

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 26 2018

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable L. Casey Manning
Circuit Court Judge

Unpublished Opinion No. 2018-UP-0416
Filed January 31, 2018
Petition for Rehearing Denied March 26, 2018

Angela Cartmel Respondent,

v.

Edward Brice Taylor Petitioner.

Appellate Case No. 2016-000635
Lower Court Case No. 2015-CP-02-1181

APPENDIX

Robert B. Varnado (SC Bar # 0007085)
Alexis M. Wimberly (SC Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for ~~Appellant~~ Petitioner

Other Counsel of Record:
Bradford M. Owensby, Esquire
Banks & Owensby, LLC
319 Park Avenue SE
Aiken, SC 29801
Attorney for Respondent

Angela Cartmel v. Edward Brice Taylor
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STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

ANGELA CARTMEL)

Plaintiff,)

vs.)

EDWARD BRICE TAYLOR)

Defendant.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL DISTRICT
CASE NO. 15-CP-02-01181

CONSENT ORDER

FILED

11-16-15

L. J. [Signature]
CLERK & G.S.

Anita [Signature] 10/15
Deputy Clerk

THIS MATTER COMES before the Court on the motion of the Defendant Edward Brice Taylor, by and through his undersigned attorney, and with the consent of the Plaintiff Angela Cartmel, by and through her undersigned attorney, to continue the hearing on the Defendant's motion to compel arbitration scheduled to be heard Monday, November 16, 2015 at 9:30 a.m. due to a court conflict on the part of Defendant's counsel. Accordingly, and for good cause shown,

IT IS ORDERED, ADJUDGED and DECREED that the hearing should be and the same is hereby CONTINUED.

AND IT IS SO ORDERED.

[Signature]

Presiding Judge
Aiken County Court of Common Pleas

Dated 11/13/15
At Aiken, South Carolina

1/3

WE SO CONSENT:



Robert B. Varnado
Alexis M. Wimberly
Brown & Varnado, LLC
P.O. Box 1127 (29465)
103 Church Street
Mount Pleasant, South Carolina 29464
P: (843) 737-7300
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rvarnado@brown-varnado.com
awimberly@brown-varnado.com
Attorneys for Defendant Edward Brice Taylor

WE SO CONSENT:

Bradford M. Owensby, Esquire
319 Park Avenue SE
Aiken, SC 29801
P: (803) 648-5777
F: (803) 648-5228
bmobankslaw@gmail.com
Attorney for Plaintiff Angela Cartmel

2/3 

WE SO CONSENT:

Robert B. Varnado, Esquire
P.O. Box 1127
Mount Pleasant, SC 29465
(843) 737-7300

Attorney for Defendant

WE SO CONSENT:



Bradford M. Owensby, Esquire
319 Park Avenue SE
Aiken, SC 29801
(803) 648-5777

Attorney for Plaintiff

~~3/3~~

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Angela Cartmel

[] Plaintiff,

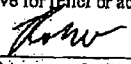
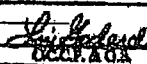
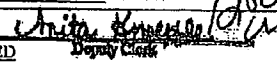
v.

Edward Brice Taylor,

[x] Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-02-01181

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Name, S.C. Bar no. and address of plaintiffs attorney Bradford M. Owensby, Esquire 319 Park Avenue SE Aiken, SC 29801 Telephone: 803-648-5777 Fax: 803-648-5228		Name, S.C. Bar no. and address of defendants attorney Robert B. Varnado, Esquire Alexis M. Wimberly, Esquire Brown & Varnado LLC P.O. Box 1127 Mt. Pleasant, SC 29465 Telephone: (843) 737-7300 Fax: (843) 654-5109 e-mail: rvarnado@brown-varnado.com	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: _____			
SECTION II: Motion/Order Type ☐ Written motion/order attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for Plaintiff  November 13, 2015 Date submitted			
SECTION III: Motion Fee [X] PAID B AMOUNT: \$25.00 [] EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judges instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		FILED JUDGE CODE: _____ Date: _____  CLERK: _____ 	
CLERKS VERIFICATION Collected by: _____ (print name) DATE FILED _____ ☒ MOTION FEE COLLECTED: \$58.45 ☐ CONTESTED B AMOUNT DUE: _____			

SCCA/233 (11-03)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP0201181

Angela Cartmel

Edward Brice Taylor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment In Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

11/25/2015

Date

For Clerk of Court Office Use Only

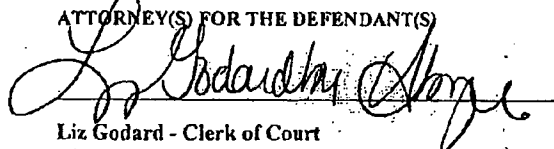
This judgment was entered on 11-16-15, and a copy mailed first class or placed in the appropriate attorney's box on 11-25-15, to attorneys of record or to parties (when appearing pro se) as follows:

Bradford M. Owensby 319 Park Ave. SE Aiken, SC 29801

Robert Bratton Varnado PO Box 1127 103 Church Street
Mt. Pleasant, SC 29465
Alexis Mills Wimberly 103 Church Street Mount Pleasant,
SC 29464

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Liz Godard - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF Aiken
IN THE COURT OF COMMON PLEAS
Angela Cartmel

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-02-01181
Edward Brian Taylor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: _____

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$ _____
		\$ _____
		\$ _____

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: This information and researchers should refer to the official court order for judgment details.

[Signature]
Circuit Court Judge

2016
Judge Code

1/25/16
Date

For Clerk of Court Office Use Only

This judgment was entered on the 25 day of Jan, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 25 day of Jan, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Brad Owensby

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert Varnado

Alexis Winberry

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

*Motion to compel arbitration
is denied. Formal Order to
follow.*

STATE OF SOUTH CAROLINA
COUNTY OF Aiken

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

ANGELA CARTMEL

Plaintiff,

vs.

EDWARD BRICE TAYLOR

Defendant.

ORDER

Docket No. 15-CP-02-1181

Hearing date: 1/25/2016
Plaintiff's counsel: Brad Owensby
Defendant's counsel: Robert V. Varnado
Presiding Judge: Hon. L. Cusey Manning

2.8.16
FILED
Shirley
Clerk
Anita Kinney
Deputy Clerk

The Parties are before the Court upon motion of Defendant to compel arbitration. Robert Varnado appeared representing Defendant Edward Brice Taylor and Brad Owensby appeared representing Plaintiff Angela Cartmel. After hearing the arguments of counsel and viewing the record before me I make the following findings of fact, conclusions of law and Order:

At issue in this case is a clause contained within a lease with option to purchase contract.

Paragraph 61 of the contract states:

"If any dispute relating to this lease between landlord and the tenant is not resolved through informal discussion within 14 days from the date the dispute arises, the Parties agree to submit the issue first before a non-binding mediator and to an arbitrator in the event that mediation fails. The decision of the arbitrator will be binding on the Parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediations or arbitrations will be paid by the Tenant."

Defendant concedes that the above stated clause does not comply with South Carolina Arbitration Act. Defendant has presented an argument that the language of Paragraph 1, describing the leased property contains a clause which would render the residential lease with option to purchase as a contract subject to the interstate commerce clause and therefore subject to the Federal Arbitration Act. The pertinent language reads "[t]he tenant may also use part of the Property for the following home-based business: Construction of Horse Jumps. The Tenant is responsible for all permits and licensing related to this home-based business and Tenant indemnifies the Landlord of all liability, costs and fees associated with this business."

The Court acknowledges that the Federal Arbitration Act applies to contracts effecting interstate commerce. The issue before the Court is whether the residential lease with option to purchase agreement at issue effects interstate commerce. The intent and objective manifestation of the Parties to a contract at the time a contract is made governs its interpretation. Lewis v. Carragher, 257 S.C. 54 (S.C. 1971). If a contract appears ambiguous in one of its terms, the entire contract is to be viewed as a whole to determine its intent and not isolated portions. Farr v. Duke Power Co. 265 S.C. 356 (S.C. 1975). The contract at issue clearly states that it is a residential lease for real property and contains the typical clauses regarding terms of lease, an option to purchase and other clauses relating to the rights and responsibilities of landlord and tenant. The contract acknowledges that Plaintiff has a home based business, however, the clause "Tenant is responsible for all permits and licensing related to this home-based business and Tenant indemnifies the Landlord of all Liability, costs and fees associated with this business" is an indemnification clause. The Court, therefore deems the contract to be a contract for the lease/purchase of property situated within Aiken County, South Carolina. "In order to activate

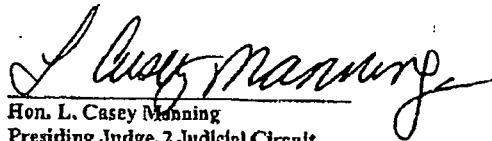
the application of the FAA, the commerce involved in the contract must be interstate or foreign."

Bradley v. Brentwood Homes, Inc. 398 S.C. 447, 730 S.E. 2nd 312, 316 (S.C. 2012).

"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." *Id* at 316. In the instant case, as between Plaintiff and Defendant, the transaction does not touch or effect interstate commerce. "[A] residential real estate sales contract does not evidence or involve interstate commerce." *Id* at 317, quoting Sancii v. Robards, 289 F.Supp. 2nd 855, 860 (W.D.Ky.2003). "The sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on a commodity - the land - which is firmly planted in one particular state." *Id* at 317. In this instance, the indemnification clause does not change the nature or character of the transaction or the contract itself, which is for the lease/sale of real property located within Aiken County and does not involve interstate commerce.

Accordingly, it is ORDERED that Defendant's Motion to Compel Arbitration is denied.

IT IS SO ORDERED


Hon. L. Casey Manning
Presiding Judge, 2 Judicial Circuit

Date:

Feb. 4, 2016

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP0201181

Angela Cartmel

Edward Brice Taylor

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

2/8/2016

Date

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on 2-8-16, and a copy mailed first class or placed in the appropriate attorney's box on 2-8-16, to attorneys of record or to parties (when appearing pro se) as follows:

Bradford M. Owensby 319 Park Ave. SE Alken, SC 29801

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert Bratton Varnado PO Box 1127 103 Church Street
Mt Pleasant, SC 29465
Alexis Mills Wimberly 103 Church Street Mount Pleasant,
SC 29464

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Liz Godard
Liz Godard - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF Aiken

ANGELA CARTMEL

Plaintiff,

vs.

EDWARD BRICE TAYLOR

Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

ORDER
DENYING MOTION (RULE 59(e))

I, Lila Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

MAR 08 2016

Docket No. 15-CP-001181

Deputy Clerk

Defendant has filed a Motion with this Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure requesting this Court alter, amend or reconsider the February 8, 2016 Order denying Defendant's Motion to compel arbitration.

The Court has considered the Motion of Defendant and said Motion is denied. The Court heard the arguments of counsel for and against Defendants Motion to compel arbitration on January 25, 2016 and requested that each Party submit an Order for consideration of this Court. Having reviewed the record before the Court, arguments of counsel and the governing law, the Court has issued it's Order and finds no compelling reason to amend, alter or reconsider it's Order.

Accordingly, Defendant's Motion to alter, amend, or reconsider it's Order is Denied.

IT IS SO ORDERED

L. Casey Manning
Hon. L. Casey Manning
Presiding Judge, 2 Judicial Circuit

Date:

Feb. 25, 2016

FILED

3-8-16

Lila Godard
C.C.P. & G.S.
Amita Knepple
Deputy Clerk

STATE OF SOUTH CAROLINA,)

COUNTY OF AIKEN)

ANGELA CARTMEL)

Plaintiff,)

vs.)

EDWARD BRICE TAYLOR)

Defendant.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

SUMMONS

Docket No.: 15-CP-02- 01181

COPY
ORIGINAL FILED

MAY 14 2015 *420*

AIKEN COUNTY
CLERK OF COURT

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Aiken, South Carolina

Dated: May 14, 2015



Plaintiff/Attorney for Plaintiff

Address: Bradford M. Owensby
319 Park Avenue SE
Aiken, SC 29801
Phone: 803.648.5228
Fax: 803.648.5228
Email: bmowensby@gmail.com

SCCA 401 (5/02)

6. Plaintiff alleges that prior to taking residence at the property she informed Defendant that there was water damage around the light and over the sink located in the kitchen of the home. Defendant informed the Plaintiff that the damage was from the February 2014 ice storm that occurred in Aiken County and he would have it repaired along with resurfacing the cabinet doors in order to induce Plaintiff to enter into the agreement.
7. Plaintiff took residence at said property on or about June 15, 2014, having paid Defendant for the prior month so that she could install fencing around the property.
8. Plaintiff alleges that in June of 2014 home located on the property, Plaintiff made numerous requests, orally and in writing, to repair roof leaks in a certain part of the home.
9. Defendant made various representations regarding the leaky roof, which included contracting with contractors and an alleged ongoing lawsuit against the manufacturer of the manufactured home which, based on information and belief, said Defendant never intended to do or fabricated said information.
10. After taking residence on the property Plaintiff began to notice that areas of the ceiling in the kitchen and bathroom had been painted over with Kilz and paint to hide water damage.
11. Sometime in late summer Plaintiff notice that an effort had been made to disguise the fact that the subfloor in the bathroom had rotted away and notified the Defendant that repairs were needed, for which Defendant again made promises to repair said damage.
12. Due to the representation of Defendant, Plaintiff forebears any repairs herself and therefore said representations of Defendant were to Plaintiff's detriment.

13. On or about December 14, 2014 a fire caused by said leaking roof shorting electrical wires erupted in the home causing damage to said home and plaintiffs property, including property located outside of said home belonging to Plaintiff.
14. The fire resulted in damages in excess of \$25,000.00.
15. As a result of the destruction of the home and damage to Plaintiff's property, Plaintiff was forced to purchase a camper to serve as temporary shelter.
16. As a result of the destruction of the home and personal property of the Plaintiff, Plaintiff could not operate her business constructing horse jumps for a period of four months.
17. Shortly after the fire, Plaintiff was contacted by Defendant and said Defendant requested that Plaintiff lie to the insurance claims adjuster and state the fire originated due to a faulty GFI outlet in a part of the home which was clearly not the cause of said fire.
18. Based on information and belief, Plaintiff alleges that subsequent to Defendant's request that she assist said Defendant in committing insurance fraud, she inquired into prior insurance claims by Defendant and discovered that Defendant made a claim on March 10, 2009 for water damage to the home; said water damage is alleged to be the identical leak which caused the fire on December 14, 2015.
19. Plaintiff alleges that Defendant, with knowledge, failed to make repairs for known damage to the home in 2009, failed to make or complete promised repairs as requested by Plaintiff and did so with reckless disregard for the safety of Plaintiff after notice of defects already known to Defendant.
20. Plaintiff has suffered economic losses, loss of business and has had to quickly locate temporary housing due to the actions and representations of Defendant.

21. Plaintiff was insured for personal property, yet suffered economic losses greater than the insurance companies paid claim for said losses.

**FOR A FIRST CAUSE OF ACTION
FRAUD IN THE INDUCEMENT AND FRAUD/MISREPRESENTATION**

As to Roof Leak

22. The foregoing Paragraphs are realleged as if repeated herein verbatim.
23. Defendant represented to Plaintiff that the home was in good working order and good repair.
24. Defendant had prior knowledge that the home located on the property was not in good repair and the roof leak would not be detected until a rain event occurred.
25. Plaintiff pointed out damage from a roof leak prior to taking residence on the property and Defendant made representations that said damage would be repaired.
26. Plaintiff relied on the representations of Defendant and was ignorant to the falsity of Defendant's representations.
27. Said representations of Defendant were material and were intended to induce Plaintiff to enter into the rent to own agreement.
28. Plaintiff had specific knowledge of said defects and intentionally misled Plaintiff with reckless disregard of the falsity of said representations.
29. Defendant intended that said falsity would be relied upon by Plaintiff.
30. Plaintiff had a right to rely on and did rely on the representations of the Defendant.
31. Said representations are material and actual and proximate cause of Plaintiff's damages.
32. The representations of Defendant made a representation regarding a preexisting fact.

33. Plaintiff further alleges that Defendant's representations that the home was in good repair is relevant as to dangerous conditions and defects such as roof leaks which was a preexisting fact to which Defendant had direct knowledge.
34. Defendant made said representation with intent to deceive.
35. Defendant's representations are the actual and proximate cause of Plaintiff's harm.

As to Habitability

36. Defendant represented to Plaintiff that the home was in good working order and good repair.
37. Plaintiff is afforded an implied warranty of habitability and Defendant did represent that said premises were in good repair and habitable.
38. Defendant had prior knowledge of the roof leak, mold in the wall voids, attic and other hidden locations leading to health and safety concerns which he intentionally sought to omit and misrepresent in order to induce Plaintiff into the rent to own agreement.
39. Plaintiff relied on the representations of Defendant and was ignorant to the falsity of Defendant's representations.
40. Said representations of Defendant were material and were intended to induce Plaintiff to enter into the rent to own agreement.
41. Plaintiff had specific knowledge of said defects limiting habitability and intentionally misled Plaintiff with reckless disregard of the falsity of said representations.
42. Defendant intended that said falsity would be relied upon by Plaintiff.
43. Plaintiff had a right to rely on and did rely on the representations of the Defendant.
44. Said representations are material and actual and proximate cause of Plaintiff's damages.

45. The representations of Defendant made a representation regarding a preexisting fact.
46. Plaintiff further alleges that Defendant's representations that the home was in good repair is relevant as to dangerous conditions and defects such as roof leaks which was a preexisting fact to which Defendant had direct knowledge and which are paramount to habitability.
47. Defendant made said representation with intent to deceive.
48. Defendant's representations are the actual and proximate cause of Plaintiff's harm.
49. Based on the foregoing, Plaintiff requests an Order of this Court finding that Defendant fraudulently induced Plaintiff into entering the agreement and awarding her actual, consequential and punitive damages.

FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT

50. The foregoing Paragraphs are realleged as if repeated herein verbatim.
51. The Parties to this action entered into a rent to own agreement, said agreement being executed by the Parties on May 12, 2015.
52. Defendant is in breach of said contract due to various references to the RLTA, the "Act" throughout the agreement which was presented by Defendant to Plaintiff.
53. Said RLTA imposes a duty of Defendant to maintain premises and insure that said premises are fit and habitable.
54. Defendant has breached said duty by fraudulently misrepresenting the condition of the home, making various promises to repair said home over a period of months, thereby inducing Plaintiff to forebear making the repairs herself and deducting the costs of repairs from rent/payments to Defendant in consideration of said promises, and misrepresenting the acreage of said premises.

55. Defendant's intentional false representations to Plaintiff regarding repairs to the home were intended to defraud Plaintiff in that Defendant never contracted with a contractor to make repairs as he stated, did not have ongoing litigation with the manufacturer of the home as stated, and in fact Defendant had received in excess of \$10,000.00 in insurance proceeds due to the roof leak which he failed to utilize for repairs and therefore had prior knowledge of the defect and the health and safety issues posed thereby.

56. Based on the foregoing, Plaintiff requests an Order of this Court finding that Defendant breached the agreement of the Parties and committed fraudulent acts prior to, during and subsequent to the execution of said agreement and awarding her actual, consequential and punitive damages.

FOR A THIRD CAUSE OF ACTION
NEGLIGENCE

57. The foregoing Paragraphs are realleged as if repeated herein verbatim.

58. The RLTA imposes certain duties on Defendant to insure that the premises are maintained, fit and habitable, thereby imposing a duty of care on Defendant in assuring that maintenance and repairs be made on the home if he is aware of or noticed regarding defects related to the habitability, fitness and safety of the premises.

59. Defendant negligently failed to make repairs after notice with reckless disregard to the health and safety of Plaintiff by making numerous representations and promises to repair the premises.

60. Defendant's reckless disregard and negligence resulted in a fire which destroyed the home along with Plaintiff's property and may well have resulted in the death of Plaintiff or others in the home.

61. Defendant's act of failing to make repair in 2009 when he first had knowledge of the defect and further failure to make necessary repairs upon notice by Plaintiff constitute a breach of Defendant's duty of care.
62. Defendant's breach of the duty of care is the proximate and actual cause of Plaintiff's harm and his failure to make repairs are the factual and legal cause of the destruction of the home and Plaintiff's property.
63. Based on the foregoing, Plaintiff requests an Order of this Court finding Defendant negligent in making necessary repairs which resulted in Plaintiff's harm and awarding her actual, consequential and punitive damages.

FOR A FOURTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION

64. The foregoing Paragraphs are realleged as if repeated herein verbatim.
65. Defendant's various representations as stated in the foregoing paragraphs were false.
66. Defendant had a pecuniary interest in Plaintiff entering into an agreement with Defendant as said payments made to Defendant were used for payment of Defendant's mortgage and said false representations and omissions were used to entice Plaintiff to enter into said agreement and Defendant stood to make profit which would be diminished should he honestly represent the nature of the premises and defects present.
67. Defendant owed a duty of care to Plaintiff, under the RLTA, contract and as seller of the home and premises to be truthful and fair dealing in representing the actual condition of the home and property.
68. Defendant failed to use due care in his dealings with Plaintiff prior to, during and subsequent to the execution of the agreement between the Parties.
69. Plaintiff justifiably relied on the representations of Defendant to her detriment.

70. Plaintiff has suffered a pecuniary loss as a direct and proximate result of the misrepresentations of Defendant and has been harmed thereby.

71. Plaintiff has suffered mental anguish, pain and suffering due to the fire as well as pecuniary loss and loss of business.

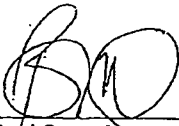
72. Based on the foregoing, Plaintiff prays for an Order of this Court finding Defendant's negligent misrepresentations are the actual and proximate cause of Plaintiff's harm and awarding her actual, proximate, consequential and pecuniary damages.

WHEREFORE, based on the foregoing, Plaintiff prays for an Order of this Court as follows:

- A. Finding that Defendant fraudulently induced Plaintiff into entering the agreement and awarding her actual, consequential and punitive damages; and/or,
- B. Finding Defendant breached the agreement of the Parties and committed fraudulent acts prior to, during and subsequent to the execution of said agreement and awarding her actual, consequential and punitive damages; and/or
- C. Finding Defendant negligent in making necessary repairs resulted in Plaintiff's harm and awarding her actual, consequential and punitive damages; and, or
- D. Finding Defendant's negligent misrepresentations are the actual and proximate cause of Plaintiff's harm and awarding her actual, proximate, consequential and pecuniary damages; and/or,

E. Any further relief deemed necessary and just.

I SO MOVE

 May 14, 2015

Brad Owensby
Banks & Owensby, LLC
319 Park Ave. SE
Aiken SC, 29801
Phone: 803.648.5777
Fax: 803.648.5228
Email: bmowensby@gmail.com

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

ANGELA CARTMEL

Plaintiff(s)

vs.

EDWARD BRICE TAYLOR

Defendant(s)

(Please Print)

Submitted By: Bradford M. Owensby

Address: 319 Park Avenue SE
Aiken, SC 29801

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP - 02- 01181

COPY
ORIGINAL FILED

MAY 14 2015

AIKEN COUNTY
CLERK OF COURT

SC Bar #: 77636

Telephone #: 803. 648. 5777

Fax #: 803. 648. 5228

Other:

E-mail: bmowensby@gmail.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|--|---|
| ☐ Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | ☐ Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -CP-
☐ Notice/ File Med Mal (230)
☐ Other (299) | ☐ Torts - Personal Injury
☐ Assault/Slender/Label (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☒ Other (399) | ☐ Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| ☐ Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | ☐ Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Other (799) | ☐ Administrative Law/Relief
☐ Reinstatement Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | ☐ Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| ☐ Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (670) | | |

Submitting Party Signature

Date:

May 14 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

5. This Defendant denies the allegations contained in Paragraphs 5, 6, 7, 8, 9, 10, 11, and 12 of the Complaint and demands strict proof thereof.

6. This Defendant lacks information sufficient to affirm or deny the allegations in Paragraphs 13, 14, 15, and 16 of the Complaint, but to the extent a response is required or the allegations therein allege, state or infer liability or wrongdoing on the part of this Defendant, then this Defendant denies same and demands strict proof thereof.

7. This Defendant denies the allegations contained in Paragraphs 17, 18, 19, 20, and 21 of the Complaint and demands strict proof thereof.

ANSWERING THE FIRST CAUSE OF ACTION
(Fraud in the Inducement and Fraud/Misrepresentation)

8. Answering Paragraph 22 of the Complaint, this Defendant re-states and re-alleges each of his previous responses as if set forth fully herein verbatim.

9. This Defendant denies the allegations contained in Paragraphs 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35 of the Complaint and demands strict proof thereof.

10. This Defendant denies the allegations contained in Paragraphs 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, and 49 and demands strict proof thereof.

ANSWERING THE SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by a Fraudulent Act)

11. Answering Paragraph 50 of the Complaint, this Defendant re-states and re-alleges each of his previous responses as if set forth fully herein verbatim.

12. This Defendant denies the allegations contained in Paragraphs 51, 52, 53, 54, 55, and 56 of the Complaint and demands strict proof thereof.

ANSWERING THE THIRD CAUSE OF ACTION
(Negligence)

13. Answering Paragraph 57 of the Complaint, this Defendant re-states and re-alleges each of his previous responses as if set forth fully herein verbatim.

14. This Defendant denies the allegations contained in Paragraphs 58, 59, 60, 61, 62, and 63 of the Complaint and demands strict proof thereof.

ANSWERING FOURTH CAUSE OF ACTION
(Negligent Misrepresentation)

15. Answering Paragraph 64 of the Complaint, this Defendant re-states and re-alleges each of his previous responses as if set forth fully herein verbatim.

16. This Defendant denies the allegations contained in Paragraphs 65, 66, 67, 68, 69, 70, 71, and 72 of the Complaint and demands strict proof thereof.

FOR A SECOND DEFENSE
(Failure to State a Cause of Action)

17. Plaintiff has failed to state facts sufficient to constitute a cause of action against this Defendant, and therefore the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Arbitration)

18. This suit is subject to a binding arbitration provision and this case should be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rule of Civil Procedure for the purpose of being referred to binding arbitration.

FOR A FOURTH DEFENSE
(Comparative Fault)

19. Plaintiff's actions were grossly negligent, willful, and wanton and are the proximate cause of the damage to the property to the extent that the Complaint should be dismissed pursuant to S.C. CODE ANN. § 15-38-15(A) and/or any award reduced proportionally.

FOR A FIFTH DEFENSE
(Waiver/Estoppel/Laches/Mistake/Fraud)

20. Plaintiff's Claims are barred by some or all of the equitable doctrines of waiver, estoppel, laches, mistake and/or fraud.

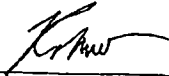
FOR A SIXTH DEFENSE
(Reservation/Non-Waiver)

21. This Defendant specifically reserves any additional defenses including affirmative defenses, as may be available or revealed to him during the course of its investigation and/or discovery in the case, and as are consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Complaint, the Defendant prays for a jury trial and that the Complaint be dismissed against him and for such other relief as the Court may deem just and proper.

Respectfully Submitted,

BROWN & VARNADO, LLC



Robert B. Varnado
Alexis M. Wimberly
P.O. Box 1127 (29465)
103 Church Street
Mount Pleasant, South Carolina 29464
P: (843) 737-7300
F: (843) 654-5109
rvarnado@brown-varnado.com
awimberly@brown-varnado.com
Attorneys for Defendant Edward Brice Taylor

August 13, 2015
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the below date, a copy of the attached *Answer of Defendant Edward Brice Taylor* was placed in an envelope, with first-class postage pre-paid, and mailed and emailed to:

Bradford M. Owensby, Esquire
319 Park Avenue SE
Aiken, SC 29801



Quinn Ibach
Litigation Paralegal

August 13, 2015
Mount Pleasant, South Carolina

COPY
ORIGINAL FILED
AUG 17 2015 8:30am
AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-02-01181

Angela Cartmel

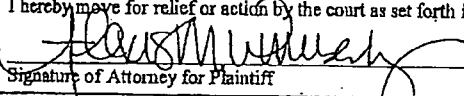
[] Plaintiff,

v.

Edward Brice Taylor,

[x] Defendant.

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Name, S.C. Bar no. and address of plaintiffs attorney Bradford M. Owensby, Esquire 319 Park Avenue SE Aiken, SC 29801 telephone: 803-648-5777 fax: 803-648-5228		Name, S.C. Bar no. and address of defendants attorney Robert B. Varnado, Esquire Alexis M. Wimberly, Esquire Brown & Varnado LLC P.O. Box 1127 Mt. Pleasant, SC 29465 telephone: (843) 737-7300 fax: (843) 654-5109 e-mail: rvarnado@brown-varnado.com	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: <u>Motion to Compel Arbitration and Mediation</u> Estimated Time Needed: <u>30 min</u> Court Reporter Needed: <u>N</u>			
SECTION II: Motion/Order Type ☒ Written motion/order attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for Plaintiff September 22, 2015 Date submitted			
SECTION III: Motion Fee ☒ PAID B AMOUNT: <u>\$25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judges instructions ☐ Motion for Execution (Rule 69, SCRCP) Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE: _____ Date: _____	
CLERKS VERIFICATION Collected by: _____ (print name) ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED B AMOUNT DUE: _____ DATE FILED			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

ANGELA CARTMEL

Plaintiff,

vs.

EDWARD BRICE TAYLOR

Defendant.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL DISTRICT
CASE NO. 15-CP-02-01181

NOTICE OF MOTION AND MOTION
OF DEFENDANT TO COMPEL
ARBITRATION AND MEDIATION

COPY
ORIGINAL FILED
SEP 25 2015

AIKEN COUNTY
CLERK OF COURT

TO: BRADFORD M. OWENSBY, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Edward Brice Taylor ("Defendant"), by and through his undersigned attorneys and pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure will move before the Presiding Judge of the Aiken County Court of Common Pleas, at the Aiken County Courthouse, 109 Park Ave., S.E., Aiken, South Carolina, 29801; on the tenth day hence, or at such time, date and place as counsel may be heard, for an Order dismissing the above-referenced action, or in the alternative to stay the same, pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C. Sec 1, et seq. ("the Act" or "the FAA") on the following grounds:

1. On May 9-12, 2014, the Plaintiff Angela Cartmel ("Plaintiff") and Defendant executed a "Lease Agreement" which governs the relationship of the parties arising out of the lease of 2694 Camp Rawls Road, Wagener, South Carolina ("Leasehold"). Paragraph 61 of the Lease Agreement contains a binding and valid arbitration clause under the Act

Mediation and Arbitration

61. If any dispute relating to this Lease between the Landlord and the Tenant is not resolved through informal discussion within 14 days from the date a dispute arises, the parties agree to submit the issue first before a non-binding mediator and to an arbitrator in the event that mediation fails. The decision of the arbitrator will be binding on the parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediation or arbitrations will be paid by the Tenant.

2. The Lease Agreement is a binding and enforceable contract between the Parties, as Plaintiff alleges in her second cause of action of her Summons and Complaint.

3. Disputes over the Lease Agreement and the Leasehold form the basis of all of Plaintiff's claims in her Summons and Complaint.

4. Plaintiff filed her Summons and Complaint on May 14, 2015 but only effected service on or about July 14, 2015; Defendant served a timely answer on or about August 12, 2015, which contained a specific defense raising the applicability of the arbitration clause.

3. The parties have not conducted mediation pursuant to Paragraph 61 of the Lease Agreement nor has Plaintiff consented to arbitration.

4. Defendant made a timely request for mediation and arbitration by letter of August 26, 2015. The demand for mediation and arbitration were made prior to commencement of any discovery; at the time of the filing of this motion, the undersigned is not aware of any discovery been propounded in the case. Defendant has not waived his right for arbitration.

5. "Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." *Lucey v. Meyer*, 401 S.C. 122, 133, 736 S.E.2d, 274, 280 (Ct. App. 2012). "The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise." *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). "Once it is determined that the FAA applies to a dispute, federal substantive law regarding arbitrability controls." *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

6. It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."

Landers, 402 S.C. at 109, 739 S.E.2d at 213 (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. Such a presumption is strengthened when an arbitration clause is broadly written. Therefore, unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute arbitration must generally be ordered." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (internal citations omitted)."

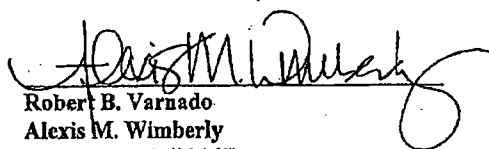
7. Plaintiff concedes that one of the primary purposes of the Lease was to operate a business to manufacture horse jumps which she would place into the stream of commerce.

8. The affidavit of Edward Brice Taylor attached herewith further demonstrates factors of interstate commerce (the US Mail, National Banks) which provide that this matter falls under the FAA.

9. Additionally, the contractual requirement of mediation should be compelled pursuant to the terms of the Lease Agreement.

Respectfully Submitted,

BROWN & VARNADO, LLC



Robert B. Varnado
Alexis M. Wimberly
P.O. Box 1127 (29465)
103 Church Street
Mount Pleasant, South Carolina 29464
P: (843) 737-7300
F: (843) 654-5109
rvarnado@brown-varnado.com
awimberly@brown-varnado.com
Attorneys for Defendant Edward Brice Taylor

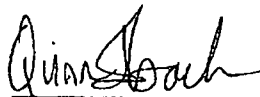
September 12, 2015
Mount Pleasant, South Carolin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the below date, a copy of the attached *Notice of Motion and Motion of Defendant to Compel Arbitration and Mediation* was placed in an envelope, with first-class postage pre-paid, and mailed to:

VIA U.S. MAIL

Bradford M. Owensby, Esquire
319 Park Avenue SE
Aiken, SC 29801
Attorney for Plaintiff Angela Cartmel



Quinn Ibach
Litigation Paralegal

September __, 2015
Mount Pleasant, South Carolina

COPY
ORIGINAL FILED
SEP 25 2015 *1250*
AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

ANGELA CARTMEL

Plaintiff,

vs.

EDWARD BRICE TAYLOR

Defendant.

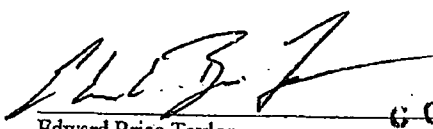
IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL DISTRICT
CASE NO. 15-CP-02-01181

**AFFIDAVIT OF
EDWARD BRICE TAYLOR**

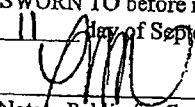
PERSONALLY APPEARED BEFORE ME, the undersigned, Edward Brice Taylor, who first being duly sworn, would depose and testify as follows:

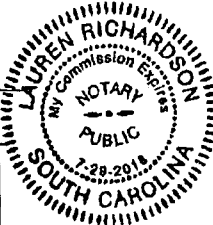
1. I am adult over the age of eighteen (18) years old and competent to make this affidavit.
2. Plaintiff delivered rent checks to me via United States mail.
3. The rent checks I received from Plaintiff were typically cashier's checks drawn on T.D. Bank
4. The majority of my communications with Plaintiff were via mobile phone and/or text messages.

FURTHER AFFIANT SAITH NOT.


Edward Brice Taylor

SWORN TO before me this
11 day of September, 2015.


Notary Public for South Carolina
My Commission Expires: 1/20/16



**COPY
ORIGINAL FILED**
122 SEP 25 2015
**AIKEN COUNTY
CLERK OF COURT**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	<u>SECOND</u> JUDICIAL CIRCUIT
COUNTY OF <u>Aiken</u>	)	
	)	
<u>ANGELA CARTMEL</u>	)	MEMORANDUM IN OPPOSITION TO
	)	DEFENDANT'S MOTION TO
Plaintiff,	)	COMPEL ARBITRATION
vs.	)	
	)	
EDWARD BRICE TAYLOR	)	
	)	
	)	
Defendant.	)	Docket No. <u>15-CP-02-1181</u>

Defendant's motion to compel arbitration fails as a matter of law under Section 15-48-10 of the South Carolina Code of Laws which states:

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

S.C. Code of Laws Sec. 15-48-10(a)

In the instant case, Defendant and Plaintiff entered into an agreement for the purchase of land. Paragraph 1 of said contract states "This is a rent to own Contract for a five year lease." The contract contains sixteen pages and a "mediation and arbitration clause" appears in Paragraph 61. Said "arbitration" is not conspicuous, does not constitute a notice pursuant to the

statute as it is not "underlined" nor is it in "capital letters." Additionally, said clause is not "rubber stamped" nor does it appear "on the first page of the contract."

The South Carolina Supreme Court has addressed the issue of contracts failing to meet the statutory requirements and has "strictly construed the notice requirement of section 15-48-10(a). In *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996), we held the terms of section 15-48-10(a) are clear, and those terms must [346 S.C. 589] be applied according to their literal meaning. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 589 (S.C., 2001)

The action at bar is one for fraud and misrepresentation, including fraud in the inducement. Plaintiff alleges that the Defendant misrepresented the condition of the home and did so intentionally. Due to Defendant's intentional fraudulent act, the home caught fire and Plaintiff suffered a loss of personal property and business earnings. "[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements" *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

The arbitration clause also fails as it is unconscionable and there is a lack of mutuality. The contract was drafted by Defendant, presented by Defendant and buried in boilerplate of the 10th page. Said clause is also unconscionable as it requires Plaintiff to be solely responsible for the cost of mediation and arbitration, regardless of which party would prevail.

Respectfully,



Brad Owensby, for Plaintiff

1/22/2016

Residential Lease Agreement

THIS LEASE (the "Lease") dated this 9 ^{May} of April, 2014

BETWEEN:

Edward Brice Taylor

(the "Landlord")

OF THE FIRST PART

- AND -

Angela Cartmel

(the "Tenant")

OF THE SECOND PART

IN CONSIDERATION OF the Landlord leasing certain premises to the Tenant, the Tenant leasing those premises from the Landlord and the mutual benefits and obligations provided in this Lease, the receipt and sufficiency of which consideration is hereby acknowledged, the parties to this Lease agree as follows:

Leased Property

1. The Landlord agrees to rent to the Tenant the mobile home, municipally described as 2694 Camp Rawls Road, Wagener, Aiken, South Carolina 29164 (the "Property"), for use as residential premises only. The Property is more particularly described as follows: This is a rent to own Contract for a 5 year lease. Contract will be rewritten prior to the termination of this lease. Land is included with this lease with the usage of the 3.86 acres for Horses. Fencing is approved and structures are approved. If tenant vacates the premises then all structures will be left in tact to landlord. The Tenant may also use part of the Property for the following home-based business: Construction of Horse Jumps. The Tenant is responsible for all permits and licenses relating to this home-based business and the Tenant indemnifies the Landlord of all liability, costs, and fees

Security Deposit

13. On execution of this Lease, the Tenant will pay the Landlord a security deposit of \$750.00 (the "Security Deposit").
14. The Landlord will hold the Security Deposit at an interest bearing account solely devoted to security deposits at _____ located at _____.
15. The Landlord will return the Security Deposit at the end of this tenancy, less such deductions as provided in this Lease but no deduction will be made for damage due to reasonable wear and tear nor for any deduction prohibited by the Act.
16. During the term of this Lease or after its termination, the Landlord may charge the Tenant or make deductions from the Security Deposit for any or all of the following:
 - a. repair of walls due to plugs, large nails or any unreasonable number of holes in the walls including the repainting of such damaged walls;
 - b. repainting required to repair the results of any other improper use or excessive damage by the Tenant;
 - c. unplugging toilets, sinks and drains;
 - d. replacing damaged or missing doors, windows, screens, mirrors or light fixtures;
 - e. repairing cuts, burns, or water damage to linoleum, rugs, and other areas;
 - f. any other repairs or cleaning due to any damage beyond normal wear and tear caused or permitted by the Tenant or by any person whom the Tenant is responsible for;
 - g. the cost of extermination where the Tenant or the Tenant's guests have brought or allowed insects into the Property or building;
 - h. repairs and replacement required where windows are left open which have caused plumbing to freeze, or rain or water damage to floors or walls;
 - i. replacement of locks and/or lost keys to the Property and any administrative fees associated with the replacement as a result of the Tenant's misplacement of the keys; and

- j. any other purpose allowed under this Lease or the Act.

For the purpose of this clause, the Landlord may charge the Tenant for professional cleaning and repairs if the Tenant has not made alternate arrangements with the Landlord.

17. The Tenant may not use the Security Deposit as payment for the Rent.

Quiet Enjoyment

18. The Landlord covenants that on paying the Rent and performing the covenants contained in this Lease, the Tenant will peacefully and quietly have, hold, and enjoy the Property for the agreed term.

Inspections

19. The Tenant acknowledges that the Tenant inspected the Property, including the grounds and all buildings and improvements, and that they are, at the time of the execution of this Lease, in good order, good repair, safe, clean, and tenantable condition.
20. At all reasonable times during the term of this Lease and any renewal of this Lease, the Landlord and its agents may enter the Property to make inspections or repairs, or to show the Property to prospective tenants or purchasers upon the greater of 24 hours notice to the Tenant and any notice required by the Act.

Renewal of Lease

21. Upon giving written notice no later than 60 days before the expiration of the term of this Lease, the Tenant may renew this Lease for an additional term. All terms of the renewed lease will be the same except for this renewal clause.

Tenant Improvements

22. The Tenant will obtain written permission from the Landlord before doing any of the following:
- a. applying adhesive materials, or inserting nails or hooks in walls or ceilings other than two small picture hooks per wall;
 - b. painting, wallpapering, redecorating or in any way significantly altering the appearance of the Property;
 - c. removing or adding walls, or performing any structural alterations;

- d. installing a waterbed(s);
- e. changing the amount of heat or power normally used on the Property as well as installing additional electrical wiring or heating units;
- f. placing or exposing or allowing to be placed or exposed anywhere inside or outside the Property any placard, notice or sign for advertising or any other purpose; or
- g. affixing to or erecting upon or near the Property any radio or TV antenna or tower.

Utilities and Other Charges

- 23. The Tenant is responsible for the payment of the following utilities and other charges in relation to the Property: electricity, water, internet, cable, telephone, garbage collection and garbage collection.

Insurance

- 24. The Tenant is hereby advised and understands that the personal property of the Tenant is not insured by the Landlord for either damage or loss, and the Landlord assumes no liability for any such loss. The Tenant is advised that, if insurance coverage is desired by the Tenant, the Tenant should inquire of Tenant's insurance agent regarding a renter's policy of insurance.
- 25. The Tenant is not responsible for insuring the Property for either damage or loss to the structure, mechanical or improvements to the building of the Property, and the Tenant assumes no liability for any such loss.
- 26. The Tenant is responsible for insuring the Property for liability insurance for the benefit of the Tenant and the Landlord.
- 27. The Tenant will provide proof of such insurance to the Landlord upon request.

Abandonment

- 28. If at any time during the term of this Lease, the Tenant abandons the Property or any part of the Property, the Landlord may, at its option, enter the Property by any means without being liable for any prosecution for such entering, and without becoming liable to the Tenant for damages or for any payment of any kind whatever, and may, at the Landlord's discretion, as agent for the Tenant, rent the Property, or any part of the Property, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such renting; and, at the Landlord's option, hold the Tenant liable for any difference between the Rent that would have been payable under this Lease during the balance of the unexpired term, if this Lease had

continued in force, and the net rent for such period realized by the Landlord by means of the renting. If the Landlord's right of re-entry is exercised following abandonment of the Property by the Tenant, then the Landlord may consider any personal property belonging to the Tenant and left on the Property to also have been abandoned, in which case the Landlord may dispose of all such personal property in any manner the Landlord will deem proper and is relieved of all liability for doing so.

Attorney Fees

29. In the event that any action is filed in relation to this Lease, the unsuccessful party in the action will pay to the successful party, in addition to all the sums that either party may be called on to pay a reasonable sum for the successful party's attorney fees.

Governing Law

30. It is the intention of the parties to this Lease that the tenancy created by this Lease and the performance under this Lease, and all suits and special proceedings under this Lease, be construed in accordance with and governed, to the exclusion of the law of any other forum, by the laws of the State of South Carolina, without regard to the jurisdiction in which any action or special proceeding may be instituted.

Severability

31. If there is a conflict between any provision of this Lease and the applicable legislation of State of South Carolina (the "Act"), the Act will prevail and such provisions of the Lease will be amended or deleted as necessary in order to comply with the Act. Further, any provisions that are required by the Act are incorporated into this Lease.
32. In the event that any of the provisions of this Lease will be held to be invalid or unenforceable in whole or in part, those provisions to the extent enforceable and all other provisions will nevertheless continue to be valid and enforceable as though the invalid or unenforceable parts had not been included in this Lease and the remaining provisions had been executed by both parties subsequent to the expungement of the invalid provision.

Amendment of Lease

33. Any amendment or modification of this Lease or additional obligation assumed by either party in connection with this Lease will only be binding if evidenced in writing signed by each party or an authorized representative of each party.

Assignment and Subletting

34. The Tenant will not assign this Lease, or sublet or grant any concession or license to use the Property or any part of the Property. Any assignment, subletting, concession, or license, whether

by operation of law or otherwise, will be void and will, at Landlord's option, terminate this Lease.

Additional Clause

35. This will be a rent to own property. Should the Tenant vacate the premises or not pay the landlord, all monies paid to date by the Tenant will be non refundable and become the Landlords. After the five year lease the tenant has the option to make a balloon payment. There will be an addendum attached giving the breakdown of final payment of the land and home. Should for some reason Tenant decides to pay off the Mortgage, there will be an additional charge of \$10,000.00 in a lump sum payment due immediately to the Landlord (For Land owned by tenant).

Then, With a check from the Tenant, the Landlord will deliver the check to the Mortgage company and pay the balance owed and provide the Tenant a Deed for the residence and property. If a balloon payment is not made at that time then the Tenant has the option for an additional five year lease and agrees to pay the balance of the home mortgage and land payment as described above (Balloon Payment). Cost of the Mortgage Payoff will be resubmitted to the Tenant in a separate addendum.

Damage to Property

36. If the Property, or any part of the Property, will be partially damaged by fire or other casualty not due to the Tenant's negligence or willful act or that of the Tenant's employee, family, agent, or visitor, the Property will be promptly repaired by the Landlord and there will be an abatement of Rent corresponding with the time during which, and the extent to which, the Property may have been untenantable. However, if the Property should be damaged other than by the Tenant's negligence or willful act or that of the Tenant's employee, family, agent, or visitor and the Landlord decides not to rebuild or repair the Property, the Landlord may end this Lease by giving appropriate notice.

Maintenance

37. The Tenant will, at its sole expense, keep and maintain the Property and appurtenances in good and sanitary condition and repair during the term of this Lease and any renewal of this Lease.
38. Major maintenance and repair of the Property involving anticipated or actual costs in excess of \$100.00 per incident not due to the Tenant's misuse, waste, or neglect or that of the Tenant's employee, family, agent, or visitor, will be the responsibility of the Landlord or the Landlord's assigns.
39. In particular, the Tenant will keep the fixtures in the Property in good order and repair. The Tenant will, at Tenant's sole expense, make all required repairs to the plumbing, range, heating apparatus, and electric and gas fixtures whenever damage to such items will have resulted from

the Tenant's misuse, waste, or neglect or that of the Tenant's employee, family, agent, or visitor.

40. Where the Property has its own garden or grass area which is for the exclusive use of the Tenant and its guests, the Tenant will water, fertilize, weed, cut and otherwise maintain the garden or grass area in a reasonable condition including any trees or shrubs therein.
41. The Tenant will also perform the following maintenance in respect to the Property: Preventative maintenance on residence such as caulking all roof vents, skylights, and around chimney once and year. And any other maintenance she sees fit.

Care and Use of Property

42. The Tenant will promptly notify the Landlord of any damage, or of any situation that may significantly interfere with the normal use of the Property or to any furnishings supplied by the Landlord.
43. The Tenant will not make (or allow to be made) any noise or nuisance which, in the reasonable opinion of the Landlord, disturbs the comfort or convenience of other tenants.
44. The Tenant will keep the Property reasonably clean.
45. The Tenant will dispose of its trash in a timely, tidy, proper and sanitary manner.
46. The Tenant will not engage in any illegal trade or activity on or about the Property.
47. The Landlord and Tenant will comply with standards of health, sanitation, fire, housing and safety as required by law.
48. The Landlord will use reasonable efforts to maintain the Property in such a condition as to prevent the accumulation of moisture and the growth of mold, and to promptly respond to any written notices from the Tenant in relations to accumulation of moisture and visible evidence of mold.
49. The Tenant will use reasonable efforts to maintain the Property in such a condition as to prevent the accumulation of moisture and the growth of mold, and to promptly notify the Landlord in writing of any moisture accumulation that occurs or of any visible evidence of mold discovered by the Tenant.

50. The Tenant agrees that no signs will be placed or painting done on or about the Property by the Tenant or at the Tenant's direction without the prior, express, and written consent of the Landlord. Notwithstanding the above provision, the Tenant may place election signs on the Property during the appropriate time periods.
51. If the Tenant is absent from the Property and the Property is unoccupied for a period of four consecutive days or longer, the Tenant will arrange for regular inspection by a competent person. The Landlord will be notified in advance as to the name, address and phone number of the person doing the inspections.
52. The hallways, passages and stairs of the building in which the Property is situated will be used for no purpose other than going to and from the Property and the Tenant will not in any way encumber those areas with boxes, furniture or other material or place or leave rubbish in those areas and other areas used in common with any other tenant.
53. Footwear which are soiled or wet should be removed at the entrance to the building in which the Property is located and taken into the Tenant's Property.
54. At the expiration of the term of this Lease, the Tenant will quit and surrender the Property in as good a state and condition as they were at the commencement of this Lease, reasonable use and wear and tear excepted.

Carbon Monoxide Alarm

55. Prior to the Tenant taking possession of the Property, the Landlord will ensure that any carbon monoxide alarm in place is operational. Upon possession, the Landlord will provide the Tenant with working batteries, for all carbon monoxide alarms. The Landlord will be responsible for the repair and replacement of any missing or nonfunctional carbon monoxide alarm upon written request of the Tenant.
56. The Tenant will keep, test, and maintain in good repair all the carbon monoxide alarms in the Property. The Tenant must provide the Landlord or the Landlord's agent with a written notice if any carbon monoxide alarm needs its batteries replaced or if the alarm is stolen, removed, missing, or not operational. Further, the Tenant must notify the Landlord, or its agent, in writing of any deficiency in any carbon monoxide alarm that the Tenant is unable to fix.
57. No person may remove any batteries from, or in any way render inoperable, a carbon monoxide alarm except as part of the process to inspect, maintain, repair or replace the alarm or batteries in the alarm.

Hazardous Materials

58. The Tenant will not keep or have on the Property any article or thing of a dangerous, flammable, or explosive character that might unreasonably increase the danger of fire on the Property or that might be considered hazardous by any responsible insurance company.

Rules and Regulations

59. The Tenant will obey all rules and regulations posted by the Landlord regarding the use and care of the building, parking lot, laundry room and other common facilities that are provided for the use of the Tenant in and around the building containing the Property.

Lead Warning

60. Housing built before 1978 may contain lead based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of known lead-based paint hazards in the dwelling. **Lessees must also receive a Federally approved pamphlet on lead poisoning prevention.**

Mediation and Arbitration

61. If any dispute relating to this Lease between the Landlord and the Tenant is not resolved through informal discussion within 14 days from the date a dispute arises, the parties agree to submit the issue first before a non-binding mediator and to an arbitrator in the event that mediation fails. The decision of the arbitrator will be binding on the parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediations or arbitrations will be paid by the Tenant.

Address for Notice

62. For any matter relating to this tenancy, the Tenant may be contacted at the Property or through the phone number below. After this tenancy has been terminated, the contact information of the Tenant is:
- a. Name: Angela Cartmel.
 - b. Phone: (724) 417-2229.
 - c. Email: arcartmel@gmail.com.
 - d. Post termination notice address: 2694 Camp Rawls Road, Wagener, Aiken, SC 29164.

63. For any matter relating to this tenancy, whether during or after this tenancy has been terminated, the Landlord's address for notice is:

- a. Name: Edward Brice Taylor.
- b. Address: 2960 Emma Lane, Mt. Pleasant, Charleston, SC 29466.

The contact information for the Landlord is:

- c. Phone: (803) 730-7793.
- d. Email address: Taylorbayhuntclub@gmail.com.

Option to Purchase

- 64. Provided the Tenant is not currently in default in the performance of any term of this Lease, the Tenant will have the option to purchase (the "Option") the Property for \$88,500.00 (the "Purchase Price").
- 65. This Option may only be exercised at any time prior to its expiration at midnight on May 15, 2019. Upon expiration of the Option, the Landlord will be released from all obligations to sell the Property to the Tenant. If the Tenant does not exercise the Option prior to its expiration, all rents and other charges paid under this Lease will be retained by the Landlord, and neither party will have any further rights or claims against each other concerning the Option.
- 66. The Option will be exercised by mailing or delivering written notice to the Landlord prior to the expiration of this Option. Notice, if mailed will be by certified mail, postage prepaid, to the Landlord at 2960 Emma Lane, Mt. Pleasant, Charleston, SC 29466 and will be deemed to have been given on the date shown on the postmark of the envelope in which such notice is mailed.
- 67. The Tenant may not assign any rights under this Option separately from all of the Tenant's other rights under this Lease. No assignment may be made without the Landlord's prior written consent.
- 68. The Landlord warrants to the Tenant that the Landlord is the legal owner of the Property and has the legal right to sell the Property under the terms and conditions of this Lease.
- 69. If the Option is exercised, the following provisions will be applicable:
 - a. The Tenant will take title to the Property subject to any:

- i. real estate taxes not yet due at the time of closing; and
 - ii. covenants, conditions, restrictions, reservations, rights, rights of way and easements then on record, if any.
- b. Unless otherwise extended by other terms of this Lease, closing will be held within the latter of 60 from the exercise of the Option or removal of any exceptions to the title by the Landlord.
- c. Rents, real estate taxes and other expenses of the Property will be prorated as of the date of the closing date. Security deposits, advance rentals or considerations involving future lease credits will be credited to the Tenant.
- d. The parties acknowledge that the availability of financing and purchase costs cannot be ascertained with certainty. The parties agree that these items will not be conditions of performance of this Lease and the parties agree they have not relied upon any other representations or warranties by brokers, sellers or any other parties which are not set out in this Lease.
- e. No later than 15 days from the exercise of the Option to purchase, the Landlord will provide the Tenant the following documents (the "Seller Disclosure"):
 - i. a property condition disclosure, signed and dated by the Landlord;
 - ii. a commitment for the policy of title insurance; and
 - iii. written notice of any claims and/or conditions known to the Landlord relating to environmental problems or building or zoning code violations.
- f. The Tenant has 15 days from the date of receipt of the Seller Disclosure to examine the title to the Property and to report, in writing, any valid objections. Any exceptions to the title which would be disclosed by examination of the records will be deemed to have been accepted unless reported in writing within 15 days. If the Tenant objects to any exceptions to the title, the Landlord will use all due diligence to remove such exceptions at the Landlord's own expense within 60 days. But if such exceptions cannot be removed within the 60 days allowed, all rights and obligations under this Option may, at the election of the Tenant, terminate and end unless the Tenant elects to purchase the Property subject to such exceptions.

- g. Upon the completion of the Closing, all rights and obligations under the Lease (other than the Option) will cease to exist and the parties will have no further rights or claims against each other concerning the Lease.

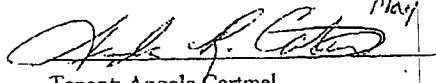
General Provisions

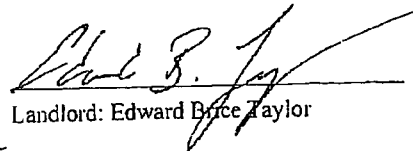
70. All monetary amounts stated or referred to in this Lease are based in the United States dollar.
71. Any waiver by the Landlord of any failure by the Tenant to perform or observe the provisions of this Lease will not operate as a waiver of the Landlord's rights under this Lease in respect of any subsequent defaults, breaches or non-performance and will not defeat or affect in any way the Landlord's rights in respect of any subsequent default or breach.
72. This Lease will extend to and be binding upon and inure to the benefit of the respective heirs, executors, administrators, successors and assigns, as the case may be, of each party to this Lease. All covenants are to be construed as conditions of this Lease.
73. All sums payable by the Tenant to the Landlord pursuant to any provision of this Lease will be deemed to be additional rent and will be recovered by the Landlord as rental arrears.
74. Where there is more than one Tenant executing this Lease, all Tenants are jointly and severally liable for each other's acts, omissions and liabilities pursuant to this Lease.
75. Locks may not be added or changed without the prior written agreement of both the Landlord and the Tenant, or unless the changes are made in compliance with the Act.
76. The Tenant will be charged an additional amount of \$25.00 for each N.S.F. check or checks returned by the Tenant's financial institution.
77. If the Tenant moves out prior to the natural expiration of this Lease, a rerent levy of \$500.00 will be charged to the Tenant.
78. The Tenant will professionally steam clean the carpets at the termination of this Lease or the Landlord may charge the Tenant or deduct the cost of having the carpets professionally steam cleaned from the security deposit.
79. Headings are inserted for the convenience of the parties only and are not to be considered when interpreting this Lease. Words in the singular mean and include the plural and vice versa. Words in the masculine mean and include the feminine and vice versa.

80. This Lease and the Tenant's leasehold interest under this Lease are and will be subject, subordinate, and inferior to any liens or encumbrances now or hereafter placed on the Property by the Landlord, all advances made under any such liens or encumbrances, the interest payable on any such liens or encumbrances, and any and all renewals or extensions such liens or encumbrances.
81. This Lease may be executed in counterparts. Facsimile signatures are binding and are considered to be original signatures.
82. This Lease will constitute the entire agreement between the Landlord and the Tenant. Any prior understanding or representation of any kind preceding the date of this Lease will not be binding on either party except to the extent incorporated in this Lease.
83. The Tenant will indemnify and save the Landlord, and the owner of the Property where different from the Landlord, harmless from all liabilities, fines, suits, claims, demands and actions of any kind or nature for which the Landlord will or may become liable or suffer by reason of any breach, violation or non-performance by the Tenant or by any person for whom the Tenant is responsible, of any covenant, term, or provisions hereof or by reason of any act, neglect or default on the part of the Tenant or other person for whom the Tenant is responsible. Such indemnification in respect of any such breach, violation or non-performance, damage to property, injury or death occurring during the term of the Lease will survive the termination of the Lease, notwithstanding anything in this Lease to the contrary.
84. The Tenant agrees that the Landlord will not be liable or responsible in any way for any personal injury or death that may be suffered or sustained by the Tenant or by any person for whom the Tenant is responsible who may be on the Property of the Landlord or for any loss of or damage or injury to any property, including cars and contents thereof belonging to the Tenant or to any other person for whom the Tenant is responsible.
85. The Tenant is responsible for any person or persons who are upon or occupying the Property or any other part of the Landlord's premises at the request of the Tenant, either express or implied, whether for the purposes of visiting the Tenant, making deliveries, repairs or attending upon the Property for any other reason. Without limiting the generality of the foregoing, the Tenant is responsible for all members of the Tenant's family, guests, servants, tradesmen, repairmen, employees, agents, invitees or other similar persons.
86. During the last 30 days of this Lease, the Landlord or the Landlord's agents will have the privilege of displaying the usual 'For Sale' or 'For Rent' or 'Vacancy' signs on the Property.

87. Time is of the essence in this Lease. Every calendar day except Saturday, Sunday or U.S. national holidays will be deemed a business day and all relevant time periods in this Lease will be calculated in business days. Performance will be due the next business day, if any deadline falls on a Saturday, Sunday or a national holiday. A business day ends at five p.m. local time in the time zone in which the Property is situated.

IN WITNESS WHEREOF Angela Cartmel and Edward Brice Taylor have duly affixed their signatures on this 9 of April, 2014.


Tenant: Angela Cartmel


Landlord: Edward Brice Taylor

MARCIA L. FERRANTE
Notary Public, State of South Carolina
My Commission Expires 6/24/2023

The Tenant acknowledges receiving a duplicate copy of this Lease signed by the Tenant and the Landlord on the 12 day of May, 2014.

Tenant: Angela Cartmel

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	SECOND JUDICIAL DISTRICT
ANGELA CARTMEL	)	CASE NO. 15-CP-02-01181
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANT'S MEMORANDUM OF
	)	LAW IN SUPPORT OF MOTION TO
EDWARD BRICE TAYLOR	)	COMPEL ARBITRATION
	)	
Defendant.	)	
	)	

COMES NOW THE Defendant Edward Brice Harker, who by and through his undersigned counsel would submit the following Memorandum of Law in Support of his motion to compel Arbitration and Mediation.

FACTUAL AND PROCEDURAL BACKGROUND

On May 9, 2014, the parties entered into a "Residential Lease Agreement" ("Agreement") for 2694 Camp Rawls Road in Wagener, South Carolina, 29164 – which is located in Aiken County ("Property").

The Agreement defines the "Tenant" as the Plaintiff, Angela Cartmel, and the Defendant Edward Brice Taylor is defined as the "Landlord." Both the parties were and remain South Carolina residents.

No party disputes that it is an otherwise valid contract. At ¶ 1 of the Agreement, the parties acknowledged it was actually a "[r]ent to own contract for a five-year lease" which would allow the Plaintiff residential use and to keep horses.

Importantly, the Agreement at ¶ 1 also says that "[t]he tenant may use part of the property for the following home-based business: the construction of horse jumps." It is undisputed that the Plaintiff did, in fact, establish a horse-jump construction business.

At ¶ 61, the Agreement provides "[i]f any dispute relating to this Lease between the Landlord and Tenant is not resolved [by informal discussion] ... the parties agree to submit the issue first before a non-binding mediator and to an arbitrator in event the mediation fails. The decision of the arbitrator will be binding on the parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediations or arbitrations will be paid by the Tenant."

At ¶ 29, however, the Agreement provides that the prevailing party (not just the Landlord if he prevails) is entitled to recover reasonable attorneys' fees "in addition to all the sums either party may be called on to pay" – i.e., a mechanism to allow the Tenant to recover costs if she prevails.

The Plaintiff initiated this suit in the Aiken County Court of Common Pleas. Despite due demand in the Answer and correspondence between the parties, Plaintiff refuses to engage in either mediation or arbitration. Defendant filed the instant motion before any discovery has taken place. In the intervening months, no written discovery or depositions have taken place, and no other case-dispositive motions have been filed.

LEGAL STANDARD

1. Governing Law & Applicability of the FAA.

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The South Carolina courts will enforce arbitration agreement under the Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1 *et seq.*, in transactions that involve interstate commerce, "regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, n. 3, 542 S.E.2d 360, 363, n.3 (2001)(emphasis added).

"Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013); *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117.

2. Burden of Proof.

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 269, 776 S.E.2d 91, 94 (Ct. App. 2015); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014).

3. Policy & Strong Presumption in Favor of Arbitrability.

It is black letter law in South Carolina that "any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration (emphasis added)." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." See *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012)). Both federal and state public policy strongly favor the arbitration of disputes. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007). A court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. Moreover, because the United States Supreme Court confirmed in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834 (1995) that the FAA is coextensive with the Commerce Clause of the U.S. Constitution, the South Carolina Supreme Court has accordingly held that arbitration agreements

enjoy a strong presumption of validity in federal and state courts on this ground as well. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379-380, 759 S.E.2d 727, 731-732 (2014); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

LEGAL ARGUMENT

Plaintiff has not met her burden of showing the claims at issue are not suitable for arbitration. She ignores the applicability of the FAA. She argues only: (I) the Agreement does not meet the technical requirements of the South Carolina Uniform Arbitration Act (SCUAA); and (II) the Arbitration provision is unconscionable. The matter does substantially impact interstate commerce because the Plaintiff operated a show-jump construction business as part of the lease. Thus, the Court should compel arbitration.

A. Technical Requirements of SCUAA Are Not Dispositive if FAA Applies.

Plaintiff's first argument is the failure of the Agreement to meet the technical requirements of S.C. Code Ann. § 15-48-10. Defendant concedes that the arbitration provision is not underlined and does not appear on the first page of the contract, but it is not dispositive if the FAA applies. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) (holding that where an agreement does not meet the technical requirements of the SCUAA, that fact is not dispositive to compelling arbitration if the FAA applies); see also *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996) ("If the arbitration agreement in the instant controversy is covered by the FAA, then ... the FAA preempts S.C. Code Ann. § 15-48-10(a); *Walden v. Harrelson Nisan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325-326 (Ct. App. 2012). For enforcement, the FAA only requires proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving "commerce." 9 U.S.C. § 2 (1947). As Plaintiff concedes in her Memorandum, this 'in writing' requirement the arbitration be written is met at ¶ 61 of the contract. Thus, the issue at bar is whether the contract

contemplates interstate commerce, irrespective of the technical requirements of the SCUAA. *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315.

B. The Contract Does Impact Interstate Commerce, and thus the FAA Applies.

Defendant can find no South Carolina case that directly analyzes the applicability of the FAA to a lease arrangement – either commercial or residential. In *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317-318 (2012), the Supreme Court noted that the FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce – the so-called “real estate” exception. This is probably Plaintiff’s best argument, but was not advanced by Plaintiff in her memorandum of law.

¶ 1 of the Agreement, however, specifically provided that the Plaintiff could and would establish a “home-based business” for “the construction of horse jumps.” It is undisputed that the Plaintiff did, in fact, establish business for horse-jump construction; there is no evidence that this business-use was not a central provision in the Agreement.

The Defendant submits that the fact the Agreement contemplates the use of the land for a “home-based” business for the manufacturing of horse jumps removes this matter from the arena of a mere residential real estate transaction and converts it to a commercial enterprise governed by Commerce Clause of the U.S. Constitution (Art. I, Sec. 8, Clause 3) and, therefore, the FAA. 9 U.S.C. § 1 *et seq.*; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379-380, 759 S.E.2d 727, 731-732 (2014); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

Since horse-jumps are a part of the national commerce of horse-jumping and other equestrian pursuits – so important to the Aiken County economy – the Plaintiff should not be heard to claim her horse-jump construction business was not a commercial activity that impacts interstate

business. It goes beyond "real estate development" or "a residential real estate matter." The business component, being not ancillary, but central is sufficient to distinguish this case from *Bradley*. Combined with the strong policy in favor of compelling arbitration and that all doubt must be resolved in favor of arbitration, the Court should grant the instant motion. , 402 S.C. 100, at 109, 739 S.E.2d at 213; *Cape Romain*, 405 S.C. at 125, 747 S.E.2d at 466; *Chassereau*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

C. Unconscionability

Plaintiff's final grounds to avoid arbitration (without any citation to authority) is that because the arbitration agreement at Paragraph 61 requires her to pay the cost of arbitration and mediation, it is therefore unconscionable. The Court should reject this unconscionability argument.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007)(citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668. Our supreme court adopted the Fourth Circuit's view, and noted "[i]t is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citation omitted). The *Simpson* Court noted, "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability.... Instead, we emphasize the importance of

a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

Here, the issue raised by Plaintiff is not that the requirement to arbitrate is unconscionable itself – merely that the cost provision at ¶ 61 is purportedly unconscionable ("the costs of the mediation or arbitration shall be paid by the Tenant.") The arbitration clause itself specifically contemplates being geared to an unbiased decision by a neutral. *Id.* Thus, it meets the test of *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

Plaintiff ignores, however, ¶ 25 ("Attorneys' Fees") which provides: "in the event that any action is filed in relation to this Lease, the unsuccessful party in the action will pay the successful party, in addition to all the sums that either party may be called on to pay, a reasonable sum for the successful party's attorneys' fees (emphasis added)." Defendant submits that when ¶¶ 61 and 25 are construed together, according to their plain and ordinary meaning, the Plaintiff is only required to front the costs of mediation and arbitration: but recovers them if she prevails, along with attorneys' fees. So few lease arrangements have an attorneys' fees and cost shift for a prevailing tenant as to be vanishingly rare, yet this one does.

Thus, this is not a case where the second prong of unconscionability can be met. An honest and fair person could accept this deal – which is evidenced by the fact the Plaintiff did. Moreover, our supreme court acknowledged that "in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause. *Simpson*, 373 S.C. at 35 n. 9, 644 S.E.2d at 674 n. 9. As there is a severability clause in this Agreement (¶ 31), that is the appropriate remedy if the Court disagrees.

CONCLUSION

Based on the foregoing the motion should be granted.

Respectfully Submitted,

BROWN & VARNADO, LLC



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Attorneys for Defendant Edward Brice Taylor

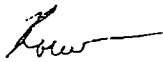
January 25, 2016
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the below date, a copy of the attached *Defendant's Memorandum of Law in Support of Motion to Compel Arbitration* was placed in an envelope, with first-class postage pre-paid, and mailed to:

VIA HAND DELIVERY AND E-MAIL

Bradford M. Owensby, Esquire
319 Park Avenue SE
Aiken, SC 29801
Attorney for Plaintiff Angela Cartmel



Robert B. Varnado

January 25, 2016
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Angela Cartmel

[] Plaintiff,

v.

Edward Brice Taylor,

[x] Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-02-01181

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

<u>Name, S.C. Bar no. and address of plaintiffs attorney</u> Bradford M. Owensby, Esquire 319 Park Avenue SE Aiken, SC 29801 telephone: 803-648-5777 fax: 803-648-5228		<u>Name, S.C. Bar no. and address of defendants attorney</u> Robert B. Varnado, Esquire Alexis M. Wimberly, Esquire Brown & Varnado LLC P.O. Box 1127 Mt. Pleasant, SC 29465 telephone: (843) 737-7300 fax: (843) 654-5109 e-mail: rvarnado@brown-varnado.com	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion to Reconsider</u> Estimated Time Needed: <u>10 Min</u>		Court Reporter Needed: <u>None</u>	
SECTION II: Motion/Order Type			
☒ Written motion/order attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <u>Robert Varnado</u> Signature of Attorney for Defendant February <u>10</u>, 2016 Date submitted			
☒ PAID B AMOUNT: <u>\$25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ Sexually Violent Predator Act Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judges instructions Name of Court Reporter: _____ ☐ Other: _____ ☐ State Agency v. Indigent Party ☐ Motion for Execution (Rule 69, SCRCP)		SECTION III: Motion Fee	
JUDGE'S SECTION		CLERKS VERIFICATION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE _____ CODE: _____ Date: _____	
Collected by: _____ (print name)		DATE FILED _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED B AMOUNT DUB: _____		SCCA/233 (11-03)	

COPY
ORIGINAL FILED
FEB 15 2016
8:30am
AIKEN COUNTY
CLERK OF COURT

Defendant.

**NOTICE OF MOTION AND
MOTION TO RECONSIDER**

COPY
ORIGINAL FILED
FEB 15 2016
8:30 AM
AIKEN COUNTY

2. No party disputes that it is an otherwise valid contract. At ¶ 1 of the Agreement, the parties acknowledged it was actually a "[r]ent to own contract for a five year lease" which

would allow the Plaintiff residential use and to keep horses. Importantly, the Agreement at ¶ 1 also says that “[t]he tenant may use part of the property for the following home-based business: the construction of horse jumps.” It is undisputed that the Plaintiff did, in fact, establish a horse-jump construction business.

3. At ¶ 61, the Agreement provides “[i]f any dispute relating to this Lease between the Landlord and Tenant is not resolved [by informal discussion] ... the parties agree to submit the issue first before a non-binding mediator and to an arbitrator in event the mediation fails. The decision of the arbitrator will be binding on the parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediations or arbitrations will be paid by the Tenant.” At ¶ 29, the Agreement provides that the prevailing party (not just the Landlord if he prevails) is entitled to recover reasonable attorneys’ fees “in addition to all the sums either party may be called on to pay” — i.e., a mechanism to allow the Tenant to recover costs if she prevails.

4. The Plaintiff initiated this suit in the Aiken County Court of Common Pleas on May 14, 2015. In her Complaint at ¶¶ 4, 20 and 21 she operated a business and she alleges damages arising from the loss of her business.

5. Despite due demand in the Answer and correspondence between the parties, Plaintiff declines to engage in either mediation or arbitration. Defendant timely filed his Answer on August 17, 2015 and serves the instant motion on September 27, 2015 before any discovery has taken place. In the intervening months, no written discovery or depositions have taken place, and no other case-dispositive motions have been filed.

6. The matter came to a hearing on January 25, 2016. The Plaintiff submitted no affidavit or testimony prior to the hearing. This Court signed the Order denying the motion on February 4, 2015 and it was filed February 8, 2015.

LEGAL ARGUMENTS

7. The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The South Carolina courts will enforce an arbitration agreement under the Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1 *et seq.*, in transactions that involve interstate commerce, "regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, n. 3, 542 S.E.2d 360, 363, n.3 (2001)(emphasis added). "Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013); *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117. The Court should alter, amend or reconsider its judgment to include this black letter law.

8. "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 269, 776 S.E.2d 91, 94 (Ct. App. 2015); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). The Court should alter, amend or reconsider its judgment to state that it required Plaintiff to meet this burden and establish and establish how she met it.

9. It is black letter law in South Carolina that "any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration (emphasis added)." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). "There is a strong presumption

in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." See *Cape Romain Contractors, Inc. v. Wando E, LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012)). Both federal and state public policy strongly favor the arbitration of disputes. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007). A court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. Moreover, because the United States Supreme Court confirmed in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834 (1995) that the FAA is coextensive with the Commerce Clause of the U.S. Constitution, the South Carolina Supreme Court has accordingly held that arbitration agreements enjoy a strong presumption of validity in federal and state courts on this ground as well. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379-380, 759 S.E.2d 727, 731-732 (2014); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). The Court should alter, amend or reconsider its judgment to include this black letter law; how it applied the strong policy favoring arbitration and the validity of arbitration contracts; and how it found with positive assurance the arbitration clause is not susceptible to any interpretation covering the dispute.

10. Plaintiff has not met her burden of showing the claims at issue are not suitable for arbitration. She does not deny the validity of the Agreement, nor the fact the arbitration provision is contained within it. Her complaint makes factual allegations that the fire she blames on the Defendant caused her to have to close of her show-jump construction business, for which she seeks damages. The show-jump construction business is the same business established in the Agreement. The Plaintiff presented absolutely no testimony or evidence, by affidavit or

otherwise, the that the horse-jump business is limited to the State of South Carolina; the Court cannot infer that, either. Plaintiff concedes – and the Order finds – that this is a mixed-use lease, with both residential and commercial aspects. Thus, the Court is without any factual or evidentiary basis to make a factual finding that the business aspects of the lease are intrastate only, and do not impact interstate commerce because the Plaintiff operated a business as part of the lease. Thus, the Court should alter, amend and/or reconsider its Order and compel arbitration for the foregoing reasons.

11. The failure of the Agreement to meet the technical requirements of S.C. Code Ann. § 15-48-10 is irrelevant under these circumstances if the FAA applies and the Court should alter, amend and/or reconsider its Order to make this clear. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) (holding that where an agreement does not meet the technical requirements of the SCUAA, that fact is not dispositive to compelling arbitration if the FAA applies); see also *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 459–60, 476 S.E.2d 149, 152 (1996) (“If the arbitration agreement in the instant controversy is covered by the FAA, then ... the FAA preempts S.C. Code Ann. § 15-48-10(a); *Walden v. Harrelson Nisan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325-326 (Ct. App. 2012). For enforcement, the FAA only requires proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving “commerce.” 9 U.S.C. § 2 (1947). As Plaintiff conceded in her Memorandum and at the hearing, this ‘in writing’ requirement the arbitration be written is met at ¶ 61 of the contract. Thus, the issue at bar is whether the contract contemplates interstate commerce, irrespective of the technical requirements of the SCUAA. *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315.

12. Contrary to the Court's ruling on page 2, the contract is not ambiguous at all and the Court should alter, amend and/or reconsider its order on this point, as well. "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. [A court is] without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." (internal citations and punctuation omitted). *South Carolina Dep't of Transportation v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008). "Leases are construed in the same manner as contracts." *Id.*, 379 S.C. at 656, 667 S.E.2d at 13. "The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into. The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract. In general, therefore, parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy." *Id.*, 379 S.C. at 656-657, 667 S.E.2d at 13-14. There was no confusion that the parties intended at the commencement of the lease that the Plaintiff would use the real estate partly for a commercial business – which she did and for which she now seeks monetary damages for the loss of the business. Thus, the Court should therefore alter, amend and/or reconsider this finding in the Order.

13. The true issue before the Court is not, as the Order states, "whether the residential with the option to purchase agreement effects [sic] interstate commerce." Instead, the real issue is

whether the a “mixed” use lease that has both residential and commercial components meets the “real estate” exception to the FAA established in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317-318 (2012) or falls under the purview of the FAA. 9 U.S.C. § 1 *et seq.*; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379-380, 759 S.E.2d 727, 731-732 (2014). The facts are completely distinguishable from *Bradley* inter alia because in that case the plaintiffs bought a fully completed home from Brentwood Homes, whereas in this case the commercial activity (i.e., the horse jump construction business) was ongoing. In any event, the contract was not “strictly” limited to residential real estate. This fact pattern tests whether the court will apply the standard that “any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration (emphasis added)” *Landers*, 402 S.C. at 109, 739 S.E.2d at 213, or whether the real estate exception in *Bradley* trumps the increasingly wider and wider net of the FAA. Thus, the Court should therefore alter, amend and/or reconsider this statement of the issues in the order.

14. Because the lease agreement specifically provided that the Plaintiff could use the land to establish a “home-based business” for “the construction of horse jumps” the Court should not have found on page 3 of the Order that the contract was merely one “for the lease/purchase of property situated in Aiken County, South Carolina” – nor on page 4 that “[i]n the instant case, between the Plaintiff and the Defendant, the transaction does not touch or effect interstate commerce.” Instead, the Court should alter, amend and/or reconsider its ruling and find the mixed use lease does contemplate a commercial enterprise governed by Commerce Clause of the U.S. Constitution (Art. I, Sec. 8, Clause 3) and, therefore, the FAA. 9 U.S.C. § 1 *et seq.*; ¶ 1 of the Agreement. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379-380, 759 S.E.2d 727, 731-732 (2014); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668

(2007). Since horse-jumps are a part of the national commerce of horse-jumping and other equestrian pursuits—so important to the Aiken County economy—the Plaintiff should not be heard to claim her horse-jump construction business was not a commercial activity that impacts interstate business. It goes beyond “real estate development” or “a residential real estate matter.” The business component is not ancillary but central is sufficient to further distinguish this case from *Bradley*. Combined with the strong policy in favor of compelling arbitration and that all doubt must be resolved in favor of arbitration, the Court should grant the instant motion. 402 S.C. 100, at 109, 739 S.E.2d at 213; *Cape Romain*, 405 S.C. at 125, 747 S.E.2d at 466; *Chassereau*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

15. The finding regarding the indemnification clause made on page 4 of the Order is irrelevant in light of the arguments made in paragraph

CONCLUSION

Based on the foregoing the Defendant respectfully requests that the motion be granted.

Respectfully Submitted,

BROWN & VARNADO, LLC



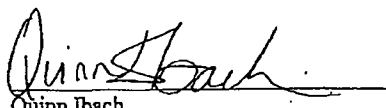
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rvarnado@brown-varnado.com
awimberly@brown-varnado.com
Attorneys for Defendant Edward Brice Taylor

February ¹⁰, 2016
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the below date, a copy of the attached *Notice of Motion and Motion to Reconsider* was placed in an envelope, with first-class postage pre-paid, and mailed and emailed to:

Bradford M. Owensby, Esquire
319 Park Avenue SE
Aiken, SC 29801


Quinn Ibach
Litigation Paralegal

February 10, 2016
Mount Pleasant, South Carolina

1 STATE OF SOUTH CAROLINA) IN COMMON PLEAS
2 COUNTY OF RICHLAND) COURT
3)
4 ANGELA CARTMEL,)
5) TRANSCRIPT
6 -V-) OF
7) RECORD
8 EDWARD BRICE TAYLOR,) 2015-CP-02-01181
9 DEFENDANT.)

10

11 JANUARY 25, 2016

12 RICHLAND, SOUTH CAROLINA

13

14 B-E-F-O-R-E:

15 HONORABLE CASEY L. MANNING, JUDGE;

16

17 A-P-P-E-A-R-A-N-C-E-S:

18 FOR THE PLAINTIFF:

19 BRADFORD M. OWENSBY, ESQ.

20

21

22 FOR THE DEFENDANT:

23 ROBERT B. VARNADO, ESQ.

24

25

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I-N-D-E-X

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PG.

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MOTION:

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CERTIFICATE OF REPORTER:

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1 (The following proceedings were held on
2 January 25, 2016.)

3 THE COURT: Good morning.

4 MR. VARNADO: Morning, Your Honor. May it please
5 the Court. I'm Rob Varnado, I represent the Defendant,
6 Edward Brice Taylor. This is my motion to compel
7 arbitration and mediation. I filed a memorandum of law and
8 sent it to your clerk this morning and it's -- I would ask
9 that Your Honor --

10 THE COURT: Did you e-mail it this morning? What
11 time?

12 MR. VARNADO: I did. Probably about 8:00.

13 THE COURT: Okay.

14 MR. VARNADO: I worked on it yesterday.

15 THE COURT: Well, go ahead. Go ahead.

16 MR. VARNADO: And I will hand it up.

17 THE COURT: I think we were on the road by 8:00.

18 MR. VARNADO: Basically, Your Honor, this is an
19 unusual case for an arbitration, but I submit to you that
20 what's proper before you is does the federal arbitration act
21 apply? There was a lease from some land in Wagner, here in
22 Aiken County. My client's the landlord. Mr. Owensby's
23 client is the tenant. They signed a lease.

24 Paragraph one of the lease said it's for a
25 residence and that she could have a show jump business. She

1 would manufacture these horse jumps. There was a fire.
2 There was a dispute between the landlord and the tenant.
3 Mr. Owensby filed a lawsuit. In the Answer, I raised
4 arbitration, filed a motion to compel arbitration, so I
5 don't think there's any sort of waiver issue. The agreement
6 at paragraph 61 said that the parties should mediate and if
7 they can't mediate, then there would be an arbitrator, a
8 neutral person, who would render an opinion and make a final
9 decision.

10 So when I was preparing this, Your Honor, I mean,
11 I told Mr. Owensby in the motion this is about the federal
12 arbitration act. The contact does not comply with the South
13 Carolina uniform act. It's not -- over the top, not in all
14 caps, not underlined, but we submit that the jurisprudence
15 over the last 10 years coming out of the Supreme Court, the
16 Court of Appeals stands for the proposition that if the
17 federal arbitration act applies --

18 THE COURT: The people of this state never thought
19 very much of the federal government. Go ahead.

20 (Laughter.)

21 MR. VARNADO: They learned the hard way.

22 So the federal act preempts the state act if
23 there's interstate commerce. So the question before Your
24 Honor is does the fact that she operated a show jump
25 business on that land create interstate commerce? And I

1 would submit that it does. And I would further submit in
2 her Answer -- I mean, her Complaint, rather, she says this
3 fire cost me my business. I had a business here. I was
4 doing a business and I have business damages. I think that
5 alone kicks it to interstate commerce.

6 Now, when I was preparing this motion, I ran
7 across this case called Bradley -- the Bradley case. And I
8 cite it in my memorandum, Your Honor. And the Bradley case
9 is against -- Bradley vs. Brentwood Homes. And the Supreme
10 Court in 2012 said well, there's this real estate exception.
11 We're going to say that the development of real estate and
12 residential property is an exception to the federal
13 arbitration act.

14 THE COURT: So put something on land and have a
15 horse jump over that becomes real estate connected?

16 MR. VARNADO: I would submit that if it was simply
17 just a residence, I couldn't be here today, I would withdraw
18 the motion, but because she had a business, because she
19 admits in her complaint she has a business, the horse jump
20 business that that made it interstate commerce. And as a
21 result, the FAA applies. And I would ask Your Honor as you
22 consider this motion to -- just to raise to Your Honor, you
23 know, the fact that there's been a lot of recent
24 jurisprudence in the last five or six years. And if the
25 arbitration agreement affects interstate commerce, it should

1 be enforced under the FAA without having to look to see
2 whether or not it complies with the technical requirements
3 of the South Carolina act.

4 I would further address Your Honor to some case
5 law, Hall vs. Greentree Servicing, which says the party
6 opposing has the burden of proof to show that it doesn't
7 affect interstate commerce.

8 And then, finally, Your Honor, there's a lot of
9 case law that's come out that says that any doubt concerning
10 arbitration should be -- by the Court should be resolved in
11 favor of arbitration, that there's a strong policy favoring
12 arbitration, that arbitration provisions and contracts are
13 presumed to be valid.

14 And then the Zabensky, which is a pretty similar
15 case, which came out a few years back. A Court should order
16 arbitration unless the Court can say with positive assurance
17 that the arbitration clause is not susceptible to any other
18 interpretation that would prevent it from being arbitrated.

19 So that -- I think that's it, Judge, is the horse
20 jump business, does it take it out of a residence? No horse
21 jump business, I don't think I'm here. Horse jump business,
22 I think it's got to arbitrate.

23 THE COURT: How long had the horses been jumping
24 on his property?

25 MR. VARNADO: I have no idea, Judge.

1 THE COURT: All right. Thank you, sir.

2 MR. VARNADO: We haven't done any discovery. The
3 only -- one thing Mr. Owensby in his memo raised was --

4 THE COURT: My question is this, had she planned a
5 horse jump business or were horses actually jumping on the
6 property?

7 MR. VARNADO: In her complaint, she said that she
8 had a business and that she had to lose the business because
9 of the fire, which she blames on my client.

10 THE COURT: Okay.

11 MR. VARNADO: And then there is one small, Mr.
12 Owensby raises unconscionability. He says well, this
13 provision is unconscionable because it has a provision where
14 all the costs are to be borne by the tenant.

15 THE COURT: All right.

16 MR. VARNADO: And I would just say, Your Honor,
17 there's been some authority on that, but, basically,
18 unconscionability means either just such a dominant, you
19 know, negotiating position that it's like an adhesion
20 contract and it's take it or leave it, or that no reasonable
21 or fair person would ever do this deal. And I would say
22 that, you know, that with the other line of authority, which
23 says that the Court should let people make their own
24 contracts. And you also look further in this contract at
25 paragraph 25 that says prevailing party, not just the

1 prevailing landlord, but the prevailing party gets
2 attorney's fees and their costs reimbursed. So I think if
3 you look at that, the fact that if she wins, she gets
4 attorney's fees and her costs reimbursed doesn't make this
5 unconscionable. Thank you, Your Honor.

6 THE COURT: Thank you, sir. I guess you can call
7 this the trigger case.

8 MR. OWENSBY: Well, Your Honor, possibly.

9 THE COURT: Well, go ahead.

10 MR. OWENSBY: Your Honor, I passed up my
11 memorandum.

12 THE COURT: Yes, sir.

13 MR. OWENSBY: I hadn't seen -- I didn't know what
14 his argument was going to be until I walked in the office
15 this morning, but if you would please turn to the first
16 page, I attached the lease to it. Residential lease
17 agreement. Now, is this a residential lease agreement?
18 Yes, but it's also a lease to own. Paragraph one says that
19 this is a lease with option to purchase. This is actually
20 tantamount to a mortgage, Your Honor. However, this is for
21 residential. This is not for commercial.

22 The only recitation in here that states anything
23 about what she does for a living, it says the tenant may
24 use, may use part of the property for a home-based business.

25 Your Honor, yeah, horses jump on the property.

1 Yes, she does make the fences. I -- it's a horse jump.
2 It's pieces of wood that horses jump over. That just
3 happens to be what she does for a living. If I go into a
4 lease with option to purchase and I happen to be a
5 commercial truck driver and I own my own truck, I'm engaging
6 in interstate commerce, but it has nothing to do with the
7 nature of my transaction to purchase property. It's simply
8 a recitation of what I do for a living, Your Honor.

9 He did bring up Bradley vs. Brentwood. It's a
10 2012 case, Your Honor. In that particular case, which is
11 not unlike this one, Brentwood Homes tried to bring this
12 under the view of the FAA in a similar way. Said well,
13 actually, in the contract, it recites interstate commerce
14 because you're going to get a home warranty. And that home
15 warranty is from any national company. Our Supreme Court
16 said no, that does not take this out of the realm of a real
17 estate transaction.

18 Additionally, Brentwood provided an affidavit to
19 the Court, which stated J.P. Morgan is financing this
20 transaction. It's obviously interstate commerce. Once
21 again, our Supreme Court says no, this is a residential real
22 property sale. And then in quoting our Supreme Court, and
23 they're quoting District of Kentucky federal court case, it
24 said, ultimately, the Court included that a residential real
25 estate sales contract is not evidence or involve interstate

1 commerce, quote, unquote. And it further goes on to say,
2 effects of interstate commerce of sale of residential real
3 estate is inherently intrastate. This is nothing but a
4 contract for the sale of residential real estate. It just
5 happens that she has a home-based business.

6 I believe in that same case, it also said the
7 Court was not --

8 THE COURT: That's enough. Thank you, gentlemen
9 for your lively presentation. I will prepare a form four.
10 The prevailing party is invited to submit a form order.
11 Thank you, both.

12 MR. VARNADO: Okay.

13 MR. OWENSBY: Thank you, Your Honor.

14 THE COURT: All right.

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1 COUNTY OF RICHLAND)

2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled Angela Cartmel Vs. Edward Brice
5 Taylor Case No. 2015-CP-02-01181, at the Aiken County
6 Courthouse, January 25, 2016.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 11 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 9th day of June, 2016.

15

16 _____
Crystal Holmes, Official Court Reporter

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Residential Lease Agreement

THIS LEASE (the "Lease") dated this 9 ^{May} of ~~April~~, 2014

BETWEEN:

Edward Brice Taylor

(the "Landlord")

OF THE FIRST PART

- AND -

Angela Cartmel

(the "Tenant")

OF THE SECOND PART

IN CONSIDERATION OF the Landlord leasing certain premises to the Tenant, the Tenant leasing those premises from the Landlord and the mutual benefits and obligations provided in this Lease, the receipt and sufficiency of which consideration is hereby acknowledged, the parties to this Lease agree as follows:

Leased Property

1. The Landlord agrees to rent to the Tenant the mobile home, municipally described as 2694 Camp Rawls Road, Wagener, Aiken, South Carolina 29164 (the "Property"), for use as residential premises only. The Property is more particularly described as follows: This is a rent to own Contract for a 5 year lease. Contract will be rewritten prior to the termination of this lease. Land is included with this lease with the usage of the 3.86 acres for Horses. Fencing is approved and structures are approved. If tenant vacates the premises then all structures will be left in tact to landlord. The Tenant may also use part of the Property for the following home-based business: Construction of Horse Jumps. The Tenant is responsible for all permits and licenses relating to this home-based business and the Tenant indemnifies the Landlord of all liability, costs, and fees

Security Deposit

13. On execution of this Lease, the Tenant will pay the Landlord a security deposit of \$750.00 (the "Security Deposit").
14. The Landlord will hold the Security Deposit at an interest bearing account solely devoted to security deposits at _____ located at _____.
15. The Landlord will return the Security Deposit at the end of this tenancy, less such deductions as provided in this Lease but no deduction will be made for damage due to reasonable wear and tear nor for any deduction prohibited by the Act.
16. During the term of this Lease or after its termination, the Landlord may charge the Tenant or make deductions from the Security Deposit for any or all of the following:
 - a. repair of walls due to plugs, large nails or any unreasonable number of holes in the walls including the repainting of such damaged walls;
 - b. repainting required to repair the results of any other improper use or excessive damage by the Tenant;
 - c. unplugging toilets, sinks and drains;
 - d. replacing damaged or missing doors, windows, screens, mirrors or light fixtures;
 - e. repairing cuts, burns, or water damage to linoleum, rugs, and other areas;
 - f. any other repairs or cleaning due to any damage beyond normal wear and tear caused or permitted by the Tenant or by any person whom the Tenant is responsible for;
 - g. the cost of extermination where the Tenant or the Tenant's guests have brought or allowed insects into the Property or building;
 - h. repairs and replacement required where windows are left open which have caused plumbing to freeze, or rain or water damage to floors or walls;
 - i. replacement of locks and/or lost keys to the Property and any administrative fees associated with the replacement as a result of the Tenant's misplacement of the keys; and

- j. any other purpose allowed under this Lease or the Act.

For the purpose of this clause, the Landlord may charge the Tenant for professional cleaning and repairs if the Tenant has not made alternate arrangements with the Landlord.

17. The Tenant may not use the Security Deposit as payment for the Rent.

Quiet Enjoyment

18. The Landlord covenants that on paying the Rent and performing the covenants contained in this Lease, the Tenant will peacefully and quietly have, hold, and enjoy the Property for the agreed term.

Inspections

19. The Tenant acknowledges that the Tenant inspected the Property, including the grounds and all buildings and improvements, and that they are, at the time of the execution of this Lease, in good order, good repair, safe, clean, and tenantable condition.
20. At all reasonable times during the term of this Lease and any renewal of this Lease, the Landlord and its agents may enter the Property to make inspections or repairs, or to show the Property to prospective tenants or purchasers upon the greater of 24 hours notice to the Tenant and any notice required by the Act.

Renewal of Lease

21. Upon giving written notice no later than 60 days before the expiration of the term of this Lease, the Tenant may renew this Lease for an additional term. All terms of the renewed lease will be the same except for this renewal clause.

Tenant Improvements

22. The Tenant will obtain written permission from the Landlord before doing any of the following:
- a. applying adhesive materials, or inserting nails or hooks in walls or ceilings other than two small picture hooks per wall;
 - b. painting, wallpapering, redecorating or in any way significantly altering the appearance of the Property;
 - c. removing or adding walls, or performing any structural alterations;

- d. installing a waterbed(s);
- e. changing the amount of heat or power normally used on the Property as well as installing additional electrical wiring or heating units;
- f. placing or exposing or allowing to be placed or exposed anywhere inside or outside the Property any placard, notice or sign for advertising or any other purpose; or
- g. affixing to or erecting upon or near the Property any radio or TV antenna or tower.

Utilities and Other Charges

- 23. The Tenant is responsible for the payment of the following utilities and other charges in relation to the Property: electricity, water, internet, cable, telephone, garbage collection and garbage collection.

Insurance

- 24. The Tenant is hereby advised and understands that the personal property of the Tenant is not insured by the Landlord for either damage or loss, and the Landlord assumes no liability for any such loss. The Tenant is advised that, if insurance coverage is desired by the Tenant, the Tenant should inquire of Tenant's insurance agent regarding a renter's policy of insurance.
- 25. The Tenant is not responsible for insuring the Property for either damage or loss to the structure, mechanical or improvements to the building of the Property, and the Tenant assumes no liability for any such loss.
- 26. The Tenant is responsible for insuring the Property for liability insurance for the benefit of the Tenant and the Landlord.
- 27. The Tenant will provide proof of such insurance to the Landlord upon request.

Abandonment

- 28. If at any time during the term of this Lease, the Tenant abandons the Property or any part of the Property, the Landlord may, at its option, enter the Property by any means without being liable for any prosecution for such entering, and without becoming liable to the Tenant for damages or for any payment of any kind whatever, and may, at the Landlord's discretion, as agent for the Tenant, rent the Property, or any part of the Property, for the whole or any part of the then unexpired term, and may receive and collect all rent payable by virtue of such renting, and, at the Landlord's option, hold the Tenant liable for any difference between the Rent that would have been payable under this Lease during the balance of the unexpired term, if this Lease had

continued in force, and the net rent for such period realized by the Landlord by means of the renting. If the Landlord's right of re-entry is exercised following abandonment of the Property by the Tenant, then the Landlord may consider any personal property belonging to the Tenant and left on the Property to also have been abandoned, in which case the Landlord may dispose of all such personal property in any manner the Landlord will deem proper and is relieved of all liability for doing so.

Attorney Fees

29. In the event that any action is filed in relation to this Lease, the unsuccessful party in the action will pay to the successful party, in addition to all the sums that either party may be called on to pay a reasonable sum for the successful party's attorney fees.

Governing Law

30. It is the intention of the parties to this Lease that the tenancy created by this Lease and the performance under this Lease, and all suits and special proceedings under this Lease, be construed in accordance with and governed, to the exclusion of the law of any other forum, by the laws of the State of South Carolina, without regard to the jurisdiction in which any action or special proceeding may be instituted.

Severability

31. If there is a conflict between any provision of this Lease and the applicable legislation of State of South Carolina (the "Act"), the Act will prevail and such provisions of the Lease will be amended or deleted as necessary in order to comply with the Act. Further, any provisions that are required by the Act are incorporated into this Lease.
32. In the event that any of the provisions of this Lease will be held to be invalid or unenforceable in whole or in part, those provisions to the extent enforceable and all other provisions will nevertheless continue to be valid and enforceable as though the invalid or unenforceable parts had not been included in this Lease and the remaining provisions had been executed by both parties subsequent to the expungement of the invalid provision.

Amendment of Lease

33. Any amendment or modification of this Lease or additional obligation assumed by either party in connection with this Lease will only be binding if evidenced in writing signed by each party or an authorized representative of each party.

Assignment and Subletting

34. The Tenant will not assign this Lease, or sublet or grant any concession or license to use the Property or any part of the Property. Any assignment, subletting, concession, or license, whether

by operation of law or otherwise, will be void and will, at Landlord's option, terminate this Lease.

Additional Clause

35. This will be a rent to own property. Should the Tenant vacate the premises or not pay the landlord, all monies paid to date by the Tenant will be non refundable and become the Landlords. After the five year lease the tenant has the option to make a balloon payment. There will be an addendum attached giving the breakdown of final payment of the land and home. Should for some reason Tenant decides to pay off the Mortgage, there will be an additional charge of \$10,000.00 in a lump sum payment due immediately to the Landlord (For Land owned by tenant).

Then, With a check from the Tenant, the Landlord will deliver the check to the Mortgage company and pay the balance owed and provide the Tenant a Deed for the residence and property. If a balloon payment is not made at that time then the Tenant has the option for an additional five year lease and agrees to pay the balance of the home mortgage and land payment as described above (Balloon Payment). Cost of the Mortgage Payoff will be resubmitted to the Tenant in a separate addendum.

Damage to Property

36. If the Property, or any part of the Property, will be partially damaged by fire or other casualty not due to the Tenant's negligence or willful act or that of the Tenant's employee, family, agent, or visitor, the Property will be promptly repaired by the Landlord and there will be an abatement of Rent corresponding with the time during which, and the extent to which, the Property may have been untenantable. However, if the Property should be damaged other than by the Tenant's negligence or willful act or that of the Tenant's employee, family, agent, or visitor and the Landlord decides not to rebuild or repair the Property, the Landlord may end this Lease by giving appropriate notice.

Maintenance

37. The Tenant will, at its sole expense, keep and maintain the Property and appurtenances in good and sanitary condition and repair during the term of this Lease and any renewal of this Lease.
38. Major maintenance and repair of the Property involving anticipated or actual costs in excess of \$100.00 per incident not due to the Tenant's misuse, waste, or neglect or that of the Tenant's employee, family, agent, or visitor, will be the responsibility of the Landlord or the Landlord's assigns.
39. In particular, the Tenant will keep the fixtures in the Property in good order and repair. The Tenant will, at Tenant's sole expense, make all required repairs to the plumbing, range, heating apparatus, and electric and gas fixtures whenever damage to such items will have resulted from

the Tenant's misuse, waste, or neglect or that of the Tenant's employee, family, agent, or visitor.

40. Where the Property has its own garden or grass area which is for the exclusive use of the Tenant and its guests, the Tenant will water, fertilize, weed, cut and otherwise maintain the garden or grass area in a reasonable condition including any trees or shrubs therein.
41. The Tenant will also perform the following maintenance in respect to the Property: Preventative maintenance on residence such as caulking all roof vents, skylights, and around chimney once and year. And any other maintenance she sees fit.

Care and Use of Property

42. The Tenant will promptly notify the Landlord of any damage, or of any situation that may significantly interfere with the normal use of the Property or to any furnishings supplied by the Landlord.
43. The Tenant will not make (or allow to be made) any noise or nuisance which, in the reasonable opinion of the Landlord, disturbs the comfort or convenience of other tenants.
44. The Tenant will keep the Property reasonably clean.
45. The Tenant will dispose of its trash in a timely, tidy, proper and sanitary manner.
46. The Tenant will not engage in any illegal trade or activity on or about the Property.
47. The Landlord and Tenant will comply with standards of health, sanitation, fire, housing and safety as required by law.
48. The Landlord will use reasonable efforts to maintain the Property in such a condition as to prevent the accumulation of moisture and the growth of mold, and to promptly respond to any written notices from the Tenant in relations to accumulation of moisture and visible evidence of mold.
49. The Tenant will use reasonable efforts to maintain the Property in such a condition as to prevent the accumulation of moisture and the growth of mold, and to promptly notify the Landlord in writing of any moisture accumulation that occurs or of any visible evidence of mold discovered by the Tenant.

50. The Tenant agrees that no signs will be placed or painting done on or about the Property by the Tenant or at the Tenant's direction without the prior, express, and written consent of the Landlord. Notwithstanding the above provision, the Tenant may place election signs on the Property during the appropriate time periods.
51. If the Tenant is absent from the Property and the Property is unoccupied for a period of four consecutive days or longer, the Tenant will arrange for regular inspection by a competent person. The Landlord will be notified in advance as to the name, address and phone number of the person doing the inspections.
52. The hallways, passages and stairs of the building in which the Property is situated will be used for no purpose other than going to and from the Property and the Tenant will not in any way encumber those areas with boxes, furniture or other material or place or leave rubbish in those areas and other areas used in common with any other tenant.
53. Footwear which are soiled or wet should be removed at the entrance to the building in which the Property is located and taken into the Tenant's Property.
54. At the expiration of the term of this Lease, the Tenant will quit and surrender the Property in as good a state and condition as they were at the commencement of this Lease, reasonable use and wear and tear excepted.

Carbon Monoxide Alarm

55. Prior to the Tenant taking possession of the Property, the Landlord will ensure that any carbon monoxide alarm in place is operational. Upon possession, the Landlord will provide the Tenant with working batteries, for all carbon monoxide alarms. The Landlord will be responsible for the repair and replacement of any missing or nonfunctional carbon monoxide alarm upon written request of the Tenant.
56. The Tenant will keep, test, and maintain in good repair all the carbon monoxide alarms in the Property. The Tenant must provide the Landlord or the Landlord's agent with a written notice if any carbon monoxide alarm needs its batteries replaced or if the alarm is stolen, removed, missing, or not operational. Further, the Tenant must notify the Landlord, or its agent, in writing of any deficiency in any carbon monoxide alarm that the Tenant is unable to fix.
57. No person may remove any batteries from, or in any way render inoperable, a carbon monoxide alarm except as part of the process to inspect, maintain, repair or replace the alarm or batteries in the alarm.

Hazardous Materials

58. The Tenant will not keep or have on the Property any article or thing of a dangerous, flammable, or explosive character that might unreasonably increase the danger of fire on the Property or that might be considered hazardous by any responsible insurance company.

Rules and Regulations

59. The Tenant will obey all rules and regulations posted by the Landlord regarding the use and care of the building, parking lot, laundry room and other common facilities that are provided for the use of the Tenant in and around the building containing the Property.

Lead Warning

60. Housing built before 1978 may contain lead based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of known lead-based paint hazards in the dwelling. **Lessees must also receive a Federally approved pamphlet on lead poisoning prevention.**

Mediation and Arbitration

61. If any dispute relating to this Lease between the Landlord and the Tenant is not resolved through informal discussion within 14 days from the date a dispute arises, the parties agree to submit the issue first before a non-binding mediator and to an arbitrator in the event that mediation fails. The decision of the arbitrator will be binding on the parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediations or arbitrations will be paid by the Tenant.

Address for Notice

62. For any matter relating to this tenancy, the Tenant may be contacted at the Property or through the phone number below. After this tenancy has been terminated, the contact information of the Tenant is:
- a. Name: Angela Cartmel.
 - b. Phone: (724) 417-2229.
 - c. Email: arcartmel@gmail.com.
 - d. Post termination notice address: 2694 Camp Rawls Road, Wagener, Aiken, SC 29164.

63. For any matter relating to this tenancy, whether during or after this tenancy has been terminated, the Landlord's address for notice is:

- a. Name: Edward Brice Taylor.
- b. Address: 2960 Emma Lane, Mt. Pleasant, Charleston, SC 29466.

The contact information for the Landlord is:

- c. Phone: (803) 730-7793.
- d. Email address: Taylorbayhuntclub@gmail.com.

Option to Purchase

64. Provided the Tenant is not currently in default in the performance of any term of this Lease, the Tenant will have the option to purchase (the "Option") the Property for \$88,500.00 (the "Purchase Price").

65. This Option may only be exercised at any time prior to its expiration at midnight on May 15, 2019. Upon expiration of the Option, the Landlord will be released from all obligations to sell the Property to the Tenant. If the Tenant does not exercise the Option prior to its expiration, all rents and other charges paid under this Lease will be retained by the Landlord, and neither party will have any further rights or claims against each other concerning the Option.

66. The Option will be exercised by mailing or delivering written notice to the Landlord prior to the expiration of this Option. Notice, if mailed will be by certified mail, postage prepaid, to the Landlord at 2960 Emma Lane, Mt. Pleasant, Charleston, SC 29466 and will be deemed to have been given on the date shown on the postmark of the envelope in which such notice is mailed.

67. The Tenant may not assign any rights under this Option separately from all of the Tenant's other rights under this Lease. No assignment may be made without the Landlord's prior written consent.

68. The Landlord warrants to the Tenant that the Landlord is the legal owner of the Property and has the legal right to sell the Property under the terms and conditions of this Lease.

69. If the Option is exercised, the following provisions will be applicable:

- a. The Tenant will take title to the Property subject to any:

- i. real estate taxes not yet due at the time of closing; and
 - ii. covenants, conditions, restrictions, reservations, rights, rights of way and easements then on record, if any.
- b. Unless otherwise extended by other terms of this Lease, closing will be held within the latter of 60 from the exercise of the Option or removal of any exceptions to the title by the Landlord.
- c. Rents, real estate taxes and other expenses of the Property will be prorated as of the date of the closing date. Security deposits, advance rentals or considerations involving future lease credits will be credited to the Tenant.
- d. The parties acknowledge that the availability of financing and purchase costs cannot be ascertained with certainty. The parties agree that these items will not be conditions of performance of this Lease and the parties agree they have not relied upon any other representations or warranties by brokers, sellers or any other parties which are not set out in this Lease.
- e. No later than 15 days from the exercise of the Option to purchase, the Landlord will provide the Tenant the following documents (the "Seller Disclosure"):
 - i. a property condition disclosure, signed and dated by the Landlord;
 - ii. a commitment for the policy of title insurance; and
 - iii. written notice of any claims and/or conditions known to the Landlord relating to environmental problems or building or zoning code violations.
- f. The Tenant has 15 days from the date of receipt of the Seller Disclosure to examine the title to the Property and to report, in writing, any valid objections. Any exceptions to the title which would be disclosed by examination of the records will be deemed to have been accepted unless reported in writing within 15 days. If the Tenant objects to any exceptions to the title, the Landlord will use all due diligence to remove such exceptions at the Landlord's own expense within 60 days. But if such exceptions cannot be removed within the 60 days allowed, all rights and obligations under this Option may, at the election of the Tenant, terminate and end unless the Tenant elects to purchase the Property subject to such exceptions.

- g. Upon the completion of the Closing, all rights and obligations under the Lease (other than the Option) will cease to exist and the parties will have no further rights or claims against each other concerning the Lease.

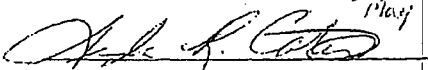
General Provisions

70. All monetary amounts stated or referred to in this Lease are based in the United States dollar.
71. Any waiver by the Landlord of any failure by the Tenant to perform or observe the provisions of this Lease will not operate as a waiver of the Landlord's rights under this Lease in respect of any subsequent defaults, breaches or non-performance and will not defeat or affect in any way the Landlord's rights in respect of any subsequent default or breach.
72. This Lease will extend to and be binding upon and inure to the benefit of the respective heirs, executors, administrators, successors and assigns, as the case may be, of each party to this Lease. All covenants are to be construed as conditions of this Lease.
73. All sums payable by the Tenant to the Landlord pursuant to any provision of this Lease will be deemed to be additional rent and will be recovered by the Landlord as rental arrears.
74. Where there is more than one Tenant executing this Lease, all Tenants are jointly and severally liable for each other's acts, omissions and liabilities pursuant to this Lease.
75. Locks may not be added or changed without the prior written agreement of both the Landlord and the Tenant, or unless the changes are made in compliance with the Act.
76. The Tenant will be charged an additional amount of \$25.00 for each N.S.F. check or checks returned by the Tenant's financial institution.
77. If the Tenant moves out prior to the natural expiration of this Lease, a rent levy of \$500.00 will be charged to the Tenant.
78. The Tenant will professionally steam clean the carpets at the termination of this Lease or the Landlord may charge the Tenant or deduct the cost of having the carpets professionally steam cleaned from the security deposit.
79. Headings are inserted for the convenience of the parties only and are not to be considered when interpreting this Lease. Words in the singular mean and include the plural and vice versa. Words in the masculine mean and include the feminine and vice versa.

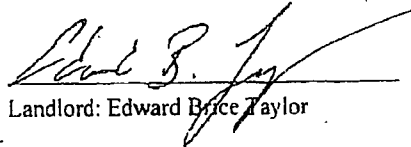
80. This Lease and the Tenant's leasehold interest under this Lease are and will be subject, subordinate, and inferior to any liens or encumbrances now or hereafter placed on the Property by the Landlord, all advances made under any such liens or encumbrances, the interest payable on any such liens or encumbrances, and any and all renewals or extensions such liens or encumbrances.
81. This Lease may be executed in counterparts. Facsimile signatures are binding and are considered to be original signatures.
82. This Lease will constitute the entire agreement between the Landlord and the Tenant. Any prior understanding or representation of any kind preceding the date of this Lease will not be binding on either party except to the extent incorporated in this Lease.
83. The Tenant will indemnify and save the Landlord, and the owner of the Property where different from the Landlord, harmless from all liabilities, fines, suits, claims, demands and actions of any kind or nature for which the Landlord will or may become liable or suffer by reason of any breach, violation or non-performance by the Tenant or by any person for whom the Tenant is responsible, of any covenant, term, or provisions hereof or by reason of any act, neglect or default on the part of the Tenant or other person for whom the Tenant is responsible. Such indemnification in respect of any such breach, violation or non-performance, damage to property, injury or death occurring during the term of the Lease will survive the termination of the Lease, notwithstanding anything in this Lease to the contrary.
84. The Tenant agrees that the Landlord will not be liable or responsible in any way for any personal injury or death that may be suffered or sustained by the Tenant or by any person for whom the Tenant is responsible who may be on the Property of the Landlord or for any loss of or damage or injury to any property, including cars and contents thereof belonging to the Tenant or to any other person for whom the Tenant is responsible.
85. The Tenant is responsible for any person or persons who are upon or occupying the Property or any other part of the Landlord's premises at the request of the Tenant, either express or implied, whether for the purposes of visiting the Tenant, making deliveries, repairs or attending upon the Property for any other reason. Without limiting the generality of the foregoing, the Tenant is responsible for all members of the Tenant's family, guests, servants, tradesmen, repairmen, employees, agents, invitees or other similar persons.
86. During the last 30 days of this Lease, the Landlord or the Landlord's agents will have the privilege of displaying the usual 'For Sale' or 'For Rent' or 'Vacancy' signs on the Property.

87. Time is of the essence in this Lease. Every calendar day except Saturday, Sunday or U.S. national holidays will be deemed a business day and all relevant time periods in this Lease will be calculated in business days. Performance will be due the next business day, if any deadline falls on a Saturday, Sunday or a national holiday. A business day ends at five p.m. local time in the time zone in which the Property is situated.

IN WITNESS WHEREOF Angela Cartmel and Edward Brice Taylor have duly affixed their signatures on this 9 of April, 2014.

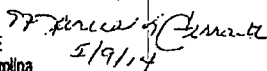


Tenant: Angela Cartmel



Landlord: Edward Brice Taylor

MARCIA L. FERRANTE
Notary Public, State of South Carolina
My Commission Expires 6/24/2023


5/9/14

The Tenant acknowledges receiving a duplicate copy of this Lease signed by the Tenant and the Landlord on the 12 day of May, 2014.

Tenant: Angela Cartmel

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

Appellate Case No. 2016-000635

RECEIVED

JAN 05 2017

SC Court of Appeals

ANGELA CARTMEL Respondent

v.

EDWARD BRICE TAYLOR Appellant

FINAL BRIEF OF APPELLANT

Robert B. Varnado (SC Bar #0007085)
Alexis M. Wimberly (SC Bar #101611)
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January 3, 2017

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STATEMENT OF THE CASE

Background.

On May 9, 2014, the parties entered into a so-called "Residential Lease Agreement" ("Agreement") for 2694 Camp Rawls Road, Wagener, South Carolina, 29164, located in Aiken County ("Property"). [R. pp. 85-98]. Under the Agreement, the Appellant is the "Landlord"; the Respondent is the "Tenant". [R. p. 85].

The Agreement contemplates a "[r]ent to own contract for a five year lease" which would allow the Plaintiff residential use and to keep horses. [R. p. 85 ¶ 1]. Notwithstanding its title, the Agreement is not strictly residential in nature.

At Paragraph 1, the Agreement provides that: "[t]he tenant may use part of the property for the following home-based business: the construction of horse jumps (emphasis added)." [R. p. 85 ¶ 1]. The same paragraph goes on to state that "[t]he Tenant is responsible for all permits and licenses related to the home-based business and the Tenant indemnifies the Landlord of all liability, costs and fees associated with this business." [R. p. 85 ¶ 1].

There is no question that Respondent did, in fact, establish the contemplated horse-jump construction business. She avers to this fact repeatedly in her Complaint, at ¶¶ 4, 20 and 21, in which she seeks business loss/interruption damages. [R. pp. 16, 18-19 ¶¶ 4, 20, 21]. Neither party disputes that the Agreement is an otherwise valid, binding and enforceable written contract. [R. pp.15-27 (Compl.), pp. 28-32 (Ans.), pp. 74-84 (Trans.)].

Arbitration Provision.

The arbitration clause is located at Paragraph 61 of the Agreement:

"[i]f any dispute relating to this Lease between the Landlord and Tenant is not resolved [by informal discussion] ... the parties agree to submit the issue

first before a non-binding mediator and to an arbitrator in event the mediation fails. The decision of the arbitrator will be binding on the parties. Any mediator or arbitrator must be a neutral party acceptable to both the Landlord and the Tenant. The cost of any mediations or arbitrations will be paid by the Tenant.”

[R. p. 85 ¶ 61]. The Agreement does not contain a capitalized, underlined notice at the top of its first page that would meet the requirements of S.C. Code Ann. § 15-48-10.

Procedural History.

The Respondent initiated this suit in the Aiken County Court of Common Pleas on May 14, 2015, claiming damages from Appellant’s alleged misrepresentations and other conduct, which she claims resulted in a fire at the Property. [R. pp. 15-27]. In her Complaint, at ¶¶ 4, 20 and 21, Respondent alleged the fire loss caused her to suffer damages connected with the interruption of her business. [R. pp. 16, 18-19].

Despite due demand in the Answer, timely filed on August 17, 2015, Respondent declined to engage in either mediation or arbitration. [R. pp. 28-32 (Ans.), pp. 74-84 (Trans)]. Before any discovery had taken place, Appellant served a motion to compel arbitration on September 27, 2015, which initially had to be continued. [R. pp. 1-5, 6].

The matter came to a full hearing on January 25, 2016 before the Honorable L. Casey Manning. [R. p. 1, pp. 74-84]. Respondent submitted no affidavit or testimony at or prior to the hearing. [R. p. 1, pp. 74-84, pp. 39-54]. Likewise, Respondent submitted no evidence other than the Agreement. [R. pp. 39-54, pp. 74-84].

Judge Manning denied the motion by a form order issued the same date, January 25, 2016, which contemplated a formal Order to follow. [R. pp. 7-8]. Ten days later, on February 4, 2015, Judge Manning issued a formal Order which was file-stamped by the Aiken County Clerk of Court on February 8, 2015 [R. pp. 9-13].

On February 10, 2016, the Appellant served a timely Notice of Motion and Motion to Reconsider, which was filed-stamped by the Aiken County Clerk of Court on February 15, 2016. [R. pp. 64-73].

Following a telephonic hearing, Judge Manning issued an Order Denying Motion Rule 59(e), dated February 25, 2016 and filed with the Clerk of Court on March 8, 2016 (of which written noticed was received by Appellant on March 11, 2016) [R. p. 14]. The instant Appeal timely followed on March 22, 2016.

STANDARD OF REVIEW

Arbitrability determinations are subject to *de novo* review. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012); *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration. *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

STATEMENT OF ISSUES ON APPEAL

I. Does the so-called “real estate exception” articulated by our Supreme Court in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), apply in the instant case?

II. If *Bradley* does not apply, is this case subject to arbitration pursuant to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*?

II. Was the circuit court was guided by an error of law in ruling that the subject agreement was ambiguous?

ARGUMENT

I.

The so-called “real estate exception” articulated by our Supreme Court in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012) does not apply in the instant case.

A. Scope.

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Id.*, 346 S.C. at 24, 644 S.E.2d at 688.

“[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 269, 776 S.E.2d 91, 94 (Ct. App. 2015); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). It is black letter law in South Carolina that “any doubts concerning the scope of arbitrable issues **must** be resolved in favor of arbitration

(emphasis added).” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013).

Stated another way, the heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Id.*, 402 S.C. at 109, 739 S.E.2d at 213 (2013) (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996)); see also *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (“There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.”). Both federal and state public policy strongly favor the arbitration of disputes. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). Such a presumption is strengthened when an arbitration clause is broadly written. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (citing *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419 (1986)).

It has been held that a court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118; *Cape Romain*, 305 S.C. at 126, 747 S.E.2d at 467; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214; *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. at 1419.

B. The Federal Arbitration Act.

The South Carolina courts will enforce an arbitration agreement under the Federal Arbitration Act (“FAA”), 9 U.S.C.A. § 1 *et seq.*, in transactions that involve interstate commerce, “regardless of whether or not the parties contemplated an interstate

transaction.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, n. 3, 542 S.E.2d 360, 363, n.3 (2001) (emphasis added). “Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA.” *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013); *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case. *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117 (“[t]o ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.”); *see also Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. at 380, 759 S.E.2d at 732.

The failure of the Agreement to meet the technical requirements of S.C. Code Ann. § 15-48-10 is irrelevant if the FAA applies. *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116 (“While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties’ agreement to arbitrate.”); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453-454, 730 S.E.2d 312, 315 (2012); *see also Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996) (“[i]f the arbitration agreement in the instant controversy is covered by the FAA, then ... the FAA preempts S.C. Code Ann. § 15-48-10(a); *Walden v. Harrelson Nisan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325-326 (Ct. App. 2012).

For enforcement, the FAA only requires proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving “commerce.” 9 U.S.C.A. § 2 (1947). The United States Supreme Court has held “[a]n

order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. a 1419. The United States Supreme Court confirmed in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834 (1995) that the FAA is coextensive with the Commerce Clause of the U.S. Constitution.

“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*, 346 S.C. at 594, 553 S.E.2d at 117. “Our courts consistently look to the essential character of the contract when applying the FAA.” *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003) (finding it was proper to “focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved”).

C. Non-Applicability of the “Real Estate Exception” in this Appeal.

The threshold issue before the Court is whether the “real estate exception” set forth in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) has any application in this case, which involves a “mixed use” lease-agreement for residential and commercial activity rather an a “strictly” residential contract.

The short answer is “no” because a mixed-use lease can never be strictly for residential purposes only – and, thus, the exception in *Bradley* cannot apply here.

In *Bradley*, plaintiffs bought a fully completed home from the defendant-developer Brentwood Homes; plaintiffs later filed a construction defect and warranty case against Brentwood Homes. 398 S.C. at 449-450, 730 S.E.2d at 313-314. Brentwood Homes moved

to compel arbitration pursuant to an arbitration provision in the sales contract, arguing that the clause was enforceable under the FAA because of: (1) the existence of a structural warranty from a national warranty company; (2) the fact out-of-state materials were used in the construction of the residence, and (3) financing from an out of state lender. *Id.* at 456, 730 S.E.2d at 316. The circuit court held that FAA did not apply because the transaction did not involve interstate commerce. *Id.*

The Supreme Court, which directly certified the matter, affirmed the circuit court in *Bradley* by holding “this Court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction.” *Id.* at 456, 730 S.E.2d at 317 (citing *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 117–18). Chief Justice Toal then concluded that “[b]ecause the essential character of the [a]greement was *strictly* for the purchase of a completed residential dwelling and not the construction, we find the FAA does not apply as these types of transactions have historically been deemed to involve interstate commerce (emphasis added).” 389 S.C. at 459-460, 730 S.E.2d at 318.

The use of the qualifying adverb “strictly” by Chief Justice Toal is consistent with the foreign authority relied on by the *Bradley* Court – *Saneii v. Robards*, 289 F.Supp.2d 855, 858-859 (W.D. Ky. 2003) (“contracts strictly for the sale of residential real estate focus entirely on a commodity – the land – which is firmly planted in one particular state.”) and *Garrison v. Palmas Del Mar Homeowners Ass’n*, 538 F.Supp.2d 468, 473 (D.P.R. 2008) (“[t]he FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce, regardless of whether said transactions involve out-of-state purchasers.”). 389 S.C. at 459-460, 730 S.E.2d at 318.

If *Bradley* remains good authority¹, then Appellant would concede a lease or a rent to own arrangement *strictly* for a tenancy in real property located within South Carolina would probably fall under the “real estate exception.” However, the Agreement at bar is not strictly a residential-only contract. *Bradley*, therefore, does not apply.

A cursory examination of the Agreement proves Appellant’s point. Unlike in *Bradley* – where the contract was “*strictly*” residential – here the Agreement between Appellant and Respondent has a substantial commercial component (the “horse jump construction business”). [R. p. 85 ¶ 1]. The fact that the Agreement specifically and expressly contemplated that Respondent would operate a business, and obtain all necessary permits and licenses, cannot be reasonably deemed to be “ancillary” either – especially since Respondent is claiming substantial losses arising out of that very business. [R. pp. 16, 18-19, ¶¶ 4, 20, 21]. The commercial aspect of the Agreement is just as important and front-and-center as the residential aspect; the fact that the business is run from a “home” is irrelevant.

Accordingly, the presence of the business component in the Agreement, by virtue of the express dual/mixed residential-commercial use language, creates a direct nexus to

¹ In *Bradley*, the Court repeatedly held that the defendant Brentwood Homes – the party *seeking* arbitration – had failed to meet *its* burden of proof in the motion. 398 S.C. at 459-460, 730 S.E.2d at 317 (2012). Two years later, the Supreme Court handed down *Dean v. Heritage Healthcare of Ridgeway, LLC*, which unequivocally puts the burden of proof on the party opposing arbitration. 408 S.C. at 379, 759 S.E.2d at 731 (2014) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513 (2000)). To the extent *Bradley* can be read to put the burden of proof on the movant in a motion to compel arbitration, then it appears to be directly overruled by *Dean*. Also, *Bradley*’s holding that national warranty clauses are ancillary in considering arbitrability may now be questionable in light of the Supreme Court’s recent decision in *Parsons v. John Weiland Homes*, 2016 WL 4411112 (2016) (involving residential sale and construction purchases, rather than sale only as in *Bradley*).

interstate commerce – which makes *Bradley* inapposite. Likewise, because the Agreement is clearly both residential and commercial, the express terms of the contract are not strictly limited to the real estate, and the Agreement cannot automatically be deemed as limited to intrastate commerce – which additionally serves as another way in which the facts of the instant Appeal differ from *Bradley*. 389 S.C. at 459-460, 730 S.E.2d at 318.

Also, unlike in *Bradley*, there is no useful policy served in holding that a mixed use “residential + commercial” contract should be deemed intrastate only. These kinds of mixed use contracts are fairly rare. The Respondent wanted to operate a home-based business, negotiated it into her lease, and agreed that the Appellant would, thus, be a residential and commercial landlord. [R. p. 85 ¶ 1]. By seeking her business-loss damages, she should not be heard to claim the Agreement was purely residential. [R. pp. 16, 18-19, ¶¶ 4, 20, 21]. Moreover, the Agreement required Respondent to administer matters related to the commerce portion of the contract - i.e., procurement of the permits and licenses for the horse jump construction business. [R. p. 85 ¶ 1]. Thus, the holding of *Matthews v. Flour Corp.* is also satisfied here. 312 S.C. 404, 407, 440 S.E.2d 880, 882 (1994) *overruled on other grounds in Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 537-538, 542 S.E.2d 360, 363-364 (2001).

In light of the foregoing, the trial court erred in holding that the Agreement was solely for the lease/sale of real property. [R. p. 11]. The trial court seems to misapply *Bradley* and *Saneii* by (apparently) finding the Agreement was “strictly” residential in nature when it was obviously not strictly residential by its own terms. [Id.]. The trial court’s focus on the “indemnification” clause in ¶ 1 of the Agreement is further misplaced,

particularly when the trial court ignored the “home-based business” clause that precedes it. [R. p. 85 ¶ 1].

The limited evidence submitted in the case cannot reasonably support the trial court’s findings that the real estate exception applies. *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. For this reason, the trial court should be reversed.

II

Since *Bradley* does not apply, this case is subject to arbitration pursuant to the Federal Arbitration Act, 9 U.S.C.A. § 1 *et seq.*

In section I.3 of Appellant’s Brief, *supra*, Appellant has shown that the trial court erred by holding that the Agreement was solely for the lease/sale of real property [R. p. 11]². (“The issue before the Court is whether the residential lease with option to purchase agreement affects interstate commerce”). As Appellant has demonstrated, the contract was a mixed-use, residential and commercial, transaction. [R. p. 85 ¶ 1]. Since the *Bradley* real estate exception does not apply, then the only remaining question is the general applicability of the FAA to the Agreement.

As the party litigating against arbitration, Respondent bore the burden of proof to that the claims at issue “are unsuitable for arbitration.” – not the Appellant. *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Hall*, 413 S.C. at 269, 776 S.E.2d at 94. She failed to meet her burden. Other than the claim for business damages in her Complaint and the submission of the Agreement, the Respondent failed to offer any evidence or testimony that met her

² The circuit court also erred in citing *Lewis v. Carnaggio*, 257 S.C. 54, 183 S.E.2d 899 (1971), for the proposition that the intent of the parties is probative in determining whether a transaction constitutes interstate commerce – a concept which is directly rejected by the more recent opinion in *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363, n.3.

burden of showing that her home-based horse-jump business did not touch on interstate commerce. [R. pp.15-27 (Compl.), pp. 41-53 (Lease), pp. 74-84 (Trans.)]. Respondent's memorandum of law is silent on this issue as well. [R. pp 39-40.].

Nothing exists in the record that could support a finding the Respondent's horse-jump building business was restricted within the borders of this State. Moreover, Judge Manning never analyzed or considered the extent or scope of the Respondent's business, but entirely focused on the fact the contract had a residential component. Accordingly, the record cannot support Judge Manning's finding that the "*nature or character of the transaction or the contract itself ... does not involve interstate commerce*" to the extent he means the Respondent's business did not touch on interstate commerce. [3.8.16 Order, p. 3]. See *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. First, it's not likely what he meant; in any event, the evidence could not reasonably support such a finding. Thus, it should be reversed on appeal. *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315. [R. p. 11].

The Respondent might be tempted to argue in her Brief that her horse jump business itself is not of an interstate character. However, she did not present any such evidence or make arguments to that effect to the circuit court. [R. pp.15-27, pp. 74-84, pp. 39-54, p. 11]. Nor did Respondent file a cross-appeal or motion to reconsider. Therefore, any new arguments or additional evidence that her horse jump business was limited to South Carolina cannot be part of the appellate review at this time. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); *Wilson v. Willis*, 416 S.C. 395, 408, 786 S.E.2d 571, 577, n.4 (Ct. App.

2016) (holding that in a motion to compel arbitration, where the trial court did not leave the record open for the addition of new evidence, an affidavit not properly admitted into evidence below cannot be considered as part of the record on appeal).

Likewise, this Court – which is tasked with ascertaining *de novo* whether this transaction involves interstate commerce by examining the agreement, the complaint, and the surrounding facts (*Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117; *Dean*, 408 S.C. at 380, 759 S.E.2d at 732) – might find the record so thin that there is a question as to whether the “horse jump construction” business is either interstate or intrastate, and rule in favor of the latter - intrastate. Such a finding (intrastate commerce), however, would violate the following black-letter precepts which the circuit court failed to apply:

- the heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213; *Cape Romain*, 405 S.C. at 125, 747 S.E.2d at 466.
- the presumption in favor of arbitrability is strengthened when an arbitration clause is broadly written. *Landers*, at 109, 739 S.E.2d at 213.
- any doubts concerning the scope of arbitrable issues **must** be resolved in favor of arbitration (emphasis added).” *Landers*, at 109, 739 S.E.2d at 213; *AT&T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. a 1419.
- a court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118; *Cape Romain*, 305 S.C. at

126, 747 S.E.2d at 467; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214; *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. at 1419.

- if the transaction involves interstate commerce, the FAA applies “regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363, n.3.
- 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) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)).

Here, the application of the foregoing authority to the facts in the record mandates reversal. Under well-settled state and federal jurisprudence, because there is *at least* a question about whether the FAA applies in this appeal, this Court must come down in favor of arbitrability. Moreover, the arbitration clause in Paragraph 61 of the Agreement is broad [R. p. 94 ¶ 61], which further mandates arbitration. The arbitration clause is also clearly subject to an interpretation that permits arbitrability, and this Court cannot say with positive assurance that it does not permit arbitrability. Since any doubts must be resolved in favor of granting a motion to compel arbitration, Appellant submits that arbitration is both suitable and permitted – and Respondent has offered nothing to the contrary.

The broad scope of the Commerce Clause of the U.S. Constitution (Art. I, Sec. 8, Clause 3) cannot be ignored either. Since horse-jumps are a part of the national commerce of horse-jumping and other equestrian pursuits (so important to the Aiken County

economy), the Plaintiff should not be heard to claim her horse-jump construction business was not a commercial activity that impacts interstate business – particularly when she offered no proof whatsoever to the contrary.

For enforcement, the FAA only requires proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving “commerce.” 9 U.S.C.A. § 2 (1947). This proof is clearly demonstrated in the record. [R. pp. 85, 94 ¶¶ 1, 61]. Setting aside the issue of whether her materials are part of interstate commerce, construction of horse jumps for the equine industry is *at the minimum* a commercial activity that *could* affect or involve interstate commerce. Combined with the strong policy in favor of compelling arbitration and that all doubt must be resolved in favor of arbitration, the Court should weigh the record (including lack of contrary evidence from the Respondent) and decide that the FAA applies in the instant Appeal. 9 U.S.C. § 1, *et seq.*; *Landers*, 402 S.C. 100, at 109, 739 S.E.2d at 213; *Cape Romain*, 405 S.C. at 125, 747 S.E.2d at 466; *Chassereau*, 373 S.C. 168, 644 S.E.2d 718; *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

III.

The circuit court was guided by an error of law in ruling that the subject agreement was ambiguous.

Contrary to the trial ruling [R. p. 11], the Agreement is not ambiguous. It is well-settled in South Carolina that:

“[w]hen a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. [A court is] without authority to alter an unambiguous contract by construction or to make new contracts for the

parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."

South Carolina Dep't of Transportation v. M&T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (internal citations and punctuation omitted). "Leases are construed in the same manner as contracts." *Id.*, 379 S.C. at 656, 667 S.E.2d at 13. "The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into. The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract. In general, therefore, parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy." *Id.*, 379 S.C. at 656-657; 667 S.E.2d at 13-14.

There was no confusion that the parties intended at the commencement of the Agreement: that the Respondent would use the real estate partly for a commercial business – which she did and for which she now seeks monetary damages for the loss of the business. [R. p. 85 ¶ 1; pp. 16, 18-19, ¶¶ 4, 20, 21]³. For this reason, the circuit court should also be reversed.

³ The trial court's ambiguity analysis is likely non-dispositive anyway since only the arbitration clause can be attacked, not the whole underlying contract. *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403–04, 440 S.E.2d 877, 879 (1994) ("[A]n arbitration agreement itself is subject to termination.... [I]t is only when a party has valid grounds upon which to challenge the arbitration clause itself that arbitration may be avoided.)."

CONCLUSION

Appellant respectfully requests that this Honorable Court reverse and vacate the circuit court's ruling and compel arbitration in this matter pursuant to the Federal Arbitration Act.

Respectfully submitted.



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January 3, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

Appellate Case No. 2016-000635

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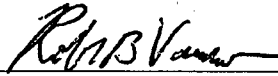
ANGELA CARTMEL Respondent

v.

EDWARD BRICE TAYLOR Appellant

CERTIFICATE OF COUNSEL

The undersigned certified that this *Final Brief of Appellant* complies with Rule 211(b), SCACR.



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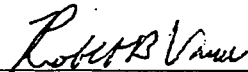
v.

EDWARD BRICE TAYLOR Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the *Final Brief of Appellant* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid this 3rd day of January, 2017 to the following:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
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L. Casey Manning, Circuit Court Judge

Case No. 2016-000635

ANGELA CARTMEL

Respondent,

v.

EDWARD BRICE TAYLOR

Appellant.

FINAL BRIEF OF RESPONDANT

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STATEMENT OF THE CASE

Appellant and Respondent entered in to a Residential Lease Agreement with a five year term for the property known as 2694 Camp Rawls Rd, Wagener, SC on May 9, 2014. Said agreement specifically included rent to own provisions for the property. The agreement also contained an arbitration buried in paragraph 61 of said agreement which states, "If any dispute relating to this lease between Landlord and Tenant is not resolved through informal discussion within 14 days from the date the dispute arises, the Parties agree to submit the issue first before a non-binding mediator and to an arbitrator in the event mediation fails. The decision of the arbitrator will be binding on the Parties. Any mediator or arbitrator must be a neutral party acceptable to both landlord and tenant. The cost of any mediations or arbitrations will be paid by the tenant". (R. pp. 93), Respondent alleges that prior to taking residence at the property she informed Appellant that there was water damage around the light and over the sink located in the kitchen of the home. Appellant informed the Respondent that the damage was from the February 2014 ice storm that occurred in Aiken County and he would have it repaired along with resurfacing the cabinet doors in order to induce Respondent to enter into the agreement. Respondent took residence at said property on or about June 15, 2014.

Respondent alleges that in June of 2014 Respondent made numerous requests, orally and in writing, to repair roof leaks in a certain part of the home. Appellant made various representations regarding the leaky roof, which included contracting for repairs and an alleged ongoing lawsuit against the manufacturer of the manufactured home. Due to the representation of Appellant, Respondent forebear any repairs herself and therefore said representations of Appellant were to Respondent's detriment. On or about December 14, 2014 a fire caused by said

leaking roof shorting electrical wires erupted in the home causing damage to said home and Respondents property, including property located outside of said home belonging to Respondent.

Respondent filed the underlying action in the Aiken County Circuit Court alleging fraud in the inducement, fraud and misrepresentation on May 14, 2015 due to the loss of the residence. Respondent is also seeking consequential damages related to losses related to her home based business.

Appellant filed a Motion to Compel Arbitration on September 27, 2015 which was heard before the Hon. Casey E. Manning on January 25, 2016. (R. p. 33)

During said hearing, Appellant admitted the Agreement, and arbitration clause contained therein, made by Appellant did not comport with the South Carolina Uniform Arbitration Act and therefore arbitration was not enforceable under said act. (R. p. 77, lines 12-13) After hearing the arguments of counsel, reviewing the Courts record and applicable case law, Judge Manning accordingly dismissed Appellants Motion via Order filed with the Aiken County Clerk of Court on February 8, 2016. (R. p. 9) Appellant filed a Motion for Reconsideration which was filed with the Court February 15, 2016 and accordingly denied by the Court. (R. p. 14) The instant appeal followed.

STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review¹ However, "although arbitrability determinations are subject to de novo review, the Court's factual findings will not be reversed if reasonably supported by the evidence."² "Arbitration is a matter of contract law and

^{1,2} Bradley V. Brentwood Homes, 398 S.C. 447, 453 (2012),

² Faltaous v Anderson Ocean Club Development, LLC, 388 S.C. 45, 48 (Ct. App. 2010)

general principles of state law apply to the Court evaluation of the enforceability of an arbitration clause."³

STATEMENT OF ISSUES ON APPEAL

- I. Is the underlying Residential Lease Agreement subject to the Federal Arbitration Act?
- II. Did the Circuit Court's decision to deny arbitration in the instant case comport with South Carolina law regarding real estate transaction and the Federal Arbitration Act?

ARGUMENT

A. The Residential Lease Agreement with rent to own provisions are not subject to arbitration under South Carolina Law.

Appellant misinterprets the nature of the underlying Lease with Option to Purchase Contract. The nature of the underlying contract was residential, "The Landlord Agrees to rent the tenant the mobile home described a 2694 Camp Rawls Rd., Wagner, Aiken, South Carolina 29164 (the property) for use as residential purposes only". (R. p. 85, para. 1) However the contract is for purchase of real property, "this is a lease to own agreement." (R. p. 85, para. 1, p. 94, para. 64-69) "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement."⁴ Where the contract language is plain and capable of legal construction, that language alone determines the instrument's force and effect.⁵ Appellant argues that the

³ Simpson v. MSA of Myrtle Beach, Inc. 373 S.C. 14, 24 (2007).

⁴ Miles v. Miles, 393 S.C. 111, 117 (2011).

⁵ Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230 (1993).

Residential Lease Agreement is a "mixed use" contract.⁶ In the instant case, there was no contemplation of a "mixed contract" and the plain and ordinary meaning of the contract is apparent, lease and purchase of real property located in the State of South Carolina. "If the intention of the parties is clear, the courts have no authority to change the contract in any particular."⁷ The Appellant in the instant action is asking the Court to do just that, change the nature and particulars of the agreement to suit their argument.

B. Intrastate real estate contracts are not subject to the FAA

Appellant seeks to bring an intrastate contract into the realm of interstate commerce by virtue of a single sentence stating "tenant may use part of the property for a home based business" in an 82 paragraph agreement involving real estate located in the State of South Carolina (R. p. 85) The only other language, and the intent readily inferred therefrom, is that appellant requests full indemnification due to the fact that Respondent is involved in the equestrian business which is inherently dangerous. There is no clause or other language indicating that the nature of the contract is anything other than a transaction for real estate which is inherently intrastate. Appellant simply asserts that any home based business must be interstate in nature because it is a home based business. (R. p. 78, lines 16 – 20) Appellants also asserts that the Residential Lease Agreement is a "mixed use" contract to indicate the contract is commercial in nature.⁸ However, the plain reading of the contract indicates that, as it's title indicates, that it is simply a residential lease/sales contract with a recitation of the renter/buyers business in order that Appellant will not be responsible for any injuries related to equine activity.

⁶ Appellants Initial Brief, Pg. 7

⁷ Newell & Company v. American Mutual Liability Insurance Company, 199 S.C. 325, 332 (1942)

⁸ See Appellants Initial Brief, Pg. 7

"The FAA generally does not apply to real estate transactions that have no substantial or direct effect to interstate commerce..."⁹

Appellant fails to provide any proofs that the nature of the agreement between the Parties involves interstate commerce. "The FAA provides: A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2. Therefore, in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign." ¹⁰

"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."¹¹ "Our courts consistently look to the essential character of the contract when applying the FAA." ¹² Additionally, the Courts "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved".¹³

"This Court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction."¹⁴ In deciding the effect of a real estate contract on interstate commerce, the Supreme Court has looked to the law in other states where contracts, such as the agreement in the case at bar, and has adopted the following:

⁹ Bradley V. Brentwood Homes, 398 S.C. 447, 458 (2012), quoting Garrison v Palmas Del Mar Homeowners Ass'n, 538 F. Supp. 2nd 468, 473 (D.P.R. 2008)

¹⁰ Bradley V. Brentwood Homes, 398 S.C. 447, 455 (2012), quoting provisions of the Federal Arbitration Act.

¹¹ Id. at 554.

¹² Id., quoting *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 96 (Ct.App.2003).

¹³ *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 96 (Ct.App.2003)

¹⁴ Bradley V. Brentwood Homes, 398 S.C. 447, 456 (2012)

Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate. Contracts strictly for the sale of residential real estate focus entirely on a commodity — the land — which is firmly planted in one particular state. The citizenship of immediate parties (the buyer and the seller) or their movements to or from that state are incidental to the real estate transaction. Those movements are not part of the transaction itself. All of the legal relationships concerning the land are bound by state law principles. Single residential real estate transactions of this type have no substantial or direct connection to interstate commerce. For all these reasons, logic suggests that such transactions are not among those considered as involving interstate commerce. To characterize a residential real estate [transaction] as involving interstate commerce under these circumstances would actually promote a lack of uniformity in the law, which is exactly contrary to one of the FAA's stated purpose. If the FAA applied to out-of-state purchasers of Kentucky real estate, different rules would apply in that considerable volume of transactions concerning property here. Applying Kentucky law to all Kentucky real estate transactions creates a more uniform and, therefore, a more equitable body of law.¹⁵

A plain reading of the agreement of the Parties agreement puts the agreement squarely in the realm of a contract for South Carolina real estate with no element of interstate commerce or contemplation thereof by the Parties.

C. Appellants argument fails under Bradley v. Brentwood

¹⁵ Bradley V. Brentwood Homes, 398 S.C. 447, 457-458 (2012)

C.1. The Agreement

In the instant case, the essential character of the contract is one for the lease and purchase of real estate in the State of South Carolina as between two residents of the State of South Carolina. The commodity subject to the agreement is the land itself. In applying the three prongs as stated in Bradley v Brentwood, there is no instance of interstate commerce as between the Parties for the lease and purchase of real property and the false notion that a home based business must be "interstate commerce" adds nothing to change the Parties agreement or the underlying facts. Additionally, the only required performance in the agreement as it pertains to Respondent and Appellant is related to the paying of rent/payments towards equity and the upkeep of property, which does not touch or effect interstate commerce. (R. pp. 85-98) Therefore the "essential character" of the contract does not need to be sussed out through careful examination and is on it's face a residential lease agreement with rent to own provisions.

To follow the line of Appellants reasoning, the following instance would result in real estate transactions in the state of South Carolina becoming regulated by interstate commerce:

Independent tractor-trailer driver engages in a lease to own agreement in South Carolina for a home, does his bookkeeping in the home and parks his rig outside of said home (an allowance recited in the lease to own agreement) when not working. Due to negligence of landlord/seller, the home explodes and damages the rig. Tenant/buyer sues and includes the loss of the rig as consequential damages. Under Appellants theory it touches interstate commerce because the tenant/buyer drives his rig (filled with "It's a beautiful day in South Carolina" bumper stickers) across state lines as part of his work.

Simply put, if Appellant were to succeed because a Party demands consequential damages related to a loss from real estate which is business related, there would be a chilling

effect on real estate law and tort law in South Carolina, taking virtually all real estate transactions into the realm of the commerce clause by virtue of actions, facts, and circumstances which are squarely outside of the Parties agreement.

C.2. The Contract

The complaint of Respondent names four causes of action in tort; specifically, fraud and misrepresentation in the inducement, breach of contract accompanied by a fraudulent act, negligence and negligent misrepresentation. (R. p. 15-25). The damages related to Respondent's home based business are consequential to destruction of the home due to Appellants alleged misrepresentation and fraud. (R. p. 15 – 25). Appellant is asking the Court to rewrite the Parties Residential Lease Agreement as something contrary to the nature and plain language of the agreement and somehow bring said agreement into the realm of interstate commerce. Consequential damages are "losses that so not flow directly or immediately from the injurious act but result indirectly from the act."¹⁶ Therefore the nature of the contract falls within the realm of a real property transaction and all causes of action within the complaint sound in tort regarding said contract for real property.

C.3. The Facts

The facts surrounding this action indicate that the Parties engaged in an agreement for real property in the state of South Carolina. Appellant admits that the Agreement, the maker of which is appellant, does not comport with and is not enforceable under the South Carolina Arbitration Act.¹⁷ Respondent has caused an action to be filed with a Court of competent jurisdiction based on fraud in the inducement, and misrepresentation and alleges that Appellant received insurance funds for the repair of a leaky roof prior to engaging with Respondent, failed

¹⁶ Blacks Law Dictionary 416 (8th Ed. 2004)

¹⁷ Initial Brief of Appellant, Pg. 2.

to make repairs, said failure to make repairs after notice from Respondent caused a short in the wiring which caused the destruction of the home and Respondent's losses: (R. p. 15-25) .

There are no facts in the immediate case which involve interstate commerce.

D. Appellant failed to offer sufficient evidence that the Residential Lease Agreement is subject to the FAA

Appellant alleges that Respondent failed to bear the burden of proof that Respondent's claims are unsuitable for arbitration. "[T]he Party resisting arbitration bears the burden of proving that the claims are unsuitable for arbitration."¹⁸ However, the facts of Hall V. Green Tree Servicing do not comport with the facts in the instant case. Green Tree's challenge to Hall was based on a transaction for personal property and statutory causes of action, "Respondents entered into a credit and sale contract (the Contract) with Green Tree through which the parties agreed Green Tree would finance Respondents' purchase of a mobile home."¹⁹ Therefore, the challenge to arbitration does not rely on the exception to real property transactions.

Appellant also relies on Bradley v. Brentwood Homes, Inc. which states that if the transaction is for real property, the burden shifts: "We agree with the circuit court's conclusion that Brentwood Homes failed to satisfy its burden of proof as none of the factors relied upon to establish the involvement of interstate commerce negate the intrastate nature of the sale and purchase of residential real estate."²⁰ In the instant case, it was noted in the lower Court that Bradley was controlling and further noted that Brentwood Homes argued that references in the contract to a home warranty from an out of state vendor and financing from an out of state

¹⁸ Hall v Green Tree Servicing, LLC, 408 S.C. 267, 268 (Ct. App. 2015)

¹⁹ Id.

²⁰ Bradley v. Brentwood Homes, Inc. 398 S.C. 447, 458 (2012) (emphasis added)

vendor (J.P. Morgan). (R. p. 82, lines 9-25, R. p. 10, lines 1-7) ²¹ Therefore, more on point as to the findings of the lower Court in the instant case, "[b]ased on the foregoing, we conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA."²² Appellant merely offers that respondent's business is interstate in nature. The Appellant is very well aware that the equine industry is vital to Aiken County and Camden County and is isolated to those horse riders using facilities at said locales. In short, fence builders in Aiken build fences in Aiken County, Aiken Contractors build barns in Aiken County, and horse jumps in Aiken County are for use in Aiken County. It is simply common sense, well known and confined to those locales where equestrian activities are located in South Carolina.

The action at bar is one for fraud and misrepresentation, including fraud in the inducement. Respondent alleges that the Appellant misrepresented the condition of the home and did so intentionally. Due to Appellant's intentional fraudulent act, the home caught fire and Respondent suffered a loss of personal property and business earnings. "[G]enerally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements"²³

E. CONCLUSION

The Circuit Court committed no error of law in reaching it's decision

²¹ See also *Bradley v. Brentwood Homes, Inc.* 398 S.C. 447 (2012), Pages 456-459.

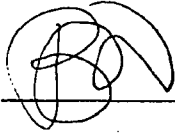
²² *Id.* at 459.

²³ *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652, (1996).

The lower Court heard the arguments of Appellant regarding the nature of the contract. In determining the applicability of the FAA, the Court considered the nature of the underlying contract, "[t]he Court acknowledges that the Federal Arbitration Act applies to contracts effecting interstate commerce. The issue before the Court is whether the residential lease with option to purchase agreement at issue effects interstate commerce. "The intent and objective manifestation of the Parties to a contract at the time a contract is made governs its interpretation." (R. p. 10, quoting Lewis v. Carnaggio, 257 S.C. 54 (S.C. 1971)). "If a contract appears ambiguous in one of its terms, the entire contract is to be viewed as a whole to determine its intent and not isolated portions. (R. p. 10, quoting Farr v. Duke Power Co. 265 S.C. 356 (S.C. 1975)). The contract at issue clearly states that it is a residential lease for real property and contains the typical clauses regarding terms of lease, an option to purchase and other clauses relating to the rights and responsibilities of landlord and tenant. The contract acknowledged that Plaintiff has a home based business, however, the clause "Tenant is responsible for all permits and licensing related to this home-based business and Tenant indemnifies the Landlord of all Liability, costs and fees associated with this business" is an indemnification clause." (R. p. 10).

The Court has reasonably interpreted the contract of the Parties and concluded that the underlying agreement is a Residential lease Agreement with rent to own provisions included therein. The only legal inference to be drawn therefrom is that the FAA does not apply to the instant case and in light of holdings regarding the enforcement of the FAA to real estate contracts, the transaction is intrastate and the FAA is inapplicable. This appeal should be dismissed.

Respectfully Submitted

A handwritten signature in black ink, appearing to be 'BO', is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2016-000635

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JAN 06 2017

SC Court of Appeals

ANGELA CARTMEL

Respondent,

v.

EDWARD BRICE TAYLOR

Appellant.

RULE 211 (b) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the brief of Respondent complies with Rule 211 (b) of the South Carolina Appellate Court Rules.



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

Appellate Case No. 2016-000635

ANGELA CARTMEL.....Respondent

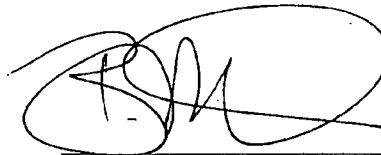
v.

EDWARD BRICE TAYLOR.....Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the *Respondent's Final Brief*, in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid this 4th day of January, 2017 to the following:

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
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Appellate Case No. 2016-000635

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JAN 05 2017

SC Court of Appeals

ANGELA CARTMEL Respondent

v.

EDWARD BRICE TAYLOR Appellant

REPLY BRIEF OF APPELLANT

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January 3, 2017

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INTRODUCTION

The Appellant Edward Brice Taylor ("Appellant" or "Taylor") submits this reply brief to address errors of law and citation of improper or unavailing authority in the Brief of Respondent filed by the Respondent Angela Cartmel ("Respondent" or "Cartmel").

REPLY TO RESPONDENT'S ARGUMENT A.

At pages 3-4 of her brief, Respondent argues that Appellant misinterprets the terms of the Lease Agreement; she contends that the unambiguous and plain meaning of the Lease Agreement is for residential use only. Thus, Respondent concludes that "[i]n the instant case there was no contemplation of a 'mixed contract [sic].'" [Resp. Br. p. 3]

Respondent's position is incorrect. The Lease Agreement clearly goes on to state in Paragraph 1 that the Respondent "may also use a part of the property for the following home-based business: construction of horse jumps." [R. p. 65 ¶ 1]. Amazingly, Respondent chooses to ignore this language in her analysis. This omission is highly problematic for three reasons.

First, as a general principle of contract construction, it is well-settled that "the parties' intention must be gathered from the contents of the entire agreement and not any particular clause therefrom." *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 498, 649 S.E. 2d 494, 502 (Ct. App. 2007). Likewise, "it is fundamental that in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." *Bluffton Towne Center v. Gilleland-Prince*, 412 S.C. 553, 569, 772 S.E.2d 882, 890 (Ct. App. 2015). A contract is read as a whole document so that one may not create an ambiguity by pointing out a single

sentence of a clause.” *Jones v. Builders Inv. Group, LLC*, 415 S.C. 321, 328-329, 781 S.E.2d 737, 741 (Ct. App. 2015). Thus, applying the “whole agreement” principle of contractual constriction, Respondent cannot claim the Lease Agreement is limited to residential purposes based on one clause in Paragraph 1, when another clause in the same paragraph contemplates a commercial component.

Second, Respondent should not even be allowed to make this argument (i.e., a residential use only contract) because Respondent averred in her Statement of the Case that she is seeking consequential damages for business losses. [Resp. Br. p. 2]. It is black-letter law that a party in appellate proceedings is bound by their admissions in the Statement of the Case. *Skelton v. Summit Builders of Greenville, Inc.*, 288 S.C. 453, 456, 343 S.E.2d 446, 448 (1986); Rule 208(b)(3), SCACR. When combined with the fact she also seeks business loss damages in the Complaint [R. pp. 16, 18-19, ¶¶ 4, 20, 21], as well as her own concession at page 4 of her Brief concerning the horse-jump business clause, her admissions should estop the Respondent from arguing that the contract was exclusively residential-only in character. *Id.*

Third, Respondent argued to Judge Manning that the Lease Agreement was ambiguous – and Judge Manning agreed when he signed Respondent’s proposed order. [R. p. 11]. Respondent now takes the opposite position that there is no ambiguity. Thus, Respondent has either conceded Appellant’s third ground for appeal, or has improperly contradicted herself.

Based on the foregoing, the Court should reject Respondent’s contention that the Lease Agreement is unambiguously “residential only” when a plain reading of all the

provisions, plus the Respondent's own admissions, shows the Lease Agreement is unambiguously a "mixed use" contract and not strictly residential.

REPLY TO RESPONDENT'S ARGUMENT B.

In this argument, Respondent makes a conclusory argument that *any* transaction for real estate is inherently intrastate in nature – which goes well beyond the holding in *Bradley v. Brentwood Homes*, 398 S.C. 447, 730 S.E.2d 312 (2012). Respondent offers no citation to authority for this argument. It should therefore not be considered by this Court. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *see also, State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000) ("An issue is also deemed abandoned if the argument in the brief is merely conclusory"). Moreover, there is nothing that keeps a commercial lease outside the scope of the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 1 *et seq.* *See, e.g., Mineola Garden City Co., Ltd. v. Bank of America*, 49 F.Supp. 3d 283 (E.D.N.Y. 2014).

Contrary to Respondent's assertion, the Lease Agreement is not "simply a residential lease/sales contract with a recitation of the renter/buyer's business in order that Appellant will not be responsible for any injuries related to equine activity." [Resp. Br. pp 4-5]. Rather, as Respondent repeatedly wants to ignore, the contract contemplates a horse-jump construction business. [R. p. 65 ¶ 1].

As to Respondent's assertion that Appellant failed to "provide any proofs that the nature of the agreement between the Parties involves interstate commerce" [Resp. Br. p.

5], Appellant would rely on *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 269, 776 S.E.2d 91, 94 (Ct. App. 2015) and *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) for the proposition that “[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration”—and which is discussed at greater length below in the Reply to Respondent’s Argument D.

Continuing with Respondent’s Argument B, she cites to general authority for applicability of the FAA [Resp. Br. pp. 5-6] — which is accurate law but which Appellant submits is misapplied here for the reasons set forth in Appellant’s Initial Brief and this Reply Brief.

If there is a failure in the record to disprove the existence of interstate commerce, it rests with the Respondent as the party opposing arbitration. *Dean*, 408 S.C. at 379, 759 S.E.2d at 731 (2014) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513 (2000)). A court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski v. Bright Acres*, 346 S.C. at 597, 553 S.E.2d at 118 (2001); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. at 126, 747 S.E.2d at 467 (2013); *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. at 109, 739 S.E.2d at 214 (2013); *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. at 1419 (1986). As no such positive assurance is in the record, arbitration should be compelled. *Id.*

REPLY TO RESPONDENT’S ARGUMENT C.

In section C of her brief, Respondent basically argues that taken together: (1) the underlying nature of the claims; and (2) the notion that neither party contemplated a

contract touching on interstate commerce, should lead this Court to affirm Judge Manning. [Resp. Br. pp. 7-9]. However, it is well-settled that in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. *Zabinski*, 346 S.C. at 596, 596, 553 S.E.2d at 118 (2001). To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Id.*, 346 S.C. at 597, 553 S.E.2d at 118. Moreover, the South Carolina courts will enforce an arbitration agreement under the FAA “regardless of whether or not the parties contemplated an interstate transaction.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, n. 3, 542 S.E.2d 360, 363, n.3 (2001) (emphasis added). Thus, Respondent’s focus on the underlying merits and intent of the parties is misplaced. As to Respondent’s hypothetical involving damage to a tractor trailer [App. Br. p. 7], Appellant would answer affirmatively – *if* the claimant had a lease with an option to operate a tractor trailer business with a binding and enforceable arbitration clause, as is the case here. Accordingly, the Court should reject the arguments set forth in this section.

REPLY TO RESPONDENT’S ARGUMENT D.

In this section, Respondent asserts that the burden of proof rule set forth in *Dean*, 408 S.C. at 379, 759 S.E.2d at 731 (2014) – that unequivocally puts the burden of proving that the claims are unsuitable for arbitration on the party opposing arbitration – does not apply when analysis is based on the “residential exception” flowing from *Bradley v. Brentwood*, 398 S.C. at 459-460, 730 S.E.2d at 317 (2012).

In other words, the Respondent advances a theory that *while in all other motions to compel arbitration since Dean clearly put the burden of proof on the party seeking to avoid arbitration*, in any case where the trial court relies on *Bradley's* residential exception, the burden remains on the party seeking to compel arbitration. This reasoning is erroneous for several reasons.

First, it's an entirely conclusory argument without citation to authority. *Broom v. Jennifer J.*, 403 S.C. at 115, 742 S.E.2d at 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal.").

Second, *Dean* and the cases following it do not limit the arbitration burden of proof rule in any way – they always establish it as a rule in the "Standard of Review." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Hall*, 413 S.C. at 269, 776 S.E.2d at 94 (Ct. App. 2015); *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016); *Wilson v. Willis*, 416 S.C. 395, 408-409, 786 S.E.2d 571, 578 (Ct. App. 2016). Placing this legal principle in the Standard of Review suggests that it is meant to apply in all cases. *Id.*

Third, the *Dean* burden of proof rule is also consistent with long-established federal substantive law applying the FAA, which the South Carolina Supreme Court has held supplants state arbitration law. *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 425, 434 S.E.2d 281, 283 (1993); *see also Buckeye Check Cashing, Inc. v. Cardegan*, 556 U.S. 440, 446, 126 S.Ct. 1204, 1208-1209 (2006) (reaffirming a 1984 decision which held that the FAA "created a body of federal substantive law which was applicable in both state and

federal courts”); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 53, 790 S.E.2d 1, 6 (2016) (applying the holding of *Buckeye*)¹.

Fourth, even if this Court were to deem *Bradley* in conflict with *Dean* regarding the burden of proof, it should still apply *Dean* because it is the newer precedent. *See Bruner v. Automobile Ins. Co. of Hartford Conn.*, 165 S.C. 421, 164 S.E. 134, 135 (1932) (generally establishing that in cases of conflicting precedent, the latest will be followed). It is true that the Court of Appeals is bound by precedent of the Supreme Court. S.C. Const. Art V § 9; *Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993). But here, the rulings of *Dean* and *Johnson* are also Supreme Court precedents that come after *Bradley* and do not overrule anything in *Bradley* except to shift the correct burden of proof. *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Johnson*, 416 S.C. at 512, 788 S.E.2d at 218.

Thus, placing the burden of proof properly on Respondent is consistent with prevailing and current Supreme Court precedent at the time of the motion to compel arbitration. This rule is also being applied by the Court of Appeals in recent opinions. *Hall*, 413 S.C. at 269, 776 S.E.2d at 94; *Wilson* 416 S.C. at 408-409, 786 S.E.2d at 578. It should be applied here, too. *Shea v. State Dep't of Mental Retardation*, 279 S.C. 604, 608, 310 S.E.2d 819, 821 (Ct. App. 1983) (“The maintenance of a harmonious body of decisional law is essential to the efficient administration of justice. Therefore, if the judicial

¹ Examples of federal case law that establishes the burden of proof are *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 522-523 (2000) and *Shearson / American Exp., Inc. v. McMahon*, 482 U.S. 220, 227, 107 S.Ct. 2332, 2337 (1987). It was the *Green Tree* case, in fact, which was cited by the South Carolina Supreme Court in *Dean*, 408 S.C. at 279, 759 S.E.2d at 727.

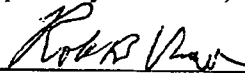
system is to operate efficiently, this court must be bound by decisions of the Supreme Court.”).

Turning to Respondent’s argument that “Appellant is very well aware that the equine industry ... is isolated to those horse riders using facilities in said locales,” not only is this an unsupported and illogical statement (no one does equine activity in Georgia?), but it violates *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review”) and *Wilson v. Willis*, 416 S.C. 395, 408, 786 S.E.2d 571, 577, n.4 (Ct. App. 2016) (holding that in a motion to compel arbitration, where the trial court did not leave the record open for the addition of new evidence, facts not properly admitted into evidence below cannot be considered as part of the record on appeal).

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court should reject the erroneous positions advanced in the Brief of Respondent.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
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The Honorable L. Casey Manning
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Appellate Case No. 2016-000635

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CERTIFICATE OF COUNSEL

The undersigned certified that this *Final Reply Brief of Appellant* complies with
Rule 211(b), SCACR.



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Appellate Case No. 2016-000635

ANGELA CARTMEL Respondent

v.

EDWARD BRICE TAYLOR Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the *Final Reply Brief of Appellant* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Angela Cartmel, Respondent,

v.

Edward Brice Taylor, Appellant.

Appellate Case No. 2016-000635

Appeal From Aiken County
L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2018-UP-046
Submitted November 1, 2017 – Filed January 31, 2018

AFFIRMED

Robert Bratton Varnado and Alexis M. Wimberly, both
of Brown & Varnado, LLC, of Mt. Pleasant, for
Appellant.

Bradford M. Owensby, of Brad Owensby Law Firm,
LLC, of Aiken, for Respondent.

PER CURIAM: We affirm pursuant to Rule 220(b), SCACR, and the following
authorities: *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d
663, 667 (2007) ("Arbitrability determinations are subject to de novo review.
Nevertheless, a [trial] court's factual findings will not be reversed on appeal if any

evidence reasonably supports the findings."); *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."); S.C. Code Ann. § 15-48-10(a) (2005) ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration."); 9 U.S.C. § 2 (2009) ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996) (holding the Federal Arbitration Act (FAA) preempts the South Carolina Uniform Arbitration Act when the underlying transaction involves interstate commerce); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363 (2001) ("Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether . . . the parties contemplated an interstate transaction."); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454, 730 S.E.2d 312, 315-16 (2012) ("[I]n order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign."); *id.* at 455, 730 S.E.2d at 316 ("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."); *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003) ("Our courts consistently look to the essential character of the contract when applying the FAA."); *Bradley*, 398 S.C. at 456, 730 S.E.2d at 317 ("This court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction.").

AFFIRMED.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

LOCKEMY, C.J., and HUFF and HILL, JJ., concur.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable L. Casey Manning
Circuit Court Judge

Appellate Case No. 2016-000635

RECEIVED

FEB 14 2018

SC Court of Appeals

ANGELA CARTMEL Respondent

v.

EDWARD BRICE TAYLOR Appellant

PETITION FOR REHEARING

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February 13, 2018

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, the Appellant Edward Brice Taylor (“Appellant” or “Taylor”) moves the Court of Appeals for rehearing on its unpublished opinion, filed January 31, 2018, affirming the decision of the Honorable Casey L. Manning who denied arbitration.

INTRODUCTION

This not a big appeal, but it is an important one. It implicates whether this Court is serious about enforcing the federal Uniform Arbitration Act – or whether it is not. The issue before the Court was whether the “real estate exception” set forth in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) has any application in this case, which involves a “mixed use” lease-agreement for residential and commercial activity rather than a “strictly” residential contract.

The unpublished opinion of the Court ignores both the holding of *Bradley* and the clear line of arbitration authority. It is worthy of more than short shrift. The case should be reversed, unless this Court wants to (1) enter a holding that if the case touches *in any way* on residential activity, it is not subject to arbitration under the Act, regardless of the other case law in the State; and (2) that the non-moving party is therefore relieved of its obligations to show why arbitration is inapplicable.

ARGUMENT

The Current Law of Arbitration.

The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration. *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to

a court's evaluation of the enforceability of an arbitration clause. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).

It is black letter law in South Carolina that “any doubts concerning the scope of arbitrable issues **must** be resolved in favor of arbitration (emphasis added).” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). The heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Id.*, 402 S.C. at 109, 739 S.E.2d at 213 (2013) (citing *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996)); see also *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (“There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration.”). Both federal and state public policy strongly favor the arbitration of disputes. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). Such a presumption is strengthened when an arbitration clause is broadly written. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213 (citing *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419 (1986)). It has been held that a court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118; *Cape Romain*, 305 S.C. at 126, 747 S.E.2d at 467; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214; *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. at 1419.

The South Carolina courts will enforce an arbitration agreement under the Federal Arbitration Act (“FAA”), 9 U.S.C.A. § 1 *et seq.*, in transactions that involve interstate commerce, “**regardless of whether or not the parties contemplated an interstate transaction.**” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, n. 3, 542 S.E.2d 360, 363, n.3 (2001) (emphasis added).

“Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA.”
Henderson v. Summerville Ford-Mercury, Inc., 405 S.C. 440, 448, 748 S.E.2d 221, 225 (2013);
Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

The failure of the Agreement to meet the technical requirements of S.C. Code Ann. § 15-48-10 is irrelevant if the FAA applies. *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116 (“While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate.”); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453-454, 730 S.E.2d 312, 315 (2012); *see also* *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996) (“[i]f the arbitration agreement in the instant controversy is covered by the FAA, then ... the FAA preempts S.C. Code Ann. § 15-48-10(a); *Walden v. Harrelson Nisan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325-326 (Ct. App. 2012). For enforcement, the FAA only requires proof (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving “commerce.” 9 U.S.C.A. § 2 (1947). The United States Supreme Court has held “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. a 1419. The United States Supreme Court confirmed in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834 (1995) that the FAA is coextensive with the Commerce Clause of the U.S. Constitution.

The Court appears to cite all of the foregoing but not to apply any of it. It begs the question of whether this law applies. If it does, then the Court cannot rely on *Bradley* to affirm the trial court.

Bradley Does Not Apply; the other Authority Does.

The Appellant has conceded that a lease or a rent to own arrangement *strictly* for a tenancy in real property located within South Carolina would probably fall under the “real estate exception.” However, the Agreement at bar is not strictly a residential-only contract. *Bradley*, therefore, does not apply. Yet, the Court of Appeals has found that it has.

It is the presence of the business component in the Agreement, by virtue of the express dual/mixed residential-commercial use language, which creates a direct nexus to interstate commerce – and makes *Bradley* inapposite.

Likewise, because the Agreement is clearly both residential and commercial, the express terms of the contract are not strictly limited to the real estate, and the Agreement cannot automatically be deemed as limited to intrastate commerce – which additionally serves as another way in which the facts of the instant Appeal differ from *Bradley*. 389 S.C. at 459-460, 730 S.E.2d at 318. The trial court erred in holding that the Agreement was solely for the lease/sale of real property. [R. p. 11]. The Court of Appeals has fallen into the same trap.

The trial court’s focus on the “indemnification” clause in ¶ 1 of the Agreement is further misplaced, particularly when the trial court ignored the “home-based business” clause that precedes it. [R. p. 85 ¶ 1]. The Court of Appeals has seemingly done the same thing.

The limited evidence submitted in the case cannot reasonably support the trial court’s findings that the real estate exception applies – nor this Court’s affirmation. *Bradley*, 398 S.C. at 453, 730 S.E.2d at 315; *Hall*, 413 S.C. at 217, 776 S.E.2d at 94. If one looks at the “essential nature of the Contract” (as the Court of Appeals says that it does, citing *Thornton*, 357 S.C. at 96, 592 S.E.2d at 52), then the affirmance is misplaced. For this reason, the trial court should be reversed, and the Court of Appeals should grant rehearing on this case.

Respondent Failed to Meet Her Burden.

As the party litigating against arbitration, Respondent bore the burden of proof to that the claims at issue "are unsuitable for arbitration" – not the Appellant. *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Hall*, 413 S.C. at 269, 776 S.E.2d at 94. She clearly failed to meet her burden, but the Unpublished Opinion lets her off the hook.

Other than the claim for business damages in her Complaint and the submission of the Agreement, the Respondent failed to offer any evidence or testimony that met her burden of showing that her home-based horse-jump business did not touch on interstate commerce. [R. pp.15-27 (Compl.), pp. 41-53 (Lease), pp. 74-84 (Trans.)]. Respondent's memorandum of law is silent on this issue as well. [R. pp 39-40.].

This analysis is germane to the proceedings. The Court of Appeals, however, has apparently found that there is a question as to whether the "horse jump construction" business is either interstate or intrastate, and rule in favor of the latter – intrastate – **without actually making the finding**. Such a finding (intrastate commerce), however, would violate the following black-letter precepts which the circuit court failed to apply:

- the heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Landers*, 402 S.C. at 109, 739 S.E.2d at 213; *Cape Romain*, 405 S.C. at 125, 747 S.E.2d at 466.
- the presumption in favor of arbitrability is strengthened when an arbitration clause is broadly written. *Landers*, at 109, 739 S.E.2d at 213.
- any doubts concerning the scope of arbitrable issues **must** be resolved in favor of arbitration (emphasis added)." *Landers*, at 109, 739 S.E.2d at 213; *AT&T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. a 1419.
- a court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118; *Cape Romain*, 305 S.C. at 126, 747 S.E.2d at 467;

Landers, 402 S.C. at 109, 739 S.E.2d at 214; *AT & T Tech., Inc.*, 475 U.S. at 650, 106 S.Ct. at 1419.

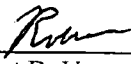
- if the transaction involves interstate commerce, the FAA applies “regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363, n.3.
- the United States Supreme Court has held that the phrase ‘involving commerce’ is the same as ‘affecting 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 S.E.2d 565, 568 (Ct. App. 2002) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)).

Under well-settled state and federal jurisprudence, because there is *at least* a question about whether the FAA applies in this appeal, this Court must come down in favor of arbitrability. Moreover, the arbitration clause in Paragraph 61 of the Agreement is broad [R. p. 94 ¶ 61], which further mandates arbitration. The arbitration clause is also clearly subject to an interpretation that permits arbitrability, and this Court cannot say with positive assurance that it does not permit arbitrability. Since any doubts must be resolved in favor of granting a motion to compel arbitration, Appellant submits that arbitration is both suitable and permitted – and Respondent has offered nothing to the contrary. The Court of Appeals ignored this law.

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court of Appeals should grant a rehearing and reverse its ruling. The one quote in the Unpublished Opinion (from *Bradley*) which the Court of Appeals’ decision hangs upon (“This court has continued to adhere to the view that the development of real estate is an inherently intrastate transaction”) is misplaced when (1) the Court considers that this was a mixed-use contract; and (2) the Court applies the substantive federal and State law. Either this State stands behind its law of arbitrability in cases large and small – or it doesn’t. As it stands, the Unpublished Opinion falls into the latter category.

Respectfully submitted,


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February 13, 2017

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EDWARD BRICE TAYLOR Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the *Petition for Rehearing* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following:

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February 13, 2018
Mt. Pleasant, South Carolina

The South Carolina Court of Appeals

Angela Cartmel, Respondent,

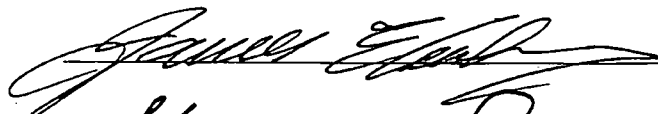
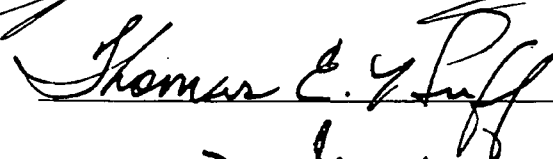
v.

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Appellate Case No. 2016-000635

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C. J.
 J.
 J.

Columbia, South Carolina

cc:

Robert Bratton Varnado, Esquire
Alexis Mills Wimberly, Esquire
Bradford M. Owensby, Esquire
The Honorable L. Casey Manning

FILED

March 26, 2018