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APPENDIX A

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

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

Appellate Case No. 2020-001048

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
J.C. Nicholson Jr., Circuit Court Judge

Opinion No. 28114

Heard February 1, 2022 – Filed September 14, 2022

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jesse Sanchez, of The Law Office of Jesse Sanchez, John Calvin Hayes IV, of Hayes Law Firm, LLC, and Catherine Dunn Meehan, of The Steinberg Law Firm, LLP, all of Charleston; and Michael J. Jordan,

of The Steinberg Law Firm, LLP, of Goose Creek, all for Petitioners.

James Lynn Werner, Jenna Brooke Kiziah McGee, and Katon Edwards Dawson Jr., all of Parker Poe Adams & Bernstein LLP, of Columbia, for Respondent Lennar Carolinas, LLC; Robert Trippett Boineau, Heath McAlvin Stewart III, and John Adam Ribock, all of McAngus, Goudelock & Courie, LLC, of Columbia, for Respondent Spring Grove Plantation Development, Inc.; Carmen Ganjehsani, James H. Elliott Jr., and Francis Heyward Grimball, all of Richardson, Plowden, & Robinson, of Columbia, for Respondents Manale Landscaping, LLC and Decor Corporation; Samia Hanafi Nettles, of Richardson Plowden & Robinson, PA, of Charleston, for Respondent Decor Corporation; Theodore L. Manos, of Robertson Hollingsworth Manos & Rahn, LLC for Respondent Super Concrete of SC; David Cooper Cleveland and Trey Matthew Nicolette, both of Clawson and Staubes, LLC, of Charleston, for Respondent Myers Landscaping, Inc.; Rogers Edward Harrell III, of Murphy & Grantland, PA, of Columbia, for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.; Steven L. Smith and Zachary James Closser, both of Smith Closser, of Charleston, and Samuel Melvil Wheeler, of Whitfield-Cargile Law, PLLC, of Brevard, NC, all for Respondent Knight's Concrete Products, Inc.; Brent M. Boyd and Timothy J. Newton, both of Murphy & Grantland, PA, of Columbia, for Respondents Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC; Alan Ross Belcher Jr. and Elizabeth Wieters, both of Hall Booth Smith, PC, of Mount Pleasant, and Christine

Companion Varnado, of Siebels Law Firm, of Charleston, all for Respondent Guaranteed Framing, LLC; Erin DuBose Dean, of Tupper, Grimsley, Dean & Canaday, PA, of Beaufort, for Respondents LA New Enterprises Construction, Inc. and Raul Martinez Masonry; Stephen Lynwood Brown and Catherine Holland Chase, both of Clement Rivers, LLP, of Charleston, and Preston Bruce Dawkins Jr., of Aiken Bridges Elliott Tyler & Saleeby, PA, of Florence, all for Respondent Alpha Omega Construction Group, Inc.; and Jenny Costa Honeycutt, of Best Honeycutt, PA, of Charleston, for Respondent South Carolina Exteriors, LLC; Clarke W. DuBose, of Haynsworth Sinkler Boyd, PA, of Columbia, for Respondent Southern Green, Inc.; Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Builders Firstsource-Southeast Group, LLC; Ronald G. Tate Jr., of Gallivan, White & Boyd, PA, and Robert Batten Farrar, of Rogers Townsend, LLC, both of Greenville, for Respondent Volkmar Consulting Services, LLC; Sidney Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent DVS, Inc.; David Shuler Black, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent TJB Trucking/Leasing, LLC; Shanna Milcetich Stephens and Wade Coleman Lawrimore, both of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent A.C.&A. Concrete, Inc.; John Elliott Rogers II, of Ward Law Firm, PA, of Spartanburg, for Respondent Land/Site Services, Inc.; David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, for Respondent Construction Applicators Charleston, LLC;

Kathy Aboe Carlsten, of Copeland, Stair, Valz & Lovell, LLP, and N. Keith Emge Jr., of Resnick & Louis, PC, both of Charleston, for Respondent Civil Site Environmental, Inc.; Scott Harris Winograd, Jeffrey A. Ross, and Philip Paul Cristaldi III, all of Ross & Cristaldi, LLC, of Mount Pleasant, for Respondent Ozzy Construction, LLC.

JUSTICE KITTREDGE: This case arises out of a construction defect suit brought by a number of homeowners (Petitioners) against their homebuilder and general contractor, Lennar Carolinas, LLC (Lennar). Lennar moved to compel arbitration, citing the arbitration provisions in a series of contracts signed by Petitioners at the time they purchased their homes. As we will explain, those contracts were contracts of adhesion. Petitioners pointed to purportedly unconscionable provisions in the contracts generally and in the arbitration provision specifically. Citing a number of oppressive terms in the contracts, and without delineating between the contracts generally and the arbitration provision specifically, the circuit court denied Lennar's motion to compel, finding the contracts were grossly one-sided and unconscionable and, thus, the arbitration provisions contained within those contracts were unenforceable. The court of appeals reversed, explaining that the United States Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* forbids con-

sideration of unconscionable terms outside of an arbitration provision (the Prima Paint doctrine).[1] *Damico v. Lennar Carolinas, L.L.C.,* 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020). The court of appeals found the circuit court's analysis ran afoul of the *Prima Paint* doctrine as it relied on the oppressive nature of terms outside of the arbitration provisions.

While we agree with the court of appeals that the circuit court violated the *Prima Paint* doctrine, we nonetheless agree with Petitioners and find the arbitration provisions—standing alone—contain a number of oppressive and one-sided terms, thereby rendering the provisions unconscionable and unenforceable under South Carolina law. We further decline to sever the unconscionable terms from the remainder of the arbitration provisions for two reasons. First, doing so would require us to blue-pencil the agreement regarding a material term of the contract, a result strongly disfavored in contract disputes. Second, as a matter of policy, we find severing terms from an unconscionable contract of adhesion (in this case, an arbitration provision) discourages fair, arms-length

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[1] *See generally Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–06 (1967) (explaining that under the Federal Arbitration Act, courts may "consider only issues relating to the making and performance of the agreement to arbitrate," rather than those affecting the contract as a whole); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.,* 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (holding *Prima Paint* applied not only to claims of fraud in the inducement of an arbitration agreement, but to all contract defenses, including unconscionability, and stating that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause").

transactions. Rather, were we to honor the severability clause in contracts such as these, it would encourage sophisticated parties to intentionally insert unconscionable terms—that often go unchallenged—throughout their contracts, believing the courts would step in and rescue the party from its gross overreach. This is not to say severability clauses in general should not be honored, because of course we are constrained to enforce a contract in accordance with the parties' intent. Rather, we merely recognize that where a contract would remain one-sided and be fragmented after severance, the better policy is to decline the invitation for judicial severance. We therefore affirm in part and reverse in part the court of appeals' decision and reinstate the circuit court's denial of Lennar's motion to compel.

I.

The Abbey is a subdivision in the Spring Grove Plantation neighborhood located in Berkeley County and consists of sixty-nine single-family homes constructed between 2010 and 2015. The lots in the Abbey were originally owned and developed by Spring Grove Plantation Development, Inc. (Spring Grove), which graded the area and constructed the storm drainage system and roads. Spring Grove in turn sold the partially-developed subdivision to Lennar, which completed construction with the help of a number of subcontractors and sold all sixty-nine homes.

In the course of development, Petitioners contracted with Lennar to build new homes to their specifications in The Abbey.[2] As part of those transactions, Lennar and Petitioners executed individual form contracts (the purchase and sale agreement) containing an arbitration provision. Section 16 of the purchase and sale agreement, titled "Mediation/Arbitration of Disputes," contains ten, numbered paragraphs setting forth the arbitration agreement. In relevant part, paragraph 1 states:

> The parties to this [purchase and sale a]greement specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall first be submitted to . . . binding arbitration as provided by the Federal Arbitration Act . . . . "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 [purchase and sale a]greement, the Property, the Community or any dealings between Buyer and [Lennar]; (2) arising by virtue of any . . . warranties alleged to have been made by [Lennar] or [Lennar's] representatives; 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

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[2] We note Petitioner Lenna Lucas bought a pre-owned home built by Lennar in the Abbey, so there is no direct contract between Petitioner Lucas and Lennar.

> [purchase and sale a]greement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby.

Paragraph 4 further provides "that [Lennar] may, at its sole election, include [Lennar's] contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration" and "that the mediation and arbitration will be limited to the parties specified herein." Finally, paragraph 5 states, "Buyer and [Lennar] 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."

After closing on their new homes, Petitioners became aware of damage to their properties, which they attributed to Spring Grove, Lennar, and the subcontractors (collectively, Respondents). As a result, they filed a construction defect suit against Respondents for, among other things, negligence, breach of contract, and breach of various warranties.

Subsequently, Lennar moved to compel arbitration under either the Federal Arbitration Act (FAA)[3] or the South Carolina Uniform Arbitration Act (SCUAA).[4] As is relevant to this appeal, Lennar argued Petitioners were required to arbitrate under

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[3] 9 U.S.C. §§ 1–16 (2021).

[4] S.C. Code Ann. §§ 15-48-10 to -240 (2005).

two different contracts: (1) the purchase and sale agreement; and (2) a limited home warranty agreement (the limited warranty booklet). The arbitration provisions within both contracts are virtually identical, so for ease of reference, we will refer only to the terms in the purchase and sale agreement unless otherwise noted. Petitioners opposed Lennar's motion to compel arbitration, claiming, among other things, that the arbitration agreement was unconscionable.

Ultimately, the circuit court denied Lennar's motion to compel. Initially, the circuit court found the "arbitration agreement" consisted of the entirety of the purchase and sale agreement and the limited warranty booklet, explaining the extensive cross-references between the two contracts combined them into a single agreement akin to that found in *Smith v. D.R. Horton, Inc.,* 417 S.C. 42, 790 S.E.2d 1 (2016) (holding an arbitration agreement was not merely a standalone provision but was instead embedded in multiple contract terms, including ones dealing with a limited home warranty). Likewise, the circuit court held the contracts were unconscionable, citing a number of oppressive, one-sided provisions. The court declined to sever the unconscionable provisions because the oppressive terms pervaded the entirety of the contracts, "thereby rendering 'severability' impractical, if not impossible."[5]

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[5] The circuit court additionally held arbitration could not be compelled under federal or state law. Specifically, the court determined the contracts involved intrastate commerce, rather than interstate commerce, and therefore the FAA did not apply. Further, the circuit court determined the arbitration agreement did not comply with the SCUAA, specifically, section 15-48-

Lennar appealed, and the court of appeals reversed. In relevant part, the court of appeals found the arbitration agreement between Petitioners and Lennar consisted only of Section 16 of the purchase and sale agreement. Relying on the *Prima Paint* doctrine, the court of appeals held the circuit court wrongly considered terms outside of the actual arbitration agreement. In particular, the court of appeals distinguished the "intertwined" arbitration agreement in *D.R. Horton* from the "distinct, separate" arbitration agreement in the purchase and sale agreement, and found the circuit court impermissibly considered the terms found in the limited warranty booklet. However, the court of appeals ended its analysis upon concluding that the arbitration agreement was composed entirely of Section 16 of the purchase and sale agreement.

While we agree with the court of appeals in that regard, we find it necessary to continue the analysis to determine whether any terms within Section 16 of the purchase and sale agreement were unconscionable in and of themselves. We therefore granted Petitioners' petition for a writ of certiorari.

II.

As an initial matter, Petitioners argue the contracts at issue do not involve interstate commerce, and therefore Lennar cannot compel Petitioners to

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10(a). *See* S.C. Code Ann. § 15-48-10(a) ("Notice that a contract is subject to arbitration pursuant to [the SCUAA] shall be typed in underlined capital letters . . . on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration [pursuant to the SCUAA].")

arbitrate under federal law, namely, the FAA. We disagree. The transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes. *See, e.g., Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("[O]ur appellate courts have consistently recognized that contracts for construction are governed by the FAA."); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (explaining that contracts requiring the construction of a new building implicate interstate commerce because it would be "virtually impossible" to construct the building "with materials, equipment[,] and supplies all produced and manufactured solely within the State of South Carolina"). Because federal law preempts state law in this instance, we need not decide whether Lennar could also compel arbitration under the SCUAA.

III.

Petitioners present two challenges to the court of appeals' opinion. First, Petitioners defend the circuit court's reliance on *D.R. Horton*, asserting the court of appeals erred in limiting the scope of the arbitration agreement to Section 16 of the purchase and sale agreement alone. Specifically, Petitioners claim the purchase and sale agreement and the limited warranty booklet expressly incorporate one another by reference and extensively cross-reference one another such that one cannot be read without the other. Petitioners therefore contend the two contracts should be read as one large arbitration agreement rather than two separate contracts. We agree with the

court of appeals and reject Petitioners' first argument.

Pursuant to the *Prima Paint* doctrine, the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint*, 388 U.S. at 395). The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").

As a result, as we stated in *D.R. Horton*, "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." 417 S.C. at 48, 790 S.E.2d at 4. Necessarily, then, the Court must first define the scope of the arbitration agreement before considering whether that agreement is unconscionable. *Id.* at 48 n.4, 790 S.E.2d at 3 n.4 (explaining the scope of the arbitration agreement must first be determined "because it controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis").

In *D.R. Horton*, one of the central issues involved defining the scope of the arbitration agreement. *Id.* at 48, 790 S.E.2d at 4. The plaintiff-homeowners

claimed the arbitration agreement comprised the entire section of the contract titled "Warranties and Dispute Resolution"; the defendant-homebuilder claimed the arbitration agreement was contained solely within one subparagraph of that section. *Id.* A majority of the Court ultimately agreed with the plaintiffs, finding the arbitration agreement broadly encompassed the entirety of the "Warranties and Dispute Resolution" section of the contract. *Id.* The Court explained the various subparagraphs in the "Warranties and Dispute Resolution" section "contain[ed] numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.* Therefore, the Court concluded that the section as a whole—including the subparagraphs relating to arbitration and those relating to warranties—"must be read [together] to understand the scope of the warranties and how different disputes are to be handled." *Id.*

Here, in contrast to *D.R. Horton*, there is a distinct section of the purchase and sale agreement that sets forth the entirety of the arbitration agreement. As correctly noted by the court of appeals, Section 16 of the agreement—titled "Mediation/Arbitration of Disputes"—deals solely with the scope of arbitration and the requisite formalities accompanying an arbitration proceeding, such as the procedural rules and the number of arbitrators required to resolve the dispute. Within Section 16, there is nothing that refers to the limited warranty booklet or incorporates it by reference. Rather, Section 16 is a standalone arbitration provision, dissimilar from that in *D.R. Horton*.

We therefore find the arbitration agreement is contained solely within Section 16 of the purchase and sale agreement.[6]

IV.

Petitioners' second argument posits that even assuming the court of appeals correctly narrowed the scope of the arbitration agreement to Section 16 of the purchase and sale agreement, it nonetheless erred in failing to analyze whether Section 16 contained unconscionable terms that would render the agreement to arbitrate unenforceable. Petitioners contend they lacked a meaningful choice with respect to Section 16 and that certain terms in Section 16 are so oppressive that no reasonable person would have agreed to them. We agree and now turn to the general law of unconscionability.

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[6] As noted above, the limited warranty booklet contains an arbitration agreement that uses identical language to Section 16 of the purchase and sale agreement. Because the arbitration agreements in both contracts are standalone provisions, it is legally irrelevant that the portions of the contracts outside of the arbitration agreements extensively cross-reference one another and incorporate one another by reference. *See Buckeye Check Cashing, Inc.*, 546 U.S. at 445–46 ("*Prima Paint* and *Southland* [*Corp. v. Keating*, 465 U.S. 1 (1984),] . . . establish[ed] three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity [as a whole] is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.").

Section 2 of the FAA provides that any arbitration provision contained within a written contract involving interstate commerce must be enforced except for "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

At its core, unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am. Jur. 2d *Contracts* § 272 (2016) (characterizing these two prongs as procedural and substantive unconscionability, respectively); *see also id.* § 271 ("Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices . . . ."). This general description of unconscionability applies to all contract terms, not merely arbitration provisions. *Cf. AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011) (noting that while arbitration agreements may be invalidated by generally applicable contract defenses, including unconscionability, they may not be invalidated by "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue"). *Compare Fanning*, 322 S.C.

at 403, 472 S.E.2d at 245 (involving an unconscionability analysis of a contract that did not contain an arbitration provision), *with Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007) (involving a similar unconscionability analysis for a contract that contained an arbitration provision).

A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case. *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012) (citation omitted). Indeed, we have previously "emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Compare Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (holding an adhesion contract between an automobile dealership and a customer was unconscionable), *with Munoz*, 343 S.C. at 541–42, 542 S.E.2d at 365 (declining to find unconscionable an adhesion contract between a consumer and a lender). "In analyzing claims of unconscionability in the context of arbitration agreements, the [United States Court of Appeals for the] Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999)).

As explained further below, a take-it-or-leave-it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice. *See generally* 17A Am. Jur. 2d

Contracts § 274; 17 C.J.S. *Contracts* § 9 & n.9 (2020) (collecting cases). Rather, to constitute unconscionability, the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Fanning*, 322 S.C. at 403, 472 S.E.2d at 245; *see also* 17A Am. Jur. 2d *Contracts* § 272 ("Although procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, both need not be present to the same degree; the agreement may be judged on a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. In an exceptional case, however, a court may find that a contract provision is so outrageous as to warrant holding it unenforceable on the grounds of substantive unconscionability alone." (footnotes omitted)). In this case, we do not hesitate in upholding the finding of unconscionability concerning Section 16 of the purchase and sale agreement.

A.

As noted, under South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike. The touchstone of the analysis begins with the presence or absence of meaningful choice. *See Fanning*, 322 S.C. at 403, 472 S.E.2d at 245; *see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004), 361 S.C. at 555, 606 S.E.2d at 758 (explaining that a party seeking to

prove an arbitration agreement is unconscionable must allege he lacked a meaningful choice as to the arbitration clause specifically, not merely that he lacked a meaningful choice as to the contract as a whole). "Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process." *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (citation omitted). Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669; *see generally* 17A Am Jur. 2d *Contracts* § 272 (listing a number of factors that courts may considering in conducting an unconscionability analysis); 17 C.J.S. *Contracts* § 10 (same).

Parties frequently claim they lack a meaningful choice when a contract of adhesion is involved. *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (explaining adhesion contracts are "standard form contracts offered on a take-it or leave-it basis with terms that are not negotiable" (internal alteration marks omitted) (citation omitted)). Because contracts of adhesion are non-negotiable, "[a]n offeree faced with such a contract has two choices: complete adherence or outright rejection." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted).

Adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; 17A Am.

Jur. 2d Contracts § 274; 17 C.J.S. Contracts § 9 & n.9 (collecting cases). However, given that one party to an adhesion contract "has virtually no voice in the formulation of the[] terms and language" used in the contract, *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901, courts tend to view adhesive arbitration agreements with "considerable skepticism," as it remains doubtful "any true agreement ever existed to submit disputes to arbitration," *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citations omitted). *See also* 17A Am. Jur. 2d Contracts § 274 (noting that "[c]ontracts of adhesion are enforceable unless they are unconscionable," but "[n]evertheless, the fact that a contract is one of adhesion is a strong indicator that [there was] an absence of meaningful choice"); 17 C.J.S. *Contracts* § 9 ("A consumer transaction which is essentially a contract of adhesion may be examined by the courts with special scrutiny to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting.").

The distinction between a contract of adhesion and unconscionability is worth emphasizing: *adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***. Nevertheless, and regrettably, it is common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue. Such a specious argument does not advance the party's position and instead detracts from other legitimate arguments the party may have. After all, unconscionability requires a finding of a lack of meaningful choice *coupled with*

unreasonably oppressive terms. Thus, an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter's case.

Here, we find it manifest that the purchase and sale agreement is a contract of adhesion given by Lennar to all of the homebuyers in the Abbey, with only a few blank spaces to fill in, including the buyer's name, the relevant property address, and the purchase price. Other than those type of minor blank spaces, the terms of the purchase and sale agreement—particularly those of any consequence to Lennar—are non-negotiable, with some terms not even applying to specific homebuyers.[7]

Moreover, the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions. These factors combine to highlight the significant disparity in the parties' bargaining power, with Lennar enjoying a much stronger bargaining position than Petitioners. We therefore find Petitioners lacked a meaningful choice in their ability to negotiate the arbitration agreement. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C.

[7] For example, Section 4 of the purchase and sale agreement lists two financing options that are mutually exclusive with one another, with checkboxes to mark which of the two options applies for any particular client.

335, 343, 384 S.E.2d 730, 735–36 (1989) ("We have [] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.").

B.

Within Section 16, Petitioners point to three provisions that are allegedly so one-sided and unreasonable as to render the agreement unconscionable. Specifically, Petitioners claim provisions in paragraphs 1, 4, and 5 require the Court to invalidate the arbitration agreement. We agree. Because paragraph 4 of Section 16 of the purchase and sale agreement contains the most egregious term, we focus our attention there.[8]

In particular, paragraph 4 states, "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 . . . the mediation and arbitration will be limited to the parties specified herein." (Emphasis added.) It is a fundamental principle of law that the plaintiff is the master of his own complaint and is the sole decider of whom to sue for his injuries. *Myles v. United States*, 416 F.3d 551, 552 (7th Cir. 2005) ("[L]itigants are masters of their own complaints and may choose who to sue—or not to sue."); 71 C.J.S. *Pleading* § 149 (Supp. 2021) (citation omitted). Giving Lennar the "sole election" to include or exclude sub-

[8] We note Lennar made no attempt in its brief to defend paragraph 4 from Petitioners' unconscionability challenge.

contractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle. *Cf.* 17A Am. Jur. 2d *Contracts* § 272 ("Mutuality [] is a paramount consideration when assessing the substantive unconscionability of a contract term.").

It is equally concerning that paragraph 4, in conjunction with paragraph 5, creates the possibility of inconsistent factual findings that would preclude Petitioners from recovery on a purely procedural (rather than a merit) basis—a legal defense to which neither Lennar nor the other Respondents are entitled. In particular, paragraph 5 states the parties agree no factual or legal finding made in arbitration is binding in any other arbitral or judicial proceeding "unless there is mutuality of parties." However, Lennar can ensure there is never a "mutuality of parties" by exercising its "sole election" in paragraph 4 to choose the parties to the arbitration. Suppose Lennar is unable or—of more concern—unwilling to compel the other named defendants to arbitrate, instead forcing Petitioners to litigate with the remaining defendants in circuit court. In that case, it is possible for the arbitration defendants to blame the remaining circuit-court defendants for Petitioners' damages, and vice versa. Were the respective fact finders to agree with the defendants' arguments to that effect, Petitioners could lose in both forums merely because the fact finder believes the absent defendants to be at fault, and, critically, *it is not Petitioners' choice that those defendants are absent*. Compounding the problem, paragraph 5 prevents any findings of fact or conclusions of law in the arbitration to be binding in any

subsequent arbitral or judicial proceeding instituted by Petitioners to recover their damages fully. Thus, Petitioners could not even use the fact that the arbitrator had found Lennar was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa.

This creation of a procedural defense to liability for Lennar is wholly unreasonable and oppressive to Petitioners. Moreover, the likelihood of inconsistent factual findings due to paragraphs 4 and 5 of the arbitration agreement—and the resultant, inherent unfairness to Petitioners—has become probable, rather than merely theoretically possible. We say this because, as it stands now, Spring Grove and a significant number of the subcontractors are not required to arbitrate with Lennar and Petitioners because either (1) their contracts with Lennar do not contain an arbitration provision; or (2) their contracts with Lennar (including the arbitration agreements therein) were executed after Petitioners filed their lawsuit, i.e., after the subcontractors had completed the work on Petitioners' homes and the Abbey in general; or (3) they did not have a contract with Lennar at all—much less an arbitration agreement.

As a result, we hold the arbitration agreement is unconscionable and unenforceable as written.

Ordinarily, the question of unconscionability beyond the arbitration provision would be determined in the arbitral forum. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010). However, in agreeing with the circuit court concerning the unconscionability of the arbitration provision, we note our

additional agreement with the circuit court that unconscionability pervades the various agreements between the parties. An example of the oppressive, one-sided nature of the parties' agreement includes a provision that Petitioners "*expressly negotiated and bargained for the waiver of the implied warranty of habitability [for] valuable consideration . . .* ***in the amount of $0***." (Emphasis added.) Lennar also specifically states the "[l]oss of use of all or a portion of your Home" is not covered by its warranty to new homebuyers.[9] Likewise, another provision of the adhesive contract states, "[T]his Agreement shall be construed as if both parties jointly prepared it"—a blatant falsehood—"and no presumption against one party or the other shall govern the interpretation or construction of any of the provisions of this Agreement." Yet another provision asserts, "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." (Original emphasis omitted, new emphasis added.) This is not even to mention the fact that Lennar attempted to insert an arbitration agreement in Petitioners' deeds, characterizing the arbitration agreement as an "equitable servitude" that runs with the land in perpetuity.

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[9] Apparently, for Lennar to even *consider* repairing any defects in the homes the construct and sell, the defects must be minor and become apparent very quickly after the sale date. Otherwise, Lennar is off the hook for the defective housing, and the innocent homebuyers are out of luck. After all, Lennar specifically disclaims any responsibility to fix major problems to the home that result in the homebuyers losing partial or complete use of their (not-inexpensive) home.

We find these and other terms of the contracts to be absurd, factually incorrect, and grossly oppressive. While none of these terms factor into our unconscionability analysis for the arbitration agreement, we recognize that although the circuit court failed to honor the *Prima Paint* doctrine, it certainly hit the nail on the head in characterizing the contracts as unquestionably unconscionable.

V.

Lennar does not argue to this Court that, should we find any provision of the arbitration agreement unconscionable, we should sever that portion of the agreement in accordance with the severability clause found in the arbitration agreement.[10] However, because Lennar made a severability argument to the circuit court and court of appeals, we assume Lennar views it as an additional sustaining ground and therefore address it in the interest of judicial economy. As we will explain, we decline to sever the unconscionable provisions of the arbitration agreement.

If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003); *Lackey*, 330 S.C. at 397, 498 S.E.2d at 903; 17A Am. Jur. 2d *Con-*

[10] Paragraph 4 of Section 16 of the purchase and sale agreement states, "The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section."

tracts § 313. However, severability is not always appropriate to remedy unconscionable contractual provisions. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673; 17A Am Jur. 2d *Contracts* § 314. In particular, courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement "such that only a disintegrated fragment would remain after hacking away the unenforceable parts." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); *see also* 17A Am Jur. 2d *Contracts* § 314. In those cases, judicial severing "look[s] more like rewriting the contract than fulfilling the intent of the parties." Simpson, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); *see also* 17A Am Jur. 2d *Contracts* § 313.

Thus, "[c]ourts have discretion [] to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." *Doe v. TCSC, L.L.C.*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020); *see also Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (noting there is no specific set of factual circumstances indicating when complete invalidation of the contract is a better option than merely excising the offending clauses). In exercising their discretion, courts should be guided by the parties' intent. *Doe*, 430 S.C. at 615, 846 S.E.2d at 880; 17A Am. Jur. 2d *Contracts* §§ 313–14; *see also* 17A Am. Jur. 2d *Contracts* § 273 ("To assess whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract.").

A.

We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon"[11] parties to the arbitration proceeding. We decline to blue-pencil that provision.

It goes without saying that the clause of a contract that names the persons or entities that may properly be joined as parties to proceedings arising from any dispute involving that contract is a material term of the agreement. *Cf. Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131–32, 678 S.E.2d 435, 439 (2009) (discussing when a term is integral to a contract, as compared to an "ancillary logistical concern," and explaining courts must look to the "essence" of the arbitration agreement; "[w]here [a particular term] has implications *that may substantially affect the substantive outcome of the resolution*, we believe that it is neither 'logistical' nor 'ancillary.'" (emphasis added)). Were we to sever such a clause from the arbitration agreement here, it would be the opposite of excising an "ancillary logistical concern." Rather, we would be materially rewriting the contract by controlling who will—or will not—participate in arbitration.

Blue-pencilling an agreement is, of course, within the Court's discretion. Here, we decline to excise a

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[11] We say "agreed upon" in quotation marks to emphasize that this is an adhesion contract, making it "considerably doubtful" the agreement truly encapsulates *both* parties' intent. *See Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Nonetheless, because Lennar drafted the adhesion contract, we assume it does accurately represent Lennar's intent.

material term of the arbitration agreement and enforce the remaining, fragmented agreement. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement." (citation omitted)); *cf. id*. at 579, 762 S.E.2d at 701 (noting even when parties manifest an intent to be bound, an indefinite material term may invalidate the agreement (quoting 1 Corbin on Contracts § 2.8 (Rev. ed. 1993))); *Shotts v. OP Winter Haven, Inc*., 86 So. 3d 456, 478 (Fla. 2011) ("Further, if the [unconscionable] provision were severed, the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other— particularly[] when those legal promises are viewed through the eyes of the contracting parties." (internal quotation marks omitted) (internal citation omitted)). Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.

B.

There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. As mentioned above, adhesion contracts "are subject to considerable skepticism upon review, due to the dis-

parity in bargaining positions of the parties." Simpson, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted); *see also* 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9. In particular, when a contract of adhesion is at issue, "there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Similarly, given the adhesive nature of the contract here, we find it "considerably doubtful" any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) (Petitioners) had no hand in drafting or negotiating any of the language of the arbitration agreement. *See Doe*, 430 S.C. at 615, 846 S.E.2d at 880 (explaining that when exercising its discretion to sever portions of the agreement, a court must be guided by the parties' intent).

The second additional consideration of which we take note is that this contract involves a consumer transaction. *See Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (placing emphasis on the need for a case-by-case analysis in cases involving consumer transactions so as to address the unique circumstances inherent in those types of contacts). More specifically, this contract involves the purchase of a new home. South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. *Kennedy*, 299 S.C. at 341–44, 384 S.E.2d at 734–36 (rejecting a result in which "a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the

imposition of traditional and technical legal distinctions"; and explaining that in the past, when the Court is confronted with a new scenario "not properly disposed of by our present set of rules," it "[o]nce more[] respond[s] by expanding our rules to provide the innocent buyer with protection" (citing *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976))). As we stated over thirty years ago, it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce." *Id.* at 344, 384 S.E.2d at 736 (citing *Rogers v. Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968)). Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction.

Generally, courts will not enforce contracts that violate public policy. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).

> A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole.

17A Am. Jur. 2d *Contracts* § 238 (Supp. 2021) (citation omitted). Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); *see also* 17A Am.

Jur. 2d *Contracts* § 238 (2016) (explaining courts may consider, *inter alia*, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically concerned that honoring the severability clause here creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer. *Cf.* Maria Kalogredis et al., *Addressing Increasing Uncertainty in the Law of Non-Competes*, Ass'n Corp. Couns. 36 (Apr. 2018), https://www.hangley.com/wp-content/uploads/2018/04/ Addressing-Increasing-Uncertainty-in-the-Law-of-Non-Competes.pdf (expressing a similar concern in the context of non-compete agreements); *Shotts*, 86 So. 3d at 478 (explaining it did not "make sense for a court to remake [the arbitration] agreement to excise the offending provisions. Given the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer form contracts that fully comply with [the law], not to revise them when they are challenged to make them compliant. *Otherwise, nursing homes have no incentive to proffer a fair form agreement*." (emphasis added) (citation omitted)); *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972) (declining to blue-pencil an

overly restrictive non-compete agreement because it would encourage employers to "fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too." (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 683 (1960)))[12]; *see also Howard Schultz & Assocs. of the Se., Inc. v. Broniec*, 236 S.E.2d 265, 269 (Ga. 1977) ("It is these very requests which are the reason for rejecting severability of employee covenants not to compete. Employers covenant for more than is necessary, hope their employees will thereby be deterred from competing, and rely on the courts to rewrite the agreements so as to make them enforceable if their employees do compete. When

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[12] We note that prior to 2012, Georgia courts prohibited blue-penciling noncompete agreements under the common law. However, in 2012, Georgia's legislature enacted sections 13-8-53 and 13-8-54, permitting—but not requiring—courts to blue-pencil such agreements. Ga. Code Ann. §§ 13-8-53(d) (2022) ("[A] court *may* modify a covenant that is otherwise void and unenforceable . . . ." (emphasis added)); *id.* § 13-8-54(b) (2022) ("[I]f a court finds that a contractually specified restraint does not comply with [the law], then the court *may* modify the restraint provision . . . ." (emphasis added)). Following the statutory enactments, Georgia courts have remained reluctant to modify overly burdensome non-compete agreements to make them enforceable, as "unreasonable restrictive covenants are against Georgia public policy." *Belt Power, L.L.C. v. Reed*, 840 S.E.2d 765, 770– 71 (Ga. Ct. App. 2020) (finding significant that sections 13-8-53(d) and 13-8-54(b) gave the court discretion whether to blue-pencil an agreement, and upholding the trial court's refusal to blue-pencil the burdensome non-compete agreement in that case).

courts adopt severability of covenants not to compete, employee competition will be deterred even more than it is at present by these overly broad covenants against competition.").

Moreover, we do not doubt that "for every [arbitration agreement] that finds its way to court, there are thousands that exercise an *in terrorem* effect on [homebuyers] who respect their contractual obligations." Kalogredis, *supra*, at 36 (quoting Blake, *supra*, at 682). "Because most [homebuyers] simply comply with their [arbitration agreements] rather than challenging them in court, the argument goes, the law should provide a strong incentive for [home builders] not to overreach." *Id*.

C.

Given that the subject matter of the contract involves new home construction, and South Carolina has an extensive history of expanding its common law on contracts so as to protect new homebuyers, we find honoring the severability clause here—particularly because it goes to a material term of the arbitration agreement—would violate public policy. Our holding is based primarily upon two factors. First, the contract at issue is a contract of adhesion, in which it is "considerably doubtful" both parties truly intended a court to sever an unconscionable provision and enforce the remainder of the agreement. Second, with respect to the public policy considerations inherent in this type of consumer transaction (homebuying), "the likelihood that refusal to enforce the bargain or term will further [public] policy" is, we hope, high. *See* 17A Am. Jur. 2d *Contracts* § 238.

VI.

In sum, we hold the court of appeals correctly limited the scope of the arbitration agreement to Section 16 of the purchase and sale agreement, in accordance with the *Prima Paint* doctrine. However, while the court of appeals declined to address the matter, there are several unconscionable provisions within Section 16, the most egregious of which strips Petitioners of their ability to name the parties against whom they are asserting their claims in the arbitration proceeding. Because this is a contract of adhesion, and because the transaction involves new home construction, we decline to sever the unconscionable provisions for public policy reasons. It is clear Lennar furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause. We refuse to reward such misconduct, particularly in a home construction setting. We therefore affirm in part and reverse in part the decision of the court of appeals and reinstate the circuit court's denial of Lennar's motion to compel. The matter is remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY, C.J., HEARN, FEW, JJ., and Acting Justice Blake A. Hewitt, concur.

APPENDIX B

THE STATE OF SOUTH CAROLINA
In The 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 Collins, 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

Appeal From Berkeley County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5730
Heard February 19, 2020 – Filed June 10, 2020

REVERSED AND REMANDED

James Lynn Werner and Katon Edwards Dawson, Jr., both of Parker Poe Adams & Bernstein, LLP, of Columbia, and Jenna Brooke Kiziah McGee, of Parker Poe Adams & Bernstein, LLP, of Charleston, all for Appellant.

Thomas Frank Dougall, William Ansel Collins, Jr., and Michal Kalwajtys, all of Dougall & Collins, of Elgin, for Respondent Ozzy Construction, LLC.

Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Builders Firstsource-Southeast Group, LLC.

Steven L. Smith, Zachary James Closser, and Samuel Melvil Wheeler, all of Smith Closser, PA, of Charleston; and Rogers Edward Harrell, III, of Murphy & Grantland, PA, of Columbia, all for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

Ronald G. Tate, Jr., and Robert Batten Farrar, both of Gallivan, White & Boyd, PA, of Greenville, for Respondent Volkmar Consulting Services, LLC.

Sidney Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent DVS, Inc.

David Cooper Cleveland and Trey Matthew Nicolette, both of Clawson & Staubes, LLC, of Charleston, for Respondent Myers Landscaping, Inc.

John Calvin Hayes, IV, of Hayes Law Firm, LLC, Jesse Sanchez, of The Law Office of Jesse Sanchez, both of Charleston; Michael J. Jordan, of The Steinberg Law Firm, LLP, of Goose Creek; and Catherine Dunn Meehan, of The Steinberg Law Firm, LLP, of Charleston, all for Respondents Patricia Damico, Joshua Buetow, Brettany Buetow, Bryan Camara, Cynthia Camara, Matthew Collins, Ellen Davis Morrow, Jonathan Douglass, Theresa Douglass, Czara England, Chad England, Lenna Lucas, and Danny Morrow.

Brent Morris Boyd, Timothy J. Newton, and Rogers Edward Harrell, III, all of Murphy & Grantland, PA, of Columbia, for Respondents Coastal Concrete Southeast, LLC, and Coastal Concrete Southeast II, LLC.

David Shuler Black, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent TJB Trucking/Leasing, LLC.

Erin DuBose Dean, of Tupper, Grimsley, Dean & Canaday, P.A., of Beaufort, for Respondents LA New Enterprises, LLC, and Raul Martinez Masonry, LLC.

Christine Companion Varnado, of Seibels Law Firm, PA, of Charleston; and Alan Ross Belcher, Jr., and Derek Michael Newberry, both of Hall Booth Smith, PC, of Mt. Pleasant, all for Respondent Guaranteed Framing, LLC.

Stephen Lynwood Brown and Catherine Holland Chase, both of Young Clement Rivers, of Charleston; and Preston Bruce Dawkins, Jr., of Aiken Bridges Elliott Tyler & Saleeby, P.A., of Florence, all for Respondent Alpha Omega Construction Group, Inc.

David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, and Everett Augustus Kendall, II, and Brian Lincoln Craven, both of Murphy & Grantland, PA, of Columbia, all for Respondent Construction Applicators Charleston, LLC.

Shanna Milcetich Stephens and Wade Coleman Lawrimore, both of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent A.C.& A. Concrete, Inc.

Robert Trippett Boineau, III, Heath McAlvin Stewart, III, and John Adam Ribock, all of McAngus Goudelock & Courie, LLC, of Columbia, for Respondent Spring Grove Plantation Development, Inc

Bachman S. Smith, IV, of Haynsworth Sinkler Boyd, PA, of Charleston, for Respondent Southern Green, Inc.

John Elliott Rogers, II, of The Ward Law Firm, PA, of Spartanburg, for Respondent Land/Site Services, Inc.

Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA, of Columbia, and Samia Hanafi Nettles, of Richardson Plowden & Robinson, PA, of Mt. Pleasant for Respondent Decor Corporation.

Jenny Costa Honeycutt, of Best Honeycutt, P.A., of Charleston, for Respondent South Carolina Exteriors, LLC.

Michael Edward Wright, of Robertson Hollingsworth Manos & Rahn, LLC, and Michael Wade Allen, Jr., and /R. Patrick Flynn, both of Pope Flynn, LLC, all of Charleston, all for Respondent Super Concrete of SC.

Francis Heyward Grimball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mt. Pleasant, for Respondent Manale Landscaping, LLC.

Kathy Aboe Carlsten, of Copeland, Stair, Kingma & Lovell, LLP, and Keith Emge, Jr., of Resnick & Louis, P.C., both of Charleston, for Respondent Civil Site Environmental, Inc.

HILL, J.: Certain homeowners in a Berkeley County development sued the general contractor Lennar Carolinas, LLC (Lennar), the developer, and various subcontractors, alleging defective construction. Lennar impleaded other subcontractors as third party

defendants and moved to compel arbitration of the entire dispute. The circuit court denied the motion, finding the arbitration agreement included not just the arbitration section of the parties' sales contract but also sections from a separate warranty agreement (as well as parts of the deeds and covenants), and that the arbitration agreement was unconscionable. The circuit court further found the South Carolina Uniform Arbitration Act (SCUAA) applied, not the Federal Arbitration Act (FAA), and there had not been compliance with the SCUAA's conspicuous notice requirements. Lennar now appeals. We conclude the FAA, rather than the SCUAA, applies, and the circuit court erred in not considering the arbitration section as an independent arbitration agreement. We further hold the arbitration section constituted a valid agreement to arbitrate, which the FAA requires us to enforce.

I.

All of the Respondent homeowners, except Lenna Lucas, purchased new homes to be constructed in the development. As part of the transaction, they signed a ten page Purchase and Sales Agreement (PA) containing an arbitration section. Lucas is the second owner of a home, but in her amended complaint, she alleges a breach of contract cause of action based upon the PA. Section 16 of the PA is entitled "Mediation/Arbitration," and begins as follows:

> 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. . . .

Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). We review circuit court determinations of arbitrability de novo but will not reverse a circuit court's factual findings reasonably supported by the evidence. *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016).

A. Whether the FAA Applies

We first consider whether the FAA applies. We hold it does, for two reasons. First, the PA provides the parties "specifically agree that this transaction involves interstate commerce." We must enforce this agreement like any other contract term. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce). Second, the transaction involved commerce in fact. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Id.* at 538, 542 S.E.2d at 363. In deciding whether a transaction involves "commerce in fact" sufficient to trigger the FAA, we examine the agreement, the complaint, and the surrounding facts. *Towles v. United*

HealthCare Corp., 338 S.C. 29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999). The phrase "involving commerce" as used in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Commerce Clause grants Congress the power to regulate (1) the use of channels of interstate commerce, (2) instrumentalities of interstate commerce or persons or things in interstate commerce, and (3) activities having a substantial relation to interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000).

In general, the development and sale of residential real estate is an intrastate activity that does not implicate the FAA, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012), but here the transaction also involved the construction of residential homes. As *Bradley* acknowledged, "our appellate courts have consistently recognized that contracts for construction are governed by the FAA." *Id.* at 458 n.8, 730 S.E.2d at 318 n.8; *see also Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977). The affidavit of Lennar's Controller states the construction involved interstate commerce, specifically the use of out-of-state contractors and materials and equipment manufactured outside South Carolina. *See Cape Romain Contractors*, 405 S.C. at 123, 747 S.E.2d at 465 (holding FAA applied where out of state materials used in dock construction were "instrumentalities of interstate commerce" and parties' contract specifically invoked

FAA). We hold the transaction here involved interstate commerce, and the FAA therefore applies.

B. Whether the Arbitration Agreement is valid and enforceable

We next consider whether there was a valid arbitration agreement. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."). Because an arbitration provision is often one of many provisions in a contract, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (arbitrator rather than court must decide claim that underlying contract in which arbitration provision was contained was fraudulently induced, but if fraudulent inducement claim went to the arbitration provision specifically, claim would be for court because such a claim goes to the "making" of the arbitration agreement and § 4 of the FAA requires the court to "order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue'"). Building from *Prima Paint*, the United States Supreme Court has developed a body of federal substantive law interpreting the FAA that applies in State and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Two of these substantive laws are central to our decision here, and they reaffirm *Prima Paint*:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (citation omitted); *see Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.").

In deciding whether the parties have a valid agreement to arbitrate we must therefore isolate the arbitration clause from the rest of the contract. If the arbitration agreement is valid, any issues as to the validity of other parts of the contract go to the arbitrator, not the court. Accordingly, a party cannot duck arbitration unless it makes a specific, pinpoint (and successful) challenge to the validity of the arbitration provision itself; attacking the validity of the contract as a whole is not enough. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) ("We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge

to the arbitration clause."). We admit this is an artificial, abstract way to view the issue, but the lens has been fixed by federal substantive law and we are not free to adjust it.

The circuit court acknowledged this lens but sought to widen the scope, bringing the multiple arbitration and warranty provisions in other documents into the frame. It then found the provisions so comingled as to be inseparable and declared all of the comingled provisions to be "the" arbitration agreement. This was not in keeping with *Prima Paint*. Nor was it, as the circuit court stated, consistent with *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48–49, 790 S.E.2d 1, 4 (2016), where a 3-2 majority held an arbitration clause found in one subsection of a contract paragraph was so "intertwined" with other subsections of the same paragraph that the entire paragraph constituted the arbitration provision for purposes of the *Prima Paint* analysis. Unlike the contract in *D.R. Horton*, the arbitration agreement here was contained in a distinct, separate section of the PA. The circuit court's finding that the arbitration provision encompassed more than this section lacks adequate factual support. We therefore conclude the circuit court erred by considering the contract as a whole rather than, as *Prima Paint* demands, focusing only on the discrete arbitration provision. *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) (reversing circuit court's denial of motion to compel arbitration where circuit court violated *Prima Paint* by considering separate warranty provision as part of arbitration agreement). Because the parties'

arbitration provision is valid, § 2 of the FAA requires that we enforce it.

That ends our inquiry into Lennar's motion to compel the homeowners to arbitrate. There is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed and the Covenants. The PA's arbitration provision states, "All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s)." Whether the disputes alleged in this lawsuit are covered by the PA's arbitration provision is therefore a question the parties clearly and unmistakably delegated to the arbitrator. *Schein*, 139 S. Ct. at 530 ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding delegation of questions of arbitrability to arbitrator must be "clear and unmistakable").

Accordingly, we reverse the order of the circuit court denying the motion to compel arbitration. We express no view as to the validity or enforceability of other sections of the PA or any other documents at issue as those questions are for the arbitrator. Because it appears the circuit court did not specifically rule on Lennar's motions to compel the subcontractors and the developer, Spring Grove Plantation, Inc., to arbitration, we remand those motions to the circuit court for a ruling.

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

APPENDIX C

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Patricia Damico, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, and Matthew Collins, Individually and Derivatively as acting on behalf of the Spring Grove Plantation Homeowners Association, Plaintiffs, vs. Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Volkmar Consulting Services, LLC, and Manale Landscaping, LLC, Defendants.	CASE NO: 2014-CP-08-02424 **ORDER DENYING DEFENDANT LENNAR'S MOTION TO COMPEL ARBITRATION**

Lennar Carolinas, LLC Third-Party Plaintiff, vs. Super Concrete of SC, Inc. Southern Green, Inc., and TJB Trucking/Leasing LLC, Third-Party Defendants.	)

THIS MATTER came before the Court on April 11, 2016 upon Defendant Lennar Carolinas, LLC's Amended Motion to Compel Arbitration. Following oral argument, the Court took Lennar's Motion under advisement. After consideration of the parties' memoranda, oral arguments and applicable law, this Court denies Lennar's Motion to Compel Arbitration and finds further, as follows:

FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

This is a defective construction suit by the Homeowners at The Abbey located in Spring Grove Plantation, individually and on behalf of others similarly situated. The Abbey consists of approximately Sixty-Nine (69) homes in the Spring Grove Plantation neighborhood located in Berkeley County. Upon information and belief, the houses were constructed from 2010 to present. Plaintiffs' have alleged that construction defects exist which have resulted in water intrusion, component and structural degradation, and extensive consequential damages.

On October 30, 2014, Plaintiffs commenced this action by Complaint which asserted a number of claims including negligence/gross negligence, breach of warranty, and strict liability against Lennar Defendants. Lennar answered the Complaint on February 17, 2015.

On June 1, 2015, Lennar filed the instant Motion requesting the Court Compel Arbitration pursuant to the Federal Arbitration Act (FAA), 9 USC Section 1, et. seq., or alternatively, the South Carolina Uniform Arbitration Act (SCUAA), SC Code Ann 15-48-10, et. seq. based upon provisions contained in a number of Exhibits submitted to the Court, including but not limited to, the Lennar Purchase and Sale Agreement and Lennar Limited Warranty.

STANDARD OF REVIEW

The question of the arbitrability of a claim is an issue for judicial determination. *Oxford Health Plans, LLC v. Sutter,* 569 U.S. _ (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Granite Rock Co. v. Int'l Bhd Of Teamsters*, 561 U.S. 287, 296 (2010); *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (noting same); *Partain v. Upstate Automotive Group,* 386 S.C. 488, 689 S.E.2d 602 (2010).

General contract defenses such as fraud, duress and unconscionability apply to a court's evaluation of the enforceability of an arbitration clause governed under either the SCUAA or the FAA. 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon

"such grounds as exist at law or in equity for the revocation of any contract."); See also § 15-48-lO(a) containing similar language to that of the FAA. Thus, this Court may address "arbitrability" based upon general contract defenses recognized in this State.[1] Therefore, if this Court finds any clause of a contract unconscionable, including an arbitration clause, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. S.C. Code§ 36-3-302(1) 2003.

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. *Williams v. Teran, Inc.*, 266 S.C. 55, 221 S.E.2d 526 (1976); *RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 321 S.E.2d 199 (Ct.App.1984). Ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and

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[1] As aptly noted by Justices Breyer, Ginsburg, Sotomayor and Kagan in their dissenting opinion to *AT&T Mobility, LLC v. Concepcion*: "even though contract defenses, e.g., duress and unconscionability, slow down the dispute resolution process, *federal arbitration law normally leaves such matters to the States*." 131 S.Ct. 1740, 1760 (2011) (emphasis added); *Rent-A-Center*, 130 S.Ct. at 2775 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses'"); *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) ("General contract principles of state law apply to arbitration clauses governed by the FAA").

should be the one to suffer from its shortcomings." *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), vacated on other grounds, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). A contract is ambiguous when its terms are reasonably susceptible of more than one interpretation. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App.1997); *see also Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968) ("[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning.") (citation omitted).Whether a contract's language is ambiguous is a question of law. *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.*; *see also Charles v. B & B Theatres, Inc.*, 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959).

Questions as to whether a transaction involves intrastate or interstate commerce, and thus, implicates the application of the South Carolina Uniform Arbitration Act ("SCUAA") or the Federal Arbitration Act ("FAA"), are reserved for the trial court. To ascertain whether a transaction involves commerce within the meaning of either the SCUAA or the FAA, the court must examine the agreement, the complaint, and the surrounding facts.

In cases involving home purchase agreements, such as here, South Carolina courts make clear that

the SCUAA applies because such contracts involve intrastate commerce as opposed to interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447,456,730 S.E.2d 312,317 (2012). Under the SCUAA, an arbitration provision must be properly disclaimed, and failure to do so, renders the arbitration provision unenforceable under the Act's express provisions. S.C. Code§ 15-48-10.[2]

ANALYSIS

I. ARBITRATION PROVISIONS AND THE *PRIMA PRINT* DOCTRINE

Lennar argues that there are "four, separate arbitration provisions that cover Plaintiff's claims in the present litigation: (1) the Purchase and Sale Agreement; (2) Lennar's Limited Warranty; (3) Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges, and Liens for Spring Grove Plantation Community (the "Covenants"); and (4) the Deed(s).

Although Lennar argues that these are separate arbitration agreements, the Court finds that they must be read in conjunction with each other and that collectively, they contain the arbitration provisions at issue. The U.S. Supreme Court has held that courts may consider only the threshold ques-

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[2] Although SCUAA's disclaimer requirements may be preempted by the FAA, such preemption only occurs in cases where the transaction at issue involves interstate versus intrastate commerce. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001).

tion of whether the arbitration agreement is fraudulently induced and thus invalid, not whether the contract as a whole is invalid. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 406 (1967). The Supreme Court of South Carolina, in the recent opinion of *Smith v. D.R.Horton*. reiterated that "in conducting an unconscionability inquiry, courts may only consider those provisions of the arbitration agreement itself, and not those of the whole contract." *Smith v. D.R.Horton*, S.Ct. Opinion No. 27645 (Filed July 6, 2016); See also *S.C. Public Serv. Auth. V. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993).

Similar to the Smith case and in line with the *Prima Paint* Doctrine, this Court finds that the arbitration provisions as set forth below in all four documents, including the entire Lennar Limited Warranty, must be read as a whole to comprise the arbitration "agreement" due to the "cross-references to one another'" and "intertwining" paragraphs. *Id*. For ease in analysis, the Court provides the specific sections and excerpts which support this reading as set forth below.

II. THE ARBITRATION PROVISIONS:

The Purchase and Sale Agreement states in Section 3[3] and 30[4] that the Agreement consists of the Agreement, Riders and Addenda, and Documents as

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[3] Section 3: Legally Binding Agreement. (...) NO WARRANTIES OR REPRESENTATIONS, OTHER THAN THOSE SPECIFIED IN THIS AGREEMENT, ARE EXPRESSED OR IMPLIED. ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF SELLER. FOR CORRECT WARRANTIES AND REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS AGREEMENT, INCLUDING THE RIDERS AND ADDENDA ATTACHED HERETO, AND THE "DOCUMENTS" (AS SUCH TERM IS DEFINED IN RIDER B) PROVIDED TO BUYER, IF ANY. (Emphasis added).

[4] 30. Entire Agreement. BUYER CERTIFIES THAT BUYER HAS READ EVERY PROVISION OF THIS AGREEMENT, WHICH INCLUDES EACH RIDER AND ADDENDUM ATTACHED HERETO AND THAT THIS AGREEMENT, TOGETHER WITH EACH SUCH RIDER AND ADDENDUM, CONSTITUTES THE ENTIRE AGREEMENT BETWEEN BUYER AND SELLER. PRIOR AGREEMENTS, REPRESENTATIONS, UNDERSTANDINGS, AND ORAL STATEMENTS NOT REFLECTED IN THIS AGREEMENT HAVE NO EFFECT AND ARE NOT BINDING ON SELLER. BUYER ACKNOWLEDGES THAT BUYER HAS NOT RELIED ON ANY REPRESENTATIONS, NEWSPAPERS, RADIO OR TELEVISION ADVERTISEMENTS, WARRANTIES, STATEMENTS, OR ESTIMATES OF ANY NATURE WHATSOEVER, WHETHER WRITTEN OR ORAL, MADE BY SELLER, SALES PERSONS, AGENTS, OFFICERS, EMPLOYEES, CO-OPERATING BROKERS (IF ANY) OR OTHERWISE EXCEPT AS HEREIN SPECIFICALLY REPRESENTED. BUYER HAS BASED HIS/HER/THEIR DECISION TO PURCHASE THE PROPERTY ON PERSONAL INVESTIGATION, OBSERVATION AND THE DOCUMENTS. (Emphasis added).

defined in Rider B. Section 3 refers to the inclusion of "warranties." Section 28[5] states that "disclaimers are incorporated." Rider B incorporates by reference Lennar's Limited Warranty in its' entirety within Section 5[6], stating that "THE EXPRESS LIMITED

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[5] 28. Incorporation and Severability. The explanations and disclaimers set forth in the Documents are incorporated into this Agreement. In the event that any clause or provision of this Agreement shall he void or unenforceable, such clause or provision shall be deemed deleted so that the balance of this Agreement is enforceable. (Emphasis added).

[6] RIDER B, 5. Warranties. Buyer understands and agrees that Seller is making only those express limited warranties set forth in the homeowner's warranty (the "Limited Warranty"). The Limited Warranty, incorporated herein, shall be delivered to Buyer at Closing and a copy of which is attached hereto **OR** a copy of which is available for examination at Seller's office and will, at Buyer's request, be attached as an exhibit to this Agreement. THE EXPRESS LIMITED WARRANTY AND REMEDIES PROVIDED BY SELLER CONSTITUTE EXCLUSIVE WARRANTY AND REMEDIES TO BE MADE AVAILABLE BY SELLER AND, EXCEPT WHERE ADDITIONAL WARRANTIES ARE REQUIRED BY APPLICABLE LAW OR REGULATION, ARE IN PLACE Of ALL OTHER GUARANTIES OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF WORKMANSHIP, MERCHANTABILITY, HABITABILITY, SUITABILITY AND FITNESS, WHICH ARE HEREBY EXPRESSLY DISCLAIMED BY SELLER AND WAIVED BY BUYER. TO THE EXTENT OF ANY CONFLICT BETWEEN ANY PROVISION OF THIS AGREEMENT RELATED TO WARRANTIES AND THE LIMITED WARRANTY, THE PROVISIONS OF THE LIMITED WARRANTY SHALL CONTROL. All of the terms of this Section 6 shall survive Closing and the delivery of the Deed. BUYER AND SELLER ACKNOWLEDGE THAT THEY HAVE EXPRESSLY NEGOTIATED AND BARGAINED FOR THE WAIVER OF THE IMPLIED WARRANTY OF HABITABILITY,

WARRANTY AND REMEDIES PROVIDED BY SELLER CONSTITUTE *EXCLUSIVE WARRANTY AND REMEDIES* TO BE MADE AVAILABLE BY SELLER." (Emphasis added). This Court views Rider B, Section 5 as tying Lennar's warranty and remedies together, and thus their interpretation should be viewed in conjunction with each other.

Rider B further defines "documents" in section 6 as those contained in the "Document Book for the Community" which contains "some of the documents of record affecting the Property and the Community" which the Court infers would contain the Restrictions offered as Exhibit M to Lennar's Motion. Section 6 further refers to taking title of the property, referencing the deed. The Restrictions make note to the deed.

AND BUYER ACKNOWLEDGES THE SUFFICIENCY AND RECEIPT OF VALUABLE CONSIDERATION FOR SUCH WAIVER IN THE AMOUNT OF $0, WHICH AMOUNT SHALL BE CREDITED TOWARD THE PURCHASE PRICE AT CLOSING. THE CONSIDERATION AGREED UPON ABOVE HAS BEEN SPECIFICALLY NEGOTIATED BETWEEN BUYER AND SELLER.

Section 16[7] and 17[8] of the Purchase and Sales Agreement also constitute the dispute resolution

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[7] 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 he 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 properly 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 !imitations or statute of repose. (Only excerpts included).

[8] 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

sections of the Purchase and Sales Agreement, and therefore, should be read together when assessing the arbitration provisions with Lennar. Section 16.1 defines disputes to include "contract, *warranty*, tort, or otherwise," and makes reference again to claims arising under "warranties." (Emphasis added).

Further, the Lennar Limited Warranty contains a section entitled "Mediation/Arbitration of Disputes" with a subsection "Other Dispute Resolutions." The language in this section of the Lennar Warranty is almost verbatim to Sections 16 and 17 of the Purchase Agreement, and offers further proof that the Dispute Resolutions sections and warranty should be read together.

In determining whether the arbitration agreement is unconscionable, the Court has considered the arbitration provisions in each of these documents pursuant to *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 US 395, 406 (1967) (holding that courts may only consider the threshold question of whether the arbitration agreement is fraudulently induced and thus invalid, not whether the contract as a whole is invalid.) South Carolina

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SELLER AGREE THAT Al"N DISPUTE, CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION SHALL BE HEARD BY A JUDGE IN A COURT PROCEEDING MID NOT A JURY. BUYER AND SELLER HEREBY WAIVE THEIR RESPECTIVE RIGHT TO A JURY TRIAL. SELLER HEREBY SUGGESTS THAT BUYER CONTACT AN ATTORNEY OF BUYER'S CHOICE IF BUYER DOES NOT UNDERSTAND THE LEGAL CONSEQUENCES OF EXECUTING THIS AGREEMENT. All of the terms of this Section 17 shall survive Closing and the delivery of the Deed.

has adopted a broad interpretation of *Prima Paint* and has held that "a party cannot avoid arbitration through rescission of the whole contract when there is no independent challenge to the arbitration clause." *See S.C. Pub. Serv. Auth. V. Great W. Coal (ky.), Inc*, 312 SC 559,562-63. 437 S.E.2d 22, 24 (1993).

II. THE MOTION TO COMPEL ARBITRATION IS DENIED DUE TO THE UNCONSCIONABILITY OF THE COLLECTIVE ARBITRATION PROVISIONS AS A WHOLE.

Lennar argues that the Purchase and Sale Agreement, the Limited Warranty, the Covenants and Restriction, and the deed all contain separate arbitration provisions. Plaintiffs assert a number of state-specific grounds challenging the legitimacy of Lennar's arbitration provisions. This Court agrees with the Plaintiffs.

A.) South Carolina Law and Prevailing Equitable Principles Invalidate Lennar's Arbitration Provisions

In South Carolina, a party may effectively challenge the arbitrability of a given claim based upon general contract defenses including fraud, duress and unconscionability. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA).

When such questions of arbitrability arise, the trial court, not the arbitrator, decides whether a

matter should be resolved through arbitration. *See Oxford Health Plans, LLC v. Sutter*, 569 U.S._ (2013) This determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (noting where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place.) When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties ..." *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013)), affirmed by S. Ct. Opinion No. 27645 (Filed July 6, 2016); *see also* S.C. Code § 15-48-20 (a) (providing arbitration will be denied if a court determines no agreement to arbitrate existed).

B.) <u>The Court finds that Lennar's Warranty Provisions are Unconscionable, and thus Unenforceable.</u>

Unconscionability is defined as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25 644 S.E.2d 663, 668-69 (2007)(citing *Carolina Cure Plan, Inc. v. United*

Health Care Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)) Unconscionability must be evaluated under both prongs: (1) lack of meaningful choice; and (2) oppressive terms.

1.) Absence of Meaningful Choice

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id*. (citations omitted). "In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citations omitted). "[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Id*. at 373 S.C at 26-27, 644 S.E.2d at 669.

In circumstances involving adhesion contracts, an absence of meaningful choice is readily apparent based upon the lack of bargaining power. Accordingly, adhesion contracts, such as commercial sales agreements and manufacturer warranties, arc subject to "considerable skepticism" due to the disparity in bargaining positions of the parties. *Id*. at 27, 644 S.E.2d at 669. Consequently, "the presumption in favor of arbitration is substantially weaker when

there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Id*. at 26, 644 S.E.2d at 669 (citations omitted).

Recently the Supreme Court issued an Order affirming the denial of a Motion to Compel Arbitration and finding the arbitration provisions unconscionable in *Smith v. D.R. Horton*, S. Ct. Opinion No.27645 (July 6, 2016). In the analysis of the lack of meaningful choice, the Supreme Court highlighted that they had previously "taken judicial cognizance of the fact that the modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Id*. (citing Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 343, 384 S.E. 2d 730, 735-36 (1989) (other internal citations omitted). Here, as in *Smith*, "there is no indication (...) that the [Plaintiffs] enjoyed a substantially stronger bargaining position against (Lennar) than the average homebuyer, or that they were represented by independent counsel." *Id*.

It does appear that Plaintiffs had no choice and zero input as to any aspect of Lennar's Purchase and Sales Agreement, Warranty, Covenants, or Deed, as for each Agreement entered into by the Plaintiffs, they all contain the same sections and same language, including the arbitration and legal remedies provisions.

Lennar argues that the Covenants bolster their arbitration clause; however, the Court disagrees. The Covenants were filed with the register of deeds, according to Lennar, "prior to the sale of the residences"; therefore, Plaintiffs could have no input into those restrictions. Plaintiffs were never consulted and were never provided the opportunity to negotiate those terms. Given Plaintiffs are not business entities, are unsophisticated, and lacking in bargaining power, it only supports the supposition that Plaintiffs were presented with Lennar's Purchase and Sales Agreement, Warranty, and Restrictions on a take it or leave it basis and that clearly there was an absence of meaningful choice. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388,394,498 S.E.2d 898, 901 (Ct. App. 1998).

As such, this Court cannot ignore the "adhesive" nature of these provisions - nonnegotiable provisions which were drafted by Lennar, and which functioned to contract away certain significant rights and remedies otherwise lawfully available to Plaintiffs. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69

2.) Oppressive/One-Sided Terms

Specifically as to oppressive terms, the South Carolina Supreme Court in affirming the earlier rulings by the Court of Appeals and trial court in *Smith v. D.R. Horton*, found that "attempts to disclaim implied warranty claims and prohibit monetary damages are clearly one-sided and oppressive."

The trial court in *Smith*, originally confronted with a motion to compel arbitration brought by D.R. Horton, viewed the warranties and arbitration section of the purchase contract *as a whole*, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies." *Id*. Per its review, the trial court held the sections' collective attempt to disclaim implied warranty claims was oppressive and unconscionable. *Id*. The trial court further found "perhaps even more stark [were] the provisions in the Limitations of Liability ..." in which D.R. Horton claimed it could not be liable for monetary damages of any kind. *Id*. Based upon the foregoing, the trial court concluded, and our Court of Appeals and Supreme Court subsequently affirmed, that the arbitration provision was wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions. *Id*.

This Court's review of Lennar's Warranty reveals strikingly similar warranty limitations and disclaimers to those addressed, and ultimately rejected, by the *Smith* Court. As seen above, the Warranty eliminates most remedies after the structure is two years old. Lennar's arbitration and remedial-related provisions result in (a) the loss of the right to a jury trial; (b) the loss of the ability to maintain a class action; and (c) the loss of other certain remedies otherwise allowed by South Carolina law including the recovery of monetary damages. Lennar further attempts to disclaim all implied warranties.

Under our state law principles of contract interpretation, such limitations offered through an adhesion contract, and which effectively deprive substantial rights and eviscerate all means of recovering any damages, arc oppressive.

As applied to The Abbey, Lennar's Warranty provisions create an internal inconsistency within the Warranty itself by negating all meaningful warranty coverage for the primary risk associated with said Warranty - damage arising out of or to the residences that Lennar built. Like the defendants in both Smith and Simpson, Lennar takes the position its Warranty relieves Lennar of all liability for this very damage under any conceivable set of circumstances. Clearly, this renders the arbitration provisions, and thus the entire Warranty (a) void of its essential purpose; (b) lacking in mutuality; and (c) procedurally and substantively unconscionable.[9]

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[9] The South Carolina Court of Appeals in *Isle of Palms Pest Control Company* versus Monticello Insurance Company, directly confronted the issue of an "internal inconsistency", concluding as follows:

> [T]he internal inconsistency created by [a policy exclusion] which purports to bar coverage for claims arising out of the very operation sought to be insured renders [the policy] ambiguous in favor of coverage.

Isle of Palms, 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994), *reh'g denied*, (Aug. 4, 1995 (emphasis added); *see also Hooters of Augusta, Inc. v. American Global Ins. Co*., 272 F. Supp.2d 1365, 1378 (S.D. Ga. 2003) (noting "[i]nsurers must not deceive insurance purchasers into believing they have coverage only to have an exclusionary provision entirely nullify it").

Irrespective of whether the FAA or SCUAA apply, this Court finds that the collective arbitration provisions are oppressive and that the Plaintiffs had no meaningful choice when entering into the adhesion contracts. *Id. citing* S.C. Code§ 36-2-302(1) (2003) ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result….").

3.) The Warranty Provisions are Not Severable

While Courts are permitted to "sever" unconscionable, contractual provisions, the purported agreement between Plaintiffs and Lennar is not a proper candidate for the application of this remedy. South Carolina courts, and a host of other courts throughout the nation, "recognize severability is not always an appropriate remedy for an unconscionable provision ... '[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts ...'" *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673; *D.R. Horton, supra*, ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (internal citations omitted) (emphasis added); *see also, Ingle v. Circuit City Stores, Inc*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because

of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C. 2005)("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights ... the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

Similar to *Simpson* and *D.R. Horton*, Lennar's arbitration clause is "made unconscionable" by oppressive provisions which pervade each of the arbitration provisions within the Documents, thereby rendering "severability" impractical, if not impossible. Thus, in line with South Carolina jurisprudence, each arbitration provisions contained in Lennar's Purchase and Sales Agreement (§§16 and 17, and Rider B), Lennar's Limited Warranty in its entirety, Arbitration provision in the Covenants and Restriction and Deed, are "excise(d) (...) altogether," and are ultimately rejected by this Court. *Id.*

III. THE COURT FINDS THAT THE ARBITRATION AGREEMENTS ARE UNCONSCIONABLE; HOWEVER, IN THE ALTERNATIVE, THE COURT FINDS THAT THE ARBITRATION PROVISIONS ARE AMBIGUOUS.

Lennar argues that the Purchase and Sale Agreement, the Limited Warranty, the Covenants

and Restriction, and the deed all contain arbitration provisions which are governed by the Federal Arbitration Act, 9 U.S.C. § I, *et seq*, or in the alternative the South Carolina Uniform Arbitration Act, but that under either Act, the arbitration provisions are proper and enforceable. Plaintiff argues that the arbitration provisions should be governed by the SCUAA and not the FAA, and that the arbitrations provisions thus do not comply with the SCUAA's notice requirements. The Court has found that the arbitration provisions are unconscionable, and thus unenforceable.

In the alternative, the Court also finds that the arbitration provisions are ambiguous. Ambiguities are to be more strictly construed against the drafter of a document. Therefore, the Court has analyzed whether the agreements are subject to interstate or intrastate commerce. The Court finds that the SCUAA applies to the arbitration provision and that notice is not in compliance with the statute. For these alternative reasons, the Court also denies to Lennar's Motion to Enforce the arbitration provisions.

Where an arbitration agreement selects the FAA or a state arbitration statute as the applicable law, that law governs regardless of whether the contract involves intrastate or interstate commerce, This principle has repeatedly been recognized by the United States Supreme Court and the South Carolina Supreme Court. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University*, the United States Supreme Court addressed the impact of parties' choice-of-law in their contract

on the question of whether the arbitration required by the contract was governed by the FAA or state law. *Volt*, 489 U.S. 468 (1989). The Court found determinative the fact that the FAA's purpose is only to require courts to enforce "agreements to arbitrate, like other contracts, in accordance with their terms." *Id*. at 478. The Court thus held that courts must enforce contractual provisions specifying the law governing contractual1y required arbitration of disputes. *Id*. at 479. The court recently reiterated this point in *DIRECTV, Inc. v. Imburgia*, providing that "parties to an arbitration contract [have] considerable latitude to choose what law governs some or all of its provisions." *Imburgia*, 136 S. C. 463, 468 (2015). The South Carolina Supreme Court applied these principles to hold that where an arbitration agreement provides that it is governed by the FAA, the FAA applies irrespective of whether there is interstate commerce. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

In reviewing the arbitration provisions at issue, the Court finds that ambiguous terms as to the choice of law are within each of the agreements Lennar claims to contain arbitration provisions.

The Purchase and Sales Agreement states on the front of the document that the arbitration notice is being provided pursuant to the South Carolina Code of Laws and pursuant to Section 15-48-10. However, Section 16 later states that 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.).

Lennar's Limited Warranty provides the same sentence as in Section 16 of the Purchase Agreement and states that the FAA applies; however, on page 14, the warranty specifies that the agreement is subject to arbitration pursuant to the Uniform Arbitration Act, Section 15-48-10 (sic), et. seq. Code of Laws of South Carolina, 1976, as Amended. The Disclaimer of Implied warranties on page 11 of the Warranty refers to and states and intention to comply "with the laws of the state in which the Home is located."

On the front page of the Amended and Restated Declaration of Covenants, the words "**THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (S.C. CODE ANN §15-48-10 ET. SEQ., AS AMENDED**." The Covenants go on to state that the "developer expressly reserves the right to amend or restate this declaration without the consent of an owner." The Deed refers to the Covenants and incorporates the same, but the Deed does not have a separate arbitration provision. Lennar admits that the Covenants were recorded in 2007, years prior to the construction and sale of Plaintiffs residences.

Therefore, the Court finds that the terms when viewed collectively are ambiguous as they refer to both the FAA and the SCUAA as written. The Court

has already found that the contract is one of adhesion with oppressive terms, the Covenant is an even more extreme case of adhesion, as it was written, agreed to, recorded and may be changed by Lennar without notice. It is not the Court's prerogative to re-write the arbitration provisions, but the agreements contain ambiguities on the choice of law.

Therefore the Court must examine whether the contract involves interstate or intrastate commerce. The Plaintiffs contend that the sales transactions for the homes located at Spring Grove did not involve interstate commerce; and therefore, that the arbitration clause does not properly invoke application of the Federal Arbitration Act, but rather the South Carolina Uniform Arbitration Act. The Court agrees finds that the subject-matter sales transactions involve intrastate commerce, as opposed to interstate commerce.

The Supreme Court of South Carolina has held that "to ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski* at 117, 553 S.E.2d at 594 *citing Towles v. United Healthcare Corp*., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). The United States Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. *Zabinski*, at 115, 553 S.E.2d at 591 *quoting Allied- Bruce Terminix Cos., Inc. v. Dubson*, 513 U.S. 265, 274 (1995). The transaction must turn out, in fact, to have involved interstate commerce. *Id. citing Roberson v. Money Tree of Ala., Inc*., 954 F.Supp. 1519 (M.D.

Ala. 1997). "Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." *Id*. at 115-6, 553 S.E.2d at 591 *citing Volt Info. Scis. Inc. v. Bd. ofTrs*., 489 U.S1 • 468 (1989).

As it applies to cases involving real estate, the Supreme Court of South Carolina has held that "interstate commerce was not involved in a contract for the sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties utilized the services of a North Carolina engineer and procured financing from a Pennsylvania lender." *Bradley*, at 456, 730 S.E.2d at 317 (2012) *citing Mathews v. Fluor Corp*., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994).

Thus, while interstate commerce may be implicated m certain transactions[10], our Supreme Court adheres to the view that real estate purchase contracts only implicate intrastate commerce because "the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity." *Bradley v. Brentwood Homes, Inc*., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012)

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[10] The Supreme Court of South Carolina has stated that a transaction involving construction on Hilton Head Island did, in fact, involve interstate commerce as contemplated by the FAA because the South Carolina partnership utilized out-of-state materials, contractors, and investors. *Zabinski*, at 595, 553 S.E.2d at 118. Furthermore, the Supreme Court of South Carolina has recently broadened the definition of interstate commerce as it applies to residency agreements in nursing homes by overturning *Timms v. Greene. Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 371, 759, S.E.2d 727, 733 (2014).,

quoting Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18. The Court further confirmed its prior rulings that the sale of a residence is inherently *intrastate. Id.*

The Court finds that the Plaintiffs' Agreements for Sale evidence that they purchased homes in Berkeley County, South Carolina. The homes were sold by Lennar, who was/is located at 1941 Savage Road, Suite 100C, Charleston, SC 29407. The General Contractor for the project, Lennar Carolinas, LLC, is a corporation organized in the State of South Carolina. Each of the above evidences intrastate commerce. Defendants have not satisfied their burden of proof to negate the well-established South Carolina precedent respecting the inherent *intrastate* nature of the sale of a home. Based on the above, the Federal Arbitration Act does not apply to the transaction or this matter.

This Court has reviewed the arbitration provisions as a whole, and found them unconscionable. In the alternative, this Court finds that the arbitration provisions do not comply with the SCUAA, as "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." The arbitration provisions in the Purchase and Sales agreement, the Warranty. Not the deed are underlined. The arbitration provision in the Warranty and Deed does not appear on the first page, and is not in capital letters. The Cove-

nants document does comply with the SCUAA; however, the Court finds the adhesive nature of the document and the fact that it was not presented to each homeowner to be persuasive and against public policy. Under the SCUAA, an arbitration provision must be properly disclaimed, and failure to do so, renders the arbitration provision unenforceable under the Act's express provisions. S.C. Code § 15-48-10[11]. Therefore, the Court finds that the Arbitration provisions arc unenforceable under the SCUAA.

CONCLUSION

In conclusion, this denies Lennar's Motion to Compel Arbitration based on the unconscionable provisions of the arbitration provisions. The Court concludes in the alternative, that the arbitration provisions ambiguously refer to both the FAA and the SCUAA, but that the SCUAA applies under the intrastate commerce rule. Therefore, the arbitration provisions are alternatively unenforceable based on noncompliance with the notice requirements in SCUAA.

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[11] Although SCUAA's disclaimer requirements may be preempted by the FAA, such preemption only occurs in cases where the transaction at issue involves interstate versus intrastate commerce. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001).

AND IT IS SO ORDERED.

/s/ J.C. Nicholson, Jr.
The Honorable J.C.
Nicholson, Jr.

September 19, 2016
Charleston, South Carolina

APPENDIX D

The Supreme Court of South Carolina

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 Cainara, 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 Collins, 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, Guar-

anteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DYS, 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, DYS, 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.

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

Appellate Case No. 2020-001048

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.

/s/ Donald W. Beatty C.J.
/s/ John W. Kittredge J.
/s/ Kaye G. Hearn J.
/s/ John Cannon Few J.
Hewitt, A. J, not participating

Columbia, South Carolina
November 17, 2022

***

[cc's intentionally omitted]

APPENDIX E

RELEVANT STATUTORY PROVISION

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9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

APPENDIX F

PURCHASE AND SALE AGREEMENT

Lennar Carolinas, LLC
1941 Savage Road, Ste. 100-C
Charleston, South Carolina 29407
843-388-8989

PURCHASE AND SALE AGREEMENT

PURSUANT TO SECTION 15-48-10, SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED, THIS SHALL CONSTITUTE WRITTEN NOTICE THAT THIS AGREEMENT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO SECTION 16 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, nei-

ther 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.

* * * *