

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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Appellate Case No. 2020-001048

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Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants;

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers

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Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants,

Of whom Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

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BRIEF OF PETITIONERS

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### **STATEMENT OF ISSUES ON APPEAL**

- I. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S ORDER DENYING LENNAR'S MOTION TO COMPEL ARBITRATION.
- II. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S FINDING THAT THE ARBITRATION PROVISIONS CONTAINED IN THE VARIOUS DOCUMENTS DRAFTED BY LENNAR "MUST BE READ AS A WHOLE TO COMPRISE THE ARBITRATION AGREEMENT" DUE TO THE "CROSS-REFERENCES TO ONE ANOTHER" AND "INTERTWINING PARAGRAPHS."
- III. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE CIRCUIT COURT'S FINDING LACKED ADEQUATE FACTUAL SUPPORT WHILE AT THE SAME TIME EXPRESSLY DECLINING TO CONSIDER THE EVIDENCE RELIED UPON BY THE CIRCUIT COURT.
- IV. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S FINDING THAT LENNAR'S ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE IT IS UNCONSCIONABLE.
- V. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S FINDING THAT, IN THE ALTERNATIVE TO BEING UNCONSCIONABLE, THE ARBITRATION AGREEMENT IS AMBIGUOUS AS TO THE CHOICE OF LAW.
- VI. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S FINDING THAT, IN THE ALTERNATIVE, THE FAA DOES NOT APPLY BECAUSE THE TRANSACTION INVOLVES THE PURCHASE AND SALE OF REAL ESTATE, AN INHERENTLY INTRASTATE ACTIVITY.
- VII. WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE CIRCUIT COURT'S FINDING THAT, IN THE ALTERNATIVE, THE SCUAA DOES NOT APPLY BECAUSE LENNAR FAILED TO COMPLY WITH THE STATUTE'S DISCLAIMER REQUIREMENTS.

### **STATEMENT OF THE CASE**

This is a construction defect lawsuit brought by several homeowners at The Abbey, a housing development in the Spring Grove Plantation neighborhood, located in Berkeley County, South Carolina. (R. pp. 75-108).

On October 30, 2014, Petitioners (“Homeowners”) commenced this action by filing a Complaint in the Berkeley County Court of Common Pleas (R. pp. 26-41). The Complaint asserted several causes of action against Defendant/Appellant Lennar Carolinas, LLC (“Lennar”), including causes of action for negligence, negligent misrepresentation, breach of the implied warranty of habitability, breach of the implied warranty of good and workmanlike service, breach of fiduciary duty, and unfair trade practices. The Homeowners alleged that construction defects exist which have resulted in water intrusion, component and structural degradation, and extensive consequential damages. (R. pp. 26-41)

On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint, generally denying the allegations, asserting several affirmative defenses, making cross-claims against other named Defendants, and asserting causes of action against several of its own subcontractors. (R. pp. 42-74).

On June 1, 2015—over seven (7) months after the Complaint was filed—Lennar filed a Motion to Compel Arbitration. (R. pp. 259-261).

On November 23, 2015, Homeowners filed an Amended Complaint. (R. pp. 75-108). On November 25, 2015, Lennar filed its Answer to the Amended Complaint, Cross-Claims, and Third-Party Complaint. (R. pp. 109-164)

On March 30, 2016—over eight (8) months after filing its initial Motion to Compel Arbitration—Lennar Carolinas amended its Motion to Compel Arbitration, requesting that the Court compel arbitration based on the Purchase and Sale Agreements, Lennar’s Limited Warranty, the Deeds to Homeowner’s residences, and Covenants. (R. pp. 262-1288). On April 7, 2016, Homeowners filed Plaintiff’s Memorandum in Opposition to Defendant Lennar’s Motion to Compel Arbitration. (R. pp. 2434-2530). A hearing on the Motion to Compel Arbitration was held on April

11, 2016. (R. pp. 203-256).

On September 21, 2016, the Circuit Court entered an Order Denying Defendant Lennar's Motion to Compel Arbitration. (R. pp. 4-23). Citing this Court's decision in Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d, 1 (2016), the Circuit Court found that "the arbitration provisions as set forth in all four documents, including the entire Lennar Limited Warranty, must be read as a whole to comprise the arbitration 'agreement' due to the 'cross-references to one another' and 'intertwining paragraphs.'" (R. p. 8, ¶ 2). The Circuit Court also found that the terms of the arbitration agreement were unconscionable, and thus unenforceable under South Carolina law and prevailing equitable principles. (R. pp. 11-17). Further, the Circuit Court found that, in the alternative to being unconscionable, the arbitration provisions drafted by Lennar were ambiguous as to the choice of law (i.e., whether the FAA or SCUAA applied). (R. pp. 17-22). As a result of the ambiguity created by Lennar's language, the Circuit Court conducted an analysis as to whether the transactions involved interstate or intrastate commerce. (R. pp. 17-22) Citing this Court's decision in Bradley v. Brentwood Homes, Inc. 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2017), among other cases, the Circuit Court found that the subject-matter sales transactions involved intrastate commerce, not interstate commerce, and that the FAA did not apply. (R. pp. 17-22). In the alternative, the Circuit Court found that the SCUAA did not apply because the arbitration provisions did not comply with the SCUAA notice requirements. (R. p. 22)

On October 3, 2016, Lennar filed Defendant/Third-Party Plaintiff Lennar Carolina LLC's Motion to Reconsider Order Denying its Motion to Compel Arbitration. (R. 2553-2572). On October 26, 2016, the Circuit Court entered its Order denying Lennar's Motion for Reconsideration. (R. p.3).

On November 18, 2016, Lennar filed its Notice of Appeal. Oral arguments were heard

before the Court of Appeals on February 19, 2020.

On June 10, 2020, the Court of Appeals **reversed** the Circuit Court's order denying Lennar Carolina's Motion to Compel Arbitration. (Patricia Damico, et al. v. Lennar Carolinas, LLC, Opinion No. 5730, filed June 10, 2020). (App. pp. 272 -281). The Court of Appeals held that the Circuit Court's finding that the various arbitration provisions, including the Lennar Warranty, must be read as a whole to comprise the arbitration agreement due to cross-references and intertwining paragraphs "lacked adequate factual support." (App. pp 280 and 305). However, in rendering its decision, the Court of Appeals expressly declined to consider the arbitration provisions found in any document other than Purchase and Sale Agreement, including those documents which the Circuit Court had relied upon. "There is no need for use to consider the similar arbitration clauses found in the Lennar Warranty, the Deed, and the Covenants." (App. p. 305). The Court of Appeals also held that the Circuit Court's finding was not consistent with Smith v. D.R. Horton, 417 S.C. 42, 48-49, 790 S.E.2d 1, 4 (2016). (App. p. 280).

On June 25, 2020, Homeowners filed a Petition for Rehearing. (App. pp. 282-312). On July 2, 2020, the Court of Appeals denied Homeowners Petition for Rehearing. (App. pp. 313-316). On July 31, 2020, Homeowners filed a Petition for Writ of Certiorari with the Supreme Court of South Carolina. The Supreme Court granted Homeowners' Petition on May 28, 2021. This brief follows.

## **FACTS**

### A. Introduction

As noted, this is a defective construction suit by the Homeowners at The Abbey located in Spring Grove Plantation, individually and on behalf of others similarly situated. (R. pp. 75-108). The Abbey consists of approximately Sixty-Nine (69) homes in the Spring Grove Plantation neighborhood located in Berkeley County, South Carolina. (R. p. 75-108; p. 2437 ¶ 1). Upon

information and belief, the houses were constructed from 2010 to present. Petitioners have alleged that construction defects exist which have resulted in water intrusion, component and structural degradation, and extensive consequential damages. (R. p. 75-108; p. 2437 ¶ 1). Additionally, there are other unsuitable and/or improperly installed components. (R. p. 75-108; p. 2437 ¶ 1).

B. The Sales Contract(s)

The residences were originally constructed and sold by Lennar. Although Patricia Damico, Joshua and Brettany Buetow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, and Matthew Collins, Bryan and Cynthia Camara, are homeowners directly at issue in this case, other homeowners are not original homeowners and have not signed similar sales agreements. (R. p. 2437 ¶ 2).

The contracts at issue are a “Purchase and Sale Agreement” and a “Warranty”, not a construction contract. (R. pp. 2454–2521 and pp. 2522–2530, respectively). Lennar entered into Purchase and Sale Agreements directly with the original Homeowners. (R. pp. 2454-2521). The original Homeowners took ownership of the property only after the real estate closings occurred, receiving completed homes from Lennar Carolina, LLC in a customary real estate purchase transaction. (R. pp. 2454-2521). The Homeowners did not enter into construction contracts with Lennar—only a residential Purchase and Sale Agreement, which Lennar drafted. (R. pp.2454-2521). For purposes of avoiding litigation, Lennar contends that the Purchase and Sale Agreement is a construction contract which involving interstate commerce and the Federal Arbitration Act (FAA). Petitioners contend that the Purchase and Sale Agreement is a Purchase and Sale Agreement, i.e. an agreement for the purchase and sale of real estate, a purely intrastate transaction under Bradley v. Brentwood Homes, Inc. 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2017) and other like cases.

The sales contracts do not contain an arbitration agreement that complies with South Carolina Law (or a state arbitration warning). S.C. Code § 15-48-10. Specifically, in order for an arbitration provision to be enforceable/valid it “shall be typed in underlined capital letters...” The contracts fail to comply with the South Carolina Statute as they are not underlined. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518, 2522). Pursuant to S.C. Code § 15-48-10, an arbitration provision must be properly disclaimed, and failure to do so, renders the arbitration provision unenforceable under the SCUAA’s express provisions.

C. Lennar’s (non) Warranty

The “Lennar Warranty” disclaims and waives all other warranties, express or implied, including but not limited warranty of habitability. (R. p. 2529, ¶ 2). In addition, the Warranty states “Lennar’s total financial obligations under the Lennar Limited Warranty are limited to the original sales price of your Home”. (R. p. 2529, ¶ 3). Further, the Lennar Warranty states “Consequential Damages Not Covered. Lennar shall not be liable for, and you expressly waive recovery of, any consequential damages..., including but not limited to: any diminution in value...; lost profits; damages to personal property; any personal injury of any kind..., any medical or hospital expenses; costs of food, moving and storage, relocation expenses, or rental value of the Home or any other costs due to loss of use...” (R. p. 2529, ¶ 4).

Ostensibly, the Lennar Warranty purports to provide relief to aggrieved homeowners. However, a detailed reading of the Warranty shows that its true purpose is to provide temporal limits on Lennar’s responsibility for shoddy construction. After one to two years, the Warranty only provides a remedy for rare, load bearing, structural defects. (R. p. 2529, ¶ 9). All other remedies of any kind for any other defect - no matter how egregious - are excluded. Even the “structural warranty” is a misnomer - the only structural components covered are those that Lennar deems are

structured components. (R. p. 2523) Stated differently, the Lennar Warranty, as written, prohibits any remedy of any kind for the defective, leaking, water damaged, termite-infested homes at The Abbey.

If there was any uncertainty left as to the lack of remedy of any kind available to the homeowners under the Warranty, one only has to go to pages 6 through 9 of the Warranty, which prohibits any coverage or remedy for:

1. Damage to land, landscaping (including sodding, seeding, shrubs, trees, and planting), sprinkler systems, outbuildings, carports, or any other appurtenant structure or attachment to the dwelling, or other additions or improvement not a part of your Home;
2. Loss of use of all or a portion of your Home;
3. Any loss or damage that is caused or made worse by any of the following causes: microorganisms, fungus, decay, wet rot, dry rot, soft rot, rotting of any kind, and mold;
4. Any and all exclusions set forth in the Workmanship Systems and Structural Standards;
5. Except as prohibited by law of the state in which the Home is located, all other warranties express or implied, including but not limited to any implied warrant of habitability, are hereby expressly disclaimed and waived;
6. Lennar shall not be liable for, and you expressly waive recovery of any consequential damages that may result from the condition of any component of the Home, including but not limited to: any diminution in value of the Home before or after repairs are performed; lost profits; damages to personal property; any hospital expenses; cost of food, moving and storage relocation expenses, or rental value of the Home or any other costs due to loss of use, inconvenience or annoyance during repair. (R. pp. 2527-2528).

Both the Sales Contract and the Warranty (discussed in further detail below) are standard, nonnegotiable, Lennar form contracts. (R. p. 2438; p. 218, line 16 to line 24; p. 219, line 11 to line 17).

D. Covenants

The Covenants were filed with the register of deeds, according to Lennar, “prior to the sale of the residences.” (R. p. 2541 ¶ 2). Accordingly, Petitioners could have no input into those

restrictions. Petitioners were never consulted and were never provided the opportunity to negotiate those terms. Even Lennar's counsel acknowledged that the Covenants could not be negotiated by the parties, despite having moved to compel arbitration pursuant to them:

The Court: ---how would you negotiate a covenant that has already been placed when you go and buy the property. How is there any possibility of negotiating that as well as the deed.

Mr. Quinn: Your Honor, the covenant—

The Court: ---because the seller prepares the deed. So how can that be negotiated those two items?

Mr. Quinn: So I was referencing more than ---

The Court: ---you put the covenants in the court house and they're there so there is no negotiation there; it's there.

Mr. Quinn: Certainly you're not negotiating the terms of that arbitration provision---

(R. p. 214, line 12 to 24)

Petitioners had no choice and zero input as to any aspect of Lennar's Purchase and Sales Agreement, Warranty, Covenants, or Deed, including their respective arbitration and legal remedies provision.

### **ARGUMENT**

I. BECAUSE THE COURT OF APPEALS EXPRESSLY DECLINED TO CONSIDER THE EVIDENCE RELIED UPON BY THE CIRCUIT COURT, IT WAS ERROR FOR IT TO HOLD THAT THE CIRCUIT COURT'S FINDING LACKED ADEQUATE FACTUAL SUPPORT.

Arbitrability determinations are subject to *de novo* review. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). However, a Circuit Court's factual findings will not be reversed on appeal if **any** evidence reasonably supports the findings. [Emphasis added] Id. at 453, 730 S.E.2d at 315. See also, Smith v. D.R. Horton, Inc., 417 S.C. 42, 47, 790 S.E.2d 1, 3

(2016), a similar case, adopting the same standard of review.

In the present case, the evidence considered by the Circuit Court reasonably supports its finding that “the arbitration provisions as set forth in all four documents, including the entire Lennar Limited Warranty must be read as whole to comprise the arbitration ‘agreement’ due to the ‘cross-references to one another’ and ‘intertwining paragraphs.’” (R. p. 8). As discussed below, the arbitration provisions—drafted by Lennar—contain various cross-references to one another and *expressly* incorporate by reference the *entirety* of the Purchase and Sale Agreement and the *entirety* of the Lennar Warranty. See Argument II, *infra*. In rendering its decision, however, the Court of Appeals expressly declined to consider all the evidence examined by the Circuit Court, finding “there is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed, and the Covenants.” (App. p. 305). In doing so, the Court of Appeals ignored the various cross-references to the entirety of the Purchase and Sale Agreement and other documents, which caused the Circuit Court to find that the arbitration provisions contained in each of these documents, and the entire Lennar Limited Warranty must be read as a whole to comprise the Arbitration Agreement.

The Circuit Court’s limited analysis falls short of the standard of review set forth in Bradley and comparable cases. Petitioners respectfully submit that a review of the evidence relied upon by the Circuit Court will reasonably support its finding that the arbitration provisions and the Lennar Limited Warranty should be read together to constitute the entire Arbitration Agreement. It was error for the Court of Appeals to hold that the Circuit Court’s finding lacked adequate factual support while at the same time expressly declining to consider the evidence the Circuit Court relied upon.

II. THERE IS ADEQUATE EVIDENCE THAT REASONABLY SUPPORTS THE CIRCUIT COURT’S FINDING THAT THE ARBITRATION PROVISIONS CONTAINED IN THE

VARIOUS DOCUMENTS DRAFTED BY LENNAR MUST BE READ “AS A WHOLE TO COMPRISE THE ARBITRATION AGREEMENT” DUE TO THE “CROSS-REFERENCES TO ONE ANOTHER” AND “INTERTWINING PARAGRAPHS”.

In Smith v. D.R. Horton, Inc., the South Carolina Supreme Court held that, in applying the *Prima Paint* doctrine, separate subparagraphs must be read together to constitute the entire arbitration provision due to “numerous cross-references to one-another, intertwining the subparagraphs so as to constitute a single provision.” 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016). Similarly, in the present case, the evidence reasonably supports that the arbitration paragraphs contained in the Purchase and Sale Agreement, Limited Warranty, Covenants, and Deeds must be read together to constitute a single provision due to the cross-references to each other. For illustration, the arbitration provision contained in the Deeds—which Lennar sought to compel arbitration under—*expressly* incorporates by reference **all the terms** of the Purchase and Sale Agreement and cross-references the Lennar Warranty. (R. Vol. 5, pp. 2252, 2258, 2264, 2278, 2284, 2290, 2301). It also contains unsegregated arbitration language and the same type of warranty disclaimers, which this Court found unconscionable in Smith v. D.R Horton:

**ALL DISPUTES IN CONNECTION WITH THIS DEED, THE UNDERLYING PURCHASE AGREEMENT AND DISPUTES CONCERNING THE SALE AND CONSTRUTCION OF THE HOME ARE SUBJECT TO FINAL AND BINDING ARBITRATION.**

**ALL OF THE TERMS AND CONDITIONS OF THE PURCHASE AGREEMENT FOR THE SALE AND PURCHASE OF THE HOUSE AND LOT ARE HEREBY INCORPORATED BY REFERENCE AS IF SET FORTH IN FULL AND SHALL NOT BE MERGED WITH THIS DEED AND REMAIN VALID AND SHALL SURVIVE THE CLOSING AND THE EXECUTION AND FILING OF THE DEED. ALSO THE PURCHASER HEREBY ACKNOWLEDGES AND ACCEPTS THAT THE LIMITED WARRANTIES PROVIDED IN THE BUILDER’S WRITTEN WARRANTY DOCUMENTS PROVIDE IT WITH ITS SOLE REMEDY AT LAW OR IN EQUITY IN LIEU OF ALL OTHER WARRANTES, EXPRESSED OR IMPLIED.**

INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION AND THE IMPLIED WARRANTY OF HABITABILITY. PURCHASER HEREBY AGREES TO WAIVE SUCH OTHER WARRANTIES AS THEY ARE FULLY AND COMPLETELY DISCHARGED HEREIN. [Emphasis added in bold].

(R. Vol. 5, pp. 2252, 2258, 2264, 2278, 2284, 2290, 2301)

As noted above, the arbitration provision and warranty disclaimers contained in the Deeds are (1) unsegregated by distinct headings, (2) expressly incorporate by reference all the terms and conditions of the Purchase and Sale Agreement and not just Section 16, (3) make express reference to builder's written warranty documents (i.e. Lennar's Warranty), noting that said documents provide homeowners with their "sole remedy at law or in equity", (4) and expressly disclaim the Implied Warranty of Workmanlike Construction and the Implied Warranty of Habitability. In other words, the arbitration language contained in the Deeds—with its cross-references to other documents, including the entirety of Lennar's Purchase and Sale Agreement and Warranty—**reasonably supports** the Circuit Court's finding that the arbitration provisions "must be read as a whole" so as to constitute a single provision. (R. p. 8), citing Smith v. D.R. Horton, Inc., 417 S.C. at 48, 790 S.E.2d at 4.

In addition, the Purchase and Sale Agreement—which is incorporated by reference **in its entirety** within the Deed's arbitration provision—**expressly** incorporates by reference **the entirety** of Lennar's Limited Warranty. (See Circuit Court's thorough analysis of Purchase and Sale agreement at R. pp. 8-11, and source Purchase and Sale Agreements at R. pp. 296-713). The Purchase and Sale Agreement also expressly states that, "THE EXPRESS LIMITED WARRANTY AND REMEDIES PROVIDED BY SELLER CONSTITUTE EXCLUSIVE WARRANTY AND REMEDIES TO BE MADE AVAILABLE BY SELLER." (R. pp. 8-11, pp. 296-713). Based on the foregoing, there was sufficient evidence to support the Circuit Court's finding that the various

arbitration provisions drafted by Lennar, including the entire Lennar Limited Warranty, “must be read as a whole to comprise the arbitration agreement” due to the “cross references to one another” and “intertwining paragraphs”. (R. p. 8, ¶ 2). It was error for the Court of Appeals to hold that the Circuit Court lacked adequate factual support to make its finding.

It is also worth noting that Lennar—a sophisticated developer of residential homes throughout South Carolina and other parts of the country—drafted the problematic language, which (1) incorporates by reference other documents in their entirety, (2) expressly disclaims warranties, and (3) sets limitations on liability. Ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981). “After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings.” Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), vacated on other grounds, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). As the architect of its own problem, Lennar should not be permitted to avoid review of all the evidence considered by the Circuit Court and cherry-pick which one of its documents this Court now examines.

### III. THE ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE IT IS UNCONSCIONABLE.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Smith v. D.R. Horton, Inc., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). In the present case, both prongs for establishing unconscionability are met.

A. The Homeowners Lacked Meaningful Choice in Entering into the Arbitration Agreement.

The Homeowners lacked a meaningful choice. Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process. Gladden v. Boykin , 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (quoting Simpson , 373 S.C. at 25, 644 S.E.2d at 669). Thus, parties frequently allege they lacked a meaningful choice when the dispute involves an adhesion contract. See Munoz v. Green Tree Fin. Corp. , 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (defining adhesion contracts as “standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable”). While adhesion contracts are not unconscionable per se, courts tend to look upon them with “considerable skepticism” because they give rise to “considerable doubt that any true agreement ever existed to submit disputes to arbitration.” *Id.* at 26–27, 644 S.E.2d at 669–70 (quotation marks omitted). In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, inter alia, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication, whether the parties were represented by independent counsel, and whether “ ‘the plaintiff is a substantial business concern.’ ” *Id.* (quoting Simpson , 373 S.C. at 25, 644 S.E.2d at 669).

In Smith v. D.R. Horton, Inc., the South Carolina Supreme Court took “judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.” 417 S.C. at 50, 790 S.E.2d at 4., quoting Kennedy v. Columbia Lumber & Mfg. Co. , 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) ; cf. Sapp v. Ford Motor Co. , 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (stating that South Carolina’s “courts have shifted from following the doctrine of caveat emptor (‘let the buyer beware’) to the doctrine of caveat venditor (‘let the seller beware’)”).

The bargaining power held by Petitioner Homeowners in the present case is identical to the

bargaining power held by the homeowners in Smith v. D.R. Horton, Inc. As in that case, (1) there is no indication in the Record that any of the Petitioner Homeowners “enjoyed a substantially stronger bargaining position” against Lennar, or (2) that they were each represented by independent counsel in negotiating the agreement. 417 S.C. at 50, 790 S.E.2d at 4-5. Further, like the homeowners in Smith v. D.R. Horton, Petitioner Homeowners were each “single clients” to a corporation that develops and sells houses throughout South Carolina and other states. Accordingly, in applying the South Carolina Supreme Court’s analysis in Smith v. D.R. Horton to the present case, this Court should affirm the Circuit Court’s finding that Petitioner Homeowners lacked a meaningful choice in their ability to negotiate the arbitration agreement. *Id.*

B. The Arbitration Agreement Contained Terms So Oppressive that No Reasonable Person Would Make Them and No Fair and Honest Person Would Accept Them.

By reading the cross-referenced terms as a whole, it is clear that they are “so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Id.*, 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Specifically, as noted above, the unsegregated arbitration language contained in the Deeds, expressly incorporate by reference **all the terms and conditions** of the Purchase and Sale Agreement, make *express* reference to builder’s written warranty documents (i.e. Lennar’s Warranty), noting that said documents provide homeowners with their “sole remedy at law or in equity”, and expressly disclaim the Implied Warranty of Workmanlike Construction and the Implied Warranty of Habitability. The language also expressly waives “such other warranties as they are fully and completely discharged herein.” (R. Vol. 5, pp. 2252, 2258, 2264, 2278, 2284, 2290, 2301). Here, as in Smith v. D.R. Horton, Inc., Lennar’s “attempts to disclaim implied warranty claims and prohibit any monetary damages are clearly one-sided and oppressive.” Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016)

A review of the cross-referenced and incorporated provisions, already cited under the recitation of facts, *supra*, further serves to amplify the extreme nature of the oppressive terms:

1) The “Lennar Warranty” expressly disclaims and waives “all other warranties, express or implied, including but not limited to any implied warrant of habitability.” (R. Vol. 6, p. 2529, ¶ 2). In addition, it states “Lennar’s total financial obligations under the Lennar Limited Warranty are limited to the original sales price of your Home”. (R. Vol. 6, p. 2529, ¶ 3). Further, the Lennar Warranty states “Consequential Damages Not Covered. Lennar shall not be liable for, and you expressly waive recovery of, any consequential damages..., including but not limited to: any diminution in value...; lost profits; damages to personal property; any personal injury of any kind..., any medical or hospital expenses; costs of food, moving and storage, relocation expenses, or rental value of the Home or any other costs due to loss of use...” (R. Vol. 6, p. 2529, ¶ 4). Both the Sales Contract and the Warranty (discussed below) are standard, nonnegotiable, Lennar form contracts. (R. p. 2438; Vol. 1, p. 218, line 16 to line 24; p. 219, line 11 to line 17).

2) The Lennar Warranty purports to provide relief to aggrieved homeowners. However, a detailed reading of the cross-referenced Warranty shows that its true purpose is to provide temporal limits on Lennar’s responsibility for defective construction. After one to two years, the Warranty only provides a remedy for rare, load bearing, structural defects. (R. Vol. 6, p. 2529, ¶ 9). All other remedies of any kind for any other defect - no matter how egregious - are excluded. Even the “structural warranty” is a misnomer - the only structural components covered are those that Lennar deems are structured components. (R. Vol. 6, p. 2523) Stated differently, the Lennar Warranty, as written, prohibits any remedy of any kind for the defective, leaking, water damaged, structurally unsound homes at The Abbey.

3) If there was any uncertainty left as to the lack of remedy of any kind available to the

homeowners under the terms of the Arbitration Agreement, one only has to go to pages 6 through 9 of the cross-referenced Warranty, which prohibits any coverage or remedy for:

1. Damage to land, landscaping (including sodding, seeding, shrubs, trees, and planting), sprinkler systems, outbuildings, carports, or any other appurtenant structure or attachment to the dwelling, or other additions or improvement not a part of your Home;
2. Loss of use of all or a portion of your Home;
3. Any loss or damage that is caused or made worse by any of the following causes: microorganisms, fungus, decay, wet rot, dry rot, soft rot, rotting of any kind, and mold;
4. Any and all exclusions set forth in the Workmanship Systems and Structural Standards;
5. Except as prohibited by law of the state in which the Home is located, all other warranties express or implied, including but not limited to any implied warrant of habitability, are hereby expressly disclaimed and waived;
6. Lennar shall not be liable for, and you expressly waive recovery of any consequential damages that may result from the condition of any component of the Home, including but not limited to: any diminution in value of the Home before or after repairs are performed; lost profits; damages to personal property; any hospital expenses; cost of food, moving and storage relocation expenses, or rental value of the Home or any other costs due to loss of use, inconvenience or annoyance during repair. (R. Vol. 6, pp. 2527-2528).

4) The Deed's arbitration provision—upon which Lennar sought to compel arbitration—also expressly incorporates by reference **all the terms and conditions** of the Purchase and Sale Agreement, not just Section 16, which Lennar now wishes to cherry-pick and rely upon in isolation. (R. Vol. 5, p. 2252, and p. 2264). In turn, the Purchase and Sale Agreement expressly incorporates by reference Lennar's Limited Warranty **in its entirety**. (See Circuit Court Analysis at R. pp. 8-11, and source Purchase and Sale Agreements, R. 296-713). The Purchase and Sale Agreement also expressly states that, "THE EXPRESS LIMITED WARRANTY AND REMEDIES PROVIDED BY SELLER CONSTITUTE EXCLUSIVE WARRANTY AND REMEDIES TO BE MADE AVAILABLE BY SELLER." (R. at Id.)

Based on the foregoing, there was sufficient evidence to **reasonably support** the Circuit Court's finding that the terms in Lennar's Arbitration Agreement were unconscionable, and thus unenforceable. See Smith v. D.R. Horton, Inc., wherein the South Carolina Supreme Court affirmed the Circuit Court and Court of Appeal's holdings that when read together as a single provision, "the arbitration provision is unconscionable and thus unenforceable." 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016). Accordingly, Homeowners respectfully request that this Honorable Court grant their Petition, reverse the Court of Appeal's Order, and deny Lennar's Motion to Compel Arbitration on the grounds that the Arbitration Agreement is unconscionable.

C. Even When Read in Isolation, the Arbitration Provision Contained in the Purchase and Sale Agreement is Unconscionable, and thus Unenforceable.

Even if this Court were to disregard Smith v. D.R. Horton and read Section 16 of the Purchase and Sale Agreement in isolation, as the Court of Appeals did in rendering its decision, disregarding all of the above cross-referenced and intertwining paragraphs, the arbitration provision would still be unconscionable because it purports that Homeowners have bound their children and other third party occupants to binding arbitration. (R. Vol. 1, P. 301). Specifically, Section 16.1 states:

Disputes (whether contract, **warranty**, tort, statutory or otherwise, shall include, but are not limited to, any and all controversies, disputes, or claims [...] (3) **relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants to the Property, or in the Community. Buyer has executed this Agreement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby.**

This provision provides (1) no meaningful choice to Homeowners, their children, or third party occupants and is, on (2) its face, so oppressive that no reasonable person would accept being bound as such.

Further, Section 16.4 of the Purchase and Sale Agreement is unconscionable because it gives Lennar unilateral power to include contractors, subcontractors, and suppliers, as well as any warranty company and insurer as part of the Mediation and Arbitration. (R. Vol. 1, P. 301).

Specifically, Section 16.4 states:

Buyer and Seller further agree [...] that Seller may, at its sole election, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and (3) that the mediation and arbitration will be limited to the parties specified herein.

Again, said provision is one-sided and provides Homeowners with (1) no meaningful choice as to what parties should be involved in arbitration, and (2) is on its face "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668. It is practically impossible to imagine how a Homeowner might effectively engage in arbitration when Lennar can unilaterally decide whether its subcontractors can participate in the arbitration—the very subcontractors that Lennar was responsible for managing and supervising.

Because the arbitration provision contained in the Purchase and Sale Agreement is unconscionable even when read in isolation, this Court should grant Homeowners Petition, reverse the Court of Appeal's Order, and deny Lennar's Motion to Compel Arbitration because "the arbitration provision is unconscionable, and thus unenforceable." Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

IV. THE CIRCUIT COURT PROPERLY DETERMINED THAT, IN THE ALTERNATIVE, THE ARBITRATION AGREEMENT IS AMBIGUOUS AS TO THE CHOICE OF LAW AND THAT NEITHER THE FAA NOR SCUAA APPLY.

At the hearing on Lennar's Motion to Compel Arbitration, even Lennar's counsel could not make a determination as to whether the Homeowners should be compelled to arbitrate under the

FAA or SCUAA, vacillating between the two:

The Court: Now you're saying that this is applicable under South Carolina Arbitration?

Mr. Quinn: Federal, both. Either, your Honor, but I think federal—

(R. p. 213, lines 13-16).

Ultimately, the Circuit Court performed thorough analysis of the documents drafted by Lennar, finding that ambiguous terms as to the choice of law within each of the document. (See R. pp 17-22). Petitioners assert that the Court's analysis was proper, and that regardless of Lennar's contention, neither the FAA nor SCUAA apply in this case.

A. The FAA Does Not Apply Because the Arbitration Agreement is Unconscionable.

In rendering its decision in the present case, the Court of Appeals held that the FAA applies because “the parties ‘specifically agree that this transaction involves interstate commerce’” and “We must enforce this agreement like an other contract term,” citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001). However, Petitioner Homeowners respectfully submit that the Court's analysis was incomplete. Specifically, in Bradley v. Brentwood Homes, Inc., the South Carolina Supreme Court set forth the standard for enforcing contractual agreements, which purport to evidence an agreement by the parties that a transaction involves commerce:

The FAA provides: “A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract.**” 9 U.S.C.A. § 2.

[Emphasis added]

Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012)

As noted by the above-cited language, a provision in a contract purporting to evidence interstate commerce is not enforceable where grounds exist, at law or in equity, for its revocation.

As set forth under Arguments II and III, *supra*, equitable and legal grounds exist for revoking the arbitration agreement drafted by Lennar. Specifically, applying the South Carolina Supreme Court’s analysis in Smith v. D.R. Horton, Inc. and Simpson v. MSA of Myrtle Beach, Inc., the terms of the arbitration agreement are unconscionable (i.e. the Respondent Homeowners lacked any meaningful choice and the terms are “so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Smith v. D.R. Horton, Inc., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Accordingly, “the arbitration provision is unconscionable and thus unenforceable.” Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

Said differently, this Court should grant Homeowner’s Petition, reverse the Court of Appeal’s order, and affirm the Circuit Court’s finding that the FAA does not apply because sufficient grounds exist for revoking the arbitration agreement. Where a Court finds any clause of a contract unconscionable, including an arbitration clause, as is the case here, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. See S.C. Code§ 36-3-302(1) 2003.<sup>1</sup> Accordingly, this Court should grant Homeowner’s petition, reverse the Court of Appeal’s order and deny Lennar’s Motion to Compel Arbitration because the arbitration agreement is unconscionable and thus unenforceable.

B. In the Alternative, the FAA Does Not Apply Because the Purchase and Sale of Residential Real Estate is an Inherently Intrastate Activity.

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

“To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012), quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). In rendering its decision the present case, the Court of Appeals held that the present case implicates the FAA because “the transaction also involved the construction of residential homes.” Petitioner Homeowners respectfully submit, that the present transaction did not involve the construction of residential homes. Rather, like the Homeowners in Bradley v. Brentwood Homes, Inc., the contracts at issue in this case are a “Purchase and Sale Agreement” and a “Warranty”, not construction contracts. (R. pp. 2454–2521 and pp. 2522–2530. respectively ). Id. 398 S.C. 447, 458 730 S.E.2d 312, 318 (2012).

In South Carolina, our Supreme Court adheres to the view that real estate purchase contracts only implicate intrastate commerce because “the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity.” Id., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) quoting Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18. The Court further confirmed its prior rulings that the sale of a residence is inherently intrastate. Id. Accordingly, it was error for this Court to find that the transaction involved the “construction of residential homes” involving interstate commerce.

Further, the Court of Appeal’s reliance on an affidavit by Lennar’s controller that the transaction involved interstate commerce because it allegedly uses out-of-state contractors and materials and equipment manufactured outside of South Carolina is not dispositive. See Bradley v. Brentwood Homes, wherein the South Carolina Supreme Court found, “[Developer’s] affidavit is inapposite as his attestation that out-of-state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing on the purchase of the completed dwelling.” 398

S.C. at 458, 730 S.E.2d at 318. Lennar’s attestation that the transaction involved interstate commerce does not make it so, particularly when the transaction involves a Purchase and Sale Agreement like we have here and not a Construction Contract. Accordingly, Homeowners respectfully request that this Honorable Court reverse the Court of Appeal’s decision, affirm the Circuit Court’s finding that the transaction was purely intrastate in nature and did not implicate interstate commerce, and remand this case for trial.

C. The SCUAA does not apply because the Arbitration Agreement does not comply with the statute’s disclaimer requirements.

The sales contracts do not contain an arbitration provision that complies with South Carolina Law (or a state arbitration warning). Pursuant to S.C. Code § 15-48-10(a), an arbitration provision must be properly disclaimed, and failure to do so, renders the arbitration provision unenforceable under the SCUAA’s express provisions. Specifically, in order for an arbitration provision to be enforceable/valid it “shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and **unless such notice is displayed thereon the contract shall not be subject to arbitration.**” S.C. Code § 15-48-10(a). [Emphasis added]

In the present case, the sales contracts fail to comply with statute as the notice is not underlined. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518, 2522). The Warranty and the Deeds do not comply because the notice does not appear on the first page and/or is not capitalized. (R. pp. 2252, 2258, 2264, 2278, 2284, 2290, 2301; and 2522). The Covenants appears to comply with the notice requirements. However, as the Circuit Court properly determined, the Covenants could not be enforced because of the adhesive nature of the document, having never been presented to each homeowner, and filed “prior to the sale of the residences.” (R. pp. 22).

CONCLUSION

Petitioners filed this case in 2014, and since 2017 they have been barred from conducting

discovery pursuant to the Stay Order issued by the Court of Appeals. Meanwhile, Petitioners' homes continue to deteriorate. For the reasons stated hereinabove, Petitioners respectfully ask the Court to reverse the Court of Appeal's Order, deny Lennar's Motion to Compel Arbitration, and remand their case for trial.

[Signature on Following Page]

Respectfully submitted,

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