STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

COURT OF COMMON PLEAS

CASE NO.: 2022-CP-07-00632

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,

Plaintiffs,

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,

Defendants.

ORDER

This matter came before the Court on July 20, 2022, for a hearing on multiple motions, including Plaintiffs' Motion to Stay Arbitration, Defendants' Motion to Compel

Arbitration, Defendants' Motion to Dismiss pursuant to Rule 12(b)(8), Plaintiffs' Motion to Disqualify Nexsen Pruet LLC as Counsel, and Plaintiffs' Motion for Partial Summary Judgment. The Court heard arguments and considered extensive briefing from the parties. Upon thorough consideration of the evidence and arguments of counsel, for the reasons set forth herein and in the materials on file with the Court and argued during the hearing, the Court rules as follows:

- Plaintiffs' Motion to Stay Arbitration and to Invalidate Purported Arbitration Clause is GRANTED.
- Defendants' Motion to Compel Arbitration is DENIED.
- Defendants' Motion to Dismiss is DENIED.
- Plaintiffs' Motion for Partial Summary Judgment is not ripe for determination at this time.
- Plaintiffs' Motion to Disqualify Nexsen Pruet LLC as counsel is not ripe for determination at this time.

BACKGROUND FACTS

This case arises out of the development of real estate in Beaufort County, South Carolina in a community called Palmetto Bluff. The facts set forth herein are taken from the Complaint or constitute contentions of the parties. Because the motions currently before the Court present questions of law, the Court is not making findings of fact in this Order. Plaintiffs are owners of residential property within the Palmetto Bluff development. Plaintiffs assert individual, derivative, and class claims relating to the

development of Palmetto Bluff. Defendants include the developer and various entities engaged in the development, management, and sale of real property within Palmetto Bluff, as well as in commercial operations relating to the development and the community.

In the course of developing Palmetto Bluff, the developer subjected the residential property to certain covenants, restrictions, and governing documents for the community ("Governing Documents"). Plaintiffs contend that among the Governing Documents, the Community Charter is hierarchically superior, with all other community documents being subservient to it.

Plaintiffs argue the Governing Documents purport to impose an automatic, mandatory obligation requiring residential property owners to join a for-profit entity, the Palmetto Bluff Club. According to the Governing Documents, "[b]y acceptance of a deed, each Owner shall automatically become a member of the Palmetto Bluff Club and shall automatically assume and agree to be bound by all of the terms and conditions of the Palmetto Bluff Club Documents, which terms and conditions are incorporated herein by reference." Plaintiffs allege that at some real estate closings for properties at Palmetto Bluff—or after the closing is done—the Club interjects "Membership Agreements" pertaining to the "automatic" Club membership. Defendants deny this. According to Defendants, these agreements are "mandatory" upon "acceptance of a deed"; the Club states that "all persons must mail or deliver to the Membership Office a fully completed and signed Membership Agreement."

The Defendants have never recorded a copy of the "Palmetto Bluff Club Documents" with the Register of Deeds for Beaufort County. Defendants maintain that they can unilaterally change the Palmetto Bluff Club Documents in their "sole and absolute discretion." Plaintiffs contend the Palmetto Bluff Club Documents were changed multiple times between the years 2017–2021 to add (and to subsequently alter) an arbitration provision. By its terms, Defendants acknowledge the arbitration provision applies "only to members who acquire their membership on or after June 19, 2017."

Meanwhile, the Community Charter contains an entire chapter dedicated to the resolution of disputes within the community. The Community Charter's dispute resolution provisions require pre-suit mediation and other steps, but Plaintiffs argue the Charter expressly permits and contemplates civil litigation. Plaintiffs assert the Community Charter's dispute resolution provisions conflict with the purported arbitration provision within the Palmetto Bluff Club Documents. The Palmetto Bluff Club Documents are expressly designated as being subservient to the Community Charter. In the event of a conflict, the Governing Documents state that the Community Charter controls. In their motions and memoranda, Plaintiffs argue a conflict exists between the Community Charter and the Palmetto Bluff Documents regarding dispute resolution.

The arbitration provision asserted by Defendants is contained within certain Palmetto Bluff Club Documents—including a "Membership Agreement"—which pertain to only one defendant: Palmetto Bluff Club, LLC (the "Club"). Plaintiffs believe the majority of the Plaintiffs did not sign a membership agreement with the Club containing

an arbitration provision. Defendant Club produced "Membership Agreements," several of which were incomplete, signed by only seven (7) of the Plaintiffs. Defendants did not produce any evidence to support a veil-piercing theory as to corporate plaintiffs. Aside from the few Club membership agreements the Club asserted, Defendants did not produce or provide evidence of any agreement to arbitrate by any plaintiff with any other defendant. Defendants did present, however, numerous legal arguments as to why the LLC Plaintiffs should be bound by the agreements signed by the individual members of each corporate plaintiff.

Plaintiffs contend the arbitration clause asserted by the Defendants contains numerous unfair and one-sided provisions, as discussed below. Plaintiffs have argued the arbitration clause is buried within hundreds of pages of covenants, restrictions, easements, rules, and guidelines. Plaintiffs contend because Defendants have never recorded it, potential purchasers may have no notice of its existence. Plaintiffs further argue that the arbitration clause is ostensibly mandatory and "automatic" on acceptance of a deed; it seeks to eliminate statutory damages; it purports to unlawfully abridge time limitation periods on claims; it has an alleged capacity for unilateral amendment by the Club. Finally, Plaintiffs contend the Defendants—who regularly pursue disputes outside of arbitration—believe they can ignore the provision when it suits them, while enforcing it against residential owners.

Plaintiffs have a dispute with Defendants, as further set forth in their Complaint. After undergoing the mediation process set forth in the Community Charter, the

Plaintiffs filed this lawsuit in the Beaufort County Court of Common Pleas. Plaintiffs deny the existence of agreements to arbitrate.

Several days after the initiation of this civil action, to preserve their rights under the 60-day limitations period asserted by Defendants, some of the plaintiffs contacted the American Arbitration Association, denying its jurisdiction but providing notice of the claims made in the lawsuit "for the purpose of preserving and not waiving . . . claims that may survive after the conclusion of [this civil action]." Defendants later filed demands in arbitration against all of the Plaintiffs. An arbitration is therefore currently pending between the parties before the American Arbitration Association, AAA Case No. 01-22-0001-5722. That arbitration is STAYED by this Order.

PLAINTIFFS' MOTION TO STAY ARBITRATION AND TO INVALIDATE PURPORTED ARBITRATION CLAUSE
AND
DEFENDANTS' MOTION TO COMPEL ARBITRATION

This case involves the development of real estate in Beaufort County, South Carolina. The development of real property does not involve interstate commerce, and therefore the South Carolina Uniform Arbitration Act ("SCUAA") applies. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012) (holding Federal Arbitration Act did not apply because "the development of real estate is an inherently intrastate transaction."). Plaintiffs have alleged the Community Charter, the Palmetto Bluff documents, and the Deeds allow for short-term rentals, and Defendants' acts interfere with Plaintiffs' short-term rental of their properties. See Complaint, pp. 7, 8, 14-18, and ¶¶ 49, 50, 129, 130, 132, 141, 145, 146, 147, 165, 179, 181, 191-194, and 198. Defendants

argue that the rental of real property involves interstate commerce. See, e.g., *Russell v. US*, 471 US 858, 862 (1985) ("The rental of real estate is unquestionably such an activity. We need not rely on the connection between the market for residential units and 'the interstate movement of people,' to recognize that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties. The congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class.")

The SCUAA provides that a "court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." S.C. Code § 15-48-20. Moreover, a written agreement to arbitrate is invalid and unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." S.C. Code § 15-48-10(a). "Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." *Id*.

South Carolina law requires that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place." *Simpson v. MSA of Myrtle Beach, Inc*., 644 S.E.2d 663, 373 S.C. 14 (2007); *see also Housing Authority v. Cornerstone Housing*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003); *Hooters of America v. Phillips*, 39 F. Supp. 2d 582, 609 (D.S.C. 1998) (holding issues of "substantive arbitrability" are properly before the trial court and these issues are whether "a valid arbitration agreement exists between the

parties and . . . [whether] the specific dispute falls within the substantive scope of the agreement") (*quoting Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997)).

The construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). Similarly, "the construction of a clear and unambiguous deed is a question of law for the court." *S.C. Dep't. of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) (internal citations omitted). Likewise, "unconscionability raises a question of law." *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013). Courts in South Carolina do not enforce unconscionable contracts, nor those that violate public policy. *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993).

I. There is no agreement to arbitrate as between numerous parties.

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001). Arbitration must be "predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019). "[A] presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate. . . ." *Id.* at 337 (emphasis in original; internal citations omitted). Here, there appears to be no agreement to arbitrate among the vast majority of the parties

to this litigation. This Court cannot enforce contracts that do not exist, and nor will it require parties to surrender access to the courts when they have never agreed to do so.

There are twenty-one (21) Plaintiffs in this action, and twelve (12) Defendants. Only one Defendant (the Club) produced any alleged agreements to arbitrate, and those alleged agreements were signed by only seven (7) of the Plaintiffs.

A. No Agreement to Arbitrate Whatsoever Exists as to Fifteen (15) Plaintiffs.

As an initial matter, fifteen (15) of the Plaintiffs have never signed any agreement to arbitrate any dispute with any of the Defendants, whatsoever. Although they appear to be limited liability companies formed by the signatories to one or more of the agreements to arbitrate, those Plaintiffs are: (1) 315 Corley CW, LLC, (2) Bridge Charleston Investments B, LLC, (3) Bridge Charleston Investments C, LLC, (4) Bridge Charleston Investments E, LLC, (5) Bridge Charleston Investments H, LLC, (6) 368 Mount Pelia, LLC, (7) Sebrina Leigh-Jones, (8) Live Oak Assets, LLC, (9) MKM 22 West, LLC, (10) One Rumford Lane, LLC, (11) Salt Works, LLC, (12) TTJR, LLC, (13) Jennifer Albero, (14) Geoffrey J. Block, and (15) Bosler-Hart Trust. In the absence of an agreement to arbitrate, those fifteen Plaintiffs cannot be deemed to have surrendered their fundamental right to access the courts, nor can they be required to arbitrate their disputes with any Defendant.[1]

[1] Defendants' primary case on this point is *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (S.C. App. 2012). *Pearson* involved significantly different facts and circumstances than here, including that (1) essentially three parties were involved in *Pearson*—a doctor, a hospital system, and a medical placement company, and (2) the dispute involved the doctor's South Carolina Payment of Wages Act and other claims against the other two parties after he was fired by them. *Pearson*'s very different circumstances cannot be compared with Defendants' attempt in this case to force numerous nonsignatory litigants—who never signed arbitration agreements with each other—into an arbitration.

Despite the lack of agreements to arbitrate, each Defendant has made demands in arbitration against each Plaintiff, within AAA Case No. 01-22-0001-5722.

AAA Case No. 01-22-0001-5722 is hereby STAYED as to the demands made against the fifteen Plaintiffs for whom no arbitration agreement exists whatsoever. S.C. Code § 15-48-20(b) ("the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate.").

B. No Agreement to Arbitrate Exists between Plaintiffs and Eleven (11) Defendants.

Defendants have not produced any contract in which any Plaintiff has agreed to arbitrate any dispute with the following eleven Defendants: (1) Palmetto Bluff Development, LLC, (2) Palmetto Bluff Real Estate Company, LLC, (3) PBLH, LLC, (4) Montage Palmetto Bluff, LLC, (5) Palmetto Bluff Preservation Trust, Inc., (6) Palmetto Bluff Preservation Trust Board of Stewards, (7) Jordan Phillips, (8) Mark Polites, (9) Gray Ferguson, (10) Henry Armistead, or (11) South Street Partners LLC. Although Defendants argued numerous grounds for why these Defendants are covered by the arbitration agreement as non-signatory beneficiaries, they are not signatories themselves.

Despite the lack of agreements to arbitrate, those eleven Defendants have brought demands in arbitration against each Plaintiff, within AAA Case No. 01-22-0001-5722.

Because those eleven Defendants have failed to demonstrate an agreement to arbitrate with any Plaintiff, **AAA Case No. 01-22-0001-5722 is hereby STAYED as to the demands against Plaintiffs made by those eleven Defendants.** S.C. Code § 15-48-20(b)

("the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate.").

II. The Club's arbitration clause is invalid, unlawful, and unenforceable.

Defendant Club claims an arbitration agreement exists between itself and seven (7) of the Plaintiffs.[2] The Court finds that those agreements are invalid, for all or any one of the following reasons:

A. Plaintiff the Bosler-Hart Trust is not bound.

For Bosler and Hart, the named plaintiff in this lawsuit is the Bosler-Hart Trust, which has never signed an arbitration agreement and therefore is not bound to arbitration. Instead, the documents produced by the Club have signatures of Bosler and Hart individually and personally, as to their personal membership in the Club, which is legally different from the real property dispute involved in this litigation and not applicable here. Moreover, the Court finds that Defendants have failed to produce evidence or make arguments sufficient for this Court to hold the Trust responsible for the individual acts of its trustees.

AAA Case No. 01-22-0001-5722 is hereby STAYED as to the demands against the Bosler-Hart Trust, for which no agreement to arbitrate exists. S.C. Code § 15-48-20(b) ("the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate.").

[2] The Club produced four purported arbitration agreements signed by the following Plaintiffs: (1) Jeffrey Kimball and Deborah Kimball, (2) Chris Leigh-Jones, (3) Matthew N. Lynch and Barbara A. Lynch, and (4) Anne Bosler and Dylan Hart.

B. The arbitration provision is eclipsed by the Community Charter, which allows filing "in any court."

Plaintiffs argue the Club's arbitration provision is within "low-level community documents" called the "Palmetto Bluff Club Documents." The alleged provision is superseded by a superior document, the Community Charter for Palmetto Bluff, which has its own dispute resolution provisions specifically allowing residential owners to file suit in court. The Community Charter's dispute resolution procedures control over those in the Palmetto Bluff Club Documents.

The Community Charter states it "is intended to serve as a framework for community governance" at Palmetto Bluff. The Charter has a table identifying for homeowners the various "Governing Documents" within the Palmetto Bluff community:

TABLE 1.1

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

Listed last are the "Palmetto Bluff Club Documents," which by definition include the "Membership Plan" and "Membership Agreement" which contain the arbitration clause asserted by the Defendants. Plaintiffs contend the Community Charter controls among the Governing Documents, and over the lower-level Membership Plan:

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

(emphasis added). The Membership Plan is identified as one of the Governing Documents.

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

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

Community Charter p. 52 § 18.1(a) (emphasis added). Here, parties mediated the dispute in conformance with this provision. As such, the Community Charter allows filing "in any court."

By their plain and clear terms, the Charter's provisions allowing disputes to be resolved "in any court" take precedence over the conflicting arbitration provision—which Plaintiffs claim was belatedly and unilaterally inserted into "low-level governing documents". Under the unambiguous language of the Charter (particularly its "Conflicts" provision), the arbitration clause does not control Plaintiffs in their resolution of disputes with Defendants. Instead, Plaintiffs are expressly authorized to file suit "in any court," and Defendants cannot compel arbitration.

AAA Case No. 01-22-0001-5722 is hereby STAYED for lack of a valid agreement to arbitrate. S.C. Code § 15-48-20(b) ("the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate.").

C. The purported arbitration clause excludes members before June 19, 2017.

By its own terms, the Club's purported arbitration clause does not apply to members who bought before June 19, 2017:

> This "Arbitration/Mediation" provision shall apply only to members who acquire their membership on or after June 19, 2017.

This language specifically excludes Plaintiffs Bridge Charleston Investments B LLC ("Bridge B"), Geoffrey J. Block, and Jennifer Albero from its scope. Bridge B acquired its Club membership in 2015; Jennifer Albero acquired her membership on June 5, 2017; and Geoffrey J. Block acquired his membership in 2016—all before June 19, 2017. As such, the clear language of the Club's clause excludes them from mandatory arbitration.

AAA Case No. 01-22-0001-5722 is hereby STAYED for lack of a valid agreement to arbitrate, particularly as to Bridge B, Geoffrey Block, Jennifer Albero, and any Plaintiff who acquired their membership before June 19, 2017. S.C. Code § 15-48-20(b) ("the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate.")

D. The purported arbitration clause is unenforceable and invalid on its face.

As to the alleged arbitration agreements which Defendants have put forth, there are multiple reasons that this Court grants Plaintiffs' Motion to Stay and denies the Defendants' Motion to Compel arbitration. Each reason discussed below is independent grounds for this Court's decision:

1. Defendants are outside of the limitations period in their own "agreement."

First, Defendants have waived arbitration of their claims under the terms of the very agreements which Defendants seek to enforce against Plaintiffs. The asserted agreement requires that a

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

If this provision were valid, Defendants unequivocally breached its self-selected sixty-day notice and filing requirement, which is made mandatory by their use of the word "shall." The referenced mediation concluded on February 14, 2022. Therefore, the sixty-day calendar deadline expired on April 14, 2022. Defendants did not file a demand with the American Arbitration Association until May 23, 2022, ninety-eight (98) days after the conclusion of the mediation. They did not file this Motion to Compel until May 24, 2022. As such—if valid—under the mandatory requirements of the provisions which Defendant Club drafted and now seeks to enforce, the Defendants have waived arbitration. *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."). This waiver does apply to Defendants' arguments that Plaintiffs' claims should be arbitrated. The Court addresses this argument elsewhere in this Order.

2. The contract fails the conspicuous notice requirement of the South Carolina Uniform Arbitration Act.

The SCUAA is clear: a contract is not subject to arbitration when it fails to give proper notice—on its very first page, in UNDERLINED CAPITAL LETTERS—that it is subject to arbitration. S.C. Code Ann. § 15-48-10(a) (2005). The alleged arbitration provision that Defendants assert fails this basic test and is therefore unenforceable as a matter of law.

This case involves real estate in Beaufort County, South Carolina, and it challenges the validity and enforceability of covenants that Defendants claim run with the land. As a threshold matter, the law is clear that the subject transaction does not involve interstate commerce, and therefore the South Carolina Uniform Arbitration Act ("SCUAA") applies. *Bradley*, 398 S.C. at 447.

The SCUAA requires conspicuous notice of a requirement to arbitrate, rendering invalid all arbitration provisions which fail to give statutorily-sufficient notice. The Act mandates: "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a) (emphasis added). Defendants have produced Membership Agreements with this Notice on the first page, but Plaintiffs contend this is insufficient under the Act.

Here, Plaintiffs maintain that the Club documents are buried toward the end of hundreds of pages of fine-print covenants, articles, restrictions, easements, waivers,

bylaws, policies, procedures, rules, resolutions, and guidelines, all of which are imposed on purchasers as part of the real estate closing process. As discussed above, the "Palmetto Bluff Club Documents" are low-level documents within the community, which are subservient to the Community Charter. According to Defendants, the arbitration provision ostensibly comes into effect, automatically, upon the closing of a home: "I hereby understand that by my acceptance of a deed for property within Palmetto Bluff I became a 'Community Member' of the Palmetto Bluff Club (the 'Club') and automatically assumed and agreed to be bound by all the terms and conditions of the Membership Plan." An arbitration clause buried within hundreds of pages of real estate closing documents violates the SCUAA's requirement that notice of arbitration must be IN UNDERLINED CAPITAL LETTERS ON THE FIRST PAGE.[3]

As such, the asserted arbitration provision runs afoul of the SCUAA's conspicuous notice requirement, and this Court will not enforce it.

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

Even if the asserted arbitration clause had not been inconspicuous and concealed, the provision would nonetheless be unenforceable under South Carolina law. The alleged arbitration agreement is unconscionable, oppressive, and adhesive: the few Plaintiffs to whom it might apply were deprived of any meaningful choice, and the terms of the contract itself are oppressive and one-sided. The "Palmetto Bluff Club

[3] In addition, the Club's Membership Plan for years did not have the mandatory language, and therefore is unenforceable. The Club later added the language, but too late to purport to bind the previous signatories.

Documents," in which the arbitration clause is buried, are themselves contracts of adhesion, unconscionable, oppressive, and one-sided. "Arbitration is a matter of contract and controlled by contract law." *Smith*, 742 S.E.2d at 37, 403 S.C. at 10 (citation omitted). As such, arbitration agreements may be stricken "upon such grounds as exist at law or in equity for the revocation of any contract." S.C. Code § 15-48-10. Courts in South Carolina do not enforce unconscionable contracts, or those that violate public policy. *Berkebile*, 311 S.C. at 50, 426 S.E.2d at 760.

The test for determining whether an arbitration agreement is unconscionable has two prongs: (1) whether there is an absence of meaningful choice, and (2) whether the terms are oppressive and one-sided. *Smith,* 417 S.C. at 42, 790 S.E.2d at 1 ("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.").

(a) The Club documents are contracts of adhesion.

As to the first prong, there is no question that there is no meaningful choice here—mere "acceptance of a deed for property within Palmetto Bluff" ostensibly means that a person is "**automatically** assumed and agreed to be bound by all the terms and conditions of the Membership Plan." (emphasis added). The Club's membership agreement is a classic example of a "take-it or leave-it" contract with terms that are not negotiable. *See Smith* at 49-50, 790 S.E.2d at 4. The Court recognizes that modern real estate

developments are filled with mandatory covenants, including covenants that require payments of fees, charges, and assessments.

Notably, the alleged governing documents for the Palmetto Bluff community are many hundreds of pages long. They include a Community Charter which purportedly has been amended and supplemented at least seventy-one (71) times, and a separate recreational covenant which purportedly has been amended and supplemented at least sixty (60) times. While Plaintiffs have produced no evidence these supplements and amendments impact Plaintiffs' claims, the Community Charter purports to incorporate the "Palmetto Bluff Club Documents" (which contain the asserted arbitration "agreement"), and the Club has never recorded a copy of its governing documents (which it states that it can change at any time in its "sole and absolute discretion") with the Register of Deeds for Beaufort County.

The asserted "Membership Agreement" is one part of a vast constellation of purported "terms and conditions" of "membership" in Palmetto Bluff Club. The purported agreement falls under the umbrella of the "Palmetto Bluff Club Membership Plan." Plaintiffs contend that at real estate closings for properties at Palmetto Bluff—or, often, after the closing is done—the Club interjects "Membership Agreements." These agreements are "mandatory;" the Club states that "all persons **must** mail or deliver to the Membership Office a fully completed and signed Membership Agreement." (emphasis added). The agreement ostensibly memorializes something "automatic" that occurs "by acceptance of a deed."

There is no opportunity whatsoever to negotiate these "automatic" provisions, in addition to the automatic acceptance of other mandatory covenants, conditions, and restrictions incident to ownership of real property at Palmetto Bluff. Elsewhere within the hundreds of pages, this lack of meaningful choice reverberates:

- By acceptance of a deed, each Owner shall ***automatically*** become a member of the Palmetto Bluff Club and shall ***automatically*** **assume and agree to be bound** by all of the terms and conditions of the Palmetto Bluff Club Documents, which terms and conditions are incorporated herein by reference." (Charter, Ch. 19, Palmetto Bluff Club) (emphasis added).
- Membership in the Club is ***mandatory*** for all owners of property in the Community. (Waiver Agreement, ¶ 1) (emphasis added).
- By acceptance of a deed, every Owner of a residence . . . shall ***automatically*** **assume and agree to be bound** by all of the terms and conditions of this Membership Plan." (Plan, p. i) (emphasis added).
- Prior to or contemporaneous with the acquisition of a homesite or residence, all persons **must** mail or deliver to the Membership Office a fully completed and signed Membership Agreement. (Plan, p. iii) (emphasis added).
- Any Owner of a residence or homesite within Palmetto Bluff **must become a member of the Club**. (Plan, p. 1) (emphasis added).
- By acceptance of a deed, every Owner of a residence . . . shall ***automatically*** **assume and agree to be bound** by all of the terms and conditions of this Membership Plan. (Plan, p. 2) (emphasis added).
- Each member agrees to be bound by the terms and conditions of the Membership Documents, **as they may be modified from time to time**. (Plan, p. 2) (emphasis added).

Because these terms are purportedly "automatic" and "mandatory," there is no conceivable potential for bargaining power on the part of those whom the provisions purport to bind.

Because the Club's asserted arbitration "agreement" is a classic contract of adhesion under South Carolina law, this Court finds it to meet the first prong of the test for unconscionable contracts.

(b) Oppressive and one-sided terms

The second prong of the unconscionability analysis is a determination of whether the arbitration agreement contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Unconscionable, oppressive terms include lack of mutuality, violation of public policy, and limitation on statutory remedies. *Simpson*, 644 S.E.2d at 663, 373 S.C. at 14. Here, the arbitration agreement asserted by the Club strips members of statutory remedies, purports to alter the statute of limitations, and it is capable of unilateral amendment in the Club's "sole and absolute discretion." Moreover, because a person is purportedly "automatically" bound by onerous, oppressive, one-sided terms within the hundreds of pages of documents, it is reasonable to conclude that no fair or honest person would accept them—if they even knew they existed.

Significantly, the evidence demonstrates that the Club frequently pursues collection of dues and charges from its members outside of arbitration, including by filing liens against its members' real property and pursuing foreclosure actions against members and their property. There is no evidence that a property owner ever demanded these collection actions be arbitrated, however.

This Court finds that the asserted arbitration clause is oppressive, unreasonable, unfair, one-sided, and unconscionable as a matter of law, including for the following reasons:

First, the clause improperly limits damages when it states, for example:

> Any arbitration shall be limited to a party's actual, out-of-pocket, compensatory damages only.

This provision is similar to terms which led our Supreme Court in *Simpson* to strike down that arbitration agreement. *See* 644 S.E.2d at 670-672. Like this one, the arbitration clause in *Simpson* prohibited the "award [of] punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect)." *Id*. at 670. The *Simpson* Court found that by purporting to prohibit certain damages, the clause violated the statutory law of the South Carolina Unfair Trade Practice Act ("SCUTPA"), which "requires a court to award treble damages for violation of the statute." *Id.*

Here, Plaintiffs have asserted a cause of action against Defendants pursuant to SCUTPA. The *Simpson* Court found that "this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA" claims. *Id*. Moreover, the Supreme Court included strong language against such terms in an adhesion contract:

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

Id. at 671. The Club's attempt to strip its members of statutory remedies within a "mandatory" and "automatic" "agreement" renders the provision unconscionable.[4]

Second, the asserted "arbitration agreement" contains a one-sided provision allowing unilateral amendment—the Club, and only the Club, claims it may change the deal whenever it likes:

> The Company reserves the right **in its sole and absolute discretion**, from time to time, to modify the Membership Plan and Rules and Regulations [of which the purported arbitration clause is a part] . . . and to make any other changes to the Membership Documents . . . .

(emphasis added). As discussed above, this vast capacity for alteration of the arbitration clause is unreasonable and oppressive, and it demonstrates a lack of mutuality that is unfair and unreasonable. The presence of a term permitting unfettered change to the arbitration clause by one side renders the clause unconscionable and unenforceable.

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

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

(emphasis added). Although the record does not support a conclusion that a potential claimant would be barred from bringing a claim after sixty days, this language provides

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[4] In *Simpson*, the contract contained a severability clause, which the Court nonetheless declined to enforce due to the pervasive unconscionability of the entire arbitration agreement in that case. Importantly, the arbitration agreements asserted by Defendants do not contain a severability clause. Thus, as a matter of law, the entire agreement is invalid and unenforceable.

further grounds for this Court's decision. *See* S.C. Code § 15-3-140 ("Contract provision shortening statutory period."; "No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action . . ."). The presence of such an oppressive provision within an adhesion contract renders the alleged arbitration clause unconscionable. *See Simpson*, 644 S.E.2d at 670-672 ("The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.").

Fourth, the asserted arbitration clause, which is already unlawful, oppressive, and unfair as discussed above, may apparently be ignored at the choice of the Club. This remarkable is shown in the public record, where the Club has filed many liens with the Beaufort County Register of Deeds, and then sought to foreclose on them in the Beaufort County Court of Common Pleas. (Declaration of Recreational Covenant for Palmetto Bluff, § 3.3, Lien for Membership Fees) (Club "may enforce such lien . . . by suit, judgment, and foreclosure."). Such one-sidedness is unconscionable, and it would be deemed objectively unfair and oppressive by a reasonable person.

Fifth, the purported arbitration clause improperly purports to divest Plaintiffs of their statutory right to have a court determine legal rights under South Carolina's Declaratory Judgment Act, S.C. Code § 15-30-10 *et seq*. That statute states that "**Courts of record** within their respective jurisdictions **shall have power** to declare rights, status and

other legal relations . . . ." including "under a deed, will, written contract or other writings constituting a contract . . ." *Id.* §§ 15-33-20, -30 (emphasis added). Here, Plaintiffs seek declaratory judgments on deeds and written contracts. Although this section is a jurisdictional statute, and although Plaintiffs point to no case or statute that prohibits parties agreeing to an arbitrator declaring such rights, the arbitration agreement is unenforceable.

In sum, the purported arbitration clause is unenforceable for the foregoing reasons. Moreover, the Club's asserted arbitration clause does not contain a severability provision, although, as the drafter, the Club certainly could have included one. Therefore, this Court finds that the above unfair and oppressive provisions render the entire arbitration agreement wholly unconscionable, invalid, and unenforceable. *See Simpson,* 644 S.E.2d at 674 (holding, despite a severability provision, that the arbitration agreement was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause.").

This Court strikes the alleged arbitration clause entirely, denies Defendants' Motion to Compel, and **AAA Case No. 01-22-0001-5722 is hereby STAYED for lack of a valid agreement to arbitrate.** S.C. Code § 15-48-20(b) ("the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate.").

III. No arbitration by non-signatories.

Without offering proof sufficient to pierce a corporate veil, Defendants argued that certain corporate Plaintiffs should be bound by Club Membership Agreements apparently signed by some of the corporation's members or shareholders. The Court finds that Defendants' arguments lacked adequate evidentiary or factual basis. Moreover, Defendants cite no applicable law for ignoring a company's corporate form in the context of limited club membership agreements, apparently signed personally by some of the corporation's purported shareholders. "It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders . . . ." *Mid-South Mgmt. v. Sherwood Dev.*, 649 S.E.2d 135, 139, 374 S.C. 588 (Ct. App. 2007) (internal citations omitted). An agreement signed by a person individually does not bind a separate company; the agreement must be explicitly signed on behalf of the company. Here, none of the Plaintiffs which are companies entered into a membership agreement or plan with the Club, and none can be bound by the purported arbitration clause. Defendants offer no evidence to pierce the corporate veil. Similarly, if individuals used the Club pool or restaurant at times for their personal enjoyment, that cannot be used as an estoppel or "benefit" argument against the separate, non-member, limited-liability company to force the company into arbitration under an agreement the company never signed. The Court finds that Defendants have failed to offer evidence sufficient to overcome the presumption against arbitration by non-signatories to a written agreement to arbitrate.

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

Even if a valid arbitration clause existed, claims in the Complaint are outside of its scope. A party seeking to compel arbitration must establish that the claims fall within the scope of the agreement. *Wilson*, 426 S.C. at 336, 827 S.E.2d 173. Defendants have failed to do so.

The purported arbitration clause states, in broad terms, that it applies to controversies "relating directly or indirectly to, or arising directly or indirectly from "the Club Membership Plan. The Club is a recreational and social organization, and the Membership Plan "describes the terms, conditions and privileges of membership in the Club." Membership involves use of the pool, restaurants, pottery studio, bowling alley, and fitness facilities, *inter alia*.

Despite the numerous allegations and Claims related to access to the Club, many allegations in the Complaint are not related to the Membership Plan or Agreement. For example:

1. Allegations against non-Club entities are not related to the Membership Plan, which only applies to the relationship between the Club and its member. Allegations in the Complaint against, for example, Defendants South Street Partners, Palmetto Bluff Development, LLC, Palmetto Bluff Preservation Trust, Inc., PBLH, LLC, Montage Palmetto Bluff, LLC, and numerous others are based on those entitles' actions and documents, not on the Membership Plan. *See, e.g.*, Compl. pp. 5–10.

2. Allegations regarding the Community Charter and the Declaration of Recreational Covenant for Palmetto Bluff relate to the terms of those documents themselves, not to the Membership Plan, which is subordinate. *See, e.g.*, *id.* ¶¶ 41–52.

3. Allegations as to the Founder's breach of fiduciary duty are based on South Carolina's law of breach of fiduciary duty, not on the Membership Plan, to which the Founder is not a signatory. *See, e.g.*, *id.* p. 11, ¶¶ 103, 129.20, 129.21.

4. Allegations as to South Street Partners, Palmetto Bluff Development, LLC, and others' unfair and unlawful competition are based on the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10 *et seq.*, not on the Membership Plan, to which those parties are not signatories. *See, e.g.*, *id.* ¶¶ 128, 129.7, 129.18, 129.20, 129.21, 129.24, 129.25, 179–184.

5. Allegations as to the Trust and the Board of Stewards' breach of fiduciary duty are based on South Carolina's law of breach of fiduciary duty, not on the Membership Plan, to which those parties are not signatories. *See, e.g.*, *id.* ¶¶ 130, 130.1, 130.2, 130.3, 130.4, 157, 186–189.

6. Allegations that the Club is a homeowners' associations and subject to the South Carolina Homeowners Association Act, S.C. Code § 27-30-110 *et seq.*, are based on that statute, not on the Membership Plan. *See, e.g.*, *id.* ¶¶ 131, 169–177.

7. Allegations of civil conspiracy against Defendants are based on the common law of South Carolina, not on the Membership Plan. *See, e.g.*, *id.* ¶¶ 197–199.

These are selected examples; the 83-page Complaint contains numerous others. In sum, many of the claims in this lawsuit are not controversies relating to the Membership Plan—which mainly involves members' use of the social club, such as pools, fitness centers, etc.—and therefore are outside of the scope of the purported arbitration clause.

In conclusion, Plaintiffs' Motion to Stay Arbitration and to Invalidate Purported Arbitration Clause is **granted** and Defendants' Motion to Compel Arbitration is **denied**. AAA Case No. 01-22-0001-5722 is stayed and shall not proceed.

DEFENDANTS' MOTION TO DISMISS

Defendants argue that this lawsuit should be dismissed pursuant to Rule 12(b)(8), SCRCP because, they claim, an identical action is pending before the American Arbitration Association ("AAA"). This Court **denies** Defendants' motion. Plaintiffs filed this civil action first, in the Beaufort County Court of Common Pleas. Certain Plaintiffs later made filings with AAA only for the purposes of preserving their rights under (*inter alia*) the ostensible 60-day statute of limitations in the purported arbitration clause, and in doing so repeatedly denied jurisdiction of the AAA. Plaintiffs have reserved and preserved all rights to pursue their claims in court. Only later did Defendants bring demands in arbitration. The arbitration proceeding, which involves different parties and claims, is not identical to this civil action. An arbitration is not an "action" under the

Rules of Civil Procedure, and a later-filed arbitration proceeding does not fulfill the terms of Rule 12(b)(8), SCRCP.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs moved for partial summary judgment on several declaratory judgment causes of action. Plaintiffs argued, *inter alia,* that summary judgment should be granted on (a) the question of whether the covenants within certain Defendants' documents, requiring Plaintiffs to pay fees to a for-profit endeavor as part of the real estate transfer, violate South Carolina's statutory prohibition against transfer fee covenants; (b) the question of whether the covenants' requirement of mandatory membership in a for-profit Club is unlawful; (c) the question of whether the Club's unrecorded governing documents are unlawful and unconscionable; and (d) the question of whether the for-profit Club is nonetheless subject to the South Carolina Homeowners' Association Act. Defendants asserted that summary judgment would be premature.

This Court finds that the motion is not ripe for determination at this time, and therefore **denies the motion at this time without prejudice to any party**. All parties maintain all claims and defenses regarding this motion, and no party is prejudiced by this ruling. Plaintiffs are free to re-file the motion at a later time.

PLAINTIFFS' MOTION TO DISQUALIFY NEXSEN PRUET, LLC AS COUNSEL FOR DEFENDANTS

Plaintiffs filed a motion to disqualify Nexsen Pruet LLC as counsel for defendants. After reviewing the filed papers, the relevant law, the case file, and the arguments of counsel, the Court determines that this motion is not ripe for determination at this time.

The Court therefore **denies the motion at this time without prejudice to any party**. All parties maintain all claims and defenses regarding this motion, and no party is prejudiced by this ruling. Plaintiffs are free to re-file the motion at a later time.

[COURT'S ELECTRONIC SIGNATURE APPEARS ON NEXT PAGE]

Beaufort Common Pleas

Case Caption: Bridge Charleston Investments B Llc , plaintiff, et al VS Palmetto Bluff Development Llc , defendant, et al

Case Number: 2022CP0700632

Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144