

# Exhibit A

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**SC Court of Appeals**

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-10-7594

One Belle Hall Property Owners Association, Inc, et al.  
PLAINTIFF(S)

Trammell Crow Residential Company  
DEFENDANT(S)

Submitted by:

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

FILED  
2014 SEP 17 PM 4:04  
CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

*J. Milob*  
Circuit Court Judge

2117  
Judge Code

9/16/14  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

\_\_\_\_\_  
**CLERK OF COURT**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

ONE BELLE HALL PROPERTY OWNERS )  
ASSOCIATION, INC. and BRANDY RAMEY, )  
individually, and on behalf of all others similarly )  
situated, )

Plaintiffs, )

vs. )

Trammell Crow Residential Company; TCR NC )  
Construction I, LP; Belle Hall Direct 101, LP; TCR )  
RLD Condominiums, Inc.; CS 101 Belle Hall, LP; )  
TCR Southeast, Inc.; TCR Carolina Properties, Inc.; )  
TCR SE Construction, Inc.; TCR SE Construction )  
II, Inc.; TCR Construction, a division of Trammell )  
Crow Residential; TCR Development, a division of )  
Trammell Crow Residential; Trammell Crow )  
Residential Carolina, a division of Trammell Crow )  
Residential; and Tauer Consulting Company, Inc., a )  
division of Trammell Crow Residential, each )  
individually, and collectively d/b/a "Trammell )  
Crow Residential," "Trammell Crow" or "TCR"; )  
Halter Properties, LLC; Halter Realty, LLC; and )  
Halter Realty Group, LLC, each individually, and )  
collectively d/b/a "Halter Companies"; Jane Doe 1- )  
5; ABG Caulking & Waterproofing of Morristown, )  
Inc. a/k/a ABG Caulking Contractors; Advanced )  
Building Products & Services, LLC; BASF )  
Corporation; Budget Mechanical Plumbing, Inc.; )  
Builders First Source – Southeast Group, LLC; )  
Builders Services Group, Inc., individually, and )  
d/b/a Gale Contractor Services, Inc.; Century Fire )  
Protection, LLC; Cline Design Associates, P.A. and )  
Gary D. Cline; Coastal Lumber & Framing, LLC; )  
Dodson Brothers Exterminating Co., Inc. a/k/a )  
Dodson Pest Control; First Exteriors, LLC; Flooring )  
Services, Inc.; General Heating & Air Conditioning )  
Company of Greenville, Inc. d/b/a General Heating )  
and Air; Jimmy Warner, individually, and d/b/a )  
Warner Heating & Air; Glazing Consultants, Inc.; )  
GWC Roofing, Inc., individually, and d/b/a )  
Southcoast Exteriors, Inc.; Houston Stafford )

IN THE COURT OF COMMON PLEAS )  
FOR THE NINTH JUDICIAL CIRCUIT )  
CASE NO. 2012-CP-10-7594 )

**ORDER DENYING DEFENDANT  
TAMKO'S MOTION TO DISMISS  
AND COMPEL ARBITRATION**

BY \_\_\_\_\_  
JULIE J. ARMSTRONG  
CLERK OF COURT  
2014 SEP 17 PM 4:04

FILED

Electrical Contractors, LP a/k/a IES Residential, )  
Inc. d/b/a Houston Stafford Electric; KMAC of the )  
Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a )  
P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. )  
a/k/a Carolina Metals; Pleasant Places, Inc.; )  
Raymond Building Supply Corporation d/b/a )  
Energy Saving Products of Florida, Inc. a/k/a )  
Energy Saving Products of Florida; RS Custom )  
Homes, LLC; Southern Specialties, Inc.; Structural )  
Contractors South, Inc.; Superior Construction )  
Services, Inc., individually, and d/b/a Superior )  
Masonry Unlimited, Inc.; TAMKO Building )  
Products, Inc. f/k/a TAMKO Roofing Products, )  
Inc.; VNS Corporation, individually, and d/b/a )  
Wholesale Building Products f/k/a Wholesale )  
Building Materials, Inc.; What Don't We Do; and )  
John Doe 1-25, )

Defendants. )

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VNS Corp., individually, and d/b/a Wholesale )  
Building Products f/k/a Wholesale Building )  
Materials, Inc., )

Third-Party Plaintiff, )

v. )

Billy Grady d/b/a United Builders, LLC, )

Third-Party Defendant. )

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Houston Stafford Electrical Contractors, LP a/k/a )  
IES Residential, Inc. d/b/a Houston Stafford )  
Electric, )

Third-Party Plaintiff, )

v. )

J. Correa Electrical Company, LLC, )

Third-Party Defendant. )

**ORDER**

THIS MATTER CAME BEFORE THE COURT on June 25, 2014 upon motions of the Defendant, TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc. (hereinafter "TAMKO"), to (a) dismiss and compel arbitration in the above-captioned case; and (b) to stay TAMKO's obligation to participate in discovery until TAMKO's arbitration Motion is resolved. Plaintiffs, One Belle Hall Property Owners Association and Brandy Ramey, individually, and on behalf of all others similarly situated (hereinafter collectively referred to as "Plaintiffs"), were represented by attorneys, Justin Lucey and Dabny Lynn; TAMKO was represented by attorney, Richard Willis.

Having reviewed the submissions of the parties and having heard the oral arguments presented by counsel, TAMKO's Motion to Dismiss and Compel Arbitration is DENIED, rendering moot TAMKO's Motion for Protective Order.

**FINDING AND CONCLUSIONS**

TAMKO's Motion to Dismiss and Compel Arbitration (hereinafter "the Motion" or "TAMKO's Motion") seeks to compel arbitration of Plaintiffs' claims against TAMKO based on the enforcement of a purported arbitration provision contained in TAMKO's Warranty.

**A.) TAMKO's Arbitration Provision is Wholly Unconscionable and Unenforceable Under South Carolina Law**

Based on the evidence presented and a plain reading of TAMKO's Warranty, this Court finds the Warranty's arbitration provision is wholly unconscionable, and thus, unenforceable under South Carolina law.

Specifically, the arbitration provision is made unconscionable based on the cumulative effect of several ambiguous, oppressive and one-sided provisions located throughout the Warranty, including the "exclusions from coverage," "transferability" and "legal remedies"

sections which purport to (a) waive TAMKO's liability for "damages of any kind whatsoever;" (b) disclaim all implied warranty claims; (c) waive various other important remedies; and (d) prevent the transfer of the Warranty altogether. This Court finds the arbitration provision cannot be severed from such numerous unconscionable provisions which pervade TAMKO's Warranty, and particularly, TAMKO's attempt to waive its liability for "damages of any kind whatsoever" including "consequential or incidental damages of any kind."

Because this Court finds the arbitration provision wholly unconscionable based upon the Warranty's cumulatively unconscionable terms, and also finds the arbitration provision cannot be severed from TAMKO's Warranty, this Court refuses to enforce TAMKO's arbitration provision so as to avoid an unconscionable result.

**B.) TAMKO'S Warranty is Wholly Unconscionable, Void of its Essential Purpose, Inherently Ambiguous, and Unenforceable Under South Carolina Law**

Based on the evidence presented and a plain reading of TAMKO's Warranty, this Court finds the Warranty's provisions, when considered in their entirety, render the Warranty procedurally and substantively unconscionable, void of its essential purpose; and inherently ambiguous.

Specifically, this Court finds that the terms of TAMKO's Warranty create internal inconsistencies throughout the Warranty itself by (a) purporting to provide certain rights on the one hand, while attempting to nullify the same rights via exclusionary provisions on the other; and (b) by negating all meaningful coverage for the very damage that the Warranty purports to cover – damage arising out of or to TAMKO's Shingles due to manufacturing defects.

Given the number of such objectionable provisions within TAMKO's Warranty, this Court finds the Warranty unconscionable at the time it was made, and thus, unenforceable per South Carolina law.

**C.) Because this Court finds Both the Warranty and the Warranty's Arbitration Provision Unenforceable Under South Carolina Law, this Court Denies TAMKO's Motion**

Based upon the foregoing, and as is further detailed below, this Court denies TAMKO's Motion because:


- (a) Plaintiffs effectively challenged the arbitrability of their claims against TAMKO based upon general contract principles recognized under South Carolina law;<sup>1</sup>
- (b) The Federal Arbitration Act ("FAA") provides arbitration clauses are unenforceable when state law or equitable principles invalidates clause provisions;<sup>2</sup>
- (c) TAMKO'S Warranty is a contract of adhesion that is oppressively (i) limited in duration; (ii) limited in transferability; (iii) limited in compensation; and (iv) limited in available recovery avenues;<sup>3</sup>
- (d) TAMKO's Warranty is lacking in mutuality of remedy, particularly in light of TAMKO's "exclusion" provisions which attempt to exempt TAMKO from liability for all monetary damages; TAMKO's "legal remedies" provisions which allegedly

<sup>1</sup>S.C. Code § 15-48-10(a) (According to South Carolina law, a party may seek revocation of a contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability).

<sup>2</sup> 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."); *see also* *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA); *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013) ("When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties.").

<sup>3</sup> *See* 2009 TAMKO Warranty; *see also* *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25 644 S.E.2d 663, 668-69 (2007) (noting "unconscionability" is defined to include both an absence of meaningful choice as well as oppressive, one-sided contractual provisions); *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability 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.")

- waive a number of legal remedies; and TAMKO's "transferability" provision which purportedly prevents transferability;<sup>4</sup>
- (e) The arbitration provision and other provisions contained in TAMKO's Warranty are made unconscionable and unenforceable based on the cumulative effect of the oppressive and one-sided provisions located throughout the Warranty;<sup>5</sup>
  - (f) The arbitration provision and other provisions of TAMKO's Warranty are cumulatively unconscionable, and thus, unenforceable under South Carolina law;<sup>6</sup>
  - (g) Given their pervasive nature, the arbitration provision and other provisions of TAMKO's Warranty are not severable from each other;<sup>7</sup> and
  - (h) TAMKO's Warranty does not provide adequate coverage for residences which incorporate the Shingles, and thus, fails its essential purpose.



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<sup>4</sup>*D.R. Horton*, 403 S.C. at 15, 742 S.E.2d at 40-41 (Relying on the South Carolina Supreme Court's analysis in *Simpson*, and affirming a trial court's finding of unconscionability, "particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages.") (emphasis added); *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69 ("Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. . .").

<sup>5</sup> *D.R. Horton*, 403 S.C. at 17, 742 S.E.2d at 41 (finding arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions" located throughout agreement).

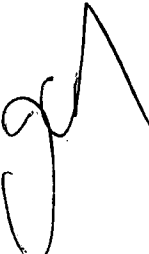
<sup>6</sup> S.C. Code § 15-48-20(a); see also *D.R. Horton*, 403 S.C. at 17, 742 S.E.2d at 41 citing S.C. Code § 36-2-302(1) (2003) ("[South Carolina] legislation permits this Court to refuse to enforce any unconscionable clause in a contract or to limit its application so as to avoid an unconscionable result.") (internal citations omitted).

<sup>7</sup> *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673 ("[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. . .") (internal citations omitted); *D.R. Horton*, 403 S.C. at 17, 742 S.E.2d at 41 ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (internal citations omitted) (emphasis added); see also *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9<sup>th</sup> Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C. 2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights. . . the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

## SUMMARY OF PERTINENT FACTS

### **A.) Overview of the Present Case**

The present case arises out of numerous defective conditions existing within the One Belle Hall Condominiums (“One Belle Hall”) located in Charleston County, South Carolina. One Belle Hall is a condominium complex consisting of four, three-story buildings featuring 59 individual condominium units located in Mt. Pleasant, South Carolina. Certain failures to properly design and manufacture the building components installed at One Belle Hall, coupled with other failures associated with the design, construction and repair of One Belle Hall, have led to construction deficiencies which, in turn, have resulted in moisture damage, water intrusion, and termite infestation affecting each of the four One Belle Hall buildings and other property.



On November 19, 2012, Plaintiff’s commenced this action by filing an Initial Complaint which asserted a number of claims including negligence, breach of warranty, unfair trade practices, strict liability, amalgamation and breach of fiduciary duty against the parties who participated in the design, construction, repair and/or supervision of One Belle Hall. On December 30, 2013, Plaintiffs filed an Amended Complaint which named additional participatory parties including TAMKO, the manufacturer of the shingles installed at One Belle Hall. On February 14, 2014, TAMKO filed an Answer to Plaintiffs’ Amended Complaint, and thereafter, TAMKO filed its Motion to dismiss Plaintiffs’ claims against TAMKO<sup>5</sup> and compel arbitration as to the same based upon purported arbitration provisions contained in TAMKO’s Warranty.

### **B.) TAMKO’s Limited Warranty**


TAMKO is a Missouri Corporation which manufactures roofing products for commercial and residential markets, and specifically, manufactures the Elite Glass-Seal (AR) 3-

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<sup>5</sup> Plaintiffs’ claims against TAMKO include negligence, breach of warranty and strict liability.

Tab Asphalt Shingles (the "Shingles") installed upon each of the One Belle Hall buildings. TAMKO's Shingles are sold with an express warranty that guarantees the Shingles are free from manufacturing defects for a period of twenty-five years. However, TAMKO's Warranty is (a) limited in duration; (b) limited in transferability; (c) limited in compensation; and (d) limited in available recovery avenues.

Given its limited nature, TAMKO's Warranty does not provide adequate coverage for residences which incorporate the Shingles. Not only does TAMKO's Warranty provide insufficient coverage, it also wrongfully attempts to disclaim TAMKO's liability for the same and unconscionably restricts recovery avenues through its "arbitration" and related "legal remedies", "exclusions from coverage" and "transferability" provisions. Specifically, these provisions provide, in pertinent part, as follows:<sup>6</sup>

- 
- Exclusions from Coverage: TAMKO shall *not* be liable *under any circumstances* for:
    - \*\*\*
    - (2) Damages to any building, either exterior or interior, or any property contained therein or for injuries or *damages of any kind whatsoever*. . .
  - Transferability: The Owner may transfer this Limited Warranty one (1) time during the first two (2) years of the Term to a Purchaser of the building upon which the Shingles are installed. . .Neither a Purchaser *nor any other person* may transfer this Warranty.
  - Legal Remedies: Except where prohibited by law, the obligation contained in this limited warranty is expressly in lieu of all other obligations, guarantees, warranties, and conditions expressed or implied, *including any implied warranty or condition of merchantability of fitness for a particular purpose, and of any other obligations or liability on the part of TAMKO Building Products, Inc.* In *no* event, shall TAMKO be liable for *consequential or incidental damages of any kind*. . . *No action for breach of this limited warranty or any other action* against TAMKO relating to or arising out the Shingles. . .*shall be brought later than one year* after any cause of action has accrued.

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<sup>6</sup>For ease of reading purposes, the notable sections of TAMKO's Warranty are extracted and referenced specifically below. However, the exact format of these extracted sections does not mirror the format of said sections as written in TAMKO's warranty as certain items are in different color, bolded or otherwise varied.

- Mandatory Binding Arbitration: *Every claim, controversy, or dispute of any kind whatsoever including whether any particular matter is subject to arbitration* (each an “action”) between you and TAMKO (including any of TAMKO’s employees and agents) relating to or arising out of the product shall be resolved by final and binding arbitration, regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory. To arbitrate an action against TAMKO, you must initiate the arbitration in accordance with the applicable rules of arbitration of the American Association (which are available online at [www.adr.org](http://www.adr.org) or by calling the American Arbitration Association at (800-778-7879), the judicial arbitration and mediation service or other arbitration service agreed to in writing by TAMKO, and provide written notice to TAMKO by certified mail at P.O. Box 1404, Joplin, Missouri 64802 within one year following the discovery of the leak.

Any action brought by you against TAMKO will be arbitrated (or, if arbitration of the action is not permitted by law, litigated) *individually and you will not consolidate, or seek class treatment for, any action unless previously agreed to in writing by both TAMKO and you.*

#### LEGAL DISCUSSION

##### A.) South Carolina Law Operates to Invalidate TAMKO’s Warranty Provisions, Including the Warranty’s Arbitration Provision

Even though the Federal Arbitration Act, 9 U.S.C. 1, *et seq.* (“FAA”) applies to the instant case, the FAA provides arbitration clauses are unenforceable when state law or equitable principles invalidate clause provisions. 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon “such grounds as exist at law or in equity for the revocation of any contract.”). In other words, where state law governs issues concerning the validity, revocability and enforcement of contracts generally,<sup>7</sup> state law also governs issues concerning the validity, revocability and enforcement of arbitration clauses.<sup>8</sup>

<sup>7</sup> According to South Carolina law, a party may seek revocation of a contract under “such grounds as exist at law or in equity,” including fraud, duress, and unconscionability. S.C. Code § 15-48-10(a).

<sup>8</sup> As noted by Justices Breyer, Ginsburg, Sotomayor and Kagan in their dissenting opinion to *AT&T Mobility, LLC v. Concepcion*: “even though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, *federal arbitration law normally leaves such matters to the States.*” 131 S.Ct. 1740, 1760 (2011) (emphasis added); *Rent-A-Center*, 130 S.Ct. at 2775 (2010) (arbitration agreements “may be invalidated by ‘generally

Thus, in South Carolina, a party may effectively challenge the arbitrability of a given claim based upon general contract defenses including fraud, duress and unconscionability. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA).

When such questions of arbitrability arise, the trial court, not the arbitrator, decides whether a matter should be resolved through arbitration. *See Oxford Health Plans, LLC v. Sutter*, 569 U.S. \_\_\_ (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 296 (2010) (noting when such questions of arbitrability arise, the trial court, not the arbitrator, decides whether a matter should be resolved through arbitration); *AT & T Tech., Inc. v. Comm'n Workers of Am.*, 475 U.S. 643, 651 (1986). This determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (noting where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place.); *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013) ("When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties."); *see also* S.C. Code § 15-48-20 (a) (providing arbitration will be denied if a court determines no agreement to arbitrate existed).

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applicable contract defenses"); *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) ("General contract principles of state law apply to arbitration clauses governed by the FAA").

Here, Plaintiffs do not consent to arbitration, and Plaintiffs present state-specific grounds challenging the legitimacy of TAMKO's arbitration provision. This Court agrees with Plaintiffs and finds South Carolina law invalidates TAMKO's arbitration provision in addition to TAMKO's other Warranty provisions.


**B.) TAMKO's Warranty Provisions are Unconscionable and Unenforceable**

Given the absence of meaningful choice necessarily involved in connection with TAMKO's Warranty, coupled with the one-sided nature of its "arbitration," "exclusion", "remedial" and "transferability" provisions, TAMKO's Warranty is unconscionable, and thus, unenforceable under South Carolina. S.C. Code § 15-48-20(a); *see also D.R. Horton*, 403 S.C. 10, 17, 742 S.E.2d 37, 41 (2013) *citing* S.C. Code § 36-2-302(1) (2003) ("[South Carolina] legislation permits this Court to refuse to enforce any unconscionable clause in a contract or to limit its application so as to avoid an unconscionable result.") (internal citations omitted).

Under our jurisprudence, "unconscionability" is defined to include both an absence of meaningful choice as well as oppressive, one-sided contractual provisions. *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25 644 S.E.2d 663, 668-69 (2007); *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability 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.").

**1.) Absence of Meaningful Choice**

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id.* (citations omitted). "In determining whether a contract was 'tainted by an absence of meaningful choice,' courts



should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citations omitted). "[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Id.* at 373 S.C at 26-27, 644 S.E.2d at 669. In circumstances involving adhesion contracts, an absence of meaningful choice is readily apparent based upon the lack of bargaining power. Accordingly, adhesion contracts, such as commercial sales agreements and manufacturer warranties, are subject to "considerable skepticism" due to the disparity in bargaining positions of the parties. *Id.* at 27, 644 S.E.2d at 669. Consequently, "the presumption in favor of arbitration is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Id.* at 26, 644 S.E.2d at 669 (citations omitted).

Here, Plaintiffs had no choice and no input as to any aspect of TAMKO's Warranty, including the Warranty's arbitration provisions. Given Plaintiffs are unsophisticated, lacked bargaining power and were presented with TAMKO's Warranty on a take it or leave it basis, there is clearly an absence of meaningful choice.<sup>9</sup> *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 ("Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge *Simpson's* claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement. . . ."); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of

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<sup>9</sup> At the June 25<sup>th</sup> hearing of this Motion, TAMKO admitted the adhesiveness of its Warranty.

adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). This is even more the case given TAMKO's arbitration and other related provisions result in (a) the loss of all monetary damages; (b) the loss of the right to a jury trial; (c) the loss of the ability to maintain a class action; and (d) the loss of other certain remedies otherwise allowed by South Carolina law including this Court's ability to adjudicate "arbitrability" questions.


As such, this Court cannot ignore the "adhesive" nature of these provisions - non-negotiable provisions which were drafted by TAMKO on a take it or leave it basis - and which functioned to contract away certain significant rights and remedies otherwise lawfully available to Plaintiffs. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69 ("Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. . .").

## **2.) Oppressive/One-Sided Terms**

Specifically as to oppressive terms, the South Carolina Court of Appeals in *Smith versus D.R. Horton* recently affirmed a trial court's decision finding the arbitration provision contained in a D.R. Horton purchase contract unconscionable and unenforceable due to the "cumulative effect" of partisan provisions. *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 15, 742 S.E.2d 37, 40 (Ct. App. 2013), *cert. granted* July 28, 2014. The trial court, confronted with a motion to compel arbitration brought by D.R. Horton, viewed the warranties and arbitration section of the purchase contract as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal

remedies. . .” *Id.* Per its review, the court held the sections’ collective attempt to disclaim implied warranty claims was oppressive and unconscionable. *Id.* The court further found “perhaps even more stark [were] the provisions in the Limitations of Liability. . .” in which D.R. Horton claimed it was not liable for monetary damages of any kind. *Id.* Based upon the foregoing, the trial court concluded, and our Court of Appeals affirmed, the arbitration provision was “wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions.” *Id.*

Here, a review of TAMKO’s Warranty reveals strikingly similar warranty limitations and disclaimers to those addressed, and rejected, by the *D.R. Horton* Court. For example, TAMKO’s arbitration provides:



Mandatory Binding Arbitration: *Every claim, controversy, or dispute of any kind whatsoever including whether any particular matter is subject to arbitration (each an “action”) between you and TAMKO (including any of TAMKO’s employees and agents) relating to or arising out of the product shall be resolved by final and binding arbitration, regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory. . .*

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Any action brought by you against TAMKO will be arbitrated (or, if arbitration of the action is not permitted by law, litigated) individually *and you will not consolidate, or seek class treatment for, any action unless previously agreed to in writing by both TAMKO and you.*

“Perhaps even more stark,” the “Legal Remedies” and “Exclusion from Coverage”

Sections of TAMKO’s Warranty further provides, in pertinent part, as follows:

Exclusions from Coverage: TAMKO shall *not* be liable *under any circumstances* for. . .*damages of any kind whatsoever. . .*

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Legal Remedies: . . .*[T]his limited warranty is expressly in lieu of all other obligations, guarantees, warranties, and conditions expressed or implied, including any implied warranty or condition of merchantability of fitness for a particular purpose, and of any other obligations or liability on the part of TAMKO Building Products, Inc. In no event, shall TAMKO be liable for consequential or incidental damages of any kind. . . .*

In other words, TAMKO's Warranty contains arbitration and remedial provisions which mirror the provisions found unconscionable in *D.R. Horton*:

D.R. Horton's Warranty	TAMKO's Warranty
Purported to be only warranty extended by Horton.	Purports to be only warranty extended by TAMKO.
Purported to disclaim all other warranties, express or implied, as to quality, fitness for particular purpose, merchantability and habitability.	Purports to disclaim all other obligations, guarantees, warranties, and conditions, express or implied, including any implied warranty or condition of merchantability or fitness for particular purpose, and of any other obligations or liability on the part of TAMKO.
Provided all disputes, of any kind, are subject to binding arbitration.	Provides all disputes, of any kind (including disputes regarding "arbitrability"), are subject to binding arbitration.
Provided Horton shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.	Provides TAMKO shall not be liable, under any circumstance, for any damages whatsoever
Provided exclusions to warranty for landscaping.	<p>Provides, among other exclusionary clauses, that TAMKO shall not be liable for damage to any building or any property contained therein.</p> <p>Provides that exposure of TAMKO Shingles at any time to winds in excess of 60 mph <i>extinguishes TAMKO's Liability</i>.</p> <p>Provides <i>neither Purchaser nor any other person may transfer</i> under its "transferability" provision.</p>

Not only does the unconscionable language of TAMKO's Warranty mirror that of D.R. Horton's Warranty, TAMKO Warranty contains an additional provision which further operates

to wrongfully deprive consumer rights.<sup>10</sup> Under our state law principles of contract interpretation, such limitations offered on a take it or leave it basis and which serve to wrongfully deprive substantial rights while concomitantly eviscerating all means of recovering any damages are unconscionable. Indeed, as noted by our Supreme Court in *Simpson*:

*The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. . . [T]his arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled. . . Therefore, under the general rule, this provision in the arbitration clause is unenforceable. . . In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, this provision is an unconscionable waiver of statutory rights, and therefore, unenforceable.*

*Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671 (emphasis added).

Subsequently, the *D.R. Horton* Court reached a similar conclusion:

Relying on the supreme court's analysis in *Simpson*, we affirm the trial court's finding of unconscionability, *particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages.*

*D.R. Horton*, 403 S.C. at 15, 742 S.E.2d at 40-41 (emphasis added).

As applied to One Belle Hall, TAMKO's Warranty provisions negates the very damages separately classified, calculated and contemplated as available under the Warranty's terms. Thus, contrary to TAMKO's contention, the TAMKO Warranty does not provide the Plaintiffs "the possibility of recovery" – there is no recovery to be had per the Warranty provisions drafted by TAMKO. Rather, The Warranty provisions create an internal inconsistency within the Warranty itself by negating all meaningful warranty coverage for the primary risk associated with said Warranty – damage arising out of or to TAMKO's Shingles. Like the defendants in both *D.R. Horton* and *Simpson*, TAMKO takes the position its Warranty relieves TAMKO of all liability for this very damage under any conceivable set of circumstances. This renders the Warranty (a) void

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<sup>10</sup>TAMKO's Warranty also purports to restrict the Statute of Limitations to one year.

of its essential purpose; (b) lacking in mutuality; and (c) procedurally and substantively unconscionable.<sup>11</sup>

Given such unconscionable provisions are unenforceable according to South Carolina law, this Court should deny TAMKO's Motion so as to avoid any unconscionable result irrespective of the FAA's application. *Id. citing* S.C. Code § 36-2-302(1) (2003) ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. . . ."); *see also* TAMKO Supporting Memorandum, p. 5 (noting the grounds for revocation of an arbitration agreement include "generally applicable contract defenses, such as fraud, duress or unconscionability. . .").

**C.) The Warranty Provisions are Not Severable**

While Courts are permitted to "sever" unconscionable, contractual provisions, the purported agreement between Plaintiffs and TAMKO is not a proper candidate for the application of this remedy. South Carolina Courts "recognize severability if not always an appropriate remedy for an unconscionable provision. . . [i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. . . ." *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673; *D.R. Horton, supra*, ("We conclude the

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<sup>11</sup> Under our jurisprudence, such internal inconsistencies render TAMKO's Warranty inherently ambiguous and unconscionable, and therefore, this Court declines to enforce the same. In the insurance context, for example, the South Carolina Court of Appeals in *Isle of Palms Pest Control Company versus Monticello Insurance Company*, directly confronted a similar "internal inconsistency" issue, concluding as follows:

[T]he internal inconsistency created by [a policy exclusion] which purports to bar coverage for claims arising out of the very operation sought to be insured renders [the policy] ambiguous in favor of coverage.

319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994), *reh'g denied*, (Aug. 4, 1995 (emphasis added); *see also Hooters of Augusta, Inc. v. American Global Ins. Co.*, 272 F. Supp.2d 1365, 1378 (S.D. Ga. 2003) (noting "[i]nsurers must not deceive insurance purchasers into believing they have coverage only to have an exclusionary provision entirely nullify it").

arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (internal citations omitted) (emphasis added); *see also Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9<sup>th</sup> Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C. 2005)("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights. . .the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

Similar to *Simpson* and *D.R. Horton*, TAMKO's arbitration clause is "made unconscionable" by oppressive provisions which pervade the Warranty, thereby rendering "severability" impractical, if not impossible. Thus, all unconscionable provisions contained within TAMKO's Warranty should be read together, and all are ultimately rejected together by this Court.

### CONCLUSION

Given this Court's authority to decide arbitrability issues, and this Court's authority to refuse to enforce unconscionable contract provisions under South Carolina law, this Court refuses to enforce TAMKO's Warranty limitations and disclaimers, including its arbitration provision, and thus, denies TAMKO's Motion. In sum, because (a) TAMKO's arbitration, exclusionary, remedial, and transferability provisions are wholly unconscionable and unenforceable as matter of South Carolina law; (b) the above-referenced provisions are made

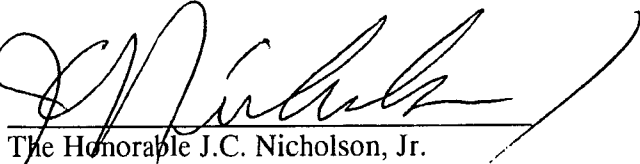
unconscionable and unenforceable due to the cumulative effect of a number of oppressive and one-sided Warranty terms under South Carolina law; (c) the above-referenced provisions are not severable from each other or from TAMKO's Warranty according to South Carolina law; and/or (d) TAMKO's Warranty is inherently ambiguous and void of its essential purpose, it is proper TAMKO's Motion is denied under South Carolina law.

Accordingly, it is hereby:

ORDERED, ADJUDGED, and DECREED that TAMKO'S Motion to Dismiss and Compel Arbitration is **DENIED**;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that TAMKO'S Motion for Protective Order is moot, and therefore, **DISMISSED as moot**.

IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.

This 15 day of Sept., 2014  
Charleston, South Carolina