. And the mediation provision has no limitations period. Any potential claimant who began and completed a mediation should have no

difficulty initiating an arbitration 60 days later. And one who somehow missed that deadline could still argue to the arbitrator that the limit was invalid under S.C. Code Ann. § 15-3-140.

The enforceability of the remedial limitations was also properly a question for the arbitrator, not the Court. "[W]here it is uncertain how the arbitrator will construe remedial limitations, the proper course is to compel arbitration." *Rowe v. AT&T, Inc.*, 2014 WL 172510, at *11 (D.S.C. Jan. 15, 2014) (citing *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003)); *Clark v. Goldline Int'l, Inc.*, 2010 WL 4929438, at *7 (D.S.C. Nov. 30, 2010); *Anderson v. Comcast Corp.*, 500 F.3d 66, 72-75 (1st Cir. 2007).

With respect to the contract's unilateral modification provision, the best Plaintiffs can muster is authority stating the truism that a party cannot unilaterally modify a contract where there is no contractual provision allowing unilateral amendment. Resp. Br. 29-30. Neither of the cited decisions involved an agreement to permit unilateral amendment. Although Defendants are unaware of any South Carolina authority directly on point—and Plaintiffs identify none—Plaintiffs do not dispute that most courts uphold unilateral modification provisions so long as any particular exercise of the modification power is reasonable and consistent with the duty of good faith and fair dealing. *See* David Horton, *The Shadow Terms: Contract Procedure And Unilateral Amendments*, 57 UCLA L. Rev. 605, 649 (2010); *see also*, *e.g.*, *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032-33 (9th Cir. 2016); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1317-18 (11th Cir. 2017).[6]

[6] *See also*, *e.g.*, *Sevier Cty. Schools Fed. Credit Union v. Branch Banking & Trust Co.*, 990 F.3d 470, 578 (6th Cir. 2021); *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051, 1062-67, 1071

Plaintiffs have no response to Defendants' demonstration, Br. 47, that a unilateral amendment provision cannot invalidate an arbitration clause unless the right to amend is contained within the four corners of the arbitration agreement. Indeed, *Damico* confirms that, "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement and not those of the whole contract." 437 S.C. at 609, 879 S.E.2d at 753 (citation and internal quotation marks omitted). And there was no evidence that the unilateral amendment provision has been exercised at all with respect to the arbitration clause, let alone in an unfair or oppressive manner.

Plaintiffs maintain that the arbitration clause was not mutual because the Club pursued some disputes with other members outside of arbitration. Resp. Br. 30-31. This is a red herring. The arbitration clause on its face is fully mutual, embracing all disputes between the parties. Plaintiffs do not dispute that perfect mutuality is not required in any event. *See* Br. 47-48; *Simpson*, 373 S.C. at 31, 644 S.E.2d at 673. Nor do they dispute the lack of evidence that any member had tried to enforce the arbitration provision. That the Club filed lawsuits does not mean that the arbitration clause did not apply to those disputes, just as the fact that Plaintiffs have sued here does not affect the scope of the arbitration provision.

(S.D. Cal. 2015), *aff'd sub. nom. Wisely v. Amazon.com, Inc.*, 709 F. App'x 862 (9th Cir. 2017); *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 280-85 (Cal. Ct. App. 1998); *Flores v. Bank of Am. N.A.*, 2019 WL 2470923, at *6-7 (D. Colo. June 13, 2019); *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 899-900 (2003); *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819 (S.D. Miss. 2001), *aff'd*, 34 F. App'x 964 (5th Cir. 2002). South Carolina courts take a similar approach toward unilateral modifications to employee handbooks, upholding modifications made with actual notice to employees. *See Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 595-96 (1994).

Plaintiffs also maintain (again without authority), Resp. Br. 31, that the arbitration provision cannot be enforced because of the right to a judicial determination under the South Carolina Declaratory Judgment Act, S.C. Code Ann. § 15-30-10, *et seq.* If that right is not waived by an agreement to arbitrate, *no* arbitration clause may *ever* be enforced in South Carolina, because all parties always must have access to the courts. But that is not how arbitration works. *See, e.g.*, *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 440 S.E.2d 877 (1994) (compelling arbitration of declaratory judgment claim); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (same).

Finally, even if a provision of the arbitration agreements could be found unenforceable, the proper remedy is to sever the unenforceable provision. As our Supreme Court has observed, "many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause." *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9. A similar policy governs the South Carolina Commercial Code, which permits a court finding unconscionability to "enforce the remainder of the contract without the unconscionable clause," or to "limit the application of any unconscionable clause as to avoid any unconscionable result." S.C. Code Ann. § 36-2-302. The South Carolina Supreme Court recognized this policy outside the context of commercial goods in *Damico*, 437 S.C. at 618, 879 S.E.2d at 758.

Plaintiffs do not argue that severability is not feasible, but merely that the arbitration agreements do not contain severability provisions. Resp. Br. 31. Courts have

the authority and discretion to sever unenforceable contract provisions, however, even in the absence of a severability clause. And that is exactly what this Court did in *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 370, 887 S.E.2d 534, 542 (Ct. App. 2023).

Plaintiffs cite *Damico* for the proposition that a court should not sever unconscionable provisions from an arbitration agreement as a matter of policy. Resp. Br. 32. *Damico* does not support Plaintiffs' position. To the contrary, the Court expressly recognized that an unenforceable provision may be severed from an arbitration agreement. *Damico*, 437 S.C. 604, 879 S.E.2d at 751. There, however, the Court found the unconscionable provisions to be so pervasive and objectionable that the contract would remain one-sided and fragmented after severance, and would require the Court to blue-pencil material terms of the agreement. *Id*. Indeed, one provision gave the seller the right in its sole discretion to determine the parties to the arbitration. *Id*. at 615, 879 S.E.2d at 757. Under those circumstances, the Court determined the better remedy was to decline to enforce the arbitration provision.

Here, any challenged terms of the arbitration agreements can be easily severed. The Circuit Court found nothing objectionable about the agreed-upon tribunal or arbitral procedures. Any alleged offending terms are isolated, not pervasive throughout the agreements. Neither Plaintiffs, nor the Circuit Court, have explained why the alleged offending terms cannot be severed without blue-penciling material terms. Under these circumstances, the appropriate remedy is to sever any provisions found to be unconscionable, and enforce the remainder of the arbitration agreements.

3. The Agreements' Limitations Period Does Not Bar Arbitration

Plaintiffs do not dispute that Defendants' counterclaims were timely under the AAA Rules. Plaintiffs nonetheless argue that Defendants are outside of the 60-day limitations period in the arbitration agreements because Defendants filed their counterclaims more than 60 days after mediation. Resp. Br. 32-33. While Plaintiffs try to paint their "Demand for Arbitration" as something other than it is, the document speaks for itself. (R. 354-362 (Defs.' Arb. Mot., Ex. A).) But the 60-day requirement in the arbitration agreements relates to the filing of an arbitration demand with the AAA, not to counterclaims in a counter-demand to a demand that was timely made. Just as a compulsory counterclaim relates back to the time of the filing of the plaintiff's complaint, *e.g.*, *Kirkland v. Lenoir Cty. Bd. of Educ.*, 216 F.3d 380, 388 (4th Cir. 2000), a timely counterclaim to an arbitration demand is timely if the original demand was timely.

More fundamentally, Defendants had no claims to bring in arbitration against Plaintiffs arising from the mediation; the mediation addressed *Plaintiffs'* claims against Defendants. Defendants had no obligation to seek preemptive relief. All Defendants could do was counterclaim within the arbitration, and seek to compel Plaintiffs to arbitrate when Plaintiffs brought arbitrable claims in court despite their agreement to arbitrate—and despite commencing an arbitration. Under the logic of Plaintiffs and the Circuit Court, if Plaintiffs had waited more than 60 days before suing, without commencing an arbitration at all, they could freely ignore their obligation to arbitrate because Defendants did not commence an arbitration based on Plaintiffs' mediation position. That makes no sense. Because Plaintiffs filed their arbitration demand within 60

days after the conclusion of mediation, Defendants' subsequent filing of a timely counter-demand was not barred by the agreements' limitation period.

4. The Arbitration Provisions in the Membership Agreements and Membership Plan Can and Should Be Harmonized With the Community Charter

The dispute resolution provisions in the Community Charter and Club documents are not in conflict and, on their face, can be harmonized. The arbitration provisions in the Club documents are limited to disputes arising from or related to the Club. Only one of the Community Charter's 20 chapters involves the Club. (R. 159-162 (Compl., Ex. 1 at Table of Contents).) Disputes involving the other 19 chapters remain subject to judicial resolution. And the very chart the Circuit Court relied upon to mischaracterize the Club documents as "low-level" makes clear that those documents "obligate all present and future Owners to be members of the Palmetto Bluff Club," carving out the very issues covered by the arbitration provisions. (R. 13, 46 (Arb. Orders at 13).) Moreover, fundamental contract principles dictate that the specific provisions in the Club documents should control within their limited scope over the general provisions in the Community Charter. "When general and specific clauses conflict, the specific clause governs the meaning of the contract." Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 32:10 (4th ed.1999). "A proper construction of a contract requires the court to give effect to specific terms over any general language." *Crenshaw v. Erskine College*, 432 S.C. 1, 28, 850 S.E.2d 1, 15 (2020) (citing Restatement (Second) of Contracts § 203(c) (1979), and *State v. Sweat*, 386 S.C. 339, 688 S.E.2d 569 (2010) (reciting "statutory construction rule that a court must follow a specific provision over general language")).

CONCLUSION

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

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-001587

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

v.

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

CERTIFICATE OF COUNSEL

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

July 20, 2023

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