RECEIVED
Feb 28 2022
S.C. SUPREME COURT

EXHIBIT A
to
Petition
to Lift Stay

HAYES LAW FIRM, LLC

180 East Bay Street, Suite 202
Charleston, South Carolina 29401
Tel: (843) 805-7003

John C. Hayes, IV
Email: jhayes@hayeslaw.org

Nina E. Meola
Email: nmeola@hayeslaw.org

February 8, 2022

VIA EMAIL AND US FIRST CLASS MAIL
James Lynn Werner
Parker, Poe, Adams & Bernstein, LLP
PO Box 1509
Columbia, SC 29201
jimwerner@parkerpoe.com

Re: Lift of Stay as to Discovery and Homeowners' Claims Against the Subcontractor Defendants
Appellate Case No.: 2020-001048

Dear Jim:

During oral argument this past Tuesday, you stated to Justice Few and the other Justices that Lennar does not have the right to force the Homeowners to litigate their claims against the Subcontractors in the arbitration forum, particularly where there are no agreements to arbitrate between the Homeowners and Subcontractors.

I was surprised to hear you make this statement to the Court given that Lennar had previously argued the exact opposite position to both the Circuit Court and the Court of Appeals. Specifically, on June 5, 2018, Lennar filed a Petition with the Court Appeals arguing that Homeowners should not be permitted to conduct discovery with, or pursue claims against the Subcontractor Defendants, on the stated ground that these claims were subject to arbitration:

> Regardless of whether Plaintiffs make claims against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case are subject to arbitration because all of the claims arise under and are related to the property and Plaintiffs' claimed injuries and damages sustained because of defects in the properties. There are no claims in the case which are not affected by and at issue in the decision to compel arbitration. (Lennar's Petition to Review Order Lifting Automatic Stay for Purposes of Discovery, filed June 5, 2018).

As a result of Lennar's Petition, the Court of Appeals reversed Judge Nicholson's May 31, 2018, Order Lifting Automatic Stay for Purposes of Discovery, and instituted a stay of all further proceedings in this case. As a result, Homeowners have not, for several years now, been able to conduct any discovery with the subcontractors or pursue and/or resolve the claims against them.

Given Lennar's representation to the Supreme Court at Tuesday's oral argument, we write to seek Lennar's consent to lift the stay enforced as a result of Lennar's June 5, 2018 Petition.

Please find attached a Joint Petition to lift the stay. If you consent, please sign by end of day Thursday, February 10th.

Best regards,

John C. Hayes IV

EXHIBIT B

to

Petition

to Lift Stay

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

PATRICIA DAMICO, AND LENNA LUCAS, individually and on behalf of all other similarly situated, JOSHUA AND BRETTANY BUETOW, 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,

Plaintiffs,

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.

LENNAR CAROLINAS, LLC,

Third-Party Plaintiff,

v.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS 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, DÉCOR 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.

DÉCOR CORPORATION,

Fourth Party
Plaintiff,

v.

BARANOV FLOORING, LLC, DJ CONSTRUCTION SERVICES, LLC, CREATIVE WOOD FLOORS, LLC, GERALDO CUNHA, EBENEZER FLOORING, LLC, ENMANUEL FLOORING AND SIDING, LLC, EUSI FLOORING AND COVERING, LLC, NICOLAS FLORES, ALEXANDER MARTINEZ, ISIDRU MEJIA, JUAN PEREZ SON, ERNESTO M. PEREZ, N&B CONSTRUCTION, LLC, JOSE DIAS RODRIGUES, LIVIA SOUSA, JOSE BETIO PEREIRA, 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 which Lennar Carolinas, LLC is the Appellant and Patricia Damico; Joshua and Brettany Buetow; Bryan and Cynthia Camara; Matthew Collins; Edward and Sylvia Dengg; Jonathan and Theresa Douglass; Czara and Chad England; Lenna Lucas; Danny and Ellen Davis Morrow; Anthony and Stacey Ray; and Defendants and Third-Party Defendants A.C.&A. Concrete, Inc.; Alpha Omega Construction Group, Inc.; Builders FirstSource-Southeast Group, LLC; Coastal Concrete Southeast, LLC; Coastal Concrete Southeast II, LLC; Construction Applicators Charleston, LLC; Civil Site Environmental, Inc.; Décor Corporation; DVS, Inc.; Guaranteed Framing, LLC; Knight's Concrete Products, Inc.; Knight's Redi-Mix, Inc.; LA New

Enterprises, LLC; Land/Site Services, Inc.; Manale Landscaping, LLC; Myers Landscaping, Inc.; Ozzy Construction, LLC; Raul Martinez Masonry, LLC; South Carolina Exteriors, LLC; Southern Green, Inc.; Spring Grove Plantation Development, Inc.; Super Concrete of SC, Inc.; TJB Trucking/Leasing, LLC; and Volkmar Consulting Services, LLC are the Respondents.

MOTION TO ENFORCE STAY

Appellant Lennar Carolinas, LLC ("Lennar") respectfully moves that the Court of Appeals issue an order pursuant to Rule 205 and Rule 241, SCACR, enforcing the automatic stay of all trial court proceedings pending resolution of Lennar's appeal, including all discovery and all motions the Circuit Court was previously scheduled to hear on December 6, 2016. The grounds for this motion are that Lennar moved to compel Plaintiffs, Defendants, and Third-Party Defendants to arbitrate their claims, the Circuit Court issued an Order denying Lennar's motion, and Lennar appealed that Order.

The Circuit Court's decision denying arbitration concerns two fundamental and preliminary issues—where the claims should proceed and which procedural rules should govern. Because those issues affect the entirety of the case, Lennar believes continuation of the trial court proceedings while the issues are being decided would defeat the point of the appeal. However, prior to filing this motion, Lennar conferred with Plaintiffs and learned they believe their claims should continue in the trial court despite the appeal. Accordingly, Lennar respectfully requests an order under Rule 205 and Rule 241, SCACR, that the instant appeal automatically stays further trial court proceedings from motion practice to discovery until the appellate courts resolve the appeal and issue a remittitur.

SUMMARY OF FACTS

Plaintiffs brought this construction defect action against Lennar, an original developer, and their subcontractors. As a result of Plaintiffs' amended pleadings, the case expanded to include

seventeen Plaintiffs, Lennar, eight other Defendants, and nineteen Third-Party Defendants.[1] Lennar moved to compel all of the Plaintiffs, six of its eight co-Defendants, and eighteen of the nineteen Third-Party Defendants to submit all claims to arbitration. Lennar sought arbitration based on contracts, deeds, and covenants applicable to the parties and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), or alternatively, the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.* ("SCUAA"). The Honorable J.C. Nicholson, Jr. denied Lennar's motion, Lennar moved for reconsideration which was also denied, and Lennar filed a notice of appeal on November 16, 2016.

Notwithstanding the appeal, a number of actions have been taken to continue the litigation, including:

- On November 22, 2016, the Berkeley County Clerk of Court set the following seventeen motions for a hearing on December 6, 2016:
    - Plaintiffs' motion for class certification;
    - two motions by Third-Party Defendants for summary judgment on Lennar's claims;
    - two motions to dismiss Lennar's cross-claims/third-party claims;
    - two motion to dismiss cross-claims asserted by another Defendant;
    - a motion to dismiss Plaintiffs' claims;
    - Plaintiffs' motion to compel a subpoena response;
    - three motions to compel discovery responses from Lennar;
    - four motions to compel discovery responses from other parties; and
    - two motions by Third-Party Defendants to amend their pleadings to assert claims

[1] Lennar dismissed its claims against two additional Third-Party Defendants, Geometrics Consulting, LLC and Low Country Renovations and Siding, LLP.

against fourth-party defendants.

Thereafter, Lennar learned the hearings were continued based on the pending appeal,[2] but because Plaintiffs do not acknowledge that an appeal of the Order denying arbitration acts as an automatic stay of the trial court proceedings under Rule 205 and Rule 241, SCACR, Lennar believes it is necessary to seek clarification from the Court of Appeals.

- A party noticed the deposition of Lennar's corporate representative under Rule 30(b)(6), SCRCP. *See* Exhibit B.
- Parties continue to conduct written discovery. *See, e.g.*, Exhibit C.

ARGUMENT

Under Rule 241, SCACR, an appeal "acts to automatically stay" a case except for "matters not affected by the appeal." Similarly, under Rule 205, SCACR, serving a notice of appeal confers "exclusive jurisdiction over the appeal" on the appellate court and restricts the lower court's powers to "proceeding with matters not affected by the appeal." Applying these rules, the Court of Appeals stated that once an appeal is filed, "the lower court is deprived of the power to proceed with matters that are affected by the appeal." *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012). Under Rule 205 and Rule 241's broad "affected by" standard, this entire case is affected by the appeal and thus automatically stayed.

That the appeal of an order denying arbitration affects the entirety of the case follows from the nature of arbitration and the fundamental question presented by such a motion: can the parties litigate in a judicial forum or are they bound to proceed in an arbitration forum? If parties enter into an arbitration agreement, the parties agree to resolve any disputes between them in arbitration and to

[2] A copy of the Berkeley County roster for the motion week of December 5, 2016 is attached hereto as Exhibit A and notes for each pending motion, "Continued...appeal pending."

forego their rights to seek relief in a judicial forum. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 667–68 (2007); *Steinmetz v. Am. Media Servs., LLC*, 393 S.C. 72, 74, 709 S.E.2d 708, 709 (Ct. App. 2011). Therefore, where parties select arbitration, the parties opt to have all decisions made by an arbitrator, opt for the procedural rules of the particular arbitration forum, and are not entitled to pursue discovery before a circuit court or seek rulings from a circuit court.

That the decision of whether parties are bound to arbitrate a dispute affects the entirety of a case is also reflected in South Carolina's appellate procedure. Whether sought under the FAA or the SCUAA, litigants have a right to immediate appellate review of a ruling denying a motion to compel arbitration. *See Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 713 (4th Cir. 2015); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34–35, 524 S.E.2d 839, 842–43 (Ct. App. 1999). That right to immediate appellate review is the result of a "deliberate determination that appeal rules should reflect a strong policy favoring arbitration," *Towles*, 338 S.C. at 34–35, 524 S.E.2d at 842–43, and the fact that because an arbitration appeal affects where the case proceeds, who decides the issues, and which procedural rules apply, the arbitration issue is an issue that must be resolved before any further litigation can take place.

Recognizing these principles, South Carolina courts have acknowledged that the entire case is affected and thus stayed when a party appeals the denial of arbitration. For example, while addressing whether the denial of a motion to compel arbitration is immediately appealable, in *Towles* this Court held that a circuit court could not refuse to compel arbitration until after the parties conducted discovery because to do so would "favor[] litigation over arbitration" and not respect the parties' agreement to arbitrate. *Towles*, 338 S.C. at 35, 524 S.E.2d at 842–43. In *Cape Romain Contractors, Inc. v. Wando E., LLC*, Appellate Case No. 2011-197207, *see* Exhibit D attached

hereto, this Court denied a party's motion to remand a case for limited discovery while there was a pending appeal on the lower court's decision denying arbitration, thereby acknowledging that the right to conduct discovery is affected by an arbitration appeal and unless the appellate courts order otherwise is stayed by the appeal.

Also, the Honorable John Few, then a circuit court judge, ordered in *Chassereau v. Global-Sun Pools, Inc.*, No. 03-CP-25, 476, 2006 WL 6087626 (Com. Pl., March 29, 2006), *see* Exhibit E attached hereto, that a case was stayed and discovery could not proceed until the appellate courts resolved the defendant's appeal of its arbitration rights. Justice Few reasoned that "[t]he general rule in South Carolina is that discovery is stayed pending an appeal" and that an arbitration appeal affects the threshold issue of the forum for resolution of the dispute and thus the availability of and rules governing discovery. He also reasoned that allowing discovery to proceed while an appeal denying arbitration is pending would defeat the purpose of permitting an immediate appeal and create a significant risk of wasting judicial and litigant resources. Additionally, the Honorable J.C. Nicholson, Jr., the circuit court judge who issued the Order on appeal here, granted a motion to stay a case until an appeal of the denial of a motion to compel arbitration was resolved. *See* Exhibit F attached hereto.

Likewise, the United States Court of Appeals for the Fourth Circuit and the majority of federal circuit courts adopted the rule that an appeal of an order denying arbitration stays the entirety of the case until resolution of the appeal. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011). The Fourth Circuit held that "[t]he core subject of an arbitrability appeal is the challenged continuation of the proceedings before the district court on the underlying claims" and thus, "permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction." *Id.* The Fourth Circuit relied on the seminal decision on this issue,

Bradford-Scott Data Corp. v. Physician Computer Network, 128 F.3d 504 (7th Cir. 1997), which states that a notice of appeal confers jurisdiction on the appellate court and divests the lower court of jurisdiction over all aspects of the case involved in the appeal. *Bradford-Scott*, 128 F.3d at 505. The *Bradford-Scott* decision then found that the appeal of a denial of arbitration affects the entire case, reasoning that "[w]hether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal [of a denial of a motion to compel arbitration], however; it is the mirror image of the question presented on appeal." *Id.*

Additionally, not only does an appeal of the denial of a motion to compel arbitration affect the entirety of the case and thus stay the case, this result is necessary to avoid duplicative and wasteful expenditures of judicial and litigant resources. If such an appeal does not stay the case, the circuit court could rule on numerous procedural and dispositive motions during the pendency of the appeal, only to have the appellate court reverse the circuit court and order arbitration. The parties would then have to re-litigate those same issues before the arbitrator, and the parties and circuit court's efforts while the appeal was pending would have been unnecessary and wasteful. The Fourth Circuit highlighted the inefficiencies that would result from permitting litigation to continue before a trial court during an arbitrability appeal, stating:

> Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. . . Cases of this kind are therefore poor candidates for exceptions to the principle that a notice of appeal divests the district court of power to proceed with the aspects of the case that have been transferred to the court of appeals.

Id. at 506.

While the decisions and reasoning outlined above establish that an arbitrability appeal automatically stays the entirety of the case, even were there an exception to that rule, the

characteristics of this case make a complete stay necessary. For example, one of the pending motions is Plaintiffs' motion to certify a class of homeowners. However, under the FAA, a party cannot pursue class claims in arbitration unless the arbitration agreement explicitly provides for class arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 559 U.S. 662, 684 (2010). Additionally, contracts that contain the arbitration agreements at issue here expressly waive the right to pursue class claims. Therefore, a determination as to whether enforceable arbitration agreements exist is a prerequisite to consideration of any motion for class certification.

Furthermore, the scope of Plaintiffs' claims, and as a result, the scope of discovery, depend on the outcome of this appeal. There are sixty-nine homes in the residential community that is the subject of this dispute, and Plaintiffs own only a few of those homes. If Plaintiffs are subject to an enforceable arbitration agreement and cannot pursue claims on behalf of a class, only their homes are at issue and the scope of this case and the scope of discovery are significantly reduced. For example, of the many subcontractor defendants who are presently parties to this dispute due to Plaintiffs' putative class action, any subcontractor defendants who performed work in the development but did not perform work on Plaintiffs' homes likely could be dismissed.

Finally, Lennar moved to compel arbitration as to *all* of the Plaintiffs and nearly all of the Defendants and Third-Party Defendants. Therefore, there is no portion of this case that could be severed from those portions potentially subject to arbitration and permitted to proceed. Plaintiffs' ability to pursue any of their claims in a judicial forum is at issue in the appeal, and until that issue is resolved, there are no claims that can proceed before the Circuit Court.

CONCLUSION

For the foregoing reasons and pursuant to Rule 205 and Rule 241, SCACR, Lennar respectfully requests the Court issue an order enforcing the automatic stay of this case during the pendency of this appeal.

November 29, 2016

Jenna K. McGee
F. Elliotte Quinn IV
Parker, Poe, Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, South Carolina 29401
(843) 727-2650
Attorneys for Appellant Lennar Carolinas, LLC

Other Counsel of Record:

Michael J. Jordan, Esq.
Catherine K. Dunn, Esq.
The Steinberg Law Firm, LLP
P.O. Box 1028
Goose Creek, SC 29445
and
John Calvin Hayes, IV, Esq.
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Attorneys for Respondents Patricia Damico; Joshua and Brettany Buetow; Bryan and Cynthia Camara; Matthew Collins; Jonathan and Theresa Douglass; Czara and Chad England; Lenna Lucas; Danny and Ellen Davis Morrow

Shanna Milcetich Stephens
Katherine C. Miars
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29402
Attorney for Respondent A.C.&A. Concrete, Inc.

Laura H. Budd, Esquire
The Budd Law Group, PLLC
10550 Independence Point Pkwy, Suite 301
Matthews, NC 28105
and
Stephen L. Brown, Esquire
Catherine H. Chase, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
and
Preston B. Dawkins, Jr., Esquire
Aiken Bridges, P.A.
P.O. Drawer 1931
Florence, SC 29503
Attorneys for Respondent Alpha Omega Construction Group, Inc.

Stephen P. Hughes, Esquire
Howell, Gibson and Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901
Attorney for Respondent Builders FirstSource-Southeast Group, LLC

Brent M. Boyd, Esq.
PO Box 6648 4406-B Forest Dr.
Columbia, SC 29260
Attorney for Respondents Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC

David S. Cobb
Turner Padget
P.O. Box 22129
Charleston, SC 29413
Attorney for Respondent Construction Applicators Charleston, LLC

Kathy A. Carlsten, Esquire
N. Keith Emge, Esquire (Chip)
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for Respondent Civil Site Environmental, Inc.

Samia Nettles, Esquire
Richardson Plowden
40 Calhoun Street, Suite 220
Charleston, SC 29401
Attorney for Respondent Décor Corporation

S. Markey Stubbs, Esquire
Baker Ravenel Bender
P.O. Box 8057
Columbia, SC 29202
Attorney for Respondent DVS, Inc.

Derek M. Newberry, Esquire
Hall Booth Smith, P.C.
40 Calhoun Street, Suite 550
Charleston, SC 29401
and
Christine Companion Varnado, Esquire
The Seibels Law Firm
38 Broad Street, Suite 200
Charleston, SC 29401
and
Alan R. Belcher, Jr., Esq.
40 Calhoun Street, Suite 550
Charleston, SC 29401
Attorneys for Respondent Guaranteed Framing, LLC

Steven L. Smith, Esquire
Zachary J. Closser, Esquire
Samuel M. Wheeler, Esquire
Smith Closser, P.A.
P.O. Box 405878
Charleston, SC 29423-0578
Attorneys for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

Erin D. Dean, Esquire
Tupper Grimsley & Dean, P.A.
PO Box 2055
Beaufort, SC 29901-2055
Attorney for Respondent LA New Enterprises, LLC

John E. Rogers, II
The Ward Law Firm, P.A.
PO Box 5663
Spartanburg, SC 29304
Attorney for Respondent Land/Site Services, Inc.

James H. Elliott, Jr., Esq.
Samia H. Nettles, Esq.
Richardson Plowden
40 Calhoun Street, Suite 220
Charleston, SC 29401
Attorneys for Respondent Manale Landscaping, LLC

Thomas F. Dougall
William A. Collins, Jr.
Michal Kalwajtys
Dougall & Collins
1700 Woodcreek Farms Road, Suite 100
Elgin, South Carolina 29045
Attorney for Respondent Ozzy Construction, LLC

Erin D. Dean, Esquire
Tupper Grimsley & Dean, P.A.
PO Box 2055
Beaufort, SC 29901-2055
Attorney for Respondent Raul Martinez Masonry, LLC

Jenny C. Honeycutt, Esq.
PO Box 13466
James Island, SC 29422
Attorney for Respondent South Carolina Exteriors, LLC

Bachman S. Smith, IV, Esq.
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, Third Floor
Charleston, SC 29401
Attorney for Respondent Southern Green, Inc.

R. Trippett Boineau, III, Esq.
Heath McAlvin Stewart, III, Esq.
McAngus, Goudelock & Courie, LLC
P.O. Box 12519
Columbia, SC 29211
Attorneys for Respondent Spring Grove Plantation Development, Inc.

R. Patrick Flynn, Esq.
Michael Allen, Esq.
Pope Flynn, LLC
PO Box 70
Charleston, SC 29402
Attorneys for Respondent Super Concrete of SC, Inc.

David Shuler Black, Esq.
Howell Gibson & Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901-0040
Attorney for Respondent TJB Trucking/Leasing, LLC

Ronald G. Tate, Jr., Esquire
R. Batten Farrar, Esquire
Gallivan, White & Boyd, P.A.
55 Beattie Place, Suite 1200 (29601)
P.O. Box 10589
Greenville, SC 29603
Attorneys for Respondent Volkmar Consulting Services, LLC

Edward and Sylvia Dengg
238 Maywood Drive
Moncks Corner, SC 29461
Pro Se Respondents

Anthony and Stacey Ray
107 Loch Circle
Hampton, VA 23669
Pro Se Respondents

Third-Party Defendant Myers Landscaping, Inc.[3]
c/o Joseph H. Myers, Registered Agent
Myers Landscaping, Inc.
382 Big Bird Lane
Summerville, SC 29486

[3] Myers Landscaping, Inc. was served but has not appeared.

EXHIBIT C

to

Petition

to Lift Stay

The South Carolina Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated; Joshua and Brettany Buetow; 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; Geometrics 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 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 Plantiff,

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; Isidru 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.

Appellate Case No. 2016-002339

ORDER

Lennar Carolinas, LLC (Lennar) served and filed a notice of appeal from a circuit court order denying its motion to compel arbitration. Lennar now moves this court to enforce a stay of proceedings in the circuit court. First, this court notes the order denying the motion to compel arbitration is immediately appealable. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (holding an order denying a motion to compel arbitration is immediately appealable). Second, because Lennar has served a notice of appeal from an appealable order, all matters affected by this appeal must be stayed during the pendency of the appeal. *See* Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal."); Rule 241(a), SCACR ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision."); *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he lower court is deprived of the power to proceed with matters that are affected by the appeal . . . .").

FOR THE COURT

Columbia, South Carolina

FILED
December 19, 2016

cc: Jenna Brooke Kiziah McGee, Esquire
Frederick Elliotte Quinn, IV, Esquire
Michael J. Jordan, Esquire
Catherine Dunn Meehan, Esquire
John Calvin Hayes, IV, Esquire
R. Patrick Flynn, Esquire
Michael Wade Allen, Jr., Esquire
Bachman S. Smith, IV, Esquire
James H. Elliott, Jr., Esquire
Samia Hanafi Nettles, Esquire

David Shuler Black, Esquire
Shanna Milcetich Stephens, Esquire
Stephen Lynwood Brown, Esquire
Catherine Holland Chase, Esquire
Preston Bruce Dawkins, Jr., Esquire
Stephen P. Hughes, Esquire
Kathy Aboe Carlsten, Esquire
N. Keith Emge, Jr., Esquire
Brent Morris Boyd, Esquire
David Starr Cobb, Esquire
Sidney Markey Stubbs, Esquire
Derek Michael Newberry, Esquire
Christine Companion Varnado, Esquire
Alan Ross Belcher, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Erin DuBose Dean, Esquire
Thomas Frank Dougall, Esquire
William Ansel Collins, Jr., Esquire
Michal Kalwajtys, Esquire
John Elliott Rogers, II, Esquire
Jenny Costa Honeycutt, Esquire
Robert Trippett Boineau, III, Esquire
Heath McAlvin Stewart, III, Esquire
Ronald G. Tate, Jr., Esquire
Robert Batten Farrar, Esquire
Edward Dengg
Sylvia Dengg
Anthony Ray
Stacey Ray
The Honorable Mary P. Brown
The Honorable J.C. Nicholson, Jr.

EXHIBIT D

to

Petition

to Lift Stay

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2014-CP-08-02424

Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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,

Plaintiffs,

vs.

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.

Lennar Carolinas, LLC,

Third-Party Plaintiff,

vs.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics 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, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South

---

PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO LIFT AUTOMATIC STAY

Carolina Exteriors, LLC, Builders FirstSource – Southeast Group, LLC, and Low Country Renovations and Siding, LLP,

Third-Party Defendants.

Décor Corporation,

Fourth Party Plaintiff,

vs.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Enmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez Son, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aparecido Corgosinho, Ricardo Chiche, Cebs Construction, Bayshore Siding and Flooring, Sebastio Luiz De Araujo, and John Does 1 – 4,

Fourth-Party Defendants.

Alpha Omega Construction Group, Inc.

Fourth-Party Plaintiff,

Vs.

Garcia Roofing, LLC, Juan Garza Ramos, Jose Vera, and Espino Roofing, LLC,

Fourth-Party Defendants.

DVS, Inc.,

Fourth-Party Plaintiff,

Vs.

Sousa Construction, LLC, Lima Construction, LLC, N&B Construction, LLC, Itatiaia Construction, LLC and JC Contractors, LLC

Fourth-Party Defendants.

South Carolina Exteriors, LLC

Fourth-Party Plaintiff,

Vs.

Juan Garza Ramos, d/b/a Juan Constructors,

Fourth-Party Defendant.

Guaranteed Framing, LLC

Fourth-Party Plaintiff,

Vs.

First Construction, LLC, JC Contractors, LLC, Jessica Marroquin d/b/a Marroquin Construction, and Unique Framing, LLC,

Fourth Party Defendants.

COME NOW Plaintiffs, Patricia Damico and Lenna Lucas, to hereby file this Motion to Lift the Stay Only for Purposes of Discovery and Memorandum in Support of said Motion. The basis for this Motion is that Plaintiffs would like to continue conducting discovery in an effort to keep the case progressing along pending resolution of Lennar's appeal.

SUMMARY OF ARGUMENT

The Court should lift the automatic stay under SCACR 241 for the following reasons:

1)The matters that are being appealed by the Defendant relate only to arbitration and not to

matters such as discovery in the underlying case.

2)The chances of spoliation of evidence are greatly increased by the delay.

3)There are no alleged arbitration agreements between the Plaintiffs and the subcontractor Defendants.

4)If discovery is not allowed to continue the case will be prolonged indefinitely, severely prejudicing the Plaintiffs.

5)Witnesses' memories are fresh concerning important facts and need to be memorialized through discovery.

6)The videos included as exhibits show the dangerous conditions that homeowners are living in. Examples include:

- Massive cracks extending from the ceiling to the floor. These cracks are expanding daily and require urgent repair.
- Pieces of drywall are falling from the walls and ceiling due to the expanding cracks.
- Cracks are extending into electrical outlets and light fixtures making them unsafe to use.
- Floors are cracking and causing insect infestation requiring immediate extermination.
- Counters in bathrooms and kitchens are separating from the walls.
- One homeowner has been without heating and air conditioning for over two years because the ground cannot support HVAC units.

7)Construction defects have created extremely hazardous conditions that need to be repaired in a timely manner.

8)The arbitration clause at issue is unconscionable and unenforceable and Defendant's appeal will be unsuccessful.

FACTUAL BACKGROUND

This is a construction defect case filed by homeowners in the development known as The Abbey at Spring Grove located in Moncks Corner, South Carolina. The Abbey development was originally started by Defendant Spring Grove Plantation Development, Inc. in 2011 and was subsequently sold to Defendant Lennar Carolinas, LLC. After purchasing the development Defendant Lennar took over the control, construction, management, and sale of the Properties.

Since the construction of the homes at Spring Grove, homeowners have experienced severe defects in their homes. Plaintiffs' investigations have revealed significant design and construction defects including but not limited to improper soil grading, improper drainage, and structural defects resulting in hazardous structural deterioration[1]. Because the defects are so severe, the grading, structures, and drainage must be completely redone to fix the harm.

PROCEDURAL BACKGROUND

Plaintiffs commenced the current action by Summons and Complaint on December 12, 2014 and asserted claims including negligence, negligent misrepresentation, breach of implied warranties, breach of fiduciary duties, and unfair trade practices against Defendant Lennar. On March 24, 2016 Plaintiffs moved for class certification and Filed an Amended Complaint. Shortly thereafter, Defendant Lennar filed a Motion to Compel Arbitration on March 30, 2016. That Motion was subsequently denied by the court and Lennar served a Notice of Appeal on Plaintiffs on November 18, 2016. (Attached hereto as Exhibit D). Afterwards, the South Carolina Court of

[1] Attached to this memorandum are three videos of homeowners and the conditions in their home. (Exhibits A-C). The conditions present in these homes are common in the neighborhood and convey the hazardous conditions present. The safety concerns caused by these conditions are reasons the stay should be lifted so the case may continue and the homes may be repaired and restored.

Appeals issued an order staying all matters affected by the appeal during its pendency. (Attached hereto as Exhibit E). Plaintiffs take the position that discovery is not affected by the Defendant's appeal. As a result, Plaintiffs have brought this motion to request the Court lift the stay to allow discovery to continue and move the case forward.

STANDARD OF REVIEW

It is within the inherent powers of this Court to control the order of its business and to safeguard the rights of litigants that come before it. *Williams v. Borden's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980).

ARGUMENT

I. Rules 205 and 241 do not stay the entire case during appeal.

When a notice of appeal of a trial court's judgment or order is served the appellate court will have jurisdiction over the matters and claims being appealed. SCACR 205. Further, any notice of appeal operates as an automatic stay on any matters being appealed. SCACR 241(a). Any matter or action that is not subject to the notice of appeal will still be under the jurisdiction of the lower court. *Id*.

In the case at hand, the matter that has been appealed is a Motion to Compel Arbitration made by Defendant Lennar. As discussed below, this is merely an attempt to prolong and delay the case and the appeal has a very low likelihood of being successful. The majority of discovery is not related to the arbitration issue and therefore does not come under the automatic stay imposed by Rule 241(a). Since the stay does not apply to such discovery, the Court should allow the process to continue. If discovery is not allowed to continue, witnesses' recollections of important facts will diminish and the hazardous conditions present at The Abbey as Spring Grove

will worsen and continue to severely harm the Plaintiffs. Further, if the hazardous conditions and construction defects continue to worsen, the Defendants will be harmed as damages will continue to accrue. The likelihood of spoliation of evidence issues increases as well. With a lengthy delay comes the possibility of valuable information and evidence being lost, destroyed, or tampered with. It will also keep the parties from fully assessing the relative strengths and weaknesses of their cases, possibly leading to surprises during trial that could further prolong the litigation. This will harm both parties and benefits no one involved in the case. Lifting the stay for discovery will eliminate the possibility of this occurring and move the case along.

The subcontractors in the case do not have arbitration agreements with the Plaintiffs. But, since Defendant Lennar has appealed the ruling on their motion to compel and a stay has been ordered Plaintiffs and other Defendants are unable to work towards discovery and resolving the case. Lifting the stay would allow for discovery to continue with the Subcontractor Defendants in this case and could possibly lead to resolution of this matter.

Further, not only will the damages to the homes increase, the homeowners will be severely prejudiced as they cannot sell or rent their homes. They are saddled with defective and hazardous dwellings that urgently require repair. It is in the best interests of all involved parties that the discovery process be allowed to continue in order to conclude the case in an efficient manner.

II. The Court should grant a motion to lift the stay for purposes of discovery.

Generally, after service of notice of an appeal and automatic stay comes into effect. Any party may move the Court to issue an order lifting that automatic stay pursuant to SCACR 241(c)(1). This order may be issued by a lower court, adjudicative tribunal, or appellate court.

SCACR 241(c)(2).

The court should lift the automatic stay for the following reasons:

1) Witnesses that are essential to both sides will be unable to recall important facts that are currently fresh in their memories.

2) It is in the best interests of the Court to promote an efficient timeline for this case and keep it moving along to lower the costs of repair and litigation and also keep the Plaintiff homeowners safe from hazardous conditions.

3) There is no arbitration agreement between the Plaintiffs and the subcontractor Defendants in the case.

4) Discovery conducted with subcontractor defendants in the case may lead to settlements that will benefit the homeowners.

5) Discovery needs to continue to prevent issues such as spoliation of evidence, lapsing memories, or illnesses or deaths of potential witnesses.

6) The Plaintiffs continue to suffer from the hazardous conditions caused by the design and construction defects at Spring Grove and will be severely prejudiced by any lengthy delay.

7) Damages and costs of repair will increase leaving the homes and their owners in a vulnerable state.

While the case at hand does not involve a Motion for a Discretionary Stay, it is important for the Court to consider the reasons a discretionary stay will not be upheld. Factors that are commonly weighed by the South Carolina District Court include: (1) likelihood of success of the appeal, (2) likelihood of injury to Defendants if stay is denied or lifted, (3) the likelihood of injury to the other parties if stay is upheld, and (4) the public interest served by allowing the stay to

remain. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). Even though the matter at hand is not in Federal District Court, the Court should look to these factors as guidance in lifting the stay.

A. The Likelihood of the Success of Defendant's Appeal is Minimal.

The arbitration clause in Article 16 of Lennar's purchase and sale agreement, (attached hereto as Exhibit F), is unconscionable under South Carolina Law and consequentially unenforceable. Therefore, the likelihood of Defendant's success in moving for this appeal is minimal.

The Federal Arbitration Act provides that arbitration clauses are unenforceable when state law invalidates contract clause provisions. 9 U.S.C. §2. This means that state laws governing contracts generally will also apply to arbitration clauses between parties.

The South Carolina Code states that "[i]f a Court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the Court may refuse to enforce the contract . . .." S.C. Code Ann. §36-2-302(1). As with fraud and duress, unconscionability is a common defense to contract enforcement. The Supreme Court of South Carolina recently ruled on this issue in *Smith v. D.R. Horton, Inc.*. The *D.R. Horton* case involved a "contract of adhesion" between a large construction corporation that built houses in 27 states and a homeowner.[2] The Court ruled that when a contract contains one-sided, unfair and oppressive terms and the party lacks a meaningful choice in the negotiation and execution of the agreement, a contract provision will be unconscionable and unenforceable. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). It was also noted that while a contract of

[2] The Court defined a "contract of adhesion" as a "standard form contract offered on a take it or leave it basis with terms that are not negotiable." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)).

adhesion is not unconscionable *per se*, such contracts or agreements should be looked upon with "considerable skepticism." *Id.* (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669-70 (2007)). In determining whether there was a lack of meaningful choice in the negotiations of the contract, the Court looked to the disparity of the bargaining power between the parties. Further, the Court adopted the view that the "modern buyer of new residential housing is in an unequal bargaining position as against the seller." *Id.* at 50 (quoting *Kennedy v. Columbia Lumber and Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989)). Using this view and the fact that the homeowners were a single client to a nationwide homebuilder, the court found that there was a lack of meaningful choice due to little to no bargaining power. As a result, the D.R. Horton arbitration clause was found to be unenforceable.

In this case, Defendant's purchase and sale agreements with the owners were contracts of adhesion. They are standard forms with boilerplate language that are not open to full and open negotiation between the parties entering the agreement. Therefore, looking at the contract with the "skepticism" used by the *D.R. Horton* Court, it is clear that there was a lack of meaningful choice due to the large disparity in bargaining power and the arbitration clause in question is unfair, oppressive, and one sided in favor of the Defendant. Much like the Defendant in *D.R. Horton*, Lennar is a large homebuilder that operates in twenty-one (21) states in some of the "finest markets in the nation." (Lennar's website). Further, their marketing reaches out to first time home buyers. The purchasers of the homes at The Abbey clearly fall within the Court's adopted view of the "modern homebuyer" and were left with no bargaining power or ability to make a meaningful choice. Based on this view and the facts at hand, Defendant's likelihood of success in appealing the Motion to Compel Arbitration is minimal.

Also, as single clients to the Defendant, there were no serious business concerns that would warrant substantial negotiations between the purchasers and the Defendant. The *D.R. Horton* Court found that when there is a single client that is dealing with a massive corporation, there is an inherent difference in bargaining power. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4. If a purchaser is not a substantial business concern to the corporation presenting the terms, there is likely going to be no negotiations. In the case of The Abbey homeowners, they were of little concern the Defendant and were not allowed any negotiation opportunities. Therefore, they held little to no bargaining power and were left with a lack of meaningful choice.

Based on the overall lack of meaningful choice and inability to negotiate the terms of the contracts at issue, the arbitration clause is unconscionable and, as a result, unenforceable. Therefore, Defendant Lennar's appeal of their Motion to Compel will be denied.

B. There is No Likelihood of Injury to Defendants if the Stay is Lifted.

Should the Court lift the stay, the injury to Defendants will be minimal if not non-existent. Allowing discovery to continue will benefit both parties because time sensitive information will be able to be gathered and analyzed. This allows the case to move on at an efficient pace and possibly be resolved in the near future. The only harm that the Defendant may suffer is in their attempts to prolong and delay the case. Therefore, the harm is minimal and the Court should find this factor weighing in favor of the Plaintiffs.

C. There is a High Likelihood of Injury to Plaintiffs if the Stay is Enforced.

Unlike the factor above, the likelihood of injury to the Plaintiffs is high. The Plaintiffs are living in extremely hazardous conditions that will only continue to get worse if the stay is not lifted and the case is stalled. As seen in the attached exhibit videos, there are dangerous

conditions present at The Abbey. An unreasonable delay will put Plaintiffs and their families in danger. Further, facts and information that are important to the Plaintiffs' case may be lost or forgotten if discovery does not continue. There is also a high risk of spoliation of evidence occurring due to a substantial delay. Upholding the stay will severely prejudice the Plaintiffs. Therefore, the Court should conclude this factor supports a lifting of the stay.

D. The Public Interest Will Be Best Served by Lifting the Stay.

Allowing discovery to continue will promote efficiency and not slow the court system down with needless and prolonged delay. Also, the prospect of settlement will grow with the continuation of the case as more facts and information are discovered.

CONCLUSION

The Court should lift the automatic stay for purposes of discovery. Failure to lift the stay will impose harm on both the Defendants and Plaintiffs and place the safety of the homeowners in jeopardy. Staying the case will also lead to an inefficient delay that is not in the best interests of the Court system. Based on the interests of all parties involved in this case, the Court should lift the stay and allow the action to move forward in a timely manner.

[Signature Page to Follow]

HAYES LAW FIRM, LLC

John C. Hayes, IV, Esquire
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: (843) 805-7003
Fax: (843) 573-7388
jhayes@hayeslaw.org

February 21, 2018
Charleston, South Carolina

EXHIBITS A-C ARE ATTACHED VIA DVD DISC

EXHIBIT D

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Case No. 2014-CP-08-2424

PATRICIA DAMICO, AND LENNA LUCAS, individually and on behalf of all other similarly situated, JOSHUA AND BRETTANY BUETOW, 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,

Plaintiffs,

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.

HQ

Defendants.

LENNAR CAROLINAS, LLC,

Third-Party Plaintiff,

v.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS 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, DÉCOR 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.

DÉCOR CORPORATION,

Fourth Party

Plaintiff,

v.

BARANOV FLOORING, LLC, DJ CONSTRUCTION SERVICES, LLC, CREATIVE WOOD FLOORS, LLC, GERALDO CUNHA, EBENEZER FLOORING, LLC, ENMANUEL FLOORING AND SIDING, LLC, EUSI FLOORING AND COVERING, LLC, NICOLAS FLORES, ALEXANDER MARTINEZ, ISIDRU MEJIA, JUAN PEREZ SON, ERNESTO M. PEREZ, N&B CONSTRUCTION, LLC, JOSE DIAS RODRIGUES, LIVIA SOUSA, JOSE BETIO PEREIRA, 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 which Lennar Carolinas, LLC is the Appellant and Patricia Damico; Joshua and Brettany Buetow; Bryan and Cynthia Camara; Matthew Collins; Edward and Sylvia Dengg; Jonathan and Theresa Douglass; Czara and Chad England; Lenna Lucas; Danny and Ellen Davis Morrow; Anthony and Stacey Ray; and Defendants and Third-Party Defendants A.C.&A. Concrete, Inc.; Alpha Omega Construction Group, Inc.; Builders FirstSource-Southeast Group, LLC; Coastal Concrete Southeast, LLC; Coastal Concrete Southeast II, LLC; Construction Applicators Charleston, LLC; Civil Site Environmental, Inc.; Décor Corporation; DVS, Inc.; Guaranteed Framing, LLC; Knight's Concrete Products, Inc.; Knight's Redi-Mix, Inc.; LA New Enterprises, LLC; Land/Site Services, Inc.; Manale Landscaping, LLC; Myers Landscaping, Inc.; Ozzy Construction, LLC; Raul Martinez Masonry, LLC; South Carolina Exteriors,

LLC; Southern Green, Inc.; Spring Grove Plantation Development, Inc.; Super Concrete of SC, Inc.; TJB Trucking/Leasing, LLC; and Volkmar Consulting Services, LLC are the Respondents.

AMENDED NOTICE OF APPEAL

Lennar Carolinas, LLC ("Appellant") appeals the orders of the Honorable J.C. Nicholson, Jr. denying Appellant's motion to compel arbitration. The Court issued an Order dated September 19, 2016, denying Appellant's motion to compel arbitration, Appellant moved for reconsideration on September 29, 2016, and Appellant received notice of the ruling on its motion to reconsider on October 28, 2016.

November 18, 2016

Jenna K. McGee
F. Elliotte Quinn IV
Parker, Poe, Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, South Carolina 29401
(843) 727-2650
Attorneys for Appellant Lennar Carolinas, LLC

Other Counsel of Record:

Michael J. Jordan, Esq.
Catherine K. Dunn, Esq.
The Steinberg Law Firm, LLP
P.O. Box 1028
Goose Creek, SC 29445
and
John Calvin Hayes, IV, Esq.
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Attorneys for Respondents Patricia Damico; Joshua and Brettany Buetow; Bryan and Cynthia Camara; Matthew Collins; Jonathan and Theresa Douglass; Czara and Chad England; Lenna Lucas; Danny and Ellen Davis Morrow

Shanna Milcetich Stephens
Katherine C. Miars
Anderson Reynolds & Stephens, LLC
P.O. Box 87

Charleston, SC 29402
Attorney for Respondent A.C.&A. Concrete, Inc.

Laura H. Budd, Esquire
The Budd Law Group, PLLC
10550 Independence Point Pkwy, Suite 301
Matthews, NC 28105
and
Stephen L. Brown, Esquire
Catherine H. Chase, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
and
Preston B. Dawkins, Jr., Esquire
Aiken Bridges, P.A.
P.O. Drawer 1931
Florence, SC 29503
Attorneys for Respondent Alpha Omega Construction Group, Inc.

Stephen P. Hughes, Esquire
Howell, Gibson and Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901
Attorney for Respondent Builders FirstSource-Southeast Group, LLC

Brent M. Boyd, Esq.
PO Box 6648 4406-B Forest Dr.
Columbia, SC 29260
Attorney for Respondents Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC

David S. Cobb
Turner Padget
P.O. Box 22129
Charleston, SC 29413
Attorney for Respondent Construction Applicators Charleston, LLC

Kathy A. Carlsten, Esquire
N. Keith Emge, Esquire (Chip)
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401

Attorneys for Respondent Civil Site Environmental, Inc.

Samia Nettles, Esquire
Richardson Plowden
40 Calhoun Street, Suite 220
Charleston, SC 29401
Attorney for Respondent Décor Corporation

S. Markey Stubbs, Esquire
Baker Ravenel Bender
P.O. Box 8057
Columbia, SC 29202
Attorney for Respondent DVS, Inc.

Derek M. Newberry, Esquire
Hall Booth Smith, P.C.
40 Calhoun Street, Suite 550
Charleston, SC 29401
and
Christine Companion Varnado, Esquire
The Seibels Law Firm
38 Broad Street, Suite 200
Charleston, SC 29401
and
Alan R. Belcher, Jr., Esq.
40 Calhoun Street, Suite 550
Charleston, SC 29401
Attorneys for Respondent Guaranteed Framing, LLC

Steven L. Smith, Esquire
Zachary J. Closser, Esquire
Samuel M. Wheeler, Esquire
Smith Closser, P.A.
P.O. Box 405878
Charleston, SC 29423-0578
Attorneys for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

Erin D. Dean, Esquire
Tupper Grimsley & Dean, P.A.
PO Box 2055
Beaufort, SC 29901-2055
Attorney for Respondent LA New Enterprises, LLC

John E. Rogers, II
The Ward Law Firm, P.A.
PO Box 5663
Spartanburg, SC 29304
Attorney for Respondent Land/Site Services, Inc.

James H. Elliott, Jr., Esq.
Samia H. Nettles, Esq.
Richardson Plowden
40 Calhoun Street, Suite 220
Charleston, SC 29401
Attorneys for Respondent Manale Landscaping, LLC

Thomas F. Dougall
William A. Collins, Jr.
Michal Kalwajtys
Dougall & Collins
1700 Woodcreek Farms Road, Suite 100
Elgin, South Carolina 29045
Attorney for Respondent Ozzy Construction, LLC

Erin D. Dean, Esquire
Tupper Grimsley & Dean, P.A.
PO Box 2055
Beaufort, SC 29901-2055
Attorney for Respondent Raul Martinez Masonry, LLC

Jenny C. Honeycutt, Esq.
PO Box 13466
James Island, SC 29422
Attorney for Respondent South Carolina Exteriors, LLC

Bachman S. Smith, IV, Esq.
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, Third Floor
Charleston, SC 29401
Attorney for Respondent Southern Green, Inc.

R. Trippett Boineau, III, Esq.
Heath McAlvin Stewart, III, Esq.
McAngus, Goudelock & Courie, LLC
P.O. Box 12519
Columbia, SC 29211

Attorneys for Respondent Spring Grove Plantation Development, Inc.

R. Patrick Flynn, Esq.
Michael Allen, Esq.
Pope Flynn, LLC
PO Box 70
Charleston, SC 29402
Attorneys for Respondent Super Concrete of SC, Inc.

David Shuler Black, Esq.
Howell Gibson & Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901-0040
Attorney for Respondent TJB Trucking/Leasing, LLC

Ronald G. Tate, Jr., Esquire
R. Batten Farrar, Esquire
Gallivan, White & Boyd, P.A.
55 Beattie Place, Suite 1200 (29601)
P.O. Box 10589
Greenville, SC 29603
Attorneys for Respondent Volkmar Consulting Services, LLC

Edward and Sylvia Dengg
238 Maywood Drive
Moncks Corner, SC 29461
Pro Se Respondents

Anthony and Stacey Ray
107 Loch Circle
Hampton, VA 23669
Pro Se Respondents

Third-Party Defendant Myers Landscaping, Inc.[1]
c/o Joseph H. Myers, Registered Agent
Myers Landscaping, Inc.
382 Big Bird Lane
Summerville, SC 29486

[1] Myers Landscaping, Inc. was served, but has not appeared.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Case No. 2014-CP-08-2424

PATRICIA DAMICO, AND LENNA LUCAS, individually and on behalf of all other similarly situated, JOSHUA AND BRETTANY BUETOW, 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,

Plaintiffs,

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.

LENNAR CAROLINAS, LLC,

Third-Party Plaintiff,

v.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS 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, DÉCOR 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.

DÉCOR CORPORATION,

Fourth Party Plaintiff,

v.

BARANOV FLOORING, LLC, DJ CONSTRUCTION SERVICES, LLC, CREATIVE WOOD FLOORS, LLC, GERALDO CUNHA, EBENEZER FLOORING, LLC, ENMANUEL FLOORING AND SIDING, LLC, EUSI FLOORING AND COVERING, LLC, NICOLAS FLORES, ALEXANDER MARTINEZ, ISIDRU MEJIA, JUAN PEREZ SON, ERNESTO M. PEREZ, N&B CONSTRUCTION, LLC, JOSE DIAS RODRIGUES, LIVIA SOUSA, JOSE BETIO PEREIRA, 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 which Lennar Carolinas, LLC is the Appellant and Patricia Damico; Joshua and Brettany Buetow; Bryan and Cynthia Camara; Matthew Collins; Edward and Sylvia Dengg; Jonathan and Theresa Douglass; Czara and Chad England; Lenna Lucas; Danny and Ellen Davis Morrow; Anthony and Stacey Ray; and Defendants and Third-Party Defendants A.C.&A. Concrete, Inc.; Alpha Omega Construction Group, Inc.; Builders FirstSource-Southeast Group, LLC; Coastal Concrete Southeast, LLC; Coastal Concrete Southeast II, LLC; Construction Applicators Charleston, LLC; Civil Site Environmental, Inc.; Décor Corporation; DVS, Inc.; Guaranteed Framing, LLC; Knight's Concrete Products, Inc.; Knight's Redi-Mix, Inc.; LA New Enterprises, LLC; Land/Site Services, Inc.; Manale Landscaping, LLC; Myers Landscaping, Inc.; Ozzy Construction, LLC; Raul Martinez Masonry, LLC; South Carolina Exteriors, LLC; Southern Green, Inc.; Spring Grove Plantation Development, Inc.; Super Concrete of SC, Inc.; TJB Trucking/Leasing, LLC; and Volkmar Consulting Services, LLC are the Respondents.

PROOF OF SERVICE

I certify that I have served the Amended Notice of Appeal on all Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 18, 2016, addressed to the following:

Michael J. Jordan, Esq.
Catherine K. Dunn, Esq.
The Steinberg Law Firm, LLP
P.O. Box 1028
Goose Creek, SC 29445
and
John Calvin Hayes, IV, Esq.
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Attorneys for Respondents Patricia Damico; Joshua and Brettany Buetow; Bryan and Cynthia Camara; Matthew Collins; Jonathan and Theresa Douglass; Czara and Chad England; Lenna Lucas; Danny and Ellen Davis Morrow

Shanna Milcetich Stephens
Katherine C. Miars
Anderson Reynolds & Stephens, LLC
P.O. Box 87
Charleston, SC 29402
Attorney for Respondent A.C.&A. Concrete, Inc.

Laura H. Budd, Esquire
The Budd Law Group, PLLC
10550 Independence Point Pkwy, Suite 301
Matthews, NC 28105
and
Stephen L. Brown, Esquire
Catherine H. Chase, Esquire
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402
and
Preston B. Dawkins, Jr., Esquire
Aiken Bridges, P.A.
P.O. Drawer 1931
Florence, SC 29503

Attorneys for Respondent Alpha Omega Construction Group, Inc.

Stephen P. Hughes, Esquire
Howell, Gibson and Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901
Attorney for Respondent Builders FirstSource-Southeast Group, LLC

Brent M. Boyd, Esq.
PO Box 6648 4406-B Forest Dr.
Columbia, SC 29260
Attorney for Respondents Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC

David S. Cobb
Turner Padget
P.O. Box 22129
Charleston, SC 29413
Attorney for Respondent Construction Applicators Charleston, LLC

Kathy A. Carlsten, Esquire
N. Keith Emge, Esquire (Chip)
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for Respondent Civil Site Environmental, Inc.

Samia Nettles, Esquire
Richardson Plowden
40 Calhoun Street, Suite 220
Charleston, SC 29401
Attorney for Respondent Décor Corporation

S. Markey Stubbs, Esquire
Baker Ravenel Bender
P.O. Box 8057
Columbia, SC 29202
Attorney for Respondent DVS, Inc.

Derek M. Newberry, Esquire
Hall Booth Smith, P.C.
40 Calhoun Street, Suite 550
Charleston, SC 29401
and

Christine Companion Varnado, Esquire
The Seibels Law Firm
38 Broad Street, Suite 200
Charleston, SC 29401
and
Alan R. Belcher, Jr., Esq.
40 Calhoun Street, Suite 550
Charleston, SC 29401
Attorneys for Respondent Guaranteed Framing, LLC

Steven L. Smith, Esquire
Zachary J. Closser, Esquire
Samuel M. Wheeler, Esquire
Smith Closser, P.A.
P.O. Box 405878
Charleston, SC 29423-0578
Attorneys for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

Erin D. Dean, Esquire
Tupper Grimsley & Dean, P.A.
PO Box 2055
Beaufort, SC 29901-2055
Attorney for Respondent LA New Enterprises, LLC

John E. Rogers, II
The Ward Law Firm, P.A.
PO Box 5663
Spartanburg, SC 29304
Attorney for Respondent Land/Site Services, Inc.

James H. Elliott, Jr., Esq.
Samia H. Nettles, Esq.
Richardson Plowden
40 Calhoun Street, Suite 220
Charleston, SC 29401
Attorneys for Respondent Manale Landscaping, LLC

Thomas F. Dougall
William A. Collins, Jr.
Michal Kalwajtys
Dougall & Collins
1700 Woodcreek Farms Road, Suite 100
Elgin, South Carolina 29045
Attorney for Respondent Ozzy Construction, LLC

Erin D. Dean, Esquire
Tupper Grimsley & Dean, P.A.
PO Box 2055
Beaufort, SC 29901-2055
Attorney for Respondent Raul Martinez Masonry, LLC

Jenny C. Honeycutt, Esq.
PO Box 13466
James Island, SC 29422
Attorney for Respondent South Carolina Exteriors, LLC

Bachman S. Smith, IV, Esq.
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, Third Floor
Charleston, SC 29401
Attorney for Respondent Southern Green, Inc.

R. Trippett Boineau, III, Esq.
Heath McAlvin Stewart, III, Esq.
McAngus, Goudelock & Courie, LLC
P.O. Box 12519
Columbia, SC 29211
Attorneys for Respondent Spring Grove Plantation Development, Inc.

R. Patrick Flynn, Esq.
Michael Allen, Esq.
Pope Flynn, LLC
PO Box 70
Charleston, SC 29402
Attorneys for Respondent Super Concrete of SC, Inc.

David Shuler Black, Esq.
Howell Gibson & Hughes, P.A.
P.O. Box 40
Beaufort, SC 29901-0040
Attorney for Respondent TJB Trucking/Leasing, LLC

Ronald G. Tate, Jr., Esquire
R. Batten Farrar, Esquire
Gallivan, White & Boyd, P.A.
55 Beattie Place, Suite 1200 (29601)
P.O. Box 10589
Greenville, SC 29603

Attorneys for Respondent Volkmar Consulting Services, LLC

Edward and Sylvia Dengg
238 Maywood Drive
Moncks Corner, SC 29461
Pro Se Respondents

Anthony and Stacey Ray
107 Loch Circle
Hampton, VA 23669
Pro Se Respondents

Third-Party Defendant Myers Landscaping, Inc.
c/o Joseph H. Myers, Registered Agent
Myers Landscaping, Inc.
382 Big Bird Lane
Summerville, SC 29486

Jenna K. McGee
F. Elliotte Quinn IV
Parker, Poe, Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, South Carolina 29401
(843) 727-2650
Attorneys for Appellant Lennar Carolinas, LLC

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-08-2424

Patricia Damico, et al
PLAINTIFF(S)

Lennar Carolinas, et al
DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

BERKELEY COUNTY, SC
16 OCT 26 PM 2:30
FILED

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion to Reconsider the Court's September 21, 2016 Order denying the Motion to Compel Arbitration is respectfully **denied** without a rehearing. This Order also **denies all** Joining Motions to Reconsider filed in response to the Court's September 21, 2016 Order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2117
Judge Code

10-24-16
Date

SCRCP Form 4C

Parker Poe

F. Elliotte Quinn IV
Associate
Telephone: 843.727.6315
Direct Fax: 843.727.2680
elliottequinn@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

November 18, 2016

The Honorable Mary P. Brown
Berkeley County Clerk of Court
PO Box 219
Moncks Corner, SC 29461

Re: *Damico, et al. v. Lennar Carolinas, LLC, et al.*
Case No.: 2014-CP-08-02424

Dear Ms. Brown

Enclosed for filing please find the original and a copy of the Amended Notice of Appeal in connection with the above-referenced matter. Please file the original and return a filed-stamped copy to me in the enclosed self-addressed stamped envelope.

Please note that the Amended Notice of Appeal correctly lists the parties that are Respondents as all the parties were not listed on the Notice of Appeal mailed for filing on November 16, 2016. The Amended Notice of Appeal also reflects the new address for Pro Se Respondents Anthony and Stacey Ray.

Please do not hesitate to contact me if you have any questions. By copy of this letter, we are serving same on all parties.

Sincerely,

Elliotte Quinn

FEQiv/kjg
Enclosures

cc: All Counsel of Record (via email and US Mail with enclosures)
Edward and Sylvia Dengg (via US Mail with enclosures)
Anthony and Stacey Ray (via US Mail with enclosures)
Joseph H. Myers, Registered Agent (via US Mail with enclosures)

PPAB 3490365v1

EXHIBIT E

The South Carolina Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated; Joshua and Brettany Buetow; 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; Geometrics 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 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 Plantiff,

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; Isidru 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.

Appellate Case No. 2016-002339

ORDER

Lennar Carolinas, LLC (Lennar) served and filed a notice of appeal from a circuit court order denying its motion to compel arbitration. Lennar now moves this court to enforce a stay of proceedings in the circuit court. First, this court notes the order denying the motion to compel arbitration is immediately appealable. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (holding an order denying a motion to compel arbitration is immediately appealable). Second, because Lennar has served a notice of appeal from an appealable order, all matters affected by this appeal must be stayed during the pendency of the appeal. *See* Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal."); Rule 241(a), SCACR ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision."); *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012) ("[T]he lower court is deprived of the power to proceed with matters that are affected by the appeal . . . .").

FOR THE COURT

Columbia, South Carolina

FILED
December 19, 2016

cc: Jenna Brooke Kiziah McGee, Esquire
Frederick Elliotte Quinn, IV, Esquire
Michael J. Jordan, Esquire
Catherine Dunn Meehan, Esquire
John Calvin Hayes, IV, Esquire
R. Patrick Flynn, Esquire
Michael Wade Allen, Jr., Esquire
Bachman S. Smith, IV, Esquire
James H. Elliott, Jr., Esquire
Samia Hanafi Nettles, Esquire

David Shuler Black, Esquire
Shanna Milcetich Stephens, Esquire
Stephen Lynwood Brown, Esquire
Catherine Holland Chase, Esquire
Preston Bruce Dawkins, Jr., Esquire
Stephen P. Hughes, Esquire
Kathy Aboe Carlsten, Esquire
N. Keith Emge, Jr., Esquire
Brent Morris Boyd, Esquire
David Starr Cobb, Esquire
Sidney Markey Stubbs, Esquire
Derek Michael Newberry, Esquire
Christine Companion Varnado, Esquire
Alan Ross Belcher, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Erin DuBose Dean, Esquire
Thomas Frank Dougall, Esquire
William Ansel Collins, Jr., Esquire
Michal Kalwajtys, Esquire
John Elliott Rogers, II, Esquire
Jenny Costa Honeycutt, Esquire
Robert Trippett Boineau, III, Esquire
Heath McAlvin Stewart, III, Esquire
Ronald G. Tate, Jr., Esquire
Robert Batten Farrar, Esquire
Edward Dengg
Sylvia Dengg
Anthony Ray
Stacey Ray
The Honorable Mary P. Brown
The Honorable J.C. Nicholson, Jr.

EXHIBIT F

not be constructed in accordance with the plans and specifications on file with the applicable governmental authorities. Without limiting the generality of the provisions of Rider B attached hereto, Seller disclaims and Buyer waives any and all express or implied warranties that construction will be accomplished in compliance with such plans and specifications. Seller has not given and Buyer has not relied on or bargained for any such warranties. In furtherance of the foregoing, in the event of any conflict between the actual construction of the Home and/or the Community, and that which is set forth on the plans and specifications, Buyer agrees that the actual construction shall prevail and to accept the Home and Community as actually constructed (in lieu of what is set forth on the plans and specifications).

13.2 Lot Change. In the event that Seller, in its sole discretion, determines that the Model of the Home selected under this Agreement cannot reasonably be built on the Homesite, then Buyer and Seller hereby agree that they will negotiate in good faith to relocate the Home to another lot in the Community, provided however that there are lots available for sale. If no replacement lot is available, then Buyer may terminate this Agreement and will be entitled to a refund of any paid Deposit.

13.3 Decorative and Landscaping Items.

13.3.1 Buyer understands and agrees that certain of the finishing items, such as tile, marble, carpet, cabinets, stone, brickwork, wood, paint, stain and mica are subject to size and color variations, grain and quality variations, and may vary in accordance with price, availability and changes by manufacturers from those shown in the model, if any, or in illustrations or brochures or those included in the specifications. Furthermore, if circumstances arise that, in Seller's opinion, warrant changes of subcontractors, suppliers, manufacturers, brand names or items, Seller reserves the right to substitute equipment, materials, appliances, etc., which in Seller's opinion are considered to be of quality substantially similar or equal, or of better quality, subject to their availability. Buyer also understands that Seller has the right to substitute or change materials and/or stain colors utilized in wood decor, if any.

13.3.2 Lot grades, lot area, options, facades, shrubs, trees, trim, built-ins, wall treatments, window treatments, furniture, furnishings, fences, decks, locations of walks, driveways and other items in or about a model home area in the subdivision are for display purposes only and are not included in the Total Purchase Price unless otherwise expressly provided herein. Seller has the right to remove any existing trees on the Property or on the surrounding area for any reason. Buyer further understands and agrees that the following items (which may be seen in models or shown in illustrations) will also not be included with the sale of the Home: wall coverings, paint colors, accent light fixtures, wall ornaments, drapes, blinds, bedspreads, furniture, furnishings, wet bars, monitoring systems, certain built-in fixtures, special floor coverings, wood trim, upgraded items and/or any other items of this nature which may be added or deleted from time to time. This list of items (which is not all-inclusive) is provided as an illustration of the type of items built-in or placed upon models or shown in illustrations strictly for purposes of decoration and example only.

13.4 Deed. By acceptance of the Deed, Buyer accepts all variations of the Home.

13.5 Survival. All of the terms of this Section 13 shall survive Closing and the delivery of the Deed.

14. **Buyer's Default.** In the event of Buyer's default and to the extent allowed by law, Seller shall be entitled to keep, as liquidated damages and not as a penalty, Buyer's Deposit not to exceed fifteen percent (15%) of the Total Purchase Price, except that Seller may, in addition, keep, as liquidated damages and not as a penalty, any and all Advanced Payments made by Buyer to Seller for options, extras or upgrades for which Seller has made contractual commitments or incurred liability by placing orders or otherwise. Buyer agrees that actual damages in the event of breach by Buyer would be costly and difficult to calculate, and that such liquidated damages are a fair and reasonable remedy and shall not be considered a penalty. The provisions of this Section shall survive the termination of this Agreement.

15. **Seller's Default.** In the event of Seller's default and to the extent allowed by law, Buyer may recover actual damages but shall not be entitled to special, consequential or punitive damages. Notwithstanding the foregoing, Buyer retains all remedies at law and in equity with respect to Seller's obligation to complete the Home within two (2) years pursuant to Section 8 above. Notwithstanding anything to the contrary in this Agreement, Buyer releases and holds harmless Seller's past and present officers and employees from all claims, liabilities, and causes of action of any nature. Buyer now has or may have arising from any act or omission of Seller's officers or employees related to Lennar's performance of its obligations under this Agreement and Lennar's construction of a Home on the Homesite. The provisions of this Section shall survive the termination of this Agreement.

16. **Mediation / Arbitration of Disputes.**

16.1 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. "Disputes" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this Agreement, the Property, the Community or any dealings between Buyer and Seller; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Seller or Seller's representative; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of 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. Any Dispute shall be submitted for binding arbitration within a reasonable time after such Dispute has arisen. Nothing herein shall extend the time period by which a claim or cause of action may be asserted under the applicable statute of limitations or statute of repose, and in no event shall the Dispute be submitted for arbitration after the date when institution of a legal or equitable proceeding based on the underlying claims in such Dispute would be barred by the applicable statute of limitations or statute of repose.

16.2 Any and all mediations commenced by any of the parties to this Agreement shall be filed with and administered by the

American Arbitration Association or any successor thereto ("AAA") in accordance with the AAA's Home Construction Mediation Procedures in effect on the date of the request. If there are no Home Construction Mediation Procedures currently in effect, then the AAA's Construction Industry Mediation Rules in effect on the date of such request shall be utilized. Any party who will be relying upon an expert report or repair estimate at the mediation shall provide the mediator and the other parties with a copy of the reports. If one or more issues directly or indirectly relate to alleged deficiencies in design, materials or construction, all parties and their experts shall be allowed to inspect, document (by photograph, videotape or otherwise) and test the alleged deficiencies prior to mediation. Unless mutually waived in writing by the parties, submission to mediation is a condition precedent to either party taking further action with regard to any matter covered hereunder.

16.3 If the Dispute is not fully resolved by mediation, the Dispute shall be submitted to binding arbitration and administered by the AAA in accordance with the AAA's Home Construction Arbitration Rules in effect on the date of the request. If there are no Home Construction Arbitration Rules currently in effect, then the AAA's Construction Industry Arbitration Rules in effect on the date of such request shall be utilized. Any judgment upon the award rendered by the arbitrator may be entered in and enforced by any court having jurisdiction over such Dispute. If the claimed amount exceeds $250,000.00 or includes a demand for punitive damages, the Dispute shall be heard and determined by three arbitrators; however, if mutually agreed to by the parties, then the Dispute shall be heard and determined by one arbitrator. Arbitrators shall have expertise in the area(s) of Dispute, which may include legal expertise if legal issues are involved. All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s). At the request of any party, the award of the arbitrator(s) shall be accompanied by detailed written findings of fact and conclusions of law. Except as may be required by law or for confirmation of an award, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

16.4 The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section. Buyer and Seller further agree (1) that any Dispute involving Seller's affiliates, directors, officers, employees and agents shall also be subject to mediation and arbitration as set forth herein, and shall not be pursued in a court of law or equity; (2) 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.

16.5 To the fullest extent permitted by applicable law, Buyer and Seller agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any other arbitration, judicial, or similar proceeding shall be given preclusive or collateral estoppel effect in any arbitration hereunder unless there is mutuality of parties. In addition, Buyer and Seller further agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any arbitration hereunder shall be given preclusive or collateral estoppel effect in any other arbitration, judicial, or similar proceeding unless there is mutuality of parties.

16.6 Unless otherwise recoverable by law or statute, each party shall bear its own costs and expenses, including attorneys' fees and paraprofessional fees, for any mediation and arbitration. Notwithstanding the foregoing, if a party unsuccessfully contests the validity or scope of arbitration in a court of law or equity, the noncontesting party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in defending such contest, including such fees and costs associated with any appellate proceedings. In addition, if a party fails to abide by the terms of a mediation settlement or arbitration award, the other party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in enforcing such settlement or award.

16.7 Buyer may obtain additional information concerning the rules of the AAA by visiting its website at www.adr.org or by writing the AAA at 335 Madison Avenue, New York, New York 10017.

16.8 Seller supports the principles set forth in the Consumer Due Process Protocol developed by the National Consumer Dispute Advisory Committee and agrees to the following:

16.8.1 Notwithstanding the requirements of arbitration stated in Section 16.3 of this Agreement, Buyer shall have the option, after pursuing mediation as provided herein, to seek relief in a small claims court for disputes or claims within the scope of the court's jurisdiction in lieu of proceeding to arbitration. This option does not apply to any appeal from a decision by a small claims court.

16.8.2 Seller agrees to pay for one (1) day of mediation (mediator fees plus any administrative fees relating to the mediation). Any mediator and associated administrative fees incurred thereafter shall be shared equally by the parties.

16.8.3 The fees for any claim pursued via arbitration in an amount of $10,000.00 or less shall be apportioned as provided in the Home Construction Arbitration Rules of the AAA or other applicable rules.

16.9 Notwithstanding the foregoing, if either Seller or Buyer seeks injunctive relief, and not monetary damages, from a court because irreparable damage or harm would otherwise be suffered by either party before mediation or arbitration could be conducted, such actions shall not be interpreted to indicate that either party has waived the right to mediate or arbitrate. The right to mediate and arbitrate should also not be considered waived by the filing of a counterclaim by either party once a claim for injunctive relief had been filed with a court.

16.10 Buyer and Seller specifically agree that notwithstanding anything to the contrary, the rights and obligations set forth in this Section 16 shall survive (1) Closing and the delivery of the Deed; (2) the termination of this Agreement by either party; or (3) the default of this Agreement by either party.

17. **Other Dispute Resolutions.** Notwithstanding the parties' obligation to submit any Dispute to mediation and arbitration, in the event that a particular dispute is not subject to the mediation or the arbitration provisions of Section 16, then the parties agree to the following provisions: BUYER ACKNOWLEDGES THAT JUSTICE WILL BEST BE SERVED IF ISSUES REGARDING THIS AGREEMENT ARE HEARD BY A JUDGE IN A COURT PROCEEDING, AND NOT A JURY. BUYER AND

EXHIBIT E

to

Petition

to Lift Stay

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO: 2014-CP-08-02424
)
)
Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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,

Plaintiffs,

vs.

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.

Lennar Carolinas, LLC,

Third-Party Plaintiff,

vs.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics 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,

ORDER GRANTING PLAINTIFFS' MOTION TO LIFT AUTOMATIC STAY FOR PURPOSES OF DISCOVERY

Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor 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.

Décor Corporation,

Fourth Party Plaintiff,

vs.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Enmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez Son, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aparecido Corgosinho, Ricardo Chiche, Cebs Construction, Bayshore Siding and Flooring, Sebastio Luiz De Araujo, and John Does 1 – 4,

Fourth-Party Defendants.

Alpha Omega Construction Group, Inc.

Fourth-Party Plaintiff,

Vs.

Garcia Roofing, LLC, Juan Garza Ramos, Jose Vera, and Espino Roofing, LLC,

Fourth-Party Defendants.

DVS, Inc.,

Fourth-Party Plaintiff,

Vs.

Sousa Construction, LLC, Lima Construction, LLC, N&B Construction, LLC, Itatiaia Construction, LLC and JC Contractors, LLC

Fourth-Party Defendants.

South Carolina Exteriors, LLC

Fourth-Party Plaintiff,

Vs.

Juan Garza Ramos, d/b/a Juan Constructors,

Fourth-Party Defendant.

Guaranteed Framing, LLC

Fourth-Party Plaintiff,

Vs.

First Construction, LLC, JC Contractors, LLC, Jessica Marroquin d/b/a Marroquin Construction, and Unique Framing, LLC,

Fourth Party Defendants.

This matter came before the Court on April 11, 2018 for a hearing upon Plaintiffs' Patricia Damico, et al. ("Plaintiffs") Motion to Lift Automatic Stay pursuant to Rule 241(c)(1), SCACR. Present for Plaintiffs was John Hayes, IV, Esq. and present for Defendant Lennar Carolinas, LLC was James Werner, Esq. Upon review of the memoranda and materials presented, oral arguments, and the applicable rules and case law, Plaintiffs' Motion to Lift the Automatic Stay is granted solely for discovery purposes.

FACTUAL AND PROCEDURAL BACKGROUND

The case involves allegations of construction defects in multiple homes located in The Abbey at Spring Grove in Moncks Corner, South Carolina. The development consists of sixty-nine (69) single-family homes constructed between 2010 and 2016 that were originally started by Defendant Spring Grove Plantation Development. In 2011, the development was sold to Defendant Lennar Carolinas, LLC, hereinafter "Lennar", who took over the control, construction, management, and sale of the homes at The Abbey.

Plaintiffs filed this lawsuit on October 30, 2014 against multiple defendants, including Lennar alleging causes of action for Negligence, Negligent Misrepresentation, Breach of Warranties, Breach of Fiduciary Duties, and Unfair Trade Practices. Plaintiffs subsequently moved for class certification and filed an Amended Complaint on March 24, 2016. On March 30, 2016 Lennar filed a Motion to Compel Arbitration pursuant to their Arbitration Agreements with some but not all of the Plaintiffs. The Motion to Compel Arbitration was denied and Lennar appealed the decision. The appeal prompted an automatic stay, which gave rise to Plaintiffs' Motion to Lift the Automatic Stay for purposes of discovery. Plaintiffs argued the parties should

be permitted to conduct discovery while the appeal is pending because discovery is not affected by the appeal. Lennar argued the automatic stay should not be lifted.

STANDARD OF REVIEW

Pursuant to Rule 205, SCACR, the entire case is not stayed during the pendency of the appeal. This allows the lower court to retain jurisdiction over matters not affected by the appeal. The Rules also allow any party to move the Court to lift the automatic stay imposed by an appeal. SCACR 241(C)(1). The moving party bears the burden of demonstrating that the automatic stay should be lifted. Rule 241(c)(1) states that the court may consider issues such as mootness and jurisdiction when deciding whether to lift an automatic stay. However, these issues are not exhaustive and the Court can act on its own discretion when removing the stay.

In *Cousar v. New London Engineering Co., Inc.*, the Supreme Court held that retaining jurisdiction over discovery matters during pendency of appeal from order denying motion to amend answer and third-party complaint was not an abuse of discretion because discovery was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Further, under *Williams v. Borden's Inc.*, this Court has the power to control its order of business and safeguard the rights of the litigants before it. *Williams v. Borden's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980).

ANALYSIS

I. THE COURT CAN PROCEED WITH MATTERS NOT AFFECTED BY THE APPEAL.

Plaintiffs have multiple claims against subcontractors that are not subject to any arbitration agreements. Pursuant to Rule 205, SCACR, "nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." Rule 205, SCACR. The

Supreme Court has held that retention of jurisdiction over discovery matters by the trial court was not an abuse of discretion and that discovery in that case was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Based on the Appellate Court Rules and Supreme Court precedent presented by the Plaintiffs, it is within the powers of this court to retain jurisdiction over discovery matters and allow the case to progress.

Accordingly, this Court finds that matters relating to the claims against subcontractors are not affected by the appeal. There are no contracts or binding arbitration agreements between the subcontractor Defendants and the Plaintiffs. In addition, any Homeowner Plaintiff who is not an original purchaser from Lennar has no arbitration agreement with Lennar. Therefore, the decision that has been appealed bears no relation to the claims between the subcontractors and the Plaintiffs. As a result, Plaintiffs are free to conduct discovery and move their case forward as to the subcontractors.

II. THE AUTOMATIC STAY IS LIFTED FOR PURPOSES OF DISCOVERY

During the pendency of an appeal, a party may move the Court to lift the automatic stay for any purpose. SCACR 241(c)(1). While Rule 241 states the court should consider issues relating to jurisdiction and mootness, this list is not exhaustive and the Court has broad discretion in deciding such matters. SCACR(c)(2); *Cousar*, 306 S.C., 410 S.E.2d.

Lennar cites to a federal case in an attempt to show the lifting of the stay is improper because the appeal is not "frivolous". *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). The issue before the Court is not whether the appeal is frivolous but whether the Automatic Stay should be lifted to allow discovery to continue. The Court agrees with Defendant that there is an automatic stay placed on the case

and it will remain until the Court of Appeals renders a decision. However, as allowed by the Appellate Court Rules, any party may move the court to lift the automatic stay and Plaintiffs have brought their motion accordingly.

Plaintiffs assert that discovery is not affected by the appeal, that Plaintiffs would be prejudiced by a delay in discovery, and that regardless of which forum the Court of Appeals choses for this matter, some form of discovery is allowed to take place. The Court finds it compelling that under the arbitration rules, discovery still needs to take place. The agreement between Plaintiffs and Lennar contains an Arbitration Clause that incorporates the AAA Residential Construction Arbitration Rules. The AAA rules allow for the exchange of documents and interviews. ARB-22. This equates to what is commonly known in litigation as discovery and depositions. The AAA rules further allow for expert reports and the exchange the any expert reports and estimates. *Id.* In the event that the Appellate Court enforces the arbitration agreements between the parties, there will be discovery conducted. The Court sees no reason to needlessly delay events that would occur eventually, regardless of the forum.

Lennar's argument relies heavily on a 2006 Circuit Court Order in *Chassereau* that states that allowing discovery during the appeal was improper in that case. The Court in *Chassereau* decided that "[p]ermitting discovery to proceed while an appellate court has jurisdiction of the case may, in some circumstances, affect the mode of trial of the case. If the rules of the applicable arbitration do not provide for discovery as part of the arbitration process, the granting of discovery to either of the parties affects the mode of trial between the parties. *In this case the arbitration agreement does not provide for discovery between the parties.*" *Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626. The basis for the Court's decision in

Chassereau was emphasized by the Court, and that basis was that there was no arbitration agreement providing for discovery. Here, we have the opposite set of facts and the underlying arbitration agreement in this case *does* address discovery and even provides the applicable rules. In addition, there are no arbitration agreements between the Plaintiffs and Subcontractor Defendants. The Supreme Court decision in *Cousar* outweighs the trial court order in *Chassereau*. Although *Chassereau* is persuasive, it is not binding upon the Court and the pertinent facts in this case differ from *Chassereau*.

Plaintiffs also argued that as time passes by in this case, which was filed in 2014, witnesses' memories will lapse, the hazardous conditions present at the Abbey will worsen, properties will continue to deteriorate, insurance coverage will diminish, and Plaintiffs will be prejudiced as a result. The passing of time and rising expenses make it clear that allowing discovery to move forward in this case would promote the interests of judicial economy and equity. Plaintiffs have sufficiently shown that there will be no prejudicial effect against either party by lifting the stay for discovery. Alternatively, the Court finds that delaying discovery would prejudice Plaintiffs. Accordingly, the Court hereby lifts the stay solely for purposes of discovery.

CONCLUSION

Based on the foregoing and it being within the sound discretion of the Court to control its order of business and safeguard the rights of the litigants before it, this Court finds there is sufficient evidence demonstrating the need for discovery to continue and that the automatic stay imposed by SCACR 205 should be lifted solely for discovery.

THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' Motion to Lift the Automatic Stay is granted for discovery to take place.

2. Plaintiffs and Defendants are entitled to engage in discovery in the above-captioned matter.

3. The Stay shall remain in place otherwise for matters affected by the appeal.

AND IT IS SO ORDERED.

The Honorable J. C. Nicholson, Jr.
Ninth Judicial Circuit

May 29, 2018
Moncks Corner, South Carolina

EXHIBIT F

to

Petition

to Lift Stay

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

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, Geometrics 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, Décor 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 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, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, 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.

APPELLANT LENNAR CAROLINAS, LLC'S PETITION TO REVIEW THE CIRCUIT COURT'S ORDER LIFTING THE AUTOMATIC STAY

James Lynn Werner
Jenna K. McGee
F. Elliotte Quinn IV
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

INTRODUCTION

Appellant Lennar Carolinas, LLC ("Lennar"), by and through undersigned counsel, hereby petitions this Court pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules to review and reverse the circuit court's order lifting the automatic stay in the captioned case while the issue of whether the entire action is subject to arbitration is pending on appeal.

The circuit court's order lifting the automatic stay is error and constitutes an abuse of discretion. While Rule 241(a), SCACR, allows that a lower court retains jurisdiction over matters not affected by the appeal, when the appeal involves the fundamental question of whether the case is subject to arbitration (and not civil litigation in the court), there are no matters in the case not affected by the appeal. In short, nothing in this matter is unaffected by Lennar's appeal of the circuit court's order denying its Motion to Compel Arbitration. Furthermore, the circuit court's unprecedented order lifting the automatic stay, and allowing discovery to proceed, while the validity of the entire action in the circuit court is pending on appeal undermines the very basis of Lennar's appeal.

Review of South Carolina authorities does not reveal any precedent for a circuit court to lift an automatic stay of a matter pending appeal in a case like this one, and the circuit court's order contains no valid basis for such an action in this case. The circuit court's order improperly lifted the automatic stay, and Lennar petitions the Court to issue an order reversing the circuit court and reinstating the automatic stay of the entire action.

FACTUAL BACKGROUND

Patricia Damico, 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 (collectively, the "Owners")

purchased homes in a community known as The Abbey at Spring Grove Plantation ("The Abbey") which is located in Berkeley County, South Carolina.

The Owners filed this lawsuit against Lennar and others alleging the right to proceed as a class action on claims of alleged construction defects. Lennar asserted cross-claims against co-defendants and third-party claims against other subcontractors. Lennar also filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling all of the parities in this action to arbitration pursuant to various applicable documents and agreements.

The circuit court held a hearing on Lennar's Motion to Compel Arbitration and denied Lennar's Motion.

Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, the Owners attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Thus, Lennar was forced to submit a Motion to Enforce the Automatic Stay pursuant to Rule 205 to the Court of Appeals. On December 19, 2016, the Court of Appeals issued an Order enforcing the automatic stay of proceedings in the circuit court.

At this time, the appeal has been fully briefed to the Court of Appeals, and the parties are awaiting notice as to whether the above-captioned case will be set for oral argument.

On February, 27, 2018, Patricia Damico and Lenna Lucas ("Plaintiffs") filed a Motion to Lift the Automatic Stay. On April 11, 2018, the circuit court held a hearing on Plaintiffs' Motion to Lift the Automatic Stay. On May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

Lennar submits this Petition requesting the Court reverse the circuit court's order and reinstate the stay of the entire action during the pendency of the appeal.

ARGUMENT

Rule 241(c)(2) establishes the standard which should be applied by the circuit court in determining whether an order lifting an automatic stay should issue. Specifically, the court "should consider whether such an order [lifting the stay] is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241, SCACR. In this case, the circuit court did not address – and, in fact, refused to consider – these determining factors. Instead, the circuit court ignored them and stated, without authority, that it may consider other issues and may "act on its own discretion when removing the stay."

As justification for its decision to lift the automatic stay, the circuit court espoused the notion that Rule 205, SCACR, allows that "nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." However, the circuit court failed to recognize that the appeal in this case affects the very existence of the case in the circuit court. Lennar's appeal seeks to compel the case to arbitration under arbitration agreements which provide that any and all controversies, disputes or claims arising under or related to (a) the agreements by which Plaintiffs acquired the houses in issue, (b) the property itself, or (c) relating to any personal injury or property damage alleged by Plaintiffs are to be submitted to binding arbitration. Thus, regardless of whether Plaintiffs make claim against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case are subject to arbitration because all of the claims arise under and are related to the property and Plaintiffs'

claimed injuries and damages sustained because of alleged defects in the properties. There are no claims in the case which are not affected by and at issue in the decision to compel arbitration.[1]

It has been well recognized by other courts addressing similar issues to those in this case that Lennar's appeal of the circuit court's denial of the Motion to Compel Arbitration is a challenge to the continuation of any proceeding before the circuit court on the underlying claims. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264-65 (4th Cir. 2011). These same courts have further recognized that discovery in the action should not proceed while the issue of arbitration is being decided. "Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the [circuit] court lacks jurisdiction." *Id.* Arbitration affects the mode of trial and, therefore, discovery is automatically stayed when an arbitrability issue is appealed. *See Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) (holding that "preparation for trial must be suspended until the court of appeals renders a decision" on an appeal from a denial of a motion to compel arbitration). In its appeal, Lennar asserts the circuit court erred in not compelling each and every party to this action to arbitration. Therefore, the entire action was removed from the circuit court's jurisdiction and automatically stayed for the duration of Lennar's appeal.

---

[1] The circuit court's order purports to find that matters relating to the claims against the subcontractor defendants are not affected by the appeal. The seventh issue in Lennar's statement of issues on appeal is "[w]hether the circuit court erred in failing to perform any analysis of the arbitration agreement(s) applicable to Spring Grove Development and the Subcontractors." The circuit court's finding that the matters relating to the claims against the subcontractors are not affected by the appeal is patently false and a wholly inappropriate basis for lifting the automatic stay and permitting discovery related to the subcontractors to proceed.

Additionally, all of the Owners' claims are affected by Lennar's appeal of the arbitrability issues. Lennar appealed the circuit court's erroneous refusal to compel the Owners (including the subsequent purchaser Owners) to arbitration pursuant to the arbitration agreements in the purchase and sale agreements, the Lennar Limited Warranty, the covenants, and the deeds for the Owners' respective properties.

The circuit court's reliance on the decision in *Cousar v. New London Engineering Company*, 306 S.C. 37, 410 S.E.2d 243 (1991), as justification for its decision to lift the stay in this case is completely misplaced. In *Cousar*, the circuit court did not lift an automatic stay of discovery. In *Cousar*, the issue on appeal was the circuit court's order denying a motion to amend a complaint, which amendment would assert claims against third-parties that had previously been dismissed from the action. *Cousar*, 306 S.C. at 39, 410 S.E.2d at 244. The Supreme Court found that the circuit court retained jurisdiction over the proceedings between the plaintiff and defendant because the issues between those parties were not affected by the appeal of the denial of a motion to amend a third-party complaint to assert claims against third-party defendants. *Id.* at 40, 410 S.E.2d at 245. The court in *Cousar* did not conduct an analysis of whether the automatic stay could or should be lifted. In *Cousar*, it was clear that the issue on appeal did not affect the case below between plaintiff and defendant. Thus, there were matters in the case unaffected by the appeal over which the circuit court properly retained jurisdiction. The situation in *Cousar* is markedly distinguishable from the case at bar because in the case at bar, the entire action is affected by the appeal. The case at bar must be stayed pending the Court's ruling on the arbitration issues.

The appeal in the case at bar involves a Motion to Compel Arbitration. When such a motion is appealed, the entire action is stayed and discovery is not permitted because arbitration fundamentally affects the mode of trial. Thus, discovery should not be permitted to proceed while the Court reviews whether the entire action is subject to arbitration.

While sitting on the circuit court, Justice Few had reason to analyze whether the circuit court should grant a motion to lift the automatic stay and to permit discovery to proceed while an appeal of arbitrability issues was pending with the Court of Appeals. *See Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626, *1 (S.C. Com.Pl. March 29, 2006). In *Chassereau*, then

Judge Few found that permitting discovery to proceed while an appellate court has jurisdiction of the case affects the mode of trial. 2006 WL 6087626, *1. He recognized that differences in discovery available in arbitration versus those allowed in civil litigation under the South Carolina Rules of Civil Procedure would mean that the granting of discovery to either of the parties while the issue of arbitration was open would affect the mode of trial between the parties. *Id.* In analyzing whether to lift the automatic stay and allow discovery to proceed, then Judge Few noted that there is a "very clear possibility of prejudice and a tactical advantage being enjoyed by one of the parties to an action when it is given access to discovery which would not otherwise be authorized." *Id.*

The circuit court's order erroneously found that Justice Few's order in *Chassereau* was distinguishable from the present case because the arbitration agreement in the present case provides for discovery. The circuit court has no basis for such a conclusion when the issue of whether and under what agreement the arbitration will proceed is a matter pending on appeal. While the circuit court's order references the AAA's Home Construction Arbitration Rules as its basis for finding that regardless of the outcome of the appeal discovery will be conducted, there is no basis for such finding at this time. In fact, even if such Arbitration Rules are ultimately determined to apply (a question by no means resolved at this point), the circuit court failed to recognize that the AAA's Home Construction Arbitration Rules (cited by the circuit court as ARB-22) do not provide parties with the same discovery that is permitted by the South Carolina Rules of Civil Procedure. Among other things, the AAA's Home Construction Arbitration Rules differ from the Rules of Civil Procedure with respect to the right to serve interrogatories and requests to admit and third-party discovery. If the automatic stay is not reinstated, then Plaintiffs will have access to discovery that would not otherwise be authorized if the action is compelled to arbitration. This access provides Plaintiffs with a clear tactical advantage and prejudices Lennar.

In addition to providing a tactical advantage by providing unauthorized discovery, the lift of the automatic stay prejudices Lennar by eroding the benefits of arbitration. Arbitration is favored in this state because it provides "a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings." *Trident Tech. Coll. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 104-05, 333 S.E.2d 781, 785 (1985) (citation omitted). "Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially." *Bradford-Scott Data Corp.*, 128 F.3d at 506. The circuit court's order lifting the automatic stay erodes the benefits of arbitration and prejudices Lennar by forcing Lennar to engage in unauthorized and expensive discovery.

Additionally, the circuit court's order noticeably omitted any analysis of the prejudicial effect of moving forward with the case in the circuit court while the appeal of the arbitrability issues is pending with the Court of Appeals. The authority is well established that Plaintiffs will be barred from proceeding with this matter as a class action if they are compelled to arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) (holding that a party may not be compelled to submit to class arbitration when an arbitration clause is silent on the issue); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 872 (4th Cir. 2016). Plaintiffs' Complaint alleges the existence of a class. If discovery is allowed to proceed in the circuit court, then discovery related to the class claims would be costly, time consuming, and a waste of judicial resources if the Court ultimately compels this action to arbitration. Therefore, the Court should grant Lennar's Petition and reinstate the automatic stay of the entire action until the Court issues its ruling on the pending appeal.

CONCLUSION

The circuit court's unprecedented order lifting the automatic stay of proceedings while the appeal is pending must be reversed. Otherwise, Lennar will be unduly prejudiced and the discovery that the circuit court has granted Plaintiffs access to will provide Plaintiffs an unjustified tactical advantage in the litigation. Lennar respectfully requests the Court issue an order reinstating the automatic stay of the entire action, so that it is not unduly prejudiced.

James Lynn Werner
Jenna K. McGee
F. Elliotte Quinn IV
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

June 5, 2018
Columbia, South Carolina

EXHIBIT G

to

Petition

to Lift Stay

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

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 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.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S RETURN TO APPELLANT'S PETITION TO REVIEW THE CIRCUIT COURT'S ORDER LIFTING AUTOMATIC STAY

Pursuant to Rule 240(e), SCACR, Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara; Matthew Collins, Jonathan and Theresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow (collectively, "Homeowners") hereby respond to the Petition to Review the Circuit Court's Order Lifting the Automatic Stay filed by Appellant Lennar Carolinas, LLC ("Lennar"). Because discovery is not affected by the pending appeal and the circuit properly exercised its discretion in lifting the automatic stay, Lennar's petition should be denied.

FACTS

This is a construction defect case that involves defects in multiple homes located in The Abbey at Spring Grove in Moncks Corner, South Carolina. The Abbey consists of sixty-nine (69) single-family homes constructed between 2010 and 2016 that were originally started by Defendant Spring Grove Plantation Development, Inc. In 2011, the development was sold to Lennar who took over the control, construction, management, and sale of the homes at The Abbey.

Since the construction of the homes at The Abbey, Homeowners have discovered severe defects in their homes. Homeowners' investigations have revealed significant design and construction defects, including but not limited to improper soil grading, improper drainage, and structural defects resulting in hazardous structural deterioration. Because the defects are so severe, the grading structures and drainage must be completely redone to fix the harm.

PROCEDURAL BACKGROUND

Homeowners filed this lawsuit on October 30, 2014, alleging causes of action for negligence, negligent misrepresentation, breach of warranties, breach of fiduciary duties, and unfair trade practices against multiple defendants, including Lennar. Homeowners filed an Amended Complaint on March 24, 2016, and subsequently moved for class certification.

On March 30, 2016, Lennar filed a Motion to Compel Arbitration pursuant to arbitration agreements it had with some but not all of the Homeowners. On September 21, 2016, Lennar's Motion to Compel Arbitration was denied. On November 18, 2016, Lennar served a Notice of Appeal related to the order denying its Motion to Compel Arbitration. On November 29, 2016, Lennar filed a Motion to Enforce Stay with the South Carolina Court of Appeals. On December 9, 2016, the Court of Appeals issued an order finding that (1) the order denying Lennar's Motion

to Compel Arbitration was immediately appealable and (2) all matters affected by the appeal were stayed during the pendency of the appeal.

On February 27, 2018, Homeowners filed a Motion to Lift the Automatic Stay for Purposes of Discovery.[1] On May 31, 2018, the circuit court entered an order granting Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery.[2] Pursuant to Rule 241(d)(2), SCACR, Lennar now seeks review of the circuit court's order granting Plaintiff's Motion to Lift Automatic Stay for Purposes of Discovery.

STANDARD OF REVIEW

Pursuant to Rules 205 and 241, SCACR, the lower court retains jurisdiction over matters not affected by an appeal. "Nothing in these rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. The circuit court's decision to retain jurisdiction over a matter that is not affected by the appeal is reviewed by this court for an abuse of discretion. *See, e.g., Cousar v. New London Eng'g Co.,* 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991) (concluding that the circuit court did not abuse its discretion in retaining jurisdiction over discovery matters during the pendency of an appeal).

In addition, Rule 241(C)(1), SCACR, permits any party to move before the lower court to lift the automatic stay imposed by an appeal. The decision to stay a case or lift a stay is within the sound discretion of the circuit court. *Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 148, 625 S.E.2d 227, 230-31 (Ct. App. 2006), *reversed on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007). Accordingly, the appellate court reviews the circuit court's decision to lift the automatic stay under the abuse of

[1] A copy of this motion is attached as **Exhibit A**.
[2] A copy of this order is attached as **Exhibit B**.

discretion standard. *Id.*

ARGUMENT

A. Discovery is not affected by the pending appeal.

As a preliminary matter, discovery is unaffected by the pending appeal. Because discovery will take place whether the case proceeds before the circuit court or in the arbitration forum identified in the allegedly applicable arbitration agreements, the matter of discovery is not affected by Lennar's pending appeal and therefore can continue to be conducted while the appeal is pending. Accordingly, the circuit court can and should retain jurisdiction over discovery during the pendency of the appeal.

Under both Rules 205 and 241, SCACR, the lower court retains jurisdiction over all matters that are not affected by the appeal. See Rule 205, SCACR ("Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."); Rule 241(a), SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.").

In the order lifting the stay, the circuit court considered this issue and found that some matters before the court were unaffected by Lennar's appeal. In that regard, the circuit court found that because there were "no contracts or binding arbitration agreements" between the Homeowners and subcontractor defendants, Homeowners' claims against the subcontractors were not affected by the appeal. Accordingly, the circuit court found that Homeowners were "free to conduct discovery and move their case forward as to the subcontractors." Homeowners agree with the circuit court's analysis as to its claims against the subcontractor defendants and would further argue that because discovery is provided for under the rules cited in the allegedly

applicable arbitration agreements, all discovery in this case is unaffected by the appeal and should be permitted to proceed.

During its analysis for lifting the stay, the circuit court properly noted that discovery will still take place under the arbitration rules. The agreement between Homeowners and Lennar contains an arbitration clause that incorporates the AAA Residential Construction Arbitration Rules. These rules allow for both the exchange of documents and recorded interviews of witnesses and experts. ARB-22. The AAA rules also allow for the exchange of expert reports and estimates. *Id.* The AAA rules also require both parties to exchange certain information, including a witness list and a written summary of each witness's expected testimony. *Id.* While the technicalities of these rules may slightly differ, the underlying substance is the same. The circuit court saw "no reason to needlessly delay events that would occur eventually, regardless of the forum." Accordingly, discovery is not affected by the appeal and the lower court should retain jurisdiction over the case for this limited purpose of discovery.

Contrary to Lennar's position in the petition, the 2006 circuit court order in *Chassereau v. Global Sun Pools, Inc.*, 2006 WL 6087626 (S.C. Com. Pl. March 29, 2006) is factually distinguishable from the current action and therefore inapplicable to the current case. In that case, Justice Few, then sitting as a circuit court judge, found that allowing discovery during the appeal of a motion to compel arbitration was improper under the facts before the court. *Id.* Specifically, the court in *Chassereau* noted that:

> Permitting discovery to proceed while an appellate court has jurisdiction of the case may, in some circumstances, affect the mode of trial of the case. If the rules of the applicable arbitration do not provide for discovery as part of the arbitration process, the granting of discovery to either of the parties affects the mode of trial between the parties. *In this case the arbitration agreement does not provide for discovery between the parties.*

Id. (emphasis in original). Unlike the arbitration agreement in *Chassereau*, the arbitration agreement in this case *does* address discovery and provides for numerous forms of discovery to take place, including the production of relevant documents, exchanging of expert reports, and the equivalent of depositions for both fact and expert witnesses. The rules adopted in the arbitration agreement permit for substantially the same discovery mechanisms as permitted under the South Carolina Rules of Civil Procedure. Accordingly, the concerns contained in *Chassereau* regarding the possible tactical advantage that could be enjoyed by a party that was given access to discovery which was not otherwise authorized is inapplicable to the instant case. Homeowners and defendants will simply be permitted to continue to conduct discovery to which they will be entitled regardless of the forum. For this reason, the court's reasoning in *Chassereau*--an unpublished circuit court opinion--does not apply.

Because discovery is permitted in both forums this issue is unaffected by the appeal and discovery should be permitted to continue while the appeal is pending.

B. The circuit court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery.

The decision to lift the automatic stay was within the sound discretion of the circuit court and this Court should not disturb that decision absent an abuse of discretion. The circuit court did not abuse its discretion in determining that it was in the parties' best interest to lift the automatic stay and permit discovery to continue.

During the pendency of an appeal, any party may move the lower court to lift the automatic stay. Rule 241(c)(1), SCACR. While Rule 241 states that the lower court should consider issues relating to jurisdiction and mootness, Rule 241 does not limit the court's review to solely these two factors. Rule 241(c)(2), SCACR. Moreover, the circuit court has broad

discretion deciding whether to lift a stay and the decision to lift a stay will only be overturned where there is an abuse of discretion. *See, e.g.*, *Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 148, 625 S.E.2d 227, 230-31 (Ct. App. 2006), *reversed on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007) (reviewing a circuit court's decision to lift a statutory automatic stay in a condemnation action and noting that because the circuit court has discretion over the imposition and lifting of stays, "the appropriate standard of review [for such a decision] is abuse of discretion"). This is consistent with the circuit court's inherent power to control the order of its business to safeguard the rights of litigants." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980).

The purpose of Rule 241 is to provide litigants with the opportunity to seek relief from the rigid application of an automatic stay, which is exactly what took place in this case. In Homeowners' motion to lift the automatic stay, Homeowners provided the circuit court with numerous reasons why it was in the parties' best interests for the court to lift the automatic stay. The circuit court conducted a thorough analysis as to whether the automatic stay should be lifted. The circuit court carefully considered the arguments from both parties and the practical implications of lifting the stay. It weighed the potential prejudices faced by both parties if the court were to lift the stay or to allow the stay to remain in place. After performing a thorough analysis, the circuit court concluded that the parties were best served by lifting the automatic stay and permitting discovery to proceed.

Because the circuit court did not abuse its discretion in deciding to lift the automatic stay, this Court should affirm this decision.

(1) The circuit court properly determined delaying discovery would likely result in prejudice to the Homeowners.

This case was filed in 2014, a year and a half prior to the filing of the present Motion to

Compel Arbitration. With any additional delay comes the increased risk of valuable information and evidence being lost, destroyed, or tampered with before trial. The likelihood of spoliation of evidence increases as the case is pending on appeal, awaiting oral argument and a decision. As time continues to pass, witnesses' memories lapse, the hazardous conditions present at The Abbey worsen, the properties continue to deteriorate, and insurance coverages diminish. All of this results in prejudiced to Homeowners.

Moreover, due to the nature of Homeowners claims in this action, there is a need to expediently resolve this dispute. Homeowners are living in extremely hazardous conditions that will only continue to worsen if the case is further delayed by leaving the stay in place. In support of the motion to lift the stay, Homeowners addressed many of the construction defects plaguing the development. The foundations of the homes are cracking and sinking into the earth, creating health and safety concerns for the homeowners. Massive cracks extend from the ceiling to the floor of the homes. These cracks are expanding daily and require urgent repair. Pieces of drywall are falling from the walls and ceilings due to the expanding cracks. Cracks are extending into electrical outlets and light fixtures making them unsafe to use. Floors are cracking and causing insect infestation requiring immediate extermination. Counters in bathrooms and kitchens are separating from the walls.

If the stay is left in place, Homeowners will be forced to continue to live in these hazardous conditions. In addition, there is a risk that these conditions will continue to deteriorate, exposing Homeowners to greater harm. The sooner this case is resolved, the sooner Homeowners will be able to make the necessary repairs that will make their homes safe and livable. By lifting the automatic stay, Homeowners avoid the prejudice that results from further unnecessary delay, including the increased safety concerns arising from further deterioration of

the structures. In addition, if discovery is further delayed, the parties may lose the opportunity to examine the defects if Homeowners are somehow able to afford repairs to their homes.

For these reasons, the circuit court exercised its sound discretion in determining that the Homeowners would be prejudiced were the automatic stay not lifted for purposes of discovery.

(2) The circuit court properly concluded that neither party will be prejudice by lifting the stay for discovery.

Lifting the automatic stay for the sole purpose of permitting discovery would not prejudice either party. To the contrary, as the circuit court noted, permitting discovery would allow the parties to gather and analyze time-sensitive information—information which could otherwise be lost, destroyed, or tampered with if the automatic stay were not lifted. By delaying discovery, all parties face the increased risk that witnesses will be unable to recall important facts that are currently fresh in their memories or that key witnesses may be rendered incapacitated due to illness or death.

Contrary to what Lennar argues, discovery will not be any more costly or time consuming if permitted to continue before the circuit court, including discovery on Homeowners' class claims. Lennar's arguments are unavailing for several reasons.

First, Lennar does not offer a single example of how discovery related to class claims would be any more expensive or time consuming than pursuing discovery for individual claims. Due to the nature of this litigation, discovery for the class claims would likely be far less expensive than proceeding with separate discovery for individual plaintiffs. Because every member of the proposed class is a homeowner in the same development, the scope of discovery for individual claims would almost entirely overlap with the one another. Separate discovery would be far more likely to result in duplicative, repetitive discovery and increased costs.

Second, permitting discovery would promote the interests of judicial economy and

equity. Discovery would allow the parties to better evaluate the strengths and weakness of their respective cases, lead to possible resolution of this matter as more facts and information are discovered, and would allow the parties to avoid surprises during trial that could further prolong litigation. Even if arbitration is compelled and the Homeowners cannot proceed as a class, the discovery conducted while the appeal is pending will still be applicable to the individual cases that will continue in the arbitration forum, permitting these cases to be resolved more expediently and less expensively.

Finally, Lennar's argument on this issue, including its argument concerning Homeowners' class claims, was presented to the circuit court in both Lennar's briefs and at the hearing on the motion to lift the stay. Even after considering these arguments, the court found "[Homeowners] have sufficiently shown that there will be no prejudicial effect against either party by lifting the stay for discovery." Because this decision falls within the sound discretion of the circuit court, this court should affirm the circuit court's finding in this regard.

(3) Lennar's reliance on federal case law concerning divestment of a trial court's jurisdiction over discovery during the pendency of an appeal concerning a motion to compel arbitration is flawed due to the procedural differences between state and federal court.

In support of its contention that the circuit court should be divested of jurisdiction over discovery during the pendency of an appeal concerning a motion to compel arbitration, Lennar largely relies federal case law. However, the cases relied upon by Lennar have important procedural mechanisms that differ from those provided in South Carolina state courts. Specifically, federal courts offer a safeguard against a party who files an appeal for purposes of delaying or otherwise disrupting litigation. Federal courts permit a party who contests an appeal on an order denying arbitration to seek certification of the appeal as "frivolous" or "forfeited." For example, in *Levin v. Alms & Assocs., Inc.*, the Fourth Circuit addressed the necessity for this

procedural safeguard, stating "it would be inadvisable to 'allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.'" 634 F.3d 260, 265 (4th Cir. 2011) (quoting *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990)). "For this reason, each of the circuits adopting the majority view [of divestiture] has created a frivolousness exception to the divestiture of jurisdiction." *Id.* The Tenth Circuit elaborated on the mechanics of the frivolousness exception as follows:

> [U]pon the filing of a motion to stay litigation pending an appeal from the denial of a motion to compel arbitration, the district court may frustrate any litigant's attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited. That certification will prevent the divestiture of district court jurisdiction.

McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1162 (10th Cir. 2005).

South Carolina state courts lack an equivalent safeguard mechanism, which would permit a party to seek permission from the court to proceed with discovery if it felt another party were pursuing an appeal solely for purposes of delay. If this Court adopts the federal standard, as Lennar suggests, and holds any appeal of a motion to compel arbitration automatically divests the lower court of jurisdiction over discovery, litigants will be forced to idly wait while appeals are processed without being afforded the necessary safeguards.

The South Carolina Appellate Rules already provide a mechanism for a party who wants to continue discovery during the pendency of an appeal. Specifically, Rule 241(c)(1), SCACR permits a party to move the Court to lift an automatic stay during the pendency of an appeal. This is precisely what happened in the present case. After considering arguments from both parties, the circuit court exercised its sound discretion in determining that the automatic stay imposed by Lennar's pending appeal should be lifted for the sole purpose of discovery.

CONCLUSION

Homeowners respectfully request that this Court affirm the ruling of the circuit court Order Granting Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery. Discovery is not affected by the appeal and the arbitration agreements that Lennar seeks to enforce permit discovery. Because discovery is unaffected by the appeal, the circuit court can and should retain jurisdiction over discovery while the appeal is pending. In addition, the circuit court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery. Prohibiting discovery while the appeal is pending will result in prejudice to the Homeowners. In contrast, proceeding with discovery does not result in prejudice to Lennar. Accordingly, the circuit court's order should be affirmed.

Jesse Sanchez, Esquire (SC Bar #101906)
The Law Office of Jesse Sanchez, LLC
98 ½ Broad Street, Suite B
Charleston, SC 29401
Phone: 843-814-8181
Fax: 843-284-3953
jesse@jessesanchezlaw.com

John C. Hayes, IV, Esquire (SC Bar # 69740)
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org

Catherine Dunn Meehan, Esquire
PO Box 9

Charleston, SC 29402-009
cmeehan@steinberglawfirm.com
843-720-2800

Michael J. Jordan, Esquire
PO Box 1028
Goose Creek SC 29445
mjordan@steinberglawfirm.com
843-572-0700

ATTORNEYS FOR RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW

June 21, 2018
Charleston, South Carolina

EXHIBIT H

to

Petition

to Lift Stay

The South Carolina Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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, Geometrics 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 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, Isidru 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.

Appellate Case No. 2016-002339

ORDER

Appellant appealed a circuit court order denying its motion to compel arbitration in a construction defect case filed by Respondents. During the pendency of this appeal, the circuit court issued an order lifting the automatic stay "for purposes of discovery." Appellant has now filed a petition to review the circuit court's order lifting the stay, requesting this court reinstate the automatic stay.

After careful consideration, the motion is granted. *See* Rule 241, SCACR (emphasis added) ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters *not affected by the appeal* including the authority to enforce any matters not stayed by the appeal."); *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) (reversing the denial of defendants' motion for a stay, reversing plaintiff's motion to compel discovery, and staying all proceedings pending arbitration because all of plaintiff's causes of action were subject to arbitration); *see also Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011) (citations omitted) ("The core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims. Therefore, because the district court lacks jurisdiction over 'those aspects of the case involved in the appeal,' it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue. That the present case involves only the continuation of discovery does not change that rationale. Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction.").

D. Garfinkel

FOR THE COURT

Columbia, South Carolina

cc: Jenna Brooke Kiziah McGee, Esquire
Frederick Elliotte Quinn, IV, Esquire
Michael J. Jordan, Esquire

FILED
July 30, 2018

Catherine Dunn Meehan, Esquire
John Calvin Hayes, IV, Esquire
R. Patrick Flynn, Esquire
Michael Wade Allen, Jr., Esquire
Bachman S. Smith, IV, Esquire
James H. Elliott, Jr., Esquire
Samia Hanafi Nettles, Esquire
David Shuler Black, Esquire
Shanna Milcetich Stephens, Esquire
Stephen Lynwood Brown, Esquire
Catherine Holland Chase, Esquire
Preston Bruce Dawkins, Jr., Esquire
Stephen P. Hughes, Esquire
Kathy Aboe Carlsten, Esquire
N. Keith Emge, Jr., Esquire
Brent Morris Boyd, Esquire
David Starr Cobb, Esquire
Sidney Markey Stubbs, Esquire
Derek Michael Newberry, Esquire
Christine Companion Varnado, Esquire
Alan Ross Belcher, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Erin DuBose Dean, Esquire
Thomas Frank Dougall, Esquire
William Ansel Collins, Jr., Esquire
Michal Kalwajtys, Esquire
John Elliott Rogers, II, Esquire
Jenny Costa Honeycutt, Esquire
Robert Trippett Boineau, III, Esquire
Heath McAlvin Stewart, III, Esquire
Ronald G. Tate, Jr., Esquire
Robert Batten Farrar, Esquire
Michael Edward Wright, Esquire
James Lynn Werner, Esquire
David Cooper Cleveland, Esquire
Rogers Edward Harrell, III, Esquire
Carmen Vaughn Ganjehsani, Esquire
Trey Matthew Nicolette, Esquire

Mary Skahan Willis, Esquire
Timothy J. Newton, Esquire
Katon Edwards Dawson, Jr., Esquire
John Adam Ribock, Esquire
Francis Heyward Grimball, Esquire
Wade Coleman Lawrimore, Esquire
Jesse Sanchez, Esquire
Edward Dengg
Sylvia Dengg
Anthony Ray
Stacey Ray

EXHIBIT I

to

Petition

to Lift Stay

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

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 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.

RESPONDENTS' PETITION FOR FULL APPELLATE COURT REVIEW OF DECISION

John C. Hayes, IV, Esquire
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
(843) 805-7003

Michael J. Jordan, Esquire
Steinberg Law Firm, LLP
PO Box 1028
Goose Creek SC 29445
843-572-0700

Jesse Sanchez, Esquire
The Law Office of Jesse Sanchez, LLC
98 ½ Broad Street, Suite B
Charleston, SC 29401
(843) 814-8181

Catherine Dunn Meehan, Esquire
Steinberg Law Firm, LLP
PO Box 9
Charleston, SC 29402-009
(843) 720-2800

Attorneys for Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Theresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow

Pursuant to Rule 241(d)(2) and Rule 241(d)(7), SCACR, Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Theresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow (collectively, "Homeowners") hereby respectfully petition the full appellate court for review of the Court of Appeals *Order* entered on July 30, 2018 (the "Subject Order").[1] The Subject Order effectively reverses the *Order Granting Plaintiffs' Motion to Lift Automatic Stay for Purposes of Discovery* entered on May 31, 2018 by the Honorable J.C. Nicholson, Jr.[2]

Homeowners respectfully submit that the Court's conclusion set forth in the Subject Order was reached in error and should be vacated for those reasons set forth in *Respondents' Return to Appellant's Petition*, dated June 21st, 2018.[3] Homeowners hereby incorporate *Respondents' Return to Appellant's Petition* and the arguments contained therein by reference. In addition, the Subject Order should be vacated for the following reasons:

1. The Subject Order fails to apply the requisite "abuse of discretion" standard of review.

In reaching its determination, the Subject Order fails to apply the "abuse of discretion" standard of review to the circuit court's *Order Granting Plaintiffs' Motion to Lift Automatic Stay for Purposes of Discovery.* While determinations of arbitrability are subject to *de novo* review, the decision to stay a case or lift a stay is within the sound discretion of the circuit court. *See, e.g., Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 367 S.C.

---

[1] A copy of this Order is attached as Exhibit A.
[2] A copy of this Order is attached as Exhibit B.
[3] A copy of the Respondents' Return is attached as Exhibit C. The Return argues, *inter alia*, that the lower court properly retained jurisdiction over discovery; that the Circuit Court exercised its sound discretion in lifting the automatic say for the sole purpose of discovery; and that procedural differences between state and federal courts make the federal cases cited by Lennar (and now the Court) inapplicable to the present matter.

141, 148, 625 S.E.2d 227, 230-31 (Ct. App. 2006), *reversed on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007) (reviewing a circuit court's decision to lift a statutory automatic stay in a condemnation action and noting that because the circuit court has discretion over the imposition and lifting of stays, "the appropriate standard of review [for such a decision] is abuse of discretion"). This is consistent with the circuit court's inherent power to control the order of its business to safeguard the rights of litigants." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980). See also, *Cousar v. New London Eng'g Co.,* 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991) (concluding that the circuit court did not abuse its discretion in retaining jurisdiction over discovery matters during the pendency of an appeal).

It was an error of law for the Court to reach its determination without applying the "abuse of discretion" standard of review to the circuit court's order. As set forth in *Respondent's Return to Appellant's Petition*, the circuit court did not abuse its discretion in retaining jurisdiction over discovery and lifting the automatic stay for purposes of discovery.[4] Accordingly, the Subject Order should be vacated.

In addition, discovery is not a matter affected by the underlying appeal. As the circuit court noted, there are no arbitration agreements to enforce between Homeowners and any of the defendant subcontractors because no agreements (arbitration or otherwise) were signed between Homeowners and the defendant subcontractors:

> [T]his Court finds that matters relating to the claims against the subcontractors are not affected by the appeal. There are no contracts or binding arbitration agreements between the subcontractor Defendants and the Plaintiffs. In addition, any Homeowner Plaintiff who is not an original purchaser from Lennar

[4] See Arguments A and B on pages 5-12 of *Respondents' Return to Appellant's Petition* (attached herein as Exhibit C) for a detailed discussion on how the circuit court exercised its sound discretion in lifting the automatic stay for purposes of discovery.

> has no arbitration agreement with Lennar. Therefore, the decision that has been appealed bears no relation to the claims between the subcontractors and the Plaintiffs. As a result, Plaintiffs are free to conduct discovery and move their case forward as to the subcontractors. (Order at p. 6, attached herein as Exhibit B).

Accordingly, it was an error of law to divest the circuit court of jurisdiction as to discovery because discovery between the Homeowners and the defendant subcontractors is not a matter affected by the underlying appeal.

The circuit court also properly determined that discovery between the Homebuilders and Lennar is not affected by the underlying appeal because discovery would occur regardless of whether this case is tried or arbitrated. The circuit court noted:

> Plaintiffs assert that discovery is not affected by the appeal, that Plaintiffs would be prejudiced by a delay in discovery, and that regardless of which forum the Court of Appeals choses for this matter, some form of discovery is allowed to take place. The Court finds it compelling that under the arbitration rules, discovery still needs to take place. The agreement between Plaintiffs and Lennar contains an Arbitration Clause that incorporates the AAA Residential Construction Arbitration Rules. The AAA rules allow for exchange of documents and interviews. ARB-22. This equates to what is commonly known in litigation as discovery and depositions. The AAA rules further allow for expert reports and the exchange the [sic] the any expert reports and estimates. *Id.* In the event that the Appellate Court enforces the arbitration agreements between the parties, there will be discovery conducted. The Court sees no reason to needlessly delay events that would occur eventually, regardless of the forum.[5]

Accordingly, it was an error of law to divest the circuit court of jurisdiction as to discovery because it is not a matter affected by the underlying appeal.

2. The Subject Order's application of *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) to the present case was an error of law because the cases are factually and procedurally distinguishable.

[5] See also Argument A. on p. 5 of *Respondents' Return to Appellant's Petition* (attached herein as Exhibit C) for a detailed discussion on the availability of discovery in the event arbitration were enforced.

The Subject Order cites *Stokes* in support of divesting the circuit court of jurisdiction over discovery matters. However, *Stokes* is distinguishable from the present case in several ways and is consequently inapplicable.

In *Stokes*, the Court of Appeals stayed discovery because it first determined that **all** of Plaintiff's causes of action were subject to arbitration and that the Federal Arbitration Act (FAA) applied to the underlying employment agreement. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711 (Ct. App. 2002) ("Having determined that Stokes' trespass and conversion actions are subject to arbitration, we next turn to the issues of the automatic stay and the trial court's order to compel discovery.") Unlike the Court in *Stokes*, this Court has not determined that any causes of action against Lennar or the various defendant subcontractors are subject to arbitration, nor has this Court determined that the FAA has any bearing on this matter. Accordingly, it was an error of law to rely on *Stokes* to divest the circuit court of jurisdiction over discovery matters because this Court has not made a determination that all of Homeowners' claims are subject to arbitration or that the FAA is applicable.

In addition, the Court in *Stokes* based its determination on the applicability of the FAA to the underlying employment agreement. The parties in *Stokes* did not dispute that the FAA applied to claims arising under the subject employment agreement. *Stokes*, 351 S.C. at 610. ("Neither party disputes the FAA applies to claims arising under the Form U-4 Stokes signed in 1992.") In the present case, Homeowners dispute that the FAA applies to their claims against Lennar and the defendant subcontractors. (See *Respondent's Final Brief* at p. 13, noting, "The Circuit Court properly determined that, in the alternative to being unconscionable, the arbitration provisions are ambiguous and not governed by the FAA.") Accordingly, it was an error of law to rely on *Stokes* to divest the circuit court of jurisdiction over discovery matters because this

Court has not made a determination that the Homeowners' claims are subject to the FAA.

Further, even if the FAA were to apply, the FAA does not require the parties to arbitrate where they have not agreed to do so. The Court in *Stokes* noted this much, stating:

> "'[T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Zabinski v. Bright Acres Assocs.*, 346 S.C. at 591-592, 553 S.E.2d at 116 (citation omitted). The FAA 'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.' Volt, 489 U.S. at 478, 109 S.Ct. 1248. *Stokes,* 351 S.C. at 611.

In the instant case, **no agreements (arbitration or otherwise) were signed between the Homeowners and the defendant subcontractors.**[6] Accordingly, it was an error of law to divest the circuit court of jurisdiction as to the claims between the Homeowners and the defendant subcontractors because the Homeowners and the defendant subcontractors have not agreed to arbitrate their claims. The circuit court had jurisdiction over discovery and exercised sound discretion in permitting discovery to proceed as to the Homeowners' claims against the subcontractors.

Also unlike *Stokes*, this Court has not made a determination that enforceable arbitration agreements exist between the Homeowners and Lennar. Even if the Court determines that enforceable arbitration agreements exist, discovery would be permitted under the arbitration rules propounded by Lennar.[7]

The forgoing distinctions render *Stokes* inapplicable to the present case. It was an error of law to rely on *Stokes* to divest the circuit court of jurisdiction over discovery matters because *Stokes* is factually and procedurally distinguishable from the present case. Accordingly, the

---

[6] See Argument 1, *supra*.
[7] See Argument 1, *supra*.

Subject Order should be vacated.

3. The Subject Order relies on *federal* case law that is inapplicable to the present matter due to substantive differences between state and federal procedural rules.

The Subject Order cites *federal* case law to support the divestiture of jurisdiction in a *state* court case. *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011). The Subject Order disregards that federal courts, including the Fourth Circuit, have created a safeguard against improper divestiture of jurisdiction where a defendant files an appeal for purposes of delaying or otherwise disrupting litigation.[8] In federal courts, an aggrieved party can immediately challenge the divestiture of jurisdiction caused by a defendant who appeals an order denying arbitration. See *Levin*, 634 F.3d at 265. The aggrieved party can immediately seek certification of the appeal as frivolous or forfeited. *Id.* **South Carolina state courts do not offer this safeguard.**

Indeed, the federal case cited by the Subject Order addresses the importance and necessity of this procedural safeguard. The Court in *Levin* noted:

> As the Ninth Circuit noted in *Britton*, it would be inadvisable to "allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration." 916 F.2d at 1412. For this reason, each of the circuits adopting the majority view has created a frivolousness exception to the divestiture of jurisdiction. [...] The Tenth Circuit elaborated on the mechanics of the frivolousness exception as follows:
>
> [U]pon the filing of a motion to stay litigation pending an appeal from the denial of a motion to compel arbitration, the district court may frustrate any litigant's attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited. That certification will prevent the divestiture of district court jurisdiction. (Citing *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005)) *Levin, 634 F.3d at 265.*

[8] See Argument 3 on p. 11 of *Respondents' Return to Appellant's Petition* (attached herein as Exhibit C) for a detailed discussion on the procedural differences between the federal and state court rules regarding divestiture of jurisdiction.

Again, South Carolina state courts do not offer an equivalent safeguard against improper divestiture of jurisdiction. It was an error of law to rely on federal case law to divest the circuit court of jurisdiction because the circuit court lacks the procedural safeguard afforded by the federal courts against improper divestiture of jurisdiction. Accordingly, the Subject Order should be vacated.

CONCLUSION

For the reasons stated hereinabove, this Court should vacate the *Order* entered on July 30, 2018. As more fully set forth in *Respondents' Return to Appellant's Petition*, discovery is not affected by the appeal. The arbitration agreements that Lennar seeks to enforce permit discovery. In addition, there are no agreements (arbitration or otherwise) between Homeowners and the defendant subcontractors. Because discovery is unaffected by the appeal, the circuit court can and should retain jurisdiction over discovery while the appeal is pending. The circuit court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery. Prohibiting discovery while the appeal is pending will result in significant prejudice to the Homeowners. In contrast, proceeding with discovery does not result in prejudice to Lennar.

In addition, the Subject Order should be vacated because it fails to apply the "abuse of discretion" standard of review to the circuit court's *Order Granting Plaintiffs' Motion to Lift Automatic Stay for Purposes of Discovery.* The circuit court has broad discretion deciding whether to lift a stay and the decision to lift a stay will only be overturned where there is an abuse of discretion. The Subject Order should be vacated because it is an error of law to rely on *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) because *Stokes* is factually and procedurally distinguishable from the present case. Lastly, the Subject Order should also be vacated because it relies on federal case law that is inapplicable to state

court cases due to substantive differences between state and federal procedural rules.

[Signature on following page]

Respectfully submitted,

Respectfully submitted,

John C. Hayes, IV, Esquire (SC Bar # 69740)
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org

Jesse Sanchez, Esquire (SC Bar #101906)
The Law Office of Jesse Sanchez, LLC
98 ½ Broad Street, Suite B
Charleston, SC 29401
Phone: 843-814-8181
Fax: 843-284-3953
jesse@jessesanchezlaw.com

Michael J. Jordan, Esquire
PO Box 1028
Goose Creek SC 29445
mjordan@steinberglawfirm.com
843-572-0700

Catherine Dunn Meehan, Esquire
PO Box 9
Charleston, SC 29402-009
cmeehan@steinberglawfirm.com
843-720-2800

ATTORNEYS FOR RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW

August 13, 2018
Charleston, South Carolina

EXHIBIT A

The South Carolina Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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, Geometrics 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 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, Isidru 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.

Appellate Case No. 2016-002339

ORDER

Appellant appealed a circuit court order denying its motion to compel arbitration in a construction defect case filed by Respondents. During the pendency of this appeal, the circuit court issued an order lifting the automatic stay "for purposes of discovery." Appellant has now filed a petition to review the circuit court's order lifting the stay, requesting this court reinstate the automatic stay.

After careful consideration, the motion is granted. *See* Rule 241, SCACR (emphasis added) ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters *not affected by the appeal* including the authority to enforce any matters not stayed by the appeal."); *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) (reversing the denial of defendants' motion for a stay, reversing plaintiff's motion to compel discovery, and staying all proceedings pending arbitration because all of plaintiff's causes of action were subject to arbitration); *see also Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011) (citations omitted) ("The core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims. Therefore, because the district court lacks jurisdiction over 'those aspects of the case involved in the appeal,' it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue. That the present case involves only the continuation of discovery does not change that rationale. Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction.").

D. Garfinkel

FOR THE COURT

Columbia, South Carolina

cc: Jenna Brooke Kiziah McGee, Esquire
Frederick Elliotte Quinn, IV, Esquire
Michael J. Jordan, Esquire

FILED
July 30, 2018

Catherine Dunn Meehan, Esquire
John Calvin Hayes, IV, Esquire
R. Patrick Flynn, Esquire
Michael Wade Allen, Jr., Esquire
Bachman S. Smith, IV, Esquire
James H. Elliott, Jr., Esquire
Samia Hanafi Nettles, Esquire
David Shuler Black, Esquire
Shanna Milcetich Stephens, Esquire
Stephen Lynwood Brown, Esquire
Catherine Holland Chase, Esquire
Preston Bruce Dawkins, Jr., Esquire
Stephen P. Hughes, Esquire
Kathy Aboe Carlsten, Esquire
N. Keith Emge, Jr., Esquire
Brent Morris Boyd, Esquire
David Starr Cobb, Esquire
Sidney Markey Stubbs, Esquire
Derek Michael Newberry, Esquire
Christine Companion Varnado, Esquire
Alan Ross Belcher, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Erin DuBose Dean, Esquire
Thomas Frank Dougall, Esquire
William Ansel Collins, Jr., Esquire
Michal Kalwajtys, Esquire
John Elliott Rogers, II, Esquire
Jenny Costa Honeycutt, Esquire
Robert Trippett Boineau, III, Esquire
Heath McAlvin Stewart, III, Esquire
Ronald G. Tate, Jr., Esquire
Robert Batten Farrar, Esquire
Michael Edward Wright, Esquire
James Lynn Werner, Esquire
David Cooper Cleveland, Esquire
Rogers Edward Harrell, III, Esquire
Carmen Vaughn Ganjehsani, Esquire
Trey Matthew Nicolette, Esquire

Mary Skahan Willis, Esquire
Timothy J. Newton, Esquire
Katon Edwards Dawson, Jr., Esquire
John Adam Ribock, Esquire
Francis Heyward Grimball, Esquire
Wade Coleman Lawrimore, Esquire
Jesse Sanchez, Esquire
Edward Dengg
Sylvia Dengg
Anthony Ray
Stacey Ray

EXHIBIT B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO: 2014-CP-08-02424
)

Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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,

Plaintiffs,

vs.

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.

Lennar Carolinas, LLC,

Third-Party Plaintiff,

vs.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics 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,

ORDER GRANTING PLAINTIFFS' MOTION TO LIFT AUTOMATIC STAY FOR PURPOSES OF DISCOVERY

Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor 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.

Décor Corporation,

Fourth Party Plaintiff,

vs.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Enmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez Son, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aparecido Corgosinho, Ricardo Chiche, Cebs Construction, Bayshore Siding and Flooring, Sebastio Luiz De Araujo, and John Does 1 – 4,

Fourth-Party Defendants.

Alpha Omega Construction Group, Inc.

Fourth-Party Plaintiff,

Vs.

Garcia Roofing, LLC, Juan Garza Ramos, Jose Vera, and Espino Roofing, LLC,

Fourth-Party Defendants.

DVS, Inc.,

Fourth-Party Plaintiff,

Vs.

Sousa Construction, LLC, Lima Construction, LLC, N&B Construction, LLC, Itatiaia Construction, LLC and JC Contractors, LLC

Fourth-Party Defendants.

South Carolina Exteriors, LLC

Fourth-Party Plaintiff,

Vs.

Juan Garza Ramos, d/b/a Juan Constructors,

Fourth-Party Defendant.

Guaranteed Framing, LLC

Fourth-Party Plaintiff,

Vs.

First Construction, LLC, JC Contractors, LLC, Jessica Marroquin d/b/a Marroquin Construction, and Unique Framing, LLC,

Fourth Party Defendants.

This matter came before the Court on April 11, 2018 for a hearing upon Plaintiffs' Patricia Damico, et al. ("Plaintiffs") Motion to Lift Automatic Stay pursuant to Rule 241(c)(1), SCACR. Present for Plaintiffs was John Hayes, IV, Esq. and present for Defendant Lennar Carolinas, LLC was James Werner, Esq. Upon review of the memoranda and materials presented, oral arguments, and the applicable rules and case law, Plaintiffs' Motion to Lift the Automatic Stay is granted solely for discovery purposes.

FACTUAL AND PROCEDURAL BACKGROUND

The case involves allegations of construction defects in multiple homes located in The Abbey at Spring Grove in Moncks Corner, South Carolina. The development consists of sixty-nine (69) single-family homes constructed between 2010 and 2016 that were originally started by Defendant Spring Grove Plantation Development. In 2011, the development was sold to Defendant Lennar Carolinas, LLC, hereinafter "Lennar", who took over the control, construction, management, and sale of the homes at The Abbey.

Plaintiffs filed this lawsuit on October 30, 2014 against multiple defendants, including Lennar alleging causes of action for Negligence, Negligent Misrepresentation, Breach of Warranties, Breach of Fiduciary Duties, and Unfair Trade Practices. Plaintiffs subsequently moved for class certification and filed an Amended Complaint on March 24, 2016. On March 30, 2016 Lennar filed a Motion to Compel Arbitration pursuant to their Arbitration Agreements with some but not all of the Plaintiffs. The Motion to Compel Arbitration was denied and Lennar appealed the decision. The appeal prompted an automatic stay, which gave rise to Plaintiffs' Motion to Lift the Automatic Stay for purposes of discovery. Plaintiffs argued the parties should

be permitted to conduct discovery while the appeal is pending because discovery is not affected by the appeal. Lennar argued the automatic stay should not be lifted.

STANDARD OF REVIEW

Pursuant to Rule 205, SCACR, the entire case is not stayed during the pendency of the appeal. This allows the lower court to retain jurisdiction over matters not affected by the appeal. The Rules also allow any party to move the Court to lift the automatic stay imposed by an appeal.. SCACR 241(C)(1). The moving party bears the burden of demonstrating that the automatic stay should be lifted. Rule 241(c)(1) states that the court may consider issues such as mootness and jurisdiction when deciding whether to lift an automatic stay. However, these issues are not exhaustive and the Court can act on its own discretion when removing the stay.

In *Cousar v. New London Engineering Co., Inc.*, the Supreme Court held that retaining jurisdiction over discovery matters during pendency of appeal from order denying motion to amend answer and third-party complaint was not an abuse of discretion because discovery was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Further, under *Williams v. Borden's Inc.*, this Court has the power to control its order of business and safeguard the rights of the litigants before it. *Williams v. Borden's Inc.*, 274 S.C. 275, 262 S.E.2d 881 (1980).

ANALYSIS

I. THE COURT CAN PROCEED WITH MATTERS NOT AFFECTED BY THE APPEAL.

Plaintiffs have multiple claims against subcontractors that are not subject to any arbitration agreements. Pursuant to Rule 205, SCACR, "nothing in these Rules shall prohibit the lower court . . . from proceeding with matters not affected by the appeal." Rule 205, SCACR. The

Supreme Court has held that retention of jurisdiction over discovery matters by the trial court was not an abuse of discretion and that discovery in that case was not affected by the appeal. *Cousar v. New London Eng'g Co.*, 306 S.C. 37, 410 S.E.2d 243 (1991). Based on the Appellate Court Rules and Supreme Court precedent presented by the Plaintiffs, it is within the powers of this court to retain jurisdiction over discovery matters and allow the case to progress.

Accordingly, this Court finds that matters relating to the claims against subcontractors are not affected by the appeal. There are no contracts or binding arbitration agreements between the subcontractor Defendants and the Plaintiffs. In addition, any Homeowner Plaintiff who is not an original purchaser from Lennar has no arbitration agreement with Lennar. Therefore, the decision that has been appealed bears no relation to the claims between the subcontractors and the Plaintiffs. As a result, Plaintiffs are free to conduct discovery and move their case forward as to the subcontractors.

II. THE AUTOMATIC STAY IS LIFTED FOR PURPOSES OF DISCOVERY

During the pendency of an appeal, a party may move the Court to lift the automatic stay for any purpose. SCACR 241(c)(1). While Rule 241 states the court should consider issues relating to jurisdiction and mootness, this list is not exhaustive and the Court has broad discretion in deciding such matters. SCACR(c)(2); *Cousar*, 306 S.C., 410 S.E.2d.

Lennar cites to a federal case in an attempt to show the lifting of the stay is improper because the appeal is not "frivolous". *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). The issue before the Court is not whether the appeal is frivolous but whether the Automatic Stay should be lifted to allow discovery to continue. The Court agrees with Defendant that there is an automatic stay placed on the case

and it will remain until the Court of Appeals renders a decision. However, as allowed by the Appellate Court Rules, any party may move the court to lift the automatic stay and Plaintiffs have brought their motion accordingly.

Plaintiffs assert that discovery is not affected by the appeal, that Plaintiffs would be prejudiced by a delay in discovery, and that regardless of which forum the Court of Appeals choses for this matter, some form of discovery is allowed to take place. The Court finds it compelling that under the arbitration rules, discovery still needs to take place. The agreement between Plaintiffs and Lennar contains an Arbitration Clause that incorporates the AAA Residential Construction Arbitration Rules. The AAA rules allow for the exchange of documents and interviews. ARB-22. This equates to what is commonly known in litigation as discovery and depositions. The AAA rules further allow for expert reports and the exchange the any expert reports and estimates. *Id.* In the event that the Appellate Court enforces the arbitration agreements between the parties, there will be discovery conducted. The Court sees no reason to needlessly delay events that would occur eventually, regardless of the forum.

Lennar's argument relies heavily on a 2006 Circuit Court Order in *Chassereau* that states that allowing discovery during the appeal was improper in that case. The Court in *Chassereau* decided that "[p]ermitting discovery to proceed while an appellate court has jurisdiction of the case may, in some circumstances, affect the mode of trial of the case. If the rules of the applicable arbitration do not provide for discovery as part of the arbitration process, the granting of discovery to either of the parties affects the mode of trial between the parties. *In this case the arbitration agreement does not provide for discovery between the parties.*" *Chassereau v. Global-Sun Pools, Inc.*, 2006 WL 6087626. The basis for the Court's decision in

Chassereau was emphasized by the Court, and that basis was that there was no arbitration agreement providing for discovery. Here, we have the opposite set of facts and the underlying arbitration agreement in this case *does* address discovery and even provides the applicable rules. In addition, there are no arbitration agreements between the Plaintiffs and Subcontractor Defendants. The Supreme Court decision in *Cousar* outweighs the trial court order in *Chassereau*. Although *Chassereau* is persuasive, it is not binding upon the Court and the pertinent facts in this case differ from *Chassereau*.

Plaintiffs also argued that as time passes by in this case, which was filed in 2014, witnesses' memories will lapse, the hazardous conditions present at the Abbey will worsen, properties will continue to deteriorate, insurance coverage will diminish, and Plaintiffs will be prejudiced as a result. The passing of time and rising expenses make it clear that allowing discovery to move forward in this case would promote the interests of judicial economy and equity. Plaintiffs have sufficiently shown that there will be no prejudicial effect against either party by lifting the stay for discovery. Alternatively, the Court finds that delaying discovery would prejudice Plaintiffs. Accordingly, the Court hereby lifts the stay solely for purposes of discovery.

CONCLUSION

Based on the foregoing and it being within the sound discretion of the Court to control its order of business and safeguard the rights of the litigants before it, this Court finds there is sufficient evidence demonstrating the need for discovery to continue and that the automatic stay imposed by SCACR 205 should be lifted solely for discovery.

THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' Motion to Lift the Automatic Stay is granted for discovery to take place.
2. Plaintiffs and Defendants are entitled to engage in discovery in the above-captioned matter.
3. The Stay shall remain in place otherwise for matters affected by the appeal.

AND IT IS SO ORDERED.

The Honorable J. C. Nicholson, Jr.
Ninth Judicial Circuit

May 29, 2018
Moncks Corner, South Carolina

EXHIBIT C

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

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 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.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S RETURN TO APPELLANT'S PETITION TO REVIEW THE CIRCUIT COURT'S ORDER LIFTING AUTOMATIC STAY

Pursuant to Rule 240(e), SCACR, Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara; Matthew Collins, Jonathan and Theresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow (collectively, "Homeowners") hereby respond to the Petition to Review the Circuit Court's Order Lifting the Automatic Stay filed by Appellant Lennar Carolinas, LLC ("Lennar"). Because discovery is not affected by the pending appeal and the circuit properly exercised its discretion in lifting the automatic stay, Lennar's petition should be denied.

FACTS

This is a construction defect case that involves defects in multiple homes located in The Abbey at Spring Grove in Moncks Corner, South Carolina. The Abbey consists of sixty-nine (69) single-family homes constructed between 2010 and 2016 that were originally started by Defendant Spring Grove Plantation Development, Inc. In 2011, the development was sold to Lennar who took over the control, construction, management, and sale of the homes at The Abbey.

Since the construction of the homes at The Abbey, Homeowners have discovered severe defects in their homes. Homeowners' investigations have revealed significant design and construction defects, including but not limited to improper soil grading, improper drainage, and structural defects resulting in hazardous structural deterioration. Because the defects are so severe, the grading structures and drainage must be completely redone to fix the harm.

PROCEDURAL BACKGROUND

Homeowners filed this lawsuit on October 30, 2014, alleging causes of action for negligence, negligent misrepresentation, breach of warranties, breach of fiduciary duties, and unfair trade practices against multiple defendants, including Lennar. Homeowners filed an Amended Complaint on March 24, 2016, and subsequently moved for class certification.

On March 30, 2016, Lennar filed a Motion to Compel Arbitration pursuant to arbitration agreements it had with some but not all of the Homeowners. On September 21, 2016, Lennar's Motion to Compel Arbitration was denied. On November 18, 2016, Lennar served a Notice of Appeal related to the order denying its Motion to Compel Arbitration. On November 29, 2016, Lennar filed a Motion to Enforce Stay with the South Carolina Court of Appeals. On December 9, 2016, the Court of Appeals issued an order finding that (1) the order denying Lennar's Motion

to Compel Arbitration was immediately appealable and (2) all matters affected by the appeal were stayed during the pendency of the appeal.

On February 27, 2018, Homeowners filed a Motion to Lift the Automatic Stay for Purposes of Discovery.[1] On May 31, 2018, the circuit court entered an order granting Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery.[2] Pursuant to Rule 241(d)(2), SCACR, Lennar now seeks review of the circuit court's order granting Plaintiff's Motion to Lift Automatic Stay for Purposes of Discovery.

STANDARD OF REVIEW

Pursuant to Rules 205 and 241, SCACR, the lower court retains jurisdiction over matters not affected by an appeal. "Nothing in these rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. The circuit court's decision to retain jurisdiction over a matter that is not affected by the appeal is reviewed by this court for an abuse of discretion. *See, e.g., Cousar v. New London Eng'g Co.,* 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991) (concluding that the circuit court did not abuse its discretion in retaining jurisdiction over discovery matters during the pendency of an appeal).

In addition, Rule 241(C)(1), SCACR, permits any party to move before the lower court to lift the automatic stay imposed by an appeal. The decision to stay a case or lift a stay is within the sound discretion of the circuit court. *Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 148, 625 S.E.2d 227, 230-31 (Ct. App. 2006), *reversed on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007). Accordingly, the appellate court reviews the circuit court's decision to lift the automatic stay under the abuse of

[1] A copy of this motion is attached as **Exhibit A**.
[2] A copy of this order is attached as **Exhibit B**.

discretion standard. *Id.*

ARGUMENT

A. Discovery is not affected by the pending appeal.

As a preliminary matter, discovery is unaffected by the pending appeal. Because discovery will take place whether the case proceeds before the circuit court or in the arbitration forum identified in the allegedly applicable arbitration agreements, the matter of discovery is not affected by Lennar's pending appeal and therefore can continue to be conducted while the appeal is pending. Accordingly, the circuit court can and should retain jurisdiction over discovery during the pendency of the appeal.

Under both Rules 205 and 241, SCACR, the lower court retains jurisdiction over all matters that are not affected by the appeal. See Rule 205, SCACR ("Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."); Rule 241(a), SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.").

In the order lifting the stay, the circuit court considered this issue and found that some matters before the court were unaffected by Lennar's appeal. In that regard, the circuit court found that because there were "no contracts or binding arbitration agreements" between the Homeowners and subcontractor defendants, Homeowners' claims against the subcontractors were not affected by the appeal. Accordingly, the circuit court found that Homeowners were "free to conduct discovery and move their case forward as to the subcontractors." Homeowners agree with the circuit court's analysis as to its claims against the subcontractor defendants and would further argue that because discovery is provided for under the rules cited in the allegedly

applicable arbitration agreements, all discovery in this case is unaffected by the appeal and should be permitted to proceed.

During its analysis for lifting the stay, the circuit court properly noted that discovery will still take place under the arbitration rules. The agreement between Homeowners and Lennar contains an arbitration clause that incorporates the AAA Residential Construction Arbitration Rules. These rules allow for both the exchange of documents and recorded interviews of witnesses and experts. ARB-22. The AAA rules also allow for the exchange of expert reports and estimates. *Id.* The AAA rules also require both parties to exchange certain information, including a witness list and a written summary of each witness's expected testimony. *Id.* While the technicalities of these rules may slightly differ, the underlying substance is the same. The circuit court saw "no reason to needlessly delay events that would occur eventually, regardless of the forum." Accordingly, discovery is not affected by the appeal and the lower court should retain jurisdiction over the case for this limited purpose of discovery.

Contrary to Lennar's position in the petition, the 2006 circuit court order in *Chassereau v. Global Sun Pools, Inc.*, 2006 WL 6087626 (S.C. Com. Pl. March 29, 2006) is factually distinguishable from the current action and therefore inapplicable to the current case. In that case, Justice Few, then sitting as a circuit court judge, found that allowing discovery during the appeal of a motion to compel arbitration was improper under the facts before the court. *Id.* Specifically, the court in *Chassereau* noted that:

> Permitting discovery to proceed while an appellate court has jurisdiction of the case may, in some circumstances, affect the mode of trial of the case. If the rules of the applicable arbitration do not provide for discovery as part of the arbitration process, the granting of discovery to either of the parties affects the mode of trial between the parties. *In this case the arbitration agreement does not provide for discovery between the parties.*

Id. (emphasis in original). Unlike the arbitration agreement in *Chassereau*, the arbitration agreement in this case *does* address discovery and provides for numerous forms of discovery to take place, including the production of relevant documents, exchanging of expert reports, and the equivalent of depositions for both fact and expert witnesses. The rules adopted in the arbitration agreement permit for substantially the same discovery mechanisms as permitted under the South Carolina Rules of Civil Procedure. Accordingly, the concerns contained in *Chassereau* regarding the possible tactical advantage that could be enjoyed by a party that was given access to discovery which was not otherwise authorized is inapplicable to the instant case. Homeowners and defendants will simply be permitted to continue to conduct discovery to which they will be entitled regardless of the forum. For this reason, the court's reasoning in *Chassereau*--an unpublished circuit court opinion--does not apply.

Because discovery is permitted in both forums this issue is unaffected by the appeal and discovery should be permitted to continue while the appeal is pending.

B. The circuit court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery.

The decision to lift the automatic stay was within the sound discretion of the circuit court and this Court should not disturb that decision absent an abuse of discretion. The circuit court did not abuse its discretion in determining that it was in the parties' best interest to lift the automatic stay and permit discovery to continue.

During the pendency of an appeal, any party may move the lower court to lift the automatic stay. Rule 241(c)(1), SCACR. While Rule 241 states that the lower court should consider issues relating to jurisdiction and mootness, Rule 241 does not limit the court's review to solely these two factors. Rule 241(c)(2), SCACR. Moreover, the circuit court has broad

discretion deciding whether to lift a stay and the decision to lift a stay will only be overturned where there is an abuse of discretion. *See, e.g., Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 367 S.C. 141, 148, 625 S.E.2d 227, 230-31 (Ct. App. 2006), *reversed on other grounds*, 373 S.C. 96, 644 S.E.2d 681 (2007) (reviewing a circuit court's decision to lift a statutory automatic stay in a condemnation action and noting that because the circuit court has discretion over the imposition and lifting of stays, "the appropriate standard of review [for such a decision] is abuse of discretion"). This is consistent with the circuit court's inherent power to control the order of its business to safeguard the rights of litigants." *Williams v. Bordon's, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980).

The purpose of Rule 241 is to provide litigants with the opportunity to seek relief from the rigid application of an automatic stay, which is exactly what took place in this case. In Homeowners' motion to lift the automatic stay, Homeowners provided the circuit court with numerous reasons why it was in the parties' best interests for the court to lift the automatic stay. The circuit court conducted a thorough analysis as to whether the automatic stay should be lifted. The circuit court carefully considered the arguments from both parties and the practical implications of lifting the stay. It weighed the potential prejudices faced by both parties if the court were to lift the stay or to allow the stay to remain in place. After performing a thorough analysis, the circuit court concluded that the parties were best served by lifting the automatic stay and permitting discovery to proceed.

Because the circuit court did not abuse its discretion in deciding to lift the automatic stay, this Court should affirm this decision.

(1) The circuit court properly determined delaying discovery would likely result in prejudice to the Homeowners.

This case was filed in 2014, a year and a half prior to the filing of the present Motion to

Compel Arbitration. With any additional delay comes the increased risk of valuable information and evidence being lost, destroyed, or tampered with before trial. The likelihood of spoliation of evidence increases as the case is pending on appeal, awaiting oral argument and a decision. As time continues to pass, witnesses' memories lapse, the hazardous conditions present at The Abbey worsen, the properties continue to deteriorate, and insurance coverages diminish. All of this results in prejudiced to Homeowners.

Moreover, due to the nature of Homeowners claims in this action, there is a need to expediently resolve this dispute. Homeowners are living in extremely hazardous conditions that will only continue to worsen if the case is further delayed by leaving the stay in place. In support of the motion to lift the stay, Homeowners addressed many of the construction defects plaguing the development. The foundations of the homes are cracking and sinking into the earth, creating health and safety concerns for the homeowners. Massive cracks extend from the ceiling to the floor of the homes. These cracks are expanding daily and require urgent repair. Pieces of drywall are falling from the walls and ceilings due to the expanding cracks. Cracks are extending into electrical outlets and light fixtures making them unsafe to use. Floors are cracking and causing insect infestation requiring immediate extermination. Counters in bathrooms and kitchens are separating from the walls.

If the stay is left in place, Homeowners will be forced to continue to live in these hazardous conditions. In addition, there is a risk that these conditions will continue to deteriorate, exposing Homeowners to greater harm. The sooner this case is resolved, the sooner Homeowners will be able to make the necessary repairs that will make their homes safe and livable. By lifting the automatic stay, Homeowners avoid the prejudice that results from further unnecessary delay, including the increased safety concerns arising from further deterioration of

the structures. In addition, if discovery is further delayed, the parties may lose the opportunity to examine the defects if Homeowners are somehow able to afford repairs to their homes.

For these reasons, the circuit court exercised its sound discretion in determining that the Homeowners would be prejudiced were the automatic stay not lifted for purposes of discovery.

(2) The circuit court properly concluded that neither party will be prejudice by lifting the stay for discovery.

Lifting the automatic stay for the sole purpose of permitting discovery would not prejudice either party. To the contrary, as the circuit court noted, permitting discovery would allow the parties to gather and analyze time-sensitive information—information which could otherwise be lost, destroyed, or tampered with if the automatic stay were not lifted. By delaying discovery, all parties face the increased risk that witnesses will be unable to recall important facts that are currently fresh in their memories or that key witnesses may be rendered incapacitated due to illness or death.

Contrary to what Lennar argues, discovery will not be any more costly or time consuming if permitted to continue before the circuit court, including discovery on Homeowners' class claims. Lennar's arguments are unavailing for several reasons.

First, Lennar does not offer a single example of how discovery related to class claims would be any more expensive or time consuming than pursuing discovery for individual claims. Due to the nature of this litigation, discovery for the class claims would likely be far less expensive than proceeding with separate discovery for individual plaintiffs. Because every member of the proposed class is a homeowner in the same development, the scope of discovery for individual claims would almost entirely overlap with the one another. Separate discovery would be far more likely to result in duplicative, repetitive discovery and increased costs.

Second, permitting discovery would promote the interests of judicial economy and

equity. Discovery would allow the parties to better evaluate the strengths and weakness of their respective cases, lead to possible resolution of this matter as more facts and information are discovered, and would allow the parties to avoid surprises during trial that could further prolong litigation. Even if arbitration is compelled and the Homeowners cannot proceed as a class, the discovery conducted while the appeal is pending will still be applicable to the individual cases that will continue in the arbitration forum, permitting these cases to be resolved more expediently and less expensively.

Finally, Lennar's argument on this issue, including its argument concerning Homeowners' class claims, was presented to the circuit court in both Lennar's briefs and at the hearing on the motion to lift the stay. Even after considering these arguments, the court found "[Homeowners] have sufficiently shown that there will be no prejudicial effect against either party by lifting the stay for discovery." Because this decision falls within the sound discretion of the circuit court, this court should affirm the circuit court's finding in this regard.

(3) Lennar's reliance on federal case law concerning divestment of a trial court's jurisdiction over discovery during the pendency of an appeal concerning a motion to compel arbitration is flawed due to the procedural differences between state and federal court.

In support of its contention that the circuit court should be divested of jurisdiction over discovery during the pendency of an appeal concerning a motion to compel arbitration, Lennar largely relies federal case law. However, the cases relied upon by Lennar have important procedural mechanisms that differ from those provided in South Carolina state courts. Specifically, federal courts offer a safeguard against a party who files an appeal for purposes of delaying or otherwise disrupting litigation. Federal courts permit a party who contests an appeal on an order denying arbitration to seek certification of the appeal as "frivolous" or "forfeited." For example, in *Levin v. Alms & Assocs., Inc.*, the Fourth Circuit addressed the necessity for this

procedural safeguard, stating "it would be inadvisable to 'allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.'" 634 F.3d 260, 265 (4th Cir. 2011) (quoting *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990)). "For this reason, each of the circuits adopting the majority view [of divestiture] has created a frivolousness exception to the divestiture of jurisdiction." *Id.* The Tenth Circuit elaborated on the mechanics of the frivolousness exception as follows:

> [U]pon the filing of a motion to stay litigation pending an appeal from the denial of a motion to compel arbitration, the district court may frustrate any litigant's attempt to exploit the categorical divestiture rule by taking the affirmative step, after a hearing, of certifying the § 16(a) appeal as frivolous or forfeited. That certification will prevent the divestiture of district court jurisdiction.

McCauley v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1162 (10th Cir. 2005).

South Carolina state courts lack an equivalent safeguard mechanism, which would permit a party to seek permission from the court to proceed with discovery if it felt another party were pursuing an appeal solely for purposes of delay. If this Court adopts the federal standard, as Lennar suggests, and holds any appeal of a motion to compel arbitration automatically divests the lower court of jurisdiction over discovery, litigants will be forced to idly wait while appeals are processed without being afforded the necessary safeguards.

The South Carolina Appellate Rules already provide a mechanism for a party who wants to continue discovery during the pendency of an appeal. Specifically, Rule 241(c)(1), SCACR permits a party to move the Court to lift an automatic stay during the pendency of an appeal. This is precisely what happened in the present case. After considering arguments from both parties, the circuit court exercised its sound discretion in determining that the automatic stay imposed by Lennar's pending appeal should be lifted for the sole purpose of discovery.

CONCLUSION

Homeowners respectfully request that this Court affirm the ruling of the circuit court Order Granting Homeowners' Motion to Lift Automatic Stay for Purposes of Discovery. Discovery is not affected by the appeal and the arbitration agreements that Lennar seeks to enforce permit discovery. Because discovery is unaffected by the appeal, the circuit court can and should retain jurisdiction over discovery while the appeal is pending. In addition, the circuit court exercised its sound discretion in lifting the automatic stay for the sole purpose of discovery. Prohibiting discovery while the appeal is pending will result in prejudice to the Homeowners. In contrast, proceeding with discovery does not result in prejudice to Lennar. Accordingly, the circuit court's order should be affirmed.

Jesse Sanchez, Esquire (SC Bar #101906)
The Law Office of Jesse Sanchez, LLC
98 ½ Broad Street, Suite B
Charleston, SC 29401
Phone: 843-814-8181
Fax: 843-284-3953
jesse@jessesanchezlaw.com

John C. Hayes, IV, Esquire (SC Bar # 69740)
Hayes Law Firm, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: 843-805-7003
Fax: 843-573-7388
jhayes@hayeslaw.org

Catherine Dunn Meehan, Esquire
PO Box 9

Charleston, SC 29402-009
cmeehan@steinberglawfirm.com
843-720-2800

Michael J. Jordan, Esquire
PO Box 1028
Goose Creek SC 29445
mjordan@steinberglawfirm.com
843-572-0700

ATTORNEYS FOR RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW

June 21, 2018
Charleston, South Carolina

[Exhibits to *Respondents' Return to Appellant's Petition to Review the Circuit Court Order Lifting Automatic Stay*, dated June 21, 2018, are not attached to this Petition, but were previously filed with the Court of Appeals as part of Respondents' Return.]

EXHIBIT J

to

Petition

to Lift Stay

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

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, Geometrics 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, Décor 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 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, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, 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.

APPELLANT LENNAR CAROLINAS, LLC'S RETURN TO RESPONDENTS' PETITION FOR FULL APPELLATE COURT REVIEW

James Lynn Werner
Jenna K. McGee
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

Appellant Lennar Carolinas, LLC ("Lennar"), by and through undersigned counsel, respectfully submits this Return to Respondents' Patricia Damico, Joshua and Brettany Beutow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the "Owners") Petition for Full Appellate Court Review.

FACTUAL BACKGROUND

The Owners purchased homes in a community known as The Abbey at Spring Grove Plantation ("The Abbey") which is located in Berkeley County, South Carolina.

The Owners filed this lawsuit against Lennar and others alleging the right to proceed as a class action on claims of alleged construction defects. Lennar asserted cross-claims against co-defendants and third-party claims against other subcontractors. Lennar also filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling all of the parities in this action to arbitration pursuant to various applicable documents and agreements.

The circuit court held a hearing on Lennar's Motion to Compel Arbitration and denied Lennar's Motion.

Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, the Owners attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Lennar was forced to submit a Motion to Enforce the Automatic Stay pursuant to Rule 205 to the Court of Appeals. On December 19, 2016, the Court of Appeals issued the first order enforcing the automatic stay of proceedings in the circuit court.

At this time, the appeal has been fully briefed to the Court of Appeals, and the parties are awaiting notice as to whether the above-captioned case will be set for oral argument.

On February, 27, 2018, Patricia Damico and Lenna Lucas filed a Motion to Lift the Automatic Stay. On April 11, 2018, the circuit court held a hearing on the Motion to Lift the Automatic Stay. On May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

On June 5, 2018, Lennar filed a Petition pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules requesting the Court reverse the circuit court's order and reinstate the stay of the entire action during the pendency of the appeal.

On July 30, 2018, the Court issued the second order granting Lennar's Petition and reinstating the automatic stay for the duration of the appeal.

On August 14, 2018, the Owners filed a Petition for Full Appellate Court Review.

Lennar submits this Return to the Owners' Petition for Full Appellate Court Review and requests the Court deny the Owners' Petition and affirm the Court's first and second orders staying the entire action for the duration of the appeal.

ARGUMENT

I. This Court is not limited to review of the prior circuit court order purporting to lift the Rule 205 automatic stay by an abuse of discretion standard. Rather, the Court is free to decide questions of law (such as the circuit court's jurisdiction to entertain the motion to lift the stay) with no deference to the circuit court.

The Owners effectively ask the Court to lift the stay and allow portions of this case, in particular discovery, to proceed while the issue of whether the case is subject to arbitration is on appeal. Because the Owners obtained a prior order from the same circuit court which denied the motion to compel arbitration purporting to lift the automatic stay under Rule 241, SCACR, the Owners argue that the circuit court's prior order can be reversed only if the circuit court is found

to have abused its discretion. The Owners' argument is misplaced and the standard of review urged is incorrect.

Lennar's appeal from the order denying the Motion to Compel Arbitration triggered the automatic stay under Rule 205, SCACR. For the circuit court to take any further action regarding this case, the matters upon which the circuit court seeks to act must be ones "not affected by the appeal." The issue is one of jurisdiction. The circuit court only "retains jurisdiction over matters not affected by the appeal." Rule 205, SCACR.

It is not a matter of the circuit court's discretion to decide if it has jurisdiction. Whether the circuit court has jurisdiction is a question of law, and this Court is "free to decide questions of law with no deference to the [circuit] court." *Chew v. Newsome Chevrolet Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). The circuit court only retains jurisdiction over matters not affected by the appeal. *See* Rule 241, SCACR. Thus, the question of whether discovery may proceed while the appeal of the arbitration issues is pending should be determined based on whether further proceedings, including discovery, in the underlying case are affected by Lennar's appeal. This determination is a question of law that is to be decided with no deference to the circuit court.

The Owners' Petition for Full Appellate Court Review is premised on the proposition that the circuit court's decision to lift the stay in this case is a matter to be reviewed for an abuse of discretion. In support of this proposition, the Owners seek to rely on the decision in *Carolina Water Service, Inc. v. Lexington County Joint Municipal Water & Sewer Commission*, 367 S.C. 141, 151, 625 S.E.2d 227, 232 (Ct. App. 2006), *cert. granted, decision rev'd sub nom, Carolina Water Service, Inc. v. Lexington County Joint Municipal Water & Sewer Commission*, 373 S.C. 96, 644 S.E.2d 681 (2007), and *overruled by Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529

(2006). However, the decision in *Carolina Water Service* provides no support for such proposition and is utterly inapplicable to this case.

The court in *Carolina Water Service* did not review a decision to lift a statutory automatic stay or an automatic stay under Rule 205, SCACR. In *Carolina Water Service*, the Lexington County Joint Municipal Water & Sewer Commission (the "Joint Commission") initiated a condemnation action to acquire certain facilities owned by Carolina Water Service, Inc. ("Carolina Water") and Utilities, Inc. ("Utilities"). *Carolina Water Serv.*, 367 S.C. at 145, 625 S.E.2d at 229. In response to the Joint Commission's action, Carolina Water, Utilities, and the Town of Lexington filed separate actions challenging the Joint Commission's right to pursue the condemnation proceeding (the "Challenge Actions"). *Id.* Carolina Water then sought a statutory stay of the condemnation proceedings and the circuit court issued an Order granting the statutory stay. *Id.* The circuit court also imposed a discretionary stay of the Challenge Actions pending the resolution of a related case in the South Carolina Administrative Law Court. *Id.* Subsequently, the circuit court issued an order lifting the discretionary stay of the Challenge Actions; however, the statutory (automatic) stay of the condemnation action remained intact. *Id.* at 151, 625 S.E.2d at 232 ("[T]he order lifting the stay in this case did not purport to disturb the statutory [automatic] stay on the condemnation proceeding, but dissolved the [discretionary] stay only as to the Challenge Actions."). On appeal, the court reviewed the circuit court's decision to lift the discretionary stay for an abuse of discretion. The court did not review the issuance or enforcement of the statutory automatic stay. Therefore, Owners' argument that the Court should apply the same standard of review and analyze the issue of whether the circuit court had the authority to issue an order permitting discovery to proceed for an abuse of discretion fails. Rather, the Court is to review jurisdictional questions without deference to the circuit court.

The controlling question before the Court is whether the circuit court retained the jurisdiction to order the parities to conduct discovery while Lennar's appeal of the circuit court's refusal to compel the entire action to arbitration is pending.[1] If discovery in this case is affected by Lennar's appeal, then the circuit court did not have jurisdiction to issue an order allowing discovery to proceed and that order is void for a lack of jurisdiction. *See* Rule 205, SCACR; *Luthi v. Luthi*, 297 S.C. 306, 376 S.E.2d 782 (Ct. App. 1989) (holding a lower court's order that was issued while the case was pending appeal was void for lack of jurisdiction).

II. The appeal of the circuit court's order denying the Motion to Compel Arbitration affects all matters in the case and does not leave the issue of proceeding with discovery while the appeal is pending within the jurisdiction of the circuit court. Further proceedings in this case, including discovery, are affected by the underlying appeal and, therefore, the circuit court lacked jurisdiction to issue an order allowing discovery to proceed.

Lennar's appeal of the arbitration issues in this case affects all further proceedings in the circuit court, including discovery. The Court's July 30, 2018, Order recognizes this reality. Thus, the Court properly reversed the circuit court's order lifting the automatic stay.

The issue of discovery in this case, including what discovery might be ultimately available, and from whom, is a matter inextricably intertwined with the resolution of the pending appeal. Lennar's appeal seeks to compel the case to arbitration under arbitration agreements which provide that any and all controversies, disputes or claims arising under or related to (a) the agreements by which Owners acquired the houses in issue, (b) the property itself, or (c) to any personal injury or property damage alleged by the Owners are to be submitted to binding arbitration. Thus, regardless of whether the Owners make claim against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case

[1] En banc consideration is not favored and ordinarily will not be granted except: (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions; or (2) when the proceeding involves a question of exceptional importance. Rule 219, SCACR. This case does not satisfy either exception and, therefore, to the extent this standard applies the Court should reject the Owners' Petition.

are subject to arbitration because all of the claims arise under and are related to the property and the Owners' claimed injuries and damages sustained because of alleged defects in the properties. Moreover, the claims against the subcontractor defendants are affected by Lennar's appeal. The seventh issue in Lennar's statement of issues on appeal is "[w]hether the circuit court erred in failing to perform any analysis of the arbitration agreement(s) applicable to Spring Grove Development and the Subcontractors." The circuit court's finding that the matters relating to the claims against the subcontractors are not affected by the appeal was patently false and a wholly inappropriate basis for lifting the automatic stay and permitting discovery related to the subcontractors to proceed. There are no claims in the case which are not affected by and at issue in the appeal of the circuit court's denial of Lennar's Motion to Compel Arbitration.

Since all relevant matters in the case are affected by Lennar's appeal, the circuit court lacked the authority to issue an order lifting the automatic stay and permitting discovery to proceed. Therefore, the Court properly reversed the circuit court's order lifting the automatic stay and the Court should now deny the Owners' Petition for Full Appellate Court Review.

III. The Court's citation to *Stokes v. Metropolitan Life Insurance Company*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) was not an error of law.

In its July 30, 2018, Order the Court correctly recognized that the appeal of the circuit court order denying the Motion to Compel Arbitration calls into question whether the claims in the case will all be subject to arbitration rather than further proceedings in the circuit court. This Court correctly recognized that if the appeal results in this case proceeding to arbitration, then by operation of law any further proceedings in the circuit court would be subject to a further stay on account of the arbitration. The Court's reference and citation to the decision in *Stokes v. Metropolitan Life Insurance Company*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002), and supports the conclusion that as long as the claims in this case may be subject to mandatory arbitration, it is logical and proper to enforce the stay of all proceedings, including discovery.

The Court cited to *Stokes* merely as support for its own logical conclusions underlying the proposition that it is appropriate to stay all proceedings when the underlying appeal involves the issue that all of a plaintiff's claims must be compelled to arbitration. The Court recognized that, in *Stokes*, the court stayed the entire case (including discovery) when the plaintiff's claims were determined to be subject to arbitration. The *Stokes* holding demonstrates that if the Court reverses the circuit court's improper denial of the motion to compel arbitration, then the entire action will be stayed and discovery will not proceed under the South Carolina Rules of Civil Procedure. Thus, it is reasonable and proper to continue the Rule 205 stay in the interim.

In the instant case, Lennar appealed the circuit court's denial of its Motion to Compel Arbitration. If on appeal the Court rules in Lennar's favor, then the entire matter will be compelled to arbitration and the case before the circuit court will be stayed pending the resolution of the arbitration. Since, the entire case will be stayed if the Court rules in Lennar's favor, the entire proceeding before the circuit court is affected by the appeal and nothing should proceed while the appeal is pending. The Court's reliance on *Stokes* for support of this proposition is appropriate and the Owners' attempt to distinguish *Stokes* from this case should be rejected. Accordingly, the Court should deny the Owners' Petition and affirm the Court's Order reversing the circuit court's order lifting the automatic stay.

IV. The Court's citation to federal authority was proper.

The Court cited to *Levin v. Alms & Associates, Inc.*, 634 F.3d 260, 264 (4th Cir. 2011) for the proposition that a motion to compel arbitration challenges the continuation of all proceedings before the court and, therefore, a lower court lacks jurisdiction over the continuation of any proceedings relating to the claims at issue while a motion to compel arbitration is pending on appeal. This reference to *Levin* reflects the Court's recognition that other learned courts have addressed the same issues presented here and have reached consistent well-founded, logical and

persuasive conclusions as this Court. Citation to *Levin* does not reflect any misplaced reliance on a sister court's prior holdings. On the contrary, it merely supports the Court's logical conclusion that when the underlying appeal presents the potential that all claims must be compelled to arbitration, it is logical and proper that further judicial proceedings in the meantime should be stayed.

The Owners' argument in opposition to the *Levin* citation lacks merit. The Court's citation to *Levin* reflects the fact that arbitration affects all of the proceedings before the lower court. South Carolina courts have consistently found that arbitration affects the entire case and when a case is compelled to arbitration the circuit court is divested of jurisdiction. *Steinmetz v. Am. Media Servs., LLC*, 393 S.C. 72, 74, 709 S.E.2d 708, 709 (Ct. App. 2011) ("When a case is sent to arbitration, the circuit court is divested of jurisdiction over the case."). Whether in state or federal court, the logical and legal basis for that proposition remains true. *See id.*; *Levin*, 634 F.3d at 264. Contrary to the Owners' assertion, the Court clearly did not apply a procedural device that is inapplicable in state court. The Court merely cited to a decision by the Fourth Circuit that further supports a recognized principle of South Carolina law. Accordingly, the Owners' argument criticizing the citation to *Levin* provides no basis for reversing the second order reinstating the automatic stay pending the resolution of Lennar's arbitration appeal.

CONCLUSION

The circuit court's order lifting the automatic stay is void for a lack of jurisdiction because the circuit court's order ruled on matters directly affected by Lennar's appeal of the arbitrability issues. Therefore, the Court correctly reversed the circuit court's order lifting the automatic stay. Accordingly, the Court should deny the Owners' Petition for Full Appellate Court Review and affirm the prior order reinstating the automatic stay of discovery for the duration of Lennar's pending appeal.

James Lynn Werner
Jenna K. McGee
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

August 31, 2018
Columbia, South Carolina

EXHIBIT K

to

Petition

to Lift Stay

The South Carolina Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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, Geometrics 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 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, Isidru 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.

Appellate Case No. 2016-002339

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

J.

J.

J.

Columbia, South Carolina

FILED
November 13, 2018

cc: Jenna Brooke Kiziah McGee, Esquire
Frederick Elliotte Quinn, IV, Esquire
Michael J. Jordan, Esquire
Catherine Dunn Meehan, Esquire
John Calvin Hayes, IV, Esquire
R. Patrick Flynn, Esquire
Michael Wade Allen, Jr., Esquire
Bachman S. Smith, IV, Esquire
James H. Elliott, Jr., Esquire
Samia Hanafi Nettles, Esquire
David Shuler Black, Esquire
Shanna Milcetich Stephens, Esquire
Stephen Lynwood Brown, Esquire
Catherine Holland Chase, Esquire
Preston Bruce Dawkins, Jr., Esquire
Stephen P. Hughes, Esquire
Kathy Aboe Carlsten, Esquire
N. Keith Emge, Jr., Esquire
Brent Morris Boyd, Esquire
David Starr Cobb, Esquire
Sidney Markey Stubbs, Esquire

Derek Michael Newberry, Esquire
Christine Companion Varnado, Esquire
Alan Ross Belcher, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Erin DuBose Dean, Esquire
Thomas Frank Dougall, Esquire
William Ansel Collins, Jr., Esquire
Michal Kalwajtys, Esquire
John Elliott Rogers, II, Esquire
Jenny Costa Honeycutt, Esquire
Robert Trippett Boineau, III, Esquire
Heath McAlvin Stewart, III, Esquire
Ronald G. Tate, Jr., Esquire
Robert Batten Farrar, Esquire
Michael Edward Wright, Esquire
James Lynn Werner, Esquire
David Cooper Cleveland, Esquire
Rogers Edward Harrell, III, Esquire
Carmen Vaughn Ganjehsani, Esquire
Trey Matthew Nicolette, Esquire
Mary Skahan Willis, Esquire
Timothy J. Newton, Esquire
Katon Edwards Dawson, Jr., Esquire
John Adam Ribock, Esquire
Francis Heyward Grimball, Esquire
Wade Coleman Lawrimore, Esquire
Jesse Sanchez, Esquire
Edward Dengg
Sylvia Dengg
Anthony Ray
Stacey Ray

EXHIBIT L

to

Petition

to Lift Stay

91400

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J.C. NICHOLSON, JR.
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2016-2339
CIVIL ACTION NO. 2014-CP-08-2424

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,

versus

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 the

RESPONDENTS.

And

Lennar Carolinas, LLC,

APPELLANT,

versus

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics 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, Décor 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 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, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC are also the

RESPONDENTS.

And

Décor Corporation,

FOURTH PARTY PLAINTIFF,

versus

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, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4,

FOURTH-PARTY DEFENDANTS.

JOINT MOTION FOR LIMITED REMAND TO THE CIRCUIT COURT FOR APPROVAL OF PARTIAL SETTLEMENT AND LIMITED CLASS CERTIFICATION FOR THE SOLE PURPOSE OF SETTLEMENT APPROVAL

Plaintiffs-Respondents in the above-captioned action [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], Manale Landscaping, LLC ("Manale"), and Décor Corporation ("Décor") hereby move this Court for a limited remand to the Circuit Court of Berkeley County for approval of the partial settlements between Plaintiffs and Manale, as well as between Plaintiffs and Décor. The parties also will seek certification of the Class pursuant to Rule 23, SCRCP before the Circuit Court for the sole purpose of approval of the partial settlements.

FACTUAL AND PROCEDURAL BACKGROUND

This is a construction defect case that involves alleged defects in multiple homes located in the Abbey at Spring Grove in Moncks Corner, South Carolina. The Abbey consists of sixty-nine (69) single-family homes constructed between 2010 and 2016. Since the construction of the homes at The Abbey, Plaintiffs have discovered alleged defects in their homes.

Plaintiffs filed this lawsuit on October 30, 2014, alleging causes of action for negligence, negligent misrepresentation, breach of warranties, breach of fiduciary duties, and unfair trade practices against multiple defendants, including Lennar Carolinas, LLC ("Lennar"). Plaintiffs filed an Amended Complaint on March 24, 2016, and subsequently moved for class certification.

On March 30, 2016, Lennar filed a Motion to Compel Arbitration pursuant to alleged arbitration agreements it had with some but not all of the Plaintiffs and its subcontractors. On or about September 19, 2016, Lennar's Motion to Compel Arbitration was denied. On or about November 16, 2016, Lennar served a Notice of Appeal of the Trial Court's order denying its Motion to Compel Arbitration. Plaintiffs, Lennar, and multiple subcontractor respondents, including Manale and Décor who also

oppose arbitration, have all filed final briefs with this Court which were each primarily filed in September 2017.

Partial Settlements Between Plaintiffs, Manale, and Décor

Plaintiffs, Manale, and Décor have tentatively settled the construction defect claims relating to Manale and Décor's work and desire to seek certification from the lower court of the Class for the sole purpose of the preliminary settlement approval and the associated approval of the settlements pursuant to Rule 23, SCRCP as set forth in the Motion For Preliminary Approval of a Partial Settlement attached hereto as Exhibit "A." While the parties believe that the settlements for which they seek approval from the Circuit Court will not affect the matters on appeal, out of an abundance of caution, the parties seek a ruling from this Court permitting a limited remand to the Circuit Court for approval of the partial settlements and the corresponding Class certification which will be limited for settlement approval only. See Rule 241(a), SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.").

The Supreme Court has instructed that when a matter is pending on appeal, a lower court may not take action on a settlement, except with regard to matters not affected by the appeal, unless the parties have requested the appellate court to have the matter remanded to the lower court. See Lancaster v. Georgia-Pacific Corp., 403 S.C. 136, 138, 742 S.E.2d 867, 868 (2013); see also Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.").

Accordingly, pursuant to the Supreme Court's guidance in Lancaster and acting out of utmost prudence, Plaintiffs, Manale, and Décor request this Court for a limited remand to the Circuit Court for the narrow purpose of the Circuit Court's approval of the partial settlements between Plaintiffs, Manale, and Décor and the limited corresponding Class certification.

Respectfully submitted,

Carmen V. Ganjehsani
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

and

James H. Elliott, Jr.
Samia H. Albenberg
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Box 21203
Charleston, South Carolina 29413
(843) 805-6550
ATTORNEYS FOR RESPONDENTS MANALE LANDSCAPING, LLC AND DÉCOR CORPORATION

John C. Hayes, IV
Nina E. Meola
HAYES LAW FIRM, LLC
180 Meeting Street, Suite 330
Charleston, SC 29401
(843)805-7003
ATTORNEYS FOR PLAINTIFFS

November 8, 2019.

EXHIBIT "A"

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO: 2014-CP-08-02424
Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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, Plaintiffs, vs. 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.	)	**NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF A PARTIAL SETTLEMENT**
Lennar Carolinas, LLC, Third-Party Plaintiff, vs. The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics 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, Décor 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.

Décor Corporation,

Fourth Party Plaintiff,

vs.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Enmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez Son, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aparecido Corgosinho, Ricardo Chiche, Cebs Construction, Bayshore Siding and Flooring, Sebastio Luiz De Araujo, and John Does 1 – 4,

Fourth-Party Defendants.

Alpha Omega Construction Group, Inc.

Fourth-Party Plaintiff,

Vs.

Garcia Roofing, LLC, Juan Garza Ramos, Jose Vera, and Espino Roofing, LLC,

Fourth-Party Defendants.

__DVS, Inc.,

Fourth-Party Plaintiff,

Vs.

Sousa Construction, LLC, Lima Construction, LLC, N&B Construction, LLC, Itatiaia Construction, LLC and JC Contractors, LLC

Fourth-Party Defendants.

___South Carolina Exteriors, LLC

Fourth-Party Plaintiff,

Vs.

Juan Garza Ramos, d/b/a Juan Constructors,

Fourth-Party Defendant.

___
Guaranteed Framing, LLC

Fourth-Party Plaintiff,

Vs.

First Construction, LLC, JC Contractors, LLC, Jessica Marroquin d/b/a Marroquin Construction, and Unique Framing, LLC,

Fourth Party Defendants.

TO: THE ABOVE-NAMED PARTIES AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel, pursuant to Rule 23 SCRCP, will move before this Honorable Court ten (10) days from the date of this notice, or as soon thereafter as the Court may schedule, at the Berkeley County Judicial Center located at 300-B California Avenue, for a Preliminary Approval of a Partial Settlement certifying the following Class in the above-captioned matter:

> **All persons and/or entities owning, in whole or in part, any homes/property within The Abbey in Spring Grove Plantation.**

The elements of Rule 23 SCRCP are satisfied in this matter. (1) The class is composed of in excess of roughly sixty-nine (69) homeowners of individual homes and/or property, such that joinder is impractical; (2) all of the questions of law and fact are common to the class members; (3) the claims of the representative parties are typical of the claims of the class members; (4) the representative party will fairly and adequately protect the interests of the class; and (5) the amount in controversy exceeds $100.00 for each member of the class.

Plaintiffs further move that:

1. Patricia Damico be designated as Class Representative;

2. That a proposed Notice of Class Action, Partial Settlement, and Final Hearing (the "Notice") to be submitted prior to the hearing be approved;

3. That a proposed Exclusion Request Form to be submitted prior to the hearing be approved;

4. Class counsel be authorized to mail the Notice and Exclusion Request Form to all class members at their last known address at The Abbey at Spring Grove Plantation.

Plaintiffs move that the Court preliminarily approve the terms of the settlements reached by and amongst the Plaintiffs certain parties as follows:

SETTLING DEFENDANT	GROSS SETTLEMENT AMOUNT
Manale Landscaping, LLC	$28,000.00
Décor Corporation	$42,000.00
TOTAL	**$70,000.00**

The Plaintiffs may move for such other orders regarding the Class as may be appropriate.

This motion will be supported by the evidence thus far in this matter, affidavits, a memorandum of law, arguments of counsel and any other material the Court may receive.

Respectfully Submitted,

HAYES LAW FIRM, LLC

s/ John C. Hayes, IV
John C. Hayes, IV, Esquire
Nina E. Meola, Esquire
180 Meeting Street, Suite 330
Charleston, SC 29401
Phone: (843) 805-7003
jhayes@hayeslaw.org

ATTORNEYS FOR PLAINTIFFS

August 15, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent Manale Landscaping, LLC and Décor Corporation, do hereby certify that I have this date served the foregoing Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification for the Sole Purpose of Settlement Approval, dated November 8, 2019, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

James Lynn Werner, Esquire
Jenna K. McGee, Esquire
Katon E. Dawson, Jr., Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
jimwerner@parkerpoe.com
jennamcgee@parkerpoe.com
katondawson@parkerpoe.com
Attorneys for Appellant

Carmen V. Ganjehsani
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
ATTORNEYS FOR RESPONDENT DÉCOR CORPORATION AND MANALE LANDSCAPING, LLC

Dated: November 8, 2019.

EXHIBIT M

to

Petition

to Lift Stay

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
NOV 18 2019
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

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, Geometrics 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, Décor 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 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, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, 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.

APPELLANT LENNAR CAROLINAS, LLC'S RETURN TO RESPONDENTS' JOINT MOTION FOR LIMITED REMAND AND APPROVAL OF PARTIAL SETTLEMENT AND LIMITED CLASS CERTIFICATION

James Lynn Werner
Jenna K. McGee
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

Appellant Lennar Carolinas, LLC ("Lennar"), by and through undersigned counsel, respectfully submits this Return to the Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification For the Sole Purpose of Settlement Approval filed by Respondents Patricia Damico, Joshua and Brettany Beutow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the "Owners"), Manale Landscaping, LLC ("Manale") and Décor Corporation ("Décor") (collectively, "Respondents").

FACTUAL BACKGROUND

The Owners purchased homes in a community known as The Abbey at Spring Grove Plantation ("The Abbey") which is located in Berkeley County, South Carolina.

The Owners filed this lawsuit against Lennar and others alleging the right to proceed as a class action on claims of alleged construction defects. Lennar asserted cross-claims against co-defendants and third-party claims against other subcontractors. Lennar also filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling all of the parities in this action to arbitration pursuant to various applicable documents and agreements.

The circuit court held a hearing on Lennar's Motion to Compel Arbitration and denied Lennar's Motion. Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, the Owners attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Lennar was forced to submit a Motion to Enforce the Automatic Stay pursuant to Rule 205 to the Court of Appeals. On December 19, 2016, the Court of Appeals issued the first order enforcing the automatic stay of proceedings in the circuit court.

On February, 27, 2018, Patricia Damico and Lenna Lucas filed a Motion to Lift the Automatic Stay. On April 11, 2018, the circuit court held a hearing on the Motion to Lift the Automatic Stay. On May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

On June 5, 2018, Lennar filed a Petition pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules requesting the Court reverse the circuit court's order and reinstate the stay of the entire action during the pendency of the appeal. On July 30, 2018, the Court issued the second order granting Lennar's Petition and reinstating the automatic stay for the duration of the appeal. On August 14, 2018, the Owners filed a Petition for Full Appellate Court Review, and the Court issued an order denying the Petition for Full Appellate Court Review on November 13, 2018.

At this time, the appeal has been fully briefed to the Court of Appeals, and oral argument is scheduled for December 10, 2019.

On November 8, 2019, Respondents filed a Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification For the Sole Purpose of Settlement Approval (the "Motion"). Lennar submits this Return to the Motion and requests the Court deny the Motion.

ARGUMENT

I. Respondents' Motion does not comply with Rule 241, SCACR, and is improper.

A. Respondents' Motion fails to meet the basic requirements of Rule 241(d)(1), SCACR, and should be denied.

Respondents' Motion is merely a veiled request for the Court to issue an order lifting the stay of the case so that the circuit court may rule on class certification issues while Lennar's appeal of the order denying its Motion to Compel Arbitration is pending before the Court.

Rule 241(d)(1), SCACR, states that only in extraordinary circumstances may a party file a motion to lift the stay without first making the motion to lift the stay to the lower court. Respondents failed to meet the requirements of Rule 241(d)(1) because:

1. Respondents did not file a motion to lift the stay with the circuit court[1]; and

2. Respondents' Motion sets for no basis for the Court to find that extraordinary circumstances exist for the Court to lift the stay prior to the Respondents' filing a motion with the circuit court.

Respondents clearly failed to comply with the basic requirements of Rule 241(d)(1), SCACR. Respondents' Motion contains no argument through which the Court may find that it is appropriate for the stay to be lifted without Respondents first satisfying the plain and unambiguous requirements of Rule 241(d)(1), SCACR. Accordingly, the Court should deny Respondents' Motion.

B. Respondents' Motion does not comply with the requirements for obtaining a lift of a stay as set forth in Rule 241(d)(3), SCACR.

Rule 241(d)(3) of the South Carolina Appellate Court Rules requires:

> A person seeking an order lifting an automatic stay or granting a writ of supersedeas must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition and verification, the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court or administrative tribunal and a copy of the notice of appeal with its proof of service.

Respondents' Motion is not verified by any of the Respondents. Additionally, Respondents did not contemporaneously file a certified copy of the order, judgment, decree or decision of the circuit court or a copy of the notice of appeal with its proof of service with the

[1] Respondents previously filed a Motion for Partial Settlement Approval with the circuit court; however, that motion did not request the circuit court lift the automatic stay of the case. The circuit court has not issued a ruling on the Respondents' prior Motion for Partial Settlement Approval and, in fact, cannot issue a ruling on the Motion for Partial Settlement Approval until the stay of the entire case is lifted.

Motion. Therefore, the Motion fails to satisfy the Rule 241(d)(3) requirements for obtaining a lift of the stay of the case. Accordingly, Respondents' failure to comply with the plain and unambiguous requirements of Rule 241(d)(3), SCACR, necessitates that the Court deny the Motion.

II. Respondents' Motion should be denied because it seeks to have the Court partially remand the matter to the circuit court so that the circuit court may rule on issues—including certain class certification issues—that are directly affected by Lennar's appeal.

The Court should not lift the stay of the case for the circuit court to consider the Respondents' Motion for Approval of Partial Settlement and Limited Class Certification because the Court's ruling on Lennar's pending appeal will directly affect whether this matter may proceed as a class action.

At no point in this litigation has the circuit court considered a motion for class certification. Through the Motion pending before the Court, the Owners are attempting to circumvent the procedural process for certification of a putative class while an appeal that may render the entire issue moot is pending before the Court. If on appeal the Court finds that this matter must be compelled to arbitration, then there is no possibility of a certifiable class because the arbitration agreements at issue do not permit or contemplate classwide arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) (finding classwide arbitration is improper when an arbitration agreement is silent on the issue); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

Oral argument on the pending appeal is currently scheduled for December 10, 2019, and to remand the case to the circuit court and permit the circuit court to make premature findings related to class certification would be inappropriate prior to a ruling by this Court. Furthermore, it is unnecessary to permit the circuit court to make findings related to class certification issues

when the appeal may render all class certification issues moot. *See* Rule 241(c)(2), SCACR (stating that the Court should consider whether an order lifting the stay is necessary to prevent a contested issue from becoming moot).

Additionally, Lennar has cross-claims pending against Manale and third-party claims pending against Décor, and the approval of a settlement agreement between Manale, Décor, and the Owners would not end the litigation for either Manale or Décor. Therefore, The approval of a settlement between the Manale, Décor, and the Owners does not favor judicial economy and only places an extra burden on the circuit court.

Accordingly, the Court should deny the Respondents' Motion because (1) the Respondents have not followed the proper procedure for moving the Court to lift the stay and (2) consideration of any issue directly affected by the appeal—including limited class certification—while the appeal is pending is improper.

James Lynn Werner
Jenna K. McGee
Katon E. Dawson Jr.
Parker Poe Adams & Bernstein LLP
PO Box 1509
Columbia, SC 29202
(803) 255-8000

Attorneys for Appellant Lennar Carolinas, LLC

November 18, 2019
Columbia, South Carolina

EXHIBIT N

to

Petition

to Lift Stay

The South Carolina Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, 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, Geometrics 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 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, Isidru 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.

Appellate Case No. 2016-002339

The Honorable J. C. Nicholson, Jr.
Berkeley County

Trial Court Case No. 2014CP0802424

ORDER

Respondents' Manale Landscaping, LLC and Bryan Camara filed a Joint Motion for Limited Remand to the Circuit Court for Approval of Partial Settlement and Limited Class Certification for the Sole Purpose of Settlement Approval. A return and a reply were filed. Upon review by the Court, the motion is Denied.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:
Jenna Brooke Kiziah McGee, Esquire
Michael J. Jordan, Esquire
Catherine Dunn Meehan, Esquire
John Calvin Hayes, IV, Esquire
R. Patrick Flynn, Esquire
Michael Wade Allen, Jr., Esquire
Bachman S. Smith, IV, Esquire
James H. Elliott, Jr., Esquire
Samia Hanafi Nettles, Esquire
David Shuler Black, Esquire
Shanna Milcetich Stephens, Esquire
Stephen Lynwood Brown, Esquire
Catherine Holland Chase, Esquire
Preston Bruce Dawkins, Jr., Esquire
Stephen P. Hughes, Esquire
Kathy Aboe Carlsten, Esquire
N. Keith Emge, Jr., Esquire
Brent Morris Boyd, Esquire
David Starr Cobb, Esquire

FILED
Nov. 27, 2019

Sidney Markey Stubbs, Esquire
Derek Michael Newberry, Esquire
Christine Companion Varnado, Esquire
Alan Ross Belcher, Jr., Esquire
Steven L. Smith, Esquire
Zachary James Closser, Esquire
Samuel Melvil Wheeler, Esquire
Erin DuBose Dean, Esquire
Thomas Frank Dougall, Esquire
William Ansel Collins, Jr., Esquire
Michal Kalwajtys, Esquire
John Elliott Rogers, II, Esquire
Jenny Costa Honeycutt, Esquire
Robert Trippett Boineau, III, Esquire
Heath McAlvin Stewart, III, Esquire
Ronald G. Tate, Jr., Esquire
Robert Batten Farrar, Esquire
Michael Edward Wright, Esquire
James Lynn Werner, Esquire
David Cooper Cleveland, Esquire
Rogers Edward Harrell, III, Esquire
Carmen Vaughn Ganjehsani, Esquire
Trey Matthew Nicolette, Esquire
Timothy J. Newton, Esquire
Katon Edwards Dawson, Jr., Esquire
John Adam Ribock, Esquire
Francis Heyward Grimball, Esquire
Wade Coleman Lawrimore, Esquire
Jesse Sanchez, Esquire
Everett Augustus Kendall, II, Esquire
Brian Lincoln Craven, Esquire
Edward Dengg
Sylvia Dengg
Anthony Ray
Stacey Ray