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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The 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

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

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, ... Petitioners.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondents try to distract this Court from the serious errors in the Court of Appeals' decision with contentions about matters that are not before this Court because they were not "specifically addressed" by the Court of Appeals. *Bonaparte v. Bonaparte*, 317 S.C. 256, 259 n4, 452 S.E.2d 836, 838 n.4 (1995). That tactic should not divert this Court's focus from the questions that *were* "specifically addressed"—and wrongly decided in a published, precedential decision—and thus warrant this Court's review.

First, Respondents repeatedly claim that many of them are "nonsignatories" who cannot be bound by the arbitration agreements. Not only was this issue not considered or decided by the Court of Appeals, but Respondents ignore that one need not *sign* an arbitration agreement in order to be *bound* by it. This Court has identified numerous theories under which nonsignatories can be compelled to arbitrate. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (listing five theories) (citing *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014), which identifies a sixth).

Second, Respondents also repeatedly suggest that they should not be bound by the arbitration agreements because they are supposedly "buried" in voluminous documents. (*E.g.*, Return at 3, 4, 5.) But Respondents are conclusively presumed to know the contents of the contracts they entered into when purchasing their residences in Palmetto Bluff. *See, e.g.*, *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding, in the context of an arbitration agreement, that "a person who can read is bound to read an agreement before signing it"). Additionally, the first page of the Membership Agreement provides notice, in <u>UNDERLINED ALL CAPS</u>, that the Membership Agreement contains an arbitration clause. (App. 574.) Simply put, Respondents—wealthy, sophisticated persons buying luxury residences—cannot credibly assert that they were *ever* unaware of the arbitration agreements. *See, e.g.*, *Sapan v. Directv, LLC*,

No. 8:22-cv-01600, 2023 WL 5505914, at *7 (C.D. Cal. June 9, 2023) (arbitration clause not "buried" where an arbitration notice appeared on the first page of the contract).

Respondents' diversionary discussions of unaddressed issues do not vitiate the need for review of the issues actually and erroneously resolved: (1) whether the parties' dispute is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, or by the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. CODE ANN. § 15-48-10, *et seq.*; (2) whether the transactions at issue involved interstate commerce; (3) whether the parties' arbitration agreements delegate the question of unconscionability to the arbitrator; and, if there was no delegation, (4) whether the arbitration agreements are unconscionable and that severance is not appropriate. (Petition at 2.)

I. The Notice Is Not a Choice-of-Law Clause

Seizing on the reasoning adopted by the Court of Appeals in its opinion on denial of rehearing, Respondents insist that the statutory notice that appears on the first page of the Membership Agreement is a "highly specific choice-of-law provision." (Return at 7.) However, Respondents fail to grapple with the undeniable fact that the notice appears on the front page of the entire contract, while the arbitration agreement itself is set forth in a separately numbered section of the agreement titled "ARBITRATION." (Petition at 9-10.) "Arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded." *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 385, 892 S.E.2d 112, 116 (2023) (cleaned up) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)).

An arbitration notice "is not the actual arbitration clause" but merely "informs the signatory that the contract contains an arbitration provision." *Newell v. SCI Alabama Funeral Servs., LLC*, 233 So. 3d 326, 332 (Ala. 2017). In *Newell*, the plaintiff contended that the arbitration agreement was rendered unconscionably overbroad by the language of an arbitration notice in a section of the "container" contract titled "Notices to Purchaser/Co-Purchaser." *Id.* at 332. Rejecting this

argument, the Alabama Supreme Court held there was no unconscionability because the actual arbitration agreement "expressly limited its scope to claims relating only to transactions contemplated by the contract of which it was a part." *Id. Accord Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 317 S.C. 274, 279, 453 S.E.2d 253, 257 (Ct. App. 1994) ("The purpose of the notice requirement of section 15–48–10(a) is to alert the contracting parties that the contract requires arbitration of disputes arising under the contract.").

Respondents also fail to refute—or even to discuss—the fact that the notice cannot possibly constitute an arbitration agreement because it does not reflect "a meeting of the minds between the parties with regard to all essential and material terms." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). Those terms are set forth on pages 4-5 of the Membership Agreement, in the section titled "ARBITRATION." (App. 578.) And, as Palmetto Bluff explained in detail in its Petition for Rehearing, the arbitration agreement provides for the application only of South Carolina *substantive* law, not South Carolina *arbitration* law. (App. 16-20.)

II. The Contracts Involve Interstate Commerce

Respondents contend (Return at 8-13) that the contracts at issue are merely "real property covenants and restrictions" that "run with land that is indisputably located in Beaufort County, South Carolina," and therefore do not involve interstate commerce, as required for application of federal arbitration law. (*Id.* at 9.) Respondents ignore both the law and the allegations of their own complaint. The contracts at issue here plainly involve interstate commerce.

"Unless the parties have contracted to the contrary, the [Federal Arbitration Act] applies in federal or state court to any arbitration agreement regarding a transaction that *in fact* involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, 343 S.C. at 538-39, 542 S.E.2d at 363 (footnote omitted) (emphasis added).

Determining whether a transaction involves interstate commerce requires consideration of "the agreement, the complaint, and the surrounding facts, focusing particularly on what the terms of the contract specifically require for performance." *Dean v. Heritage Healthcare of Ridgeway LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014) (internal quotation marks omitted). As this Court has explained, the question is not whether the contract "on its face" reflects a transaction involving interstate commerce. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 123, 747 S.E.2d 461, 465 (2013). Rather, "the proper analysis involves consideration of all three broad categories of activity within the purview of Congress's commerce power—use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce."[1] *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)).

Considering the contracts, the allegations of the complaint, and the undisputed surrounding facts, the transactions at issue here obviously involved interstate commerce. First, it is undisputed that eight of the Respondent property owners hail from out of state. (App. 728-729.) Second, the allegations of the complaint demonstrate that the transactions at issue here involved interstate commerce. For example, the complaint alleges that "[p]art of the … master plan" for Palmetto Bluff was the establishment of "Designated Rental Areas"; owners of residences in such areas have "the vested right" to market their properties for short-term rental ("STR"). (App. 287-289 (Complaint at 14-16).) Such properties are marketed on internet websites such as VRBO.com and

[1] In light of this holding, Respondents improperly rely on *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 S.E.2d 880, 882 (1994), in which the Court ruled that, even though the transaction involved parties from outside South Carolina, the interstate commerce requirement was not met because "the express terms of the contract" did not show evidence of interstate commerce. *See Cape Romain*, 405 S.C. at 122-23, 747 S.E.2d at 464-65 (explicitly holding that the circuit court erred in relying on *Mathews* and looking only to the face of the contract).

Airbnb.com. (App. 729-730.) Respondents further allege that Palmetto Bluff seeks to increase its profits and drive traffic to the onsite hotel by denying STR guests' access to neighborhood amenities, actions which have damaged the rental income of STR property owners, including through "[l]ost customers," "[l]ost revenue," and "[l]ost profits." (App. 327 (Complaint ¶¶ 132.11.1, 132.11.2, 132.11.3).)

Taken together, it is clear that the transactions at issue here involved interstate commerce. Contrary to Respondents' contentions, the development of real estate is not the fulcrum of this case. The complaint's "preamble" frames the issues in terms of short-term renters' rights. (App. 280, 28-291 (Complaint at 7, 15-18).) Counts 1, 3, 5, and 6 specifically refer to rental issues; all other claims incorporate by reference the allegations regarding the effects on Plaintiffs' rental businesses and tenants; and Counts 5 and 9 are asserted on behalf of a short-term rental class. (App. 334-354 (Complaint ¶¶ 160-253).) The remaining causes of action attack Club ownership, operations, and policies, with specific reference to access limitations and fees imposed on short-term renters' use of Club facilities. (*See, e.g.*, App. 337-338 (challenging Club "rules regulations, guidelines (including purported 'access guidelines'), and fee schedules")); App. 346, 351 (seeking refund of Club dues and fees); App. 347 (claiming Club dues and fees as damages); App. 348-350 (seeking plaintiff ownership of Club); App. 351 (seeking equitable easement over Club property); App. 354 (seeking damages or rescission of Club membership contracts).)

"The rental of real estate is unquestionably … an activity [affecting interstate commerce]." *Russell v. United States*, 471 U.S. 858, 862 (1985). In so holding, the Supreme Court did "not rely on the connection between the market for residential units and 'the interstate movement of people,'" but instead "recognize[d] that the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Id.* at 862; *see also United States v.*

Medeiros, 897 F.2d 13, 16 (1st Cir. 1990) ("*Russell* … holds that rental property is *per se* property used in an activity affecting interstate commerce."). The interstate character of the online vacation rental market merely underscores that the issues here involve interstate commerce.

Respondents simply ignore their own claims for the sake of their attempt to shoehorn this case into the narrow holding of *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012), that the sale of a "completed dwelling" is an intrastate transaction. *Cf. Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022) (holding that "[t]he transactions here manifestly involve interstate commerce, as they involved the construction of new homes … rather than the purchase of pre-existing homes," as in *Bradley*); *Dixon v. Pattee*, 442 S.C. 233, 254, 898 S.E.2d 158, 169 (Ct. App. 2023) (holding *Bradley* inapplicable where transaction "involved at a minimum the completion of custom elements in the home which fall within the parameters of construction"). As Respondents' own allegations make clear, the transactions at issue here involved far more than the mere purchase of a completed dwelling. Rather, the transactions concerned membership in a for-profit entity (the Club), including its operations and management; the collection of dues and fees; and online marketing of properties for short-term rental. Thus, the transactions involved interstate commerce.

III. The Arbitration Agreements' Delegation Clause Precluded the Circuit Court from Ruling on Arbitrability

Respondents contend that there is no "clear and unmistakable evidence" that they agreed to arbitrate the question of arbitrability, claiming that the arbitration agreements contain only "a vague and ambiguous" reference to the Commercial Arbitration Rules of the American Arbitration Association. (Return at 14 (cleaned up).) On the contrary, state and federal courts have uniformly recognized that incorporation of these rules in an arbitration agreement constitutes precisely the kind of "clear and unmistakable" statement that establishes the parties' agreement to have the

arbitrator, rather than the court, decide issues of arbitrability. Indeed, as the Sixth Circuit recently noted, "every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'" *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020). State courts agree. *See, e.g., Uber Techs., Inc. v. Royz*, 517 P.3d 905, 910 (Nev. 2022) ("[A]s many courts have found, incorporating the AAA's rules, even without more, constitutes clear and unmistakable evidence of intent to submit the question of arbitrability to the arbitrator."); *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) ("As a matter of policy, we adopt the majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator.").[2]

[2] In addition to Delaware and Nevada, numerous other states have recognized the same rule, including at least the following: **Alabama**: *Wiggins v. Warren Averett, LLC*, 307 So. 3d 519, 524 (Ala. 2020) (agreement to arbitrate "in accordance with" AAA Commercial Arbitration Rules delegated arbitrability to the arbitrator); **Arizona**: *Brake Masters Sys., Inc. v. Gabbay*, 78 P.3d 1081, 1088 (Ariz. Ct. App. 2003) ("By incorporating the AAA rules into the agreement, Brake Masters and Gabbay clearly and unmistakably agreed that the arbitrator would primarily decide the arbitrability of the issues."); **Arkansas**: *HPD, LLC v. TETRA Techs., Inc.*, 424 S.W.3d 304, 311 (Ark. 2012) **Colorado**: *Johnson-Linzy v. Conifer Care Communities A, LLC*, 469 P.3d 537, 542 (Colo Ct. App. 2020); **Florida**: *United States Fire Ins. Co. v. Am. Walks at Port St. Lucie, LLC*, 386 So. 3d 575, 580 (Fla. Dist. Ct. App. 2024); **Indiana**: *Illinois Cas. Co. v. B&S of Fort Wayne Inc.*, 235 N.E.3d 827, 835 (Ind. 2024); **Iowa**: *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75, 78 (Iowa 1997); **Kentucky**: *Ally Align Health, Inc. v. Signature Advantage, LLC*, 574 S.W.3d 753, 756 (Ky. 2019); **Louisiana**: *Fla. Gas Transmission Co., LLC v. Texas Brine Co., LLC*, 267 So. 3d 633, 637 (La. Ct. App. 2018) ("A contract's incorporation of the AAA Rules that empower an arbitrator to decide issues of arbitrability serves as clear and unmistakable evidence of the parties' intent to delegate such issues to the arbitrator."); **Mississippi**: *McInnis Elec. Co. v. Brasfield & Gorrie, LLC*, 384 So. 3d 485, 490 (Miss. 2023) ("Agreeing to the American Arbitration Association rules is tantamount to agreeing to delegate scope questions to the arbitrators."); **Missouri**: *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 48 (Mo. 2017); **New Mexico**: *Felts v. CLK Mgmt., Inc.*, 254 P.3d 124, 134 (N.M. Ct. App. 2011) ("[I]ncorporation of the NAF Code of Procedure constitutes clear and unmistakable evidence of the parties' intent to delegate arbitrability issues."); **New York**: *Acevedo v. Citibank, N.A.*, 83 Misc. 3d 706, 745, 209 N.Y.S.3d 753, 785 (N.Y. Sup. Ct. 2024); **North Carolina**: *Bailey v. Ford Motor Co.*, 780

Moreover, the Court of Appeals *itself* recognized, in its opinion on denial of rehearing, that the arbitration agreements' incorporation of the AAA Commercial Arbitration Rules means that questions of arbitrability are to be decided by the arbitrator. (App. 39.) And the Court of Appeals further admitted that, under the U.S. Supreme Court's decisions in *Rent-A-Center, West v. Jackson*, 561 U.S. 63 (2010), and *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 586 U.S. 63 (2019), it was required to apply the terms of the arbitration agreements as written—*i.e.*, as delegating arbitrability to the arbitrator. The Court of Appeals nevertheless *refused to follow* the decisions in *Rent-A-Center* and *Henry Schein*, contending that it was required, under the South Carolina Constitution's supremacy clause, to follow this Court's *earlier* decision in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), which the Court of Appeals construed as establishing a categorical rule that questions of arbitrability must *always* be decided by the court.

Tellingly, Respondents make no attempt to defend the Court of Appeals' outright refusal to apply binding Supreme Court precedent, under the state supremacy clause or on any other basis. Instead, Respondents assert wholly irrelevant factual differences between the delegation provision in the arbitration agreements at issue here, and the delegation provisions in *Rent-A-Center* and

S.E.2d 920, 927 (N.C. Ct. App. 2015) ("Given the parties' adoption of the CPR rules … we hold that the parties clearly and unmistakably intended that an arbitrator would decide questions of substantive arbitrability, like the one at issue here."); **North Dakota**: *26th St. Hosp., LLP v. Real Builders, Inc.*, 879 N.W.2d 437, 446 (N.D. 2016) ("The incorporation of the AAA Rules is clear and unmistakable evidence the parties agreed to arbitrate the question of arbitrability."); **Oregon**: *Gozzi v. W. Culinary Inst., Ltd.*, 366 P.3d 743, 751 (Or. Ct. App. 2016); **Texas**: *Estate of Moncrief*, 699 S.W.3d 315, 334–35 (Tex. App. 2024); **Washington**: *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC*, 400 P.3d 347, 348 (Wash. Ct. App. 2017); **West Virginia**: *W. Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 796 S.E.2d 574, 588 (W. Va. 2017) ("We find that incorporation of the AAA rules into the arbitration agreements is sufficient evidence that the parties clearly and unmistakably agreed to arbitrate arbitrability."); **Wisconsin**: *Mortimore v. Merge Techs. Inc.*, 824 N.W.2d 155, 161 (Wisc. Ct. App. 2012).

Simpson.[3]

To be clear: Respondents never dispute that this Court's 2007 decision in *Simpson*, insofar as it holds that questions of arbitrability must *always* be decided by the court, is contrary to the U.S. Supreme Court's subsequent decisions in *Rent-A-Center* (2010) and *Henry Schein* (2019), holding that the parties may delegate questions of arbitrability (including unconscionability) to the arbitrator. Respondents also do not deny that a grant of certiorari is necessary so that this Court can clarify or resolve any inconsistency between *Simpson*, on the one hand, and *Rent-A-Center* and *Henry Schein*, on the other. Respondents' only contention is that an agreement to arbitrate "in accordance with" the AAA's Commercial Arbitration Rules is not a "clear and unmistakable" delegation of arbitrability to the arbitrator. However, as the Court of Appeals recognized and the vast majority of state and federal courts have held, incorporation of rules that allow the arbitrator resolve questions of arbitrability *does* constitute such a "clear and unmistakable" delegation.

IV. The Arbitration Agreements Are Not Unconscionable

A. There Was No Absence of Meaningful Choice

Respondents attempt to shore up the Court of Appeals' erroneous reasoning as to the absence of meaningful choice by yet again resorting to their characterization of the arbitration agreement as "buried" in the documents executed at closing.[4] But as noted above (at 1-2), Respondents are presumed to have read and understood the contracts they entered into, including

[3] With respect to *Simpson*, Respondents' attempted distinction utterly fails. According to Respondents, the arbitration agreement in *Simpson* "was far more specific" as to delegation of arbitrability to the arbitrator. (Return at 15.) Not so. The arbitration agreement in *Simpson* provided for arbitration "in accordance with the Commercial Arbitration Rules of the American Arbitration Association." *Simpson*, 373 S.C. at 20, 644 S.C. at 666. This is *precisely the same language* that appears in the arbitration agreements here. (App. 578.)

[4] Respondents also complain that the documents are "unrecorded," but they fail to cite any law or articulate any theory as to why the Membership Agreement and/or the Membership Plan were required to be recorded.

the arbitration agreements. More importantly, Respondents cannot dispute that they are, as the Court of Appeals described them, "wealthy purchasers of secondary homes" (App. 41), some of which were purchased with the intent to market them as short-term rentals. The Court of Appeals' one-size-fits-all approach improperly fails to take account of the actual facts regarding the relative positions of the parties to the transactions at issue.

B. The Arbitration Agreements Are Not Unconscionable

To defend the unconscionability ruling below, Respondents mainly chastise Palmetto Bluff for citing non-South Carolina authority and also try to distinguish that authority on the basis of factual differences that are irrelevant to the governing legal principles. As to the first point, this Court has not hesitated to cite out-of-jurisdiction opinions when deciding appeals involving arbitration. *See, e.g.*, *Dean*, 408 S.C. at 382-87, 727 S.E.2d at 733-36 (citing opinions by courts in Minnesota, Washington, New Mexico, Illinois, Mississippi, North Carolina, Virginia, Idaho, Kansas, and South Dakota, as well as the 9th and 11th federal circuits).

Respondents' attempted factual distinctions are simply irrelevant to whether the arbitration agreement is unconscionable because it allows for unilateral amendment. Palmetto Bluff cited cases like *PeopleSoft*[5] for the *legal principle* that a unilateral modification provision that is not part of the arbitration agreement cannot render the arbitration agreement unconscionable. (Petition at 20-21.) These cases are simply specific illustrations of a principle this Court has long recognized: "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016); *see Damico, LLC*, 437 S.C. at 607, 879 S.E.2d at 752-53 (agreeing with the Court of Appeals that "the circuit court impermissibly considered the terms

[5] *Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005).

found in the limited warranty booklet" when ruling on the unconscionability of the "distinct, separate arbitration agreement" (internal quotation marks omitted)).

Notably, Maryland law as applied in *PeopleSoft* is exactly the same as the law in South Carolina: "In examining whether an arbitration agreement is a valid contract, we examine only the language of the arbitration agreement itself." *PeopleSoft*, 412 F.3d at 543. As pertinent here, *PeopleSoft* illustrates how this rule applies in the context of a unilateral modification provision: if the unilateral modification provision is not found within the "four corners" of the arbitration agreement, it cannot render the arbitration agreement unconscionable. *Id.* at 544 (emphasis omitted).

There may sometimes be a question as to what part of a larger contract constitutes the "arbitration agreement." *See, e.g.*, *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4 (holding that the entire section titled "Warranties and Dispute Resolution," not just one subsection, constituted the arbitration agreement). Here, however, there is no ambiguity. The arbitration agreement is set forth in a self-contained section of the Membership Agreement, with the heading "VII. ARBITRATION." (App. 578.) The provision allowing for unilateral modification of contract terms is found in a separate section, with the heading "VI. ACKNOWLEDGEMENT OF MEMBERSHIP RIGHTS." (App. 577-78.) The clear and well-established law of South Carolina prohibited the Court of Appeals from considering the unilateral modification provision in its unconscionability analysis because that provision is not part of the arbitration agreement.[6]

[6] The numerous cases cited in footnote 10 of the Return are not to the contrary. (Return at 21 n.10.) As Respondents' own parenthetical descriptions of those cases make clear, the right to unilateral modification in those cases applied to the arbitration agreement itself.

Where a unilateral modification provision is not within or does not apply to the arbitration agreement, numerous courts have held that the arbitration agreement is not illusory. *See, e.g.*, *Gillon v. UCB Inc.*, __ F. Supp. 3d __, 2024 WL 4829503, at *2 (S.D. Tex. Nov. 19, 2024) ("UCB's promise is not illusory because it did not retain the ability to unilaterally modify the

As to the supposed unconscionability of the limitation of remedies, Palmetto Bluff's petition explained that the Court of Appeals had failed to recognize that because the outcome is uncertain until (and unless) the arbitrator is actually called upon to interpret and apply a limitation-of-remedy provision, the proper course is to compel arbitration. (Petition at 21-22 (citing *Rowe v. AT&T, Inc.*, 2014 WL 172510, at *11 (D.S.C. Jan. 15, 2014).) In *Rowe*, the court relied on *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 557, 606 S.E.2d 752, 759 (2004), in which this Court held that arbitration was required despite a prohibition on "punitive or exemplary damages," because (1) "an arbitrator may or may not choose to award treble damages in accordance with the [South Carolina Unfair Trade Practices Act], depending upon whether an arbitrator finds the SCUTPA was violated and whether the arbitrator finds that statutory treble damages are punitive or compensatory damages"; and (2) the question of punitive damages at common law was not ripe because "it is unclear whether CCP will prevail on the merits in arbitration," and if it did prevail, "it is unclear whether an arbitrator would find that punitive damages are warranted."

Respondents fail to discuss *Rowe* or explain why the remedies limitations should be considered by the court when they were unripe under *Carolina Care Plan*. Respondents do no more than echo the Court of Appeals' citation of *Simpson* for the proposition that limitations on remedies render an arbitration agreement unconscionable. In *Simpson*, however, the Court stated

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Arbitration Agreement."); *Hernandez v. Isotalent, Inc.*, No. 2:23-cv-831, 2024 WL 3358240, at *3 (D. Utah July 8, 2024) ("IsoTalent cannot unilaterally modify the terms of the arbitration provisions … and the language regarding arbitration is not illusory."); *La Frontera Ctr., Inc. v. United Behav. Health, Inc.*, 268 F. Supp. 3d 1167, 1226 (D.N.M. 2017) ("The arbitration agreement is not "subject to unilateral modification or revocation" and, hence, is not "illusory and unenforceable."); *Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014, 1024 (Wyo. 2017) (arbitration agreement not illusory where the drafter "did not retain the right to unilaterally alter the agreement's existence or scope").

that the arbitration agreement was unenforceable "based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause." *Simpson*, 373 S.C. at 35, 644 S.E.2d at 674. Here, the only potentially unconscionable provision is the limitation of remedies, which at this point is not ripe for consideration.

The Court of Appeals also failed to consider whether severance of the unconscionable term was appropriate. This Court has refused to sever unconscionable arbitration terms where doing so would simply reward the drafter for overreaching and where the arbitration agreement "would remain one-sided and be fragmented after severance." *Damico*, 437 S.C. at 604-05, 879 S.E.2d 751. Here, however, the arbitration agreement does not demonstrate the kind of pervasive overreach that rightly troubled the Court in *Damico*. The only limitation challenged as unconscionable is the prohibition of trebled damages, which potentially applies to only *one* of the *sixteen* causes of action alleged in the complaint. Moreover, unlike in *Damico*, severing the unconscionable provision would not result in a "fragmented" agreement or one that remains one-sided.

CONCLUSION

Palmetto Bluff agrees with Respondents on one key point: arbitration is a matter of contract. Palmetto Bluff, no less than Respondents, is entitled to have the contracts here enforced according to their terms—which would mean reversing and remanding for arbitration. Certiorari is necessary and warranted here because the decision of the Court of Appeals violates this principle in numerous ways. The Court should grant certiorari to correct the Court of Appeals' errors and to ensure that South Carolina continues to respect parties' rights to contract as they see fit, including by agreeing to arbitrate their disputes.

Respectfully submitted,

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