

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

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

v.

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

FINAL REPLY BRIEF OF APPELLANTS

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At its core, the lower court's decision is based on the premise that arbitration is inherently unconscionable and therefore should not be compelled. Contrary to this reasoning, and Respondents' assertions, our Supreme Court and the United States Supreme Court have decided as a matter of law that arbitration is an adequate and indeed favored forum in which to adjudicate disputes.

In declining to enforce the arbitration agreement between a purchaser and builder for the construction of a single-family residence, the lower court identified nothing so unique or different about this case that would justify disregarding binding precedent that compels arbitration. Therefore, in refusing to compel arbitration, the lower court committed reversible error.

ARGUMENT

A. THE LOWER COURT ERRED BY DECLINING TO APPLY THE FEDERAL ARBITRATION ACT ("FAA").

Respondents argue that the lower court properly refused to apply the FAA. This position overlooks that (1) the parties expressly stipulated that the arbitration provisions would fall within the coverage of the FAA, (2) the purchase and construction of the subject residence undeniably involved interstate commerce, and (3) the FAA and general state law principles are not mutually exclusive in a court's evaluation of arbitration clauses. Each of these issues will be addressed *seriatim*.

The central purpose of the FAA is to enforce arbitration agreements. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 540-41, 542 S.E.2d 360, 364 (2001). As a result, courts rigorously give effect to the contractual rights and expectations of the parties and resolve every doubt in favor of arbitration. *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476, 109 S.Ct. 1248 (1989) (The FAA

“requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 116, (2001) (federal and state policy strongly favor arbitration). Where, as here, the parties’ contract expressly stipulates that the FAA will apply, courts are required to enforce that stipulation. *See, e.g., Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 (overturning trial court’s refusal to apply the FAA to parties’ agreement, which stated that the contract is to be governed by the FAA).

Even if the arbitration agreement did not expressly stipulate that the FAA applies, which it does, the FAA must apply based on the extensive and undisputed evidence of interstate commerce,¹ including out-of-state parties, materials, and suppliers, and a legal presumption that construction involves interstate commerce. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) (affirming trial court’s determination that FAA applies where arbitration agreement “pertains to a transaction involving interstate commerce due to the nature of the construction project” and affidavits demonstrated that the construction project required the infusion of out-of-state businesses and supplies). The record is clear that the dwelling was not complete, the contract was entered during the course of construction, and the construction involved out-of-state materials and suppliers. (*See R. pp. 128-130; R. pp.*

¹ Respondents’ allegation that the Affidavit of David Murphy fails for lack of personal knowledge was neither raised nor ruled on by the lower court and, consequently, is not properly before this Court. *See State v. NV Sumatra Trading Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008) (refusing to entertain claim of insufficient authentication of affidavit on appeal where argument was not raised in any submission to lower court); *Poch v. Bayshore Concrete/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009) (declining to exclude affidavit from consideration where issue was not preserved for appellate review). The same reasoning precludes consideration of Respondents’ merger by deed argument, which is raised for the first time in their opposition brief and is likewise unsupported by the record evidence.

160-162). Based on the undisputed evidence of interstate activity and the legal presumption of such activity in the construction context, the lower court was compelled to apply the FAA.

Although Respondents appear to concede the interstate nexus issue,² they argue that federal arbitration law is nevertheless irrelevant to the dispute. A review of *Herron v. BMW*, 387 S.C. 525, 530, 693 S.E.2d 394, 397 (2010), *vacated by Sonic Auto. Inc. v. Watts*, 131 S.Ct. 2872 (2011), *original opinion reinstated by* 395 S.C. 461, 719 S.E.2d 640 (2011) and *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 confirms that the lower court was required to determine, as a threshold matter, whether the FAA applied, so that it knew the extent to which state law might be considered. For these reasons, the lower court erred by declining to apply the FAA.

B. THE LOWER COURT ERRED BY DETERMINING THAT THE NEGLIGENCE, WARRANTY AND OTHER CLAIMS FALL OUTSIDE THE SCOPE OF THE ARBITRATION AGREEMENT.

Because Respondents have carefully avoided asserting a breach of contract claim, they contend that the arbitration provisions within the parties' construction agreement do not cover their claims for negligence, warranty, and unfair trade practices.

Pursuant to our Supreme Court's reasoning in *Zabinski*, 346 S.C. at 597-98, 553 S.E.2d at 119, tort claims that relate to the underlying contract are arbitrable. Citing *Zabinsky*, this Court has stated that "[a] broadly-worded arbitration agreement applies to disputes that do not arise under the governing contract when a 'significant relationship exists between the asserted claims and the contract in which the arbitration clause is

² In their opposition brief, Respondents do not argue that the construction of the residence lacked interstate commerce.

contained.” *Partain v. Upstate Automotive Group*, 378 S.C. 152, 156, 662 S.E.2d 426, 428-29 (Ct. App. 2008).

Here, the arbitration provisions provide, in pertinent part, that:

ALL CLAIMS, CONTROVERSIES, OR DISPUTES . . . 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.

(R. p. 160) (emphasis in original). The plain language of the arbitration provisions neither limits the scope to contract claims nor excludes the arbitration of tort, warranty, or unfair trade practices claims. On the contrary, “all claims relating to the construction of the subject residence” fall within the express scope of the arbitration provisions. (R. p. 160); (R. p. 136, lines 7-24).

While Respondents avoided suing in contract, their claims undoubtedly arise from or relate to the parties’ contract. Specifically, the Complaint alleges that Respondents’ injuries result from a failure “to design and/or construct the Subject Residence in accordance...with the approved construction plans and specifications.” (R. p. 4). The claimed construction defects include the alleged failure of structural systems, inadequate flashing, improperly installed siding, roofing, and exterior cladding, and improper site preparation. (R. pp. 15-16). Such claims exist only by virtue of the fact that Respondents bought a house by contract. Under these circumstances, Respondents cannot simply cast their contract claims as torts as an “end-run” around the arbitration provisions. See *Partain*, 386 S.C. at 494-95, 689 S.E.2d at 605; *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 152, 644 S.E.2d 705, 709 (2007) (“[A] tort claim which essentially alleges a breach of the underlying contract...would be within the contemplation of the parties in

agreeing to arbitrate.”). The lower court therefore erred when it found that the claims did not arise from or relate to contract.

Even if the tort and warranty claims had no contractual nexus, which they do, it is undisputed that they “relat[e] to the construction of the subject residence.” (R. p. 160). To confirm, this Court need look no further than Respondents’ and the lower court’s own characterization of the claims. The Complaint states that “[t]his matter arises of out of the design, development, construction and sale of the Subject Residence” (R. p. 12), and the first line of Respondents’ brief states “[t]his is a construction defect case,” (Respondents’ Initial Brief p. 1). Furthermore, the first page of the Order states “[t]his case arises out of alleged construction defects to a single-family home in Summerville, South Carolina.” (R. p. 3). Thus, the underlying allegations and the remedies sought, whatever the legal label used, derive from the construction of the residence.

On similar facts, the United States District Court for the District of South Carolina held that personal injury, negligence, and unfair trade practice claims arising from allegedly improper construction of a condominium unit had a “significant relationship” to the arbitration agreement so as to require the submission of the case to arbitration. *See Osborne v. Marina Inn at Grande Dunes, LLC*, No. 0490, 2009 WL 3152044, at *7-8 (D.S.C. Sept. 23, 2009) (determining condo purchaser’s tort claims were construction defect claims and therefore subject to arbitration agreement); *see also Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2004) (finding negligence claims stemming from allegedly defective installation of masonry fell within the scope of arbitration provision). Accordingly, regardless of the legal labels attached to the dispute (*i.e.*, tort or breach of contract), a significant relationship exists between the unfair trade

practice, warranty, and negligence claims and the operative agreement, such that the claims should be arbitrated.

C. THE LOWER COURT ERRED BY DETERMINING THAT THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE.

The lower court determined that the arbitration agreement is unconscionable based on a single decision, the facts of which stand in sharp contrast with this matter.³ Indeed, the findings upon which the lower court's determination is based fall well short of establishing "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." South Carolina law requires a valid finding of such circumstances, and no such finding is valid in this case. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

1. RESPONDENTS DID NOT LACK MEANINGFUL CHOICE IN ENTERING INTO THE AGREEMENT.

In the decision below, the court concluded that Respondents had no meaningful choice in agreeing to arbitrate claims based on the following findings: (1) Appellants are relatively sophisticated business entities; (2) Respondents are first-time homebuyers; (3)

³ Respondents argue that the lower court properly severed the arbitration agreement in its entirety. This is incorrect. South Carolina law provides that to the extent unconscionable provisions exist, which Appellants deny, courts should sever such provisions and enforce the remainder of the arbitration agreement. *Herron*, 387 S.C. at 536, 693 S.E.2d at 400. Here, the lower court found only the reservation of limited equitable rights in the arbitration agreement to be unconscionable. As that provision is easily severed from the larger arbitration agreement, the remainder of the arbitration agreement should be enforced. While the lower court also found a merger clause in a separate section of the contract to be unenforceable, that provision applies with equal force in court and arbitration. As such, it has no bearing on the enforceability of the arbitration provisions.

the terms of the arbitration clauses are contained in a dense agreement; (4) and the agreement was executed by only one of the two Respondents. (R. p. 7).⁴

The parties' contract for construction of a single-family residence is markedly different from the agreement and surrounding circumstances in *Simpson* — the one appellate court decision of this state deeming an arbitration clause to be unconscionable. As the Supreme Court explained in *Herron*, 387 S.C. at 533, 693 S.E.2d at 398, “the *Simpson* arbitration agreement was inconspicuously buried in the sales contract, on the opposite page from the customer's signature, in paragraph ‘10’ of sixteen other paragraphs. Additionally, the *Simpson* customer alleged the contract was ‘hastily’ presented for her signature.”

By contrast, the instant arbitration agreement, like that in *Herron*, “is clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font. The important terms and provisions of the agreement appear in the body of the contract [and] above the signature line.” *Id.*; (See R. p. 160). Indeed, the lower court commented on the record as follows:

I have a one page contract that at the top say it's subject to arbitration, and then it says, see Paragraph Seven. And Paragraph Seven takes up twenty percent of the front page and it's underlined in big letters and says, y'all arbitrating. That's what it says to me.

⁴ The lower court did not find the subject agreement to be an adhesion contract. Nor did the court make any other factual findings with respect to the meaningful choice prong of the two-part unconscionability test. *FoodMart v. South Carolina Dept. of Health & Envtl. Control*, 322 S.C. 232, 471 S.E.2d 688 (holding matters not argued to or ruled on by the trial court are not preserved for appellate review and are procedurally barred). Respondents discuss other issues, but the Order plainly shows that the lower court did not rule on such issues. *Elam v. South Carolina Dept. of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“A party must file [a Rule 59(e) motion] when an issue or argument has been raised but not ruled on, in order to preserve it for appellate review.”).

(R. p. 150, lines 10-14).⁵ As the lower court observed, the arbitration provisions are not contained in a dense agreement.

Respondents also claim they were surprised by the arbitration provisions. The lower court made no such finding. However, to the extent this Court entertains that allegation, it is important to note that the parties owe a duty to each other and to the public to learn the contents of documents before they sign the contract. *See Regions Bank v. Schumach*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003). If Respondents had read the contract, they would have noted the clear, conspicuous, and unambiguous arbitration provisions. Furthermore, an arbitration agreement governed by the FAA will not be set aside on the ground that the arbitration clause was not explained. *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (declining to find arbitration agreement unconscionable because party was not advised of same); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999) (holding that South Carolina law does not impose a duty to explain an arbitration provision).

In seeking to avoid arbitration, Respondents do not allege that the contract was “hastily” presented. On the contrary, Respondents concede that the purchase of their home was a “process” involving multiple trips and consultation with the builder’s

⁵ The arbitration provisions are the only bolded and emphasized terms on the face of the contract. *Id.* Courts routinely enforce arbitration provisions with the same, or even less, emphasis. *See, e.g., Munoz* 343 S.C. at 536, 542 S.E.2d at 362 (enforcing arbitration agreement that was neither bolded nor underlined); *Lucey v. Meyer*, No. 4960, 2012 WL 1020984 (Ct. App. March 28, 2012) (compelling arbitration in spite of unconscionability claims where arbitration provision appeared in regular type and was not bolded, capitalized or underlined); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998) (determining arbitration provision that was capitalized but not underlined or bolded was not unconscionable). In light of such precedent, the well-marked arbitration provisions should be enforced.

representatives. (See R. pp. 130-131). During construction, Respondents reviewed the contract and signed off on exterior cladding, foundation, and the modification of the floor plans to include an alternative master bath, recreation room, and wood burning fireplace. (See R. pp. 160-162); (R. p. 128). In fact, the second page of the contract is replete with their "Sales Contract Specifications." *Id.* The inescapable conclusion based on these facts is that Respondents had a meaningful choice in making the decision to enter into this contract. See *Lucey v. Meyer*, No. 4960, 2012 WL 1020984, (Ct. App. Mar. 28, 2012) (reversing trial court's determination that arbitration agreement contained in employment contract was unconscionable where party had unequal bargaining power but sufficient time to review and accept the terms).

Furthermore, the lower court erred in finding that the parties need not arbitrate because Respondent Stover ("Stover") did not sign the purchase contract.⁶ Non-signatories to an arbitration agreement who play an "integral role" in the underlying dispute are compelled to arbitrate. See *Hinson v. Jusco Co., Ltd.*, 868 F.Supp. 145, 148 (D.S.C. 1994) (compelling non-signatory to arbitrate based on non-signatory's "integral role" in underlying dispute about stock purchase). According to the Short Affidavit,

⁶ The evidence indicates that Respondent Short ("Short") acted as Stover's agent in signing the agreement. The agency relationship between a husband and a wife is governed by the same rules which apply to other agency relationships and need not depend on express appointment and acceptance thereof, but instead on words and conduct of parties. *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984) (imputing to wife knowledge of and consent to representation agreement signed by husband where wife co-signed note and was named as party to litigation). The facts and circumstances surrounding the purchase demonstrate that Stover intended for Short to act as his agent in signing the contract for the purchase and construction of the residence. As proof, he does not dispute paying for the house, executing the loan documents and filing suit against Appellants seeking the benefit of his bargain.

Respondents decided to purchase the residence “together as a family,” and the purchase “was a huge deal for him.” (R. p. 130). Indeed, it is undisputed that Stover and Short jointly purchased the residence, as evidenced by his signature on the deed and mortgage. (R. p. 160). Based on these facts, the unmistakable conclusion is that Stover played an integral role in the home purchase and should be compelled to arbitrate.

This Court should also compel arbitration because Stover and Short allege identical claims against the same parties based on the same conduct. Non-signatories to an arbitration agreement are compelled to arbitrate when their claims are inextricably interwoven with the claims of parties who are subject to arbitration. *See J.J. Ryan & Sons v. Rhone Poulenc Textile*, 863 F.2d 315, 319 (4th Cir. 1988) (stating non-parties must arbitrate if their claims are based on the same facts underlying claims against a party to the agreement); *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000) (same).⁷ Stover’s claims arise by virtue of the fact that he jointly purchased the residence. Accordingly, he cannot seek to be a purchaser for purposes of his claims and then deny that the purchase agreement binds him.

Even if the agreement did not obligate Stover to arbitrate, which it does, the United States Supreme Court has stated unequivocally that “an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.” *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20, 103 S.Ct. 927, 939 (1983). Therefore, the lower

⁷ Because the FAA applies here, the question of whether a non-signatory is compelled to arbitrate is an issue of federal substantive law. *See Goer v. Jafco Indus., Inc.*, 395 F. Supp. 2d 308 (D.S.C. 2005) (federal principles governing arbitrability of non-signatories’ claims apply to arbitration agreements within the coverage of the FAA); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24.

court should have compelled Short to arbitrate regardless of whether Stover was similar obligated, which he was.

2. THE TERMS OF THE ARBITRATION PROVISIONS ARE NEITHER ONE-SIDED NOR OPPRESSIVE.

Respondents fail to point to any oppressive, one-sided terms justifying the lower court's decision. In *Lucey*, this Court reiterated that "this prong of the test [requires that] no reasonable person would make [the terms] and no fair and honest person would accept them." 2012 WL 1020984, at *10. While the *Simpson* agreement satisfied this prong, that agreement differs significantly from the arbitration agreement at issue here.⁸

"The arbitration provision in *Simpson* required the customer to waive her right to punitive damages and double and treble compensatory damages." *Herron*, 387 S.C. at 534, 693 S.E.2d at 399. Nothing in the parties' agreement prevents the arbitrator from awarding double or treble damages. (*See generally* R. p. 160). Nor does any provision prohibit the award of punitive damages. There are no limitations on damages whatsoever.

Far from being unconscionable, certain provisions favor Respondents. For instance, Respondents are permitted to select the venue and are not obligated to arbitrate in a location that would be potentially inconvenient to them. (Construction Industry Arbitration Rule R-12). Moreover, based on the terms of the provisions, an unbiased arbitrator will decide the parties' dispute 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. *McMullen v.*

⁸ *Simpson* represents the only located appellate case in South Carolina finding the terms of an arbitration agreement to be unduly one-sided and biased.

Meijer, Inc., 355 F.3d 485 (6th Cir. 2004) (finding AAA to be a neutral, non-profit public service organization that provides unbiased dispute resolution services); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335 (2d Cir. 1987) (same). Respondents are also expected to participate in the selection of the arbitrator, and the parties are to bear arbitration costs equally. (Construction Industry Arbitration Rules R-14, 53 and 54).

Nevertheless, Respondents argue that the arbitration provisions grossly favor Appellants by allowing them to pursue certain equitable relief in a judicial forum. (Respondents' Initial Brief pp. 14-15).⁹ This argument overlooks the fact that South Carolina law imposes no mutuality of remedy requirement. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365; *Lackey* 330 S.C. at 402, 498 S.E.2d at 905; *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 355 S.E.2d 286 (Ct. App. 1987) (allowing one party an exclusive remedy to seek specific performance compelling property purchase does not invalidate the agreement for lack of mutuality).

Unconscionability arises only when a party's reservation of judicial remedies completely undermines the other party's ability to arbitrate. *Simpson*, 373 S.C. at 32, 644 S.E.2d at 672 (arbitration agreement was unconscionable where dealer could repossess a vehicle and collect a monetary judgment from owner before the owner could even arbitrate its rights in the same vehicle). Allowing Appellants to file a motion for a preliminary injunction or specific performance in state court does not undermine

⁹ The Agreement states that Appellants "may bring an equitable judicial proceeding against [Respondents] for an injunction or specific performance..." (R. p. 160).

Respondents' ability to pursue their claims in arbitration.¹⁰ Nor does it preclude Respondents from raising defenses to such motion practice. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (upholding arbitration provision preventing party from pursuing judicial remedies, including counterclaims, where party is not prohibited from litigating in court any defense to judicial action).

“A party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the very least, identification of judicial relief not available in arbitration.” *Id.* Respondents have not identified any judicial relief not available in arbitration. Indeed, Respondents have not been “deprived of a remedy – they simply must seek their remedy through arbitration rather than through the judicial system.” *Munoz*, 343 S.C. at 342, 542 S.E.2d at 365. Thus, the limited judicial carve-out does not invalidate the arbitration agreement.

Respondents' argument that the contractual language in Paragraph 10 invalidates the arbitration provisions in Paragraph 7 is also without merit. Paragraph 10 states as follows:

¹⁰ The lower court's conclusion that the reservation of limited, equitable relief invalidates the arbitration provisions overlooks the realities of business risks. Appellants retained the option to use judicial relief to enforce a construction agreement through equitable means. Such an option is a business necessity where, as here, prospective homebuyers may seek to avoid purchasing the residence once construction is complete. Carving out an exception for injunctive relief is also necessitated by the fact that such relief could only be obtained through the courts. *See Lackey* 330 S.C. at 402, 498 S.E.2d at 905 (reversing trial court's determination that arbitration agreement was unconscionable where the relief reserved could only be obtained judicially).

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.

(R. p. 160). The lower court concluded that this merger clause excludes implied warranties and therefore renders the arbitration agreement unconscionable.

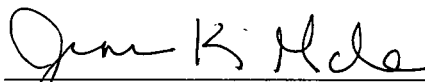
If the foregoing language disclaims warranties, as the lower court decided, it applies with equal force in judicial and arbitral forums. In other words, arbitrators and trial courts are required to enforce the disclaimers.¹¹ Thus, Respondents may obtain "the same relief in arbitration which is [or is not] available in a judicial setting," such that compelled arbitration does not prejudice Respondents. *Lackey*, 330 S.C. at 400-01, 498 S.E.2d at 905 (reversing trial court's invalidation of arbitration agreement where respondents failed to demonstrate that remedies available in court are foreclosed to them in arbitration).

In light of the foregoing, there is simply no basis to conclude that the arbitration provisions are oppressive, one-sided, and not geared toward achieving an un-biased decision by a neutral decision-maker. In conjunction with the evidence of meaningful choice in agreeing to arbitrate, these provisions are not an unconscionable waiver of any judicial rights and are therefore enforceable.

¹¹ To the extent the purported disclaimers are unenforceable, both the court and the arbitrator(s) are obligated to apply the relevant law. *See Green Tree Fin. Corp. v. Bazzell*, 539 U.S. 444, 452, 123 S.Ct. 2402, 2407 (2003) (noting "arbitrators are well-suited" to decide issues of contract interpretation); *Lackey*, 330 S.C. at 400, 498 S.E.2d at 905 (holding that courts are prohibited from viewing arbitration "as an inherently less beneficial form of dispute resolution").

CONCLUSION

For the reasons set forth in Appellants' Initial and Reply Briefs, the lower court erred by denying Appellants' Motion to Stay and Compel Arbitration.



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In The Court of Appeals

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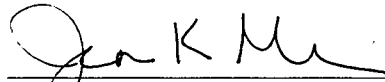
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR.



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CERTIFICATE AND PROOF OF SERVICE

On September 13, 2012, the undersigned hereby certifies that on she served a copy of the **Final Reply Brief of Appellants** on all Counsel of Record to this Appeal by United States Mail, postage prepaid, addressed as follows:

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