IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jan 13 2025
S.C. SUPREME COURT

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

Appellate Case No. 2024-002098
Court of Appeals Case No. 2022-001587
Supreme Court Case No. 2024-002098

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

v.

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

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in applying the clear language of a contract that Petitioners themselves drafted?

II. Did the Court of Appeals err in following this Court's rulings that South Carolina law applies to South Carolina land?

III. Did the Court of Appeals err when it declined to write a delegation clause into a contract that Petitioners drafted and deliberately omitted?

IV. Did the Court of Appeals err in following clear South Carolina law that the purported arbitration agreements are unconscionable?

V. Did the Court of Appeals err in following clear South Carlina law that "There is, however, no public policy—federal or state—'favoring' arbitration."

STATEMENT OF THE CASE

The underlying case is about the development of real property in Beaufort County, South Carolina—particularly the validity and enforceability of covenants and restrictions which were imposed on that real property by the developer during development. On one side of the caption are "Homeowners" (Respondents, here). On the other side of the caption are a plethora of development entities, referred to herein collectively (for simplicity's sake) as "Developers" (Petitioners, here). The underlying case involves numerous unlawful actions by Developers that have improperly altered and damaged the planned community.

This appeal involves the question of arbitrability. Arbitration is a matter of contract. A key point that Petitioners' brief omits is that **there is <u>not</u> an arbitration contract between most of the parties to this litigation**. (App. 243–245).

I. FACTUAL BACKGROUND

Palmetto Bluff is indeed an expensive residential community, and the Homeowners indeed invested millions of dollars in their homes. Homeowners undertook this investment—one of the biggest in their lifetimes—based on a recorded master plan promoted by the Developer: extensive first–class infrastructure in a community that included luxury amenities. (*See* App. 275–292, Compl. pp. 2–19, "The Palmetto Bluff Hoax"). The Homeowners filed suit because the real estate development plan—particularly covenants and restrictions imposed on Homeowners' property—is unlawful. This is an action pertaining to title to South Carolina real estate, and the Homeowners are the record title holders of the real property in question. (App. 292–299).

Many of the allegations within the "Factual Background" in the Petition are speculative and unproven, including guesswork by Petitioners about people who may or may not be principals of some of the corporate Respondents—and who are not parties to this lawsuit. Of note, the circuit court stated in its order that it was "not making findings of fact in this Order." (App. 237). Accordingly, Developers' attempts in the Petition to argue certain facts is not preserved, and in any event the alleged facts are unproven, disputed, and often inaccurate.

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

A. No agreements to arbitrate exist

No arbitration contract *whatsoever* exists between any of these eleven Petitioners and any Respondent:

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

(App. 245–246). Put another way, not one of the above-listed Petitioners has a contract with any Respondent that contains an arbitration clause. Put yet another way, to make the point, **not even one of the 21 Respondents has ever agreed to waive their rights to jury trials as to any of the above-named 11 Petitioners.** The circuit court decided that such contracts did not exist, as a matter of law, quite simply because not one of the above-listed Petitioners came forward with a contract to support their motion to compel arbitration (which was their burden). (App. 244–246). The Court of Appeals correctly affirmed that ruling.

B. Same as it ever was.

So, how did we get here? The answer is that one Petitioner, Palmetto Bluff Club LLC (the "Club"), moved to compel arbitration because 7 out of the 21 Respondents signed a (mandatory) Club "membership" agreement which does contain a purported arbitration provision. As decided by both the circuit court and the Court of Appeals, that arbitration provision is invalid and not binding. But Petitioners are attempting to bootstrap numerous individual, class, and derivative claims—against numerous different parties—all into arbitration, based on that solitary Petitioner's (the Club's) arbitration clause, which is buried in an "agreement" that was not signed by most of the Respondents.

The third-grade math problem at the heart of this appeal: If 7 out of 21 Respondents have a contract with the Club, then what do the other 14 Respondents have? Nothing. The other 14 Respondents have no agreement with the Club that contains an arbitration clause. This Court should deny the Petition for that reason alone.

Similarly: if 1 out 12 Petitioners has a contract with 7 out of the 21 Respondents, then what do the 11 other Petitioners have? Again, Nothing. The other 11 Petitioners have no agreement with the 21 Respondents that contains an arbitration clause. This Court should deny the Petition for that reason as well.

C. A hidden clause

A brief factual discussion about the ostensible "arbitration agreement" at issue here for seven Respondents with one Petitioner: The Palmetto Bluff development has literally <u>thousands</u> of pages of "Governing Documents," which are all under the umbrella of a recorded Community Charter (which has been amended and supplemented more than *seventy* times) containing the covenants and restrictions for the community. (App. 368, Charter p. 3). In addition to the Charter, the community has a separate Recreational Covenant (which has been amended and supplemented over *sixty* times). (App. 457). Palmetto Bluff also has copious rules, by-laws, guidelines, restrictions, fee schedules, policies, procedures, and other parameters, all of which the Developers contend that they can alter, modify, or amend unilaterally, at any time, without consent of the Homeowners. (*See, e.g.,* App. 420, Charter p. 55) ("The Palmetto Bluff Club Documents may be amended . . . without the consent of the Owners.") . According to Developers, a Homeowner accepts his title subject to these *thousands* of pages of malleable fine print. As Homeowners pointed out, a void covenant would not be binding, and it would never attach to title.

Notably, the arbitration clause at issue is buried in what Developers themselves describe as low-level governing documents—the Club Membership Plan, Membership

Agreement, and related documents (the "Club Documents"). (*See* App. 368, Charter p. 3, Table; *see also* App. 247–249). The Club Documents have not ever been recorded with the register of deeds. Notwithstanding the Developers' failure to record them, Developers claim they are incorporated by reference within the Community Charter, which states that it runs with the land. (*Id.*)

The Club Documents are subservient to the Community Charter, which contain a <u>conflicting</u> ADR provision expressly allowing "suit in any court" after mandatory *mediation*. (App. 417, *id.* p. 52 § 18.1(a)). The Developer included a conflict resolution clause within the covenants which states that provisions in the higher-level documents prevail over those in subservient documents. (App. 369, Charter p. 4, § 1.3). In other words, under the documents themselves, which were drafted by Developer, the "suit in any court" provision trumps over the conflicting arbitration clause buried in a low-level document. (App. 369, Charter p. 4 § 1.3; pp. 52–53 § 18.2). The Petition should be denied for this additional reason, which is independent sustaining grounds for the circuit court's decision. (App. 247–250).

II. PROCEDURAL HISTORY

Respondents agree with the basic chronology articulated in the Petition's "Procedural History" as to the pleadings, motions, and hearings that occurred on certain dates. Respondents respectfully disagree with the Petition's mischaracterization of aspects of the lower courts' rulings, such as claiming that the Court of Appeals "abandoned the reasoning in its first opinion" and "acknowledged that its ruling was contrary to the Supreme Court's decision." Instead, Respondents would respectfully

refer the Court to the text of the lower courts' opinions, which speak for themselves and were correctly reasoned and articulated.

ARGUMENT

The threshold question in this appeal is the easiest to answer: whether federal or state law applies. As discussed below, the Court of Appeals answered this gateway question correctly in a unanimous, published Opinion that comports with the long-established precedent of this Court: South Carolina law applies. For Petitioners, the problem with this simple, straightforward, and correct answer is that all of Petitioners' arguments fail under South Carolina law. Perhaps for this reason, the Petition is laden with citations to inapposite federal court cases, dependent on the application of the Federal Arbitration Act (FAA). Respectfully, because the Court of Appeals ruled correctly that South Carolina law applies, and because there is no special or important reason justifying the review of its decision, this Court's analysis should begin and end with Petitioners' failure to cross the threshold. To the extent that Petitioners argue that South Carolina law should be displaced by federal law, this Court should not reverse or dilute its clear, consistent, and manifold decisions on arbitration and the public policy surrounding it and the right to a jury trial.

I. In which Petitioners attack their own contract, which they drafted, as being a "boilerplate" contract which "comes nowhere close to demonstrating there has been a meeting of the minds with respect to arbitration."

The Court of Appeals correctly decided that Developers specifically elected to be bound by the South Carolina Uniform Arbitration Act ("SCUAA"), including because Developers—who drafted the contract—chose to emblazon it[1] with this sentence:

> THIS MEMBERSHIP AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO SOUTH CAROLINA CODE SECTION 15-48-10, ET. SEQ. [*i.e.* the SCUAA]

(Opinion, App. 38). The Court of Appeals rightly observed that this all-caps, underlined choice-of-law provision, which identifies the SCUAA as controlling, leaves no doubt as to the governing law.

In an effort to get around their own contract, which ***they drafted***, Developers now argue that their highly specific choice-of-law provision "comes nowhere close to demonstrating there has been a meeting of the minds with respect to arbitration," and that it is merely "boilerplate." (Pet. p. 10). This seems ironic, given Developers' position in this appeal that this same contract is not a boilerplate contract of adhesion, that Respondents had a meaningful choice, and that there was a meeting of the minds on arbitration purportedly requiring Respondents to arbitrate six ways to Sunday.

This is neither a novel nor complex issue, and it is unworthy of certiorari review. Instead, this is a simple and straightforward instance of plain words being given their

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[1] As discussed above and correctly held by the circuit court, Petitioners had the burden of showing an agreement to arbitrate, and yet Petitioners could muster only four contracts signed by plaintiffs in this case, pertaining to one Petitioner (the Club). (Order, App. 244–245, 246, fn. 2). Respondents reserve and do not waive the independent sustaining ground that there is no requirement to arbitrate by the vast majority of Respondent plaintiffs. Nonetheless, several of the membership agreements that Petitioners produced do indeed contain this underlined, all-caps choice-of-law provision. (*See, e.g.*, App. 581).

plain meaning: the Developers must be bound by their own contract's clear language manifesting their unambiguous[2] intent to "ARBITRAT[E] PURSUANT TO [the SCUAA]." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) ("If [a contract's] 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."). The Court of Appeals got it right.

As discussed next, there also is no mystery that the SCUAA would apply, even in the absence of this clear announcement by the Developers, because the contracts at issue do not pertain to interstate commerce.

II. South Carolina law applies to South Carolina land.

Initially, the question of what law applies to contracts involving the development of real property is also <u>not</u> a novel question worthy of this Court's time and attention, having already been decided by *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012) ("the development of real estate is an inherently intrastate transaction."). The FAA only applies to arbitration agreements within contracts involving interstate commerce. *Id.,* 730 S.E.2d at 315–316 ("Interstate commerce is a necessary basis for application of the federal act, and a contract or agreement not so predicated must be governed by state law. To activate application of the federal act, the commerce involved in the contract must be interstate or foreign.").

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[2] To the extent that Developers make the odd argument that perhaps their own contract, which they drafted, is ambiguous because the patently clear statement that the SCUAA applies seems, in hindsight, to be at odds with their current desire to be bound by the FAA: this Court should disregard this argument as nonsense. There is nothing ambiguous about an all–caps, underlined pronouncement that the agreement is "subject to" the SCUAA, and certainly not when there is no reference at all to the FAA in any other part of the contract, which in fact specifically invokes the "law of South Carolina." (App. 486–487).

The circuit court correctly found that the contracts at issue here—which are real property covenants and restrictions, which expressly state that they run with land located in Beaufort County, South Carolina—are uniquely **intrastate**. *Pressl v. Appalachian Power Co.*, 842 F.3d 299 (4th Cir. 2016) ("the interpretation of a state conveyance is a quintessential question of state property law."). The document in which the arbitration provision here is buried plainly states that the contract is bound to the land:

> **THIS MEMBERSHIP PLAN SHALL BE A COVENANT RUNNING WITH THE LAND WITHIN PALMETTO BLUFF**
>
> By acceptance of a deed, every Owner of a residence or homesite within Palmetto Bluff shall become a "Community Member" of the Club and shall automatically assume and agree to be bound by all of the terms and conditions of this Membership Plan, including the obligation to pay Membership Joining Fees, Club Dues, User Fees and other charges as set forth herein, while he or she remains an owner of a residence or homesite. This covenant running with the land is set forth at Chapter 19 of the Charter and the Article III of the Recreational Covenant.

(App. 473) (this is one example of this same language, which reverberates throughout the Record). (*See, e.g.,* Pet. 3–4, quoting the Charter; App. 256). **South Carolina law therefore applies, and not the FAA. Having chosen to attach their contracts to South Carolina land, Developers have expressly acknowledged the contracts' intrastate nature.**

Moreover, this is a dispute about real estate development. The gravamen of the Complaint is the validity and enforceability of covenants and restrictions that purport to encumber Respondent Homeowners' titles, and which Developers claim run with land that is indisputably located in Beaufort County, South Carolina.[3] As this Court knows,

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[3] Developers' description of the subject matter of the Complaint does not coincide with the actual words on the page, and Homeowners respectfully request that this Court would take some time to read the Complaint. (App. 274–356, Complaint). This Court will notice that this is a real property dispute, concerned with covenants and restrictions imposed on real property by the Developer as instruments of development. The Complaint is <u>not</u> about the construction of houses. It is <u>not</u> about "commercializing" property. It is about the Homeowners' and the Developers' South Carolina real estate and its

real estate development is accomplished by subjecting land and its title to covenants, restrictions, easements, and other servitudes, and then conveying the land. For this reason, this Court has held that "the development of real estate is an inherently intrastate transaction." *Bradley*, 398 S.C. 447, 730 S.E.2d 312. This is so, even if South Carolina real property is sold to an out-of-state purchaser. *See Mathews v. Fluor Corp*., 312 S.C. 404, 440 S.E.2d 880, 881–882 (1993), *overruled on other grounds by Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 (2001) ("In the present case, the object of the contract was the sale of real estate situated in South Carolina. Although the contracting parties are domiciled outside of South Carolina and transactions incident to the sale were conducted in foreign jurisdictions, there is no evidence in the record that the express terms of the contract involved interstate commerce.").

The arbitration provisions being asserted by Developers are embedded in the real property that is Palmetto Bluff. The Community Charter (which controls the overall Palmetto Bluff Development) makes clear that it is bound to South Carolina land:

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

(App. 367, Charter p. 2) (emphasis added). The Community Charter states that it incorporates the "Palmetto Bluff Club Documents." (App. 368, Charter p. 3). The Palmetto Bluff Club Documents include the membership documents, which contain the

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encumbrances. (*Id*.).

arbitration clause at issue here. Therefore, for the purpose of analyzing whether the contract at issue involves interstate commerce, the answer is an easy "No." The contract at issue has as its subject South Carolina land, and it plainly says that it runs with title to South Carolina real property; **by its own device, the alleged arbitration clause is rooted in South Carolina and cannot leave it.** *See Mathews,* 440 S.E.2d at 881–882.

Real property covenants are intrastate; they cannot not flow to other states. A host of cases—both Federal and State—support this conclusion. *See, e.g., Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 118 L.Ed.2d 39 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."); *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L.Ed.2d 136 (1979), *superseded by statute* ("Property interests are created and defined by state law."); *Reconstruction Finance Corporation v. Beaver County, Pa,* 328 U.S. 204, 66 S. Ct. 992, 90 L. Ed. 1172 (1946) ("Concepts of real property are deeply rooted in state traditions, customs, habits, and laws."); *Pressl*, 842 F.3d at 299 (remanding easement dispute to state court because "the interpretation of a state conveyance is a quintessential question of state property law."); *Bradley*, 398 S.C. at 447 ("the development of real estate is an inherently intrastate transaction.").[4]

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[4] This Court previously has considered and thoughtfully ruled on arguments like those Developers make here, about alleged interstate commerce in the context of real estate transactions, ultimately quoting a federal court ruling:

> Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on **a commodity—the land—which is firmly planted in one particular state.** The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those movements are not part of the transaction itself. **All of the legal relationships concerning the land are bound by state law principles**. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce.
>
> To characterize a residential real estate [transaction] as involving interstate commerce

Developers improperly attempt to distinguish the very clear law applicable to their own real estate conveyances, covenants, and restrictions, by introducing a sheerly conjectural argument about which law *might* apply to hypothetical short-term rental agreements.[5] <u>This argument by Petitioners is a red herring</u>: this is not a dispute between parties to a short-term rental contract—it is a dispute between parties to real property covenants and restrictions. In deciding whether the FAA might apply, this Court should look to the documents that contain the alleged arbitration clause (here, real property instruments encumbering South Carolina titles to Beaufort County real property) and not to (imaginary) short-term rental agreements that are not in the Record. *Hicks Unlimited, Inc. v. Unifirst Corp.*, 439 S.C. 623, 889 S.E.2d 564, 570 (2023) ("It was error to rely on [arguments of counsel, unsupported by evidence] in deciding whether the contract involves interstate commerce").

Similarly, Developers' efforts to carve out some distinction because the homes at issue are ostensibly "luxury" homes, and the plaintiffs are allegedly "persons of wealth," and because some (but not all) of the plaintiffs might be "out-of-state purchasers," are unworkably biased and discriminating.[6] Would the property instruments at issue here

> under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.

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

[5] This is sheer conjecture by Developers. There is no evidence in the Record of actual short-term rental agreements.

[6] ***All*** of these allegations are <u>unproven arguments of counsel, without supporting evidence in the Record or finding of fact by the circuit court</u>. Petitioners also speculate that the homes might be second homes, although there is no evidence in the record for this proposition and in fact many of the Respondents

have a different impact if the homes were ramshackle and the Plaintiffs were impoverished, or if the conveyance was to a buyer from Greenville County? No. Real property conveyances and instruments, which run with the land, are quintessentially intrastate in nature—regardless of speculation about the bank account or hometown of the person to whom the real estate title is transferred. Otherwise, the result would be unpredictable lack of uniformity in the law.

The law here is not unclear, nor are the issues novel. "Dirt law" is—and always has been—a creature of State law and a fundamental intrastate matter. The circuit court was correct that the SCUAA applies to this dispute about the development of real property. This Court should deny the Petition for a Writ of Certiorari.

III. The purported "agreement" to arbitrate does not have a delegation clause.

As a threshold matter, Petitioners' delegation clause argument hinges on its claim that the FAA applies here, which it does not. Therefore, Petitioners' argument, mired in federal law, should be discarded. Moreover, this issue puts the cart way ahead of the horse by arguing about unstated terms within contracts that either do not exist at all,[7] or which are unequivocally unconscionable. Petitioners' argument is based on the faulty premise that "when the parties *agree* to delegate" matters to the arbitrator, then "a court must enforce that agreement." (Pet. p. 16) (emphasis added). Here, the circuit court correctly held that **there is no agreement to arbitrate** between the vast majority of the

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reside full-time in the community.

[7] Petitioners carry on the fiction that they met their burden to produce agreements to arbitrate—when the circuit court clearly held: **"No Agreement to Arbitrate *Whatsoever* Exists as to Fifteen (15) Plaintiffs"** and **"No Agreement to Arbitrate Exists between Plaintiffs and Eleven (11) Defendants."** (App. 244–246) (emphasis added). This is the law of this case.

parties to this lawsuit, and the Court of Appeals correctly held that the few existing agreements are unconscionable. These holdings make Petitioners' argument on this issue largely academic, and not appropriate for certiorari review.

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001) (emphasis added). **Arbitration is not magical; it's contractual**. But Petitioners' argument here is that if Petitioners simply *incant* the word, "ARBITRATION," then Petitioners have thereby (almost magically) deprived every party to this case of their access to the courts, because the entire dispute must be whisked to an arbitrator to decide whether or not there is even an agreement in the first place. There is simply no way to make logical sense of Petitioners' argument that a defendant could force a dispute into arbitration, in the absence of arbitration agreements, just by claiming that an arbitration agreement might exist.

Arguendo, putting aside Petitioners' failure to produce valid agreements to arbitrate, the purported arbitration provision that is buried within the Club documents contains no "delegation clause" on its face, and certainly not a "clear and unmistakable" delegation clause. *First Options Chicago v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."), *quoting AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415 1418, 89 L.Ed.2d 648 (1986). Instead, the provision references—in a vague and ambiguous manner—the Commercial Arbitration Rules of the American Arbitration Association.

(App. 487). Those rules indicate that an arbitrator has power to rule on jurisdiction and other matters, but the rules do not state that the arbitrator has exclusive power to do so.

This clause is very different from even the federal cases cited by Petitioners, where the arbitration provisions were explicit on their face that the arbitrator had "exclusive authority to resolve" any such disputes. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (focusing on the specific language of the agreement at issue, which provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." (emphasis added)). For example, in *Rent-A-Center*, the United States Supreme Court—applying the FAA—was focused on the specific contractual wording "exclusive authority." In contrast, here the Developers' self-authored document contains no such "exclusive" language, and instead deliberately omits such restrictions.[8]

Even the clause in the *Simpson* case, relied on by the Court of Appeals in its Opinion but assailed by Petitioners in the Petition, was far more specific than the purported delegation clause at issue in this appeal. The *Simpson* clause stated that the arbitrator was to determine "issues involving 'the validity and scope of this contract . . . in accordance with the Commercial Arbitration Rules of the American Arbitration

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

Association.'" *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 666, 668, 373 S.C. 14 (2007). The clause that Petitioners seek to enforce in this appeal contains no such specific or precise language; it instead only vaguely refers to the AAA rules and the substantive law of South Carolina. (App. 487).

The Developers' omission of specific, clear, and unmistakable delegation language is all the more critical under the SCUAA, where our Legislature has expressly given to the circuit court the authority to rule on "the existence of an agreement to arbitrate." S.C. Code § 15-48-20(a). South Carolina's statute—which the Petitioners themselves specified as controlling—is clear that a court "shall" have authority to decide and deny an application for arbitration:

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

S.C. Code § 15-48-20 (emphasis added).[9] And this Court correctly reinforced this authority even in the presence of a clear delegation clause (again, lacking here):

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

Simpson, 373 S.C. at 14 (emphasis added); *see also Housing Authority v. Cornerstone Housing*, 356 S.C. 328, 333, 588 S.E.2d 617 (Ct. App. 2003) (citing to S.C. Code § 15-48-20, the trial court ruled on arbitrability regarding an arbitration clause that (like here) stated it was subject to the Commercial Arbitration Rules of the American Arbitration Association—

[9] *See supra*: THIS MEMBERSHIP AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO SOUTH CAROLINA CODE SECTION 15-48-10, ET. SEQ.

the same purported "delegation clause" as here); *Hooters of America v. Phillips*, 39 F. Supp. 2d 582, 609 (D. S.C. 1998) (holding that issues of "substantive arbitrability" are properly before the trial court and these issues are whether "a valid arbitration agreement exists between the parties and . . . [whether] the specific dispute falls within the substantive scope of the agreement") (*quoting Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997)). The Developer's verbal acrobatics notwithstanding, South Carolina law is clear that the circuit court "shall" and "must immediately" make this decision.

In sum, this issue is immaterial because the Court of Appeals correctly determined that the SCUAA applies here, and the SCUAA is clear that the question of whether an agreement to arbitrate exists is for the court. Moreover, even if Petitioners had met their burden to produce valid agreements to arbitrate, the Club Documents do not contain a delegation clause at all—and particularly not a clause clearly, unmistakably, and exclusively foisting the question of arbitrability into arbitration. The Court of Appeals correctly decided this question, by applying long-established South Carolina law, and this Court should deny the Petition.

IV. The Arbitration Agreements are Unconscionable.

The Petition uses two tactics to try to knock down the Court of Appeals' correct ruling that the arbitration clause is unconscionable. First, the Petition mis-portrays the reasoning in the Opinion. Then, the Petition largely cites to inapplicable authority—a UCLA Law Review article, a Ninth Circuit Court of Appeals opinion based on California law—to attempt to justify the Developers' position. In fact, the Court of Appeals' Opinion is based on well-established South Carolina law that is soundly applied here.

A. Absence of Meaningful Choice

On the first prong of the unconscionability analysis, the Petition mis-portrays the Opinion's reasoning by claiming that the Court of Appeals simply cited to a "general proposition" without addressing the Developer's incorrect version of the "reality." Contrary to this portrayal, the Court of Appeals properly articulated South Carolina law that contracts of adhesion are not *per se* unconscionable, so long as the terms are even-handed. The Court of Appeals then discussed the various factors that are to be considered under South Carolina cases such as *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022), and *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 667 (2007). From that legal premise, the Court of Appeals articulated the relevant factors—unequal bargaining power, relative sophistication of a homebuyer versus a developer, etc.—and analyzed them as to the documents. When a person takes title to property at Palmetto Bluff, the Developer claims that all arbitration and other terms *instantly and automatically* bind to the purchaser—without signature, sight unseen, and even though many of the documents are not recorded with the register of deeds and are not part of the closing materials. Instead of simply citing to a "general proposition," the Court of Appeals delved into the complexity of this particular situation and got it right: the Club's asserted arbitration clause, buried in unrecorded documents that are "mandatory" and "automatic" "upon acceptance of a deed," is a classic contract of adhesion under South Carolina law.

B. Oppressive and One-Sided Terms

On the second prong of the unconscionability analysis, the Court of Appeals did an in-depth analysis of the legal factors as applied to the contract at issue. It correctly concluded that the provision met the standard for unconscionability, including because (a) it purports to allow one party, and only one party—the Developer—unilaterally change the contract at will, and (b) it violates this Court's ruling in *Simpson* regarding prohibition of damages. As discussed below, there are numerous other independent sustaining grounds, including under this Court's recent ruling in *Huskins v. Mungo Homes, LLC* (Op. 28245, App. Case 2023-000452, Dec. 11, 2024).

On the first point (unilateral change), Petitioners do not dispute that they drafted this provision so that only the Developer can modify the terms, at will and without consent. Instead, Petitioners cite to a UCLA Law Review article from 2010 that, they say, means this is okay. However, the Court of Appeals' conclusion is entirely consistent with established South Carolina law, such as *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014) (noting that once a contractual bargain is formed, and the obligations are set, that the contract can only be altered by mutual agreement and for further consideration), *citing* 17A Am.Jur.2d Contracts § 507 ("[O]ne party to a contract may not unilaterally alter its terms."), and *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161 (2003) ("We cannot find anything in *Fleming* or elsewhere that allows a party to alter the terms of a bilateral contract by unilateral modification. It is well established that '[a] written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract,'" *quoting Florence*

City-County Airport Comm'n v. Air Terminal Parking Co., 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)).

When the Petition turns to East Coast law, it cites to a hodgepodge of cases that do not apply to the situation here. The first is *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543–44 (4th Cir. 2005). The South Carolina Court of Appeals also cited *Peoplesoft* in its Opinion, noting it to be under Maryland law involving an arbitration agreement under different circumstances. In *Peoplesoft*, the Fourth Circuit Court of Appeals cited to a specific Maryland case (*Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 378 Md. 139, 835 A.2d 656 (2003)) to conclude that the United States District Court in Maryland should not have looked to a separate document, a general employee policy, for certain terms, which were not supported by consideration. The differences between *Peoplesoft* and this case are legion: different facts (for example, the Maryland arbitration agreement was actually signed by all of the parties in that case and could not be unilaterally changed; the disputed term was in a separate document that was a "company policy generally applicable to all employees" called the IDS Program); different law (Maryland law and referencing the FAA); different reasoning (the case hinged on whether there was consideration for the separate document, the IDS Program company policy). The Court of Appeals properly differentiated *Peoplesoft* from this matter and noted that "the documents in which the arbitration agreement is located are subject in their entirety to the Defendants' unilateral ability to make changes. Therefore, it is part of the arbitration agreement." (Op. p. 9).

The other cases cited by the Petition are even more distant, analytically. *Canteen v. Charlotte Metro Credit Union*, 386 N.C. 18, 23, 900 S.E.2d 890 (2024), involved an

amendment to a consumer contract by a bank that provided the bank customer with both advance notice *and* 30 days to opt out of the amendment. Under those specific facts, that court held that the covenant of good faith and fair dealing was not violated. The opinion recognizes a large body of case law rejecting unilateral amendments to contracts.[10] Also

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[10] *See Canteen*, 386 N.C. 18, 900 S.E. 890 (Riggs, J., dissenting and citing: "*Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (affirming a trial court's determination that an arbitration agreement supplemental to an employment contract was illusory partly because the employer could unilaterally change or eliminate arbitration); *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 292–93 (4th Cir. 2022) (holding an arbitration provision subject to a unilateral modification clause allowing one party to 'change, abolish, or modify existing policies, procedures or benefits . . . as it may deem necessary with or without notice' was illusory); *Morrison v. Amway Corp.*, 517 F.3d 248, 257 (5th Cir. 2008) (holding an arbitration amendment inserted into multi-level marketing distribution agreements were illusory because 'nothing . . . precludes amendment to the arbitration program—made under Amway's unilateral authority to amend its Rules of Conduct—from eliminating the entire arbitration program or its applicability to certain claims or disputes'); *Torres v. S.G.E. Mgmt., L.L.C.*, 397 F. App'x 63, 68 (5th Cir. 2010) (holding arbitration promise in a multi-level marketing contract was illusory when the promisor 'essentially could renege on its promise to arbitrate by merely posting an amendment to the agreement on its website'); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 206 (5th Cir. 2012) (holding an employment contract's arbitration clause was illusory under Texas law where another provision of the contract allowed the employer to unilaterally modify all provisions of the agreement and did not contain a savings clause); *Floss v. Ryan's Fam. Steak Houses, Inc.*, 211 F.3d 306, 315–16 (6th Cir. 2000) (holding an arbitration agreement illusory because it allowed one party 'to alter the applicable rules and procedures without any obligation to notify, much less receive consent from [the other party]'); *Penn v. Ryan's Fam. Steak Houses, Inc.*, 269 F.3d 753, 759–60 (7th Cir. 2001) (holding an arbitration agreement was illusory when it gave one party 'the sole, unilateral discretion to modify or amend' the arbitration provisions); *Dumais v. Am. Golf. Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) ('We join other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory.' (citations omitted)); *Canales v. Univ. of Phoenix, Inc.*, 854 F. Supp. 2d 119, 126 (D. Me. 2012) ('[B]ecause Phoenix retained the unfettered right to amend the terms of the arbitration agreement with its employees, the arbitration agreement was illusory and unenforceable.'); *In re Zappos.com, Inc. Customer Data Sec. Breach Litigation*, 893 F. Supp. 2d 1058, 1066 (D. Nev. 2012) ('In effect, the agreement allows Zappos to hold its customers and users to the promise to arbitrate while reserving its own escape hatch. . . . Because the Terms of Use binds consumers to arbitration while leaving Zappos free to litigate or arbitrate wherever it sees fit, there exists no mutuality of obligation.'); *Cheek v. United Healthcare of the Mid-Atl., Inc.*, 835 A.2d 656, 662 (Md. Ct. App. 2003) ("[T]he fact that United HealthCare reserves the right to alter, amend, modify, or revoke the Arbitration Policy at its sole and absolute discretion at any time with or without notice creates no real promise and, therefore, insufficient consideration to support an enforceable agreement to arbitrate.' (cleaned up)); *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 776–77 (Mo. 2014) (en banc) (holding arbitration agreement was illusory notwithstanding a thirty-day notice provision where one party 'retain[ed] unilateral authority to amend the agreement retroactively'); *Pelegv. Neiman Marcus Grp.*, 140 Cal. Rptr. 3d 38, 58 (Cal. Ct. App. 2012) (holding a retroactive arbitration amendment pursuant to an unlimited unilateral amendment clause in the underlying contract was illusory because 'one party can avoid its promise to arbitrate by amending the provision or terminating it altogether' (cleaned up)); *Pruett v. WESTconsin Credit Union*, 998 N.W.2d 529, 544–45 (Wis. Ct. App. 2023) (holding, based in part on the discussion of illusoriness by the Court of Appeals' dissent in this case, that a credit union could not unilaterally add an arbitration clause to its services agreement notwithstanding the fact that the original agreement required 'any legal action . . . be

cited by Petitioners, *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016), involved an internet direct-to-consumer genetic testing service under California law and recognizes that "we have held that a unilateral modification provision itself may be unconscionable" but "we do not reach this claim here." *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 292–93 (4th Cir. 2022), is another case under Maryland law that the South Carolina Court of Appeals referenced in its Opinion, and it concludes that the arbitration clause was not enforceable because (*inter ali*a) the employer retained the right to amend or abolish the agreement without notice to the employee.

On the second point (unlawful limitation of remedies), the Court of Appeals was entirely correct that the Club Documents violate this Court's rule in *Simpson*, 373 S.C. at 28–29; 644 S.E.2d at 670. (Op. p. 10). The Petition does not dispute this—and the Petition should be denied for that reason alone. Instead, the Petition tries to dodge the issue by claiming that an arbitrator should have made this decision, not the circuit court. The Opinion correctly noted that Developer's cited cases were inapposite because the "contract in the instant case specifically prohibits the award of treble damages, regardless of whether they are construed as compensatory or punitive" and therefore there is no uncertainty for an arbitrator to address. (Op. pp. 10–11).

In addition to these points, there are independent grounds for sustaining the circuit court and Court of Appeals' rulings, including that (a) the arbitration clause contains an unlawful 60-day statute of limitations in violation of S.C. Code § 15-3-140, as

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brought in the county in which the credit union is located'); *cf. Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1091 (8th Cir. 2021) (holding an arbitration provision was not illusory where any modification required separate 'acknowledgment and agreement' of that modification through an unconditioned duty to notice the change and the customer's continued use following said notice)."

this Court recently held in *Huskins v. Mungo Homes, LLC* (Op. 28245, App. Case 2023-000452, Dec. 11, 2024)[11]; (b) the Developer contends that the arbitration provision does not apply to the Developer, and freely files cases in courts rather than taking its disputes to arbitration; and (c) the arbitration clause unlawfully purports to divest Homeowners of their statutory right to have a court determine legal rights under South Carolina's Declaratory Judgment Act, S.C. Code § 15-30-10 *et seq*. (*See* App. 134–147 (discussing additional grounds for determining unconscionability)).

As a parting point, the Petition argues that Developer's unlawful terms should have been severed. Importantly, neither the Membership Plan nor the membership agreements—both of which Developer drafted—contain a severability provision. A court would have to blue-pencil a severability provision ***into*** the agreement, in order to blue-pencil ***out*** unconscionable terms. This Court meticulously explained its reasoning when it declined to sever unconscionable provisions in the *Damico* case:

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

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[11] This Court's ruling in *Huskins v. Mungo* is applicable here as an additional sustaining ground: "The court of appeals held the clause limiting the statute of limitations was both unconscionable and unenforceable. We believe the better view is that the clause is unenforceable because it is void and illegal as a matter of public policy. *See White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371–72, 601 S.E.2d 342, 345 (2004) (contracts violating public policy expressed in statutory law are unenforceable). Because it is unenforceable, we need not decide whether it is also unconscionable. . . ." Op. 28245, p. 3.

> contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer.

879 S.E.2d at 751, 760–761. Space does not permit us to quote the Court's thorough reasoning in its entirety, but the same potential for abuse and over-reach is present in the massive Palmetto Bluff development of 4,000 homes.

This conclusion is further supported by this Court's recent ruling in *Huskins v. Mungo Homes*, which involved the sale of a house:

> The whole point of an arbitration provision is to provide an alternative way to resolve disputes in a fair and efficient manner. Yet Mungo designed its arbitration provision not to streamline the resolution of disputes but to reduce their number. One sure way to reduce the number of disputes is to shrink the time in which they may ordinarily be brought under applicable law. We conclude Mungo's manipulative skirting of South Carolina public policy goes to the core of the arbitration agreement and weighs heavily against severance.

Op. 28245, p. 4. As with *Damico*, space does not permit us to quote the Court's thorough reasoning in its entirety. But the conclusion as to developer Mungo Homes is applicable to this Developer as well. The Court of Appeals correctly declined to rewrite the contract, and this Court should deny the Petition asking this Court to do so.

V. "There is, however, no public policy—federal or state—'favoring' arbitration."

Finally, Developer argues that public policy "favors" arbitration and therefore this Court should grant the Petition to emphasize that point. Homeowners respectfully submit that this Court already has thoroughly researched and clearly and thoughtfully spoken on this subject:

> [W]hen considered in the proper context, our statements that the law "favors" arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. **There is, however, no public policy—federal or state— "favoring" arbitration.**

Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 856 S.E.2d 150 (2021) (emphasis added). Here, it is undisputed that none of the 21 Respondents have a signed arbitration agreement with 11 of the Petitioners. It is not seriously disputed that the arbitration clause between one Petitioner (the Club) and seven Respondents has blatantly unlawful terms such as limitation of remedies and a 60-day statute of limitations (*inter alia*). As to the Petition's rhetoric on denigration of the right to contract, Respondents would respectfully submit that Petitioners failed to produce a lawful arbitration contract between each Petitioner and each Respondent that actually has each party's signature on it, instead contending that hidden and buried provisions, ostensibly incorporated by reference within *thousands* of pages of development documents, all of which can be—and frequently are—unilaterally changed by Developers alone, were nonetheless "automatic" and binding "upon acceptance of a deed." These facts significantly diminish their position that Homeowners contracted "with their eyes wide open."

There is no public policy favoring arbitration, and certainly not one that would compel arbitration in the utter absence of any agreement to do so. Homeowners respectfully request that this Court deny the Developer's Petition.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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