STATE OF SOUTH CAROLINA COUNTY OF HORRY GLENN R. MOSS, JR. and SHERRILL L. MOSS, Plaintiffs, vs. CAPITAL RESORTS GROUP, LLC and CRG ACQUISITIONS, LLC, Defendants.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CASE NO. 2017-CP-26-07822

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND/OR COMPEL ARBITRATION
(Staying Action)
(Not Ending Action)

This matter came before me on the Defendants' Motion to Dismiss and/or Compel Arbitration. Present on behalf the Defendants, Capital Resorts Group, LLC and CRG Acquisitions, LLC (hereinafter "Capital Entities"), was Daniel J. MacDonald, Esquire. Present on behalf the Plaintiffs, Glenn R. Moss, Jr. and Sherrill L. Moss (hereinafter collectively "Moss"), was L. Sidney Connor, IV, Esquire. In addition to the Memorandum filed by the Defendants, a copy of the agreement containing the arbitration provision was filed. The Plaintiffs filed a Memorandum opposing the Defendants' Motion and an Affidavit of L. Sidney Connor, IV, Esquire.

Based up the written and oral arguments of counsel, I find and conclude as follows:

This Court has jurisdiction over the parties, the subject matter of the case, and the Motion to Dismiss and/or Compel Arbitration. The Defendants' Motion to Dismiss and//or Compel Arbitration was timely filed.

The Capital Entities and Moss entered into a Capital Resorts Club Club Purchase Agreement (hereinafter "Agreement") dated July 3, 2017. In the Agreement, Moss agreed to pay Forty-Eight Thousand Five Hundred Twenty-Five and No/100

($48,525.00) Dollars for a vacation/timeshare club membership. Paragraph 38 of the Agreement is entitled "Mandatory Arbitration", and contains the following language:

> **Mandatory Arbitration**. In the event of any bona fide dispute, claim, question, or disagreement arising from or relating to this Agreement in any manner or the breach thereof, the parties hereto shall use their best efforts to amicably settle the dispute, claim, question or disagreement. To this effect, and prior to filing a lawsuit or lodging any complaint with a governmental or non-governmental agency or other third party, the parties shall participate in at least (3) hours of mandatory mediation in Clearwater, FL, or such other location as may be mutually agreed upon by the parties, before a mediator mutually agreed upon by the parties, during which they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. Each party shall bear its own costs, except that the costs of the mediator shall be split equally between the parties. Any complaints or litigation initiated by a party hereto without first participating in mandatory mediation shall be subject to immediate withdrawal and/or dismissal and the party initiating same shall be responsible to pay all attorney costs, fees and expenses of the other party in obtaining such withdrawal and/or dismissal. If the parties do not reach a mutually agreeable solution to the dispute at mediation, then, upon notice by either party to the other, all disputes, claims, questions or differences shall be finally settled by binding arbitration administered by the American Arbitration Association ("AAA") in accordance with its commercial arbitration rules, including the optional rules for emergency measures of protection, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Disputes under this clause shall be resolved by arbitration in accordance with Title 9 of the US Code (United States Arbitration Act) and the Commercial Arbitration Rules of the American Arbitration Association. In addition to the foregoing, PURCHASER EXPRESSLY WAIVES ANY RIGHT OR AUTHORITY TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM OR ACTION, INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS. Arbitrators shall be appointed as provided in the AAA Commercial Arbitration Rules. The arbitration shall be conducted in Atlanta, Georgia. Face-to-face proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the arbitrator(s). The arbitrator(s) may grant any remedy or relief that the arbitrator(s) deems just and equitable within the scope of this Agreement. The arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute. Each party shall bear its own costs and expenses and an equal share of the arbitrators' and administrative fees of arbitration. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of both parties. Within thirty (30) days of receipt of any award (which shall not be binding if an appeal is taken), any party may notify the AAA of an intention to

> appeal to a second arbitral tribunal, constituted in the same manner as the initial tribunal. The appeal tribunal shall be entitled to adopt the initial award as its own, modify the initial award or substitute its own award for the initial award. The appeal tribunal shall not modify or replace the initial award except for manifest disregard of law or facts. The award of the appeal tribunal shall be final and binding, and judgment may be entered by a court having jurisdiction thereof. (¶ 38, Club Purchase Agreement)

Moss' Complaint asserts claims for rescission of the Agreement and claims for Unfair Trade Practices. Chiefly relying on the case of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E. 663 (2007), Moss argues that the Agreement's arbitration provision is unconscionable, and therefore unenforceable. The Capital Entities argue that the facts of this case and arbitration provision in the Agreement are distinguishable from the facts and the agreement in Simpson, and the provision in the Agreement is enforceable against Moss.

South Carolina courts strongly favor arbitration of disputes, whether brought under the Federal Arbitration Act, 9 U.S.C. §1 et. seq. ("FAA") or the South Carolina Uniform Arbitration Act ("SCUAA") S.C. Code Ann. §15-48-10, et. seq. See, Hefner v. Destiny, Inc., 471 S.E.2d 135 (1995). In recognition of the preference for arbitration, courts must resolve any doubts concerning the application and scope of arbitration agreements in favor of arbitration. See, Towles v. United Health Care Corp., 524 S.E.2d 839 (Ct. App. 1999); Landers v. Fed. Deposit Ins. Co., 739 S.E.2d 209, 213 (2013); Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92 (4th Cir. 1996). The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. See, Hall v. Green Tree Servicing, LLC, 776 S.E.2d 91, 94 (Ct. App. 2015).

The Court must determine if the arbitration provision is enforceable by determining if the purchaser had a meaningful choice in agreeing to arbitrate by evaluating three (3) factors: (1) is the contract an adhesion contract; (2) is the arbitration clause conspicuous or inconspicuous in the contract; and (3) is the purchased item a "necessity". See, Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 259, 743 S.E. 2d 868, 873 (Ct. App. 2013). In the present case, the

caption for the arbitration provision is in bold, and a portion of the body of the paragraph contains capitalized letters, both of which draw the reader's attention to the provisions. I find the arbitration provision is conspicuous. Additionally, the purchase of a vacation interest (timeshare) is clearly not the purchase of a "necessity." Finally, there is no evidence that the contract is one of adhesion. I therefore conclude that Moss had a meaningful choice under this three (3) prong test.

This Court is also required to determine if the arbitration provision itself is unconscionable. "Unconscionable" has been defined by our Court as substantively oppressive and one-sided. See, Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E. 663 (2007); see also, Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 259, 743 S.E. 2d 868, 873 (Ct. App. 2013). A review of the facts and arbitration provision in this case reveals that this Agreement's mandatory arbitration language is not oppressive or a one-sided provision. It appears to me that none of the issues which infected the agreement in Simpson exist in this case. In their Memorandum in Opposition, Moss sets forth seven (7) ways in which they believe the arbitration provision is substantially oppressive and one-sided. I disagree. The arbitration provision is not infected with the deficiencies set forth in Simpson. In fact, many of the provisions objected to by Moss, such as mandatory pre-suit mediation, appeals procedure, and attorney fee provisions, are similar to procedures or requirements required or allowed under South Carolina law or the Rules of Court. Moss' statutory remedies remain available, and the costs of the arbitration are born equally by the parties. When viewed as whole, the arbitration provision in this Agreement is not unconscionable, and is therefore enforceable against Moss.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the parties are ordered to abide by and participate in mandatory arbitration as set forth in paragraph 38 of the Agreement.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the above-captioned action is **stayed pending** the completion of the arbitration.

AND IT IS SO ORDERED.

Honorable William H. Seals, Jr.
Presiding and Chief Administrative Judge
Fifteenth Judicial Circuit

Horry Common Pleas

Case Caption: Glenn R Moss Jr , plaintiff, et al VS Capital Resorts Group LLC , defendant, et al

Case Number: 2017CP2607822

Type: Order/Other

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157