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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

\_\_\_\_\_  
Edgar W. Dickson, Circuit Court Judge

\_\_\_\_\_  
Appellate Case No. 2020-000384

Melissa Dixon and Willard Dixon ..... Respondents,

v.

Lansing Pattee, Stephanie Pattee, Weekley Homes, LLC f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes, John Doe, A2Z Advanced Home Inspections, LLC, Fidelity and Deposit Company of Maryland, Westchester Fire Insurance Company.....Defendants,

And

Lansing Pattee and Stephanie Pattee.....Third Party-Plaintiffs,

v.

Gutter Pros, LLC.....Third- Party Defendant,

Of whom Weekley Homes, LLC f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes, is the Appellant

And

Lansing Pattee and Stephanie Pattee are Respondents.

\_\_\_\_\_  
**FINAL REPLY BRIEF OF APPELLANT**  
\_\_\_\_\_

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## REPLY ARGUMENT

### **I. Respondents Melissa Dixon and Willard Dixons' failure to contest issues raised in Weekley's opening brief is a concession that the Circuit Court ruled incorrectly as to those issues and should be reversed.**

Respondents Melissa Dixon and Willard Dixon (the "Dixons") do not address or advance any arguments in opposition to many of the arguments raised by Appellant Weekley Homes f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes ("Weekley") at the Circuit Court level and in Weekley's opening brief.

A respondent's failure to address an issue raised in the appellant's opening brief is a concession as to that issue. See First Union Nat. Bank v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) rev'd in part on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly."); Alexander v. Houston, 403 S.C. 615, 744 S.E.2d 517, n. 4 (2013) ("While a respondent may raise on appeal any additional sustaining grounds appearing in the record, even where those reasons have not been ruled on by the lower court, we are reticent to invoke an alternative sustaining ground where the ground is not raised in the appellate brief."), citing I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723-24 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . Of course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief.").

The Dixons' opening brief concedes the following issues, which were fully briefed and argued by Weekley at the lower court and on appeal:

- An agreement that the transaction involved interstate commerce and that the Federal Arbitration Act ("FAA") applies is enforceable;
- The agreements in the Agreement and Warranty that the transaction involved interstate commerce and that the FAA would apply are clear and unambiguous;
- The causes of action and claims asserted against Weekley in this case are within the scope of the arbitration agreements contained in the Agreement and Warranty; and
- The terms of the Agreement and Warranty are enforceable against the Dixons because the causes of action asserted by the Dixons against Weekley are dependent upon the agreements.

Because these issues have been conceded by the Dixons, the Court should rule in Weekley's favor, reverse the Circuit Court, and compel arbitration.

**II. Respondents Melissa Dixon and Willard Dixon do not dispute that the parties to the subject agreements expressly agreed that the transaction between them involved interstate commerce and that the Federal Arbitration Act would apply. These agreements are enforceable as a matter of law.**

The parties to the Agreement and Warranty expressly agreed that the transaction involved interstate commerce and that the FAA would govern. **(R. p. 201)** ("Any claim, dispute or cause of action involving Seller or Purchaser . . . shall be resolved by binding arbitration, in accordance with the Federal Arbitration Act") (bold and all capitalized in original); **(R. p. 233)** ("This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by and interpreted under the Federal Arbitration Act now in effect and as may be hereafter amended (the 'FAA') to the exclusion of any inconsistent state law, regulation or judicial decision.").

Under this Court's recent ruling in Damico v. Lennar Carolinas, LLC, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020), provisions in an arbitration agreement concerning whether the

agreement involved interstate commerce and is subject to the FAA are enforceable in accordance with their terms. See also Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542, S.E.2d 360, 373 (2001).

In Damico, Lennar Carolina, LLC's purchase and sale agreement with the plaintiff-homeowners contained the following provision: "The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) and not by or in a court of law or equity. . ." Id. This Court reversed the circuit court's denial of Lennar's motion to compel arbitration, finding as follows:

We first consider whether the FAA applies. We hold it does, for two reasons. First, the PA [the Purchase and Sales Agreement] provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term.

Id. (internal citations omitted).

Agreements among parties that the FAA will apply to disputes arising out of such agreements are equally as enforceable. Cape Romain Contractors, Inc., 405 S.C. at 126, 747 S.E.2d at 467 ("Section 19.2 of the Contract expressly invokes the FAA and such contractual provisions should be enforced in accordance with their unambiguous terms.") (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221, 105 S. Ct. 1238, 84 L.Ed.2d 158 (1985) for the proposition that the "preeminent concern" in construing arbitration agreements is to protect the contractual rights of the parties, which requires courts to enforce "rigorously" those terms upon which private parties have agreed); see also Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) ("[T]he arbitration agreement, which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA.

Arbitration agreements, like other contracts, are enforceable in accordance with their terms.”) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255 (1989) for the holding that the FAA requires courts to enforce privately negotiated agreements to arbitrate in accordance with their terms).

Here, the agreements to arbitrate under the FAA in the Agreement and Warranty are clear, unambiguous, and enforceable and the Dixons have failed to establish any grounds for sustaining the Circuit Court’s Orders as a matter of law.<sup>1</sup> The Circuit Court committed an error of law warranting reversal because the plain, unambiguous language of the Agreement and Warranty represents an agreement among the parties that the transaction involved interstate commerce and that the FAA would apply to suits arising therefrom.

**III. Respondents Melissa Dixon and Willard Dixon’s conclusory argument that the transaction was for the sale of a completed dwelling rather than for the construction of a dwelling is unsupported. The transaction included construction aspects, which involved interstate commerce in fact, providing an alternate and additional basis for application of the Federal Arbitration Act as a matter of law.**

The Dixons argue that the Real Estate Purchase Agreement that Respondents Lansing Pattee and Stephanie Pattee (the “Pattees”) and Weekley entered into on August 18, 2008, which incorporated a limited warranty of the home, are not governed by the FAA and are unenforceable under the South Carolina Uniform Arbitration Act because the transaction involved the sale and warranty of a completed home, not the sale and warranty of a home that was to be constructed in any part.

The Dixons’ argument that the FAA does not apply because the Agreement with Weekley involved the sale of a completed dwelling rather than the agreement to construct a dwelling fails

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<sup>1</sup> As stated in the preceding section, instead of addressing the contractual argument for application of the FAA, the Dixons only argue that the transaction did not involve interstate commerce.

because the unambiguous language of the Agreement provides that the parties agreed the transaction involved interstate commerce and the only evidence shows that the transaction at issue involved interstate commerce in fact.<sup>2</sup>

In their answering brief, the Dixons cite to the Agreement and admit that Weekley contractually agreed to make a “list of minimal modifications to the interior of the home.” (**Resp. Br. p. 4**). According to the Dixons, the performance of these modifications “clearly did not serve to convert the intrastate transaction to one involving interstate commerce.” (**Resp. Brief p. 5**). The Dixons’ argument fails for many reasons.

The United States Supreme Court has held that the phrase “involving commerce” is the same as “affecting commerce,” which has been broadly interpreted to mean that Congress intended to utilize its powers to regulate interstate commerce to its fullest extent. Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 130 L.Ed.2d 753 (1995)). Any construction involves interstate commerce. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012), recognizes that. See id. at 449 (“Pursuant to the Agreement, Bradley agreed to purchase a completed dwelling wherein Brentwood Homes acted as a seller of the completed dwelling rather than as a contractor for the construction of the dwelling.”); id. at 458 (“Notably, the provisions of the Agreement providing for ‘New Construction,’ ‘House Plan,’ ‘Options,’ and ‘Color Selection,’ are eliminated as ‘N/A’ and were not signed by Bradley.”) (underline added).

The rule from Bradley v. Brentwood Homes is that an agreement that is purely for the sale of residential real estate – and nothing more – is intrastate activity. Id. The subject Agreement in

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<sup>2</sup> It is worth noting that the analysis in the preceding section, which the Dixons have not addressed, is a wholly independent reason the circuit court must be reversed and arbitration compelled.

this case contemplated sale *and construction aspects*; namely, the installation of hardwood floors, replacement and installation of countertops, fixtures, and crown molding. The Court in Bradley was careful to stress that the construction of a residence *does* involve interstate commerce. See id. at n. 8 (“We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA.”). Moreover, Weekley has shown through the Affidavit of Tim Dupree and John Burchfield that the additional work performed involved materials that were produced, manufactured, and/or furnished from outside South Carolina, such that this additional component of the Agreement involved interstate commerce, mandating the application of the FAA. **(R. pp. 194-195); (R. pp. 247-248).**

The Dixons attempt to negate the construction component of the transaction by speculating certain construction could have been performed on the subject the home: (1) after construction was completed; or (2) prior to the entry into the Agreement. See (Resp. Br. p. 5) (“[I]t is unclear whether the referenced interior changes were made *before or after* the Pattees signed these documents.”) (bold and italics added). The Dixons have submitted no evidence; their arguments are pure speculation and must be rejected in the face of the evidence submitted by Weekley in support of its motion. See Zabinski v. Bright Acres Assoc., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) (“To ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.”).

The record is clear that changes to the home were to be made after the Agreement was entered. The terms of the Agreement provide that Weekley may allow the purchaser to select interior items, such as floor colorings and appliances (defined as “Custom Choices”) and request modifications to the interior of the home (defined as “Change Requests”) “if selected and deposits

[are] paid within fourteen (14) days of the Write-Up Date of this Agreement.” (R. pp. 199-200). In the following section of the Agreement, additional provisions specify that the Custom Choices and Change Requests that were made and accepted by Weekley: “Sellers to continue hardwoods through Family Room (to door of Owners Retreat), Kitchen, and Breakfast Rooms. Sellers to replace laminate kitchen countertops, sink, and faucet with a first level Quartz countertop (customers choice), 2 Bowl undermount Stainless Sink and Stainless Faucet. Sellers to continue crown molding through Study and Family Room. Closing to take place on or before September 14, 2008.” (R. p. 203) (bold and underline added in part) (all bold and underlined in original). The fact that the agreed-upon choices and changes were reflected in the Agreement and Sales Incentive Worksheet establishes only that the purchasers and Weekley had agreed on the specified Custom Choices and Change Requests in advance or at the time of execution of the Agreement – not that purchases and work that were necessary to implement the accepted choices and changes had already been performed.

The bare support that Respondents offer for their contentions is a line from the Sales Incentive Worksheet that uses two verbs (“extended” and “added”) in the past-tense. (R. p. 197). The provisions of the Agreement related to the same choices and changes are versed in future tense (“Sellers *to continue* hardwoods . . . Sellers *to replace* laminate kitchen countertops, sink, and faucet . . . Sellers *to continue* crown molding . . .”) and are personal to the purchasers (the Quartz countertop, kitchen sink, and faucet were chosen by the customer); the “Additional Provisions” contained in the Agreement indicates that certain of the changes were the customers’ choice. (R. p. 203) (bold and italics added) (all bold and underlined in original).

Lastly, in their answering brief, the Dixons claim that neither of Weekley’s affidavits address whether Weekley’s contract with the Pattees was for the sale of a completed dwelling

rather than for the construction of a dwelling. (**Resp. Brief p. 4**). The record belies the Dixons' argument. In addition to the Affidavit of Tim Dupree, Weekley offered the Affidavit of John Burchfield, who attested that the Agreement "concern[ed] the *construction* and sale of a home" and that the construction component of the Agreement, including the customization of the subject home, implicated interstate commerce. (**R. p. 194**) (bold and italics added).

The Dixons offer as alternative sustaining grounds that the arbitration agreements do not comply with the South Carolina Uniform Arbitration Act. The Dixons' argument fails because the South Carolina Uniform Arbitration Act is preempted where the FAA applies. See Bradley, 398 S.C. at 453-54 ("Brentwood Homes concedes the Agreement does not meet the technical requirements of section 15-48-10(a) of the UAA as the arbitration provision is not underlined and does not appear on the first page of the contract. This concession, however, is not dispositive. Because an application of the South Carolina law would have rendered the parties' arbitration agreement completely unenforceable, consideration of the applicability of the FAA is required. The FAA is intended to ensure that the arbitration will proceed in the event a state law would have preclusive effect on an otherwise valid arbitration agreement."); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 537-41, 542 S.E.2d 360 (2001) (rejecting an argument that noncompliance with our State's Arbitration Act invalidated an arbitration agreement that was governed by the FAA); Zabinski v. Bright Acres Assoc., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) ("The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements."). The FAA is applicable here and preempts the South Carolina Uniform Arbitration Act because the parties agreed it would and because the transaction involved interstate commerce in fact.

The Agreement and Affidavits of Burchfield and Dupree show that the Agreement encompassed both the sale of property and the completion of construction, customization, and changes to the home per the purchasers' specifications, which involved interstate commerce in fact. Therefore, under the cases cited herein, including Bradley v. Brentwood Homes, the Agreement and Warranty are subject to the FAA as a matter of law.

**IV. Respondents Melissa Dixon and Willard Dixon incorrectly argue that the arbitration clause in the Agreement is unconscionable.**

As an alternative argument against enforcement of the arbitration agreement contained in the Agreement, the Dixons contend that the arbitration clause is unconscionable and unenforceable. "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998). "Unconscionability is characterized by the 'absence of meaningful choice on the part of one party due to one-sided contract provisions, *together with* terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.'" Id. at 395, 498 S.E.2d at 902 (emphasis in original) (citations omitted). "Thus, unconscionability is 'due to *both* an absence of meaningful choice and oppressive, one-sided terms.'" York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 85, 749 S.E.2d 139, 148 (Ct. App. 2013) (citation omitted) (emphasis in original). Here, the Dixons have failed to show either.

"In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged

clause; and the conspicuousness of the clause.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) (internal citations omitted); York, at 86, 749 S.E.2d at 148-49.

The Dixons allege that the Agreement was a form document, primarily consisting of boilerplate terms, that was drafted and provided by Weekley to the Pattees after Weekley had completed construction of the subject property. (**Resp. Br. p. 5**). In conclusory fashion, the Dixons claim that the Pattees lacked relative bargaining power, sophistication, and a meaningful choice to agree to arbitrate. (**Resp. Br. p. 6**). The Dixons further conclude: that the placement and form of the arbitration notice was “inconspicuous,” that the agreement was “one-sided and oppressive,” and that the timing of the contract somehow restricted the Pattees’ meaningful choice to agree to arbitrate. (**Resp. Br. p. 6**).

The Dixons make the foregoing claims without any factual or evidentiary support. See Zabinski v. Bright Acres Assoc., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) (providing that the reviewing court must look to the agreement, complaint, and surrounding facts). The Dixons were not parties to the transaction between the Pattees and Weekley, have no independent knowledge about the transaction and/or the making, negotiation, and timing of the execution of the Agreement, and no one has testified or attested to these facts. In short, there is nothing in the record to support the Dixons’ claim that the unconscionability of the Agreement is an additional sustaining ground for the Circuit Court’s Orders. Just as conclusory statements can be deemed abandonment of an issue by an appellant, they should be deemed insufficient to support alternative sustaining grounds. See, e.g., State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (“[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review. An issue is also deemed abandoned if the argument in the brief is merely conclusory.”) (internal quotations and citations omitted).

The Record on Appeal shows that the Pattees had a meaningful choice to enter into the Agreement with Weekley, had bargaining power, and exercised such power to obtain the “Additional Provisions” specified in Section 12 of the Agreement and the closing documents. **(R. p. 203); (R. p. 197); (R. p. 222)**. The Pattees negotiated for certain choices and changes to the interior of the home and further negotiated that these choices and changes be made by Weekley at no charge to them. **(R. p. 203); (R. p. 197)**. They also negotiated other aspects of the transaction, including the provision of \$5,000.00 in closing costs and discounts. **(R. p. 197)**. There is no evidence that the Pattees lacked sophistication or an understanding as to the terms of the Agreement and Warranty, including the arbitration clauses.

The Dixons state in conclusory fashion that the arbitration notice was inconspicuously formed and placed. **(Resp. Br. p. 6)**. Contrary to the Dixons’ conclusory argument, the arbitration clause in the Agreement is called out by bold, capitalized font in Section 9, the Pattees were required to initial every page of the Agreement, including the three pages that Section 9 spanned across, and the signature page of the Agreement contained a separate and additional notice of arbitration agreement just below the purchaser’s signature block. **(R. pp. 198-204)**. Its terms are clear and unequivocal and there is no evidence that the Pattees did not notice or understand that the Agreement was subject to arbitration under the FAA. **(R. p. 204)** (“NOTICE OF ARBITRATION AGREEMENT: This David Weekley Homes Real Estate Purchase Agreement provides that all disputes between you and David Weekley Homes (including its agents, contractors, and developers) will be resolved by BINDING ARBITRATION.”). (all bold in original).

Further, the Dixons also fail to advance any argument showing that the terms of the arbitration agreement are so oppressive that no reasonable person would make them and no fair

and honest person would accept them. Assuming *arguendo* that the Dixons were able to show an absence of meaningful choice on the Pattees' part, the Dixons would also have to show that the terms of the arbitration agreement are offensive and one-sided in order to prevail on their defense that the arbitration clause was unconscionable. See York, 406 S.C. at 85; Lackey, 330 S.C. at 393-94.

The Dixons do not provide any reason the arbitration clauses in the Agreement or Warranty are one-sided and oppressive, they just conclude that they are. “In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.” Smith v. D.R. Horton, Inc., 403 S.C. 10, 14, 742 S.E.2d 37, 40 (Ct. App. 2013) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007)). “Our supreme court adopted the Fourth Circuit’s view, and noted ‘[i]t is under this general rubric that we determine whether a contract provision is unconscionable. . . .’” Id. (quoting Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (additional citation omitted)).

The Dixons’ conclusion presupposes that arbitration is going to result in a decision that is in favor of Weekley (i.e., one-sided) and that Weekley has superior rights in the arbitration process as compared to the Dixons. Neither assumption is true. The arbitration provisions contained in the Agreement and Warranty are fair, neutral, and geared toward achieving an unbiased decision via a neutral decision-maker. The arbitrator is not of Weekley’s unilateral choosing, Weekley is not the only party paying the arbitrator, and widely accepted rules are to govern the proceeding. (**R. pp. 201-203**).

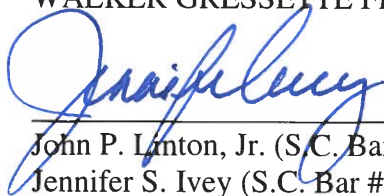
Respondents Melissa Dixon and Willard Dixon have failed to show either a lack of meaningful choice or oppressive and one-sided terms within the arbitration clause itself. Consequently, to the extent this Court sees it necessary to address Respondents' alternative ground, the ground should be rejected as unsupported by any evidence.

### **CONCLUSION**

For the foregoing reasons, as well as the reasons stated in the opening brief of Weekley, the Circuit Court's Orders refusing to compel arbitration should be **REVERSED** and arbitration compelled.

Respectfully Submitted,

WALKER GRESSETTE FREEMAN & LINTON, LLC



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