THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate 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, 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.

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QUESTIONS PRESENTED

1. Does the Federal Arbitration Act (FAA) apply to the arbitration agreement at issue here? Specifically:

   a. Did the Court of Appeals err in ruling that a form arbitration notice on the first page of a container contract constituted an agreement to apply state arbitration law, when the arbitration agreement contained a choice-of-law provision explicitly limited to state substantive law?

   b. Does a transaction for the purchase of both a residence and a resort club membership involve interstate commerce such that the FAA applies, where the purchaser is from out of state and/or the residence is marketed nationally for short-term rental, and the parties' dispute concerns operation and management of the club, including renters' ability to access club facilities?

2. Did the Court of Appeals err in holding the parties' arbitration agreement unconscionable when (a) the purchasers are sophisticated and wealthy persons buying luxury vacation homes, who did not lack bargaining power or choice; (b) the unilateral modification clause is subject to the implied covenant of good faith and fair dealing and, in any event, has never been exercised; and (c) a purported limitation on remedies has not been construed by the arbitrator and, if determined to be improper, should be severed?

3. In light of controlling precedent of the U.S. Supreme Court, did the Court of Appeals err refusing to honor the parties' agreement to delegate questions of arbitrability to the arbitrator?

4. Did the circuit court err in ruling:

   a. That a nonsignatory entity is not bound by an arbitration agreement signed by its principals or agents?

   b. That a nonsignatory defendant is not entitled to enforce an arbitration agreement where the claims against it are inextricably intertwined with claims against the signatory defendant?

   c. That certain claims were not covered by the parties' arbitration agreement?

INTRODUCTION

This Court granted certiorari to review the Court of Appeals' affirmance of the circuit court's refusal to enforce an arbitration agreement according to its terms. The decisions below rest on erroneous refusals to apply the Federal Arbitration Act ("FAA") to disputes relating to interstate commerce—including the FAA's requirement that delegations to the arbitrator be enforced—and an erroneous application of South Carolina unconscionability principles to these agreements between wealthy and highly sophisticated parties.

STATEMENT OF THE CASE

I. Factual Background

Petitioners are the Palmetto Bluff Club, LLC and other entities and individuals (collectively, "Petitioners" or "Palmetto Bluff") involved in the operation of Palmetto Bluff, a luxury residential/resort community in Beaufort County.[1] (App. 297-300.) The community's facilities include the Palmetto Bluff Club (the "Club"), which all Palmetto Bluff owners must join as a condition of purchasing their properties. The Club's Membership Agreement ("Agreement") and Membership Plan ("Plan") require the parties to arbitrate "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from" the Agreement and Plan. (App. 486-487 (Plan); App. 578-579 (Agreement).)

[1] Current asking prices for existing homes in Palmetto Bluff range from $1,250,000 to $4,995,000. *See* www.palmettobluff.com/live/home-listings# (visited July 21, 2025).

Respondents (Plaintiffs below) are a group of disgruntled property owners who have asserted multiple claims related to the operation of the Club. (App. 292-297, 328-354.) They are persons of substantial wealth and business acumen, including business owners, C-level executives, and high-level investors, including in real estate development and investments. Additionally, many Respondents are out-of-state purchasers who bought their properties for investment purposes and/or have transferred title to LLCs or other entities they own and control. (App. 728-729.) All of Respondents' properties are located in the area of Palmetto Bluff designated for short-term rentals ("STR"), and many Respondents market their properties nationwide on STR websites like VRBO.com and Airbnb.com. (App. 729-730.) It is undisputed that Respondents had an abundance of choice in deciding whether to purchase homes in Palmetto Bluff or elsewhere, or to forgo a purchase altogether. Palmetto Bluff is far from the only developer of luxury homes in the Lowcountry and other desirable coastal areas, and Respondents do not contend that vacation homes, second homes, or luxury homes are necessities.

Palmetto Bluff is subject to various governing documents, including a Community Charter, which has been duly recorded with the Beaufort County Register of Deeds. (App. 303.) Among other things, the Charter establishes the Club. (App. 724.) The Charter provides that "[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." (App. 420.)

The governing documents for the Club are the Membership Agreement and the Membership Plan. The Agreement comprises six-pages: a cover page (which plainly states that the Agreement is subject to arbitration); a two-page form completed by the property owner; three pages of membership terms and member signature blocks; and a signature page for Palmetto Bluff. (App. 574-580.) The Agreement also contains an arbitration agreement, set off in a separate section of the document and denoted in bold capitals: "**ARBITRATION**." (App. 578.) The arbitration agreement provides that:

> any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from this Membership Agreement, including, but not limited to, the breach or alleged breach of this Membership Agreement, shall be resolved by mandatory arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "Rules") then in effect (unless Member [and/or any person exercising such member's membership rights] and Palmetto Bluff Club, LLC, mutually agree otherwise), applying the substantive laws of South Carolina.

(App. 578 (brackets in original).) By executing the Agreement, the owner "acknowledge[s] receipt of the Membership Plan," agrees that he or she has "read and understand[s]" the Plan and "agree[s] to be bound by" the Plan as it "may be amended from time to time." (App. 577.) The Plan contains an arbitration agreement that is substantively identical to the one in the Agreement. (App. 486-487.)

In July 2020, some Respondents complained that certain actions taken or contemplated under the Membership Plan were "intended … to suppress [their] STR activity." (App. 495.) In October 2021, after mediation efforts to resolve the July 2020 complaints were unsuccessful, an overlapping group of property owners similarly

complained about Palmetto Bluff's "position that their right to use [Club] facilities can be restricted to exclude any use by their [STR] guests and tenants." (App. 489.) The parties conducted another unsuccessful mediation after the October 2021 letter.

II. Procedural History

A. Circuit Court Proceedings

Respondents filed their complaint in April 2022, asserting 16 causes of action, all focusing on the management and operation of the Club. (App. 274-256.) Respondents seek damages for, *inter alia*, lost STR earnings that they allege were caused by certain Club policies. The Complaint makes clear that Respondents' STR activities, and the alleged effects of Petitioners' policies on Respondents' STR income, are at the core of this dispute. For example, the Complaint's introductory section frames the issues in terms of short-term renters' rights and Petitioners' alleged attempts to stifle competition by falsely claiming that Club facilities are being overburdened by renters. (App. 288-290.) Four causes of action (1, 3, 5, 6) specifically refer to rental issues; all the rest incorporate by reference the allegations regarding the effects on Plaintiffs' rental businesses and tenants; two (5 and 9) are asserted on behalf of a short-term rental class, of which all Respondents are members. (App. 334-354.) The remaining causes of action attack Club ownership, operations, and policies, generally with specific reference to access limitations and fees imposed on short-term renters' use of Club facilities.

Two days after filing their Complaint, Respondents filed a Demand for Arbitration with the American Arbitration Association ("AAA"), attaching the Complaint as an exhibit. (App. 557-560.) Petitioners answered the Demand on May 16 (App. 566-568), filed

a timely Counterdemand on May 23 (App. 570-572), and filed a Counterclaim on June 7. The Answer, Counterdemand, and Counterclaims sought resolution of the same issues raised in Respondents' Demand.

In the circuit court, Respondents moved to stay arbitration and for "summary proceedings" on the validity of the arbitration agreement (App. 549-551), and Petitioners moved to dismiss the Complaint or to compel arbitration. (App. 553-555.) Three Respondents then filed a motion for partial summary judgment, which was subsequently joined by the others. (App. 683-685, 1061-1062.) Both sides submitted supporting and opposing memoranda.

After conducting a non-evidentiary hearing, the circuit court granted Respondents' motion to stay arbitration and denied Palmetto Bluff's motions to dismiss and to compel arbitration. (App. 203-235.) On the arbitration issues, the circuit court held that (1) because the "development of real property" does not involve interstate commerce, the South Carolina Arbitration Act ("SCUAA"), S.C. Code Ann. § 15-48-10, *et seq.*, applied, rather than the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*; (2) 15 Respondents and 11 Petitioners had never signed an arbitration agreement; (3) the arbitration agreement is invalid, unlawful, and unenforceable; and (4) certain of Respondents' claims did not "relat[e] directly or indirectly to, or aris[e] directly or indirectly from" the Membership Plan and thus were outside the scope of the arbitration agreements. (App. 203-235.) In response to Palmetto Bluff's timely motion to alter or amend, the circuit court entered an "Amended Order" that was identical to the Arbitration Order except for the date and title. (App. 236-268.)

Palmetto Bluff timely appealed. (App. 959.)

B. Court of Appeals – Initial Opinion

The Court of Appeals issued an opinion affirming the circuit court on July 24, 2024. (App. 1-12.) In summary, the Court of Appeals ruled as follows:

- The arbitration agreement's reference to "the substantive laws of South Carolina" required application of the SCUAA rather than the FAA. (App. 5.)
- The circuit court properly decided arbitrability, despite the parties' delegation of that question to the arbitrator, "because disputes about *contract formation* (such as unconscionability) are reserved for the courts." (App. 5-6 (emphasis in original).)
- The arbitration agreement is unconscionable because (1) it is a contract of adhesion, and (2) its terms are oppressive and one-sided in that they give Palmetto Bluff the unilateral right to amend the contracts and preclude an award of treble damages. (App. 8.)

C. Court of Appeals – Substituted Opinion

Palmetto Bluff timely petitioned for rehearing. (App. 13-29.) On November 13, 2024, the Court of Appeals denied rehearing and issued a substitute opinion attempting to address the errors identified in the petition for rehearing. (App. 32-33; App. 34-45.) In its substitute opinion, the Court of Appeals ruled as follows:

- As to the applicability of federal arbitration law, the Court of Appeals abandoned the reasoning in its initial opinion and instead ruled that the SCUAA controlled because the arbitration notice on the front page of the Membership Agreement states, "This membership agreement is subject to arbitration pursuant to South Carolina Code Section 15-48-10, *et. seq.*" (App. 38.)
- With respect to delegation, the Court of Appeals admitted that its ruling was contrary to the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). The court ruled, however, that under the supremacy clause of the South Carolina Constitution, it was bound to follow this Court's decision in *Simpson v. MSA of Myrtle Beach, Inc.*,

373 S.C. 14, 644 S.E.2 663 (2007), even though *Simpson* was decided three years *before Rent-A-Center*. (App. 38-39.)

- The Court of Appeals adhered to the ruling in its initial opinion that the arbitration agreements are unconscionable. (App. 40-44.)

Palmetto Bluff timely petitioned for a writ of certiorari, which this Court granted on June 25, 2025.

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d. 663, 667 (2007).

ARGUMENT

As this Court has made clear, arbitration is a matter of contract, and thus the "parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). It is not the courts' role to second-guess the contracting parties; "if a contract is neither illegal nor ambiguous, courts must enforce it 'according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.'" *Richards v. Spicer*, 445 S.C. 514, 522, 915 S.E.2d 486, 490 (2025) (quoting *Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 397 (2014)). "[S]tatements 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." *Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021); *see Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) ("The FAA

requires that courts treat arbitration agreements the same as all other contracts—no more, no less." (internal quotation marks omitted)).

I. The FAA Applies to the Arbitration Agreements Because the Transactions Involved Interstate Commerce

"Unless the parties have contracted to the contrary, the FAA 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 v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). Moreover, "involving commerce" is broadly construed because it covers more than "only persons or activities within the flow of interstate commerce"; rather, "the word 'involving,' like 'affecting,' signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-77 (1995). Indeed, "the smallest connection of an arbitration agreement with interstate commerce is sufficient to bring the agreement within the FAA." *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 13 (Ala. 1998).

A. The Court of Appeals Erred in Attempting to Avoid This Question

Neither the Court of Appeals' initial opinion nor its opinion on rehearing addresses whether the parties' transactions involved interstate commerce. Instead, the Court of Appeals twice avoided the interstate commerce issue by finding that the parties had contracted for application of the SCUAA. "Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA," but such an intention must be expressed in the contractual

language. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001). Here, the explicit choice-of-law provision in the arbitration agreements is unambiguously limited to state *substantive* law, so that the FAA applies so long as the contract is one "involving" interstate commerce, 9 U.S.C. § 2—and, as explained below, it is. Neither of the grounds identified by the Court of Appeals supports a contrary conclusion.

1. The SCUAA Is Not "the Substantive Law of South Carolina"

The first opinion of the Court of Appeals held *sua sponte* that the arbitration agreement's reference to "the substantive laws of South Carolina" mandated application of the SCUAA rather than the FAA. (App. 5.) The Court of Appeals' subsequent opinion prudently abandoned this position, which conflicts with binding precedent of this Court and the United States Supreme Court.

This Court has recognized that "[g]eneric choice of law provisions cannot be used to incorporate into an arbitration agreement a state law which would be preempted by the FAA." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116. Application of this rule is illustrated by this Court's decision in *Osteen v. T.E. Cuttino Construction Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993). In *Osteen*, the parties agreed to arbitrate pursuant to the AAA's Construction Industry Arbitration Rules, and separately agreed that the contract "shall be governed by the law of the place where the Project is located." *Id.* at 423-24, 434 S.E.2d at 282. The Osteens contended that this general choice-of-law provision required application of the SCUAA, which would have rendered the arbitration agreement invalid because it did not meet the SCUAA's notice requirements (which otherwise would have been preempted by the less-stringent requirements of the FAA). *See id.* at 424-25, 434 S.E.2d at 282-83.

Construing the "contract in a manner that gives effect to all its provisions," this Court rejected the contention that the provision "encompass[ed] state substantive and arbitration law to the exclusion of the FAA." *Id.* at 427, 434 S.E.2d at 284. The Court held that the arbitration clause—not the choice-of-law provision—"comprises the parties' agreement to submit their disputes to arbitration." *Id*. In contrast, the Court concluded that the "'governing law' provision," properly construed, "indicates the parties' agreement to have the validity and construction of the contract determined by arbitrators according to the substantive law 'of the place where the Project is located.'" *Id.* Based on this distinction between the agreement to arbitrate and the choice of substantive law under which the arbitration would proceed, the Court concluded that the FAA, rather than the SCUAA, controlled as to questions of the validity of the arbitration agreement. *See id.*

Two years later, the U.S. Supreme Court confirmed that *Osteen* was correct. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1993). The contract in *Mastrobuono*, like the one at issue here, provided in a single paragraph that the contract "shall be governed by the laws of the State of New York" and that disputes "shall be settled by arbitration in accordance with the rules … of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange Inc." *Id.* at 58 n.2. Contrary to the FAA, which places no remedial limits on arbitrators, New York law prohibits arbitrators (but not courts) from awarding punitive damages. Thus, in *Mastrobuono*—just as in *Osteen* and in this case—the core question was whether the general choice-of-law provision expressed

the parties' intention to have state arbitration law, rather than the FAA, control the scope of the arbitration award. *See id.* at 59. Also like *Osteen*, *Mastrobuono* relied on the rule that a contract "should be read to give effect to all its provisions and to render them consistent with each other." *Id.* at 63; *cf. Osteen*, 315 S.C. at 427, 434 S.E.2d at 284 (applying this principle). The Court also noted that the choice-of-law provision was juxtaposed with one calling for the application of a particular arbitration tribunal's rules. 514 U.S. at 60-61. And the Court concluded that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators." 514 U.S. at 63-64.

The arbitration agreement here is very similar to the agreements in *Osteen* and *Mastrobuono*, except that the choice-of-law provision is explicitly limited to "the *substantive* laws of South Carolina." (App. 578 (emphasis added).) That is, the limit to substantive law rather than rules of arbitration procedure is explicit and need not be inferred from the structure of the contract, as was the case in *Osteen*.

Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989), on which the Court of Appeals relied, does not require a contrary result. The choice-of-law provision at issue in *Volt* said only that the contract "shall be governed by the law of the place where the Project is located." *Id.* at 470. The arbitration agreement here explicitly and unambiguously specifies application of only the "*substantive* laws of South Carolina"(App. 578 (emphasis added))—making it even more clear that state

procedural rules on arbitration do not apply. *See Osteen*, 315 S.C. at 427, 434 S.E.2d at 284 (distinguishing between "state substantive law and arbitration law").

2. The Arbitration Notice Is Not the Arbitration Agreement

In its opinion on rehearing, the Court of Appeals adopted another novel theory, holding that a reference to the SCUAA in the form arbitration notice on the first page of the Membership Agreement demonstrated with "no ambiguity" that the parties chose to arbitrate according to state law. (App. 38.) This too was error, because an arbitration *notice* is not "a contract providing for arbitration under [state] rules." *Munoz*, 343 S.C. at 538 n.2, 542 S.E.2d at 353 n.2. It is not a contract at all; the notice merely serves to alert the parties that the document contains an arbitration agreement.

"A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). An arbitration notice comes nowhere close to demonstrating that there has been a meeting of the minds with respect to arbitration. As but one example, the arbitration notice does not set forth the parties' agreement as to what issues are subject to arbitration, nor does it reflect the exchange of consideration and obligation that is essential to the formation of a contract. On the contrary, the natural reading of the notice is as an effort to comply with South Carolina law in order to foreclose the possibility of a court finding (erroneously) that the FAA does not preempt the notice requirement. Here, as in *Osteen*, the provision of the contract expressly labeled "Arbitration" "comprises the parties' agreement to

submit their disputes to arbitration," 315 S.C. at 428, 434 S.E.2d at 284, not the separate notice on the face page of the contract as a whole.

Even if the arbitration notice had some evidentiary value in determining whether the parties have agreed to arbitrate under state law, it could not change the actual terms of the arbitration agreement. Here, the parties agreed that arbitration shall occur "in accordance with the Commercial Arbitration Rules of the" AAA. (App. 578.) Agreeing to arbitrate under AAA rules "do[es] not evince a clear intent to choose state over federal arbitration rules." *Metzler Contracting Co. LLC v. Stephens*, 774 F. Supp. 2d 1073, 1077 (D. Haw. 2011). On the contrary, as in *Mastrobuono*, the agreement to abide by the rules of an arbitration tribunal suggests that state arbitration-procedure rules do *not* apply. 514 U.S. at 63-64.

In addition, the FAA prohibits the use of arbitration-specific state rules of contract interpretation to curtail the powers of arbitrators, *see Mastrobuono*, 514 U.S. at 59-64, or otherwise to materially alter the terms of arbitration, *see DIRECTV v. Imburgia*, 577 U.S. 47, 54-58 (2015). Neither the Court of Appeals nor Respondents (who have never contended that the notice constitutes an agreement to arbitrate under the SCUAA) identified any general principle of South Carolina law that turns a notice on the cover page of a contract into a choice-of-law provision. The Court of Appeals' holding creates needless uncertainty in the law. There are doubtless hundreds—if not thousands—of contracts with a front-page arbitration notice that, like the one here, cites the SCUAA. The substituted opinion of the Court of Appeals, if allowed to stand, would turn every single one of these notices into a selection of the South Carolina arbitration law, letting courts

disregard the actual terms of an arbitration agreement in favor of a *pro forma* notice that serves only to alert parties to the existence of an arbitration agreement elsewhere in the document. This Court should reverse the Court of Appeals' ruling on this point.

B. The Transactions Involve Interstate Commerce

Since the parties did not agree to arbitrate under the SCUAA, this Court must reach the question of whether the transactions between Petitioners and Respondents involved interstate commerce such that the FAA applies. Relying on this Court's decision in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), the circuit court ruled that "[t]he development of real property does not involve interstate commerce," and applied the SCUAA. (App. 208.) But *Bradley* does not control here because the transactions at issue were not merely for the purchase of a personal residence. When the transactions are considered in full, as this Court's jurisprudence requires, it is clear that they involved interstate commerce.

"Unless the parties have contracted to the contrary, the FAA applies … 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). 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, 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).

First, the documents themselves demonstrate that the transactions here involved *both* the purchase of raw land for development (in some cases, a house) *and* acquisition of Club membership. For example, the Purchase and Sale Agreement for a property in Palmetto Bluff plainly states—in a section separately initialed by the parties—that "by purchasing the property" identified in the agreement, "Purchaser acquires and is required to maintain a membership in the Club." (App. 741.)

Second, Respondents' claims arise out of their Club membership: they contend that restrictions on STR access to Club amenities has reduced the rental value of their properties. Among other things, the complaint alleges that the "master plan" for Palmetto Bluff included establishment of "Designated Rental Areas" in which owners have "the vested right" to market their properties for short-term rental. (App. 287-289.) Respondents further allege that restrictions on STR-guest access to the Club are intended to increase Palmetto Bluff's profits and drive traffic to the onsite hotel and that those restrictions have damaged Respondents through "[l]ost customers," "[l]ost revenue," and "[l]ost profits." (App. 327.) Moreover, the eight out-of-state Respondents (App. 728), show that the Club serves out-of-state customers, and thus its operation involves interstate commerce. *See United States v. Rivera-Rivera*, 555 F.3d 277, 286 (7th Cir. 2009) (collecting cases for the proposition that "where a business serves out-of-state customers, the business is engaged in interstate commerce"). That is enough to apply the FAA here.

"The rental of real estate is unquestionably … an activity" involving interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 (1985). This is true regardless of whether landlord and tenant come from different states because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties." *Id.* The circuit court acknowledged *Russell* and recognized Respondents' claims that Petitioners had "interfere[d] with [Respondents'] short-term rental of their properties" but nevertheless relied on this Court's decision in *Bradley*, *supra*, to hold that the transactions here were for the development of real estate and therefore did not involve interstate commerce.[2] (App. 6.) *Bradley* does not apply here, however.

First, the transaction at issue in *Bradley* was materially different from the transactions at issue here. In *Bradley*, "the essential character of the [transaction] was *strictly* for the purchase of a completed residential dwelling." *Bradley*, 398 S.C. at 459, 730 S.E.2d at 318 (emphasis added). Although there were interstate aspects of the transaction (a national warranty and out-of-state financing), those circumstances were "tangential to the performance" of the contract. *See id.* at 459, 730 S.E.2d at 318. Moreover, the property was purchased for use solely as a residence; nothing suggests that Bradley intended to

[2] Even if the circuit court were correct that this case is about "[t]he development of real property" (App. 208), the FAA would still apply because the development of the Palmetto Bluff community—not just the residences but also the Club and its associated amenities—involves interstate commerce, as the eight out-of-State Plaintiff property owners attest. Just as these Respondents' purchases were actual interstate transactions, the creation of the Palmetto Bluff community, including the sale of property within it, are activities involving interstate commerce even though "a piece of real estate being sold in interstate commerce does not itself pass across state lines." *United States v. Romer*, 148 F.3d 359, 367 (4th Cir. 1998).

rent out the property. And finally, Bradley's claims related only to the construction of the dwelling. *See id.* at 450, 730 S.E.2d at 313-14.

The facts here are very different. To begin, the purchases by out-of-state Respondents are interstate transactions on their face. Apart from this, the interstate aspects of the transactions—specifically, the purchase of land intending to build a residence to be marketed nationwide for short-term rental—are central to Respondents' claims. Unlike in *Bradley*, Respondents' claims have nothing to do with the construction of their properties but rather concern Respondents' Club memberships. In further contrast, the home in *Bradley* was to be used solely as a primary residence, but Respondents make commercial use of their properties by offering them on the national STR market. *Cf. Cusimano v. Schnurr*, 44 N.E.3d 212, 217 (N.Y. Ct. App. 2015) ("Although certain courts have determined that single residential real estate transactions are intrastate in nature, matters concerning commercial real estate have been treated as implicating interstate commerce." (citations omitted)). Finally, the record demonstrates that the wealthy and business-savvy As already noted, *see supra* at 3, Respondents are not in the position of a typical buyer of new residential construction, who "is normally in an unequal bargaining position as against the seller." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016).

The U.S. Supreme Court's decision in *Russell* counsels strongly against extending *Bradley* to the purchase of a residence that will be used in commerce as a rental property. If the *rental* of residential real estate to an *in-state* tenant involves interstate commerce, as *Russell* establishes, then *sale* of property to an *out-of-state* buyer—an actual interstate

transaction—must do so as well. *See, e.g.*, *United States v. Leslie*, 103 F.3d 1093, 1102 (2d Cir. 1997) ("[I]f renting real estate is an activity which unquestionably affects interstate commerce, one need not make a leap of faith to conclude that a business engaged in real estate markets also has, at least, a minimal effect on interstate commerce."); *cf. United States v. Nerone*, 563 F.2d 836, 850-51 (7th Cir. 1977) ("[T]ransactions related to real estate do 'affect' interstate commerce.").

Accordingly, the Court should rule that *Bradley* does not apply to the transactions at issue here, and should instead hold that the transactions at issue involved interstate commerce, such that the FAA applies to the arbitration agreements.

II. The Arbitration Agreement Is Not Unconscionable

The Court of Appeals affirmed the circuit court's ruling that the arbitration agreement is unconscionable. (App. 40-45.) It is not. "[U]nconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions *together with* terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (emphasis added). Neither element is satisfied here.

A. Respondents Did Not Lack Meaningful Choice

Determining whether an arbitration agreement is tainted by an absence of meaningful choice requires consideration of all the facts and circumstances, including "the parties' relative sophistication." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 613, 879 S.E.2d 746, 755 (2022). Contrary to the case-by-case determination required by *Damico*, the Court of Appeals simply and uncritically applied the general proposition that a buyer

of residential construction "is *normally* in an unequal bargaining position as against the seller." *Smith*, 417 S.C. at 50, 790 S.E.2d at 4 (emphasis added). It thus failed to give effect to the uncontested reality that Respondents are "wealthy purchasers of secondary homes" (App. 8), who seek to profit from their purchases by participating in the STR market. In contrast to *Damico*, the homes at issue here are luxury second homes, often for out-of-state purchasers, often held by limited liability companies, and often purchased as investments for rental business. Moreover, Respondents did not simply purchase a residence, they purchased a residence—or, more often, land to be developed into a luxury residence—and a Club membership, both of which they planned to commercially exploit. In short, Respondents were not seeking necessary shelter from a local developer; they were making a discretionary purchase by selecting from one among many competing luxury developments in South Carolina and throughout the world, and they generally *were* the developer of the land they bought. They don't fall within the rule of *Damico* at all.

In deciding *Damico*, this Court could have adopted a blanket rule that purchasers of new residential construction are *always* in an inferior bargaining position *vis-à-vis* the seller, but it did not. It merely recognized that the typical home buyer is "normally" in an unequal bargaining position. By not adopting a blanket rule, this Court necessarily recognized that not all home buyers are "typical." Some, like Plaintiffs here, operate with a high level of sophistication and choice. *Damico* required the Court of Appeals to consider and give effect to these differences. And when considered, those differences

foreclose application of unconscionability doctrine at the threshold, and instead require holding Respondents to the bargain they made.

B. The Agreement's Terms Are Neither Oppressive Nor One-Sided

The Court of Appeals further erred in ruling that the terms of the arbitration agreements are oppressive and one-sided due to the provision allowing for unilateral modification of the contract and by the provision precluding an award of treble damages. (App. 8-10.)

1. The Modification Provision Is Not Unconscionable

The Membership Plan for the Club reserves to Palmetto Bluff "the right, in its sole and absolute discretion, from time to time, to modify this Membership Plan." (App. 485.) The Court of Appeals erred in holding that the mere presence of this unilateral modification provision—which is not part of the arbitration agreement—rendered the arbitration agreement unconscionable.

Because an arbitration agreement is severable from the contract containing it, a unilateral right to amend will not invalidate an arbitration agreement unless the modification right is found within or specific to the arbitration agreement itself. *See Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 (4th Cir. 2005); *Hicks v. Brookdale Senior Living Communities, Inc.*, No. 6:17-cv-02462, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018). The Court of Appeals recognized the rule articulated in *PeopleSoft* but refused to follow it, holding that "although the language permitting unilateral modification to the contract is located outside the arbitration clause itself, it is not located in a *separate policy*." (App. 9 (emphasis added).) The Court also tried to tie the modification provision to the

arbitration agreement by noting that the clause regarding modification states that it applies to "the documents in which the arbitration agreement is located." (*Id.*)

The Court of Appeals' reasoning is erroneous. As an initial matter, the mere presence in a contract of a unilateral modification clause does not necessarily mean there is no agreement. On the contrary, such common provisions—which allow necessary updates to administrative and other details without requiring the parties to reach a new agreement—are judged by the way they are exercised. *See Canteen v. Charlotte Metro. Credit Union*, 900 S.E.2d 890, 897 (N.C. 2024) (rejecting argument that the mere presence of a unilateral modification provision renders a contract illusory); *see also Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016) ("[T]he implied covenant of good faith and fair dealing prevents a party from exercising its rights under a unilateral modification clause in a way that would make it unconscionable."). A party can always attack an unconscionable *exercise* of the unilateral modification power, *Tompkins*, 840 F.3d at 1032, but Respondents do not contend that the arbitration agreement here has been modified at all, much less unreasonably. *See Toth v. Everly Well, Inc.*, 114 F. 4th 403, 414 (1st Cir. 2024) (unilateral-modification term did not render arbitration agreement unconscionable where it did not clearly apply to the arbitration agreement and there was no assertion that the arbitration agreement had ever been modified).

Moreover, "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract," *Smith*, 417 S.C. at 48, 790 S.E.2d at 4, unless the modification provision is otherwise tied to the arbitration agreement. *Cf. Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 290,

292 (4th Cir. 2022) (holding unilateral amendment provision was part of an arbitration agreement where it was contained in an acknowledgement form that specifically listed the arbitration agreement). Here, the modification provision is separate from, and does not mention, the arbitration agreement. Moreover, possible amendments listed in the modification provision are concerned with membership and access, not with dispute resolution. *Cf. Crenshaw v. Erskine Coll.*, 432 S.C. 1, 28, 850 S.E.2d 1, 15 (2020) ("A proper construction of a contract requires the court to give effect to specific terms over any general language."). Accordingly, the Court of Appeals erred in holding that the modification provision rendered the arbitration agreement unconscionable.

2. *The Limitation of Remedies Provision Cannot Be Held Unconscionable Until the Arbitrator Has Had a Chance to Interpret and Apply It*

As to limitation of remedies, the Court of Appeals erroneously failed to apply case law recognizing that until the arbitrator is called to interpret and apply remedy limitations in an arbitration agreement, the outcome is uncertain and "the proper course is to compel arbitration." *Rowe v. AT&T, Inc.*, No. 6:13-cv-01206, 2014 WL 172510, at *11 (D.S.C. Jan. 15, 2014). *Rowe* considered *and rejected* the same argument Respondents made here and that the Court of Appeals erroneously accepted. The proper course was for the arbitrator to address, in the first instance, the scope of the available remedies.

3. *If Unconscionable, the Limitation of Remedies Provision Should Be Severed*

Additionally, the Court of Appeals failed to consider whether the limitation of remedies provision, if unconscionable, could be severed and the remainder of the arbitration agreement enforced. It is well settled that a court may sever an unconscionable

provision from an arbitration agreement even if the agreement does not contain a severability provision. *See Damico*, 437 S.C. at 618, 879 S.E.2d at 758-59. The General Assembly has codified this power in S.C. Code Ann. § 36-2-302(1): "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court … may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result." Severance is only improper when "illegality pervades the entire agreement" such that little of the arbitration agreement would remain after severance or when the unconscionable provision is itself a material term. *Damico*, 437 S.C. at 618-19, 879 S.E.2d at 758; *cf. Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 171 (5th Cir. 2004) (holding that severance is improper where it would involve rewriting the parties' agreement rather than simply deleting "an invalid excrescence").

Severance is possible here because the remedies limitation is not a core or material term of the arbitration agreement. The essence of the parties' agreement is to resolve any disputes through arbitration rather than litigation. The nature of the remedies available is an ancillary procedural matter that does not go to the heart of the parties' bargain. *See The Shipman Agency, Inc. v. TheBlaze Inc.*, 315 F. Supp. 3d 967, 974 (S.D. Tex. 2018) (severing invalid limitation of statutory remedy because "[t]he essential purpose of the Arbitration Provision is to submit any dispute to an arbitral forum rather than to a court"); *Yakovee v. Miami Heat Ltd. P'ship*, No. 20-cv-20540, 2020 WL 9256557, at *6 (S.D. Fla. Apr. 30, 2020) (same). It is at most an "invalid excrescence" that can and should be removed to preserve the parties' agreement. *Iberia Credit Bureau*, 379 F.3d at 171.

III. The Parties Delegated Questions of Arbitrability to the Arbitrator

The U.S. Supreme Court has recognized that, because "a party who has not agreed to arbitrate will normally have a right to the court's decision about the merits of its dispute[,] … courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Coinbase, Inc. v. Suski*, 602 U.S. 143, 149 (2024) (cleaned up) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). The requisite clear and unmistakable evidence may be found in a delegation clause that refers threshold or gateway issues to the arbitrator. *See Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019).

Here, the arbitration agreement provides for arbitration "in accordance with the Commercial Arbitration Rules of the" AAA (App. 578), under which the arbitrator, not the court, decides questions of contract formation. *See* AAA Commercial Arb. Rule R-7(b) ("The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."); *see also id.* Rule R-7(a) (arbitrator decides all questions regarding "his or her jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim"). Federal and state courts have uniformly agreed that incorporation of the AAA Rules establishes the parties' intent to have the arbitrator decide all issues of arbitrability. *See, e.g.*, *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) ("[E]very 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

… provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'"); *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.").

In its original opinion, the Court of Appeals correctly recognized that "parties can delegate questions of arbitrability," including "whether an arbitration agreement is valid," and that incorporation of the AAA Rules "do[es] exactly that." (App. 5.) It nevertheless refused to honor the delegation clause "because disputes about *contract formation* (such as unconscionability) are reserved for the courts." (*Id.* (emphasis in original).) Palmetto Bluff then explained in its petition for rehearing that U.S. Supreme Court precedent requires enforcement of a delegation clause unless the party claiming unconscionability "challenged the delegation provision specifically"—which Respondents did not do. *Rent-A-Center*, 561 U.S. at 72; *see TCSC*, 430 S.C. at 608, 846 S.E.2d at 877 (holding that court decides the validity of a delegation clause only if the party resisting arbitration challenges it specifically, "rather than the arbitration agreement as a whole"). In its substituted opinion on denial of rehearing, the Court of Appeals "acknowledge[d]" the holding of *Rent-A-Center* but refused to apply it, asserting that:

> Pursuant to S.C. Const. art. V, § 9, this Court is bound by *Simpson [v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2 663 (2007)], which states that, under the SCUAA … the question of enforceability is for the court to decide when an arbitration agreement is challenged as unconscionable.

(App. 39-40 n.3.)

Regardless of whether the Court of Appeals properly adhered to *Simpson*, this Court is bound under the Supremacy Clause to either limit the relevant portion of *Simpson* or recognize that it has been partially overruled. *See DIRECTV*, 577 U.S. at 53 ("[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." (internal quotation marks omitted)). At the very least, the arbitration agreement's incorporation of the AAA rules is a contractual term that must be enforced like any other. *See Volt*, 489 U.S. at 478-79. Application of *Simpson* would "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," thereby thwarting "the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.*

This Court recognized in *Simpson* that "the arbitrability of a claim is an issue for judicial determination, *unless the parties provide otherwise*." 373 S.C. at 23, 644 S.E.2d at 667 (quoting *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118) (emphasis added). In both *Simpson* and *Zabinski*, this Court relied on the U.S. Supreme Court's decision in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986). *See Simpson*, 373 S.C. at 23, 644 S.E.2d at 667; *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. As *Rent-A-Center* and *Henry Schein* make clear, *AT&T Technologies* requires enforcement of broad delegation provisions. Accordingly, this Court should either limit the relevant portion of *Simpson* or recognize that it has been partially overruled by *Rent-A-Center*.

IV. The Arbitration Agreements Are Binding on Nonsignatory Entity Respondents

In light of its holding that the arbitration agreements are unconscionable, the Court of Appeals did not review the circuit court's ruling that the arbitration agreement was not binding upon Respondents that did not sign it, *i.e.*, the entity Respondents (11 LLCs and the Bosler-Hart Trust) and three individual Respondents (Sebrina Leigh-Jones, Jennifer Albero, and Geoffrey J. Block). As to the LLCs, the circuit court ruled that they were not bound by arbitration agreements "signed by their members or shareholders" because Palmetto Bluff did not offer "proof sufficient to pierce a corporate veil." (App. 229.) Similarly, the circuit court ruled that the Trust was not bound because Palmetto Bluff failed to provide grounds "to hold the Trust responsible for the individual acts of its trustees." (App. 213.) Both of these rulings are erroneous.

As an initial matter, the record shows that signed Membership Agreements exist for many Respondents:

- Respondent Live Oak Assets, LLC: Signed by Michael and Jennifer McGuire
- Respondents Matthew and Barbara Lynch: Signed by Matthew and Barbara Lynch
- Respondent Salt Works, LLC: Signed by Robert O' Keefe and Lynn Ann Casey
- Respondents R. Jeffrey Kimball and Deborah Kimball: Signed by R. Jeffrey Kimball and Deborah Kimball
- Respondent MKM 22 West, LLC: Signed by David and Darby Mingey
- Respondent TTJR, LLC: Signed by Todd and Beth Kugler
- Respondent Bosler-Hart Trust: Signed by Dylan Skye Hart and Anne Bolser

- Respondent Bridge Charleston Investments C, LLC: Signed by Chris Leigh-Jones[3]
- Respondent Bridge Charleston Investments H, LLC: Signed by Chris Leigh-Jones
- Respondent One Rumford Lane, LLC: Signed by Douglas and Patricia Locke
- Respondent 368 Mount Pelia, LLC: Signed by Michael and Lynn Addy
- Respondent 315 Corley CW, LLC: Signed by Courtland and Kaitlyn Williams

"Well-established common law principles dictate that in an appropriate case a nonsignatory can … be bound by… an arbitration provision within a contract executed by other parties." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). This Court has recognized that a non-signatory may be compelled to arbitrate "under general principles of contract and agency law," including agency, assignment, and estoppel. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). Each of these theories applies here.

First, the LLC and Trust Respondents are bound to the arbitration agreements under traditional agency principles. *See Pearson*, 400 S.C. at 288-97, 733 S.E.2d at 600-05. By statute, members or managers of LLCs, and trustees of trusts, have broad powers to act for and bind their respective entities. *See* S.C. Code Ann. § 33-44-301 (agency of

[3] Petitioners were unable to locate signed Membership Agreements for Respondents Bridge Charleston Investments B and E. However, Sebrina and Chris Leigh-Jones are the principals of all four Bridge Charleston Investments entities (B, C, H, and E), and the record contains signed Membership Agreements for C and H. Bridge Charleston Investments B, LLC joined the Club before the arbitration agreement was added to the Membership Agreement in June 2017, but it signed a Purchase and Sale Agreement containing an arbitration provision, however, as well as an arbitration notice on the first page. (App. 740-752.)

members and managers of LLCs); S.C. Code Ann. §§ 62-7-814 to -816 (discretionary, general, and specific powers of trustees). And it is undisputed that the LLC and Trust Respondents are owned and controlled by their respective members and trustees, who are "signatories to one or more of the agreements to arbitrate." (App. 211.) The inescapable conclusion, therefore, is that the LLC and Trust Respondents are bound by the actions of their members and trustees. *See Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) ("[A]gency may be implied or inferred and may be circumstantially proved by the conduct of the purported agent … showing evidence of apparent or implied authority[.]"). The entity Respondents are bound by arbitration agreements executed on their behalf by their members or trustees.

Even when an agent lacks actual or apparent authority to act for the principal, the transaction is ratified by principal's conduct in retaining its benefits. *See Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). Here, the entity Respondents retained benefits under the Membership Agreement and Plan; indeed, the parties' dispute arises out of the desire of Respondents, including the entity Respondents, to commercialize their Club memberships to enhance STR revenues. Thus, any lack of authority is cured by the LLC and Trust Respondents' ratification through their retention of the benefits of the Membership Agreement and Plan.

Second, the entity Respondents are bound to the arbitration agreements as assignees of their members or trustees. "An assignee cannot resist arbitration on the ground that it was not a party to the original agreement, as its obligations come from those of the assignor." 1 Domke on Com. Arb. § 13:38; *see PTA-FLA, Inc. v. Huawei Techs.*

USA, Inc., No. 3:14-cv-01312, 2014 WL 3100458, at *9 (D.S.C. July 2, 2014) (recognizing "the basic principle that an assignee or other party whose rights are premised on a contract is bound by the remedial provisions bargained for between the original parties to the contract" (internal quotation marks & emphasis omitted)). As assignees of individuals who purchase property in Palmetto Bluff and signed the Membership Agreement, the LLC and Trust Respondents assumed both the rights and obligations of the Membership Agreement and Plan, including the arbitration agreements.

Third, the LLC and Trust Respondents are bound to the arbitration agreements by principals of equitable estoppel. "[A] nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Blackwell v. Mary Black Health Sys., LLC*, 445 S.C. 62, 74, 911 S.E.2d 147, 153 (Ct. App. 2024) (cleaned up) (quoting *Wilson*, 426 S.C. at 340-41, 827 S.E.2d at 175); *see Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 628 (4th Cir. 2006) ("[E]stoppel is appropriate if … the signatory's underlying complaint is based on the nonsignatory's alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim." (cleaned up)).

Equitable estoppel compels a nonsignatory to arbitrate when (1) the nonsignatory's claims arise out of and relate directly to the written agreement containing the arbitration provision, or (2) the nonsignatory receives or asserts entitlement to a direct benefit from a contract containing an arbitration provision. *See Pearson*, 400 S.C. at 290-

97, 733 S.E.2d at 601-05; *see also Am. Bankers Ins. Grp.*, 453 F.3d at 626-30. Both situations are present here:

- The crux of Respondents' claims is that Petitioners created a "scheme" to profit by requiring all property owners to become fee-paying members of the Club. (App. 344.). These claims necessarily rest on the existence of the Membership Agreement and Plan—the documents containing the arbitration agreements.
- All Respondents have received and continue to receive, benefits under the Membership Agreement and Plan; indeed, Respondents complain that they are unable to use Club facilities as much as they wish. Having embraced the benefits of Club membership conferred by the Membership Agreement and Plan, the LLC and Trust Respondents cannot rely on their nonsignatory status to repudiate the arbitration clauses in those very contracts.

Ultimately, every claim asserted by Respondents—signatories and nonsignatories alike—is premised on the Membership Agreement and Plan. This being so, principles of equitable estoppel require that the nonsignatory LLC and Trust Respondents be bound to the arbitration agreements just as the signatory Respondents are.

V. Nonsignatory Petitioners Are Entitled to Enforce the Arbitration Agreements

Respondents chose to name 12 entities and individuals as defendants in this action, only one of which—the Palmetto Bluff Club—signed the Membership Agreement. Nevertheless, all of the defendants (now Petitioners) are entitled enforce the arbitration agreements against Respondents. First, Respondents "should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in [their] complaint ... because this would nullify the rule requiring arbitration." *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993).

Second, "[a] non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract," including when the claims against the nonsignatory are "intimately founded in and intertwined with a contract containing an arbitration clause." *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001) (internal quotation marks omitted). Respondents' Complaint alleges that Petitioners are an "amalgamated single business enterprise" and that "[t]here is an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities, including, inter alia, intertwining of the operations of the entities and a failure to strictly comply with corporate formalities." (App. 281, 299-300.) Respondents further allege that all Petitioners participated in a civil conspiracy "for the purpose of injuring" Respondents. (App. 344.) Indeed, Respondents allege that "justice, equity, and fundamental fairness require that accountability be placed on the single business enterprise" consisting of all Petitioners. (App. 300.)

Respondents' Complaint could not be clearer in alleging that Petitioners all act as one. Respondents' claims against the nonsignatory Petitioners are, therefore, "closely intertwined" with the claims against the Palmetto Bluff Club. *Long*, 248 F.3d at 320. And the claims are identical, not merely "similar to and dependent upon" those claims against the Club. *Id.*

Equitable estoppel principles set forth in *Pearson* require the same result. In *Pearson*, this Court held that a nonsignatory defendant could invoke an arbitration agreement where the claims against both defendants arose from the same set of facts and the plaintiff did not distinguish between the defendants. *See* 400 S.C. at 297, 733 S.E.2d at

605. Here as in *Pearson*, all of Respondents' claims arise from the same set of facts and the Complaint consistently fails to distinguish between or among the various Petitioners. Under these circumstances, the nonsignatory Petitioners are entitled to invoke the arbitration agreements.

VI. The Circuit Court's Other Erroneous Rulings

A. Respondents' Claims Are Subject to Arbitration

The circuit court ruled that many of Respondents' claims are not arbitrable because they "are not related to the Membership Plan or Agreement." (App. 230.) These rulings were entirely improper because the parties plainly delegated questions of arbitrability to the arbitrator, *see supra*. Additionally, the circuit court was wrong on the merits: all of Respondents' claims fall within the broad scope of the arbitration agreements.

The arbitration agreements here are very broad, encompassing "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from," the Membership Agreement or Membership Plan. (App. 578.) "A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly." *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-14 (2013) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967)). Such a clause "does not limit arbitration to the literal interpretation or performance of the contract" but "embraces every dispute between the parties having a significant relationship to the contract." *Id.* at 109-110, 739 S.E.2d at 214. The arbitration agreement here is even broader than the one in *Landers*, as it encompasses all indirect relationships.

All of Respondents' claims "relat[e] directly or indirectly to, or aris[e] directly or indirectly from," the Membership Agreement and Plan. Even the allegations against non-Club entities concern actions with respect to the Club, which is a defendant to each of the sixteen causes of action asserted in the Complaint. (App. 334-354.) Accordingly, all of Respondents' claims fall within the broad scope of the arbitration agreements.

The circuit court further erred in ruling that Respondents' common law and statutory claims did not fall within the scope of the arbitration agreements. (App. 231.) The arbitration agreements are not limited to issues regarding contract interpretation or contractual obligations, but encompass "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from" the Membership Agreement and Plan, whether the based on common law, contract, or statute. *See Landers*, 402 S.C. at 109-13, 739 S.E.2d at 214-15 ("[A] tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause."); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) ("The fact that count one alleges a conspiracy … does not remove the dispute from the scope of arbitration.").

Respondents' claims fall within the scope of the arbitration agreements so long as there is a "significant relationship" between them. *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. Here, the relationship is close. Respondents' claims reduce to contentions that the Club is improperly structured, that Club membership should not be mandatory, and that the Club should be managed differently. Respondents attached the Membership Plan, including its arbitration provision, as an exhibit to their Complaint, and the allegations

in the Complaint demonstrate that the Palmetto Bluff Club is at the core of Respondents' claims.

A dispute about the scope of an arbitration agreement must be resolved in favor of arbitration "[u]nless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213. Far from adhering to this basic rule, the circuit court bent over backwards in its efforts to narrow the arbitration provision nearly into inexistence. Properly construed, however, the arbitration agreements easily encompass all of Respondents' claims.

B. The FAA Preempts the SCUAA's Notice Requirement, Which Nevertheless Is Satisfied

Where an arbitration agreement is governed by the FAA—as the arbitration agreements here are—a court may not invalidated "under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original). Consistent with this rule, this Court has recognized that the FAA preempts the SCUAA's notice requirement, S.C. Code Ann. § 15-48-10(a). *See Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 459, 476 S.E.2d 149, 152 (1996). Therefore, the circuit court erred in ruling that the notice requirement applied.

Moreover, the circuit court erred in ruling that the inapplicable notice requirement was not satisfied. As the circuit court admitted, the Membership Agreement, which contains one of the two identical arbitration agreements, has the SCUAA-required notice on its first page. (App. 219.) The circuit court nevertheless ruled that the notice

requirement was not satisfied because the Membership Agreement was "buried within hundreds of pages of real estate closing documents." (App. 219.) In so holding, the circuit court improperly imposed requirements beyond those in the SCUAA. The SCUAA does not require that the notice appear on the first page of the first document or contract exchanged in a complex transaction; the notice need only appear on the first page of the contract containing the arbitration provision. *See* S.C. Code Ann. § 15-48-10(a). In addition to being improper, the additional requirement invented by the circuit court was meaningless because Respondents (or their agents) actually signed the Membership Agreement, precluding any contention that the notice was somehow "buried" and undiscoverable.

C. **The Limitations Period Does Not Bar Arbitration**

The circuit court also erred in ruling that Petitioners waived arbitration of their counterclaims because they were not asserted within the 60-day window provided in the arbitration agreements. (App. 218.) However, the circuit court acknowledged that "the record does not support a conclusion" that the limitations period would bar a potential claimant who brought "a claim after sixty days." (App. 226.) Moreover, Respondents had already commenced arbitration between by filing their demand for arbitration within 60 days of mediation. Nothing required Petitioners to make a like demand where a demand had already been made.

D. **The Community Charter Does Not Override the Arbitration Agreements**

Finally, the circuit court erred in ruling that the dispute resolution terms of the Community Charter conflicted with and thus nullified the arbitration agreements. (App.

214-216.) There is no conflict. Under fundamental principles of contract interpretation, related documents should be construed so as to give effect to all of their provisions and to be consistent with each other, such that none is rendered meaningless. *See, e.g.*, *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014); *Dixon v. Dixon*, 362 S.C. 388, 396, 608 S.E.2d 849, 852 (2005). That principle has added force in the arbitration context, where arbitration agreements are presumptively valid and enforceable, and arbitration should generally be ordered unless no interpretation of the arbitration clause covers the asserted dispute. *See Landers*, 402 S.C. at 109, 739 S.E.2d at 213; *Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466.

The dispute resolution provisions of the Community Charter and the arbitration agreements of the Membership Plan and Agreements are easily harmonized. The Community Charter provision authorizes (but does not compel) litigation in court "as appropriate." The Membership Plan and Agreements carve out a defined subset of disputes to be resolved by mandatory arbitration. Under the arbitration provisions in the Membership Agreements and Membership Plan, arbitration is the "appropriate" mechanism for resolution of the subset of claims that directly or indirectly arise from, or are directly or indirectly related to those documents. Disputes relating to the Community Charter, but that have nothing to do with the Club, can proceed to court.

CONCLUSION

A core principle of both state and federal arbitration law is that parties who enter into an agreement to arbitrate disputes are entitled to have the agreement enforced according to its terms. It is emphatically not the role of the courts to undermine the

parties' agreement by disregarding or misconstruing its terms. Regrettably, however, that is precisely what the Court of Appeals and the circuit court did. Rather than enforce the arbitration agreements as written and according to the FAA, the Court of Appeals disregarded the facts, the law, and the terms of the arbitration agreement. Its decision, if allowed to stand, will make South Carolina an outlier and will put this State's jurisprudence in opposition not only to the FAA and U.S. Supreme Court precedent, but also with this Court's prior decisions. The Court should reverse the Court of Appeals and remand with instructions to dismiss this action so that arbitration can proceed.

Signatures on following page.

August 4, 2025
Columbia, South Carolina

s/Val H. Stieglitz

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