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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay . . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. . . . . Appellants.

AND

Concerned Riverchase Estate Owners, Clark, Perry, Elder & White. . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A., LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.. . . . . Defendants

Of whom Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. are the . . . . Appellants.

Appellate Case No. 2015-00193

The Honorable R. Knox McMahon
Lancaster County
Trial Court Case Nos. 2013CP2900649, 2014CP2900792

RETURN TO MOTION TO DISMISS

Pursuant to Rule 240, SCACR, Appellants respectfully submit the following return in opposition to Respondents Motion to Dismiss served on August 28, 2015 ("Motion").

I. Facts and Procedural Background[1]

Respondents purchased residential lots in the Riverchase Subdivision and commenced the above captioned lawsuits alleging that Appellants failed to develop the property in accordance with the original master plan for the development as set forth in the Declaration of Covenants, Conditions and Restrictions for Riverchase Estates, Section I recorded in Book 480, Page 89 with the Register of Deeds for Lancaster County, SC (the "Covenants.") The Covenants set forth mandatory dispute resolution procedures which include formal presentment, formal response, and non-binding mediation. (Covenants, §§ 10.02 and 10.03.) If the prescribed resolution procedures are not successful, then either party may demand mandatory arbitration. (Covenants, § 10.05(a).) The Covenants further provide that arbitration proceedings must be conducted in Lancaster County, South Carolina unless they involve Developer (which is appellant LGI Land SC, LLC), in which instance the proceedings must be conducted in Montgomery County, Texas. (Covenants, § 10.05(d).)

Respondents failed to comply with the informal resolution, mediation or arbitration procedures as required by the Covenants. Accordingly, Appellants sought enforcement of

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[1] More detailed background information is set forth in the Statement of the Case and Statement of Facts in Appellants' Initial Brief.

these procedures. The motions and corresponding lower court orders are as follows.

1. Motion to Compel Contractual ADR in First Lawsuit. Appellants filed the Motion to Dismiss or Stay Proceedings and Compel Arbitration in case number 2013CP2900649 ("First Lawsuit") seeking dismissal of the lawsuit and/or enforcement of arbitration in Montgomery County, Texas ("First ADR Motion"). Appellants argued that Respondents failed to satisfy necessary conditions precedent to filing the lawsuit as required by the Covenants. (First ADR Motion, ¶ 4.) Appellants also argued that they were entitled to "an Order compelling arbitration in Montgomery County, Texas in accordance with the Covenants and the dismissal or stay of this action." (First ADR Motion, ¶ 7.) A copy of the First ADR Motion is attached at **Exhibit A**.

2. Order Denying First ADR Motion. The lower court denied the First ADR Motion in its entirety as set forth in the Order Denying Defendant's Rule 12(B)(6) Motion attached at **Exhibit B**.

3. Motion to Reconsider. Appellants filed the Notice of and Motion to Reconsider ("Motion to Reconsider") and continued its argument that the lower court should enforce arbitration in Texas. (Motion to Reconsider, ¶¶ 2, 3.) In the section entitled "In the Alternative, the Court Should

Compel Arbitration," Appellants argued that arbitration in Lancaster County should be entered if the lower court "refuses to reconsider its determination that arbitration in Texas is unconscionable." (Motion to Reconsider, ¶ 4.) A copy of the Motion to Reconsider is attached at **Exhibit C**.

4. Motion to Compel Contractual ADR in Second Lawsuit. Appellants filed the Motion to Dismiss or Stay Proceedings and Compel Arbitration in case number 2014CP2900792 ("Second Lawsuit") with arguments and relief sought virtually identical to that as in the First ADR Motion ("Second ADR Motion"). A copy of the Second ADR Motion is attached at **Exhibit D**.

5. Orders Refusing to Enforce Arbitration in Texas and Informal Resolution. The lower court heard arguments on the Motion to Reconsider and the Second ADR Motion together and altered its original order in the First Lawsuit and ordered that the parties submit both lawsuits to binding arbitration in Lancaster County, South Carolina. Copies to these two orders are attached collectively at **Exhibit E**.

Appellants appealed the lower court's refusal to enforce the forum selection clause contained in the arbitration in Montgomery County, Texas and refusal to enforce the mandatory informal resolution procedures.

II. Discussion

A. Appellants Did Not Consent to Arbitration in Lancaster County.

Respondents do not dispute that Appellants moved the lower court to compel arbitration in Texas or that the lower court refused to grant this relief. Rather, Respondents argue that the lower court's decision to compel arbitration in Lancaster County cannot be appealed because Appellants *consented* to the relief granted. The sole basis proffered in support of this specious contention is a transcript, which is inapposite to the stated contention, and a fatal misunderstanding of the legal effect of seeking relief in the alternative.

The grant of alternative relief does not preclude appeal if the party is aggrieved by the decision. "The alternative relief did not prevent a review by this Court on the basic contention. If the primary relief had been granted, as it should have been, the alternative motion would have been unnecessary." Sickora v. Metro. Life Ins. Co., 278 S.C. 99, 101, 292 S.E.2d 593, 595 (1982). In addition, "a party may appeal adverse portions of an otherwise favorable verdict or order." Jean Hoefer Toal, Appellate Practice in South Carolina, p. 109 (2002) *citing* Neal v. Clark, 196 S.C. 139, 12 S.E.2d 921 (1941). Appellants were aggrieved by the lower court's decision and perfected this appeal to redress the

lower court's refusal to enforce the arbitration clause and the information resolution procedures as written.

Respondents further mistake consent to *mediation* in Lancaster County with consent to *arbitration* in Lancaster County. Respondents quoted transcripts from the hearing where Appellants consented to *mediation* in Lancaster County. The same page of the transcript begins dialogue as to *arbitration* where consent clearly was not given.

> MR. WHITE: The defendants would certainly be amenable to mediation in Lancaster County.
>
> THE COURT: Would the plaintiffs?
>
> MR. GREELEY: To mediation? Of course, mediation is not binding and so that's why I think the defendants are saying they are amenable to it.
>
> MR. WHITE: Well, I will go further. If the Court asks me were the defendants willing to resolve these various motions for arbitration in Lancaster County, I don't know. I would have to speak to my client, but I would speak to them and we could render-get a decision back to the Court rather quickly.
>
> MR. GREELEY: That's fine with us. Yeah, we—I mean—
>
> THE COURT: Well, what if I just order it?
>
> MR. WHITE: Well, then if you order it then they have a choice, if they're amenable to it then we . . . move this case along, if they are not then they have the decision to make of whether they want to pay the piper and roll down to Columbia.

(Trans. of Hearing, pp. 23-24.) Copies of these two pages are attached at **Exhibit F.**

Respondents submitted a proposed order and Appellants confirmed their position in a letter to Judge McMahon which ends with the following: "It should be noted in this letter that the LGI Defendants do not agree with or consent to the Court's announced decision to compel arbitration of these two lawsuits in Lancaster County, South Carolina rather than Montgomery County, Texas." A copy of this letter is attached at **Exhibit G.**

There is no demonstration of consent to waive the contractual forum selection provision for arbitration.[2] Appellants merely requested a less drastic ruling in the alternative if the lower court was unwilling to enforce the entire arbitration provision as written in the Covenants.

B. Issues are Immediately Appealable

As set forth to a greater degree in Appellants' Initial Brief (which arguments are incorporated herein by reference), the lower court's refusal to enforce mandatory dispute resolution procedures is immediately appealable.

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[2] See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992) ("waiver is a voluntary and intentional abandonment or relinquishment of a known right"); see also State v. Whitner, 399 S.C. 547, 555, 732 S.E.2d 861, 865 (2012) *quoting* Black's Law Dictionary 346 (9th Ed. 2009) ("'Consent' is a broad term and is defined as 'agreement, approval, or permission as to some act or purpose.'").

1. Informal Resolution. The Covenants require both informal resolution and mediation prior to filing a lawsuit or seeking arbitration. The Developer has been denied its right to engage in pre-litigation negotiation and mediation to work with purchasers to resolve potential claims. If not enforced, loss of this right is final. Accordingly, "[a] number of courts have found that when parties to a lawsuit have elected not to be subject to a court's jurisdiction until some condition precedent is satisfied, such as mediation, the appropriate remedy is to dismiss the action." Tattoo Art, Inc. v. Tat Int'l, LLC, 711 F. Supp. 2d 645, 651 (E.D.Va.2010).[3]

2. Arbitration. An order denying arbitration is immediately appealable. Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464, n. 4 (2013). As noted in the Initial Brief, no South Carolina precedent addresses the right to an immediate appeal upon the denial of the forum selection clause contained in an arbitration agreement. The Tennessee Court of Appeals has addressed this issue and upheld an immediate appeal, reasoning as follows:

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[3] See also Houseboat Store, LLC v. Chris-Craft Corp., 692 S.E.2d 61, 65 (Ga.2010); Hometown Servs., Inc. v. Equitylock Solutions, Inc., -F.Supp.2d-, 2014 WL 4406973, at *2 (W.D.N.C.2014); Santana v. Olguin, 208 P.3d 328, 335 (Kan.2009).

> However, as in this case, when the trial court compels arbitration but, sua sponte, reforms the parties' agreement as to their forum selection and that decision is not immediately appealable, both the purposes of the FAA and section 16 are thwarted. If the parties in this case were denied the right to appeal, they would have to proceed through arbitration, then appeal the trial court's action, and if it was determined by this Court that the trial court's reformation of the agreement should be reversed, the parties would have to conduct a second arbitration. Such a result surely does not ensure the "speed, simplicity, and economy associated with arbitration." *Accordingly, we hold that an aggrieved party may appeal in the unique situation where the trial court orders arbitration but, sua sponte, reforms the parties' choice of law and forum selection clauses.*

Spell v. Labelle, 2004 WL 892534, at *3 (Tenn.Ct.App. 2004) (italics added). This reasoning is consistent with the underlying purpose of the Federal Arbitration Act ("FAA") "to overcome state court's refusal to enforce arbitration agreements." Zabinski v. Bright Acres Associates, 346 S.C. 580, 590-91, 553 S.E.2d 110, 115 (2001). "[C]ourts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted. Thus, the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement." Cape Romain, 405 S.C. at 125-126, 747 S.E.2d at 466 (citations and internal quotations omitted).

The "unique situation" described in Spell is squarely presented in this matter and this appeal is necessary to protect the contractual rights and benefits of Appellants intended by the dispute resolution provisions contained in the Covenants. To require otherwise, Appellants lose even if they ultimately prevail.

III. CONCLUSION

For the reasons stated above, the Motion should be denied allowing this Court to reach a determination on this appeal on the merits.

Respectfully submitted,

Date: September 22, 2015

By: _____

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ATTORNEYS FOR APPELLANTS

Exhibit A

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER) SIXTH JUDICIAL CIRCUIT

Concerned Riverchase Estate Owners, Clark, Perry, Elder & White, Plaintiffs, vs. Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A.; LGI Land SC, LLC; and LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc., Defendants.	**MOTION TO DISMISS OR STAY PROCEEDINGS AND COMPEL ARBITRATION** C.A. No. 13-CP-29-649

PLEASE TAKE NOTICE that defendants Riverchase Estates Property Owners Assoc., Inc. ("Association"), LGI Land SC, LLC ("Developer"), LGI Holdings, LLC ("LGI Holdings"), LGI Development, Inc. ("LGI Development") and Lexon Insurance Company, Inc. ("Lexon"), (collectively, the "LGI Defendants"), through their undersigned counsel, hereby move, at such time and place as is convenient to the Court, but no sooner than 10 days from the date of service of this Motion, for entry of an order dismissing the Complaint as against them, pursuant to Rule 12(b)(1), (2), (3) and (6) SCRCP, or staying proceedings and compelling arbitration on the grounds that the allegations set forth in the Complaint are subject to prescribed dispute resolution procedures, including mandatory arbitration. The basis for this Motion is as follows:

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1. Plaintiffs own residential lots in the Riverchase Subdivision sold by Developer. (Complaint, ¶¶ 2, 5.) Plaintiffs allege ownership in an undivided legal estate interest to community common elements as joint tenants in common pursuant to the Declaration of Covenants, Conditions and Restrictions for Riverchase Estates, Section I recorded in Book 480, Page 89 with the Register of Deeds for Lancaster County, SC ("Covenants"). (Complaint, ¶ 2.)

2. With respect to the LGI Defendants, the gravamen of the Complaint is that the LGI Defendants have failed and refused to develop the subject real property in accordance with the original master plan for the development as set forth in the Covenants. (See, e.g., Compliant, ¶¶ 1 and 2.)

3. The Covenants broadly define "Dispute or Disputes" as "any claim, demand, action or cause of action, and all rights or remedies regarding same, whether in contract or tort, statutory or common law, or legal or equitable, claimed or asserted by the Association, by the Committee, by any Member or Owner or any other person not associated with or employed by Developer" regarding any aspect of (i) the design, construction, development, operation, maintenance, repair or management of the Subdivision; (ii) the design, construction, sale maintenance or repair of each Lot; (iii) the establishment, operation or management of, and any acts or omissions of the Association; (iv) the construction, operation,

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application or enforcement of any provisions of, or otherwise arising out of or relating to the Covenants or a breach thereof; or (v) all other matters relating directly or indirectly to any of the foregoing. (Covenants, § 10.01.)

4. The Covenants set forth and mandate all Disputes must be initiated and pursued in strict accordance with the terms contained therein. (Covenants, §§ 10.02 and 10.03.) Plaintiffs have not satisfied the necessary conditions precedent set forth in Section 10 of the Covenants.

5. Moreover, the Developer or any other disputing party may by written request, whether made before or after the institution of any legal action, require that all unresolved matters be submitted to binding arbitration before a single arbitrator conducted in accordance with the Construction Industry Arbitration Rules (or substantial equivalent) of the American Arbitration Association. (Covenants, § 10.05(a).)

6. The Covenants further provide that arbitration proceedings must be conducted in Lancaster County, South Carolina unless they involve Developer, in which instance the proceedings must be conducted in Montgomery County, Texas. (Covenants, § 10.05(d).)

7. Developer and Association are entitled under both the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* and/or the South Carolina Uniform Arbitration Act, S.C.Code Ann. § 15-48-10, *et*

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seq., to an Order compelling arbitration in Montgomery County, Texas in accordance with the Covenants and the dismissal or stay of this action.

8. The LGI Defendants are entitled to an Order dismissing the Complaint for lack of subject matter jurisdiction and improper venue pursuant to Rule 12(b)(1) and (3), SCRCP.

9. The LGI Defendants are entitled to an Order dismissing the Complaint for failure to state a claim upon which relief can be granted by this Court pursuant to Rule 12(b)(6), SCRCP.

10. LGI Development was not involved in any manner with the development of the subject property. LGI Development was an entity formed and dissolved in the 1990s and has never had contacts with the State of South Carolina. Accordingly, as an additional ground for dismissal regarding LGI Development, this Court has no personal jurisdiction over LGI Development and LGI Development should be dismissed under Rule 12(b)(2), SCRCP.

11. Moreover, the Complaint fails to state any claim against Lexon and LGI Holdings. It appears that Lexon is a named defendant because Lexon issued bonds to secure construction of certain common areas (Complaint, ¶ 112) and that LGI Holdings is named solely to its involvement in the securing of these bonds. Claims related to these bonds are not ripe. Claims related to these bonds are dependant upon and derivative to the underlying claims against Developer. Accordingly, any claims against Lexon

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and LGI Holdings, LLC should be dismissed without prejudice pursuant to Rule 12(b)(6), SCRCP or in the alternative, stayed until underlying claims against the Developer have been adjudicated.

WHEREFORE, the LGI Defendants pray that this action be dismissed or stayed as set forth herein and that arbitration be compelled as mandated by the Covenants.

Rock Hill, S.C.

Date: August 9, 2013

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Exhibit B

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	SIXTH JUDICIAL CIRCUIT
Concerned Riverchase Estate Owners, Clark, Perry, Elder & White,	)	
Plaintiffs,	)	
vs.	)	ORDER DENYING DEFENDANTS' RULE 12(B)(6) MOTION
Riverchase Estates Property Owners Assoc., Inc.;Woodforest Bank, N.A.; LGI Land SC, LLC; and LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.,	)	C.A. No. 13-CP-29-649
Defendants.	)	

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This matter came before the Court January 6, 2014 pursuant to Defendants' Rule 12(b)(6) Motion to Dismiss or Stay Proceedings and Compel Arbitration. The motion was filed Defendants Riverchase Estates Property Owners Assoc., Inc. , LGI Land SC, LLC ("Developer"), LGI Holdings, LLC, LGI Development, Inc. and Lexon Insurance Company, Inc., (collectively, the "LGI Defendants") and joined in by Defendant Woodforest Bank, N.A., who filed a similar motion to dismiss.

All parties of record appeared and presented arguments through counsel. Mark W. White, Esq. of the York County bar appeared on behalf of the Riverchase, LGI and Lexon Defendants. Tucker S. Player, Esq. of the Richland County bar appeared for Defendant Woodforest Bank, N.A. Leland L. Greeley, Esq. and J. Cameron Halford, Esq. of the York

County bar appeared for Plaintiffs Elder, White, Clark and Perry. Based on the matters before the Court, the arguments of counsel, the Court denies the Defendants' Motions.

Defendants' motions first seek the full dismissal of the Complaint pursuant to Rule 12(b)(6), SCRCP. "*The trial court must dispose of a motion for failure to state a cause of action based solely on the allegations set forth in the face of the complaint.*" Brown v. Leverette, 291 S.C. 364, 366, 353 S.E. 2d 697, 698 (1987). When a pleading filed in an action fails "*...to state facts sufficient to constitute a cause of action*", it may be dismissed. Rule 12(b)(6), SCRCP. The motion must be deal with based solely on the allegations contained in the pleading. FOC Lawshe Limited Partnership v. International Paper Company, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002). In considering the motion, all allegations of the pleadings, and all inferences reasonably deducible therefrom are deemed admitted. Id. "*If the facts and inferences drawn from the facts alleged in the complaint, viewed in a light most favorable to the Plaintiff, would entitle Plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.*" Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). Based on this standard of review, the arguments of counsel, and the court's review of the pleadings, the court finds that dismissal would be

improper. The motion must be dealt with based solely on the allegations contained in the pleading. FOC Lawshe Limited Partnership v. International Paper Company, 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002).

Defendants' motions seek, alternatively, that the court stay proceedings and compel binding arbitration. Defendants cite what Defendants describe as mandatory pre-litigation condition precedents contained within the covenants and restrictions of the Riverchase development that require written notices and a series of nonbinding arbitration processes (both inside and outside of South Carolina). All counsel have acknowledged that the restrictive covenants require, *inter alia*, that arbitration proceedings must be conducted in Lancaster County, South Carolina *unless they involve the Developer*, in which case the proceedings ultimately must be conducted in Montgomery County, Texas. Again, the court must review these matters on the face of the pleadings, and Plaintiffs have pleaded causes of action as against the developer, as amalgamated, with other defendants, for various causes of action arising out of the construction of a large residential project in Lancaster County.

Plaintiff has argued that followed through to its legal conclusion, ultimately only the developer could resort to the courts of South Carolina after lengthy, complex non-binding arbitration

procedures involving Texas forums and law. Plaintiffs argue the language of the covenants to be unconscionable and violative of South Carolina public policy where the developers failure to maintain registered offices effectively abandoned informal dispute resolution processes.

The court finds and concludes that the provisions of the covenants must be analyzed and applied in accordance with South Carolina law. S.C. Code Ann. §15-7-120. Construction and interpretation of a contract is a question of law to be decided by the court. Hawkins v. Greenwood Development Corp., 328 S.c. 585, 493 S.E.2d 875 (Ct. App. 1997). "*Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.*" Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E. 2d 485, 493 (Ct. App. 2004). (Quoting Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001). S.C. Code Ann. §15-7-120(1976, as amended) provides:

> Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.

It is plain that the language of the developer covenants intended that legal action could only follow nonbinding arbitration(s), including application of Texas law and Texas venue, where the developer is named. What is left to determine is how the covenant provisions are affected by S.C. Code Ann. 15-7-120. It is illogical to say that the statute could be given effect only when the covenants mandate application of laws of another jurisdiction. If that were so, the statute could never be given effect in any agreement where another state's law otherwise governed the substance of the parties' agreement and was controlling. *See, e.g.*, Johnson v. Paraplane, 391 S.C. 247, 460, S.E.2d 398 (Ct. App. 1995), *vacated on other grounds*, 321 S.C. 316, 468 S.E. 2d 620 (1996). The court ultimately is presented with the reasonableness of a forum selection clause.

The common thread of case law on the subject is succinctly expressed in the United States Supreme Court decision of M/S Breman v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.E.2d 513 (1972) where the court stated that forum selection clauses "... *are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable"* under the circumstances". Id. Other courts have tended to look to the facts of the case presented and either expressly, or impliedly, applied a standard of reasonableness under the circumstances. Applying the

above factors to this case, there are several things to be considered.

First, this case involves a multi-party, complex matter. The subject matter involves a large scale planned residential project in Lancaster County. Under the complaint allegations, all parties had some role in the design, finance, and construction of the project. Severing parts of a complex master deed from others would not serve judicial economy or a global resolution of the dispute as among all parties.

Second, it is clear that the parties would nevertheless be subjected to this state's jurisdiction for alleged tort liability arising from the development and construction of the project, thus making it reasonable to infer that defendant parties contemplated, from the beginning, that they may have to deal with litigation in South Carolina. This is further illustrated by the complex binding arbitration mechanisms argued by the parties that are set forth in the developer covenants. Thus I find and conclude that the covenants provision requiring arbitration would be unconscionable, void, and unenforceable as contravening the policy of South Carolina insofar as it purports to require binding arbitration pursuant to Texas law where the developer is named as a Defendant party.

The court notes that the face of the Complaint alleges that Defendants, as amalgamated, failed to fully develop the project

pursuant to master plan, and that Defendants abandoned informal dispute processes under the covenants. Viewing the face of the complaint and its allegations as true, or admitted, the Defendants' Rule 12(b)(6) motion to compel binding arbitration is therefore improper and should be denied.

NOW, THEREFORE, based upon the foregoing

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss and Defendants' motion to stay and compel binding arbitration brought pursuant to Rule 12(b)(6) is denied.

AND IT IS SO ORDERED this 24 day of ~~February~~ April, 2013.

Honorable R. Knox McMahon
Presiding Judge
Sixth Judicial Circuit

Date: 24 April 13
~~Lancaster~~, South Carolina

Exhibit C

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	SIXTH JUDICIAL CIRCUIT
Concerned Riverchase Estate Owners, Clark, Perry, Elder & White,	)	
Plaintiffs,	)	**NOTICE OF AND MOTION TO RECONSIDER**
vs.	)	
Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A.; LGI Land SC, LLC; and LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.,	)	C.A. No. 13-CP-29-649
Defendants.	)	

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PLEASE TAKE NOTICE that the LGI Defendants,[1] through their undersigned counsel, hereby move, at such time and place as is convenient to the Court, but no sooner than 10 days from the date of service of this Motion, for entry of an order pursuant to Rule 59(e), SCRCP, to amend, reconsider or otherwise set aside the Order Denying Defendants' Rule 12(B)(6) Motion filed on April 29, 2014 ("Order"). In support of this Motion, the LGI Defendants respectfully submit the following.

1. Motion to Reconsider. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on

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[1] Capitalized terms not otherwise identified shall have the definitions and meanings ascribed to them in the Motion to Dismiss filed by the LGI Defendants on August 12, 2013.

the merits.'" Collins Music Co., Inc. v. IGT 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct.App.2002)(citations omitted). "[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments. A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Elam v. South Carolina Dept. of Transp. 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-79 (2004)(citations omitted).

2. **Federal Arbitration Act Preempts Venue Statute.** The Order's reliance on S.C.Code § 15-7-120 is clear error. Plaintiff's argument that the venue statute set forth in S.C.Code Ann. § 15-7-120 affects the proper mode of trial in this matter has been rejected expressly as this venue statute is preempted by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"). In Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 540 S.E.2d 864 (Ct.App.2000), the Court of Appeals expressly ruled that the arbitration statutes preempt the venue statute of S.C.Code Ann. § 15-7-120. The court of appeals held as follows:

> The trial court erred by applying § 15-7-120 to the arbitration clauses sub judice because state law is preempted by the Federal Arbitration Act (FAA) under the circumstances presented by this action. Where a contract evidencing

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> interstate commerce contains an arbitration clause, the FAA preempts conflicting state arbitration law. This prohibition specifically prevents state courts from requiring a judicial resolution of a conflict which the parties agreed to arbitrate. Accordingly, the trial court erred by refusing to dismiss the state contract action and compel arbitration.

Tritech Electric, 343 S.C. at 399-400, 540 S.E.2d at 865-66 (citations omitted). This matter involves a contractual arbitration provision involving interstate commerce; Plaintiffs' have not contended otherwise. Therefore, the venue statute "is preempted by the Federal Arbitration Act" which "specifically prevents state courts from requiring a judicial resolution of a conflict which the parties agreed to arbitrate." Id.

3. **Arbitration is not Unconscionable.** The Court determined that the arbitration provision was unconscionable because the large-scale development involved numerous parties in Lancaster County and the parties would be subject to jurisdiction for tort liability. This basis is factually and legally erroneous and ignores the precedents providing for the enforceability of arbitration provisions. Moreover, the Order fails to apply the heightened standard necessary to invalidate this contract term. "The party opposing enforcement of the forum-selection clause carries a heavy burden of showing the forum-selection clause should not be enforced. A forum selection clause will be invalidated only (1) if it was the product of fraud or overreaching, (2) if the agreed forum is so inconvenient as to deprive the litigant of his day in court, or (3) if enforcement

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would contravene a strong public policy of the forum in which the suit is brought." Minorplanet Sys. USA Ltd. v. Am. Aire, Inc., 368 S.C. 146, 150, 628 S.E.2d 43, 45 (2006)(applying Texas law and enforcing Texas forum selection clause).

4. **In the Alternative, the Court Should Compel Arbitration in South Carolina**. Even if the Court refuses to reconsider its determination that arbitration in Texas is unconscionable, this Court should still dismiss this action and compel arbitration in South Carolina. The Order provides no ruling, basis or reasoning as to why the Motion should not be granted and arbitration compelled in South Carolina. It is undisputed that the parties agreed to arbitrate claims of the type set forth in the Complaint. The Order does not provide any proper basis for this Court to refuse to dismiss this action and compel arbitration in South Carolina. Moreover, Plaintiffs have offered no argument in support thereof. Given these circumstances and the prevailing authority, even if this Court finds arbitration in Texas is unconscionable then this Court should sever the Texas forum selection provision and order arbitration in South Carolina.[2] "In consideration of the federal and state policies favoring arbitration agreements, severability clauses have been used to remove the unenforceable provisions in an arbitration clause while

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[2] Although this Court could sever the Texas forum selection provision without an express severability clause in a contract, the Covenants provide that they are severable. (Covenants, § 9.04.)

saving the parties' overall agreement to arbitrate." Simpson, 373 S.C. at 34, 644 S.E.2d at 673 (citations omitted). In Simpson, the Supreme Court noted that it "generally would encourage severability of an unconscionable provision."

5. **Dismissal of Certain Defendants**. The Order did not address the motions to dismiss of LGI Development, Lexon and LGI Holdings. LGI Development should be dismissed because it was not involved in any manner with the development of the subject property, was dissolved in the 1990s, and has never had contacts with the State of South Carolina. The Complaint fails to state any claim against Lexon and LGI Holdings as claims against these defendants are derivative and premature. It appears that Lexon is a named defendant because Lexon issued bonds to secure construction of certain common areas (Complaint, ¶ 112) and that LGI Holdings is named solely by its involvement in the securing of these bonds.

6. **Conclusion**. Based on the forgoing, the Court should reconsider its prior decision and enforce the mandatory arbitration provisions requiring this matter be arbitrated if not in Texas then in Lancaster County, South Carolina, along with the dismissal of certain defendants.

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Rock Hill, S.C.

Date: May 12, 2014

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By: _____

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Exhibit D

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS SIXTH JUDICIAL CIRCUIT
Concerned Riverchase Owners Andrew Dodd, Heather Dodd and Charles Ratay, Plaintiffs, vs. Riverchase Estates Property Owners' Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc., Defendants.	)	**MOTION TO DISMISS OR STAY PROCEEDINGS AND COMPEL ARBITRATION** C.A. No. 14-CP-29-792

FILED
OFFICE OF CLERK
OF COURT
2014 AUG 15 PM 12:00
CLERK OF COURT
LANCASTER SC

PLEASE TAKE NOTICE that defendants Riverchase Estates Property Owners Assoc., Inc. ("Association"), LGI Land SC, LLC ("Developer"), LGI Holdings, LLC ("LGI Holdings"), LGI Development, Inc. ("LGI Development") and Lexon Insurance Company, Inc. ("Lexon"), (collectively, the "LGI Defendants"), through their undersigned counsel, hereby move, at such time and place as is convenient to the Court, but no sooner than 10 days from the date of service of this Motion, for entry of an order dismissing the Complaint as against them, pursuant to Rule 12(b)(1), (2), (3) and (6) SCRCP, or staying proceedings and compelling arbitration on the grounds that the allegations set forth in the Complaint are subject to prescribed dispute resolution procedures, including mandatory arbitration. The basis for this Motion is as follows:

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1. Plaintiffs own residential lots in the Riverchase Subdivision sold by Developer. (Complaint, ¶¶ 2, 5.) Plaintiffs allege ownership in an undivided legal estate interest to community common elements as joint tenants in common pursuant to the Declaration of Covenants, Conditions and Restrictions for Riverchase Estates, Section I recorded in Book 480, Page 89 with the Register of Deeds for Lancaster County, SC ("Covenants"). (Complaint, ¶ 2.)

2. With respect to the LGI Defendants, the gravamen of the Complaint is that the LGI Defendants have failed and refused to develop the subject real property in accordance with the original master plan for the development as set forth in the Covenants. (See, e.g., Compliant, ¶¶ 1 and 2.)

3. The Covenants broadly define "Dispute or Disputes" as "any claim, demand, action or cause of action, and all rights or remedies regarding same, whether in contract or tort, statutory or common law, or legal or equitable, claimed or asserted by the Association, by the Committee, by any Member or Owner or any other person not associated with or employed by Developer" regarding any aspect of (i) the design, construction, development, operation, maintenance, repair or management of the Subdivision; (ii) the design, construction, sale maintenance or repair of each Lot; (iii) the establishment, operation or management of, and any acts or omissions of the Association; (iv) the construction, operation,

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application or enforcement of any provisions of, or otherwise arising out of or relating to the Covenants or a breach thereof; or (v) all other matters relating directly or indirectly to any of the foregoing. (Covenants, § 10.01.)

4. The Covenants set forth and mandate all Disputes must be initiated and pursued in strict accordance with the terms contained therein. (Covenants, §§ 10.02 and 10.03.) Plaintiffs have not satisfied the necessary conditions precedent set forth in Section 10 of the Covenants.

5. Moreover, the Developer or any other disputing party may by written request, whether made before or after the institution of any legal action, require that all unresolved matters be submitted to binding arbitration before a single arbitrator conducted in accordance with the Construction Industry Arbitration Rules (or substantial equivalent) of the American Arbitration Association. (Covenants, § 10.05(a).)

6. The Covenants further provide that arbitration proceedings must be conducted in Lancaster County, South Carolina unless they involve Developer, in which instance the proceedings must be conducted in Montgomery County, Texas. (Covenants, § 10.05(d).)

7. Developer and Association are entitled under both the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* and/or the South Carolina Uniform Arbitration Act, S.C.Code Ann. § 15-48-10, *et*

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seq., to an Order compelling arbitration in accordance with the Covenants and governing law and the dismissal or stay of this action.

8. The LGI Defendants are entitled to an Order dismissing the Complaint for lack of subject matter jurisdiction and improper venue pursuant to Rule 12(b)(1) and (3), SCRCP.

9. The LGI Defendants are entitled to an Order dismissing the Complaint for failure to state a claim upon which relief can be granted by this Court pursuant to Rule 12(b)(6), SCRCP.

10. LGI Development was not involved in any manner with the development of the subject property. LGI Development was an entity formed and dissolved in the 1990s and has never had contacts with the State of South Carolina. Accordingly, as an additional ground for dismissal regarding LGI Development, this Court has no personal jurisdiction over LGI Development and LGI Development should be dismissed under Rule 12(b)(2), SCRCP.

11. Moreover, the Complaint fails to state any claim against Lexon and LGI Holdings. It appears that Lexon is a named defendant because Lexon issued bonds to secure construction of certain common areas (Complaint, ¶ 97) and that LGI Holdings is named solely to its involvement in the securing of these bonds. Claims related to these bonds are not ripe. Claims related to these bonds are dependant upon and derivative to the underlying claims against Developer. Accordingly, any claims against Lexon

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and LGI Holdings, LLC should be dismissed without prejudice pursuant to Rule 12(b)(6), SCRCP or in the alternative, stayed until underlying claims against the Developer have been adjudicated.

WHEREFORE, the LGI Defendants pray that this action be dismissed or stayed as set forth herein and that arbitration be compelled as mandated by the Covenants.

Rock Hill, S.C.

Date: August 14, 2014

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By: W. Chaplin Spencer Jr.

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Exhibit E

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SIXTH JUDICIAL CIRCUIT
COUNTY OF YORK)	
	C.A. NO. 2013-CP-29-649
Concerned Riverchase Estate Owners, Clark, Perry, Elder & White,)	
Plaintiffs,)	ORDER
vs.)	
Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A. LGI Land SC, LLC; and LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.,)	
Defendants.)	

This matter came before the court on September 8, 2014 on Defendants' Rule 59(e) motion to reconsider, alter or amend the court's prior judgment and order of April 28, 2014. By its prior order, this court denied Defendants' joint Rule 12(b)(6) motion to dismiss and/or stay the case and compel arbitration.

Present in court on September 8, 2014 and representing the LGI Defendants was Mark W. White of the York County Bar. Tucker Player, Esq. appeared on behalf of Woodforest National Bank, N.A. who joined in the motion. The Plaintiffs were represented by Leland Greeley and Cameron Halford, both of the York County bar. Based upon the prior order, the memorandums, and arguments of counsel, the court grants the motion in part and denies in part the motion, as follows:

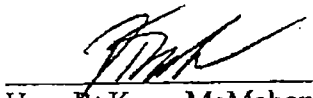
1. The court GRANTS the motion and modifies and amends its prior ruling as to applicability of the alternative dispute resolution procedures of the covenants, and holds that the Defendants and Plaintiffs could reasonably have expected to have to engage in alternative dispute resolution pursuant to the covenants.
2. The court DENIES the motion to the extent that it seeks to dismiss any of the named defendants in the action or compel non-binding, or binding, alternative dispute resolution in any forum other than South Carolina.

The court finds that requiring binding arbitration between the parties, absent the complexities of non-binding procedures and/or resort to Texas forum and/or laws under the covenants, would expedite resolution of the case and that no party would suffer prejudice by ordering the parties to submit to binding arbitration in Lancaster County, South Carolina.

IT IS THEREFORE ORDERED that Plaintiffs and Defendants shall submit to binding arbitration in Lancaster County, South Carolina. Defendants' motion to sever the provisions of the covenants mandating non-binding and/or resort to Texas forums or law is granted in this regard. The court denies the relief sought as to dismissal of any named Defendant party, and the court denies reconsideration of requiring or compelling unreasonable non-binding or binding alternative dispute resolution processes outside of South Carolina.

All plaintiff and defendant parties are required to submit to binding arbitration of this dispute in Lancaster County, South Carolina before a single arbitrator conducted in accordance with the Construction Industry Arbitration Rules (or substantial equivalent) of the American Arbitration Association.

AND IT IS SO ORDERED this 8th day of September, 2014.



Hon. R. Knox McMahon
Presiding Judge
Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	SIXTH JUDICIAL CIRCUIT
COUNTY OF YORK)	
Concerned Riverchase Estate)	C.A. NO. 2014-CP-29-792
Owners, Andrew Dodd, Heather)	
Dodd, and Charles Ratay,)	ORDER
Plaintiffs,)	
)	
vs.)	
)	
)	
Riverchase Estates Property Owners)	
Assoc., Inc.; LGI Land SC, LLC;)	
LGI Holdings, LLC; LGI)	
Development, Inc. ,and)	
Lexon Insurance Company,)	
Inc.,)	
)	
Defendants.)	

This matter came before the court on September 8, 2014 on Defendants' Motion to Dismiss or Stay Proceedings and Compel arbitration. Present and appearing for the Defendants in this case was Mark W. White, Esq. Cameron Halford, Esq. appeared for the Plaintiffs. The matter was heard in conjunction with a defense motion to reconsider, alter or amend in a similar case in civil action no. 2013-CP-46-649 "*Concerned Riverchase Owners Clark, Perry, Elder & White, et al*", said case involving a similar motion to dismiss and/or stay and compel arbitration as heard by this court on January 6, 2014. Following oral argument an Order was entered April 24, 2014.

The court's prior order, as modified, is here incorporated by reference. The motion to dismiss is denied as set forth in that amended order. The motion to compel binding arbitration is granted as set forth in the amended order. The plaintiff and defendant parties are ORDERED to submit to binding arbitration within Lancaster County, South Carolina.

AND IT IS SO ORDERED this 18th day of September, 2014.

Hon. R. Knox McMahon
Presiding Judge
Sixteenth Judicial Circuit

Exhibit F

THE COURT: Well, I looked at Mr. White's reply to the plaintiff's return to the motion to reconsider, and on the next to the last page, three or four, indicates, "based on the foregoing the Court should reconsider the order and enforce the mandatory arbitration provision in either Texas or Lancaster County along with the dismissal of certain defendants." I get -- I mean, I guess my question is, Mr. White, would the defendants be amenable to mediation in Lancaster County?

MR. WHITE: The defendants would certainly be amenable to mediation in Lancaster County.

THE COURT: Would the plaintiffs?

MR. GREELEY: To mediation? Of course, mediation is not binding and so that's why I think the defendants are saying that they are amenable to it.

MR. WHITE: Well, I will go further. If the Court asks me were the defendants willing to resolve these various motions for arbitration in Lancaster County, I don't know, I would have to speak to my client, but I would speak to them and we could render -- get a decision back to the Court rather quickly.

MR. GREELEY: That's fine with us. Yeah, we -- I mean --

THE COURT: Well, what if I just order it?

MR. WHITE: Well, then if you order it then they have a

choice, if they're amenable to it then we rock on and move this case along, if they are not then they have the decision to make of whether they want to pay the piper to roll on down to Columbia.

THE COURT: I'm not sure they have a choice then unless that choice would be being held in contempt or not if I order it.

MR. WHITE: I would have to look at it. It's a mode of trial. The question is is Texas arbitration, is that a mode of trial and immediately appealable versus Lancaster? It may not be, I can't stand here and say I know the answer to that.

THE COURT: And I was going by your return to the -- I mean that -- to me that seems like a way to move the case along for the plaintiffs, they -- wherever the case ends up it has got to be resolved between the parties. I think it's unconscionable -- and I'm not using that necessarily in the legal sense -- to have plaintiffs that do own property in Lancaster County have to go to Texas to resolve that issue, to resolve whatever the issues are.

MR. WHITE: If this Court were to preserve the arbitration right and force it in Lancaster, it would present the defendants a very difficult choice on whether they -- for one, it may not be a amenable, I don't know the answer to that. Number two, they are getting their mode,

Exhibit G

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December 15, 2014

Via U.S. Mail and Electronic Mail (kmcmahonlc@sccourts.org)
The Honorable R. Knox McMahon
Lexington County Judicial Center
205 E. Main Street
Lexington, SC 29072

Re: Concerned Riverchase Estate Owners, *et al.* v. Riverchase Estates Property Owners Association, Inc., *et al.*
C.A. No.: 13-CP-29-649

Concerned Riverchase Estate Owners, *et al.* v. Riverchase Estates Property Owners Association, Inc., *et al.*
C.A. No.: 14-CP-29-792

Dear Judge McMahon:

This firm represents defendants Riverchase Estates Property Owners Assoc., Inc., LGI Land SC, LLC, LGI Holdings, LLC, LGI Development, Inc. and Lexon Insurance Company, Inc., (collectively, the "LGI Defendants") in the matters referenced above.

I write to comment on the proposed orders submitted by counsel for the plaintiffs.

In the civil action bearing C.A. No. 13-CP-29-649, the LGI Defendants suggest two modifications to the proposed order. First, the LGI Defendants submit that the following paragraph should be deleted from the middle of Page 2 of the proposed order:

> *Counsel for all parties indicated that there may exist support for binding arbitration in Lancaster*

> *County, South Carolina to move the case toward resolution. Plaintiffs' counsel indicated that there is no objection by Plaintiffs to binding arbitration. Defendants' counsel indicated that while no objection was known at the time of oral argument, that support may exist after defense counsel consults with Defendants. The court finds that the matter has been pending since April 24, 2014 wherein the parties could have engaged in discussions regarding moving the case forward to resolution but that this has not occurred.*

The basis for this proposed modification is that the content of this paragraph is not germane to the Court's decision and does not serve to provide any legal or factual basis for the Court's decision.

Second, the LGI Defendants submit that the last sentence of the proposed order should be modified as follows:

> All plaintiff and defendant parties are required to submit to binding arbitration of this dispute in Lancaster County, South Carolina before a single arbitrator conducted in accordance with the Construction Industry Arbitration Rules (or substantial equivalent) of the American Arbitration Association ~~as may be arranged through the office of the Clerk of Court~~.

The basis for this proposed modification is to harmonize the order and the Court's reasoning. The Court held that the arbitration clause contained in the Covenants is enforceable except as to the Texas venue. The inserted language set forth above is the exact language used in the Covenants to establish the procedure for the arbitration.

The LGI Defendants have no comments as to the proposed order in the civil action bearing C.A. No. 14-CP-29-792.

It should be noted in this letter that the LGI Defendants do not agree with or consent to the Court's announced decision to

compel arbitration of these two lawsuits in Lancaster County, South Carolina rather than Montgomery County, Texas.

Respectfully,

SPENCER & SPENCER, P.A.

W. Mark White

(*Via Electronic Mail*)
cc: Chris Wren
Tucker S. Player, Esq.
J. Cameron Halford, Esq.
Leland B. Greeley, Esq.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay . . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. . . . . Appellants.

AND

Concerned Riverchase Estate Owners, Clark, Perry, Elder & White. . . . . Respondents,

v.

Riverchase Estates Property Owners Assoc., Inc.; Woodforest Bank, N.A., LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc.. . . . . Defendants

Of whom Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. are the . . . . Appellants.

Appellate Case No. 2015-00193

The Honorable R. Knox McMahon
Lancaster County
Trial Court Case No. 2013CP2900649, 2014CP2900792

PROOF OF SERVICE

I certify that I have served the Return to Motion to Dismiss by depositing a copy of each in the United States

Mail, postage prepaid, on September 22, 2015, addressed to counsel of record as follows:

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Elizabeth Gray, Esq.
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SPENCER & SPENCER, P.A.

Date: September 22, 2015

By: hb

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September 22, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Concerned Riverchase Estate Owners, *et al.* v. Riverchase Estates Property Owners Association, Inc., *et al.*
Appellate Case No.: 2015-00193

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of the Return to the Motion to Dismiss and Proof of Service in the above referenced matter. Please file the originals with the records of your court and return a clocked copy in the enclosed envelope.

Thank you for your assistance in this matter.

Respectfully,

SPENCER & SPENCER, P.A.

W. Mark White

enclosures

cc: Chris Wren
Beth Richardson, Esq.
J. Cameron Halford, Esq.
Leland Greeley, Esq.

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