THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Costal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations

and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This action is about whether a general contractor—Lennar Carolinas, LLC ("Lennar")—may compel the individuals with whom it contracted for the sale of a lot and the construction of a house to arbitrate those individuals' construction defect claims.

The houses at issue in this construction litigation are located in a development known as The Abbey at Spring Grove Plantation ("The Abbey") which is located in Berkeley County, South Carolina. The lots in The Abbey were originally owned by Spring Grove Planation Development, Inc. ("Spring Grove Development"). As the owner of all of the lots in The Abbey, Spring Grove Development drafted and filed the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Spring Grove Plantation Community ("Covenants") covering each individual lot. Lennar purchased the subdivision lots in The Abbey from Spring Grove Development subject to the Covenants.

Subsequently, Patricia Damico, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the "Owners")[1] entered into individual contracts (the "Purchase and Sale Agreement") with Lennar for the purchase of a lot and the construction of a residence in The Abbey. The Owners' individual purchases are subject to Lennar's 1-2-10 Warranty (the "Lennar Warranty"). In addition to the Purchase and Sale Agreement and the Lennar Warranty, each Owner received either a Deed or Title to Real Estate from Lennar.[2] Furthermore, each individual lot is subject to

[1] Plaintiff Lenna Lucas purchased her home from Paula Sellers. Paula Sellers purchased the house she sold to Lenna Lucas from Lennar. The circuit court's order did not distinguish Lenna Lucas from the other owners.

[2] During the course the development of The Abbey, Lennar conveyed the lots pursuant to two separate documents. The individuals who purchased a lot in 2011 received a "Title to Real Estate" and those who purchased a lot in 2013 received a "Deed." The documents will

the Covenants that remain valid and enforceable against each Owner.

The Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds from Lennar to the Owners each contain an arbitration provision that requires the Owners to arbitrate claims arising out of the construction of the houses in The Abbey.

To construct the houses for the Owners, Lennar entered into multiple (sub)contracts with the following subcontractors: Manale Landscaping, LLC; Super Concrete of SC, Inc.; Southern Green, Inc.; TJB Trucking/Leasing, LLC; Civil Site Environmental; Volkmar Consulting Services, LLC; Land/Site Services, Inc.; Myers Landscaping, Inc.; A.C. & A. Concrete, Inc.; Knight's Concrete Products, Inc.; Knight's Redi-Mix, Inc.; Coastal Concrete Southeast, LLC; Coastal Concrete Southeast II, LLC; Guaranteed Framing, LLC; Ozzy Construction, LLC; Construction Applicators Charleston, LLC; LA New Enterprises, LLC; Décor Corporation; DVS, Inc.; Raul Martinez Masonry, LLC; Alpha Omega Construction Group, Inc.; South Carolina Exteriors, LLC; and Builders Firstsource-Southeast Group, LLC (collectively, the "Subcontractors").

The contracts with the Subcontractors fall into one of six categories of agreement: (1) the Subcontractor Base Agreement; (2) the Subcontract Agreement; (3) the Master Trade Partner Agreement; (4) the General Agreement for Consulting Services; (5) the Business Partner Agreement; and (6) the Supplier Base Agreement. Each of the aforementioned agreements contains a valid and enforceable arbitration provision.

The Owners filed this lawsuit against Lennar and others based upon alleged construction defects, and Lennar asserted cross-claims against co-defendants and third-party claims against the Subcontractors.

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collectively be referred to as "the Deeds." Furthermore, the subsequent purchasers did not receive a deed from Lennar; however, the circuit court did not separately discuss the deeds at issue in this case.

Lennar subsequently filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling the Owners to arbitration pursuant to the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds. Lennar's Motion also requested the circuit court compel Spring Grove Development to arbitration pursuant to the Covenants and the Subcontractors to arbitration based on their individual contracts with Lennar associated with the construction of the houses.

A hearing was held on Lennar's Motion to Compel Arbitration and the circuit court denied Lennar's Motion in its entirety. In denying Lennar's Motion, the circuit court violated the basic tenets upon which it was to review the enforceability of an arbitration agreement and read all of the Owners' agreements with Lennar as a single arbitration agreement. Utilizing this erroneous application of the laws of South Carolina, the circuit court found terms in the Lennar Warranty rendered all of the arbitration agreements unconscionable and unenforceable. Furthermore, the circuit court failed to provide any analysis or reasoning in support of its denial of the motion to compel either Spring Grove Development or the Subcontractors to arbitration.

Lennar filed a Motion to Alter or Amend; however, the circuit court denied Lennar's motion in a Form 4 order and did not provide any additional explanation. This appeal followed.

FACTS / PROCEDURAL HISTORY

The owners of ten residences (the Owners) in The Abbey brought this action, individually and on behalf of a putative class, against Lennar and others claiming defective construction of their single-family homes.[3] (**R.** ___). Through the contracts with Lennar, and purchasing property in The Abbey, the Owners agreed in four separate documents to arbitrate the claims or disputes:

[3] The circuit court never certified the class and, therefore, the Owners are addressed in their individual capacities.

a. the Covenants (**R.** ___);

b. the Purchase and Sale Agreement (**R.** ___);

c. the Lennar Warranty (**R.** ___); and

d. the Deeds. (**R.** ___).

A. The Covenants and Spring Grove Development

On October 22, 2010, Lennar entered into an agreement for the Purchase and Sale of subdivision lots with Spring Grove Development. (**R.** ___). Lennar agreed to purchase sixty-nine (69) residential subdivision lots in The Abbey from Spring Grove Development. (**R.** ___).

Prior to Lennar's acquisition of the land on which it would eventually construct houses for the Owners, Spring Grove Development filed the Covenants. (**R.** ___). The top of the first page of the Covenants expressly states the following:

> **THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (S.C. CODE ANN. § 15-48-10 ET SEQ., AS AMENDED**

(**R.** ___). Thereafter, on page 48, in a separately and distinctly numbered section (Section 15), with a clear and specific heading "BINDING ARBITRATION," the Covenants provide:

> The Owner and the Association by acceptance of a deed agree that any dispute arising out of use, occupancy, [or] ownership of a Lot or on the Common Area of the enforcement of any covenant, condition, rule or regulation and any complaint to the Developer shall be settled by binding arbitration pursuant to the South Carolina Arbitration Act.

B. The Purchase and Sale Agreement

Between January 2011 and May 2013, Owners entered into a Purchase and Sale Agreement with Lennar for the construction and purchase of a home in The Abbey. (**R.** ___). As a part of the purchase, Owners selected various construction details, components, and finishes for their houses. (**R.** ___). Certain Owners also negotiated additional options to complete the

construction of their residences including specific washers and dryers, faux blinds, privacy fencing, and other upgrades. (**R.** ___).

Each Purchase and Sale Agreement contains the following arbitration provision in a separately numbered Section 16.1, which bears a distinct and separate heading entitled "Mediation/Arbitration of Disputes."

> 16.1 The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) and not by or in a court of law or equity. "Disputes" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this Agreement, the Property, the Community or any dealings between Buyer and Seller; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Seller or Seller's representative; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community. Buyer has executed this Agreement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby. Any Dispute shall be submitted for binding arbitration within a reasonable time after such Dispute has arisen. Nothing herein shall extend the time period by which a claim or cause of action may be asserted under the applicable statute of limitations or statute of repose, and in no event shall the Dispute be submitted for arbitration after the date when institution of a legal or equitable proceeding based on the underlying claims in such Dispute would be barred by the applicable statute of limitations or statute of repose.

(**R.** ___).

C. The Lennar Warranty

In conjunction with a Purchase and Sale Agreement, the Owners also became party to the Lennar Warranty. The Lennar Warranty contains a distinctly labeled section, segregated on pages six through eight of the Lennar Warranty, entitled "**MEDIATION/ARBITRATION OF DISPUTES.**" That arbitration agreement provides:

> By purchasing a Lennar home and receiving this warranty, Buyer specifically agrees that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et. seq.) and not by or in a court of law or equity. **"Disputes"** (Whether contract, warranty, tort, statutory or otherwise, shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to your Purchase and Sale Agreement, the Property, the Community (as these terms are defined in Buyer's Purchase and Sale Agreement) or any dealings between Buyer and Seller . . . .

(**R.** ___).

D. The Deeds

Separate and apart from the Purchase and Sale Agreement and the Lennar Warranty, each Owner who accepted the conveyance of a lot from Lennar received either a Deed or Title to Real Estate. Each Deed and Title to Real Estate from Lennar included an arbitration provision. (**R.** ___).

E. The Subcontracts

To construct the houses for the Owners, Lennar entered into multiple (sub)contracts with the Subcontractors. Each of the contracts between the Subcontractors and Lennar contains an express arbitration provision in a separate and distinct section of the contract, clearly labeled. (**R.** ___).

F. Procedural History

On December 12, 2014, the Owners filed a Complaint against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC based upon alleged construction defects in the houses. (**R.** ___). On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (**R.** ___). On June 1, 2015, Lennar filed a Motion to Compel Arbitration. (**R.** ___).

On November 23, 2015, the Owners filed their Amended Complaint (the "Amended Complaint"). (**R.** ___). On November 25, 2015, Lennar timely filed its Answer to Plaintiff's Amended Complaint, Cross-Claims, and Third-Party Complaint. (**R.** ___).

On March 30, 2016, Lennar amended its Motion to Compel Arbitration requesting the circuit court issue an order compelling the Owners to arbitration pursuant to the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds. (**R.** ___). Lennar's Amended Motion to Compel Arbitration (the "Motion") also requested the circuit court compel Spring Grove Development to arbitration pursuant to the Convents and the Subcontractors to arbitration on the cross-claims or third-party claims pursuant to their individual contracts with Lennar. (**R.** ___).

A hearing on the Motion was held on April 11, 2016. (**R.** ___).

On September 19, 2016, the circuit court issued an order denying the Motion. The circuit court made the following findings in its order: (1) the Purchase and Sale Agreements, the Lennar Warranty, the Covenants and the Deeds should be read together as a single arbitration provision; (2) the agreements are adhesion contracts; (3) the Lennar Warranty's terms are unconscionable; (4) the Lennar Warranty's terms are not severable from the arbitration provision; (5) the arbitration provisions are ambiguous because they contains references to both the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et. seq.* ("SCUAA"), and the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.* ("FAA"); (6) the FAA does not apply to the Owners' contracts with Lennar because they only involve intrastate commerce; and (7) the arbitration provisions fail to comply with the SCUAA's notice requirements. (**R.** ___). The circuit court made no specific or separate findings regarding the arbitration agreements between either Lennar and Spring Grove Development, or Lennar and the individual subcontractors.

On October 3, 2016, Lennar filed a Motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, arguing the circuit court erred in:

1. Failing to follow the *Prima Paint* doctrine by relying on terms outside of each document's arbitration provision to find the provisions unconscionable;

2. Relying on terms in the Lennar Warranty to find the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds unconscionable;

3. Failing to give effect to the arbitration agreements' severability provisions;

4. Finding the Lennar Warranty's arbitration provision contains oppressive and one-sided terms;

5. Finding the arbitration provisions are ambiguous;

6. Failing to find that regardless of any potential ambiguity the parties clearly demonstrated an intent to arbitrate any dispute arising from their transaction;

7. Failing to consider evidence that the parties' agreement for the construction and sale of a house involves interstate commerce;

8. Finding Lennar—a Delaware company—is organized in South Carolina;

9. Finding the Covenants comply with the SCUAA but failing to compel arbitration under its terms; and

10. Ruling on the motion to compel the Subcontractors to arbitration without considering or analyzing any of Lennar's agreements to arbitrate with the Subcontractors.

(**R.** ___).

On October 16, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 order denying Lennar's Motion to Alter or Amend. (**R.** ___).

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination and is subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). A circuit court's factual findings for which there is reasonable

evidentiary support should not be reversed on appeal. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016), *reh'g denied* (Sept. 5, 2016) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)).

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (internal quotation marks and citation omitted). In other words, there is a presumption in favor of the enforceability and application of arbitration agreements to disputes, and the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013).

ARGUMENT

Lennar moved the circuit court to compel the Owners to arbitrate the claims in their Complaint. Lennar also moved the circuit court to compel Spring Grove Development and the Subcontractors to arbitrate the claims in the Cross-Complaints and in the Third-Party Complaints.

With respect to the motion against the Owners, Lennar asserted that any one (and indeed each) of four separate agreements required the Owners to arbitrate; namely, (1) the Purchase and Sale Agreement; (2) the Lennar Warranty; (3) the Covenants; or (4) the Deeds. With respect to the motion against the Subcontractors, Lennar asserted that each subcontract agreement required arbitration of the claims or disputes. Regarding Spring Grove Development, Lennar asserted that the Covenants required arbitration of the claims or disputes.

In considering Lennar's Motion with respect to the Owners, the circuit court was required

to determine whether any one of the four agreements to arbitrate, upon which the Motion was premised, was valid and enforceable under the controlling law. If any one of the four agreements to arbitrate is valid and enforceable on its own, the Motion to Compel Arbitration should have been granted. There need not be review of the other agreements to arbitrate once any one is determined to be enforceable.

In considering Lennar's Motion with respect to the Subcontractors, the circuit court was required to evaluate the agreement to arbitrate with respect to each specific subcontractor and determine whether that agreement to arbitrate was valid and enforceable.

In considering Lennar's Motion with respect to Spring Grove Development, the circuit court was required to evaluate the Covenants and determine whether Lennar and Spring Grove Development's agreement to arbitrate was valid and enforceable.

In each case, Lennar's Motion to Compel Arbitration was to be reviewed and decided in the context of the absolutely clear and unquestionable policy, of both South Carolina and the United States, favoring the arbitration of disputes. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

The circuit court generally recognized the controlling legal authorities and standards applicable to its review of Lennar's Motion to Compel Arbitration; however, the circuit court then incorrectly applied that law and erred in denying Lennar's Motion. In doing so, the circuit court abused its discretion, misapplied the law, and made findings unsupported by the record. Additionally, the circuit court did not even address Lennar's agreements to arbitrate with the Subcontractors and, instead, merely issued a blanket denial of Lennar's Motion to Compel arbitration based on its erroneous analysis of the agreements to arbitrate with the Owners. Similar to the circuit court's analysis of the Subcontractors and their agreements with Lennar, the circuit court conducted no analysis of whether Spring Grove Development should be compelled

to arbitration pursuant to the Covenants.

This Court need only find the circuit court erred in failing to compel the Owners to arbitration pursuant to any one of the Owners' four separate agreements to arbitrate in order to reverse the circuit court's denial of Lennar's Motion to Compel. Reversal is appropriate because the circuit court plainly erred in applying well settled South Carolina law to the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds. Specifically, the circuit court erred in: (1) reading the entirety of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds together as a single arbitration agreement; (2) finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds unconscionable based on reference only to other provisions (not the arbitration provision) in the Lennar Warranty; (3) finding the arbitration provisions are not to be severable within their respective contracts; (4) finding the arbitration provisions to be ambiguous; (5) finding the FAA does not apply to the Purchase and Sale Agreement, the Lennar Warranty, and the Deeds; (6) finding the SCUAA does not apply to the Covenants; and (7) failing to compel either Spring Grove, or the Subcontractors, to arbitration pursuant to their respective contracts and arbitration agreements with Lennar without any analysis of the agreements to arbitrate in each the applicable agreements.

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE WHOLE OF (1) THE PURCHASE AND SALE AGREEMENT, (2) THE LENNAR WARRANTY, (3) THE COVENANTS, AND (4) THE DEEDS SHOULD BE READ IN CONJUNCTION WITH EACH OTHER AND COLLECTIVELY AS THE ARBITRATION AGREEMENT.

A. The court erred in considering extrinsic evidence when it evaluated the separate and distinct arbitration provisions.

The circuit court erred in its application of the basic analysis upon which a court may review a motion to compel arbitration.

An arbitration provision in a contract should be interpreted by a court using the standard

rules of contract interpretation. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). The primary difference in interpreting an arbitration provision compared to a contract, is that when a court reviews the validity of an arbitration provision, its analysis is restricted to that provision alone. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967).

If the language of a contract is clear and unambiguous, then that language alone determines the contract's force and effect. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). In other words, if a contract's language is clear, then extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its terms. *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E.2d 155, 161 (Ct. App. 2014). Therefore, when reviewing an arbitration provision a court is required to consider the language of that provision alone to determine the arbitration provision's force and effect. *See Prima Paint*, 388 U.S. at 406.

In deciding whether parties agreed to submit a particular grievance to arbitration, a court is not to consider the merits of the underlying claims. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. In other words, once a court determines a dispute must be compelled to arbitration its analysis of that issue is complete.

In the instant case, the circuit court utterly misapplied the law, and facts, applicable to a proper review of the motion to compel arbitration in a dispute arising out of a transaction for the construction and purchase of a house. In doing so, the circuit court erred.

A proper analysis of Lennar's Motion to Compel would have resulted in the circuit court examining each document, and its respective arbitration provision, separately and without considering any extrinsic evidence—as required by the basic rules of contract interpretation.

For example, the circuit court should have reviewed the Purchase and Sale Agreement

and located the arbitration provision in Section 16. (**R.** ___). Since the language of Section 16 is clear and unambiguous, the circuit court's review is restricted to Section 16 and only Section 16. The circuit court should have then interpreted Section 16 to find that it provides that all disputes arising from the contract are subject to arbitration:

> 16.1 The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall . . . be submitted to binding arbitration as provided by the Federal Arbitration Act.

(**R.** ___). For the purposes of the circuit court's review under the Motion to Compel Arbitration, Section 16 is the entirety of the agreement. The circuit court's interpretation of that agreement to arbitrate is restricted to only its plain and unambiguous terms. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008). The circuit court may not look outside of Section 16's plain and unambiguous terms to create an ambiguity. *See id.* (finding a party may not create an ambiguity when it does not exist within the four corners of the contract). Since the terms of Section 16 are plain and unambiguous, the circuit court should have found that the Owners' dispute with Lennar must be compelled to arbitration. At this point, the circuit court's analysis was complete. Once a dispute or claim is subject to arbitration a court may not consider its merits, and further analysis of the other provisions within that contract, or of the other documents or agreements was unnecessary and improper. Any finding regarding the other documents was simply superfluous, because compelling arbitration pursuant to the Purchase and Sale Agreement is appropriate and it is unnecessary to conduct further analysis when the disposition of a prior issue is dispositive of the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when disposition of a prior issue is dispositive).

If the circuit court found the Owners' claims were not subject to arbitration pursuant to

the Purchase and Sale Agreement (which it could not under any valid review), then the circuit court should have proceeded with an analysis of whether the Owners' claims were subject to arbitration pursuant to the Lennar Warranty. The circuit court's analysis should have continued with each additional agreement to arbitrate, one by one, until it either determined that Lennar's claims were subject to arbitration under any one of them, or there were no remaining agreements to review. Any analysis after determining the claims are subject to arbitration was improper and simply unnecessary.

Instead of conducting this simple and straightforward analysis, the circuit court employed a misguided and erroneous interpretation of South Carolina law to weave the four agreements (the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds) into a single conflated arbitration provision. In doing this, the circuit court erred by violating the basic rules of contract interpretation and the controlling law applicable to the specific analysis of an agreement to arbitrate.

For the reasons set forth herein, this Court should reverse the circuit court and compel the Owners' claim to arbitration pursuant to the terms of the Purchase and Sale Agreement's arbitration provision. Consideration of the remainder of the circuit court's order—that is an undeniable misapplication of the law—is unnecessary. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

B. The circuit court violated the *Prima Paint* doctrine when it erroneously applied the decision in *D.R. Horton* to conflate all of the four contracts collectively as one arbitration agreement.

The circuit court erred in finding that four separate documents—(1) the Purchase and Sale Agreements; (2) the Lennar Warranty; (3) the Covenants; and (4) the Deeds—should be read together and considered as one whole integrated arbitration agreement.

When there is an arbitration clause contained in a written contract, a motion to compel

arbitration should be granted unless the arbitration clause in question is not susceptible to any interpretation which would apply to the dispute in issue. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399540 S.E.2d 864, 865 (Ct. App. 2000). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118).

A party contesting the validity of a contract's arbitration provision "must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable." *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4 (emphasis in original); *see Prima Paint*, 388 U.S. at 406. This principal of law is referred to as the *Prima Paint* doctrine. S*ee S.C. Public Service Authority v. Grant W. Coal (Ky.), Inc.*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (adopting the *Prima Paint* doctrine in South Carolina). Therefore, when applying the *Prima Paint* doctrine, it is an error of law to find an arbitration provision is unconscionable based upon other terms of the contract that are not themselves in the arbitration provision, because a court may only consider the terms of the arbitration provision itself—not the terms of the whole contract. *Id.*

The circuit court seeks to justify its decision to read the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds together as a single arbitration provision based on our Supreme Court's decision in *D.R. Horton*. *See D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4. The court in *D.R. Horton* reviewed the language of the D.R. Horton home purchase agreement to determine whether the home buyers' dispute with D.R. Horton should be compelled to arbitration. *Id.* Section 14 in the D.R. Horton home purchase agreement was entitled "Warranties and Dispute Resolution." *See id.* at 55, 790 S.E.2d at 7. Section 14 of the contract consisted of subparagraphs 14(a) through 14(j). *See id.* at 55-58, 790 S.E.2d at 7-9. The

specific arbitration agreement was subpart "g" of Section 14 entitled "**MANDATORY BINDING ARBITRATION.**" *See id.* at 57, 790 S.E.2d at 9 (emphasis in original). Section 14, including all subparts, more broadly included warranty disclaimers, and a limitation of "monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." *See id.* The court chose to read the entirety of Section 14 as the arbitration agreement's arbitration provision because it found Section 14's subsections (subparagraphs) contained numerous cross-references to one another, and were intertwined. For example, Section 14 in the D.R. Horton agreement contained the following cross-references:

> **d. Exclusions.** The following are excluded from all warranties provided by Seller: . . . those matters excluded in sub-paragraph (f) below . . . .
>
> **h.** In addition to the rights and obligations of each party specified in subparagraph (a)-(d) above. . . .

See id. at 55-58, 790 S.E.2d at 7-9. The court relied on subparagraphs like these intertwining subparagraphs, and the various cross-references between the subparagraphs in Section 14, to conclude that it was proper in that case to read the entirety of Section 14 in the D.R. Horton home purchase agreement as a single arbitration provision. *See id.* at 48, 790 S.E.2d at 4.

The circuit court in this case took unwarranted liberties, apparently based on an exaggerated interpretation of the decision in *D.R. Horton*, and held that the applicable "arbitration agreement" to be reviewed to decide Lennar's Motion to Compel Arbitration with respect to the Owners was the collective and conjunctive total of all provisions in four separate agreements (the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds). The circuit court did this by specifically ignoring that each of those separate agreements contained a clearly delineated, distinct arbitration provision which was segregated within a much broader whole contract.

Obviously, the circuit court felt liberty to take an overbroad review and analysis of the

Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds because the court in *D.R. Horton* decided to consider all of Section 14 in the D.R. Horton home purchase agreement as the arbitration agreement. However, the limited reasoning employed by the *D.R. Horton* court for characterizing the arbitration agreement in that case more broadly than just subpart "g" of Section 14 is not justified, by either the controlling law or the applicable facts, in this case. The agreement to arbitrate in each Lennar document is not intertwined with other sections or documents; rather, each is markedly segregated, separate, and distinct. The terms of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds provide no basis for the circuit court's overly broad and erroneous application of *D.R. Horton.*

The circuit court erred and violated the *Prima Paint* doctrine when it misapplied an expansive interpretation of *D.R. Horton* to (1) the Purchase and Sale Agreement, (2) the Lennar Warranty, (3) the Covenants, and (4) the Deeds to expand the scope of each agreement's arbitration provision.

1. The Purchase and Sale Agreement

The circuit court erred in applying an expansive interpretation of *D.R. Horton* so that it could consider terms outside of the Purchase and Sale Agreement when it reviewed the Purchase and Sale Agreement's arbitration provision.

The entirety of the Purchase and Sale Agreement's arbitration provision is found in Section 16. (**R.** ___). Section 16 does not contain any cross-references to other sections of the Purchase and Sale Agreement. (**R.** ___). Section 16 also does not contain any cross-reference to any provision in another document. (**R.** ___). The unique circumstances that allowed the court in *D.R. Horton* to read Section 14 and all of its subparagraphs as a single arbitration provision are not present in Section 16 of the Purchase and Sale Agreement. Therefore, consideration by the circuit court of any terms outside of Section 16 violates the *Prima Paint* doctrine and is not

justifiable under any applicable precedent. Accordingly, the circuit court erred in considering terms that are outside of Section 16 when it reviewed the Purchase and Sale Agreement's arbitration provision.

2. The Lennar Warranty

The circuit court erred in applying an expansive interpretation of *D.R. Horton* so that it could consider terms outside of the Lennar Warranty's arbitration provision when it reviewed the Lennar Warranty's arbitration provision.

The Lennar Warranty contains seven separately labeled and segregated sections that are clearly marked with bold and underlined headings. Additionally, each section ends with a page break that clearly marks the end of the section and segregates it from any other section. The third section of the Lennar Warranty is expressly labeled "**MEDIATION/ARBITRATION OF DISPUTES.**" (**R.** ___).

The Lennar Warranty's arbitration provision does not contain cross-references to other sections or paragraphs in the Lennar Warranty, or to any other document or agreement. (**R.** ___). The Lennar Warranty's arbitration provision is entirely contained in the Lennar Warranty's third section and is not intertwined with any other provisions or terms. (**R.** ___). The unique circumstances that allowed the court in *D.R. Horton* to read Section 14 and all of its subparts as a single arbitration provision are not present in the Lennar Warranty's arbitration provision. The *Prima Paint* doctrine requires that the court review only the Lennar Warranty's arbitration provision—not the entire agreement—when evaluating the provision's enforceability. *See Prima Paint*, 388 U.S. at 403-04. Therefore, the circuit court erred in considering terms that are not part of the Lennar Warranty's arbitration provision when it analyzed the enforceability of the Lennar Warranty's arbitration provision.

3. The Covenants

The circuit court erred in applying an expansive interpretation of *D.R. Horton* so that it could consider terms outside of the Covenants' arbitration provision when it reviewed the Covenants' arbitration provision.

Section 15, on page 48, of the Covenants constitutes the entirety of the Covenants' arbitration provision. (**R.** ___). Section 15 is separately numbered and labeled and is distinct from any other section or provision. (**R.** ___). Section 15 states:

> The Owner and the Association by acceptance of a deed agree that any dispute arising out of use, occupancy, [or] ownership of a Lot or on the Common Area of the enforcement of any covenant, condition, rule or regulation and any complaint to the Developer shall be settled by binding arbitration pursuant to the South Carolina Arbitration Act.

(**R.** ___). This arbitration provision obviously contains no cross-references to other provisions or documents. Any interpretation of this provision that incorporates additional language is an error, because unlike the arbitration provision in *D.R. Horton*, this provision is in no way intertwined with any other provisions or documents. It does not even have other paragraphs. Yet, the circuit court chose to read this simple provision in conjunction with three other documents as one integrated whole. The circuit court's unjustified expansion of Section 15 of the Covenants is an obvious error of law that this Court should correct. Accordingly, the Court should reverse the circuit court's finding that the Covenants' arbitration provision should be interpreted in conjunction with anything other Section 15 of the Covenants.

4. The Deeds

The circuit court did not address the Deeds' arbitration provisions in deciding that the terms of all four documents constituted a single arbitration agreement. The circuit court erroneously applied the holding in *D.R. Horton* to find the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds were a single arbitration agreement and the

terms of this agreement were unconscionable. In reaching this flawed conclusion, the circuit court did not address the Deeds. The circuit court merely concluded—without any explanation—that the Deeds were a part of a single arbitration agreement that was comprised of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds. Therefore, this Court should find the circuit court erred in finding the entirety of the Deeds are incorporated into a single arbitration agreement with the other three documents.

For the reasons stated above, the circuit court's expansive application of *D.R. Horton* lacks precedential support, violates the *Prima Paint* doctrine, and is simply an error of law that must be corrected by this Court. Accordingly, this Court should reverse the circuit court's denial of Lennar's Motion to Compel Arbitration because the circuit court's decision was based upon an erroneous application of the law and factual conclusions unsupported by the Record.

II. THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS UNCONSCIONABLE.

The arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are not unconscionable, and the circuit court erred in finding otherwise.

Under South Carolina law, the test for establishing unconscionability consists of two elements: (1) "the absence of meaningful choice on the part of one party due to one-sided contract provisions" and (2) "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668 (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). Both elements must be present for the arbitration clause to be unconscionable. *Id.*

In *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C.

51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016), this court addressed a similar issue regarding the unconscionability of a warranty's arbitration provision and reversed the circuit court's denial of a manufacturer's motion to compel arbitration. Similar to the circuit court in this case, the circuit court in *One Belle Hall* misapplied the holding in *D.R. Horton* to find terms—outside of the warranty's actual arbitration provision—that limited the manufacturer's liability and rendered the warranty's arbitration provision unconscionable. *Id.* This Court reversed the circuit court's holding on the grounds that the purported unconscionable provisions were not in the warranty's arbitration provision and, therefore, consideration of the terms outside of the warranty's arbitration provision violated the *Prima Paint* doctrine. *Id.*

Similar to the circuit court in *One Belle Hall*, the circuit court in this case purported to find terms outside of each respective document's arbitration provision rendered the arbitration provisions unconscionable. Specifically, the circuit court said that other terms in the Lennar Warranty resulted in (a) the loss of the right to a jury trial; (b) the loss of the ability to maintain a class action; and (c) the loss of other certain remedies otherwise allowed by South Carolina law. (**R.** __).

As a preliminary matter, jury trial and class action waivers are not unconscionable terms in an arbitration provision as a matter of law. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding a class action waiver in an arbitration agreement is not unconscionable); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91-94, 749 S.E.2d 139, 151-53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA) *The Gates at Williams–Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 301, 792 S.E.2d 240, 250 (Ct. App. 2016), *reh'g denied* (Nov. 17, 2016) (holding a jury trial waiver is not unconscionable); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 ("The loss of the right to a jury trial is an obvious result of arbitration."). Therefore, the circuit court erred in finding these provisions

have any impact on whether the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds are unconscionable.

The only remaining provisions the circuit court found to be unconscionable are the "remedial-related provisions" of the Lennar Warranty. (**R.** ___). The circuit court did not identify which specific provisions it found to be unconscionable but a review of the Lennar Warranty reveals that the "remedial-related provisions" described by the circuit court are found in the fifth section of the Lennar Warranty. (**R.** ___). The fifth section of the Lennar Warranty, titled "Limitations on Lennar Limited Warranty," disclaims all implied warranties, limits consequential damages, and caps Lennar's total financial obligation to the original sales price of each Owners' home. (**R.** ___). This is the only provision that might be construed to comport with the circuit court's description of the Lennar Warranty's "remedial-related provisions" that disclaim warranties and limit the Owners' damages; however, it is not part of the arbitration provision which is distinctly and separately set forth.

The only terms that the circuit court cited as unconscionable are in the fifth section of the Lennar Warranty, which is not a part of the Lennar Warranty arbitration provision or any of the other documents' arbitration provisions. None of the arbitration provisions in the Owners' agreements with Lennar contain the terms the circuit court found to be unconscionable. The arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds do not contain oppressive or one-sided terms. The circuit court did not find the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds contain oppressive or one-sided terms. Instead, the circuit court relied exclusively on terms in the fifth section of Lennar Warranty (which is not the Lennar Warranty's arbitration provision) to find each of the individual arbitration agreements is unconscionable.

As discussed above, the circuit court's decision to look outside of the individual arbitration agreements violates the *Prima Paint* doctrine and is unsupportable. *See Prima Paint*, 388 U.S. at 403-04. Any analysis of whether the individual arbitration provisions are unconscionable is limited to a separate review of each arbitration provision. It is improper to consider any other terms. Therefore, the circuit court erred in finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are unconscionable. Accordingly, the Court should reverse the circuit court's finding that the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are unconscionable and compel Owners' claims to arbitration.

III. THE ARBITRATION PROVISIONS ARE SEVERABLE FROM THE OTHER PROVISIONS OF THE RESPECTIVE AGREEMENTS.

The circuit court erred in finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Deeds, and the Covenants were not severable from their respective agreements.

An arbitration provision is severable from a contract in which it is embedded. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001). South Carolina case law is clear that an unconscionable provision should be severed to maintain the enforceability of an arbitration agreement. *See Simpson*, 373 S.C. at 34-35 n.9, 644 S.E.2d at 673-74 n.9; 6 C.J.S. *Arbitration* § 11 ("Agreements for arbitration contained in a contract are treated as separable parts of the contract, so that the illegality of another part of the contract does not nullify an agreement to arbitrate." (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959)).

The circuit court sought to rely on *Simpson* and *D.R. Horton* to find the arbitration

provisions in the agreements are not severable.[4] (**R.** ___). In both *Simpson* and *D.R. Horton*, the courts held that the unconscionable terms in the arbitration provisions were not severable from the arbitration provisions. However, in *Simpson*, the court found the arbitration provision was wholly unconscionable and unenforceable based upon the cumulative effect of the oppressive and one-sided terms specifically contained within the arbitration provision itself, and the unconscionable terms were so intertwined with the arbitration provision the court was unable to separate out a reasonable arbitration provision. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674. In *D.R. Horton*, the court declined to analyze whether the unconscionable terms were severable because the D.R. Horton contract did not contain a severability provision. Therefore, in the absence of a severability provision, the *D.R. Horton* court found that the parties did not intend for unconscionable terms to be struck from their arbitration agreement. *D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6.

Unlike the unconscionable terms in *Simpson* and *D.R. Horton*, the purported unconscionable terms of the Lennar Warranty are not a part of the Lennar Warranty's arbitration provision and they are not part of the arbitration agreements within the other Lennar documents for that matter. Therefore, the circuit court may separate out the arbitration provision from each contract from any potentially unconscionable term. The circuit court's failure to recognize that the alleged unconscionable terms in the Lennar Warranty are not in any of the agreements' arbitration provisions pervades its analysis in this case and is the basis for many of its erroneous rulings. This error is again evident in the circuit court's finding that the arbitration provisions

[4] Significantly, the circuit court also relied on *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C.) for support; however, any reliance on that decision is utterly misplaced since that decision was reversed and remanded by the Fourth Circuit and the district court was ordered to compel the plaintiff's claims to arbitration. *See In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 287 (4th Cir. 2007).

are not severable from their respective contracts.

Additionally, the arbitration provisions in the Purchase and Sale Agreement (Section 16.4), the Lennar Warranty, and the Covenants each contain an express severability provision—something the contract at issue in *D.R. Horton* lacked. (**R.** ___).

The circuit court failed to acknowledge or apply any of the applicable severability provisions. These provisions evidence the parties' clear intent for any unconscionable provision to be severed so that any dispute may be compelled to arbitration. Accordingly, the circuit court erred in finding the purported unconscionable provisions are not severable from the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, and the Covenants.

IV. THE FAA GOVERNS ANY ARBITRATION OF A DISPUTE THAT ARISES PURSUANT TO THE PURCHASE AND SALE AGREEMENT, THE LENNAR WARRANTY, OR THE DEEDS.

The circuit court erred in finding the FAA does not govern the Purchase and Sale Agreement and the Lennar Warranty because (1) the parties expressly agreed in each of those documents that their transaction involves interstate commerce and is governed by the FAA; and (2) an agreement for the construction and purchase of a house involves interstate commerce and is subject to the FAA.

A. The parties agreed any dispute arising from the Purchase and Sale Agreement and the Lennar Warranty is subject to binding arbitration as provided by the FAA.

The circuit court erred in ignoring the plain language of the Purchase and Sale Agreement and the Lennar Warranty and failed to recognize that the Owners and Lennar contractually agreed for any dispute arising from their transaction to be subject to arbitration governed by the FAA.

Parties are free to choose the terms under which they will arbitrate their disputes. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989);

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). Therefore, an arbitration provision that states the parties agreed that it is governed by the FAA is in fact governed by the FAA. *See id.*

The Purchase and Sale Agreement and the Lennar Warranty each contain a provision stating that the parties "specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall . . . be submitted to binding arbitration as provided by the Federal Arbitration Act. . . ." (**R.** ___). This allowable and enforceable language presents undeniable evidence that the Owners and Lennar chose to have any dispute arising from their transaction to be subject to arbitration and governed by the FAA. Therefore, any dispute arising from either the Purchase and Sale Agreement, or the Lennar Warranty, is subject to arbitration that is governed by the FAA, because the documents' plain language states as much. The circuit court erred in finding otherwise, and its findings must be reversed.

B. An agreement for the construction and purchase of a house involves interstate commerce.

The circuit court erred in finding the Purchase and Sale Agreement involved intrastate and not interstate commerce.

"The FAA is intended to ensure that arbitration will proceed in the event a state law would have preclusive effect on an otherwise valid arbitration agreement." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). The FAA provides that a written arbitration provision in any contract "evidencing a transaction involving commerce" is to be compelled to arbitration if a controversy arises out of the contract or the refusal to perform the contract. 9 U.S.C.A. § 2. "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full

extent." *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."). The South Carolina Supreme Court has adopted the United States Supreme Court's broad interpretation of the phrase "involving commerce." *See Zabinksi*, 346 S.C. at 591, 553 S.E.2d at 115.

It is well settled that contract for the construction of a house involves interstate commerce. *Blanton*, 351 S.C. at 540-41, 570 S.E.2d at 568; *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) (finding contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builders' affidavit swearing the project would involve businesses and supplies from outside of South Carolina). A contract for the construction of a home involves interstate commerce because it undoubtedly contemplates the use of materials, equipment and supplies that are manufactured outside of South Carolina. *Blanton*, 351 S.C. at 541, 570 S.E.2d at 569; *Bradley*, 398 S.C. at 458 n.8, 730 S.E.2d at 318 n.8. ("We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA.").

In the instant case, the circuit court erred in finding the agreement for the construction and purchase of a house between the Owners and Lennar did not involve interstate commerce.

The Purchase and Sale Agreements, Options Summaries, Color Selection Sheets, and Addendums to the Purchase and Sale Agreement provide ample evidence that the Owners entered into agreements not merely for the sale of a completed house, but for the construction of a house. (**R.** ___). The construction of a house involves interstate commerce because it would have been impossible for Lennar and the Subcontractors to build houses for the Owners with the materials, equipment, and supplies all produced and manufactured solely within the State of South Carolina. Furthermore, several of the Owners were residents of other states at the time of purchase. (**R.** ___).

Additionally, the circuit court erroneously found that Lennar—a Delaware corporation—is a corporation organized under the laws of the State of South Carolina. (**R.** ___). Lennar denied this assertion in its Answer to Plaintiff's Amended Complaint, and the South Carolina Secretary of State records demonstrate that Lennar is organized and existing under the laws of the State of Delaware. (**R.** ___). The circuit court's finding is plainly contrary to, and unsupported by, the evidence in the record. (**R.** ___).

Therefore, the evidence presented to the circuit court required it to find that the Owners—some of whom are from out of state—entered into agreements with a Delaware corporation for the construction and purchase of a home in Berkeley County, South Carolina. Accordingly, the FAA applies because the Owners' contracts for the construction of a residence involve interstate commerce.

V. THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE AMBIGUOUS.

A. The arbitration provisions contain an unambiguous agreement to arbitrate disputes.

The circuit court erred in finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are ambiguous as to whether they are governed by either the FAA, or the SCUAA.

The circuit court found the arbitration provisions in the Purchase and Sale Agreement, and the Lennar Warranty are ambiguous because the notice provisions in those agreements state that the agreements are subject to arbitration pursuant to the SCUAA while the arbitration provisions themselves state that any dispute shall be submitted to binding arbitration pursuant to the FAA. (**R.** ___).

The court in *Zabinski v. Bright Acres Associates* addressed a similar issue. 346 S.C. at 594, 553 S.E.2d at 117. In *Zabinski*, a partnership agreement contained a notice provision at the top of the first page that did not satisfy the technical requirements of the SCUAA, but stated that the "partnership agreement shall be governed by, and construed and enforced in accordance with the laws of the State of South Carolina." *Id.* The partnership agreement's arbitration clause stated:

> If any controversy or claim arising out of this partnership agreement cannot be settled by the partners, the controversy shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in effect, and judgment on the award may be entered in any court having jurisdiction.

Id. at 588, 553 S.E.2d at 114. The court found the notice provision (that it referred to as a "governing law clause") does not require the application of state, rather than federal, arbitration law, because these statutorily required provisions simply indicate the parties' intention to have the validity and construction of their contract determined by arbitrators. *Id.* at 594, 553 S.E.2d at

117. The court also found that notice provisions such as these are frequently required by state arbitration statutes; however, state laws are preempted by the FAA to the extent they would invalidate the arbitration agreement. *Id.* at 593, 553 S.E.2d at 116-17; *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Therefore, the court noted that in instances where a contract attempts to comply with a state law requiring certain language in a notice provision, a party's efforts to comply with a state law requiring a notice provision may not invalidate an agreement to arbitrate because the FAA preempts a state law to the extent it invalidates an agreement to arbitration. *Id.* at 594, 553 S.E.2d at 117. Therefore, a court may not invalidate an arbitration agreement simply based on a party's simultaneous efforts to comply with a state law requiring an arbitration notice provision.

Here, the Purchase and Sale Agreement and the Lennar Warranty each contain a notice provision stating that the agreement is subject to binding arbitration pursuant to the SCUAA and each of those documents contains an arbitration provision stating that the agreement is governed by the FAA. As discussed in *Zabinski*, an effort to comply with a state law notice provision may not invalidate an agreement to arbitrate. The circuit court erred in finding a notice provision that is required by state law creates an ambiguity that invalidates an agreement to arbitrate. Accordingly, this Court should reverse the circuit court and find the notice provision and the arbitration provision do not create an ambiguity that renders the arbitration provision unenforceable.

B. An ambiguity does not affect the enforceability of the arbitration provisions.

As discussed above, it is an error of law to consider any language outside of an arbitration provision when determining whether an arbitration provision is valid and enforceable. A notice provision is not a part of an arbitration provision, and the circuit court should not have

relied on the notice provision in an effort to create an ambiguity. However, even if the notice provisions and arbitration provisions in the Owners' agreements with Lennar are construed to create an ambiguity, each agreement evidences the Owners' and Lennar's clear and unambiguous intent to arbitrate any claim arising from their agreement.

It is well established that the primary rule of contract interpretation is that courts should construe contracts "to give them effect and carry out the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (citation omitted); *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988); *D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). The parties' intentions must—in the first instance—be derived from the language of the contract. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Furthermore, a contract is "interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) (quoting *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008)).

In *Osborne v. Marina Inn at Grande Dunes, LLC*, No. CIV.A. 4:08-CV-0490, 2009 WL 3152044, at *6 (D.S.C. Sept. 23, 2009) the court analyzed a contract containing a notice provision that stated the following:

> **PORTIONS OF THIS AGREEMENT ARE SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, § 15-48-10, S.C. CODE OF LAWS OF 1976, AS AMENDED.**

Osborne at *2. The arbitration provision at issue in *Osborne* stated that any dispute that could not be resolved by mediation "**SHALL BE SETTLED BY BINDING ARBITRATION**

ADMINISTERED BY THE AAA IN ACCORDANCE WITH ITS COMMERCIAL ARBITRATION RULES. . . ." *Id.* The appellant argued that the arbitration agreement was ambiguous because the notice provision on the first page stated that the SCUAA applied while the arbitration agreement stated that the rules of the American Arbitration Association (AAA) applied. *Id.* at *5-6. The court held that "even if the agreement was ambiguous, that alone would not make the arbitration provision unenforceable." *Id.* at *6. The court found that even if the contract was ambiguous, judicial construction permits it to determine the parties' intent and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (citation and internal quotation marks omitted). The court stated that in construing the parties' agreement in light of the "clear federal policy in favor of arbitration . . . the parties entered into a facially valid agreement to arbitrate and the claims asserted are within the scope of the agreement." *Id.* Therefore, the court concluded that regardless of potentially ambiguous language regarding whether the SCUAA or the AAA applied to the parties' agreement to arbitrate, the parties' contract evidenced a clear and unambiguous intent to arbitrate disputes arising from the agreement. *Id.*

If differences in the notice provisions and the arbitration provisions create an ambiguity, then the circuit court erred in failing to find the plain language of each agreement expresses the parties' undeniable intent to arbitrate any dispute arising from the transaction. Like the contract in *Osborne*, each of the documents expresses a plain and unambiguous intent to arbitrate claims arising between the parties. A potential ambiguity does not invalidate the parties' intentions, and the language of the agreements demonstrates an overwhelming intent to arbitrate claims between the Owners and Lennar. Therefore, the circuit court erred in finding an ambiguity invalidated the Owners' and Lennar's intent to arbitrate their disputes. Accordingly, the Court should reverse the circuit court's opinion and find that regardless of whether an ambiguity exists the

agreements evidence the parties' clear and unambiguous intent to arbitrate their disputes.

VI. THE CIRCUIT COURT ERRED IN FAILING TO COMPEL THE OWNERS TO ARBITRATION PURSUANT TO THE COVENANTS.

The circuit court found the Purchase and Sale Agreements and the Lennar Warranty did not comply with the SCUAA's notice provision requirements. However, because the Covenants do comply with the SCUAA's notice provision requirements, the circuit court again erred when it found the Covenants' arbitration provision was unenforceable on the grounds that the Covenants violate public policy. (**R.** __). There is no basis in the law to support the circuit court's holding that the Covenants' arbitration provision is unenforceable because the Covenants violate public policy. Therefore, the circuit court erred in failing to compel the Owners and Spring Grove Development to arbitration pursuant to the terms of the Covenants' arbitration provision.

For an arbitration provision to be valid and enforceable under the SCUAA, the contract containing the provision must contain a notice that the contract is subject to arbitration pursuant to the SCUAA and that notice must be typed in underlined capital letters on the first page of the contract. S.C. CODE ANN. § 15-48-10.

The top of the first page of the Covenants states the following:

> **THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (S.C. CODE ANN. § 15-48-10 ET SEQ., AS AMENDED**

(**R.** ___). The circuit court properly found the Covenants complied with the SCUAA's notice provision. (**R.** ___).

Even though the Covenants comply with the SCUAA and contain an arbitration provision that contains no unconscionable terms, the circuit court refused to enforce the arbitration agreement because it reasoned the Covenants were not enforceable as a matter of public policy.

The circuit court's finding that the Covenants' arbitration provision is void as a matter of public policy does not comport with the applicable precedent in this state. A generalized statement that the Covenants' arbitration provision is unenforceable as a matter of "public policy" is not a recognized basis for refusing to compel arbitration. To invalidate a contract on the basis of public policy in South Carolina, the contract must violate a public policy expressed in a constitutional provision, a statutory law, or a judicial decision. *See White v. J.M. Brown Amusement Co, Inc.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). The circuit court did not refer to any public policy expressed in a constitutional provision, statutory law, or judicial decision in support of its holding, and none exists.

Contrary to the circuit court's finding, the General Assembly and our courts have expressed an overwhelming public policy in favor of the enforceability of covenants and arbitration agreements. *See* S.C. CODE ANN. § 15-48-10; *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) ("There is a strong policy in favor of the validity of arbitration agreements because of the strong policy favoring arbitration."). Moreover, arbitration agreements in deeds or covenants are binding and enforceable. *See Roberson v. Cliffs Communities, Inc.*, No. 6:09-2701-HMH, 2010 WL 2721030 (D.S.C., July 8, 2010) (compelling arbitration based on arbitration provisions in a deed and declaration of covenants).

The courts of South Carolina have recognized it is a common practice for a property owner to create covenants related to a horizontal property regime. *See SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83-84, 781 S.E.2d 115, 121 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016). Therefore, the circuit court's refusal to compel arbitration on the basis that covenants which contain an agreement to arbitration violate public policy is misguided. Such an a conclusion, in fact, violates the generally recognized policies favoring arbitration.

Accordingly, this Court should reverse the circuit court's finding that the Covenants' arbitration provision is void as a matter of public policy and compel the Owners' to arbitrate their claims.

VII. THE CIRCUIT COURT ERRED IN FAILING TO PERFORM ANY ANALYSIS OF THE ARBITRATION AGREEMENT(S) APPLICABLE TO SPRING GROVE DEVELOPMENT AND THE SUBCONTRACTORS.

The circuit court failed to provide any basis for denying Lennar's motion to compel Spring Grove Development and the Subcontractors to arbitration. Furthermore, it is clear that analysis of the agreements to arbitrate for the Owners have no application to the arbitration agreements applicable to Spring Grove Development and the Subcontractors.

A. Spring Grove Development

The circuit court's reasoning related to the application of the Covenants does not apply to Spring Grove Development, because Spring Grove Development is the entity that drafted and filed the Covenants. All of the circuit court's analysis related to the enforceability of the Covenants related to a mistaken concern regarding public policy and the fact that the Covenants were created and attached to the individual lots before the Owners purchased their individual lots. Even if those concerns were valid, the circuit court's concerns are not applicable to Spring Grove Development as the party that drafted and filed the Covenants. The circuit court provided no independent analysis regarding Lennar's request to compel Spring Grove Development to arbitration. Therefore, this Court should reverse the circuit court and compel Spring Grove Development to arbitrate its dispute with Lennar pursuant to the valid and enforceable arbitration provision in the Covenants.

B. The Subcontractors

The circuit court also failed to provide any analysis or basis for denying Lennar's motion to compel the Subcontractors to arbitration.

Lennar contracted with each of the Subcontractors to perform work on The Abbey. The

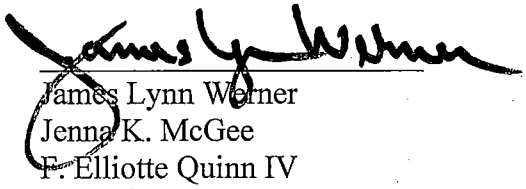
Subcontractors entered into at least one of the following six contracts with Lennar: (1) the Subcontractor Base Agreement; (2) the Subcontract Agreement; (3) the Master Trade Partner Agreement; (4) the General Agreement for Consulting Services; (5) the Business Partner Agreement; and (6) the Supplier Base Agreement. (**R.** ____). Each of the respective contracts contains an agreement to arbitrate that is segregated from the other provisions, designated by an individually numbered paragraph, that is bold and underlined. (**R.** ____). Furthermore, the contracts' respective arbitration provisions do not contain cross-references to other sections or intertwining language like the arbitration provision in *D.R. Horton.*

The circuit court denied Lennar's motion to compel arbitration in its entirety without performing any analysis or making any findings regarding Lennar's individual contracts with the Subcontractors. In fact, the circuit court provided no information to support a conclusion it had reviewed or considered the agreements to arbitrate between Lennar and the Subcontractors at all. Lennar filed a Motion to Alter or Amend the circuit court's order and requested the circuit court address the arguments related to the Subcontractors. The circuit court denied the Motion to Alter or Amend, without explanation, in a Form 4 Order. (**R.** ___). Therefore, the circuit court erred in denying Lennar's Motion to Compel the Subcontractors to arbitration without providing any reasonable basis or explanation. Accordingly, this Court must, at a minimum, remand the circuit court's arbitrary and baseless ruling and order the circuit court to consider each of the Subcontractors' agreements to arbitrate individually and in a manner that complies with the applicable method of reviewing an agreement to arbitrate.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Lennar's Motion to Compel Arbitration. It was error for the circuit court to declare the arbitration provisions in the four agreements unenforceable and unconscionable because neither the law, nor the facts, support the

circuit court's determination that the terms of any of those arbitration provisions are one-sided or oppressive. Therefore, Lennar respectfully requests the Court (a) reverse the circuit court; (b) hold the Owners must submit to arbitration pursuant to the Purchase and Sale Agreement, or alternatively the Lennar Warranty, the Covenants, or the Deeds; (c) hold that Spring Grove Development must submit to arbitration pursuant to the Covenants; (d) find that the Subcontractors must submit to arbitration pursuant to their contracts with Lennar; and (e) remand for entry of an order compelling arbitration.



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April 5, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,
Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Costal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

PROOF OF SERVICE

The undersigned hereby certifies that on April 5, 2017, copies of the foregoing **APPELLANT LENNAR CAROLINA, LLC'S INITIAL BRIEF and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** were served on all counsel of record by placing a copy in the United States Mail, first class postage prepaid, addressed as follows:

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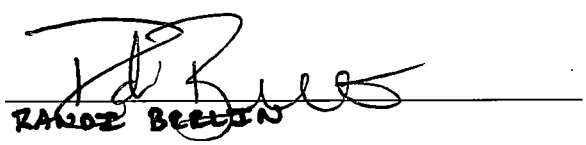

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April 5, 2017

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211

Re: ***Patricia Damico, et al. v. Lennar Carolinas, LLC, et al.***
Case No. 2014-CP-08-2424; Appellate Case No. 2016-2339

Dear Mrs. Kitchings:

Enclosed please find the original and two (2) copies of the following regarding the above-referenced case:

1. Appellant Lennar Carolinas, LLC's Initial Brief;

2. Designation of Matter to Be Included in the Record on Appeal; and

3. Proof of Service.

Please file the original documents and return file-stamped copies to me in the self-addressed stamped envelope enclosed herein.

By copy of this letter, I am serving the Initial Brief, Designation of Matter to Be Included in the Record on Appeal, and Proof of Service on counsel for the Respondents.

Thank you for your attention to this request.

Very truly yours,

James Lynn Werner

JLW:rmb
Enclosures

cc: All Counsel of Record

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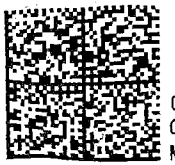

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