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.

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And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries 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, 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, 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, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, 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.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S FINAL BRIEF

FOR THE RESPONDENTS:

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STATEMENT OF ISSUES ON APPEAL

I. **WHETHER 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.**

II. **WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE UNCONCSIONABLE.**

III. **WHETHER THE CIRCUIT COURT ERRED IN FINDING THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO THE PURCHASE AND SALE AGREEMENT, THE LENNAR WARRANTY, OR THE DEEDS.**

IV. **WHETHER THE CIRCUIT COURT ERRED IN FIDNING THE ARBITRATION PROVISIONS ARE AMBIGUOUS.**

V. **WHETHER THE CIRCUIT COURT ERRED IN FIDNING THE ARBITRATION PROVISIONS ARE NOT SEVERABLE FROM THE OTHER PROVISIONS OF THEIR REPSECTIVE AGREEMENTS.**

VI. **WHETHER THE CIRCUIT COURT ERRED IN FAILING TO COMPEL THE OWNERS TO ARBITRATION PURSUANT TO THE COVENANT.**

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

STATEMENT OF THE CASE

A. Introduction

This is a defective construction suit by the Homeowners at The Abbey located in Spring Grove Plantation, individually and on behalf of others similarly situated. The Abbey consists of approximately Sixty-Nine (69) homes in the Spring Grove Plantation neighborhood located in Berkeley County, South Carolina. Upon information and belief, the houses were constructed from 2010 to present. Plaintiff/Respondents have alleged that construction defects exist which have resulted in water intrusion, component and structural degradation, and extensive

consequential damages. Additionally, there are other unsuitable and/or improperly installed components.

B. The Sales Contract(s)

The residences were originally constructed and sold by Appellant/Defendant Lennar. Although Patricia Damico, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, and Matthew Collins, Bryan and Cynthia Camara, are homeowners directly at issue in this case, other homeowners are not original homeowners and have not signed similar sales agreements. (R. p. 2437 ¶ 2).

The contracts at issue are a "Purchase and Sale Agreement" and a "Warranty", **not** a construction contract. (R. pp. 2454–2521 and pp. 2522–2530. respectively). The sales contracts do not contain an arbitration agreement that complies with South Carolina Law (or a state arbitration warning). S.C. Code § 15-48-10. Specifically, in order for an arbitration provision to be enforceable/valid it "shall be typed in underlined capital letters..." The contracts fail to comply with the South Carolina Statute as they are not underlined. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518, 2522). Pursuant to S.C. Code § 15-48-10, an arbitration provision must be properly disclaimed, and failure to dos so, renders the arbitration provision unenforceable under the SCUAA's express provisions.

The "Lennar Warranty" disclaims all "other warranties, express or implied, including but not limited warranty of habitability, are hereby expressly disclaimed and waived". (R. p. 2529, ¶ 2). In addition, it states "Lennar's total financial obligations under the Lennar Limited Warranty are limited to the original sales price of your Home". (R. p. 2529, ¶ 3). Further, the Lennar Warranty states "Consequential Damages Not Covered. Lennar shall not be liable for, and you

expressly waive recovery of, any consequential damages..., including but not limited to: any diminution in value...; lost profits; damages to personal property; any personal injury of any kind..., any medical or hospital expenses; costs of food, moving and storage, relocation expenses, or rental value of the Home or any other costs due to loss of use..." (R. p. 2529, ¶ 4). Both the Sales Contract and the Warranty (discussed below) are standard, nonnegotiable, Lennar form contracts. (R. p. 2438; p. 218, line 16 to line 24; p. 219, line 11 to line 17).

C. Lennar's (non) Warranty

Ostensibly, the Lennar Warranty purports to provide relief to aggrieved homeowners. However, a detailed reading of the Warranty shows that its true purpose is to provide temporal limits on Lennar's responsibility for shoddy construction. After one to two years, the Warranty only provides a remedy for rare, load bearing, structural defects. (R. p. 2529, ¶ 9). All other remedies of any kind for any other defect - no matter how egregious - are excluded. Even the "structural warranty" is a misnomer - the only structural components covered are those that Lennar deems are structured components. (R. p. 2523) Stated differently, the Lennar Warranty, as written, prohibits any remedy of any kind for the defective, leaking, water damaged, termite-infested homes at The Abbey.

If there was any uncertainty left as to the lack of remedy of any kind available to the homeowners under the Warranty, one only has to go to pages 6 through 9 of the Warranty, which prohibits any coverage or remedy for:

> **1.** Damage to land, landscaping (including sodding, seeding, shrubs, trees, and planting), sprinkler systems, outbuildings, carports, or any other appurtenant structure or attachment to the dwelling, or other additions or improvement not a part of your Home;
> **2.** Loss of use of all or a portion of your Home;
> **3.** Any loss or damage that is caused or made worse by any of the following causes: microorganisms, fungus, decay, wet rot, dry rot, soft rot, rotting of any kind, and mold;
> **4.** Any and all exclusions set forth in the Workmanship Systems and Structural Standards;

5. Except as prohibited by law of the state in which the Home is located, all other warranties express or implied, including but not limited to any implied warrant of habitability, are hereby expressly disclaimed and waived;
6. Lennar shall not be liable for, and you expressly waive recovery of any consequential damages that may result from the condition of any component of the Home, including but not limited to: any diminution in value of the Home before or after repairs are performed; lost profits; damages to personal property; any hospital expenses; cost of food, moving and storage relocation expenses, or rental value of the Home or any other costs due to loss of use, inconvenience or annoyance during repair. (R. pp. 2527-2528).

D. Covenants

The Covenants were filed with the register of deeds, according to Lennar, "prior to the sale of the residences." (R. p. 2541 ¶ 2). Accordingly, Plaintiff/Respondents could have no input into those restrictions. Plaintiff/Respondents were never consulted and were never provided the opportunity to negotiate those terms.

Indeed, Plaintiffs had no choice and zero input as to any aspect of Lennar's Purchase and Sales Agreement, Warranty, Covenants, or Deed, including their respective arbitration and legal remedies provision.

FACTS/PROCEDURAL HISTORY

This is a defective construction suit by the Homeowners at The Abbey located in Spring Grove Plantation, individually and on behalf of others similarly situated. (R. pp. 26-41). On October 30, 2014, Plaintiff/Respondents commenced this action by Complaint, which asserted a number of claims including negligence/gross negligence, breach of warranty, and strict liability against Defendant/Appellant Lennar. (R. pp. 26-41). Lennar answered the Complaint on February 17, 2015. (R. pp. 42-74).

On June 1, 2015, over, seven (7) months after the Complaint was filed, Lennar filed a Motion requesting that the Court Compel Arbitration based upon purported arbitration provisions contained the Lennar Purchase and Sale Agreement and Lennar Limited Warranty. (R. pp. 257-

261).

On November 23, 2015, Plaintiff/Respondents filed an Amended Complaint. (R. p.75-108). On November 25, 2015, Defendant/Appellant Lennar filed its Answer to the Amended Complaint, Cross-claims, and Third-Party Complaint. (R. pp. 109-164).

On March 30, 2016, Lennar amended its Motion to Compel Arbitration. (R. pp. 262-1288). On April 7, 2016, Plaintiff/Respondents filed Plaintiff's Memorandum in Opposition to Defendant Lennar's Motion to Compel Arbitration. (R. pp. 2434 -2530) A hearing on the Motion was held on April 11, 2016. (R. p. 4).

On September 19, 2016, the Circuit Court issued an order denying the Motion to Compel, finding, among other things that the arbitration provision is unconscionable and unenforceable. (R. pp. 4-23). Appellant thereafter moved the Circuit Court pursuant to Rule 59(e), SCRCP, to reconsider its prior order. (R. pp. 2553-2572). The Circuit Court entered the Order denying Appellant's Motion for Reconsideration on October 26, 2016. (R. p. 3). This appeal follows.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to *de novo review*." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT

The Circuit Court found the arbitration provision was unenforceable, and upon

reconsideration of Appellant's arguments, re-affirmed its initial conclusion. As set forth herein, the Circuit Court correctly determined the issues before it and properly found the arbitration agreement was, among other things, unconscionable and unenforceable.

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE ARBITRATION PROVISIONS IN (1) THE PURCHASE AND SALE AGREEMENT, (2) THE LENNAR WARRANTY, (3) THE COVENANTS, AND (4) THE DEEDS MUST BE READ AS A WHOLE TO COMPRISE THE ARBITRATION AGREEMENT.

The Circuit Court **did not**, as Appellant contends, find that "the whole of (l) 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." Rather, the Circuit Court properly determined that the ***arbitration provisions*** (not the entire agreements) must be read as a whole to comprise the arbitration agreement. (R. p. 8 ¶ 1-2). Specifically, the Court found that "the arbitration provisions as set forth below in all four documents, including the entire Lennar Limited Warranty, must be read as a whole to comprise the arbitration 'agreement' due to the 'cross-references to one another' and 'intertwining paragraphs." (Citing *Smith v. D.R. Horton*, S.Ct. Opinion No. 27645) (Filed July 6, 2016). (R. p. 8, ¶ 2)

In limiting its decision to the arbitration provisions at issue, the Circuit Court properly considered and applied the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, (holding that courts may only consider the threshold question of whether the arbitration agreement is fraudulently induced and thus invalid, not whether the contract as a whole is invalid) 388 U.S. 395, 406 (1967), and the Supreme Court of South Carolina's decision in *Smith v. D.R. Horton*, which reiterated that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement

itself, and not those of the whole contract." S.Ct. Opinion No. 27645 (filed July 6, 2016). (R. p. 8 ¶ 1-2).

Just as the South Carolina Supreme Court did in *Smith*, the Circuit Court provided a thorough analysis of the arbitration provisions at issue, specifically citing all relevant "cross-references" and "intertwining paragraphs," which it considered in reaching its decision. Plaintiff/Respondents hereby incorporate the Court's thorough analysis, which is contained in the Order Denying Defendant Lennar's Motion to Compel Arbitration. (R. pp. 7-11).

Accordingly, Appellants' contention that the Circuit Court read the whole of the four agreements as the arbitration agreement is incorrect and not supported by the Circuit Court's Order or the record.

II. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE COLLECTIVE ARBITRATION PROVISIONS ARE UNCONSCIONABLE AS A WHOLE.

A. South Carolina Law and Prevailing Equitable Principles Invalidate Lennar's Arbitration Provisions.

In South Carolina, a party may effectively challenge the arbitrability of a given claim based upon general contract defenses, including fraud, duress and unconscionability. *See Munoz v. Green Tree Fin. Corp*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA.)

When such questions of arbitrability arise, the trial court, not the arbitrator, decides whether a matter should be resolved through arbitration. *See Oxford Health Plans, LLC v. Sutter*, 569 U.S.__(2013). This determination involves a two—step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive

scope of the arbitration agreement. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (noting where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place.) "When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look at the state law that ordinarily governs the formation of contract in determining whether a valid arbitration agreement arose between the parties…" *Smith v. DR. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), affirmed by S. Ct. Opinion No. 27645 (Filed July 6, 2016); *see also* S.C. Code § 15-48-20 (a) (providing arbitration will be denied if a court determines no agreement to arbitrate exists).

B. Lennar's Warranty Provisions are Unconscionable, and thus Unenforceable.

Unconscionability is defined as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25 644 S.E.2d 663, 668-69 (2007) (citing *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 SC. 544, 606 S.E.2d 752, 757 (2004)) Unconscionability must be evaluated under both prongs: (1) lack of meaningful choice; and (2) oppressive terms.

1. Absence of Meaningful Choice

"Absence of meaningful choice on the part of one part generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id.* (citations omitted). In determining whether a contract was 'tainted by an absence of meaningful choice,' the Court 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." *Simpson*, 373 S.C. at 25, 644 S.E.2e at 669 (citations omitted). "[U]nder 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." *Id.* at 373 S.C. at 26-27, 644 S.E.2d at 669.

In circumstances involving adhesion contracts, an absence of meaningful choice is readily apparent based upon the lack of bargaining power. Accordingly, adhesion contracts, such as commercial sales agreements and manufacturer warranties, are subject to "considerable skepticism" due to the disparity in bargaining positions of the parties. *Id.* at 27, 644 S.E.2d at 669. 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).

Most recently, in *Smith v. D.R. Horton*, the South Carolina Supreme Court issued an Order affirming the denial of a Motion to Compel Arbitration and finding the arbitration provisions unconscionable. *Smith v. D.R. Horton*, S.Ct. Opinion No. 27645 (July 6, 2016). In the analysis of the lack of meaningful choice, the Supreme Court highlighted that it had previously "taken judicial cognizance of the fact that the modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Id.* (*citing Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E. 2d 730, 735-36 (1989) (other internal citations omitted). Here, as in *Smith*, "there is no indication (...) that the [Plaintiffs] enjoyed a substantially stronger bargaining position against [Lennar] than the average homebuyer, or that

they were represented by independent counsel." *Id.*

Plaintiffs had no choice and zero input as to any aspect of Lennar's Purchase and Sales Agreement, Warranty, Covenants, or Deed, as for each Agreement entered into by the Plaintiff/Respondents, they all contain the same sections and same language, including the arbitration and legal remedies provisions. (R. pp. 2454–2521; 2522–2530; 296-713; 2315-2366; 2388-89).

Lennar argued that the Covenants bolster their arbitration clause; however, the Circuit Court properly disagreed. The Covenants were filed with the register of deeds, according to Lennar, "prior to the sale of the residences"; therefore, Plaintiff/Respondents could have no input into those restrictions. (R. p. 2541 ¶ 2). Plaintiff/Respondents were never consulted and were never provided the opportunity to negotiate those terms. (R. p. 214, lines 12 to 24). Given Plaintiff/Respondents are not business entities, are unsophisticated, and lacking in bargaining power, it only supports the supposition that Plaintiff/Respondents were presented with Lennar's Purchase and Sales Agreement, Warranty, and Restriction on a take it or leave it basis and that clearly there was an absence of meaningful choice. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998).

As such, the Circuit Court properly determined that it could not ignore the "adhesive" nature of these provisions—nonnegotiable provisions which were drafted by Lennar, and which functioned to contract away certain significant rights and remedies otherwise lawfully available to Plaintiff/Respondents. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. (R. p. 14, lines 16-19)

2. Oppressive/One—Sided Terms

Specifically as to oppressive terms, the South Carolina Supreme Court in affirming the early rulings by the Court of Appeals and trial court in *Smith v. D.R. Horton*, found that

"attempts to disclaim implied warranty claims and prohibit monetary damages are clearly one-sided and oppressive."

The trial court in *Smith*, originally confronted with a motion to compel arbitration brought by D.R. Horton, viewed the warranties and arbitration section of the purchase contract as a *whole*, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies." *Id.* Per its review, the trial court held the sections' collective attempt to disclaim implied warranty claims was oppressive and unconscionable. *Id.* The trial court further found "perhaps even more stark [were] the provisions in the Limitations of Liability..." in which D.R. Horton claimed it could not be liable for monetary damages of any kind. *Id.* Based upon the foregoing, the trial court concluded, and the Court of Appeals and Supreme Court subsequently affirmed, that the arbitration provision was wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one0sided provisions. *Id.*

The Circuit Court's review of Lennar's Warranty revealed strikingly similar warranty limitations and disclaimers to those addressed, and ultimately rejected, by the *Smith* Court. The Warranty eliminates most remedies after the structure is two years old. (R. pp. 2523, 2527-2530). Lennar's arbitration and remedial-related provisions result 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 including the recovery of monetary damages (R. p. 2525-2526; 2529-2530) . Lennar further attempts to disclaim all implied warranties. (R. p. 2529 ¶ 2).

Under South Carolina state law principles of contract interpretation, such limitations offered through an adhesion contract, and which effectively deprive substantial rights and

eviscerate all means of recovering any damages, are oppressive.

As applied to The Abbey, Lennar's Warranty provisions create an internal inconsistency within the Warranty itself by negating all meaningful warranty coverage for the primary risk associated with said Warranty - damage arising out of or to the residences that Lennar built. Like the defendants in both *Smith* and *Simpson*, Lennar takes the position its Warranty relieves *Lennar of all liability for this very damage under any conceivable set of circumstances*. (R. pp. 2527-2529; 128 ¶ 140). This renders the arbitration provisions, and thus the entire Warranty (a) void of its essential purpose; (b) lacking in mutuality; and (c) procedurally and substantively unconscionable.

Irrespective of whether the FAA or SCUAA apply, the Circuit Court properly determined that the collective arbitration provisions are oppressive and that the Plaintiff/Respondents had no meaningful choice when entering into the adhesion Contracts. *Id. citing* S.C. Code§ 36-2-302(l) (2003) ("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...."). (R. p. 16).

III. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE WARRANTY PROVISIONS ARE NOT SEVERABLE.

While Courts are permitted to "sever" unconscionable, contractual provisions, the purported agreement between Plaintiff/Respondents and Lennar is not a proper candidate for the application of this remedy. South Carolina courts, and a host of other courts throughout the nation, "recognize severability is not always an appropriate remedy for an unconscionable provision...'[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts... '" *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673; *D.R. Horton, supra*, ("We conclude the arbitration clause in this case should not be severed

from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages") (internal citations omitted) (emphasis added); *see also*, *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yam Antitrust Litig.,* 406 F.Supp.2d 585, 604 (M.D.N.C. 2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights the Court finds that the better course of action in this case is to excise the arbitration clauses altogether").

Similar to *Simpson* and *D.R. Horton*, Lennar's arbitration clause is "made unconscionable" by oppressive provisions which pervade each of the arbitration provisions within the Documents, thereby rendering "severability" impractical, if not impossible. Thus, in line with South Carolina jurisprudence, each arbitration provisions contained in Lennar's Purchase and Sales Agreement (§§16 and 17, and Rider B), Lennar's Limited Warranty in its entirety, Arbitration provision in the Covenants and Restriction and Deed, were "excise(d) (...) altogether," and properly rejected by the Circuit Court. *Id.*

IV. THE CIRCUIT COURT PROPERLY DETERMINED THAT, IN THE ALTERNATIVE TO BEING UNCONSCIONABLE, THE ARBITRATION PROVISIONS ARE AMBIGUOUS AND NOT GOVERNED BY THE FAA.

Appellant Lennar argued that the Purchase and Sale Agreement, the Limited Warranty, the Covenants and Restriction, and the deed all contain arbitration provisions which are governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*, or in the alternative the South Carolina

Uniform Arbitration Act, but that under either Act, the arbitration provisions are proper and enforceable. (R. 215, line 13 to 16).

Plaintiff/Respondents argued that the arbitration provisions should be governed by the SCUAA and not the FAA, and that the arbitrations provisions thus do not comply with the SCUAA's notice requirements. (R. p. 208, line 5 to 23; p. 222, line 2 to page 29, line 9). The Circuit Court properly determined that the arbitration provisions are unconscionable, and thus unenforceable. (R. p. 18).

In the alternative, the Circuit Court found that the arbitration provisions are ambiguous. (R. p. *Id.*)Ambiguities are to be more strictly construed against the drafter of a document. Therefore, the Circuit Court analyzed whether the agreements are subject to interstate or intrastate commerce. (R. p. *Id.*) The Court found that the SCUAA applies to the arbitration provision and that notice is not in compliance with the statute. (R. p. *Id.*)For these alternative reasons, the Court also denied to Lennar's Motion to Enforce the arbitration provisions. (R. p. *Id.*)

Where an arbitration agreement selects the FAA or a state arbitration statute as the applicable law, that law governs regardless of whether the contract involves intrastate or interstate commerce. This principle has repeatedly been recognized by the United States Supreme Court and the South Carolina Supreme Court. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University*, the United States Supreme Court addressed the impact of parties' choice-of-law in their contract on the question of whether the arbitration required by the contract was governed by the FAA or state law. *Volt*, 489 U.S. 468 (1989). The Court found determinative the fact that the FAA's purpose is only to require courts to enforce "agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478. The

Court thus held that courts must enforce contractual provisions specifying the law governing contractually required arbitration of disputes. *Id.* at 479. The court recently reiterated this point in *DIRECTV, Inc. v. Imburgia*, providing that "parties to an arbitration contract [have] considerable latitude to choose what law governs some or all of its provisions." Imburgia, 136 S.C. 463, 468 (2015). The South Carolina Supreme Court applied these principles to hold that where an arbitration agreement provides that it is governed by the FAA, the FAA applies irrespective of whether there is interstate commerce. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

In reviewing the arbitration provisions at issue, the Circuit Court properly determined that ambiguous terms as to the choice of law are within each of the agreements Lennar claims to contain arbitration provisions. (R. p. 19).

The Purchase and Sales Agreement states on the front of the document that the arbitration notice is being provided pursuant to the South Carolina Code of Laws and pursuant to Section 15-48-10. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518). However, Section 16 later states that 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.)." (R. pp. 2458, 2473, 2483, 2491, 2501, 2512).

Lennar's Limited Warranty provides the same sentence as in Section 16 of the Purchase Agreement and states that the FAA applies (R. p. 2525 ¶ 1; p. 831 ¶ 1) however, on page 14, the Warranty specifies that the agreement is subject to arbitration pursuant to the Uniform Arbitration Act, Section 15-48-10 (sic), et. seq. Code of Laws of South Carolina, 1976, as

Amended. (R. p. 839). The Disclaimer of Implied Warranties on page 11 of the Warranty refers to and states an intention to comply "with the laws of the state in which the Home is located." (R. p. 836).

On the front page of the Amended and Restated Declaration of Covenants, the words "**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. p. 2315). The Covenants go on to state that the "developer expressly reserves the right to amend or restate this declaration without the consent of an owner." (R. p. 2315). The Deed refers to the Covenants and incorporates the same (R. p. 2388), but the Deed does not have a separate arbitration provision. Lennar admits that the Covenants were recorded in 2007, years prior to the construction and sale of Plaintiffs residences. (R. p. 2541 ¶ 2).

Therefore, the Circuit Court correctly found that the terms when viewed collectively are ambiguous as they refer to both the FAA and the SCUAA as written. (R. p. 20 ¶ 1).The Court has already found that the contract is one of adhesion with oppressive terms, the Covenant is an even more extreme case of adhesion, as it was written, agreed to, recorded and may be changed by Lennar without notice. (R. p. 2315). The Circuit Court properly noted that it is not the Court's prerogative to rewrite the arbitration provisions, but the agreements contain ambiguities on the choice of law. (R. p. 20 ¶ 1).

Therefore the Circuit Court examined whether the contract involves interstate or intrastate commerce. The Respondents argued that the sales transactions for the homes located at Spring Grove did not involve interstate commerce; and therefore, that the arbitration clause does not properly invoke application of the Federal Arbitration Act, but rather the South Carolina

Uniform Arbitration Act. (R. pp. 2441-2443; p. 222, line 2 to p. 226 line 11; p. 254, line 3 to page 255, line 17). The Circuit Court agreed finding that the subject-matter sales transactions involve intrastate commerce, as opposed to interstate commerce. (R. p. 20 ¶ 2).

The Supreme Court of South Carolina has held that "to ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski* at 117, 553 S.E.2d at 594 *citing Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). The United States Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. *Zabinski*, at 115, 553 S.E.2d at 591 *quoting Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274 (1995). The transaction must turn out, in fact, to have involved interstate commerce. *Id*, citing *Roberson v. Money Tree of Ala., Inc.*, 954 F.Supp. 1519 (M.D. Ala. 1997). "Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 115-6, 553 S.E.2d at 591 citing *Volt Info. Scis. Inc. v. Bd. of Trs.*, 489 U.S. 468 (1989).

As it applies to cases involving real estate, the Supreme Court of South Carolina has held that "interstate commerce was not involved in a contract for the sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties utilized the services of a North Carolina engineer and procured financing from a Pennsylvania lender." *Bradley v. Brentwood Homes, Inc., 398 S.C. 447*, 456, 730 S.E.2d 312, 317 (2012) citing *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994).

Thus, while interstate commerce may be implicated in certain transactions, our Supreme Court adheres to the view that real estate purchase contracts only implicate intrastate commerce because "the development of land within South Carolina's borders is the quintessential example

of a purely intrastate activity." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) quoting *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 117-18. The Court further confirmed its prior rulings that the sale of a residence is inherently *intrastate*. *Id.*

The Circuit Court properly found that the Plaintiff/Respondents' Agreements for Sale evidence that they purchased homes in Berkeley County, South Carolina. The homes were sold by Lennar, who was/is located at 1941 Savage Road, Suite 100C, Charleston, SC 29407. (R. p. 2412). The General Contractor for the project, Lennar Carolinas, LLC, is a corporation organized in the State of South Carolina. (R. p. 80 ¶ 22; p.116 ¶ 22) Each of the above evidences intrastate commerce. Defendants have not satisfied their burden of proof to negate the well-established South Carolina precedent respecting the inherent intrastate nature of the sale of a home. Based on the above, the Federal Arbitration Act does not apply to the transaction or this matter.

V. THE CIRCUIT COURT PROPERLY DETERMINED THAT IN THE ALTERNATIVE TO BEING UNCONSCIONABLE, THE ARBITRATION PROVISIONS DO NOT COMPLY WITH THE SCUAA.

The Circuit Court reviewed the ***arbitration provisions*** as a whole, and found them unconscionable. (R. p. 22). In the alternative, the Circuit Court found that the arbitration provisions do not comply with the SCUAA, as "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." (R. p.22). The arbitration provisions in the Purchase and Sales agreement, the Warranty, nor the deed are underlined. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518, 2522; The arbitration provision in the Warranty and Deed does not appear on the first page, and is not in capital letters. (R. pp. 2522 and 2388). The Covenants document

does comply with the SCUAA, however, the Circuit Court properly determined that the adhesive nature of the document and the fact that it was not presented to each homeowner to be persuasive and against public policy. (R. p. 2315; p. 22)). Under the SCUAA, an arbitration provision must be properly disclaimed, and failure to do so, renders the arbitration provision unenforceable under the Act's express provisions. S.C. Code § 15-48-10. Therefore, the Arbitration provisions are unenforceable under the SCUAA.

VI. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE HOME OWNERS MAY NOT BE COMPELLED TO ARBITRATE BASED ON THE COVENANTS

As noted above under Argument IV, the Circuit Court properly determined that the Owners may not be compelled to arbitrate based on the Covenants.

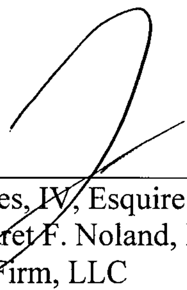
Lennar argued that the Covenants bolster their arbitration clause (R. p. 214, line 12 to page 13, line 4); however, the Circuit Court properly disagreed (R. p. 22). The Covenants were filed with the register of deeds, according to Lennar, "prior to the sale of the residences"; therefore, Plaintiff/Respondents could have no input into those restrictions (R. p. 2541 ¶ 2). Plaintiff/Respondents were never consulted and were never provided the opportunity to negotiate those terms. (R. p. 2541 ¶ 2). Given Plaintiff/Respondents are not business entities, are unsophisticated, and lacking in bargaining power, it only supports the supposition that Plaintiff/Respondents were presented with Lennar's Purchase and Sales Agreement, Warranty, and Restriction on a take it or leave it basis and that clearly there was an absence of meaningful choice. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998).

As such, the Circuit Court properly determined that it could not ignore the "adhesive" nature of these provisions—nonnegotiable provisions which were drafted by Lennar, and which

sought to contract away certain significant rights and remedies otherwise lawfully available to Plaintiff/Respondents. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. (R. p. 14).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the ruling of the Circuit Court and remand this action for further proceedings and, ultimately, a trial by jury in the Circuit Court.



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September 5, 2017
Charleston, 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.

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SC Court of Appeals

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries 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, 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, 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.

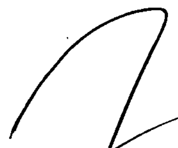
Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, 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.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S CERTIFICATION OF FINAL BRIEF

I, John C. Hayes, IV, do hereby certify that the Final Brief of Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow complies with Rule 211(b), *SCACR*. Additionally, the undersigned hereby certifies that the Final Briefs comply with the Supreme Court Order of April 15, 2014.

[Signature on Following Page]

Respectfully submitted,



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