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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2024-002098

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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.

PETITIONERS' RESPONSE TO AMICUS CURIAE BRIEF OF PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

Counsel listed inside front cover

Val H. Stieglitz, SC Bar No. 5356
Maynard Nexsen, PC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, SC 29202
Telephone: 803.771.8900
Email: VStieglitz@maynardnexsen.com

Bruce Wallace, SC Bar No. 11653
Maynard Nexsen, PC
205 King Street, Suite 400
Charleston, SC 29401
Telephone: 843.720.1760
Email: BWallace@maynardnexsen.com

Kirsten Small, SC Bar No. 75681
Maynard Nexsen, PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
Telephone: 843.370.2211
Email: KSmall@maynardnexsen.com

Of Counsel:
Donald Falk, *admitted pro hac vice*
Schaerr Jaffe, LLP
Four Embarcadero Center, Suite 140
San Francisco, CA 94111
Telephone: 415.562.4942
Email: DFalk@schaerr-jaffe.com

Attorneys for Petitioners

Douglas W. MacKelcan, III SC Bar No. 76332
Copeland, Stair, Valz & Lovell, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Telephone: (843) 727-0307
Email: dmackelcan@csvl.law

Attorney for Petitioners Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards

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ARGUMENT

Half of the arguments submitted by *Amicus Curiae* the Public Investors Advocates Bar Association ("the PIABA") simply parrot contentions made in Respondents' brief. The other half were not raised by Respondents, and thus are not properly considered by the Court. *See James v. Anne's Inc.*, 390 S.C. 188, 193–94, 701 S.E.2d 730, 732–33 (2010) ("[A]mici can argue only the issues that were raised by the parties." (citing Rule 213, SCACR)). All of the PIABA's contentions are meritless, and the Court should reject them.

I. The Question of Unconscionability Can Be Delegated to the Arbitrator

The PIABA argues that "[d]etermining whether a valid arbitration agreement was formed is always for the Court, even if an arbitration agreement purports to delegate *that question* to the arbitrator." (PIABA Br. at 4 (emphasis added).) But "that question" is actually two questions: (1) whether an arbitration agreement was formed; and (2) whether the arbitration agreement is valid (i.e. whether it is enforceable). *See Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 5, 881 S.E.2d 646, 648 (Ct. App. 2022) (recognizing that "the issue of the formation of the arbitration agreement is quite different from the issue of the validity of a concluded agreement, i.e. whether an arbitration agreement that was formed is nevertheless invalid because of fraud, duress, unconscionability, or some other defense to the enforcement of a contract" (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 n.2 (2010)). Only the latter question is at issue here.[1]

[1] There is no dispute that arbitration agreements were formed; there is only a dispute as to whether those agreements bind, or may be enforced by, nonsignatories. (Petitioners' Br. at 23-34; Petitioners' Reply Br. at 18-24.) This dispute is one of arbitrability that may be delegated to the arbitrator, as the parties did here. *See Phoenix Ins. Co. of Am. v. Ping an*

Unconscionability goes to the validity of the arbitration agreement. *See Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884 (2013) (holding that "[c]ourts should not refuse to enforce a contract on grounds of unconscionability" unless there is both unfairness and inequality of bargaining power); *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 604, 879 S.E.2d 746, 751 (2022) (same); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016) (same); *Maybank v. BB&T Corp.*, 416 S.C. 541, 574, 787 S.E.2d 498, 515 (2016) (same). And invalidity of an arbitration agreement is a question of arbitrability that the parties can agree to delegate to the arbitrator. *See, e.g.*, *Simmons*, 438 S.C. at 6, 881 S.E.2d at 648 (holding that court will decide validity "assuming the parties have not delegated that issue to the arbitrator").

Relying on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the PIABA contends that "an agreement's unconscionability goes to whether the agreement was validly formed," and therefore "courts must answer that question." (PIABA Br. at 5.) While there is a brief comment in *Simpson* suggesting that unconscionability goes to the existence of a contract, overall it is clear that *Simpson* recognized unconscionability as a question of the *validity* and *enforceability* of a contract. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (recognizing that a court "may refuse to enforce [an] unconscionable clause"); *id.* at 30, 644 S.E.2d at 671 ("[T]his provision is an unconscionable waiver of statutory rights, and therefore, unenforceable."); *id.* at 32, 644

Prop. & Cas. Ins. Co. of China, Ltd., No. 24-cv-1056, 2025 WL 2784228, at *3 (E.D. Pa. Sept. 30, 2025) (citing decisions by the 1st, 2d, 5th, 6th, and 8th Circuit holding that "the issue of whether a non-signatory may enforce a valid arbitration agreement against a signatory is a question of arbitrability").

S.E.2d at 672 ("[T]the provision is unconscionable and unenforceable."); *id.* at 33, 644 S.E.2d at 673 ("[W]e hold that this provision of the arbitration clause is an unconscionable and unenforceable violation of public policy.").

In fact, this Court has repeatedly described *Simpson* as holding the arbitration agreement *unenforceable* because it was *unconscionable*. *See, e.g.*, *Herron v. Century BMW*, 395 S.C. 461, 469 n.10, 719 S.E.2d 640, 644 n.10 (2011) ("In *Simpson*, this Court denied a motion to compel arbitration, finding an arbitration clause in a vehicle trade-in contract was *unconscionable and, therefore, unenforceable* due to a multitude of one-sided terms." (emphasis added)); *Maybank*, 416 S.C. at 575, 787 S.E.2d at 516 (citing *Simpson* for the proposition that "only in rare circumstances has an appellate court *invalidated* a contract on the basis of unconscionability" (emphasis added)); *cf. Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 597, 910 S.E.2d 474, 477 (2024) (discussing whether to "salvage" an existing arbitration agreement by severing unconscionable provisions, and citing *Simpson*); *Damico*, 437 S.C. at 618–19, 879 S.E.2d at 758–59 (citing *Simpson* to support severance analysis of existing arbitration agreement); *D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 (2016) (same).[2]

Accordingly, the Court should reject, as contrary to settled South Carolina law, the

[2] The Court of Appeals has likewise described *Simpson* in this way. *See Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC*, 445 S.C. 566, 598, 915 S.E.2d 736, 753 (Ct. App. 2025) ("In *Simpson*, our supreme court found an arbitration clause in an adhesion contract with unconscionable terms 'wholly unenforceable . . . .'"); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) ("In *Simpson*, our supreme court held an arbitration clause in a vehicle trade-in contract between an automobile dealership and customer was unconscionable and unenforceable.").

PIABA's contention that unconscionability cannot be delegated to the arbitrator.

II. Incorporation of the AAA Commercial Arbitration Rules Clearly and Unmistakably Delegates Arbitrability to the Arbitrator

The PIABA next contends that "mere incorporation" of the AAA Commercial Arbitration Rules is insufficient to demonstrate the parties' clear and unmistakable intent to delegate arbitrability to the arbitrator. (PIABA Br. at 7-12.) In support of this contention, the PIABA makes two arguments: (1) the arbitration agreement does not use the word "delegation"; and (2) AAA Commercial Rule 7 "merely *allows* an arbitrator to decide gateway matters; it does not say the arbitrator *must* decide them." (PIABA Br. at 8.)

A. The Cases Cited by the PIABA Do Not Support Its Argument

With respect to the first argument, the PIABA admits that state and federal courts have overwhelmingly held that incorporation of AAA rules in an arbitration agreement clearly and unmistakably establishes the parties' agreement to have the arbitrator, rather than the court, decide issues of arbitrability. Indeed, as the Sixth Circuit recently noted, "every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate 'arbitrability.'" *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020). State courts agree. *See*, *e.g.*, *Uber Techs., Inc. v. Royz*, 517 P.3d 905, 910 (Nev. 2022) ("[A]s many courts have found, incorporating the AAA's rules, even without more, constitutes clear and unmistakable evidence of intent to submit the question of arbitrability to the

arbitrator."); *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) ("As a matter of policy, we adopt the majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator.").[3]

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[3] In addition to Delaware and Nevada, numerous other states have recognized the same rule, including at least the following: **Alabama**: *Wiggins v. Warren Averett, LLC*, 307 So. 3d 519, 524 (Ala. 2020) (agreement to arbitrate "in accordance with" AAA Commercial Arbitration Rules delegated arbitrability to the arbitrator); **Arizona**: *Brake Masters Sys., Inc. v. Gabbay*, 78 P.3d 1081, 1088 (Ariz. Ct. App. 2003) ("By incorporating the AAA rules into the agreement, [the parties] clearly and unmistakably agreed that the arbitrator would primarily decide the arbitrability of the issues."); **Arkansas**: *HPD, LLC v. TETRA Techs., Inc.*, 424 S.W.3d 304, 311 (Ark. 2012); **Colorado**: *Johnson-Linzy v. Conifer Care Communities A, LLC*, 469 P.3d 537, 542 (Colo Ct. App. 2020); **Florida**: *United States Fire Ins. Co. v. Am. Walks at Port St. Lucie, LLC*, 386 So. 3d 575, 580 (Fla. Dist. Ct. App. 2024); **Indiana**: *Illinois Cas. Co. v. B&S of Fort Wayne Inc.*, 235 N.E.3d 827, 835 (Ind. 2024); **Iowa**: *Smith Barney, Inc. v. Keeney*, 570 N.W.2d 75, 78 (Iowa 1997); **Kentucky**: *Ally Align Health, Inc. v. Signature Advantage, LLC*, 574 S.W.3d 753, 756 (Ky. 2019); **Louisiana**: *Fla. Gas Transmission Co., LLC v. Tex. Brine Co., LLC*, 267 So. 3d 633, 637 (La. Ct. App. 2018) ("A contract's incorporation of the AAA Rules that empower an arbitrator to decide issues of arbitrability serves as clear and unmistakable evidence of the parties' intent to delegate such issues to the arbitrator."); **Mississippi**: *McInnis Elec. Co. v. Brasfield & Gorrie, LLC*, 384 So. 3d 485, 490 (Miss. 2023) ("Agreeing to the American Arbitration Association rules is tantamount to agreeing to delegate scope questions to the arbitrators."); **Missouri**: *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 48 (Mo. 2017); **New Mexico**: *Felts v. CLK Mgmt., Inc.*, 254 P.3d 124, 134 (N.M. Ct. App. 2011) ("[I]ncorporation of the NAF Code of Procedure constitutes clear and unmistakable evidence of the parties' intent to delegate arbitrability issues."); **New York**: *Acevedo v. Citibank, N.A.*, 83 Misc. 3d 706, 745, 209 N.Y.S.3d 753, 785 (N.Y. Sup. Ct. 2024); **North Carolina**: *Bailey v. Ford Motor Co.*, 780 S.E.2d 920, 927 (N.C. Ct. App. 2015) ("Given the parties' adoption of the CPR rules … we hold that the parties clearly and unmistakably intended that an arbitrator would decide questions of substantive arbitrability, like the one at issue here."); **North Dakota**: *26th St. Hosp., LLP v. Real Builders, Inc.*, 879 N.W.2d 437, 446 (N.D. 2016) ("The incorporation of the AAA Rules is clear and unmistakable evidence the parties agreed to arbitrate the question of arbitrability."); **Oregon**: *Gozzi v. W. Culinary Inst., Ltd.*, 366 P.3d 743, 751 (Or. Ct. App. 2016); **Texas**: *Estate of Moncrief*, 699 S.W.3d 315, 334–35 (Tex. App. 2024); **Washington**: *Raven Offshore Yacht, Shipping, LLP v. F.T. Holdings, LLC*, 400 P.3d 347, 348 (Wash. Ct. App. 2017); **West Virginia**: *W. Va. CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 796 S.E.2d 574, 588 (W. Va. 2017) ("We find that incorporation of the AAA rules into

Weighed against this mountain of federal and state appellate authority, the smattering of cases the PIABA cites for the contrary proposition are not persuasive. The block quote from the trial court decision in *Taylor v. Samsung Electronics America, Inc.* (PIABA Br. at 9) superficially appears supportive, but the arbitration agreement in that case provided only that arbitration would be "administered by the AAA under its Consumer Arbitration Rules." No. 1:19-cv-4526, 2020 WL 1248655, at *3 (N.D. Ill. Mar. 16, 2020). The same language appears in the arbitration agreement at issue in another case the PIABA cites, *Global Client Solutions, LLC v. Ossello*, 367 P.3d 361, 365 (Mont. 2016). A statement that arbitration will be "administered by the AAA" is far less clear than the delegation clause here, which plainly states that arbitration will occur "in accordance with" the AAA Commercial Arbitration Rules.

Gilbert Street Developers, LLC v. La Quinta Homes, LLC, 174 Cal. App. 4th 1185 (Cal. Ct. App. 2009), is even more clearly inapposite. The court in *Gilbert* found no clear and unmistakable intent because the AAA "had no rule providing that arbitrators had jurisdiction to rule on their own jurisdiction" when the parties entered into the arbitration agreement. *Id.* at 1187-88. In light of this, the court reached the unsurprising conclusion that the parties cannot "clearly and unmistakably" incorporate a rule that does not exist. *See id.* at 1193-94. The final case cited by the PIABA is an unpublished decision by the Ohio Eighth District Court of Appeals that is countered by decisions of other Ohio District

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the arbitration agreements is sufficient evidence that the parties clearly and unmistakably agreed to arbitrate arbitrability."); **Wisconsin**: *Mortimore v. Merge Techs. Inc.*, 824 N.W.2d 155, 161 (Wisc. Ct. App. 2012).

Courts of Appeals. *Compare Little Aquanauts, LLC v. Makovich & Pusti Architects, Inc.*, No. CV-19-926299, 2021 WL 1147753, at *4 (Ohio 8th Dist. Ct. App. 2021), *with, e.g.*, *Summit Constr. Co. v. L.L.F.J.A.O., LLC*, No. 25621, 2012 WL 473953, at *4 (Ohio 9th Dist. Ct. App. Feb. 15, 2012) (holding that incorporation of AAA Construction Industry Arbitration Rules is clear and unmistakable evidence of parties' intents to delegate arbitrability to the arbitrator); *von Arras v. Columbus Radiology Corp.*, No. 04AP–934, 2005 WL 1220735, at *4 (Ohio 10th Dist. Ct. App. May 24, 2005) ("When, as here, the parties explicitly incorporate rules, including Rule 7, which empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."). Thus, against eleven federal courts of appeals and precedent from 22 states, the PIABA musters one unpublished decision on the minority side of a split in one intermediate state court of appeals. This Court should join the overwhelming weight of authority and hold that incorporating the AAA Commercial Rules clearly and unmistakably delegates the issue of arbitrability to the arbitrator.

B. The PIABA's "Must/May" Argument Is Improper and Meritless

The PIABA's second argument is that the AAA Commercial Arbitration Rules, which provide that the arbitrator "shall have the power to rule on his or her own jurisdiction," establish only that the arbitrator "may" decide arbitrability, not that the arbitrator "must" do so. (PIABA Br. at 9-11.) As an initial matter, this argument is not properly before the Court because Respondents never advanced it. *See James*, 390 S.C. at 193–94, 701 S.E.2d at 732–33. In any event, the argument is without merit. As the Sixth Circuit cogently explained, accepting such semantic contortions would lead to chaos:

> Most people who read the sentence, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction," wouldn't then think "but a court may also rule on this issue." And things would get pretty chaotic if the rule were read this way. It would lead to a race to the courthouse (or arbitrator's forum) to have each party's preferred decisionmaker be the first to rule on the issue. For if a court ruled on the issue first, then that ruling could bind the arbitrator under the doctrine of res judicata. But if the arbitrator ruled on the issue first, then that ruling would be subject to an exceedingly narrow form of judicial review.

Blanton, 962 F.3d at 849 (citations omitted). That is why the court concluded "that the AAA Rules are best read to give arbitrators the exclusive authority to decide questions of 'arbitrability.'" *Id.*; *see also, e.g.*, *Illinois Cas. Co. v. B&S of Fort Wayne Inc.*, 235 N.E.3d 827, 834 (Ind. 2024) (agreeing with *Blanton's* reasoning).

III. The Arbitration Agreement Is Not Unconscionable

The PIABA next argues that the arbitration agreement is unconscionable. With respect to the first element of unconscionability—absence of meaningful choice—the PIABA seeks to reproach Palmetto Bluff for not proving that it would have "agreed to strike or modify the arbitration clause had any Respondent asked."[4] (PIABA Br. at 14-15.) This argument, too, was not raised by Respondents and therefore cannot be considered by the Court. *See James*, 390 S.C. at 193–94, 701 S.E.2d at 732–33. Additionally, it is beside the point. Even if Respondents could not have changed or struck out the arbitration agreement, they are nothing like the unsophisticated purchasers of primary residences in *Damico* and *D.R. Horton*. Rather, Respondents are purchasers of luxury second homes,

[4] Ironically, the PIABA seeks to support this contention with the truism that those who have the gold make the rules, ignoring the uncontested fact that Respondents, as wealthy purchasers of luxury homes, have plenty of gold.

often for out-of-state purchasers, often held by limited liability companies, and often purchased as investments for rental business. They had ample choice of properties in many similar communities in the Lowcountry of South Carolina, or for that matter in Georgia or North Carolina.

With respect to the second prong of the unconscionability analysis—whether the terms of the arbitration agreements are oppressive—the PIABA focuses on the "unilateral amendment" term in the Membership Agreement. (PIABA Br. at 15-16.) The PIABA's argument ignores the controlling and dispositive fact that the unilateral amendment clause does not appear in the arbitration agreement. Under rule established in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), courts must "separate the validity of an arbitration clause from the validity of the contract in which it is embedded." *Damico*, 437 S.C. at 608–09, 879 S.E.2d at 753. Under *Prima Paint*, "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4. Since the unilateral amendment provision does not appear in the arbitration agreement, under *Prima Paint* it cannot be considered in the unconscionability analysis. *See Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 544 (4th Cir. 2005) (holding unilateral amendment term irrelevant where it was not "*contained* in the arbitration policy" (emphasis in original)); *Hicks v. Brookdale Sr. Living Communities, Inc.*, No. 6:17-cv-2462, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018) (same). Even if the unilateral amendment provision were relevant to unconscionability (under *Prima Paint*, it is not), it would not justify a finding of unconscionability here. It is undisputed that the unilateral amendment

provision has never been used to modify the arbitration agreement, let alone unreasonably.

IV. Nonsignatory Respondents Are Bound Under Principles of Equitable Estoppel

Finally, the PIABA relies on *Wilson v. Willis*, 426 S.C. 326, 345, 827 S.E.2d 167, 177 (2019), for the proposition that equitable estoppel should never be used as "a sword to compel arbitration." (PIABA Br. at 16-17.) But what *Wilson* actually says is that while equitable estoppel is to be used "sparingly," nevertheless it "is . . . properly viewed as a shield to prevent injustice rather than a sword to compel arbitration." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (quoting *Hirsch v. Amper Fin. Servs., LLC*, 71 A.3d 849, 852 (N.J. 2013)). Here, equitable estoppel is properly applied to shield Palmetto Bluff from injustice.

At its core, this case is about Respondents' complaints that they were forced to become Club members when they bought their properties, and that the Club is mistreating them by limiting short-term renters' access to Club amenities and charging improper fees for Club access. Respondents, both signatories and nonsignatories, can only assert their claims if they are members of the Club and subject to the Membership Agreement and the Membership Plan. Yet to avoid arbitration, the nonsignatory Respondents contend 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. Respondents cannot have it both ways. They want a membership that, like Schrödinger's cat, is both alive and dead depending on which state of affairs benefits a particular argument. The long-settled law of South Carolina is that "[a] party may not

rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 295, 733 S.E.2d 597, 604 (Ct. App. 2012).

The PIABA also contends that "[a] state cannot have special estoppel rules for arbitration agreements that do not apply to other contracts." (PIABA Br. at 16.) The PIABA appears to be suggesting that South Carolina has adopted an arbitration-specific equitable estoppel rule for binding nonsignatories to arbitration agreements. This is incorrect. The rule that one cannot claim the benefits of a contract without being bound to the contract in its entirety arises from "[w]ell-established common law principles," which apply equally to arbitration agreements and to all other kinds of contracts. *Pearson*, 400 S.C. at 288-89, 733 S.E.2d at 600.

CONCLUSION

The PIABA's arguments, to the extent they are even properly considered by the Court, are meritless and should be rejected by the Court.

Signatures on following page.

February 17, 2026
Columbia, South Carolina

Respectfully submitted,

MAYNARD NEXSEN, PC

s/Val H. Stieglitz

Val H. Stieglitz, SC Bar No. 5356
MAYNARD NEXSEN, PC
1230 Main Street, Suite 700
Columbia, SC 29201
Telephone: 803.771.8900
Email: VStieglitz@nexsenpruet.com

Bruce Wallace, SC Bar No. 11653
MAYNARD NEXSEN, PC
205 King Street, Suite 400
Charleston, SC 29401
Telephone: 843-720-1760
Email: BWallace@nexsenpruet.com

Kirsten Small, SC Bar No. 75681
MAYNARD NEXSEN, PC
104 S. Main Street, 9th Floor
Greenville, SC 29601
Telephone: 864.370.2211
Email: KSmall@nexsenpruet.com

Donald Falk, *admitted pro hac vice*
SCHAERR JAFFE, LLP
Four Embarcadero Center, Suite 140
San Francisco, CA 94111
Telephone: 415.562.4942
Email: DFalk@schaerr-jaffe.com

Attorneys for Petitioners

Douglas W. MacKelcan, III, SC Bar No. 76332
COPELAND, STAIR, VALZ & LOVELL, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Telephone: (843) 727-0307
Email: dmackelcan@csvl.law

Attorney for Petitioners Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards