

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LANCASTER COUNTY

Court of Common Pleas APR 18 2016

R. Knox McMahon, Circuit Court Judge
Trial Court Case Nos. 2013-CP-29-00649, SC SUPREME COURT 29-00792

S.C. Ct.App. filed December 10, 2015
Appellate Case No. 2015-000193

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.
Petitioners
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 Petitioners.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

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Concerned Riverchase Estate Owners, Andrew
Dodd, Heather Dodd and Charles Ratay Respondents, SC Court of Appeals

v.

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

AND

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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

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in refusing to enforce the Arbitration Clause as written?
2. Did the lower court err in refusing to enforce the pre-litigation dispute resolution mandate as written?

STATEMENT OF THE CASE

Respondents Concerned Riverchase Estate Owners, Clark, Perry, Elder & White filed the first lawsuit, designated C.A. No. 2013-CP-29-649, on May 3, 2013 ("First Lawsuit"). On August 9, 2013, Appellants served the Motion to Dismiss or Stay Proceedings and Compel Arbitration in the First Lawsuit. The lower court conducted a hearing on January 6, 2014 and denied the motion by order filed April 29, 2014 ("First Order"). Appellants served a motion to reconsider on May 12, 2014.

Respondents Concerned Riverchase Estate Owners, Andrew Dodd, Heather Dodd and Charles Ratay filed the second lawsuit, designated C.A. No. 2014-CP-29-792, on June 23, 2014 ("Second Lawsuit"). Appellants served the Motion to Dismiss or Stay Proceedings and Compel Arbitration in the Second Lawsuit on August 14, 2014.

The lower court conducted a hearing on September 8, 2014 to address both the motion to reconsider in the First Lawsuit and the motion to dismiss and compel arbitration in the Second Lawsuit. The lower court rendered its decision on the matters

addressed in the September 8, 2014 hearing by the filing of two orders on December 18, 2014.¹

In the First Lawsuit, the lower court altered its prior order and ordered that the parties shall submit to binding arbitration in Lancaster, South Carolina. The order in the Second Lawsuit incorporated the amended decision reached the First Lawsuit and placed the two matters on parallel tracts.

Appellants timely served notices of appeal on January 21, 2015. This Court consolidated the appeals from the First Lawsuit and Second Lawsuit by order filed on May 28, 2015.

STATEMENT OF THE FACTS

Respondents purchased residential lots in the Riverchase Subdivision and commenced the First Lawsuit and Second Lawsuit alleging that Riverchase Estates Property Owners Assoc., Inc.; LGI Land SC, LLC; LGI Holdings, LLC; LGI Development, Inc.; and Lexon Insurance Company, Inc. (collectively, "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") (See First Complaint, ¶ 2, 4, 18; Second Complaint, ¶ 2, 4, 15.) Respondents claim an "undivided legal

¹ Appellants first received written notice of the filing of these two orders upon receipt of the filed orders on December 22, 2014.

estate interest to community common elements as joints tenants in common pursuant to the Restrictive Covenants"

(Complaints, ¶2.) Respondents further claim that "LGI Land SC, LLC and/or LGI Development [Inc.] is unwilling or incapable of completing the common areas, and has failed to develop the subdivision by installation of utilities, roads, sewer, clubhouse, grounds and other common areas." (First Complaint, ¶25; Second Complaint ¶29.)²

Although Respondents lodge numerous claims against numerous defendants, the gravamen of these actions is that the developer of Riverchase Estates, LGI Land SC, LLC ("Developer"), failed to develop Riverchase Estates in accordance with the Covenants. Accordingly, Respondents do not dispute that the Covenants exist in their chain of title and are binding as between Appellants and Respondents.

The Covenants set forth specific dispute resolution procedures including pre-litigation conditions precedent as well as mandatory arbitration. Respondents did not seek informal resolution, did not seek mediation and did not seek arbitration. Rather, Respondents filed the lawsuits against Appellants in Lancaster County. Respondents failed to comply

² The Common Area is broadly defined in the Covenants to include "all real property (including the improvements thereto) within the Subdivision owned by the Developer and/or the Association for the common use and enjoyment of the Owners" (Covenants, § 1.06.)

with any of the mandatory dispute resolution procedures set forth in the Covenants.

The Covenants unambiguously mandate that all disputes be initiated and pursued in strict accordance with the terms thereof. (Covenants, §§ 10.02 and 10.03.) The Covenants require any party to follow the mandatory dispute resolution procedures. The Covenants provide that substantial compliance with the terms thereof is a condition precedent to the right to bring suit pertaining to any Dispute. (Covenants, § 10.08.) These procedures include formal presentment, formal response, and non-binding mediation. (Covenants, §§ 10.02 and 10.03.)

Section 10.02 of the Covenants sets forth the sole manner a party may initiate a claim over any dispute and requires that following the presentment of the Notice of Dispute, "the Developer and the Disputing Party agree to use reasonable efforts to resolve the Disputes." (Covenants, § 10.03.) If a Dispute is not settled within sixty-days, "then Developer by written request may require that all unresolved matters be submitted to non-binding mediation." (Covenants, § 10.04.) Respondents failed to satisfy this condition precedent to filing the First Complaint or the Second Complaint.

The Covenants provide that if mediation is not successful, then "the Developer or the Disputing Party may by

written request, whether made before or after the institution of any legal action, require that all unresolved matters as set forth in the Dispute Notice be submitted to binding arbitration" (Covenants, § 10.05(a).) 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) (emphasis added).)

ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE ARBITRATION CLAUSE AND PRE-LITIGATION DISPUTE RESOLUTION MANDATES AS WRITTEN IN THE COVENANTS

A. Appeal of Refusal to Enforce Arbitration Clause

A lower court's refusal to enforce an arbitration clause is immediately appealable. See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 464, n. 4 (2013) (finding that an "order denying arbitration is immediately appealable"); see also S.C.Code Ann. § 15-48-200(a)(1) (an appeal may be taken from an order denying an application to compel arbitration). In this case, Appellants moved the lower court to compel arbitration in Texas as prescribed in the Covenants. The lower court refused to enforce the arbitration clause as written in the Covenants and as agreed by the parties; rather, the lower court elected to

order arbitration in South Carolina. As discussed herein, the lower court failed to adhere to the necessary legal standard in rendering this decision and the record is devoid of any evidence to support the necessary legal standard to disregard and set aside the unambiguous terms contained in the Covenants.

Although no South Carolina precedent addresses this issue, Tennessee has addressed this precise issue. The Tennessee court of appeals reversed a lower court's refusal to enforce the express language of an arbitration clause by ignoring the forum selection clause. The Tennessee Court of Appeals upheld an immediate appeal, reasoning as follows:

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*). 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.

B. Standard of Review

"Arbitrability determinations are subject to de novo review." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Id. The motion to dismiss was based upon subject matter jurisdiction, personal jurisdiction, venue and failure to state a claim upon which relief may be granted. Jurisdictional and venue matters are questions of law. "Questions of law may be decided with no particular deference to the trial court." Doe ex rel. Legal Guardian v. Barnwell Sch. Dist. 45, 369 S.C. 659, 662, 633 S.E.2d 518, 519 (Ct. App.2006).

C. Enforcement of the Forum Selection Contained in the Arbitration Clause

1. Validity and Enforcement of Arbitration Clauses

The arbitration provisions in the Covenants are valid, binding and enforceable. Respondents do not dispute the validity of the Covenants. Respondents do not claim the Covenants are not binding on the parties. Respondents do not claim that the dispute resolution clauses contained in the Covenants are ambiguous. Rather, Respondents claimed below

that the forum selection clause should be unenforceable on the grounds that it is unconscionable. Nothing in the record supports Respondents' argument, and the lower court committed reversible error by failing to apply the proper legal standard to invalidate the forum selection clause.

The Federal Arbitration Act ("FAA") and the South Carolina Uniform Arbitration Act mandate enforcement of arbitration provisions. "Arbitration is not litigation carried on by other means, but is an alternative means for resolving disputes without the cost and delay of a lawsuit . . . Arbitration is a favored method of settling disputes in South Carolina." Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555-56 (Ct.App.2002).

"A written provision in any contract evidencing a transaction involving commerce to settle by arbitration 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 (2000).³ "Where a contract evidencing 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." Tritech Elec., Inc. v. Frank M. Hall & Co.,

³ The parallel South Carolina arbitration statute has almost identical language as the FAA. See S.C.Code Ann. § 15-48-10.

343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct.App.2000)
(citations omitted) (finding that the state venue statute was preempted and that trial court erred by refusing to dismiss the action and compel arbitration).

Respondents did not make any argument to the lower court that interstate commerce is not involved. Any argument on the point would have been futile; the Covenants clearly evidence interstate commerce in that the Covenants control agreements and transactions involving the construction and development of a large residential subdivision proximate to border between North Carolina and South Carolina. (See Covenants, p. 1 (noting that Riverchase Estates encompasses almost 600 acres in Lancaster County).

Respondents did not make any argument to the lower court that the subject matter of this litigation falls outside the scope of the Arbitration Clause. Again, any argument on the point would have been futile.

Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement. To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. A motion to

compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.

Zabinski, 346 S.C. at 596-97, 553 S.E.2d at 118-119 (citations omitted).

"The basic purpose of the FAA is 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). In this case, after initially refusing to enforce the Arbitration Agreement, the lower court refused to enforce the Arbitration Clause as written by refusing to enforce the forum selection clause contained therein. The lower court failed to apply the correct legal standard in reaching this decision and based its decision on a record lacking any facts in support.

2. Validity and Enforcement of Forum Selection Clauses

The lower court's refusal to enforce the forum selection clause violated controlling federal and state legal principles. "The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." Grant v. Magnolia Manor Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "Section 4 [of the FAA] specifically states that 'the court shall make an order directing the parties to proceed to arbitration in accordance

with the terms of the agreement.' Id. (emphasis added). The district court must, therefore, apply a forum selection clause contained in the agreement if such a clause exists." Energy Absorption Sys. v. Carsonite Int'l, 377 F. Supp. 2d 501, 504 (D.S.C. 2005); See 6 C.J.S. Arbitration § 36 (noting that "[a]greements to arbitrate in a particular forum are enforced as a matter of contract law").

The Covenants provide that "[t]he 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).)

The lower court should have following South Carolina Supreme Court precedent. The Supreme Court, applying Texas law,⁴ has affirmed enforcement of a forum selection clause requiring the arbitration to occur in Texas. The South Carolina Supreme Court established the following legal standard:

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 would contravene a strong public policy of the forum in which the suit is brought.

⁴ In this matter, the Covenants provide that the substantive and procedural laws of Texas govern if Developer is a party to the arbitration. (Covenants, § 10.05(d).)

Minorplanet Sys. USA Ltd. v. Am. Aire, Inc., 368 S.C. 146, 150, 628 S.E.2d 43, 45 (2006). This legal standard is similar to federal precedent.

A forum-selection clause is 'prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.' A clause is unreasonable if (1) it was the result of 'fraud or overreaching'; (2) 'trial in the contractual forum [would] be so gravely difficult and inconvenient [for the complaining party] that he [would] for all practical purposes be deprived of his day in court'; or (3) 'enforcement would contravene a strong public policy of the forum in which suit is brought'").

Pee Dee Health Care, P.A. v. Sanford, 509 F.3d 204, 213-14 (4th Cir. 2007) quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

In Atl. Floor Servs., Inc. v. Wal-Mart Stores, Inc., 334 F. Supp. 2d 875 (D.S.C. 2004), the District Court of South Carolina enforced a forum selection clause imposed by Walmart for a contract originating in South Carolina and to be performed in South Carolina. While dismissing the action and holding that Arkansas was the proper forum, the court noted:

Plaintiff is a small, closely held South Carolina corporation while defendant, Walmart is a billion dollar corporation. Unequal bargaining power is not a justification in and of itself to hold a provision of a contract invalid. In Carnival Cruise Lines the U.S. Supreme Court upheld a forum selection clause where the parties were a large corporation and individual plaintiffs even though their sizes were dramatically different . . . A party seeking to escape a forum selection clause must 'show that trial in the contractual

forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'

Atl. Floor Servs., 334 F. Supp. 2d at 877-78 (citations omitted).

As cautioned by the United States Supreme Court in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 592 (1991), "even where the forum clause establishes a remote forum for resolution of conflicts, 'the party claiming [unfairness] should bear a heavy burden of proof.'" In Carnival, the forum selection clause was enforced mandating residents of the State of Washington who boarded a cruise ship on the west coast to litigate in Florida. Notably, the Supreme Court recognized that terms of a forum selection clause in a cruise ticket "are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line." The Supreme Court rejected any requirement that the clause be negotiated. Carnival, 499 U.S. at 593.

The lower court's orders do not attempt to apply any of the three parts of the prescribed legal standard: "(1) if [the forum selection clause] 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 would contravene a strong public policy of the

forum in which the suit is brought." Minorplanet, 368 S.C. at 150, 628 S.E.2d at 45.

As to the first basis, Respondents have not met their "heavy burden." As in the cases involving Walmart and Carnival, the record in this appeal is "devoid of any evidence of fraud or overreaching on the part of [LGI] despite the alleged unequal bargaining power of the parties." Atl. Floor Servs., 334 F. Supp. 2d at 878.

As to the second basis, the lower court had nothing on which to support a finding that arbitration in Texas would be "so gravely difficult and inconvenient that [Respondents] will for all practical purposes be deprived of [their] day in court." Atl. Floor Servs., 334 F. Supp. 2d at 877-78.

As to the third basis, forum selection clauses are not violative of public policy and have been enforced by numerous South Carolina appellate courts. See Atl. Floor Servs., 334 F. Supp. 2d at 879-80 (noting "despite numerous opportunities, South Carolina's appellate courts have not suggested, much less declared, that forum selection clauses violate the public policy of the State. In fact, the courts have affirmed and recognized that these clauses are valid and enforceable"). Public policy favors enforcement of both contractual and arbitration provisions.

Arbitration is contractual by nature There is a strong presumption in favor of the validity of

arbitration agreements because of the strong policy favoring arbitration. This policy [favoring arbitration], as contained within the Act, requires courts to enforce the bargain of the parties to arbitrate. [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). There is no evidence that an arbitrator in Texas will be unfair to Respondents. Respondents proffered nothing to satisfy the necessary legal standard to support the lower court's refusal to enforce the forum selection clause contained in the Covenants.

In addition, the lower court applied the wrong standard. The lower court's sole finding was that "no party would suffer prejudice by ordering the parties to submit to binding arbitration in Lancaster County, South Carolina." (Order in First Lawsuit, filed December 18, 2014, p. 2.) Under the FAA, the Supreme Court expressly refused to allow a lower court to consider "a more convenient forum" and held the "correct approach would have been to enforce the forum clause specifically unless [the plaintiff] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching". M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

The lower court committed clear error of law under Minorplanet, Wal-Mart, and Carnival.

3. Forum Selection is not Unconscionable

⁵The forum selection clause in the Covenants is not unconscionable. "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (citations omitted). The decision is not whether the court believes the terms to be fair, reasonable or advisable. Rather, Courts must focus "on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Simpson, 373 S.C. at 25, 644 S.E.2d at 668.

Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom

⁵ This section is included to the extent the lower court's discussion regarding unconscionability was not abrogated by the filing of the two orders on December 18, 2014.

enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882, 885 (2013); see also Carlson v. South Carolina State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct.App.2013) (enforcing an arbitration provision involving facts more similar to this matter (homeowner against a builder and subdivision developer) than the facts involved in Simpson).

The arbitration provisions in the Covenants are not oppressive and apply to all parties as "an alternative means for resolving disputes without the cost and delay of a lawsuit." There is no evidence that these purchasers of real estate were not sophisticated or lacked "basic reading ability." In addition, Respondents were required to be represented by an attorney at the closing transaction for each purchase of real estate involving Developer and the lots at Riverchase. See State v. Buyers Service Co., 292 S.C. 426, 357 S.E.2d 15 (1987). The forum selection clause is contained in the Covenants which is within the chain of title of each lot purchase; the forum selection clause was not hidden or obscured. The lots subject to this lawsuit were not small purchases but rather vacant lots in an upscale development for future construction. (See Complaint, Exhibit A (noting purchase price of \$144,900 for one of the lots).)

Accordingly, the trial court's finding the forum selection provision unconscionable is an error and should be reversed.

D. Conditions Precedent to Litigation

In the initial instance, the lower court committed error by refusing to dismiss the First Lawsuit and the Second Lawsuit without prejudice on the grounds Respondents failed to satisfy the Covenants' dispute resolution terms which are conditions precedent to the filing of any litigation. The Covenants require parties to undertake certain efforts at informal resolution as a condition precedent to litigation.

Section 10.02 provides as follows:

Present of Dispute Required. The Disputing Party must submit written notice to Developer by certified mail, return receipt requested within the time as hereinafter set forth, setting forth all Disputes, if any, claimed or asserted against or adverse to Developer (herein referred to as the "Dispute Notice"). The Dispute Notice must set forth each claim, demand, action and cause of action to be included in the Dispute, a reasonably detailed factual description thereof and all remedial action deemed necessary to remedy all Disputes, and a reasonably detailed description of the nature and extent and amount of all claims for damages, if any. Upon request of Developer, the Disputing Party must also provide Developer with any evidence that depicts the nature and cause of the Dispute, the nature and extent of all remedial action including expert reports, photographs and videotapes to the fullest extent the evidence would be discoverable under the South Carolina Rules of Civil Procedure. ALL DISPUTES NOT SET FORTH IN THE DISPUTE NOTICE, IF ANY, ARE WAIVED BY THE DISPUTING PARTY.

(Covenants, § 10.02.) Following the presentment of the Notice of Dispute, "the Developer and the Disputing Party agree to use reasonable efforts to resolve the Disputes." (Covenants,

§ 10.03.) If a Dispute is not settled within sixty-days, "then Developer by written request may require that all unresolved matters be submitted to non-binding mediation." (Covenants, § 10.04.) Only if mediation is not requested or is not successful can a party proceed to request arbitration. (Covenants, § 10.05.)

"Modern courts are quite willing to enforce agreements to mediate as a condition precedent to litigation." (1 Mediation: Law, Policy and Practice 6:4 (2014).) "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) (dismissing action); see also Houseboat Store, LLC v. Chris-Craft Corp., 692 S.E.2d 61, 65 (Ga.2010) (holding that plaintiff's failure "to allege in its complaint that it had complied with the mediation provision prior to filing the instant lawsuit, the trial court's dismissal on this ground was proper"); Hometown Servs., Inc. v. Equitylock Solutions, Inc., -F.Supp.2d-, 2014 WL 4406973, at *2 (W.D.N.C. Sept. 5, 2014) (dismissing lawsuit because the "[a]greement requires the parties to mediate before any legal action is instituted").

In Santana v. Olguin, 208 P.3d 328, 335 (Kan.2009), the court dismissed the action and noted "mediation is intended to provide an alternative to litigation and thus creates a condition precedent to litigation that the parties mediate their disputes. Our conclusion is consistent with case law that has construed contracts with grievance procedures as requiring pursuit of such procedures *prior* to litigation."

Dismissal is consistent with the FAA because the mandatory enforcement of arbitration provisions are not triggered when a party fails to comply with mediation requirements. "FAA's policy in favor of arbitration does not operate without regard to the wishes of the contracting parties Because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply." Kemiron Atl., Inc. v. Aquakem Int'l, Inc., 290 F.3d 1287, 1291 (11thCir.2002). "Where contracting parties condition an arbitration agreement upon the satisfaction of some condition precedent, the failure to satisfy the specified condition will preclude the parties from compelling arbitration and staying proceedings under the FAA. Because neither HIM nor DeVito ever attempted to mediate this dispute, neither party can be compelled to submit to arbitration." HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41, 44 (1stCir.2003).

The Developer has been denied its right to engage in pre-litigation negotiation and mediation to work with purchasers to resolve potential claims. Requiring Respondents to participate in pre-litigation alternative dispute resolution as required by the Covenants, to which each of them voluntarily elected to be bound, offends no legal or equitable principle. Depriving the Developer its contractual right to have an opportunity to work through issues prior to litigation in a large development such as Riverchase is particularly egregious given the unforeseen real estate recession which directly impacted the development.

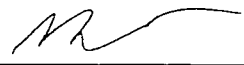
Although Respondents make numerous factual allegations in the Complaint, there is no dispute that the Covenants mandate actions prior to litigation that Respondents failed to undertake. The trial court properly determined that the parties "could reasonably have expected to have to engage in alternative dispute resolution pursuant to the covenants." (Order, p. 2.) However, the trial court failed to enforce the contractual mandate and this Court should reverse this error through enforcement of the mandatory dispute resolution procedures of the Covenants and dismiss the lawsuit without prejudice.

CONCLUSION

For the reasons stated above, the trial court's order refusing to dismiss this case or in the alternative mandate arbitration in Montgomery County, Texas should be reversed.

Date: July 29, 2015

Respectfully submitted,

By: 

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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

vs.

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,

vs.

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 Hon. R. Knox McMahon
Lancaster County
Trial Court Case Nos. 2013-CP-29-00649, 2014-CP-29-00792

RESPONDENTS MOTION TO DISMISS

Respondents respectfully move the court to Dismiss the Appeal filed by Appellants on two grounds. First, the Appellants have sought Appeal of a non-final order that does not affect substantial rights or "mode of trial" because Defendants *consented* to Alternative Dispute Resolution in Lancaster County. [see, Exhibit-A] Defendants expressly requested enforcement of binding arbitration within their June 3, 2014 Reply memorandum to the court. [Exhibit-B, p.4 line

(1)]. [“Based on the foregoing, the Court should reconsider the Order and enforce the mandatory arbitration provisions in either Texas *or Lancaster County, South Carolina...*”]. *See also, Exhibit-A*, lines 1-6).

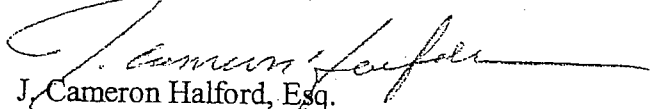
It is only in exceptional cases that the appellate court views with approval an appeal from an interlocutory order; it is usually far better for the party to await the final decree or judgment. Capel v. Moses, 36 S.C. 559, 15 S.E. 711 (1892). Ordinarily, where a judgement or order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding. Johnson v. Johnson, 301 S.C. 44, 425 S.E.2d 46 (Ct. App. 1992). A consent decree or order cannot be properly regarded as a judgment of the court, but is a mere agreement between the parties, which cannot be set aside except for fraud or mistake; it is therefore, not appealable. Parsons v. Gibbes, 59 S.C. 215, 37 S.E. 753 (1901). The right of appeal from such an order is regarded as waived. (*A party cannot appeal from an order or judgment that he has requested*). Exhibit-B. Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984); accord Gibbes, supra.

Second, the court’s September 8, 2014 Order (modifying its previous order of April 29, 2014) granted the relief that defendants sought and was thus favorable to the defendant parties. Normally, one cannot appeal from an order favorable to him, nor can a party appeal from the granting of his own motion. Neal v. Clark, 196 S.C. 139, 12 S.E.2d 921 (1941) The court’s order of September 8, 2014 did not therefore deprive defendants to a mode of trial to which they were entitled to as a matter of right. Appellants expressly pleaded for, consented to, and were granted enforcement of binding arbitration in Lancaster County. Exhibit-B.

CONCLUSION

Because the trial court's order did not determine *with finality* any matter forming the whole or part of some cause of action or defense in the case Appellants were not deprived of the ability to contest the cases on the merits. They remained capable of doing so in court-ordered binding arbitration that defendants consented to after requesting the same by reply memorandum to the trial court. Respondents therefore seek that this appeal be dismissed and the case be remanded for binding arbitration in Lancaster County as ordered by the trial court on September 8, 2014.

Respectfully submitted,



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Halford Niemiec & Freeman, L.L.P.

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Fort Mill, South Carolina 29708

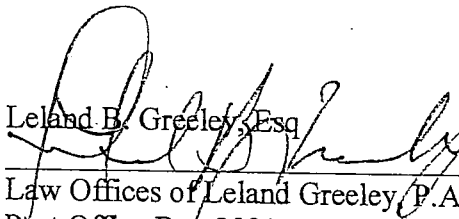
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ATTORNEYS FOR RESPONDENTS CLARK,
PERRY, DODD AND RATAY

JOINDER BY:



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ATTORNEY FOR RESPONDENTS
ELDER & WHITE

Exhibit-A
Respondent August 28, 2015
Motion to Dismiss

[Excerpt September 8 ,2014 Transcript]
Lines 1-6
Lines 10-11

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

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

12 THE COURT: Would the plaintiffs?

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

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

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

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

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

Exhibit – B

Respondent Motion to Dismiss
August 28, 2015

[Defendant Reply Memorandum Dated June 3, 2014]
p.4 at line (1)

STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
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.

REPLY TO PLAINTIFFS' RETURN
TO MOTION TO RECONSIDER

C.A. No. 13-CP-29649

FILED
JUN -3 PM 1:25
CLERK OF COURT
LANCASTER, SC

The LGI Defendants¹ hereby offer this Reply in response to Plaintiffs' Return to the Motion to Reconsider.

1. Preemption. Plaintiffs' claim that the LGI Defendants failed to raise preemption is without merit. The LGI Defendants cited express and direct authority mandating enforcement of federal and state arbitration provisions. These arguments were noted numerous times including the following excerpts in the Memorandum in Support:

a. Both the Federal Arbitration Act ("FAA") and the South Carolina Uniform Arbitration Act ("SC Arbitration Act") mandate enforcement of arbitration provisions. . . . "The policy of the United States and South Carolina is to favor arbitration of disputes." Zabinski v. Bright Acres

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.

00115455.WPD

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Associates, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (Memorandum, p. 6).

b. "A written provision in any contract evidencing a transaction involving commerce to settle by arbitration 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 (2000)."² Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550-51, 606 S.E.2d 752, 755 (2004) (Memorandum, p. 6).

c. "On application of a party showing an [arbitration] agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied." S.C.Code Ann. § 15-48-20(a) (Memorandum, p. 7).

d. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." Zabinski, 346 S.C. at 596-97, 553 S.E.2d at 118-19 (citations omitted) (Memorandum, p. 7).

The LGI Defendants properly cited and relied on the more specific FAA and SC Arbitration Act statutes than the venue statute relied upon by Plaintiffs. See Spectre, LLC v. S.C. Dep't of Health & Env'tl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010) ("Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect"). Moreover, application of the SC

² The SC Arbitration Act has almost identical language as the FAA. See S.C.Code Ann. § 15-48-10.

Arbitration Act does not even involve preemption. As noted in the Motion to Reconsider, the Court of Appeals expressly ruled that the venue statute does not apply.

2. Severability. The LGI Defendants are not precluded from arguing severability of the arbitration provision. First, the LGI Defendants expressly argued that the Covenants are severable, including in the proposed order. (*Proposed Order Granting Motion to Dismiss*, p. 4, n.2). In addition, Plaintiffs never argued that arbitration in South Carolina was unconscionable and thus unenforceable. Plaintiffs' arguments focused on unconscionability of arbitration in Texas. With the abundance of case law enforcing arbitration provisions, it was never contemplated that the Court would refuse to enforce arbitration in South Carolina. See In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct.App.1998) ("South Carolina courts 'have adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal.' When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCp, to alter or amend the judgment in order to preserve the issue for appeal").

3. Conclusion. Based on the foregoing, the Court should reconsider the Order and enforce the mandatory arbitration

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provisions in either Texas or Lancaster County, South Carolina
along with dismissal of certain defendants.

Rock Hill, S.C.

Date: June 2, 2014

SPENCER & SPENCER, P.A.

By: W. Mark White

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CERTIFICATE OF SERVICE

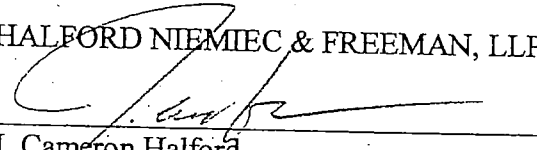
I hereby certify that we are counsel for the Respondents in the above captioned matters and that we did on August 28, 2015 serve a copy of the foregoing RESPONDENTS NOTICE OF MOTION AND MOTION TO DISMISS on counsel for Appellants, as follows, by depositing a copy of the same in the United States mail, postage prepaid, and addressed as follows:

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AND LEXON INSURANCE COMPANY, INC.

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RECEIVED

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SEP 25 2015

Concerned Riverchase Estate Owners, Andrew
Dodd, Heather Dodd and Charles Ratay Respondents, SC Court of Appeals

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 Background¹

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

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.

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:

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: h m
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STATE OF SOUTH CAROLINA 2013 AUG 12 PM 12:36

COUNTY OF LANCASTER) IN THE COURT OF COMMON PLEAS
CLERK OF COURT SIXTH JUDICIAL CIRCUIT
LANCASTER, SC

Concerned Riverchase Estate)
Owners, Clark, Perry, Elder &)
White,)

Plaintiffs,)

vs.)

MOTION TO DISMISS OR
STAY PROCEEDINGS AND
COMPEL ARBITRATION

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.)

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) SCRCF, 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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00112055.WPD

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., Complaint, ¶¶ 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), SCRPC.

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), SCRPC.

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), SCRPC.

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), SCRPC 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.

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Date: August 9, 2013

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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,	)	
	)	ORDER DENYING DEFENDANTS'
vs.	)	RULE 12(B)(6) MOTION
	)	
Riverchase Estates Property	)	
Owners Assoc., Inc.; Woodforest	)	C.A. No. 13-CP-29-649
Bank, N.A.; LGI Land SC, LLC; and	)	
LGI Holdings, LLC; LGI	)	
Development, Inc.; and Lexon	)	
Insurance Company, Inc.,	)	
	)	
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), SCRPC. *"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), SCRPC. 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). 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

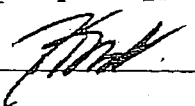


pursuant to master plan, and that Defendants abandoned informal dispute processes under the covenants. Viewing the face of the complaint and its allegations as true, or admitted, the Defendants' Rule 12(b)(6) motion to compel binding arbitration is therefore improper and should be denied.

NOW, THEREFORE, based upon the foregoing

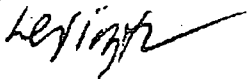
IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss and Defendants' motion to stay and compel binding arbitration brought pursuant to Rule 12(b)(6) is denied.

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



Honorable R. Knox McMahon
Presiding Judge
Sixth Judicial Circuit

Date: 24 April 14
Lancaster, South Carolina



STATE OF SOUTH CAROLINA)

COUNTY OF LANCASTER)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUITConcerned Riverchase Estate)
Owners, Clark, Perry, Elder &)
White,)

Plaintiffs,)

vs.)

NOTICE OF AND
MOTION TO RECONSIDERRiverchase 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.)

C.A. No. 13-CP-29649

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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), SCRCF, 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), SCRCF, 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

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

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: Wk

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

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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) SCRCF, 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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00116047.WPD

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., Complaint, ¶¶ 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), SCRCF.

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), SCRCF.

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), SCRCF.

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), SCRPC 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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STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
 SIXTH JUDICIAL CIRCUIT

Concerned Riverchase Estate)
 Owners, Clark, Perry, Elder &)
 White,)

C.A. NO. 2013-CP-29-649

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.)

FILED
 OFFICE OF CLERK OF COURT
 FOR LANCASTER COUNTY

12-18-14
 LANCASTER COUNTY
 LANCASTER, SC

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:



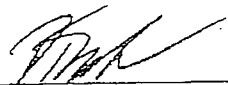
1. The court GRANTS the motion and modifies and amends its prior ruling as to applicability of the alternative dispute resolution procedures of the covenants, and holds that the Defendants and Plaintiffs could reasonably have expected to have to engage in alternative dispute resolution pursuant to the 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)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

Concerned Riverchase Estate)
Owners, Andrew Dodd, Heather)
Dodd, and Charles Ratay,)
Plaintiffs,)

C.A. NO. 2014-CP-29-792

ORDER

vs.)

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

Defendants.)

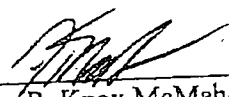
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2014 DEC 18 PM 2:59
CLERK OF COURT
LANCASTER, SC

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.

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DATE 12/22/14
SPENCER & SPENCER, P.A.

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



Hon. R. Knox McMahon
Presiding Judge
Sixteenth Judicial Circuit

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

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

12 THE COURT: Would the plaintiffs?

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

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

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

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

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

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

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

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

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

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

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December 15, 2014

Via U.S. Mail and Electronic Mail (kcmahonlc@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

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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.

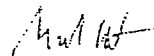
It should be noted in this letter that the LGI Defendants do not agree with or consent to the Court's announced decision to

The Honorable R. Knox McMahon
December 15, 2014
Page 3

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.

RECEIVED

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SEP 25 2015

SC Court of Appeal

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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J. Cameron Halford
Halford, Niemiec & Freeman, LLP
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Fort Mill, SC 29708

Leland Greeley
Leland Greeley, P.A.
P.O. Box 2981
Rock Hill, SC 29732

SPENCER & SPENCER, P.A.

Date: September 22, 2015

By: hb

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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

vs.

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,

vs.

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 Hon. R. Knox McMahon
Lancaster County
Trial Court Case Nos. 2013-CP-29-00649, 2014-CP-29-00792

RESPONDENTS' REPLY TO
APPELLANTS' RETURN TO MOTION TO DISMISS

Respondents respectfully submit the following Reply in response to the Appellants'
Return and in support of dismissal pursuant to SCACR 240.

I. FACTS AND PROCEDURAL BACKGROUND.

Respondents purchased residential lots in Riverchase Subdivision and commenced the above captioned lawsuits alleging, *inter alia*,¹ that Appellants failed to Develop the property in accord with the original master plan for the development as set forth in the Declaration of Covenants, Conditions and Restrictions for Riverchase Estates. The CCR's are recorded in 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 *informal 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, that is*, the dispute involves the Developer LGI Land SC, LLC. *In which instance, the proceedings must be conducted in Montgomery County, Texas*. (Covenants, §10.05(d)). Herein lies the Achilles heel for what is ultimately Texas corporations who have, via a South Carolina LLC, engaged in developing and selling land in Lancaster County in derivation of the Covenants.

II. DISCUSSION

In asserting that Respondents failed to comply with the informal resolution, mediation and arbitration procedures required by the Covenants, Respondents seek to side step and evade the most critical issue involved in the lower court's decision on unconscionability and, later, enforcement of arbitration, e.g., Defendants' abandonment of its own SC Offices and informal

¹ Respondents also alleged that the Developer, LGI Land SC, LLC (a South Carolina entity) had abandoned its registered offices and had thus abandoned informal dispute resolution procedures mandated by the declarant's own covenants and as amalgamated with the other Texas defendants, abandoned informal dispute resolution procedures that begin with their own offices in South Carolina which no longer exist.

resolution procedures available through the same. These facts on the face of the complaint, properly viewed as true by the trial judge, led the court to find the provisions in the Covenants regarding Texas binding arbitration to be unconscionable and void as against public policy.

While Appellants side step the issue, the Appellants do not dispute that the registered offices for informal dispute resolution now lie addressed in Texas. They ignore that Appellants attempted, *to no avail*, to engage in informal dispute resolution set forth in the Covenants through registered offices in South Carolina that were abandoned or utterly nonresponsive. This fact underscores, precisely, the futility involved in the Covenants and why the lower court found the procedural labyrinth found within the Covenants unconscionable. The trial court's partial grant of relief in the subsequent December 18, 2014 Order grants relief being requested by Appellants' counsel. The trial court ultimately finds that all parties could have expected binding arbitration in South Carolina. The question becomes whether the trial court erred as a matter of law in exercising its inherent authority to manage litigation.

A. The trial court properly exercised its inherent authority to manage litigation by eliminating the *futility* inherent in the labyrinth of non-binding ADR procedures in the covenants.

Appellants correctly point out that the developer of Riverchase Estates is LGI Land SC, LLC. The appellants do not dispute that LGI Land SC, LLC is a South Carolina entity. It is also the Declarant under the CCR's. Nor do Appellants dispute that the SC entity was the party responsible for developing and maintaining Riverchase subdivision, its common elements, amenities and registration and "formal response" regarding informal dispute resolution. Following Appellants' logic, litigants who are ignored entirely when attempting, through counsel, to engage the developer through abandoned offices and procedures, said litigants

nonetheless must further proceed through the abysmal process of informal mediations (none of which are binding), be required to travel to foreign forums, because the developer (A South Carolina LLC entity nonetheless) is involved. The problem with this logic is it underscores why the courts of this state should not permit foreign corporations amalgamated immunity through a shell South Carolina entity.

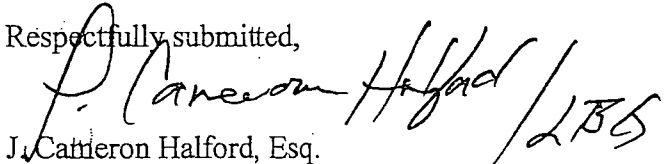
- B. Appellants are not an “aggrieved party” where the court order and the restrictive covenants mandate, ultimately, the method of alternative dispute resolution dictated by the declarant’s covenants.**

Appellants argue that *“to require otherwise, Appellants lose even if they ultimately prevail.”* The unique situation described by Appellants under Spell is ultimately self-inflicted where, again, Appellants have consented by brief and otherwise to a willingness to submit to alternative dispute resolution in Lancaster County. The trial court simply cut out the futility involved.

III. CONCLUSION

For the reasons stated above, the Motion to Dismiss should be granted and the case remanded for binding arbitration in Lancaster County, South Carolina as Ordered by the trial court dated September 8, 2014.

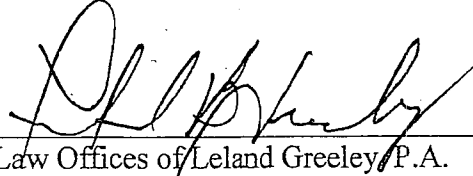
Respectfully submitted,

 LBS

J. Cameron Halford, Esq.
Halford Niemiec & Freeman, L.L.P.
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ATTORNEYS FOR RESPONDENTS CLARK,
PERRY, DODD AND RATAY

JOINDER BY:

Leland B. Greeley, Esq.

A handwritten signature in black ink, appearing to read 'L. B. Greeley', is written over a horizontal line.

Law Offices of Leland Greeley, P.A.

Post Office Box 2981

Rock Hill, South Carolina 29732

Phone: 803-329-0088

Fax: 803-329-4310

E-mail: lgreeley@lbgreeleylaw.com

ATTORNEY FOR RESPONDENTS

ELDER & WHITE

S. C. Bar #: 7850

CERTIFICATE OF SERVICE

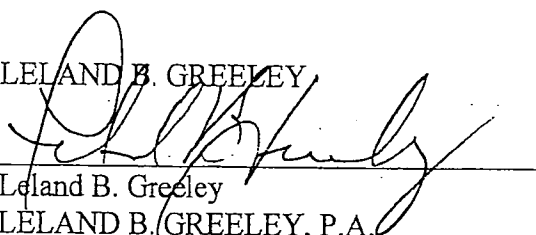
I hereby certify that I am counsel for the Respondents in the above captioned matter and that I did on October 5, 2015 serve a copy of the foregoing RESPONDENTS REPLY TO APPELLANTS' RETURN, as follows, by depositing a copy of the same in the United States mail, postage prepaid, and addressed as follows:

Mark W. White, Esq.
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ATTORNEYS FOR APPELLANTS
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AND LEXON INSURANCE COMPANY, INC.

Elizabeth Van Doren Grey, Esq.
Beth B. Richardson, Esq.
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ATTORNEYS FOR APPELLANT
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The South Carolina Court of Appeals

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

v.

Riverchase Estates Property Owners Association, 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, and White, Respondents,

v.

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

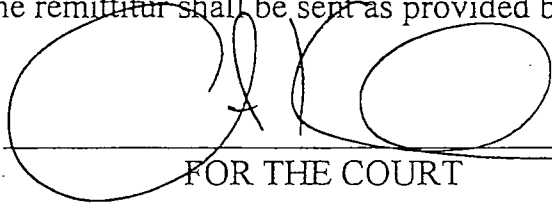
Of whom Riverchase Estates Property Owners
Association., Inc.; LGI Land SC, LLC; and LGI
Holdings, LLC; LGI Development, Inc.; and Lexon
Insurance Company, Inc., are the Appellants.

Appellate Case No. 2015-000193

ORDER

Respondents have filed a motion to dismiss, asserting (1) the underlying order compelling arbitration in South Carolina is not immediately appealable and (2)

Appellants are not aggrieved because they requested the relief that was granted. Appellants have filed a return opposing the motion, and Respondents have filed a reply. After consideration, the motion is granted. In their motion to reconsider, Appellants requested arbitration in South Carolina as alternative relief; thus, Appellants are not an aggrieved party. Further, the order compelling arbitration is not an appealable order under section 15-48-200 of the South Carolina Code (2005). *See Toler's Cover Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding the Federal Arbitration Act does not preempt the "state procedural rule that an order compelling arbitration is not immediately appealable"). The remittitur shall be sent as provided by Rule 221(b), SCACR.



FOR THE COURT

Columbia, South Carolina

cc: William Mark White, Esquire
W. Chaplin Spencer, Jr., Esquire
J. Cameron Halford, Esquire
Leland B. Greeley, Esquire

FILED
12/10/15

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DEC 23 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SC 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

PETITION FOR REHEARING

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

(collectively, "Appellants") through their undersigned counsel and pursuant to Rules 221(a) and 240, SCACR, and respectfully request that the Court rehear and reconsider its Order dismissing this appeal filed December 10, 2015 ("Order").

I. Condensed Background¹

Respondents are owners of residential lots in the Riverchase Subdivision and commenced lawsuits alleging that Appellants failed to develop the property in accordance with the master plan as set forth in the Covenants. The Covenants set forth mandatory dispute resolution procedures. If the prescribed resolution procedures are not successful, then either party may demand mandatory arbitration. 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. The trial court refused to enforce arbitration in Texas as set forth in the Covenants resulting in this appeal.

II. Arguments Supporting Rehearing

The Order provides two reasons for dismissal: (1) "Appellants are not aggrieved because they requested the

¹ More detailed information is set forth in Appellants' Initial Brief. Defined terms herein shall have the meaning set forth in Appellants' Initial Brief.

relief that was granted" and (2) "the order compelling arbitration is not an appealable order under section 15-48-200 of the South Carolina Code 2005)." Appellants respectfully submit that the Court overlooked or misapprehended the underlying facts and law as follows.

1. A Party is Aggrieved when Relief sought is denied even if Alternative Relief is granted. The primary relief sought in the Motion to Dismiss was the enforcement of the subject arbitration clause which mandated arbitration in Montgomery County, Texas. Recognizing that arbitration in the wrong venue is preferable to a trial in that venue, 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.) The law does not require a party to waive appellate review of the denial of its primary remedy by seeking mitigation of a lower court's error through an alternative remedy.

"Rule 201(b), SCACR, provides that '[o]nly a party aggrieved by an order, judgment, or sentence may appeal.' We recently reiterated that '[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest.' 'The word 'aggrieved' refers to a substantial grievance, a denial of some personal

or property right, or the imposition on a party of a burden or obligation.'" Shaw v. City of Charleston, 351 S.C. 32, 36, 567 S.E.2d 530, 532 (Ct. App. 2002) (citations omitted).

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 as written. The South Carolina Supreme Court recognized that a party may be aggrieved by receiving alternative relief in Sickora v. Metro. Life Ins. Co., 278 S.C. 99, 101, 292 S.E.2d 593, 595 (1982) and allowed appellate review by holding:

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.

Moreover, "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).

2. Arbitration was Denied. The Order fails to recognize that this case involves the appeal of a lower court's refusal to compel arbitration in accordance with the applicable contract as opposed to an appeal of a lower court's order compelling arbitration per a contract. This distinction is critical and manifest. While it is true that a party may not take an immediate appeal from order compelling arbitration as required in a valid contract, the refusal to compel

arbitration in accordance with the terms of the governing contract is immediately appealable. The lower court in this matter refused to compel arbitration in Montgomery County, Texas as expressly required in the contract. This appeal cannot be justly discarded as an appeal of the grant of arbitration when it's the exact opposite.

While no South Carolina precedent has addressed these specific facts, the courts in Tennessee have. In the Tennessee case, the lower court compelled an arbitration but refused to compel the arbitration in the forum selected in the applicable contract. After noting that normally an order compelling arbitration is not immediately appealable, the Tennessee Court of Appeals provided an exception to this normal rule when the trial court reforms an agreement and does not enforce a forum selection clause contained therein. Recognizing the unique policy considerations present upon such an occurrence, the court ruled as follows:

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).

"[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.'" Cape

Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (citations omitted). Therefore, this Court should allow this appeal to proceed as the gravamen of this Appeal is to redress the refusal of the lower court to compel the arbitration prescribed in the contract.

WHEREFORE, the undersigned counsel for Appellants respectfully request this Court to grant this Petition for Rehearing and allow this appeal to proceed on the merits.

Date: December 23, 2015

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

RECEIVED

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

DEC 23 2015

SC 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 Petition for Rehearing
by depositing a copy in the United States Mail, postage

prepaid, on December 23, 2015, addressed to counsel of record
as follows:

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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

vs.

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,

vs.

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 Hon. R. Knox McMahon
Lancaster County
Trial Court Case Nos. 2013-CP-29-00649, 2014-CP-29-00792

RESPONDENTS REPLY TO APPELLANTS
PETITION FOR REHEARING

Respondents respectfully move the court to DENY Appellants' motion for re-hearing filed on December 28, 2015 pursuant to S.C. Code Ann. § 15-48-200 and *Toler's Cover Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 611 586 S.E. 581, 584-85 (2003). Respondents move the court to deny the relief on the grounds that Appellants seek reconsideration of an order

that is not appealable where Appellants are not an aggrieved party as contemplated by Rule 201(b) SCACR. Appellants consented, via prayer for alternative relief, to binding arbitration in Lancaster County. Predicated on this fact alone, the lower court did not reform the parties' choice of law and forum selection clauses. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995). [holding all orders relating to arbitration not mentioned in S.C. Code Ann. 15-48-200(a) are not immediately appealable.] Id.

BACKGROUND

Respondents are purchasers and owners of residential lots in the Riverchase Subdivision in Lancaster County and commenced lawsuits alleging that Appellants, *developers*, (a) abandoned registered offices and alternative dispute resolution procedures created in their very own covenants,¹ and (b) Appellants failed to develop the property in accordance with the community master plan. The core issue of Appellants' dispute in the case is that the developer (Appellant LGI Land SC, LLC) is named as a defendant party. At no prior point have Appellants argued the South Carolina LLC developer was under disability, or incapable of managing its own affairs. Appellants merely argue, therefore, that the lower court was incorrect and should have compelled binding arbitration in Montgomery County, Texas because the developer in this case -- a South Carolina LLC -- is *Sui Juris*. The trial court determined that the labyrinth of ADR procedures set forth in the developers' covenants was both unconscionable and void as to public policy in South Carolina, but the court later amended its Order (at Appellants' request) to compel binding arbitration in Lancaster County, South Carolina.

¹ Appellants seek to evade the fact that the registered offices of the Appellant were non-responsive and abandoned as alleged in the Complaint. The trial court did not refuse to compel arbitration, it simply refused to compel arbitration in Montgomery County, Texas where Appellants, in the alternative, prayed for binding arbitration in Lancaster County, South Carolina.

ARGUMENTS IN OPPOSITION TO REHEARING

1. The trial court neither over-looked nor misapprehended the underlying facts or law because S.C. Code Ann. §15-48-200 is not inconsistent nor would it undermine the goals and policies of the Federal Arbitration Act ("FAA").

This case involves a South Carolina LLC (developer) attempting to draw upon unconscionable (and arguably oppressive and invalid) procedures set forth in the quagmire found within the restrictive covenants. Had the developer or other Appellants sought to honor the procedures set forth in the covenants, they would not have ignored certified notices to registered offices where they essentially went "dark". The trial court determined all parties could reasonably have expected binding arbitration in Lancaster County. Lancaster County is where the lands are located and where, factually, development (or lack thereof) occurred or did not occur.

In the instant case §15-48-200 of the South Carolina code neither invalidated the arbitration agreements, nor undermined the goals set forth in the FAA. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Construction Co., Inc.*, 355 S.C. 605, 586 S.E. 2d 581 (2003) (citing *Zablinsky v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110). Instead, the court's order enforces arbitration which, pursuant to *Toler's* and *Zablinski*, coincides with the policies of the FAA in favor of arbitration of disputes.

2. The alternative relief prayed for by Appellants was granted and Appellants are not an aggrieved party as contemplated by SCACR 201(b).

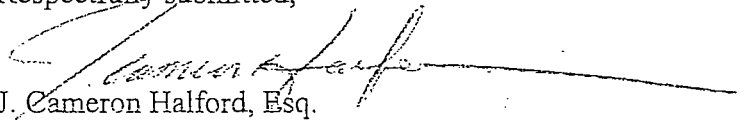
Judge Knox McMahon essentially *excised* the labyrinth of procedural *quick sand* set forth in the covenants--*a valid exercise of the court's power to manage litigation*. There is no dispute that the case involves the sale of lots in Lancaster County. There is no dispute that the developer is a South Carolina LLC. As such, both the developer and Appellants could reasonably have

contemplated jurisdiction in Lancaster County and binding arbitration in the same locale. The trial court's determination was without legal error or abuse of discretion. It was a valid exercise of the court's inherent power to manage litigation. Appellants seek application of Tennessee precedent where S.C. Code Ann. §15-48-200, et seq and *Toler's Cove* would be controlling South Carolina precedent. Contrary to the position asserted by Appellants, the trial court did not "*reform*" the parties' choice of forum. Rather, the trial court enforced resolution both parties consented to and could reasonably have expected procedurally under the contracts and covenants.

CONCLUSION

For the reasons set forth above and for reasons accurately set forth in the court's last Order, the Petition for Rehearing should be denied and the case remanded to Lancaster County for binding arbitration. The trial court validly exercised its inherent powers to manage the litigation. In essence the trial court excised redundant, oppressive ADR procedures found in the developer's covenants and compelled binding arbitration [which all parties could have reasonably contemplated] in Lancaster, South Carolina. The December 10, 2015 ruling by the Court of Appeals should stand.

Respectfully submitted,



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ATTORNEY FOR RESPONDENTS

ELDER & WHITE

CERTIFICATE OF SERVICE

I hereby certify that we are counsel for the Respondents in the above captioned matters and that we did on January 4, 2016 serve a copy of the foregoing RESPONDENTS REPLY AND MOTION TO DENY APPELLANT PETITION FOR REHEARING on counsel for Appellants, as follows, by depositing a copy of the same in the United States mail, postage prepaid, and addressed as follows:

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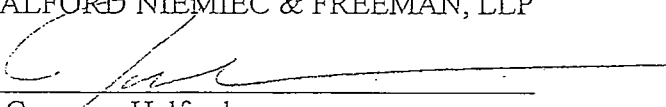
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January 6, 2016
Fort Mill, South Carolina

The South Carolina Court of Appeals

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

v.

Riverchase Estates Property Owners Association, 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, and White, Respondents;

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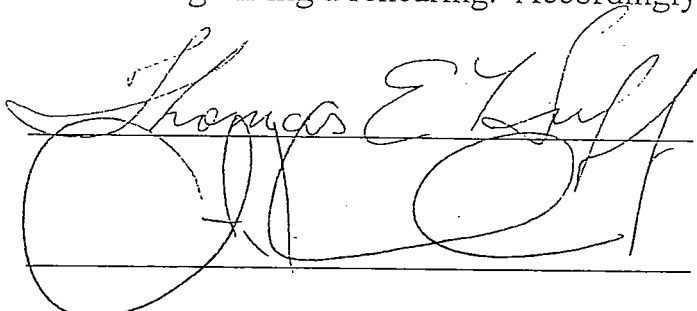
Of whom Riverchase Estates Property Owners
Association., Inc.; LGI Land SC, LLC; and LGI
Holdings, LLC; LGI Development, Inc.; and Lexon
Insurance Company, Inc., are the Appellants.

Appellate Case No. 2015-000193

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.

 J.
 J.

Columbia, South Carolina

cc: William Mark White, Esquire
W. Chaplin Spencer, Jr., Esquire
J. Cameron Halford, Esquire
Leland B. Greeley, Esquire

FILED
3/16/16

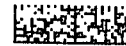
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