

MAR 31 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 SIX FIFTY SIX OWNERS ASSOCIATION,)
 INC. and ROBERT JOHN NUTLEY,)
 individually, and on behalf of all others)
 similarly situated,)
)
 Plaintiffs,)
)
 vs.)
)
 WCB, LLC, 656 COLEMAN, LLC, and THE)
 RYLAND GROUP, INC.,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS)
 FOR THE NINTH JUDICIAL CIRCUIT)
 CASE NO. 2016-CP-10-3456)

SC SUPREME COURT

**ORDER DENYING DEFENDANT
 WCB, LLC's MOTION TO COMPEL
 ARBITRATION**

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 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

This matter came before the Court on October 19, 2016, on Defendant WCB, LLC's ("WCB") Motion to Compel Arbitration. Movant was represented by Hamlin O'Kelley; Respondent was represented by Justin Lucey. Counsel for other parties were present but did not indicate support for or against the Motion.

SUMMARY OF DISPUTE

WCB moved to compel arbitration pursuant to Article X of the Master Deed. Plaintiffs opposed, asserting that WCB is not entitled to compel arbitration for three (3) reasons. First, the arbitration provision is not designed to foster a fair and impartial proceeding and result; and, it is therefore unconscionable. Second, Plaintiff Six Fifty Six Owners Association (the "Association") never agreed to arbitrate. The unilateral insertion of the one-sided arbitration provisions in the Master Deed while the Association was under WCB's control was a breach of WCB's fiduciary duty to the Association and the ensuing development/members and, therefore, unenforceable. Third, WCB has assigned all of its Developer Rights to others under the Master Deed. As such, it is no longer entitled to compel the arbitration of disputes. WCB disputes Plaintiffs' three opposition grounds.

FACTUAL SUMMARY

This is a suit filed by the Association and one of its members, Robert John Nutley, individually and on behalf of all others similarly situated against the developers of 656 Coleman. The 656 Coleman Townhomes consist of fifty-two (52) townhomes situated in twelve (12) buildings located on Coleman Boulevard in Mt. Pleasant, South Carolina. Plaintiffs' engineers have allegedly found construction defects and the existence of unsuitable and/or improperly installed building components, which have resulted in water intrusion, component and structural degradation, and extensive consequential damages.

WCB began the initial development of the 656 Coleman Townhomes in approximately 2006. WCB engaged general contractors Winsor South, LLC and Jeffrey Thomas to construct the complex. On July 14, 2006, the Six Fifty Six Owners Association, Inc. was incorporated by Jeffrey Thomas. On March 19, 2007, the Regime was created pursuant to the Master Deed (executed by Jeffrey Thomas on WCB's behalf) and By-Laws (executed by Jeffrey Thomas on the Association's behalf), which were recorded on March 20, 2007 in the Charleston County RMC Office at Book E619, Page 738.

WCB developed several buildings prior to transferring the remaining project and developer rights to others. On December 30, 2008, WCB assigned its Developer Rights to Defendant 656 Coleman, LLC. Other Developers eventually completed the project, and the last developer turned the control of the Association over to the homeowners in March of 2016.

PROCEDURAL BACKGROUND

On July 5, 2016, Plaintiffs commenced this action against the various developers of the 656 Coleman Townhomes by filing a Complaint, which requested class certification and asserted a number of defective construction claims, including negligence/gross negligence, breach of

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warranty, breach of fiduciary duty, and unfair trade practices.¹ The suit also included declaratory action/injunction/reformation claim relating to various provisions in the Master Deed which Plaintiffs termed as “anti-suit” provisions. Answers were filed on September 1, 2016 by WCB, on September 12, 2016 by Defendant 656 Coleman, LLC, and on October 17, 2016 by Defendant Ryland Group. WCB filed its Motion to Compel Arbitration on September 1, 2016, without supporting memorandum, relying solely upon Article X in the Master Deed. Plaintiffs filed a detailed Memorandum in Opposition on October 17, 2016.

APPLICABLE PROVISIONS IN THE MASTER DEED

The Master Deed, drafted and recorded by WCB, appears to be drafted to limit the rights of the Association and its members (the homeowners) to bring litigation against the Developers. Initially, the Master Deed purports to eliminate virtually all warranties in Article IX, Sec. 9.2:

Section 9.2 Limited Warranty. Subject to applicable law the Developer acknowledges that all contractual warranties in its favor set forth in the building construction contracts are limited warranties for material and equipment in the Unit and shall accrue to the benefit of the Co-Owner of such Unit along with all limited warranties, if any, provided by the manufacturer or supplier of appliances, air conditioning, heating utility systems in the Unit. **SUBJECT TO APPLICABLE LAW THE CLOSING OF TITLE OR OCCUPANCY OF THE UNIT SHALL CONSTITUTE ACKNOWLEDGMENT BY THE UNIT CO-OWNER THAT THE DEVELOPER MAKES NO OTHER IMPLIED OR EXPRESSED WARRANTIES RELATING TO THE UNIT AND OR THE COMMON AREAS AND FACILITIES, OTHER THAN THE WARRANTIES EXPRESSLY SET FORTH HEREIN.**

(emphasis in original).

Article 10 (The “Arbitration Provision”), Section 10.3(C)(1) of the Master Deed further limits the remedies available:

The arbitrator may award any remedy or relief that a court of the State of South Carolina could order or grant, including, without limitation, specific performance

¹ On July 5, 2016, Plaintiffs separately commenced an action against the various general contractors and subcontractors of the 656 Coleman Townhomes by filing a Complaint, which requested class certification and asserted a number of claims, including negligence/gross negligence, breach of warranty, and strict liability. (*Six Fifty Six Owners Association, etc. v. Winsor South, LLC, et al.*, Case No. 2016-CP-10-3455).

of any obligation created under the Regime Documents, or issuance of an injunction, as well as the imposition of sanctions for abuse or frustration of the arbitration process; *provided, however*, the arbitrator will have no authority to award punitive damages or any other damages not measured by the prevailing Party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Regime Documents.

(emphasis added).

While the grant of authority in this section begins with a very broad grant, the “*provided, however*” limitation places definitive restrictions on the Arbitrator’s authority. The Arbitrator is prohibited from awarding statutory or punitive damages, or any damages beyond the party’s actual damages. The Provision further prohibits any award that “does not conform to the terms and conditions of the Regime Documents.” Plaintiffs assert that this can be read to prohibit any award in contravention of the waiver of substantially all expressed and implied warranties contained in Paragraph 9.2.

The Arbitration Provision further includes a penalty clause mandating complete forfeiture if the Arbitration Provision is violated. If a party fails to submit his claim to binding arbitration, the claim is “deemed abandoned, and Respondent is released and discharged from any and all liability.” Sec. 10.3(C)(2).

The Arbitration Provision concludes with a litigation cost-shifting provision, effectively a winner-take-all, arguably meant to discourage claims. This cost shifting provision not only includes attorney fees, but also expert witness fees. Plaintiffs argue the discouragement is not only problematic because the Claimant may have to bear the Respondent’s litigation expenses, but also because the provision is not mutual; WCB purports to be defunct and, regardless, was at all times an SPE (single purpose entity) without assets after the sale of all substantial assets to Southeastern during foreclosure proceedings. As such, it is unable to pay the Claimant’s litigation expenses, rendering the provision non-mutual in reality. (Plaintiffs assert that while



insurance coverage for the defunct entity may be found to pay for an award on consequential damages, coverage for a fee award is likely to be more problematic).

Less onerous, but still indicative of the Developer's intent in drafting the Master Deed, is the Developer's attempt to inhibit suits against it by requiring that institution of proceedings required a vote by the membership in addition to board action. (Article X, Section 10.6).

DISCUSSION

I) Arbitration Agreements Containing Unconscionable Terms are Unenforceable

Adhesive contracts which contain sufficiently oppressive contractual provisions are unconscionable and our courts may refuse to enforce the offensive provisions. *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability as “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.”); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4, 2016 S.C. LEXIS 155, *9 (S.C. 2016), *reh'g denied*, (Sept. 5, 2016) (finding an arbitration provision in contract for sale of residential property unconscionable and unenforceable based upon oppressive and one-sided provisions”); *see also* S.C. Code §36-2-302(1) (2003) (“[South Carolina] legislation permits this Court to refuse to enforce any unconscionable clause in a contract or to limit its application so as to avoid an unconscionable result.”) (internal citations omitted).

The *Simpson* Court held that “despite” the presumption in favor of arbitration:

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Accordingly, a party may seek revocation of the contract under “such grounds as exist at law or in equity,” including fraud, duress, and unconscionability. S.C. Code Ann. § 15-48-10(a). Arbitration will be denied if a

court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. 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. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-5, 644 S.E.2d 663 (2007) (oppressive arbitration provisions in automobile contract deemed unconscionable and unenforceable).

A) This is a Contract of Adhesion Offered on A Take It Or Leave It Basis With an Absence of Meaningful Choice

Plaintiffs argue that to the extent that the Master Deed is considered to be a contract, or a quasi-contract, that it is a contract of adhesion, offered on a take it or leave it basis, as evidenced by an absence of meaningful choice. The *Simpson* Court described an absence of meaningful choice as follows:

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293....

There are many cases in this jurisdiction and others involving the enforceability of arbitration clauses in adhesion contracts between commercial entities and consumers. Each transaction is analyzed on its own particular facts in conjunction with the federal and/or state policies favoring arbitration....

The Ohio courts characterize automobiles as a “necessity” and factor this characterization into a determination of whether a consumer had a “meaningful choice” in negotiating the arbitration agreement. . . . Under the Ohio courts’ rationale, “the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.” *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859, 866 (1998).

Turning to the instant case, we first note that under general principles of state contract law, an adhesion contract is a standard form contract offered on a “take-it-or-leave-it” basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). . . . Adhesion contracts, however, are not per se unconscionable. Therefore, finding an adhesion contract is merely the beginning point of the analysis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct.App.1998).

We agree with the rationale of the Ohio courts and proceed to analyze this contract between a consumer and automobile retailer with “considerable skepticism.”

. . . . [T]his particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute.

Simpson, 373 S.C. at 25-27 (footnotes omitted). Similar to *Simpson*, the *Smith* Court observed and concluded:

“We have [] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.” *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989); cf. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147-48, 687 S.E.2d 47, 49-50 (2009) (stating that South Carolina’s “courts have shifted from following the doctrine of caveat emptor (‘let the buyer beware’) to the doctrine of caveat venditor (‘let the seller beware’)”). *There is no indication in the record *5 that the Smiths enjoyed a substantially stronger bargaining position against D.R. Horton than the average homebuyer, or that they were represented by independent counsel.* Moreover, the Smiths were a single client to a corporation that constructs houses in twenty-seven states. Thus, the Smiths were also not a substantial business concern of D.R. Horton, as they did not comprise a large portion of D.R. Horton’s clientele.

Accordingly, we find that the Smiths lacked a meaningful choice in their ability to negotiate the arbitration clause in the Agreement.

Smith, 417 S.C. at 50. (emphasis added). As seen by the foregoing, South Carolina Courts take “judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.” *Id.* As in *Smith*, there is no evidence that the 656 homeowners “enjoyed substantially stronger bargaining position . . . than the average homebuyer. . . .” Moreover, like *Simpson*, which involved a contract concerning “a necessity in modern society” (automobile), the quasi-contract at issue here also involves “a necessity in modern society” (housing). This, together with the fact that this was a non-negotiable, take it or leave it contract in which the 656 homeowners had zero input (and which contains one-sided terms), clearly establishes this as a contract of adhesion.

Applying the *Simpson* and *Smith* factors, the Master Deed is clearly a contract of adhesion because “it was offered on a ‘take it or leave it basis’ with terms that are not negotiable.” *Id.* at 373 S.C at 26-27, 644 S.E.2d at 669. The absence of meaningful choice is readily apparent based upon the 656 homeowners’ lack of any bargaining power. Due this bargaining power disparity, the 656 Master Deed is subject to “considerable skepticism” similar to the adhesive contracts in both *Smith* and *Simpson*. Consequently, “the presumption in favor of arbitration is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.” *Id.* at 26, 644 S.E.2d at 669 (citations omitted).

B) The Master Deed and its Arbitration Provision Contain Oppressive and One Sided Terms Geared Toward Favoring Developer

The remaining question is whether this adhesive quasi-contract, and more particularly its “Arbitration Provision,” contains one-sided terms which operate to wrongfully oppress the 656

homeowners while favoring the developer. In other words, the question is one of “fairness” and Plaintiffs contend the Master Deed, as well as its Arbitration Provision, is patently unfair, one-sided, and oppressive. Plaintiffs point to five different limitations on damages and causes of action in the Arbitration Provision, together with several other less important terms, that further evidence the Developer’s intent to stack the deck against a claimant:

- 1) The Arbitration Provision prevents the claimant from seeking, and the arbiter from making, an award on an implied or express warranty;
- 2) The Arbitration Provision prevents the claimant from seeking, and the arbiter from making, an award of statutory treble damages on Plaintiffs’ pending Unfair Trade Practice Claim;
- 3) The Arbitration Provision prevents the claimant from seeking, and the arbiter from making, an award of statutorily-prescribed attorneys’ fees on Plaintiffs’ pending Unfair Trade Practice Claim;
- 4) The Arbitration Provision prevents the claimant from seeking, and the arbiter from awarding, punitive damages on Plaintiffs’ pending claim for gross negligence; and
- 5) The Arbitration Provision attempts to eviscerate the claimant’s claims and release all liability of the respondent where the claimant fails to first submit a claim to arbitration.²

Further, the Arbitration Provision contains a forfeiture clause and a winner-take-all attorney and expert fee shifting provision which may further inhibit the use of arbitration by a claimant.

(Oppressiveness: Disclaimer of Warranties Generally)

The Master Deed contains a disclaimer of all warranties *by the developer*. This is contrary to the policy of our state. *Kennedy vs. Columbia Lumber*, 299 S.C. 335, 344, 384

² To be clear, Section 10.3(C)(2) provides: “In the event the Claimant does not submit the Claim to binding arbitration. . .the Claim is deemed abandoned, and Respondent is released and discharged from any and all liability to Claimant arising out the Claim. . .” Applied to the facts here, this would mean the 656 homeowners would have no claim and developer would have zero liability if compelled to arbitrate. This is the definition of unfair and cannot be the case because the question of arbitrability is for the Court to decide. Just because the homeowners proceeded in this Court versus arbitration based upon their legitimate belief that the Arbitration Provision is unconscionable cannot mean they no longer have claims to arbitrate.

S.E.2d 739, 736 (1989) (it is the policy of this state to protect residential homebuyers.) The *Smith* Court found such disclaimers to be oppressive:

Moreover, in considering the actual provisions of the arbitration agreement, we find that D.R. Horton's *attempts to disclaim implied warranty claims* and prohibit any monetary damages *are clearly one-sided and oppressive*. Under the terms of paragraph 14, the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton. This is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate. We therefore affirm the court of appeals and hold the arbitration provision is unconscionable and thus unenforceable.⁶

Smith, 417 S.C. at 50. While the Master Deed in this case does not expressly prohibit any monetary recovery, the limitation of the Arbiter's authority to the terms of the Master Deed, which disclaim all express or implied warranties, substantially curtails or eliminates the ability to achieve a monetary recovery.³

(Oppressiveness: Disclaimer of the Warranty of Habitability)

The disclaimer of implied warranties would naturally include the implied warranty of habitability. The disclaimer of habitability is specifically disfavored by the public policy of this state.” *Kirkman v. Parex, Inc.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858, 2006 S.C. LEXIS 233, *11 (S.C. 2006) (waivers of the warranty of habitability are disfavored in this state and will not be enforced absent evidence that the waiver was conspicuous, known to the buyer, and specifically bargained for). Notably, not only does this State prioritize the ability to bring a warranty of habitability claim, it is unique in its value to a residential housing Plaintiff. It is an important right and cause of action for the residential housing claimant as it does not require proof of fault or negligence. *See Kirkman*, 369 S.C. at 482 (“The seller's liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects.”) (internal quotations

³ Keeping in mind that a developer is not necessarily liable in negligence for a builder's derelictions.

omitted). The Seller, in this case, the developer, is typically the only party against which the homeowner claimant can assert this claim.⁴ *See id.* At 483.

The *Smith versus D.R. Horton* Court recently affirmed the principles set out by *Kennedy*, *Kirkman*, and *Simpson* that the disclaimer of the implied warranty of habitability is very disfavored in this state:

However, in the majority of the remaining subparagraphs of paragraph 14, D.R. Horton expressly disclaims all warranties for the home—including the implied warranty of habitability—except for a ten-year structural warranty. Moreover, subparagraph 14(i) stipulates that D.R. Horton “shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.”

Smith, 417 S.C. at 45. In further bolstering its decision to find the arbitration clause at issue to be unconscionable and unenforceable, the Court noted D.R. Horton’s attempt to disclaim the implied warranty of habitability, stating “that D.R. Horton’s attempts to disclaim implied warranty claims [...] [is] clearly one-sided and oppressive.” *Id.* at 50.

(Oppressiveness: Disclaimer of Statutory Remedies)

By prohibiting the Arbiter from making an award not measured by the claimant’s actual damages, the Master Deed severely curtails or eliminates Plaintiffs’ rights to obtain a recovery under their Unfair Trade Practice claim for treble damages or attorney fees. The *Simpson* Court found the prohibition of Simpson’s Unfair Trade Practice claim in violation public policy and oppressive:

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying

⁴ And in contrast, homeowners cannot assert some of their other more powerful claims against the developer, e.g., strict liability and the implied warranty of workmanlike service.

statutes' very purposes of punishing acts that adversely affect the public interest.⁷ Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 373 S.C. at 29-30.⁵

(Oppressiveness: Other Limitations)

While the other oppressive provisions complained of by the Plaintiff might not make the Arbitration Provision unconscionable by themselves, they certainly do continue to increase the one-sidedness of the Provision. For example, the penalty and forfeiture clause clearly violates public policy. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172 *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363-64 (2002) (“Equity will not enforce a penalty for breach of contract[; . . .]’ Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice.”).⁶

C. The Arbitration Provision is not Designed to Foster a Fair and Impartial Proceeding and Result; and, it is Therefore Unconscionable, and the Unconscionable Terms are so Global they Cannot be Severed.

WCB’s Arbitration Provision does not facilitate an unbiased decision. To be enforceable, an Arbitration Provision must be “geared toward achieving an unbiased result by a neutral decision maker.” *Hooters of Amer., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir.1999)

⁵ The Court also found the Dealer’s ability to pursue judicial claims to the detriment of the consumer’s arbitration claims to be an important factor.

⁶ *Cf., ProTherapy Assocs., LLC v. AFS of Bastian, Inc.*, 782 F.Supp.2d 206, 217 (W.D. Va. 2011) (emphasis added):

The validity of a liquidated damages provision is a question of law, committed to the determination of the court. *Smith v. Newell*, 37 Fla. 147, 20 So. 249, 251 (1896). Generally, where “there is nothing in the record ... to show that the parties believed, at the time of entering into the agreement that they were stipulating for the forfeiture of a sum out of all proportion to the damages which might reasonably be sustained,” the provision should be enforced. *Hyman*, 73 So.2d at 401. Otherwise, the court must “conclude that the provision was intended to impose a penalty for breach, held in terrorem over the promisor to deter him from breaking his promise.” *MCA Television Ltd. v. Pub. Interest Corp.*, 171 F.3d 1265, 1271 (11th Cir.1999) (quotations omitted). “[T]his use of liquidated damages clauses to compel compliance with contractual terms has long been rejected.” *Humana Med. Plan, Inc. v. Jacobson*, 614 So.2d 520, 521–22 (Fla.Dist.Ct.App.1992). “[I]n doubtful cases, the tendency of the courts is to construe a provision ... as a provision for a penalty....” *Hyman*, 73 So.2d at 402.

(describing unconscionability as whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker); *see also Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 n.8 (9th Cir. 2003) (citing *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003); *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (an arbitration provision that is facially neutral may still be substantively unconscionable)). When the actual effect of the arbitration clause unfairly “stacks the deck” against one party, the clause is unconscionable and unenforceable. *Plaskett v. Bechtel Int'l, Inc.*, 243 F. Supp. 2d 334, 345 (3rd Cir. 2003) (citing *Acorn*, 211 F. Supp. at 1174); *Parsons vs. John Wieland homes and Neighborhoods of the Carolinas, Inc.*, Opinion No. 27655 (August 17, 2016) (the Court’s focus in reviewing the conscionability of arbitration terms is the *Hooters* precedent recognized by *Simpson* as “explaining unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker” or whether the decks are stacked in opposition to the claimant).⁷

This arbitration clause is not designed to result in a fair and impartial outcome. It is expressly and implicitly designed to protect the developer. The authority of the Arbiter is expressly limited.⁸ Many or most key remedies are removed from the proceeding. In fact, if compelled to arbitrate, the 656 homeowners have no remedy and the developer has no liability according to the Arbitration Provision. This violates the principals enunciated in *Hooters* and repeated by our Supreme Court in *Simpson*, *Smith*, and *Parsons*.

The broad grant of authority to the Arbiter as to what he may “award” in the first sentence in Sec. 10(C)(1) is severely restricted by the “*provided however*” clause that follows.

⁷ The *Parsons* Court rejected the claimants’ unconscionability argument with little discussion of the allegedly unconscionable terms and therefore provides little guidance.

⁸ The limitation on the authority of the arbiter is extremely troublesome because an arbitrator exceeding his authority is one of the few grounds upon which an arbiter’s award can be challenged. By limiting his authority, the Developer not only stacks the deck in the arbitration proceeding but also protects himself from the confirmation of an adverse award.

The superseding “*provided however*” clause provides that the Arbiter is prohibited from issuing an order which would contradict the terms of the Master Deed. This prohibition would prevent an award on an implied warranty of habitability, as the developer disclaimed all implied warranties in Sec 9.2. The Arbitration Provision additionally invalidates statutory remedies by limiting any award to actual damages. The Arbitration Provision further prohibits punitive damages and discourages claims through other provisions. Because the Arbitration clause is not geared to foster a neutral, fair, adjudication, it is unconscionable and, therefore, unenforceable. The homeowners here (and the Association) are no better off than the homeowners in *Smith*; and possibly worse off.

This Court finds the “Arbitration Provision” at issue here consists of the entirety of Article X in the 656 Master Deed. All sections of this article are explicitly interrelated based upon the plain language of these sections, the subject matter discussed within these sections, and the placement of these sections in a single, overarching article. Moreover, Article X contains neither a severability nor savings clause, further evidencing the developer’s intent that Article X constitutes a single, integrated, dispute resolution provision/arbitration clause. This Court finds this “Arbitration Provision”, alone, is geared toward achieving a biased result in favor of superior party, and thus, is unconscionable. This Court finds this Arbitration Provision unconscionably limits the arbitrator's authority by prohibiting the arbitrator from making an award which contradicts the waiver terms of the Master Deed. To the extent WCB reads the waiver and limits on the arbitrator's authority differently (as argued at the hearing), it evidences that the Arbitration Provision contains ambiguities which must be resolved against the drafter and in favor of the 656 homeowners (and Association) because the provision does facially limit the arbitrator's authority to make an award which contradicts the waiver terms of the Master Deed.

II. The Association Never Agreed to Arbitrate, and the Unilateral Insertion of the One-Sided Arbitration Requirement in the Master Deed While the Association was Under WCB's Control was a Breach of WCB's Fiduciary Duty to the Association; and, it is Therefore Unenforceable.

While the law favors the arbitration of disputes, it only does so when there is an agreement to arbitrate. The Association never voluntarily "agreed" to arbitrate:⁹ As the restrictions on remedies and processes were inserted into the Master Deed by the Developer during a conflict of interest, and in contravention of its fiduciary duty to treat its wards fairly and without undue advantage being taken, the over-reaching by the developer is unenforceable.

Master deeds are uniformly decreed and enrolled by a single party, the developer, without input from the receiving party, the ensuing regime/association, and their future members, the homeowners. At the time the master deed is enrolled, the association is typically controlled by the developer.

In this case, the same individual, Jeffrey Thomas: 1) controlled the developer, WCB; 2) signed the Master Deed on behalf of the developer that created the Regime; 3) formed the Association which would be entrusted with the Regime; and 4) signed the Bylaws on behalf of the previously formed Association. Clearly, Mr. Thomas/WCB was on both sides of the transaction, and had a conflict of interest in the insertion of provisions into the Master Deed that would benefit him/WCB at the Regime's, Association's, and future Members'/Homeowners' expense and detriment. It is unconscionable that the Association's rights to pursue the Developer for construction deficiencies have been severely restricted through a one-sided arbitration provision that was drafted by the Developer for the sole benefit and protection of the

⁹ See Simpson quote on page 5 requiring an agreement to arbitrate in the first instance.

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Developer, without the true consent of the Association being formed to be controlled by the Master Deed.

A. WCB Owed a Fiduciary Duty to the Association and Its Members, Giving Rise to a Conflict of Interest in the Insertion of Restrictions in the Master Deed.

As a developer, WCB owed a fiduciary duty to the ensuing neighborhood, association, and its members. See *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (finding there to be a corollary between the promoters of a corporation and the developers of a neighborhood, recognizing that in both instances a fiduciary duty exists and, thus, developers like promoters, are bound to act in good faith and in the best interest of the regime it develops); *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 259-60, 562 S.E.2d 633, 637, 638 (2002) (holding “the developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair” and “failure to do so subjects the developer to liability for bringing the common areas up to standard”).

This fiduciary duty included the duty to act in the best interests of the Association and its members while the developer was in the control of the Association. *Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (fiduciary duties owed by developer to association and homeowners includes the duties: (a) to hand over common elements or amenities that developer represented as part of the development; (b) to hand over common elements or amenities in good condition; and (c) to act in the best interests of property owners while controlling the association).

The Association is a separate, legal entity created by the Developer which remained under the control of the Developer at the time the Master Deed was created. At this time, the Association either: (a) had no board of directors through which to operate; or, (b) had a board

which operated according to the Developer's directives. The "President" at the time the Association's Bylaws were executed and appended to the unfiled Master Deed was the Developer – Jeffrey Thomas. This means there is no way the Association had the capacity to "voluntarily" accept anything on its own behalf, given it did not have the capacity to act independently in the first place. This Court has recognized that a property owners association lacks independent capacity during the period that a developer-controlled board is in place. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012), (finding that it was unlikely the property owners association was going to sue itself while it was developer controlled), *cert. dismissed*, 414 S.C. 198, 199, 777 S.E.2d 831, 832 (2015).

Also at this time, 656 Homeowners did not exist – no closings had occurred and no deeds were executed. This means there is no way the Homeowners "agreed" to an arbitration provision on *behalf* of the Association even if they could so "agree".

Further, the record is devoid of any subsequent act by the Association constituting some sort of "acceptance" or "agreement" by the Association as to the eradication of its substantial rights or to arbitrate disputes. To the contrary, after the Association became independent (March 2016) and aware of the offensive provisions in the circumstances that evolved, the Association moved decisively to indicate its lack of consent to the arbitration agreement by voting to file suit and immediately doing so.

The bottom line is there is no way the Association acted on its own behalf, there was no knowing, voluntary agreement to one-sided arbitration provisions by the Association, and there is nothing in the record that indicates to the contrary.

B. The Offensive Provisions in the Master Deed do not Pass the Required Scrutiny.

As noted by this Court in *Island Car Wash, Incorporated vs. Norris*:

[I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987) (emphasis added). This Court must “zealously scrutinize” the offensive provisions the Developer inserted into the Master Deed.¹⁰ The “zealous scrutiny” standard presumes a lack of knowledge and voluntariness in transactions occurring within the fiduciary context such as that at issue here. *See Wilson v. Wilson*, 117 S.C. 454, 117 S.E. 330 (1921) (“[W]herever a fiduciary relation exists between two persons and a business transaction occurs between them, as a result of which the superior party obtains a possible benefit, equity raises a presumption against its validity, throwing the burden upon him to prove his good faith.”).

Simply put, even if the offensive provisions in the quasi-contract at issue (the Master Deed) were fair, the law presumes the offensive provisions are invalid until shown otherwise. Here, however, the offending provisions are patently unfair, and the record is entirely void of any evidence indicating the Developer acted in any way other than furthering its own interest at the expense of the Association and the future homeowners.

III. WCB’s Legal Support is Unavailing

Although WCB did not file a memorandum on these issues, WCB did hand up and argue two cases in response to Plaintiffs’ Opposition Memorandum. WCB cites to *The Spur at Williams Brice Owners Association, Inc.* 415 S.C. 72, 781 S.E.2d 115 (2016) as support for the validity of the Master Deed restriction. However, the *Spur* is inapposite. In the *Spur*, the Court

¹⁰ As this quasi-contract is adhesive in nature, and for a necessity (housing), these restrictions on rights must also be scrutinized with “considerable skepticism.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007).

upheld a homeowners' association's enforcement of a rental restriction in the master deed challenged by a homeowner. The *Spur* does not address a dispute between a developer and a homeowners' association regarding the assertion of allegedly unconscionable, one-sided terms in a master deed which benefit the developer at the expense of the association and its members.

Additionally, WCB relied upon *One Belle Hall Property Association, Inc. et. al. vs. TCR et. al.*, ___ S.E.2nd ___, 2016 WL 5484922 (S.C. Ct. App. Sept 28, 2016) as to the enforceability of the Arbitration Provision. However, this case too is unavailing. The Court simply found an inadequate link between the disclaimers and the arbitration clause at issue; and further held alternatively that the severability provision within the arbitration clause would permit the severance of the waivers.

Further, in response to the offensive provisions, Counsel for WCB kept insisting that WCB did not read the allegedly offensive provisions the same way as Plaintiffs. However, WCB stopped short of stipulating that WCB would not use the offensive provisions in further defense of the suit. Furthermore, as WCB is just one of three developers that might eventually be a party to an arbitration, and a stipulation by WCB would not be binding upon the other developers. Therefore, even a stipulation by WCB would not fix the offensive provisions (even if they could be retroactively, unilaterally fixed).

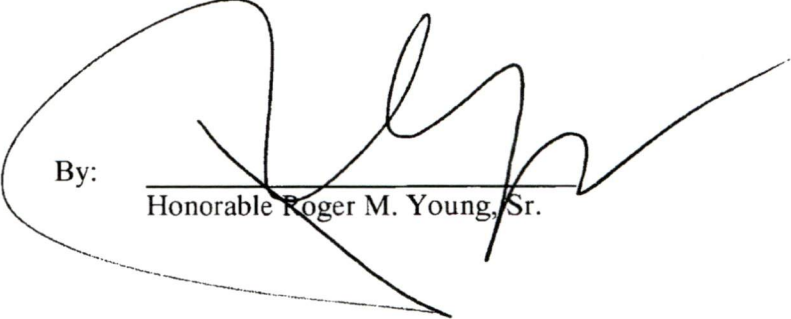
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CONCLUSION

In conclusion, this Court denies WCB's Motion to Compel Arbitration for the reasons stated herein.¹¹

AND IT IS SO ORDERED!

1/21, 2017
Charleston, South Carolina

By: 
Honorable Roger M. Young, Sr.

¹¹ Given the foregoing, the Court declines to decide the issue of whether the assignment of developer rights vacated WCB's right to compel arbitration.