THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2018-CP-10-02152
Appellate Case No. 2019-000562

Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually, and on behalf of all others similarly situated, Respondents,

v.

WCB, LLC; 656 Coleman, LLC; and The Ryland Group, Inc., Defendants

Of which The Ryland Group, Inc. is the Appellant.

APPELLANT THE RYLAND GROUP, INC.'S INITIAL BRIEF

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STATEMENT OF THE CASE

The underlying lawsuit was commenced when Robert John Nutley ("Nutley") and Six Fifty Six Owners Association, Inc.'s (the "Association", collectively "Plaintiffs") filed a complaint (the "Complaint") against WCB, LLC ("WCB"), 656 Coleman, LLC ("656 Coleman"), and the Ryland Group, Inc. ("Ryland"), on July 5, 2016. (R. __). In the Complaint, Plaintiffs asserted claims against WCB, 656 Coleman, and Ryland for alleged damages arising out of the design, development, construction, repair, maintenance, and management of twelve (12) buildings comprised of fifty-two (52) total units on Coleman Boulevard in Mount Pleasant, South Carolina (the "Project"). (R. __).

On August 16, 2016, Ryland accepted service of process. Prior to Ryland filing a response to the Complaint, on September 1, 2016, WCB filed a motion to compel the Plaintiffs to arbitrate their claims against WCB pursuant to Article X of the Master Deed for the Project (the "Master Deed"). (R. __).

On October 17, 2016, Ryland filed its initial Answer. (R. __). Three days later, the circuit court held a hearing on WCB's Motion to Compel Arbitration.

On November 17, 2016, Ryland filed an Amended Answer to the Complaint and asserted cross-claims against WCB and 656 Coleman and third-party claims against the subcontractors for the Project. (R. __).

On January 3, 2017, the circuit court issued an order denying WCB's Motion to Compel Arbitration (the "January 3, 2017, Order"). (R. __). Less than ten (10) days later, on January 12, 2017, Ryland filed its Motion to Compel Arbitration arguing the Association and Nutley should be compelled to arbitrate their claims against Ryland pursuant to the arbitration clauses within the Master Deed and the purchase and sale agreement for Nutley's unit (the "Purchase and Sale

Agreement"). (R. __). Ryland filed an Amended Motion to Compel Arbitration on March 15, 2017. (R. __).

On April 25, 2017, a Consent Motion to Strike the Case from the active roster, pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, was filed. (R. __). On April 23, 2018, the case was restored to the active roster. (R. __). A hearing was not held on Ryland's Motion to Compel Arbitration before the case was stricken from the active roster.

On August 3, 2018, Ryland filed a Second Amended Motion to Stay the Case and Compel Arbitration as to Nutley, the Association and Co-Defendants under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the South Carolina Uniform Arbitration Act, S.C. CODE ANN. § 15-48-10, *et seq.* (R. __). Ryland filed a separate motion to Compel the third-party subcontractor defendants to arbitration.[1] (R. __).

The circuit court held a hearing on Ryland's Motion to Compel the Plaintiffs to Arbitration on September 21, 2018. (R. __). On October 15, 2018, the Court entered a Form 4 Order finding (1) the January 3, 2017, Order is the law of the case and (2) Ryland's Purchase and Sale Agreement is unconscionable. (R. __). On October 26, 2018, Ryland filed a Motion to Reconsider Order Denying the Motion to Compel Arbitration. (R. __).

While Ryland's Motion to Reconsider was pending, on December 27, 2018, the circuit court entered a Consent Order and Joint Stipulation of Dismissal with Prejudice (the "Joint Stipulation of Dismissal") which dismissed Plaintiffs' claims against WCB, 656 Coleman, and the subcontractors for the buildings that were constructed prior to Ryland's purchase of the

[1] The Motion to Compel the subcontractor defendants was dismissed without prejudice due, in part, to its interdependency with the Motion to Compel Plaintiffs to Arbitration. (R. __).

Project.[2] (R. __).

On March 5, 2019, the circuit court denied Ryland's Motion to Reconsider. (R. __). On April 4, 2019, Ryland filed its Notice of Appeal.

FACTS AND PROCEDURAL HISTORY

WCB was the initial developer for the Project. WCB incorporated the Association on July 14, 2006, and recorded the Master Deed for the Project on March 20, 2007. (R. __). WCB and an affiliated or successor entity, Southeastern Recapitalization Group, LLC, constructed buildings 400, 500, and 600 at the Project, and sold the units therein to individual owners. (R. __).

The Master Deed contains the following relevant terms comprising the agreement to arbitrate:

> Section 10.1 Agreement to Avoid Costs of Litigation and to Limit Right to Litigate Disputes. The Developer, Association and Owners (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes between and among themselves involving this Master Deed or the Association, and to avoid the emotion and financial cost of litigation. Accordingly, each Bound Party covenants and agrees that all claims, grievances and disputes (including those in the nature of counterclaims or cross-claims) between Bound Parties involving the Master Deed or the Association, including without limitation, claims, grievance or dispute arising out of or relating to the interpretation, application or enforcement thereof (collectively "Claims") . . . are subject to the procedures set forth in Section 10.3. . . .
>
> Section 10.3 Mandatory Procedures for Non-Exempt Claims. Any Bound Party having a Claim ("Claimant") against a Bound Party involving the Master Deed or the Association, or all or any combination of them ("Respondent"), other than an Exempt Claim under Section 10.2, will not file suit in any court or initiate any proceeding before any administrative tribunal seeking redress or resolution of the Claim until it has complied with the following procedures, and then only to enforce the results thereof. . . .

[2] The dismissal of WCB and 656 Coleman renders the issues related to compelling these parties to arbitration moot.

> (C) Final and Binding Arbitration. If the parties do not resolve the Claim through negotiation within 30 days of the date of the Notice (or within such other period as may be agreed upon the Parties [sic]) ("Termination Negotiation"), a Claimant will have 30 days within which to submit the Claim to binding arbitration under the auspices and the Commercial Arbitration Rules of the American Arbitration Association; and in accordance with the substantive and procedural laws of the state of South Carolina . . . .

(R. __).

WCB transferred the remainder of the property and assigned its developer rights under the Master Deed to 656 Coleman on December 30, 2008. (R. __). 656 Coleman then transferred the Project and assigned its developer rights under the Master Deed to Ryland. (R. __). Ryland—through subcontractors—constructed buildings 100 through 300 and 700 through 1200. (R. __).

On May 21, 2013, Ryland entered into a Purchase and Sale Agreement with Todd and Kimberly Neison (the "Purchase and Sale Agreement") for Unit 204. (R. __). Section 13 the Purchase and Sale Agreement—the arbitration provision—states the following:

> **13. ARBITRATION: ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO (A) THIS AGREEMENT, (B) THE PROPERTY, (C) YOUR PURCHASE OF THE PROPERTY, (D) OUR CONSTRUCTION OF THE HOME, OR (E) ANY PERSONAL INJURY OR PROPERTY DAMAGE THAT YOU ALLEGE TO HAVE SUSTAINED ON THE PROPERTY, SHALL FIRST BE SUBMITTED TO MEDIATION AND, IF NOT SETTLED DURING MEDIATION, SHALL BE RESOLVED BY BINDING ARBITRATION UNDER THE FEDERAL ARBITRATION ACT OR SIMILAR STATE STATUTE, AND NOT BY A COURT OF LAW.**

(R. __).

Section 21 of the Purchase and Sale Agreement—Home Owner's Warranty—states that the Ryland Home Warranty Program Insured Limited Warranty is the only warranty being issued

by Ryland to the purchaser of Unit 204. (R. __). Section 21 of the Purchase and Sale Agreement creates the express warranty for the individual units and acknowledges that the buyer agrees and accepts the Ryland Home Warranty Program Insured Limited Warranty as the only warranty from Ryland. (R. __). Section 25 of the Purchase and Sale Agreement incorporates the Ryland Home Warranty Program Insured Limited Warranty into the Purchase and Sale Agreement. (R. __). Section 23 of the Purchase and Sale Agreement contains a merger clause which states "[t]here are no other oral or written agreements or representations, directly or indirectly connected with this Agreement." (R. __).

The Neisons executed a Rider to the Agreement of Sale, on May 21, 2013, expressly acknowledging that they received a copy of the Ryland Home Warranty Insured Limited Warranty. (R. __).

The construction of the Neison's Unit (Unit 204) was completed, and the Certificate of Occupancy was issued on December 20, 2013. The same day, the Neison's sold Unit 204 to Jim Speilberger. On March 14, 2014, Mr. Spielberger sold Unit 204 to Nutley.[3] (R. __).

On or about December 1, 2014, Nutley submitted warranty repair requests concerning Unit 204 to Ryland. (R. __). On December 2, 2014, Ryland subcontractors, Charlotte Flooring, Inc., AC Construction, and East Coast Wall Systems, Inc., responded to the warranty repair

[3] Nutley purports to represent the unit owners as a class representative; however, Nutley, as a subsequent purchaser, is not a signatory to a Ryland Purchase and Sale Agreement while many of the other owners and putative class members are original purchasers who did sign the Purchase and Sale Agreement for their unit. In this way, among others, Nutley is not typical of other purported class members and is incapable of representing the proposed class of unit owners. The strategic selection of a unit owner who is a subsequent purchaser does not void the other unit owners express agreements to arbitrate their claims against Ryland. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012) ("South Carolina has recognized 'a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint... because this would nullify the rule requiring arbitration.'" (quoting *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993)).

requests and repaired Nutley's Unit. (R. __). On that date, Nutley acknowledged "[a]ll items have been completed to my satisfaction and/or have been addressed in writing." (R. __).

Between December 2013 and March 2016, Ryland transferred the units constructed by its subcontractors to the various individual unit owners. On March 22, 2016, Ryland turned over control of the Association to the unit owners. (R. __).

On July 5, 2016, Plaintiffs filed this action against WCB, 656 Coleman, and Ryland. Plaintiffs alleged various deficiencies in the construction of the Project and asserted claims for negligence, breach of express and implied warranties, breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act, and a declaratory judgment. (R. __).

Ryland accepted service of process in this suit on August 16, 2016. Pursuant to a pleading extension, Ryland did not serve its responsive pleading until October 17, 2016. (R. __). Between the time Ryland accepted service and filed its answer, on August 30, 2016, WCB moved to compel Plaintiffs to arbitrate their claims against WCB pursuant to the Master Deed. (R. __). On October 20, 2016, a hearing was held before the Honorable Roger M. Young, Sr. on WCB's Motion to Compel Arbitration. Ryland did not support or oppose the motion at that time, as Ryland had only filed its Answer three (3) days prior.

On January 3, 2017, the circuit court denied WCB's motion to compel Plaintiffs to arbitrate their claims against WCB. (R. __). On January 12, 2017—less than ten (10) days after the issuance of the circuit court's order on WCB's Motion to Compel Arbitration—Ryland filed its own separate motion to compel arbitration of the claims against it. (R. __). Specifically, Ryland asserted that Plaintiffs are required to arbitrate their claims against Ryland pursuant to the arbitration provisions in the Purchase and Sale Agreement and the Master Deed. (R. __).

On August 3, 2018, Ryland filed a Second Amended Motion to Stay the Case and

Compel Arbitration as to Nutley, the Association and Co-Defendants under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the South Carolina Uniform Arbitration Act, S.C. CODE ANN. § 15-48-10, *et seq.* ("Ryland's Motion to Compel Arbitration"). (R. __). Again, Ryland asserted that Plaintiffs are required to arbitrate their claims against Ryland pursuant to the Master Deed and the Purchase and Sale Agreement. (R. __).

On September 18, 2018, after all defendants had answered the Complaint and while Ryland's Motion to Compel Arbitration was pending, Plaintiffs attempted unilaterally to dismiss their claims for breach of express warranty, without prejudice, pursuant to Rule 41, SCRCP. (R. __). Plaintiffs did not seek or obtain the consent of Ryland or the other parties when they attempted to have this claim dismissed, and no order dismissing the claims was ever entered by the circuit court. (R. __).

On September 21, 2018, a hearing was held on Ryland's Motion to Compel Arbitration. (R. __). On October 15, 2018, the circuit court entered a Form 4 Order finding "Judge Young's Order is the Law of the Case and Ryland's Purchase Agreement is unconscionable." (R. __). On October 26, 2018, Ryland timely filed a Motion to Reconsider Order Denying the Motion to Compel Arbitration. (R. __). Ryland's Motion to Reconsider requested the circuit court reconsider its finding that the January 3, 2017, Order is the law of the case and Ryland's Purchase Agreement is unconscionable on several grounds. (R. __). Ryland's Motion to Reconsider also requested the circuit court rule on several issues that were previously raised to the circuit court, but remained unaddressed in the Order denying the Motion to Compel Arbitration. (R. __).

On March 5, 2019, the circuit court denied Ryland's Motion to Reconsider. (R. __). On April 4, 2019, Ryland filed its Notice of Appeal.

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination and is subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (internal quotation marks and citation omitted). In other words, there is a presumption in favor of the enforceability and application of arbitration agreements to disputes, and the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013); *see also AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986).

ARGUMENT

The circuit court erred in denying Ryland's Motion to Compel Arbitration. A valid and enforceable agreement to arbitrate exists and Plaintiffs' claims fall within the scope and coverage of that agreement to arbitrate.

The circuit court's ruling on a motion to compel arbitration filed by another defendant, WCB, is not the law of the case and does not apply to determine the outcome of Ryland's Motion to Compel Arbitration of the claims against it. The circuit court's order denying Ryland's Motion to Compel Arbitration based upon the conclusion that a prior circuit court order is the law of the case is an error of law.

The circuit court's ruling that "Ryland's Purchase Agreement is unconscionable" as a basis for denying Ryland's Motion to Compel Arbitration is an error of law. In determining

whether Ryland is entitled to compel arbitration of Plaintiffs' claims, the circuit court's inquiry must be limited to the terms of the Purchase and Sale Agreement's arbitration provision specifically. The circuit court may not determine the enforceability (conscionability) of the arbitration provision by assessing and testing the other terms of the Purchase and Sale Agreement, or the entirety of the Purchase and Sale Agreement. Denial of a motion to compel arbitration based on an analysis of whether the entire Purchase and Sale Agreement is unconscionable, as opposed to whether the arbitration provision on its own is unconscionable, is an error of law.

The Court first should correct these errors and reverse the circuit court's order. Next, the Court should consider the merits of Ryland's remaining arguments and compel Plaintiffs to arbitrate their claims against Ryland pursuant to the valid and enforceable arbitration provisions in the Purchase and Sale Agreement and the Master Deed.[4]

I. The circuit court erred in denying Ryland's Motion to Compel Arbitration based on a finding that the January 3, 2017, Order is the law of the case.

The circuit court erred in finding the circuit court's January 3, 2017, Order (which ruled on the other defendant's motion to compel arbitration of the claims against it) is the law of the case. The law of the case doctrine only applies after a case has been appealed and Ryland was not bound immediately to appeal the January 3, 2017, Order denying another party's motion to compel arbitration.

"[T]he law of the case doctrine . . . applies only to subsequent proceedings in the same litigation **following an appellate decision**." *Lifschultz Fast Freight, Inc. v. Haynsworth,*

[4] In its Rule 59(e) Motion to Alter or Amend, Ryland specifically enumerated the arguments that it raised to the circuit court in favor of compelling Plaintiffs to arbitration but that the circuit court failed to address. Therefore, these issues are properly preserved for appellate review. (R. __); *see Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion.").

Marion, McKay & Guerard, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999) (emphasis added). "[O]rdinarily an interlocutory order which merely decides some point or matter essential to the progress of the [case], collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (citation omitted). South Carolina law allows, but does not require, an appeal from an order denying a motion to compel arbitration. *See* S.C. CODE ANN. §15-48-200 ("An appeal *may* be taken from . . . [a]n order denying an application to compel arbitration." (emphasis added)). Under South Carolina law such an order remains interlocutory and is not final for appeal purposes. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842 (Ct. App. 1999) (stating that an order favoring litigation over arbitration is interlocutory).

The Fourth Circuit Court of Appeals addressed the issue of whether the doctrine of the law of the case applies to a party's failure to immediately appeal the denial of a motion to compel arbitration in *Choice Hotels International, Inc. v. Patel*, 236 F. App'x 868, 870 (4th Cir. 2007). In *Choice Hotels*, 236 F. App'x at 869, the defendant's initial motion to compel arbitration was denied in November 2004. No appeal was taken from the denial. The defendant filed a subsequent motion to compel arbitration seven months later. *Id.* at 869-70. The district court denied the second motion to compel arbitration on the grounds that the November 2004 order (denying the original motion to compel arbitration) was the law of the case. *Id.* at 870. On appeal, the Fourth Circuit Court of Appeals found that the district court's initial order denying the defendant's motion to compel arbitration did not bind the defendant on the issue of arbitrability under law of the case doctrine. The court recognized that the initial order was an immediately appealable interlocutory order pursuant to the Federal Arbitration Act, 9 U.S.C. §

16(a)(1), *id.*; however, the court noted that the initial order denying the motion to compel arbitration was immediately "appealable because Congress, notwithstanding [the order's] interlocutory character, had made it appealable." *Id.* (citation omitted). This statutory grant of a right to appeal did not alter the interlocutory character of the order. Thus, the court found that the defendant could have appealed the initial order denying the motion to compel arbitration "but [he was] not bound to." *Id.* In the end, the court found the law of case doctrine was inapplicable in the context of an interlocutory appeal of a denial of a motion to compel arbitration because "it requires a final judgment to sustain the application of the rule of the law of the case." *Id.* (citation omitted).

Similar to the Federal Arbitration Act, the South Carolina Arbitration Act permits, but does not require, the immediate appeal of an interlocutory an order denying a motion to compel arbitration. S.C. CODE ANN. § 15-48-200. However, the mere fact that the South Carolina Arbitration Act allowed an appeal from the January 3, 2017, Order denying WCB's motion to compel arbitration does not deprive the order of its fundamental interlocutory nature. *See Towles*, 338 S.C. at 35, 524 S.E.2d at 842 (acknowledging the interlocutory nature of an order denying a motion to compel arbitration). As such, the January 3, 2017, Order is not a final unappealed order that is binding upon all of the parties pursuant to the law of the case doctrine. *See Lucius v. Du Bose*, 114 S.C. 375, 103 S.E. 759, 761 (1920) ("[P]reliminary findings, on interlocutory motions, are not final or conclusive, and do not bind the parties or the court at the trial of the case on its merits."). Therefore, no final judgment has been entered in this case on the issue of arbitrability, and the law of the case doctrine is inapplicable without such a final order. In light of the foregoing, the circuit court erred in its application of the law of the case doctrine as the basis to deny Ryland's Motion to Compel Arbitration.

Accordingly, the Court should reverse the circuit court's finding that the circuit court's January 3, 2017, Order is the law of the case.[5]

II. The circuit court erred in denying Ryland's Motion to Compel Arbitration based on a finding that the Purchase and Sale Agreement, as a whole, is unconscionable.

In denying Ryland's Motion to Compel Arbitration, the circuit court stated merely that "Ryland's Purchase Agreement is unconscionable." The circuit court did not identify the specific provisions or terms found to be unconscionable, or describe in any way the standard applied to determine unconscionability. (R. __). Despite being asked to reconsider and clarify its ruling, the circuit court said nothing more. (R. __).

In this case, with no specific findings or explanation, it must be concluded that the circuit court reached a broad conclusion that the Ryland Purchase and Sale Agreement, taken as a whole, was somehow unconscionable and decided that finding alone justified refusing to enforce the arbitration provision in the Agreement. (R. __). There is no analysis, and the circuit court made no finding that the specific arbitration provision in the Purchase and Sale Agreement—self-contained in Section 13 of the Agreement—is itself unconscionable. (R. __). Thus, the circuit court erred as a matter of law in denying the Motion to Compel Arbitration based on a ruling that the Purchase and Sale Agreement—as a whole—is unconscionable.

A. The *Prima Paint* doctrine recognizes that when a court is reviewing an arbitration provision in an agreement, it is required to limit its review to the

[5] Ryland's arguments in favor of compelling Plaintiffs to arbitration did not require one circuit court judge to overrule a prior order issued by another circuit court judge. Rather, Ryland's Motion to Compel Arbitration raised—for the first time—the argument that Plaintiffs must be compelled to arbitrate their claims against Ryland pursuant to the Master Deed's arbitration provision and the arbitration provision in the Purchase and Sale Agreement. Ryland is a different party from WCB and Ryland stands in a different position in relation to the Master Deed. *See Binkley v. Burry*, 352 S.C. 286, 295, 573 S.E.2d 838, 843 (Ct. App. 2002) (holding one circuit court judge did not overrule another circuit court judge where they ruled on related but distinguishable issues). Due process and fundamental fairness entitle Ryland to have a court properly consider the issues raised in its Motion to Compel Arbitration without an undue adherence to the circuit court's prior erroneous ruling on WCB's Motion to Compel Arbitration.

arbitration provision alone and not the conscionability of the entire agreement.

The *Prima Paint* doctrine states that when reviewing an arbitration provision in an agreement, a court is required to consider the language of that provision alone to determine the arbitration provision's force and effect. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). A party contesting the validity of a contract's arbitration provision "must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (emphasis in original); *see S.C. Public Service Authority v. Grant W. Coal (Ky.), Inc.*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (adopting the *Prima Paint* doctrine in South Carolina). "Similarly, in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." *Id.* "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 5-6 (Ct. App. 2008).

The South Carolina Supreme Court, in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016), reiterated the *Prima Paint* doctrine and held

> to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole. Thus, for example, a party must allege that the arbitration agreement is unconscionable, not that the entire contract is unconscionable. Similarly, in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.

(internal citations omitted).

Similarly, in *One Belle Hall Property Owners Association, Inc. v. Trammell Crow*

Residential Company, 418 S.C. 51, 63, 791 S.E.2d 286, 293 (Ct. App. 2016), the court further acknowledged that, in accordance with the *Prima Paint* doctrine, "an arbitration agreement is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole."

Pursuant to the *Prima Paint* doctrine, it was an error of law for the circuit court to find the arbitration provision within the Purchase and Sale Agreement is unconscionable based upon terms outside of Section 13 (the self-contained arbitration agreement) of the Purchase and Sale Agreement. (R. __). The record is clear that the circuit court was presented with arguments by Plaintiffs that sections 16, 21, and 23 of the Purchase and Sale Agreement, as well as the terms of the separate and additional Ryland Home Warranty, were the unconscionable provisions. The circuit court was not even presented any argument that Section 13 of the Purchase and Sale Agreement—the arbitration provision—was, itself, unconscionable. Consideration of the enforceability of any section of the Purchase and Sale Agreement other than the self-contained arbitration provision (Section 13) violates the *Prima Paint* doctrine.

The other sections of the Purchase and Sale Agreement are separate from and outside of the arbitration provision. (R. __). Therefore, the circuit court erred in denying the Motion to Compel Arbitration based upon a finding that the "Purchase and Sale Agreement is unconscionable" because the issue of whether the entire Purchase and Sale Agreement is unconscionable is not a valid or proper determining factor in assessing the enforceability of the arbitration agreement. Consideration of other terms of the Purchase and Sale Agreement to determine the validity of the arbitration provisions violated the *Prima Paint* doctrine. Accordingly, the Court should find the circuit court violated the *Prima Paint* doctrine and

reverse the circuit court's finding that the Motion to Compel Arbitration may be denied on the grounds that Purchase and Sale Agreement is unconscionable.

III. The circuit court erred in failing to compel Plaintiffs to arbitrate their claims against Ryland pursuant to the arbitration provision in the Purchase and Sale Agreement.

Ryland is entitled to an order compelling Plaintiffs to arbitrate their claims against Ryland because (1) the Purchase and Sale Agreement contains a valid and enforceable arbitration provision; (2) Plaintiffs, whether or not they are signatories to the Purchase and Sale Agreement, seek to obtain direct benefits from and to enforce the Purchase and Sale Agreement's specific express warranty and, therefore, they are estopped from denying or avoiding application of the Purchase and Sale Agreement's arbitration provision; and (3) Plaintiffs' claims against Ryland are plainly within the scope or coverage of the Purchase and Sale Agreement's arbitration provision. Additionally, Plaintiffs attempt, retroactively, to avoid the Purchase and Sale Agreement's arbitration provision by trying to manipulate the pleadings to make an after-the-fact withdrawal, without prejudice, of their express warranty claim is ineffective and cannot be successful as a ploy to avoid the obligation to arbitrate their claims. (R. __).

A. The Arbitration Provision in the Purchase and Sale Agreement is valid and enforceable, and not unconscionable.

The Purchase and Sale Agreement's arbitration provision is valid and enforceable and does not contain oppressive terms that would render its application unconscionable.

Under South Carolina law, the test for establishing unconscionability consists of two elements: (1) "the absence of meaningful choice on the part of one party due to one-sided contract provisions" and (2) "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007) (citing *Carolina Care Plan, Inc. v. United*

HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). Both elements must be present for the arbitration provision to be unconscionable. *Id.*

In analyzing whether the Purchase and Sale Agreement's arbitration provision is unconscionable, the Court is limited to review and consideration of the Purchase and Sale Agreement's specific arbitration provision alone—Section 13—which states the following:

> **13. ARBITRATION: ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO (A) THIS AGREEMENT, (B) THE PROPERTY, (C) YOUR PURCHASE OF THE PROPERTY, (D) OUR CONSTRUCTION OF THE HOME, OR (E) ANY PERSONAL INJURY OR PROPERTY DAMAGE THAT YOU ALLEGE TO HAVE SUSTAINED ON THE PROPERTY, SHALL FIRST BE SUBMITTED TO MEDIATION AND, IF NOT SETTLED DURING MEDIATION, SHALL BE RESOLVED BY BINDING ARBITRATION UNDER THE FEDERAL ARBITRATION ACT OR SIMILAR STATE STATUTE, AND NOT BY A COURT OF LAW.**
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> **THE MEDIATION AND THE ARBITRATION SHALL BE CONDUCTED BY THE AMERICAN ARBITRATION ASSOCIATION (AAA) UNDER THE AAA CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES UNLESS THE PARTIES AGREE OTHERWISE. THE DECISION OF THE ARBITRATOR SHALL BE BASED ON APPLICABLE LAW AND BE FINAL AND BINDING ON YOU AND US AND JUDGMENT UPON THE AWARD MAY BE ENFORCED IN ANY COURT HAVING JURISDICTION.**
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> **IN THE EVENT THAT THE PROVISIONS OF THIS SECTION ARE DETERMINED TO BE UNENFORCEABLE FOR ANY REASON, WE AND YOU AGREE THAT ANY TRIAL OF THE ISSUES RELATING TO THIS AGREEMENT OF SALE SHALL BE TRIED ONLY TO THE COURT AND NOT TO A JURY. YOU EXPRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY.**
>
> **THE RIGHTS AND OBLIGATIONS SET FORTH IN THIS SECTION SHALL SURVIVE CLOSING OR ANY EARLY TERMINATION OF THIS AGREEMENT OF SALE. WE**

SHALL HAVE THE OPTION TO INCLUDE OUR SUBCONTRACTORS, SUPPLIERS AND WARRANTY COMPANY AS PARTIES IN THE MEDIATION AND ARBITRATION.

(R. __).

There are no terms within this arbitration provision that would render it unconscionable. (R. __). The agreement to apply the American Arbitration Association's Construction Industry Arbitration Rules and Mediation Procedure is not unconscionable. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 613, 586 S.E.2d 581, 585 (2003) (finding the fees associated with compelling arbitration pursuant to the AAA's Construction Industry Arbitration Rules are not unconscionable). Jury trial waivers are not, as a matter of law, unconscionable terms in an arbitration provision. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91-94, 749 S.E.2d 139, 151-53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 ("The loss of the right to a jury trial is an obvious result of arbitration."). The Purchase and Sale Agreement's arbitration provision does not contain any impermissible limitations on statutory remedies. *See Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758 (finding a limitation of punitive damages did not render an arbitration provision unconscionable); *Gladden v. Boykin*, 402 S.C. 140, 144-45, 739 S.E.2d 882, 884 (2013) (holding that limitation of liability and exculpation clauses are routinely entered into in South Carolina and do not render an arbitration provision unconscionable). The arbitration provision does not contain any limitations related to discovery that would render the provision unconscionable. *See Lucey v. Meyer*, 401 S.C. 122, 143, 736 S.E.2d 274, 285 (Ct. App. 2012) (stating that limited discovery, standing alone, is not a sufficient reason to invalidate an arbitration agreement).

In sum, review of the Purchase and Sale Agreement's arbitration provision demonstrates that there are no unfair or one-sided provisions. *See York*, 406 S.C. at 89-90, 749 S.E.2d at 150-51 (finding a provision in an arbitration agreement permitting only one of the parties to the contract to maintain the right to continue to seek judicial remedies was an unfair and one-sided provision). The entirety of the arbitration provision is designed to foster a fair and impartial procedure for dispute resolution.

In addition to the lack of unconscionable terms, the Purchase and Sale Agreement's arbitration provision contains a severability provision. (R. __). Thus, if the Court were to find that an individual term within the Purchase and Sale Agreement's arbitration provision is unconscionable, then the proper recourse would be to strike that provision from the arbitration provision and enforce the remainder. *See Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9 (stating that the South Carolina Supreme Court "would generally encourage severability of an unconscionable provision"); S.C. CODE ANN. § 36-2-302 (permitting the court to sever an unconscionable term and enforce the remainder of the contract). However, application of the severability provision is unnecessary in this case due to the fact that the Purchase and Sale Agreement's arbitration provision does not contain any unconscionable terms.

Accordingly, the Court should find the Purchase and Sale Agreement's arbitration agreement is valid and enforceable because it is not unconscionable. It does not contain any one-sided or oppressive terms.

B. Plaintiffs are estopped from avoiding the application of the arbitration provision in the Purchase and Sale Agreement.

The doctrine of equitable estoppel bars Plaintiffs from claiming they are not bound by the Purchase and Sale Agreement's arbitration provision while they attempt to enforce the express warranty provision set forth in and arising from the Purchase and Sale Agreement.

"[A] party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)). "Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Id.* (quoting *Int'l Paper Co.*, 206 F.3d at 416-17).

"A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause.'" *Pearson*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (quoting *Int'l Paper*, 206 F.3d at 418). "A benefit is direct if it flows directly from the agreement." *Wilson v. Willis*, 426 S.C. 326, 343, 827 S.E.2d 167, 176 (2019). "'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'" *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper*, 206 F.3d at 418).

In the case at bar, Plaintiffs' claims are like those at issue in *Pearson,* 400 S.C. at 290, 733 S.E.2d at 601. Plaintiffs assert a claim for breach of express warranty which arises solely from the Purchase and Sale Agreement and must be determined by reference to it. As recognized by the court in *Pearson*, and reaffirmed by the court in *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176, such a circumstance defines a situation for application of "direct benefits estoppel."

The court in *Pearson*, 400 S.C. at 296-97, 733 S.E.2d at 605, applied the direct benefits estoppel framework to find a doctor (Pearson) was equitably estopped from asserting that, as a

nonsignatory, he was not bound by the arbitration provision in a contract between a hospital and a medical professional placement company (Locum). The court found that although Pearson was a nonsignatory to the contract between the hospital and Locum, "he received a benefit due to the contract, in that he was able to work at the [h]ospital and receive payment for his work." *Id.* at 296, 733 S.E.2d at 605. The court stated that "[i]f not for that contract, then Dr. Pearson would have had to make separate arrangements with the [h]ospital in order to work there" and Pearson knowingly accepted the benefits of the contract between the hospital and Locum. *Id.* at 296-297, 733 S.E.2d at 605. The court found that in Pearson's complaint he was either seeking a benefit under the hospital's contract with Locum or he was attempting to hold the hospital accountable under his contract with Locum. *Id.* at 297, 733 S.E.2d at 605. Therefore, the *Pearson* court held, and the *Wilson* court reiterated and confirmed, that direct benefits estoppel applied in such circumstances and barred Pearson from avoiding the arbitration clause in the contract between the hospital and Locum. *Id.*

The court in *Wilson*, 426 S.C. at 340, 827 S.E.2d at 175, contrasted the proper application of direct benefits estoppel applied in *Pearson* with a different fact pattern which it said constituted only indirect benefit. In analyzing the Insurers' motion to compel arbitration in the fact pattern before it, the court in *Wilson* distinguished between a party seeking to obtain direct benefits and a party seeking to obtain indirect benefits from a contract. *Id.* at 342-44, 827 S.E.2d at 176-77. Under the facts of the case in *Wilson*, the court found that the nonsignatory was not making a claim under or directly exploiting terms of the agreement which also contained the arbitration clause. Only the relationship of the parties arising from the agreement was relevant to the claims by the nonsignatories in *Wilson*, not actual provisions of the agreement. In such circumstances, the *Wilson* court found that direct benefits estoppel did not apply. However, the

court stated that "a benefit is direct if it flows directly from the agreement." *Id.* at 343, 827 S.E.2d at 176. The court noted that the Insurers in the *Wilson* case did not even argue that the agency agreement, by its express terms, was applicable to other parties, or the plaintiffs at the time the plaintiffs purchased their insurance policies. Moreover, the plaintiffs did not assert a claim for breach of the agency agreement (in fact, the plaintiffs were not even aware of the existence of the contract between the Insurers and Southern Risk until the Insurers filed their motion to compel arbitration). *Id.* at 342, 827 S.E.2d at 176.

Unlike the plaintiffs in *Wilson*, the Plaintiffs in the case at bar were aware of the Purchase and Sale Agreement prior to filing the Complaint. The Plaintiffs previously exploited (and thereby assumed) the obligations of the Purchase and Sale Agreement, as evidenced by the fact that prior to filing the action they made multiple warranty repair requests to Ryland pursuant to the express warranty in the Purchase and Sale Agreement. (R. __). Additionally, Plaintiffs sued specifically for breach of express warranty—which warranty was only stated in, and made part of the unit purchase through the Purchase and Sale Agreement. (R. __). Plaintiffs, like the doctor in *Pearson*, seek to obtain direct benefits from the Purchase and Sale Agreement through their claim against Ryland for breach of express warranty. As the basis for their claim for "Breach of Warranty," Plaintiffs allege:

> 76. The design, construction sale, and repair of 656 Coleman Townhomes came with express and implied warranties that work would be performed in a careful, diligent and workmanlike manner. . . .

(R. __) (emphasis added).

Plaintiffs have specifically sued upon, and seek to enforce, the "express" warranty. (R. __). Ryland's express warranty arises specifically and exclusively from the terms of the Purchase and Sale Agreement. The only express warranty issued by Ryland on Unit 204

(Nutley's property), or any unit, was created by the Purchase and Sale Agreement. In section 21 of the Purchase and Sale Agreement, Ryland agrees that when the purchaser pays the balance of the total purchase price and the settlement costs, Ryland will register the purchaser with the Ryland Home Warranty Program Insured Limited Warranty. (R. __). This section of the Purchase and Sale Agreement establishes the terms for the creation of the only express warranty for the Property. Section 21 of the Purchase and Sale Agreement also contains an agreement between Ryland and the purchaser of Unit 204 (Nutley's Property), or any unit, that the warranty created pursuant to this section is the only express warranty issued by Ryland for the property. (R. __).

When Plaintiffs attempt to enforce, and specifically assert a claim under the express warranty, they seek to take direct benefit from the Purchase and Sale Agreement. When Plaintiffs seek to take direct benefits of the Purchase and Sale Agreement, and to enforce the terms of the express warranty contained therein, they must be bound by all of the terms within the Purchase and Sale Agreement—including the arbitration provision. *See One Belle Hall Prop. Owners Ass'n, Inc.*, 418 S.C. at 65, 791 S.E.2d at 294 (enforcing an arbitration provision in a roof shingle warranty against a condominium owners' association that argued it did not agree to the arbitration provision in the warranty); *Pearson*, 400 S.C. at 295, 733 S.E.2d at 604 ("[A] party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage."). This estoppel applies regardless of whether Plaintiffs are themselves signatories to the Purchase and Sale Agreement. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016) ("[A] party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be

enforced to benefit him." (citation omitted)). To hold otherwise would be to disregard the doctrine of direct benefits estoppel and permit Plaintiffs to enforce the terms of the express warranty created by and contained in the Purchase and Sale Agreement while simultaneously permitting them to avoid compliance with the other terms of the Purchase and Sale Agreement—including the arbitration provision. Therefore, Plaintiffs are equitably estopped from avoiding the application and enforcement of the arbitration provision in the Purchase and Sale Agreement.

C. Plaintiffs' claims are within the scope and coverage of the Purchase and Sale Agreement's Arbitration Provision.

All of Plaintiffs' claims are within the broad scope of the Purchase and Sale Agreement's arbitration provision. That arbitration provision expressly applies to

> **ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO (A) THIS AGREEMENT, (B) THE PROPERTY, (C) YOUR PURCHASE OF THE PROPERTY, (D) OUR CONSTRUCTION OF THE HOME, OR (E) ANY PERSONAL INJURY OR PROPERTY DAMAGE THAT YOU ALLEGE TO HAVE SUSTAINED ON THE PROPERTY.**

(R. __).

These are the controversies, claims and disputes asserted by Plaintiffs in this litigation. "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Id.* (citation omitted).

"[E]ven if the court finds that a claim is outside the scope of the arbitration clause, the clause may still apply." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 492, 689 S.E.2d 602, 604 (2010). "Both the United States Court of Appeals for the Fourth Circuit and our supreme court 'have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (citation omitted). Thus, "[a] broadly-worded arbitration clause 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 contained." *Partain*, 386 S.C. at 492, 689 S.E.2d at 604 (quoting *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119).

When an arbitration provision in a contract is written to apply to all disputes "arising out of or relating to," that arbitration provision is deemed by the law to be broad and "capable of an expansive reach." *Landers*, 402 S.C. at 109, 739 S.E.2d at 213-14 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir.1996)). "The scope of the clause 'does not limit arbitration to the literal interpretation or performance of the contract[, but] embraces every dispute between the parties having a significant relationship to the contract.'" *Id.* (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988) (alteration in original)); *see also Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007) (stating that a broadly-worded arbitration agreement applies "to disputes in which a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained").

South Carolina courts have frequently interpreted broad arbitration provisions to encompass common law tort claims and claims for violation of statutes, such as the South

Carolina Unfair Trade Practices Act. *See Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7, 791 S.E.2d 128, 131 (2016) (compelling to arbitration a residential home purchaser's claim for fraud pursuant to the broad arbitration provision in the warranty incorporated into the purchase and sale agreement); *Landers*, 402 S.C. at 111, 739 S.E.2d at 214-15 (compelling the plaintiff's defamation claim to arbitration because the plaintiff's claim had a significant relationship to his employment agreement which contained a broad arbitration provision); *Partain*, 386 S.C. at 490, 689 S.E.2d at 603 (compelling a claim for violation of the South Carolina Unfair Trade Practices Act to arbitration pursuant to an arbitration provision in an agreement to purchase a used truck).

The arbitration provision set forth in Section 13 of the Purchase and Sale Agreement encompasses all claims arising out of or in any way related the construction project and the property at issue in this case. It is undeniably a broad arbitration provision. (R. __).

The Complaint explicitly states that this matter "arises out of the design, development, construction, repair and sale of 656 Coleman Townhomes. (R. __). Plaintiffs allege that Ryland and its co-defendants "had a duty to design, develop, construct, and repair 656 Coleman Townhomes in a workmanlike manner with suitable materials and free from all defects." (R. __). Nutley's allegations in support of his claim to represent a class of unit purchasers demonstrates that Nutley's, and the purported class, claims arise out of or bear a significant relationship to the Purchase and Sale Agreement. (R. __). These common legal and factual issues include the following:

> (a) Whether Defendants negligently designed, developed constructed and/or repaired 656 Coleman Townhomes;
>
> (b) Whether the construction and/or repair of 656 Coleman Townhomes was defective; . . .

(d) Whether Defendants know or should have known their repairs were defective;

(e) Whether Defendants failed to disclose to purchasers and/or homeowners the defects and/or unsuccessful repairs.

(R. __).

Review of the Complaint evidences that all of Plaintiffs' claims are directly related to, or arise out of, (1) the Purchase and Sale Agreement; (2) the property; (3) the purchase of the Property; (4) the construction of the property; or (5) alleged damage to the property. Therefore, the Court must find that Plaintiffs' claims are all within the scope and coverage of the Purchase and Sale Agreement's broad arbitration provision, and are subject thereto. Accordingly, Plaintiffs must be compelled to arbitrate their claims against Ryland.

D. Plaintiffs may not avoid application of the arbitration agreement by an after-the-fact unilateral—and without the consent of Ryland—attempt to dismiss the claim for breach of express warranty, without prejudice.

Plaintiffs, in what can only be recognized as a tacit acknowledgement that their claim for breach of the express warranty in the Purchase and Sale Agreement brings them within the coverage of the arbitration obligation, attempted to manipulate the pleadings after-the-fact, to voluntarily withdraw, without prejudice, their express warranty claim. (R. __). However, this blatant attempt to manipulate the situation, and to avoid the obligation to arbitrate by an after-the-fact effort to withdraw the express warranty claim, without prejudice, does not alter the obligation to arbitrate. *See R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 164 (4th Cir. 2004) ("Our conclusion does not mean that a nonsignatory may use artful pleading to avoid arbitration when 'in substance . . . [it] is attempting to hold [a party] to the terms of [an] agreement.'" (citing *Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir. 1981)). The Complaint unequivocally asserts a claim for breach of the express warranty in the Purchase and Sale Agreement. (R. __). After Ryland (and the other

defendants) had answered and already moved to compel arbitration, Plaintiffs filed—without seeking or obtaining consent from any of the defendants—a purported Rule 41 motion to dismiss the express warranty claim without prejudice. (R. __). No order actually dismissing the express warranty claim has ever been entered.

Moreover, Rule 41 of the South Carolina Rules of Civil Procedure does not permit a unilateral dismissal without prejudice under the attending circumstances. After Ryland and the co-defendants have answered the Complaint—as is the circumstance in this case—Plaintiffs may only effectively dismiss a claim by obtaining a stipulation of dismissal signed by all parties who have appeared in the case, or by obtaining an order of the court upon such terms and conditions as are proper. Neither of the Rule 41 requirements or conditions have been satisfied in this case.

Since the requirements of Rule 41 have not been satisfied, Plaintiffs are bound to their Complaint, which unequivocally alleges a claim against Ryland for breach of the express warranty arising from the Purchase and Sale Agreement. That express warranty is a creation and creature of the Purchase and Sale Agreement (Sections 21, 23, and 25 of the Purchase and Sale Agreement). (R. __). Thus, when Plaintiffs sue on and attempt to enforce the express warranty, they are suing on and attempting to enforce the Purchase and Sale Agreement. That same Purchase and Sale Agreement contains an unequivocal and unambiguous agreement to arbitrate. Therefore, Plaintiffs' claim for breach of express warranty remains a part of the Complaint and the Court must compel Plaintiffs to arbitrate all of their claims against Ryland pursuant to the Purchase and Sale Agreement's valid and enforceable arbitration provision.

IV. The circuit court erred in not compelling Plaintiffs to arbitrate their claims against Ryland pursuant to the arbitration agreement in the Master Deed.

A. The circuit court erred in failing properly to consider Ryland's argument in favor of compelling Plaintiffs to arbitration pursuant to the Master Deed's arbitration provision.

The circuit court's order denying Ryland's Motion to Compel Arbitration pursuant to the Master Deed provided no justification for the decision other than stating that the prior order denying the motion of the other developer defendant was the law of the case. The court's order contained no analysis of the arbitration agreement in the Master Deed. As discussed above, the circuit court's order denying Ryland's Motion to Compel Arbitration founded on the conclusion that the January 3, 2017, Order is the law of the case, was an error of law. Thus, there is no stated justification by the circuit court for refusing to enforce the arbitration agreement in the Master Deed.

B. The Master Deed's arbitration provision is valid and enforceable.

The Master Deed's arbitration provision is valid and enforceable—not unconscionable. (R. __). The Master Deed's arbitration provision is not oppressive or one-sided. Rather, it promotes a fair and unbiased method for dispute resolution. The Master Deed's arbitration provision provides the same rights and obligations for all parties to the agreement. It does not improperly favor one party over the other. *See York*, 406 S.C. at 89-90, 749 S.E.2d at 150-51 (finding a provision permitting a car dealership to seek judicial remedies while requiring a consumer to arbitrate their claims one-sided and oppressive). The Master Deed arbitration provision simply requires submission of claims that fall within the broad scope of its arbitration provision to binding arbitration under the "Commercial Arbitration Rules of the American Arbitration Association; and in accordance with the substantive and procedural laws of the state of South Carolina." *See Toler's Cove Homeowners Ass'n, Inc.*, 355 S.C. at 613, 586 S.E.2d at 585 (finding the fees associated with compelling arbitration pursuant to the AAA's Construction Industry Arbitration Rules are not unconscionable).

1. In the January 3, 2017, Order, the circuit court erred in considering terms outside of the self-contained arbitration provision in the Master Deed.

In the January 3, 2017, Order denying the motion to compel arbitration by the other developer defendant, the circuit court's analysis of the enforceability of the agreement to arbitrate set forth in the Master Deed was fundamentally flawed and was error. In reaching the conclusion that the agreement to arbitrate in the Master Deed was unenforceable, the circuit court impermissibly analyzed and relied upon other provisions of the Master Deed—not the self-contained terms of the arbitration provision. (R. __). The *Prima Paint* doctrine limits the proper analysis to the terms of the self-contained arbitration provision. A court cannot assess the validity of an agreement to arbitrate by reference to the conscionability or enforceability of other provisions in the Master Deed not contained in the arbitration provision itself. *See D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4; *Prima Paint*, 388 U.S. at 406. It is improper, and a violation of the *Prima Paint* doctrine, for a court to consider any term outside of a self-contained arbitration agreement to decide whether the arbitration provision is valid and enforceable in considering a motion to compel arbitration. *Id.*

The circuit court's January 3, 2017, Order plainly violates the *Prima Paint* doctrine by its express reliance on terms that reside outside of the Master Deed's arbitration provision (Article X) to judge the enforceability of the arbitration agreement in the Master Deed. (R. __). Although the arbitration provision of the Master Deed is contained wholly and exclusively in Article X of the Master Deed, the January 3, 2017, Order improperly considered separate (and, in fact, valid and enforceable) warranty disclaimers in Section 9.2 of Article IX of the Master Deed in order to justify a conclusion that the arbitration provision in the Master Deed was unenforceable. (R. __). Section 9.2 is not within the Master Deed's self-contained arbitration provision (Article X). (R. __). Therefore, the January 3, 2017, Order of the circuit court was error and plainly violated the *Prima Paint* doctrine.

2. In the January 3, 2017, Order, the circuit court erred in finding the Master Deed's arbitration provision contains damages limitations that render the arbitration provision unconscionable.

Similarly, the January 3, 2017, Order incorrectly, and in error, justified the conclusion that the arbitration provision of the Master Deed was unenforceable based on the damages limitations provision in Section 10(C)(1) of the Master Deed's arbitration provision. (R. __). That provision contains the following language:

> [T]he arbitrator will have no authority to award punitive damages or any other damages not measured by the prevailing Party's actual damages.

(R. __). Contrary to the circuit court's conclusion, this language does not render the arbitration provision unconscionable or unenforceable.

A provision in an arbitration agreement restricting an arbitrator from awarding punitive damages does not render an arbitration provision unconscionable. *Carolina Care Plan*, 361 S.C. at 548, 606 S.E.2d at 754. In contrast, an arbitration provision that restricts a party from recovering statutory remedies may be found unconscionable. *See Simpson*, 373 S.C. at 28, 644 S.E.2d at 670. The courts in *Carolina Care Plan*, 361 S.C. at 548, 606 S.E.2d at 754, and *Simpson*, 373 S.C. at 28, 644 S.E.2d at 670, analyzed arbitration provisions that exemplify this distinction.

In *Carolina Care Plan*, 361 S.C. at 548, 606 S.E.2d at 754, the court reviewed and validated the following damages limitation in an arbitration provision:

> The arbitrators shall have no power to award any punitive or exemplary damages or to vary or ignore the terms of this Agreement and shall be bound by controlling law.

Like the Plaintiffs here, the plaintiff in *Carolina Care* argued that the limitation of damages violated the public policy of the South Carolina Unfair Trade Practices Act ("SCUTPA"), was unconscionable, and rendered the arbitration provision unenforceable. *Id.* at 557, 606 S.E.2d at

759. The court in *Carolina Care* rejected this argument and held that the issue of whether an arbitration clause prohibiting an arbitrator from awarding punitive damages violated public policy was an issue for the arbitrator to decide (specifically, it was for the arbitrator to decide whether statutory treble damages under SCUPTA are punitive or compensatory damages). *Id.* at 557, 606 S.E.2d at 759 (discussing *PacifiCare Health Systems v. Book*, 538 U.S. 401 (2003)). Since the issue was for the arbitrator to decide, the court compelled the plaintiff's claims to arbitration. *Id.*

In comparison, the court in *Simpson*, 373 S.C. at 28, 644 S.E.2d at 670, found the following language in an arbitration provision that specifically barred the recovery of certain statutory remedies was unconscionable:

> In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party.

The court in *Simpson* distinguished this provision from the damages limitation provision at issue in *Carolina Care*. *Simpson*, 373 S.C. at 28-29, 644 S.E.2d at 670-71. In particular, the court relied on the fact that double and treble damages were expressly prohibited outright, rather than leaving that determination to the arbitrator as the justification for finding the clause was unenforceable. *Id.* In *Simpson*, the plaintiff asserted claims for violation of the Dealers Act (which permits the court to award double damages) and for violation of SCUPTA (which permits the court to award treble damages). *Id.* at 30, 644 S.E.2d at 671. The court in *Simpson* held that an express ban on these statutory remedies rendered the arbitration provision in that case unconscionable on its face. *Id.*

The January 3, 2017, Order erred in finding the Master Deed's damages limitations are similar to the unconscionable limitation of a statutory remedy in *Simpson*. (R. __). The Master Deed's arbitration provision permissibly limits the arbitrator's authority to award punitive

damages. The Master Deed's arbitration provision does not contain unconscionable language barring the award of statutory remedies (double or treble damages). (R. __).

Comparison of the language in the arbitration provisions in the Master Deed with the provisions in the contracts at issue in *Carolina Care* and *Simpson* plainly reveals that the language in the Master Deed's arbitration provision is significantly more similar to the enforceable arbitration provision in *Carolina Care*. (R. __). Specifically, the limitation of damages to "any other damages not measured by the prevailing Party's actual damages" does not bar Plaintiffs from recovering double or treble damages. The arbitration clause in the case at bar is unlike, and distinguishable from the unconscionable provision in *Simpson*. Awards of double or treble damages are plainly based upon Plaintiffs' actual damages and, therefore, are not expressly excluded in this case. Thus, like the court in *Carolina Care*, the Court must find that the Master Deed's damages limitation language does not render the arbitration provision in the Master Deed unconscionable or unenforceable.

C. Plaintiffs' claims against Ryland are within the broad scope and coverage of the Master Deed's arbitration provision.

The Master Deed's arbitration provision (Section 10.1) defines the scope of issues that are subject to arbitration as follows:

> The Developer, Association and Owners (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes between and among themselves involving this Master Deed or the Association, and to avoid the emotion and financial cost of litigation. Accordingly, each Bound Party covenants and agrees that all claims, grievances and disputes (including those in the nature of counterclaims or cross-claims) between Bound Parties involving the Master Deed or the Association, including without limitation, claims, grievance or dispute arising out of or relating to the interpretation, application or enforcement thereof (collectively "Claims") . . . are subject to the procedures set forth in Section 10.3.

(R. __).

A broad arbitration provision, like the Master Deed's arbitration provision, encompassing "all claims, grievances and disputes" is afforded an expansive reach. *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. The expansive reach of the Master Deed's arbitration provision includes claims within the literal terms of the arbitration provision, as well as those claims with a significant relationship to the Master Deed. *Partain*, 386 S.C. at 493, 689 S.E.2d at 604.

Applying the expansive reach of the Master Deed's broad arbitration provision results in a finding that each and every claim against Ryland—defined as a "Developer" under the Master Deed—by the Plaintiffs (Nutley and the Association) falls within the broad scope of the Master Deed's arbitration provision. (R. __). Plaintiffs jointly asserted claims against Ryland for negligence, breach of express and implied warranties, breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act, and a declaratory judgment. (R. __). Each of the Plaintiffs' claims is between Ryland (Developer), the Association (Association) or Nultey (Owner). Therefore, all of Plaintiffs' claims are between "Bound Parties" as defined by the Master Deed's arbitration provision and involve the Association. (R. __). Additionally, each and every claim, at a minimum, bears a significant relationship to the Master Deed. Any doubt as to whether a claim, grievance or dispute between Plaintiffs and Ryland involves the Master Deed or the Association must be resolved in favor of compelling arbitration. *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. Accordingly, the Court must find that Plaintiffs' claims are within the broad scope of the Master Deed's arbitration agreement.

D. Plaintiffs are bound by the Master Deed's arbitration provision.

The doctrine of equitable estoppel bars Plaintiffs from claiming they are not bound by the Master Deed's arbitration provision while they are suing to enforce duties that arise from and exist purely based on the terms of the Master Deed and Ryland's prior participation in the homeowners' association through that Master Deed. The doctrine of equitable estoppel (also

referred to as direct benefits estoppel) enforces a simple principle: a nonsignatory must be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement. *See Wilson*, 426 S.C. at 340-41, 827 S.E.2d at 175.

Although they are not signatories to the Master Deed, Plaintiffs make claims against Ryland expressly arising from the terms of the Master Deed. Indeed, they are trying to enforce the Master Deed. In the Complaint, Plaintiffs admitted that the alleged duties to administer, maintain, and repair the property, the very duties upon which Plaintiffs assert claims against Ryland, are derived from the Master Deed. They expressly and specifically alleged:

> **By virtue of the Master Deed** and/or Bylaws, The Association is charged with, *inter alia*, the management and administration of 656 Coleman Townhomes, the investigation, maintenance and repair of 656 Coleman Townhomes' Common Elements and Areas of Responsibility . . . .

(R. __). Plaintiffs seek to impose these obligations, belonging to the Association pursuant to the Master Deed, on Ryland through their allegation that "[Ryland] continued to exercise control and influence over the Association, the Regime, and the 656 Coleman Townhomes until March 2016" when control of the Association was turned over to the unit owners. (R. __).

The duties arising out of the Master Deed that Plaintiffs seek to enforce against Ryland are found in Article V and Article VII of the Master Deed. (R. __). Section 5.5 (B) of Article V of the Master Deed conforms with the Plaintiffs' admission that the Association, or the entity in control of the Association, is charged with the duty to maintain and repair the property:

> All maintenance, repairs and replacements to the General Common Elements whether located inside or outside of the Units . . . .shall be made by the Board of Directors and be charged to all the Unit Owners as a Common Expense. . . .

(R. __). Section 7.8 of Article VII of the Master Deed requires that the Association, or the entity in control of the Association, "establish and maintain an adequate reserve fund for the periodic maintenance, repair and replacement of the Common Area." (R. __).

Plaintiffs allegations against Ryland are based upon Ryland's alleged failure to perform certain duties while it was in control of the Association. Specifically, Plaintiffs repeatedly alleged that Ryland failed to perform duties that arise out of the plain language of the Master Deed, to wit:

i. Ryland "breached . . . [its] duties by placing [its] interest ahead of the Association's and Class Members' interest, by failing to maintain the Regime and 656 Coleman Townhomes, by failing hold the builders and other at-fault parties accountable for the construction of the Regime and the 656 Coleman Townhomes, and by failing to properly develop and transfer the Capital accounts" (R. __);

ii. Ryland "breached [its] duties to Plaintiff and the Class in a manner that was negligent, careless, reckless, grossly negligent, willful, and wanton in the following particulars: . . . (g) in failing to make proper repairs" (R. __);

iii. Ryland "breached the fiduciary duties they owed to the Plaintiffs by: . . . turning over the Property to the Association without depositing sufficient funds to the account of the Association to bring the elements up to reasonable repair" (R. __); and

iv. Ryland's "activities, including placing 656 Coleman Townhomes with defective design and construction into the stream of commerce, failing to properly repair defective conditions, failing to comply with the building code, failing to properly transfer the Capital accounts, and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of the Defendants' trade." (R. __).

South Carolina has not recognized an affirmative common law duty for a developer to repair property that it caused to be constructed, or to fund capital accounts for future

maintenance or repair. These duties, if they exist at all, were created by the Master Deed. Without the Master Deed (Article V), Plaintiffs have no basis for asserting that Ryland owes an affirmative duty to make repairs or maintain the property. (R. __). Without the Master Deed (Article VII), Plaintiffs have no basis for asserting that Ryland has a duty to create and maintain capital accounts for the future repair and maintenance of the property. (R. __). By suing upon and seeking to enforce duties expressly alleged to arise "by virtue of the Master Deed," Plaintiffs make an effort to take a direct benefit from and to enforce the terms of the Master Deed.

Pursuant to the doctrine of direct benefits estoppel, Plaintiffs may not seek to obtain benefits from the Master Deed (Article V and Article VII) while avoiding the application of the arbitration provision (Article X) therein. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (applying the direct benefits estoppel framework to find a doctor was equitably estopped from asserting that as a nonsignatory he was not bound by the arbitration provision in a contract between a hospital and a medical professional placement company). Therefore, Plaintiffs are equitably estopped from avoiding the Master Deed's arbitration provision while they attempt to obtain direct benefits and enforce duties they allege were created by the Master Deed. Accordingly, the Court must find that Plaintiffs are required to arbitrate their claims against Ryland pursuant to the Master Deed's arbitration provision.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Ryland's Motion to Compel Arbitration. It was an error for the circuit court to find the January 3, 2017, Order was the law of the case and that the Purchase and Sale Agreement was unconscionable. Ryland respectfully requests the Court (a) reverse the circuit court's denial of Ryland's Motion to Compel Arbitration; (b) hold that Plaintiffs must submit to arbitration pursuant to the Purchase and Sale

Agreement, or alternatively the Master Deed; and (c) remand for entry of an order compelling arbitration.

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Attorneys for The Ryland Group, Inc.

July 5, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2018-CP-10-02152
Appellate Case No. 2019-000562

Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually, and on behalf of all others similarly situated, Respondents,

v.

WCB, LLC; 656 Coleman, LLC; and The Ryland Group, Inc., Defendants

Of which The Ryland Group, Inc. is the Appellant.

PROOF OF SERVICE

I hereby certify that I have served the **APPELLANT THE RYLAND GROUP, INC.'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 5, 2019, addressed to the following:

Justin O'Toole Lucey, Esq.
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July 5, 2019

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Six Fifty Six Owners v. WCB, LLC***
***Appellate Case No.* 2019-000562**

Dear Mrs. Kitchings:

Enclosed for filing please find an original and one (1) copy of Appellant The Ryland Group, Inc.'s Initial Brief and Designation of Matter to be Included in the Record on Appeal regarding the above-referenced matter.

Please return a filed-stamped copy with our courier. As evidenced by the attached Proof of Service and by copy of this letter, we are providing counsel of record with a copy of same.

With kindest regards,

Sincerely,

Katon E. Dawson, Jr.

KED:bg
Enclosures

cc: Justin O'Toole Lucey, Esq.
Joshua Fletcher Evans, Esq.
James L. Floyd, III, Esq.
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