

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2009-CP-18-1602

**RECEIVED**  
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SC Court of Appeals

Jennifer Short and David Stover..... Respondents.

v.

Lennar Carolinas, Inc., Don Galloway  
Homes, LLC, and Lennar Communities  
of the Carolinas, Inc..... Appellants.

**RECORD ON APPEAL**

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

**JUDGMENT IN A CIVIL CASE**

CASE NO: 2009CP1801602

**Jennifer Short vs. Lennar Carolinas Inc**

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DORCHESTER COUNTY

**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), 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;  Statement of Judgment by the Court:

Dated at St. George, South Carolina, this 30th day of Sept. 2011.

Court Reporter:

  
- Cheryl Graham, Clerk of Court, By: Carolyn Ayer, Deputy

This judgment was entered on the 30th day of Sept. 2011, and a copy mailed first class this 30th day of Sept. 2011, to attorneys of record or to parties (when appearing pro se) as follows:

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )

JENNIFER SHORT AND DAVID STOVER, )  
 )  
Plaintiffs. )

vs. )

LENNAR CAROLINAS, INC., )  
DON GALLOWAY HOMES, LLC, and )  
LENNAR COMMUNITIES OF THE )  
CAROLINAS, INC, )

Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT  
CASE NO: 2009-CP-18-1602

ORDER DENYING DEFENDANT LENNAR  
CAROLINAS, INC.'S MOTION TO  
COMPEL ARBITRATION AND TO STAY  
PROCEEDINGS, OR, ALTERNATIVELY,  
TO DISMISS

*Jenna McGee*  
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This matter came before the court on November 7, 2010, upon Defendant Lennar Carolinas, Inc.'s Motion to Compel Arbitration and to Stay Proceedings, or, Alternatively, to Dismiss. Present on behalf of the Plaintiffs was John Edward Robinson, Esquire. Present on behalf of Defendants was Jenna McGee, Esquire.

**FACTS**

This case arises out of alleged construction defects to a single-family home in Summerville, South Carolina. Plaintiffs purchased their home from the Defendant and have alleged a variety of defects with their home including improper framing, roofing, improperly installed siding, windows, structural framing and concrete slab, violations of building codes, structural defects, as well as failing to properly install various flashings so as to prevent moisture intrusion into their home, all of which led to damage to their home. Plaintiffs believe that the arbitration clauses in the contract for the

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purchase of the residence at issue are unconscionable and unenforceable and fail due to violation of various South Carolina legal standards.

**APPLICATION OF CASE LAW TO FACTS OF THE CASE**

In the instant case, Defendants seek to enforce an arbitration clause contained in the original home purchase agreement, which if enforced, would require Plaintiffs to take their civil claims to an arbitral forum. Plaintiffs specifically point to what they believe are one-sided terms in the clause, whether a home purchase should be subject to arbitral proceedings, the nature and scope of their damages, partial execution of the arbitration agreement, and issues related to conspicuousness of the arbitration clauses.

Defendant further raises the issue of whether the Federal Arbitration Act (FAA) applies in this matter.

**A. Binding Authority Regarding Arbitration Law in South Carolina.**

Simpson v. MSA of Myrtle Beach, Inc. is the controlling case in this jurisdiction dealing with the unconscionability and enforcement of arbitration clauses in contracts of adhesion. 373 S.C. 14 (2007).

In South Carolina, there is a strong presumption in favor of the validity of arbitration clauses. Id. at 24. However, arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. Id. (citing

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Towles v. United Healthcare Corp., 338 S.C. 29, 37 (S.C. App. 1999)). Accordingly, a party may seek revocation of the contract under “such grounds as exist at law or in equity,” including fraud, duress, and unconscionability. Id.; S.C. Code Ann. § 15-48-10(a). Arbitration will be denied if a court determines no agreement to arbitrate existed. Id.; S.C. Code Ann. § 15-48-20(a).

General contract principles of South Carolina law apply in the court's evaluation of the enforceability of an arbitration clause. Id. (citing Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 (2001)). 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.” Id. at 25 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554 (2004)). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. Id.; S.C. Code Ann. § 36-2-302(1).

Plaintiffs’ contract clearly falls into the ambit of current legal authority. For reasons discussed below, this case properly follows a Simpson analysis.

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**B. Absence of a Meaningful Choice**

Absence of meaningful choice generally deals with the fundamental fairness of the bargaining process in the contract at issue. Id. (citing, generally, Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir. 1989)). 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.” Id. (citing Carlson, 883 F.2d at 293).

In Simpson, the court analyzed an adhesion contract for the sale of an automobile. While the court first noted that such contracts are standard in the automobile industry, it also stated that this contract involved a “vehicle intended for use as Simpson’s primary transportation, which is critically important in modern day society.” Id. at 27. It also found that Simpson did not possess the business judgment necessary to “understand the implications of the arbitration agreement,” and she did not have a lawyer present when she signed the document. Id. Furthermore, the court noted that the contract was “hastily” presented for signature. Id.

Additionally, the arbitration clause in the contract in dispute in Simpson was embedded within the small print and was deemed “inconspicuous” by the court. Id.

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Based on the foregoing, the court found that Simpson lacked a meaningful choice in agreeing to the arbitration clause. Id. at 28.

Plaintiffs' purchase of a home is certainly more important than the purchase of a car, yet it is obvious that the parties had disparate bargaining agreement, that Lennar is a relatively sophisticated business entity while Plaintiffs are first-time homebuyers, that the terms for the arbitration clause are contained in a dense agreement, and that the agreement was executed by only one of the Plaintiffs.

Defendants argue that a non-signatory is bound by an arbitration agreement where that non-signatory seeks to enforce other provisions of the subject contract. However, Plaintiffs do not seek remedies on a breach of contract cause of action, but rather various tort-based claims, further analysis of the applicability of contract construction principals is not necessary. Assuming *arguendo*, that such arguments must be addressed, pursuant to Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., and its progeny, this Court may strike only those clauses that are unconscionable, rather than force rescission or reconstruction of the entirety of the parties' agreement. In pursuit of mutuality of remedies, this Court removes only the applicability of the whole arbitration clause- not the entire contract of the parties. For the same reason, any mandate that the parties be bound pursuant to the Federal Arbitration Act is void. As the entire arbitration clause is unconscionable, so is any patent language in Paragraph 7 purporting to bind the parties subject to the FAA. Furthermore, Defendant's arguments that this matter is governed by the FAA because

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the subject house was produced in “interstate commerce” are unavailing, as such a connection is merely tangential in light of the fact that the Plaintiffs, South Carolina residents, bought a house built in South Carolina, and the acts, omissions, and allegations of the Complaint all arise from a house built in South Carolina. Plaintiffs lacked meaningful choice in agreeing to the arbitration clause, and in the instance of co-Plaintiff David Stover, there is an absence of evidence that he knew of the contract or arbitration clause *at all*.

### C. Oppressive and One Sided Terms

In examining the nature of the terms of an arbitration clause, the Simpson court specifically stated that they will continue to abide by precedent establishing that a lack of mutuality of remedy will not invalidate an arbitration agreement. Id. at 32.

However, it also stated that the provision in Simpson’s contract dictating that the dealer’s judicial remedies supersede the consumer’s arbitral remedies is “one-sided and oppressive and does not promote a neutral and unbiased arbitral forum.” Id.

In Ms. Short’s contract, the arbitration clause in Paragraph 7 of the purchase agreement states that “Don Galloway Homes, LLC may bring an equitable judicial proceeding against you for an injunction or specific performance for any breach of unlawful action in connection with your obligations hereunder and this shall not constitute a waiver of its right to compel all claims that may be asserted against Don Galloway Homes, LLC to be arbitrated.” If this language deems the company’s remedy

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as “superseding” the arbitral remedies of the consumer, the court could deem it one sided and oppressive, rendering it invalid. Moreover, in Paragraph 10 of the purchase agreement, it appears that the contract excludes implied remedies, including the implied warranty of habitability.

Defendants argue that Plaintiff’s warranty claims and remedies would be the same in arbitration as in this state court action. However, the plain face of the purchase agreement, and specifically Paragraph 10, appear to exclude any other warranties. Based on the plain language of the purchase agreement, Defendant’s argument fails because of the implied limitation of Paragraph 10 as to other remedies of the Plaintiffs. Therefore, it is impossible to conclude that the common-law remedies sought by Plaintiffs in state court would be preserved in an arbitral forum. This implicates Kirkman v. Parex, Inc. 369 S.C. 477 (2006), where the Court held that when an attempted disclaimer of the implied warranty of habitability is not (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for, that such a disclaimer is void.

In Simpson, the court found several aspects of the arbitration clause as oppressive and one sided. Not only did the contract elevate the position of the company in terms of their remedies, but the terms stated that the dealer’s judicial remedies would not be stayed during any arbitration proceedings, and any warranty claims were also precluded from judicial resolution, which happened to be in violation of federal law Id. at 28-33.

It is apparent that a blanket exclusion of Defendants' implied warranty of habitability and an apparent lack of full mutuality of remedies creates different remedies in practical effect for the parties. The contract that the parties are subject to in this action is one-sided, oppressive, and does not promote arbitral remedies that are neutral in their effect on the parties.

### CONCLUSION

Given that (1) the relevant arbitration provisions are unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions (2) that the arbitration provisions fail to meet the standard established in Simpson v. MSA and its progeny, and/or pursuant to the South Carolina Uniform Arbitration Act, it is proper that Defendant's Motion to Compel Arbitration and to Stay Proceedings, or, Alternatively, to Dismiss is DENIED.

AND IT IS SO ORDERED this 21<sup>th</sup> day of Sept., 2011 at Orangeburg,  
South Carolina.

/s/ E. W. Dickson  
Honorable Edgar Warren Dickson  
Presiding Judge  
First Judicial Circuit

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT  
CASE NO. 09-CP-10-1602

JENNIFER SHORT and )  
DAVID STOVER, )

Plaintiffs, )

COMPLAINT

vs. )

(re: defective construction,  
building code violations)

LENNAR CAROLINAS, INC, )  
DON GALLOWAY HOMES, LLC, and )  
LENNAR COMMUNITIES OF THE )  
CAROLINAS, INC, )  
Defendants. )

jury trial demanded

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DORCHESTER COUNTY

COME NOW THE PLAINTIFFS, Jennifer Short and David Stover, by and through their undersigned counsel, complaining of the Defendants herein, and respectfully allege and show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Jennifer Short and David Stover (hereinafter "Plaintiffs") are citizens of the State of South Carolina, residing in Dorchester County.
2. Plaintiffs are the owners of certain real estate, together with improvements thereon, commonly known as 201 Temuco Lane, Summerville, South Carolina, (hereinafter the "Subject Residence").
3. Upon information and belief, Defendant, Lennar Carolinas, Inc, (hereinafter "Lennar") is a company organized pursuant to the laws of Delaware regularly transacting business throughout South Carolina, including Dorchester County.

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4. At all times relevant hereto, Lennar was engaged in the practice of designing, developing, building, and selling homes in Dorchester County.

5. Upon information and belief, Defendant Don Galloway Homes, LLC, (hereinafter "Galloway") is a limited liability company organized pursuant to the laws of North Carolina and at all times relevant hereto, was engaged in the practice of designing, developing, building, and selling homes in Dorchester County. Upon information and belief, Lennar and Galloway entered a partnership or business venture in which they constructed the subdevelopment in which the Subject Residence is located.

6. Upon information and belief, Defendant Lennar Communities of the Carolinas, Inc., is a Delaware corporation which superseded Galloway and Lennar, and at all times relevant hereto, was engaged in the practice of designing, developing, building, and selling homes in Dorchester County as a licensed residential home builder.

7. Upon information and belief, the Defendants, either through their own employees or the use of subcontractors, designed, developed, constructed and sold the Subject Residence.

8. This matter arises out of the design, development, construction, and sale of the Subject Residence, located in Dorchester County.

9. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

FACTUAL ALLEGATIONS

10. Plaintiffs hereby incorporate the allegations of the foregoing paragraphs as if fully restated herein.

11. Plaintiffs are the owners of the Subject Residence.

12. Defendants obtained the necessary building permits which allowed the Subject Residence to be constructed. As such, Defendants owed a duty to the Plaintiffs to construct the residence free from defects, in a good and workmanlike manner and in accordance with applicable building codes and industry standards.

13. Plaintiffs, due to recent investigations, have determined that their residence is extensively damaged, which damage was proximately caused by the Defendants, their agents, servants, employees, and/or subcontractors. As a direct and proximate result of the Defendants' actions, Plaintiffs have spent and will continue to expend substantial sums of money in order to renovate and restore the Subject Residence to make it safe and habitable, and in addition thereto, the residence has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiffs will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiffs' damage in an amount to be determined. As a result of the conduct referenced herein, Plaintiffs are entitled to punitive damages in an amount to be determined.

14. Notwithstanding that Plaintiffs have properly maintained the Subject Residence, the construction defects set forth herein have caused occurrences in the form

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of leaks, damages, material failures, defects, structural deficiencies and errors in design, and failures within the structure which are not readily apparent to one examining the exterior surface thereof.

15. The latent construction defects have resulted in repeated water intrusion into the Subject Residence, failure of the components of the exterior envelope, failure of the structural system(s), and other consequential damages. Upon information and belief, these adverse events have occurred each and every year since construction, and constitute "occurrences" and compensable damage; further, the negligence of each defendant herein has resulted in damage to the work of the other subcontractors and trades and in damage to the Subject Residence, the Plaintiffs' property, and the Plaintiffs' use and enjoyment of the Subject Residence.

**FOR A FIRST CAUSE OF ACTION**  
**(Negligence/Gross Negligence as to all Defendants)**

16. Plaintiffs hereby incorporate the allegations of the foregoing Paragraphs as if fully restated herein.

17. The Defendants, either by their own employees or through the use of subcontractors, constructed and sold the Subject Residence.

18. Defendant Galloway is, upon information and belief, the holder of a South Carolina Residential Homebuilder's license which allowed him to obtain the building permit from the governing municipality thereby enabling the Subject Residence to be constructed.

19. As a licensed Residential Homebuilder, Defendant Galloway owed a duty to the Plaintiffs to exercise due care in the construction of the Subject Residence and to build the Subject Residence free from defects and in conformity with all applicable building codes, using good construction practices.

20. Defendant Galloway, or its successors, as the license holder, is personally responsible for any negligence, gross negligence, incompetence, and/or misconduct in the practice of his profession and of his subcontractors.

21. At all times relevant hereto, the Defendants, their agents, servants, employees, and/or subcontractors undertook and were under a duty to design and construct the Subject Residence in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner.

22. The Defendants, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to design and/or construct the Subject Residence in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, thereby breaching the above-referenced duty by, but not limited to, the following particulars:

- a. In failing to construct the residence so as to prevent leaks of water into the interior and thereby violating the residential building code in effect at the time the home was constructed;
- b. In failing to install appropriate flashings;
- c. In failing to adequately supervise the work of their subcontractors;

- d. In failing to discover defects in the work performed by their subcontractors;
- e. In constructing the home in a defective manner;
- f. In failing to construct the home in accordance with applicable building codes and industry standards;
- g. In failing to correct defective work;
- h. In failing to install the siding in accordance with applicable building codes, industry standards, and manufacturer's installation instructions;
- i. In failing to install roofing materials in accordance with applicable building codes, industry standards and manufacturer's installation instructions;
- j. In failing to frame the residence in accordance with applicable building codes and industry standards;
- k. In failing to construct the home in accordance to plans and making structural alterations that have weakened the Subject Residence;
- l. In failing to properly construct the foundation or prepare the site for a foundation;
- m. In failing to use the degree of care and caution that a reasonably prudent builder would have used in constructing the Subject Residence; and
- n. In such other failures that will be shown during the discovery of this case and at trial.

23. As a direct, foreseeable, and proximate result of the negligence and gross negligence of the Defendants, the Plaintiffs have suffered significant physical damage to their residence, including shifting walls and floors, constant floor, wall, and finish damage, loss of structural integrity, as well as diminution in its value. The Plaintiffs

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have further been damaged in that they have spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

24. The violation of applicable building codes constitutes negligence *per se*.

25. The breach of duty, code violations, and deviations from industry standards on the part of the Defendants constitute gross negligence, entitling Plaintiffs to an award of all actual, consequential, and punitive damages.

**FOR A SECOND CAUSE OF ACTION**  
**(Breach of Implied Warranties as to all Defendants)**

26. Plaintiffs hereby incorporate the allegations of the foregoing Paragraphs as if fully restated herein.

27. The Defendants impliedly warranted that the home would be constructed in a careful, diligent, and workmanlike manner and would be free from all defects.

28. Certain warranties implied by law arose out of the construction of the Subject Residence.

29. Those implied warranties include, but are not limited to, the implied warranty of workmanlike construction, fitness, and merchantability.

30. Further, the implied warranty of habitability arises from the sale of the Subject Residence by the Defendants to the Plaintiffs.

31. The Defendants have breached these warranties by constructing and selling a defective house as set forth above.

32. These breaches of warranties have damaged the Plaintiffs, in that the Plaintiffs have suffered significant physical damage to their residence, including water intrusion as well as diminution in its value. The Plaintiffs have further been damaged in that they have spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

**FOR A THIRD CAUSE OF ACTION**

**(Violation of South Carolina's Unfair Trade Practices Act as to all Defendants)**

33. Plaintiffs hereby incorporate the allegations of the foregoing Paragraphs as if fully restated herein.

34. The Defendants' conduct constitutes unfair and deceptive trade practices and is a violation of the South Carolina Unfair Trade Practices Act, SC Code Ann. § 39-5-10 *et seq.* Furthermore, the Defendants' conduct was willful.

35. The Defendants' conduct is capable of repetition, and upon information and belief, has been repeated.

36. The Defendants' conduct affects the public interest.

37. The Defendants knew or should have known that their actions constituted unfair and deceptive trade practices.

38. As a direct, foreseeable, and proximate result of the Defendants' unfair and deceptive trade practices, the Plaintiffs have suffered an ascertainable loss of money and property.

39. The Plaintiffs are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees.

WHEREFORE, the Plaintiffs pray this Honorable Court inquire into the matters set forth herein and award judgment in favor of the Plaintiffs against the Defendants, jointly and severally, as follows:

1. For all actual and consequential damages against the Defendants, jointly and severally, in an amount to be shown at trial;
2. For treble actual damages against the Defendants pursuant to applicable law;
3. For punitive damages in an amount to be determined by the trier of fact;
4. For prejudgment interest;
5. For all attorneys fees and costs associated with investigating and prosecuting this action; and
6. For all other relief this Honorable Court deems just and proper.

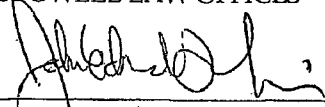
Respectfully submitted,

(signature page to follow)

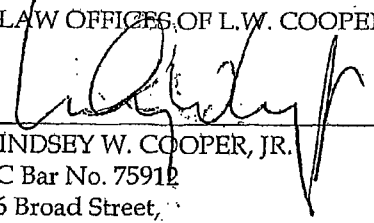
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Dated: June 8 2009  
St. George, South Carolina


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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT  
CASE NO.: 09-CP-18-1602

JENNIFER SHORT AND DAVID )  
STOVER, )

Plaintiffs, )

vs. )

**DEFENDANTS' MOTION TO DISMISS  
OR, ALTERNATIVELY, STAY  
THE ACTION**

LENNAR CAROLINAS, INC., DON )  
GALLOWAY HOMES, LLC, AND )  
LENNAR COMMUNITIES OF THE )  
CAROLINAS, INC. )

Defendants. )

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CLERK OF COURT  
DORCHESTER COUNTY

COME NOW the Defendants Lennar Carolinas, Inc., Don Galloway Homes, LLC and Lennar Communities of the Carolinas, Inc. ("Defendants") and hereby file this Motion to Dismiss or alternatively, Stay the Action.

Defendants move to dismiss or stay this action on the grounds that the claims asserted in the Complaint, which is attached as Exhibit A, are subject to mandatory arbitration under the terms of the Purchase Agreement dated March 11, 2003 between Plaintiffs and Don Galloway.<sup>1</sup> A copy of the Agreement is appended to this Motion as Exhibit B.

The policy of South Carolina is to favor arbitration of disputes. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001). Therefore, any dispute that falls within the scope of an arbitration clause must be submitted to arbitration. *See Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116 ("Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered.")

<sup>1</sup> Lennar Carolinas, Inc. and Lennar Communities of the Carolinas, Inc. were improperly identified as defendants in this action, which arises from a dispute between Plaintiff and Don Galloway Homes, LLC. In any event, the improper naming of these parties does not impact the arbitrability of the dispute. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000).

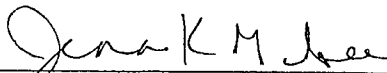
The Agreement specifies that any dispute arising from or relating to the dispute must be submitted to binding arbitration. *See* Agreement ¶ 7. Each of the causes of action pled in the Complaint relate directly to the construction and sale of the residential property that is the subject of the Agreement. Therefore, Defendants request that the Court dismiss the action in its entirety under Rule 12(b)(1) of the South Carolina Rules of Civil Procedure for lack of subject matter jurisdiction, or alternatively, stay the action pending arbitration and compelling the Plaintiffs to arbitrate their claims related to the subject property in accordance with the Agreement.

Defendants also move to stay this action on the grounds that Plaintiffs have not complied with the pre-suit notification requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code § 40-59-810 *et seq.* (the “Right to Cure” Act). Pursuant to the Right to Cure Act, homeowners who assert a claim against a contractor concerning an alleged defect in the design, construction, or condition of their residential home must serve a written notice of claim on the contractor no later than ninety days before filing the action. S.C. Code § 40-59-840. The written notice of claim must contain the following: “(1) a statement that the claimant asserts a construction defect; (2) a description of the claim or claims in reasonable detail sufficient to determine the general nature of the construction defect; and (3) a description of any results of the defect, if known.” *Id.*

If the homeowners fail to provide such notice, the litigation is stayed to allow the contractor reasonable time to inspect and potentially repair the alleged construction defects. S.C. Code § 40-59-830. Defendants have never received written notice from Plaintiffs that would satisfy Plaintiffs’ obligations under the Right to Cure Act. Therefore, this action should be stayed for the additional reason that Plaintiffs have complied with their notice obligations under the Right to Cure Act.

WHEREFORE, the Defendants respectfully request that the Court enter an Order dismissing or staying the action for the foregoing reasons.

Respectfully submitted,



Ellis R. Lesemann  
Jenna K. McGee  
PARKER POE ADAMS & BERNSTEIN LLP  
200 Meeting Street, Suite 301  
Charleston, SC 29401

ATTORNEYS FOR DEFENDANTS  
DON GALLOWAY HOMES, LLC AND  
LENNAR CAROLINAS, LLC

Charleston, South Carolina  
July 27, 2009

---

**EXHIBIT A**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DORCHESTER )  
 )  
 JENNIFER SHORT and )  
 DAVID STOVER, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 LENNAR CAROLINAS, INC, )  
 DON GALLOWAY HOMES, LLC, and )  
 LENNAR COMMUNITIES OF THE )  
 CAROLINAS, INC, )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FIRST JUDICIAL CIRCUIT  
 CASE NO. 09-CP-18-1602

COMPLAINT

(re: defective construction,  
 building code violations)

jury trial demanded

2009 JUN 10 PM 4:42  
 CERTIFIED COPY  
 Clerk of Court  
 DORCHESTER COUNTY

COME NOW THE PLAINTIFFS, Jennifer Short and David Stover, by and through their undersigned counsel, complaining of the Defendants herein, and respectfully allege and show unto this Honorable Court as follows:

PARTIES AND JURISDICTION

1. Jennifer Short and David Stover (hereinafter "Plaintiffs") are citizens of the State of South Carolina, residing in Dorchester County.
2. Plaintiffs are the owners of certain real estate, together with improvements thereon, commonly known as 201 Temuco Lane, Summerville, South Carolina, (hereinafter the "Subject Residence").
3. Upon information and belief, Defendant, Lennar Carolinas, Inc, (hereinafter "Lennar") is a company organized pursuant to the laws of Delaware regularly transacting business throughout South Carolina, including Dorchester County.

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4. At all times relevant hereto, Lennar was engaged in the practice of designing, developing, building, and selling homes in Dorchester County.

5. Upon information and belief, Defendant Don Galloway Homes, LLC, (hereinafter "Galloway") is a limited liability company organized pursuant to the laws of North Carolina and at all times relevant hereto, was engaged in the practice of designing, developing, building, and selling homes in Dorchester County. Upon information and belief, Lennar and Galloway entered a partnership or business venture in which they constructed the subdevelopment in which the Subject Residence is located.

6. Upon information and belief, Defendant Lennar Communities of the Carolinas, Inc., is a Delaware corporation which superseded Galloway and Lennar, and at all times relevant hereto, was engaged in the practice of designing, developing, building, and selling homes in Dorchester County as a licensed residential home builder.

7. Upon information and belief, the Defendants, either through their own employees or the use of subcontractors, designed, developed, constructed and sold the Subject Residence.

8. This matter arises out of the design, development, construction, and sale of the Subject Residence, located in Dorchester County.

9. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

FACTUAL ALLEGATIONS

10. Plaintiffs hereby incorporate the allegations of the foregoing paragraphs as if fully restated herein.

11. Plaintiffs are the owners of the Subject Residence.

12. Defendants obtained the necessary building permits which allowed the Subject Residence to be constructed. As such, Defendants owed a duty to the Plaintiffs to construct the residence free from defects, in a good and workmanlike manner and in accordance with applicable building codes and industry standards.

13. Plaintiffs, due to recent investigations, have determined that their residence is extensively damaged, which damage was proximately caused by the Defendants, their agents, servants, employees, and/or subcontractors. As a direct and proximate result of the Defendants' actions, Plaintiffs have spent and will continue to expend substantial sums of money in order to renovate and restore the Subject Residence to make it safe and habitable, and in addition thereto, the residence has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiffs will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiffs' damage in an amount to be determined. As a result of the conduct referenced herein, Plaintiffs are entitled to punitive damages in an amount to be determined.

14. Notwithstanding that Plaintiffs have properly maintained the Subject Residence, the construction defects set forth herein have caused occurrences in the form

of leaks, damages, material failures, defects, structural deficiencies and errors in design, and failures within the structure which are not readily apparent to one examining the exterior surface thereof.

15. The latent construction defects have resulted in repeated water intrusion into the Subject Residence, failure of the components of the exterior envelope, failure of the structural system(s), and other consequential damages. Upon information and belief, these adverse events have occurred each and every year since construction, and constitute "occurrences" and compensable damage; further, the negligence of each defendant herein has resulted in damage to the work of the other subcontractors and trades and in damage to the Subject Residence, the Plaintiffs' property, and the Plaintiffs' use and enjoyment of the Subject Residence.

**FOR A FIRST CAUSE OF ACTION**  
(Negligence/Gross Negligence as to all Defendants)

16. Plaintiffs hereby incorporate the allegations of the foregoing Paragraphs as if fully restated herein.

17. The Defendants, either by their own employees or through the use of subcontractors, constructed and sold the Subject Residence.

18. Defendant Galloway is, upon information and belief, the holder of a South Carolina Residential Homebuilder's license which allowed him to obtain the building permit from the governing municipality thereby enabling the Subject Residence to be constructed.

19. As a licensed Residential Homebuilder, Defendant Galloway owed a duty to the Plaintiffs to exercise due care in the construction of the Subject Residence and to build the Subject Residence free from defects and in conformity with all applicable building codes, using good construction practices.

20. Defendant Galloway, or its successors, as the license holder, is personally responsible for any negligence, gross negligence, incompetence, and/or misconduct in the practice of his profession and of his subcontractors.

21. At all times relevant hereto, the Defendants, their agents, servants, employees, and/or subcontractors undertook and were under a duty to design and construct the Subject Residence in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner.

22. The Defendants, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to design and/or construct the Subject Residence in accordance with the applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner, thereby breaching the above-referenced duty by, but not limited to, the following particulars:

- a. In failing to construct the residence so as to prevent leaks of water into the interior and thereby violating the residential building code in effect at the time the home was constructed;
- b. In failing to install appropriate flashings;
- c. In failing to adequately supervise the work of their subcontractors;

- 
- d. In failing to discover defects in the work performed by their subcontractors;
  - e. In constructing the home in a defective manner;
  - f. In failing to construct the home in accordance with applicable building codes and industry standards;
  - g. In failing to correct defective work;
  - h. In failing to install the siding in accordance with applicable building codes, industry standards, and manufacturer's installation instructions;
  - i. In failing to install roofing materials in accordance with applicable building codes, industry standards and manufacturer's installation instructions;
  - j. In failing to frame the residence in accordance with applicable building codes and industry standards;
  - k. In failing to construct the home in accordance to plans and making structural alterations that have weakened the Subject Residence;
  - l. In failing to properly construct the foundation or prepare the site for a foundation;
  - m. In failing to use the degree of care and caution that a reasonably prudent builder would have used in constructing the Subject Residence; and
  - n. In such other failures that will be shown during the discovery of this case and at trial.

23. As a direct, foreseeable, and proximate result of the negligence and gross negligence of the Defendants, the Plaintiffs have suffered significant physical damage to their residence, including shifting walls and floors, constant floor, wall, and finish damage, loss of structural integrity, as well as diminution in its value. The Plaintiffs

have further been damaged in that they have spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

24. The violation of applicable building codes constitutes negligence *per se*.

25. The breach of duty, code violations, and deviations from industry standards on the part of the Defendants constitute gross negligence, entitling Plaintiffs to an award of all actual, consequential, and punitive damages.

**FOR A SECOND CAUSE OF ACTION**  
(Breach of Implied Warranties as to all Defendants)

26. Plaintiffs hereby incorporate the allegations of the foregoing Paragraphs as if fully restated herein.

27. The Defendants impliedly warranted that the home would be constructed in a careful, diligent, and workmanlike manner and would be free from all defects.

28. Certain warranties implied by law arose out of the construction of the Subject Residence.

29. Those implied warranties include, but are not limited to, the implied warranty of workmanlike construction, fitness, and merchantability.

30. Further, the implied warranty of habitability arises from the sale of the Subject Residence by the Defendants to the Plaintiffs.

31. The Defendants have breached these warranties by constructing and selling a defective house as set forth above.

32. These breaches of warranties have damaged the Plaintiffs, in that the Plaintiffs have suffered significant physical damage to their residence, including water intrusion as well as diminution in its value. The Plaintiffs have further been damaged in that they have spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

**FOR A THIRD CAUSE OF ACTION**  
**(Violation of South Carolina's Unfair Trade Practices Act as to all Defendants)**

33. Plaintiffs hereby incorporate the allegations of the foregoing Paragraphs as if fully restated herein.

34. The Defendants' conduct constitutes unfair and deceptive trade practices and is a violation of the South Carolina Unfair Trade Practices Act, SC Code Ann. § 39-5-10 *et seq.* Furthermore, the Defendants' conduct was willful.

35. The Defendants' conduct is capable of repetition, and upon information and belief, has been repeated.

36. The Defendants' conduct affects the public interest.

37. The Defendants knew or should have known that their actions constituted unfair and deceptive trade practices.

38. As a direct, foreseeable, and proximate result of the Defendants' unfair and deceptive trade practices, the Plaintiffs have suffered an ascertainable loss of money and property.

39. The Plaintiffs are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees.

WHEREFORE, the Plaintiffs pray this Honorable Court inquire into the matters set forth herein and award judgment in favor of the Plaintiffs against the Defendants, jointly and severally, as follows:

1. For all actual and consequential damages against the Defendants, jointly and severally, in an amount to be shown at trial;
2. For treble actual damages against the Defendants pursuant to applicable law;
3. For punitive damages in an amount to be determined by the trier of fact;
4. For prejudgment interest;
5. For all attorneys fees and costs associated with investigating and prosecuting this action; and
6. For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

(signature page to follow)

(remainder of page intentionally left blank)

Dated: June 8 2009  
St. George, South Carolina

MCDOWELL LAW OFFICES

By: 

JOHN EDWARD ROBINSON  
SC Bar No.: 75919  
36 Broad Street,  
Charleston, SC 29401  
T: 843-723-5152  
F: 843-577-4570  
Email: john@charlestonlawoffice.com

THE LAW OFFICES OF L.W. COOPER JR, LLC

By: 

LINDSEY W. COOPER, JR.  
SC Bar No. 75912  
36 Broad Street,  
Charleston, SC 29401  
T: 843-723-5152  
F: 843-577-4570

THURMOND KIRCHNER & TIMBES, P.A.

By: 

JESSE A. KIRCHNER  
SC Bar No.: 70479  
MATT YELVERTON  
SC Bar No.: 69734  
15 Middle Atlantic Wharf, Suite 101  
Charleston, SC 29401  
T: 843-937-8000  
F: 843-937-4200  
Email: jkirchner@tktlawfirm.com

*Attorneys for the Plaintiffs*

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIRST JUDICIAL CIRCUIT  
) CASE NO. 09-CP-10-1602

JENNIFER SHORT and  
DAVID STOVER,

Plaintiffs,

vs.

LENNAR CAROLINAS, INC,  
DON GALLOWAY HOMES, LLC, and  
LENNAR COMMUNITIES OF THE  
CAROLINAS, INC,  
Defendants.

CERTIFICATE OF SERVICE


I certify that the Summons and Complaint were served on June 17, 2009 by

Certified, Registered, Return Receipt Requested Mail to the following:

CT Corporation System  
Lennar Communities of the Carolinas, Inc.  
75 Beattie Place, 10<sup>th</sup> Flr.  
Greenville, SC 29601

CT Corporation System  
Lennar Carolinas, LLC  
75 Beattie Place, 10<sup>th</sup> Flr.  
Greenville, SC 29601

CT Corporation System  
Don Galloway Homes, LLC  
75 Beattie Place, 10<sup>th</sup> Flr.  
Greenville, SC 29601

  
\_\_\_\_\_  
Tammy L. Cartrett

Charleston, South Carolina  
June 17, 2009

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**EXHIBIT B**

*Don Galloway*  
**DON GALLOWAY HOMES**  
 A LENNAR COMPANY

Job No. R11  
 Lot No. 11  
 Block No. \_\_\_\_\_  
*Spec*

**SOUTH CAROLINA PURCHASE AGREEMENT**

***THIS AGREEMENT IS SUBJECT TO ARBITRATION (SEE PARAGRAPH 7 HEREIN).***

*Jennifer L. Short & David A. Short* Buyer agrees to purchase from Don Galloway Homes, LLC ("Don Galloway Homes") as Seller, the real estate and improvements ("Property") described below, upon the following terms and conditions:

1. Property Description: City or Town of Summerville  
 County of Richland State of South Carolina  
 Street Address 10111111 Lane  
 Subdivision Summerville Model Harriet (Garage: 1 car,  2 car, none).

2. Purchase Price: The purchase price is \$ 197,214.00, and shall be paid as follows:  
 \$ 5000 in earnest money paid upon execution of this Contract.  
 (See Standard Provisions.)  
 \$ \_\_\_\_\_ as additional earnest money to be paid to Seller on or before \_\_\_\_\_ (See Standard Provisions.)  
 \$ \_\_\_\_\_ Non-refundable money for options.  
 \$ \_\_\_\_\_, the balance of the down payment in cash at closing.

3. Loan Application: Buyer agrees to apply for an FHA, VA or Conventional Loan through an approved Don Galloway Homes Lender \_\_\_\_\_ in the amount of \$ \_\_\_\_\_ at the applicable interest rate as of the date of closing, on or before five (5) days from the date of this Contract. The aforementioned loan shall be secured by the real property described herein. Buyer shall endeavor in good faith to obtain said loan and when requested by lender shall supply all necessary information and sign the customary loan applications, forms and instruments. If Buyer's loan application is rejected for a cause that cannot reasonably be cured, or if a commitment for said financing cannot reasonably be obtained by specified closing date, Buyer shall be deemed unable to obtain said loan. In such case, either Buyer or Seller may terminate this agreement and Buyer shall pay any appraisal fee and/or credit report charges. The Escrow Agent shall then refund the earnest money to Buyer.

4. Closing Costs: Buyer shall pay loan closing costs in the maximum amount of \$ See addendum and Seller shall pay the balance. Buyer shall, however, pay in addition at closing all prepaid expenses and required escrow deposits, including but not limited to, any mortgage insurance premium, hazard insurance premium, interim interest, homeowner's association dues, and escrow deposits for property tax, mortgage insurance, hazard insurance and homeowner's association dues. See addendum

5. Other Provisions and Conditions: (a) All of the Standard Provisions (1 through 13) on the reverse side of this Contract apply to and are hereby incorporated into this Contract. (b) The following numbered Optional Provisions on the reverse side of this Contract apply to and are hereby incorporated into this Contract:  
 \_\_\_\_\_, 14, \_\_\_\_\_, 15, \_\_\_\_\_, 16. (Initial if included.)

6. Special Stipulations: \_\_\_\_\_

**7. ARBITRATION: ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE CONSTRUCTION OF THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND, SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THE PARTIES ACKNOWLEDGE THAT ARBITRATION SHALL BE THE SOLE, FINAL, BINDING AND EXCLUSIVE REMEDY OF THE PARTIES WITH RESPECT TO ANY SUCH MATTER FOR WHICH ARBITRATION IS REQUIRED HEREUNDER. AFTER AN AWARD IS RENDERED BY THE ARBITRATORS, A JUDGEMENT MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. NOTWITHSTANDING THE FOREGOING, DON GALLOWAY HOMES, LLC MAY BRING AN EQUITABLE JUDICIAL PROCEEDING AGAINST YOU FOR AN INJUNCTION OR SPECIFIC PERFORMANCE FOR ANY BREACH OR UNLAWFUL ACTION IN CONNECTION WITH YOUR OBLIGATIONS HEREUNDER AND THIS SHALL NOT CONSTITUTE A WAIVER OF ITS RIGHT TO COMPEL ALL CLAIMS THAT MAY BE ASSERTED AGAINST DON GALLOWAY HOMES, LLC TO BE ARBITRATED. IN PREPARATION FOR THE ARBITRATION HEARING, EACH PARTY MAY UTILIZE ALL METHODS OF DISCOVERY AUTHORIZED BY THE PROCEDURAL RULES AND STATUTES OF THIS STATE, AND MAY ENFORCE THE RIGHT TO DISCOVERY IN THE MANNER PROVIDED BY THE RULES OF CIVIL PROCEDURE THAT ARE APPLICABLE TO THE MATTER. THIS PROVISION SHALL BE CONSTRUED AND ENFORCED, AT ALL TIMES, PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. (1 ET SEQ)).**

8. Closing: The home will be deemed complete when it is issued a Certificate of Occupancy by the appropriate governmental authority. Upon issuance of the Certificate of Occupancy, Buyer agrees to close the purchase within 5 days, at the time and place designated by the Seller.

9. Counterparts: This Contract shall be signed by both Buyer and Seller and can be executed in TWO counterparts with an executed counterpart being retained by each party.

10. The written text of this Purchase Agreement, any addendum, sales contract specifications and the attached Standard Provisions represent the complete intent and understanding of the parties involved. There are no other promises, representations, or guarantees, either verbal or written, other than what are contained in the Purchase Agreement's Special Stipulation Section #6, any addendum, sales contract specifications or in the Standard Provisions.

Date of Offer: 3-11-03

\_\_\_\_\_  
 Buyer (SEAL) DON GALLOWAY HOMES, LLC  
 \* \_\_\_\_\_ (SEAL) By: \_\_\_\_\_ (SEAL)  
 Buyer For the Seller

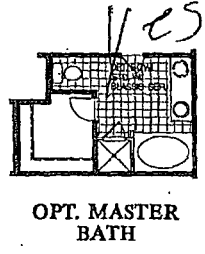
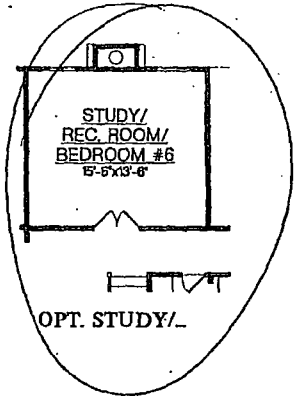
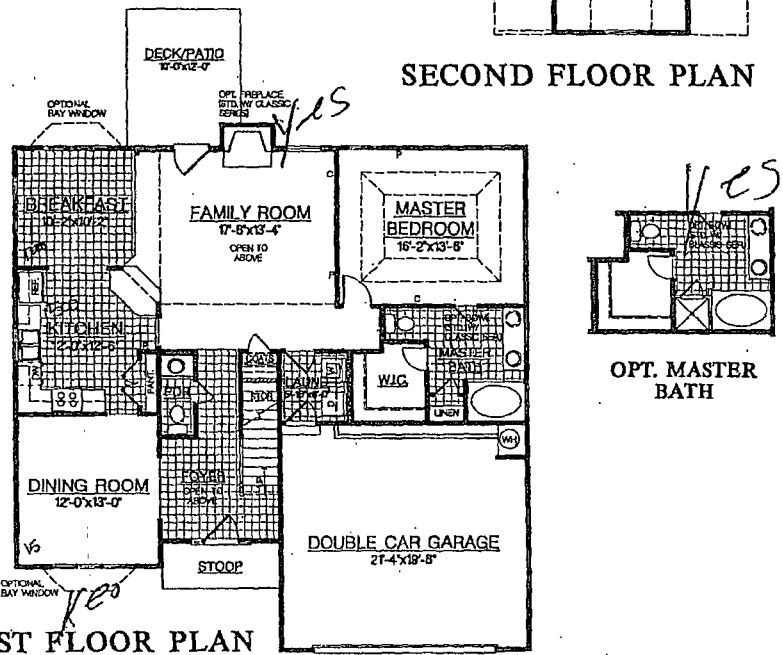
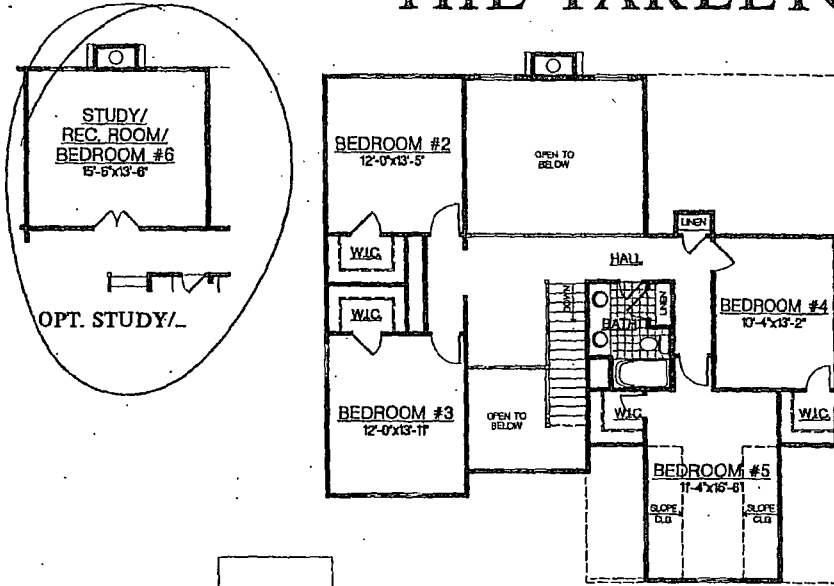
I hereby acknowledge receipt of the sum of \$ 5000 as the Buyer's initial earnest money deposit, in accordance with and subject to the terms and provisions of the Contract.

Form # 101821 • South Carolina  
 Revised 03/02

*Shonda Jackson* (SEAL)  
 Sales Consultant



# THE TARLETON



THIS SHEET IS FOR ILLUSTRATIVE PURPOSES ONLY, AND NOT PART OF A LEGAL CONTRACT. FLOOR PLANS AND STANDARD FEATURES MAY VARY WITH HOME STYLE SELECTED AND ARE SUBJECT TO CHANGE WITHOUT NOTICE. OPTIONAL FEES INCLUDE FOOTING, COST, ROOM SIZE ARE APPROXIMATE AND DIMENSIONS MAY BE CONCEPTUAL. 08/18/2018

JOB # 11

PROPER

LESS 201 TEMUCO Lane

**FINANCIAL CONCESSIONS ACKNOWLEDGEMENT**

Please Initial Here

Don Galloway Homes agrees to pay up to \$11,000 towards non-recurring closing costs and loan origination fee when Buyer uses Universal American Company. By doing so, Don Galloway Homes reserves the right to choose the closing attorney.

\* This is to give you notice that Don Galloway Homes has a business relationship with Universal American Company. Don Galloway Homes and Universal American Company are both wholly owned subsidiaries of The Lennar Group. Because of this relationship, this referral may provide Don Galloway Homes a financial or other benefit.

**CONSTRUCTION SCHEDULING**

Please Initial Here

A start date for your new home will not be given until loan approval and all earnest money is received by Don Galloway Homes' corporate office. \* Once loan approval is received, a start date is scheduled during our weekly meeting. The start date will be approximately three to four weeks after this meeting. This time period allows for permits to be obtained, materials to be ordered, lot preparation, etc.

The average time to build a Don Galloway home is 4 months. This time period begins when the footers of the house are dug. Outside factors, such as weather, inspections/inspectors, product delivery, trades and circumstances beyond our control, can affect the construction schedule.

Closing dates and times are scheduled by Don Galloway Homes' corporate office. The sales consultant and project manager do not schedule closing dates.

We do our best to complete each home on schedule while at the same time maintaining our standard of high quality.

\* If you are purchasing a home with a contingency contract, your start date will be given when the contingency has been removed and loan approval has been received.

**TREE AND LAWN POLICY**

Please Initial Here

This is to acknowledge receipt of Don Galloway Homes' Tree and Lawn Established Policies, As stated therein, it is hereby understood and agreed that:

A. It is Don Galloway Homes' policy to remove only those trees affected by construction. In this regard, any trees within approximately 25 feet of the rear or 10 feet from the sides or front of the homes, or of any water, gas or electric lines and driveway may, at our discretion, be removed. Don Galloway Homes will do everything possible to preserve the natural beauty of your homestead.

B. All stumps and debris from clearing the lot will be removed from the lot

C. During construction it is necessary to use large equipment to dig basements, back fill the foundation and trench for utilities. In the process, some damage may occur to the remaining trees. We recommend that you repair the areas by sawing broken limbs flush with the main trunk and treating these areas, along with any damaged bark areas, with a tree wound compound. Don Galloway Homes will not be responsible for the loss of any tree resulting from machine damage or by changing the grade of the lot, nor will we remove any trees after occupancy unless agreed to in writing before the closing.

D. Yards will be tractor graded, seeded, fertilized and strawed before closing. Maintenance of the yard and shrubs will be Don Galloway Homes' responsibility until closing. Regrading, re-sowing, aeration, maintenance and watering of the yard and shrubs after closing is the responsibility of the homeowner.

**HOME ACCESS ACKNOWLEDGEMENT**

Please Initial Here

Due to OSHA Regulations and a genuine concern for the Buyer's safety, the Buyer shall be provided access to the property before closing only upon prior reasonable notice and request to the Seller, and only when accompanied by an authorized representative of the Seller and subject to such further, reasonable restrictions as may be imposed by the Seller. Buyer otherwise shall be prohibited access of any type to the property prior to transfer of title, personally or through any representative. Seller hereby disclaims liability for any and all loss, damage or injury which might arise from any access or visit to the property by Buyer, friends, family members, agents or representative.

**FULL DISCLOSURE STATEMENT**

Please Initial Here

The purchaser acknowledges that the written text of this Purchase Agreement represents the full intent of the parties involved.

\* No promises, representations or guarantees, either verbal or written, other than what is contained in the Purchase Agreement, have been made at this time. In addition, at no time in the future should the purchaser accept any promises, representations or guarantees, except those made in writing.

Date 3/11/03

Sales Consultant

Buyer

Sales Manager

Buyer

OFFICE COPY

# Don Galloway Homes

A Lennar Company

## Financial Concessions Acknowledgment

S/D Lot and Block # PC 77 Purchase Agreement Date 3-27-03

Property Address ~~44~~ 201 TEMUCO LANE

Don Galloway Homes agrees to pay the following Closing Costs:

½% Origination Fee, Credit Report, Tax Service fee, Flood Certification Fee, Attorney's Fee (assuming our Attorney is used), Title Insurance, Recording Fees, Survey (if DGH approved surveyor used).

By doing so, Don Galloway Homes reserves the right to choose the closing attorney and approve the Mortgage Lender.

Any other closing costs, including but not limited to, discount points, lender junk fees Underwriting fees, application fees, and ect.) mortgage insurance, prepaid items (insurance and taxes), and interim interest, Shall be the sole responsibility of the Buyer.

Southern Trust Mortgage, Inc.  
Kristen Lavelle  
Phone 843.416.1152  
Cell 843.224.4062  
Fax 843.416.1166

Homeowners Mortgage, Inc.  
Larry Luzader  
Phone 843.763.2008  
Fax 843.763.2445

Bank of America  
Carl Wolff III  
Phone 843.745.8341  
Fax 843.745.8429

Mortgage Trust Group  
Ray Marcoux  
Phone 843.388.8400  
Fax 843.388.8040

Closing Attorney  
Lisa Wolff Herbert  
Phone 843.849.0888  
Fax 843.849.0889

U.A.M.C.

Buyer Cartha L. Ford Date 3-27-03

Buyer \_\_\_\_\_ Date \_\_\_\_\_

[mw/mydocuments/pcfincconcessions](http://mw/mydocuments/pcfincconcessions)



REQUEST FOR START

PLAN BARLOW  
JOB NO. PL 77

Date: 8/1/02

Spec. House \_\_\_\_\_ Contract House & Date \_\_\_\_\_ Closing Date \_\_\_\_\_  
Community Plus Creek Sales Agent \_\_\_\_\_  
Address 2017 avenue Lot 27 Block \_\_\_\_\_

PLAN SPECIFICATIONS:

Heritage  Classic \_\_\_\_\_ Custom \_\_\_\_\_

Garage: None \_\_\_\_\_ One \_\_\_\_\_ Two  Side Load  Enclosed \_\_\_\_\_

Refer to Addendum/Change Orders for Contract House  
Refer to Options listed below for Spec. Houses

1.	<u>Rec Room</u>	Price	<u>5500</u>
2.	<u>Delux Bath</u>	Price	<u>2210</u>
3.	<u>Wood Burn. FIRE Place</u>	Price	<u>2250</u>
4.	<u>White Cabinets - MADD cabinet</u>	Price	<u>378</u>
5.	<u>ALB Pack</u>	Price	<u>283</u>
6.	<u>Bay window</u>	Price	<u>1450</u>
7.	<u>Side Load</u>	Price	<u>2750</u>
8.	<u>Microwave / white</u>	Price	<u>420</u>

Base Price 186,980 Total Option Price \_\_\_\_\_  
Total Sales Price 202,152

Color Selection: Ordered \_\_\_\_\_ Attached  To Follow \_\_\_\_\_  
Plot Plan: Ordered \_\_\_\_\_ Received \_\_\_\_\_

Building Permit Number \_\_\_\_\_ Issue Date \_\_\_\_\_  
Plans/Specs/and Purchase Orders Received \_\_\_\_\_  
Release Date \_\_\_\_\_ Expected Completion Date \_\_\_\_\_

Sales Agent \_\_\_\_\_ Date \_\_\_\_\_ Sales Manager [Signature] Date 8/2/02

Additional Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Don Galloway*  
**DON GALLOWAY HOMES**

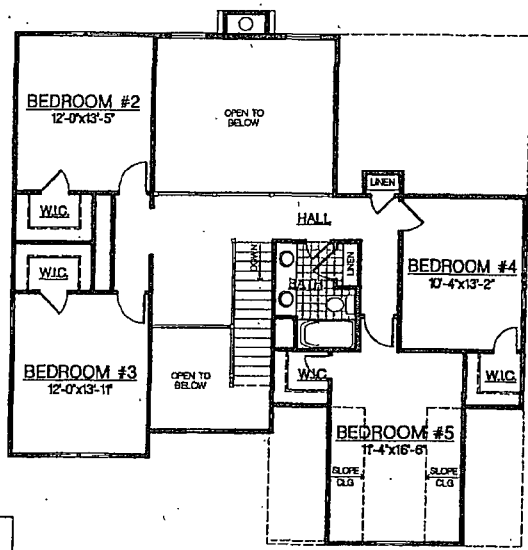
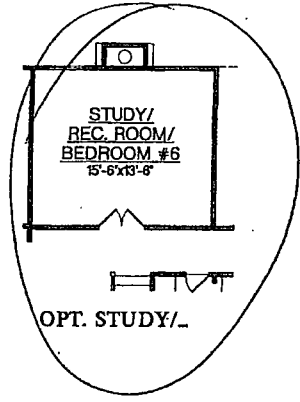
A LENNAR COMPANY



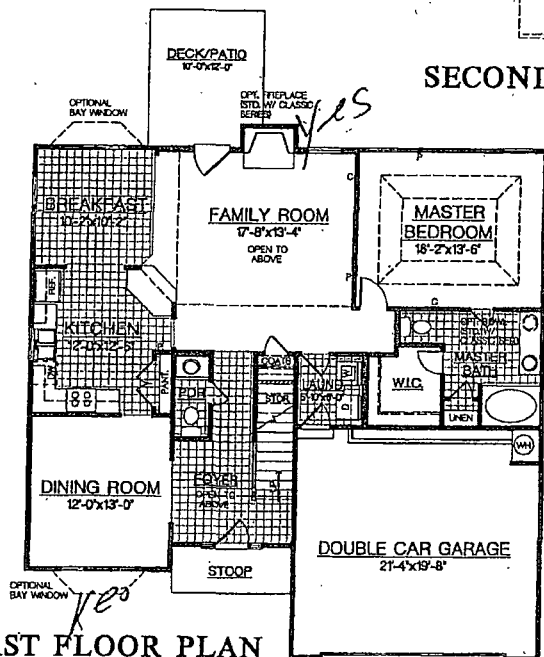
ELEVATIONS SHOWN WITH OPTIONAL FEATURES AND MAY BE CONCEPTUAL IMAGES

**THE TARLETON**

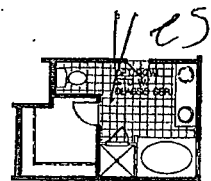
# THE TARLETON



SECOND FLOOR PLAN



FIRST FLOOR PLAN



OPT. MASTER BATH



THIS SHEET IS FOR ILLUSTRATIVE PURPOSES ONLY, AND NOT PART OF A LEGAL CONTRACT. FLOOR PLANS AND STANDARD FEATURES MAY VARY WITH HOME STYLE SELECTED AND ARE SUBJECT TO CHANGE WITHOUT NOTICE. OPTIONAL FEATS REQUIRE ADDITIONAL COST. ROOM SIZES ARE APPROXIMATE, AND ELEVATIONS MAY BE CONCEPTUAL. ENVS/08/08

LISA WOLFF HERBERT, ATTORNEY AT LAW

REAL ESTATE TRUST ACCOUNT

864 LOWCOUNTRY BLVD  
MT. PLEASANT, SC 29464  
(843) 849-0688

NBSC  
THE NATIONAL BANK OF SOUTH CAROLINA  
CHARLESTON, SC 29402

67-58/532

74229

May. 09, 2003

PAY TO THE  
ORDER OF

Don Galloway Homes, LLC, A Delaware LLC

\$\*193,243.73\*

\*\* One Hundred Ninety Three Thousand Two Hundred Forty Three and 73/100 \*\*\*\*\* DOLLARS

Don Galloway Homes, LLC, A Delaware LLC

MEMO

Cash to Seller 03-567

⑆071229⑆ ⑆053200666⑆ ⑆7075087040⑆⑆

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

**A. Settlement Statement**

U.S. Department of Housing  
and Urban Development



OMB No. 2502-0265

**B. Type of Loan**

1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input checked="" type="checkbox"/> Conv. Unins	File Number 03-567	Loan Number 0302207	Mortgage Insurance Case Number
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> Conv. Ins.				

**C. NOTE:** This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "p.o.c." were paid outside of closing; they are shown here for informational purposes and are not included in the totals.

**D. NAME AND ADDRESS OF BORROWER:** *David A. Stover* *Jennifer L. Short*  
201 Temuco Lane, Summerville, SC 29483 201 Temuco Lane, Summerville, SC 29483

**E. NAME AND ADDRESS OF SELLER:** *Don Galloway Homes, LLC, A Delaware LLC*  
11230 Carmel Commons Blvd., Charlotte, NC

**F. NAME AND ADDRESS OF LENDER:** *Homeowners Mortgage Enterprises, Inc.*  
2530 Devline Street, Columbia, SC 29205

**G. PROPERTY LOCATION:** 201 Temuco Lane  
Summerville, SC 29483

**H. SETTLEMENT AGENT:** *Lisa Wolff Herbert, PA*  
PLACE OF SETTLEMENT: 864 Lowcountry Blvd., Suite C, Mount Pleasant, SC 29464  
TIN: 58-2312870

**I. SETTLEMENT DATE:** 05/09/2003 **RESCISSION DATE:**

**J. SUMMARY OF BORROWER'S TRANSACTION** **K. SUMMARY OF SELLER'S TRANSACTION**

<b>100. GROSS AMOUNT DUE FROM BORROWER:</b>		<b>400. GROSS AMOUNT DUE TO SELLER:</b>	
101. Contract Sales Price	\$197,214.00	401. Contract Sales Price	\$197,214.00
102. Personal Property		402. Personal property	
103. Settlement charges to borrower: (from line 1400)	\$5,316.82	403.	
104.		404.	
105.		405.	
<b>ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:</b>		<b>ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:</b>	
106. City/town taxes to		406. City/town Taxes to	
107. County Taxes to		407. County Taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
<b>120. GROSS AMOUNT DUE FROM BORROWER:</b>	<b>\$202,530.82</b>	<b>420. GROSS AMOUNT DUE TO SELLER:</b>	<b>\$197,214.00</b>
<b>200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:</b>		<b>500. REDUCTIONS IN AMOUNT DUE TO SELLER:</b>	
201. Deposit or earnest money	\$500.00	501. Excess deposit (see instructions)	\$500.00
202. Principal amount of new loan(s)	\$201,376.00	502. Settlement charges to seller (line 1400)	\$3,306.44
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
<b>ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:</b>		<b>ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:</b>	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 01/01/2003 to 05/09/2003	\$163.83	511. County taxes 01/01/2003 to 05/09/2003	\$163.83
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
<b>220. TOTAL PAID BY/FOR BORROWER:</b>	<b>\$202,039.83</b>	<b>520. TOTAL REDUCTIONS IN AMOUNT DUE TO SELLER:</b>	<b>\$3,970.27</b>
<b>300. CASH AT SETTLEMENT FROM/TO BORROWER:</b>		<b>600. CASH AT SETTLEMENT TO/FROM SELLER</b>	
301. Gross amount due from borrower (line 120)	\$202,530.82	601. Gross amount due to seller (line 420)	\$197,214.00

L. SETTLEMENT CHARGES				PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL SALES/BROKER'S COMMISSION					
BASED ON PRICE \$197,214.00 @ % =					
DIVISION OF COMMISSION (LINE 700) AS FOLLOWS:					
701.	to				
702.	to				
703.	to				
704.	to				
705. Commission paid at settlement					
706. Deposit Held by Galloway \$500					
800. ITEMS PAYABLE IN CONNECTION WITH LOAN:					
801.	Loan origination fee	0.5000% to Homeowners Mortgage Enterprises,			\$1,006.88
802.	Loan discount	% to Homeowners Mortgage Enterprises,			
803.	Appraisal fee to:	Homeowners Mortgage Enterprises, Inc.			
804.	Credit report fee:	Homeowners Mortgage Enterprises, Inc.			
805.	Lender's inspection fee:	Homeowners Mortgage Enterprises, Inc.			
806.	Mortgage insurance application fee to:	Homeowners Mortgage Enterprises, Inc.			
807.	Assumption fee:	Homeowners Mortgage Enterprises, Inc.			
808.	Application Fee to:	Homeowners Mortgage			\$495.00
809.	Tax Service Fee to:	Treats			\$80.00
810.	Flood Cert. Fee to:	FDST			\$30.00
811.	Express Mail Fee to:	Homeowners Mortgage		\$37.00	
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE:					
901.	Interest from	05/09/2003 to 06/01/2003 @ \$31.72/day		\$729.56	
902.	Mortgage insurance premium for	mos. to			
903.	Hazard insurance premium for	1.00 yrs. to Farm Bureau		\$932.39	
904.	Flood insurance premium for	ys. to			
905.	Rural Housing Fee			\$3,020.64	
1000. RESERVES DEPOSITED WITH LENDER:					
1001.	Hazard insurance	3.00 months @ \$77.67 per month		\$233.01	
1002.	Mortgage insurance	months @ per month			
1003.	City property taxes	months @ per month			
1004.	County property taxes	8.00 months @ \$38.75 per month		\$310.00	
1005.	Annual assessments	months @ per month			
1006.	Flood insurance	months @ per month			
1007.		months @ per month			
1008.		months @ per month			
1009.	Aggregate Accounting Escrow Adjustment			(\$193.79)	
1100. TITLE CHARGES:					
1101.	Settlement or closing fee to:	Lisa Wolff Herbert			\$300.00
1102.	Abstract or title search to:				
1103.	Title examination to:				
1104.	Title insurance binder to:				
1105.	Document preparation to:	Lisa W. Herbert (POC)			
1106.	Notary fees to:				
1107.	Attorney's fees to:				
(includes above items Numbers: )					
1108.	Title insurance to:	Port City Title Insurance		\$528.50	
(includes above items Numbers: )					
1109.	Lender's coverage	\$528.50	\$201,376.00		
1110.	Owner's coverage		\$197,214.00		
1111.	PCT 604 / ERIC 404 (Binder included)				
1112.	Express Mail Package to:	Homeowners Mortgage		\$17.50	
1113.	Express Mail Proceeds to:	Seller			\$17.50
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES:					
1201.	Recording fees:	Deed \$11.00 ; Mortgage \$22.00 ; Releases			\$33.00
1202.	City/county tax/stamps:	Deed \$730.75 ; Mortgage			\$730.75
1203.	State tax/stamps:	Deed ; Mortgage			
1204.					
1205.					
1300. ADDITIONAL SETTLEMENT CHARGES:					
1301.	Survey to:	Nielson & Assoc. (POC-S)			
1302.	Pest inspection to:	Elans Pest (POC)			
1303.	Mors. Registration Fee to:	Homeowners		\$3.95	
1304.	2003 dues to:	Plum Creek HOA		\$226.56	
1305.	2-10 Warranty				\$84.81
1306.					
1307.					
1400. TOTAL SETTLEMENT CHARGES				\$5,316.82	\$3,306.44

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Mar. 11. 2003 1:46PM

No. 0605 P. 1

**CONTRACT ACCEPTANCE ANALYSIS**

NEW YES PLAN TARLTON  
REWRITE \_\_\_\_\_ Is this house a spec yes JOB # PG77  
CHANGE ORDER \_\_\_\_\_ DATE 3/12/03

	SALES	PROJECTED	VARIANCE
1. PRICE	\$ 203,214	\$ 197,314	
2. OPTIONS:			
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
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	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
	\$	\$	0
3. PROJECT SALES PRICE (TOTAL)	\$ 203,214	\$ 197,314	
4. CONTRACT AMOUNT (SALES)			
5. VARIANCE			6,000

OTHER COMMENTS:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO. 09-CP-10-1602
JENNIFER SHORT and	)	
DAVID STOVER,	)	
	)	
Plaintiffs,	)	<b>PLAINTIFF'S OPPOSITION TO</b>
	)	<b>DEFENDANTS' MOTION TO</b>
vs.	)	<b>DISMISS, OR ALTERNATIVELY,</b>
	)	<b>STAY</b>
	)	<b>THE ACTION</b>
LENNAR CAROLINAS, INC,	)	
DON GALLOWAY HOMES, LLC,	)	
and LENNAR COMMUNITIES OF	)	
THE CAROLINAS, INC,	)	
	)	
Defendants.	)	

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The Plaintiffs respond in opposition to Defendants Lennar Carolinas, Inc., Don Galloway Homes, LLC and Lennar Communities of the Carolinas, Inc.'s ("Defendant" or "Defendant's") Motion to Dismiss or Alternatively, Stay the Action, and request that the Court deny Defendant's Motion to Dismiss for the reasons stated herein.

As Plaintiffs have previously conceded in conference with counsel for the Defendants, the Defendants are entitled to a 90-day stay in this litigation pursuant to the Right to Cure Act, S.C. Code § 40-59-810 *et. seq.* Plaintiffs do not object to the Defendants exercising a clear statutory

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procedural right granted to them, and therefore do not oppose Defendants' requested relief in the motion as to a stay of this litigation.

### **GROUNDS FOR OPPOSITION**

Plaintiffs strongly oppose Defendants' attempts to dismiss this action on the basis that it is subject to binding arbitration. Plaintiffs contest this dismissal on two separate grounds, pursuant to South Carolina case law:

1. The Arbitration Clause in the Purchase Agreement is adhesive, unconscionable, incomplete and unenforceable in this action, and dismissal of this action in order to arbitrate is improper. The Plaintiffs show that the Arbitration Clause is part of an adhesive form agreement, that they had no real choice of terms in the Purchase Agreement, and that facially, the co-Plaintiff David Stover is not bound by these terms, because he did not sign the Purchase Agreement.

2. The Purchase Agreement conforms to the Simpson Grounds for invalidating a provision requiring arbitration, and therefore, dismissal of this action to arbitrate is improper. Pursuant to Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14 (2007) and its progeny, the Shorts are not subject to the arbitration clause in the Purchase Agreement because they are not commercially sophisticated parties, the purchase agreement was

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hastily and/or arbitrarily executed as is evident from Defendant's exhibits, and Plaintiffs did not have the benefit of counsel or negotiation in making a major purchase that fundamentally limited their legal rights.

## ARGUMENT

### **I. The Arbitration Clause in the Purchase Agreement is Adhesive, Unconscionable, and Incomplete, and is therefore Unenforceable in this Action.**

South Carolina favors the arbitration of disputes, but only so long as certain requirements are met by the parties when entering into an arbitration clause, and only so long as the language and mutual promises contained in the arbitration clause itself meet certain guidelines. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14 (2007). An arbitration clause contained in a contract may therefore be unenforceable on the same grounds as a whole contract, including unenforceability on the grounds of unconscionability.

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." Id. at 25 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554 (2004)). If a court as a matter of law finds any

clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. Id.; S.C. Code Ann. § 36-2-302(1).

The Purchase Agreement signed by Jennifer Short and representatives of Don Galloway Homes is a form agreement. None of the terms of the agreement related to legal remedies were negotiated by the parties. The Purchase Agreement is missing the signature of the co-purchasor purportedly bound by the legal terms and conditions contained in the Agreement. The Purchase Agreement Arbitration Clause is facially adhesive, in that its terms were not bargained for by the parties.

Moreover, informed consent to arbitrate is facially lacking in this Purchase Agreement because the co-purchasor and co-plaintiff, David Stover, did not sign the agreement, yet Don Galloway Homes, Inc., allowed the sale to proceed despite this obvious deficiency. While another party may have been engaged to bargain on his behalf, the agreement of the parties on the Purchase Agreement does not reflect what, if any, knowledge, Mr. Stover had of the rights he was forfeiting under the Arbitration Clause.

## II. The Plaintiffs' Purchase Agreement Conforms to the *Simpson* Grounds for Invalidating a Provision Requiring Arbitration.

In *Simpson*, the court analyzed an adhesion contract for the sale of an automobile. While the court first noted that such contracts are standard in the automobile industry, it also stated that this contract involved a "vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society." *Id.* at 27. It also found that Simpson did not possess the business judgment necessary to "understand the implications of the arbitration agreement," and she did not have a lawyer present when she signed the document. *Id.* Furthermore, the court noted that the contract was "hastily" presented for signature. *Id.*

Additionally, the arbitration clause in the contract in dispute in *Simpson* was embedded within the small print and was deemed "inconspicuous" by the court. *Id.* Based on the foregoing, the court found that Simpson lacked a meaningful choice in agreeing to the arbitration clause. *Id.* at 28.

The Purchase Agreement in this case contains boilerplate language that provides scant evidence of the magnitude of the Shorts' purchase. cursory review of the document shows that none of the essential arbitration terms offer a blank area for the addition or modification of terms. There is no area for the parties to initial. Moreover, as previously indicated, the

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Purchase Agreement was deemed valid by Lennar even though the co-plaintiff and co-purchasor, David Stover, did not sign off of the agreement. This pre-printed form purports to have governed the purchase of their home, while simultaneously voiding their right to a trial by jury. The contract purports to eliminate any remedy to the Shorts for construction defects, while reserving equitable rights to Defendants and apparently, disclaiming all of the builders' statutory warranties, including the warranty of habitability.

Plaintiffs assert a home purchase is the greatest purchase most Americans make in their life. Home ownership may be described as a matter that essential to our society, and even more significant than the vehicle purchase dispute raised in *Simpson*. In the case of the Shorts, it was their first home purchase, yet during this life- and status-altering event, Plaintiffs are alleged to have permanently given up fundamental rights, even though one of the Plaintiffs did not execute the Purchase Agreement. Another factor weighing against enforcement of the arbitration clause in the Purchase Agreement is the commercial sophistication of the Plaintiffs. The Plaintiffs are not commercially-sophisticated parties. This property is the Plaintiffs' first home, and their first attempt at a home purchase. From the appearance of the contract, Plaintiffs were dealing with an agent of

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Don Galloway Homes, not an independent realtor, and similarly, it appears no lawyer (or informed, non-interested party) was present when Plaintiffs entered into the purchase agreement, and ostensibly, the arbitration clause. Any agent of Don Galloway homes would have been on inquiry notice that this was the first home purchase for Plaintiffs and that they are not intimately knowledgeable of real estate, commercial, or construction law.

Lastly, the incompleteness of the purchase agreement speaks for itself as to the arbitrary and hasty manner in which the parties reached agreement. The form is facially incomplete. It contains information scrawled in by a Lennar agent.

### CONCLUSION

For the above reasons and those that may be presented in oral argument, Plaintiffs respectfully request that the Court deny the Defendants' Motion to Dismiss.

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*Attorneys for the Plaintiffs*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DORCHESTER )

IN THE COURT OF COMMON PLEAS  
  
FOR THE FIRST JUDICIAL CIRCUIT

JENNIFER SHORT AND DAVID STOVER, )  
 )  
Plaintiffs, )

C.A. NO.: 09-CP-18-1602

vs. )

LENNAR CAROLINAS, INC., DON )  
GALLOWAY HOMES, LLC, AND LENNAR )  
COMMUNITIES OF THE CAROLINAS, )  
INC., )

**DEFENDANTS' MEMORANDUM IN  
SUPPORT OF MOTION TO STAY THE  
ACTION AND COMPEL ARBITRATION**

Defendants. )

2010 OCT -6  
CERTIFIED C.L.  
11:53  
DORCHESTER COUNTY

Defendants Lennar Carolinas, Inc., Don Galloway Homes, LLC, and Lennar Communities of the Carolinas, Inc. (collectively, "Defendants"), by and through their undersigned attorneys, respectfully submit this Memorandum in Support of their Motion to Stay the Action and Compel Arbitration.

**BACKGROUND**

This action involves allegations of defects in the construction of a single-family residence located in Dorchester County, South Carolina (the "Property") that is owned by Plaintiffs Jennifer Short and David Stover ("Plaintiffs"). The subject residence was constructed and purchased pursuant to the South Carolina Purchase Agreement, which was entered into by Plaintiff Short and Defendant Don Galloway Homes, LLC<sup>1</sup> (the "Agreement") on March 11, 2003. In conspicuous, bold, underlined, and capitalized type, the first page of the Agreement provides, *inter alia*, that:

**ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE CONSTRUCTION OF THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND, SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THE PARTIES ACKNOWLEDGE THAT ARBITRATION SHALL BE THE SOLE, FINAL, BINDING AND**

<sup>1</sup> Lennar Carolinas, Inc. and Lennar Communities of the Carolinas, Inc. were improperly identified as defendants in this action, which arises from a dispute between Plaintiffs and Don Galloway Homes, LLC. In any event, the improper naming of these parties does not impact the arbitrability of the dispute. See *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 (4th Cir. 2000).

**EXCLUSIVE REMEDY OF THE PARTIES WITH RESPECT TO ANY SUCH  
MATTER FOR WHICH ARBITRATION IS REQUIRED HEREUNDER.**

See Agreement at ¶ 7. A copy of the Agreement is attached hereto as Exhibit A (emphasis in original). The first line of the Agreement also states that “**THIS AGREEMENT IS SUBJECT TO ARBITRATION (SEE PARAGRAPH 7 HEREIN).**” *Id.* (emphasis in original).

Through this provision, the parties agreed and stipulated that all disputes regarding the Property, the Agreement, and any dealings between the parties would be resolved through arbitration. Similar arbitration provisions relating to homes purchased from Defendants have been upheld and enforced by Judge Dennis and Judge Harrington. See Order of the Honorable R. Markley Dennis, Jr. Granting Motion to Compel Arbitration dated March 19, 2009, attached as Exhibit B; see also Order of the Honorable Kristi L. Harrington Granting Motion to Compel Arbitration dated December 21, 2009, attached as Exhibit C.

In violation of these mandatory arbitration provision, Plaintiffs brought the present action against Defendants, alleging claims for negligence, breach of implied warranties, and unfair trade practices. Defendants have denied all such allegations and have moved to have this matter arbitrated in accordance with the parties’ Agreement.

**ANALYSIS**

**A. The Parties’ Arbitration Agreement is Enforceable under the Federal Arbitration Act.**

The Federal Arbitration Act (“FAA”), 9 U.S.C.A. § 1 *et seq.*, codifies the federal policy favoring arbitration. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

In the instant case, the parties stipulated that “this transaction involves interstate commerce” and that the parties’ claims will be submitted to mandatory mediation and arbitration “as provided by the Federal Arbitration Act.” See Agreement ¶ 7. Furthermore, Defendants have submitted an Affidavit

showing that the transaction that underpins the Agreement and forms the basis of the Complaint involves significant out-of-state activities, and in fact, could not have taken place absent the infusion of out-of-state materials and supplies, which were transported into the State of South Carolina. See Affidavit of David Murphy ¶ 6 (attached hereto as Exhibit D). Indeed, it is likely that nearly every item of material that was used in the construction of the subject residence implicated interstate commerce in some fashion or other.

Although Defendants are able to provide specific proof of this fact with respect to a number of specified materials, South Carolina courts essentially accept it as given that construction involves interstate commerce. See *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (“It would be virtually impossible to construct” [a housing project for the elderly] “with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.”); see also *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because “the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce”) The same principle would apply here in the event that Defendants were without actual proof of interstate commerce, which is not the case. Based on the foregoing, it is clear that the transaction necessarily involved interstate commerce such that the FAA governs the enforceability of the Arbitration Agreement.

The purpose of the FAA “was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.E.2d 26 (1991). “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Id.* (highlighting the heavy presumption in favor of the validity of arbitration agreements). Section 2 of the FAA states that an arbitration clause in a contract involving interstate commerce “shall be valid, irrevocable, and

enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2; see also *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001) (quoting *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273, 115 S.Ct. 834, 839 (1995)). It appears that pursuant to Section 2 of the FAA, Plaintiffs are challenging the validity of the arbitration provisions on the grounds of common law unconscionability.<sup>2</sup>

**B. The Arbitration Agreement is Not Unenforceable as Unconscionable.**

To be unenforceable as unconscionable under South Carolina law, there must be an “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.” *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752, 757 (2004). Plaintiffs bear the burden of proving both the absence of meaningful choice on their part and that the arbitration provisions are oppressive and unreasonably favorable to the other party. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92, 121 S.Ct. 513 (2000).

**1. Plaintiffs did not lack meaningful choice in signing the Agreement.**

Absence of meaningful choice on the part of one party requires evidence of a fundamentally unfair bargaining process in the contract at issue. See *Herron v. Century BMW*, 382 S.C. 525, 532, 693 S.E.2d 394, 398 (2010) (holding consumer had meaningful choice in making decision to enter into adhesion contract with used car salesperson). In the context of arbitrability issues, the Fourth Circuit has described unconscionability as whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision-maker. *Hooters of Amer., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

Plaintiffs are anticipated to argue that the Agreement was not a take-it-or-leave-it adhesion contract. Although Defendants did supply a standardized contract, Stover thoroughly negotiated the terms of the Agreement. See Exhibit D. As further evidenced by the addendum to the Purchase

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<sup>2</sup> Plaintiffs have not challenged that their claims fall within the scope of the arbitration provisions. The Arbitration Agreement covers all claims, controversies, or disputes “arising out of or relating to this contract.” See Exhibit A (emphasis omitted). All of Plaintiffs’ allegations relate directly to the construction and sale of the residential property that is the subject of the Agreement. As such, any challenge by Plaintiffs to the scope of the arbitration provisions would be unproductive.

Agreement demonstrates, the terms of the Agreement were altered when Don Galloway agreed to pay all non-recurring closing costs and the loan origination fee. *Id.* ¶ 5; *see also Exhibit A.* Stover also requested and received certain upgrades, as specified by the handwriting on the floor plans in the Purchase Agreement. *Id.*

Counsel for Plaintiffs argue that Plaintiffs lacked the ability to understand the Arbitration Agreement, that there was no attorney present to explain the Agreement, and that the Agreement was “hastily” presented for their signatures. “Noticeably, however, except for the agreements themselves, Plaintiff[s] fail[] to present any evidence, by way of affidavit or otherwise, to support these allegations, and as stated above, [they bear] the burden of establishing that the agreements at issue are unenforceable.” *Holden v. Carolina Payday Loans, Inc.*, No. 08-182-TLW, 2008 WL 4198587, at \* 14 (D.S.C. Sept. 5, 2008) (finding that all claims should be submitted to arbitration in accordance with the agreements where the plaintiffs failed to substantiate their allegations with affidavits). As a result, there is no evidence to corroborate these allegations.<sup>3</sup>

Taking Plaintiffs’ allegations are true, the “mere fact that one party to the contract is larger than the other” cannot be the basis for finding that an arbitration clause is unenforceable. *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991). “There are many cases in this jurisdiction and others involving the enforceability of arbitration clauses . . . between commercial entities and consumers.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26, 644 S.E.2d 663, 669 (2007). As the South Carolina Supreme Court has noted, the standardization of contracts is “a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations.” *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

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<sup>3</sup> Plaintiffs also claim that the Agreement is missing the signature of a co-purchaser and that this missing signature is proof that they lacked a meaningful choice. It is well-established that “a non-signatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000); *Benefits in a Card, LLC v. TALX Corp.*, No. 6:06-cv-03655-GRA, 2007 WL 750638, at \*2 (D.S.C. March 7, 2007).

---

In signing the contract, there was no lack of a meaningful choice. The Agreement is clearly labeled to be an arbitration agreement at the top of the document in bold, capital and underlined font. *Herron*, 387 S.C. at 533, 693 S.E.2d at 398 (holding that conspicuously labeled arbitration agreement renders the decision to sign such an agreement meaningful).<sup>4</sup> The terms of the arbitration agreement appear again typed in bold, underlined and capital letters on the first page of the contract. *Id.*

Plaintiffs rely heavily on the South Carolina Supreme Court case of *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Applying a case-by-case analysis reveals that the Arbitration Agreement is significantly different from the agreement at issue in *Simpson*. The *Simpson* arbitration agreement “in its entirety was written in standard small print and embedded in paragraph ten (10) of sixteen (16) paragraphs included on the page.” The *Simpson* court found that “the inconspicuousness nature of the arbitration provision” prevented any meaningful choice in agreeing to arbitrate. Accordingly, the significant features that impacted the unconscionability determination in *Simpson* are not present here.

Finally, there is a legal presumption that parties to a contract have read and understood the terms of the contract. As stated above, Stover signed the Agreement in multiple places and requested and received numerous changes. *See* Murphy Affidavit ¶ 5. As such, Plaintiffs had a meaningful choice in making the decision to enter into this contract with Defendants.

## **2. The Arbitration Agreement lacks oppressive, one-sided terms.**

Under the Arbitration Agreement, an unbiased arbitrator will decide the parties’ disputes in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (“AAA”), which is universally recognized as a full service provider of alternative dispute resolution. *See Exhibit A*. Clearly, the use of the AAA is not unconscionable.

Moreover, the arbitration provision in the Agreement does not contain a limitation on damages or otherwise attempt to limit Plaintiffs’ ability to recover. As with the arbitration provision that was deemed

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<sup>4</sup> Similar to the arbitration agreement in *Herron*, the arbitration provision in the Agreement is conspicuous, as evidenced by the fact that it meets the stringent notice requirements under South Carolina law.

enforceable in *Herron*, the Agreement does not “prevent[] the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the [A]greement limit any available statutory remedies.” *Herron*, 387 S.C. at 534, 693 S.E.2d at 399.<sup>5</sup> By contrast, the arbitration agreement that was deemed unenforceable in *Simpson* required the customer to waive her right to punitive damages as well as double and treble compensatory damages. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. The Agreement merely sets forth the forum in which Plaintiffs are to bring their claims.

Furthermore, there is no evidence that the cost of arbitration will prevent Plaintiffs from pursuing their claim. See *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002). (“Where a party seeks to invalidate an arbitration agreement on the ground that the arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”). The Complaint does not specify the amount of damages that Plaintiffs are seeking, but if they are seeking rescission of their Agreement in the amount of \$197,214, the filing fee under the Construction Industry Rules would be \$2,800. A copy of the Construction Industry Rules are attached as Exhibit E. Even with treble damages, the filing fee would not exceed \$6,200. *Id.* Thus, the cost of arbitration will not deprive Plaintiffs of their day in court especially in light of the fact that Defendants share responsibility for the arbitration costs.

Certain provisions also favor the customer, such as allowing the customer to choose the venue. *Id.* There is no requirement that the parties arbitrate in Miami, Florida, where Lennar is headquartered, or some other location that would be potentially inconvenient to Plaintiffs. Furthermore, both the customer and builder are subject to the terms of the arbitration agreement such that there is no lack of mutuality of remedies. See *Herron*, 387 S.C. 534, 693 S.E.2d at 399 (fact that the arbitration agreement applies to both the customer and the commercial entity shows that the provisions are not one-sided and oppressive).

Even if the Agreement were arguably one-sided, parties have a duty to read and digest the contract. A person who can read is bound to read an agreement before signing it. *Towles*, 338 S.C. 29,

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<sup>5</sup> Plaintiffs allege that “Don Galloway has disclaimed all of the builder’s statutory warranties, including the warranty of habitability.” Such a disclaimer would not be a basis for avoiding arbitration, as disclaimers apply with equal force in the courts as in any arbitral body. Indeed, such disclaimers are routinely enforced by courts in South Carolina. See e.g., *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006) (finding that the “principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability”).”

39, 524 S.E.2d 839, 845 (1999) (“[T]he law does not impose a duty to explain a document’s contents to an individual when the individual can learn the contents simply from reading the document.”). The duty to read is particularly important, where, as here, Plaintiffs assert that the purchase of the residence was one of the most significant expenditures of their lives. The record contains no evidence that would support a finding that the terms of the Arbitration Agreement are oppressive, one-sided or geared toward achieving a biased decision by an impartial decision maker. Accordingly, the Arbitration Agreement is not unconscionable and should be enforced.

**Conclusion**

Based upon the foregoing reasons, this case should be stayed, and the Plaintiffs compelled to arbitrate their claims against Defendants.

Respectfully submitted,



Ellis R. Lesemann, Esq.  
email: [ellislesemann@parkerpoe.com](mailto:ellislesemann@parkerpoe.com)  
Jenna K. McGee, Esq.  
email: [jennamcgee@parkerpoe.com](mailto:jennamcgee@parkerpoe.com)  
PARKER POE ADAMS & BERNSTEIN LLP  
200 Meeting Street, Suite 301  
Charleston, SC 29401  
Phone: (843) 727-2650  
Fax: (843) 727-2680

*ATTORNEYS FOR DEFENDANTS LENNAR  
CAROLINAS, INC., DON GALLOWAY HOMES, LLC,  
AND LENNAR COMMUNITIES OF THE CAROLINAS,  
INC.*

Charleston, South Carolina

October 5, 2010

---

# Exhibit A

*Don Galloway*  
**DON GALLOWAY HOMES**

A LENNAR COMPANY

**SOUTH CAROLINA PURCHASE AGREEMENT**

Job No. R11  
Lot No. 11  
Block No. \_\_\_\_\_  
*Spec*

**THIS AGREEMENT IS SUBJECT TO ARBITRATION (SEE PARAGRAPH 7 HEREIN)**

Jennifer L. Smith & David A. Smith Buyer agrees to purchase from Don Galloway Homes, LLC ("Don Galloway Homes") as Seller, the real estate and improvements ("Property") described below, upon the following terms and conditions:

1. Property Description: City or Town of: Summerville  
County of: Durham State of: South Carolina  
Street Address: 101 Terrace Lane  
Subdivision: Blue Creek Model: Timber (Garage:  1 car;  2 car;  none).

2. Purchase Price: The purchase price is \$ 197,214.00, and shall be paid as follows:  
\$ 5000 in earnest money paid upon execution of this Contract.  
(See Standard Provisions.)

\$ \_\_\_\_\_ as additional earnest money to be paid to Seller on or before \_\_\_\_\_ (See Standard Provisions.)

\$ \_\_\_\_\_ Non-refundable money for options.

\$ \_\_\_\_\_ the balance of the down payment in cash at closing.

3. Loan Application: Buyer agrees to apply for an FHA, VA or Conventional Loan through an approved Don Galloway Homes Lender \_\_\_\_\_ in the amount of \$ \_\_\_\_\_ at the applicable interest rate as of the date of closing, on or before five (5) days from the date of this Contract. The aforementioned loan shall be secured by the real property described herein. Buyer shall endeavor in good faith to obtain said loan and when requested by lender shall supply all necessary information and sign the customary loan applications, forms and instruments. If Buyer's loan application is rejected for a cause that cannot reasonably be cured, or if a commitment for said financing cannot reasonably be obtained by specified closing date, Buyer shall be deemed unable to obtain said loan. In such case, either Buyer or Seller may terminate this agreement and Buyer shall pay any appraisal fee and/or credit report charges. The Escrow Agent shall then refund the earnest money to Buyer.

4. Closing Costs: Buyer shall pay loan closing costs in the maximum amount of \$ See addendum and Seller shall pay the balance. Buyer shall, however, pay in addition at closing all prepaid expenses and required escrow deposits, including but not limited to, any mortgage insurance premium, hazard insurance premium, interim interest, homeowner's association dues, and escrow deposits for property tax, mortgage insurance, hazard insurance and homeowner's association dues. NO 1st 1.0-1.

5. Other Provisions and Conditions: (a) All of the Standard Provisions (1 through 13) on the reverse side of this Contract apply to and are hereby incorporated into this Contract. (b) The following numbered Optional Provisions on the reverse side of this Contract apply to and are hereby incorporated into this Contract:  
14. \_\_\_\_\_ 15. \_\_\_\_\_ 16. (Initial if included.)

6. Special Stipulations: \_\_\_\_\_

**7. ARBITRATION: ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE CONSTRUCTION OF THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND, SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THE PARTIES ACKNOWLEDGE THAT ARBITRATION SHALL BE THE SOLE, FINAL, BINDING AND EXCLUSIVE REMEDY OF THE PARTIES WITH RESPECT TO ANY SUCH MATTER FOR WHICH ARBITRATION IS REQUIRED HEREUNDER. AFTER AN AWARD IS RENDERED BY THE ARBITRATORS, A JUDGEMENT MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. NOTWITHSTANDING THE FOREGOING, DON GALLOWAY HOMES, LLC MAY BRING AN EQUITABLE JUDICIAL PROCEEDING AGAINST YOU FOR AN INJUNCTION OR SPECIFIC PERFORMANCE FOR ANY BREACH OR UNLAWFUL ACTION IN CONNECTION WITH YOUR OBLIGATIONS HEREUNDER AND THIS SHALL NOT CONSTITUTE A WAIVER OF ITS RIGHT TO COMPEL ALL CLAIMS THAT MAY BE ASSERTED AGAINST DON GALLOWAY HOMES, LLC TO BE ARBITRATED. IN PREPARATION FOR THE ARBITRATION HEARING, EACH PARTY MAY UTILIZE ALL METHODS OF DISCOVERY AUTHORIZED BY THE PROCEDURAL RULES AND STATUTES OF THIS STATE, AND MAY ENFORCE THE RIGHT TO DISCOVERY IN THE MANNER PROVIDED BY THE RULES OF CIVIL PROCEDURE THAT ARE APPLICABLE TO THE MATTER. THIS PROVISION SHALL BE CONSTRUED AND ENFORCED, AT ALL TIMES, PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. {1 ET SEQ}).**

8. Closing: The home will be deemed complete when it is issued a Certificate of Occupancy by the appropriate governmental authority. Upon issuance of the Certificate of Occupancy, Buyer agrees to close the purchase within 5 days, at the time and place designated by the Seller.

9. Counterparts: This Contract shall be signed by both Buyer and Seller and can be executed in TWO counterparts with an executed counterpart being retained by each party.

10. The written text of this Purchase Agreement, any addendum, sales contract specifications and the attached Standard Provisions represent the complete intent and understanding of the parties involved. There are no other promises, representations, or guarantees, either verbal or written, other than what are contained in the Purchase Agreement's Special Stipulation Section #6, any addendum, sales contract specifications or in the Standard Provisions.

Date of Offer: 3-11-03

\_\_\_\_\_  
Buyer (SEAL) DON GALLOWAY HOMES, LLC

\* \_\_\_\_\_ (SEAL) By: \_\_\_\_\_ (SEAL)  
Buyer For the Seller

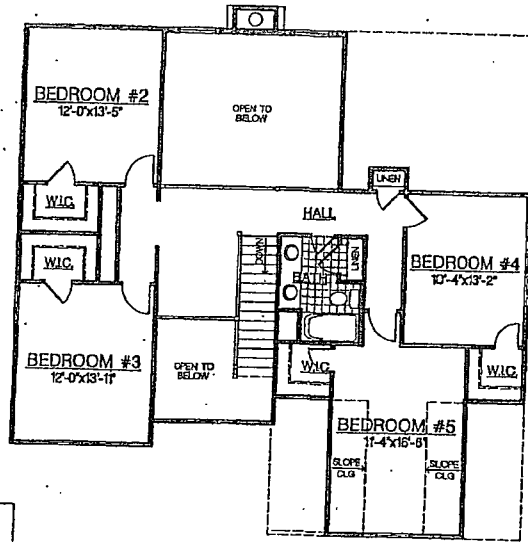
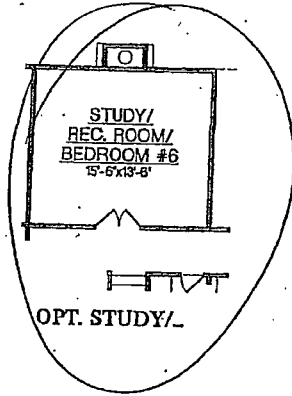
I hereby acknowledge receipt of the sum of \$ 5000 as the Buyer's initial earnest money deposit, in accordance with and subject to the terms and provisions of the Contract.

Form # 101821 • South Carolina  
Revised 03/02

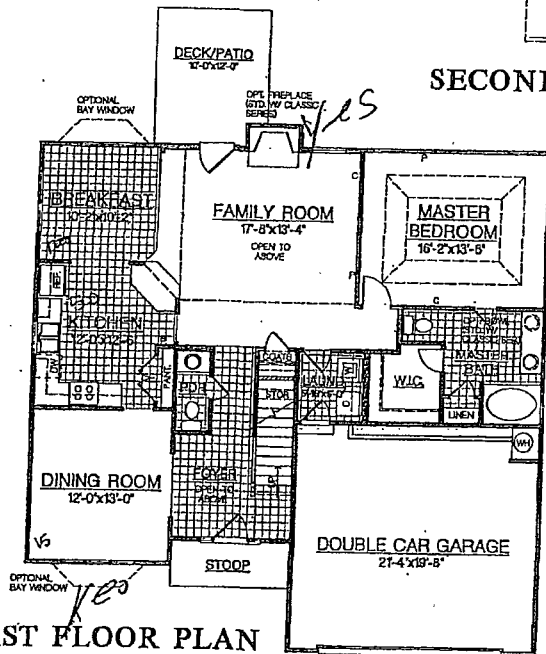
Shaunda Jackson (SEAL)  
Sales Consultant



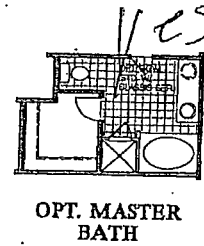
# THE TARLETON



SECOND FLOOR PLAN



FIRST FLOOR PLAN



THIS SHEET IS FOR ILLUSTRATIVE PURPOSES ONLY AND IS NOT PART OF A LEGAL DOCUMENT. FLOOR PLAN AND STANDARD FEATURES MAY VARY WITH HOME STYLE SELECTED AND ARE SUBJECT TO CHANGE WITHOUT NOTICE. OPTIONAL HOME INCLUDES ADDITIONAL COSTS. ROOM SIZES ARE APPROXIMATE AND DIMENSIONS MAY BE CONCEPTUAL. SEE ARCHITECT'S NOTES.

JOB RTT

PROPE,

ESS 201 Temuco Lane

**FINANCIAL CONCESSIONS ACKNOWLEDGEMENT**

Please Initial Here

Don Galloway Homes agrees to pay up to \$11,000 towards non-recurring closing costs and loan origination fee when Buyer uses Universal American Company. By doing so, Don Galloway Homes reserves the right to choose the closing attorney.

*\* This is to give you notice that Don Galloway Homes has a business relationship with Universal American Company. Don Galloway Homes and Universal American Company are both wholly owned subsidiaries of The Lennar Group. Because of this relationship, this referral may provide Don Galloway Homes a financial or other benefit.*

**CONSTRUCTION SCHEDULING**

Please Initial Here

A start date for your new home will not be given until loan approval and all earnest money is received by Don Galloway Homes' corporate office. Once loan approval is received, a start date is scheduled during our weekly meeting. The start date will be approximately three to four weeks after this meeting. This time period allows for permits to be obtained, materials to be ordered, lot preparation, etc.

The average time to build a Don Galloway home is 4 months. This time period begins when the footers of the house are dug. Outside factors, such as weather, inspections/inspectors, product delivery, trades and circumstances beyond our control, can affect the construction schedule.

Closing dates and times are scheduled by Don Galloway Homes' corporate office. The sales consultant and project manager do not schedule closing dates.

We do our best to complete each home on schedule while at the same time maintaining our standard of high quality.

*\* If you are purchasing a home with a contingency contract, your start date will be given when the contingency has been removed and loan approval has been received.*

**TREE AND LAWN POLICY**

Please Initial Here

This is to acknowledge receipt of Don Galloway Homes' Tree and Lawn Established Policies, As stated therein, it is hereby understood and agreed that:

A. It is Don Galloway Homes' policy to remove only those trees affected by construction. In this regard, any trees within approximately 25 feet of the rear or 10 feet from the sides or front of the homes, or of any water, gas or electric lines and driveway may, at our discretion, be removed. Don Galloway Homes will do everything possible to preserve the natural beauty of your homestead.

B. All stumps and debris from clearing the lot will be removed from the lot

C. During construction it is necessary to use large equipment to dig basements, back fill the foundation and trench for utilities. In the process, some damage may occur to the remaining trees. We recommend that you repair the areas by sawing broken limbs flush with the main trunk and treating these areas, along with any damaged bark areas, with a tree wound compound. Don Galloway Homes will not be responsible for the loss of any tree resulting from machine damage or by changing the grade of the lot, nor will we remove any trees after occupancy unless agreed to in writing before the closing.

D. Yards will be tractor graded, seeded, fertilized and strawed before closing. Maintenance of the yard and shrubs will be Don Galloway Homes' responsibility until closing. Regrading, re-sowing, aeration, maintenance and watering of the yard and shrubs after closing is the responsibility of the homeowner.

**HOME ACCESS ACKNOWLEDGEMENT**

Please Initial Here

Due to OSHA Regulations and a genuine concern for the Buyer's safety, the Buyer shall be provided access to the property before closing only upon prior reasonable notice and request to the Seller, and only when accompanied by an authorized representative of the Seller and subject to such further, reasonable restrictions as may be imposed by the Seller. Buyer otherwise shall be prohibited access of any type to the property prior to transfer of title, personally or through any representative. Seller hereby disclaims liability for any and all loss, damage or injury which might arise from any access or visit to the property by Buyer, friends, family members, agents or representative.

**FULL DISCLOSURE STATEMENT**

Please Initial Here

The purchaser acknowledges that the written text of this Purchase Agreement represents the full intent of the parties involved.

*\* No promises, representations or guarantees, either verbal or written, other than what is contained in the Purchase Agreement, have been made at this time. In addition, at no time in the future should the purchaser accept any promises, representations or guarantees, except those made in writing.*

Date 3-11-03

Sales Consultant

Quanda Jackson

Buyer

[Signature]

Buyer

Sales Manager

[Signature]

OFFICE COPY

# Don Galloway Homes

A Lennar Company

## Financial Concessions Acknowledgment

S/D Lot and Block # PC 77 Purchase Agreement Date 3-27-03

Property Address ~~404~~ 201 Tenueo Lane

Don Galloway Homes agrees to pay the following Closing Costs:

½% Origination Fee, Credit Report, Tax Service fee, Flood Certification Fee, Attorney's Fee (assuming our Attorney is used), Title Insurance, Recording Fees, Survey (if DGH approved surveyor used).

By doing so, Don Galloway Homes reserves the right to choose the closing attorney and approve the Mortgage Lender.

Any other closing costs, including but not limited to, discount points, lender junk fees Underwriting fees, application fees, and ect.) mortgage insurance, prepaid items (insurance and taxes), and interim interest, Shall be the sole responsibility of the Buyer.

Southern Trust Mortgage, Inc.  
Kristen Lavelle  
Phone 843.416.1152  
Cell 843.224.4062  
Fax 843.416.1166

Homeowners Mortgage, Inc.  
Larry Luzader  
Phone 843.763.2008  
Fax 843.763.2445

Bank of America  
Carl Wolff III  
Phone 843.745.8341  
Fax 843.745.8429

Mortgage Trust Group  
Ray Marcoux  
Phone 843.388.8400  
Fax 843.388.8040

Closing Attorney  
Lisa Wolff Herbert  
Phone 843.849.0888  
Fax 843.849.0889

U.A.A.C.

Buyer Cartha L. Ford Date 3-27-03

Buyer \_\_\_\_\_ Date \_\_\_\_\_

[mwh/mydocuments/pfinconcessions](http://mwh/mydocuments/pfinconcessions)



REQUEST FOR START

PLAN PARLLOW  
JOB NO. PC 77

Date: 8/1/02

Spec. House \_\_\_\_\_ Contract House & Date \_\_\_\_\_ Closing Date \_\_\_\_\_  
Community Phoenicia Sales Agent \_\_\_\_\_  
Address 2017 avenue Lot 27 Block \_\_\_\_\_

PLAN SPECIFICATIONS:

Heritage  Classic \_\_\_\_\_ Custom \_\_\_\_\_  
Garage: None  One  Two  Side Load  Enclosed \_\_\_\_\_

\_\_\_\_\_  
Refer to Addendum/Change Orders for Contract House  
\_\_\_\_\_  
Refer to Options listed below for Spec. Houses

1.	<u>Rec Room</u>	Price	<u>5500</u>
2.	<u>Deluxe Bath</u>	Price	<u>2200</u>
3.	<u>Wood Burn F.R.E. Place</u>	Price	<u>2250</u>
4.	<u>Wenge Cabinets - Maple Cabinet</u>	Price	<u>358</u>
5.	<u>CLB Pool</u>	Price	<u>283</u>
6.	<u>Bay window</u>	Price	<u>1450</u>
7.	<u>Side Load</u>	Price	<u>2750</u>
8.	<u>microwave / white</u>	Price	<u>420</u>

Base Price 126,980 Total Option Price \_\_\_\_\_  
Total Sales Price 212,642

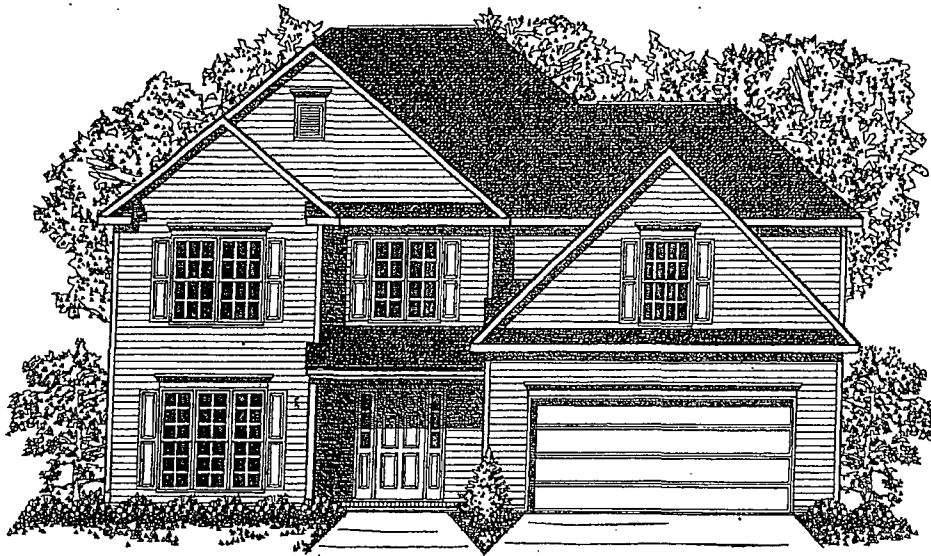
Color Selection: Ordered \_\_\_\_\_ Attached  To Follow \_\_\_\_\_  
Plot Plan: Ordered \_\_\_\_\_ Received \_\_\_\_\_

Building Permit Number \_\_\_\_\_ Issue Date \_\_\_\_\_  
Plans/Specs/and Purchase Orders Received \_\_\_\_\_  
Release Date \_\_\_\_\_ Expected Completion Date \_\_\_\_\_

Sales Agent \_\_\_\_\_ Date \_\_\_\_\_ Sales Manager [Signature] Date 8/2/02

Additional Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

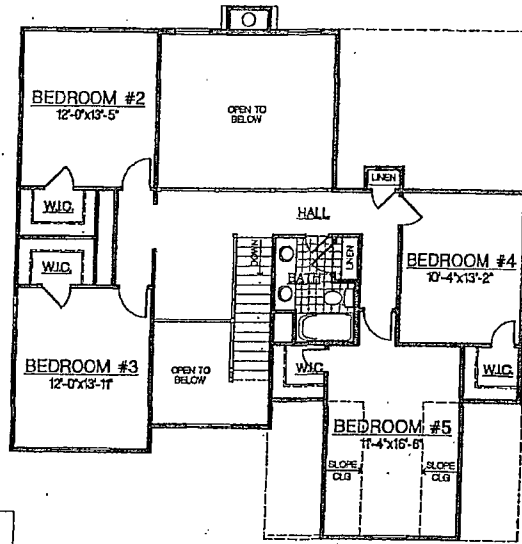
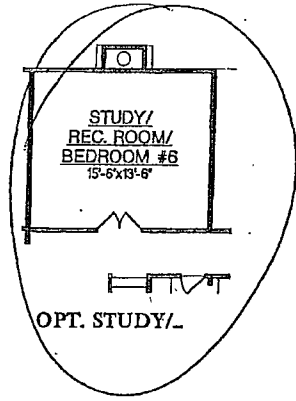
*Don Galloway*  
**DON GALLOWAY HOMES**  
A LENNAR COMPANY



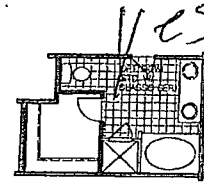
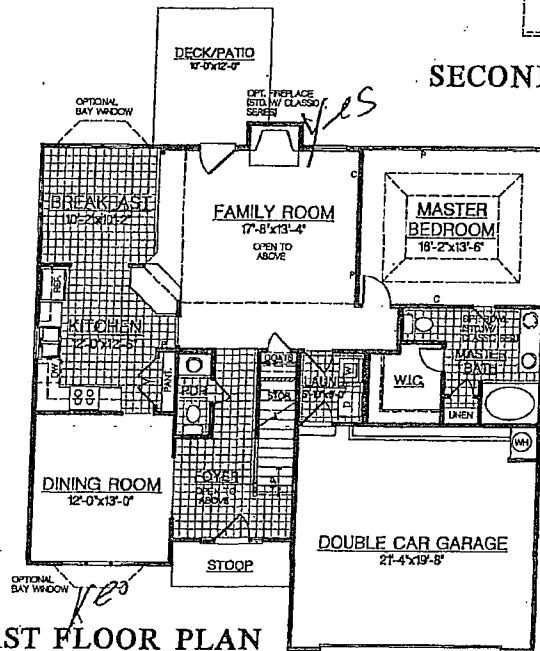
ELEVATIONS SHOWN WITH OPTIONAL FEATURES AND MAY BE CONCEPTUAL DRAWINGS

**THE TARLETON**

# THE TARLETON



SECOND FLOOR PLAN



FIRST FLOOR PLAN



THIS SHEET IS FOR ILLUSTRATIVE PURPOSES ONLY, AND NOT PART OF A LEGAL CONTRACT. FLOOR PLANS AND STANDARD FEATURES MAY VARY WITH HOME STYLE, BUILDING AND ARE SUBJECT TO CHANGE WITHOUT NOTICE. OPTIONAL ITEMS REQUIRE ADDITIONAL COST. ROOM SIZES ARE APPROXIMATE AND ELEVATIONS MAY BE CONCEPTUAL. ENDDP/PS

LISA WOLFF HERBERT, ATTORNEY AT LAW

REAL ESTATE TRUST ACCOUNT  
884 LOWCOUNTRY BLVD  
MT. PLEASANT, SC 29464  
(843) 848-0888

NBSO  
THE NATIONAL BANK OF SOUTH CAROLINA  
CHARLESTON, SC 29402

67-66532

74229

May. 09, 2003

PAY TO THE  
ORDER OF

Don Galloway Homes, LLC, A Delaware LLC

\$\*193,243.73\*

MEMO

\*\* One Hundred Ninety Three Thousand Two Hundred Forty Three and 73/100 \*\*\*\*\*

DOLLARS

Don Galloway Homes, LLC, A Delaware LLC


MEMO

Cash to Seller03-567

⑆076229⑆ ⑆053200666⑆ 170750870401⑆

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

A. Settlement Statement

U.S. Department of Housing  
and Urban Development 

OMB No. 2502-0285

B. Type of Loan					
1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input checked="" type="checkbox"/> Conv. Unins	File Number 03-567	Loan Number 0302207	Mortgage Insurance Case Number
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> Conv. Ins.				

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "p.o.c" were paid outside of closing; they are shown here for informational purposes and are not included in the totals.

D. NAME AND ADDRESS OF BORROWER: *David A. Stover* *Jennifer L. Short*  
201 Temuco Lane, Summerville, SC 29483 201 Temuco Lane, Summerville, SC 29483

E. NAME AND ADDRESS OF SELLER: *Don Galloway Homes, LLC, A Delaware LLC*  
11230 Carmel Commons Blvd., Charlotte, NC

F. NAME AND ADDRESS OF LENDER: *Homeowners Mortgage Enterprises, Inc.*  
2530 Devine Street, Columbia, SC 29205

G. PROPERTY LOCATION: 201 Temuco Lane  
Summerville, SC 29483

H. SETTLEMENT AGENT: *Lisa Wolff Herbert, PA*  
PLACE OF SETTLEMENT: 864 Lowcountry Blvd., Suite C, Mount Pleasant, SC 29464  
TIN: 58-2312670

I. SETTLEMENT DATE: 05/09/2003 RECISSION DATE:

J. SUMMARY OF BORROWER'S TRANSACTION K. SUMMARY OF SELLER'S TRANSACTION

100. GROSS AMOUNT DUE FROM BORROWER:		400. GROSS AMOUNT DUE TO SELLER:	
101. Contract Sales Price	\$197,214.00	401. Contract Sales Price	\$197,214.00
102. Personal Property		402. Personal property	
103. Settlements charges to borrower:		403.	
(from line 1400)	\$5,316.82		
104.		404.	
105.		405.	
ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:		ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:	
106. City/town taxes to		406. City/town Taxes to	
107. County Taxes to		407. County Taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER:	\$202,530.82	420. GROSS AMOUNT DUE TO SELLER:	\$197,214.00
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:		500. REDUCTIONS IN AMOUNT DUE TO SELLER:	
201. Deposit or earnest money	\$500.00	501. Excess deposit (see instructions)	\$500.00
202. Principal amount of new loan(s)	\$201,376.00	502. Settlement charges to seller (line 1400)	\$3,306.44
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:		ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:	
210. City/town taxes to		510. City/town taxes to	
211. County taxes 01/01/2003 to 05/09/2003	\$163.83	511. County taxes 01/01/2003 to 05/09/2003	\$163.83
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. TOTAL PAID BY/FOR BORROWER:	\$202,039.83	520. TOTAL REDUCTIONS IN AMOUNT DUE TO SELLER:	\$3,970.27
300. CASH AT SETTLEMENT FROM/TO BORROWER:		600. CASH AT SETTLEMENT TO/FROM SELLER	
301. Gross amount due from borrower (line 120)	\$202,530.82	601. Gross amount due to seller (line 420)	\$197,214.00

**SETTLEMENT CHARGES**

700. TOTAL SALES/BROKER'S COMMISSION		PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
BASED ON PRICE \$197,214.00 @ % =			
DIVISION OF COMMISSION (LINE 700) AS FOLLOWS:			
701.	to		
702.	to		
703.	to		
704.	to		
705. Commission paid at settlement			
706. Deposit Held by Galloway \$500			
800. ITEMS PAYABLE IN CONNECTION WITH LOAN:			
801. Loan origination fee 0.5000% to Homeowners Mortgage Enterprises,			\$1,006.88
802. Loan discount % to Homeowners Mortgage Enterprises,			
803. Appraisal fee for Homeowners Mortgage Enterprises, Inc.			
804. Credit report for Homeowners Mortgage Enterprises, Inc.			
805. Lender's inspection fee Homeowners Mortgage Enterprises, Inc.			
806. Mortgage insurance application fee to Homeowners Mortgage Enterprises, Inc.			
807. Assumption fee Homeowners Mortgage Enterprises, Inc.			
808. Application Fee to Homeowners Mortgage			\$495.00
809. Tax Service Fee to Trots			\$80.00
810. Flood Cert. Fee to FDSI			\$30.00
811. Express Mail Fee to Homeowners Mortgage		\$37.00	
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE:			
901. Interest from 05/09/2003 to 06/01/2003 @ \$31.72/day		\$729.56	
902. Mortgage insurance premium for mos. to			
903. Hazard insurance premium for 1.00 yrs. to Farm Bureau		\$932.39	
904. Flood insurance premium for yrs. to			
905. Rural Housing Fee		\$3,020.64	
1000. RESERVES DEPOSITED WITH LENDER:			
1001. Hazard insurance	3.00 months @ \$77.67 per month	\$233.01	
1002. Mortgage insurance	months @ per month		
1003. City property taxes	months @ per month		
1004. County property taxes	8.00 months @ \$38.75 per month	\$310.00	
1005. Annual assessments	months @ per month		
1006. Flood insurance	months @ per month		
1007.	months @ per month		
1008.	months @ per month		
1009. Aggregate Accounting Escrow Adjustment		(\$193.79)	
1100. TITLE CHARGES:			
1101. Settlement or closing fee to Lisa Wolff Herzert			\$300.00
1102. Abstract or title search to			
1103. Title examination to			
1104. Title insurance binder to			
1105. Document preparation to Lisa W. Herzert (POC)			
1106. Notary fees to			
1107. Attorney's fees to			
(Includes above items Numbers: )			
1108. Title insurance to Port City Title Insurance			\$528.50
(Includes above items Numbers: )			
1109. Lender's coverage \$528.50 (\$201,376.00)			
1110. Owner's coverage (\$197,214.00)			
1111. PCT 60# / LTC 40# (Binder Included)			
1112. Express Mail Package to Homeowners Mortgage		\$17.50	
1113. Express Mail Proceeds to Seller			\$17.50
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES:			
1201. Recording fees: Deed \$11.00 ; Mortgage \$22.00 ; Releases			\$33.00
1202. City/county tax/stamps: Deed \$730.75 ; Mortgage			\$730.75
1203. State tax/stamps: Deed ; Mortgage			
1204.			
1205.			
1300. ADDITIONAL SETTLEMENT CHARGES:			
1301. Survey to Nielson & Assoc. (POC-S)			
1302. Pest inspection to Elms Pest (POC)			
1303. Mers. Registration Fee to Homeowners		\$3.95	
1304. 2003 dues to Plum Creek HOA		\$226.56	
1305. 2-10 Warranty			\$84.81
1306.			
1307.			
1400. TOTAL SETTLEMENT CHARGES		\$5,316.82	\$3,306.44

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Mar. 11. 2003 1:46PM

No. 0906 P. 1

CONTRACT ACCEPTANCE ANALYSIS					
NEW <input checked="" type="checkbox"/> YES	Is this house a spec <i>yes</i>			PLAN TARLTON	
REWRITE <input type="checkbox"/>				JOB # PC77	
CHANGE ORDER	DATE <i>3/11/03</i>	SALES	PROJECTED	VARIANCE	
1. PRICE	\$	203,214	\$	197,214	
2. OPTIONS:	\$		\$		0
	\$		\$		0
	\$		\$		0
	\$		\$		0
	\$		\$		0
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	\$		\$		0
	\$		\$		0
	\$		\$		0
	\$		\$		0
3. PROJECT SALES PRICE (TOTAL)	\$	203,214	\$	197,214	
4. CONTRACT AMOUNT (SALES)	\$		\$		
5. VARIANCE					6,000
OTHER COMMENTS:					

---

# Exhibit B

377

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
WILLIAM SCOTT STERLING AND )  
JESSICA ROSS STERLING, )

Plaintiffs, )

vs. )

DON GALLOWAY HOMES, A )  
LENNAR COMPANY, LENNAR )  
CAROLINA, INC. A/K/A MNJ )  
PROPERTIES, LLC, DVS, INC., AND )  
ROBERTO PEREIRA, )

Defendants. )

IN THE COURT OF COMMON PLEAS )  
 )  
FOR THE FIRST JUDICIAL CIRCUIT )

Case No.: 08-CP-10-377

**ORDER GRANTING MOTION TO  
DISMISS AND COMPEL ARBITRATION  
OF DEFENDANTS DON GALLOWAY  
HOMES AND LENNAR CAROLINA, INC.**

2009 MAR 19 PM 2:33  
JULIE J. ARNOLD  
CLERK OF COURT

FILED

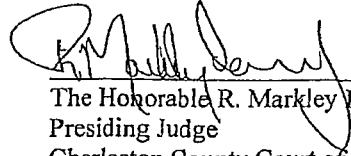
This matter comes before the Court on the Motion to Dismiss and Compel Arbitration filed by Defendants Don Galloway Homes and Lennar Carolina, Inc. ("Defendants") on January 7, 2009. In response to the Motion, it is the decision of this Court that this action should be dismissed with respect to Don Galloway and Lennar Carolina pursuant to S.C. Code Ann. § 15-48-20(a) (2005) and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, due to the fact that the claims in dispute are subject to mandatory arbitration in accordance with the South Carolina Purchase Agreement dated August 21, 2004 ("Agreement"), so that Plaintiffs, Don Galloway and Lennar Carolina may proceed with arbitration.

Therefore, based upon the Defendants' Motion, it is hereby ordered that the proceedings in this Court with respect to Don Galloway and Lennar Carolina are dismissed in anticipation

PPAB 1545635v1

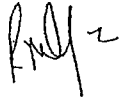
that Plaintiffs will arbitrate all claims against Don Galloway and Lennar Carolina relating to this dispute in accordance with the terms of the Agreement.

**IT IS SO ORDERED.**



The Honorable R. Markley Dennis, Jr.  
Presiding Judge  
Charleston County Court of Common Pleas

This the 19<sup>th</sup> day of March, 2009  
Charleston, South Carolina



---

# Exhibit C

JULIE J. ARMSTRONG  
CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 105  
CHARLESTON, SC 29401-2258  
RETURN SERVICE REQUESTED



www3.charlestoncounty.org

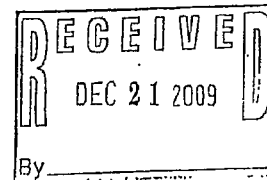
200



MC GEE, JENNA KIZIAH  
200 MEETING ST STE 301  
CHARLESTON SC 29401-3156

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC  
ORDER - ORDER GRANTING MOTION TO STAY & COMPEL ARBITRATION  
OF DEFNTS LENNAR CORP, LENNAR CAROLINAS LLC & LENNAR OF THE

THIS JUDGMENT WAS ENTERED ON THE 11TH DAY OF DECEMBER, 2009 AND A COPY MAILED  
FIRST-CLASS THIS 17TH DAY OF DECEMBER, 2009 TO ALL COUNSEL OF RECORD AND/OR  
ALL PERSONS ENTITLED TO RECEIVE NOTICE.  
YOU MAY VIEW AND DOWNLOAD THIS DOCUMENT AT WWW3.CHARLESTONCOUNTY.ORG



MC GEE, JENNA KIZIAH  
200 MEETING ST STE 301  
CHARLESTON SC 29401-3156

2009-CP-10-001304  
JUMANI, SULTAN  
VS.  
LENNAR CORPORATION ETC

JULIE J. ARMSTRONG  
CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 106  
CHARLESTON, SC 29401-2258  
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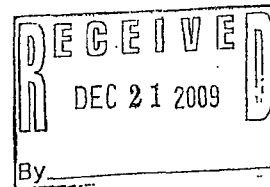


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MCGEE, JENNA KIZIAH  
200 MEETING STREET  
STE 301  
CHARLESTON , SC 29401

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC  
ORDER - ORDER GRANTING MOTION TO DISMISS & COMPEL  
ARBITRATION OF DEFNTS LENNAR CORP, LENNAR CAROLINAS LLC &

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MCGEE, JENNA KIZIAH  
200 MEETING STREET  
STE 301  
CHARLESTON , SC 29401

2009-CP-10-001305  
DIMAGGIO, SIMON JR  
VS.  
LENNAR CORPORATION ETC

**JULIE J. ARMSTRONG**  
CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 106  
CHARLESTON, SC 29401-2259  
RETURN SERVICE REQUESTED

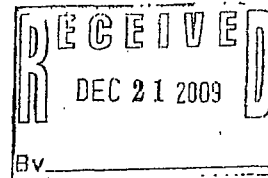


[www3.charlestoncounty.org](http://www3.charlestoncounty.org)

MCGEE, JENNA KIZIAH  
200 MEETING STREET  
STE 301  
CHARLESTON , SC 29401

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC  
ORDER - ORDER GRANTING MOTION TO STAY & COMPEL  
ARBITRATION OF DEFNTS LENNAR CORP, LENNAR CAROLINAS LLC &

THIS JUDGMENT WAS ENTERED ON THE 11TH DAY OF DECEMBER , 2009 AND A COPY MAILED  
FIRST-CLASS THIS 17TH DAY OF DECEMBER , 2009 TO ALL COUNSEL OF RECORD AND/OR  
ALL PERSONS ENTITLED TO RECEIVE NOTICE.  
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MCGEE, JENNA KIZIAH  
200 MEETING STREET  
STE 301  
CHARLESTON , SC 29401

2009-CP-10-001306  
ALLEN, ERIC ETAL  
VS.  
LENNAR CORPORATION ETC

**JULIE J. ARMSTRONG**  
CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 106  
CHARLESTON, SC 29401-2258  
RETURN SERVICE REQUESTED



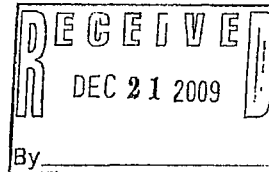
www3.charlestoncounty.org



MCGEE, JENNA KIZIAH  
200 MEETING STREET  
STE 301  
CHARLESTON , SC 29401

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC  
ORDER - ORDER GRANTING MOTION TO STAY & COMPEL  
ARBITRATION OF DEFNTS LENNAR CORP, LENNAR CAROLINAS LLC &

THIS JUDGMENT WAS ENTERED ON THE 11TH DAY OF DECEMBER , 2009 AND A COPY MAILED  
FIRST-CLASS THIS 17TH DAY OF DECEMBER , 2009 TO ALL COUNSEL OF RECORD AND/OR  
ALL PERSONS ENTITLED TO RECEIVE NOTICE.  
YOU MAY VIEW AND DOWNLOAD THIS DOCUMENT AT WWW3.CHARLESTONCOUNTY.ORG



MCGEE, JENNA KIZIAH  
200 MEETING STREET  
STE 301  
CHARLESTON , SC 29401

2009-CP-10-001307  
JACKSON, MARK ETAL  
VS.  
LENNAR CORPORATION ETC

---

# Exhibit D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	IN THE FIRST JUDICIAL CIRCUIT
JENNIFER SHORT AND DAVID STOVER,	)	C.A. No.: 2009-CP-18-1602
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
LENNAR CAROLINAS, INC., DON GALLOWAY	)	<b>AFFIDAVIT OF</b>
HOMES, LLC, AND LENNAR COMMUNITIES	)	<b>DAVID MURPHY</b>
OF THE CAROLINAS, INC.,	)	
	)	
Defendants,	)	
	)	
	)	
	)	
	)	

Comes now the undersigned, and after having been duly sworn, does depose and state as follows:

1. My name is David Murphy. I am over nineteen (19) years of age, and I have personal knowledge of the matters contained in my affidavit. I make this affidavit in support of Defendants' Motion to Stay the Action and Compel Arbitration.

2. The facts stated in this affidavit are from my personal knowledge and from information contained in the records of Lennar Carolinas, LLC ("Lennar") and its predecessors.<sup>1</sup> If called as a witness, I would and could testify competently thereto.

3. I am currently the Financial Controller for Lennar. My primary responsibilities include overseeing the accounting operations of Lennar. Furthermore, I am familiar with the allegations raised in the Complaint.

4. The transaction that forms the basis of the Complaint is the purchase of residential property located at 201 Temuco Lane in the Plum Creek subdivision in Summerville, South Carolina. The Purchase Agreement evidencing this transaction was executed on March 27, 2003.

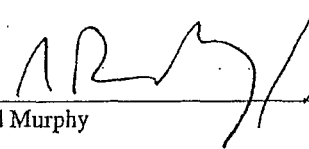
<sup>1</sup> In May 2004, Lennar Communities of Carolinas, Inc. ("Lennar Communities") purchased all of the assets of Don Galloway Homes, LLC ("Don Galloway"). Lennar Communities is now doing business as Lennar Carolinas, LLC, which possesses all of the business records of Don Galloway that were maintained in the normal course of business.

5. Plaintiffs thoroughly negotiated the terms of the Purchase Agreement. As the addendum to the Purchase Agreement demonstrates, Plaintiffs requested and received a provision requiring Don Galloway to pay all non-recurring closing costs and the loan origination fee. *See* South Carolina Purchase Agreement, attached to the Motion as Exhibit A. Additionally, Plaintiffs requested certain upgrades, as specified by the handwriting on the floor plans in the Purchase Agreement. *See* Exhibit A.

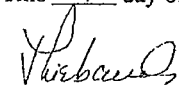
6. The purchase, sale and construction of the subject residence involved significant out-of-state activities and could not have taken place absent the infusion of out-of-state materials and supplies. In constructing the subject residence, Don Galloway used materials manufactured out-of-state and transported into the state:

- The residence was sold with Moire Black shingles, which were manufactured by CertainTeed, based in Valley Forge, Pennsylvania.
- The residence was sold with windows, which were manufactured by Kinco Windows, based in Jacksonville, Florida.
- The residence was sold with insulation, which was manufactured by 31-W Insulation, based in Nashville, Tennessee.
- The residence was sold with appliances, which were manufactured by GE Appliances, based in Fairfield, Connecticut.

FURTHER AFFIANT SAITH NOT.

  
\_\_\_\_\_  
David Murphy

Sworn to and subscribed before me:  
This 5<sup>th</sup> day of October 2010

  
\_\_\_\_\_  
Notary Public for South Carolina  
My commission expires: 1/26/2019

---

# Exhibit E



American Arbitration Association

*Dispute Resolution Services Worldwide*

Construction Industry Arbitration Rules and Mediation Procedures  
(Including Procedures for Large, Complex Construction Disputes)  
Rules Amended and Effective October 1, 2009  
Fee Schedule Amended and Effective June 1, 2010

To access the AAA Construction Arbitration Rules and Mediation Procedures with the previous versions of Fee Schedules, visit the Archived Rules area of the site -- [click here](#).

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[Arbitration](#)

[Regular Track Procedures](#)

[Procedures for the Resolution of Disputes through Document Submission](#)

[Fast Track Procedures](#)

[Procedures for Large Complex Construction Disputes](#)

[The National Construction Panel](#)

[Administrative Fees](#)

[Alternative Dispute Resolution \(ADR\) Clauses](#)

[Mediation](#)

[Arbitration](#)

## CONSTRUCTION INDUSTRY MEDIATION PROCEDURES

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[M-2. Initiation of Mediation](#)

[M-3. Fixing of Locale](#)

[M-4. Representation](#)

[M-5. Appointment of the Mediator](#)

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[M-12. No Stenographic Record](#)

[M-13. Termination of Mediation](#)

[M-14. Exclusion of Liability](#)

M-15. Interpretation and Application of Procedures

M-16. Deposits

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## CONSTRUCTION INDUSTRY ARBITRATION RULES

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R-11. Administrative Conference

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R-13. Date, Time and Place of Hearing

R-14. Arbitrator Appointment from National Construction Panel

R-15. Direct Appointment by a Party

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R-20. Disqualification of Arbitrator

R-21. Communication with Arbitrator and the AAA

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R-23. Preliminary Management Hearing

R-24. Exchange of Information

R-25. Attendance at Hearings

R-26. Representation

R-27. Oaths

R-28. Stenographic Record

R-29. Interpreters

R-30. Postponements of Hearings

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- D-4. Time of Award

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- Standard Fee Schedule
- Flexible Fee Schedule
- Hearing Room Rental

NATIONAL CONSTRUCTION DISPUTE RESOLUTION COMMITTEE

Representatives of the organizations listed below constitute the National Construction Dispute Resolution Committee (NCDRC). This Committee serves as an advisory body to the American Arbitration Association concerning construction dispute resolution services.

American Association of Airport Executives  
American Bar Association -- Forum on the Construction Industry

American Bar Association - Construction Litigation Committee  
American Bar Association - Public Contract Law Section  
American College of Construction Lawyers  
American College of Real Estate Lawyers  
American Council of Engineering Companies  
American Institute of Architects  
American Road and Transportation Builders Association  
American Society of Civil Engineers  
American Subcontractors Association  
Associated Builders & Contractors, Inc.  
Associated General Contractors of America  
American Specialty Contractors, Inc.  
Construction Financial Management Association  
Construction Management Association of America  
Construction Owners Association of America  
Construction Specifications Institute  
Design Build Institute of America  
Dispute Review Board Foundation  
Engineers Joint Contract Documents Committee  
National Association of Home Builders  
National Association of Minority Contractors  
National Association of State Facilities Administrators  
National Association of Surety Bond Producers  
National Society of Professional Engineers  
National Utility Contractors Association Surety Association of America  
Victor O. Schinnerer  
Women Construction Owners & Executives, USA

#### IMPORTANT NOTICE

These Rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the American Arbitration Association. To insure that you have the most current information, visit [www.adr.org](http://www.adr.org). If an agreement for mediation or arbitration specifies that rules in effect at the time the agreement was executed be used, then absent the parties' agreement otherwise, the AAA shall apply the Rules as required by the agreement. We encourage parties to use the most current, state of the art, AAA rules available.

#### INTRODUCTION

Each year, many thousands of construction-related transactions take place. Occasionally, disagreements in connection with these transactions develop. Often, these disputes are resolved by arbitration, the voluntary submission of a dispute to a disinterested person or persons for final and binding determination. Arbitration has been proven to be an effective way to resolve disputes fairly, privately, promptly, and economically.

The American Arbitration Association (AAA) is a public-service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. The AAA is headquartered in New York and has offices located in many major cities throughout the United States and around the world, including Dublin, Mexico City and Singapore. Parties may hold hearings at local AAA offices or at other locations convenient for them. The AAA also provides education and training, publications, and conducts research on all forms of out-of-court dispute resolution.

Generally, the AAA's services are concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

## Mediation

By agreement, the parties may submit their dispute to mediation before arbitration under the mediation procedures herein. Mediation involves the services of one or more individuals, to assist parties in settling a controversy or claim by direct negotiations between or among themselves. The mediator or mediators participate (s) impartially in the negotiations, guiding and consulting the various parties involved. The result of the mediation should be an agreement that the parties find acceptable. The mediator cannot impose a settlement and can only guide the parties toward achieving their own settlement.

The AAA will administer the mediation process to achieve orderly, economical, and expeditious mediation, utilizing to the greatest possible extent the competence and acceptability of the mediators on the AAA's Construction Mediation Panel. Depending on the expertise needed for a given dispute, the parties can obtain the services of one or more individuals who are willing to serve as mediators and who are trained in mediation skills. In identifying those persons most qualified to mediate, the AAA is assisted by the National Construction Dispute Resolution Committee.

The AAA itself does not act as mediator. Its function is to administer the mediation process in accordance with the agreement of the parties, to teach mediation skills to members of the construction industry, and to maintain the National Panel from which mediators can be chosen.

Procedures for mediation cases are described in Sections M-1 through M-18.

## Arbitration

The arbitration rules contain four procedural tracks: the Regular Track Procedures (Section R), the Procedures for the Resolution of Disputes through Document Submission (Section D), the Fast Track Procedures (Section F) and the Procedures for Large, Complex Construction Disputes (Section L). The Regular Track Procedures are applied to the administration of all arbitration cases, unless they conflict with any portion of Section D, Section F or Section L whenever these Sections apply. In the event of a conflict, the Fast Track Procedures, Procedures for the Resolution of Disputes through Document Submission, or the Procedures for Large, Complex Construction Disputes apply.

### Regular Track Procedures

The highlights of the Regular Track Procedures are that they enable:

- opportunities for an administrative conference to help structure the dispute resolution process from the starting point;
- party input into the AAA's preparation of lists of proposed arbitrators;
- checklists for parties and arbitrators to organize the management hearing to address the needs associated with each dispute;
  
- express arbitrator authority to control the discovery process;
- broad arbitrator authority to control the hearing;
- award format choices;
- a Demand Form and an Answer Form, both of which seek information that will help the AAA to better serve the parties.

## PROCEDURES FOR THE RESOLUTION OF DISPUTES THROUGH DOCUMENT SUBMISSION

The highlights of the Procedures for the Resolution of Disputes through Document Submissions are that they provide:

- a simple process for resolution of disputes where a face-to-face hearing is not necessary;
- flexibility to take advantage of technology options;
- the ability to may to be applied to any size dispute by party agreement.

### Fast Track Procedures

The Fast Track Procedures are designed for cases involving claims between two parties where no party's disclosed claim or counterclaim exceeds \$75,000, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. The highlights of these Procedures are:

- a 45-day "time standard" for hearing process completion;
- the establishment of a special pool of arbitrators who are pre-qualified to serve on an expedited basis;
- an expedited arbitrator appointment process, with party input;
- conference call with the arbitrator within 10 days of confirmation of the arbitrator;
- the presumption that cases involving \$10,000 or less will be decided on a documents only basis;
- a single day of hearing in most cases;
- an award in no more than 14 calendar days after completion of the hearing.

### Procedures for Large, Complex Construction Disputes

Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes will be applied to all cases administered by the AAA under the Construction Arbitration Rules in which the disclosed claim or counterclaim of any party is at least \$1,000,000 exclusive of claimed interest, attorneys' fees, arbitration fees and costs.

The key features of these Procedures include:

- a highly qualified, trained Panel of Neutrals, compensated at their customary rates;
- a mandatory preliminary hearing with the arbitrators, which may be conducted by telephone;
- broad arbitrator authority to order and control discovery, including depositions;
- the presumption that hearings will proceed on a consecutive or block basis;
- a reasoned award unless the parties agree otherwise.

### The National Construction Panel

The AAA maintains a National Panel of individuals competent to hear and decide disputes administered under the Construction Industry Arbitration Rules. The AAA considers for appointment to the Construction Industry Panel persons recommended by the National Construction Dispute Resolution Committee, regional advisory committees and customers. These individuals are qualified to serve by virtue of their experience in the construction field. The majority of these neutrals are actively engaged in the construction industry with attorney neutrals generally devoting at least half of their practice to construction matters. Neutrals serving on the Panel and under these Rules must also attend periodic training.

### Administrative Fees

The AAA charges a filing fee based on the amount of claim or counterclaim. This fee information, which is contained with these Rules, allows the parties to exercise control over their administrative fees and costs.

The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, nor do the fees cover reporting services, hearing room rental or any post-award charges incurred by the parties in enforcing the award.

### Alternative Dispute Resolution (ADR) Clauses

#### Mediation

If the parties elect to adopt mediation as a part of their contractual dispute settlement procedure, the following mediation clause can be inserted into the contract in conjunction with a standard arbitration provision:

*If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.*

If the parties choose to use a mediator to resolve an existing dispute, the following language may accompany the submission:

*The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)*

#### Arbitration

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

*Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.*

Arbitration of existing disputes may be accomplished by use of the following:

*We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one)(three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the award.*

The AAA's Guide to Drafting Dispute Resolution Clauses for Construction Contracts ([www.aaaonline.org/construction\\_clauses.pdf](http://www.aaaonline.org/construction_clauses.pdf)) offers additional information about dispute resolution options available for construction disputes. For more information about the AAA's Construction Dispute Avoidance and Resolution Services, as well as the full range of other AAA services, contact the nearest AAA office or visit [www.adr.org](http://www.adr.org)

## CONSTRUCTION INDUSTRY MEDIATION PROCEDURES

### M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedures, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

### M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via AAA WebFile at [www.adr.org](http://www.adr.org).

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- i. A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
- ii. The names, regular mail addresses, email addresses (if available), and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
- iii. A brief statement of the nature of the dispute and the relief requested.
- iv. Any specific qualifications the mediator should possess.

Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the AAA, a party may request the AAA to invite another party to participate in "mediation by voluntary submission". Upon receipt of such a request, the AAA will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

#### M-3. Fixing of Locale (the city, county, state, territory and, if applicable, country of the Mediation)

(a) When the parties' agreement to mediate is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be the city nearest to the site of the project in construction disputes as determined by the AAA.

(b) When the parties' agreement to mediate requires a specific locale, absent the parties' agreement to change it, the locale shall be that specified in the agreement to mediate.

(c) If the reference to a locale in the agreement to mediate is ambiguous, the AAA shall have the authority to consider the parties' arguments and determine the locale.

#### M-4. Representation

Any party may participate without representation (pro-se), or by any representative of that party's choosing, or by counsel, unless such choice is prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number and address, and email address if available of the representative.

#### M-5. Appointment of the Mediator

Parties may search the online profiles of the AAA's Panel of Mediators at [www.aaamediation.com](http://www.aaamediation.com) in an effort to agree on a mediator. If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- i. Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
- ii. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable to that party. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of

mutual preference, the AAA shall invite a mediator to serve.

iii. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

#### M-6. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

#### M-7. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-5.

#### M-8. Duties and Responsibilities of the Mediator

i. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.

ii. The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.

iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

iv. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

v. In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.

vi. The mediator is not a legal representative of any party and has no fiduciary duty to any party.

vii. The mediator shall set the date, time, and place for each session of the mediation conference. The parties shall respond to requests for conference dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established conference schedule. The AAA shall provide notice of the conference to the parties in advance of the conference date, when timing permits.

#### M-9. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

#### M-10. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

#### M-11. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- i. Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- ii. Admissions made by a party or other participant in the course of the mediation proceedings;
- iii. Proposals made or views expressed by the mediator; or
- iv. The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

#### M-12. No Stenographic Record

There shall be no stenographic record of the mediation process.

#### M-13. Termination of Mediation

The mediation shall be terminated:

- i. By the execution of a settlement agreement by the parties; or
- ii. By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- iii. By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
- iv. When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

#### M-14. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures. Parties to a mediation under these procedures may not call the mediator, the AAA or AAA employees as a witness in litigation or any other proceeding relating to the mediation. The mediator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

#### M-15. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

#### M-16. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

#### M-17. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

#### M-18. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly or daily mediation rate published on the mediator's AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour or one half day minimum charge for a mediation conference. Expenses referenced in Section M-17 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the request to initiate mediation is filed but prior to the mediation conference the cost is \$200 plus any mediator time and charges incurred. These costs shall be borne by the initiating party unless the parties agree otherwise.

If you have questions about mediation costs or services visit [www.aaamediation.com](http://www.aaamediation.com) or contact your local AAA office.

#### CONSTRUCTION INDUSTRY ARBITRATION RULES

## REGULAR TRACK PROCEDURES

## R-1. Agreement of Parties and Designation of Applicable AAA Rules

(a) The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Construction Industry Arbitration Rules or whenever they have provided for arbitration of a construction dispute pursuant to the Rules of the AAA without designating particular AAA Rules.

(b) Unless the parties or the AAA determines otherwise, the Fast Track Procedures shall apply in any case involving no more than two parties in which no disclosed claim or counterclaim exceeds \$75,000, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. The Fast Track Procedures shall be applied as described in Section F of these Rules, in addition to any other portion of these Rules that is not in conflict with the Fast Track Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is \$1,000,000 or more, exclusive of claimed interest, attorneys' fees, and arbitration fees and costs. The Procedures for Large, Complex Construction Disputes shall be applied as described in Section L of these Rules, in addition to any other portion of these Rules that is not in conflict with the Procedures for Large, Complex Construction Disputes.

(d) Parties may, by agreement, apply the Fast Track Procedures, the Procedures for Large, Complex Construction Disputes or Procedures for the Resolution of Disputes through Document Submission (Section D of these Rules) to any dispute.

(e) All other cases shall be administered in accordance with Regular Track Procedures of these Rules

## R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

## R-3. National Panel of Construction Neutrals

The AAA shall establish and maintain a National Panel of Construction Arbitrators ("National Panel") and shall appoint arbitrators as provided in these Rules. The term "arbitrator" in these Rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

## R-4. Filing Requirements Under an Arbitration Agreement in a Contract

(a) Filing of a Demand: Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

(i) The initiating party ("the claimant") shall, within the time period, if any, specified in the contract(s), file with the AAA a demand for arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration. Filing may be accomplished through use of AAA WebFile, located at [www.adr.org](http://www.adr.org), or by filing the demand with any AAA office.

(ii) The claimant shall simultaneously provide a copy of the demand and the applicable arbitration agreement to the opposing party ("the respondent").

(ii) The demand shall include:

- (a) The name of each party;
- (b) The address for each party, including, if known, telephone and fax numbers and email addresses;
- (c) If applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party;
- (d) A statement setting forth the nature of the claim including the relief sought and the amount involved;
- (f) The locale requested, if the arbitration agreement does not specify one.

(b) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration however, any disputes in connection with the AAA's determination may be decided by the arbitrator.

If a filing does not satisfy the Filing Requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party.

(c) Answers and Counterclaims

(i) Answering Statement: A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(ii) Counterclaim: A respondent may file a counterclaim within 14 calendar days after notice of the filing of the demand is sent by the AAA. The Respondent shall, at the time of any such filing, send a copy of the counterclaim to the claimant and to all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

If the counterclaim filing is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party.

(d) Parties are encouraged to provide descriptions of their claims, in any document filed pursuant to this section, in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

#### R-5. Filing Requirements Under a Submission Agreement

Parties to any existing dispute, who have not previously agreed to use these Rules, may commence arbitration under these Rules by either filing online through AAA WebFile or by filing at any office of the AAA a written submission to arbitrate under these Rules, signed by the parties. The submission shall contain:

- (a) The names and addresses for each party and their representatives, including, if known, telephone and fax numbers and email addresses;
- (b) A statement setting forth the nature of the dispute including the relief sought, the amount involved and the claims and counterclaims asserted by the parties. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party;

(c) The hearing locale, if agreed upon by the parties;

(d) The appropriate filing fee for each claim or counterclaim as provided in the AAA Fee Schedule applicable at the time of filing.

Parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of their dispute clear to the arbitrator.

#### R-6. Changes of Claim or Counterclaim

(a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

#### R-7. Consolidation or Joinder

(a) If the parties are unable to agree to consolidate related arbitrations or to the joinder of parties to an ongoing arbitration, the AAA shall directly appoint a single arbitrator (hereinafter referred to as the R-7 arbitrator) for the limited purpose of deciding whether related arbitrations should be consolidated or parties joined.

(i) To request consolidation of arbitrations, the requesting party must have filed a demand for arbitration, including the applicable arbitration provision(s) from the parties' contract(s) and must provide a written request for consolidation which outlines the reasons for such request. It is the requesting party's responsibility to provide a copy of the request to all parties.

(ii) To request joinder of parties, the requesting party must file a written request to join parties to an existing arbitration which provides the names and contact information for such parties, names and contact information for the parties' representatives, if known and the reasons for such request. It is the requesting party's responsibility to provide a copy of the request to all parties.

(b) Absent agreement of all parties, the R-7 arbitrator appointed under this Rule shall not be an arbitrator who is appointed to any pending case involved in the consolidation request at issue.

(c) If the R-7 arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, that arbitrator may also establish a process for selecting arbitrators for any ongoing or newly constituted case and, unless agreed otherwise by the parties, the allocation of responsibility for arbitrator compensation among the parties, subject to reapportionment by the arbitrator(s) appointed to the newly constituted case in the final arbitration award.

(d) The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator.

(e) The AAA shall maintain a panel of construction attorneys who have experience with consolidation or joinder issues. All arbitrators appointed to hear requests under this Rule shall be appointed from that panel, unless the parties agree otherwise.

#### R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

#### R-9. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

#### R-10. Mediation

(a) At any stage of the proceedings, the parties may agree to conduct a mediation conference under the AAA Construction Industry Mediation Procedures in order to facilitate settlement. Unless requested by all parties, the mediator shall not be an arbitrator appointed to the case. Should the parties jointly request that the arbitrator serve as a mediator, the arbitrator's consent to do so is also required.

(b) If the case is initially filed for arbitration and the parties subsequently agree to mediate, unless the parties agree otherwise, or in the absence of party agreement, by the decision of the arbitrator, the arbitration process shall not be stayed while the mediation is pending.

#### R-11. Administrative Conference

(a) Before the appointment of the arbitrator, any party may request, or the AAA, in its discretion, may schedule an administrative conference with a representative of the AAA and the parties and/or their representatives.

(b) The purpose of the administrative conference is to organize and expedite the arbitration, explore administrative details, establish an efficient means of selecting an arbitrator, ascertain the parties' preferred arbitrator qualifications and to consider mediation as a dispute resolution option and to address other appropriate concerns of the parties, including but not limited to joinder of parties, consolidation of related cases, changes to claims and the possibility of proceeding through the submission of documents only as set out in optional Section D of the Rules, may also be explored.

(c) Administrative conferences may be convened, at the AAA's discretion or at the request of any party, at other times during the case to address case management matters that do not require the arbitrator's involvement.

#### R-12. Fixing of Locale (the city, county, state, territory and, if applicable, country of the arbitration)

The parties may mutually agree to the locale where the arbitration is to be held. Any disputes regarding the locale must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

(a) When the parties' arbitration agreement is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be the city nearest to the site of the project in dispute, as determined by the AAA, subject

to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.

(b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, the locale shall be that specified in the arbitration agreement.

(c) If the reference to a locale in the arbitration agreement is ambiguous and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

#### R-13. Date, Time and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing and/or conference. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall provide notice of hearing to the parties at least 7 calendar days in advance of the hearing date, unless otherwise agreed by the parties or so directed by the arbitrator.

#### R-14. Arbitrator Appointment from National Construction Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

(a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Construction Panel. The parties are encouraged to agree on an arbitrator from the submitted list and to advise the AAA of their agreement.

(b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA.

The parties shall not exchange arbitrator selection lists. If a party does not return the list within the time specified by the AAA, all persons named therein shall be deemed acceptable by that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve.

(c) If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the authority to make the appointment from among other members of the National Construction Panel without the submission of additional lists.

(d) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators without the submission of lists.

(e) In a three-arbitrator case, the parties shall first attempt to agree on the professional backgrounds of the composition of the arbitration panel. If the parties are unable to agree, then the AAA shall determine the professional composition of the panel, taking into account any preferences expressed by the parties.

The AAA may provide the parties with lists, separated by industry, in order for the parties to select arbitrators

from different professional background. If separate lists are used, the total number of names will be no less than 15, unless the AAA determines otherwise.

#### R-15. Direct Appointment by a Party

(a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name, address and telephone number and fax number and email, if known, of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Construction Panel from which the party may, if it so desires, make the appointment.

(b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of R-20 with respect to impartiality and independence unless the parties have specifically agreed pursuant to R-20(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.

(c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

(d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

#### R-16. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

(a) If, pursuant to Section R-15, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by AAA and the parties have authorized those arbitrators to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.

(b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.

(c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Construction Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-14, a list selected from the National Construction Panel, and the appointment of the chairperson shall be made as provided in that Section.

#### R-17. Nationality of Arbitrator in International Arbitration

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

#### R-18. Number of Arbitrators

(a) If the parties have not agreed on the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.

(b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim must be made to the AAA and the other parties to the arbitration no later than 7 calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request

for a change in the number of arbitrators, the AAA shall make that determination.

#### R-19. Disclosure

(a) Any person appointed or to be appointed as an arbitrator as well as the parties and their representatives shall disclose to the AAA, as promptly as practicable, any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-19 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances is likely to affect impartiality or independence.

#### R-20. Disqualification of Arbitrator

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and may be subject to disqualification for

(i) Partiality or lack of independence,

(ii) Inability or refusal to perform his or her duties with diligence and in good faith, and

(iii) Any grounds for disqualification provided by applicable law.

The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-15 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

#### R-21. Communication with Arbitrator and the AAA

(a) No party and no one acting on behalf of any party shall communicate ex-parte with an arbitrator except as follows. A party or anyone acting on behalf of a party may communicate ex-parte with a candidate for direct appointment pursuant to Section R-15 in order to advise the candidate of the general nature of the controversy, and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

(b) R-21(a) does not apply to arbitrators directly appointed by the parties who, pursuant to R-20(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under R-20(a), the AAA shall as an administrative practice suggest to the parties that they agree further that R-21(a) should nonetheless apply prospectively.

(c) In the course of administering an arbitration, the AAA and the parties or anyone acting on behalf of any of the parties may communicate with each other either jointly or individually.

(d) As set forth in R-41, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by

any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

#### R-22. Vacancies

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules.

(b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.

(c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

#### R-23. Preliminary Management Hearing

As promptly as practicable after the selection of the arbitrator(s), a preliminary management hearing shall be held among the parties and/or their attorneys or other authorized representatives and the arbitrator(s). Unless the parties agree otherwise or the arbitrator specifically directs otherwise, the preliminary management hearing will be conducted by telephone rather than in person.

At the Preliminary Management Hearing the matters to be discussed may include:

(a) The issues to be arbitrated, including:

- (i) review of claims as set forth in the parties' claims and counterclaims;
- (ii) the schedule for specification of any undisclosed claims or counterclaims;
- (iii) deadlines for amending claims, if the arbitrator deems appropriate;
- (iv) whether claims for attorneys' fees, costs, interest or any other similar claims exist;
- (v) if any limitations exist on the arbitrator's authority to award any of the remedies sought.

(b) The identification of any ongoing, related litigation or other dispute resolution.

(c) The procedures for maintaining an efficient and cost effective dispute resolution process, including:

- (i) the extent to which testimony may be admitted at the hearing telephonically, over the internet, by affidavit, or by any other means;
- (ii) the overall cost of the dispute resolution process as structured through this management hearing;
- (iii) exhibit management;
- (iv) a review of possible cost- and time-saving steps.

(d) The date, time, place, and estimated duration of the hearings.

(e) The scope and timing of exchange of information

- (f) The need for pre- or post- hearing submissions and schedules for the same if applicable.
- (g) The schedule for submission of witness lists.
- (h) The form of award.
- (i) Any other matters the arbitrator deems appropriate.

The arbitrator shall promptly issue written orders reflecting his or her decisions on the above matters and may conduct additional conferences when the need arises.

#### R-24. Exchange of Information

- (a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct
  - (i) the production of documents and other information, and
  - (ii) the identification of any witnesses to be called.
- (b) At least 7 calendar days prior to the hearing, or by the date established by the arbitrator, the parties shall exchange copies of all exhibits they intend to submit at the hearing.
- (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
- (d) There shall be no other discovery, except as indicated herein, unless so ordered by the arbitrator in exceptional cases.

#### R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any person other than a party and its representative.

#### R-26. Representation

Any party may participate without representation (pro-se), or by counsel or any other representative of that party's choosing, unless such choice is prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number and address, and email address if available of the representative at least 7 calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

#### R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

#### R-28. Stenographic Record

- (a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall

notify the other parties of these arrangements at least 7 calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.

(b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

(c.) If the transcript or any other recording is agreed by the parties and determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

(d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

#### R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

#### R-30. Postponements of Hearings

The arbitrator for good cause shown may postpone any hearing upon agreement of the parties, upon request of a party, or upon the arbitrator's own initiative.

#### R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

#### R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence supporting its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide that such witness submit to examination.

(c) The arbitrator may entertain motions, including motions that dispose of all or part of a claim, or that may expedite the proceedings, and may also make preliminary rulings and enter interlocutory orders.

(d) The parties may agree to waive oral hearings in any case.

#### R-33. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered. The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where: 1) any of the parties is absent, in default, or has waived the right to be present, or 2) the parties and the arbitrators agree otherwise.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena to the other parties to the arbitration simultaneously upon making the request to the arbitrator.

#### R-34. Evidence by Affidavit and Post-hearing Filing of Documents or Other Evidence

(a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, and shall give it such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

(b) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence, unless otherwise agreed by the parties and the arbitrator, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

#### R-35. Inspection or Investigation

An arbitrator finding it necessary to make a site inspection or other investigation in connection with the arbitration shall set the date and time for such inspection or investigation and shall direct the AAA to so notify the parties. Any party who so desires may be present at such an inspection or investigation. Absent agreement of the parties, the arbitrator shall not undertake a site inspection unless all parties are present. In the event of a case proceeding in the absence of a party pursuant to Section R- 31 of these Rules, agreement of the parties for the arbitrator to proceed without all parties' present is not necessary so long as sufficient notice of the inspection or investigation is provided.

#### R-36. Interim Measures

(a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.

(b) Such interim measures may be taken in the form of an interim award, and the arbitrator may require security for the costs of such measures. If it has been determined that an interim award is needed, the arbitrator shall establish a reasonable due date for issuing the interim award. In the event an arbitrator does not promptly establish such a due date, the AAA shall set the due date.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(d) The arbitrator shall have the discretion to apportion costs associated with the application for any interim relief in the interim award or in the final award.

### R-37. Closing of Hearing

- (a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.
- (b) If documents or responses are to be filed as provided in Section R-34 (b) , or if briefs are to be filed, the hearing shall be declared closed as of the final due date set by the arbitrator for the receipt of documents, responses, or briefs. If no documents, responses or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.
- (c) The time limit which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

### R-38. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Fast Track Procedures).

### R-39. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

### R-40. Extensions of Time

- (a) The parties may modify any period of time by mutual agreement, provided that any such modification that adversely affects the efficient resolution of the dispute is subject to review and approval by the arbitrator. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except as set forth in R-37 (c).
- (b) The AAA shall notify the parties of any extension.

### R-41. Serving of Notice

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith, or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.
- (b) The AAA, the arbitrator and the parties may also use overnight delivery, electronic fax transmission (fax) or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by other methods of communication.
- (c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

#### R-42. Majority Decision

When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions; however, in a multi-arbitrator case, if all parties and all arbitrators agree, the chair of the panel may make procedural decisions.

#### R-43. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

#### R-44. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.

(c) The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R-44 (b) of these Rules the arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award. After the conclusion of the Preliminary Management Hearing, the parties may not change the form of the award without the arbitrator's express consent. In such event, the arbitrator shall confirm the nature of the change to the form of award.

#### R-45. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.

(b) In addition to the final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.

(c) In the final award, the arbitrator shall assess fees, expenses, and compensation as provided in Sections R-52, R-53, and R-54. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

(d) The award of the arbitrator may include:

(i) interest at such rate and from such date as the arbitrator may deem appropriate; and

(ii) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement

#### R-46. Award Upon Settlement

(a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of

arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.

(b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation amounts have been paid in full.

#### R-47. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known address, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

#### R-48. Modification of Award

(a) Within 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award. The arbitrator is not empowered to re-determine the merits of any claim already decided.

(b) If the modification request is made by a party, the other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

(c) If applicable law provides a different procedural time frame, that procedure shall be followed.

#### R-49. Release of Documents

The AAA shall, upon the written request of a party to the arbitration, furnish to that party, at its expense, copies or certified copies of papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

#### R-50. Withdrawal of Claims or Counterclaims

(a) Once the AAA has provided notice to the parties that the filing requirements for a claim or counterclaim have been met, no claim or counterclaim may be withdrawn unless the parties agree or the arbitrator consents.

(b) Disputes regarding whether a claim or counterclaim is withdrawn with or without prejudice may be decided by the arbitrator.

#### R-51. Applications to Court and Exclusion of Liability

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

(d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages, injunctive or declaratory relief for any act or omission in connection with any arbitration under these rules.

(e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA or AAA employees as a

witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

#### R-52. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees and service charges to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable.

The filing fee shall be advanced by the party or parties, subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

#### R-53. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

#### R-54. Neutral Arbitrator's Compensation

(a) Arbitrators shall be compensated at rate consistent with the arbitrator's stated rate of compensation.

(b) Absent an agreement of the parties otherwise, or as determined by an arbitrator appointed under the auspices of Section R-7, each party shall share equally in the compensation of the arbitrator, subject to reapportionment in the final award. In the event that multiple parties are participating in the arbitration through a single representative, the AAA may consider them a single party for the purposes of allocating arbitrator compensation.

(c) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the Association and confirmed to the parties.

(d) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

(e) The arbitrator's requests for payment shall be made available to the parties upon request.

#### R-55. Deposits

(a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

(b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided from the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity or length of each case.

(c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation of the arbitrator's request for deposits.

#### R-56. Remedies for Nonpayment

(a) If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

(b) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator issue an order directing what measures might be taken in light of a party's non-payment.

Such measures may include limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim. The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any such determination. In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments, to submit such evidence as the arbitrator may require for the making of an award.

(c) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.

(d) If arbitrator's compensation or administrative fees remain unpaid after a determination to suspend an arbitration due to non payment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator.

#### Procedures for the Resolution of Disputes through Document Submission

##### D-1. Applicability

(a) In any case, regardless of claim size, the parties may agree to waive in-person hearings and resolve the dispute through submission of documents to one arbitrator. Such agreement should be confirmed in writing no later than the deadline for the filing of an answer.

(b) If one party makes a request to use the Procedures for the Resolution of Disputes through Document Submission

(D-Procedures) and the opposing party is unresponsive, the arbitrator shall have the power to determine whether to proceed under the D-Procedures. If both parties seek to use the D-Procedures after the appointment of an arbitrator, the arbitrator must also consent to the process.

(c) When parties agree to the D-Procedures, the procedures in Sections D-1 through D-4 of these Rules shall supplement other portions of these rules which are not in conflict with the D-Procedures.

##### D-2. Preliminary Management Hearing

Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator shall convene a preliminary management hearing, via conference call, video conference or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

##### D-3. Removal From the D Procedures

(a) The arbitrator has the discretion to remove the case from the D-Procedures if the arbitrator determines that an in-person hearing is necessary.

(b) If the parties agree to in-person hearings after a previous agreement to proceed under the D-Procedures, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearing after agreeing to the D-

Procedures, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

#### D-4. Time of Award

(a) The arbitrator shall establish the date for either final written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

(b) Unless the parties have agreed to a form of award other than that set forth in Rule R-44 (b), when the parties have agreed to resolve their dispute by the D-Procedures, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.

(c) If the parties agree to a form of award other than that described in Rule R-44 (b), the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.

(d) The award is subject to all other provisions of the Regular Track of these Rules which pertain to awards.

### FAST TRACK PROCEDURES

#### F-1. Fast Track Applicability

The Fast Track Procedures shall apply to all two party cases where no party's disclosed claim or counterclaim exceeds \$75,000.

If a claim or counterclaim is amended to exceed \$75,000, the case will be administered under the Regular Track Procedures (or Large Complex Case Procedures, if applicable) unless all parties agree that the case may continue to be processed under the Fast Track Procedures.

The AAA, in its discretion, may reassign a matter to the Regular Track Procedures or, if applicable, Large Complex Case Procedures, upon the occurrence of any of the following events:

- (a) The case is to be decided by more than one arbitrator;
- (b) The parties agree to any information exchange beyond that permitted by Section F-8;
- (c) The timing of the case exceeds the Time Standards set forth in Section F-12; or
- (d) Hearing time exceeds what is allowable under Section F-11.

Where no party's claim exceeds \$10,000, exclusive of interest, attorneys' fees and arbitration costs, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing or conference call is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents, as set forth in the D-Procedures of these Rules.

#### F-2. Answers and Counterclaims

If an answer or counterclaim is to be filed, it shall be filed within 7 calendar days after notice of the filing of the demand is sent by the AAA. All other requirements of Section R-4 apply.

#### F-3. Limitation on Extensions

(a) In the absence of extraordinary circumstances, the AAA may grant no more than one 7 calendar day extension

of the time in which to respond to a demand for arbitration or a counterclaim as provided in F-2.

(b) All other requests for extensions of time are subject to Sections F-12 and R-40 of these Rules, as applicable.

#### F-4. Changes of Claim or Counterclaim

(a) A party may increase or decrease the amount of its claim or counterclaim up to 7 calendar days prior to the first scheduled hearing, subject to the provisions of F-1. Such changes must be made in writing and provided to the AAA and the opposing party.

(b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 7 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without with the arbitrator's consent.

#### F-5. Appointment and Qualification of Arbitrator

(a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall simultaneously submit to each party an identical list of 5 names from the Construction Panel from which one arbitrator shall be appointed.

(b) The parties are encouraged to agree to an arbitrator from this list, and to advise the Association of their agreement.

(c) If the parties cannot agree upon an arbitrator, each party may strike up to two names from the list and rank the remaining names in order of preference. The list shall be returned to the AAA within 7 calendar days of the AAA's transmission of the list. If a party does not return the list by the due date, all names shall be deemed acceptable to that party.

(d) The AAA will appoint the agreed-upon arbitrator, or in the event the parties cannot agree on an arbitrator, will designate the arbitrator from among those names not stricken. The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in R-20.

(e) Within the time period established by the AAA, the parties shall notify the AAA of any objection to the arbitrator appointed. Any objection by a party to the arbitrator shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

(f) Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.

(g) In the event the AAA is unable to appoint an arbitrator from the first list submitted, the AAA is empowered to appoint an arbitrator without the submission of additional lists.

#### F-6. Serving of Notice for Hearing

In addition to notice being provided according to the means specified in R-41, parties shall accept notice of hearings, including preliminary hearings, by telephone, email, AAA WebFile, fax or mail.

#### F-7. Preliminary Telephone Management Hearing

(a) A preliminary telephone conference shall be held among the parties or their representatives, and the arbitrator within 10 business days from the confirmation of the arbitrator's appointment.

(b) During this conference, the arbitrator shall direct the parties' preparations and presentations so that Fast Track

F-12 Time Standard can be met. Arrangements made during the Preliminary Management Hearing shall be confirmed in writing to the parties.

#### F-8. Exchange of Information

At least 5 business days prior to the hearing or no later than the date established by the arbitrator, the parties shall (a) exchange directly between themselves copies of all exhibits, affidavits and any other information they intend to submit at the hearing, and (b) identify all witnesses they intend to call at the hearing. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

#### F-9. Discovery

There shall be no discovery, except as provided in F-8 or as ordered by the arbitrator in exceptional cases.

#### F-10. Date, Time and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing. The hearing shall be set so that the time standards in F-12 will be satisfied. The AAA will notify the parties in advance of the hearing date.

#### F-11. The Hearing

The hearing should not exceed one day. For good cause shown, the arbitrator may schedule additional time, which shall not exceed the equivalent of one day. The arbitrator shall schedule any additional time so as to comply with the F-12 Time Standards. At the discretion of the arbitrator, this additional time can take the form of an in-person meeting, a conference call, or some other means of taking testimony, provided that each party has the right to be heard and is given a fair opportunity to present its case.

#### F-12. Time Standards

The hearing shall be closed no later than 45 calendar days after of the date of the preliminary telephone conference, unless all parties and the arbitrator agree otherwise and such agreement is memorialized by the arbitrator prior to the expiration of the initial 45 day period. Such report shall include the reason for the extension of the Time Standards. The AAA may extend the Time Standards in the event the parties agree to AAA mediation.

#### F-13. Time of Award

The award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

#### F-14. Neutral Arbitrator's Compensation

Arbitrators serving on Fast Track cases will receive compensation at rates established by the AAA.

### PROCEDURES FOR LARGE, COMPLEX CONSTRUCTION DISPUTES

#### L-1. Applicability

Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes (hereinafter LCC) shall apply to all cases administered by the AAA under the Construction Industry Arbitration Rules in which the disclosed claim or counterclaim of any party is \$1,000,000 or more, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may agree to use these Procedures in cases involving claims or counterclaims under 1,000,000 or in cases involving non-monetary claims. The LCC Procedures are designed to complement the Regular Track of these Rules. To the extent there is any conflict between the Regular Track and

the LCC procedures, the LCC Procedures shall control.

#### L-2. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference call will take place within 14 calendar days after the notice that the administrative filing requirements have been satisfied. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrator as well as an efficient method for selecting the arbitrator;
- (c) to obtain conflicts statements from the parties;
- (d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate;
- (e) to identify whether there are other related arbitrations or parties which may be requested to consolidate or join the arbitration;
- (f) to discuss means and methods for cost effective case management; and
- (g) to discuss any other items which may facilitate the management of a complex arbitration.

#### L-3. Arbitrators

- (a) Large, Complex Construction Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree, three arbitrators shall hear the case.
- (b) The parties are encouraged to agree upon a method for selection of the arbitrator(s). The AAA shall appoint arbitrator(s) by the method agreed upon by the parties.
- (c) If the parties are unable to agree on a method of appointment, the AAA shall appoint arbitrator from the Large, Complex Construction Case Panel, in the manner provided in the Regular Construction Industry Arbitration Rules. The AAA shall determine the number of names on the list(s).
- (d) Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.

#### L-4. Preliminary Management Hearing

As promptly as practicable after the confirmation of the appointment of the arbitrator, a preliminary management hearing shall be held among the parties and/or their attorneys or other representatives and the arbitrator. Unless the parties agree otherwise, or unless the arbitrator determines that an in-person hearing is necessary, the preliminary hearing will be conducted by telephone conference call rather than in person.

In addition to the items enumerated in R-23, at the preliminary management hearing for LCC cases, the matters to be considered shall include, without limitation:

- (a) service of a detailed statement of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities the parties may wish to bring to the attention of the arbitrator;
- (b) stipulations to uncontested facts;
- (c) the extent to which discovery shall be conducted;
- (d) exchange and pre-marking of those documents which each party believes may be offered at the hearing;
- (e) the identification and availability of witnesses, including experts, and such matters with respect to witnesses including their biographies and expected testimony as may be appropriate;
- (f) whether, and the extent to which, any sworn statements and/or depositions may be introduced;
- (g) the extent to which hearings will proceed on consecutive days;
- (h) whether a stenographic or other official record of the proceedings shall be maintained;
- (i) the possibility of utilizing mediation or other non-adjudicative methods of dispute resolution; and
- (j) the procedure for the issuance of subpoenas; and
- (k) such other items which may facilitate the efficient and cost effective management of the arbitration.

The arbitrator may issue an agenda in advance of the preliminary management hearing outlining the scope of the hearing in effort to efficiently manage the process and eliminate superfluous issues.

By agreement of the parties and/or order of the arbitrator, the pre-hearing activities and the hearing procedures that will govern the arbitration will be memorialized in a Scheduling and Procedure Order.

#### L-5. Management of Proceedings

- (a) The arbitrator shall take such steps as the arbitrator may deem necessary or desirable to avoid delay and to achieve a just, efficient and cost-effective resolution of Large, Complex Construction Cases.
- (b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator considers such production to be consistent with the goal of achieving a just, efficient and cost effective resolution of a Large, Complex Construction Case.
- (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate. If the parties cannot agree on production of document and other information, the arbitrator, consistent with the expedited nature of arbitration, may establish the extent of the discovery.
- (d) At the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions of, or the propounding of interrogatories to such persons who may possess information determined by the arbitrator to be necessary to a determination of the matter.
- (e) The parties shall exchange copies of all exhibits they intend to submit at the hearing 10 calendar days prior to the hearing unless the arbitrator determines otherwise.
- (f) The exchange of information pursuant to this Rule, as agreed by the parties and/or directed by the arbitrator, shall be included within the Scheduling and Procedure Order.

(g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(h) Generally hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

#### L-6. Form of Award

In addition to the award requirements set forth in R-44 (a) and (b) unless the parties agree otherwise, the arbitrator shall issue a reasoned award.

#### Administrative Fee Schedules (Standard and Flexible Fee)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

**Fees for incomplete or deficient filings:** Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

**Fees for additional services:** The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties' agreement or stipulation.

#### Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Final Fee
Above \$0 to \$10,000	\$775	\$200
Above \$10,000 to \$75,000	\$975	\$300
Above \$75,000 to \$150,000	\$1,850	\$750
Above \$150,000 to \$300,000	\$2,800	\$1,250

Above \$300,000 to \$500,000	\$4,350	\$1,750
Above \$500,000 to \$1,000,000	\$6,200	\$2,500
Above \$1,000,000 to \$5,000,000	\$8,200	\$3,250
Above \$5,000,000 to \$10,000,000	\$10,200	\$4,000
Above \$10,000,000	Base fee of \$12,800 plus .01% of the amount above \$10,000,000  Fee Capped at \$65,000	\$6,000
Nonmonetary Claims <sup>1</sup>	\$3,350	\$1,250
Consent Award <sup>2</sup>		
Deficient Claim Filing Fee <sup>3</sup>	\$350	
Additional Services <sup>4</sup>		

<sup>1</sup> This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$10,200.

<sup>2</sup> The AAA may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

<sup>3</sup> The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.

<sup>4</sup> The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$2,800 for the Initial Filing Fee, plus a \$1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to \$75,000, a minimum filing fee of \$350 will not be refunded. For all other cases, a minimum fee of \$600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- > 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- > 50% of the filing fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.
- > 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

#### Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties.

*No refunds or refund schedule will apply to the Filing or Proceed Fees once received.*

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Above \$0 to \$10,000	\$400	\$475	\$200
Above \$10,000 to \$75,000	\$625	\$500	\$300
Above \$75,000 to \$150,000	\$850	\$1250	\$750
Above \$150,000 to \$300,000	\$1,000	\$2125	\$1,250

Above \$300,000 to \$500,000	\$1,500	\$3,400	\$1,750
Above \$500,000 to \$1,000,000	\$2,500	\$4,500	\$2,500
Above \$1,000,000 to \$5,000,000	\$2,500	\$6,700	\$3,250
Above \$5,000,000 to \$10,000,000	\$3,500	\$8,200	\$4,000
Above \$10,000,000	\$4,500	\$10,300 plus .01% of claim amount over \$10,000,000 up to \$65,000	\$6,000
Nonmonetary <sup>1</sup>	\$2,000	\$2,000	\$1,250
Consent Award <sup>2</sup>			
Deficient Claim Filing Fee	\$350		
Additional Services <sup>3</sup>			

<sup>1</sup> This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$3,500 and a proceed fee of \$8,200.

<sup>2</sup> The AAA may assist the parties with the appointment of an arbitrator for the sole purpose of having their Consent Award signed.

<sup>3</sup> The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$1,000 for the Initial Filing Fee; \$2,125 for the Proceed Fee; and \$1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the demand for arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

#### Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF DORCHESTER ) IN THE FIRST JUDICIAL CIRCUIT

JENNIFER SHORT AND DAVID STOVER, ) C.A. No.: 2009-CP-18-1602  
 )  
 )

Plaintiffs, )  
 )

vs. )  
 )

LENNAR CAROLINAS, INC., DON GALLOWAY )  
 HOMES, LLC, AND LENNAR COMMUNITIES )  
 OF THE CAROLINAS, INC., )  
 )

Defendants. )  
 )  
 )  
 )  
 )  
 )  
 )

**AFFIDAVIT OF  
 DAVID MURPHY**

*David Murphy*  
 CLERK OF COURT  
 DORCHESTER COUNTY

CERTIFIED COPY  
 2010 OCT -5 PM 4:35

Comes now the undersigned, and after having been duly sworn, does depose and state as follows:

1. My name is David Murphy. I am over nineteen (19) years of age, and I have personal knowledge of the matters contained in my affidavit. I make this affidavit in support of Defendants' Motion to Stay the Action and Compel Arbitration.

2. The facts stated in this affidavit are from my personal knowledge and from information contained in the records of Lennar Carolinas, LLC ("Lennar") and its predecessors.<sup>1</sup> If called as a witness, I would and could testify competently thereto.

3. I am currently the Financial Controller for Lennar. My primary responsibilities include overseeing the accounting operations of Lennar. Furthermore, I am familiar with the allegations raised in the Complaint.

4. The transaction that forms the basis of the Complaint is the purchase of residential property located at 201 Temuco Lane in the Plum Creek subdivision in Summerville, South Carolina. The Purchase Agreement evidencing this transaction was executed on March 27, 2003.

<sup>1</sup> In May 2004, Lennar Communities of Carolinas, Inc. ("Lennar Communities") purchased all of the assets of Don Galloway Homes, LLC ("Don Galloway"). Lennar Communities is now doing business as Lennar Carolinas, LLC, which possesses all of the business records of Don Galloway that were maintained in the normal course of business.

5. Plaintiffs thoroughly negotiated the terms of the Purchase Agreement. As the addendum to the Purchase Agreement demonstrates, Plaintiffs requested and received a provision requiring Don Galloway to pay all non-recurring closing costs and the loan origination fee. *See* South Carolina Purchase Agreement, attached to the Motion as Exhibit A. Additionally, Plaintiffs requested certain upgrades, as specified by the handwriting on the floor plans in the Purchase Agreement. *See* Exhibit A.

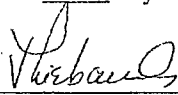
6. The purchase, sale and construction of the subject residence involved significant out-of-state activities and could not have taken place absent the infusion of out-of-state materials and supplies. In constructing the subject residence, Don Galloway used materials manufactured out-of-state and transported into the state:

- The residence was sold with Moire Black shingles, which were manufactured by CertainTeed, based in Valley Forge, Pennsylvania.
- The residence was sold with windows, which were manufactured by Kinco Windows, based in Jacksonville, Florida.
- The residence was sold with insulation, which was manufactured by 31-W Insulation, based in Nashville, Tennessee.
- The residence was sold with appliances, which were manufactured by GE Appliances, based in Fairfield, Connecticut.

FURTHER AFFIANT SAITH NOT.

  
\_\_\_\_\_  
David Murphy

Sworn to and subscribed before me:  
This 5<sup>th</sup> day of October 2010


  
\_\_\_\_\_  
Notary Public for South Carolina  
My commission expires: 1/26/2019



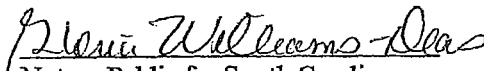
5. We closed on our property at 201 Temuco Lane on 5/9/2003. The closing took place in Mt. Pleasant at Lisa Wolff Herbert's office. I was told if we used one of Lennar's listed attorney's we got a reduced rate at closing.
6. We did not bring our own attorney to the closing. At no time did anyone, including Lisa Wolff Herbert use the term Arbitration. The first time I even heard about arbitration was when I hired McDowell Law Offices.
7. David and I did not have our own realtor. We found and went through the process of purchasing our home from Lennar ourselves.
8. This was our first home purchase together as a family which made it so important. I can't stress enough how important this home purchase meant to David, myself and our children. I had purchased a home prior this 201 Temuco but this was David's first home purchase ever. David grew up living in a trailer most of his life so this was a huge deal for him. This was meant to be a home not only for our family now but for our children's future. This home was supposed to be a solid foundation for our children's lives. This homes importance is too important to be measurable. This was a MAJOR purchase to say the least. Something that was supposed to be new with no problems turned out to be our biggest headache and problem.
9. David never filled out any paperwork in Lennar's office with Mandy, who was the sales representative for Don Galloway/Lennar. We met Mandy when we first looked at the house and showed some interest in the neighborhood. Mandy showed us the model homes and the house that we are living in. We really liked the floor plan. Dave and I came back numerous times to look at the home to make sure we both agreed on it. The times we spoke with Mandy weren't very long or about our house but about the

neighborhood and it's amenities. She also tried to push Lennars lenders saying they will offer the best rates and they will pay all of the closing if you used them. I met with Mandy and put a deposit on the house so they couldn't sell it to anyone else until we could try to get financed. That's when I filled out the papers saying we were purchasing upon approved credit. Mandy never said anything about arbitration in any of our conversations or paperwork when I was filling them out. She told me to fill out my name and information and that's all she needed. David did attend the closing and sign documents at Lisa Herbert's office.

Further Affiant Sayeth Naught!

  
Jennifer Short, Affiant.

Subscribed to and sworn before me  
this 26 day of October, 2010

  
Notary Public for South Carolina  
My Commission Expires: 12-10-2011

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

David and Bridgette Manning, )  
Individually and as Guardians )  
of Tate M. Manning and Colby )  
D. Manning, )  
PLAINTIFFS )

CASE NO. 2009-CP-18-1601

VS. )

Lennar Carolinas, Inc., Don )  
Galloway Homes, LLC, and )  
Lennar Communities of the )  
Carolinas, Inc., )  
DEFENDANTS )

TRANSCRIPT OF RECORD

MOTIONS TO COMPEL  
ARBITRATION

Jennifer Short and David )  
Stover, )  
PLAINTIFFS )

CASE NO. 2009-CP-18-1602

VS. )

Lennar Carolinas, Inc., Don )  
Galloway Homes, LLC, and )  
Lennar Communities of the )  
Carolinas, Inc., )  
DEFENDANTS )

DATE:

NOVEMBER 2, 2010

BEFORE:

HONORABLE EDGAR DICKSON, PRESIDING JUDGE

APPEARANCES:

JOHN ROBINSON, ESQUIRE

ATTORNEYS FOR THE PLAINTIFFS

JENNA J. MCGEE, ESQUIRE

FOR THE DEFENDANTS

HARRY A. WALKER (MRS.)  
COURT REPORTER, FIRST JUDICIAL CIRCUIT  
POST OFFICE BOX 127  
ROWESVILLE, SOUTH CAROLINA 29133

I N D E X

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E X H I B I T S

NONE

1 DATE:

2 NOVEMBER 2, 2010

3 THE COURT: Ms. Harry Dot, I've got two cases. One is  
4 David and Bridgette Manning, individually and as legal  
5 guardians of Tate N. Manning and Colby D. Manning, Plaintiffs,  
6 versus Lennar Carolinas, Inc., Don Galloway Homes, LLC, and  
7 Lennar Communities of the Carolinas, Inc. And that is Case  
8 Number 2009-CP-18-1601. And then the next case we have is --  
9 we're dealing with both of these cases today?

10 MS. MCGEE: That's right.

11 MR. ROBINSON: That's correct, Your Honor.

12 THE COURT: It's Jennifer Short and David Stover,  
13 Plaintiffs, versus Lennar Carolinas, Inc., Don Galloway Homes,  
14 LLC, and Lennar Communities of the Carolinas, Inc., and that  
15 docket number is 2009-CP-18-1602. And we're here on  
16 Defendants' Motion to Compel, is that correct?

17 MS. MCGEE: Yes, Your Honor.

18 THE COURT: Okay. And who's representing the defendants?

19 MR. ROBINSON: Your Honor, to clarify this -- go ahead,  
20 Jenna, I'm sorry.

21 THE COURT: Okay.

22 MS. MCGEE: Jenna McGee on behalf of the defendants.

23 COURT REPORTER: Jen McGee?

24 MS. MCGEE: Jenna.

25 THE COURT: And you're on behalf of which defendants?

1 MS. MCGEE: All defendants.

2 THE COURT: All defendants. Very good.

3 MR. ROBINSON: And make this easy.

4 THE COURT: And your name?

5 MR. ROBINSON: Your Honor, I'm John Robinson, of McDowell  
6 and Robinson - - -

7 THE COURT: Yes, sir.

8 MR. ROBINSON: For the collective plaintiffs.

9 THE COURT: For all the plaintiffs?

10 MR. ROBINSON: Yes, sir.

11 THE COURT: Alright. And Ms. McGee, this is your motion?

12 MS. MCGEE: It is, Your Honor.

13 THE COURT: Okay. Tell me what you need.

14 ARGUMENT BY MS. MCGEE:

15 MS. MCGEE: Thank you for accommodating us today. We've  
16 had some difficulty scheduling these because the conflict that  
17 Judge Goodstein has with these matters. And we're here today  
18 to enforce mandatory and binding arbitration agreements  
19 between plaintiffs and Lennar, and these construction defect  
20 cases relating to residences that the plaintiffs purchased  
21 from Lennar. And Your Honor, if you will take a look at the  
22 contract, attached is Exhibit A to our Memorandum, it is  
23 evidenced from the face of the home construction contract that  
24 Lennar and these plaintiffs agreed to mandatory arbitration.  
25 In fact, if you look in the header at the top of the first

1 page of the contract it's in bold, underlined, capitalized and  
2 italicize font, and it states: "This agreement is subject to  
3 arbitration", the mandatory arbitration language and also  
4 repeated in Paragraph Seven, which is again on the first page  
5 of the contract. It's very prominent conspicuous, again it's  
6 in bold, underlined and capitalized font, and it states, and I  
7 quote, "All disputes relating to the construction of the  
8 subject residence or of any other kind shall be settled by  
9 arbitration in accordance with the construction industry rules  
10 of the American Arbitration Association." So, not only did  
11 the plaintiffs agree to arbitration, they agreed to arbitrate  
12 these foreseeable and standard claims. The claims include  
13 breach of warranty, negligence, unfair trade practices, but  
14 ultimately the legal label that's assigned is irrelevant.  
15 What is relevant are the allegations that they have alleged in  
16 their complaints. They've alleged building code violations,  
17 water intrusion and issues of the flashing, the siding, the  
18 roofing. There's also allegations of mold damage, building  
19 envelope failures. These are clearly construction defects  
20 that they're alleging, and there's no doubt that these alleged  
21 construction defects are within the scope of these arbitration  
22 agreements. In fact, plaintiffs make no argument that if  
23 these clauses, if they're in fact binding, that they would not  
24 cover the claims that have been asserted in these two cases.  
25 But even if there were doubt, even if such arguments had been

1 raised, the case law is clear that the Court must stay with  
2 positive assurance that these claims are not subject to  
3 arbitration in order to deny our Motion to Compel. So, since  
4 the parties agreed to arbitrate claims, federal law requires  
5 that their private agreements be enforced according to their  
6 terms. And as this Court is well aware, but it bears  
7 repeating, there is a strong presumption in favor of  
8 arbitration, and that's because of the state and federal  
9 policy that favors arbitration. For that reason the Federal  
10 Arbitration Act applies in state and federal courts so long as  
11 one condition is met, and that condition is that the contract  
12 involves interstate commerce. And there's been no dispute in  
13 that regard here. The parties stipulated to the fact that the  
14 contract involves interstate commerce. There's also, it's  
15 essentially given for the courts that contracts of this nature  
16 that involve construction, residential construction, involve  
17 interstate commerce. And also in the record we've submitted  
18 affidavits of various individuals, employees of Lennar, who  
19 have averred that these homes contained the infusions of out  
20 of state materials that were transported into the state and  
21 used in the construction of the homes. And the case law has  
22 found that that is sufficient to establish the nexus to  
23 interstate commerce such that the Federal Arbitration Act  
24 applied. So, as a result federal law compels arbitration  
25 here. But nevertheless, as is evidence by the fact that we're

1 here, the plaintiffs have filed these actions in state court.

2 I'm anticipating that the plaintiffs will argue that  
3 these arbitration agreements are unconscionable. Your Honor,  
4 these arbitration agreements are not unconscionable. If these  
5 arbitration agreements are unconscionable it is unclear what  
6 arbitration agreement is enforceable. I have researched and I  
7 have located one reported case in South Carolina that upheld  
8 the refusal to enforce an arbitration agreement on the grounds  
9 of unconscionability, and that case - - -

10 THE COURT: That was the car case.

11 MS. MCGEE: Pardon me?

12 THE COURT: That was the case involving the sale of a  
13 car?

14 MS. MCGEE: Yes.

15 THE COURT: Okay.

16 MS. MCGEE: And that case is Simpson versus MSA of Myrtle  
17 Beach, it sounds like the Court is familiar with it.

18 THE COURT: Yes, ma'am.

19 MS. MCGEE: And the arbitration agreement in that case is  
20 markedly different from the arbitration agreements that are it  
21 issue here. And I won't belabor this point, but just to  
22 illuminate the differences I'd like to briefly go through and  
23 compare - - -

24 THE COURT: Yes, ma'am.

25 MS. MCGEE: The facts of these two cases. In Simpson the

1 Court noted that the font in the arbitration agreement was  
2 small and it was inconspicuous. By comparison, and as we  
3 discussed, we're talking about bold, underlined and  
4 capitalized font.

5 THE COURT: And why don't they put that in color?

6 MS. MCGEE: They should have, Your Honor.

7 THE COURT: They should have, I'm just, I'm sorry, I'm -

8 - -

9 MS. MCGEE: That was probably the only thing that would  
10 have made it jump off the page anymore.

11 THE COURT: I'm sorry, Ms. McGee, I shouldn't have asked  
12 that question. Excuse me. Go ahead, go ahead.

13 MS. MCGEE: One other point in that arbitration agreement  
14 is this, it was not labeled an arbitration agreement. As  
15 we've already discussed, it was clearly labeled in the Manning  
16 and Stover contracts that these were subject to arbitration.  
17 And then, the arbitration provisions were buried in the text  
18 of the agreement. Here we're talking about arbitration  
19 provisions that are stated prominently on the first page, in  
20 the header and then again in the text. In Simpson the Court  
21 took particular issue with the requirement that the consumers  
22 would be forced to waived any rights to punitive, double or  
23 treble damages by submitting their claims to arbitration.  
24 Here there is no limitation on damages whatsoever. And also  
25 in Simpson, and this is my final point on that case, that the

1 party filing for arbitration was required to pay the fees in  
2 their entirety. And here you're talking about a shared cost  
3 arrangement. So, it's clear that the terms in the arbitration  
4 agreement in Simpson stand in sharp contrast with the terms of  
5 the arbitration agreement in the Manning and Stover cases.

6 In fact, instead of being analogous to the Simpson case,  
7 this case is far closer to BMW versus Heron, which is the most  
8 recent case from the Supreme Court on this issue. It was  
9 decided just this year, 382 South Carolina 525. And again,  
10 I'd just like to highlight the similarities between these two  
11 cases and just note how striking the similarities are. And  
12 BMW had a take it or leave it contract between a consumer and  
13 a used car salesman. And in this case Lennar admits that this  
14 is a forum contract that we supplied to the plaintiffs. This  
15 is a contract that was for the sale of a residential home and  
16 it's a contract that we often use, or that Lennar oftentimes  
17 uses in selling its homes. However, the Court in BMW found  
18 that the arbitration agreement was not unconscionable and  
19 therefore it was enforceable. And the same should be applied  
20 here. The fact that Lennar drafter the agreement, the fact  
21 that Lennar supplied the agreement should not render it  
22 unconscionable. In BMW you had a sophisticated business  
23 entity that was trying to enforce the arbitration agreement.  
24 Likewise, here you have a large residential home builder  
25 that's trying to enforce arbitration agreement. In BMW the

1 Court found that the fact that one party is larger cannot be  
2 the basis for invalidating an arbitration agreement. In BMW  
3 the Court noted specifically that the arbitration agreement  
4 and the contract itself was clearly labeled in bold,  
5 capitalized and underlying font. You have the same situation  
6 here except in addition there's italicized font. So, except  
7 for the fact that it's not in color, they couldn't have done  
8 anymore to illuminate and have it jump off the page. In BMW  
9 the important terms appear very prominently in the body of the  
10 contract. Again, it's the same bold and underlining,  
11 capitalized font here. In BMW you have a year toward an  
12 unbiased arbitrator. In Manning and Short the parties are  
13 free to select their own arbitrator from Triple A. The filing  
14 fees in BMW were shared, they're shared here so clearly, costs  
15 are not going to hinder the ability to pursue arbitration.  
16 And finally, in BMW there was no prohibition against punitive,  
17 double or treble damages. You have no such limitation  
18 presented here.

19 Your Honor, in fact, the arbitration agreements there  
20 before you today are even more enforceable than the  
21 arbitration agreements that were upheld in BMW versus Heron,  
22 and that's because there are certain provisions that say to  
23 the plaintiffs, and one of those provisions is that they  
24 weren't forced to arbitrate in Miami, and Miami, Florida, is  
25 where Lennar's headquartered, nor is there any sort of

1 requirement that they arbitrate in any other location that's  
2 potentially inconvenient to these plaintiffs.

3 Your Honor, just to put this all into perspective for  
4 just a moment, it's well established that parties are free to  
5 contract. They're free to agree to arbitration. And the loss  
6 of the right to a jury trial is something that, of course, is  
7 an obvious result of arbitration. Nevertheless, plaintiffs  
8 are claiming that despite that conspicuous language, despite  
9 how it was emphasized, they were unaware that these contracts  
10 contained arbitration provisions. Well, as Your Honor is well  
11 aware, parties are presumed to have read and digested the  
12 contents of contracts, and that is then reiterated time and  
13 time again by the courts, but just to name one case  
14 specifically, Munaz versus Greentree from Two thousand One.  
15 So therefore, if these parties, if these plaintiffs failed to  
16 read the arbitration agreement that cannot invalidate their  
17 enforce ability. And in Greentree the Supreme Court stated,  
18 and I quote, "An arbitration agreement will not be set aside  
19 on the ground that the arbitration agreement was not noticed  
20 or explained, since a party signing an agreement is presumed  
21 to have read it." And moreover, in Towls versus United Health  
22 Care, the Court of Appeals in Nineteen Nine stated, and I'll  
23 quote again, "The law does not impose a duty to explain the  
24 document contents to an individual when the individual can  
25 learn the contents simply by reading the document."

1 Finally, Your Honor, there's been some discussion in the  
2 record about whether these parties were represented by  
3 counsel. Well, the fact is that they were both represented by  
4 counsel. In her Affidavit, which has been supplied by the  
5 plaintiffs' attorney, Ms. Short, one of the plaintiffs, states  
6 that she used one of Lennar's listed closing attorneys, a  
7 woman by the name of Lisa Wolf Herbert. And any real estate  
8 attorney knows that dual representation is common and typical  
9 in a real estate contest. So, this closing attorney  
10 represented both the parties and owed fiduciary obligations to  
11 both of them. But even if they had absolutely no counsel, no  
12 one there, no real estate agent, no one to instruct them and  
13 interpret the terms of the contract for them, the case law is  
14 clear, the Court of Appeals has stated, "The decision to  
15 forego counsel does not invalidate an arbitration agreement.  
16 In Lackey versus Greentree, from Nineteen Ninety-eight, the  
17 Court said it would enforce an arbitration agreement on the  
18 basis that mobile home purchasers could have consulted an  
19 attorney prior to signing their contract. And therefore, the  
20 arbitration agreement embedded therein was enforceable.

21 So, Your Honor, these arbitration agreements are clearly  
22 far from unconscionable. There are thousands and thousands of  
23 cases with similar types of arbitration provisions, they are  
24 arbitrated every day. In fact, we're arbitration three  
25 different matters, pardon me, five different matters on behalf

1 of Lennar right now. The law is very clear on this issue, and  
2 there's been a great deal of mis-spent resources here trying  
3 to avoid these arbitration agreements. And in fact, we had  
4 this occur on two other occasions, homeowners involving these  
5 same sets of defendants have challenged these arbitration  
6 agreements on the same grounds, and those challenges were  
7 unsuccessful. Judge Dennis and Judge Harrington upheld and  
8 enforced the provision, and we've included copies of their  
9 Orders as Exhibit B and C to our Memorandum. Your Honor, it's  
10 not just Judge Harrington and Judge Dennis, courts enforce  
11 these sorts of arbitration agreements between consumers and  
12 businesses all the time.

13 Your Honor, I'll attempt to conclude quickly, but just  
14 one final point because I anticipate that the plaintiffs may  
15 raise this argument. I'm anticipating that they may claim  
16 that one of the plaintiffs, Mr. Stover, should not be required  
17 to arbitrate even if the rest of the plaintiffs are because he  
18 didn't sign the contract in his individual capacity. Well,  
19 first of all, the Court need not address that issue. Once the  
20 Court determines that an enforceable arbitration agreement  
21 exists, the inquiry ends. But even if the Court were to  
22 entertain this argument the result would be the same. And the  
23 result would be the same because non-signatories may not only  
24 enforce contracts that contain arbitration agreements, they  
25 may be bound by them. There are a great number of cases, one

1 South Carolina case is South Carolina Public Service versus  
2 Ray Cole from Nineteen Ninety-three. Three's also Fourth  
3 Circuit case law on this point that I've cited in my Brief.  
4 There are various grounds on which a non-signatory can be  
5 bound. First, a non-signatory can be bound when the issues  
6 are so intertwined with the contract. Here the issues could  
7 not be more intertwined. You have the exact same facts, the  
8 exact same claims, the exact same house, and the same  
9 contract. Your Honor, the issues are clearly intertwined such  
10 as this non-signatory should be a party to arbitration. Also,  
11 arbitration can't be avoided because Mr. Stover impliedly  
12 authorized his partner, or presumably his wife, to sign the  
13 contract. The contract was signed and it was on that basis  
14 that Lennar agreed to build and sell the home. They would not  
15 have sold the home but for the signature on the contract. And  
16 there can clearly be no dual proceedings here. We're talking  
17 about the same house, the same alleged injury. Moreover, Mr.  
18 Stover attended a closing, he signed certain documents, at  
19 least according to Ms. Short's affidavit, so it's hard to  
20 argue that even though he was at the closing, even though he  
21 had initially gone and toured the neighborhood, he didn't  
22 realize that he was purchasing a home. And my final point on  
23 the signature issue, Your Honor, is that plaintiffs are  
24 asserting claims that derive from the contracts, and based  
25 upon that they're deriving benefit from the contracts. And

1 yet, they're seeking to avoid an arbitration agreement that's  
2 contained therein. It's undisputed that Mr. Stover has  
3 received a benefit from the contract, he's living in his  
4 residence. Now, he may have, he may dispute the quality of  
5 that residence, but he is living in the residence, so he can't  
6 claim the benefit of the contract and yet avoid his burden  
7 which he perceives to include this obligation to arbitrate.  
8 If that is the case, if that's allowed it would contravene the  
9 purposes of the Federal Arbitration Act, and it would be  
10 inequitable to prevent Mr. Stover to claim that Lennar  
11 constructed his home improperly, on the one hand, and at the  
12 same time deny that he is a party to the contract to avoid  
13 arbitration, on the other hand.

14 So, Your Honor, I know I haven't been brief, but I just  
15 want to quickly recap, clearly, the parties had elected to  
16 arbitrate the claims. Clearly, these claims fall within the  
17 ambit of the arbitration provision, they're bound to adhere to  
18 it. Lennar is here today only asking the Court to enforce the  
19 agreement, and if the Court has no questions we would simply  
20 ask in conclusion that the Court stay these actions and compel  
21 arbitration.

22 THE COURT: Oh, the Court has questions.

23 MS. MCGEE: Okay.

24 THE COURT: Okay, good. Alright, Ms. McGee, let me just  
25 ask you, this is an area of the law that fascinates me. Okay?

1 I have a Federal Arbitration Act that tells me that if, if  
2 it's part of interstate commerce it's going to usurp State  
3 law. Okay? I have a house that's built in Summerville by a  
4 builder operating in Summerville, by an owner that's going to  
5 live in that house in Summerville. Correct?

6 MS. MCGEE: Yes, Your Honor.

7 THE COURT: Okay. Okay. And because they use materials  
8 that are in interstate commerce, they're using the same theory  
9 that the Supreme Court has always used to get cases involved,  
10 to be involved in cases. Is that correct?

11 MS. MCGEE: That's correct, Your Honor.

12 THE COURT: Okay. And that doesn't seem like  
13 overreaching to you?

14 MS. MCGEE: Your Honor, this is, like you've pointed out,  
15 an issue that is raised in the highest court in the land.

16 THE COURT: I understand.

17 MS. MCGEE: And the highest court in the land has said  
18 that it is a sufficient nexus such that the Arbitration Act  
19 applies.

20 THE COURT: I understand.

21 MS. MCGEE: And on that basis we were able to go through  
22 the home, we simply took a look at the contract, there were  
23 dozens of products that were used in these homes that came  
from all over the country.

THE COURT: I have no question, I was looking at the

1 affidavit, I saw that the insulation came from somewhere, and  
2 something else came from somewhere else. I mean, I really do  
3 understand that. I'm just, it's just interesting to me that a  
4 South Carolina builder selling to a South Carolina owner for a  
5 house in South Carolina, is then governed arbitrarily by the  
6 Federal Arbitration Law just because some of the products came  
7 from interstate commerce. I just find that, I mean, that's  
8 just to me is a fascinating concept. But I mean, I agree with  
9 you, I agree with your interpretation of the law and like  
10 that. I do understand it, I just wanted your thoughts on  
11 that.

12 MS. MCGEE: Well, I agree that that has appealed, and I  
13 think that's why it's been made, and I think it's been named  
14 in a number of different cases.

15 THE COURT: And it's not working yet.

16 MS. MCGEE: And it's not working. And it's not working  
17 perhaps because it's been definitively decided.

18 THE COURT: Okay, now, the other thing is, according --  
19 you're telling me that he doesn't have to -- the arbitration  
20 hearing will be held somewhere convenient to Summerville,  
21 South Carolina?

22 MS. MCGEE: Your Honor, for instance, in the arbitrations  
23 that I mentioned, we're currently proceeding with Ally Gibson,  
24 who you may be aware of, is a local lawyer, and all of the  
25 proceedings that have occurred so far have been local. So,

1 Your Honor, I think that the way that Triple A works, it  
2 allows for local arbitrators to be assigned. Of course, they  
3 would have to have the requisite expertise.

4 THE COURT: And there's a list by this Arbitration  
5 Association of the number of attorneys, or arbitrators that  
6 are approved?

7 MS. MCGEE: Yes, Your Honor.

8 THE COURT: How do you -- if you can't agree how do you  
9 resolve disputes over who get to be the arbitrator?

10 MS. MCGEE: Well, Your Honor, we would basically rely  
11 upon the construction industry arbitration rules which have  
12 been specified in contracts. And Mr. Robinson and I have  
13 attempted to resolve this particular, these two motions prior  
14 to coming here today, and Lennar has taken a position  
15 steadfastly that they want to avail themselves of Triple a,  
16 and also their rights under the construction industry rules  
17 because that's what the parties agreed to in the contracts.  
18 So, Your Honor, in the event that there was some sort of  
19 disagreement as to the specific person, I think we would have  
20 to -- my understanding that is you rank order, so basically  
21 you say, here are five people that we have who are local, and  
22 you have five people, and then the highest number that  
23 corresponds to both would be the arbitrator to be selected.

24 THE COURT: Sort of like trying to get into school after  
25 you're a doctor, when they go and they pick out the different

1 places to see if they match up?

2 MS. MCGEE: Exactly the same.

3 THE COURT: Okay. Cool. Alright, thank you, ma'am, I  
4 appreciate it.

5 MS. MCGEE: Thank you.

6 THE COURT: Alright, Mr. Robinson, let me hear from you.

7 MR. ROBINSON: Your Honor, do you have any questions  
8 about our facts before I begin?

9 THE COURT: No, I mean, a list -- she -- I mean, I've got  
10 this right here. I've got, I have a one page contract that at  
11 the top says it's subject to arbitration, and then it says,  
12 see Paragraph Seven. And Paragraph Seven takes up twenty per  
13 cent of the front page and it's underlined and in big letters  
14 and says, y'all are arbitrating. That's what it says to me.  
15 What does it say to you?

16 ARGUMENT BY MR. ROBINSON:

17 MR. ROBINSON: Your Honor, I'm here to argue for my  
18 clients' right to a jury trial.

19 THE COURT: I understand.

20 MR. ROBINSON: And I would agree with you that that  
21 document says on the face of it what it says.

22 THE COURT: Okay.

23 MR. ROBINSON: There's no dispute about that.

24 THE COURT: Alright, sir.

25 MR. ROBINSON: However, you hinted at the Simpson case

1 right off the bat, so let me go through a few things that I'm  
2 going to focus on that Simpson case, - - -

3 THE COURT: Alright, sir.

4 MR. ROBINSON: --- regardless of whether the Court's  
5 inclined to agree with me or not.

6 THE COURT: Okay.

7 MR. ROBINSON: You know, Steve Fipps(sp) was my professor  
8 in law school and he always loved to tell a story about when  
9 he got an arbitration agreement in a car sales contract he  
10 crossed it out. And the dealer said, well, what are you  
11 doing? And he said, well, I'm not agreeing to those terms,  
12 I've just negotiated. He said, we can't have the car. And  
13 that was the end of that. It was a take it or leave it  
14 proposition.

15 In Ms. McGee's Brief she argues very well, very lucidly  
16 that this contract was bargained for, that it was negotiated.  
17 Well, Judge, if you flip through Exhibit A you'll see that the  
18 Mannings and the Shorts got to make important decisions on  
19 things such as tile and paint color and vinyl and floor layout  
20 of their house. And there are check boxes for them to put the  
21 answer for what they want, or write yes or not. But nowhere  
22 near the arbitration agreement do you see a box that says, I  
23 will accept or I will not accept, or these terms are subject  
24 to modification. Similarly, and I will go straight to the  
25 Simpson v MSA case, and I would commend that case because Ms.

1 McGee focuses in her Brief on the issue of conspicuousness of  
2 a clause, and the Court has spoken acknowledging about that  
3 particularly the Supreme Court. However, Simpson v. MSA, and  
4 this is a case that's only three years old, the Court has also  
5 clearly said that any Court reviewing the enforce ability of  
6 an arbitration clause must look to the totality of the  
7 circumstances in which that arbitration agreement was  
8 rendered. The totality of the circumstances in Simpson, and  
9 I'm ad-libbing here so if I'm not perfect I apologize,  
10 included that the contract was hastily presented, that it was  
11 a take it or leave it, and that it was a take it or leave it  
12 proposition. The Court said that the facts of each individual  
13 case should be reviewed individually. So, while I respect  
14 that Ms. McGee has spoken about other judges who have ruled on  
15 other Lennar cases, I would like the facts of my client's case  
16 considered for several reasons. We submitted affidavits which  
17 the Court may or may not find helpful from the plaintiff's  
18 wives in both of these cases, Mrs. Bridgette Manning and Mrs.  
19 Short. And while I would concede that the affidavits don't  
20 point to a glaring lack of process, what it does indicate in  
21 the Simpson factor that you're taking into account, is the  
22 way I read the affidavits is that the contracts were almost a  
23 formality, they were done to put a deposit down on a house and  
24 that was that, and that's what got their foot in the door,  
25 especially when they didn't want the particular model home

1 that they wanted taken from them. And Ms. McGee is right in  
2 the cases that there was a closing attorney involved in these  
3 cases, Ms. Lisa Wolf Herbert. There's supposed to be dual  
4 representation, but if you read on in the contract there was  
5 an inducement to that which is, we will cut your fee and give  
6 you a better rate if you use our attorney, our approved  
7 attorney. So, I think that that's an issue that the Court  
8 should at least consider and not gloss over in its review of  
9 these arbitration agreements.

10 Your Honor, perhaps most importantly, there are a few  
11 cases that I would like to distinguish that Ms. McGee has  
12 recorded in her Brief. The first is the issue of the non-  
13 signatory. David Stover, who is the husband of Jennifer  
14 Short, did not sign the arbitration agreement. He is not on  
15 that first page and you can see that for yourself. I would  
16 point out that the case cited by Ms. McGee, International  
17 Paper v. Swabeditzen(sp), I believe, I'm not an expert in  
18 German, is a case between two multi-national corporations over  
19 whether a subsidiary can be bound by the parent company, and  
20 visa versa, in a negotiated arbitration agreement. And  
21 obviously that's not a boiler plate contract like the one that  
22 we have here. This contract is very much a boiler plate  
23 contract and they've admitted that. So when you have people  
24 who are in agency roles I don't know if the wife can be the  
25 agent of the husband in consent and waiving a legal right. I

1 know that we certainly would, that would certainly not be  
2 acceptable in criminal court.

3 Your Honor, one important distinction that I think has a  
4 lot of merit, not to just belabor or distinguish cases that  
5 Ms. McGee has talked about, is the issue of a series of cases  
6 that have come out in Two thousand Eight, and I've given you  
7 Hatcher v. Edward Jones and Company -- may I approach, Your  
8 Honor?

9 THE COURT: Yes, sir.

10 MR. ROBINSON: These are all the cases that we have  
11 referred to or cited to that we printed off Case Maker last  
12 night.

13 THE COURT: Thank you, sir, appreciate it.

14 MR. ROBINSON: So, that may aid the Court's ability to  
15 review some of these issues. The case of Hatcher v. Edward  
16 Jones is interesting. It was a services contract for an  
17 investor, and it said, basically said, I will manage your  
18 accounts, you agree that if we have any disputes they will be  
19 resolved in arbitration. The problem was, the broker then  
20 made several withdrawals and did other things with the money  
21 that were inappropriate that were intentional torts. And the  
22 Supreme Court of South Carolina said, those are clearly  
23 outside of the scope of an arbitration agreement, that was not  
24 in contemplation of the Court. And there are a series of  
25 cases beginning -- well, I should clarify. Hatcher cites

1 another case Sabenski v. Bright Acres, which you also find in  
2 Ms. McGee's Brief. Both of those discuss that broadly worded,  
3 bland, arbitrary, arbitration agreements may be subject to  
4 having certain claims removed from arbitration because they do  
5 not arise out of the contract and were not within the  
6 contemplation of the parties. Why does that matter here? Ms.  
7 McGee has told you our claims are, unfair trade practices,  
8 implied warranties that are not found in the contract. But to  
9 me it looks like on Paragraph Ten there is an implied  
10 disclaimer of South Carolina Implied Warranties on the first  
11 page of the sales contract.

12 And gross negligence, we have a personal injury claim in  
13 our case, Your Honor.

14 THE COURT: A what?

15 MR. ROBINSON: A personal injury claim. The minor  
16 children of the Mannings suffer from what we allege and what  
17 we believe to be a mold problem resulting from excessive  
18 moisture in the house. Excessive moisture comes from what we  
19 believe and what our engineer has said to believe are defects  
20 in the envelope structure in the foundation of the house. And  
21 I would just ask the Court, and again, you decide what you  
22 decide, but I would just ask the Court to consider, when the  
23 Mannings sat down and signed this agreement, and put down a  
24 deposit on their house, did they really contemplate, was it  
25 foreseeable that a claim that they would agree to arbitrate

1 would be the illness of their children because of defects with  
2 the house. And maybe the answer is, yes, construct -- any  
3 issue arising out of the construction of the house is broad  
4 enough. But I point out that the Supreme Court of South  
5 Carolina has also said, we do not apply a, but for, causation  
6 test when applying arbitration agreements, meaning, the Court  
7 has thrown out the idea that just because the parties only met  
8 because of the contract involving arbitration agreement, had  
9 dealings with each other because of the clause involved in the  
10 arbitration agreement does not mean that the Court is not free  
11 to throw out whatever claims it does not believe are covered  
12 by the arbitration agreement. And we take the position that  
13 gross negligence, unfair trade practices as were alleged in  
14 the Hatcher case, an intentional tort or gross negligence,  
15 things not in contemplation of the party and were not within  
16 the scope of a broad reading of a bland arbitration agreement.

17 THE COURT: Alright, sir.

18 MR. ROBINSON: Your Honor, if I may just briefly speak to  
19 the totality of the circumstances in the transaction. It is  
20 evident to me and from the affidavits that the package that  
21 the parties were sent to take home was packaged and involved  
22 your tile selection and paint colors and which way your  
23 driveway is pointed. What I see and the way I see those  
24 affidavits, I'm sorry they're not clear, but my perception is  
25 that the affidavits say that they signed a sales agreement in

1 the office and it was treated as a mere formality. I would  
2 see that as a negotiated bargain for result. And that goes to  
3 the point of not only Simpson v. MSA, but more importantly to  
4 the assumptions applying the Federal Arbitration Act. And I  
5 quote the Swabeditzen (sp) case that I have provided you  
6 today. "Arbitration is a matter of consent, not coercion, and  
7 parties are generally free to structure their arbitration  
8 agreement as they see fit." And that's citing another case  
9 heard by the U. S. Supreme Court, Volt Info Sciences versus  
10 Board of Trustees that I've also supplied to you. The FAA  
11 requires Courts to enforce privately negotiated agreements to  
12 arbitrate. The implication is clear that even with FAA, even  
13 though it's enforceable against consumers, and I agree with  
14 you, there's been a long stream of cases that says these kinds  
15 of agreements are enforceable, there's clearly a contemplation  
16 that you're dealing with sophisticated and that the terms of  
17 an arbitration agreement were negotiated. The arbitration  
18 agreement itself in this case was not negotiated, and that's  
19 the question before the Court.

20 Thank you.

21 THE COURT: Alright, thank you, sir.

22 Now, you know, since this is a Dorchester County case I  
23 do not have the file, and what I would ask y'all, if you  
24 wouldn't mind, if you could mail me copies of their Complaints  
25 so I can look and see what your Complaint actually alleges.

1 MR. ROBINSON: Yes, sir.

2 THE COURT: And Ms. McGee, he gave me some cases and like  
3 that, and I know you cited some cases. If you want to -- if  
4 you have them for me that would be appreciated. If not you  
5 can mail them to me.

6 MS. MCGEE: Okay. I have cases for you here.

7 THE COURT: Ma'am?

8 MS. MCGEE: I have cases for you here.

9 THE COURT: Great, if you've got them that will save me  
10 some time and money. Okay. Thank you, ma'am.

11 Alright. I appreciate it, y'all.

12 MR. ROBINSON: Thank you for your time, Your Honor.

13 THE COURT: And Ms. McGee, I hope you've highlighted the  
14 appropriate sections in here for me to read.

15 MS. MCGEE: Unfortunately, I did not, I thought I  
16 shouldn't take that liberty. I'll remember next time.

17 THE COURT: Do it next time, it makes it easier for me.  
18 You need to remember that, too, Mr. Robinson.

19 MR. ROBINSON: Okay, sir.

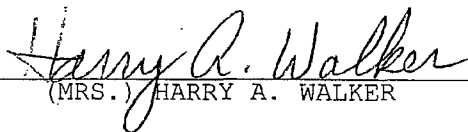
20 THE COURT: Thank you, I appreciate it.

CERTIFICATE

1  
2 I, the undersigned, Mrs. Harry A. Walker, of Rowesville,  
3 South Carolina, Official Court Reporter for the First Judicial  
4 Circuit of the State of South Carolina, do hereby certify that  
5 the foregoing is a true, accurate, and complete transcript of  
6 record of all the proceedings had and evidence introduced in  
7 the captioned cause, relative to appeal, in the Court of  
8 Common Pleas for Dorchester County, South Carolina, (held in  
9 Orangeburg County) on the Second day of November, 2010.

10 I do further certify that I am neither of kin, counsel,  
11 nor interest to any party hereto.

12  
13 DATE: January 5, 2012

14  
15   
16 (MRS.) HARRY A. WALKER  
17

*Don Galloway*  
**DON GALLOWAY HOMES**

A LENNAR COMPANY

**SOUTH CAROLINA PURCHASE AGREEMENT**

Job No. R77  
 Lot No. 11  
 Block No. \_\_\_\_\_

*Spec*

**THIS AGREEMENT IS SUBJECT TO ARBITRATION (SEE PARAGRAPH 7 HEREIN).**

Jennifer L. Short & David A. Short Buyer agrees to purchase from Don Galloway Homes, LLC ("Don Galloway Homes") as Seller, the real estate and improvements ("Property") described below, upon the following terms and conditions:

1. Property Description: City or Town of Summerville  
 County of Richland, State of South Carolina  
 Street Address 101 Willow Lane  
 Subdivision Willow Creek Model Luxidia (Garage, 1 car, 2 car, none).

2. Purchase Price: The purchase price is \$ 197,214.00, and shall be paid as follows:  
 \$ 5000 in earnest money paid upon execution of this Contract.  
 (See Standard Provisions.)

\$ \_\_\_\_\_ as additional earnest money to be paid to Seller  
 on or before \_\_\_\_\_ (See Standard Provisions.)  
 \$ \_\_\_\_\_ Non-refundable money for options.  
 \$ \_\_\_\_\_ the balance of the down payment in cash at closing.

3. Loan Application: Buyer agrees to apply for an FHA, VA, or Conventional Loan through an approved Don Galloway Homes Lender \_\_\_\_\_ in the amount of \$ \_\_\_\_\_ at the applicable interest rate as of the date of closing, on or before five (5) days from the date of this Contract. The aforementioned loan shall be secured by the real property described herein. Buyer shall endeavor in good faith to obtain said loan and when requested by lender shall supply all necessary information and sign the customary loan applications, forms and instruments. If Buyer's loan application is rejected for a cause that cannot reasonably be cured, or if a commitment for said financing cannot reasonably be obtained by specified closing date, Buyer shall be deemed unable to obtain said loan. In such case, either Buyer or Seller may terminate this agreement and Buyer shall pay any appraisal fee and/or credit report charges. The Escrow Agent shall then refund the earnest money to Buyer.

4. Closing Costs: Buyer shall pay loan closing costs in the maximum amount of \$ See addendum and Seller shall pay the balance. Buyer shall, however, pay in addition at closing all prepaid expenses and required escrow deposits, including but not limited to, any mortgage insurance premium, hazard insurance premium, interim interest, homeowner's association dues, and escrow deposits for property tax, mortgage insurance, hazard insurance and homeowner's association dues. See addendum

5. Other Provisions and Conditions: (a) All of the Standard Provisions (1 through 13) on the reverse side of this Contract apply to and are hereby incorporated into this Contract. (b) The following numbered Optional Provisions on the reverse side of this Contract apply to and are hereby incorporated into this Contract:  
14, 15, 16. (Initial if included.)

6. Special Stipulations: \_\_\_\_\_

**7. ARBITRATION: ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE CONSTRUCTION OF THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND, SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THE PARTIES ACKNOWLEDGE THAT ARBITRATION SHALL BE THE SOLE, FINAL, BINDING AND EXCLUSIVE REMEDY OF THE PARTIES WITH RESPECT TO ANY SUCH MATTER FOR WHICH ARBITRATION IS REQUIRED HEREUNDER. AFTER AN AWARD IS RENDERED BY THE ARBITRATORS, A JUDGMENT MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. NOTWITHSTANDING THE FOREGOING, DON GALLOWAY HOMES, LLC MAY BRING AN EQUITABLE JUDICIAL PROCEEDING AGAINST YOU FOR AN INJUNCTION OR SPECIFIC PERFORMANCE FOR ANY BREACH OR UNLAWFUL ACTION IN CONNECTION WITH YOUR OBLIGATIONS HEREUNDER AND THIS SHALL NOT CONSTITUTE A WAIVER OF ITS RIGHT TO COMPEL ALL CLAIMS THAT MAY BE ASSERTED AGAINST DON GALLOWAY HOMES, LLC TO BE ARBITRATED. IN PREPARATION FOR THE ARBITRATION HEARING, EACH PARTY MAY UTILIZE ALL METHODS OF DISCOVERY AUTHORIZED BY THE PROCEDURAL RULES AND STATUTES OF THIS STATE, AND MAY ENFORCE THE RIGHT TO DISCOVERY IN THE MANNER PROVIDED BY THE RULES OF CIVIL PROCEDURE THAT ARE APPLICABLE TO THE MATTER. THIS PROVISION SHALL BE CONSTRUED AND ENFORCED, AT ALL TIMES, PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. (1 ET SEQ)).**

8. Closing: The home will be deemed complete when it is issued a Certificate of Occupancy by the appropriate governmental authority. Upon issuance of the Certificate of Occupancy, Buyer agrees to close the purchase within 5 days, at the time and place designated by the Seller.

9. Counterparts: This Contract shall be signed by both Buyer and Seller and can be executed in TWO counterparts with an executed counterpart being retained by each party.

10. The written text of this Purchase Agreement, any addendum, sales contract specifications and the attached Standard Provisions represent the complete intent and understanding of the parties involved. There are no other promises, representations, or guarantees, either verbal or written, other than what are contained in the Purchase Agreement's Special Stipulation Section #6, any addendum, sales contract specifications or in the Standard Provisions.

Date of Offer: 3-11-03

Jennifer Short (SEAL) DON GALLOWAY HOMES, LLC  
 Buyer  
 \* \_\_\_\_\_ (SEAL) By: Shanda Wilson (SEAL)  
 Buyer For the Seller

I hereby acknowledge receipt of the sum of \$ 5000 as the Buyer's initial earnest money deposit, in accordance with and subject to the terms and provisions of the Contract.

Form # 101921 • South Carolina  
 Revised 03/02

Shanda Wilson (SEAL)  
 Sales Consultant

14120 Ballantyne Corporate Place  
Suite 400  
Charlotte, NC 28277  
(704) 542-8300

*Don Galloway*  
**DON GALLOWAY HOMES**

A LENNAR COMPANY

R11  
Lot# \_\_\_\_\_ Block# \_\_\_\_\_  
Page 1 of 1

**SALES CONTRACT SPECIFICATIONS**

PURCHASER Jennifer L. Short & David A. Slater  
PRESENT ADDRESS 953 Orangeburg Rd.  
HOME PHONE 821-7630 BUSINESS PHONE cell 910-2478/ Dave 871-6215  
PROPERTY PURCHASED R11  
COMMUNITY Plum Creek PLAN Tarleton  
TYPE LOAN Conventional LOAN AMOUNT 197,000

LENDER \_\_\_\_\_  
GARAGE:  S  D  NONE ROOM OVER GARAGE:  YES  NO FOUNDATION:  SLAB  CRAWL  
SPECIFICATIONS:  CAROLINA  AMERICAN  HERITAGE  CLASSIC  BASEMENT  
 ALL VINYL SIDING  PARTIAL BRICK FRONT  FULL BRICK FRONT  OTHER \_\_\_\_\_  
 OTHER \_\_\_\_\_

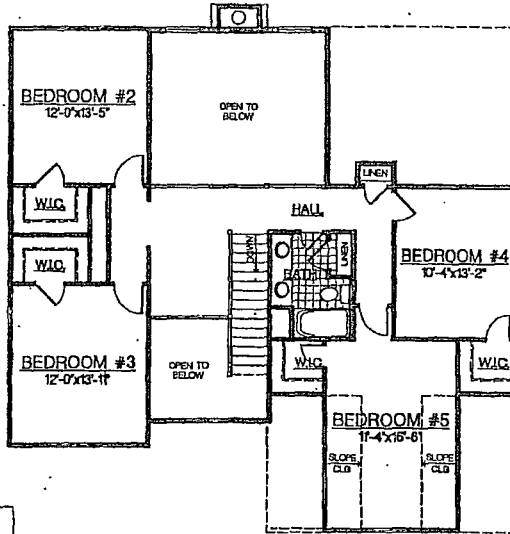
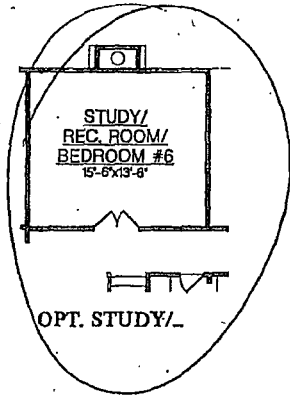
Base Price	\$	180,950 <sup>00</sup>
OPTIONS: <u>Deluxe bath</u>	\$	2250 <sup>00</sup>
<u>Rec. Room</u>	\$	5500 <sup>00</sup>
<u>Woodburning Fireplace</u>	\$	2250 <sup>00</sup>
<u>Cell carpet pad</u>	\$	283 <sup>00</sup>
<u>Bay Window</u>	\$	1450 <sup>00</sup>
<u>Side load</u>	\$	2150 <sup>00</sup>
<u>Microwave</u>	\$	375 <sup>00</sup>
<u>Maple Cabinets</u>	\$	1400 <sup>00</sup>
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
<u>Galloway Money</u>	\$	(6000 <sup>00</sup> )
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
	\$	
Total Price:	\$	197,214 <sup>00</sup>

\* ONLY OPTIONS AVAILABLE IN THE COMMUNITY IN WHICH THE HOME IS PURCHASED ARE ALLOWABLE.  
\* CHANGE ORDERS: THERE WILL BE NO CHANGE ORDERS ACCEPTED AFTER SEVEN (7) CALENDAR DAYS FROM THE SIGNING OF THE CONTRACT BY THE PURCHASERS. DURING THE FIRST SEVEN (7) DAYS, CHANGES (TO ADD OR DELETE OPTIONS ONLY) WILL BE REVIEWED BY DON GALLOWAY HOMES TO DETERMINE IF THEY CAN BE DONE ACCORDING TO THE STAGE OF CONSTRUCTION OF THE HOME. AFTER EXPIRATION OF THE ABOVE MENTIONED SEVEN (7) DAY TIME PERIOD, IT IS AGREED AND UNDERSTOOD THAT ANY CHANGE ORDER APPROVED AND ACCEPTED BY DON GALLOWAY HOMES MANAGEMENT WILL HAVE A CHARGE OF \$300.00.  
\* COLOR SELECTIONS MUST BE SPECIFIED WITHIN SEVEN (7) DAYS OF CONTRACT ACCEPTANCE DATE. COLOR SELECTIONS NOT SPECIFIED WITHIN THE TIME LIMITATIONS WILL BE DETERMINED BY DON GALLOWAY HOMES, LLC. SOME SELECTIONS MAY BE DISCONTINUED AND UNAVAILABLE AT THE TIME OF INSTALLATION. PURCHASER WILL BE ASKED TO MAKE A NEW SELECTION AND NO CHARGE WILL APPLY. PURCHASER UNDERSTANDS DYE-LOT COLOR VARIATIONS MAY OCCUR WHICH ARE BEYOND THE CONTROL OF DON GALLOWAY HOMES, LLC OR THE MANUFACTURER. THERE IS A \$300.00 FEE FOR ANY CHANGES MADE AFTER THE ABOVE MENTIONED SEVEN (7) DAY PERIOD.  
THE ABOVE SALES PRICE INFORMATION HAS BEEN COMPLETELY FILLED IN, REVIEWED, AND ACCEPTED. WE HAVE REVIEWED ALL OF THE ABOVE AND AGREE TO ITS ACCURACY AND ITS TERMS: AND TO THE ATTACHED DECORATING SELECTION SHEET.

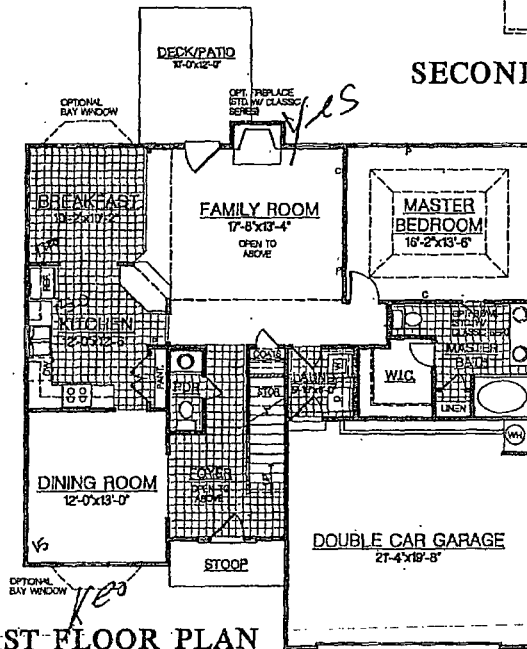
\$ 500<sup>00</sup> DEPOSIT RECEIVED BY:  
Amanda Watson  
SALES REPRESENTATIVE  
DATE 3-11-03  
PURCHASER: Jennifer L. Short  
PURCHASER:  
SELLER: [Signature] (VALID ONLY WHEN SIGNED BY AN OFFICER)

© 2001 # 101024

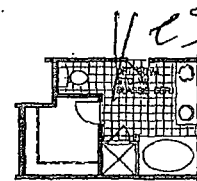
# THE TARLETON



SECOND FLOOR PLAN



FIRST FLOOR PLAN



OPT. MASTER BATH



THIS SHEET IS FOR ILLUSTRATIVE PURPOSES ONLY AND NOT PART OF A LEGAL CONTRACT. FLOOR PLANS AND STANDARD FEATURES MAY VARY WITH HOME STYLE SELECTED AND ARE SUBJECT TO CHANGE WITHOUT NOTICE. OPTIONAL FEATURES INCURE ADDITIONAL COST. ROOM SIZES ARE APPROXIMATE AND DIMENSIONS MAY BE CONCEPTUAL. ENCL 01/19/99

JOB RTT

PROPER LESS 201 Temuco Lane

**FINANCIAL CONCESSIONS ACKNOWLEDGEMENT**

Please Initial Here

Don Galloway Homes agrees to pay up to \$10,000 towards non-recurring closing costs and loan origination fee when Buyer uses Universal American Company. By doing so, Don Galloway Homes reserves the right to choose the closing attorney.

*\* This is to give you notice that Don Galloway Homes has a business relationship with Universal American Company. Don Galloway Homes and Universal American Company are both wholly owned subsidiaries of The Lennar Group. Because of this relationship, this referral may provide Don Galloway Homes a financial or other benefit.*

**CONSTRUCTION SCHEDULING**

Please Initial Here

A start date for your new home will not be given until loan approval and all earnest money is received by Don Galloway Homes' corporate office. Once loan approval is received, a start date is scheduled during our weekly meeting. The start date will be approximately three to four weeks after this meeting. This time period allows for permits to be obtained, materials to be ordered, lot preparation, etc.

The average time to build a Don Galloway home is 4 months. This time period begins when the footers of the house are dug. Outside factors, such as weather, inspections, inspectors, product delivery, trades and circumstances beyond our control, can affect the construction schedule.

Closing dates and times are scheduled by Don Galloway Homes' corporate office. The sales consultant and project manager do not schedule closing dates.

We do our best to complete each home on schedule while at the same time maintaining our standard of high quality.

*\* If you are purchasing a home with a contingency contract, your start date will be given when the contingency has been removed and loan approval has been received.*

**TREE AND LAWN POLICY**

Please Initial Here

This is to acknowledge receipt of Don Galloway Homes' Tree and Lawn Established Policies, As stated therein, it is hereby understood and agreed that:

A. It is Don Galloway Homes' policy to remove only those trees affected by construction. In this regard, any trees within approximately 25 feet of the rear or 10 feet from the sides or front of the homes, or of any water, gas or electric lines and driveway may, at our discretion, be removed. Don Galloway Homes will do everything possible to preserve the natural beauty of your homestead.

B. All stumps and debris from clearing the lot will be removed from the lot

C. During construction it is necessary to use large equipment to dig basements, back fill the foundation and trench for utilities. In the process, some damage may occur to the remaining trees. We recommend that you repair the areas by sawing broken limbs flush with the main trunk and treating these areas, along with any damaged bark areas, with a tree wound compound. Don Galloway Homes will not be responsible for the loss of any tree resulting from machine damage or by changing the grade of the lot, nor will we remove any trees after occupancy unless agreed to in writing before the closing.

D. Yards will be tractor graded, seeded, fertilized and strawed before closing. Maintenance of the yard and shrubs will be Don Galloway Homes' responsibility until closing. Regrading, re-sowing, aeration, maintenance and watering of the yard and shrubs after closing is the responsibility of the homeowner.

**HOME ACCESS ACKNOWLEDGEMENT**

Please Initial Here

Due to OSHA Regulations and a genuine concern for the Buyer's safety, the Buyer shall be provided access to the property before closing only upon prior reasonable notice and request to the Seller, and only when accompanied by an authorized representative of the Seller and subject to such further, reasonable restrictions as may be imposed by the Seller. Buyer otherwise shall be prohibited access of any type to the property prior to transfer of title, personally or through any representative. Seller hereby disclaims liability for any and all loss, damage or injury which might arise from any access or visit to the property by Buyer, friends, family members, agents or representative.

**FULL DISCLOSURE STATEMENT**

Please Initial Here

The purchaser acknowledges that the written text of this Purchase Agreement represents the full intent of the parties involved.

*\* No promises, representations or guarantees, either verbal or written, other than what is contained in the Purchase Agreement, have been made at this time. In addition, at no time in the future should the purchaser accept any promises, representations or guarantees, except those made in writing.*

Date 3-11-03

Sales Consultant Quanda Sykes

Buyer [Signature]

Sales Manager [Signature]

OFFICE COPY

# Don Galloway Homes

A Lennar Company

## Financial Concessions Acknowledgment

S/D Lot and Block # PC 77 Purchase Agreement Date 3-27-03

Property Address ~~44~~ 201 TEMUCO LANE

Don Galloway Homes agrees to pay the following Closing Costs:

½% Origination Fee, Credit Report, Tax Service fee, Flood Certification Fee, Attorney's Fee (assuming our Attorney is used), Title Insurance, Recording Fees, Survey (if DGH approved surveyor used).

By doing so, Don Galloway Homes reserves the right to choose the closing attorney and approve the Mortgage Lender.

Any other closing costs, including but not limited to, discount points, lender junk fees Underwriting fees, application fees, and ect.) mortgage insurance, prepaid items (insurance and taxes), and interim interest, Shall be the sole responsibility of the Buyer.

Southern Trust Mortgage, Inc.  
Kristen Lavelle  
Phone 843.416.1152  
Cell 843.224.4062  
Fax 843.416.1166

Homeowners Mortgage, Inc.  
Larry Luzader  
Phone 843.763.2008  
Fax 843.763.2445

Bank of America  
Carl Wolff III  
Phone 843.745.8341  
Fax 843.745.8429

Mortgage Trust Group  
Ray Marcoux  
Phone 843.388.8400  
Fax 843.388.8040

Closing Attorney  
Lisa Wolff Herbert  
Phone 843.849.0888  
Fax 843.849.0889

U.A.M.C.

Buyer Cartha L. Ford Date 3-27-03

Buyer \_\_\_\_\_ Date \_\_\_\_\_

mm/mydocuments/pcfmconcessions



REQUEST FOR START

PLAN ARLTON  
JOB NO. PC 77

Date: 8/1/02

Spec. House \_\_\_\_\_ Contract House & Date \_\_\_\_\_ Closing Date \_\_\_\_\_  
Community Plan 2211 Sales Agent \_\_\_\_\_  
Address 2017 Avenue Lot 27 Block \_\_\_\_\_

PLAN SPECIFICATIONS:

Heritage  Classic \_\_\_\_\_ Custom \_\_\_\_\_

Garage: None \_\_\_\_\_ One \_\_\_\_\_ Two 2 Side Load  Enclosed \_\_\_\_\_

Refer to Addendum/Change Orders for Contract House  
Refer to Options listed below for Spec. Houses

1.	<u>Rec Room</u>	Price	<u>5500</u>
2.	<u>Deluxe Bath</u>	Price	<u>2210</u>
3.	<u>Wood Bureau F.R.E. Place</u>	Price	<u>2250</u>
4.	<u>White cabinets - Made cabinet</u>	Price	<u>750</u>
5.	<u>BLB Pack</u>	Price	<u>283</u>
6.	<u>Bay window</u>	Price	<u>1450</u>
7.	<u>Side Load</u>	Price	<u>2750</u>
8.	<u>M.C. concrete / white</u>	Price	<u>425</u>

Base Price 186,950 Total Option Price \_\_\_\_\_  
Total Sales Price 202,625

Color Selection: Ordered \_\_\_\_\_ Attached  To Follow \_\_\_\_\_  
Plot Plan: Ordered \_\_\_\_\_ Received \_\_\_\_\_

Building Permit Number \_\_\_\_\_ Issue Date \_\_\_\_\_  
Plans/Specs/and Purchase Orders Received \_\_\_\_\_  
Release Date \_\_\_\_\_ Expected Completion Date \_\_\_\_\_

Sales Agent \_\_\_\_\_ Date \_\_\_\_\_ Sales Manager [Signature] Date 8/2/02

Additional Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Don Galloway*  
**DON GALLOWAY HOMES**

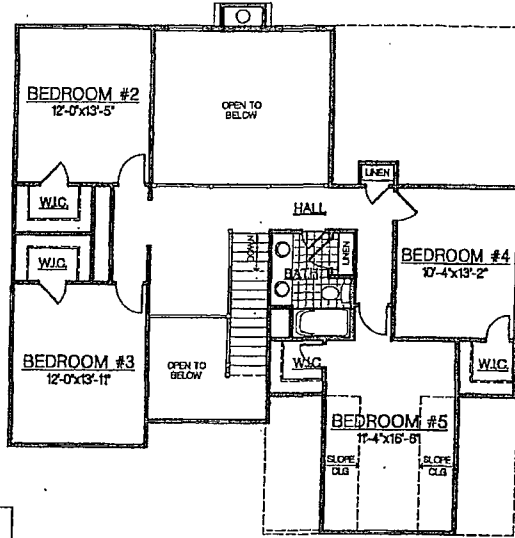
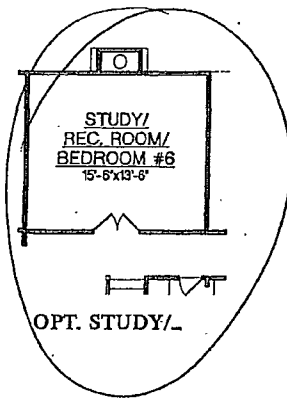
A LENNAR COMPANY



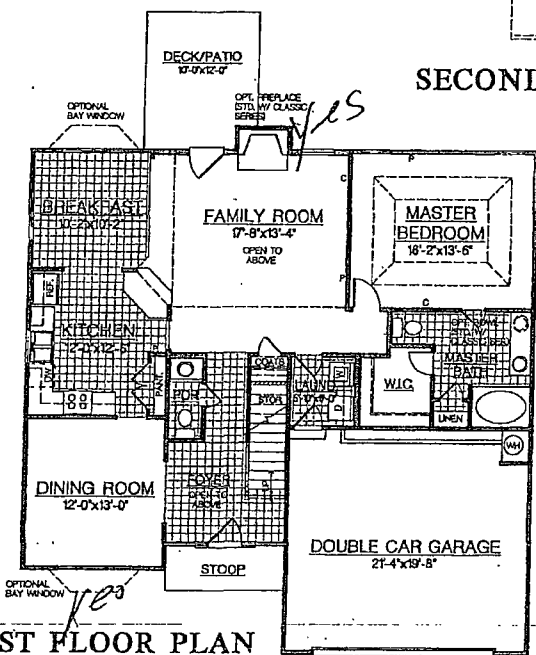
ELEVATIONS SHOWN WITH OPTIONAL FEATURES AND MAY BE CONCEPTUAL. BR03098

**THE TARLETON**

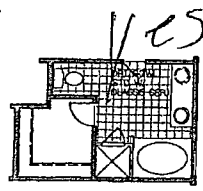
# THE TARLETON



SECOND FLOOR PLAN



FIRST FLOOR PLAN



OPT. MASTER BATH



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THIS CHECK IS VOID UNLESS IT IS MADE ON THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER

**LISA WOLFF HERBERT, ATTORNEY AT LAW**  
REAL ESTATE TRUST ACCOUNT  
864 LOWCOUNTRY BLVD  
MT. PLEASANT, SC 29464  
(843) 849-0388

NBSC  
THE NATIONAL BANK OF SOUTH CAROLINA  
CHARLESTON, SC 29402  
67-68532

74229

May. 09, 2003

PAY TO THE ORDER OF

Don Galloway Homes, LLC, A Delaware LLC

\$\*\*193,243.73\*\*

MEMORANDUM

\*\* One Hundred Ninety Three Thousand Two Hundred Forty Three and 73/100 \*\*\*\*\* DOLLARS

Don Galloway Homes, LLC, A Delaware LLC


MEMO

Cash to Seller03-567

⑈074229⑈ ⑆053200666⑆ 170750870401⑈

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

**A. Settlement Statement**

U.S. Department of Housing  
and Urban Development   
OMB No. 2502-0205

<b>B. Type of Loan</b>		File Number	Loan Number	Mortgage Insurance Case Number
1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input checked="" type="checkbox"/> Conv. Unins	03-567	0302207
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> Conv. Ins.			

**C. NOTE:** This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "p.o.c" were paid outside of closing; they are shown here for informational purposes and are not included in the totals.

<b>D. NAME AND ADDRESS OF BORROWER:</b>	<i>David A. Stover</i> 201 Temuco Lane, Summerville, SC 29483	<i>Jennifer L. Short</i> 201 Temuco Lane, Summerville, SC 29483
<b>E. NAME AND ADDRESS OF SELLER:</b>	<i>Don Galloway Homes, LLC, A Delaware LLC</i> 11230 Carmel Commons Blvd., Charlotte, NC	
<b>F. NAME AND ADDRESS OF LENDER:</b>	<i>Homeowners Mortgage Enterprises, Inc.</i> 2530 Devine Street, Columbia, SC 29205	
<b>G. PROPERTY LOCATION:</b>	201 Temuco Lane Summerville, SC 29483	
<b>H. SETTLEMENT AGENT:</b>	<i>Lisa Wolff Herbert, PA</i> PLACE OF SETTLEMENT: 864 Lowcountry Blvd., Suite C, Mount Pleasant, SC 29464 TIN: 58-2312870	

<b>I. SETTLEMENT DATE:</b>	05/09/2003	<b>RECISSION DATE:</b>	
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<b>J. SUMMARY OF BORROWER'S TRANSACTION</b>		<b>K. SUMMARY OF SELLER'S TRANSACTION</b>	
<b>100. GROSS AMOUNT DUE FROM BORROWER:</b>		<b>400. GROSS AMOUNT DUE TO SELLER:</b>	
101. Contract Sales Price	\$197,214.00	401. Contract Sales Price	\$197,214.00
102. Personal Property		402. Personal property	
103. Settlement charges to borrower: (from line 1400)	\$5,316.82	403.	
104.		404.	
105.		405.	
<b>ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:</b>		<b>ADJUSTMENTS FOR ITEMS PAID BY SELLER IN ADVANCE:</b>	
106. City/town taxes	to	406. City/town Taxes	to
107. County Taxes	to	407. County Taxes	to
108. Assessments	to	408. Assessments	to
109.		409.	
110.		410.	
111.		411.	
112.		412.	
<b>120. GROSS AMOUNT DUE FROM BORROWER:</b>	<b>\$202,530.82</b>	<b>420. GROSS AMOUNT DUE TO SELLER:</b>	<b>\$197,214.00</b>
<b>200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER:</b>		<b>500. REDUCTIONS IN AMOUNT DUE TO SELLER:</b>	
201. Deposit or earnest money	\$500.00	501. Excess deposit (see instructions)	\$500.00
202. Principal amount of new loan(s)	\$201,376.00	502. Settlement charges to seller (line 1400)	\$3,306.44
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage loan	
205.		505. Payoff of second mortgage loan	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
<b>ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:</b>		<b>ADJUSTMENTS FOR ITEMS UNPAID BY SELLER:</b>	
210. City/town taxes	to	510. City/town taxes	to
211. County taxes 01/01/2003 to 05/09/2003	\$163.83	511. County taxes 01/01/2003 to 05/09/2003	\$163.83
212. Assessments	to	512. Assessments	to
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
<b>220. TOTAL PAID BY/FOR BORROWER:</b>	<b>\$202,039.83</b>	<b>520. TOTAL REDUCTIONS IN AMOUNT DUE TO SELLER:</b>	<b>\$3,970.27</b>
<b>300. CASH AT SETTLEMENT FROM/TO BORROWER:</b>		<b>600. CASH AT SETTLEMENT TO/FROM SELLER</b>	
301. Gross amount due from borrower (line 120)	\$202,530.82	601. Gross amount due to seller (line 420)	\$197,214.00

L. SETTLEMENT CHARGES				PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
<b>700. TOTAL SALES/BROKER'S COMMISSION</b>					
BASED ON PRICE \$197,214.00 @ % =					
DIVISION OF COMMISSION (LINE 700) AS FOLLOWS:					
701.	to				
702.	to				
703.	to				
704.	to				
705. Commission paid at settlement					
706. Deposit Held by Galloway \$500					
<b>800. ITEMS PAYABLE IN CONNECTION WITH LOAN:</b>					
801. Loan origination fee 0.5000% to Homeowners Mortgage Enterprises,					\$1,006.88
802. Loan discount % to Homeowners Mortgage Enterprises,					
803. Appraisal fee to: Homeowners Mortgage Enterprises, Inc.					
804. Credit report to: Homeowners Mortgage Enterprises, Inc.					
805. Lender's inspection fee Homeowners Mortgage Enterprises, Inc.					
806. Mortgage insurance application fee to Homeowners Mortgage Enterprises, Inc.					
807. Assumption fee Homeowners Mortgage Enterprises, Inc.					
808. Application Fee to Homeowners Mortgage					\$495.00
809. Tax Service Fee to Trets					\$80.00
810. Flood Cert. Fee to FDSI					\$30.00
811. Express Mail Fee to Homeowners Mortgage				\$37.00	
<b>900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE:</b>					
901. Interest from 05/09/2003 to 06/01/2003 @ \$31.72/day				\$729.56	
902. Mortgage insurance premium for mos. to					
903. Hazard insurance premium for 1.00 yrs. to Farm Bureau				\$932.39	
904. Flood insurance premium for yrs. to					
905. Rural Housing Fee				\$3,020.64	
<b>1000. RESERVES DEPOSITED WITH LENDER:</b>					
1001.	Hazard insurance	3.00 months @	\$77.67 per month	\$233.01	
1002.	Mortgage insurance	months @	per month		
1003.	City property taxes	months @	per month		
1004.	County property taxes	8.00 months @	\$38.75 per month	\$310.00	
1005.	Annual assessments	months @	per month		
1006.	Flood insurance	months @	per month		
1007.		months @	per month		
1008.		months @	per month		
1009. Aggregate Accounting Escrow Adjustment				(\$193.79)	
<b>1100. TITLE CHARGES:</b>					
1101. Settlement or closing fee to Lisa Wolff Herbert					\$300.00
1102. Abstract or title search to					
1103. Title examination to					
1104. Title insurance binder to					
1105. Document preparation to Lisa W. Harbert (POC)					
1106. Notary fees to					
1107. Attorney's fees to					
(includes above items Numbers: )					
1108. Title insurance to Port City Title Insurance					\$528.50
(includes above items Numbers: )					
1109. Lender's coverage \$528.50 (\$201,376.00)					
1110. Owner's coverage (\$197,214.00)					
1111. PCT 60% / LTIC 40% (Binder Included)					
1112. Express Mail Package to Homeowners Mortgage				\$17.50	
1113. Express Mail Proceeds to Seller					\$17.50
<b>1200. GOVERNMENT RECORDING AND TRANSFER CHARGES:</b>					
1201. Recording fees: Deed \$11.00 ; Mortgage \$22.00 ; Releases					\$33.00
1202. City/county tax/stamps: Deed \$730.75 ; Mortgage					\$730.75
1203. State tax/stamps: Deed ; Mortgage					
1204.					
1205.					
<b>1300. ADDITIONAL SETTLEMENT CHARGES:</b>					
1301. Survey to Nielson & Assoc. (POC-S)					
1302. Pest inspection to Elam Pest (POC)					
1303. Mers. Registration Fee to Homeowners				\$3.95	
1304. 2003 dues to Plum Creek HOA				\$226.56	
1305. 2-10 Warranty					\$84.81
1306.					
1307.					
<b>1400. TOTAL SETTLEMENT CHARGES</b>				\$5,316.82	\$3,306.44

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

Mar. 11. 2003 1:46PM

No. 0605 P. 1

CONTRACT ACCEPTANCE ANALYSIS

NEW YES

Is this house a spec yes

PLAN TARLTON

REWRITE \_\_\_\_\_

JOB # PC 77

CHANGE ORDER	DATE	SALES	PROJECTED	VARIANCE
1. PRICE	<u>3/11/03</u>			
		\$ 203,214	\$ 197,214	
2. OPTIONS:				
		\$	\$	0
		\$	\$	0
		\$	\$	0
		\$	\$	0
		\$	\$	0
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		\$	\$	0
		\$	\$	0
3. PROJECT SALES PRICE (TOTAL)		\$ 203,214	\$ 197,214	
4. CONTRACT AMOUNT (SALES)				
5. VARIANCE				6,000
OTHER COMMENTS:				

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

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Case No. 2009-CP-18-1602

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Jennifer Short and David Stover..... Respondents.

v.

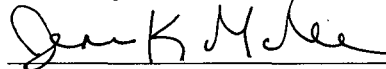
Lennar Carolinas, Inc., Don Galloway  
Homes, LLC, and Lennar Communities  
of the Carolinas, Inc..... Appellants.

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that the Record on Appeal contains all material  
proposed to be included by any of the parties and not any other material



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*Attorneys for Appellants Lennar  
Carolinas, Inc., Don Galloway Homes,  
LLC and Lennar Communities of the  
Carolinas, Inc.*

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM DORCHESTER COUNTY  
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v.

Lennar Carolinas, Inc., Don Galloway  
Homes, LLC, and Lennar Communities  
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**CERTIFICATE AND PROOF OF SERVICE**

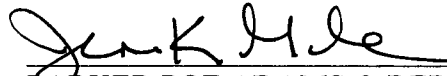
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On August 24, 2012, the undersigned hereby certifies that on she served a copy of the foregoing **Record on Appeal** on all Counsel of Record to this Appeal by United States Mail, postage prepaid, addressed as follows:

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**RECEIVED**

AUG 27 2012

**SC Court of Appeals**