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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2024-_____

Court of Appeals Appellate Case No. 2022-001587

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

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.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
VOLUME I

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INDEX

VOLUME I

VOLUME II

VOLUME III

THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2022-001587

Appeal From Beaufort County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 6074
Heard June 4, 2024 – Filed July 24, 2024

AFFIRMED

Val S. Stieglitz, III, of Columbia, Robert Bruce Wallace, of Charleston, Kirsten Elena Small, of Greenville, and Alexandra Harrington Austin, of Charleston, all of Maynard Nexsen PC; and Donald Falk, admitted pro hac vice, of Schaerr Jaffe, LLP, of San Francisco, California, all for Appellants/Respondents.

Ian S. Ford, Ainsley Fisher Tillman, and Hunter H. James, all of Ford Wallace Thomson LLC, of Charleston, for Respondents/Appellants.

GEATHERS, J.: In these cross-appeals, Appellants/Respondents Developers (the Defendants) appeal the circuit court's order refusing to compel arbitration in a dispute arising from several contracts underlying the Defendants' sale of real estate in the Palmetto Bluff Development to Respondents/Appellants Homeowners (the Plaintiffs). The Plaintiffs cross-appeal the circuit court's order denying summary judgment for their declaratory judgment action. We affirm the circuit court's order denying the Defendants' motion to compel arbitration and dismiss the Plaintiffs' cross-appeal.

FACTS

The Palmetto Bluff Development (Palmetto Bluff) is a planned residential community located in Beaufort. Purchasers of real estate in Palmetto Bluff are required to join the Palmetto Bluff Club (the Club) as a condition of purchasing property in the development; membership in the Club is purportedly automatic upon acceptance of a deed. Club membership is then further memorialized by the execution of a Club Membership Agreement, and the governing terms of the Club are set forth in the Club Membership Plan (collectively, the Club Documents). The Club is for-profit, is managed by the Defendants, and retains the power, according to the parties, to unilaterally change its fees and policies with no input from the Club's members.

The Club Membership Agreement includes the following arbitration clause:

> [A]ny 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 [rules of the American Arbitration Association (AAA) then in effect], applying the substantive laws of South Carolina.

This provision was added on June 19, 2017, and the Club Membership Plan acknowledges that the provision consequently applies only to those who became Club members on or after this date. The arbitration clause is mirrored in the Club Membership Plan and forms the foundation for this appeal.

In July 2020, several of the Plaintiffs complained to the Defendants about changes the Club was planning to make that the Plaintiffs understood would, in some capacity, limit the ability of their short-term tenants to access and use the Club's facilities. Later, in October 2021, following failed mediation attempts, a larger group that included more of the Plaintiffs in the present action sent a letter disagreeing with the Defendants' assertion that the Defendants possessed the ability to implement such restrictions. After further mediation attempts, the Plaintiffs commenced this suit on April 12, 2022, asserting sixteen causes of action. Two days later, the Plaintiffs sent a demand for arbitration to the AAA that included their complaint.

On May 10, 2022, the Plaintiffs asked the circuit court to stay arbitration and sought summary judgment on the alleged invalidity of the arbitration clause. On May 16, 2022, the Defendants answered the demand and filed a counterdemand with the AAA. The Defendants then asked the court to dismiss the action pursuant to Rule 12(b)(8), SCRCP, or, alternatively, to compel arbitration and stay the action.

Following several hearings, the circuit court issued an order on September 15, 2022, (1) granting the Plaintiffs' motion to stay arbitration, (2) denying the Defendants' motion to compel arbitration—in part because the arbitration agreement was unconscionable—and (3) denying, without prejudice, the Plaintiffs' motion for partial summary judgment. These appeals followed.

THE DEFENDANTS' ISSUES ON APPEAL

1. Did the circuit court err in ruling on the arbitrability of the claims rather than reserving this determination for an arbitrator?

2. Did the circuit court err in determining that an agreement to arbitrate does not exist between many of the parties?

3. Did the circuit court err in finding that any agreements to arbitrate that do exist are invalid, unlawful, and unconscionable?

4. Did the circuit court err in determining that the South Carolina Uniform Arbitration Act applies?

THE PLAINTIFFS' ISSUE ON APPEAL

1. Did the circuit court err in refusing to grant partial summary judgment to the Plaintiffs on their declaratory judgment claim?

STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff'd as modified on other grounds*, 373 S.C. 168, 644 S.E.2d 718 (2007). Nonetheless, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019); *see also Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664, 521 S.E.2d 749, 753 (Ct. App. 1999) ("[South Carolina] now join[s] the majority of jurisdictions granting deference to a circuit [court]'s factual findings made when deciding a motion to stay an action pending arbitration.").

LAW/ANALYSIS

I. THE DEFENDANTS' APPEAL

The Defendants appeal the circuit court's refusal to compel arbitration and argue that the arbitration agreement contained in the Club Documents requires all of the claims in this case to be arbitrated. We hold that (1) the circuit court was the proper adjudicator to determine whether an agreement to arbitrate existed and (2) the arbitration clause contained in the Club Documents is unconscionable and unenforceable.

A. Federal Arbitration Act or the South Carolina Uniform Arbitration Act

As a threshold matter, the Defendants contend that the Federal Arbitration Act (FAA)[1] governs this dispute rather than the South Carolina Uniform Arbitration Act (SCUAA).[2] Because the arbitration agreement explicitly requires application of South Carolina law, we need not address any requirements for FAA coverage; instead, we hold that the SCUAA applies. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Where . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . ."); *Wilson*, 426 S.C. at 336, 827 S.E.2d at 172 ("The FAA applies . . . to any arbitration agreement involving interstate commerce, *unless the parties contract otherwise*." (emphasis added)).

B. Gateway Questions

The parties disagree as to the question of who should resolve their claims—an arbitrator or a court. The Defendants argue that parties can agree to give the determination of an arbitration agreement's existence to an arbitrator and that the incorporation of the AAA rules in the arbitration agreement here did exactly that. We hold that the question of the arbitration agreement's existence was properly before the circuit court because disputes about *contract formation* (such as unconscionability) are reserved for the courts.

It is true that parties can delegate questions of arbitrability—such as the question of whether an arbitration agreement is valid—to an arbitrator. *See Aiken v. World Fin. Corp. of South Carolina*, 367 S.C. 176, 179, 623 S.E.2d 873, 874 (Ct. App. 2005) ("The question whether a claim is subject to arbitration is a matter [for] judicial determination, unless the parties have provided otherwise." (quoting *Chassereau*, 363 S.C. at 631, 611 S.E.2d at 307)); *see also Carson v. Giant Foods, Inc.*, 175 F.3d 325, 329 (4th Cir. 1999) ("[T]he parties can agree to let an arbitrator determine the scope of his own jurisdiction."); *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186, 1195 (2024) (Gorsuch, J., concurring) ("[P]arties can agree to send arbitrability questions to an arbitrator . . . .").

Further, Rule 7(a) of the AAA's Commercial Arbitration Rules—which, again, the parties incorporated into their agreement here—purports to do exactly

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[1] 14 U.S.C. §§ 1–16.

[2] S.C. Code Ann. § 15-48-10 to -240 (2005).

that: "The arbitrator shall have the power to rule on his or her own 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, without any need to refer such matters first to a court." AAA, *R-7. Jurisdiction*, Commercial Arbitration Rules and Mediation Procedures, 14 (2022) (emphases added) www.adr.org/sites/default/files/Commercial-Rules_Web.pdf.

However, in South Carolina, "where one party denies the *existence* of an arbitration agreement[,] . . . *a court* must immediately determine whether [an] agreement exists in the first place." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (emphases added). The court in *Simpson* relied heavily on section 15-48-20(a) of the South Carolina Code (2005), which provides, "If [a] party denies the *existence* of the agreement to arbitrate, *the court* shall proceed summarily to the determination of the issue so raised . . . ." (emphases added). Furthermore, because questions of contract formation are separate from questions of arbitrability (such as validity), the Fourth Circuit Court of Appeals has suggested that courts can still decide whether an agreement to arbitrate exists at all, notwithstanding an arbitration provision's incorporation of the AAA's rules:

> There is a difference between disputes over arbitrability and disputes over contract formation. While "parties may agree to have an arbitrator decide . . . gateway questions of arbitrability," such an agreement does not "preclude a court from deciding that a party never made an agreement to arbitrate *any* issue." That is, it does not erase the court's obligation to determine whether a contract was formed . . . . *Thus*[,] *the incorporation of the rules of the* [*AAA*], *which allow the arbitrator to rule on questions of arbitrability, does not obviate the need for courts to decide the threshold issue of contract formation.*

Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC, 993 F.3d 253, 258 (4th Cir. 2021) (second emphasis added) (citations omitted) (quoting *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 n.9 (4th Cir. 2019)); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) ("The issue of [a] contract's validity is different from the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded."); *cf. Coinbase, Inc.*, 144 S. Ct. at 1193 ("[T]he question is whether the parties agreed to send the given dispute to arbitration—and, per usual, *that* question must be answered by a court.").

In the case at hand, the Plaintiffs' attack on the arbitration agreement as unconscionable challenges formation of the agreement rather than its validity because challenges to an arbitration provision on grounds of unconscionability "bring[] into question whether an arbitration agreement even existed in the first place." *Simpson*, 373 S.C. at 23, 644 S.E.2d at 668. Consequently, the parties here are disputing whether any agreement to arbitrate ever existed—a dispute over contract formation rather than the validity of the arbitration agreement. The matter was therefore properly before the circuit court rather than an arbitrator.

C. Unconscionability

The circuit court concluded that the arbitration agreement in the Club Documents was unenforceable because it is unconscionable. We agree because the Plaintiffs lacked a meaningful choice in entering the agreement and the agreement—which can be unilaterally modified by the Defendants—improperly limits statutorily-mandated damages.

An arbitration agreement is unconscionable if there is (1) an absence of meaningful choice in entering the agreement and (2) oppressive and one-sided terms. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016).

1. Absence of Meaningful Choice

"Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process." *Id.* To this end, courts consider, among other things, "the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether 'the plaintiff is a substantial business concern.'" *Id.* (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). Contracts of adhesion are "standard form contract[s] offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 373 S.C. at 26–27, 644 S.E.2d at 669 (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). However, "[a]dhesion contracts . . . are not per se unconscionable." *Id.* at 27, 644 S.E.2d at 669. Instead, "*adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). In *Simpson*, our supreme court further stated that "[t]he general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution." 373 S.C. at 29–30, 644 S.E.2d at 671.

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Id. at 25, 644 S.E.2d at 669 (citation omitted) (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989)). Our supreme court has "taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Smith*, 417 S.C. at 50, 790 S.E.2d at 4 (quoting *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989)). Here, the Defendants' reliance on the sophistication of the Plaintiffs as wealthy purchasers of secondary homes is misplaced in light of our supreme court's analysis in *Damico*:

> [T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar[, a real estate developer]. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions.

437 S.C. at 614–15, 879 S.E.2d at 756. The contract here is one of adhesion. Agreement to the terms of the Club Documents is automatic and mandatory when purchasing a home in Palmetto Bluff. As the circuit court aptly put it, "there is no conceivable potential for bargaining power on the part of those whom the provisions purport to bind." We hold that agreement to the arbitration clause in this case is characterized by an absence of meaningful choice on the Plaintiffs' part.

2. Oppressive and One-Sided Terms

Turning to the second prong of unconscionability, terms are unconscionably oppressive and one-sided when they are such that "no reasonable person would make them and no fair and honest person would accept them." *Id.* at 612, 879 S.E.2d at 755. The Club Documents in this case provide, "[The Defendants] reserve[] the right

in [their] sole and absolute discretion, from time to time, to modify the Membership Plan and Rules and Regulations . . . and to make any other changes to the Membership Documents . . . ." We are not satisfied with the Defendants' contention that the circuit court was forbidden from considering this provision because it is in the container contract rather than the arbitration clause itself. *Cf. Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543–44 (4th Cir. 2005) (applying Maryland law and refusing to invalidate an arbitration agreement for lack of consideration when language permitting one party to unilaterally amend the contract was not contained within the arbitration clause); *id.* at 544 ("[T]he district court simply was not at liberty to go beyond the language of the [a]rbitration [a]greement in determining whether the agreement contained an illusory promise."). Here, although the language permitting unilateral modification to the contract is located outside the arbitration clause itself, it is not located in a separate policy. Furthermore, it specifically states that the documents in which the arbitration agreement is located are subject in their entirety to the Defendants' unilateral ability to make changes. Therefore, it is part of the arbitration agreement. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) ("Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable *specifically relates to the arbitration provision*." (emphasis added) (quoting *Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003))); *see also Hicks v. Brookdale Senior Living Cmtys, Inc.*, No. 617-cv-2462-DCC-KFM, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018) (noting that in other cases before the United States District Court for the District of South Carolina, arbitration agreements were upheld when reservations of the power to unilaterally modify a contract were "contained in a *separate policy* and [were] not *directed specifically to the arbitration agreement*" (emphases added)); *cf. Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 292–93 (4th Cir. 2022) (concluding that, under Maryland Law, an acknowledgment receipt containing a clause permitting unilateral modification of the contract was part of the arbitration agreement because the agreement's language incorporated the receipt and the receipt served as the signature page for the agreement); *see generally Marcrum v. Embry*, 282 So.2d 49, 52 (Ala. 1973) ("It is quite true that where one party reserves an absolute right to cancel or terminate a contract at any time, mutuality is absent."). As the circuit court recognized, this unilateral ability to modify any part of the contract—including as to the terms of existing contracts—speaks to the one-sidedness of the arbitration agreement.

Furthermore, the arbitration clause provides, "No consequential, lost profits, diminution in value, lost opportunity, intangible, emotional, trebled, enhanced[,] or

punitive damages may be awarded in said arbitration." In *Simpson*, our supreme court struck down an arbitration agreement that prohibited the "award [of] punitive, exemplary, double, or treble damages (or any other damages [that] are punitive in nature or effect)" because the South Carolina Unfair Trade Practices Act (SCUTPA) "requires a court to award treble damages for violations of the statute."[3] 373 S.C. at 28–29, 644 S.E.2d at 670; *see also* S.C. Code Ann. § 39-5-140(a) (2023) (stating that on finding that a violation of the SCUTPA was "willful or knowing[,] . . . [a] court shall award three times the actual damages sustained."). Like in *Simpson*, the arbitration agreement in the Club Documents would deprive the Plaintiffs of their statutory right to treble damages for the SCUTPA claim that they bring. *See also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 88, 749 S.E.2d 139, 150 (Ct. App. 2013) (holding that an arbitration provision identical to the one in *Simpson* precluding treble damages was unconscionable).

The Defendants' reliance on *Rowe v. AT&T, Inc.*, a federal District Court case, is misplaced. No. 6:13–cv–01206–GRA, 2014 WL 172510 (D.S.C. Jan. 15, 2014). Citing to the U.S. Supreme Court in *PacifiCare Health System, Inc. v. Book*, the *Rowe* court wrote, "[I]n cases where it is uncertain how the arbitrator will construe remedial limitations, 'the proper course is to compel arbitration.'" *Id.* at *11 (quoting *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003)). In *PacifiCare*, the Supreme Court refused to invalidate an arbitration clause that potentially restricted the right to treble damages under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. 538 U.S. at 407. The arbitration agreement in *PacifiCare* provided that (1) "punitive damages shall not be awarded [in arbitration]," (2) "[t]he arbitrators . . . shall have no authority to award any punitive or exemplary damages," and (3) "[t]he arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages." *Id.* at 405 (alterations in original). The Supreme Court held the issue on appeal was unripe because it was speculative whether an arbitrator would construe treble damages as compensatory or punitive. *Id.* at 406–07.

[3] The court also noted this clause improperly limited the mandatory award of double damages for violations of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act. 373 S.C. at 28–30, 644 S.E.2d at 670–71; *see also* S.C. Code Ann. § 56-15-110 (2018) (providing a person injured by a violation of the statute "shall recover double the actual damages by him sustained").

Here, there is no such uncertainty. The contract in the instant case specifically prohibits the award of treble damages, regardless of whether they are construed as compensatory or punitive.[4]

In light of this limitation on damages and the Defendants' unilateral ability to modify the arbitration agreement, no reasonable person would make the present terms in this arbitration agreement, nor would any reasonable person accept them. Consequently, we hold that the arbitration agreement in the Club Documents is unconscionable.[5] As a result, we need not address the Defendants' remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("[An] appellate court need not address remaining issues when [resolution] of [a] prior issue is dispositive.").

II. THE PLAINTIFFS' APPEAL

We dismiss the Plaintiffs' appeal of the circuit court's denial of its motion for summary judgment because, in South Carolina, "it is well-settled that an order denying summary judgment is never reviewable on appeal." *Bank of N.Y. v. Sumter County*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010); *see also Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary

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[4] In a similar vein, the Defendants also cite a case from our supreme court, *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, wherein the court enforced an arbitration agreement that prohibited the award of punitive damages even though the plaintiffs advanced the argument that the agreement improperly limited their right to treble damages under the SCUTPA. 361 S.C. 544, 557, 606 S.E.2d 752, 759 (2004). This case is not persuasive for the same reason we stated as to *PacifiCare* (to which *Carolina Care Plan* also cites): regardless of whether an arbitrator were to find that treble damages in the instant case are compensatory or punitive, the arbitration clause specifically purports to prohibit the award of treble damages *altogether*.

[5] We decline to analyze whether the unconscionable terms are severable because the parties did not include a severability clause in the arbitration agreement. *See Smith*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 ("Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions.").

judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial."); *Holloman v. McAllister*, 289 S.C. 183, 185–86, 345 S.E.2d 728, 729 (1986) ("Appellate review of orders denying motions for summary judgment could lead to an absurd result: one who has sustained his position after a full trial and a more complete presentation of the evidence might nevertheless find himself losing on appeal because he failed to prove his case fully at the time of the motion.").

Although appellate courts have discretion to consider an order that is not immediately appealable if an immediately appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation,[6] the supreme court did not intend for this exception to apply to orders denying summary judgment motions. *See Skywaves I Corp. v. Branch Banking and Trust Co.*, 423 S.C. 432, 460, 814 S.E.2d 643, 658 (Ct. App. 2018).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the circuit court's order denying the motion to compel arbitration. We also **DISMISS** the Plaintiffs' cross-appeal because the order denying summary judgment is not reviewable.

HEWITT and VINSON, JJ., concur.

[6] *See Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978).

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PETITION FOR REHEARING

Appellants/Respondents ("Palmetto Bluff"), pursuant to Rule 221(a), SCACR, respectfully submit this Petition for Rehearing. Rehearing is appropriate here because this Court's decision overlooks and/or misapprehends multiple points of fact and law, proper consideration of which would have led to reversal of the circuit court's order denying arbitration. *See* Rule 221(a), SCACR.

BACKGROUND

Respondents/Appellants ("Plaintiffs") are a small group of property owners in the Palmetto Bluff premier residential/resort community. It is undisputed that Plaintiffs had an abundance of choice in deciding whether to purchase homes in this award-winning community. Plaintiffs do not contend that vacation homes, second homes, or luxury homes are necessities, and Palmetto Bluff is far from the only developer of luxury homes in the Lowcountry and other desirable coastal areas. Many Plaintiffs are out-of-state purchasers who bought their properties for commercial investment and/or who have transferred title to their limited liability companies or other closely held entities.

In purchasing a property from Palmetto Bluff, the owner executes a Palmetto Bluff Club Membership Agreement that contains an arbitration agreement. Additionally, the Club operates pursuant to the Membership Plan, which also contains an arbitration agreement. The core text of both arbitration agreements is identical, and provides:

> [A]ny and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from this Membership Agreement [or "Membership Plan"], including, but not limited to, the breach or alleged breach of this Membership Agreement [or "Membership Plan"], shall be resolved by mandatory arbitration **in accordance with the Commercial Arbitration Rules of the**

> **American Arbitration Association (the "Rules") then in effect . . . applying the substantive laws of South Carolina**.

(R. 376; 524 (emphasis added).) Each Membership Agreement also states that each member acknowledges receipt of the Membership Plan and agrees to be bound by all of its respective terms and conditions, as they may be amended from time to time. (R. 375 (Agreement § V).)

Plaintiffs' properties are all located in the designated area for short-term rentals, and their dissatisfaction with lack of short-term renter access to Club amenities drives the multiple claims asserted in their complaint. Plaintiffs' claims thus arise directly from the documents containing the arbitration agreements that Plaintiffs now seek to avoid.

On July 24, 2024, this Court issued its Order affirming circuit court's summary judgment ruling that relieved Plaintiffs' from their contractual agreements to arbitrate these disputes. First, the Court held "[a]s a threshold matter" that because the arbitration agreements call for application of "the substantive laws of South Carolina," the South Carolina Uniform Arbitration Act[1] controlled to the exclusion of the Federal Arbitration Act.[2] (Slip. Op. at 5.) Second, and following from its holding that the SCUAA applied rather than the FAA, the Court held that even though the arbitration clauses incorporated the Commercial Arbitration Rules of the American Arbitration Association ("AAA"), and even though such rules delegate to the arbitrator questions of the existence and validity of the agreement to arbitrate, South Carolina law requires that a court determine the

[1] S.C. Code Ann. §§ 15-48-10 to -240 ("SCUAA").

[2] 14 U.S.C. §§ 1-16 ("FAA").

validity of the arbitration clauses. (Slip Op. at 5-7.) Third, the Court affirmed the circuit court's determination that the arbitration clauses are unconscionable. (Slip Op. at 7-11.) In reaching this conclusion, this Court held that Plaintiffs—undeniably sophisticated purchasers of luxury homes, several operated as short-term rental properties—lacked choice or bargaining power just like the average buyer of an ordinary primary residence from a large national tract developer. The Court then held that the terms of the arbitration clauses are unconscionable because (1) language outside the arbitration clause allows for "unilateral modification" of the parties' contracts; and (2) the arbitration clauses prohibit an award of trebled damages. The Court did not consider the severability of the purportedly unconscionable terms.

In light of its determination that the arbitration clauses are unconscionable, the Court did not reach the remaining issues raised by Palmetto Bluff in support of reversal.[3]

ARGUMENT

I. The Court's Application of the SCUAA Violates Settled Rules of Contract Construction

The Circuit Court ruled that the SCUAA applied on the grounds that "[t]he development of real property does not involve interstate commerce." (R. 6 (Order at 6).) The parties' appellate briefs argued this issue at length. In particular, Palmetto Bluff explained:

> [T]his case . . . turns on Plaintiffs' claims that various Palmetto Bluff governing documents are being used to restrict access to Palmetto Bluff Club amenities by short-term renters. The renters include persons from outside South Carolina, as Plaintiffs market their

[3] The Court dismissed Plaintiffs' cross-appeal of the Circuit Court's denial of their motion for summary judgment. (Slip Op. at 11.)

> properties to renters nationwide . . . . Plaintiffs complain, not about their real estate purchases, but about how the Club's operation hurts their rental businesses. The eight out-of-state Plaintiffs show that the Club serves out-of-state customers, and thus its operation involves interstate commerce.

(Final Appellants' Br. of Appellants-Respondents, at 13-14 (record references & case citations omitted).) Neither Palmetto Bluff nor Plaintiffs ever argued, either before the Circuit Court or in their appellate briefs, that the arbitration agreements' reference to "the substantive laws of South Carolina" mandated application of the SCUAA rather than the FAA. (Slip Op. at 5.) This issue was raised for the first time by the Court during oral argument.

The Court should grant rehearing because its holding that the reference to "the substantive laws of South Carolina" mandates application of the SCUAA to the exclusion of the FAA is contrary to binding precedent of the South Carolina Supreme Court and the United States Supreme Court.

"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). "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. *Id.* at 538 n.2, 542 S.E.2d at 353 n.2; *see Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019) (arbitration is a matter of contract).

Importantly, "[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 v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E2d 110, 116 (2001). As support for this rule, the Supreme Court relied on its prior decision in *Osteen v. T.E. Cuttino Construction Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993). *Osteen* deserves careful scrutiny, as the Supreme Court considered materially identical circumstances to this case but reached the opposite result.

In *Osteen*, the parties' arbitration agreement required arbitration pursuant to the AAA's Construction Industry Arbitration Rules and also provided 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, and therefore the arbitration agreement was 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. Our Supreme Court rejected this argument, reasoning as follows:

> In the contract before us, [the choice-of-law provision] and [the arbitration clause] create an ambiguity when read together. These two provisions may be construed as either (1) requiring the arbitrators to apply South Carolina law to disputes arising under the contract, or (2) encompassing state substantive and arbitration law to the exclusion of the FAA.
>
> A court must construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court reasonably may do so. . . . In accordance with these principles, we hold that the "arbitration" clause . . . comprises the parties' agreement to submit their disputes to arbitration. We further hold that the "governing law" provision . . . 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. at 427, 434 S.E.2d at 284. On this basis, the Court concluded that the FAA, rather than

the SCUAA, controlled as to questions of the validity of the arbitration agreement. *See id.*

Osteen is on all fours with the United States Supreme Court's subsequent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1993), which also involved a contract containing an arbitration provision and a general choice-of-law provision, which in *Mastrobuono* called for the application of New York law. Contrary to the FAA, 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 this 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. Just as our Supreme Court did in *Osteen*, the *Mastrobuono* Court rejected this proposition, reasoning that "[a]t most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards," and such ambiguities must be resolved in favor of arbitration. *Id.* at 62. The Court also relied on the rule of contract construction "that a document should be read to give effect to all its provisions and to render them consistent with each other." *Id.* at 63. The *Osteen* Court likewise applied this principle. *See Osteen*, 315 S.C. at 427, 434 S.E.2d at 284.

Although the facts here are materially indistinguishable from the facts of *Osteen* and *Mastrobuono*, this Court reached the opposite result, relying on *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989). *Volt* is distinguishable, however. Unlike in *Mastrobuono*, *Osteen*, and this case, it appears the choice-of-law provision and arbitration agreement were in separate parts of the *Volt*, so there was not the same ambiguity in *Volt* as there was in *Mastrobuono* and *Osteen*, where

the arbitration agreement itself provided for both non-state arbitration rules and application of state law. Moreover, the arbitration agreements here specify application of only the "*substantive* laws of South Carolina"—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").

Accordingly, rehearing is warranted so that the Court can reconsider its analysis in light of the controlling decisions in *Osteen* and *Mastrobuono*.

In light of its decision that the parties had contracted for application of the SCUAA, the Court did not reach the question of whether the contracts involved interstate commerce. As explained at length in Palmetto Bluff's opening and reply briefs, the dispute here centers on Plaintiffs' participation in the nationwide market for short-term rentals, an activity that clearly occurs in interstate commerce. *See* Final Appellants' Br. of Appellants-Respondents, at 13-17; Final Reply Br. of Appellants-Respondents, at 3-5.

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

Rehearing should also be granted as to this Court's ruling that "the question of the arbitration agreement's existence was properly before the circuit court because disputes about *contract formation* (such as unconscionability) are reserved for the courts." (Slip Op. at 5 (emphasis in original).) The Court correctly recognized that "parties can delegate questions of arbitrability," including "whether an arbitration agreement is valid," and that the AAA Commercial Arbitration Rules explicitly provide for this. (Slip Op. at 5-6.) Nevertheless, the Court ruled that arbitrability must be decided by the circuit court. (Slip

Op. at 6.)

The Court's refusal to enforce the delegation of this issue contravenes Supreme Court authority on the point. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65, 67–68 (2019). If the AAA Rules conflict with South Carolina law, the FAA resolves the conflict in favor of Rule R-7. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The FAA allows parties to agree to have an arbitrator decide "whether the parties have agreed to arbitrate," *Henry Schein*, 586 U.S. at 67–68, including through the "delegation provision" in the AAA rules. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010); *Terminix Int'l Co., LLP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). Moreover, when the parties have agreed to delegate unconscionability to the arbitrator, a court must "treat [the delegation provision] as valid … and must enforce it" unless the party claiming unconscionability "challenged the delegation provision specifically." *Rent-A-Center*, 561 U.S. at 72. Here, Plaintiffs did not specifically challenge the delegation provisions.

The Court's ruling contravenes not only the foregoing cases, but also cannot be reconciled with the decisions the Court itself cites. For example, the Court relied on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2 663 (2007). (Slip Op. at 6.) But *Simpson* clearly recognizes that arbitrability is a question for the court *only if the parties have not provided otherwise*, as they did here. *Id.* at 23, 644 S.E.2d at 667 (quoting *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118). Moreover, the Court's ruling is contrary to its own recent decision holding that the court "retains the right and duty to determine whether the delegation is valid and enforceable" only "as long as the party resisting arbitration

has made a direct and discreet challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole." *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020). Again, Plaintiffs did not specifically challenge the delegation clause. The question of arbitrability should be decided by the arbitrator.

III. The Arbitration Agreements Are Not Unconscionable

The Court should also grant rehearing as to its holding that the arbitration agreements are unconscionable because (1) Plaintiffs lacked meaningful choice in accepting the arbitration agreement; and (2) the terms of the arbitration agreements are oppressive and one-sided. (Slip Op. at 7-11.) As to lack of meaningful choice, the Court's reasoning fails to account for the facts of this case, which are that Plaintiffs are sophisticated purchasers of optional luxury homes (not primary residences), some of which are used as investments in the short-term rental business. As to the purported oppressiveness and one-sidedness of the arbitration terms, the Court failed to recognize that any improper term in the arbitration agreements can simply be severed, thereby preserving the parties' contractual agreement to arbitrate their disputes.

A. Plaintiffs Had a Meaningful Choice

Determining whether an arbitration agreement is tainted by an absence of meaningful choice is fact- and context-specific. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 611, 879 S.E.2d 746, 755 (2022) ("A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case.") Critically, in deciding whether an absence of meaningful choice taints a contract term, courts must

consider *all* of the facts and circumstances, including "the parties' relative sophistication." *Id.* at 613, 879 S.E.2d at 775 (emphasis added).

Contrary to the case-by-case determination required by *Damico*, this Court simply and uncritically applied the *general* proposition that a buyer of new residential construction "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) (emphasis added). The Court failed to give effect to the undisputable and uncontested reality that Plaintiffs are not typical purchasers of a primary residence. They are, as the Court acknowledged, "wealthy purchasers of secondary homes." (Slip Op. at 8.) Indeed, Plaintiffs do not dispute their own sophistication or the supporting evidence in the record. Moreover, the properties at issue in *Damico* were primary homes, lived in by the plaintiffs, who were all individuals. *See* First Am. Compl., *Damico v. Lennar Carolinas, LLC*, No. 2014-CP-08-02424, 2015 WL 13780350 (S.C. Com. Pl. Nov. 23, 2015). In contrast, the homes at issue here are luxury second homes, often for out-of-state purchasers, often held by limited liability companies, and often purchased as investments for rental business. Indeed, some Plaintiffs had previously bought property in Palmetto Bluff.

The *Damico* 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, the *Damico* Court necessarily recognized that not all home buyers are "typical." Some, like Plaintiffs here, operate with a high level of sophistication and choice. *Damico* requires this Court to consider and give

effect to these differences. Rehearing is necessary so the Court can conduct this analysis.

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

Rehearing is also, or alternatively, necessary as to the Court's ruling that the terms of the arbitration agreements are oppressive and one-sided.[4] The Court's conclusion that the arbitration agreements are rendered unconscionable by the provision allowing for unilateral modification of the contract and by the provision precluding an award of treble damages. (Slip Op. at 8-10.) Rehearing should be granted as to both of these determinations.

As to unilateral modification, the Court misapprehended the applicable law. Multiple courts have held that a provision allowing one party the unilateral right to amend a contract does not invalidate an arbitration provision where the right to amend is not contained within, or specific to, the arbitration provision itself. *See Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 (4th Cir. 2005); *Hicks v. Brookdale Senior Living Communities, Inc.*, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018).

The Court recognized this principle, including by citing *Peoplesoft*, but then disregarded 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*." (Slip Op. at 9 (emphasis added).) The Court also tried to tie the modification

[4] If the Court determines on reconsideration that Plaintiffs had the ability to exercise meaningful choice, it would be unnecessary to reconsider the question of whether the terms are oppressive and one-sided. By the same token, if on rehearing the Court agrees that the terms are not oppressive and one-sided, it need not reconsider whether Plaintiffs had a meaningful choice.

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

The Court's reasoning on this point is contrary to established law. "Most courts hold that companies can unilaterally amend any procedural term if the underlying contract includes a change-of-terms clause." David Horton, *The Shadow Terms: Contract Procedure And Unilateral Amendments*, 57 UCLA L. Rev. 605, 649 (2010). Among these is the North Carolina Supreme Court, which recently held that "traditional modification analysis which requires mutual assent and consideration does not apply to changes stemming from a valid unilateral change-of-terms provision in an existing contract"; rather, actual unilateral changes are valid so long as they "reasonably relate back to the universe of terms discussed and anticipated in the original contract" and thus comply with the obligation of good faith and fair dealing. *Canteen v. Charlotte Metro. Credit Union*, 386 N.C. 18, 23, 28, 900 S.E.2d 890, 894 898 (2024). *Canteen* specifically rejected the argument, adopted by Court here, that the mere presence of a unilateral modification provision renders a contract illusory. *Id.* at 26–27, 900 S.E.2d at 897; *see also Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016) (noting that "the 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").

Thus, if (contrary to the weight of authority) the mere presence of a unilateral amendment provision can invalidate an agreement at all, it cannot invalidate an arbitration agreement unless the unilateral modification clause is within the arbitration

agreement itself, or at the very least is specific to the arbitration clause. For example, in *Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288 (4th Cir. 2022), the court found the requisite specificity where the modification provision appeared in an acknowledgement form, and the arbitration agreement explicitly referenced the acknowledgement form. *See id.* at 290, 292. Here, unlike in *Coady* or the other cases cited by the Court, the provision allowing for unilateral amendment does not reference the arbitration agreements, nor do the arbitration agreements reference the provision allowing for unilateral amendment. Thus, the circumstances that would tie the two provisions together are simply absent, and it was error for the Court to determine that the unilateral modification provision rendered the arbitration agreements unconscionable.

Next, rehearing is warranted with respect to the limitation on remedies, first, because the Court 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.*, 2014 WL 172510, at *11 (D.S.C. Jan. 15, 2014). *Rowe* considered *and rejected* the same argument Plaintiffs here made and that this Court erroneously accepted. The proper course was for the arbitrator to address, in the first instance, the scope of the available remedies.

Apart from this, rehearing on this issue is also warranted because the Court failed to consider whether the limitation on remedies, to the extent it might render the arbitration agreements unconscionable, could be severed and the remainder of the agreements enforced. It is well settled that a court may sever an unconscionable provision from an arbitration clause, even if the arbitration clause does not contain a severability

provision. *See Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 370, 887 S.E.2d 534, 542 (Ct. App. 2022). The strong federal policy favoring arbitration suggests that where severance is possible, it should be employed to preserve the parties' agreement to arbitrate. Too, as noted, the Community Charter itself contemplates severance when necessary to comport with South Carolina law. **Cite to come.**

IV. The Court's Decision Undermines the Federal Policy Favoring Enforcement of Valid Arbitration Agreements and Denigrates the Parties' Right to Contract as They See Fit

Last, but by no means least, rehearing is necessary because the Court's reasoning and decision evince precisely the kind of hostility to, and suspicion of, arbitration that the FAA was meant to overcome and that South Carolina courts have long since abandoned. *See, e.g.*, *Doe*, 430 S.C. at 616, 846 S.E.2d at 881 (recognizing that the purpose of the FAA was to "revers[e] the judicial hostility against arbitration"); *Munoz*, 343 S.C. at 540-41, 542 S.E.2d at 364 (recognizing "liberal policy favoring arbitration").

Plaintiffs purchased their Palmetto Bluff properties with their eyes wide open and of their own free choice. None of the Plaintiffs *had* to purchase a home (or, in the case of some Plaintiffs, more than one home) in Palmetto Bluff—they could have chosen not to purchase a luxury residence, or to purchase from another developer, in another community in South Carolina or elsewhere. Those Plaintiffs who purchased their properties as investments for short-term rentals had every incentive to review and understand the terms of Club membership and dispute resolution. And, it is undisputed that Plaintiffs are wealthy individuals with much greater sophistication than the typical buyer of a primary residence.

V. On Rehearing, the Court Should Reverse the Circuit Court and Remand with Instructions to Enter an Order Compelling Arbitration

As a result of its holding that the arbitration agreements are unconscionable and unenforceable, the Court did not reach a number of issues raised by Palmetto Bluff on appeal, including without limitation its arguments as to why all Plaintiffs should be bound to arbitrate their disputes with Palmetto Bluff. Palmetto Bluff expressly preserves, and does not waive, all issues and arguments presented in its briefs that were not reached by the Court in its Opinion.

CONCLUSION

For the reasons set forth above, Palmetto Bluff respectfully requests rehearing of the Court's Opinion of July 24, 2024.

Signatures on Following Page

Respectfully submitted,

s/Val H. Stieglitz

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Pro Hac Vice

September 20, 2024

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Sep 20 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr. , Circuit Court Judge

Appellate Case No. 2022-001587

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

v.

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

PROOF OF SERVICE

I certify that I served the foregoing **Petition for Rehearing** on Respondents/Appellants by emailing a copy of the same to the following counsel of record for Respondents/Appellants using the primary email address listed in the Attorney Information System.

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September 20, 2024

s/*Kirsten E. Small*
Kirsten E. Small, SC Bar No. 75681

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,
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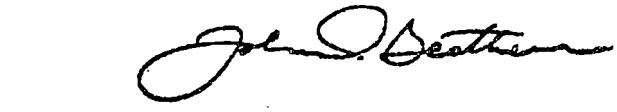
Appellate Case No. 2022-001587

ORDER

After careful consideration of the petition for rehearing, the Court withdraws Opinion Number 6074, filed July 24, 2024, and substitutes the attached opinion. Accordingly, the petition for rehearing is denied.



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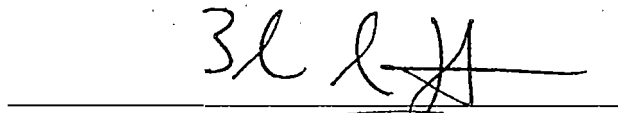

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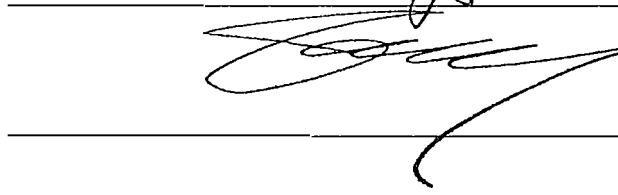

J.

Columbia, South Carolina

FILED
Nov 13 2024

cc:
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Robert Bruce Wallace, Esquire
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Hunter H James, Esquire
Kirsten Elena Small, Esquire
Donald Falk, Esquire
Alexandra Harrington Austin, Esquire
The Honorable R. Ferrell Cothran, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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,
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Appellate Case No. 2022-001587

Appeal From Beaufort County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 6074
Heard June 4, 2024 – Filed July 24, 2024
Withdrawn, Substituted, and Refiled November 13, 2024

AFFIRMED

Val S. Stieglitz, III, of Columbia, Robert Bruce Wallace, of Charleston, Kirsten Elena Small, of Greenville, and Alexandra Harrington Austin, of Charleston, all of Maynard Nexsen PC; and Donald Falk, admitted pro hac vice, of Schaerr Jaffe, LLP, of San Francisco, California, all for Appellants/Respondents.

Ian S. Ford, Ainsley Fisher Tillman, and Hunter H. James, all of Ford Wallace Thomson LLC, of Charleston, for Respondents/Appellants.

GEATHERS, J.: In these cross-appeals, Appellants/Respondents Developers (the Defendants) appeal the circuit court's order refusing to compel arbitration in a dispute arising from several contracts underlying the Defendants' sale of real estate in the Palmetto Bluff Development to Respondents/Appellants Homeowners (the Plaintiffs). The Plaintiffs cross-appeal the circuit court's order denying summary judgment for their declaratory judgment action. We affirm the circuit court's order denying the Defendants' motion to compel arbitration and dismiss the Plaintiffs' cross-appeal.

FACTS

The Palmetto Bluff Development (Palmetto Bluff) is a planned residential community located in Beaufort. Purchasers of real estate in Palmetto Bluff are required to join the Palmetto Bluff Club (the Club) as a condition of purchasing property in the development; membership in the Club is purportedly automatic upon acceptance of a deed. Club membership is then further memorialized by the execution of a Club Membership Agreement, and the governing terms of the Club are set forth in the Club Membership Plan (collectively, the Club Documents). The Club is for-profit, is managed by the Defendants, and retains the power, according to the parties, to unilaterally change its fees and policies with no input from the Club's members.

The Club Membership Agreement includes the following arbitration clause:

> [A]ny 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 [rules of the American Arbitration Association (AAA) then in effect], applying the substantive laws of South Carolina.

This provision was added on June 19, 2017, and the Club Membership Plan acknowledges that the provision consequently applies only to those who became Club members on or after this date. The arbitration clause is mirrored in the Club Membership Plan and forms the foundation for this appeal.

In July 2020, several of the Plaintiffs complained to the Defendants about changes the Club was planning to make that the Plaintiffs understood would, in some capacity, limit the ability of their short-term tenants to access and use the Club's facilities. Later, in October 2021, following failed mediation attempts, a larger group that included more of the Plaintiffs in the present action sent a letter disagreeing with the Defendants' assertion that the Defendants possessed the ability to implement such restrictions. After further mediation attempts, the Plaintiffs commenced this suit on April 12, 2022, asserting sixteen causes of action. Two days later, the Plaintiffs sent a demand for arbitration to the AAA that included their complaint.

On May 10, 2022, the Plaintiffs asked the circuit court to stay arbitration and sought summary judgment on the alleged invalidity of the arbitration clause. On May 16, 2022, the Defendants answered the demand and filed a counterdemand with the AAA. The Defendants then asked the court to dismiss the action pursuant to Rule 12(b)(8), SCRCP, or, alternatively, to compel arbitration and stay the action.

Following several hearings, the circuit court issued an order on September 15, 2022, (1) granting the Plaintiffs' motion to stay arbitration, (2) denying the Defendants' motion to compel arbitration—in part because the arbitration agreement was unconscionable—and (3) denying, without prejudice, the Plaintiffs' motion for partial summary judgment. These appeals followed.

THE DEFENDANTS' ISSUES ON APPEAL

1. Did the circuit court err in ruling on the arbitrability of the claims rather than reserving this determination for an arbitrator?

2. Did the circuit court err in determining that an agreement to arbitrate does not exist between many of the parties?

3. Did the circuit court err in finding that any agreements to arbitrate that do exist are invalid, unlawful, and unconscionable?

4. Did the circuit court err in determining that the South Carolina Uniform Arbitration Act applies?

THE PLAINTIFFS' ISSUE ON APPEAL

1. Did the circuit court err in refusing to grant partial summary judgment to the Plaintiffs on their declaratory judgment claim?

STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff'd as modified on other grounds*, 373 S.C. 168, 644 S.E.2d 718 (2007). Nonetheless, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019); *see also Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664, 521 S.E.2d 749, 753 (Ct. App. 1999) ("[South Carolina] now join[s] the majority of jurisdictions granting deference to a circuit [court]'s factual findings made when deciding a motion to stay an action pending arbitration.").

LAW/ANALYSIS

I. THE DEFENDANTS' APPEAL

The Defendants appeal the circuit court's refusal to compel arbitration and argue that the arbitration agreement contained in the Club Documents requires all of the claims in this case to be arbitrated. We hold that (1) the circuit court was the proper adjudicator to determine whether a valid agreement to arbitrate existed and (2) the arbitration clause contained in the Club Documents is unconscionable and unenforceable.

A. Federal Arbitration Act or the South Carolina Uniform Arbitration Act

As a threshold matter, the Defendants contend that the Federal Arbitration Act (FAA)[1] governs this dispute rather than the South Carolina Uniform Arbitration Act (SCUAA).[2] "Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001). "[T]he dispositive question is whether the parties intended to be bound by federal or state arbitration law." *Osteen v. T.E. Cuttino Const. Co.*, 315 S.C. 422, 426, 434 S.E.2d 281, 283 (1993). Here, there is no ambiguity regarding whether the parties intended to be bound by federal or state arbitration law. The Membership Agreement contains more than a generic choice of law provision. The front page of the Membership Agreement states, underlined and in all capital letters, that "This membership agreement is subject to arbitration pursuant to South Carolina Code Section 15-48-10, et. seq." Because the Membership Agreement explicitly requires application of South Carolina arbitration law, we need not address any requirements for FAA coverage; instead, we hold that the SCUAA applies. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

B. Gateway Questions

The parties disagree as to the question of who should resolve their claims—an arbitrator or a court. The Defendants argue that parties can agree to give the determination of an arbitration agreement's validity to an arbitrator and that the incorporation of the AAA rules in the arbitration agreement here did exactly that. We hold that the question of the arbitration agreement's validity was properly before the circuit court because our supreme court held that, under the SCUAA, courts must determine the enforceability of arbitration agreements challenged as unconscionable. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007).

It is true that parties can delegate questions of arbitrability—such as the question of whether an arbitration agreement is valid—to an arbitrator. *See Aiken v. World Fin. Corp. of South Carolina*, 367 S.C. 176, 179, 623 S.E.2d 873, 874 (Ct.

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[1] 14 U.S.C. §§ 1–16.

[2] S.C. Code Ann. § 15-48-10 to -240 (2005).

App. 2005) ("The question whether a claim is subject to arbitration is a matter [for] judicial determination, unless the parties have provided otherwise." (quoting *Chassereau*, 363 S.C. at 631, 611 S.E.2d at 307)); *see also Carson v. Giant Foods, Inc.*, 175 F.3d 325, 329 (4th Cir. 1999) ("[T]he parties can agree to let an arbitrator determine the scope of his own jurisdiction."); *Coinbase, Inc. v. Suski*, 602 U.S. 143, 152 (2024) (Gorsuch, J., concurring) ("[P]arties can agree to send arbitrability questions to an arbitrator . . . .").

Further, Rule 7(a) of the AAA's Commercial Arbitration Rules—which, again, the parties incorporated into their agreement here—purports to do exactly that: "The arbitrator shall have the power to rule on his or her own 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, without any need to refer such matters first to a court." AAA, *R-7. Jurisdiction*, Commercial Arbitration Rules and Mediation Procedures, 14 (2022) www.adr.org/sites/default/files/Commercial-Rules_Web.pdf.

However, in South Carolina, if an arbitration provision is challenged on grounds of unconscionability, the question of the clause's validity is for courts to decide, even if the clause delegates issues of validity by incorporating the AAA's Commercial Arbitration Rules. *Simpson*, 373 S.C. at 23–24, 644 S.E.2d at 668. In *Simpson*, the arbitration agreement stated that, in addition to certain disputes between the dealer (or its agents) and the customer, any dispute relating to "the validity and scope of this contract[] shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association." *Id.* at 20, 644 S.E.2d at 666. But the court held that under S.C. Code Ann. § 15–48–20(a), "the trial court was the proper forum for determining the enforceability of the arbitration clause" because Plaintiffs "challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place."[3] *Id.* at 23, 644

[3] We acknowledge that in *Rent-A-Center, West, Inc., v. Jackson*, the United States Supreme Court held that under the FAA, where an arbitration agreement delegates the question of its enforceability to arbitrators, a court may decide the question if a party specifically challenges the delegation clause as unconscionable, but an arbitrator must decide the question if a party merely challenges the arbitration agreement as a whole as unconscionable. 561 U.S. 63, 71–72 (2010); *see also Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020). Pursuant to S.C. Const. art. V, § 9, this Court is bound by *Simpson*, which states that, under the SCUAA, specifically, section 15-48-20(a), the question of enforceability is for

S.E.2d at 668. The matter was therefore properly before the circuit court rather than an arbitrator.

C. Unconscionability

The circuit court concluded that the arbitration agreement in the Club Documents was unenforceable because it is unconscionable. We agree because the Plaintiffs lacked a meaningful choice in entering the agreement and the agreement—which can be unilaterally modified by the Defendants—improperly limits statutorily-mandated damages.

An arbitration agreement is unconscionable if there is (1) an absence of meaningful choice in entering the agreement and (2) oppressive and one-sided terms. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016).

1. Absence of Meaningful Choice

"Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process." *Id.* To this end, courts consider, among other things, "the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether 'the plaintiff is a substantial business concern.'" *Id.* (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at

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the court to decide when an arbitration agreement is challenged as unconscionable. 373 S.C. at 23–24, 644 S.E.2d at 668. We query whether, if the supreme court relied on the SCUAA to reach its result in *Simpson*, the FAA would have preempted section 15-48-20(a) to the extent it invalidated the delegation clause, which is essentially "an additional, antecedent agreement" to arbitrate the validity of the arbitration agreement as a whole. *Rent-A-Center*, 561 U.S. at 70; *see e.g., Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116 ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."). But in *Simpson*, the supreme court disposed of this issue, stating "FAA pre-emption of the UAA is not an issue in this case because the state laws applicable to this case do not operate to completely invalidate the parties' agreement to arbitrate." *Simpson*, 373 S.C. 14, 22 n.1, 644 S.E.2d 667 n.1. As the state law issues in this case are the same as those in *Simpson*—the SCUAA and general contract principles governing unconscionability—we must follow *Simpson* in holding that the SCUAA is not preempted.

669). Contracts of adhesion are "standard form contract[s] offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 373 S.C. at 26–27, 644 S.E.2d at 669 (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). However, "[a]dhesion contracts . . . are not per se unconscionable." *Id.* at 27, 644 S.E.2d at 669. Instead, "*adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). In *Simpson*, our supreme court further stated that "[t]he general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution." 373 S.C. at 29–30, 644 S.E.2d at 671.

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Id. at 25, 644 S.E.2d at 669 (citation omitted) (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989)). Our supreme court has "taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Smith*, 417 S.C. at 50, 790 S.E.2d at 4 (quoting *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989)). Here, the Defendants' reliance on the sophistication of the Plaintiffs as wealthy purchasers of secondary homes is misplaced in light of our supreme court's analysis in *Damico*:

> [T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar[, a real estate developer]. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions.

437 S.C. at 614–15, 879 S.E.2d at 756. The contract here is one of adhesion. Agreement to the terms of the Club Documents is automatic and mandatory when

purchasing a home in Palmetto Bluff. As the circuit court aptly put it, "there is no conceivable potential for bargaining power on the part of those whom the provisions purport to bind." We hold that agreement to the arbitration clause in this case is characterized by an absence of meaningful choice on the Plaintiffs' part.

2. Oppressive and One-Sided Terms

Turning to the second prong of unconscionability, terms are unconscionably oppressive and one-sided when they are such that "no reasonable person would make them and no fair and honest person would accept them." *Id.* at 612, 879 S.E.2d at 755. The Club Documents in this case provide, "[The Defendants] reserve[] the right in [their] sole and absolute discretion, from time to time, to modify the Membership Plan and Rules and Regulations . . . and to make any other changes to the Membership Documents . . . ." We are not satisfied with the Defendants' contention that the circuit court was forbidden from considering this provision because it is in the container contract rather than the arbitration clause itself. *Cf. Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543–44 (4th Cir. 2005) (applying Maryland law and refusing to invalidate an arbitration agreement for lack of consideration when language permitting one party to unilaterally amend the contract was not contained within the arbitration clause); *id.* at 544 ("[T]he district court simply was not at liberty to go beyond the language of the [a]rbitration [a]greement in determining whether the agreement contained an illusory promise."). Here, although the language permitting unilateral modification to the contract is located outside the arbitration clause itself, it is not located in a separate policy. Furthermore, it specifically states that the documents in which the arbitration agreement is located are subject in their entirety to the Defendants' unilateral ability to make changes. Therefore, it is part of the arbitration agreement. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) ("Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable *specifically relates to the arbitration provision*." (emphasis added) (quoting *Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003))); *see also Hicks v. Brookdale Senior Living Cmtys, Inc.*, No. 617-cv-2462-DCC-KFM, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018) (noting that in other cases before the United States District Court for the District of South Carolina, arbitration agreements were upheld when reservations of the power to unilaterally modify a contract were "contained in a *separate policy* and [were] not *directed specifically to the arbitration agreement*" (emphases added)); *cf. Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 292–93 (4th Cir. 2022) (concluding that, under Maryland Law, an acknowledgment receipt containing a clause

permitting unilateral modification of the contract was part of the arbitration agreement because the agreement's language incorporated the receipt and the receipt served as the signature page for the agreement); *see generally Marcrum v. Embry*, 282 So.2d 49, 52 (Ala. 1973) ("It is quite true that where one party reserves an absolute right to cancel or terminate a contract at any time, mutuality is absent."). As the circuit court recognized, this unilateral ability to modify any part of the contract—including as to the terms of existing contracts—speaks to the one-sidedness of the arbitration agreement.

Furthermore, the arbitration clause provides, "No consequential, lost profits, diminution in value, lost opportunity, intangible, emotional, trebled, enhanced[,] or punitive damages may be awarded in said arbitration." In *Simpson*, our supreme court struck down an arbitration agreement that prohibited the "award [of] punitive, exemplary, double, or treble damages (or any other damages [that] are punitive in nature or effect)" because the South Carolina Unfair Trade Practices Act (SCUTPA) "requires a court to award treble damages for violations of the statute."[4] 373 S.C. at 28–29, 644 S.E.2d at 670; *see also* S.C. Code Ann. § 39-5-140(a) (2023) (stating that on finding that a violation of the SCUTPA was "willful or knowing[,] . . . [a] court shall award three times the actual damages sustained."). Like in *Simpson*, the arbitration agreement in the Club Documents would deprive the Plaintiffs of their statutory right to treble damages for the SCUTPA claim that they bring. *See also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 88, 749 S.E.2d 139, 150 (Ct. App. 2013) (holding that an arbitration provision identical to the one in *Simpson* precluding treble damages was unconscionable).

The Defendants' reliance on *Rowe v. AT&T, Inc.*, a federal District Court case, is misplaced. No. 6:13–cv–01206–GRA, 2014 WL 172510 (D.S.C. Jan. 15, 2014). Citing to the U.S. Supreme Court in *PacifiCare Health System, Inc. v. Book*, the *Rowe* court wrote, "[I]n cases where it is uncertain how the arbitrator will construe remedial limitations, 'the proper course is to compel arbitration.'" *Id.* at *11 (quoting *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 (2003)). In *PacifiCare*, the Supreme Court refused to invalidate an arbitration clause that potentially restricted the right to treble damages under the federal Racketeer Influenced and Corrupt

[4] The court also noted this clause improperly limited the mandatory award of double damages for violations of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act. 373 S.C. at 28–30, 644 S.E.2d at 670–71; *see also* S.C. Code Ann. § 56-15-110 (2018) (providing a person injured by a violation of the statute "shall recover double the actual damages by him sustained").

Organizations (RICO) Act. 538 U.S. at 407. The arbitration agreement in *PacifiCare* provided that (1) "punitive damages shall not be awarded [in arbitration]," (2) "[t]he arbitrators . . . shall have no authority to award any punitive or exemplary damages," and (3) "[t]he arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages." *Id.* at 405 (alterations in original). The Supreme Court held the issue on appeal was unripe because it was speculative whether an arbitrator would construe treble damages as compensatory or punitive. *Id.* at 406–07.

Here, there is no such uncertainty. The contract in the instant case specifically prohibits the award of treble damages, regardless of whether they are construed as compensatory or punitive.[5]

In light of this limitation on damages and the Defendants' unilateral ability to modify the arbitration agreement, no reasonable person would make the present terms in this arbitration agreement, nor would any reasonable person accept them. Consequently, we hold that the arbitration agreement in the Club Documents is unconscionable.[6] As a result, we need not address the Defendants' remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613,

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[5] In a similar vein, the Defendants also cite a case from our supreme court, *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, wherein the court enforced an arbitration agreement that prohibited the award of punitive damages even though the plaintiffs advanced the argument that the agreement improperly limited their right to treble damages under the SCUTPA. 361 S.C. 544, 557, 606 S.E.2d 752, 759 (2004). This case is not persuasive for the same reason we stated as to *PacifiCare* (to which *Carolina Care Plan* also cites): regardless of whether an arbitrator were to find that treble damages in the instant case are compensatory or punitive, the arbitration clause specifically purports to prohibit the award of treble damages *altogether*.

[6] We decline to analyze whether the unconscionable terms are severable because the parties did not include a severability clause in the arbitration agreement. *See Smith*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 ("Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions.").

518 S.E.2d 591, 598 (1999) ("[An] appellate court need not address remaining issues when [resolution] of [a] prior issue is dispositive.").

II. THE PLAINTIFFS' APPEAL

We dismiss the Plaintiffs' appeal of the circuit court's denial of its motion for summary judgment because, in South Carolina, "it is well-settled that an order denying summary judgment is never reviewable on appeal." *Bank of N.Y. v. Sumter County*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010); *see also Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial."); *Holloman v. McAllister*, 289 S.C. 183, 185–86, 345 S.E.2d 728, 729 (1986) ("Appellate review of orders denying motions for summary judgment could lead to an absurd result: one who has sustained his position after a full trial and a more complete presentation of the evidence might nevertheless find himself losing on appeal because he failed to prove his case fully at the time of the motion.").

Although appellate courts have discretion to consider an order that is not immediately appealable if an immediately appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation,[7] the supreme court did not intend for this exception to apply to orders denying summary judgment motions. *See Skywaves I Corp. v. Branch Banking and Trust Co.*, 423 S.C. 432, 460, 814 S.E.2d 643, 658 (Ct. App. 2018).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the circuit court's order denying the motion to compel arbitration. We also **DISMISS** the Plaintiffs' cross-appeal because the order denying summary judgment is not reviewable.

HEWITT and VINSON, JJ., concur.

[7] *See Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-001587

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

v.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF ISSUES ON APPEAL

Almost simultaneously, Plaintiffs sued in Circuit Court and initiated arbitration, asserting claims challenging the legal structure, governance, and management of the Palmetto Bluff Club. But Plaintiffs backed out of the arbitration they started.

The question presented is whether the Circuit Court should have compelled Plaintiffs to arbitrate their claims in accord with their arbitration agreements. In particular,

A. Whether the Federal Arbitration Act applies to the arbitration agreements.

B. Whether the delegation clause in the arbitration agreements precluded the Circuit Court from ruling on issues of substantive arbitrability.

C. Whether binding arbitration agreements exist for the disputes at issue here

   1. For the Plaintiffs who signed arbitration agreements;

   2. For the LLC and trust Plaintiffs whose principals, agents, or trustees signed arbitration agreements;

   3. For nonsignatory Plaintiffs under principles of equitable estoppel;

   4. As to nonsignatory Defendants because the claims against them are closely intertwined with, and similar to and dependent upon, the claims against signatory Defendants; and

   5. As to all claims on the ground that they "relat[e] directly or indirectly to, or aris[e] directly or indirectly from" the arbitration agreements.

D. Whether the arbitration agreements are invalid, unlawful, and unenforceable.

INTRODUCTION

This case was brought by a small group of property owners in the Palmetto Bluff luxury resort community who seek to enhance their short-term rental businesses by commercializing their memberships in the private Palmetto Bluff Club. The Club owns and operates amenities that include swimming pools, fitness centers, and dining facilities open to Club members and their guests. All Palmetto Bluff owners agree to join the Club when they purchase their property.

Respondents/Appellants ("Plaintiffs"), at least eight of whom hail from out of state, sued the Club and various other entities and individuals connected to the Club, the Appellants/Respondents here ("Defendants"). But this case belongs in arbitration, not in court. When they joined the Club, these wealthy and sophisticated Plaintiffs agreed that they would arbitrate "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from" the Club Membership Agreement or the Club Membership Plan.

All of Plaintiffs' 16 causes of action arise from or are related to Club membership and operations. They challenge the structure and governance of the Club, the requirement to join the Club, and various Club policies and access rules.

Yet the Circuit Court refused to hold Plaintiffs to their bargain, relying on multiple erroneous grounds. These include (but are by no means limited to) refusing to apply the Federal Arbitration Act; refusing to enforce the parties' delegation to the arbitrators to decide "the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim"; refusing to enforce arbitration agreements signed by

individuals when they bought into Palmetto Bluff against the Plaintiff LLCs that took title to property; and holding the agreements unconscionable as applied to the sophisticated, luxury second-home owners at issue here.

The Circuit Court's decision reflects the judicial hostility to arbitration that the Federal Arbitration Act and the South Carolina Uniform Arbitration Act were designed to overcome. This Court should reverse the orders under appeal and remand with instructions to compel arbitration.

STATEMENT OF THE CASE

This appeal arises from the Circuit Court's refusal to enforce arbitration agreements contained in governing documents for the Palmetto Bluff community. Plaintiffs own residential property within Palmetto Bluff and assert individual, derivative, and class claims relating to the creation, development, governance, and operation of the Palmetto Bluff Club ("Club"). (R. 90-95, 126-152 (Compl. at ¶¶ 1-17, 133-253) (Plaintiffs do not in fact assert any claim derivatively on behalf of any other entity).) 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. (R. 284-285; 376-377 (Plan, 15-16; Agreement ¶ VII).) Defendants include the developer, other entities and individuals connected with the community, and a separate entity that operates a hotel in the community. (R. 95-98 (Compl. ¶¶ 18-26).)

A. Factual Background

The Palmetto Bluff community is a premier high-end residential/resort development in Beaufort County. (R. 100 (*Id*. at ¶ 36).) Its 20,000 acres include 4,000 home sites, protected natural areas, restaurants, shops, the Montage Palmetto Bluff Hotel, and the private Palmetto Bluff Club. (R. 77-81 (*Id*. at 6-10).) 800 homes have been built, with 400 more under construction. (*Id*.)

The purchase prices in the record reflect Palmetto Bluff's luxury status. Recent transactions ranged from $1,125,000 to $2,375,000. (R. 593, 611, 704, 710, 782 (Mem. in Support of Defs.' MTC, Exs. B.5, B.8, B.26, B.27; Pls.' MPSJ, Ex. 1).) Current property listings for completed homes seek between $1.7 and $5.95 million. *See* www.palmettobluff.com/live/home-listings# (visited Jan. 26, 2023). Many purchasers come from out of state, including Plaintiffs Live Oak Assets, LLC; Matthew and Barbara Lynch; Salt Works, LLC; R. Jeffrey Kimball and Deborah Kimball; MKM 22 West, LLC; TTJR, LLC; Dylan Skye Hart and Anne Bolser; and One Rumford Lane, LLC. (R. 522-523 (Ferguson Aff. ¶ 14).)

Palmetto Bluff was established in 2003 as a planned community. (R. 74 (Compl. at 3).) Several entities, Defendants here, are involved in the development and operation of Palmetto Bluff. Palmetto Bluff Development, LLC is the developer of Palmetto Bluff; South Street Partners LLC (actually South Street Partners NC, LLC) is the manager of Palmetto Bluff Development. (R. 76, 80 (*Id*. at 5, 9).) Palmetto Bluff Club, LLC owns and operates the Palmetto Bluff Club. (R. 77 (*Id*. at 6).) Palmetto Bluff Real Estate Company, LLC markets real estate in Palmetto Bluff. (R. 78 (*Id*. at 7).) PBLH, LLC owns the Montage

Palmetto Bluff hotel. (*Id.*) Palmetto Bluff Preservation Trust, Inc. is the community's homeowners' association; Defendants Jordan Phillips, Mark Polites, Gray Ferguson, and Henry Armistead serve on the Trust's Board of Stewards. (R. 76, 31 (*Id*. at 5, ¶ 45).) Montage Palmetto Bluff, LLC operates and manages the hotel. (R. 79 (*Id*. at 8).)

As a planned community, Palmetto Bluff is subject to covenants, restrictions, and governing documents. (R. 100 (*Id*. at ¶ 37).) The Community Charter is recorded in the Office of the Beaufort County Register of Deeds and provides, among other things, for the establishment of the Palmetto Bluff Club. (R. 101; 518; 218 (*Id.* at ¶ 41; Ferguson Aff. ¶ 4; Charter § 19).) The Charter states: "By acceptance of a deed, each Owner shall automatically become a member of the Palmetto Bluff Club and shall automatically assume and agree to be bound by all of the terms and conditions of the Palmetto Bluff Club Documents, which terms and conditions are incorporated herein by reference." (R. 218 (Charter § 19).)

Upon becoming a member of the Palmetto Bluff Club, the owner executes a Palmetto Bluff Club Membership Agreement ("Membership Agreement"). (R. 273; 520 (Plan at 4; Ferguson Aff. ¶ 10).) The Membership Agreement contains an arbitration clause, which provides, in relevant part:

> Subject to the provisions of subparagraph (b) below, **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.

(R. 376; 524 (Agreement § VII(a) (emphasis added); Ferguson Aff. ¶ 16).) Each Membership Agreement also states that each member acknowledges receipt of the Membership Plan and agrees to be bound by all of its respective terms and conditions, as they may be amended from time to time. (R. 375 (Agreement § V).)

The Palmetto Bluff Club operates pursuant to the Membership Plan. (R. 236 (Plan at 7).) It contains the following arbitration clause, in relevant part:

> Subject to the provisions of the below paragraph, **any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from this Membership Plan,** including, but not limited to, the breach or alleged breach of this Membership Plan, **shall be resolved by mandatory arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association** (the "Rules") then in effect (unless the member [and/ or any person exercising such members membership rights] and Palmetto Bluff Club, LLC mutually agree otherwise), applying the substantive laws of South Carolina. The arbitration shall take place in Charleston, South Carolina, before a panel of three arbitrators selected in accordance with the Rules.

(R. 284-285 (*Id*. at 15-16 (emphasis added)).) Plaintiffs attached the Membership Plan as an exhibit to the Complaint. (R. 265-285 (Compl., Ex. 4).)

Plaintiffs own residential property within Palmetto Bluff. (R. 90-95 (*Id*. at ¶¶ 1-17).) They include individuals, closely held family LLCs, and a family trust. (*See id*.) One set of related plaintiffs—the Bridge Charleston Investments LLCs—owns four Palmetto Bluff properties. (R. 91-92 (*Id*. at ¶¶ 4-7).) Publicly available information confirms Plaintiffs' wealth and sophistication. For example,

- Plaintiff Block owns a real estate investment and development company that touts its acquisition of a 147,000-square-foot office building in New Jersey.
- Plaintiff Albero is the senior vice-president of an investment management company specializing in real estate investments.
- Plaintiffs Chris and Sebrina Leigh-Jones (also principals of the Bridge Charleston Investment LLCs) co-founded Luxury Simplified, a vertically integrated real estate, construction, and luxury rental firm with more than $75 million in assets.
- One of the principals of Plaintiff TTJR, LLC, Todd Kugler, is the CFO of Nationwide Title Clearing, LLC.
- One of the principals of Plaintiff 315 Corley CW, LLC, Courtland Williams, is an executive with financial services firm Raymond James & Associates.
- Plaintiff R. Jeffrey Kimball is the former CEO of a 500-person engineering and architectural firm.
- The principals of Plaintiff MKM 22 West, LLC, Dave and Darby Mingey, are experienced corporate executives.
- The principals of Plaintiff Salt Works, LLC, Robert O'Keefe and Lynn Ann Casey, have their own management and technology consulting firm.
- One of the principals of Plaintiff Live Oak Assets, LLC, Mike McGuire, is president of an engineering firm.
- And one of the principals of Plaintiff 368 Mount Pelia, LLC, Michael Addy, owns a Myrtle Beach auto dealer whose arbitration clause was held unconscionable in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2 663 (2007).

(R. 524-525; 576, 580, 588, 600, 620-624, 640, 648, 667-672, 686-692, 719, 731 (Ferguson Aff.; Mem. in Support of Defs.' MTC, Ex. B).)

Some of the Plaintiffs were among a group that complained to some of the Defendants in July 2020 about actions taken or contemplated under the Membership Plan that Plaintiffs maintained were "intended … to suppress the STR [short-term rental]

activity" of the complainants. (R. 293 (Compl., Ex. 5).) An overlapping group incorporated that letter by reference in raising similar complaints in an October 2021 letter complaining that Defendants asserted that Plaintiffs' and other complainants' "right to use [Club] facilities can be restricted to exclude any use by their short-term rental guests and tenants." (R. 287 (*Id.*).) The parties conducted another unsuccessful mediation after the October 2021 letter. (R. 16, 49 (Arb. Orders, 16).)

B. Procedural History

Plaintiffs sued Defendants on April 12, 2022, in the Court of Common Pleas for the County of Beaufort, asserting 16 causes of action that largely duplicated those in the October 2021 letter.[1] (R. 134-152 (Complaint).) Two days later, Plaintiffs filed a Demand

[1] The causes of action are: (1) declaratory judgment (S.C. Code Ann. § 15-53-10, *et seq.*) – all Plaintiffs vs. all Defendants; (2) violation of the South Carolina Homeowners Association Act (S.C. Code Ann. § 27-30-110, *et seq.*) – all Plaintiffs vs. Palmetto Bluff Development LLC, Palmetto Bluff Club, LLC, Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards; (3) South Carolina Unfair Trade Practices Act (S.C. Code Ann. § 39-5-10, *et seq.*) – individual Plaintiffs vs. all Defendants; (4) breach of fiduciary duty – all Plaintiffs vs. Palmetto Bluff Development, LLC, Palmetto Bluff Club, LLC, Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards; (5) interference with contractual relationships – STR class and individual Plaintiffs vs. all Defendants; (6) civil conspiracy – all Plaintiffs vs. all Defendants; (7) negligent misrepresentation – all Plaintiffs vs. all Defendants; (8) quantum meruit and unjust enrichment – all Plaintiffs vs. all Defendants; (9) promissory estoppel – STR class and individual Plaintiffs vs. Palmetto Bluff Development, LLC, Palmetto Bluff Club, LLC, PBLH, LLC, and Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards; (10) in the alternative, equitable title in common – all Plaintiffs vs. Palmetto Bluff Development, LLC and Palmetto Bluff Club, LLC; (11) in the alternative, equitable common interest – all Plaintiffs vs. Palmetto Bluff Development, LLC and Palmetto Bluff Club, LLC; (12) in the alternative, equitable easement appurtenant – all Plaintiffs vs. Palmetto Bluff Development, LLC and Palmetto Bluff Club, LLC; (13) money had and received and conversion – all Plaintiffs vs. all Defendants; (14) constructive fraud – all Plaintiffs vs. all Defendants; (15) fraud and misrepresentation – all Plaintiffs and all Defendants; and (16) in the alternative, breach of

for Arbitration with the American Arbitration Association ("AAA"), attaching their Circuit Court Complaint. (R. 354-362 (Defs.' Arb. Mot., Ex. A).) Defendants answered the Demand on May 16, and filed a timely Counter-Demand with the AAA on May 23 and a Counterclaim on June 7, seeking resolution of the same issues raised in Plaintiffs' Demand. (R. 363-370 (*Id.* at Exs. B-C; Defs.' Mem. in Support of MTD, Ex. A).) *See* American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, Rule R-5(b) ("A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set for in Rule R-6 [applicable only after appointment of an arbitrator].")

In the Circuit Court, Plaintiffs filed a Motion to Stay Arbitration and a Motion for Summary Proceedings on the Invalidity of the Purported Arbitration Clause ("Plaintiffs' Arbitration Motion") on May 10, 2022. (R. 347-350.) On May 24, 2022, Defendants moved to dismiss the Circuit Court action pursuant to Rule 12(b)(8), SCRCP ("Defendants' MTD") or, in the alternative, to compel arbitration and stay the Circuit Court action ("Defendants' MTC") (together, "Defendants' Arbitration Motion"). (R. 351-353.) Three Plaintiffs filed a Motion for Partial Summary Judgment on June 9, 2022, which the remaining Plaintiffs joined on July 17. (R. 481-483, 855-856.) On June 15, 2022, Plaintiffs filed a Motion to Disqualify Nexsen Pruet LLC as Counsel for Defendants. The parties submitted supporting and opposing memoranda.

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contract – all Plaintiffs vs. Palmetto Bluff Development, LLC, Palmetto Bluff Club, LLC, and Palmetto Bluff Preservation Trust, Inc., and its Board of Stewards.

All motions came before the Circuit Court for hearing on July 20, 2022. (R. 1-2 (Sept. 15 Order, 1-2).) On September 15, 2022, the Circuit Court entered an Order granting Plaintiffs' Motion to Stay Arbitration; denying Defendants' Motion to Compel Arbitration and Motion to Dismiss; and holding that Plaintiffs' Motion for Partial Summary Judgment and Motion to Disqualify were not ripe for determination. (R. 1-33.) On the arbitration issues, the court stated "[b]ecause the motions currently before the Court present questions of law, **the Court is not making findings of fact in [these] Order[s].**" (R. 2 (emphasis added).) The court then held that (1) the Federal Arbitration Act does not apply; (2) no arbitration agreement exists as to 15 Plaintiffs or 11 Defendants; (3) the non-signatory Plaintiffs are not bound by the arbitration agreements; (4) the arbitration agreements are invalid, unlawful, and unenforceable; and (5) claims in the Complaint do not "relat[e] directly or indirectly to, or aris[e] directly or indirectly from [the Palmetto Bluff Club] Membership Plan," and thus are outside the scope of the arbitration agreements. (R. 28-30.)

Defendants timely moved to Alter or Amend the September 15 Order. (R. 863-890.) On November 2, 2022, the Circuit Court entered an Amended Order that was identical to the September 15 Order except for the date and title. (R. 34-66.) We refer to the September 15 and November 2 Orders collectively as the "Arbitration Orders." On November 8, 2022, the Circuit Court entered a Form 4 Order clarifying that the November 2 Order "was entered in relation to Defendants' Motion to Alter or Amend pursuant to Rule 59(e), SCRCP" (the "Form 4 Order"). (R. 67-69.)

Defendants timely appealed the Arbitration Orders and Form 4 Order on November 15, 2022 (R. 959-960.) Plaintiffs cross-appealed on December 5, 2022. (R. 961-963.)

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) (*citing Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). Factual findings "will not be overruled if there is any evidence reasonably supporting them." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999). The Circuit Court stated, however, that it was "not making findings of fact." Accordingly, there are no findings of fact that require deference from this Court.

ARGUMENT

The Federal Arbitration Act ("FAA") and the South Carolina Uniform Arbitration Act ("SCUAA") implement "[t]he policy of the United States and South Carolina … to favor arbitration of disputes." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Both statutes were enacted to overcome "widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); Thad H. Westbrook & A. Mattison Bogan, *Arbitration: Alive and Delivering Results in S.C.*, S. C. Lawyer 31 (Sept. 2008) (noting South Carolina's "shift in public policy from a negative view of arbitration to one that favors the enforceability of arbitration agreements").

Doubts about whether a dispute is arbitrable are resolved in favor of arbitration. *See, e.g.*, *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986); *Landers v.*

FDIC, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). "[A]s a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." *Landers*, 402 S.C. at 108, 739 S.E.2d at 213 (citation omitted). Therefore, "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration must generally be ordered." *Id.* at 109, 739 S.E.2d at 213.

In addition, "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG, LLP v. Cocchi*, 565 U.S. 18, 19 (2011). "[A] trial court may not refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy." *Wellman*, 366 S.C. at 71, 620 S.E.2d at 91. Arbitration agreements must be enforced as to the claims and parties within their scope.

A. The Federal Arbitration Act Applies to the Arbitration Agreements

Section 2 of the FAA provides that a "written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013). "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 Financial Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). 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).

The Circuit Court held that "[t]he development of real property does not involve interstate commerce," and applied the SCUAA. (R. 6, 39 (Arb. Orders at 6).) But the development of real estate is not the fulcrum of this case, which turns on Plaintiffs' claims that various Palmetto Bluff governing documents are being used to restrict access to Palmetto Bluff Club amenities by short-term renters. (R. 293 (Compl., Ex. 5).) The renters include persons from outside South Carolina, as Plaintiffs market their properties to renters nationwide, on VRBO.com, stayinpalmettobluff.com, Airbnb.com, luxurysimplifiedretreats.com, palmettobluffluxuryrental.com, hometogo.com and propertyconciergeofbluffton.net. (R. 523 (Ferguson Aff. ¶ 15).) Plaintiffs complain, not about their real estate purchases, but about how the Club's operation hurts their rental businesses. The eight out-of-state Plaintiffs, (R. 522 (*Id.* at ¶ 14)), 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); *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 67 (2d Cir. 1997); *cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573-74 (1997). That is enough to apply the FAA here.

The Complaint also makes clear that Plaintiffs' rental businesses—including rental guests' access to Club amenities—and the alleged effects of Club governance and policies on those businesses, are at the core of the dispute. The Complaint's "preamble" frames the issues in terms of short-term renters' rights. (R. 78, 86-89 (Compl. at 7, 15-18).) 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. (R. 132-152 (Compl. ¶¶ 160-253).) 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. (*See, e.g.*, *id.* (2d COA (challenging Club "rules regulations, guidelines (including purported 'access guidelines'), and fee schedules"); 8th and 12th COAs (seeking refund of Club dues and fees); 9th COA (claiming Club dues and fees as damages); 10th and 11th COAs (seeking Plaintiff ownership of Club; 12th COA (seeking gratis equitable easement over Club property); 16th COA (seeking damages or rescission of Club membership contracts).) The pre-suit claims letters – which identify meaningfully identical causes of action – put short-term rental guests' access to Club facilities at the center of the dispute. (R. 286-295 (*Id.* at Ex. 5).)

In contrast, no cause of action complains about the fact that Plaintiffs bought property in Palmetto Bluff. Instead, Plaintiffs seek relief to enhance their ability to commercialize their properties and their Club membership—which they advertise to a national audience on national rental platforms.

The United States Supreme Court held long ago that "[t]he rental of real estate is unquestionably … an activity [affecting interstate commerce]." *Russell v. United States*, 471 U.S. 858, 862 (1985); *see also Groome Res. Ltd., LLC v. Jefferson Parish*, 234 F.3d 192, 209-10 (5th Cir. 2000) ("discriminatory actions in the purchase, sale, or rental of housing" affect "the interstate market for housing"); *Cho v. Casnak LLC*, 2022 WL 16894869, at *3 (N.D. Cal. Sept. 7, 2022) (enforcing arbitration agreement). The Court made clear that rental activity involves interstate commerce whether or not landlord and tenant come from different states. The 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." *Russell*, 471 U.S. 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."). As noted above, the FAA's "word 'involving' … is indeed the functional equivalent of 'affecting,'" the term at issue in *Russell*. *Allied-Bruce Terminix*, 513 U.S. at 263-74. The interstate character of the online vacation rental market merely underscores that the issues here involve interstate commerce.

The Circuit Court acknowledged *Russell*, and recognized that Plaintiffs have alleged "Defendants' acts interfere with Plaintiffs' short-term rental of their properties." (R. 6, 39 (Arb. Orders at 6).) Yet instead of reaching the conclusion compelled by *Russell*—that the FAA applies here—the Circuit Court reached the opposite conclusion.

Even if the Circuit Court were correct that this case focuses on "[t]he development of real property," (*Id.*), the FAA would apply here. The development of Palmetto Bluff

involves interstate commerce, as the eight out-of-State Plaintiff property owners attest. (R. 522 (Ferguson Aff. ¶ 14).) Just as their purchases were specific, concrete interstate transactions, the creation of the Palmetto Bluff community, and the sale of property in 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).

The Circuit Court relied on *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), for the proposition that real estate development does not involve interstate commerce. (R. 6, 39 (Arb. Orders at 6).) *Bradley* is inconsistent with the U.S. Supreme Court's decision in *Russell.* If the *rental* of residential real estate to a necessarily *in-state* tenant nonetheless affects or involves interstate commerce, the *sale* of property to *out-of-state* buyers—actual interstate commercial transactions—must do so as well. "[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." *United States v. Leslie*, 103 F.3d 1093, 1102 (2d Cir. 1997). Contrary to the suggestion in *Bradley*—supported only by a pair of federal district court decisions from other circuits, *see* 398 S.C. at 456-58, 730 S.E.2d at 316-18—interstate sales of real estate are not categorically exempted from the scope of Congress's Commerce Power. On the contrary, "transactions related to real estate do 'affect' interstate commerce." *United States v. Nerone*, 563 F.2d 836, 850-51 (7th Cir. 1977). And "transactions occurring across state lines" *are* "interstate commerce." *Edgar v. MITE Corp.*, 457 U.S. 624, 641–42 (1982).

Were the law otherwise, the Fair Housing Act would be invalid; in that statute, Congress exercised its Commerce Power precisely to address residential housing transactions regardless of their financing or additional links to interstate commerce. Court after court has sustained the reach of the Commerce Clause to residential housing sales. Thus, the Eleventh Circuit rejected the "argument that, because the real estate market involves private intrastate transactions, no interstate commerce is involved in residential sales and rentals." *Seniors C.L. Ass'n, Inc. v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992); *see also Morgan v. Secy of Hous. & Urb. Dev.*, 985 F.2d 1451, 1455 (10th Cir. 1993).

Accordingly, *Bradley* should be limited to its facts: a transaction "strictly for the purchase of a completed residential dwelling." 398 S.C. at 457, 730 S.E.2d at 317. In contrast, the transaction at issue here encompassed the Club documents and a Community Charter that were designed "to facilitate the creation and governance" of a community comprising hundreds of homes and including the Trust and the Club, which provides "amenities that protect the purchasers' investments and expectations." *U.S. Home Corp. v. Michael Ballesteros Trust*, 415 P.3d 32, 39 (Nev. 2018) (distinguishing *Bradley* as involving only the purchase of a single residence). Transactions in the interstate market for homes in luxury resort communities, like Plaintiffs' purchases here, clearly "involv[e] interstate commerce" within the meaning of the FAA, 9 U.S.C. § 2.

B. The Delegation Clause in the Arbitration Agreement Precluded the Circuit Court From Ruling on Issues of Substantive Arbitrability

The Circuit Court decided multiple issues of substantive arbitrability that the arbitration agreements expressly delegated to the arbitration panel. These issues include

the court's holdings that no arbitration agreement exists as to 15 Plaintiffs or 11 Defendants, that the nonsignatory Plaintiffs are not bound by the arbitration agreements, that the agreements are invalid, unlawful, and unenforceable, and that some claims in the Complaint fall outside the scope of the agreements. (R. 8-30, 41-63 (Arb. Orders at 8-30).)

Those rulings were improper. The arbitration clauses require disputes to be resolved "in accordance with the Commercial Arbitration Rules of the American Arbitration Association." Rule R-7(a) provides that the arbitrator, not the court, is to decide "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." Under AAA Rule R-7(b), "[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."

Parties to a contract may set the rules of arbitration by reference to "the rules of a particular association" such as the AAA. *First Baptist Church v. Creed & Sons, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 122-23 (1981). "By incorporating the AAA Rules into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005).

Plaintiffs contended in the Circuit Court that S.C. Code Ann. § 15-48-20—which provides that "if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised"—requires

the court, rather than the arbitration panel, to decide the arbitrability question in all circumstances. The Circuit Court did not address delegation, but implicitly adopted Plaintiffs' argument by deciding the arbitrability issues.

If AAA Rule R-7 conflicts with S.C. Code Ann. § 15-48-20, however, the FAA resolves the conflict in favor of Rule R-7. The FAA preempts state laws that "invalidate arbitration agreements under state laws applicable only to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), or that would "stand as an obstacle to the accomplishment of the FAA's objectives," *Concepcion*, 563 U.S. at 341-42.

The United States Supreme Court has held that the FAA allows parties to agree to have an arbitrator decide "whether the parties have agreed to arbitrate," including through the "delegation provision" in the AAA rules. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). The Court addressed whether a court may "decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to an arbitrator." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 65 (2010). Unless the party claiming unconscionability "challenged the delegation provision specifically," the Court held, a court must "treat [the delegation provision] as valid … and must enforce it[,] … leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id*. at 72; *accord Henry Schein*, 139 S. Ct. at 528.

Here, Plaintiffs did not specifically challenge the delegation provisions. The Arbitration Orders neither addressed the delegation provision in the AAA Rules, nor acknowledged Plaintiffs' failure to challenge it. Under *Henry Schein* and *Rent-A-Center*,

however, because Plaintiffs did not specifically challenge the delegation provisions, the arbitrator, not a court, must decide the validity of Plaintiffs' agreement to arbitrate.

Even if the FAA did not apply, the delegation provision should be enforced under South Carolina law. The parallel provision of the FAA contains language almost identical to Section 15-48-20: "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. As explained above, the U.S. Supreme Court has made clear that a delegation provision displaces a court notwithstanding the court's powers in the absence of such a provision. This Court should construe Section 15-48-20 to accord with the definitive interpretation of 9 U.S.C. § 4. *See Crouch Const. Co. v. Causey*, 405 S.C. 155, 166, 747 S.E.2d 482, 488 (2013) (meaning of parallel FAA provision provides "guidance" in absence of binding interpretation of SCUAA provision).

The Arbitration Orders relied on three cases for the proposition that challenges to the existence or validity of an arbitration agreement are properly decided by the trial court. Two of those cases do not involve a delegation clause. *See Housing Auth. v. Cornerstone Housing*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003); *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 609 (D.S.C. 1998). And *Hooters* lacks authority to the extent it conflicts with the Supreme Court's later decisions in *Rent-A-Center* and *Henry Schein*.

In the third case, the court declined to apply a delegation clause covering the "validity and scope of [the] contract" where the party resisting arbitration called into question "whether an arbitration agreement even existed in the first place," and there

was no "clear and unmistakable evidence" the parties agreed to arbitrate that issue. *Simpson*, 373 S.C. at 23-24, 644 S.E.2d at 668.

Simpson does not control here. To begin with, in contrast to the language at issue in *Simpson*, the AAA Rules' delegation provision, incorporated in the arbitration agreements at issue here, is "clear and unmistakable" in delegating to the arbitrator "any objections with respect to the *existence*, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." AAA Rule R-7(a); *see Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has determined that incorporation of the [AAA's] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.") (collecting cases); *Airbnb, Inc. v. Doe*, 336 So.3d 698, 704 (Fla. 2022).

Simpson acknowledged that "[t]he question of 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). Both *Simpson* and *Zabinski* relied on the U.S. Supreme Court's decision in *AT&T Technologies*. *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. *Rent-A-Center* and *Henry Schein* make clear that, under *AT&T Technologies*, broad delegation provisions should be enforced. And as this Court recently acknowledged, a court "retains the right and duty to determine whether the delegation is valid and enforceable" only "as long as the party resisting arbitration has made a direct and discreet challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole." *Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App.

2020). Plaintiffs here made no such "challenge to the validity and enforceability of the delegation clause specifically."

In sum, whether or not the FAA applies, the Circuit Court should have left to the arbitration panel all issues concerning arbitrability, including questions as to the existence of the agreement and the validity of the arbitration provisions.

C. Binding Arbitration Agreements Cover The Disputes At Issue Here.

1. The Circuit Court Erred in holding No Arbitration Agreement Exists as to 15 Plaintiffs

The Circuit Court's ruling that "fifteen (15) of the Plaintiffs have never signed any agreement to arbitrate any dispute with any of the Defendants, whatsoever," conflicts with undisputed evidence in the record. (R. 9, 42 (Arb. Orders at 9).) To the contrary, the record evidence establishes that for at least 16 of the 20 named Plaintiffs, there are signed Membership Agreements that contain the following notice on the first page ("Arbitration Notice"):[2]

THIS MEMBERSHIP AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO SOUTH CAROLINA CODE SECTION 15-48-10, ET. SEQ.

- Six individual Plaintiffs: Matthew N. Lynch and Barbara A. Lynch, R. Jeffrey Kimball and Deborah S. Kimball, and Sebrina Leigh-Jones and Chris Leigh-Jones.[3] (R. 379-386, 396-404 (Defs.' MTD, Ex. D at 9-16, 26-34).)

[2] Appendix A to this brief references the signed arbitration agreements as to each Plaintiff in tabular form, citing the appropriate parts of the record in the Circuit Court.

[3] As the owners of Charleston Bridge Investments C LLC and Charleston Bridge Investments H LLC, Sebrina Leigh-Jones and Chris Leigh-Jones have Membership Agreements for 852 Old Moreland Road and 8 Hannah Lane, respectively. (R. 433-450 (Defs.' MTD, Ex. D at 63-80).) Both Agreements are signed by Chris but list Sebrina as the "Primary Member" and Chris as the "Spouse," showing intent to bin both owners. (*Id.*)

- Nine LLC Plaintiffs with Membership Agreements signed by the LLCs' members or shareholders: Live Oak Assets LLC, Salt Works LLC, MKM 22 West LLC, TTJR LLC, One Rumford Lane LLC, Bridge Charleston Investments C LLC, Bridge Charleston Investments H LLC, 368 Mount Pelia LLC,[4] and 315 Corley CW LLC.[5] (R. 372-378, 387-395, 405-414, 415-423, 433-440, 441-450, 451-459, 460-465, Defs.' MTD, Ex. D at 2-8, 17-25, 35-44, 45-53, 63-70, 71-80, 81-89, 90-95).) There is no dispute that the individual signatories own and control the LLCs.

- The Trustee Plaintiffs, Anne Bosler and Dylan Hard, with a Membership Agreement they signed. (R. 424-432 (Defs.' MTD, Ex. D at 54-62).)

The Palmetto Bluff Club has been unable to locate signed Membership Agreements for Bridge Charleston Investments B LLC, or Bridge Charleston Investments E LLC, although they are all Club members and must have agreed to become members at some point. (R. 91-92 (Compl. ¶¶ 4, 6).) In addition, Geoffrey J. Block and Jennifer Albero signed an older version of the Membership Agreement that did not contain an arbitration provision, and Bridge Charleston Investments B, LLC joined the Club before the arbitration provision was added to the Membership Agreement in June 2017. (R. 528-553 (Ferguson Aff. Exs. A-C).) Bridge Charleston Investments B, LLC signed a Purchase and Sale

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As an owner of Charleston Bridge Investments B LLC, Sebrina Leigh-Jones signed a Purchase and Sale Agreement containing an arbitration clause, and the Arbitration Notice on the first page. (R. 524, 534-553 (Ferguson Aff. ¶ 17, Exs. B-C).)

[4] The Palmetto Bluff Club has been unable to locate the first page of the Membership Agreement for 368 Mount Pelia LLC. Based on the date its agreement was signed, as well as the version number in the bottom left hand of each page, the first page of their Membership Agreement would have contained the Notice. (R. 521 (Ferguson Aff. ¶ 12).)

[5] Courtland and Kaitlyn Williams, owners of 315 Corley CW, LLC, signed their Membership Agreement, containing the Arbitration Notice on the first page, on March 26, 2019, for 22 North Drayton Street (Lot 42) in Palmetto Bluff. (R. 467-472 (Defs.' MTD, Ex. D at 97-102).) The Williamses subsequently sold 22 North Drayton Street and purchased 315 Corley Street (Lot 5556). (R. 521-522 (Ferguson Aff. ¶ 13).) On January 13 and 14, 2022, they transferred their Palmetto Bluff Club membership to 315 Corley Street. (R. 473-480 (Defs.' MTD, Ex. D at 103-110).)

Agreement containing an arbitration provision, however, as well as an arbitration notice on the first page.[6] (R. 534 (Ferguson Aff. Ex. B).) Additionally, the four Bridge Charleston Investments entities (B, C, H, and E) have the same principals—namely, Sebrina and Chris Leigh-Jones. The Membership Agreements for C and H are in the Leigh-Jones' names and contain arbitration agreements. In addition, the LinkedIn profile for Mr. Leigh-Jones states that he is the owner of "Bridge Charleston Investments LLC." (R. 600 (Mem. in Support of Defs.' MTC., Ex. B.6).) Thus, because the principals of E have already agreed to arbitrate the identical claims brought by C, and H, and by themselves individually, E should be bound by the arbitration agreements of C and H, as well.

In any event, as discussed below in Section C.3, under the doctrine of equitable estoppel, any Plaintiff who is not a signatory to an arbitration agreement is nonetheless compelled to arbitrate the claims here.

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

The Arbitration Orders hold that certain LLC and Trust Plaintiffs cannot be bound by the arbitration agreements that were signed by the LLC members or shareholders because Defendants did not offer "proof sufficient to pierce the corporate veil." But veil

[6] The Purchase and Sale Agreement contains a scrivener's error and lists the purchaser of Lot 5512 as Bridge Charleston Investments A, LLC, but General Warranty Deed for Lot 5512 conveys the property to Bridge Charleston Investments B, LLC as the purchaser. (R. 549-553 (Ferguson Aff. Ex. C).) The arbitration provision in the Purchase and Sale Agreement encompasses "[a]ny controversy, dispute or claim arising out of this Agreement." (R. 534-547 (*Id*. at Ex. B).) The Lynch Plaintiffs signed a similar agreement that added "relating directly or indirectly to" language. (R. 555-571 (*Id*. at Ex. D).)

piercing is not at issue here. Rather, the LLC and Trust Plaintiffs are bound by the arbitration agreements directly, under agency principles, or as assignees.

Plaintiffs do not dispute that the Plaintiff entities are owned and controlled by the underlying individuals, but pick and choose when they want the Plaintiff entities and the individuals to be viewed together, and when they want them to be viewed separately. When individuals rather than the Plaintiff entities bought property, paid joining fees, or paid Club dues, Plaintiffs want the individuals to be treated as indistinguishable from their closely held entities. When it comes to arbitration, however, Plaintiffs want to separate the individuals from the entities. The Circuit Court allowed the entity Plaintiffs to claim the benefit of every part of every agreement they wished, and reject every part they wished. Under governing legal principles, Plaintiffs cannot have it both ways.

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

The LLC and Trust Plaintiffs are bound by the express terms of the arbitration provisions in the Membership Agreements and Membership Plan. The Plan provides that "A MEMBERSHIP MAY BE HELD IN THE NAME OF AN ENTITY," and instructs that, "[i]f a residence or homesite is held in the name of a partnership, company, trust or other form of multiple ownership ("Entity"), the Entity must designate one individual ("Entity Member") who will have the right to use the Club Facilities" (and up to three additional users. (R. 277 (Plan at 8).) The Plan also makes clear that the entity is bound by the contract, and is "jointly and severally liable for all amounts due" to the Club. (*Id.*)

In addition, the arbitration provisions apply to disputes brought, not merely by members, but by anyone "exercising such member's membership rights." Plaintiffs' lawsuit seeks relief based in part on Plaintiffs' purported rights under the Membership Agreements. And in their efforts to bestow their membership privileges on short-term renters, the nonsignatory plaintiffs are exercising the membership rights that are appurtenant to the property they own. In addition, seven nonsignatory Plaintiffs—Live Oak Assets, LLC, Salt Works, LLC, MKM 22 West, LLC, TTJR, LLC, One Rumford Lane, LLC, 368 Mount Pelia, LLC, and 315 Corley CW, LLC—spent money using Club amenities in 2022. (R. 524-525 (Ferguson Aff. ¶ 19).) Plaintiffs cannot exercise their membership rights, yet avoid their obligations to arbitrate their disputes.

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

It is well-established that a nonsignatory may be bound to an arbitration agreement under traditional agency principles. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288-97, 733 S.E.2d 597, 600-05 (Ct. App. 2012). Accordingly, where an LLC Plaintiff purchased (or now owns) the property, but the membership documents containing the arbitration provisions were signed by principals or agents of the LLC, the LLC Plaintiff is bound by the arbitration agreements that its agents signed. That is especially clear here, where the documents containing the arbitration agreements run with the land owned by the LLC Plaintiffs. (R. 218; 271 (Charter § 19; Agreement § II; Plan at 2).)

The Circuit Court recognized that the LLC Plaintiffs "appear to be limited liability companies *formed by the signatories* to one or more of the agreements to arbitrate." (R. 9,

42 (Arb. Orders at 9 (emphasis added)).) Based on the relationship of the signatories to the nonsignatory LLC Plaintiffs, the signatories had actual or apparent authority to bind the respective LLC Plaintiffs to the arbitration agreements. *See Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) ("A true agency relationship may be established by showing evidence of apparent or implied authority … .").

The individuals who signed the arbitration agreements plainly have actual authority to bind the LLCs, which can act only through their owners or managers. *See* S.C. Code Ann. § 33-44-301(a)(1), (b); *see also Hofer v. St. Clair*, 298 S.C. 503, 510, 381 S.E.2d 736, 740 (S.C. 1989) ("if a partner has the actual authority to bind the partnership, that partner's acts will bind the partnership"). Reinforcing the relationship is the individual principals' indisputable "*right to control* the conduct of" the LLCs. *Fernander*, 278 S.C. at 144, 293 S.E.2d at 426. Where there is a close relationship between the signatory, the nonsignatory, and the claims at issue, the nonsignatory party is bound by the arbitration agreement. *See Hinson v. Jusco Co., Ltd.*, 868 F. Supp. 145, 149 (D.S.C. 1994) (nonsignatory parent to signatory bound by arbitration agreement); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (nonsignatory agents and employees bound).

The nonsignatory LLC Plaintiffs are also bound to the arbitration provision because of their relationship to Defendants and to the Club as the property owner to which Club membership is appurtenant. The Membership Agreements are prefaced by the statement that "I hereby understand that by my acceptance of a deed for property within Palmetto Bluff I became a 'Community Member' of the Palmetto Bluff Club…." (R. 375 (Agreement § II).) Thus, the Agreements' plain language represents that they have

been signed by the deed holder. The nonsignatory LLC Plaintiffs, in having their principals or agents sign the agreements, placed the individuals in a position to contractually bind the LLC property owner. *See Fernander*, 278 S.C. at 143, 293 S.E.2d at 426 ("agency … may be circumstantially proved by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal").

Furthermore, the agency relationship is apparent from Plaintiffs' own central allegation that "all prospective purchasers [are required] to execute a purported 'Membership Agreement' as a condition of closing." (R. 110 (Compl. ¶ 89).) The LLC Plaintiffs are the purchasers and property owners, so that Plaintiffs themselves allege that the LLC Plaintiffs executed the Membership Agreements. Thus, an individual principal or agent of the LLC Plaintiffs who signed a Membership Agreement necessarily did so on behalf of the purchaser LLC Plaintiff. In addition, even if an agent lacked actual or apparent authority to enter into a transaction on behalf of the principal, the principal's conduct in retaining its benefits ratifies the transaction. *See Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). The LLC Plaintiffs retained benefits under the Membership Agreements; indeed, the whole dispute here arises out of the desire of those Plaintiffs, and the other Plaintiffs, to commercialize their Club memberships to enhance their short-term rental businesses. Thus, the LLC Plaintiffs ratified the execution of the Membership Agreements by their principals or agents on their behalf.

Plaintiffs Bosler and Hart signed the Membership Agreement, yet the Circuit Court held that they were not bound by it because they are named in the Complaint as

trustees for the Bosler Trust. (R. 11, 44 (Arb. Orders at 11).) But the Trust is bound by the agreement that its trustees signed. *See* S.C. Code Ann. § 62-7-303(4). A trust may be contractually bound to an arbitration agreement signed by a trustee, even without a trustee designation, if it can be "inferred from the circumstances that such was the intent." *Godwin v. Gallagher*, 892 F.2d 74 (4th Cir. 1989). Here, the trustees signed the Membership Agreement to comply with the Trust's obligation to join the Club upon purchase. As with the LLCs, the Membership Agreement for the Bosler property recited that it was signed by the person who "accept[ed] a deed for property within Palmetto Bluff," that is, the property owner. That is clear evidence of intent to bind the Bosler Trust.

The entity Plaintiffs' stake in this controversy rests on their status as property owners, and the execution of the Membership Plan and Agreements are purported "conditions of closing" required of the purchasers. Thus, the individuals entered into the Membership Agreements on behalf of Plaintiff entities. Just as a plaintiff cannot "avoid an arbitration agreement by naming … signatory parties in their individual capacity" as defendants, *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993), plaintiffs cannot "nullify the rule requiring arbitration" by choosing to name as plaintiffs closely held entities owned and controlled by signatories who allegedly signed arbitration agreements in their individual capacity.

c. The Nonsignatory Plaintiffs Are Bound as Assignees

To the extent some of the properties were purchased by individuals, and subsequently transferred to entity Plaintiffs, the entity Plaintiffs are bound as assignees of the signatories to the membership documents containing the arbitration provisions.

See, e.g., (R. 610-618, 703-717 (Mem. in Support of Defs.' MTC, Exs. B.8-B.9, B.26-B.28).) As an initial matter, the governing documents set forth that, by acceptance of a deed, each owner assumes and agrees to be bound by all of the terms and conditions of the Palmetto Bluff Club Documents, including the Membership Agreements and Membership Plan. Thus, the arbitration provisions are made applicable to and binding upon the LLC Plaintiffs by virtue of their ownership of their respective properties.

Arbitration provisions transfer with, and become binding upon, assignees of contracts containing such provisions. *See PTA-FLA, Inc. v. Huawei Techs. USA, Inc.*, 2014 WL 3100458, at *10 (D.S.C. Jul. 2, 2014). As a New York court explained more than a century ago, "[i]f the arbitration clause of an assignable contract of sale is not available, except as to the parties to such a contract, it would then be a simple matter, if either party sought to escape the effect of such a clause, to assign the contract to a third party." *Id.* (quoting *In re Lowenthal*, 199 A.D. 39, 191 N.Y.S. 282, 285 (1921)). As the subsequent property owners, the entity Plaintiffs assumed the rights and obligations set forth in the Membership Agreements and Membership Plan, including the arbitration provisions. Accordingly, entity Plaintiffs that signatories formed and to which they transferred their properties are bound by the arbitration provisions.

3. All Remaining Plaintiffs Are Bound by the Arbitration Agreements Under Principles of Equitable Estoppel

"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*, 400 S.C. at 288, 733 S.E.2d at 600 (quoting *Int'l Paper Co. v.*

Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-17 (4th Cir. 2000)). The *Pearson* court discussed these principles at length. *See* 400 S.C. at 287-97, 733 S.E.2d at 599-605 (reversing Circuit Court's denial of motion to compel arbitration).

As most relevant here, a nonsignatory can be bound to an arbitration agreement through the doctrine of equitable estoppel. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (citing *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014)); *see also Campbell v. Anesthesia Mgmt. Sols., LLC*, 2021 WL 4691692, at *4 (D.S.C. July 14, 2021). The doctrine of equitable estoppel compels a nonsignatory to arbitrate in two situations: (1) when the nonsignatory's claims arise out of and relate directly to the written agreement containing the arbitration provision, or (2) when the nonsignatory receives—or asserts entitlement to receive—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. Group, Inc. v. Long*, 453 F.3d 623, 626-30 (4th Cir. 2006). Both situations are present here.

a. Plaintiffs' Claims Arise Out of and Relate to the Documents Containing the Arbitration Provisions

The nonsignatory Plaintiffs bring claims based upon an alleged coordinated scheme by all Defendants, allegedly injuring all Plaintiffs, and arising from the governing documents and associated contracts including the Palmetto Bluff Club Documents. They cannot base their claims on those documents, yet ignore the same documents in determining arbitrability of those issues.

"[A] nonsignatory should be estopped from denying it is bound by an arbitration clause when its claims against the signatory arise from the contract containing the arbitration clause." *Am. Bankers*, 453 F.3d at 628 (internal quotation marks omitted). And there is a "clear policy in favor of arbitrating claims against non-parties to an arbitration agreement if those claims are based on the same alleged facts underlying claims against a party to the agreement." *Hinson*, 868 F. Supp. at 149.

Here, the crux of all of Plaintiffs' claims is that Defendants purportedly created a "scheme" to mandate all property owners become members of the Club and pay fees for Defendants' own profit, (R. 75-76, 108, 142, 144 (Compl. at 4-5, ¶¶ 80, 197-98, 208-09)), and that the Club Membership Agreement, Membership Plan, and "associated documents" are purportedly unlawful and invalid, (R.134 (*Id*. at ¶ 166.4)). These claims rely upon the existence of the Palmetto Bluff Club documents and require reference to those documents, which contain arbitration provisions.

Plaintiff's Complaint attached the Membership Plan as Exhibit 4, and pleaded the Plan's central significance at length. (R. 113-118 (*Id*. at ¶¶ 104-127).) That makes crystal clear that *all* Plaintiffs, including the three who joined the Club before the arbitration clause came into effect (*see* § C.1, *supra*), rely on and benefit from the current Plan. Because the Complaint treats the Plaintiffs as a unified group—even proposing class certification—without differentiating their claims or circumstances, all Plaintiffs can and should be compelled to arbitrate here.

The Arbitration Order adopted Plaintiffs' contention that the principles adopted in *Pearson* do not apply because *Pearson* involved only three parties bringing claims under

different sources of law. (R. 9, 42 (Arb. Orders at 9 n.1).) But neither *Pearson* nor any other identified authority limits equitable estoppel to a certain number of parties or to certain types of claims. All Plaintiffs may properly be compelled to arbitration.

b. Plaintiffs Directly Benefit from the Documents Containing the Arbitration Provisions

"When a signatory seeks to enforce an arbitration agreement against a nonsignatory, [the nonsignatory is estopped] from claiming that [it] is not bound to the arbitration agreement when [it] receives a direct benefit from a contract containing an arbitration clause." *Pearson*, 400 S.C. at 295, 733 S.E.2d at 604 (citation omitted). That reasoning applies to "non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *Id.* at 291, 733 S.E.2d at 602 (cleaned up). And "courts have applied equitable estoppel" specifically "where plaintiffs sue and seek relief based on contracts containing arbitration clauses." *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. The reason is clear: "To allow [a plaintiff] to claim the benefit of [a] contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying" the FAA. *Int'l Paper*, 206 F.3d at 418 (citation omitted).

Here, the Palmetto Bluff Club Documents are the foundation of every claim asserted by the nonsignatory Plaintiffs. And Plaintiffs seek damages based on dues and fees payable under those documents, along with other remedies relating to obligations under those documents including the obligation of membership itself. The nonsignatory Plaintiffs even bring a cause of action for breach of the Membership Agreement,

Membership Plan, and associated documents. Thus, the nonsignatory Plaintiffs seek to directly benefit from the existence of documents containing arbitration provisions. These Plaintiffs include, at a minimum, all entity plaintiffs whose principals signed arbitration agreements, Sebrina Leigh-Jones, and Bridge Charleston Investments E, which joined the Club after the arbitration clause was in effect. Plaintiffs cannot, on the one hand, receive a benefit from those documents yet, on the other, avoid the documents' requirement to arbitrate disputes. *See Pearson*, 400 S.C. at 297, 733 S.E.2d at 605.

All nonsignatory Plaintiffs have received, and continue to receive, benefits under those contracts in the form of Palmetto Bluff Club membership privileges, which Plaintiffs not only use but which run with the land and thus benefit any nonsignatory entity Plaintiffs with title to Palmetto Bluff property. Indeed, Plaintiffs claim in their Complaint that they are unable to use the Club facilities as much as they wish. Having embraced the benefits they received under the contracts providing them use of the Palmetto Bluff Club (and demanded even more benefits), the nonsignatory Plaintiffs cannot rely on their nonsignatory status to repudiate the arbitration clauses in those very contracts. *See id.* at 297, 733 S.E.2d at 605.

4. The Claims Against Nonsignatory Defendants Are Arbitrable

As a matter of law, all Defendants may rely upon and enforce the arbitration provisions in the Membership Agreements and Membership Plan even though only the Palmetto Bluff Club is a signatory to those documents. "[A] party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint ... because this would nullify the rule requiring arbitration." *S.C. Pub. Serv. Auth.*, 312 S.C.

at 563, 437 S.E.2d at 24. Under agency and contract principles, a nonsignatory defendant may rely on an arbitration agreement to which it is not a party where the facts and claims against it and the signatories are "closely intertwined," and the claims against the nonsignatory defendant are "similar to and dependent upon" the arbitrable claims. *Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001). That principle applies here.

Here, Plaintiffs' Complaint alleges that the Palmetto Bluff entities are an "amalgamated single business enterprise," and that the remaining Defendants have joined in an alleged "conspiracy" based on alleged misuse of Palmetto Bluff Club agreements. (R. 79, 97-98, 108, 109, 121-122, 127, 129, 142 (Compl. at 8, ¶¶ 25, 80, 82, 129.22, 137, 145, 196-199).) In particular, the Complaint alleges 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." (R. 97-98 (*Id*. at ¶ 25.1).) The Complaint also alleges that Palmetto Bluff Development, LLC, Palmetto Bluff Preservation Trust, Inc., Palmetto Bluff Club, PBLH, LLC, and Palmetto Bluff Real Estate Company, LLC "are likely just an amalgamated single business enterprise." (R. 76-79 (*Id*. at 5-8 (listing entities).) The Complaint more confidently alleges that "Defendants Founder [*i.e.*, Palmetto Bluff Development, LLC], Trust, Club, the Real Estate Company, PBLH, and South Street Partners *are* a single business enterprise and/or are amalgamated," (R. 97 (*Id*. at ¶ 25) (emphasis added)), and identifies all these parties as a singular "Developer" at least 19 times. (R. 89, 121, 122, 123, 124, 127, 131, 132, 133, 137, 140, 149, 151 (*Id*. at 18, ¶¶ 129.20, 129.21, 129.22.1, 129.22.3.1, 129.24, 130, 130.1, 130.3,

130.4, 137, 153, 154, 159, 165, 179.1, 179.3, 187.3, 231, 244).) Indeed, Plaintiffs allege that "justice, equity, and fundamental fairness require that accountability be placed on the single business enterprise." (R. 98 (*Id.* at ¶ 25.3).) And Plaintiffs make clear that this single enterprise includes entities beyond the "Developer," as the Complaint accuses Defendants of "[p]utting the interests of the Developer *and its amalgamated entities* above that of the Owners in Palmetto Bluff." (R. 121 (*Id.* at ¶ 129.20) (emphasis added).)

The claims against the individual defendants single them out based on their roles on the Board of Stewards of Defendant Palmetto Bluff Preservation Trust—part of the "amalgamated business enterprise" that Plaintiffs dub the "Developer." Because the Trust may arbitrate its claims, its officers or agents may arbitrate as well when sued for acts in their official role. To hold otherwise would allow a party to "avoid an arbitration agreement by naming nonsignatory parties in his complaint, or signatory parties in their individual capacity," and thus "would nullify the rule requiring arbitration." *S.C. Pub. Serv. Auth.*, 312 S.C. at 563, 437 S.E.2d at 24.

The Complaint also intertwines Defendant Montage Palmetto Bluff with the single amalgamated business enterprise, accusing South Street Partners—part of the "Developer"—of "puppeteering" Montage, and accuses Montage of "conspiring" with the other Defendants. (R. 88, 121 (Compl. at 17, ¶ 129.22).) The Complaint further alleges that the Founder (Palmetto Bluff Development, LLC) delegated its duties and obligations to Montage Palmetto Bluff, LLC. (R. 79 (*Id.* at 8).)

Plaintiffs' Complaint could not be clearer that the Defendants all act as one. Plaintiffs' claims against the nonsignatory defendants are thus "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 defendant who was not a signatory to an arbitration agreement with the plaintiff could invoke arbitration provisions 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, all Plaintiffs' claims arise from the same set of facts centered around the Club, and Plaintiffs treat all the Defendants as a single enterprise, including the "puppeteer[ed]" Montage.

Thus, not only do Plaintiffs lump all of the Palmetto Bluff entities together, but Plaintiffs' claims against all Defendants arise under and are intertwined with the Club and the Club agreements. Accordingly, all Defendants may invoke the arbitration provisions in the Palmetto Bluff Club Documents.

5. Plaintiffs' Claims Are Within the Scope of the Arbitration Agreements

The Circuit Court recognized that Plaintiffs make "numerous allegations and Claims related to access to the Club," but held that "many allegations in the Complaint are not related to the Membership Plan or Agreement," and are thus outside the scope of their arbitration provisions. (R. 28, 61 (Arb. Orders at 28).) The Circuit Court should have addressed this issue; as explained above in Section B, the arbitration agreement delegated to the arbitration panel all issues as to the scope of the arbitration agreement as well the existence of an agreement.

And the Circuit Court also was wrong on the merits. The arbitration clauses at issue are broad in scope and apply to "*any and all* controversies, disputes or claims *relating directly or indirectly* to, or *arising directly or indirectly from*," the Membership Agreement or Membership Plan. "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly and is capable of an expansive reach." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 95, 749 S.E.2d 139, 153-54 (Ct. App. 2013). "Thus, a claim is within the scope of an arbitration clause that purports to cover all related disputes, so long as a significant relationship exists between the claim and the contract containing the arbitration agreement." *Id.* at 95, 749 S.E.2d at 154. The clause here is even broader, as it encompasses all indirect relationships.

All claims here relate directly or indirectly to the Membership Agreement or Membership Plan; indeed, all or almost all relate to the "relationship between the Club and its member." The Complaint advances "[a]llegations against non-Club entities," (*Id.*), but those allegations are all related at least indirectly to the non-Club entities' actions with respect to the Club – indeed, the Club is named as a defendant to all sixteen causes of action in the Complaint. All the "[a]llegations regarding the Community Charter and the Declaration of Recreational Covenant," "the Founder's breach of fiduciary duty," and "the Trust and Board of Stewards' breach of fiduciary duty, (R. 29, 62 (Arb. Orders at 29)), relate to mandatory Club membership, Club structure, and Club governance. *See, e.g.*, (R. 139-140, 146-148 (Compl. ¶¶ 185-89, 216-26)). All allegations relating to "unfair and unlawful competition," (R. 29, 62 (Arb. Orders at 29)), relate to Club rules and regulations as well as Club membership, Club structure, and Club governance (R. 78-79, 88, 90

(Compl. at 7-8, 17, 19)). "Allegations that the Club is a homeowners' association," (R. 29, 62 (Arb. Orders at 29)), relate to Club structure and governance (R. 85, 124 (Compl. at 14, ¶ 131)). And the civil conspiracy allegations, (R. 30, 63 (Arb. Orders at 30)), all relate to Club rules and regulations, Club membership, Club structure, and Club governance (R. 108, 121, 142 (Compl. ¶¶ 80, 129.22, 197-99)).[7]

The Circuit Court erred in denying arbitration to claims based on common law or statutes. *See* (R. 28-30, 61-63 (Arb. Orders at 28-30).) The arbitration provision is not limited to issues regarding contract interpretation or contractual obligations, but encompasses "any and all controversies, disputes or claims relating directly or indirectly to, or arising directly or indirectly from" the Membership Agreement or Membership Plan, whether the claims rely on tort, contract, statutory, or fiduciary duties. *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, 319 (4th Cir. 1988) (alleging "conspiracy" … does not remove the dispute from the scope of arbitration").

[7] In addition, the causes of action all "arise from" the Plaintiff Bridge Charleston B's Purchase and Sale Agreement and "relat[e] to" or "aris[e] from" the Lynch Plaintiffs' Purchase and Sale Agreement. Page 2 of each Agreement contains a commitment to join and maintain membership in the Club, an acknowledgement that Club membership is mandatory, and an agreement to comply with the Club Plan. (R. 535, 556 (Ferguson Aff., Exs. B and D at 2).)

So long as there is a "significant relationship" with the agreement, the claims are arbitrable. *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. And the relationship between the claims and agreements here is close.

Plaintiffs' claims reduce to contentions that the Club is improperly structured, that Club membership should not run with the land, and the Club should be managed differently. Plaintiffs 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 Plaintiffs' claims.

A dispute about the scope of an arbitration agreement must be resolved in favor of arbitration "[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute." *Id.* at 109, 739 S.E.2d at 213. Yet rather than resolving doubts in favor of arbitration, the Arbitration Orders bent over backward to narrow the arbitration provision nearly into inexistence. Properly construed, the arbitration provision covers all claims at issue here. At a minimum, because the Circuit Court conceded that many of Plaintiffs' claims relate to the Palmetto Bluff Club, at least those claims should be referred to arbitration.

D. The Arbitration Agreements Are Valid, Lawful, and Unenforceable

"There is a strong presumption in favor of the validity of arbitration agreements … ." *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). That "presumption is strengthened when an arbitration clause is broadly written." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213. The Circuit Court relied on legally inadequate grounds to refuse enforcement here.

1. The SCUAA's Conspicuous Notice Requirements Are Preempted and in any Event Are Satisfied Here

As explained above, the FAA governs the arbitration issues. Under the FAA, "[c]ourts many not … invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs.*, 517 U.S. at 687. That "federal policy favoring arbitration … is binding on state courts and supersedes inconsistent state law and statutes that invalidate arbitration agreements." *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584 (2003).

As the South Carolina Supreme Court has held, the FAA preempts the SCUAA's conspicuous notice provisions (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). And *Doctor's Associates* is directly on point. That case addressed a Montana statute that required "'[n]otice that [the] contract is subject to arbitration'" to be "'typed in underlined capital letters on the first page of the contract.'" 517 U.S. at 683 (quoting Montana statute). The Supreme Court held that the FAA preempted that requirement and any other "threshold limitations placed specifically and solely on arbitration provisions." *Id.* at 688.

But even if the SCUAA's conspicuous notice requirements applied, the Membership Agreement, which specifically refers to and incorporates the Membership Plan, complies with those requirements. The Circuit Court acknowledged that "Defendants have produced Membership Agreements with this Notice on the first page," but nonetheless held that the notice did not comply with the SCUAA because the contract

at issue was "buried within hundreds of pages of real estate closing documents." (R. 17, 50 (Arb. Orders at 17).)

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. The Circuit Court's extra-textual requirement contradicts the strong State policy favoring the enforceability of arbitration agreements. Under that policy, restrictions on arbitration agreements should not be construed to become traps for the unwary, especially not in the context of six- or seven-figure transactions between sophisticated parties. And the spurious additional requirement makes especially little sense here because Plaintiffs actually signed the Membership Agreements under the cover page with conspicuous notice, precluding any contention that the notice was "buried" and thus undiscoverable.

2. The Arbitration Agreements Are Not Unconscionable

The Arbitration Orders also held that the arbitration agreements are unconscionable. (R. 18-26, 51-59 (Arb. Orders at 18-26).) They are 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 (paraphrasing *Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996)). *Accord Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. Neither element is satisfied here.

a. Plaintiffs Did Not Lack Meaningful Choice

The Circuit Court's Arbitration Orders held that the arbitration agreements are contracts of adhesion because Plaintiffs lacked meaningful choice. (R. 19-22, 52-55 (Arb. Orders at 19-22).) It is well-established under South Carolina law, however, that "[t]he fact that a contract is one of adhesion does not make it unconscionable." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E. 898, 901 (Ct. App. 1998).

While the Arbitration Orders recognize that "modern real estate developments are filled with mandatory covenants, including covenants that require payments of fees, charges, and assessments," they appear to suggest that the "adhesive" nature of the arbitration agreements is exacerbated by the number of supplements and amendments to the Community Charter. (R. 19-20, 52-53 (Arb. Orders at 19-20).) But the arbitration provisions at issue are in the Membership Plan and Membership Agreement, not the Community Charter. And the Arbitration Orders recognize that "Plaintiffs have produced no evidence these supplements and amendments impact Plaintiffs' claims." (R. 20, 53 (*Id.* at 20).)

Plaintiffs could not possibly do so because, when determining the validity and enforceability of an arbitration provision, a court may only consider the arbitration provision itself. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)); *see also One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016). Any challenges to other provisions of a contract that are not part of the arbitration clause are irrelevant to the validity and enforceability of the arbitration clause.

In any event, the sophisticated buyers of six- and seven-figure vacation properties did not suffer from an absence of meaningful choice. Whether there was an absence of meaningful choice depends on (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the clause. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. Further, a finding of unconscionability should be made only in extreme circumstances:

> Courts should not refuse to enforce a contract on grounds of unconscionability even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882, 884-85 (2013).

Analysis of the factors in *Simpson* and *Gladden* makes clear that Plaintiffs did not lack meaningful choice here. Plaintiffs' only alleged injuries are economic. Plaintiffs may not be substantial business enterprises, but some of them operate such enterprises, and all are successful business people (or entities owned and controlled by such people) who have amassed considerable wealth as a result of their business acumen. The parties have equivalent sophistication and bargaining power. Luxury second-home properties in Palmetto Bluff are not necessities, like medical care, phones, employment, or a basic automobile. And similar properties are available from other sellers, including in the Lowcountry. If Plaintiffs did not want to agree to the arbitration provisions, they did not

need to buy a property in Palmetto Bluff. And there was no element of surprise in this conspicuous arbitration clause contained in documents for high-dollar transactions that reasonable people read thoroughly and carefully (in contrast, for example, with some bulky consumer contracts). "Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). These sophisticated Plaintiffs undoubtedly read the documents they signed.

There was "no extreme inequality of bargaining power," no "lack of basic reading ability," and no "evident intent to obscure" the conspicuously labeled arbitration provision. *Gladden*, 402 S.C. at 145, 739 S.E.2d at 884-85. This agreement to join an exclusive club in a luxury development was not a contract of adhesion.

b. The Terms of the Arbitration Agreement Are Not Oppressive or One-Sided

The Arbitration Orders concluded that the arbitration agreements are oppressive and one-sided because they "strip[] members of statutory remedies, purport[] to alter the statute of limitations, and [are] capable of unilateral amendment in the Club's 'sole and absolute discretion.'" (R. 22, 55 (Arb. Orders at 22).) Again, the Circuit Court was wrong.

First, a (perceived) limitation on remedies available pursuant to state statutes (such as Plaintiffs' claims under the South Carolina Unfair Trade Practices Act and South Carolina Declaratory Judgment Act) does not provide a ground to invalidate an arbitration provision. "[I]n cases where it is uncertain how the arbitrator will construe remedial limitations, the proper course is to compel arbitration." *Rowe v. AT&T, Inc.*, 2014 WL 172510, at *11 (D.S.C. Jan. 15, 2014) (citing *Pacificare Health Sys., Inc. v. Book*, 538 U.S.

401 (2003)). The plaintiff in *Rowe* made the same argument advanced by Plaintiffs here, similarly relying on *Simpson*. But the district court refused to "speculate that the arbitration agreement deprives Plaintiff of all remedies or creates illusory remedies," and instead required that the plaintiff "first pursue her remedies through arbitration." *Id*. That was the proper course for the Circuit Court in this case.

Even if the limitation on remedies were unconscionable, it could and should be severed and the agreement to arbitrate enforced. A court may sever an unconscionable provision from an arbitration clause, even if the arbitration clause does not contain a severability provision. *See Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 370, 887 S.E.2d 534, 542 (Ct. App. 2022). Indeed, South Carolina provides this power with regard to any contract: "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." S.C. Code Ann. § 36-2-302(1).

Nor does a perceived alteration to the statute of limitations invalidate the arbitration provisions because, as the Circuit Court recognized, "the record does not support a conclusion that a potential claimant would be barred from bringing a claim after sixty days" had elapsed following the contractually required mediation. (R. 24-25, 57-58 (Arb. Orders at 24-25).) Moreover, the 60-day provision was not at issue here, as Plaintiffs filed their arbitration demand within the 60-day limit. Nonetheless, the Circuit Court held that the 60-day limitations language "provide[d] further grounds for [its] decision." (*Id.*)

Similarly, while the Arbitration Orders suggest that the arbitration agreement is unconscionable because the Club may unilaterally amend the "Membership Plan and Rules and Regulations," (R. 24, 57 (*Id*. at 24)), that is insufficient to find the *arbitration agreement* unconscionable. "Most courts hold that companies can unilaterally amend any procedural term if the underlying contract includes a change-of-terms clause." David Horton, *The Shadow Terms: Contract Procedure And Unilateral Amendments*, 57 UCLA L. Rev. 605, 649 (2010). Moreover, multiple courts have held that a provision allowing one party the unilateral right to amend a contract does not invalidate an arbitration provision where the right to amend is not contained within, or specific to, the arbitration provision itself. *See Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 (4th Cir. 2005); *Hicks v. Brookdale Senior Living Communities, Inc.*, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018); *see also Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1032 (9th Cir. 2016) (also noting that "the 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"); *Hall v. UBS Fin. Servs., Inc.*, 435 S.C. 75, 85, 866 S.E.2d 337, 342 (2021) (holding that "[t]here exists in every contract an implied covenant of good faith and fair dealing"). A court may only look to the four corners of the arbitration provision in determining its validity. *Hill*, 412 F.3d at 544. *Accord Noffz v. Austin Maint. & Const., Inc.*, 2016 WL 4385872, at *4 (D.S.C. Jul. 25, 2016). The arbitration agreement insulated changes from affecting the fairness of the process by selecting the AAA Commercial Rules to govern all procedural aspects. *See One Belle Hall*, 418 S.C. at 65, 791 S.E.2d at 294. And there is no evidence to suggest that the

Club has exercised this power to amend the arbitration provision at all, let alone in an oppressive or one-sided manner.

The Arbitration Orders also imply that the arbitration provision may be oppressive or one-sided because "the Club frequently pursues collection of dues and charges from its members outside of arbitration." (R. 22, 55 (Arb. Orders at 22).) But that does not invalidate the arbitration provisions, which do not remove these disputes from the scope of arbitration. Even if they did, "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672 (citing *Munoz*, 343 S.C. at 542, 542 S.E.2d at 365). As the Arbitration Orders acknowledge, "[t]here is no evidence that a property owner ever demanded these collection actions be arbitrated"—let alone evidence that the arbitration provision would not be enforced in the face of such a demand. (R. 22, 55 (Arb. Orders at 22).)

Thus, there is no evidence to support the Circuit Court's conclusion that the arbitration provisions are oppressive or one-sided, or that they have been enforced in an oppressive or one-sided manner. No evidence overcomes the strong presumption of the validity of arbitration agreements. *See Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466. The arbitration agreement is enforceable and should be enforced.

3. Arbitration Is Not Barred by the Agreements' Limitations Period

Although Plaintiffs submitted a demand for arbitration within the contractual 60-day period, and Defendants' counterclaims addressing only the issues Plaintiffs raised were indisputably timely under the AAA Rules, the Circuit Court also held that

Defendants "have waived arbitration of their claims" because they did not assert their *counterclaim* within the 60-day limitation period. (R. 16, 49 (Arb. Orders at 16).) Yet 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." (R. 24, 57 (*Id*. at 24).) Moreover, Plaintiffs had already commenced arbitration between the parties by filing their demand for arbitration within 60 days of mediation. Nothing required Defendants to make a like demand where a demand had already been made.

Whether the arbitration was untimely was an issue for the arbitrator, not the Circuit Court. *See* Section B, *supra*. And because "arbitration agreements are liberally construed in favor of arbitrability," *Landers*, 402 S.C. at 108, 739 S.E.2d at 213, any doubt as to whether a claimant would be barred from bringing a claim for arbitration after the 60-day period, or as to whether Plaintiffs' arbitration demand satisfied the 60-day limitation for both parties, must be resolved in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

4. The Community Charter Does Not Invalidate the Arbitration Provisions in the Membership Plan and Membership Agreements

The Community Charter's dispute resolution provision provides that, if the parties are unable to settle a claim at mediation, "[t]he Claimant shall thereafter be entitled to file suit or to initiate administrative proceedings on the Claim, *as appropriate*." The Circuit Court held that this provision conflicted with and thus nullified the arbitration provisions of the Membership Agreements and Membership Plan. (R. 12-14, 45-47 (Arb. Orders at 12-14).) But there is no conflict.

Under fundamental principles of contract interpretation, provisions in related documents should be read 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.*, *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008). 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 provisions 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

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

Respectfully submitted,

s/Val H. Stieglitz

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July 20, 2023

Attorneys for Appellants/Respondents

APPENDIX 1

Entity	Lot #	Signatory	Date Signed	Evidence of relationship	Exhibit*	Sophistication*
315 Corley CW, LLC	42 then 5556	Roger Courtland & Kaitlyn Williams	3/26/2019 then 1/3/2022	Lot no. in Intent to Transfer; Complaint Para. 1; Affidavit of Gray Ferguson pp. 4-5	B.12; B.15; Ex D	Exs. B.12, B.13, B.14
368 Mount Pelia LLC		Michael & Lynn Addy	2/4/2018	Membership Agreement says they own 368 Mt. Pelia; Affidavit of Gray Ferguson pp. 4-5	B.30	Exs. B.30, B.31
Bridge Charleston Investments C, LLC	5513	Chris Leigh- Jones	10/26/2020	Affidavit of Gray Ferguson pp. 4-5; Membership Agreement signed by Chris Leigh-Jones same address in Complaint (para. 5) for LLC	Ex. D	Exs. B.4, B.6, B.7
Bridge Charleston Investments H, LLC	5527	Chris Leigh- Jones	10/26/2020	Affidavit of Gray Ferguson pp. 4-5; Membership Agreement signed by Chris Leigh-Jones same address in Complaint (para. 7) for LLC	Ex. D	Exs. B.4, B.6, B.7
Live Oak Assets, LLC	5500	Michael and Jennifer McGuire	1/1/2018	Deed for no consideration from McGuire to Live Oak Assets; Affidavit of Gray Ferguson pp. 4-5; Membership Agreement	B.28; Ex. D.	B.29,
MKM 22 West, LLC	5005	Dave & Darby Mingey	2/12/2020	Address in Complaint (para. 14) same as address in Membership Agreement	Ex. D; Ex. B.18	B.18, B.19, B.20
One Rumford Lane, LLC	5044	Douglas & Patricia Locke	7/24/2020	Address in Complaint (para. 15) same as address in Membership Agreement	Ex. D	
Salt Works, LLC	5540	Lynn Ann Casey & Robert O'Keefe	10/18/2019	Address in Complaint (para. 17) same as address in Membership Agreement; Affidavit of Gray Ferguson pp. 4-5	Ex. D; B.21	B.21, B.22, B.23
TTJR, LLC	37	Todd and Beth Kugler	9/27/2020	Deed for no consideration from Kugler to TTJR ; Membership Agreement	B.9; Ex D	B.10, B.11

*B ex. cites are to Defs.' MTC
*D ex. cites are to Defs.' MTD

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-001587

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

v.

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

CERTIFICATE OF COUNSEL

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

July 20, 2023

s/Kirsten Small

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

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RESPONSE BRIEF
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Miscellaneous

INTRODUCTION

This case is about the development of real property in Beaufort County, South Carolina—particularly the validity and enforceability of covenants and restrictions which were imposed on that real property by the developer in the course of development. On one side of the caption are "Homeowners" (Respondents, here). On the other side of the caption are a plethora of development entities, referred to herein collectively (for simplicity's sake) as "Developers" (Appellants, here).

This appeal involves the question of arbitrability. Arbitration is a matter of contract: is there a contract? or isn't there? Not to spoil the ending to the Developers' lengthy briefing, but **there is <u>not</u> an arbitration contract between the vast majority of the parties to this litigation**.

Developers' factual arguments are untethered from the reality that is the Record on Appeal. Developer's legal arguments are untethered from the reality that is the law. This Court should affirm the circuit court's decision, which correctly applied binding precedent to the facts of this case.

COUNTER-STATEMENT OF THE CASE

Palmetto Bluff is indeed "a premier high-end residential/resort development in Beaufort County," and the Homeowners indeed invested millions of dollars in their homes. (*See* App. Br. p. 4). Homeowners undertook this investment—one of the biggest in their lifetimes—based on a master plan promoted by the Developer: extensive first-class infrastructure in a community that included luxury amenities. (*See* R. pp. 73–90, Compl. pp. 2–19, "The Palmetto Bluff Hoax"). The Homeowners have filed suit because

the real estate development plan—particularly covenants and restrictions imposed on Homeowners' property—is unlawful. This is an action pertaining to title to real estate, and therefore the plaintiffs are the record title holders of the real property in question.

Many of the allegations within the "Factual Background" in Developers' Initial Brief are speculative and unproven, including complete guesswork by Developers about people who may or may not be principals of the corporate plaintiffs. (Ap. Br. pp. 6–7; 24–30). As Developers themselves point out (in bold), the circuit court stated that it was "not making findings of fact in its Order." (Ap. Br. pp. 10–11). This knocks out, for example, the Developers' entire argument about agency and apparent authority (Ap. Br. pp. 24–30), which would be fact-intensive, as well as their repeated refrain on the purported sophistication of the parties, including Developers' lengthy and unproven bullet-point postulation on certain individuals' "wealth" found on pages 6–7 and 43–44. The circuit court decided the question of arbitrability as a matter of law, and this Court should affirm. (Order, R. p. 34).

THE ONLY FACTS THAT MATTER
Which Are Undisputed

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

A. No agreements to arbitrate exist

No arbitration contract ***whatsoever*** exists between any Plaintiff and any of these eleven defendants:

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

Put another way, not a one of the above-listed Defendants has a contract with any Plaintiff that contains an arbitration clause. Put yet another way, just to make the point, **not a single one of the Homeowners has ever agreed to waive their rights to jury trials as to a single one of the above-named Defendants.** The circuit court decided that such contracts did not exist, as a matter of law, quite simply because not one of the above-listed Defendants came forward with a contract to support their motion to compel arbitration (which was their burden).

B. Same as it ever was.

So, how did we get here, this Court might ask? The answer is that one defendant, Palmetto Bluff Club LLC (the "Club"), moved to compel arbitration because 7 out of the 21 Homeowner plaintiffs signed a (mandatory) Club "membership" agreement which does contain a purported arbitration provision. As discussed herein, that arbitration

provision is invalid and not binding . . . but it does exist, so here we are. Developers are attempting to bootstrap numerous individual, class, and derivative claims—against numerous different parties—into arbitration, based on that solitary defendant's arbitration clause, which is buried in an "agreement" that was not ever signed by the vast majority of the plaintiffs.

The third-grade math problem at the heart of this appeal: If 7 out of 21 Homeowners have a contract with the Club, then what do the other 14 Homeowners have? Nothing. The other 14 Homeowners have no agreement with the Club that contains an arbitration clause.

Similarly: if 1 out 12 Defendants has a contract with 7 out of the 21 Homeowners, then what do the 11 other Defendants have? Again, Nothing. The other 11 Defendants have no agreement with the 21 Plaintiffs that contains an arbitration clause.

C. A hidden clause

A brief factual[1] discussion about the ostensible "arbitration agreement" at issue here for seven Homeowners with one Defendant: The Palmetto Bluff Community has literally thousands of pages of "Governing Documents," which are all under the umbrella of a recorded Community Charter (which has been amended and supplemented more than *seventy* times) containing the covenants and restrictions for the community. (R. p. 166, Charter p. 3). In addition to the Charter, the community has a separate Recreational

[1] These facts pertain to unambiguous written instruments, which can be construed by this Court as a matter of law, as the circuit court correctly did. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014) (the construction of a clear and unambiguous contract is a matter of law for the court.); *S.C. Dep't. of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("the construction of a clear and unambiguous deed is a question of law for the court.").

Covenant (which has been amended and supplemented over *sixty* times).[2] (R. p. 255). Palmetto Bluff also has copious rules, by-laws, guidelines, restrictions, fee schedules, policies, procedures, and other parameters, all of which the Developers contend that they can alter, modify, or amend unilaterally, at any time, without consent of the Homeowners. (*See, e.g.,* R. p. 218, Charter p. 55). According to Developers, a Homeowner accepts his title subject to these *thousands* of pages of fine print. As Homeowners point out in their Cross-Appeal, a void covenant would not be binding, and it would never attach to title.

Notably, the arbitration clause at issue is buried in what Developers themselves describe as low-level governing documents—the Club Membership Plan, Membership Agreement, and related documents (the "Club Documents"). (*See* R. p. 166, Charter p. 3, Table). The Club Documents have not ever been recorded with the register of deeds. Notwithstanding the Developers' failure to record them, Developers claim they are incorporated by reference within the Community Charter, which states that it runs with the land. (*Id.*)

The Club Documents are subservient to the Community Charter, which contain a conflicting ADR provision expressly allowing "suit in any court" after mandatory *mediation*. (R. p. 215, *Id.* p. 52 § 18.1(a)). The Developer included a conflict resolution

[2] As discussed in Homeowners' cross-appeal, which is incorporated herein, these documents contain numerous provisions which *per se* unreasonably restrain the alienability of Homeowners' title, and which unlawfully attempt to compel mandatory, automatic "membership" in Developers' for-profit business. Homeowners filed this lawsuit for the purpose of reforming the Developers' unlawful development practices which affect their property.

clause within the covenants which states that provisions in the higher-level documents prevail over those in subservient documents. (R. p. 167, Charter p. 4). In other words, under the documents themselves, which were drafted by Developer, the "suit in any court" provision trumps over the conflicting arbitration clause buried in a low-level document. (R. p. 167, Charter, p. 4 § 1.3; 52–53 § 18.2).

A MORE ACCURATE PROCEDURAL HISTORY

Homeowners filed this lawsuit on April 12, 2022, in the Beaufort County Court of Common Pleas, seeking declaratory judgments as to the unlawfulness of certain real covenants, as well as damages for the improper actions of development entities in the development, operation, and maintenance of the community. (R. p. 70). On May 10, 2022, Homeowners filed a Motion pursuant to South Carolina Code § 15-48-20, for Summary Proceedings on the Invalidity of a Purported Arbitration Clause. (R. p. 347).

Before filing suit, the Homeowners participated in two mediations with Developers, as required under the ADR provision of the Community Charter for Palmetto Bluff, which "establishes a procedure for the overall development, administration, maintenance, protection, conservation and preservation of the Community." (R. pp. 165, 215, Charter p. 2; p. 52 "Dispute Resolution"). The Charter expressly states that after mediation a party "shall thereafter be entitled to file suit." (R. p. 216, Charter p. 53). Homeowners filed suit shortly after the second mediation was declared an impasse.

Developers' description of "arbitration filings" is not forthright. Homeowners did not ever demand arbitration with the AAA, and this Court should review the Record

rather than relying on arguments of counsel. (*See* R. pp. 754, 355, 358, Pl. Memo. in Opp. to Def. Mtn. Dismiss; Ex. A to Defendants' Motion to Dismiss).[3] To be accurate, Homeowners sent a letter to the American Arbitration Association ("AAA"), enclosing the civil Complaint and stating that the circuit court for Beaufort County, South Carolina had jurisdiction over the dispute. The letter was in response to claims by Developers that an ADR provision within lower-level governing documents requires arbitration and imposes a 60-day statute of limitations on Homeowners' claims. Although counsel for Homeowners disagreed with Developers' position, they sent the letter to the AAA (after filing the lawsuit) to foreclose an argument by Developers that the alleged 60-day limitations period had run.

In circuit court, on May 24, 2022, Developers filed a Motion to Dismiss or in the Alternative to Compel Arbitration. (R. p. 351). On June 9, 2022, Homeowners filed a Motion for Partial Summary Judgment, seeking declaratory judgments on the construction of unambiguous covenants and restrictions. These judgments are the

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[3] Certain Homeowners were concerned about a provision within the Club Membership Plan imposing a truncated 60-day statute of limitations. (The unlawfulness of which is discussed herein, Section III.D.2 (pp. 28–31)). Out of an abundance of legal caution, some Homeowners communicated with the AAA, attaching their already-filed lawsuit and stating:

> The South Carolina Court of Common Pleas, Beaufort County, has jurisdiction over the matters set forth in the lawsuit and over all parties and their property.
>
> Please note, as further explained within the enclosed form, that my clients are filing this "Demand for Arbitration" form with AAA out of an abundance of legal caution, for the purpose of preserving and not waiving my clients' rights and claims. My clients deny that arbitration is required, and they deny that AAA or an arbitrator has jurisdiction over the parties and the disputes.
>
> We request that the matter be put on hold while the lawsuit is pending.

R. p. 355, Letter from Ian S. Ford, Esq., to American Arbitration Association dated April 14, 2022 (emphasis in original).

subject of Homeowners' Cross-Appeal.

The parties filed supporting memoranda for their motions. (R. pp. 484–857).

All motions came before the Honorable R. Ferrell Cothran, Jr., for a hearing on July 20, 2022.[4] On September 15, 2022, the circuit court entered its Order, which is the subject of this appeal and cross-appeal. (R. p. 1). Developers answered the Complaint on October 5, 2022. (R. p. 299). Developers moved to alter or amend the Order, arguing—as they do on appeal—that the Federal Arbitration Act ("FAA") applies because some homes in the community are sometimes used for short-term rentals. The circuit court amended its order to include additional language rejecting this argument, stating: "The fact that some of the homes within the development are used for short-term rentals does not transform the development into one which involves interstate commerce." (R. p. 40, Amended Order p. 7). Otherwise, the Order remained unchanged.

Developers appealed on November 15, 2022. Homeowners cross-appealed on December 5, 2022. (R. pp. 959, 961).

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

"Arbitration is a matter of contract, and **a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.**" *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001) (emphasis added).

The threshold question for this Court is: Does an agreement to arbitrate exist? The circuit court found that there is not an arbitration agreement as to numerous parties, as a

[4] The hearing lasted for most of the day. Unfortunately, the court reporter experienced a technological error, and no transcript of the hearing could be made.

matter of law. There is no need to decide any other issue put forward by the Developers in the absence of agreements to arbitrate. By starting their Brief with the question of whether the FAA applies and whether a delegation clause covers the dispute, Developers put the cart before the horse—the primary question is whether the circuit court correctly found that agreements to arbitrate do not exist.

Homeowners therefore respectfully re-arrange and re-state the issues on appeal, in order of priority:

I. Did the circuit court correctly find that agreements to arbitrate do not exist?

II. Did the circuit court correctly find that South Carolina's Uniform Arbitration Act applies to this dispute over encumbrances to South Carolina real estate?

III. Did the circuit court correctly find as a matter of law that those few arbitration agreements that do exist are invalid, unlawful, and unconscionable?

IV. Did the circuit court correctly find that non-signatory Homeowners cannot be forced to give up their rights to jury trials, including against non-signatory defendants, based on non-existent arbitration agreements?

V. Did the circuit court have authority to decide these issues under the statute specifying that a court decides these issues?

STANDARD OF REVIEW

Developers are wrong about the standard of review, which is not *de novo* but is instead limited to the correction of errors of law and of factual findings that are not supported by "any evidence." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Developers themselves point out that the lower court heard and decided the issues before it as matters of law—based on the undisputed facts and unambiguous language of the covenants and contracts; as such, Developers note, the court "did not make findings

of fact."[5] (Ap. Brief pp. 10–11). **The standard of review is therefore that of an action at law tried by a judge**. *Lackey*, 330 S.C. at 393–394 ("In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence.").

"Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014). Moreover, the construction of a clear and unambiguous contract is a matter of law for the court. *Lee*, 407 S.C. at 512, 757 S.E.2d at 394. "The construction of a clear and unambiguous deed is a question of law for the court." *S.C. Dep't. of Nat. Res.*, 345 S.C. at 623, 550 S.E.2d at 302. "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." *Lackey*, 330 S.C. at 393–394.

The lower court made the following decisions of law, which this Court should review for error of law under an "any evidence" standard:

I. There is no agreement to arbitrate as between numerous parties.
   a. No agreement whatsoever exists as to fifteen (15) plaintiffs.
   b. No agreement to arbitrate exists between plaintiffs and eleven (11) defendants.

II. The Club's arbitration clause is invalid, unlawful, and unenforceable.
   a. Plaintiff the Bosler-Hart Trust is not bound.
   b. The arbitration provision is eclipsed by the Community Charter which allows filing "in any court."
   c. The purported arbitration clause excludes members before June 19, 2017.
   d. The purported arbitration clause is unenforceable and invalid on its face.

[5] Perhaps ironically, it was Developers who insisted the Order include the holding: "Because the motions currently before the Court present questions of law, the Court is not making findings of fact in this Order." (R. p. 928, Ex. 1, track changes, to Pl. Opp. Mtn. Reconsider). Developers asked for this language to be included in the Order, and they are bound by it.

i. Defendants are outside the limitations period of their own "agreement."
ii. The contract fails the conspicuous notice requirement of the South Carolina Uniform Arbitration Act.
iii. The purported agreement to arbitrate is unconscionable and invalid.
    1. The Club documents are contracts of adhesion.
    2. The terms are oppressive and one-sided.

III. No arbitration by non-signatories.

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

This Court should affirm the circuit court, which correctly decided the above questions as a matter of law.

Moreover, when it reviews the circuit court's decision not to sever unconscionable terms, this Court should do so under an "abuse of discretion" standard. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746, 759 (2022) ("courts have discretion to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive") (cleaned up). In addition, as discussed in Section IV.D below, this Court should review the circuit court's ruling on equitable estoppel under an "abuse of discretion" standard.

ARGUMENT

All told, Developers itemize eleven issues on appeal (including subparts). This is because the circuit court's decision was based on numerous independent grounds, each of which sustains the Order's denial of arbitration. Notably, for this Court to reverse the circuit court, it would need to find that the Order was wrong as a matter of law on each of the independent rulings of law identified in the Standard of Review section above.

Developers' arguments on appeal revolve around their repeated contention that public policy "favors" arbitration. This argument would have the Court misunderstand the law, which does not "favor" arbitration at all:

> Our courts' statements that the law 'favors' arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions. *See* Richard Frankel, *The Arbitration Clause As Super Contract*, 91 Wash. U. L. Rev. 531, 533 (2014) ("Much of this arbitration favoritism is attributable to lower-court misinterpretation of thirty-year-old dicta . . . .") . . . Therefore, when considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. **There is, however, no public policy—federal or state—"favoring" arbitration.**

Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 432 S.C. 633, 638–639, 856 S.E.2d 150, 152–153 (2021) (cleaned up) (emphasis added).

Because arbitration is entirely a creature of contract, the threshold question is whether an agreement to arbitrate exists. Homeowners discuss this issue first, because in the absence of an agreement there is no need to delve into questions about interstate commerce, delegation clauses, scope, or agency. Each defendant moving to compel arbitration had the burden to produce contracts, signed by each plaintiff, in which each plaintiff had agreed to arbitrate their claims against each defendant. Quite simply, as the

Record shows and as the circuit court correctly found, eleven of the Developer defendants did not meet their burden at all as to **any** of the Homeowners. Moreover, the circuit court correctly found that the few signed contracts mustered by a single defendant were unenforceable as a matter of law for multiple, independent reasons.

I. The circuit court correctly found that no agreement to arbitrate exists as between numerous parties, as a matter of law.[6]

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski*, 346 S.C. at 596. Arbitration must be "predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019). When Developers moved to compel arbitration, the Homeowners contended that they had never agreed to arbitrate. The circuit court held:

> Here, there appears to be no agreement to arbitrate between the vast majority of the parties to this litigation. **This Court cannot enforce contracts that do not exist**, and nor will it require parties to surrender access to the courts when they have never agreed to do so . . . fifteen of the Plaintiffs have never signed any agreement to arbitrate any dispute with any of the Defendants, whatsoever . . . [the arbitration] is hereby STAYED as to the demands made against the fifteen Plaintiff for whom no arbitration agreement exists whatsoever . . . Defendants have not produced any contract in which any Plaintiff has agreed to arbitrate any dispute with the following eleven Defendants . . . [listing] . . . those eleven Defendants have failed to demonstrate an agreement to arbitrate with any Plaintiff . . .

(R. pp. 41–43, Order p. 8–10).

Importantly, in moving to compel arbitration, the Developers had the burden to come forward with valid, enforceable arbitration agreements. *Landbank Fund VII, LLC v.*

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[6] This argument addresses Section C-1 of Developers' Brief.

Dickerson, 632 S.E.2d 882, 369 S.C. 621 (Ct. App. 2006) ("The burden is on a party pleading a fact to prove it."). They failed to meet their burden, and the circuit court decided the question of the (non)existence of such agreements as a matter of law. Developers tried to confuse the issue before the trial court by attaching various club membership agreements to their motion; but—as the circuit court held—most of those agreements are not signed by any plaintiff to this litigation.[7] Developers' arguments on appeal (and in the circuit court) hinge on disputed and tenuous factual assertions about the supposed relationship between corporate plaintiffs and the individuals who signed club membership agreements.[8] The circuit court, in the best position to weigh and evaluate the evidence, discarded Developers' evidentiary theories and found as a matter of law that the Plaintiffs had not contractually agreed to arbitrate with the Defendants.

On appeal, Developers mislead this Court with the repeated refrain that "[d]oubts about whether a dispute is arbitrable are resolved in favor of arbitration." (*See, e.g.*, App. Br. p. 11). Developers are wrong, as the South Carolina Supreme Court recently held:

> [T]he presumption in favor of arbitration . . . **does <u>not</u> apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement.** . . . Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so.

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[7] This appellate Court should note that Developers' arguments about (i) whether and (ii) how the few agreements they assert are (iii) actually linked to the Plaintiffs in this litigation are fact and evidentiary arguments. The circuit court heard these factual arguments at length, in a hearing lasting for most of a day, and it decided that agreements to arbitrate, as to the particular parties to this litigation, simply do not exist. This Court should affirm the circuit court's fact and evidentiary findings, particularly because the court found the "evidence" to be so absent as to enable it to rule as a matter of law.

[8] Appendix 1 to Developers' Brief exemplifies the sort of unsubstantiated factual "evidence" that the circuit court found was not credible or compelling.

Wilson, 426 S.C. at 337 (cleaned up; emphasis added).

Under the applicable standard of review, this brief and this appeal should end here, with affirmance of the circuit court's findings on this issue—which findings are supported by the evidence (or lack thereof). "In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Lackey*, 330 S.C. at 393394. This Court should affirm the circuit court's decision that no arbitration agreement whatsoever exists between the vast majority of the parties, here.

II. South Carolina law applies to South Carolina land.[9]

The question of whether the Federal Arbitration Act applies is much less complicated than Developers make it out to be. The FAA only applies to arbitration agreements within contracts involving interstate commerce. The circuit court correctly found that the contracts at issue here—real property covenants which expressly state that they run with land located in Beaufort County, South Carolina—are uniquely **intrastate**. *Pressl v. Appalachian Power Co.*, 842 F.3d 299 (4th Cir. 2016) ("the interpretation of a state conveyance is a quintessential question of state property law."). South Carolina law therefore applies, and not the FAA.

This is a dispute about real estate development.[10] Real estate development is

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[9] This argument addresses Section A of Developers' Brief.

[10] Developers' description of the subject matter of the Complaint does not coincide with the actual words on the page, and Homeowners respectfully request that this Court would take some time to read it. (R. pp. 73–90, Complaint). What this Court will notice is that this is a real property dispute, concerned with covenants and restrictions imposed on real property by the Developer as instruments of development. The Complaint is not about the construction of houses. It is not about the rental of houses. It is not about "commercializing" property. The gravamen of the Complaint is about the validity and enforceability of covenants that purport to encumber Homeowners' title, and which

accomplished by subjecting land and its title to covenants, restrictions, easements, and other servitudes, and then conveying the land. For this reason, our South Carolina Supreme Court holds that "the development of real estate is an inherently intrastate transaction." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012).

The arbitrations agreements asserted by Developers are embedded in the real property that is Palmetto Bluff. Developers themselves chose to bind their contracts to real estate located in South Carolina. The Community Charter (the covenants which control the Palmetto Bluff Development) makes clear that this is about South Carolina land:

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

(R. p. 165, Charter p. 2) (emphasis added).

The Community Charter states that it incorporates by reference the "Palmetto Bluff Club Documents." (R. p. 166, Charter p. 3). The Palmetto Bluff Club Documents include the membership agreement, which contains the arbitration clause at issue here.[11]

Developers claim run with land that is indisputably located in Beaufort County, South Carolina. (*Id.*).

[11] The question of whether a developer can impose in one set of covenants an obligation to pay money to a separate, for-profit business (on a separate parcel *not* subject to those covenants), is the subject of Homeowners' Cross-Appeal and motion for summary judgment, below. This Court can affirm the circuit court's order on arbitration on the grounds that these covenants are void and without effect, pursuant to Rule 220(c), SCACR ("Affirmance on Any Ground Appearing in the Record") (*see* R. pp. 754, 821, Plaintiffs' Memorandum in Support of Motion for Summary Judgment; Plaintiffs' Memorandum in Support of Motion to Stay and in Opposition to Motion to Compel Arbitration).

Therefore, for the purpose of analyzing whether the contract at issue involves interstate commerce, the answer is an easy "No." The contract at issue has as its subject South Carolina land, and it ostensibly runs with title to South Carolina real property; **by its own device, the alleged arbitration clause is rooted in South Carolina and cannot leave it.**

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

Developers introduce a sheerly conjectural argument about which law might apply to hypothetical short-term rental agreements.[12] To do this, they use a combination of (1) unproven assertions about hypothetical short-term rentals, and (2) Alabama law[13]

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[12] There is no evidence in the Record of short-term rental agreements.

[13] We will see Developers' Alabama law, and raise them some law from Kentucky, which was quoted with approval of the South Carolina Supreme Court:

> Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on **a commodity—the land—which is firmly planted in one particular state.** The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those

to argue against the clear precedent of the South Carolina Supreme Court. (*See* App. Br. pp. 12–17, *citing* the Alabama case of *Med. Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998) and arguing that the *Bradley* Court was wrong). First, this argument is a red herring: this is not a dispute between parties to a short-term rental contract—it is a dispute between (certain) parties to real property covenants, restrictions, and governing documents.[14] In deciding whether to apply the FAA, this Court should look to the document that contains the alleged arbitration clause (here, real property instruments encumbering South Carolina titles to Beaufort County real property) and not to (imaginary) short-term rental agreements that are not in the Record. Second, there is no connection between the covenants at issue and interstate commerce—our South Carolina Supreme Court has dispositively decided this question based on the overwhelming weight of authority on the "historical intrastate character of real estate transactions." *See Bradley*, 398 S.C. at 447; *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1993); *Zabinski*, 346 S.C. at 592. Further, our Supreme Court has expressly rejected Developers' arguments about the

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> movements are not part of the transaction itself. **All of the legal relationships concerning the land are bound by state law principles**. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce.
>
> To characterize a residential real estate [transaction] as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.

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

[14] As a reminder, most parties to this litigation do not have a contractual relationship at all—let alone one that contains an arbitration clause.

import of some plaintiffs being out-of-state residents. *Mathews*, 312 S.C. at 404, *overruled on other grounds by Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001) ("In the present case, **the object of the contract was . . . real estate situated in South Carolina**. Although the contracting parties are domiciled outside of South Carolina and transactions incident to the sale were conducted in foreign jurisdictions, there is no evidence in the record that the express terms of the contract involved interstate commerce.") (emphasis added).

This Court should not veer from established precedent. The circuit court was correct that the SCUAA applies to this dispute about the development of real property. Even the Developers rely on the covenants that were imposed on the real property—embedded in South Carolina dirt—when they argue in favor of arbitration. This Court should affirm the circuit court's holding that the SCUAA applies to an alleged arbitration clause buried in documents which purport to run with South Carolina land.

As discussed in Section III, below, the alleged arbitration clause is invalid under the SCUAA.

III. The scant few arbitration "agreements" that a single Appellant put forth are unenforceable and unconscionable as a matter of law.[15]

The circuit court correctly found that the few arbitration agreements[16] asserted by one Defendant (the Club) "are invalid, for all or any one of [numerous] reasons." (R. p.

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15 This argument addresses Section D of Developers' Brief.

16 The Club produced Club "membership" agreements signed by the following plaintiffs (most of whom are husband/wife pairs): Anne Bosler and Dylan Hart; R. Jeffrey Kimball and Deborah S. Kimball; Chris Leigh-Jones; and Matthew N. Lynch and Barbara A. Lynch. The invalidity of mandatory "memberships" in a for-profit business is the subject of Homeowners' cross-appeal and additional grounds to strike the arbitration agreements.

44, Order p. 11). "Trial by jury is a substantial right and any waiver thereof must be strictly construed." *North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 416 S.E.2d 637, 307 S.C. 533 (1992). This Court should affirm the circuit court's rulings that (1) the arbitration provision is eclipsed by the Community Charter, which allows filing "in any court"; (2) the purported arbitration clause expressly excludes buyers before June 19, 2017; (3) the purported arbitration clause is unenforceable on its face; (4) the purported agreement to arbitrate is unconscionable and invalid. (R. p. 45–60, Order pp. 12–26).

Notably, after arguing for the first 30 pages of their Brief that the Club's arbitration provisions, buried at the bottom of a stack of covenants, "run with the land" and should therefore bind non-signatory Plaintiffs six ways to Sunday, the Developers contend in Section D that the provision was conspicuous, could have been negotiated, and is not oppressive. In addition to affirming the circuit court's reasoning (discussed below), this Court should heed a recent opinion on this argument, by the South Carolina Supreme Court:

> This is not even to mention the fact that Lennar [the developer] attempted to insert an arbitration agreement in Petitioners' deeds, characterizing the arbitration agreement as an "equitable servitude" that runs with the land in perpetuity. **We find these and other terms of the contracts to be absurd, factually incorrect, and grossly oppressive.**

Damico, 879 S.E.2d at 758 (emphasis added).

A. The alleged arbitration provision in a low-level document is eclipsed by the Community Charter.

The circuit court correctly found that the Club's purported arbitration provision, which is found within low-level documents called the "Palmetto Bluff Club Documents,"

is superseded by the dispute resolution procedures in a superior, recorded instrument, the Community Charter for Palmetto Bluff. The governing documents themselves say that the Community Charter controls over the Palmetto Bluff Club Documents. The construction of a clear and unambiguous contract is a matter of law for the court. *Lee*, 407 S.C. at 512.

The Community Charter, recorded with the Beaufort County Register of Deeds, is the core governing document at Palmetto Bluff, and it is the founding document of the Palmetto Bluff Community. (R. p. 158, Charter). The Community Charter "is intended to serve as a framework for community governance" at Palmetto Bluff. (R. p. 164, Charter, pp. 1–3). The Charter has a table identifying the various "Governing Documents" within the Palmetto Bluff community:

TABLE 1.1

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

(R. p. 166, Charter, p. 3). Listed last are the "Palmetto Bluff Club Documents," which include the "Membership Plan and related documents" which the Developers contend compel arbitration. The Community Charter identifies the "Palmetto Bluff Club Documents" as hierarchically subservient to the Community Charter, specifically stating that **the Charter controls** among the Governing Documents:

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

(R. p. 167, Charter) (emphasis added). The Membership Plan and related documents are identified as subservient documents. (R. p. 166, *id.* at p. 3, Table 1.1).

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

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

(R. p. 215, Charter p. 52 § 18.1(a); § 18.2(c) (emphasis added)). Here, parties mediated the dispute in conformance with this provision. As such, the Community Charter allows filing "in any court." The circuit court correctly found, as a matter of law and clear contract construction, that the conflicting language pertaining to arbitration within the Club Documents is inapplicable in the face of the explicit Dispute Resolution provision

of the controlling Charter.

B. The purported arbitration clause excludes home-buyers before June 19, 2017.

By its own terms, the Club's purported arbitration clause does not apply to members who bought before June 19, 2017. (R. p. 284, Compl. Ex. 4, p. 15) ("This 'Arbitration/Mediation' provision shall apply only to members who acquire their membership on or after June 19, 2017."). This language specifically excludes Plaintiffs Bridge Charleston Investments B LLC ("Bridge B"), Geoffrey J. Block, and Jennifer Albero from its scope.[17] As such, the circuit court correctly found that the clear language of the Club's clause excludes them from mandatory arbitration, as a matter of law. Developers do not challenge this ruling on appeal, and it is the law of the case.

C. The purported arbitration clause is unenforceable on its face.

The circuit court correctly found that the South Carolina Uniform Arbitration Act ("SCUAA") applies to this real property dispute over land located in South Carolina and its encumbrances and appurtenances in South Carolina. The SCUAA requires that a contract provide conspicuous notice on its first page—in UNDERLINED CAPITAL LETTERS—that it is subject to arbitration.[18] S.C. Code § 15-48-10(a). Developers argue that they produced membership agreements with this notice "on the first page." (App. Br. p. 41). This argument does not tell the whole truth. In fact, a solitary defendant (the

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[17] Bridge B acquired its Club membership in 2015; Jennifer Albero acquired her membership on June 5, 2017; and Geoffrey J. Block acquired his membership in 2016—all before June 19, 2017. (R. pp. 782–793, Memo in Supp. Mtn to Stay, Exhibit 1 (deeds)).

[18] **This discussion feels a bit absurd, considering that there is actually no contract at all containing an arbitration clause, as between eleven of the Defendants and any of the Plaintiffs**, on which a notice might or might not be furnished.

Club) produced four "Club Membership Agreements" signed by a few plaintiffs to this action[19] with notice on what the Club claims to be the first page. But the circuit court was correct that these "membership" agreements are but one component of a vast constellation of purported "Governing Documents" for the Palmetto Bluff Community. (*See supra* Issue III.A; R. p. 166, Charter p. 3). The Club Documents (of which the "membership agreements" are a part) are designated as subservient to other community documents, including the Community Charter—they are expressly identified by the Appellants themselves as being at the bottom of a stack of hundreds of pages of covenants and restrictions purportedly binding the Homeowners' property. (*Id*.) (*See infra* p. 22). In other words, the ostensible "first page" of the membership agreement is—in reality—hundreds of pages into the "various documents that have a legal and binding effect on all Owners and occupants of property in the Community." (R. p. 166, *Id*. § 1.1).

In this litigation, Homeowners seek to invalidate provisions of the community's chief governing documents, the Community Charter and the Recreational Covenant. (R. pp. 132–135, Complaint) (*see also* Homeowners' Cross-Appeal). The Charter and the Recreational Covenant do not contain any arbitration clause at all—indeed they have a different ADR provision permitting "suit in any court." (R. p. 216, Charter p. 53). But, in a "flea wags the dog" argument, the Developers wrongly urge this Court to find that an alleged arbitration clause in an expressly subservient document, to which a tiny fraction of litigants are parties, could drive into arbitration a dispute about superior documents.

[19] As discussed above, the Club produced membership agreements by non-parties to this action, which are completely irrelevant, and it is disingenuous for Appellants to argue about whatever words might appear on the first pages of those agreements.

The circuit court correctly discarded this argument.

For Developers to compel arbitration of disputes about the validity and enforceability of the Community Charter and Covenants, those instruments must conform to the SCUAA. **The SCUAA requires:**

> Notice that the contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

S.C. Code § 15-48-10. Neither the Community Charter nor the Recreational Covenant (nor the numerous other superior community governing documents) contain any arbitration provision whatsoever, let alone on the first page. This Court should affirm the circuit court's ruling that the arbitration clause here, buried in hundreds of pages of closing documents, fails to give the conspicuous notice required by the SCUAA.

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

The circuit court correctly found that the alleged arbitration "agreement" is unconscionable, oppressive, and adhesive: the few plaintiffs to whom it might apply were deprived of any meaningful choice, and the terms of the contract itself are oppressive and one-sided. "Arbitration is a matter of contract and controlled by contract law." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016) (citation omitted). As such, arbitration agreements may be stricken "upon such grounds as exist at law or in equity for the revocation of any contract." S.C. Code § 15-48-10.[20] Courts in South Carolina do not enforce unconscionable contracts, or those that violate public policy.

[20] The SCUAA applies here. However, the FAA contains an identical provision and requires a similar analysis. *See Damico*, 879 S.E.2d at 754.

Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).

The test for determining whether an arbitration agreement is unconscionable has two prongs. *Damico*, 437 S.C. at 610, 879 S.E.2d at 754 (this case has a thorough discussion of the history of this test, in contract law and arbitration specifically). Courts must decide (1) whether there is an absence of meaningful choice, and (2) whether the terms are oppressive and one-sided. *Id.*; *see also Smith,* 790 S.E.2d at 4 ("In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."). The circuit court correctly analyzed both prongs.

1. The Club documents are contracts of adhesion.

The Club's membership agreement is a classic example of a "take-it or leave-it" contract with terms that are not negotiable. *See Smith*, 417 S.C. at 49–50, 790 S.E.2d at 4. According to Developers, mere "acceptance of a deed for property within Palmetto Bluff" ostensibly means that a person is "**automatically** assumed and agreed to be bound by all the terms and conditions of the Membership Plan." (R. pp. 265, 271, 275, Def. Ex. D, p. 3, § II) (emphasis added). Importantly, **Developers have never recorded with the register of deeds** the Club Membership Plan containing the ostensible arbitration clause, which they claim is binding "upon the acceptance of a deed." Yet Developers dissonantly argue here, "If Plaintiffs did not want to agree to arbitration provisions, they did not need to buy a property in Palmetto Bluff . . . *there was no element of surprise* in this conspicuous arbitration clause contained in documents for high-dollar transactions that reasonable

people read thoroughly and carefully." (App. Br. p. 44) (emphasis added). To the contrary, there is a great deal of surprise in hidden, unrecorded provisions that claim to mandate arbitration and which are "automatic" "on acceptance of a deed."

There is no opportunity whatsoever to negotiate these ostensibly "automatic" provisions, and the circuit court was right that the Club Documents are contracts of adhesion. (*See* R. pp. 21, 54, Order p. 21, bulleted list of adhesive, non-negotiable terms, which pervade the documents). There is no conceivable potential for bargaining power on the part of those whom the "automatic" and "mandatory" provisions purport to bind.

Developers incorrectly emphasize the purported "sophistication" of certain people, some of whom are plaintiffs. (App. Br. pp. 43–45). This argument is wrong for two reasons: first, the "facts" Developers argue were never proven, which was their burden. Second, the South Carolina Supreme Court in *Damico* has put this issue to bed in the developer/homebuyer context, and this Court should again reject the argument:

> [T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions.

Damico, 437 S.C. at 614–615, 879 S.E.2d at 756. Similarly, Palmetto Bluff's Development Plan with the Town of Bluffton calls for approximately 4,000 residential lots, almost 1,000 of which have already been sold by the Developer.

The circuit court correctly found that the Club's asserted arbitration provision, buried in documents that are "mandatory" and "automatic" "upon acceptance of a deed" is a classic contract of adhesion under South Carolina law.

2. The Club's terms are oppressive and one-sided.

The second prong of the unconscionability analysis is a determination of whether the arbitration agreement contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 667 (2007). Unconscionable, oppressive terms include lack of mutuality, violation of public policy, and limitation on statutory remedies. *Id.* Here, the circuit court correctly found that the arbitration clause asserted by the Club strips members of statutory remedies, purports to alter the statute of limitations, and it is capable of unilateral amendment in the Club's "sole and absolute discretion"—all of which are oppressive, one-sided contract terms.

Among other things, the circuit court properly followed South Carolina precedent when it examined the arbitration clause, here. It is telling that Developers resort[21] to a law review article and federal law in their Brief on this point. This is wrong: "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Id.*, 644 S.E.2d at 667.

(a) Five indicia of oppression and one-sidedness.

First, the circuit court adhered to *Simpson* to find that the Club's limitation on damages clause—nearly identical to the one in *Simpson*—"violates statutory law because it prevents [Homeowners] from receiving the mandatory statutory remedies to which [they] may be entitled in underlying SCUTPA" claims. *See* 644 S.E.2d at 670–672; R. p. 376, Def. Ex. D, p. 4 ("Any arbitration shall be limited to a party's actual, out-of-pocket,

[21] (Pun intended).

compensatory damages only."). The *Simpson* Court included strong language against such limiting terms in an adhesion contract:

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

644 S.E.2d at 671. This Court should hold that the Club's attempt to strip its members of statutory remedies within a "mandatory" and "automatic" "agreement" renders the provision unconscionable.

Second, the circuit also found that the Club's "arbitration agreement" is oppressive and unreasonable because it contains a one-sided provision allowing unfettered, unilateral amendment by the Club. (R. p. 376, Def. Ex. D, p. 4, "The Company reserves the right **in its sole and absolute discretion**, from time to time, **to modify** the Membership Plan and Rules and Regulations [of which the purported arbitration clause is a part] . . . **and to make any other changes** to the Membership Documents . . . .") (emphasis added). In defense of this provision, Developers cite a law review article for the basic proposition that all the cool companies are doing it, so it must be okay. (App. Br. pp. 46–47). This is wrong according to your dad, and also under South Carolina law. *See Lee*, 407 S.C. 512, 757 S.E.2d 394 (noting that once a contractual bargain is formed, and the obligations are set, that the contract can only be altered by mutual agreement and for further consideration), *citing* 17A Am.Jur.2d Contracts § 507 ("[O]ne party to a contract may not unilaterally alter its terms."); *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161 (2003) ("We cannot find anything in *Fleming* or elsewhere that allows a party to alter the terms of a bilateral contract by unilateral modification. It is well established

that '[a] written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract,'" *quoting Florence City-County Airport Comm'n v. Air Terminal Parking Co.*, 283 S.C. 337, 341, 322 S.E.2d 471, 473 (Ct. App. 1984)).

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

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

(R. p. 376, Def. Ex. D, p. 4) (emphasis added). This attempted short-circuit of South Carolina law is *per se* invalid and unlawful. *See* S.C. Code § 15-3-140 ("Contract provision shortening statutory period: No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action . . ."). The circuit court correctly found that the presence of such an oppressive provision within an adhesion contract renders the alleged arbitration clause unconscionable. *See Simpson*, 644 S.E.2d at 670–672 ("The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.").

Fourth, the circuit court found indicia of one-sidedness in Homeowners' evidence that the Club itself ignores the provision at its whim, by filing liens and foreclosures

rather than taking its fee disputes to arbitration. (*See* R. p. 794, Pl. Memo, Ex. 2); *see also* R. p. 257, Recreational Covenant § 3.3, Lien for Membership Fees) (Club "may enforce such lien . . . by suit, judgment, and foreclosure."). The court found that such a one-sided "requirement" for arbitration (which the Club ignores when it chooses) would be deemed objectively unfair and oppressive by a reasonable person.

Fifth, the purported arbitration clause improperly purports to divest Homeowners of their statutory right to have a court determine legal rights under South Carolina's Declaratory Judgment Act, S.C. Code § 15-30-10 *et seq*. That statute states that "**Courts of record** within their respective jurisdictions **shall have power** to declare rights, status and other legal relations . . . ." including "under a deed, will, written contract or other writings constituting a contract . . ." *Id.* §§ 15-33-20, -30 (emphasis added). Here, the circuit court found the Club's attempt to strip members of this statutory right is unconscionable and unlawful.

(b) Severing terms is not the answer.

Developers attempt to argue that this Court should just re-write the parties' contract to sever the unconscionable terms. (App. Br. p. 46). The circuit court was right to reject this idea, and this Court should affirm its proper exercise of discretion. *See Damico,* 879 S.E.2d at 759 (courts have discretion to sever—or not—offending terms).

Importantly, neither the Membership Plan nor the membership agreements—both of which the Club drafted—contain a severability provision. The Court would have to blue-pencil a severability provision ***into*** the agreement, in order to blue-pencil ***out*** unconscionable terms. South Carolina's Supreme Court meticulously explained its

reasoning when it declined to sever unconscionable provisions in the *Damico* case:

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

Id., 879 S.E.2d at 751, 760–761. Space does not permit us to quote the Court's thorough reasoning in its entirety, but the same potential for abuse and over-reach is present in the massive Palmetto Bluff development of 4,000 homes. This Court should affirm the circuit court's decision not to sever unconscionable terms—which was a proper exercise of its discretion.

E. The circuit court was right: Developers are outside of the limitations period in their own "agreement."

As discussed above, the Club's arbitration clause contains a provision imposing a 60-day statute of limitations for filing claims, which the circuit court found unconscionable. (R. pp. 57–58, Order pp. 24–25, quoting the provision). The circuit court also found that Developers—who waited **98 days** to file claims in arbitration against Homeowners—breached their own limitations provision. (R. p. 49, Order p. 16).

Developers want this Court to find that they are not bound by the 60-day limitations provision (which they drafted), but they also don't want this Court to find the provision is invalid or oppressive. (App. Br. pp. 46, 48–49). This is a rock and a hard place, for sure.

Developers are wrong that purported public policy "favoring" arbitration permits them to evade their own limitations period. *See Palmetto Constr. Grp.,* 856 S.E.2d at 152–153 ("our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions.").

This Court should affirm the circuit court, which correctly construed the plain and unambiguous 60-day provision against the drafter. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178, 183 (2013) ("the contract's language determines the instrument's force and effect."); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement."). This Court should also note that this short, three-paragraph-long issue is alone sufficient to affirm the circuit court's decision to deny Developers' Motion to Compel Arbitration: even if every other argument in this Brief fails, Developers missed their own, self-imposed window—a window that they doubtlessly would have tried to use to bar Homeowners' claims, had Homeowners not taken the extra precaution of notifying AAA. (*See supra* pp. 6–7 and fn. 3).

IV. Plaintiffs are not bound by agreements to which they are not parties.

In Sections C.2–5 of their Brief, the Developers argue that the LLC Plaintiffs—which never signed arbitration agreements—are nonetheless bound by country club

agreements signed by individual people whom Developers believe might be principals of the corporations in some capacity. This is an odd and inconsistent position for Developers, which themselves operate under murky layers of LLC entities designed to insulate their owners from personal liability. Under the Developers' argument, every gym membership, credit card application, school field trip form, and other obligation that the Developers' individual owners have ever personally signed are binding on all of the Developer corporations (and *vice versa*).

Cognitive dissonance aside, it was the *Developers'* burden to prove that each of what they call the "nonsignatory Plaintiffs" did in fact enter into arbitration agreements—*and the Developers entirely failed to do so*. Importantly, the corporate composition of the numerous corporate Plaintiffs is not in this Record. The Record is silent as to who their members are and what connection or authority (if any) the members might have as to the few signatories to Club documents. The circuit court, in the best position to judge and weigh the evidence (or lack thereof) found:

> Defendants argued that certain corporate Plaintiffs should be bound by Club Membership Agreements apparently signed by some of the corporation's members or shareholders. The Court finds that Defendants' arguments **lacked adequate evidentiary or factual basis**. . . . The Court finds that Defendants have **failed to offer evidence sufficient to overcome the presumption against arbitration by non-signatories** to a written agreement to arbitrate.

(R. p. 60, Order p. 27) (emphasis added). This Court should affirm the circuit court's evidentiary findings, under the applicable standard of review. *Lackey*, 330 S.C. at 393–394 ("In an action at law, the appellate court's jurisdiction is limited to the correction of . . . factual findings which are unsupported by any evidence.").

Lacking concrete evidence of corporate composition, the Developers' Brief relies on hollow phrases such as "*plainly* have actual authority" and "*inferred* from the circumstances." (App. Br. pp. 26–28) (emphasis added).[22] The circuit court ruled as a matter of law on this question because there was no basis for a ruling that non-signatory plaintiffs somehow agreed to be bound by non-existent arbitration agreements. (*See* R. p. 60, Am. Order p. 27). Under an "any evidence" standard, there are simply not facts sufficient to reverse the circuit court's determination that the Developers did not muster evidence sufficient to support their claim. (*See* R. pp. 38, 44, 60, Order pp. 5, 11, 27).

Second, the Developers' current version of events is a textbook example of how a purported arbitration provision should *not* be handled in a development in South Carolina. Under the Developers' story, the Palmetto Bluff Developers truly and earnestly intended to require mandatory arbitration for all sorts of entities and persons—very few of whom the Developers ever bothered to have sign an actual arbitration agreement. Frankly, Developers are asking this Court to step through the Looking Glass into an upside-down world where people who have never signed an arbitration agreement can be forced into arbitration against other people—who are <u>also</u> not subject to an arbitration

[22] The Developer did submit an affidavit of Gray Ferguson on certain points, which is simply incorrect even on the face of the documents it references. As just one example, the affidavit ¶ 10(a) states that "Plaintiff Live Oak Assets, LLC: Signed by Michael and Jennifer McGuire." But the referenced Membership Agreement (signed 1/1/2018) has no mention whatsoever of Live Oak Assets, LLC. (R. pp. 516, 373, Aff. of G. Ferguson ¶ 10(a); Membership Agreement signed by Michael and Jennifer McGuire). Similarly false is ¶ 10(c): "Plaintiff Salt Works, LLC: Signed by Robert O'Keefe and Lynn Ann Casey." But the referenced Membership Agreement (signed 10/18/2019) has no mention whatsoever of Salt Works, LLC. *See id.* The list goes on, and similar purely conjectural misstatements are made regarding other LLCs and entities.

Similarly, Developer's Appendix 1 is as weak as what it cites, which is, again, Mr. Ferguson's inaccurate affidavit and Developers' speculation, unsupported by actual direct evidence.

agreement—based on sheer conjecture. Developers resort to acrobatics about scrivener errors, equitable estoppel, implied authority, inferences, etc., to cover what (if true) most charitably could be called gross sloppiness in forgetting to put arbitration agreements in place. The law and this Court should not reward such a position or practices. Moreover, under these circumstances, a ruling in favor of the Developers would be interpreted to mean that, in South Carolina, *any* developer *always* can compel arbitration—if it can come up with some unlikely, unproven *post hoc* story about arbitration once a lawsuit is filed. *See Damico*, 879 S.E.2d at 760–763 (refusing, based on public policy, to sever unconscionable provisions from alleged arbitration agreement; "South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.").

Developers' arguments in this section are all the more surreal because the non-signatory Plaintiffs (who are the record owners of the real property that is the subject of this litigation) actually do have contracts with the non-signatory Defendants, including the Community Charter and the Recreational Covenant. **And those contracts—which Developer drafted—indisputably do not contain arbitration clauses**. In fact, the Community Charter contemplates *litigation*, expressly allowing a party to "file suit in any court." (R. p. 215, Charter p. 52 § 18.1(a)).

In other words, the non-signatory Plaintiffs entered into contracts expressly permitting litigation in court with the non-signatory Defendants. Developers are wrong to suggest to this Court that it should use equitable doctrines to supplant express contractual provisions. It is hornbook law that the equitable doctrines propounded by Defendants do not apply in the face of a contractual remedy. "The court will reserve its

equitable powers for situations when there is no adequate remedy at law." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); *see also Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003) ("The function of equity is to supplement the law, not to displace it."); *see also Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250, 251 (1939) ("The basis for granting equitable relief is the impracticability of obtaining full and adequate [relief] at law.").

As discussed below, each of Developers' arguments in Sections C.2–5 fails. The predicate law is that corporations are separate from their owners: "It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders . . . ." *Mid-South Mgmt. v. Sherwood Dev.*, 649 S.E.2d 135, 139, 374 S.C. 588 (Ct. App. 2007) (internal citations omitted). An agreement signed by a person individually does not bind a separate company; the agreement must be explicitly signed on behalf of the company. Similarly, if individuals used the Club pool or restaurant at times for their personal enjoyment, that cannot be used as an estoppel or "benefit" argument against the separate, non-member limited-liability company to force the company into arbitration under an agreement the company never signed.

A. The "express terms" do not bind nonsignatories.

Developers argue that the language of the Membership Plan automatically binds non-signatories. This is wrong. The Plan states that other designated users *also* must submit a Membership Agreement, which is subject to approval by the Club. (R. p. 277, Plan p. 8). That process, and requirement, would not be necessary if everyone

automatically was bound. Nor have the Developers submitted evidence that that process was followed for each nonsignatory Plaintiff (it was not). The fact is that Developers cannot force people and entities into arbitration if they have not signed an agreement to do so.

Also wrong is Developers' argument that under the Plan it can bind anyone "exercising such member's membership rights." That Plan language actually is from an *exception* to the arbitration provision: "(unless the member [and/or any person exercising such member's membership rights] and Palmetto Bluff Club, LLC mutually agree otherwise)". (R. p. 285, Plan p. 16). The Plan provision clearly limits its application:

> This "Arbitration/Mediation" provision shall apply [1] **only** to [2] **members** who [3] **acquire their membership** [4] on or after June 19, 2017.

(R. p. 284, Plan p. 15 (emphasis added, bracketed numbers added)). Under no lawful interpretation can that include people or entities (nonsignatory Plaintiffs) who have never signed or agreed to the purported arbitration agreement.

B. Agency law does not bind non-signatories to arbitrate.

Developers argue that nonsignatories are bound to the purported arbitration agreement by agency law, because the "relationship" shows "actual or apparent authority." As an initial matter, each of those assertions would require a highly fact-specific[23] conclusion which (a) the circuit court did not make, and (b) Developers did not

[23] For example, the elements required to prove apparent authority are very fact-specific: "(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment. . . ." *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717 (Ct. App. 2004) (internal citations and quotations omitted).

prove. Moreover, it does not appear that these arguments were preserved for appeal.[24] In the circuit court, the Developers did not raise the issues except in cursory fashion, nor support them with any evidence. The unpreserved discussion of agency can end here.

Addressing the specific arguments, Developers assert that the individual signatories "plainly" had authority to bind the corporate nonsignatories. In support of this vague but complex assertion, the Developers offer . . . no . . . actual facts . . . of any substance. Instead, Developers reference broad principles of agency law and leave it at that. Even the cases cited by Developers show that their arguments fail. In *Fernander v. Thigpen*, for example, the question of agency was supported by the testimony of numerous witnesses and documents, and the court held it was not appropriate for summary judgment—it was a jury question. 278 S.C. 140, 143, 293 S.E.2d 424 (1982). Similarly, *Hofer v. St. Clair* involved complex factual inquiries, such as whether or not the partner had authority to bind the partnership to the specific contract at issue.[25] 381 S.E.2d 736, 298 S.C. 503, 506 (1989). Here, Developers have not even tried to prove those factual

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[24] Developers raised these arguments for the first time in their Motion to Reconsider. (*See* R. p. 918, Pl. Opp. to Defendants' Rule 59 Motion, p. 21). In their original filings with the circuit court, the Developers made a single statement that the Plaintiffs are agents or assigns of signatories, which they did not support with any evidence other than speculation. (*See* R. p. 507, Def. Mem. Supp. Mot. to Compel, p. 18). That cursory, unsupported argument did not preserve the question for review.

[25] In *Hofer*, the issues of agency and partner authority were highly fact-specific: "The questions on appeal [were] whether a partnership existed between the defendants; whether the actions of one partner were sufficient to bind the partnership; whether valid contracts for the sale of land existed; whether the defendants breached such contracts; and whether plaintiff was damaged and in what amount as a result of this breach." 381 S.E.2d 736, 298 S.C. 503, 506 (S.C. 1989). "The evidence showed that in the course of this transaction St. Clair made counteroffers, signed a listing agreement and a management agreement on behalf of both of the partners. In the past, St. Clair had alone executed contracts for the sale of partnership property and other partnership contracts on behalf of both partners." *Id.* at 510.

issues for each party. In sum, Developers have the burden of proof on their agency argument—a highly fact-specific inquiry that it must satisfy as to *each party*—and they each have failed to carry that burden.

Next, Developers argue that nonsignatory LLCs are property owners, and therefore they are automatically bound to the arbitration provisions of the Club. As an initial matter, this is the subject of Homeowners' cross-appeal: Developers' position violates South Carolina law, because (*inter alia*) it purports to tie to the land a mandatory "membership" in Developer's separate for-profit Club business. Homeowners refer to the arguments in their cross-appeal, and request that this Court hold that the alleged obligations to pay dues and fees to a for-profit business, purportedly tied to the land, is unlawful.

Moreover, (as discussed *supra*) Palmetto Bluff property owners are subject to the Community Charter for Palmetto Bluff, which has its own dispute resolution provisions. The Charter's provision explicitly allows a party to "to file suit in any court." (R. p. 215, Community Charter, p. 52 § 18.1(a)). This higher-level document supersedes any purported arbitration clause in a different document that the party never signed.

Finally, Developers' ratification argument was not preserved for appeal, and in any event would require a highly fact-intensive showing[26] which the Developers never

[26] Each of the elements of ratification requires a highly fact-intensive showing: "(1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements." *Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E.2d 801, 803, 300 S.C. 188 (Ct. App. 1989).

made.[27]

In sum, the circuit court found that Developers entirely failed to carry their burden to prove that non-signatories are bound by the purported arbitration agreement. This Court should affirm.

C. Developers' assignee argument fails.

Developers' assignee argument was not preserved and is waived. To the extent the Court still wishes to consider it, Developers' allegations about binding non-signatory assignees fail for the reasons discussed above, including that Developers did not carry their burden of proof in the circuit court and have not made an adequate showing here.

D. Equitable estoppel does not bind "all remaining Plaintiffs."

Developers soldier on, in Section C.3 of their Brief, in their attempt to justify forcing nonsignatories to lose their rights to a trial. Their next "spaghetti against the wall" argument is based on equitable estoppel. (App. Br. pp. 30–34). The wall against which Developers throw is the rule that "a presumption *against* arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." *Wilson*, 426 S.C. at 337 (emphasis in original).

The South Carolina Supreme Court has emphasized that "[e]quitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345 (*citing* 28 Am. Jur. 2d Estoppel and Waiver § 29 (2011), stating equitable estoppel should be used with restraint and only in exceptional circumstances).

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[27] Developers also argue that the Bosler-Hart Trust is bound to an arbitration agreement it never signed because it can be "inferred from the circumstances." This fails for the same reasons as apply to the other non-signatories.

Moreover, a lower court's decision on this issue is reviewed for abuse of discretion:

> When, however, the district court's decision is based on principles of equitable estoppel, we review the district court's decision for abuse of discretion. . . .

American Bankers Ins. Group, Inc. v. Long, 453 F.3d 623, 629 (4th Cir. 2006).

Developers divide their argument into two sections (arise out of/relate to, and direct benefit) but the arguments really are the same—that the "Club documents are the foundation [or 'crux'] of every claim" and have provided benefits, and therefore the arbitration provision binds anyone Developers choose, whenever Developers choose. (App. Br. pp. 32–33).

As an initial matter, Developers' argument mis-portrays Homeowners' claims. The gravamen of the Complaint (the "foundation," the "crux") is the overall unlawful structure that the Developers have imposed on the Palmetto Bluff community and on Homeowners, particularly in the Community Charter—which is, literally, Exhibit 1 to the Complaint. (*See, e.g.*, R. p. 101, Compl. ¶ 42: "The Charter sets forth the Founder's vision for Palmetto Bluff, and it 'is intended to serve as a framework for community governance.'"; *see also* R. pp. 101–104, *id.* ¶¶ 43–58 (discussing Charter)). The lower-level Club documents are a prodrome of *some* of the problems caused by that overarching unlawful structure. The overarching structure, and interplay of the governing documents, is depicted in the Charter's Table 1.1. (R. p. 158, Charter p. 3) (*see supra* p. 21). The Developers' Table defines the Club documents as the lowest in the hierarchy. So low, they are not even of record.[28] Instead, the "foundation," the "crux," is the Community

[28] R. p. 104, Compl. ¶ 59: "The Palmetto Bluff Club documents have never been recorded with the Beaufort County Register of Deeds." R. p. 317, Ans. ¶ 59: "The allegations of Paragraph 59 are

Charter (Exhibit 1 to Complaint) which eclipses the Club documents and allows a Homeowner "to file suit in any court." (R. p. 215). As was argued at the hearing before the circuit court, allowing the lowest-level document to control this entire lawsuit would be more than a "tail wags dog" situation, it would be "flea wags dog."

Moreover, Homeowners are not seeking to enforce or benefit from the low-level Club documents; they are claiming that—as one example of a by-product of Developers' overall unlawful scheme—those purported obligations are unlawful and void. It is simply inaccurate for Developers now to claim that the lowest-level document is the "foundation" or "crux" of this lawsuit. Instead, the Club documents are one symptom of the disease.

Developers also complain about the circuit court's analysis of Developers' primary case, *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). The circuit court noted that *Pearson* involved only three parties, in a different situation, with different types of issues. (R. p. 42, Am. Order p. 9 n.1). But Developers cite no case—none at all—even remotely similar to the Developers' demand here that *dozens* of non-signatories (15 plaintiffs, 11 defendants) be forced into arbitration with each other based on equitable estoppel. Indeed, the cases on which Developers rely involve just a few parties, and they cannot be reasonably construed to lasso in a huge herd of non-signatories. For that reason, the circuit court soundly concluded:

> *Pearson's* very different circumstances cannot be compared with Defendants' attempt in this case to force numerous nonsignatory litigants—who never signed arbitration agreements with each other—into an arbitration.

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admitted . . ."

(R. p. 42, Am. Order p. 9 n.1). When viewed under the "abuse of discretion" standard for equitable estoppel (or any other standard) the circuit court's decision should be affirmed.

Indeed, the Developers' demand here would, for both legal precedent purposes and practical purposes, expand the doctrine of equitable estoppel to dominate over the contract law requirement that a developer actually obtain a signed agreement to arbitrate. *Wilson*, 426 S.C. at 337 (arbitration must be "predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts."). Developers throughout South Carolina would interpret a reversal here as justifying any other tenuous scenario they can concoct, regardless of whether or not homeowners sign an agreement. Homeowners here respectfully request that this Court follow South Carolina legal precedent and its presumption *against* mandating arbitration as to non-signatories. *See id*.

E. Non-signatory defendants cannot compel arbitration.

Continuing, Developers argue that the eleven (11) defendants who indisputably never signed an arbitration agreement nonetheless are entitled to compel arbitration. Developers base this on "agency and contract principles" which have been covered previously (*see supra*).

In addition, Developers argue that arbitration can be compelled by non-signatory defendants because the Complaint alleges conspiracy and amalgamation. Of note, in their pleadings Developers categorically deny all conspiracy and amalgamation claims. (*See, e.g.*, R. pp. 313–329, Answer ¶ 25 ("denied"), ¶ 80 ("denied"), ¶ 82 ("denied"), ¶ 129 ("denied"), ¶ 197 ("denied")). Developers further deny that there are common questions

of law or fact for the multiple defendants. (*See, e.g., id.* ¶ 137 ("denied"), ¶ 145 ("denied")). Having taken that position repeatedly in their pleadings, Developers cannot argue the opposite here, and yet clearly intend to pivot again (later in this litigation) and categorically deny conspiracy and amalgamation. Moreover, for purposes of Developers' motion to compel arbitration, it was the **Developers' burden** to prove the nonsignatories are amalgamated.

In any event, in this section Developers admit that "only the Palmetto Bluff Club is a signatory to those documents" that contain arbitration provision. Developers never bothered to have the eleven other defendants sign those documents and cannot now spackle over that decision based on allegations that Developers vehemently deny. Arbitration is a matter of contract. Contract is a decision of the parties. Given Developers' decisions to avoid contracts, it would be unlawful, and absurd, and inequitable, to allow eleven nonsignatory defendants to compel arbitration with twenty-one plaintiffs with whom they have no arbitration agreement whatsoever.

F. Plaintiffs' claims are not all subject to the alleged arbitration agreement.

Developers' final sub-section in Section C of their Brief largely repeats their previous points. Developers again go through their "flea wags dog" argument: that every single claim within sixteen causes of action among twenty-one (21) plaintiffs and twelve (12) defendants is swallowed by the arbitration clause contained only in the lowest-level Club documents signed by only one (1) defendant and seven (7) plaintiffs.

As discussed above, Homeowners' actual claims are much larger, and different, than portrayed by Developer. The circuit court specifically identified numerous

examples in its Order at pages 28–30. (R. pp. 61–63). The circuit court also noted that "These are selected examples; the 83-page Complaint contains numerous others. In sum, many of the claims in this lawsuit are not controversies relating to the Club Membership Plan—which mainly involves members' use of the social club, such as pools, fitness centers, etc.—and therefore are outside of the scope of the purported arbitration clause." (R. p. 63, Am. Order p. 30). This conclusion is consistent with the allegations in the Complaint, which involve the overall Palmetto Bluff community and numerous entities. The Club, and its low-level documents, are only a small part of that. In sum, the circuit court correctly held that "[e]ven if a valid arbitration clause existed, claims in the Complaint are outside of its scope." (R. p. 61, Am. Order p. 28).

V. The Developers' delegation clause argument falls flat.

In Section B of their Brief, the Developers make two broad arguments. First, the Developers argue that by simply ***saying*** a dispute is subject to arbitration, they can always—*always*—force that dispute to an arbitrator for all rulings of every kind. *Es muss sein*, even if there is no signed agreement among parties. It Must Be. Second, the Developers argue that if—as here—South Carolina law is contrary to the Developers' position, South Carolina law must be changed or ignored. The law must comply with the Developers. As this Court knows, it's the other way around—South Carolina Code § 15-48-20 and *Simpson v. MSA of Myrtle Beach, Inc.* control here, and the circuit court properly followed those precedents.

First, the Developers argue that because they invoke the mere claim of arbitrability, *all* parties must be swept away to an arbitration to determine if the

Developer's invocation is true. But the law does not vest the Developer with such limitless power. Here, there is no dispute that Homeowners have never entered into any arbitration agreement whatsoever with 11 Defendants. (R. pp. 10, 43). There also is no dispute that 15 of the Homeowners have no arbitration agreement whatsoever with the Club, or with any Defendant at all. (R. pp. 9, 42). Any dispute over arbitration is solely between (a) the Club, alone, and (b) the few Homeowners for which the Club has produced an alleged agreement to arbitrate. Those are the only parties to whom a purported "delegation clause" claim is even arguably applicable.

Turning to the "delegation clause," the Developers base nearly all of their arguments on their puzzling misapprehension that "Here, [Homeowners] did not specifically challenge the delegation provisions" and "because [Homeowners] did not specifically challenge the delegation provisions, the arbitrator, not a court, must decide the validity of Plaintiffs' agreement to arbitrate.'" (App. Br. pp. 19, 21). To put this misrepresentation to rest, Homeowners did indeed challenge the delegation provision:

> To be clear, Plaintiffs challenge the arbitration provision as a whole as well as its individual parts, including the so-called "delegation provision" which purports to give the arbitrator(s) the authority to decide whether the arbitration clause is valid. Under South Carolina law—including S.C. Code § 15-48-20 and *Simpson*—the Court decides whether an arbitration clause is valid.

(R. p. 757: Pl. Memo. to Stay Arb., p. 4 n.1) (emphasis in original). Because the Developers' foundation is faulty, their arguments based on that foundation collapse as well.

Importantly, the purported arbitration provision itself contains no "delegation clause" on its face. Instead, it references—in a vague and ambiguous manner—the Commercial Arbitration Rules of the American Arbitration Association. (R. p. 285).

Those rules indicate that an arbitrator has power to rule on jurisdiction and other matters, but the rules do not state that the arbitrator has exclusive power to do so. This is very different from other cases where the arbitration provisions were explicit on their face that the arbitrator had "exclusive authority to resolve" any such disputes. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66 (2010) (focusing on the specific language of the agreement at issue, which provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." (emphasis added)). For example, in *Rent-A-Center*, the United States Supreme Court repeatedly focused on the specific contractual wording "exclusive authority." In contrast, here the Developers' self-authored document contains no such "exclusive" language, and instead deliberately omits such restrictions.[29] That is a critical omission in South Carolina, where our Legislature has given the circuit court authority to rule on this issue, as specifically required by South Carolina statute, S.C. Code § 15-48-20.

This leads to the Developers' second argument in this section: South Carolina law must be ignored, or limited, to comply with Developers' wishes. Developers argue that its flawed and ambiguous contract should "displace" South Carolina law, and that South

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

Carolina Supreme Court law "does not control here." But South Carolina's statute is clear that a court "shall" have authority to deny an application for arbitration:

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

S.C. Code § 15-48-20 (emphasis added). And the South Carolina Supreme Court has reinforced this authority:

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

Simpson, 373 S.C. at 14 (emphasis added); *see also Housing Authority v. Cornerstone Housing*, 356 S.C. 328, 333, 588 S.E.2d 617 (Ct. App. 2003) (citing to S.C. Code § 15-48-20, the trial court ruled on arbitrability regarding an arbitration clause that (like here) stated it was subject to the Commercial Arbitration Rules of the American Arbitration Association—the same purported "delegation clause" as here); *Hooters of America v. Phillips*, 39 F. Supp. 2d 582, 609 (D.S.C. 1998) (holding that issues of "substantive arbitrability" are properly before the trial court and these issues are whether "a valid arbitration agreement exists between the parties and . . . [whether] the specific dispute falls within the substantive scope of the agreement") (*quoting Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997)). South Carolina's controlling case—*Simpson*, quoted above—is directly on point here, and involved an arbitration clause that (like here) referenced "Commercial Arbitration Rules of the American Arbitration Association" (the same purported "delegation clause" as here). *Simpson*, 644 S.E.2d at 666. The Developer's verbal acrobatics notwithstanding, South Carolina law is clear that the circuit court "shall" and

"must immediately" make this decision. Here, the circuit court got it right and this Court should affirm.

CONCLUSION

The circuit court was right to deny Developers' Motion to Compel Arbitration. For each of the reasons discussed above, this Court should affirm the Order. Homeowners respectfully request that this Court would make the rulings requested in Homeowners' Cross-Appeal, and remand this case for the jury trial to which Homeowners are entitled.

Respectfully submitted,

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July 19, 2023
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-001587

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

v.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

INTRODUCTION

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

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

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

The Arbitration Orders should be reversed and arbitration ordered.

ARGUMENT

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

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

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

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

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

A. The Federal Arbitration Act Applies

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

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

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

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

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

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

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

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

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

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

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

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

C. Binding Arbitration Agreements Cover This Dispute

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. The Assignee Argument Is Preserved and Meaningfully Undisputed

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

2. Principles of Equitable Estoppel Bind the Remaining Plaintiffs

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

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

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

3. The Nonsignatory Defendants May Enforce the Arbitration Agreements

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

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

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

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

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

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

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

D. The Arbitration Agreements Are Enforceable

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

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

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

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

2. The Arbitration Agreements Are Not Unconscionable

a. Plaintiffs Did Not Lack Meaningful Choice of Luxury Homesites

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

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

contrary, the *Damico* Court specifically "emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Damico*, 437 S.C. at 611, 879 S.E.2d at 755. Indeed, "in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances … *the parties' relative sophistication*." *Id.* at 613, 879 S.E.2d at 755 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Agreements' Limitations Period Does Not Bar Arbitration

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2022-001587

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

v.

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

CERTIFICATE OF COUNSEL

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

July 20, 2023

s/Kirsten Small

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