STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2016-CP-32-02742

Tina Huffstetler,

Plaintiff,

v.

Michael Nemec & Company, Inc.; Nemec Construction Company, Inc.; Michael Nemec, Individually; C. Jeff Stroud Architect, AIA, Inc.; Jeff Stroud, Individually; Lake Murray Environmental Services, LLC; J & A Masonry, LLC; Chris Phillips, individually and d/b/a J & C Framing; P&B Building, LLC; SH Land Clearing & Excavating, Inc.; Land Clearing and Excavating, Inc.; George Otto d/b/a Otto Express Cabinets & Trim; Lake Murray Environmental Services, LLC; Timothy Clark d/b/a Timothy Clark Roofing; CDH Painting, LLC d/b/a CDH Custom Painting; Forterra Brick, LLC; Hollis Plumbing Co., Inc.; Ace Drywall, Inc.; Toby Kesister; and Bruce Chavis;

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY COMPLAINT

THIS MATTER came before the Court on March 1, 2018 upon Defendants Michael Nemec and Michael Nemec and Company, Inc.'s Motion to Compel Arbitration. Following oral argument, the Court took Defendants' Motion under advisement. After consideration of the Parties' memoranda, oral arguments, and applicable law, this Court denies Defendants' Motion to Compel Arbitration and finds further, as follows:

FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

This is a defective and negligent construction suit filed by the Plaintiff, Ms. Tina Huffstetler. Ms. Huffstetler contracted with Defendant Michael Nemec and Company, Inc. for the construction of her home, a single-family two-story dwelling in the Regatta subdivision in Lexington County. The structure was built over a crawl space with concrete masonry piers and

foundation brick curtain walls. The exterior cladding consists of brick veneer. The roof was constructed with a hip configuration and covered with architectural grade composition shingles. A two-car garage was constructed on a concrete slab on grade. The designer of the residence was C. Jeff Stroud, AIA Architects.

The contract was entered on November 12, 2014 for the construction of Ms. Huffstetler's home at 307 Anchor Bend, Columbia, SC 29212 (hereinafter "the Contract"). Under the terms of that contract, construction was to begin on December 1, 2014 and be completed by November 30, 2015. At the time the parties entered into the Contract, the Defendant party to that Contract, Michael Nemec and Company, Inc., was not a licensed residential builder or contractor.

The Contract included the following provision:

> SECTION ELEVEN
> ARBITRATION
>
> All claims and disputes relating to this contract shall be subject to arbitration at the option of either owner or contractor, in accordance with the Arbitration Rules of American Arbitration Association for the construction industry then operating. Written notice of demand for arbitration shall be filed with the other party to the contract and with the American Arbitration Association, within a reasonable time after the dispute has arisen. (Contract, p. 3).

On August 4, 2016, Plaintiff commenced this action by Complaint. In her Amended Complaint filed August 7, 2017, Plaintiff asserts a number of claims including negligence/gross negligence, breach of warranties, breach of contract, violation of the South Carolina Unfair Trade Practices Act, and other causes of action against Defendants. Specifically, Plaintiff alleges Defendants were negligent and their work was defective in many ways including failure to properly grade the land which led to tremendous amounts of water collecting within the crawlspace of the home causing damage to other components of the home; failure to construct a proper foundation; failure to install proper vapor barriers; and numerous other defective

installations and construction. These many defects and failures by the Defendants have rendered the home uninhabitable. In response to the original complaint, Defendant answered on October 14, 2016 and contemporaneously moved to compel arbitration under the Contract.

Nemec filed the instant Motion requesting that the Court compel arbitration pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et. seq., or alternatively, the South Carolina Uniform Arbitration Act (SCUAA), S.C. Code Ann §§ 15-48-10, et. seq. based upon provisions contained in a number of Exhibits submitted to the Court, including but not limited to, the Contract entered into with the Plaintiff. Pursuant to the arbitration provision shown above, Defendant is also required to file written notice of its demand to arbitrate with the American Arbitration Association (AAA), within a reasonable time after the dispute has arisen. However, no such demand was filed. Also attached to the Defendant's Motion was affidavit by Defendant Michael Nemec where he expressly stated he was "incorrectly identified in the Complaint as Nemec Construction Company, Inc."

STANDARD OF REVIEW

The question of the arbitrability of a claim is an issue for judicial determination. *Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564 (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Granite Rock Co, v. Int'l Bhd Of Teamsters*, 561 U.S. 287, 296 (2010); *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (noting same); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010).

General contract defenses such as fraud, duress and unconscionability apply to a court's evaluation of the enforceability of an arbitration clause governed under either the SCUAA or the FAA. 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and

unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."); *see also* § 15-48-10(a) containing similar language to that of the FAA. Thus, this Court may address "arbitrability" based upon general contract defenses recognized in this State.[1] Therefore, if this Court finds any clause of a contract unconscionable, including an arbitration clause, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. S.C. Code § 36-3-302(1) 2003.

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. *Williams v. Teran, Inc.*, 266 S.C. 55, 221 S.E.2d 526 (1976); *RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 321 S.E.2d 199 (Ct.App.1984). Ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), *vacated on other grounds*, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). A contract is ambiguous when its terms are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App.1997); *see also Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968) ("[An ambiguous contract is one capable of being understood in more senses than one, an

[1] As aptly noted by Justices Breyer, Ginsburg, Sotomayor and Kagan in their dissenting opinion to *AT&T Mobility, LLC v. Concepcion:* "even though contract defenses, e.g., duress and unconscionability, slow down the dispute resolution process, *federal arbitration law normally leaves such matters to the States.*" 131 S.Ct. 1740, 1760 (2011) (emphasis added); *Rent-A-Center*, 130 S.Ct. at 2775 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses'"); *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (200 I) ("General contract principles of state law apply to arbitration clauses governed by the FAA.")

agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.") (citation omitted). Whether a contract's language is ambiguous is a question of law. *South Carolina Dept of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.*; *see also Charles v. B & B Theatres, Inc.*, 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959).

Questions as to whether a transaction involves intrastate or interstate commerce, and thus, implicates the application of the South Carolina Uniform Arbitration Act ("SCUAA") or the Federal Arbitration Act ("FAA"), are reserved for the trial court. To ascertain whether a transaction involves commerce within the meaning of either the SCUAA or the FAA, the court must examine the agreement, the complaint, and the surrounding facts. For the FAA to apply, the court must determine the contract involves commerce that is interstate. *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 459, 476 S.E.2d 149, 152 (1996).

Under the SCUAA, notice of an arbitration provision must be "typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract," and failure to do so renders the arbitration provision unenforceable under the SCUAA's express provisions. S.C. Code § 15-48-10(a).

ANALYSIS

I. DEFENDANT MICHAEL NEMEC AND COMPANY, INC. IS EXPRESSLY PROHIBITED BY STATUTE FROM ENFORCING THE TERMS OF THE CONTRACT BECAUSE IT WAS NOT A LICENSED RESIDENTIAL BUILDER WHEN IT ENTERED INTO CONTRACT.

South Carolina Code Ann. § 40-59-30(B) states that "a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not . . . bring an action at law or in equity to enforce the provisions of a contract for residential building

or residential specialty contracting which the person or firm entered into in violation of this chapter." The licensing statutes for commercial contractors contain a similar prohibition: "An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract." S.C. Code Ann. § 40-11-370(C).

Here, Defendant has answered and filed counterclaims against Plaintiff including claims for Breach of Contract. Now, in the present Motion to Compel Arbitration, Defendant seeks to enforce the arbitration provision of the Contract. In its first paragraph, the Contract stated that Defendant Michael Nemec and Company, Inc. was "a company duly licensed as a contractor in the State of South Carolina . . ." However, at the time Defendant entered into this agreement on November 12, 2014, it was not a duly licensed contractor in the State of South Carolina. Not only is Defendant's representation that it was a licensed contractor a fraudulent misrepresentation that induced the Plaintiff to enter into the agreement, but that fraudulent misrepresentation when Defendant was not a licensed residential contractor expressly forbids him from actions to enforce the terms of the contract pursuant to S. C. Code Ann. §40-59-30(B) as outlined above. The contract defenses of fraud and misrepresentation, and the equitable doctrine of unclean hands prevent enforcement of the contract's terms by the Defendant.

At oral arguments, Defendant produced a document purporting to show it was a licensed contractor at the time it entered into the contract. However, that document stated that Defendant Nemec Construction Company, Inc. was a licensed contractor. Yet, in an affidavit supporting this very motion, Defendant Michael Nemec and Company, Inc. expressly denies it is properly

named as Nemec Construction Company, Inc. The only Defendant who contracted with the Plaintiff to build her home was Defendant Michael Nemec and Company, Inc. The only Defendant seeking to enforce the arbitration provision of the Contract is Defendant Michael Nemec and Company, Inc. The Court has seen nothing to demonstrate Defendant Michael Nemec and Company, Inc. was a licensed residential contractor or held any other type of contracting license at the time the contract was entered with the Plaintiff. Defendant is trying to be Nemec Construction Company for the purposes of licensing, but trying NOT to be Nemec Construction Company, Inc. for the purpose of the pleadings in this lawsuit.

Because the Defendant that entered into the contract with Plaintiff was not a licensed contractor, a fact he misrepresented to the Plaintiff at the time the agreement was entered, Defendant's present Motion to Compel Arbitration is denied. Such attempts by Defendant to enforce the terms of the Contract are expressly prohibited by statue, and the provision is voidable because of Defendant's fraudulent inducement, misrepresentations, and unclean hands.

II. DEFENDANT MICHAEL NEMEC AND COMPANY, INC. HAS FAILED TO COMPLY WITH THE TERMS OF THE ARBITRATION PROVISION IT SEEKS TO ENFORCE AND HAS THEREFORE WAIVED ENFORCEMENT OF THAT PROVISION.

The arbitration provision, by its express terms, requires that the party seeking to compel arbitration must provide "(w)ritten notice of demand for arbitration . . . filed with the other party to the contract and with the American Arbitration Association, within a reasonable time after the dispute has arisen." (Contract p. 3) The Defendant admitted in oral arguments it failed to provide any such notice to the American Arbitration Association. Thus, Defendant seeks to enforce the arbitration provision, but has not complied with the terms of the very same provision it seeks to enforce.

"A waiver is an intentional relinquishment of a known right." *Bonnette v. State,* 277 S.C. 17, 282 S.E.2d 597 (1981). It may be either express or implied. *Lawrimore v. American Health and Life Insurance Co.,* 276 S.C. 112, 276 S.E.2d 296 (1981). An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable. *Pitts v. New York Life Insurance Company,* 247 S.C. 545, 148 S.E.2d 369 (1966).; *Lyles v. BMI, Inc.,* 292 S.C. 153, 158-159, 355 S.E.2d 282.

Because Defendant has not complied with the terms of the provision it seeks to enforce, a provision the Defendant drafted, the Defendant has waived enforcement of that provision. This case has been pending since Plaintiff filed its Complaint on August 4, 2016. Now, nearly eighteen months later, Defendant has failed to comply with the very provision it seeks to enforce, perhaps because it is barred by statute from bringing any action to enforce the contract. The Defendant's conduct and failure to abide by the terms of the provision it now seeks to enforce constitutes an implied waiver of the Arbitration Provision of the Contract, and Defendant's present Motion to Compel Arbitration is denied on this ground.

III. THIS INTRASTATE TRANSACTION IS SUBJECT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, NOT THE FEDERAL ARBITRATION ACT, AND THE ARBITRATION PROVISION IS INVALID UNDER THE REQUIREMENTS OF THE SOUTH CAROLINA ARBITRATION ACT:

The court must determine whether a transaction involves intrastate or interstate commerce, and thus, implicates the application of the South Carolina Uniform Arbitration Act ("SCUAA") or the Federal Arbitration Act ("FAA"). To ascertain whether a transaction involves commerce within the meaning of either the SCUAA or the FAA, the court must examine the agreement, the complaint, and the surrounding facts. For the FAA to apply, the court must

determine, based on the agreement, the complaint, and the surrounding facts that the transaction must be interstate, or foreign.

The Supreme Court of South Carolina has held that "to ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski* at 117, 553 S.E.2d at 594 *citing Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). The United States Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. *Zabinski,* at 115, 553 S.E.2d at 591 *quoting Allied- Bruce Terminix Cos., Inc. v, Dobson,* 513 U.S. 265, 274 (1995). The transaction must turn out, in fact, to have involved interstate commerce. *Id. citing Roberson v. Money Tree of Ala., Inc.*, 954 F.Supp. 1519 (M.D. Ala. 1997). "Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 115-6, 553 S.E.2d at 591 *citing Volt Info. Scis. Inc. v. Bd. Of Try.*, 489 U.S 1468 (1989).

In cases involving the sale of real property South Carolina courts make clear that the SCUAA applies because such contracts involve intrastate commerce as opposed to interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012). The Court in *Bradley* went a step further, holding that "the development of land within South Carolina's borders is **the quintessential example of a purely intrastate activity.**" *Id.* at 317 *quoting Zabrinski*, 346 S.C. at 595, 553 S.E.2d at 117-18 (emphasis added). The Supreme Court of South Carolina has also held that "interstate commerce was not involved in a contract for the sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties utilized the services of a North Carolina engineer and procured

financing from a Pennsylvania lender." *Bradley*, at 456, 730 S.E.2d at 317 (2012) *citing Matthews v. Fluor Corp.*, 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994).

Here, the Plaintiff's Amended Complaint alleges multiple construction deficiencies and failures to perform building tasks outlined in the contract. The agreement memorialized in the contract was made between a South Carolina resident and a South Carolina corporation. The agreement was entered in to in the State of South Carolina. The home was designed by an architect who is domiciled in Lexington County, South Carolina, and the Amended Complaint alleges claims against some fifteen subcontractors, all of whom are citizens and residents of the State of South Carolina, County of Lexington. Finally, and most importantly, the home which is the subject of this lawsuit is located in Lexington County, South Carolina. The fact that some of the supplies used to construct the home were manufactured outside of South Carolina is in no way relevant to Plaintiff's claims. It would be difficult to build a home with stronger South Carolina ties than this one, and the Plaintiff would have never expected to be forced to arbitrate disputes related to this home in accordance with the Federal Act. The Plaintiff's claims involve negligent construction and breach of contract by South Carolina contractors for the construction of a home being built in South Carolina. These claims do not involve the manufacture or purchase of products or materials from out of state.

The Plaintiff's claims arose when the Lexington County Defendants failed to properly grade Lexington County dirt, on a Lexington County parcel of land. That led to Lexington County rainwater collecting under the Lexington County Plaintiff's home. That moisture caused tremendous mold damage in Lexington County which has rendered the Lexington County Plaintiff's home uninhabitable.

A. NO NOTICE OF ARBITRATION CLAUSE.

The Contract provides in pertinent part:

SECTION ELEVEN
ARBITRATION

> All claims and disputes relating to this contract shall be subject to arbitration at the option of either owner or contractor, in accordance with the Arbitration Rules of American Arbitration Association for the construction industry then operating. Written notice of demand for arbitration shall be filed with the other party to the contract and with the American Arbitration Association, within a reasonable time after the dispute has arisen.

However, The South Carolina Uniform Arbitration Act states that "[n]otice that a contract is subject to arbitration pursuant to this chapter **shall be typed in underlined capital letter, 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 § 15-48-10 (emphasis added). The arbitration provision here is not typed in underlined capital letters and is not on the first page of the contract. Therefore, under the South Carolina Uniform Arbitration Act the arbitration provision is not enforceable.

B. THE ARBITRATION NOTICE IS AMBIGUOUS AS TO CHOICE OF LAW AND IS THEREFORE INVALID.

The Arbitration provision is ambiguous as to its choice of law because it does not state whether the SCUAA or the FAA applies. Ambiguities are to be more strictly construed against the drafter of a document. Therefore, the Court must determine whether the agreements are subject to interstate or intrastate commerce. The SCUAA applies to the arbitration provision and that notice is not in compliance with the statute. For these alternative reasons, the Court denies Defendant's Motion to Enforce the arbitration provisions.

Where an arbitration agreement selects the FAA or a state arbitration statute as the

applicable law, that law governs regardless of whether the contract involves intrastate or interstate commerce. This principle has repeatedly been recognized by the United States Supreme Court and the South Carolina Supreme Court. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Tr. University*, the United States Supreme Court addressed the impact of parties' choice-of-law in their contract on the question of whether the arbitration required by the contract was governed by the FAA or state law. *Volt*, 489 U.S. 468 (1989). The Court found determinative the fact that the FAA's purpose is only to require courts to enforce "agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478. The Court thus held that courts must enforce contractual provisions specifying the law governing contractually required arbitration of disputes. *Id.* at 479. The court recently reiterated this point in *DIRECTV, Inc. v. Imburgia*, providing that "parties to an arbitration contract [have] considerable latitude to choose what law governs some or all of its provisions." *Imburgia*, 136 S. C. 463, 468 (2015). The South Carolina Supreme Court applied these principles to hold that where an arbitration agreement provides that it is governed by the FAA, the FAA applies irrespective of whether there is interstate commerce. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

In reviewing the arbitration provision at issue, the Court finds that ambiguous terms as to the choice of law are within the arbitration provisions. Here, the arbitration provision does not provide whether it is governed by the FAA or the SCUAA.

The Contract heading is titled "STATE OF SOUTH CAROLINA" and "COUNTY OF LEXINGTON", and the opening paragraph of the Contract makes reference to both parties being residents of the State of South Carolina and the Defendant being a contractor licensed in the

State of South Carolina. There is no mention of whether the FAA applies or the SCUAA. This provision in no way makes it clear whether the FAA applies or the SCUAA.

Because of this ambiguity Plaintiff argues, in the alternative, the ambiguity should be construed against the drafter, and the SCUAA should govern this provision. As mentioned multiple times above, this provision fails the requirements of the SCUAA **(shall be typed in underlined capital letter, or rubber-stamped prominently, on the first page of the contract)**. Because the arbitration provision is ambiguous and any ambiguities should be construed against the drafter, the SCUAA governs this provision, the provision does not meet the notice requirements of the SCUAA, and the provision is thus stricken. The Defendant's Motion is denied on this ground.

IV. THE MOTION TO COMPEL ARBITRATION IS DENIED DUE TO THE UNCONSCIONABILITY OF THE ARBITRATION PROVISION AS A WHOLE

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

When such questions of arbitrability arise, the trial court, not the arbitrator, decides whether a matter should be resolved through arbitration. See *Oxford Health Plans, LLC v. Sutter, 569 U.S.* 564 (2013) This determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (noting where one party denies the existence of an arbitration agreement

raised by an opposing party, a court must immediately determine whether the agreement exists in the first place.) When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties..." *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013)), affirmed by S. Ct. Opinion No. 27645 (Filed July 6, 2016); *see also* S.C. Code § 15-48-20 (a) (providing arbitration **will** be denied if a court determines no agreement to arbitrate existed).

A. THE DEFENDANTS' ARBITRATION PROVISION IS UNCONSCIONABLE, AND THUS UNENFORCEABLE

Unconscionability is defined as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25 644 S.E.2d 663, 668-69 (2007) (citing *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)) Unconscionability must be evaluated under both prongs: (1) lack of meaningful choice; and (2) oppressive terms.

1. Absence of Meaningful Choice

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id.* (citations omitted). "In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d

at 669 (citations omitted). "[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Id.* at 373 S.0 at 26-27, 644 S.E.2d at 669.

In circumstances involving adhesion contracts, an absence of meaningful choice is readily apparent based upon the lack of bargaining power. Accordingly, adhesion contracts, such as commercial sales agreements and manufacturer warranties, are subject to "considerable skepticism" due to the disparity in bargaining positions of the parties. *Id.* at 27, 644 S.E.2d at 669. Consequently, "the presumption in favor of arbitration is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." Id. at 26, 644 S.E.2d at 669 (citations omitted).

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

The Plaintiff had no choice and zero input as to any aspect of the Agreement entered into by the Plaintiff, Defendants used its standard contract which contain the same sections and same language for all of their agreements, including the arbitration and legal remedies provisions.

Plaintiff was never consulted and was never provided the opportunity to negotiate those terms. Given Plaintiff is not a business entity, is unsophisticated, and lacks in bargaining power, it only supports the supposition that Plaintiff was presented with Defendant's Contract on a take it or leave it basis and that clearly there was an absence of meaningful choice. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998). As such, the "adhesive" nature of these provisions — nonnegotiable provisions which were drafted by Defendants, and which functioned to contract away certain significant rights and remedies otherwise lawfully available to Plaintiffs. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69.

The Court finds the Contract is an adhesion contract where the Plaintiff was not given the opportunity to negotiate its terms. This provision buried within the Contract takes away the most significant and precious right a Plaintiff has – the right to a jury trial.

2. Oppressive/One-Sided Terms

Similar to *Simpson* and *D.R. Horton*, Defendant's arbitration clause is "made unconscionable" by its oppressive nature which pervades the arbitration provision. Thus, in line with South Carolina jurisprudence, the arbitration provision drafted by the Defendants as part of this adhesion contract is hereby stricken by this Court.

The Contract at issue in this case was entered in to by the Plaintiff and only one of the many defendants, Michael Nemec and Company, Inc. The Plaintiff never agreed to arbitrate its claims or potential claims against the other numerous defendants against whom the Plaintiff's

complaint has been filed. To force the Plaintiff to arbitrate its claims against Defendant Michael Nemec and Company, Inc. while Plaintiff continues to pursue its claims against the numerous other defendants in State Court litigation would be oppressive and unduly burdensome to the Plaintiff. That result would subject the Plaintiff to the costs of litigation, discovery, alternative dispute resolution, and potentially trial in state court, and also the costs and time involved with pursuing its claims against Defendant Michael Nemec and Company, Inc. in arbitration. Additionally, this burdensome effect could result in multiple and inconsistent findings of fact and outcomes. Because the arbitration provision of this adhesion contract is unconscionable, the Defendant's Motion to Compel Arbitration is denied on this ground.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Compel Arbitration is DENIED.

AND IT IS SO ORDERED.

R. Knox McMahon
Presiding Judge, 11th Judicial Circuit
16 March 18

March 12, 2018
Lexington, South Carolina