IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the Petitioner

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

APPENDIX

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INDEX

VOLUME II OF II

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Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the

Appellant,

And Omega Flex, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are the

Respondents.

FINAL BRIEF OF RESPONDENT OMEGA FLEX, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

STATEMENT OF THE ISSUES ON APPEAL

Respondent Omega Flex (hereinafter "this Respondent") would restate the issue on appeal as:

> Did the Trial Court properly refuse to compel binding arbitration because the Purchase Agreement between the parties Plaintiffs/Homebuyers and the Seller/John Wieland Homes is a contract for the sale of a home that did not involve interstate commerce to invoke application of the Federal Arbitration Act?

STATEMENT OF THE CASE

This action arises from a fire that occurred in the Daniel Island home of the Plaintiffs (hereinafter "Homebuyers") on June 25, 2009. In their complaint, Homebuyers allege that the fire was caused when lightning energy entered their home resulting in the perforation of the corrugated stainless steel tubing (hereinafter "CSST") which supplied natural gas to the gas water heater and heat exchanger. [ROA 9; Complaint, filed June 14, 2012.] Homebuyers have sued this Respondent (the manufacturer of the CSST) asserting products liability causes of actions for negligence, breaches of express and implied warranties and strict liability. In addition, Homebuyers have asserted causes of action for negligence, breach of contract and breaches of warranties against (a) Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. (hereinafter "Seller") from whom Homebuyers purchased the home and (b) several subcontractors allegedly involved in the installation of the CSST–Respondents AAA Plumbing, LLC, and Charleston LEC, Inc., and Fogel Services, Inc. (collectively hereinafter "Seller's Subcontractors").

Charleston LEC filed an answer denying that it installed the tubing. [ROA 29; Answer, filed, July 23, 2012.] Fogel Services filed an answer admitting that it installed the tubing, but denying any negligence or breach of warranties. [ROA 35; Answer, filed August 10, 2012. AAA Plumbing filed an answer with general denials and various defenses. [ROA 45; Answer, filed August 20, 2012.]

This Respondent filed an answer, denying the allegations and asserting various defenses. [ROA ; Answer, filed August 17, 2012.] This Respondent filed an amended answer, with cross-claims for indemnification. [ROA 226; Amended Answer, filed December 19, 2012.]

Seller filed an answer denying the allegations and asserting various defenses. Seller also has asserted cross-claims against Seller's Subcontractors for negligence, breach of contract, breach of warranty and indemnification, and cross-claims against this Respondent for negligence, breach of warranty and strict liability. [ROA 73; Answer and Cross-claims, filed October 30, 2012.]

In addition, Seller asserted, as a defense in its answer, that the action is barred by a mandatory binding arbitration provision. Seller also filed a motion to compel arbitration, seeking to compel Homebuyers and all of Seller's Subcontractors (thus all of Seller's Co-Defendants other than this Respondent) to arbitrate all claims against Seller and Seller's Subcontractors. [ROA 324; Motion, filed October 30, 2012.]

The Trial Court denied the motion based on its conclusion that "the transaction between the parties was a contract for the sale of home and not for the construction of a house," and thus, did not involve interstate commerce under the holding in Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012). [ROA 4; Order p. 2, filed

4/25/2013.] Seller filed a motion for reconsideration, which was denied in a Form 4 order. [ROA 344, 8; Motion, filed May 8, 2013; Order, filed May 30, 2013.] Seller timely filed a Notice of Appeal.

STATEMENT OF THE FACTS

In June 2008, Homebuyers entered into a "Purchase Agreement" with Seller for property at 1417 Hooper Street in the Daniels Island development in Charleston, South Carolina. The agreement is denominated as as an "Agreement to Buy and Sell: Property."[ROA 172; Purchase Agreement ¶1 attached to Affidavit of Dennis Black.] Homebuyers and Seller executed a series of addenda to the Purchase Agreement covering such matters as the a change to the grass type for landscaping and custom paint colors. [ROA 161-168, 178-85; Attachments to Black Affidavit.]

Seller is listed and identified as "Seller." Homebuyers are listed and identified as "Purchasers" in the Purchase Agreement and they are listed alternately as "Buyers" or "Homebuyers" in certain other of the documents. [ROA 161-168, 178-85; Attachments to Black Affidavit.]

The Purchase Agreement does not actually contain an arbitration clause; rather, it purports to incorporate the arbitration provisions of a separate Warranty Agreement through Paragraph 22 of the Purchase Agreement which is designated as "Warranty and Arbitration" and states that:

> ... in connection with the sale contemplated by this agreeement, Purchaser will be enrolled in [Seller's] 5-20 Extended Warranty program [Seller's] Warranty), [Seller's] Warranty being incorporated herein by reference. .... PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT [Seller] WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE MANDATORY

BINDING ARBITRATION PROVISIONS CONTAINED THEREIN...." [ROA 175.]

Section V, Paragraph O of the Warranty, entitled "Mandatory Binding Arbitraton" provides, in pertinent parts:

> Any and all unresolved claims and disputes of any kind or nature between [Seller] and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with [Seller], (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resoluaton shall be final. This applies only to claims or dispute that arise after the later of: (a) the issuance of the final certificate of occupancy for the Home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s). This specificially includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by [Seller] or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.
>
> ****
>
> As the purchase agreement with [Seller] and this warranty are transactions involving interstate commerce ,arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Section 1-16, to the exclusion of any provisions of state law.
>
> ****
>
> [SELLER] AND HOMEBUYER(S) HEREBY ACKNOWLEDGE AND AGREE THAT THE ARBITRATION PROCEDURE SET FORTH HEREIN SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE RESOLUTION OF ANY AND ALL DISPUTES ARISING AFTER THE INITIAL CLOSINGO F THE PURCHASE OF THE HOME BY THE INITIAL HOMEBUER(S). [SELLER] AND HOMEBUYER(S) HEREBY WAIVE ANY AND ALL OTHER RIGHTS AND REMEDIES AT LAW, IN EQUITY OR OTHERWISE WHICH MIGHT OTHERWISE HAVE BEEN AVAILABLE TO THEM IN CONNECTION WITH ANY SUCH DISPUTES.

[ROA 199-201; Warranty attached to Black Affidavit.]

Each of Seller's Subcontractors executed a "Trade Contractor Application and Agreement Form" with Seller, although they do not specifically reference the home sold to Homebuyers. The form provides that the Trade Contractor "shall cooperate and participate in, as may be reasonably directed by [Seller], any arbitration proceedings arising out of the home warranty coverage provided by [Seller] or otherwise related to or arising out of the construction of the homes by [Seller]." [ROA 218; Affidavit of Andrew McBride with attachments.]

ARGUMENT

Standard of Review

Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). Arbitrability determinations are subject to *de novo* review. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

The Federal Arbtration Act – "Involving Commerce"

While both state and federal policy favor arbitration, Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013), the predicate question on any motion to compel is whether there is compliance with the state or federal arbitration law requirements. There is no dispute in this case that the arbitration agreement is not enforceable under state law because it does not meet the technical requirements of the South Carolina statute, §15-48-10(a), in that the arbitration provision is not underlined and does not appear on the first page of the Purchase Agreement. [See Appellant's Brief, p. 2 n. 1.] Thus, the question is whether the arbitration agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. §§1, et seq.

Section 2 of the FAA, provides that a "written provision in any ... contract ***evidencing a transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013) (emphasis added).

"Involving commerce" means the functional equivalent of "affecting commerce." Zabinski v. Bright Acres Associates, 346 S.C. 580, 593, 553 S.E.2d 110, 115 (2001) (quoting Allied–Bruce Terminix Co. v. Dobson, 513 U.S. 265, 274 (1995)); *accord* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56(2003)).

Our Supreme Court has repeatedly stated that: "Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." Landers v. Federal Deposit Ins. Co., 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)); Henderson v. Summerville Ford-Mercury Inc., 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013). To determine whether the FAA applies to a particular arbitration agreement, a court must consider whether the contract concerns a transaction involving interstate commerce. Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977); Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013).

I. The Trial Court properly denied the motion to compel arbitration because the Purchase Agreement was for the sale of a home to which the FAA does not apply.

In accord with the authorities discussed above, in order to compel arbitration under the provisions of the FAA, Seller must prove that the Purchase Agreement with the Homebuyers was a transaction involving interstate commerce. The Trial Court held that:

> I have concluded that under recent South Carolina jurisprudence, the determination of this dispute depends on whether the contract between the [Homebuyers] and [Seller] was for the construction of a dwelling or the sale of a home. Bradley v. Brentwood Homes, Inc., et al., 398 S.C. 447, 730 S.E.2d 312 (2012). If the former, the FAA would apply; but if the latter, the FAA would not apply and under established South Caroilna law mandatory arbitration would not take place. As the Court views all the material submitted in connection with this matter by all parties, it has concluded the transaction between the parties as contained in the agreement was a contract for the sale of a home and not for the construction of a house. [ROA 4; Order, p. 2.]

In Bradley v. Brentwood Homes, the Supreme Court addressed the issue of when a transaction involves interstate commerce:

> "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." [Zabinski] at 594, 553 S.E.2d at 117. "Our courts consistently look to the essential character of the contract when applying the FAA." Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct.App.2003) (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved"). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct.App.1999).

730 S.E.2d at 316. The Supreme Court discussed the historical intrastate character of real estate transactions, and noted that precedent adhered to the view that the development of real estate is an inherently intrastate transaction. Ultimately, the Supreme Court concluded that: "Because the essential character of the Agreement was strictly for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to involve intrastate commerce." *Id.* at 318.

Seller argues that the Purchase Agreement should be governed by the FAA because the Warranty contains the recitation that: "As the purchase agreement with

[Seller] and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Section 1-16, to the exclusion of any provisions of state law." However, Seller's argument is based on a circular logic using the language of the arbitration clause to prove the predicate fact of whether the very same clause is enforceable. Such a recitation is a warranty form incorporated by reference, unsupported by the facts of the actual transaction between the parties to the agreement, and does not per se establish the requisite involvement in interstate commerce. See Mostella v. N & N Motors, 840 So. 2d 877, 881 (Ala. 2002) (abrogated on other grounds as stated in Wolff Motor Co. v. White, 869 So. 2d 1129, 1135 (Ala. 2003)); Aronov Realty Brokerage, Inc. v. Morris, 838 So.2d 348 (Ala.2002); Rogers Foundation Repair, Inc. v. Powell, 748 So.2d 869, 872 (Ala.1999).

Seller also argues that the addenda proves that the contract was more than just a contract to sell a completed home; rather, Seller argues, it is one "to customize the construction of a home" that involved interstate commerce. Howewer, as noted by the Trial Court, the affidavit of Dennis Black submitted by Seller states that Homebuyers "entered into a purchase agreement with [Seller] ***to buy a home***." [ROA 159; Black Affidavit, ¶ 3. Emphasis added.] In view of the very recent pronoucement by the Supreme Court in Bradley v. Brentwood Homes, the Trial Court properly viewed this agreement, with all the addenda, and correctly concluded that the essential character of the Purchase Agreement in this case is for the purchase of a home, not construction, and it did not involve interstate commerce. Accordingly, the Trial Court's order should be affirmed, and the case remanded for all the claims to proceed through the judicial process in Circuit Court.

The Trial Court's determination is especially appropriate in the context of the multiple claims and cross-claims with Seller's subcontractors and this Respondent as the manufacturer of the CSST. The language in the Trade Contractor form does not impose mandatory binding arbitration on Seller's Subcontractors, and no basis exists (or has even been asserted) to compel this Respondent to submit to binding arbitration. Thus, submitting the primary claims by the Homebuyers against Seller to binding arbitration would create the potential for inconsistent verdict and be a disservice to judicial economy.

CONCLUSION

The Plaintiffs/Homebuyers entered into a Purchase Agreement with Seller/John Wieland Homes to purchase a house. Under Bradley v. Brentwood Homes, that contract does not involve interstate commerce, and the FAA does not apply. Therefore, the Trial Court properly denied the motion to compel and the order should be affirmed.

Respectfully submitted,

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Certification of Counsel

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

Robert H. Hood, Jr.

Certificate of Service

I certify that on this 29th day of April, 2014, a copy of the foregoing Final Brief of Respondent Omega Flex, Inc. was served on all Parties by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to their Counsel of Record of as listed below:

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Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

FINAL REPLY BRIEF OF APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. IN REPLY TO RESPONDENT OMEGA FLEX, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY ARGUMENT

I. Respondent Omega Flex, Inc., like the circuit court, mistakenly ignores that where, as here, the subject agreement expressly provides that the relevant transaction involves interstate commerce, the Federal Arbitration Act applies as a matter of law.

By its plain language, the Purchase and Sale Agreement (the "Purchase Agreement"), which incorporates the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program (the "Warranty") (collectively, the "Agreement"), provides that the Purchase Agreement and Warranty are transactions involving interstate commerce and that the Agreement and Warranty are governed by the Federal Arbitration Act ("FAA"): ***"As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act. . . ."*** **(R.p.200, §V, ¶ O)** (double emphasis added).

"The construction of a clear and unambiguous contract presents a question of law for the court." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009). An appellate court may decide questions of law "with no particular deference to the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

The Supreme Court of South Carolina has held that a contractual provision that a particular agreement involves interstate commerce such that it is governed by the FAA—like the provision quoted above in the Agreement between Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes") and Respondents Peter T. Phillips and Summar C. Phillips (the "Phillips")—is enforceable. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). Specifically, in Munoz, the Court held that "the arbitration agreement, which applies to this contract and the relationships which result from this contract, ***provides it shall be governed by the FAA . . . [and] . . . [a]rbitration***

agreements, like other contracts, are enforceable in accordance with their terms." Id. at 539, 542 S.E.2d at 363-64 (internal quotation marks omitted; double emphasis added) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland, 489 U.S. 468, 478 (1989)). Moreover, the Supreme Court of South Carolina recently reiterated this holding in Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013), by parenthetically citing to this ruling in Munoz.

Nevertheless, Respondent Omega Flex, Inc. ("Omega Flex"), mistakenly relying on Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012), argues that the Agreement was *not* governed by the FAA because, according to Omega Flex, the Agreement only involved the sale of a completed home. As set forth *infra*, this argument ignores the true nature of the transaction, which involved the construction and sale of the Phillips' home. Moreover, this argument ignores the impact of Munoz and Cape Romain Contractors, discussed above, which unequivocally emphasize that, where an agreement states that the transaction involves interstate commerce, the FAA governs. It is worth noting that this issue was not raised or addressed in the Brentwood Homes opinion. Furthermore, Omega Flex has not cited any precedent from a South Carolina court holding that such an agreement is unenforceable. Under these circumstances, there is no reason for a court to proceed to analyze the nature of the transaction further because the plain, unambiguous language of the contract must be applied, as a matter of law.

Based on the foregoing, the circuit court committed an error of law warranting reversal because the plain, unambiguous language of the Agreement states that the underlying transaction involves interstate commerce and that the FAA governs the transaction.

II. Respondent Omega Flex, Inc., like the circuit court, mistakenly ignores the Addenda to the Purchase Agreement, including the customization specifications

applicable to the construction of the Phillips' house, which unambiguously involve interstate commerce. For this alternative reason, the FAA governs, as a matter of law.

Not only did the Phillips and John Wieland Homes expressly agree that the Agreement would be governed by the FAA, but the Agreement also unambiguously involved the construction and customization of the subject home. Accordingly, as a matter of law, the Agreement includes transactions involving interstate commerce, and the FAA applies.

Appellate courts in South Carolina have consistently held that a contract involving the construction of a residence, by its very nature, involves interstate commerce. For instance, in Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318, n. 8 (2012), the Supreme Court of South Carolina held that a contract for the mere purchase of real property would not involve interstate commerce, but nevertheless emphasized "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." (citations omitted); see also Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project involved interstate commerce where materials, equipment, and supplies were produced and manufactured out-of-state); Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

Relying on Brentwood Homes, Omega Flex argues that the Agreement did not involve interstate commerce because, according to Omega Flex, the Agreement solely involved the purchase of a completed residence. This belies both the unambiguous language of the Agreement

and the only evidence submitted as to the nature of the transaction, which establish, as a matter of law, that the subject transaction involved interstate commerce.

In this respect, a comparison of the facts in the present case to those involved in Brentwood Homes is instructive. In Brentwood Homes, 398 S.C. at 458, 730 S.E.2d at 317, the Court held that the sale and purchase of residential real estate was a purely intrastate activity. In reaching its conclusion, the Court specifically noted that the contract in that case did *not* include customizations of the home: "Notably, the provisions of the Agreement providing for . . . 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley." Id.

In this case, on the other hand, the parties contracted for the customizations which were noticeably absent in Brentwood Homes. Specifically, the parties agreed to the following customizations in various Addenda to the Agreement: (1) adding custom paint colors; (2) converting the patio and front walkway to oyster shell; (3) adding phone/cable to the bonus room over garage; (4) adding a dedicated receptacle for a wine cooler in butler's pantry area; (5) reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor; (6) constructing an additional parking pad to the drive; (7) adding additional patio space; (8) converting the entire house to 7 ¼ inch baseboards; and (9) several modifications related to wiring or prewiring for surround sound. **(R.pp.161-68).**

These customizations, which are incorporated into the Purchase Agreement, involve interstate commerce, as confirmed by the only evidence submitted to the circuit court on this issue—the affidavit of Dennis A. Black, the one-time Division Quality Control Manager for John Wieland Homes. In fact, Black specifically states in his affidavit that the construction of the Phillips' home "implicates interstate commerce." **(R.p.159, ¶¶ 1, 4).** The terms of the Addenda to the Purchase Agreement and Black's affidavit that the construction of the Phillips' house

involved interstate commerce unequivocally establish that the Agreement was governed by the FAA. See e.g., New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct. App. 2008) ("we find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . . [the builder's] affidavit swearing the project will involve businesses and supplies from outside South Carolina.").

Based on the foregoing, the circuit court's decision that the Agreement did not encompass transactions involving interstate commerce is an error of law, warranting reversal. See Brentwood Homes, at 458, 730 S.E.2d at 318, n. 8 ("We emphasize 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." (emphasis added)).

III. Omega Flex's failure to respond to the remaining issues in John Wieland Homes' opening brief should amount to a concession that the circuit court ruled incorrectly as to these issues.

A respondent's failure, in the respondent's brief, to address an issue raised in the appellant's brief may amount to a concession as to that issue. See First Union Nat. Bank v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) rev'd in part on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly.").

In its brief, Omega Flex asserts only that the Agreement did not involve interstate commerce and, therefore, the Agreement falls outside the scope of the FAA. While John

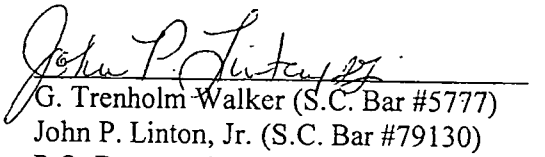
Wieland Homes additionally contends in its opening brief that the scope of the arbitration provision in the Agreement encompasses every claim raised by the Phillips and that any claims against John Wieland's trade contractors should also be subject to arbitration, Omega Flex advances no arguments in opposition to these contentions. Consequently, Omega Flex's failure to respond to these arguments should amount to a concession as to their validity.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the opening brief of John Wieland Homes, the circuit court's orders refusing to compel arbitration should be **REVERSED,** and this Court should remand this case to the circuit court for the entry of an order compelling the parties to arbitrate all claims involved in this case.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA



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April 29, 2014
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

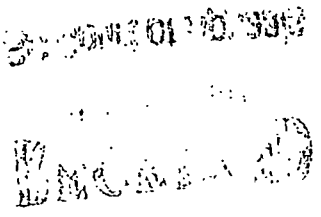
Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply to Respondent Omega Flex, Inc. enclosed herewith, comply with Rule 211(b), SCACR.



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Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

PROOF OF SERVICE

I hereby certify that true and correct copies of Final Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc.; Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply to Respondent Omega Flex, Inc.; and Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply Respondents Peter T. Phillips and Summar C. Phillips were served on this 29th day of September, 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter T. Phillips and Summar C. Phillips, Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., Defendants,

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc., is the Appellant,

And Omega Flex, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are the Respondents.

Appellate Case No. 2013-001449

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2015-UP-300
Submitted March 1, 2015 – Filed June 24, 2015

AFFIRMED

John Phillips Linton, Jr., and George Trenholm Walker, both of Pratt-Thomas Walker, PA, of Charleston, for Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc.

Robert H. Hood, Robert H. Hood, Jr., A. Walker Barnes, and Deborah H. Sheffield, all of Hood Law Firm, LLC, of Charleston, for Respondent Omega Flex, Inc.; Everett A. Kendall, II, and James E. Cavanaugh, both of Sweeny Wingate & Barrow, PA, of Columbia, for Respondent Fogel Services, Inc.; John F. McKenzie, Amanda N. Pittman, and Robert A. McKenzie, all of McDonald, McKenzie, Rubin, Miller & Lybrand, LLP, of Columbia, for Respondents Peter T. Phillips and Summar C. Phillips; R. Patrick Flynn and Christopher M. Ramsey, both of Robertson Hollingsworth & Flynn, of Charleston, for Respondent Charleston LEC, Inc.; and Jeffrey A. Ross, of Clawson & Staubes, LLC, of Charleston, for Respondent AAA Plumbing, LLC.

PER CURIAM: Peter T. and Summar C. Phillips (the homeowners) filed this action against Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc. (John Wieland), AAA Plumbing, Fogel Services, Inc., and Charleston LEC, Inc., alleging numerous causes of action arising from a fire at the homeowners' home on Daniel Island. John Wieland appeals the trial court's denial of its motion to compel arbitration, arguing the trial court erred in (1) finding the parties' agreement (the Purchase Agreement) was not governed by the Federal Arbitration Act (FAA); (2) not considering the addenda to the Purchase Agreement; (3) not finding the Purchase Agreement compelled arbitration for all claims relating to the home; and (4) not compelling the homeowners to arbitrate the claims against trade contractors. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1: As to whether the Purchase Agreement was governed by the FAA: *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) ("adher[ing] to the view that the development of real estate is an inherently intrastate transaction"); *id.* at 458, 730 S.E.2d at 317-18 (noting the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce); *id.* at 459, 730 S.E.2d at 318 (stating if ancillary factors in the purchase agreement for a residential home, such as out-of-state financing or a national warranty, were enough to constitute interstate commerce, "then every transaction that involved these ancillary factors would be subject to the FAA"); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542

S.E.2d 360, 363 (2001) (stating "the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"); *id.* at 539 n.3, 542 S.E.2d at 363 n.3 (overruling *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1994) to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied).

2: As to whether the court failed to consider the addenda to the Purchase Agreement: *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318 (noting the purchase agreement specifically provided for the purchase of a completed dwelling rather than for the construction of a dwelling and provisions of the agreement providing for 'New Construction,' 'House Plan,' 'Options,' and 'Color Selection' were eliminated as not applicable and were not signed by the purchaser); *Aiken v. World Fin. Corp. of S. Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (stating a circuit court's factual findings in determining whether to compel arbitration will not be reversed on appeal if any evidence reasonably supports the findings).

3: As to the remaining issues: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (concluding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.[1]

SHORT, LOCKEMY, and McDONALD, JJ., concur.

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

76560

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
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Peter T. Phillips and Summar C. Phillips ..... Respondents,

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Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is.....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are.....Respondents.

PETITION FOR REHEARING BY APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.

Pursuant to Rule 221(a), SCACR, Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("Appellant" or "John Wieland Homes") hereby petitions for rehearing of the Court's unpublished decision in this appeal of an order denying arbitration. See Phillips v. John Wieland Homes, Op. No. 2015-UP-300 (Ct. App. filed June 24, 2015).

Rehearing is appropriate because (1) the Court's decision overlooks, misapprehends, or fails to address Appellant's argument that the Federal Arbitration Act

applies because the Respondents Peter T. Phillips and Summar C. Phillips' (the "Phillips") Agreement with John Wieland Homes specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act; (2) the Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house; and (3) the Court's decision misapplies the standard of review for factual findings of the Circuit Court.[1]

Based on the foregoing, John Wieland Homes respectfully requests that the Court grant rehearing.

FACTUAL/PROCEDURAL BACKGROUND

The Phillips and John Wieland Homes entered into a Purchase and Sale Agreement ("the Purchase Agreement") which incorporated the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program ("the Warranty") (collectively, the "Agreement"). **(R.pp.159-217).** This Agreement included several Addenda wherein the Phillips' specially contracted for several specific options or customizations of the

[1] The Court's decision also fails to address Appellant's arguments that (1) the Circuit Court committed an error of law in failing to find that the Agreement expressly and unambiguously compels arbitration of all claims between the Phillips and John Wieland Homes when the Agreement specifically compels arbitration of any and all claims between John Wieland Homes and the Phillips arising out of or relating in any manner to the Phillips' home and (2) that the Circuit Court committed an error of law in failing to compel the Phillips to arbitrate their claims against the Trade Contractors when their claims against the Trade Contractors are all dependent upon the Phillips' Agreement with John Wieland Homes, which requires arbitration. The Court did not address these issues because its decision with respect to the applicability of the Federal Arbitration Act was dispositive of these issues. On rehearing of the appeal, the Court should consider these issues that the Court's decision did not address.

residence. **(R.pp.161-68).** Specifically, the Phillips and John Wieland Homes agreed to the following items in various Addenda to the Purchase Agreement: adding custom paint colors; converting the patio and front walkway to oyster shell; adding phone/cable to the bonus room over the garage; adding a dedicated receptacle for a wine cooler in butler's pantry area; reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor; constructing an additional parking pad to the drive; adding additional patio space; converting the entire house to 7 ¼ inch baseboards; and several modifications related to wiring or prewiring for surround sound. **(R.pp.161-68).**

The Agreement specifically provides that the transaction involved interstate commerce: "As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law." **(R.p.200, ¶ O).** The terms of the Agreement were specifically agreed to by the Phillips; and both the Purchase Agreement and Warranty include mandatory arbitration provisions. **(R.p.175, ¶ 22 and R.pp.199-201, ¶ O).**

Paragraph 22 of the Purchase Agreement, entitled "Warranty and Arbitration," provides, in pertinent part that the Phillips agree to the binding arbitration provisions of the Warranty:

> Warranty and Arbitration, Purchaser and Seller hereby agree that, in connection with the sale contemplated by this agreement, Purchaser will be enrolled in the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program (JWH Warranty), the JWH Warranty being incorporated herein by reference.
>
> * * *
>
> PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT JWH

> WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN . . .

(R.p.175, ¶ 22). The Phillips agreed to Paragraph 22 and initialed it separately, acknowledging that they read and received the Warranty. **(R.p.175, ¶ 22).** In so doing, per the terms of the Warranty, which is incorporated into Paragraph 22 of the Purchase Agreement by reference, the Phillips expressly agreed as follows:

> Any and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. . . . This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.

(R.pp.199-200, §V, ¶ O). The Agreement mandates that arbitration procedure shall be the exclusive dispute resolution process for any dispute arising after the closing. **(R.p.201, §V, ¶ O).**

On June 14, 2012, the Phillips filed a complaint against Respondent Omega Flex, Inc. ("Omega Flex"), John Wieland Homes, Respondent AAA Plumbing ("AAA Plumbing"), Respondent Fogel Services, Inc. ("Fogel Services"), and Respondent Charleston LEC, Inc. ("Charleston LEC"), alleging causes of action for negligence, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, strict liability, breach of contract, breach of implied warranty of workmanlike service, and breach of implied warranty of habitability. **(R.pp. 13-28).** The Phillips' Complaint seeks damages arising from a fire on June 25, 2009

at 1417 Hooper Street on Daniel Island. **(R.p.14, ¶¶ 7-9)**. The fire was allegedly caused by a lightning strike that created a hole in a CSST gas pipe, which allegedly caused the natural gas to ignite at the hole in the CSST, which then purportedly escaped the hole in the CSST. **(R.p.14, ¶ 10).**

On October 29, 2012, John Wieland Homes moved to compel arbitration of the Phillips' claims against John Wieland Homes and to compel arbitration of the Phillips' claims against AAA Plumbing, Fogel Service, and Charleston LEC (collectively, the "Trade Contractors") on the basis that these claims are all subject to arbitration under the Federal Arbitration Act. **(R.pp.324-27).**[2] The Circuit Court refused to compel arbitration, ruling that the Agreement entered into between the Phillips and John Wieland Homes did not involve interstate commerce and was not subject to the Federal Arbitration Act. **(R.pp.1-7).** This appeal followed.

LAW/ANALYSIS

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885).

Rehearing in the present case is supported by the following alternative grounds:

1. **The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Federal Arbitration Act applies because the Phillips' Agreement with John Wieland Homes specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act.**

[2] The parties did not dispute that the arbitration agreement at issue in this case does not meet the technical requirements of South Carolina Code section 15–48–10(a). **(R.p.4).**

The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Federal Arbitration Act applies because the Phillips' Agreement with John Wieland Homes specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act.

The Federal Arbitration Act provides: "A written provision in . . . 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, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. Here, by its plain language, the Agreement provides that the transactions involved interstate commerce and that it is governed by the Federal Arbitration Act: "As the purchase agreement with Wieland and this warranty are ***transactions involving interstate commerce***, arbitrations ***shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16***, to the exclusion of any provisions of state law." **(R.p.200, ¶ O) (double emphasis added).**

The South Carolina Supreme Court has held that an agreement that an agreement that provides it shall be governed by the Federal Arbitration Act is enforceable in accordance with its terms. Specifically, in Munoz v. Green Tree Fin. Corp., the Court held that "the arbitration agreement, which applies to 'this contract and the relationships which result from this contract', provides it shall be governed by the FAA . . . [and] . . . [a]rbitration agreements, like other contracts, are enforceable in accordance with their terms." 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (internal quotation marks omitted) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,

489 U.S. 468, 478 (1989)). The Supreme Court has recently reaffirmed this ruling. See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013) (citing Munoz, 343 S.C. at 538, 542 S.E.2d at 363–64, and stating in a parenthetical as follows: "holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms").

The Court's decision does not address that the Agreement specifically provides that it involves interstate commerce and that it shall be governed by the FAA. The Court's decision cites to Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012) for the proposition that the development of real estate is inherently interstate transaction and the proposition that the Federal Arbitration Act does not apply to a residential real estate transaction that has no substantial or direct connection to interstate commerce. Brentwood Homes did not address the issue of whether a contract, providing that the transaction involves interstate commerce and would be governed by the Federal Arbitration Act, is enforceable. Therefore, Brentwood Homes is not controlling as to whether the Phillips and John Wieland Homes agreement that the Agreement involved interstate commerce and was governed by the Federal Arbitration Act is enforceable. It is totally inapposite. The Court's decision also cites Munoz, but for the proposition that the Federal Arbitration Act applies to contracts regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate commerce transaction.

The Court's decision does not address or distinguish the applicable rule of law—that a contract, providing that it involves interstate commerce and that it shall be governed by the Federal Arbitration Act, is enforceable in accordance with its terms. As recognized

by the courts in Volt Info. Sciences and Munoz, and most recently in Cape Romain Contractors, arbitration agreements, like other contracts, are enforceable in accordance with their terms—an agreement that provides it shall be governed by the Federal Arbitration Act is enforceable in accordance with its terms. Because the Court's decision failed to address this argument, rehearing should be granted.

2. **The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house and the Court's decision misapplies the standard of review for factual findings of the Circuit Court.**

   (a) The Court's decision misapplies the rule that a circuit court's factual findings are entitled to deference on appeal, because the Circuit Court in this case did not consider the Addenda at all or make any findings with respect to the Addenda, it simply ignored them.

The Court, citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007), found that the Circuit Court did not commit legal error with respect to the Addenda because a circuit court's factual findings in determining whether to compel arbitration will not be reversed if any evidence reasonably supports the findings. The Court's decision misapplies the rule that a circuit court's factual findings are entitled to deference on appeal. The Circuit Court in the case did not consider the Addenda at all or make any findings with respect to the Addenda, it simply ignored them. The Circuit Court's discussion of the terms of the Agreement illustrates that it did not consider the Addenda at all:

> Under this contract, the seller, John Wieland Homes, had a right to build as it deemed fit. It had ultimate discretion on materials. The provision of the agreement allowing the Plaintiffs to make certain selections was marked as not applicable. John Wieland Homes reserved the right to decide home placement, driveway location, number of deck steps and all exterior colors. The seller was not required to gain the purchaser's permission prior to making any of these decisions. The agreement further provided that no

structural or mechanical changes could be made once framing was complete.

(R.p.5). This characterization of the Agreement makes clear the Circuit Court did not consider the Addenda, which included, among other things, customizing paint colors, reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor, construction an additional parking pad to the drive, and adding additional patio space.

The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Circuit Court erred by only considering the original Agreement and failing to consider the Addenda, which included the type of options and customizations that involve interstate commerce such that the Federal Arbitration Act would apply. The Circuit Court's failure to consider the full Agreement, which would include consideration the Addenda, is reversible error. See e.g., Brentwood Homes, at 455, 730 S.E.2d at 316 ("To ascertain whether a transaction involves commerce within the meaning of the FAA, ***the court must examine*** the agreement, the complaint, and the surrounding facts." (quoting Zabinski, at 594, 553 S.E.2d at 116) (double emphasis added)). Because the Court's decision fails to address, overlooks, or misapprehends Appellant's argument, rehearing should be granted.

(b) The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house.

The Court's decision failed to address, overlooks, or misapprehends Appellant's argument the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house.

The Federal Arbitration Act applies and preempts state law because the transaction—a contract to customize the construction of a home and for the purchase of that home—involves interstate commerce. The FAA provides: "A written provision in . . . 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, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)).

"The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). "The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements." Id. at 590-91, 553 S.E.2d at 115 (citation omitted); see also Allied-Bruce Terminix Companies, 513 U.S. at 270. "While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." Zabinski, 346 S.C. at 592, 553 S.E.2d at 116 (citation omitted).

South Carolina Courts have consistently held that a contract that involves the construction of a residence, by its very nature, involves interstate commerce. See Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318, n. 8 (2012) ("We

emphasize 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.") (citations omitted); Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project was interstate where materials, equipment, and supplies were produced and manufactured out-of-state); Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

However, in Brentwood Homes, the Court held that the sale and purchase of residential real estate was a purely intrastate activity. See Brentwood Homes, at 458, 730 S.E.2d at 317 ("[W]e conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA."). The Brentwood Homes Court specifically noted that the contract in that case did not include customizations of the home: "Notably, the provisions of the Agreement providing for . . . 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley." Id.

Here, the Agreement does include customizations of the construction of the home, as provided by the Addenda. Specifically, the Phillips and John Wieland Homes agreed to the following items in various Addenda to the Purchase Agreement: adding custom paint colors; converting the patio and front walkway to oyster shell; adding phone/cable to the bonus room over garage; adding a dedicated receptacle for a wine cooler in butler's pantry area; reframing of the stairs to accommodate hardwood treads on first flight of stairs to

second floor; constructing an additional parking pad to the drive; adding additional patio space; converting the entire house to 7 ¼ inch baseboards; and several modifications related to wiring or prewiring for surround sound. **(R.pp.161-68).**

The Agreement clearly involves interstate commerce, based upon the customizations of the construction of the home, as provided by the Addenda. Each of the items included in the Addenda, which are part of the Agreement, involve interstate commerce. In fact, Dennis A. Black, the one-time Division Quality Manager for John Wieland Homes, specifically stated in his affidavit that the construction of the Phillips' home "implicates interstate commerce." **(R.p.159, ¶¶ 1, 4).** The terms of the Addenda to the Agreement and Black's affidavit that the construction of the Phillips' house involved interstate commerce unequivocally demonstrate that the Agreement involved interstate commerce. See e.g., New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct. App. 2008) ("we find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . . [the builder's] affidavit swearing the project will involve businesses and supplies from outside South Carolina.").

Therefore, because the Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Agreement clearly involves interstate commerce, based upon the construction customizations provided for in the Addenda, rehearing should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant a rehearing.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA

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July 9, 2015
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July 9, 2015

Via Courier
The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
1220 Senate Street
Columbia, SC 29201

Re: Phillips, et al. v. Omega Flex, Inc., et al.
Appellate Case No. 2013-001449
Our Client: John Wieland Homes & Neighborhoods of the Carolinas, Inc.
Our File No. 1895-013

Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Petition for Rehearing of Appellant John Wieland Homes & Neighborhoods of the Carolinas, Inc. in the above referenced matter. Also enclosed are the Proof of Service and our firm check for the filing fee.

Please contact me if you have any questions. Thank you for your assistance.

Very truly yours,

PRATT-THOMAS WALKER, P.A.

John P. Linton, Jr.

JPL/cam
c: All Counsel of Record

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is.....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

PROOF OF SERVICE

I hereby certify that true and correct copies of Petition for Rehearing of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. were served on this 9th day of July, 2015 via U.S. mail, postage prepaid, upon the following counsel of record:

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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Omega Flex, Inc., John Wieland homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ...Defendants,

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc., is the ...Appellant,

And Omega Flex, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are.....Respondents.

RETURN TO PETITION FOR REHEARING OF RESPONDENTS PETER T. PHILLIPS AND SUMMAR C. PHILLIPS

Appellant John Wieland Homes and Neighborhoods of the Carolina, Inc. ("Appelant" or "John Wieland Homes") served a Petition for Rehearing on July 9, 2015, which was sent out by the South Carolina Court of Appeals on July 10, 2015. Appellant filed this petition alleging that the Court failed to address its arguments and misapplied the standard of review. For the following reasons, Respondents Peter T. Philips and Summar C. Phillips ("Respondents" or the "Phillips") respectfully request that this Court deny John Wieland Homes' petition for rehearing.

FACTUAL/PROCEDURAL BACKGROUND

The Phillipses and John Wieland Homes entered into a Purchase and Sale Agreement ("Purchase Agreement") on June 7, 2008, which purported to include a mandatory arbitration provision. (R. pp. 359-64). The parties have agreed that the arbitration section does not conform to the South Carolina Uniform Arbitration Act requirements. (R. p. 4). The Purchase Agreement states that the contract is for the sale of property. (R. p. 359). Additionally, the Purchase Agreement incorporated the John Wieland Homes and Neighborhoods 5-20 Extended Warranty, along with the Addendum to the Purchase Agreement. (R. p. 362). (R. p. 365). (R. p. 368).

Peter T. Phillips and Summar C. Phillips ("the Phillipses"), the Respondents, sued Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes"), along with other Defendants who are also Respondents in this appeal. (R. pp. 9-28). The Phillipses pled several causes of action. (R. pp. 9-28).

The Phillipses Complaint arises out of a home fire on June 25, 2009, at the Phillipses' home located at 1417 Hooper Street in Daniel Island, South Carolina. (R. p. 4). The Phillipses purchased the home from John Wieland Homes approximately one (1) year prior to the fire. (R. p. 14). As a result, the Phillipses home and its contents were severely damaged, and they were unable to live in their home for a period of time. (R. p. 14).

At the time of the purchase, the Phillipses and John Wieland Homes executed a Purchase Agreement containing an arbitration clause, prompting the Appellant, John Wieland Homes, on October 29, 2012, to move to compel arbitration between the Phillipses and the other Defendants in the original action. (R. pp. 324-27). The Appellant argued in its motion to compel arbitration that the Phillipses claims were subject to arbitration under the Federal Arbitration Act. (R. pp.

324-27). In turn, the Phillipses contended that the Agreement was not subject to the Federal Arbitration Act because the contract was for the sale of a home rather than the construction of a home, meaning interstate commerce was not involved in the transaction. (R. pp. 340-43). The Honorable J.C. Nicholson, Jr. heard the motion on December 18, 2012, and issued an order which held that the Agreement did not involve interstate commerce, and, therefore, was not subject to the Federal Arbitration Act. (R. pp. 3-7).

The Appellant filed a Motion to Reconsider, Alter, or Amend that Order on May 6, 2013, which was denied, and Appellant filed a notice of its intent to appeal on June 25, 2013. (R. pp. 345-58). This appeal followed. The case was decided on the briefs, and the Court issued its decision on June 24, 2015, affirming the decision of the lower court, citing several cases to support its decision. *See Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015).

LAW/ANALYSIS

A party may file a Petition for Rehearing if a point has been overlooked or misapprehended by the Court. Rule 221, SCACR. However, it is important to note that "the purpose of a petition for rehearing is not just to have the case tried in [the appellate court] a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 172, 167 S.E. 234, 237 (1933). Petitions for rehearing are typically dismissed because "they contain nothing but a 'rehash' of what the losing party has said before, matters which the Court has already considered well and disposed of." *Id.* Appellant's petition for rehearing rehashes its previous arguments that the Court has already considered well and disposed of.

The Phillips assert that a rehearing should be denied based on the following grounds:

1. **The Court's decision addresses, considers, and correctly interprets Appellant's arguments regarding the applicability of the Federal Arbitration Act.**

Appellant rehashes the arguments verbatim from its Final Brief rather than introduce new arguments that the Court has not considered. Therefore, it is the Respondent's position that the court has already considered well and disposed of those arguments. Appellant's Final Brief discussed the contractual provisions of the Agreement, and Respondent's Final Brief discussed, among other things, that the alleged contractual agreement was not enforceable. It is clear that the Court considered the contractual arguments in both Appellant's and Respondent's Final Briefs.

The Appellants contend that *Bradley v. Brentwood Homes, Inc.*, is inapposite. The Supreme Court of South Carolina held in *Bradley* that when a home purchase agreement provides that a purchaser is receiving a completed dwelling and is not contracting for the construction of a home, the transaction does not involve interstate commerce, meaning that the transaction is not subject to the Federal Arbitration Act. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). Paragraph One (1) of the purchase agreement explicitly states that the contract is for the sale of property. (R. p. 359). Additionally, Appellant's own witness, Dennis A. Black, a Division Quality Manager for Appellant, states in Paragraph Three (3) of his affidavit supporting Appellant's motion that the Phillipses "entered a purchase agreement with JWH to buy a home in the located [sic] at 1417 Hooper Street, Charleston, SC 29492." (R. pp. 159-160).

The South Carolina Court of Appeals cited specific quotes from the *Bradley* case in its Opinion, which Appellant attacks. The Court of Appeals determined that this contract was a contract for real estate only, and "real estate is an inherently intrastate transaction." *Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct.

App. filed June 24, 2015), citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 456, 730 S.E.2d at 317 (2012).

Finally, Appellant states that the Court cited *Munoz* but does not provide any discussion of this case. The Court cited *Munoz v. Green Tree Financial Corporation*, "stating 'the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.'" *Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015), citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Again, it is clear that the Court synthesized the Appellant's arguments in its Final Brief and determined that an arbitration agreement must actually involve interstate commerce for the FAA to apply, whether the parties intended for it to apply or not. Since the Court determined that this was a transaction which involved real estate only, interstate commerce was not involved, and the FAA did not apply even though Appellant hoped for it to apply.

2. The Court's decision addresses, considers, and correctly interprets the Appellant's arguments regarding the Addenda to the Agreement and applied the correct standard of review.

a. The Court addressed, considered, and correctly interpreted the rule that a circuit court's factual findings are entitled to deference on appeal.

The Circuit Court considered the Addenda to the Agreement in making its decision. First, the Addenda, or its contents, were mentioned at both the hearing on December 18, 2012, and April 16, 2013. (R. pp. 255-323). In the Order issued by Judge Nicholson on April 23, 2013, he mentioned the "incidental choices" that Plaintiffs could make, which were contained within the Addenda. (R. p. 5). It is clear that Judge Nicholson considered the Addenda when

issuing his Order. Therefore, this Court addressed, considered, and correctly interpreted the standard of review because the Circuit Court considered the Addenda in rendering its Order.

b. The Court addressed, considered, and correctly interpreted the Appellant's argument when it determined that the Agreement and Addenda did not involve interstate commerce.

Appellant, again, rehashes the arguments verbatim from its Final Brief rather than introduce new arguments that the Court has not considered. Therefore, it is the Respondent's position that the court has already considered well and disposed of those arguments. The Court cites the *Bradley* case regarding this issue in its Order, "noting the purchase agreement specifically provided for the purchase of a completed dwelling." *Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015), citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 458, 730 S.E.2d at 317 (2012). The Court then addressed that the homeowner in *Bradley* did not make any decisions regarding the house plan, options, or color selection. *Id.* As in *Bradley*, the Phillipses had no real decision-making authority regarding the construction specifics of the home. The Court's use of this particular quote shows that it considered the incidental choices that the Phillipses made in the original Agreement and Addenda and determined that this was the sale of a home rather than the construction of a home.

CONCLUSION

The Court's Opinion addresses, considers, and correctly interprets all of the Appellant's arguments. Based on the discussion above, a rehearing should be denied.

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July 17, 2015

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the Return to Petition for Rehearing of Respondents Peter T. Phillips and Summar C. Phillips was served upon the attorneys listed below by depositing said paper(s) in the United States Mail, Columbia, South Carolina, on the 17th day of July, 2015, with the first class postage duly-affixed and a return address clearly indicated on the envelope, addressed as follows:

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RE: Appellate Case Number: 2013-001449

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Charleston County
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

Unpublished Opinion No. 2015-UP-300
Submitted March 1, 2015 – Filed June 24, 2015

Peter T. Phillips and Summar C. Phillips,

Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., Defendants,

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the

Appellant,

And Omega Flex, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are the

Respondents.

RESPONDENT OMEGA FLEX, INC.'S RETURN TO PETITION FOR REHEARING BY APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.

Respondent Omega Flex (hereinafter "this Respondent") submits this Return to the Petition for Rehearing filed by Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. (hereinafter "Seller") as directed by the Court. Respondent

respectfully submits that this Court properly affirmed the Trial Court in its decision Phillips v. John Wieland Homes, Op. No. 2015-UP-300 (Ct. App. filed June 24, 2015) and did not overlook or misapprehend any relevant points. Specifically, this Court applied the appropriate standard of review and the applicable law on the point that the purchase agreement for the sale of a home did not involve interstate commerce to invoke application of the Federal Arbitration Act.

The Purchase Agreement – Paragraph 22 – The Warranty & Arbitration Clause

A full recitation of the facts are found in the brief. Briefly, for the context of this Return, the Respondent would not that In June 2008, Homebuyers entered into a "Purchase Agreement" with Seller for property at 1417 Hooper Street in the Daniels Island development in Charleston, South Carolina. The agreement is denominated as as an "Agreement to Buy and Sell: Property."[ROA 172.] Homebuyers and Seller executed a series of addenda to the Purchase Agreement covering such matters as the a change to the grass type for landscaping and custom paint colors. [ROA 161-168, 178-85.]

The Purchase Agreement does not actually contain an arbitration clause; rather, it purports to incorporate the arbitration provisions of a separate Warranty Agreement through Paragraph 22 of the Purchase Agreement which is designated as "Warranty and Arbitration." The Appellant contends that the Court overlooked or misapprehended the fact that the Warrant Agreement included the following lanugage: "As the purchase agreement with [Seller] and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Section 1-16, to the exclusion of any provisions of state law." [ROA 200.]

1. **The Federal Arbitration Act does not apply because the transaction for purchase of a home that did not – as a matter of fact -- involve interstate commerce, notwithstanding any provision in the Warranty.**

While both state and federal policy favor arbitration, Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013), the predicate question on any motion to compel arbitration is whether there is compliance with the state or federal arbitration law requirements. It is indisputable in this case that the arbitration agreement is not enforceable under state law because it does not meet the technical requirements of the South Carolina statute, §15-48-10(a), in that the arbitration provision is not underlined and does not appear on the first page of the Purchase Agreement. Thus, the question is whether the arbitration agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. §§1, et seq. This Court correctly relied on that applicable authorities of Bradley v.Brentwood Homes, Inc., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012), and Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001), in affirming the Trial Court's finding that the Purchase Agreement is not governed by the FAA.

> 1. As to whether the Purchase Agreement was governed by the FAA: *Bradley v.Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) ("adher[ing] to the view that the development of real estate is an inherently intrastate transaction"); id. at 458, 730 S.E.2d at 317-18 (noting the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce); id. at 459, 730 S.E.2d at 318 (stating if ancillary factors in the purchase agreement for a residential home, such as out-of-state financing or a national warranty, were enough to constitute interstate commerce, "then every transaction that involved these ancillary factors would be subject to the FAA"); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (stating "the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"); id. at 539 n.3, 542 S.E.2d at 363 n.3 (overruling Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994) to the

extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied).

Section 2 of the FAA, provides that a "written provision in any ... contract ***evidencing a transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2013) (emphasis added). As a predicate to applying the FAA, the court first must consider whether the contract concerns a transaction involving interstate commerce. Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977); Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 122, 747 S.E.2d 461, 464 (2013).

In order to compel arbitration under the provisions of the FAA, Seller must prove that the Purchase Agreement with the Homebuyers was a transaction involving interstate commerce. The Trial Court held that:

> I have concluded that under recent South Carolina jurisprudence, the determination of this dispute depends on whether the contract between the [Homebuyers] and [Seller] was for the construction of a dwelling or the sale of a home. Bradley v. Brentwood Homes, Inc., et al., 398 S.C. 447, 730 S.E.2d 312 (2012). If the former, the FAA would apply; but if the latter, the FAA would not apply and under established South Carolina law mandatory arbitration would not take place. As the Court views all the material submitted in connection with this matter by all parties, it has concluded the transaction between the parties as contained in the agreement was a contract for the sale of a home and not for the construction of a house. [ROA 4.]

Seller argues that Bradley v. Brentwood Homes is somehow not controlling as to the issues in this case. This Respondent urges this Court to examine the Supreme Court's holding in Bradley v. Brentwood Homes and rebut Seller's attempt to distinguish that

case from the present one. In Bradley v. Brentwood Homes, the Supreme Court addressed the issue of when a transaction involves interstate commerce:

> "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." [Zabinski] at 594, 553 S.E.2d at 117. "Our courts consistently look to the essential character of the contract when applying the FAA." Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct.App.2003) (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved"). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct.App.1999).

730 S.E.2d at 316. The Supreme Court discussed the historical intrastate character of real estate transactions, and noted that precedent adhered to the view that the development of real estate is an inherently intrastate transaction. Ultimately, the Supreme Court concluded that: "Because the essential character of the Agreement was strictly for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to involve intrastate commerce." Id. at 318.

Appellant Seller argues that Brentwood Homes is not controlling because it did not address the issue of whether a contract, providing that the transaction involves interstate commerce and would be governed by the Federal Arbitration Act, is enforceable. Seller argues that the Purchase Agreement should be governed by the FAA because the Warranty contains the recitation that: "As the purchase agreement with [Seller] and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Section 1-16, to the exclusion of any provisions of state law." Seller's argument, however, is based upon the circular logic that uses the

language of the arbitration clause to prove the predicate fact of whether the very same clause is enforceable. The Court's direction as expressed in Brentwood Homes is "the court must examine the agreement, the complaint, and the surrounding facts." Such a recitation is a warranty form incorporated by reference, unsupported by the facts of the actual transaction between the parties to the agreement, and does not establish by itself the requisite involvement in interstate commerce.

The Appellant Seller also relies upon Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, (1989), but while that opinion may stand for the proposition that the parties are free to enter into a contract providing for arbitration under rules established by state law rather than under rules established by the FAA, it does not support the proposition that the such a recitation, as in this case, meets the predicate involvement of interstate commerce where the facts do not establish any such interstate commerce.

In Munoz v. Green Tree Fin. Corp., as cited by this Court, the Supreme Court expressly stated that the "transaction in this case in fact involves interstate commerce;" notably, the Supreme Court did not rely upon a similar recitation in the agreement in that case. 542 S.E.2d at 364. Similarly, as the Court discussed in Zabinski v. Bright Acres Associates, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001), the appropriate test is a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply: "In other words, the transaction must turn out, in fact, to have involved interstate commerce." Thus, the facts – not the recitation – are determinative. *See also* Mostella v. N & N Motors, 840 So. 2d 877, 881 (Ala. 2002) (abrogated on other grounds as stated in Wolff Motor Co. v. White, 869 So. 2d 1129, 1135 (Ala. 2003));

Aronov Realty Brokerage, Inc. v. Morris, 838 So.2d 348 (Ala.2002); Rogers Foundation Repair, Inc. v. Powell, 748 So.2d 869, 872 (Ala.1999).

2. The addenda to the Purchase Agreement to buy a home do not conclusively establish involvement of interstate commerce.

Appellant Seller also argues that the Court's decision misapplies the standard of review for factual findings because the Circuit Court failed to consider certain Addenda to the Agreement provides for the specific customization of the construction of the Phillips' house. This Court applied the correct standard of review, to wit: a circuit court's factual findings in determining whether to compel arbitration will not be reversed on appeal if any evidence reasonably supports the findings. Aiken v. World Fin. Corp. of S. Carolina, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

Seller also argues that the addenda proves that the contract was more than just a contract to sell a completed home; rather, Seller argues, it is one "to customize the construction of a home" that involved interstate commerce. However, as noted by the Trial Court, the affidavit of Dennis Black submitted by Seller itself states that Homebuyers "entered into a purchase agreement with [Seller] ***to buy a home***." [ROA 159; emphasis added.] The fact that the Circuit Court's order does not include a discussion of the addenda specifically does not mean that the Circuit Court ignored the addenda. But in any event, that affidavit constitutes "any evidence" which reasonably supports the Circuit Court's predicate finding that the contract did not involve interstate commerce.

In view of the very recent pronoucement by the Supreme Court in Bradley v. Brentwood Homes, this Court properly viewed this agreement, with all the addenda, and correctly concluded that the essential character of the Purchase Agreement in this case is

for the purchase of a home, not construction, and it did not involve interstate commerce. Accordingly, this Court's decision should be affirmed, and the case remanded for all the claims to proceed through the judicial process in Circuit Court.

This Court's determination is especially appropriate in the context of the multiple parties in this case, including this Respondent's role in this case. No basis exists (or has even been asserted) to compel this Respondent to submit to binding arbitration. Thus, submitting the claims by the Homebuyers against Seller to binding arbitration would create the potential for an inconsistent verdict and be a disservice to judicial economy.

CONCLUSION

This Court did not overlook or misapprehend either the law or the facts. The Plaintiffs/Homebuyers entered into a Purchase Agreement with Seller/John Wieland Homes to purchase a completed house. Under Bradley v. Brentwood Homes, that contract does not involve interstate commerce, and the FAA does not apply. Therefore, this Court properly affirmed the Circuit Court' order denying the motion to compel arbitration.

Respectfully submitted,

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July 20, 2015
Charleston, South Carolina

Certificate of Service

I certify that on July 20, 2015, a copy of the foregoing Return of Respondent Omega Flex, Inc. was served on all Parties by depositing said copy in the U.S. Mail, with sufficient first class postage, addressed to their Counsel of Record of as listed below:

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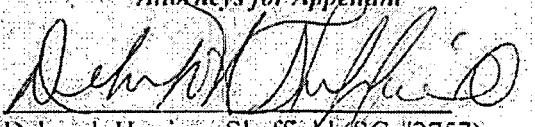

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The South Carolina Court of Appeals

Peter T. Phillips and Summar C. Phillips, Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., Defendants,

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the Appellant,

And Omega Flex, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are the Respondents.

Appellate Case No. 2013-001449

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

James E. Lockemy J.

Stephen P. McDonald J.

FILED

August 20, 2015

Columbia, South Carolina

cc:
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