THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-001825
Trial Court Case No. 2015-CP-08-01213

Christopher Duvall and Natalie Duvall, Plaintiffs,

v.

The Ryland Group, Inc., Defendant.

And

The Ryland Group, Inc., Third-Party Plaintiff,

v.

Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc., Third-Party Defendants,

Of which The Ryland Group, Inc. is the Appellant,

And

Of which Christopher Duvall and Natalie Duvall, Land Site Services, Inc., Carolina Consulting Engineers, Inc., A.C. Construction, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. are the Respondents.

INITIAL BRIEF OF RESPONDENTS STARK TRUSS COMPANY, INC. A/K/A STARK TRUSS COMPANY OF SUMMERVILLE, LTD. A/K/A STARK TRUSS, INC. D/B/A CAROLINA TRUSS SYSTEMS, INC. AND LAND SITE SERVICES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED IN DENYING RYLAND'S MOTION TO COMPEL ARBITRATION?

STATEMENT OF THE CASE

The matter at issue in this appeal is whether the circuit court erred in denying The Ryland Group's ("Ryland") motion to compel arbitration. The subject house was completed on September 18, 2006. Ryland thereafter sold the house to the original purchasers. The Duvall Respondents purchased the house on December 31, 2008 from the original purchasers. The Duvall Respondents brought the instant suit against Ryland on May 20, 2015, alleging numerous structural defects, including, but not limited to, cracking in the house's foundation. Ryland brought a Third-Party Complaint against three of its subcontractors, including Third Party Defendants Land Site Services, Inc. ("Land Site") and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd., a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. ("Stark"), based on their alleged respective work done and/or materials provided for the job.

Ryland alleges that Land Site and Stark entered into identical Subcontractor Agreements with Ryland. *See* Alleged Subcontractor Agreement between Ryland and Stark, July 5, 2002. Stark denies the applicability of the alleged contract. Ryland has produced in discovery and referenced in its supporting memorandum an alleged Subcontractor Agreement with Land Site dated June 19, 2002, and an alleged Subcontractor Agreement with Stark dated July 5, 2002 claiming that these alleged Subcontractor Agreements govern the parties' relationship with respect to the Duvall Respondents' house. *See* Alleged Subcontract Agreement between Ryland and Land Site, June 19, 2002. There is no mention of Duvall Respondents' house in these alleged Agreements, which predate construction of the house by four years. Ryland also produced and referenced a Scope of Work allegedly for Land Site for Clearing, Grading, Backfill

& Excavation executed on October 23, 2006, which postdates the subject house's completion. *See* Scope of Work between Ryland and Land Site, October 23, 2006. The alleged Subcontractor Agreements do not apply, and Landsite further argues that the Scope of Work does not govern Ryland and Land Site's relationship with respect to the Duvall Respondents' house, and therefore cannot serve as the basis for Ryland's motion to compel arbitration.

Assuming only for the purpose of Ryland's attempt to compel arbitration that these documents apply to Landsite and Stark, the arbitration language on which Ryland relies provides as follows:

> Except in the event that either party is sued by someone other than a party hereto or it would be appropriate for complete resolution of the issues for either party to cross-claim against the other party in a legal action not initiated by either of the parties hereto, any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof shall be settled by binding arbitration conducted by a neutral arbitrator.

Id. ¶ 16.

Ryland moved to compel arbitration. Stark and Land filed a Response to Ryland's Motion to Compel Arbitration. *See* Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd., a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. and Land Site Services' Memorandum of Law In Opposition To The Ryland Group's Motion To Compel Arbitration. The Court issued a Form 4 Order denying Ryland's Motion to Compel Arbitration. *See* Form 4 issued on June 28, 2016. Ryland filed a Motion to Reconsider, Amend and/or Alter Order Denying Its Motion to Compel Arbitration. Stark and Land filed a Response to the Ryland's Motion to Alter or Amend. *See* Stark Truss Company, Inc. a/k/a Stark Truss Company Of Summerville, Ltd., a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. And Land Site Services' Response To The Ryland Group's Motion To Alter Or Amend The Court's Order

Denying Ryland's Motion To Compel Arbitration. The Court denied Ryland's Motion to Alter or Amend. *See* Order Denying Ryland's Motion to Alter or Amend dated July 26, 2016.

ARGUMENT

I. THE COURT OF APPEALS MAY AFFIRM THE CIRCUIT COURT'S RULING ON ANY GROUNDS APPEARING IN THE RECORD ON APPEAL.

The below arguments by Respondents were raised to the circuit court. The circuit court issued a Form 4 Order which did not specifically delineate grounds for its Order. At the hearing, the circuit court indicated that Ryland had waived its right to arbitrate. *See* Transcript of June 27, 2016 Hearing, p.6. The Order on the Motion to Alter or Amend also did not contain any specific grounds for the ruling. However, the below arguments were raised by the Respondents to the circuit court.

The Supreme Court in *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) addressed the issue of additional sustaining grounds. The Court stated that in "revising the appellate court rules, we intended to abandon restrictions surrounding additional sustaining grounds and allow a more flexible process. We chose to avoid using the term "additional sustaining ground" in the present appellate court rules." *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. at 418, 526 S.E.2d at 722. Instead, the present rules provide simply that "[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c), [SCACR]." *I'On, L.L.C. v. Town of Mount Pleasant, supra* (citing Rule 208(b)(2), SCACR). Rule 220(c), in turn, provides that "[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal." *I'On, L.L.C. v. Town of Mount Pleasant, supra.*

Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. *Id.* The Court stated that it would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. *Id.*

II. THE PLAIN LANGUAGE OF THE ARBITRATION CLAUSE IN THE ALLEGED SUBCONTRACTOR AGREEMENTS EXPLICITLY EXCLUDES THE SUBJECT ACTION FROM ARBITRATION.

The plain and unambiguous language of the arbitration clauses in the alleged Subcontractor Agreements explicitly excludes Ryland's claims against Land Site and Stark from arbitration under the facts of this case.

When a party files a motion to compel arbitration, the Court must determine the applicability and enforceability of the arbitration clause at issue to the parties. *See BG Grp., PLC v. Republic of Argentina,* 134 S. Ct. 1198, 1206-07 (2014). Courts determine the existence and applicability of an arbitration agreement by applying ordinary principles that govern contract formulation. *See Towles v. United HealthCare Corp.,* 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999).

The determination whether a claim is subject to arbitration is reviewed *de novo*. *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

The arbitration clauses in Ryland's alleged Subcontractor Agreements with Land Site and Stark (1) are not applicable or enforceable against Land Site or Stark based upon their plain

language; (2) are not governed by the Federal Arbitration Act (FAA), and (3) and are not in compliance with the South Carolina Uniform Arbitration Act (UAA).

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). General contract principles apply in evaluating the enforceability of an arbitration clause. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 258-59, 743 S.E.2d 868, 873 (Ct. App. 2013). If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)).

The arbitration clause at issue begins as follows: "**Except in the event that either party is sued by someone other than a party hereto or it would be appropriate for complete resolution of the issues for either party to cross-claim against the other party in a legal action not initiated by either of the parties hereto**, any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof shall be settled by binding arbitration conducted by a neutral arbitrator." (Emphasis added). The arbitration clause contains two independent exclusions: (1) If either party has been sued by someone other than a party to the Subcontract Agreement OR (2) if it would be appropriate for complete resolution for either party to file cross-claims in a legal action not initiated by either party to the Subcontractor Agreement.

The first exclusion precludes arbitration in this case. The homeowners filed this suit against Ryland. They did not sue Land Site or Stark. The homeowners are not parties to

Ryland's alleged Subcontractor Agreements with Land Site and Stark. Because Ryland has been sued by someone other than a party to the alleged Subcontractor Agreements, the arbitration clause does not apply.

Ryland did not alter the character of the lawsuit by filing its Third-Party Complaint against Land Site and Stark. This action remained "a legal action not initiated by either of the parties" to the alleged Subcontractor Agreement. In addition, Ryland has asserted claims not just for breach of contract and contractual indemnity but also for equitable indemnity, breach of warranty, and negligence.

Therefore, the arbitration clause in the alleged Subcontractor Agreements plainly, clearly, and unambiguously excludes Ryland's claims from arbitration.

III. THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO RYLAND'S ALLEGED SUBCONTRACTOR AGREEMENTS WITH LAND SITE AND STARK.

As discussed below, the alleged agreements with Land Site and Stark clearly do not meet the requirements of the South Carolina Uniform Arbitration Act (the "UAA"), and therefore the only way Ryland can compel arbitration is if the matter is subject to the FAA. Even if the alleged Subcontractor Agreements did not preclude arbitration based on their own unambiguous language, the FAA does not apply.

The applicability and enforcement section of the FAA provides:

> A written provision in any maritime transaction **or a contract evidencing a transaction involving commerce** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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 (emphasis added).

In order for the FAA to apply and govern, the alleged Subcontractor Agreement must evidence foreign or interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454, 730 S.E.2d 312, 315-16 (2012). "Despite [the] expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 591, 553 S.E.2d at 115-16. Further, the FAA does not require arbitration where the parties do not agree to do so, "nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Id.* at 591-92, 553 S.E.2d at 116. In other words, the primary goal of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms, and not to impose the terms of the FAA when the parties have agreed otherwise. *Id.* at 592, 553 S.E.2d at 116.

This case involves the clearing and preparation of land and the supplying of roof trusses for a single-family house in 2006, all of which occurred in South Carolina. The alleged agreements did not state that the arbitration was to be pursuant to the FAA and did not mention the FAA at all.

Ryland argues "[w]hile the South Carolina Supreme Court has held that the 'purchase and sale of residential real estate' is an intrastate transaction, and thus not subject to the FAA, *see Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012), that decision is of no impact here." Ryland's Brief, pp.19-20. Ryland goes on to argue that "[e]ven if Appellant and the original purchasers, and by extension Duvalls, did not expressly agree that the construction and sale of the residence involved interstate commerce, which Appellant denies, South Carolina courts essentially accept it as given that construction involves interstate commerce." Ryland's Brief, p.20. This is not true. South Carolina Courts conduct a fact intensive inquiry to determine whether the construction involved interstate commerce. Ryland

cites *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977), but that Court held that in determining whether the FAA applied they must determine if there is a written provision for arbitration in the contract, **if the contract evidences a transaction involving commerce**, if the Court is satisfied that the issue involved in suit is referable to arbitration under the written agreement, and if the applicant for the stay is not in default in proceeding with such arbitration. *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. at 637, 239 S.E.2d at 650. The Court then went on to specifically examine whether or not the "contracts evidence a transaction involving commerce." *Id.*

The Court then went on to make that factual determination and found the following:

> Initially, the specifications of Lafaye are replete with references to equipment and materials to be furnished from outside South Carolina. The following corporations and their locations are found at the designated pages of Lafaye's specifications:
> 1. Master Builders Co., Cleveland, Ohio p. 3-9
> 2. Finestone Corporation., Detroit, Michigan p. 7-5
> 3. Tnemec Co., Inc., North Kansas City, Missouri p. 9-16
> 4. L & M Surco, Atlanta, Georgia p. 9-13
> 5. Master Mechanics Co., Cleveland, Ohio p. 9-16
> 6. Desco Chemical Co., Inc., Buffalo, New York p. 9-16
> 7. Vitricon, Inc., Woodside, New York p. 9-16
> 8. Armstrong Cork Co., Lancaster, Pa. p. 2-4
> 9. W. S. Tyler Co., Cleveland, Ohio p. 14-10
> 10. Globe Van Dorn, Milwaukee, Wis. p. 19-10
> 11. Otis Elevator Co., New York, N.Y. p. 14-10
> 12. Danlstrom Metallic Door Co., Jamestown, N.Y. p. 14-13
> 13. Noonan-Laing, Inc., York, Pa. p. 3-1
> Moreover, the following pages of the specifications refer to manufacturers, products and trade names which are certainly sufficient to put EHC on notice that materials and equipment from outside South Carolina would be used in the construction of the Finlay House: pp. 3-1, 3-10, 3-13, 3-15, 3-16, 4-2, 5-7, 5-9, 7-2, 7-3, 7-4, 8-2, 8-5, 9-8, 9-10, 9-19, 10-1, 10-5, 10-6, 11-1, 11-2, 12-2, 12-4, 14-5, 15A-5, 15A-6, 15A-7, 15A-9, 15A-10, 15A-13, 15A-15, 15A-16, 15B-9, 15B-11, 15B-12, 15B-13, 15B-15, 15B-16, 15B-19, 15B-24, 15B-25, 16-5, 16-7, 16-9. FHA Form 2328, dated July 22, 1971, is a part of the contract documents which lists the contractor's cost breakdown and names all subcontractors involved in the construction of the Finlay House. The following out-of-state subcontractors are listed on this document: Acoustics, Inc.; Truzillo Construction; Miles Plastering Co.; Westinghouse Electric Corp.

> In light of the foregoing, the contract documents "evidence transactions in commerce" on their face. As an additional ground for holding that the contracts between the parties evidence transactions in commerce, one need only consider the nature of the project and the actual work performed in fulfillment of the contractual obligations. It would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina. The affidavit of J. D. McCall, Jr., President of Lafaye indicates that shop drawings from all over the country were utilized by the architects to prepare the specifications prior to July 22, 1971. The affidavit of Robert L. Sumwalt, Jr., Senior Vice President of McCrory, indicates that labor, supplies and materials from all over the country were utilized in the construction of the Finlay House.

Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. at 639-40, 239 S.E.2d at 651-52.

None of this is the case here. This case involves the clearing and preparation of land and the supplying of roof trusses for a single-family house in 2006, all of which occurred in South Carolina.

Ryland argues that "[b]ecause the subcontractor agreements 'contemplated the use of materials manufactured outside the state of South Carolina' and could not be performed 'without the use of materials in interstate commerce,' the claims against Third-Party Defendants subcontractors also implicate interstate commerce and are subject to the FAA." Ryland's Brief, p.22. Ryland asserts that it has provided specific instances of the involvement of interstate commerce in the construction of the subject residence and then refers to the affidavit of Michael Boyle. Although not specifically argued, in the affidavit of Michael Boyle, the only alleged "facts" by Ryland as to interstate commerce by Ryland are its allegations that 1) the Stark entities are Ohio corporations and the payment to Stark for its work and materials provided for the subject residence was acquired across state lines as payment was sent to Canton, Ohio; 2) The Ryland Group, Inc. who executed the agreement with the original purchasers is incorporated in Maryland (*see* Ryland's Exhibit A to its Memorandum of Law in support of Its Motion for Summary Judgment); 3) the Mortgage for the subject residence signed by the original purchasers

was organized under the laws of Pennsylvania (*see* Ryland's Exhibit I to its Memorandum of Law in support of Its Motion for Summary Judgment); and 4) "interstate communications and products that were manufactured outside the State of South Carolina were used relative to the construction and sale of the residence." Affidavit of Michael Boyle.

None of the above either alone or taken together are sufficient to establish interstate commerce and are not sufficient to establish that that the FAA would apply. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 456, 730 S.E.2d at 317 ("adher[ing] to the view that the development of real estate is an inherently intrastate transaction"); *id.* at 458, 730 S.E.2d at 317 (noting the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce); *id.* at 459, 730 S.E.2d at 318 (stating if ancillary factors in the purchase agreement for a residential home, such as out-of-state financing or a national warranty, were enough to constitute interstate commerce, "then every transaction that involved these ancillary factors would be subject to the FAA").

Although Ryland asserts that the Ryland Group, Inc. who executed the agreement with the original purchasers is incorporated in Maryland, the contract clearly shows that it is with Ryland Homes Charleston Division with an address of 3955 Faber Place, Suite 100, North Charleston, SC 29405 as the Seller. Even Ryland cannot point out anything in the agreement which in any way references interstate commerce. The mortgage is not sufficient. *See Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 318, 730 S.E.2d at 459 (Bradley's use of a North Carolina branch of JPMorgan Chase Bank & Co., a national financial institution, also did not bring the sale of the home within interstate commerce as the use of this lender was tangential to the performance of the Agreement). And the blanket statement that interstate communications and products that were manufactured outside the State of South Carolina were used relative to the

construction and sale of the residence is insufficient to establish anything without the requisite facts to establish such an assertion.

As to the allegations as to Stark, these are unfounded and provide no basis for the establishment of interstate commerce. *See* Affidavit of Mike Dyer. Upon information and belief, Stark Truss Company, Inc. purchased the assets only of Carolina Truss Systems, Inc. effective July 31, 2002. The business and plant was located in Summerville, South Carolina. Stark initially operated the business under the name of Stark Truss Company of Summerville, LTD dba Carolina Truss Systems. Upon information and belief, Stark changed the name to Carolina Total Supply around perhaps 2006 and it operated under that name for approximately one (1) year. Then the name was changed to Stark Truss Company, Inc. permanently. Regardless of the name, the business and plant were located in Summerville, South Carolina. The Job name was Lot 74 The Reserve with a delivery address of 1502 Marsh Reed Court, Goose Creek, SC in Berkeley County. The roof trusses would have been built in the Summerville, South Carolina Plant. The roof trusses at issue would have been manufactured within the State of South Carolina. The alleged contract with Carolina Truss has an address of PO Box 1049, Summerville, SC with a phone number of 843-875-0550. The alleged contract is signed by Michael Redman, a then employee of Carolina Truss, who was located within South Carolina and never worked at any other location and had no responsibilities at any other location other than in the State of South Carolina. The trusses were quoted, ordered, sold, designed, manufactured, and delivered in the State of South Carolina. The only involvement of the company outside the State of South Carolina was the accounting performed by the corporate headquarters in Ohio. This accounting process in no way had any involvement in the transaction which included the customer relations, communication, fulfillment and manufacturing related to

the job which all occurred in the State of South Carolina. All of Ryland's communications with the sales, design and manufacturing for the products in question would have been conducted entirely within the State of South Carolina. Although Ryland may have sent a check to Canton, Ohio, all of the manufacturing, delivery, and supply of any materials were solely within the State of South Carolina. The document clearly lists the address for Carolina Truss Systems in Summerville, South Carolina with delivery in South Carolina from South Carolina with a sold to as Ryland Homes in South Carolina. In summary, this order was made in South Carolina and fulfilled in South Carolina. Affidavit of Mike Dyer.

Therefore, there is no factual basis to find that the transactions involving this single family residence involve interstate commerce such that the FAA applies. Ryland asserts that "South Carolina courts essentially accept it as given that construction involves interstate commerce" under *Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. at 640, 239 S.E.2d at 652.[1] However, the court in *Episcopal* recognized that specific documents in that case showed transactions involving interstate commerce on their face. *Id.* at 638, 239 S.E.2d at 650. The court noted over 40 specific references in the contract to out-of-state equipment, materials, manufacturers, subcontractors, and products. *Id.* at 639-40, 239 S.E.2d at 651. "The contract documents 'evidence transactions in commerce' on their face." *Id.* at 640, 239 S.E.2d at 652.

The alleged Subcontractor Agreements at issue in this case do not evidence interstate commerce. The alleged contracts contain no mention of any out-of-state equipment, materials, manufacturers, or products. Therefore, the FAA does not apply.

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[1] Ryland also asserts that the FAA is binding in state courts and supersedes inconsistent state law under *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 611, 586 S.E.2d 571, 584 (2003). *Toler's* held the FAA applied and the contract evidenced interstate commerce in the construction of a condominium complex when the lower court took judicial notice of the fact the agreement involved interstate commerce and neither party took issue with that finding. *Id.* It was therefore the law of the case and not examined by the Court.

Moreover, the Supreme Court of South Carolina "has continued to adhere to the view that the development of real estate is an ***inherently intrastate transaction.***" *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 456, 730 S.E.2d at 317 (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 595, 553 S.E.2d at 117-18) (emphasis added). The Court in *Bradley* held that the sale of a house does not involve interstate, but intrastate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 459-60, 730 S.E.2d at 317-18. The Court arrived at this conclusion even though: (1) the terms of the agreement specified that any warranty claim be submitted to a national warranty office in Georgia; (2) the house was constructed using materials, subcontractors, and suppliers from outside of South Carolina; and (3) the home buyer was financed by a North Carolina lender. *Id.* at 456, 730 S.E.2d at 316.

In *Bradley v. Brentwood Homes, Inc.*, *supra*, Bradley and Brentwood Homes entered into a Home Purchase Agreement (the "Agreement") for the purchase of a home located in North Myrtle Beach, South Carolina. In the Agreement, Bradley and his wife were designated as the purchasers and Brentwood Homes was designated as the seller. Pursuant to the Agreement, Bradley agreed to purchase a completed dwelling wherein Brentwood Homes acted as a seller of the completed dwelling rather than as a contractor for the construction of the dwelling. The closing of the home took place on March 2, 2007. On July 31, 2009, Bradley initiated a lawsuit against Brentwood Homes in which he alleged numerous **construction defects** in the dwelling. In his Complaint, Bradley identified causes of action for fraud, negligence, and breach of implied warranty. Brentwood Homes moved to compel arbitration. Brentwood Homes claimed the Agreement "on its face involves interstate commerce" as it provided that the Seller would purchase a warranty from 2–10 HBW Warranty, or such other national warranty, and that claims would be submitted to the East Region of 2–10 HBW, which was located in Tucker, Georgia. *Id.*

at 451, 730 S.E.2d at 314. Additionally, Brentwood Homes supplemented its motion with affidavits to establish that the home purchase was financed by a North Carolina branch of JPMorgan Chase Bank & Co., and that Brentwood Homes "used subcontractors, materials and suppliers from outside of the State of South Carolina" in the construction of Bradley's home. *Id.* at 451-52, 730 S.E.2d at 314.

The Court held that to ascertain whether an arbitration agreement implicates interstate commerce and the FAA, "the court must examine the agreement, the complaint, and the surrounding facts." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 455, 730 S.E.2d at 316. The Court found that there was insufficient evidence to establish interstate commerce and the FAA did not apply.

The alleged Subcontractor Agreements in this case do not evidence transactions involving interstate commerce. This issue is answered by looking at the essential character of the alleged Subcontractor Agreements. *See Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 455, 730 S.E.2d at 316. Here, Ryland has failed to reference in any part of the alleged Subcontractor Agreements with Land Site or Stark any information that evidenced a transaction involving interstate commerce. The alleged contracts between Land Site and Ryland and Stark and Ryland do not in any way evidence interstate commerce, and Ryland cannot try to use any of its own dealings with other parties to establish that these alleged contracts involve interstate commerce.

Ryland relies only on its conclusory allegations that the alleged Subcontractor Agreements "contemplated the use of materials manufactured outside the state of South Carolina" and could not be performed "without the use of materials in interstate commerce."[2]

[2] The quoted text Ryland relies on in its assertion comes from *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002), and not from the alleged Subcontractor Agreements. There is no provision in the alleged Subcontractor Agreements stating that the parties' work could not be completed without materials from interstate commerce.

However, Ryland has not identified any specific materials in the alleged Subcontractor Agreements or any reference in the alleged Agreements evidencing interstate commerce.

In addition, for the contract at issue between Ryland and the Duvall Respondents, the FAA still would not apply because that suit centers on the purchase of the house which is exactly analogous to *Bradley v. Brentwood Homes, Inc.*, *supra*. The Duvall Respondents' claims against Ryland are exactly on point with *Bradley*. The Duvall Respondents have sued Ryland in regard to claims arising from the warranty that springs from the sale of the residence and therefore the FAA would not apply to those claims or any alleged subcontractor agreements. *Bradley v. Brentwood Homes, Inc.*, *supra* (a builder-vendor's contract solely for the sale of a single-family house does not involve interstate commerce even if out-of-state materials, subcontractors and financing was used; hence, the FAA does not apply).

Accordingly, the FAA does not apply, and the Court should deny Ryland's Motion to Compel Arbitration.

IV. THE ARBITRATION CLAUSE FROM THE ALLEGED SUBCONTRACTOR AGREEMENTS IS UNENFORCEABLE BECAUSE IT IS NOT IN COMPLIANCE WITH THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

South Carolina's Uniform Arbitration Act (UAA) requires:

> (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter *shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.*

S.C. Code Ann. § 15-48-10 (emphasis added).

These elements are to be strictly adhered to in order to satisfy the notice requirements. *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 588-89, 553 S.E.2d at 114. No other variation is acceptable. *See Zabinski v. Bright Acres Assocs., supra.*

Ryland's alleged Subcontractor Agreements with Land Site and Stark do not meet the requirements of the UAA. The arbitration clauses in the respective alleged Subcontractor Agreements are not capitalized, bolded, underlined, or rubber stamped. Moreover, the arbitration clauses are buried on the third page of the alleged agreement. These arbitration clauses do not comply with the explicit requirements of the UAA. Accordingly, the alleged Subcontractor Agreements identified by Ryland are not subject to arbitration.

V. S.C. CODE ANN. SECTION 15-48-10 MAY NOT APPLY TO THE RYLAND'S AGREEMENT WITH RESPONDENTS DUVALL IF THE NEW LAW IS PASSED.

The Legislature addressed the arbitration provision that Ryland has argued would be applicable to the Duvall Respondents. 2017 South Carolina House Bill No. 3202, South Carolina One Hundred Twenty-Second Session General Assembly - First Regular Session ("Summary: To Amend Section 15-48-10, Code Of Laws Of South Carolina, 1976, Relating To Validity Of Arbitration Agreements And Exceptions From Operation Of The Chapter, So As To Provide That Certain Arbitration Clauses Contained In Adhesion Contracts With Consumers Are Void, Unenforceable, And Severable From The Remaining Terms Of A Contract."). The proposed legislation if passed which would take effect upon approval by the Governor, provides that Section 15-48-10 "shall not apply to" "(5) arbitration clauses contained in adhesion contracts are void ab initio when a consumer had no meaningful choice in negotiating the terms of the arbitration agreement or the agreement did not provide a guaranteed benefit to the consumer. An arbitration clause described in this section is unenforceable and severable from the remaining

terms of the contract." If this legislation is passed and becomes law, then it would appear that Ryland could not use Section 15-48-10 to compel arbitration against the Duvall Respondents which in turn means that in addition to the other arguments, Ryland could not compel arbitration against Land Site and Stark.

VI. RYLAND HAS WAIVED ANY ALLEGED RIGHT TO COMPEL ARBITRATION.

Land Site and Stark join in the arguments by Duvall Respondents that Ryland has waived any alleged right to arbitration.

VII. RYLAND'S DISPUTE RESOLUTION PROCEDURE ALLEGEDLY WITH THE HOMEOWNER IS UNCONSCIONABLE.

Land Site and Stark join in the arguments by Duvall Respondents that the dispute resolution procedure in Ryland's Home Warranty Program Insured Limited Warranty is unconscionable.

VIII. OTHER ADDITIONAL ARGUMENTS BY DUVALL RESPONDENTS.

Land Site and Stark join in any other arguments by the Duvall Respondents that are not inconsistent with its arguments or positions taken in this matter.

CONCLUSION

The circuit court properly denied Ryland's Motion to Compel Arbitration and also properly found that Ryland had waived arbitration. In addition, the arbitration clauses in Ryland's alleged Subcontractor Agreements with Land Site and Stark are not applicable or enforceable against Land Site or Stark based upon their plain language. The provision in the alleged contracts simply does not provide for arbitration in this matter. The FAA is not applicable because the alleged agreements did not involve interstate commerce. Finally, the

arbitration provisions in the alleged agreements are not in compliance with the South Carolina Uniform Arbitration Act, and therefore are not enforceable under the Act.

For the aforementioned reasons, Respondents respectfully request that this Court affirm the circuit court's ruling and affirm the denial of Ryland's Motion to Compel Arbitration.

Respectfully submitted,

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