

CLERK OF THE COURT

Electronically Filed
Sep 14 2015 03:16 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

1 **NOTC**
2 Gregory H. King, Bar No. 7777
3 ghk@paynefears.com
4 Sarah J. Odia, Bar No. 11053
5 sjo@paynefears.com
6 Chad D. Olsen, Bar No. 12060
7 cdo@paynefears.com
8 PAYNE & FEARS LLP
9 7251 W. Lake Mead Blvd., Suite 525
10 Las Vegas, Nevada 89128
11 Telephone: (702) 851-0300
12 Facsimile: (702) 851-0315

13 Attorneys for Defendant
14 U.S. HOME CORPORATION

15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 Case No. A-15-714219-D
18 Dept. No. XXXI

19 **NOTICE OF APPEAL**

20 THE MICHAEL BALLESTEROS TRUST;
21 RODRIGO ASANION, individually;
22 FEDERICO AGUAYO, individually; FELIPE
23 ENRIQUEZ, individually; JIMMY FOSTER
24 JR., individually; THE GARCIA FAMILY
25 TRUST; ARNULFO ORTEGA-GOMEZ and
26 ELVIRA GOMEZ-ORTEGA, individually;
27 JOHN J. and IRMA A. OLSON, individually;
28 OMAR PONCE, individually; BRANDON
WEAVER, individually; JON YATES,
individually; MINTESNOT
WOLDETSADIK, individually; and ROES 1
through 500, inclusive,

Plaintiffs,

v.

U.S. HOME CORPORATION, a Delaware
Corporation; CAMPBELL CONCRETE OF
NEVADA, INC. a Nevada Corporation;
VALENTE CONCRETE, LLC. a Nevada
Limited-Liability Company; RED ROSE,
INC., a Nevada Corporation; REPUBLIC
ELECTRIC, INC., a Nevada Corporation; and
DOES 1 through 500, inclusive,

Defendants.

Notice is hereby given that Defendant U.S. Home Corporation appeals to the Supreme Court of Nevada from the District Court order entered on August 18, 2015 (filed on August 20),

PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300

1 which denied Defendant's Motion to Compel Arbitration.

2 DATED: September 10, 2015

PAYNE & FEARS LLP

3

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By /s/ Chad D. Olsen

5

GREGORY H. KING, NV Bar No. 7777

SARAH J. ODIA, NV Bar No. 11053

6

CHAD D. OLSEN, NV Bar No. 12060

7251 W. Lake Mead Blvd., Suite 525

7

Las Vegas, Nevada 89128

Tel. (702) 851-0300

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Attorneys for Defendant U.S. HOME

CORPORATION

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4827-8189-1624.1

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PAYNE & FEARS LLP

ATTORNEYS AT LAW

7251 W. LAKE MEAD BLVD., SUITE 525

LAS VEGAS, NEVADA 89128

(702) 851-0300

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2015, I deposited a true and correct copy of the above and foregoing, **NOTICE OF APPEAL** in the United States mail, postage prepaid, at Las Vegas, NV, to the last known address as follows:

Duane E. Shinnick, Esq.
Melissa Bybee, Esq.
Bradley S. Rosenberg, Esq.
Shinnick, Ryan & Ransavage, P.C.
4001 Meadows Lane
Las Vegas, NV 89107
Tel/Fax: (702) 631-8014/(702) 631-8024
Attorneys for Plaintiffs

/s/ Nancy Babas

Nancy Babas
An Employee of PAYNE & FEARS LLP

4850-5922-6914.1

PAYNE & FEARS LLP

ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., STE 525
LAS VEGAS, NV 89128
(702) 851-0300

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CLERK OF THE COURT

1 ASTA
Gregory H. King, Bar No. 7777
2 ghk@paynefears.com
Sarah J. Odia, Bar No. 11053
3 sjo@paynefears.com
Chad D. Olsen, Bar No. 12060
4 cdo@paynefears.com
PAYNE & FEARS LLP
5 7251 W. Lake Mead Blvd., Suite 525
Las Vegas, Nevada 89128
6 Telephone: (702) 851-0300
Facsimile: (702) 851-0315

7 Attorneys for Defendant
8 U.S. HOME CORPORATION

9
10 **DISTRICT COURT**
CLARK COUNTY, NEVADA

11 THE MICHAEL BALLESTEROS TRUST;
12 RODRIGO ASANION, individually;
FEDERICO AGUAYO, individually; FELIPE
13 ENRIQUEZ, individually; JIMMY FOSTER
JR., individually; THE GARCIA FAMILY
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through 500, inclusive,

18 Plaintiffs,

19 v.

20 U.S. HOME CORPORATION, a Delaware
21 Corporation; CAMPBELL CONCRETE OF
NEVADA, INC. a Nevada Corporation;
22 VALENTE CONCRETE, LLC. a Nevada
Limited-Liability Company; RED ROSE,
23 INC., a Nevada Corporation; REPUBLIC
ELECTRIC, INC., a Nevada Corporation; and
24 DOES 1 through 500, inclusive,

25 Defendants.

Case No. A-15-714219-D
Dept. No. XXXI

CASE APPEAL STATEMENT

27 Pursuant to NRAP 3(f), Appellant U.S. Home Corporation respectfully files this Case
28 Appeal Statement. This Case Appeal Statement concerns the appeal taken by U.S. Home to the

PAYNE & FEARS LLP

ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300

1 Supreme Court of Nevada from a District Court order entered on August 18, 2015 (filed on
2 August 20), which denied U.S. Home's Motion to Compel Arbitration.

3 1. Name of appellants filing this case appeal statement: U.S. Home Corporation.

4 2. Identify the judge issuing the decision, judgment, or order appealed from: The
5 Honorable Susan H. Johnson.

6 3. Identify each appellant and the name and address of counsel for each appellant:
7 U.S. Home Corporation is represented by:

8 Gregory H. King, NV Bar No. 7777
9 Sarah J. Odia, NV Bar No. 11053
10 Chad D. Olsen, NV Bar No. 12060
11 PAYNE & FEARS LLP
12 7251 W. Lake Mead Blvd., Suite 525
13 Las Vegas, Nevada 89128
14 Telephone: (702) 851-0300

15 4. Identify each respondent and the name and address of appellate counsel, if known,
16 for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much
17 and provide the name and address of that respondent's trial counsel): The Michael Ballesteros
18 Trust; Rodrigo Asanion; Federico Aguayo; Felipe Enriquez; Jimmy Foster Jr.; The Garcia Family
19 Trust; Arnulfo Ortega-Gomex & Elvira Gomez-Ortego; John J. & Irma A. Olson; Omar Ponce;
20 Brandon Weaver; Jon Yates; and Mintesnot Woldetsadik, each of whom is represented by:

21 Duane E. Shinnick, NV Bar No. 7176
22 Melissa Orr, NV Bar No. 8390
23 Courtney K. Lee, NV Bar No. 8154
24 Bradley S. Rosenberg, NV Bar No. 8737
25 SHINNICK, RYAN & RANSAVAGE P.C.
26 4001 Meadows Lane
27 Las Vegas, NV 89107
28 Telephone: (702) 631-8014

5. Indicate whether any attorney identified above in response to question 3 or 4 is not
licensed to practice law in Nevada and, if so, whether the district court granted that attorney
permission to appear under SCR 42 (attach a copy of any district court order granting such
permission): None, not applicable.

///

1 6. Indicate whether appellants were represented by appointed or retained counsel in
2 the district court: Retained counsel.

3 7. Indicate whether appellant is represented by appointed or retained counsel on
4 appeal: Retained counsel.

5 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the
6 date of entry of the district court order granting such leave: No, not applicable.

7 9. Indicate the date the proceedings commenced in the district court: Complaint was
8 filed on February 20, 2015.

9 10. Provide a brief description of the nature of the action and result in the district court,
10 including the type of judgment or order being appealed and the relief granted by the district court:

11 This is a construction defect case involving 12 single-family homes located
12 in North Las Vegas, Nevada. U.S. Home developed the homes at issue.

13 Each Respondent entered into a purchase and sale agreement with U.S.
14 Home or Greystone in connection with the purchase of their homes. Pursuant to
15 these purchase and sale agreements, each Respondent agreed to submit to binding
16 arbitration any dispute relating to their homes, including construction defect
17 disputes. Further, Respondents' homes are subject to CC&Rs, which state that both
18 U.S. Home and Respondents must submit any construction dispute to binding
19 arbitration.

20 On April 30, 2015, U.S. Home filed a motion to compel arbitration, seeking
21 to enforce the arbitration agreements as to each Respondent. On June 3, the District
22 Court held a hearing to address the motion to compel arbitration. On August 18, an
23 order was entered denying the motion to compel arbitration.

24 U.S. Home is now appealing the District Court's denial of the motion to
25 compel arbitration.

26 11. Indicate whether the case has previously been the subject of an appeal to or original
27 writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of
28 the prior proceeding: No, not applicable.

 12. Indicate whether this appeal involves child custody or visitation: No, not
applicable.

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1 13. If this is a civil case, indicate whether this appeal involves the possibility of
2 settlement: No.

3 DATED: September 10, 2015 PAYNE & FEARS LLP

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By /s/ Chad D. Olsen
GREGORY H. KING, NV Bar No. 7777
SARAH J. ODIA, NV Bar No. 11053
CHAD D. OLSEN, NV Bar No. 12060
7251 W. Lake Mead Blvd., Suite 525
Las Vegas, Nevada 89128
Tel. (702) 851-0300

Attorneys for Defendant U.S. HOME
CORPORATION

4814-2333-0344.1

PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2015, I deposited a true and correct copy of the above and foregoing, **CASE APPEAL STATEMENT** in the United States mail, postage prepaid, at Las Vegas, NV, to the last known address as follows:

Duane E. Shinnick, Esq.
Melissa Bybee, Esq.
Bradley S. Rosenberg, Esq.
Shinnick, Ryan & Ransavage, P.C.
4001 Meadows Lane
Las Vegas, NV 89107
Tel/Fax: (702) 631-8014/(702) 631-8024
Attorneys for Plaintiffs

/s/ Nancy Babas

Nancy Babas
An Employee of PAYNE & FEARS LLP

4850-5922-6914.1

PAYNE & FEARS LLP

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7251 W. LAKE MEAD BLVD., STE 525
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DEPARTMENT 31
CASE SUMMARY
CASE NO. A-15-714219-D

Michael Ballesteros Trust, Plaintiff(s)
vs.
U.S. Home Corporation , Defendant(s)

§
§
§
§
§

Location: **Department 31**
Judicial Officer: **Kishner, Joanna S.**
Filed on: **02/20/2015**
Cross-Reference Case Number: **A714219**

CASE INFORMATION

Case Type: **Chapter 40**
Case Flags: **Appealed to Supreme Court**
Jury Demand Filed
Arbitration Exemption Granted

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-15-714219-D
Court	Department 31
Date Assigned	02/20/2015
Judicial Officer	Kishner, Joanna S.

PARTY INFORMATION

Plaintiff		<i>Lead Attorneys</i>
Aguayo, Federico		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Asanion, Rodrigo		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Enriquez, Felipe		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Foster, Jimmy, Jr.		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Garcia Family Trust		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Gomez -Ortega, Elvira		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Michael Ballesteros Trust		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Olson, Irma A		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Olson, John J		Shinnick, Duane E. <i>Retained</i> 702-631-8014(W)
Ortega-Gomez, Arnulfo		Shinnick, Duane E. <i>Retained</i>

DEPARTMENT 31
CASE SUMMARY
CASE NO. A-15-714219-D

Ponce, Omar

702-631-8014(W)

Shinnick, Duane E.
Retained
 702-631-8014(W)

Weaver, Brandon

Shinnick, Duane E.
Retained
 702-631-8014(W)

Woldetsadik, Mintesnot

Shinnick, Duane E.
Retained
 702-631-8014(W)

Yates, Jon

Shinnick, Duane E.
Retained
 702-631-8014(W)

Defendant

Campbell Concrete of Nevada Inc

Red Rose Inc








Luh, Charlie H.
Retained
 7023678899(W)

Republic Electric Inc

U.S. Home Corporation

King, Gregory H.
Retained
 7023823574(W)

Valente Concrete LLC









DATE	EVENTS & ORDERS OF THE COURT	INDEX
02/20/2015	 Complaint (CD, Complex) Filed By: Plaintiff Michael Ballesteros Trust <i>Construction Defect Complaint</i>	
02/20/2015	Case Opened	
04/21/2015	 Initial Appearance Fee Disclosure Filed By: Defendant U.S. Home Corporation <i>Initial Appearance Fee Disclosure</i>	
04/21/2015	 Answer (CD, Complex) Filed By: Defendant U.S. Home Corporation <i>Defendant U.S. Home Corporation's Answer to Complaint</i>	
04/21/2015	 Disclosure Statement Party: Defendant U.S. Home Corporation <i>Defendant U.S. Home Corporation's NRCP 7.1 Disclosure</i>	
04/24/2015	 Affidavit of Non-Service Filed By: Plaintiff Michael Ballesteros Trust <i>Affidavit of Non-Service-Republic Electric, Inc.</i>	
04/24/2015	 Affidavit of Non-Service Filed By: Plaintiff Michael Ballesteros Trust <i>Affidavit of Non-Service-Campbell Concrete of Nevada, Inc.</i>	
04/27/2015	 Summons Filed by: Plaintiff Michael Ballesteros Trust	

DEPARTMENT 31
CASE SUMMARY
CASE NO. A-15-714219-D

Summons-U.S. Homes

04/28/2015	 Summons Filed by: Plaintiff Michael Ballesteros Trust <i>Summons-Civil</i>
04/30/2015	 Motion to Compel Filed By: Defendant U.S. Home Corporation <i>Defendant U.S. Home Corporation's Motion to Compel Arbitration</i>
05/05/2015	 Affidavit of Service Filed By: Plaintiff Michael Ballesteros Trust <i>Affidavit of Service-Republic Electric, Inc.</i>
05/13/2015	 Affidavit of Service Filed By: Plaintiff Michael Ballesteros Trust <i>Affidavit of Service-Red Rose, Inc.</i>
05/13/2015	 Summons Filed by: Plaintiff Michael Ballesteros Trust <i>Summons-Civil</i>
05/13/2015	 Affidavit of Non-Service Filed By: Plaintiff Michael Ballesteros Trust <i>Affidavit of Non-Service-Valente Concrete, Inc.</i>
05/13/2015	 Affidavit of Non-Service Filed By: Plaintiff Michael Ballesteros Trust <i>Affidavit on Non-Service-Republic Electric, Inc.</i>
05/13/2015	 Certificate of Mailing Filed By: Plaintiff Michael Ballesteros Trust <i>Certificate of Mailing-Valente Concrete, Inc.</i>
05/14/2015	 Initial Appearance Fee Disclosure Filed By: Defendant Red Rose Inc <i>Defendant Red Rose, Inc.'s Initial Appearance Fee Disclosure</i>
05/14/2015	 Answer (CD, Complex) Filed By: Defendant Red Rose Inc <i>Defendant Red Rose, Inc.'s Answer to Plaintiffs' Complaint</i>
05/14/2015	 Demand for Jury Trial Filed By: Defendant Red Rose Inc <i>Defendant Red Rose, Inc.'s Demand for Jury Trial</i>
05/15/2015	 Opposition to Motion to Compel Filed By: Plaintiff Michael Ballesteros Trust <i>Plaintiffs' Opposition To Defendant U.S. Home Corporation's Motion To Compel Arbitration</i>
05/21/2015	 Commissioners Decision on Request for Exemption - Granted <i>Commissioner's Decision on Request for Exemption</i>
05/27/2015	

DEPARTMENT 31
CASE SUMMARY
CASE NO. A-15-714219-D

	 Reply in Support Filed By: Defendant U.S. Home Corporation <i>Reply in Support of U.S. Home Corporation's Motion to Compel Arbitration</i>
06/03/2015	 Motion to Compel (9:00 AM) (Judicial Officer: Kishner, Joanna S.) 06/03/2015, 06/26/2015 <i>Defendant U.S. Home Corporation's Motion to Compel Arbitration</i>
06/16/2015	 Certificate of Mailing Filed By: Plaintiff Michael Ballesteros Trust <i>Certificate of Mailing-Campbell Concrete of Nevada, Inc.</i>
06/16/2015	 Affidavit of Due Diligence Filed By: Plaintiff Michael Ballesteros Trust <i>Affidavit of Due Diligence-Valente Concrete, LLC.</i>
08/20/2015	 Findings of Fact, Conclusions of Law and Order Filed By: Defendant U.S. Home Corporation <i>Findings of Fact, Conclusions of Law, and Order</i>
08/21/2015	 Notice of Entry of Order Filed By: Defendant U.S. Home Corporation <i>Notice of Entry of Order</i>
09/10/2015	 Notice of Appeal Filed By: Defendant U.S. Home Corporation <i>Notice of Appeal</i>
09/10/2015	 Case Appeal Statement Filed By: Defendant U.S. Home Corporation <i>Case Appeal Statement</i>

DATE	FINANCIAL INFORMATION
	Defendant Red Rose Inc Total Charges 473.00 Total Payments and Credits 473.00 Balance Due as of 9/11/2015 0.00
	Defendant U.S. Home Corporation Total Charges 497.00 Total Payments and Credits 497.00 Balance Due as of 9/11/2015 0.00
	Plaintiff Aguayo, Federico Total Charges 30.00 Total Payments and Credits 30.00 Balance Due as of 9/11/2015 0.00
	Plaintiff Asanion, Rodrigo Total Charges 30.00 Total Payments and Credits 30.00 Balance Due as of 9/11/2015 0.00
	Plaintiff Enriquez, Felipe Total Charges 30.00 Total Payments and Credits 30.00 Balance Due as of 9/11/2015 0.00

DEPARTMENT 31
CASE SUMMARY
CASE NO. A-15-714219-D

Plaintiff Foster, Jimmy, Jr.	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Garcia Family Trust	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Gomez -Ortega, Elvira	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Michael Ballesteros Trust	
Total Charges	520.00
Total Payments and Credits	520.00
Balance Due as of 9/11/2015	0.00
Plaintiff Olson, Irma A	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Olson, John J	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Ortega-Gomez, Arnulfo	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Ponce, Omar	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Weaver, Brandon	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Woldetsadik, Mintesnot	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Plaintiff Yates, Jon	
Total Charges	30.00
Total Payments and Credits	30.00
Balance Due as of 9/11/2015	0.00
Defendant U.S. Home Corporation	
Appeal Bond Balance as of 9/11/2015	500.00

DISTRICT COURT CIVIL COVER SHEET

Clark County, Nevada A - 1 5 - 7 1 4 2 1 9 - D
 Case No. _____ X X X I
 (Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s): The Michael Ballesteros Trust 6137 Darnley Street North Las Vegas, NV 89081 Attorney (name/address/phone): Bradley S. Rosenberg, Esq. SHINNICK RYAN & RANSAVAGE P.C. 4001 Meadows Lane Las Vegas, NV 89107 (702) 631-8014	Defendant(s): U.S. Home Corporation 2490 Paseo Verde Parkway, Suite 120 Henderson, NV 89074 Attorney (name/address/phone):
---	---

II. Nature of Controversy (Please select the one most applicable filing type below)

Civil Case Filing Types

<p align="center">Real Property</p> <p>Landlord/Tenant</p> <p><input type="checkbox"/> Unlawful Detainer</p> <p><input type="checkbox"/> Other Landlord/Tenant</p> <p>Title to Property</p> <p><input type="checkbox"/> Judicial Foreclosure</p> <p><input type="checkbox"/> Other Title to Property</p> <p>Other Real Property</p> <p><input type="checkbox"/> Condemnation/Eminent Domain</p> <p><input type="checkbox"/> Other Real Property</p>	<p align="center">Torts</p> <p>Negligence</p> <p><input type="checkbox"/> Auto</p> <p><input type="checkbox"/> Premises Liability</p> <p><input type="checkbox"/> Other</p> <p>Malpractice</p> <p><input type="checkbox"/> Medical/Dental</p> <p><input type="checkbox"/> Legal</p> <p><input type="checkbox"/> Accounting</p> <p><input type="checkbox"/> Other Malpractice</p>	<p>Other Torts</p> <p><input type="checkbox"/> Product Liability</p> <p><input type="checkbox"/> Intentional Misconduct</p> <p><input type="checkbox"/> Employment Torts</p> <p><input type="checkbox"/> Insurance Tort</p> <p><input type="checkbox"/> Other Tort</p>
<p align="center">Probate</p> <p>Probate (select case type and estate value)</p> <p><input type="checkbox"/> Summary Administration</p> <p><input type="checkbox"/> General Administration</p> <p><input type="checkbox"/> Special Administration</p> <p><input type="checkbox"/> Set Aside</p> <p><input type="checkbox"/> Trust/Conservatorship</p> <p><input type="checkbox"/> Other Probate</p> <p>Estate Value</p> <p><input type="checkbox"/> Over \$200,000</p> <p><input type="checkbox"/> Between \$100,000 and \$200,000</p> <p><input type="checkbox"/> Under \$100,000 or Unknown</p> <p><input type="checkbox"/> Under \$2,500</p>	<p align="center">Construction Defect & Contract</p> <p>Construction Defect</p> <p><input checked="" type="checkbox"/> Chapter 40</p> <p><input type="checkbox"/> Other Construction Defect</p> <p>Contract Case</p> <p><input type="checkbox"/> Uniform Commercial Code</p> <p><input type="checkbox"/> Building and Construction</p> <p><input type="checkbox"/> Insurance Carrier</p> <p><input type="checkbox"/> Commercial Instrument</p> <p><input type="checkbox"/> Collection of Accounts</p> <p><input type="checkbox"/> Employment Contract</p> <p><input type="checkbox"/> Other Contract</p>	<p align="center">Judicial Review/Appeal</p> <p>Judicial Review</p> <p><input type="checkbox"/> Foreclosure Mediation Case</p> <p><input type="checkbox"/> Petition to Seal Records</p> <p><input type="checkbox"/> Mental Competency</p> <p>Nevada State Agency Appeal</p> <p><input type="checkbox"/> Department of Motor Vehicle</p> <p><input type="checkbox"/> Worker's Compensation</p> <p><input type="checkbox"/> Other Nevada State Agency</p> <p>Appeal Other</p> <p><input type="checkbox"/> Appeal from Lower Court</p> <p><input type="checkbox"/> Other Judicial Review/Appeal</p>
<p align="center">Civil</p> <p>Civil Writ</p> <p><input type="checkbox"/> Writ of Habeas Corpus</p> <p><input type="checkbox"/> Writ of Mandamus</p> <p><input type="checkbox"/> Writ of Quo Warrant</p>	<p align="center">Writ</p> <p><input type="checkbox"/> Writ of Prohibition</p> <p><input type="checkbox"/> Other Civil Writ</p>	<p align="center">Other Civil Filing</p> <p>Other Civil Filing</p> <p><input type="checkbox"/> Compromise of Minor's Claim</p> <p><input type="checkbox"/> Foreign Judgment</p> <p><input type="checkbox"/> Other Civil Matters</p>

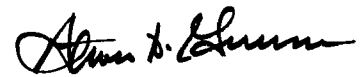
Business Court filings should be filed using the Business Court civil coversheet.

February 20, 2015

Date

/s/ **Bradley S. Rosenberg**

Signature of initiating party or representative



CLERK OF THE COURT

1 **FFCO**
2 Gregory H. King, Bar No. 7777
3 ghk@paynefears.com
4 Sarah J. Odia, Bar No. 11053
5 sjo@paynefears.com
6 PAYNE & FEARS LLP
7 7251 W. Lake Mead Blvd., Suite 525
8 Las Vegas, Nevada 89128
9 Telephone: (702) 851-0300
10 Facsimile: (702) 851-0315

11 Attorneys for Defendant
12 U.S. HOME CORPORATION

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 THE MICHAEL BALLESTEROS TRUST;
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17 FEDERICO AGUAYO, individually; FELIPE
18 ENRIQUEZ, individually; JIMMY FOSTER
19 JR., individually; THE GARCIA FAMILY
20 TRUST; ARNULFO ORTEGA-GOMEZ and
21 ELVIRA GOMEZ-ORTEGA, individually;
22 JOHN J. and IRMA A. OLSON, individually;
23 OMAR PONCE, individually; BRANDON
24 WEAVER, individually; JON YATES,
25 individually; MINTESNOT
26 WOLDETSADIK, individually; and ROES 1
27 through 500, inclusive,

28 Plaintiffs,

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29 U.S. HOME CORPORATION, a Delaware
30 Corporation; CAMPBELL CONCRETE OF
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32 VALENTE CONCRETE, LLC. a Nevada
33 Limited-Liability Company; RED ROSE,
34 INC., a Nevada Corporation; REPUBLIC
35 ELECTRIC, INC., a Nevada Corporation; and
36 DOES 1 through 500, inclusive,

37 Defendants.

Case No. A-15-714219-D
Dept. No. XXXI

**FINDINGS OF FACTS, CONCLUSIONS
OF LAW, AND ORDER**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter, concerning DEFENDANT U.S. HOME CORPORATION'S
("DEFENDANT" or "US HOME") Motion to Compel Arbitration filed on April 30, 2015, came

PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300



1 on for hearing on the 3rd day of June 2015 at the hour of 9:00 a.m. before Department XXXI of
2 the Eighth Judicial District Court, in and for Clark County, Nevada with the honorable JUDGE
3 JOANNA S. KISHNER presiding. PLAINTIFFS appeared by and through their attorney, DUANE
4 E. SHINNICK, ESQ. of the law firm, SHINNICK, RYAN & RANSAVAGE, P.C.; and
5 DEFENDANT U.S. HOME CORPORATION appeared by and through its attorney, GREGORY
6 KING, ESQ. of the law firm, PAYNE & FEARS LLP. All other appearances noted in the record.
7 Having reviewed the papers and pleadings on file herein, and heard the oral arguments of the
8 attorneys, the Court makes the following Findings of Fact, and Conclusions of Law:

9 FINDINGS OF FACT AND PROCEDURAL HISTORY

10 1. PLAINTIFFS THE MICHAEL BALLESTEROS TRUST; RODRIGO ASANION;
11 FEDERICO AGUAYO; FELIPE ENRIQUEZ; JIMMY FOSTER JR.; THE GARCIA FAMILY
12 TRUST; ARNULFO ORTEGA-GOMEZ and EL VIRA GOMEZ-ORTEGA; JOHN J. and IRMA
13 A. OLSON; OMAR PONCE; BRANDON WEAVER; JON YATES; and MINTESNOT
14 WOLDETSADIK (“PLAINTIFFS”) are alleged to be owners of individual residences within the
15 “Azure Manor/Rancho de Paz” development located in Las Vegas, Nevada.

16 2. The “Azure Manor/Rancho de Paz” community was developed and/or built by
17 DEFENDANT and sold to PLAINTIFFS, or PLAINTIFFS’ predecessors, from approximately
18 2004 to 2005.

19 3. On February 20, 2015, twelve (12) of the PLAINTIFF homeowner groups¹ filed
20 their Complaint against DEFENDANT as a result of an alleged multitude of constructional defects
21 located within the single family residences and common area elements² located within the Azure
22 Manor/Rancho de Paz community. The matter was assigned to Department XXXI.

23 4. On April 30, 2015, DEFENDANT¹ moved this Court to compel all twelve (12) of
24 the PLAINTIFF homeowner groups to seek redress of their construction defect disputes via
25 arbitration (the “Motion”) based upon arbitration provisions within the Covenants, Conditions and
26 Restrictions (“CC&Rs”) of the Azure Manor/Rancho de Paz community where their homes are

27 ¹ A “homeowner group” encompasses those owners who jointly own the residence.

28 ² See PLAINTIFFS’ Construction Defect Complaint filed on February 20, 2015, Paragraphs 3, 21, 22, 23, and 24.

1 located. DEFENDANT further seeks to specifically compel arbitration for construction defects for
2 PLAINTIFFS John and Irma Olson, and Michael Ballesteros, as trustee of the Michael Ballesteros
3 Trust, based upon the arbitration provisions provided within Paragraph 18 of their purchase and
4 sales agreements ("PSAs") entered into with DEFENDANT US HOME.

5 5. DEFENDANT argues that all PLAINTIFFS are bound by the CC&Rs, and the
6 arbitration provisions contained therein. DEFENDANT further contends that the Federal
7 Arbitration Act ("FAA"), Title 9 U.S.C. §§1 et seq. mandates enforcement of the arbitration
8 provisions, and any state laws providing the contrary are preempted by the FAA. DEFENDANT
9 asserts that the arbitration provisions are neither procedurally nor substantively unconscionable,
10 therefore such provisions must be enforced. PLAINTIFFS opposed the Motion stating that there
11 are no valid agreements to arbitrate, that the FAA does not apply, that the arbitration provisions
12 are procedurally and substantively unconscionable, the arbitration provisions are contrary to
13 Nevada law, and that compelling arbitration would not be judicially efficient. There would have to
14 be twelve (12) separate arbitrations (assuming that agreements to arbitrate were proven as to all
15 PLAINTIFFS).

16 CONCLUSIONS OF LAW

17 6. In analyzing the matter, this Court first notes that in order to compel arbitration,
18 DEFENDANT US HOME must show that there is a valid and enforceable agreement between the
19 parties to arbitrate. See Mitri, et al. v. Arnel Management Company, et al., 157 Cal.App.4th 1164,
20 69 Cal.Rptr.3d 223 (Cal.App. 2007). Here, PLAINTIFFS do not dispute the existence of the
21 arbitration provisions at issue, or that the claims fall within the scope of the arbitration provisions,
22 but rather contend that the arbitration provisions are unenforceable in light of the NRS Chapter 40
23 protections of homeowner rights, and the fact that the provisions are unconscionable.

24 7. The United States Congress enacted the Federal Arbitration Act ("FAA") in 1925
25 in response to widespread judicial hostility to arbitration agreements. See AT&T Mobility, LLC
26 v. Concepcion, ___ U.S. ___, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011), citing Hall Street
27 Associates, LLC v. Mattel, Inc., 552 U.S. 576, 581, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).

28

1 Title 9 U.S.C. § 2, the "primary substantive provision of the Act,"³ provides in relevant part as
2 follows:

3 A written provision in any maritime transaction or a contract evidencing a
4 transaction involving commerce to settle by arbitration a controversy thereafter
5 arising out of such contract or transaction...shall be valid, irrevocable, and
6 enforceable, save upon such grounds as exist at law or in equity for the
7 revocation of any contract

8 8. The United States Supreme Court has described Title 9 U.S.C. § 2 as reflecting
9 both a "liberal federal policy favoring arbitration,"⁴ and the "fundamental principal that
10 arbitration is a matter of contract."⁵ Keeping in line with these principles, the high court has
11 held judges must place arbitration agreements on an equal footing with other contracts, and
12 enforce them according to their terms. AT&T Mobility, LLC, 131 S.Ct. at 1745-46.

13 9. The Court notes that the FAA specifically sets forth in part, "a contract
14 evidencing a transaction *involving commerce* to settle by arbitration a controversy...shall be
15 valid, irrevocable, and enforceable,..." Title 9 U.S.C. §2 (Emphasis added). As other state and
16 federal courts have found, in order to activate the application of the FAA, the commerce
17 involved in the contract must be interstate or foreign. See Bradley v. Brentwood Homes, Inc.,
18 398 S.C. 447, 454, 730 S.E.2d 312, 315-16 (2012), citing 2 S.C. Jur. Arbitration § 6 (Supp.
19 2012) ("Interstate commerce is a necessary basis for application of the federal act, and a
20 contract not so predicated must be governed by state law. To activate application of the federal
21 act, the commerce involved in the contract must be interstate or foreign.").

22 10. The United States Supreme Court has held that the phrase "involving commerce"
23 is the same as "affecting commerce," which has been broadly interpreted to mean Congress
24 intended to use its powers to regulate interstate commerce to its full extent. See Blanton v.
25 Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App. 2002), citing Allied-Bruce Terminex
26 Cos. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed. 753 (1995). "Congress' Commerce
27 Clause power 'may be exercised in individual cases without showing any specific effect upon

28 ³ Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 U.S. 927, 74 L.Ed.2d 765
(1983).

⁴ Moses H. Cone Memorial Hospital, 460 U.S. at 24.

⁵ Rent-A-Center, West Inc. v. Jackson, 561 U.S. 63, ___, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010).

1 interstate commerce' if in the aggregate the economic activity in question would represent 'a
2 general practice...subject to federal control.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 53, 56-
3 57, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003), quoting Mandeville Island Farms, Inc. v. Am.
4 Crystal Sugar Co., 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed.2d 1328 (1948). "Despite this
5 expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the
6 entire field of arbitration." Zabinski v. Bright Acres Associates, 346 S.C. 580, 592, 553 S.E.2d
7 110, 116 (2001), citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford
8 Junior University, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (Emphasis added).

9 11. Both state and federal jurisdictions addressing the issue have held the sale of
10 residential real estate is inherently intrastate, whereby the FAA does not apply. See Sancii v.
11 Robards, 289 F.Supp.2d 855, 858 (W.D.Ky. 2003); SI V, LLC v. FMC Corporation, 223
12 F.Supp.2d. 1059, 1062 (N.D.Cal. 2002), citing Cecala v. Moore, 982 F.Supp. 609,612 (N.D.Ill.
13 1997); Bradley, 298 S.C. at 456, 730 S.E.2d at 317; see also Garrison v. Palmas Del Mar
14 Homeowners Association, Inc., 538 F.Supp.2d 468, 473 (D.P.R. 2008). These courts reason that
15 contracts strictly for the sale of residential real estate focus entirely on the commodity, which is
16 the land firmly planted in one particular state. The citizenship of the immediate parties, the buyer
17 and seller, or their movements to and from that state are incidental to the real estate transaction.
18 That is, those movements are not part of the transaction itself.

19 12. In the present case, this Court concludes that the FAA does not apply to the
20 arbitration agreements because the construction defect claims at issue relate to real property
21 contained entirely within the state of Nevada, and therefore do not affect interstate commerce.
22 Furthermore, no federal law is implicated by the construction defect claims. For these reasons,
23 logic suggests such transactions are not among those considered as involving interstate commerce.

24 13. Although the Court finds the FAA to be inapplicable here⁶, arbitration may still be
25 compelled pursuant to Nevada law. In Nevada, strong public policy favors arbitration, and such
26 clauses generally are enforceable. Gonski v. Second Judicial Dist. Ct., 126 Nev. ____, 245 P.3d

27 ⁶ Even if the FAA were found to apply, "[g]enerally applicable contract defenses, such as fraud, duress, or
28 unconscionability, may be applied to invalidate arbitration agreements without contravening. . .[the FAA]". Doctor's
Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 116 S.Ct. 1652, 1653 (1996).

1 1164, 1168 (2010), citing D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159, 1162
2 (2004). The Supreme Court of Nevada has held that there is a “presumption of arbitrability” where
3 there is an agreement to arbitrate. Phillips v. Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).
4 Even though the party seeking to enforce an arbitration clause bears the burden of proving the
5 clause's valid existence, any party opposing the arbitration may establish a defense to enforcement.
6 Gonski, 245 P.3d at 1169, citing D.R. Horton, 120 Nev. at 553, 96 P.3d at 1162.

7 14. The arbitration clause may be invalidated if it is found by this Court to be
8 unconscionable. Cf Picardi v. Eighth Judicial Dist. Ct., 127 Nev. ___, 251 P.2d 723, 726 (2011),
9 effectively overruled by AT&T Mobility, LLC v. Concepcion, ___ U.S. ___, 131 S.Ct. 1740, 179
10 L.Ed.2d 742 (2011), quoting Rivero v. Rivero, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009)
11 (“Parties are free to contract, and the courts will enforce their contracts if they are not
12 unconscionable, illegal, or in violation of public policy.”). In order to find the arbitration
13 provisions to arbitrate unconscionable, the Court must determine whether the arbitration
14 provisions are both procedurally and substantively unconscionable. D.R. Horton, 120 Nev. at 553,
15 quoting Burch v. Second Judicial Dist. Ct., 118 Nev. 438, 442, 49 P.3d 647, ___ (2002). That is, a
16 finding of unconscionability requires the “procedural” element focusing on “oppression” or
17 “surprise” due to unequal bargaining power, and the “substantive” factor on “overly harsh” or
18 “one-sided” results. Armendariz v. Foundation Health Psychcare Service, Inc., 24 Cal.4th 83, 114,
19 99 Cal.Rptr.2d 745, ___, 6 P.3d 669, 690 (Cal. 2000).

20 15. An arbitration agreement is “procedurally unconscionable when a party lacks a
21 meaningful opportunity to agree to the clause terms either because of unequal bargaining power,
22 as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a
23 review of the contract.” D.R. Horton, 120 Nev. at 554. “Procedural unconscionability” often
24 involves the “use of fine print or complicated, incomplete or misleading language that fails to
25 inform a reasonable person of the contractual language’s consequences.” D.R. Horton, 120 Nev. at
26 556. The defendant does not have a duty to explain in detail each and every right the plaintiff
27 would be waiving by agreeing to arbitration for the provision to be enforceable. However, an
28

1 arbitration clause, at the least, must be conspicuous and clearly place him or her on notice that
2 he/she is waiving important rights under Nevada law. D.R. Horton, 120 Nev. at 556-57.

3 16. In the present matter, the Court finds that the arbitration clause set forth in the
4 CC&Rs is procedurally unconscionable. The arbitration provision is located on page 76 of 86 of
5 the CC&Rs, and is in the same sized font as the rest of the CC&Rs. The arbitration provisions are
6 inconspicuously placed within the voluminous document, and there is nothing to draw attention to
7 the average home buyer of the important rights being waived. The text of the arbitration provisions
8 is not bolded or capitalized, is in the same font as the other provisions of the CC&Rs, and does not
9 stand out to draw attention to the fact that significant rights are being waived.

10 17. Furthermore, the CC&Rs abrogate Nevada's Chapter 40 and are against public
11 policy in requiring different timelines and/or additional procedures to bring construction defect
12 claims. The Nevada Supreme Court has held that arbitration provisions in homes sales contracts
13 (and presumably in CC&Rs) that abrogate a homeowner's NRS Chapter 40 rights are not
14 enforceable as they are unconscionable and violate the public policy behind NRS Chapter 40. See
15 Gonski v. Second Judicial Dist. Ct., 126 Nev. ___, 245 P.3d 1164 (2010). Here, the arbitration
16 hearing is to be convened no later than one hundred eighty (180) days from the date the arbitrator
17 is appointed. This timeline and procedure is not mandated under NRS Chapter 40.

18 18. The arbitration provisions in Paragraph 18 of the PSAs are also procedurally
19 unconscionable because they do not draw attention to the arbitration provisions. To the contrary,
20 the text of the arbitration clauses is not capitalized or bolded to bring attention to such provisions.
21 There is no explicit "construction defect" term mentioned indicating that such claims must be
22 arbitrated. The arbitration clauses, like many others within the PSAs, are inconspicuous on page 2
23 of 4. There is nothing to highlight the importance of the arbitration provisions. Furthermore, the
24 arbitration provisions are confusing because they state that claims should be arbitrated, not by or
25 in a court of law. However, shortly thereafter the provisions state that "in the event the
26 Homeowner's Warranty provided by Seller does not provide for binding arbitration, a claim under,
27 or covered by, the warranty will be administered as provided in the warranty prior to submission
28 to binding arbitration." It is therefore uncertain whether Plaintiffs must first proceed through a

1 Homeowner's Warranty process prior to seeking arbitration for any claims. Even had Plaintiffs
2 been aware that there were arbitration provisions and read them, it would be difficult to understand
3 this confusing and apparently contradictory provision.

4 19. The arbitration provisions do not clearly state that the purchaser is waiving his right
5 to a jury trial, nor does it mention any impact on the purchaser's rights under NRS Chapter 40.
6 The Court finds that the arbitration provisions lack clarity. While a DEFENDANT does not have
7 the duty to explain in detail each and every right the prospective home buyer would be waiving by
8 agreeing to Paragraph 18, the arbitration provisions must be conspicuous and clearly place the
9 purchaser on notice that he or she is waiving substantial rights under Nevada law. As previously
10 indicated, PLAINTIFFS were not given an opportunity to negotiate the terms of the arbitration
11 provisions, and/or that they would be given up certain important rights, including Chapter 40
12 rights. For these reasons, this Court concludes that Paragraph 18 of the PSAs is "procedurally
13 unconscionable".

14 20. The next issue is whether the arbitration clauses in the CC&Rs and PSAs are
15 "substantively unconscionable". "Substantive unconscionability" focuses on the "one-sidedness
16 of the contract terms." D.R. Horton, 120 Nev. at 554. In D.R. Horton, 120 Nev. at 554, the
17 Nevada Supreme Court relied upon the substantive unconscionability analysis employed by the
18 Ninth Circuit Court of Appeals in Ting v. AT&T, 319 F.2d 1126, 1149 (9th Cir. 2003). In that
19 case, the Ninth Circuit Court of Appeals required an arbitration agreement have a "modicum of
20 bilaterality." Ting, 319 F.2d at 1149, quoting Armendariz, 99 Cal.Rptr.2d 745, 6 P.3d at 692.

21 21. Section 17.16 of the CC&Rs state that "costs of the arbitration shall be borne
22 equally by the parties." The Nevada Supreme Court in the D.R. Horton case found substantively
23 unconscionability when there was a requirement that each party pay equally for the costs of
24 arbitration. D.R. Horton, 120 Nev. at 1165.

25 22. Further, the arbitration provisions contained in the CC&Rs would not be binding on
26 any subcontractors. As the subcontractors would not be required to arbitrate, there would be
27 inconsistent results – those reached in arbitration versus the court, along with a duplication of
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1 efforts, and no saving of costs. As written, the CC&Rs would give US HOME the sole right to
2 bring subcontractor parties in the separately arbitrated matters or to consolidate proceedings.

3 23. In Paragraph 18, page 3, of the PSA, the "Seller shall have the option to include its
4 subcontractors and suppliers as parties in the mediation and arbitration". There is no bilaterality in
5 the sole option of DEFENDANT to include subcontractors and suppliers in mediation and
6 arbitration. This provision is impermissibly one-sided as it divests PLAINTIFFS of the similar
7 right to include subcontractors and suppliers that it would ordinarily be given under NRS Chapter
8 40 in litigation. Further, Paragraph 18 of the PSAs requires the parties to equally share the costs of
9 the arbitration, and implicitly to bear their own attorneys' fees. Such provisions contradict the
10 policies underlying NRS 40.600 et seq. which provide the claimant is entitled to reimbursement of
11 his or her attorney's fees if a constructional defect is proven, and the contractor or builder elected
12 not to inspect and repair. See NRS 40.655. This is in abrogation of a claimant's right under NRS
13 Chapter 40, which alone is enough for a finding of substantive unconscionability. See Gonski v.
14 Second Judicial Dist. Ct., 126 Nev. ___, 245 P.3d 1164, 1173 (2010). In addition, under Nevada
15 law, the prevailing party is entitled to reimbursement of costs. See NRS Chapter 18. In this Court's
16 view, such provisions, essentially stripping the home buyer of his entitlements, indicate
17 "impermissible one-sidedness". Furthermore, the PLAINTIFFS were not given the opportunity to
18 negotiate the terms of such provisions, therefore they were contracts to "take it or leave it", which
19 are impermissibly adhesive. All in all, this Court concludes that the arbitration provisions in the
20 CC&Rs and in Paragraph 18 of the PSAs are "substantively unconscionable" consistent with the
21 findings in D.R. Horton, Gonski, and Burch cases.

22 24. As the arbitration provisions in both the CC&Rs and PSAs are both procedurally
23 and substantively unconscionable, the Court finds that the arbitration provisions are
24 unenforceable.

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Accordingly, and based upon the aforementioned Findings of Fact and Conclusions of Law,

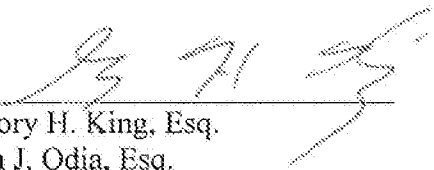
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that DEFENDANT U.S. HOME CORPORATION'S Motion to Compel Arbitration filed April 30, 2015 is denied.

DATED this 18 day of May 2015.



HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

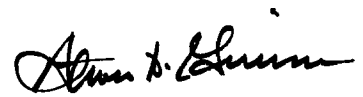
Respectfully submitted by:



Gregory H. King, Esq.
Sarah J. Ochia, Esq.
PAYNE & FEARS LLP
7251 W. Lake Mead Blvd., Suite 525
Las Vegas, NV 89128

Attorneys for DEFENDANT
U.S. HOME CORPORATION
4837-5337-6549.1

PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 651-4000



CLERK OF THE COURT

1 **NEOJ**
Gregory H. King, Bar No. 7777
2 ghk@paynefears.com
Sarah J. Odia, Bar No. 11053
3 sjo@paynefears.com
PAYNE & FEARS LLP
4 7251 W. Lake Mead Blvd., Suite 525
Las Vegas, Nevada 89128
5 Telephone: (702) 851-0300
Facsimile: (702) 851-0315
6
7 Attorneys for Defendant
U.S. HOME CORPORATION

8
9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

Case No. A-15-714219-D
Dept. No. XXXI

NOTICE OF ENTRY OF ORDER

11 THE MICHAEL BALLESTEROS TRUST;
RODRIGO ASANION, individually;
12 FEDERICO AGUAYO, individually; FELIPE
ENRIQUEZ, individually; JIMMY FOSTER
13 JR., individually; THE GARCIA FAMILY
TRUST; ARNULFO ORTEGA-GOMEZ and
14 ELVIRA GOMEZ-ORTEGA, individually;
JOHN J. and IRMA A. OLSON, individually;
15 OMAR PONCE, individually; BRANDON
WEAVER, individually; JON YATES,
16 individually; MINTESNOT
WOLDETSADIK, individually; and ROES 1
17 through 500, inclusive,

18 Plaintiffs,

19 v.

20 U.S. HOME CORPORATION, a Delaware
Corporation; CAMPBELL CONCRETE OF
21 NEVADA, INC. a Nevada Corporation;
VALENTE CONCRETE, LLC. a Nevada
22 Limited-Liability Company; RED ROSE,
INC., a Nevada Corporation; REPUBLIC
23 ELECTRIC, INC., a Nevada Corporation; and
DOES 1 through 500, inclusive,

24 Defendants.
25
26
27
28

PAYNE & FEARS LLP

ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300

PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that an Order was entered and filed on the 20th day of August, 2015, a copy of which is attached hereto.

DATED: August 21, 2015

PAYNE & FEARS LLP

By /s/ Sarah J. Odia

GREGORY H. KING, NV Bar No. 7777
SARAH J. ODIA, NV Bar No. 11053
7251 W. Lake Mead Blvd., Suite 525
Las Vegas, Nevada 89128
Tel. (702) 851-0300

Attorneys for Defendant U.S. HOME
CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, I deposited a true and correct copy of the above and foregoing, **NOTICE OF ENTRY OF ORDER** in the United States mail, postage prepaid, at Las Vegas, NV, to the last known address as follows:

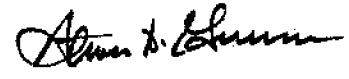
Duane E. Shinnick, Esq.
Melissa Bybee, Esq.
Bradley S. Rosenberg, Esq.
Shinnick, Ryan & Ransavage, P.C.
4001 Meadows Lane
Las Vegas, NV 89107
Tel/Fax: (702) 631-8014/(702) 631-8024
Attorneys for Plaintiffs

/s/ Nancy Babas
Nancy Babas
An Employee of PAYNE & FEARS LLP

4850-5922-6914.1

PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., STE 525
LAS VEGAS, NV 89128
(702) 851-0300

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CLERK OF THE COURT

1 **FFCO**
Gregory H. King, Bar No. 7777
2 ghk@paynefears.com
Sarah J. Odia, Bar No. 11053
3 sjo@paynefears.com
PAYNE & FEARS LLP
4 7251 W. Lake Mead Blvd., Suite 525
Las Vegas, Nevada 89128
5 Telephone: (702) 851-0300
Facsimile: (702) 851-0315

6 Attorneys for Defendant
7 U.S. HOME CORPORATION

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 THE MICHAEL BALLESTEROS TRUST;
11 RODRIGO ASANION, individually;
FEDERICO AGUAYO, individually; FELIPE
12 ENRIQUEZ, individually; JIMMY FOSTER
JR., individually; THE GARCIA FAMILY
13 TRUST; ARNULFO ORTEGA-GOMEZ and
ELVIRA GOMEZ-ORTEGA, individually;
14 JOHN J. and IRMA A. OLSON, individually;
OMAR PONCE, individually; BRANDON
15 WEAVER, individually; JON YATES,
individually; MINTESNOT
16 WOLDETSADIK, individually; and ROES 1
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17 Plaintiffs,

18 v.

19 U.S. HOME CORPORATION, a Delaware
20 Corporation; CAMPBELL CONCRETE OF
NEVADA, INC. a Nevada Corporation;
21 VALENTE CONCRETE, LLC. a Nevada
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22 INC., a Nevada Corporation; REPUBLIC
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24 Defendants.

Case No. A-15-714219-D
Dept. No. XXXI

**FINDINGS OF FACTS, CONCLUSIONS
OF LAW, AND ORDER**

25
26 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

27 This matter, concerning DEFENDANT U.S. HOME CORPORATION'S
28 ("DEFENDANT" or "US HOME") Motion to Compel Arbitration filed on April 30, 2015, came



PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300

1 on for hearing on the 3rd day of June 2015 at the hour of 9:00 a.m. before Department XXXI of
2 the Eighth Judicial District Court, in and for Clark County, Nevada with the honorable JUDGE
3 JOANNA S. KISHNER presiding. PLAINTIFFS appeared by and through their attorney, DUANE
4 E. SHINNICK, ESQ. of the law firm, SHINNICK, RYAN & RANSAVAGE, P.C.; and
5 DEFENDANT U.S. HOME CORPORATION appeared by and through its attorney, GREGORY
6 KING, ESQ. of the law firm, PAYNE & FEARS LLP. All other appearances noted in the record.
7 Having reviewed the papers and pleadings on file herein, and heard the oral arguments of the
8 attorneys, the Court makes the following Findings of Fact, and Conclusions of Law:

9 FINDINGS OF FACT AND PROCEDURAL HISTORY

10 1. PLAINTIFFS THE MICHAEL BALLESTEROS TRUST; RODRIGO ASANION;
11 FEDERICO AGUAYO; FELIPE ENRIQUEZ; JIMMY FOSTER JR.; THE GARCIA FAMILY
12 TRUST; ARNULFO ORTEGA-GOMEZ and ELVIRA GOMEZ-ORTEGA; JOHN J. and IRMA
13 A. OLSON; OMAR PONCE; BRANDON WEAVER; JON YATES; and MINTESNOT
14 WOLDETSADIK (“PLAINTIFFS”) are alleged to be owners of individual residences within the
15 “Azure Manor/Rancho de Paz” development located in Las Vegas, Nevada.

16 2. The “Azure Manor/Rancho de Paz” community was developed and/or built by
17 DEFENDANT and sold to PLAINTIFFS, or PLAINTIFFS’ predecessors, from approximately
18 2004 to 2005.

19 3. On February 20, 2015, twelve (12) of the PLAINTIFF homeowner groups¹ filed
20 their Complaint against DEFENDANT as a result of an alleged multitude of constructional defects
21 located within the single family residences and common area elements² located within the Azure
22 Manor/Rancho de Paz community. The matter was assigned to Department XXXI.

23 4. On April 30, 2015, DEFENDANT moved this Court to compel all twelve (12) of
24 the PLAINTIFF homeowner groups to seek redress of their construction defect disputes via
25 arbitration (the “Motion”) based upon arbitration provisions within the Covenants, Conditions and
26 Restrictions (“CC&Rs”) of the Azure Manor/Rancho de Paz community where their homes are

27 ¹ A “homeowner group” encompasses those owners who jointly own the residence.

28 ² See PLAINTIFFS’ Construction Defect Complaint filed on February 20, 2015, Paragraphs 3, 21, 22, 23, and 24.

1 located. DEFENDANT further seeks to specifically compel arbitration for construction defects for
2 PLAINTIFFS John and Irma Olson, and Michael Ballesteros, as trustee of the Michael Ballesteros
3 Trust, based upon the arbitration provisions provided within Paragraph 18 of their purchase and
4 sales agreements (“PSAs”) entered into with DEFENDANT US HOME.

5 5. DEFENDANT argues that all PLAINTIFFS are bound by the CC&Rs, and the
6 arbitration provisions contained therein. DEFENDANT further contends that the Federal
7 Arbitration Act (“FAA”), Title 9 U.S.C. §§1 et seq., mandates enforcement of the arbitration
8 provisions, and any state laws providing the contrary are preempted by the FAA. DEFENDANT
9 asserts that the arbitration provisions are neither procedurally nor substantively unconscionable,
10 therefore such provisions must be enforced. PLAINTIFFS opposed the Motion stating that there
11 are no valid agreements to arbitrate, that the FAA does not apply, that the arbitration provisions
12 are procedurally and substantively unconscionable, the arbitration provisions are contrary to
13 Nevada law, and that compelling arbitration would not be judicially efficient. There would have to
14 be twelve (12) separate arbitrations (assuming that agreements to arbitrate were proven as to all
15 PLAINTIFFS).

16 CONCLUSIONS OF LAW

17 6. In analyzing the matter, this Court first notes that in order to compel arbitration,
18 DEFENDANT US HOME must show that there is a valid and enforceable agreement between the
19 parties to arbitrate. See Mitri, et al. v. Arnel Management Company, et al., 157 Cal.App.4th 1164,
20 69 Cal.Rptr.3d 223 (Cal.App. 2007). Here, PLAINTIFFS do not dispute the existence of the
21 arbitration provisions at issue, or that the claims fall within the scope of the arbitration provisions,
22 but rather contend that the arbitration provisions are unenforceable in light of the NRS Chapter 40
23 protections of homeowner rights, and the fact that the provisions are unconscionable.

24 7. The United States Congress enacted the Federal Arbitration Act (“FAA”) in 1925
25 in response to widespread judicial hostility to arbitration agreements. See AT&T Mobility, LLC
26 v. Concepcion, ___U.S.____, 131 S.Ct. 1740, 1745, 179 L.Ed.2d 742 (2011), citing Hall Street
27 Associates, LLC v. Mattel, Inc., 552 U.S. 576, 581, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).
28

1 Title 9 U.S.C. § 2, the "primary substantive provision of the Act,"³ provides in relevant part as
2 follows:

3 A written provision in any maritime transaction or a contract evidencing a
4 transaction involving commerce to settle by arbitration a controversy thereafter
5 arising out of such contract or transaction...shall be valid, irrevocable, and
6 enforceable, save upon such grounds as exist at law or in equity for the
7 revocation of any contract

8 8. The United States Supreme Court has described Title 9 U.S.C. § 2 as reflecting
9 both a "liberal federal policy favoring arbitration,"⁴ and the "fundamental principal that
10 arbitration is a matter of contract."⁵ Keeping in line with these principles, the high court has
11 held judges must place arbitration agreements on an equal footing with other contracts, and
12 enforce them according to their terms. AT&T Mobility, LLC, 131 S.Ct. at 1745-46.

13 9. The Court notes that the FAA specifically sets forth in part, "a contract
14 evidencing a transaction *involving commerce* to settle by arbitration a controversy...shall be
15 valid, irrevocable, and enforceable,..." Title 9 U.S.C. § 2 (Emphasis added). As other state and
16 federal courts have found, in order to activate the application of the FAA, the commerce
17 involved in the contract must be interstate or foreign. See Bradley v. Brentwood Homes, Inc.,
18 398 S.C. 447, 454, 730 S.E.2d 312, 315-16 (2012), citing 2 S.C. Jur. Arbitration § 6 (Supp.
19 2012) ("Interstate commerce is a necessary basis for application of the federal act, and a
20 contract not so predicated must be governed by state law. To activate application of the federal
21 act, the commerce involved in the contract must be interstate or foreign.").

22 10. The United States Supreme Court has held that the phrase "involving commerce"
23 is the same as "affecting commerce," which has been broadly interpreted to mean Congress
24 intended to use its powers to regulate interstate commerce to its full extent. See Blanton v.
25 Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App. 2002), citing Allied-Bruce Terminex
Cos. v. Dobson, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed. 753 (1995). "Congress' Commerce
26 Clause power 'may be exercised in individual cases without showing any specific effect upon

27 ³ Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 U.S. 927, 74 L.Ed.2d 765
(1983).

28 ⁴ Moses H. Cone Memorial Hospital, 460 U.S. at 24.

⁵ Rent-A-Center, West Inc. v. Jackson, 561 U.S. 63, ___, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010).

1 interstate commerce' if in the aggregate the economic activity in question would represent 'a
2 general practice...subject to federal control.'" Citizens Bank v. Alafabco, Inc., 539 U.S. 53, 56-
3 57, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003), quoting Mandeville Island Farms, Inc. v. Am.
4 Crystal Sugar Co., 334 U.S. 219, 236, 68 S.Ct. 996, 92 L.Ed.2d 1328 (1948). "Despite this
5 expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the
6 entire field of arbitration." Zabinski v. Bright Acres Associates, 346 S.C. 580, 592, 553 S.E.2d
7 110, 116 (2001), citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford
8 Junior University, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (Emphasis added).

9 11. Both state and federal jurisdictions addressing the issue have held the sale of
10 residential real estate is inherently intrastate, whereby the FAA does not apply. See Saneij v.
11 Robards, 289 F.Supp.2d 855, 858 (W.D.Ky. 2003); SI V, LLC v. FMC Corporation, 223
12 F.Supp.2d. 1059, 1062 (N.D.Cal. 2002), citing Cecala v. Moore, 982 F.Supp. 609,612 (N.D.Ill.
13 1997); Bradley, 298 S.C. at 456, 730 S.E.2d at 317; see also Garrison v. Palmas Del Mar
14 Homeowners Association, Inc., 538 F.Supp.2d 468, 473 (D.P.R. 2008). These courts reason that
15 contracts strictly for the sale of residential real estate focus entirely on the commodity, which is
16 the land firmly planted in one particular state. The citizenship of the immediate parties, the buyer
17 and seller, or their movements to and from that state are incidental to the real estate transaction.
18 That is, those movements are not part of the transaction itself.

19 12. In the present case, this Court concludes that the FAA does not apply to the
20 arbitration agreements because the construction defect claims at issue relate to real property
21 contained entirely within the state of Nevada, and therefore do not affect interstate commerce.
22 Furthermore, no federal law is implicated by the construction defect claims. For these reasons,
23 logic suggests such transactions are not among those considered as involving interstate commerce.

24 13. Although the Court finds the FAA to be inapplicable here⁶, arbitration may still be
25 compelled pursuant to Nevada law. In Nevada, strong public policy favors arbitration, and such
26 clauses generally are enforceable. Gonski v. Second Judicial Dist. Ct., 126 Nev. ___, 245 P.3d

27 ⁶ Even if the FAA were found to apply, "[g]enerally applicable contract defenses, such as fraud, duress, or
28 unconscionability, may be applied to invalidate arbitration agreements without contravening. . .[the FAA]". Doctor's
Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 116 S.Ct. 1652, 1653 (1996).

1 1164, 1168 (2010), citing D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159, 1162
2 (2004). The Supreme Court of Nevada has held that there is a "presumption of arbitrability" where
3 there is an agreement to arbitrate. Phillips v. Parker, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).
4 Even though the party seeking to enforce an arbitration clause bears the burden of proving the
5 clause's valid existence, any party opposing the arbitration may establish a defense to enforcement.
6 Gonski, 245 P.3d at 1169, citing D.R. Horton, 120 Nev. at 553, 96 P.3d at 1162.

7 14. The arbitration clause may be invalidated if it is found by this Court to be
8 unconscionable. Cf Picardi v. Eighth Judicial Dist. Ct., 127 Nev. ___, 251 P.2d 723, 726 (2011),
9 effectively overruled by AT&T Mobility, LLC v. Concepcion, ___ U.S. ___, 131 S.Ct. 1740, 179
10 L.Ed.2d 742 (2011), quoting Rivero v. Rivero, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009)
11 ("Parties are free to contract, and the courts will enforce their contracts if they are not
12 unconscionable, illegal, or in violation of public policy."). In order to find the arbitration
13 provisions to arbitrate unconscionable, the Court must determine whether the arbitration
14 provisions are both procedurally and substantively unconscionable. D.R. Horton, 120 Nev. at 553,
15 quoting Burch v. Second Judicial Dist. Ct., 118 Nev. 438, 442, 49 P.3d 647, ___ (2002). That is, a
16 finding of unconscionability requires the "procedural" element focusing on "oppression" or
17 "surprise" due to unequal bargaining power, and the "substantive" factor on "overly harsh" or
18 "one-sided" results. Armendariz v. Foundation Health Psychcare Service, Inc., 24 Cal.4th 83, 114,
19 99 Cal.Rptr.2d 745, ___, 6 P.3d 669, 690 (Cal. 2000).

20 15. An arbitration agreement is "procedurally unconscionable when a party lacks a
21 meaningful opportunity to agree to the clause terms either because of unequal bargaining power,
22 as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a
23 review of the contract." D.R. Horton, 120 Nev. at 554. "Procedural unconscionability" often
24 involves the "use of fine print or complicated, incomplete or misleading language that fails to
25 inform a reasonable person of the contractual language's consequences." D.R. Horton, 120 Nev. at
26 556. The defendant does not have a duty to explain in detail each and every right the plaintiff
27 would be waiving by agreeing to arbitration for the provision to be enforceable. However, an
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1 arbitration clause; at the least, must be conspicuous and clearly place him or her on notice that
2 he/she is waiving important rights under Nevada law. D.R. Horton, 120 Nev. at 556-57.

3 16. In the present matter, the Court finds that the arbitration clause set forth in the
4 CC&Rs is procedurally unconscionable. The arbitration provision is located on page 76 of 86 of
5 the CC&Rs, and is in the same sized font as the rest of the CC&Rs. The arbitration provisions are
6 inconspicuously placed within the voluminous document, and there is nothing to draw attention to
7 the average home buyer of the important rights being waived. The text of the arbitration provisions
8 is not bolded or capitalized, is in the same font as the other provisions of the CC&Rs, and does not
9 stand out to draw attention to the fact that significant rights are being waived.

10 17. Furthermore, the CC&Rs abrogate Nevada's Chapter 40 and are against public
11 policy in requiring different timelines and/or additional procedures to bring construction defect
12 claims. The Nevada Supreme Court has held that arbitration provisions in homes sales contracts
13 (and presumably in CC&Rs) that abrogate a homeowner's NRS Chapter 40 rights are not
14 enforceable as they are unconscionable and violate the public policy behind NRS Chapter 40. See
15 Gonski v. Second Judicial Dist. Ct., 126 Nev. ____, 245 P.3d 1164 (2010). Here, the arbitration
16 hearing is to be convened no later than one hundred eighty (180) days from the date the arbitrator
17 is appointed. This timeline and procedure is not mandated under NRS Chapter 40.

18 18. The arbitration provisions in Paragraph 18 of the PSAs are also procedurally
19 unconscionable because they do not draw attention to the arbitration provisions. To the contrary,
20 the text of the arbitration clauses is not capitalized or bolded to bring attention to such provisions.
21 There is no explicit "construction defect" term mentioned indicating that such claims must be
22 arbitrated. The arbitration clauses, like many others within the PSAs, are inconspicuous on page 2
23 of 4. There is nothing to highlight the importance of the arbitration provisions. Furthermore, the
24 arbitration provisions are confusing because they state that claims should be arbitrated, not by or
25 in a court of law. However, shortly thereafter the provisions state that "in the event the
26 Homeowner's Warranty provided by Seller does not provide for binding arbitration, a claim under,
27 or covered by, the warranty will be administered as provided in the warranty prior to submission
28 to binding arbitration." It is therefore uncertain whether Plaintiffs must first proceed through a

1 Homeowner's Warranty process prior to seeking arbitration for any claims. Even had Plaintiffs
2 been aware that there were arbitration provisions and read them, it would be difficult to understand
3 this confusing and apparently contradictory provision.

4 19. The arbitration provisions do not clearly state that the purchaser is waiving his right
5 to a jury trial, nor does it mention any impact on the purchaser's rights under NRS Chapter 40.
6 The Court finds that the arbitration provisions lack clarity. While a DEFENDANT does not have
7 the duty to explain in detail each and every right the prospective home buyer would be waiving by
8 agreeing to Paragraph 18, the arbitration provisions must be conspicuous and clearly place the
9 purchaser on notice that he or she is waiving substantial rights under Nevada law. As previously
10 indicated, PLAINTIFFS were not given an opportunity to negotiate the terms of the arbitration
11 provisions, and/or that they would be given up certain important rights, including Chapter 40
12 rights. For these reasons, this Court concludes that Paragraph 18 of the PSAs is "procedurally
13 unconscionable".

14 20. The next issue is whether the arbitration clauses in the CC&Rs and PSAs are
15 "substantively unconscionable". "Substantive unconscionability" focuses on the "one-sidedness
16 of the contract terms." D.R. Horton, 120 Nev. at 554. In D.R. Horton, 120 Nev. at 554, the
17 Nevada Supreme Court relied upon the substantive unconscionability analysis employed by the
18 Ninth Circuit Court of Appeals in Ting v. AT&T, 319 F.2d 1126, 1149 (9th Cir. 2003). In that
19 case, the Ninth Circuit Court of Appeals required an arbitration agreement have a "modicum of
20 bilaterality." Ting, 319 F.2d at 1149, quoting Armendariz, 99 Cal.Rptr.2d 745, 6 P.3d at 692.

21 21. Section 17.16 of the CC&Rs state that "costs of the arbitration shall be borne
22 equally by the parties." The Nevada Supreme Court in the D.R. Horton case found substantively
23 unconscionability when there was a requirement that each party pay equally for the costs of
24 arbitration. D.R. Horton, 120 Nev. at 1165.

25 22. Further, the arbitration provisions contained in the CC&Rs would not be binding on
26 any subcontractors. As the subcontractors would not be required to arbitrate, there would be
27 inconsistent results – those reached in arbitration versus the court, along with a duplication of
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1 efforts, and no saving of costs. As written, the CC&Rs would give US HOME the sole right to
2 bring subcontractor parties in the separately arbitrated matters or to consolidate proceedings.

3 23. In Paragraph 18, page 3, of the PSA, the "Seller shall have the option to include its
4 subcontractors and suppliers as parties in the mediation and arbitration". There is no bilaterality in
5 the sole option of DEFENDANT to include subcontractors and suppliers in mediation and
6 arbitration. This provision is impermissibly one-sided as it divests PLAINTIFFS of the similar
7 right to include subcontractors and suppliers that it would ordinarily be given under NRS Chapter
8 40 in litigation. Further, Paragraph 18 of the PSAs requires the parties to equally share the costs of
9 the arbitration, and implicitly to bear their own attorneys' fees. Such provisions contradict the
10 policies underlying NRS 40.600 et seq. which provide the claimant is entitled to reimbursement of
11 his or her attorney's fees if a constructional defect is proven, and the contractor or builder elected
12 not to inspect and repair. See NRS 40.655. This is in abrogation of a claimant's right under NRS
13 Chapter 40, which alone is enough for a finding of substantive unconscionability. See Gonski v.
14 Second Judicial Dist. Ct., 126 Nev. ____, 245 P.3d 1164, 1173 (2010). In addition, under Nevada
15 law, the prevailing party is entitled to reimbursement of costs. See NRS Chapter 18. In this Court's
16 view, such provisions, essentially stripping the home buyer of his entitlements, indicate
17 "impermissible one-sidedness". Furthermore, the PLAINTIFFS were not given the opportunity to
18 negotiate the terms of such provisions, therefore they were contracts to "take it or leave it", which
19 are impermissibly adhesive. All in all, this Court concludes that the arbitration provisions in the
20 CC&Rs and in Paragraph 18 of the PSAs are "substantively unconscionable" consistent with the
21 findings in D.R. Horton, Gonski, and Burch cases.

22 24. As the arbitration provisions in both the CC&Rs and PSAs are both procedurally
23 and substantively unconscionable, the Court finds that the arbitration provisions are
24 unenforceable.


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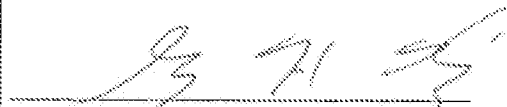
Accordingly, and based upon the aforementioned Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that DEFENDANT U.S. HOME CORPORATION'S Motion to Compel Arbitration filed April 30, 2015 is denied.

DATED this 18 day of Oct 2015.


HONORABLE JOANNA S. KISHNER, DISTRICT COURT JUDGE

Respectfully submitted by:


Gregory H. King, Esq.
Sarah J. Oda, Esq.
PAYNE & FEARS LLP
7251 W. Lake Mead Blvd., Suite 525
Las Vegas, NV 89128

Attorneys for DEFENDANT
U.S. HOME CORPORATION
4837-5337-6549.1

PAYNE & FEARS LLP
ATTORNEYS AT LAW
7251 W. LAKE MEAD BLVD., SUITE 525
LAS VEGAS, NEVADA 89128
(702) 851-0300

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Chapter 40

COURT MINUTES

June 03, 2015

A-15-714219-D Michael Ballesteros Trust, Plaintiff(s)
vs.
U.S. Home Corporation , Defendant(s)

June 03, 2015 9:00 AM Motion to Compel

HEARD BY: Kishner, Joanna S. **COURTROOM:** RJC Courtroom 12B

COURT CLERK: Sandra Harrell

RECORDER: Rachelle Hamilton

REPORTER:

PARTIES

PRESENT: King, Gregory H. Attorney
 Shinnick, Duane E. Attorney

JOURNAL ENTRIES

- DEFENDANT U.S. HOME CORPORATION'S MOTION TO COMPEL ARBITRATION

Extensive arguments by counsel. RULING DEFERRED; Court to further review and a Decision will issue from Chambers. If the Court receives written notification before 6/23/15 that parties jointly want matter stayed, then the Court will defer its decision until farther out.

CONTINUED FOR DECISION: 6/26/15 (CHAMBERS)

DISTRICT COURT
CLARK COUNTY, NEVADA

Chapter 40

COURT MINUTES

June 26, 2015

A-15-714219-D Michael Ballesteros Trust, Plaintiff(s)
vs.
U.S. Home Corporation , Defendant(s)

June 26, 2015 3:00 AM Motion to Compel Defendant U.S.
Home Corporation's
Motion to Compel
Arbitration

HEARD BY: Kishner, Joanna S.

COURTROOM:

COURT CLERK: Andrea Natali

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- This matter came before the Court on June 3, 2015, on Defendant US Home Corporation's Motion to Compel Arbitration. Present at the hearing was Gregory King, Esq., counsel for Defendant US Home Corporation ("US Home") and Duane Shinnick, Esq., counsel for Plaintiffs. The Court deferred ruling on the motion to further review the issues presented. After a full review of all the papers, pleadings, documents on file, oral arguments of counsel, and all applicable statutes and case law, the Court finds as follows.

Defendant US Home seeks to compel arbitration for the construction defects alleged by Plaintiffs in this case. Defendant asserts that each of the homeowners is bound by the arbitration provision contained within the CC&Rs of the Rancho de Paz community where their homes are located, and that Plaintiffs John and Irma Olson and Michael Ballesteros, as trustee of the Michael Ballesteros Trust, are also specifically bound by the arbitration provisions in their purchase agreements with US Home. Plaintiffs do not dispute the existence of the arbitration provisions at issue, or that the claims fall within the scope of the agreements, but rather contend that the arbitration provisions are unenforceable in light of the NRS Chapter 40 protections of homeowner rights, and the

fact that the provisions are unconscionable.

Defendant first argues that the arbitration provisions are subject to the terms of the Federal Arbitration Act ("FAA") codified in 9 U.S.C. 1 et seq. The Court finds that the FAA does not apply to the instant arbitration agreements, because the construction defect claims at issue relate to property contained entirely within the state of Nevada, and therefore do not affect interstate commerce. Furthermore, no federal law is implicated by the claims. As such, the Court finds that the FAA does not apply to the instant arbitration provisions.

Although the Court finds the FAA to be inapplicable here, arbitration may still be compelled pursuant to Nevada law. The Supreme Court of Nevada has held that there is a "presumption of arbitrability" where there is an agreement to arbitrate. *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990). In order to invalidate an arbitration agreement based on unconscionability, the Court must determine that the agreement is both procedurally and substantively unconscionable. *DR Horton v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004).

Here, the Court finds the arbitration provision contained within the CC&Rs to be procedurally unconscionable. The provision is located on page 76 of 86 of the CC&Rs, and is in the same sized font as the rest of the CC&Rs. The provision is therefore inconspicuously placed within the voluminous document, and there is nothing to draw attention to the average home buyer of the important rights being waived. The format of the text also does not provide enough notice to Plaintiffs as well as the other aspects set forth in the pleadings. Furthermore, the procedural timing, requiring the matter to be heard no later than 180 days from when the arbitrator is appointed, is also inconsistent with NRS Chapter 40.

The Court further finds the arbitration provisions within the CC&Rs to be substantively unconscionable. The provision in the CC&Rs and the purchase agreements require the parties to pay equally for the costs of arbitration, which is inconsistent with the provisions of NRS Chapter 40. Thus under the ruling of *DR Horton* wherein the Court found a similar situation to be unconscionable the Court would in the present case find the provisions to not be appropriate. Furthermore, as the arbitration provision appears not to be binding on any subcontractors, the arbitration provision further creates the possibility of inconsistent results and duplicative proceedings. It also does not save costs or comply with other provisions of Chapter 40.

For the same reason as the CC&Rs, the provision in the purchase agreement is similarly procedurally unconscionable. Although the purchase agreement was only four pages, the arbitration provision appears on the second page, and is in the same sized font as the rest of the agreement. There is nothing to highlight or draw attention to the arbitration provision or separate it from the other provisions of the contract. The arbitration provision is also unclear as to what rights are being foregone and does not even mention the term "construction defects." To the extent that arbitration provision in the purchase agreement is less inconspicuous as it is on the second of four pages, it is still procedurally unconscionable because of the lack of clarity it provides for the rights that are being waived by the purchaser. Specifically, the provision first says that the claims should be arbitrated, not

by or in a court of law, and then shortly thereafter states "in the event the Homeowner's Warranty provided by the Seller does not provide for binding arbitration, a claim under, or covered by, the warranty will be administered as provided in the warranty prior to submission to binding arbitration." The provision is therefore confusing and apparently contradictory in certain aspects. The provision does not clearly state that purchaser is waiving their right to a jury trial, nor does it mention any impact on the purchaser's rights under NRS Chapter 40.

The provision in the purchase agreement is substantively unconscionable because, like the agreements at issue in *DR Horton, Gonski v. Dist. Ct.*, 126 Nev. Adv. Op. 51, 245 P.3d 1164 (2010) and *Burch v. Dist. Ct.*, 118 Nev. 438, 49 P.3d 647 (2002), the contract is adhesive and one-sided. Furthermore, the Seller has the option to include subcontractors as parties to the arbitration whereas the Buyer does not, potentially resulting, as noted above, in inconsistent results and duplicative proceedings. Gonski furthermore held that a provision which abrogates a homeowner's rights under NRS Chapter 40 are unconscionable and violate public policy.

As the arbitration provision in both the CC&Rs and the purchase agreements are both procedurally and substantively unconscionable, the Court finds the arbitration provision to be unenforceable, and as such, the Motion to Compel Arbitration is DENIED without prejudice.

As the instant minute order is a summary, incorporating the arguments of the opposition, Plaintiff's counsel is directed to prepare detailed findings of fact and conclusions of law with sufficient analysis of all of the relevant issues, consistent herewith, circulating to all parties for approval as to content and form, and submit to chambers within 10 days in accordance with EDCR 7.21.

CLERK'S NOTE: A copy of the foregoing minute order was distributed to the following parties via electronic mail: Gregory King, Esq. via ghk@paynefears.com and Duane Shinnick, Esq. via dshinnick@ssllplaw.com (6/26/15 amn).

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; DISTRICT COURT CIVIL COVER SHEET; FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER; NOTICE OF ENTRY OF ORDER; DISTRICT COURT MINUTES

THE MICHAEL BALLESTEROS TRUST;
RODRIGO ASANION; FEDERICO AGUAYO;
FELIPE ENRIQUEZ; JIMMY FOSTER JR.;
THE GARCIA FAMILY TRUST; ARNULFO
ORTEGA-GOMEZ; ELVIRA GOMEZ-
ORTEGA; JOHN J. OLSON; IRMA A.
OLSON; OMAR PONCE; BRANDON
WEAVER; JON YATES; MINTESNOT
WOLDETSADIK,

Plaintiff(s),

vs.

U.S. HOME CORPORATION; CAMPBELL
CONCRETE OF NEVADA INC.; VALENTE
CONCRETE, LLC; RED ROSE, INC.;
REPUBLIC ELECTRIC, INC.,

Defendant(s),

Case No: A714219

Dept No: XXXI

now on file and of record in this office.

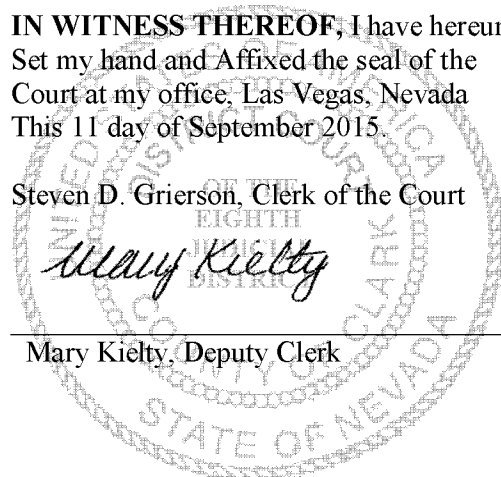
IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 11 day of September 2015.

Steven D. Grierson, Clerk of the Court



Mary Kielty

Mary Kielty, Deputy Clerk



087193



PAYNE & FEARS LLP

Jamboree Center, 4 Park Plaza, Suite 1100
Irvine, CA 92614
T 949.851.1100 • F 949.851.1212

AMERICAN BUSINESS BANK
ORANGE COUNTY REGION
16-4280/1220

DATE

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8/19/2015

087193

TWO HUNDRED FIFTY AND XX / 100 Dollars

AMOUNT

****\$250.00

PAY
TO THE
ORDER OF

Clerk of the Supreme Court

Void After 6 Months

A-15-714219-D

2 Signatures Required on Amounts Over \$10,000.00

RED CHECK NUMBERING IMAGES THROUGH TO BACK OF SHEET

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