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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
The Honorable Jessica A. Salvini, Circuit Court Judge

Appellate Case No. 2025-001404
Circuit Court Case No. 2024-CP-39-00465

David Griffith and William Coleman, as Trustee of the William Coleman Revocable Trust, individually, and on behalf of all others similarly situated, Respondents,

v.

JMC Communities, Inc., JMC Homes of South Carolina, LLC, Patrick Square, LLC f/k/a Digital Development, LLC, Alpha Omega Construction Group, Inc., Gorze, Inc., Cothran Landscapes and Grading, LLC, Gentry Services, LLC a/k/a Gentry Brothers Services, LLC, Tiny Bill Swaney d/b/a Swaney Masonry, Solid Rock Construction Services, LLC, H&H Concrete, LLC, Maria Construction Inc., F&V Framing, LLC, Five Star Construction, Inc., Davis Framing, LLC, Ashley Cothran d/b/a Cothran Custom Homes, LLC, UFP Mid-Atlantic, LLC, Builder First Source, Inc. a/k/a Builders Firstsource Atlantic Group, LLC a/k/a Builders Firstsource Southeast Group, LLC, RC Johnson, LLC, Gunter Heating and Air Conditioning of SC, LLC, 84 Lumber Company, LP, Dogwood Exteriors, LLC, H&R Drywall, Inc., Cristobal and Painters, LLC, Willow Tree Landscaping, Inc., Harbin Lumber Company, Inc., Soto HVAC, LLC, Riverside Landscaping, LLC, International Construction Services, Inc., Palmetto Grading and Drainage, Inc., Jane Doe #1-10, and John Doe #27-50, Defendants,

of which JMC Communities, Inc., JMC Homes of South Carolina, LLC and Patrick Square, LLC are the Appellants.

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Statement of the Issues on Appeal

1. Whether arbitration agreements contained within construction contracts involve interstate commerce, and are therefore enforceable under the Federal Arbitration Act, where the construction involved multiple out-of-state contractors and the transportation of labor and materials across state lines, and the prospective homeowners selected personalized options to customize their homes, revealing the essential character of the parties' transaction to be construction, as opposed to the sale of a completed dwelling.

2. Whether arbitration provisions—when considered in isolation as required by South Carolina law—could be considered unconscionable in circumstances where the rights to arbitration are mutual, there are no exclusions to the scope of arbitrability, and the provisions related to the scope of arbitral issues are customary and commonplace.

Statement of the Case

A. The Patrick Square Residential Community and the Parties.

Patrick Square is a residential subdivision in Pickens County, South Carolina, comprised of approximately 371 dwelling units, including single family homes, paired homes, and town homes. (R. p. 18, ¶ 1; p. 190, ¶ 4). Patrick Square was developed by the Appellants—JMC Communities, Inc. ("JMCC") provided administrative and management support; JMC Homes of South Carolina, LLC ("JMC Homes") acted as the general contractor and builder for approximately 236 of the approximately 265 single family homes; and Patrick Square, LLC f/k/a Digital Development, LLC ("PSL") acted as the seller of the homes built by JMC Homes. (R. pp. 190–191, ¶¶ 6–8). (JMCC, JMC Homes, and PSL are collectively referred to herein as the "Developer Defendants" or the "Appellants.")

On or about November 7, 2016, JMC Homes entered into an "Owner/Builder Agreement" with William Coleman and Deborah Coleman, in their individual capacities (the "Coleman Construction Agreement"). (R. p. 191, ¶ 10; pp. 80–90). Under the Coleman Construction Agreement, JMC Homes, on behalf of the Developer Defendants, agreed to construct a single-family home on Lot No. 235 for the price of $364,190. (R. p. 80, §§ 1–2; p. 191, ¶10).[1]

On or about December 20, 2018, JMC Homes entered into an "Owner/Builder Agreement" with David Griffith (the "Griffith Construction Agreement"). (R. p. 191, ¶ 11; pp. 92–103). Under the Griffith Construction Agreement, JMC Homes, on behalf of the Developer Defendants, agreed

[1] The only deed in the record relating to Lot 235 indicates that PSL conveyed Lot No. 235 to "Deborah C. Coleman, Trustee of the Deborah C. Coleman Revocable Trust, dated the 20th day of January, 2012, her heirs and assigns forever." (R. p. 129). The connection between the Deborah C. Coleman Revocable Trust (which is not a party) and the William Coleman Revocable Trust (one of the Respondents) is not made clear in the record. In all events, Mr. and Ms. Coleman, in their individual capacities, signed the Coleman Construction Agreement. (R. pp. 80–90, at p. 86).

to construct a single-family home on Lot No. 277 for the price of $375,560. (R. p. 92, §§ 1–2; p. 191, ¶ 11).

B. The Construction Agreements.

The Coleman Construction Agreement and the Griffith Construction Agreement (the "Construction Agreements") are not identical. However, they both make clear that their general intent and purpose was to set out the terms by which the Developer Defendants would construct single family homes. Moreover, the Construction Agreements not only afford the prospective residents with options for the custom construction of their respective homes, but they also contain agreements to arbitrate disputes arising from or related to the Construction Agreements.

A. <u>The Construction Agreements Set Out the Terms by the Which Developer Defendants Would Construct Single Family Homes.</u>

Section 1 of the Construction Agreements describes the "Scope of Work," to include the "furnish[ing of] all the materials and labor to perform all of the work necessary for the construction through completion and delivery of a single family residential home." (R. p. 80, § 1; p. 92, § 1). Sections 2 and 3 of the Construction Agreements lay out a construction schedule and issues relating to potential construction delays, respectively. (R. p. 81, §§ 3–4; p. 93, §§ 3–4). In particular, Section 3 of the Construction Agreements provides that construction will commence only after execution of the Construction Agreement or the closing on the lot, and it requires the builder to use its best efforts to complete the residence within approximately 150 days from the start of construction. (R. p. 81, § 3; p. 93, § 3). And Sections 5 and 6 of the Construction Agreements describe the specific construction plans and specifications, together with the applicable construction standards. (R. p. 81, §§ 5–6; p. 93, §§ 5–6).

Under section 14 of the Construction Agreements, the prospective residents agreed that the builder—JMC Homes—was "entitled to select the subcontractors, employees, and suppliers who will work on or provide material to the Home." (R. p. 83, § 14; p. 95, § 14). Consistent with this discretion, JMC Homes hired subcontractors to work on the Patrick Square residential development project that were from states other than South Carolina, and materials were transported across state lines in order to carry out the construction. (R. p. 191, ¶¶ 14–15; pp. 21–25, ¶¶ 28–53).

B. Options and Choices for Custom Construction.

The Construction Agreements provide that the respective single-family homes "will be constructed substantially in accordance with the floor plan, elevation, standard features, *custom features*, and other applicable drawings and specifications described in the Plans and Specifications *subject to substitutions, modifications, and change orders authorized by this Agreement*." (R. p. 81, § 5 (emphasis added); R. p. 93, § 5 (emphasis added)). Section 8 of the Construction Agreements then sets out some of the custom designs the prospective residents choose and select for their single-family homes:

8. **Selections & Change Orders**. Owner agrees to make all necessary selections for exterior colors, interior finishes, electrical outlet locations, and lighting locations within forty-five (45) days from the effective date of this agreement. Owner also agrees to make all decorative lighting fixture selections and to review and approve the landscaping design within seven (7) days after the rough-in electrical work is completed. Any and all upgrades or modifications to the standard plan and included finishes will also be made within 45 days of the effective date of this agreement and shall be payable to Builder at the time the change order is signed. Selections or changes or upgrades made by Owner shall be final unless the selected item or color becomes unavailable to Builder and Builder requests Owner to make an alternative selection. If Owner fails to make any selection within the timeframe specified herein, the Builder may, at Builder's option, make the selection on Owner's behalf without further notice. Builder makes no representation about any color selected by Owner, but will use best and reasonable efforts to install colors as close as possible to those selected.

If Owner and Builder agree to any change in the Plans and Specifications or standard selections following execution of this Agreement, such change, and its cost, shall be set forth in a written change order signed by Owner and Builder. The cost of each change shall be added to the total price of the Residence and shall be payable to Builder at the time the change order is signed. Owner understands that certain items and improvements are subject to design change by the manufacturer and subject to changes in color and gradations and may vary from any samples that may be shown or specified on the plans made available to Owner. No subcontractor or supplier is authorized to agree to a change on behalf of Builder.

(R. p. 82, § 8; p. 94, § 8). Exhibit B to the Construction Agreements, titled "Construction Draw Schedule," sets out a schedule of payments to be made to JMC Homes by the prospective residents. (R. p. 90, Exh. B; p. 102, Exh. B). Those draw schedules separate out the "Total base contract price" from the "Options" the prospective resident gets to select. (*Id.*). The "Options" total $37,290 (more than 11% of the base contract price) in the case of the Coleman Construction Agreement, and they total $42,460 (more than 12% of the base contract price) in the case of the Griffith Construction Agreement. (*Id.*)

C. <u>Agreements to Arbitrate.</u>

If JMC Homes materially breaches the Construction Agreements, the prospective residents "shall be entitled, after giving Builder written notice of such breach and a ten (10) day period in which to substantially cure the breach, *to demand arbitration* or to terminate this Agreement in writing." (R. p. 84, § 22(A) (emphasis added); p. 96, § 22(A) (emphasis added)). The Construction Agreements also afford JMC Homes a mutual right to arbitrate in the event of a breach of the prospective resident:

> If Owner fails to timely make any payment required under this Agreement or other breach, then Builder shall be entitled after giving Owner written notice of such breach and a ten (10) day period to cure, to immediately terminate this Agreement by providing written notice to Owner of such termination or *to demand arbitration*. . . .

(R. p. 84, § 22(B) (emphasis added); p. 96, § 22(B) (emphasis added)). The Coleman Construction Agreement further provides the following standalone arbitration provision:

24. **Binding Arbitration.** All parties to this Agreement acknowledge that, in the event any issue in law or equity arises after execution of this Agreement, same shall be resolved through binding arbitration. If the claim relates to the warranty provided by Builder and/or other claims, then the arbitration will be provided through Construction Arbitration Services, Inc. ("CAS"). The CAS arbitration will be conducted in accordance with their rules in effect at the time of the request for arbitration and the Federal Arbitration Act. All parties by entering into this agreement acknowledge that arbitration shall be the only manner of settling any issue arising after execution of this Agreement and that the results of the arbitration decision shall be binding on the parties to this Agreement. All parties to the Agreement agree to arbitrate the matter while continuing to comply with the other terms of this Agreement including proceeding to Closing, unless the parties mutually consent to a stay of further compliance with the terms of the Agreement during the period the issue is being arbitrated. In the event that an arbitration decision requires repairs or adjustments to be made by the Builder, these repairs or adjustments shall be made in accordance with the standards as outlined in the Warranty, or which are customary to generally accepted local area building industry criteria and standards in the event the Warranty is silent as to an applicable standard. The provisions of this paragraph shall survive Closing and delivery of the limited warranty deed to the Owner.

(R. p. 85, § 24). A comparable standalone arbitration provision does not appear in the Griffith Construction Agreement.

C. Procedural History

A. Plaintiffs' First Amended Complaint

On September 24, 2024, David Griffith and William Coleman as Trustee of the William Coleman Revocable Trust, individually and on behalf of all others similarly situated filed a first amended putative class action complaint (the "Complaint") against the Developer Defendants and over twenty contractors or subcontractors allegedly involved in the construction of the dwelling units at Patrick Square. (R. pp. 14–38). The named contractors and subcontractors who allegedly participated in the construction of dwelling units at Patrick Square—according to the Respondents' own allegations—included entities organized in South Carolina as well as North Carolina, Georgia, Pennsylvania, and Delaware. (R. pp. 21–25, ¶¶ 28–53).

The Complaint alleges the Developer Defendants "designed, developed, constructed, marketed and sold the Plaintiffs' Residences," and it asserts various defects in the constructed dwelling units, including "failure in exterior cladding systems, inadequate framing, inadequate shingle installation, inadequate brick installation, water intrusion into and through windows, doors, roofs and the exterior building envelope, as well as, flooding and insufficient drainage capabilities in the yards and spaces adjacent to the homes." (R. p. 20, ¶ 20; pp. 28–29, ¶ 91). Based on these allegations, the Plaintiffs assert two causes of action against all defendants: (1) negligence and gross negligence/recklessness and (2) breach of implied warranty. (R. pp. 34–37, ¶¶ 122–139).

At the time of this appeal, the Complaint remains a putative class action that has not been certified. As a result, the only plaintiffs are David Griffith and William Coleman as Trustee of the William Coleman Revocable Trust.

B. Developer Defendants' Motion to Compel Arbitration and Dismiss or Stay, the Trial Court's Orders, and the Timely Notice of Appeal.

Following a notice of removal to the United States District Court for the District of South Carolina and a subsequent remand order, the Developer Defendants filed a Motion to Compel Arbitration and Dismiss or Stay (the "Motion"). (R. pp. 39–41). The Developer Defendants argued in briefing filed with the trial court that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "FAA") compelled arbitration of the Plaintiffs' claims because (a) the arbitration agreements are in writing, (b) the matter involves interstate commerce, and (c) the Respondents' claims fall within the scope of the arbitration provisions. (R. pp. 46–50).

The trial court heard oral arguments on the Motion on May 7, 2025. (R. pp. 151–187). The following day on May 8, 2025, the trial court entered a Form 4 Order denying the Motion (the "Form 4 Order"). (R. pp. 1–3). And on June 30, 2025, the trial court entered a long-form Order denying the Motion (the "Order"). (R. pp. 4–13). In the Order, the trial court based its decision on four (4) separate conclusions: (1) the matter does not involve interstate commerce, rendering the FAA inapplicable; (2) the arbitration provisions in the Construction Agreements do not comply with the notice requirements of the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. §§ 15-48-10, *et seq.*; (3) the arbitration provisions violate South Carolina public policy and the law set forth in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022); and (4) as it relates to Respondent William Coleman as Trustee for the William Coleman Revocable Trust, there is no agreement with that entity, meaning there is no arbitration requirement to enforce. (*Id.*)

On July 15, 2025, the Developer Defendants timely appealed from the Form 4 Order and the Order. (R. pp. 147–150).

SUMMARY OF THE ARGUMENT

The arbitration provisions in the Construction Agreements are enforceable under the FAA because they are in writing and the parties' transaction involves interstate commerce. Not only were out-of-state contractors involved in the construction, but also labor and supplies were transported into South Carolina from out of state.

In addition, South Carolina courts consistently recognize that contracts for construction involve interstate commerce. Here, the essential character of the transactions is that of construction of single-family dwellings, as opposed to the sale of a completed residence. This is evident from the plain language of the Construction Agreements, as well as the options prospective homeowners were allowed—and in some cases expected—to make to customize the construction of their home.

The arbitration provisions in the Construction Agreements encompass the parties' dispute, despite the fact that the Respondents do not assert a claim for breach of the Construction Agreements. That is because the Respondents' claims arise from the construction of homes, and the Complaint makes repeated connections to the Construction Agreements.

Finally, the arbitration provisions are not unconscionable. As a threshold matter, the Court should first define the scope of the arbitration provision to include only Section 22(A) of the Construction Agreements and Section 24 of the Coleman Construction Agreement because these distinct, standalone provisions are not connected with any other provisions of the Construction Agreements that would require a different result under South Carolina law. Upon review of the arbitration provisions properly defined, there is no basis to deem them unconscionable because the arbitration rights are mutual, and the provisions related to the scope of arbitral issues are customary and commonplace.

Given the liberal policy favoring arbitration, coupled with this Court's obligation to resolve any doubts regarding arbitrability in favor of arbitration, the Court should conclude that the arbitration provisions are enforceable under the FAA and that the Respondents are obligated to arbitrate their claims.

STANDARD OF REVIEW

Unless parties agree otherwise, "the question of arbitrability of a claim is an issue for judicial determination." *Dixon v. Pattee*, 442 S.C. 233, 251, 898 S.E.2d 158, 167 (Ct. App. 2023). "Determinations of arbitrability are subject to de novo review." *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002); *see New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.E. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review."). Where there is evidence to support them, factual findings "will not be overruled." *Stokes*, 351 S.C. at 610, 571 S.E.2d at 713. However, where there is "no evidence to reasonably support" a factual finding made by a trial court, the appellate court on review need not be bound by it. *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 182 594 S.E.2d 523, 525 (Ct. App. 2004).

"[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, the court is not to rule on the potential merits of the underlying claims." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

ARGUMENT

I. The agreements to arbitrate contained in the Construction Agreements are enforceable under the FAA and its liberal policy favoring arbitration.

Under Section 2 of the FAA, "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Courts construe this language to mean that the FAA "declares a liberal policy favoring arbitration." *Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 430, 343 S.E.2d 45, 46 (Ct. App. 1986) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Consistently, the United States Supreme Court has clarified that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 903 (Ct. App. 1998) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24). Stated differently, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Lackey*, 330 S.C. at 396–97, 498 S.E.2d at 903 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *see id.* at 397 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 626 ("the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"). This judicial construction is in furtherance of the purpose of the FAA, namely to "overcome courts' refusals to enforce agreements to arbitrate, and ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Dixon*, 442 S.C. at 251, 898 S.E.2d at 167–68 (internal quotation marks omitted).

Because the arbitration provisions in the Construction Agreements are in writing, and because the transactions contemplated by the Construction Agreements evidence a transaction involving interstate commerce, the arbitration provisions are enforceable. *See Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019) (setting forth two requirements).

A. <u>The arbitration agreements are in writing.</u>

There can be no dispute that the Construction Agreements, which contain the relevant arbitration provisions, are contracts in writing. Section 22(A) of the Construction Agreements affords the prospective residents the right to demand arbitration in the event of a breach by JMC Homes. (R. p. 84, § 22(A); p. 96, § 22(A)). And Section 22(B) of the Construction Agreements affords JMC Homes a commensurate right to demand arbitration in the event the prospective resident fails to make timely payments due under the Construction Agreements or commits another breach. (R. p. 84, § 22(B); p. 96, § 22(B)). The Coleman Construction Agreement further provides an additional standalone written arbitration provision at Section 24. (R. p. 85, § 24). Because the Construction Agreements contain written agreements to arbitrate, enforceability under the FAA turns on whether the parties' transaction involves interstate commerce.

B. The parties' transaction relating to the development of residential homes, which included custom selections and the transportation of labor and materials across state lines, involves interstate commerce.

The Supreme Court defines the FAA's reach "expansively as coinciding with that of the Commerce Clause." *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995)). This means that the FAA applies so long as a transaction affects interstate commerce. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) ("the FAA applies in . . . state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce"). In determining whether a transaction involves interstate commerce, "the court must examine the agreement, the complaint, and the surrounding facts." *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2022) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001)) (relying on affidavit). This is a highly "fact dependent" inquiry which "focuses on what the specific contract terms require for performance." *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 633, 889 S.E.2d 564, 569 (2023). Importantly, parties' intent to carry out an *intrastate* transaction does not control the inquiry. *See Munoz*, 343 S.C. at 538, 542 S.E.2d at 363 (FAA applies to transactions involving interstate commerce "regardless of whether or not the parties contemplated an interstate transaction").

The broad reach of the commerce clause extends to regulating "(1) the use of the *channels* of interstate commerce, (2) the *instrumentalities* of interstate commerce, and (3) those activities having a *substantial relation* to interstate commerce." *Cape Romain Contractors, Inc.*, 405 S.C.

at 121, 747 S.E.2d at 464 (internal quotation marks and alterations omitted; emphasis in original).[2] Channels of interstate commerce are the "interstate transportation routes through which persons and goods move." *Id.* (internal quotation marks omitted). Included within this definition are highways. *See id.* Instrumentalities of interstate commerce "are the people and things themselves moving in commerce." *Id.* (internal quotation marks omitted).

Here, for several reasons, the parties' transaction involves both the instrumentalities of commerce and the channels of commerce. <u>First</u>, the involvement of out-of-state subcontractors reveals the interstate nature of the parties' transaction. Jim Baar, the Secretary and Chief Financial Officer of JMCC, testified in his affidavit that, "[u]pon information and belief, some of the subcontractors Developer Defendants used on the Project were from different states other than South Carolina." (R. p. 191, ¶ 14). This is consistent with the Respondents' own allegations which name subcontractors who allegedly participated in the construction of dwelling units at Patrick Square to include entities organized in South Carolina as well as North Carolina, Georgia, Pennsylvania, and Delaware. (R. pp. 21–25, ¶¶ 28–53). The Supreme Court of South Carolina has relied on the involvement of out-of-state companies in the construction of a housing project to find that a transaction involved interstate commerce. *See Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 639–40, 239 S.E.2d 647, 651–52 (1977) (relying on the inclusion of "out-of-state

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[2] In concluding that "[t]he interstate nature of the construction materials does not have a *significant impact*" on the transaction (R. p. 10 (emphasis added)), the trial court appears to have errantly relied on third prong of the commerce clause analysis (substantial relation) to the exclusion of the first two (channels and instrumentalities), which is error. *See Cape Romain Contractors, Inc.*, 405 S.C. at 123, 747 S.E.2d at 465 ("the proper analysis involves consideration of all three broad categories of activity within the purview of Congress's commerce power"). Moreover, as to consideration of channels or instrumentalities of commerce, and contrary to the trial court's Order, there is no "significant" or "substantial" qualification that applies.

subcontractors" in a project to conclude "the contract documents 'evidence transactions in commerce' on their face" and the FAA applies).

Second, and consistent with the involvement of out-of-state subcontractors, there is evidence that materials used by the Developer Defendants in constructing single-family homes at Patrick Square were transported into South Carolina from other states. Mr. Baar stated under oath that, "[u]pon information and belief, some of the materials Developer Defendants used on the Project originated from outside of South Carolina and were transported across state lines." (R. p. 191, ¶ 15); *see Circle S. Enters., Inc.*, 288 S.C. at 431, 343 S.E.2d at 47 (relying on affidavit regarding equipment and supplies shipped into South Carolina for interstate-commerce analysis).

The movement of labor and materials into South Carolina to construct single-family homes at Patrick Square is evident from the Construction Agreements themselves, which provide, in the "Scope of Work" section, that "[t]he Builder agrees to furnish all of the materials and labor to perform all of the work necessary for the construction through completion and delivery of a single family residential home." (R. p. 80, § 1; p. 92, § 1; *see Episcopal Hous. Corp.*, 269 S.C. at 639, 239 S.E.2d at 651 (finding FAA applies in light of contract definition of "The Work" to "include[ ] all labor necessary to produce the construction required by the contract Documents, and all materials and equipment incorporated or to be incorporated in such construction")). It is immaterial that the Construction Agreements "do not specifically say that equipment or materials are to be furnished from outside South Carolina and do not refer to subcontractors, either inside or outside this state" because "the nature of the project and the work to be performed . . . were sufficient to give notice that materials, equipment and supplies from outside South Carolina would be required." *Circle S. Enters. Inc.*, 288 S.C. at 431, 343 S.E.2d at 46–47.

Third, and finally, this Court can follow the lead of other South Carolina courts in applying common sense to conclude that the Developer Defendants—together with subcontractors—cannot construct 236 single-family homes without labor and materials from outside of South Carolina. "[O]ne need only consider the nature of the project and the actual work performed in fulfillment of the contractual obligations" to reach that conclusion. *Episcopal Hous. Corp.*, 269 S.C. at 640, 239 S.E.2d at 652 (finding construction project "virtually impossible . . . with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *see Circle S. Enters., Inc.*, 288 S.C. at 431–32, 343 S.E.2d at 47 ("In other words, anyone who knew what would be required to perform the contract in the instant case would also know that it could not be performed without equipment and materials from outside South Carolina.").

The trial court discounted the above evidence of the interstate nature of the Construction Agreements by concluding that it "do[es] not 'negate the intrastate nature of the sale and purchase of residential real estate.'" (R. p. 9 (quoting *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012))). By subsequently concluding that "[t]he contract between Plaintiffs and Developer Defendants is a sale contract as opposed to a construction contract" (R. p. 10), the trial court erred.

There is no real dispute in the law that contracts for the sale of a completed home are typically not governed by the FAA but that "contracts for construction are governed by the FAA." *Bradley*, 398 S.C. at 458 & n.8, 730 S.E.2d at 317–18 & n.8. In distinguishing between the two for purposes of application of the FAA, "[o]ur courts consistently look to the essential character of the contract." *Id.* at 455, 730 S.E.2d at 316 (internal quotation marks omitted).

When a party purchases a completed dwelling, does not have a contract for construction of that dwelling, and does not have options to personalize the build-out of the dwelling, South

Carolina courts have found the essential character of those transactions to be the sale of real estate, to which the FAA does not apply. *See id.* at 459, 730 S.E.2d at 318. In *Bradley*, a homebuyer purchased a home pursuant to a "Home Purchase Agreement." *Id.* at 458, 730 S.E.2d at 218. Specifically, the homebuyer "purchase[d] a completed dwelling rather than contract for the construction of a dwelling." *Id.* Importantly, in purchasing a completed dwelling, the homebuyer neither made choices nor elected from options to personalize the home he bought. *See id.* ("[T]he provisions of the Agreement providing for 'New Construction,' 'House Plan,' 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by [the homebuyer]."). But in finding the FAA to be inapplicable "[b]ecause the essential character of the Agreement was strictly for the purchase of a completed residential dwelling and not the construction," *id.* at 459, 730 S.E.2d at 318, the Supreme Court of South Carolina clarified that "had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA," *id.* at 458 n.8, 730 S.E. 2d at 318 n.8.

Construing *Bradley*, South Carolina appellate courts reached the opposite conclusion in two subsequent cases. *See Dixon*, 442 S.C. 251–54, 898 S.E.2d at 167–69; *Damico*, 437 S.C. at 608, 879 S.E.2d at 753. In *Damico*, the Supreme Court of South Carolina evaluated arbitration provisions in purchase and sale agreements in the context of a sixty-nine-home subdivision. 437 S.C. at 605, 879 S.E.2d at 751. That court found the transactions at issue to "manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes." *Id.* at 608, 879 S.E.2d at 753.[3]

[3] While finding the parties' transaction involved interstate commerce and that the FAA governed, the Supreme Court of South Carolina in *Damico* nevertheless declined to enforce an arbitration provision in that case for reasons discussed *infra*.

In *Dixon* a year later, this Court, considering both *Bradley* and *Damico*, found the FAA applicable to arbitration provisions in a home purchase agreement based on "language of the Agreement and the record [that] demonstrate[d] the Agreement was not for the purchase of a completed home but involved at a minimum the completion of custom elements in the home which fall within the parameters of construction." 442 S.C. at 254, 898 S.E.2d at 169. The "custom elements" on which this Court in *Dixon* relied included (a) contractual provisions suggesting the ability to "select options for flooring, appliance color, bath hardware, countertops, plumbing fixtures, shower enclosures, interior and exterior hardware, lighting style, interior paint, and backsplash and wall tile"; (b) additional contractual provisions suggesting "specific directions for the additional laying of hardwood floor, the extension of crown molding, the replacement of laminate countertops with quartz, and the installation of specified sinks and faucets"; and (c) evidence of the payment of "$15,275 worth of customizations." *Id.* at 254, 898 S.E.2d at 169.

Here, in assessing whether the "essential character" of the Construction Agreements was for the sale of a completed dwelling or for the construction of a residence, this case is more like *Dixon* and *Damico* (and less like *Bradley*) for several reasons. As an initial matter, the following provisions of the Construction Agreements plainly and expressly contemplate construction, as opposed to the sale of a completed home:

- Section 1 (Scope of Work) – providing that builder will "furnish all the materials and labor to perform all of the work necessary for the construction through completion and delivery" (R. p. 80, § 1; p. 92, § 1);

- Sections 3 & 4 (Construction Schedule and Delays) – setting out dates for commencement and completion of construction, and addressing construction delays (R. p. 81, § 3; p. 93, § 3);

- Section 6 (Construction Standards) – noting compliance with local industry standards and South Carolina Residential Construction Standards (R. p. 81, § 6; p. 93, § 6);

- Section 8 (Selections and Change Orders) – noting obligations of homebuyers to make customized selections (R. p. 82, § 8; p. 94, § 8);

- Section 14 (Subcontractors) – discussing builder discretion to identify subcontractors, employees and suppliers (R. p. 83, § 14; p. 95, § 14);

- Section 15 (Insurance) – requiring maintenance of builder's risk insurance and public liability insurance (R. p. 83, § 15; p. 95, § 15); and

- Exhibit B (Construction Draw Schedule) – setting out percentage of price owed upon completion of various construction phases (R. p. 90, Exh. B; p. 102, Exh. B).

Indeed, the Court need look no further than Section 3 of the Construction Agreements (titled "Construction Schedule") to see that the purchase of the real property was a completely separate transaction that necessarily predated the construction of the single-family homes contemplated by the Construction Agreements. (R. p. 81, § 3 ("Following execution of this Agreement or the date of closing on Owner's acquisition of the Lot, whichever is later, Builder shall use its best efforts to deliver the completed residence specified herein on or about 150 days from start of construction."); p. 93, § 3 (same)). Stated differently, the Construction Agreements are not mere purchase agreements because the Developer Defendants' obligations to start construction under the Construction Agreements did not commence until after the lots were purchased.

Moreover, as in *Damico* and *Dixon*, the prospective purchasers here had the option—and in some cases the obligation—to make personalized choices to customize their respective homes. They were required to make "all necessary selections for exterior colors, interior finishes, electrical outlet locations, and lighting locations." (R. p. 82, § 8; p. 94, § 8). They were required to select "all decorative lighting fixture[s]" and "review[ed] and approve[d] the landscaping design." (*Id.*). And they had the option to make "upgrades or modifications to the standard plan and included finishes." (*Id.*). Indeed, it appears that both prospective homeowners exercised these rights and options: the Griffith Construction Agreement notes $42,460.00 in "Options," and the Coleman Construction Agreement notes $37,290.00 in "Options." (R. p. 90, Exh. B; p. 102, Exh. B).

Despite making contrary arguments before the trial court, the Respondents own allegations make clear they understand the parties' transactions related to the construction of residences. (R. p. 26, ¶ 62 ("This matter arises out of the design, development, construction, marketing, sale and/or attempted repair of the Residences.")).

The foregoing facts make clear that the "essential character" of the Construction Agreements, *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316 (internal quotation marks omitted), is the construction of dwellings, which shows the involvement of, and effect on, interstate commerce. When construing the facts of this case with the required interpretive gloss—including the "liberal policy favoring arbitration," *Circle S. Enters., Inc.*, 288 S.C. at 430, 343 S.E.2d at 46, and the requirement that this Court resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration," *Lackey*, 330 S.C. at 396–97, 498 S.E.2d at 903 (internal quotation marks omitted)—there can be no question that the FAA applies.[4]

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[4] Because the FAA applies, the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. § 15-48-10, is preempted. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (finding the SCUAA is preempted where the FAA applies). Any additional requirements imposed by the SCUAA do not apply here. *See id.* at 537, 542 S.E.2d at 363 (finding that the FAA preempted the SCUAA and reversing a trial court's refusal to enforce an arbitration agreement on the grounds that it did not comply with additional SCUAA requirements); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000) (same); *see also Damico*, 437 S.C. at 608, 879 S.E.2d at 753 ("Because federal law preempts state law in this instance, we need not decide whether [builder] could also compel arbitration under the SCUAA."); *Circle S. Enters., Inc.*, 288 S.C. at 429 n.1, 343 S.E.2d at 46 n.1 (noting FAA supersedes state law, despite also noting noncompliance with SCUAA).

II. The Appellants' claims fall within arbitration agreements.

Upon concluding that the FAA applies to the Construction Agreements because the transactions affect interstate commerce, this Court should also conclude that the specific claims asserted by the Respondents fall within the reach and scope of the arbitration provisions in the Construction Agreements. "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement . . . ." *Dixon*, 442 S.C. at 256, 898 S.E.2d at 170 (internal quotation marks omitted; alteration in original). In practice, this means that "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (internal quotation marks omitted).

Here, the arbitration agreements in the Construction Agreements are broad. Both Construction Agreements provide for arbitration "[i]f Builder materially breaches its obligations under this Agreement." (R. p. 84, § 22(A); p. 96, § 22(A)). The Coleman Construction Agreement further provides for arbitration of "any issue in law or equity [that] arises after execution of the [Coleman Construction] Agreement." (R. p. 85, § 24). The Respondents' claims plainly fall within the scope of these broad arbitration provisions. By way of non-exhaustive example, the Respondents' claims directly correlate to specific provisions in the Construction Agreements:

- The Respondents allege the Developer Defendants failed to properly plan for construction. (*See* R. p. 34, ¶ 126 (a) & (c)). And the Construction Agreements require the Developer Defendants to construct single-family dwellings "in accordance with the Plans and Specifications" attached to the Construction Agreements. (R. pp. 80–81 & 87–89, §§ 1, 5, & Exh. A; pp. 92–93 & 99–101, §§ 1, 5, & Exh. A).

- The Respondents allege the Developer Defendants failed to account for site specific conditions. (*See* R. p. 34, ¶ 126(b)). And the Construction Agreements address the Developer Defendants' duties with regard to grading and site conditions. (R. p. 84, § 18; p. 96, § 18).

- The Respondents allege the Developer Defendants failed to comply with applicable building codes and industry practices. (*See* R. p. 34, ¶ 126(d)). And the Construction Agreements required the Developer Defendants to comply with "local industry standards and criteria, and the South Carolina Residential Construction Standards." (R. p. 81, § 6; p. 93, § 6).

- The Respondents allege the Developer Defendants approved design changes without accounting for ramifications on overall design. (*See* R. p. 35, ¶ 126(e)). And the Construction Agreements specify the requirements for selections and change orders. (R. p. 82, § 8; p. 94, § 8).

- The Respondents allege the Developer Defendants breached a warranty (implied) to construct homes in a workmanlike manner free of defects. (*See* R. p. 36, ¶¶ 132, 135). And the Construction Agreements "warrant[ ] the Residence to the Owner . . . against defects in the original materials and workmanship" for a period of time. (R. p. 84, § 19; p. 96, § 19).

The fact that the Respondents brought claims for negligence and breach of implied warranty—as opposed to breach of contract—is immaterial to this analysis. *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (requiring courts to evaluate scope of arbitration provision to asserted claims "regardless of the label assigned to the claim[s]"). Such an argument was rejected by this Court in *Dixon*. *See* 442 S.C. at 249, 255–556, 898 S.E.2d at 166, 170 (finding arbitration provision encompassed claim for equitable indemnification, despite argument that claimants "were not trying to sue under the Agreement or Warranty," because the claim "arises from the construction of the home" and the argument was "belied by the language in their complaint").

Given the broad scope of the arbitration agreements and the nature of the Respondents' claims, together with the presumption in favor of arbitration, this Court should conclude that the Respondents' claims fall within the scope of the arbitration provisions in the Construction Agreements.

III. There are no contract defenses that prevent enforcement of the arbitration provisions.

A. The Court's consideration of contract defenses must be limited to the actual arbitration provisions in the Constructions Agreements, and not any other, separate provisions of the Construction Agreements.

Where, as here, the FAA applies, arbitration agreements are enforceable "save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court "narrowly construe[s]" this provision as "permitting "'agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 52, 790 S.E.2d 1, 6 (2016) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

But because "[t]he validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator," *Damico*, 437 S.C. at 609, 879 S.E.2d at 753, the Court—under what is commonly known as the *Prima Paint* doctrine[5]—"may only consider the provisions of the arbitration agreement itself, and not those of the whole contract" in assessing the applicability of contract defenses, *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4; *see also One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 62 n.6, 791 S.E.2d 286, 292 n.6 (Ct. App. 2016) (noting that "an arbitration agreement is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole"). Thus, before the Court can evaluate contract defenses, "the Court must first define the scope of the arbitration agreement." *Damico*, 437 S.C. at 609, 879 S.E.2d at 753.

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5 *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

This task is typically not in dispute where "there is a distinct section of the purchase and sale agreement that sets forth the entirety of the arbitration agreement." *Damico*, 437 S.C. at 610, 879 S.E.2d at 754. In *Damico*, for example, the Supreme Court of South Carolina determined that one narrow section of the agreement in that case—a section titled "Mediation/Arbitration of Disputes," which "deal[t] solely with the scope of arbitration and the requisite formalities accompanying an arbitration proceeding"—constituted the arbitration agreement to which an analysis of contract defenses could then be applied. *Id.*

Damico contrasts with the earlier *D.R. Horton* decision, which identified a much larger contractual section of the agreement in that case to be the arbitration agreement, comprised of nine subsections including an arbitration provision but also other provisions discussing warranties, termination rights, and other topics. *See* 417 S.C. at 48, 790 S.E.2d at 4.[6] The *D.R. Horton* court reasoned that "[t]he subparagraphs within [the larger section] contain[ed] numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.*

The *Damico* court found the reasoning in *D.R. Horton* concerning the scope of the arbitration agreement to be inapplicable to the facts of that case. Specifically, the *Damico* court declined to include various warranty provisions (contained in a "limited warranty booklet") as part of the arbitration agreement against which contract defenses would be considered, concluding: "Within Section 16, there is nothing that refers to the limited warranty booklet or incorporates it by reference. Rather, Section 16 is a standalone arbitration provision, dissimilar from that in *D.R. Horton*." 437 S.C. at 610, 879 S.E.2d at 754. Importantly, the *Damico* court made that decision

[6] The relevant contractual provisions in *D.R. Horton* appear in a dissent authored by Justice Kittredge. *See* 417 S.C. at 53–59, 790 S.E.2d at 6–10 (Kittredge, J., dissenting).

despite the fact that the standalone arbitration provision made reference to other parts of the larger agreement in that case, namely provisions regarding warranties. *See* 437 S.C. at 605–06, 879 S.E.2d at 751–52.[7]

Here, there is no dispute between the parties that Section 22(A) of the Construction Agreements and Section 24 of the Coleman Construction Agreement are part of the arbitration agreement against which contract defenses may be considered. (R. pp. 84–85, §§ 22(A), 24; p. 96, § 22(A)). But the trial court also considered as part of the arbitration agreement a completely separate section of the Construction Agreements—Section 19 titled "Limited Warranty." (R. p. 84, § 19; p. 96, § 19; p. 11). While the trial court did not explain its reasoning, the trial court presumably concluded that a single reference to warranty claims in Section 24 of the Coleman Construction Agreement somehow renders Section 24 (concerning arbitration) intertwined with Section 19 (concerning warranties) for purpose of this analysis.[8] That reasoning is flawed.

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[7] In relevant part, paragraph 1 of Section 16 of the agreement in *Damico* provides as follows: "The parties to this [purchase and sale a]greement specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall first be submitted to . . . binding arbitration as provided by the Federal Arbitration Act. . . . 'Disputes' (whether contract, **warranty**, tort, statutory or otherwise) [ ] shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this [purchase and sale a]greement, the Property, the Community or any dealings between Buyer and [Lennar]; (2) arising by virtue of any . . . **warranties** alleged to have been made by [Lennar] or [Lennar's] representatives; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community. Buyer has executed this [purchase and sale a]greement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby." 437 S.C. at 605–06, 879 S.E.2d at 751–52 (emphasis added, alterations in original).

[8] Respondents did not argue below that Section 22(A) of the Construction Agreements was intertwined with other sections—and/or had the effect of pulling in extraneous provisions into the arbitration agreements—for purpose of this analysis. And there does not appear to be any basis to make such an argument.

The reference in Section 24 of the Coleman Construction Agreement to warranty claims is very similar to the references to warranty claims in the relevant agreement in *Damico*. (*Compare supra* n.7 *with* R. p. 85, § 24). And both of those provisions are nothing like the nine intertwined and cross-referencing subsections of the agreement in *D.R. Horton* titled "Warranties and Dispute Resolution." It is simply not the case that one would need to read both Section 24 of the Coleman Construction Agreement and Section 19 to understand "how different disputes are to be handled," as was the case in *D.R. Horton*. 417 S.C. at 48, 790 S.E.2d at 4.

This Court should follow the lead of *Damico* and decline to extend the scope of the arbitration provisions to separate, unrelated provisions concerning warranties. As a result, for purposes of defining the scope of the arbitration agreements against which contractual defenses might be considered, this Court should limit its inquiry to Sections 22(A) of the Construction Agreements and Section 24 of the Coleman Construction Agreement. Stated differently, and for the avoidance of confusion, the Court should not consider Section 19 of the Construction Agreements (or any other sections of the Construction Agreements) in assessing the application of contract defenses to the enforcement of the arbitration provisions.[9]

B. <u>The arbitration provisions in the Construction Agreements are not unconscionable, rendering consideration of severability unnecessary.</u>

When limiting its review to Section 22(A) of the Construction Agreements and Section 24 of the Coleman Construction Agreement, this Court should not find those routine and common arbitration provisions to be unconscionable or oppressive. "In South Carolina, unconscionability

[9] Should the Court reach this conclusion, it would not foreclose the Respondents from raising issues with other parts of the Construction Agreements. But those disputes must be raised with the arbitrator in the first instance. *See Damico*, 437 S.C. at 609, 879 S.E.2d at 753 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006)) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").

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." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). "Adhesion contracts . . . are not per se unconscionable." *Id.* at 27, 644 S.E.2d at 669. Stated differently, "even though [an agreement] may indicate one party lacked a meaningful choice," the agreement "is not necessarily unconscionable." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. Rather, to find that contract terms are unconscionable, the Court must conclude they are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* Assessment of claims of unconscionability should be made on a "case-by-case" basis, taking into account "all the facts and circumstances of the case." *Id.* at 611, 879 S.E.2d at 755 (internal quotation marks omitted).

Here, Section 22(A) of the Construction Agreements (which affords JMC Homes the right to initiate arbitration), is followed by Section 22(B) of the Construction Agreements (which affords the prospective homeowners a mutual right to initiate arbitration). (R. p. 84, § 22(A) & (B); p. 96, § 22(A) & (B)). Indeed, the prospective homeowners' rights in Section 22(B) are arguably broader than JMC Home's right to initiate arbitration, insofar as the former is triggered by any breach, and the latter is limited to material breaches. (*See id.*). Under these circumstances, it would fly in the face of common sense to conclude that these mutual rights are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755.

The Court should reach the same conclusion regarding Section 24 of the Coleman Construction Agreement by way of contrast with *D.R. Horton* and *Damico*, two cases in which the Supreme Court of South Carolina found arbitration provisions unconscionable. To find unconscionability, the *D.R. Horton* court relied on language in the arbitration agreement that limited the buyer to a repair-and-replace remedy and precluded the buyer from monetary damages. *See* 417 S.C. at 50, 790 S.E.2d at 5. To find unconscionability in *Damico*, that court relied on two provisions in the relevant arbitration agreement: (1) unilateral discretion afforded to the seller to include (or exclude) the seller's contractors, subcontractors, and suppliers in any arbitration, *see* 437 S.C. at 615, 879 S.E.2d at 757 ("Giving [seller] the 'sole election' to include or exclude subcontractors in the arbitration proceedings strips [buyers] of th[e] right [to be the master of their complaint] and overturns a firmly entrenched legal principle."); and (2) a provision providing that factual and legal findings made at an arbitration are not binding in other proceedings, *see id.* at 616, 879 S.E.2d at 757 (noting the "possibility of inconsistent factual findings" that could ultimately prevent the buyer from recovering based on procedural grounds, and concluding: "This creation of a procedural defense to liability for [seller] is wholly unreasonable and oppressive to [buyers].").

Here, by contrast, there are no provisions in Section 24 of the Coleman Construction Agreement that even come close to the level of oppressiveness noted in *D.R. Horton* and *Damico*. Rather, Section 24 applies equally to both parties (buyer and seller), it contains no exclusions to the scope of arbitrability, and it sets forth customary provisions related to the scope of arbitral issues ("any issue in law or equity"), the arbitral forum ("Construction Arbitration Services, Inc."), and the exclusivity of arbitration as the only dispute resolution process and its binding nature, among other commonplace procedural terms.

Therefore, even if any real or perceived unequal bargaining power between the Developer Defendants and the Respondents existed, and even if the Construction Agreements are deemed contracts of adhesion, there is no factual basis on which this Court could conclude that Section

22(A) of the Construction Agreements and Section 24 of the Colemen Construction Agreement are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. As a result, this Court cannot find those arbitration provisions to be unconscionable.[10]

IV. The Respondents claims should be referred to arbitration notwithstanding their additional challenges to enforcement of the arbitration provisions.

The Respondents make two last-ditch arguments attempting to undercut or prevent the plain language and application of the arbitration provisions in the Construction Agreements. These arguments—both individually and collectively—are without merit.

A. <u>The Colemans cannot avoid application of the arbitration provisions by transferring title to real property from themselves on one or more trusts with which they are affiliated.</u>

While making no mention of this issue in the Form 4 Order, the trial concluded in the Order that (a) the deed to the Colemans' home "was transferred to William Coleman as Trustee of the William Coleman Revocable Truest on October 8, 2021"; (b) "[t]he Trust is a subsequent owner of the property"; and therefore (c) "no agreement made by the original purchaser with the Developer Defendants is binding on William Coleman as Trustee of the William Coleman Revocable Trust." (R. pp. 11–12). But there is absolutely no evidence in the record regarding this alleged transfer, meaning the Court can disregard it. *Cf. Deloitte & Touche, LLP*, 358 S.C. at 182, 594 S.E.2d at 525 ("appellate court on review need not be bound by" factual finding with "no

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10 Having erroneously found the arbitration provisions in the Construction Agreements to be unconscionable, the trial court proceeded to conclude that the severability provisions of the Construction Agreements could not be enforced to sever any unconscionable provisions in light of South Carolina public policy. (R. p. 11). But because the arbitration provisions in the Construction Agreements are not unconscionable, the Court need not address the severability provision or the import of South Carolina public policy to the application of severability.

evidence to reasonably support" it). And the information that is in the record—including the Respondents' own allegations—is inconsistent.

Despite the trial court's conclusion that the Colemans' real property (at 413 Pershing Avenue) was transferred to the William Coleman Revocable Trust in 2021 (*see* R. p. 11), the Respondents' Complaint filed in 2024 alleges—*in the present tense*—that "*Mr. Coleman owns* a home . . . at 413 Pershing Avenue." (R. p. 18, ¶ 6 (emphasis added)). The Complaint and Mr. Coleman's Affidavit both state that Mr. Coleman purchased the home at 413 Pershing Avenue in 2016 from the Developer Defendants. (*See* R. p. 18, ¶ 7; p. 140, ¶ 3). Yet, the only deed in the record regarding 413 Pershing Avenue is a deed from the same year (2016) from PSL to a different entity affiliated with the Colemans: the Deborah C. Coleman, Trustee of the Deborah C. Coleman Revocable Trust, dated the 20th day of January 2012. (R. pp. 129–132).

For purposes of this appeal, this Court need not unravel this confusing chain of title in order to enforce the arbitration provision against William Coleman, as Trustee of the William Coleman Revocable Trust, for two reasons. First, the Coleman Construction Agreement (which contains the arbitration provisions) provides that "[t]he terms, covenants and conditions of this Agreement shall inure to the benefit of, and be binding upon, the parties hereto, their heirs, successors, legal representatives and permitted assigns." (R. p. 86, § 29). To the extent "William Coleman" transferred title to his home to the "William Coleman Revocable Trust," the trust is a successor in interest that is bound by the Coleman Construction Agreement, including the arbitration provisions therein. *See generally Battery Homeowners Ass'n v. Lincoln Fin. Resources, Inc.*, 309 S.C. 247, 250, 422 S.E.2d 93, 95 (1992) (describing the term "successor" as a "term of art" with flexible meanings, including "succeeding to a place, or a right" and including "one entitled to succeed as well as in the sense of one who has in fact succeeded"); *cf. Berry v. Spang*, 433 S.C. 1, 13, 855

S.E.2d 309, 316 (Ct. App. 2021) (declining to enforce arbitration agreement against non-signatory successor, in part because the arbitration agreements "contained no language binding successors or assigns").

Second, even without an express contractual provision binding successors, [i]n an appropriate case a nonsignatory can . . . be bound by [ ] an arbitration provision with a contract executed by other parties." *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600 (internal quotation marks omitted).[11] One such circumstance recognized in South Carolina law is where a non-signatory is the alter ego of the signatory. *See Wilson*, 426 S.C. at 338, 827 S.E.2d 167. Application of an alter-ego theory requires "(1) total domination and control of one entity by another and (2) inequitable consequences caused thereby." *Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012). Here, while the record is undeveloped on this point, the Court can look to the Respondents' own allegations to establish domination and control of the trust by Mr. Coleman. (R. p. 18, ¶ 6 (alleging "Mr. Coleman owns a home . . . at 413 Pershing Avenue" but filing suit in the name of the trust).

For these reasons, the Court should not allow the Colemans to circumvent application of the agreed-upon arbitration provisions by transferring title to their real property to a revocable trust.

B. <u>There are only two defendants in this case, and Respondents' intent to attempt to certify a class in the future is irrelevant to this Court's assessment of the arbitration provisions in the two Construction Agreements at issue.</u>

Finally, while the Plaintiffs argued below that the Construction Agreements do not provide for class arbitration, that issue is irrelevant, and the trial court did not even address it. (R. p. 2

[11] In determining "[w]hether an arbitration agreement may be enforced against a nonsignatory," this Court conducts a "de novo review." *Wilson*, 426 S.C. at 336, 827 S.E.2d at 172.

("The Court declines to address whether the Contracts are silent about class action arbitration because no class has been certified.")). At present, there are only two defendants in this case. Plaintiffs' First Amended Complaint remains a *putative* class action; no class has been certified. It would be premature—and therefore inappropriate—for the Court to even consider the issue of class arbitration.[12] *See generally Bennett v. ACS Primary Care Physicians-Southeast P.C.*, 444 S.C. 458, 475, 908 S.E.2d 110, 119 (Ct. App. 2024) ("nothing in the record indicates that [the parties seeking to arbitrate] have even requested class arbitration," rendering the question "hypothetical and, thus, unripe for judicial review"). Rather, this Court should limit its review to the narrow issue before it: whether the arbitration provisions in the Coleman Construction Agreement and the Griffith Construction Agreement require the only two defendants in this case to arbitrate the claims they have asserted against the Developer Defendants.

CONCLUSION

For these reasons, this Court should reverse the decision of the trial court which denied the Developer Defendants' motion to compel arbitration and dismiss or stay this action, and it should remand the action to the trial court, with instructions to refer this matter to arbitration and to dismiss or stay the action pending resolution of arbitration proceedings.

This 21st day of July 2026.

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[12] It would likewise be inappropriate for this Court to consider agreements between the Developer Defendants and individuals who are not parties to this case. (*See* R. p. 166, lines 14–24).

Attorneys for JMC Communities, Inc., JMC Homes of South Carolina, LLC, and Patrick Square, LLC

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
The Honorable Jessica A. Salvini, Circuit Court Judge

Appellate Case No. 2025-001404
Circuit Court Case No. 2024-CP-39-00465

David Griffith and William Coleman, as Trustee of the William Coleman Revocable Trust, individually, and on behalf of all others similarly situated, Respondents,

v.

JMC Communities, Inc., JMC Homes of South Carolina, LLC, Patrick Square, LLC f/k/a Digital Development, LLC, Alpha Omega Construction Group, Inc., Gorze, Inc., Cothran Landscapes and Grading, LLC, Gentry Services, LLC a/k/a Gentry Brothers Services, LLC, Tiny Bill Swaney d/b/a Swaney Masonry, Solid Rock Construction Services, LLC, H&H Concrete, LLC, Maria Construction Inc., F&V Framing, LLC, Five Star Construction, Inc., Davis Framing, LLC, Ashley Cothran d/b/a Cothran Custom Homes, LLC, UFP Mid-Atlantic, LLC, Builder First Source, Inc. a/k/a Builders Firstsource Atlantic Group, LLC a/k/a Builders Firstsource Southeast Group, LLC, RC Johnson, LLC, Gunter Heating and Air Conditioning of SC, LLC, 84 Lumber Company, LP, Dogwood Exteriors, LLC, H&R Drywall, Inc., Cristobal and Painters, LLC, Willow Tree Landscaping, Inc., Harbin Lumber Company, Inc., Soto HVAC, LLC, Riverside Landscaping, LLC, International Construction Services, Inc., Palmetto Grading and Drainage, Inc., Jane Doe #1-10, and John Doe #27-50, Defendants,

of which JMC Communities, Inc., JMC Homes of South Carolina, LLC and Patrick Square, LLC are the Appellants.

RULE 211(b) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **BRIEF OF APPELLANTS** complies with SCACR 211(b) because it is identical to the previously filed Initial Brief of Appellants except for references to the record and correction of typographical errors and misspellings

This the 21st day of July 2026.

/s/ Jonathan E. Schulz
Jonathan E. Schulz (SC Bar No. 79850)