Case No. 68810

SUPREME COURT
OF THE STATE OF NEVADA

U.S. HOME CORPORATION, a Delaware corporation,

Appellant,

vs.

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

Respondents.

On appeal from the Eighth Judicial District Court,
Clark County, Nevada, Case No. A-15-714219-D

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Appellant U.S. Home Corporation is a wholly-owned subsidiary of Lennar Corporation. Lennar Corporation has no parent company, and no publicly-traded entity owns 10% or more of its stock.

2. Payne & Fears LLP represented Appellant U.S. Home Corporation during the district court proceedings. Payne & Fears LLP will represent Appellant U.S. Home Corporation before this Court.

/s/ Gregory H. King
Gregory H. King, attorney of record for
Appellant U.S. Home Corporation

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JURISDICTIONAL STATEMENT

On August 18, 2015, the district court entered an order denying Appellant U.S. Home Corporation's motion to compel arbitration. (Joint Appendix ("App.") 455.) The notice of entry of the order was filed on August 21, 2015 (App. 465), and the notice of appeal was filed on September 10, 2015 (App. 478).

This Court has jurisdiction over this appeal pursuant to NRS 38.247, which provides that an appeal may be taken from "[a]n order denying a motion to compel arbitration." *See Mikohn Gaming Corp. v. McCrea*, 89 P.3d 36, n.1 (Nev. 2004) ("NRS 38.247(1)(a) allows an immediate appeal of an order denying a motion to compel arbitration.").

STATEMENT OF ISSUES

1. Whether the contracts for the construction and sale of the homes within the Rancho de Paz community evidence transactions that involve or affect interstate commerce, thereby requiring the application of the Federal Arbitration Act.

2. Whether the arbitration agreement in the Covenants, Conditions, and Restrictions requiring Respondents ("Homeowners") to arbitrate their claims against U.S. Home is enforceable.

3. Whether the arbitration provisions in the purchase and sale agreements executed by three Homeowners requiring them to arbitrate their claims against US Home are enforceable.

4. Whether the district court erred in finding that the arbitration agreement in the CC&Rs is procedurally unconscionable.

5. Whether the district court erred in finding that the arbitration agreement in the CC&Rs is substantively unconscionable.

6. Whether the district court erred in finding that the arbitration provisions in the purchase agreements are procedurally unconscionable.

7. Whether the district court erred in finding that the arbitration provisions in the purchase agreements are substantively unconscionable.

STATEMENT OF CASE

This is a construction defect case involving 12 single-family homes located in the Rancho de Paz community, which was developed by U.S. Home. (App. 3.) Homeowners' homes are subject to a declaration of covenants, conditions, restrictions, reservations and easements ("CC&Rs"), which contains an arbitration agreement requiring U.S. Home and Homeowners to submit any construction-related dispute to binding arbitration. (App. 129.) Furthermore, three Homeowners entered into purchase agreements with U.S. Home that contain arbitration provisions. (App. 144–51.)

Nevertheless, in violation of these arbitration agreements, Homeowners filed a complaint in district court. (App. 2.) On April 30, 2015, U.S. Home filed a motion to compel Homeowners to arbitrate their claims pursuant to the arbitration provisions in the CC&Rs and the purchase agreements. (App. 29.) On June 3, the motion was heard (App. 397–98), and on August 18, an order was entered denying the motion (App. 464).

U.S. Home appeals the district court's denial of the motion to compel arbitration.

STATEMENT OF FACTS

I. THE HOMES ARE SUBJECT TO CC&RS, WHICH CONTAIN AN ARBITRATION AGREEMENT.

The Homeowners reside within the North Las Vegas housing development known as "Rancho de Paz." (App. 3, 188–250.) Rancho de Paz is a common-interest community, subject to CC&Rs duly recorded in the Clark County

Recorder's Office on August 24, 2004. (App. 49.) U.S. Home is defined as a "Declarant" by the CC&Rs. The CC&Rs explain the requisite covenants, conditions and restrictions relating to the development, construction and use of single-family homes within the community. (App. 54.)

At the front of the CC&Rs, the table of contents directs Homeowners to section 17.16, which is entitled "**Arbitration**." (App. 53, 129.) This arbitration provision is (1) highlighted by its own bolded and underscored heading, and (2) written in the same-size text as the other provisions in the CC&Rs. It states, in relevant part:

> **Arbitration**. Any dispute that may arise between: (a) the … Owner of a Unit, and (b) the relevant Declarant, or any person or entity who was involved in the construction of any . . . Unit, shall be resolved by submitting such dispute to arbitration before a mutually acceptable arbitrator who will render a decision binding on the parties which can be entered as a judgment in court pursuant to NRS 38.015, et seq.

(App. 129.)

The CC&Rs also provide that the invalidation of any provision of the CC&Rs by court order "shall in no way affect any other provisions, which shall remain in full force and effect." (App. 124 at § 17.2.)

Pursuant to Nevada's Common-Interest Ownership Act, the Homeowners had the right to cancel their purchase agreements, and the accompanying arbitration agreements, until the end of the fifth day after their execution thereof, thereby entitling them to a full refund of any paid deposit, if, for instance, they did not agree to arbitrate. NRS 116.4108; NRS 116.41095.

II. HOMEOWNERS ENTERED INTO PURCHASE AGREEMENTS WITH U.S. HOME CONTAINING ARBITRATION PROVISIONS.

U.S. Home entered into purchase agreements with various homebuyers to construct and sell them homes within the Rancho de Paz community, including Homeowners Michael Ballesteros (trustee of the Michael Ballesteros Trust) and John and Irma A. Olson. (App. 144–51.)[1] Among other things, the purchase agreements advise Homeowners that the property on which the homes were being built were "construction sites" in light of the "improvements, equipment and supplies" being utilized during the construction process. (App. 144–51 at p. 1, §§ 4, 6, 11, 14, 16, 21.) The agreements also discuss the deadline for Homeowners to select their options (e.g., carpet, exterior paint, etc.) so that they can be incorporated into the homes. (*Id.*) These three Homeowners initialed each page and signed the last page of their respective purchase agreements, indicating their consent and understanding of the terms thereof. (App. 144–51.)

The purchase agreements contain arbitration provisions that are (1) highlighted by their own, all-capitalized heading entitled "**ARBITRATION OF DISPUTES**," (2) written in the same-size text as the other provisions in the agreements, (3) found on page two of the four and one-half page agreements, and (4) located before the signature lines, which are on the last page of the agreements. These provisions state:

> 18. **ARBITRATION OF DISPUTES.** The parties to this Agreement specifically agree that this transaction involves interstate commerce and

[1] The other Homeowners in this case are subsequent owners of their homes whose predecessors in interest entered into the purchase agreements with U.S. Home.

> that any dispute …, including, but not limited to, (a) any and all controversies, disputes or claims arising under, or related to, this Agreement, the property, or any dealings between the Buyer and Seller … 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. All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator.
>
> …
>
> Unless otherwise provided by law . . . the cost of mediation and arbitration shall be borne equally by Seller and Buyer. . . . The waiver or invalidity of any portion of this paragraph shall not affect the validity or enforceability of the remaining portions of this paragraph.

(App. 144–51.)

Homeowners had the right to cancel their purchase agreements, and the accompanying arbitration agreements, until five days after signing the documents. NRS 119.182(2). The purchase agreements informed Homeowners of this right in all-bold text placed directly above their signatures. (*Id.*)

III. HOMEOWNERS ASSERT CONSTRUCTION DEFECT CLAIMS AGAINST U.S. HOME AND FILE A COMPLAINT IN VIOLATION OF THE ARBITRATION AGREEMENTS.

In August 2013, U.S. Home began receiving pre-litigation notices of constructional defects on behalf of Homeowners pursuant to NRS 40.645. (App. 154.) These notices continued to trickle in to U.S. Home for the next 18 months, the last one being served in February 2015. (*Id.*)

Throughout this time period, U.S. Home sent multiple letters to Homeowners' counsel repeatedly reminding them of their obligations to arbitrate their claims pursuant to the terms of the arbitration agreements. (App. 157–62.) U.S. Home also

advised Homeowners that its proceeding through the NRS 40 process should not be construed as U.S. Home's waiver of the arbitration agreements. (*Id.*). At no time did Homeowners disavow the arbitration agreements or suggest that they were unenforceable.

On February 20, 2015, in violation of the arbitration agreements, Homeowners filed their complaint against U.S. Home. After being served with the complaint, U.S. Home filed its answer on April 21, asserting arbitration as an affirmative defense. (App. 22–23.)

IV. THE DISTRICT COURT DENIES U.S. HOME'S MOTION TO COMPEL ARBITRATION.

Nine days after filing its answer, on April 30, 2015, U.S. Home filed its motion to compel arbitration. (App. 29.) In their opposition to the motion, Homeowners submitted declarations from only 2 of the 14 Homeowners, Michael Ballesteros and John Olson. (App. 352–55.) One declaration simply states that the homeowner "did not realize that by signing the original purchase agreement I was waiving my rights to bring a claim for construction defects under Nevada law but was instead agreement to arbitrate those claims." (App. 352.) The other concludes that the homeowner "did not read the PSA or the CC&Rs before the purchase of the property, as it was too many papers." (App. 354).

The district court heard the motion on June 3, 2015. (App. 397.) Thereafter, on August 18, the district court entered an order denying the motion. (App. 455–64.) In its order, the district court held that (1) the Federal Arbitration Act ("FAA") does not apply to the arbitration agreements, (2) the arbitration agreement in the CC&Rs

is unconscionable, and (3) the arbitration agreements in the purchase agreements are unconscionable. (*Id.*) In so ruling, the district court did not cite or mention the two homeowners declarations. The court did, however, note that Homeowners "do not dispute the existence of the arbitration provisions at issue, or that the claims fall within the scope of the arbitration provisions, but rather contend that the arbitration provisions are unenforceable."

SUMMARY OF ARGUMENT

I. CC&RS ARE BINDING ON HOMEOWNERS WHETHER THEY READ AND UNDERSTOOD THEM OR NOT.

NRS 116 allows for the creation of a common-interest community through the recording of a declaration that sets forth the CC&Rs that are to apply to all homes within the development. The CC&Rs identify the many restrictions and limitations imposed on individual unit owners within the community and "any other matters the declarant considers appropriate," including dispute resolution procedures, such as arbitration. Pursuant to Nevada law, Homeowners are bound by duly recorded CC&Rs whether or not they have read them or had them explained to them.

To protect homeowners from unknowingly agreeing to restrictions placed upon them by CC&Rs, the Nevada Legislature provided them with a five-day period within which to cancel the purchase agreement. This right to cancel provides the homeowner with an additional period of time to consider the consequences of purchasing a unit governed by CC&Rs and to ensure that the

homeowner does so knowingly and willingly. However, once the five-day period expires, the homeowner is bound by the CC&Rs.

Here, there is no dispute that the Rancho de Paz CC&Rs were properly recorded and that Homeowners did not exercise their right to cancel during the five-day opt-out period. Therefore, they are bound by the CC&Rs, including the arbitration agreement contained therein.

II. THE FAA APPLIES IN THIS CASE.

The district court erred by holding that the FAA does not apply in this case. In so ruling, the district court applied the wrong test. Instead of looking to see if interstate commerce was involved in the transactions evidenced by the CC&Rs and the purchase agreements (i.e., the construction and development of homes within the Rancho de Paz community), the court focused on the nature of the *Homeowners' claims* against U.S. Home. The district court also incorrectly looked to see if "federal law is implicated" by those claims, which is not part of the analysis.

Had the court applied the correct test, it should have concluded, like the vast majority of courts throughout the country, that construction of residential properties involves interstate commerce, thereby triggering the FAA. This is particularly true when considering the construction of homes in the aggregate with other homes constructed throughout the country. Furthermore, the multistate nature of the parties involved here further supports a finding that interstate commerce is involved.

The district court also ignored the fact that three Homeowners *stipulated* in the purchase agreements that the construction of their homes involved interstate commerce and that any related arbitration would be subject to the FAA.

III. THE ARBITRATION PROVISIONS ARE NOT UNCONSCIONABLE.

Nevada also has a strong, long-standing policy favoring arbitration. To escape their obligations to arbitrate, Homeowners bear the heavy burden of proving both procedural and substantive unconscionability. They have failed to do so.

Furthermore, to the extent that any particular provision of the arbitration agreements is unconscionable, it should be severed from the otherwise enforceable arbitration agreement. Severance is preferred to rendering the entire agreement unenforceable, as it preserves the intent of the agreement and complies with the FAA and Nevada's policy favoring arbitration.

A. The Arbitration Provisions are not Procedurally Unconscionable.

With regard to the arbitration agreement in the CC&Rs, the district court ruled it to be procedurally unconscionable because, in its view, it is "inconspicuously" placed on page 76 of the CC&Rs and "is in the same size font as the rest of the CC&Rs." In so ruling, the district court violated a directive from the United States Supreme Court mandating that arbitration agreements be placed on equal footing with other contractual terms and prohibiting courts from holding them to a higher standard. Furthermore, the court ignored the fact that the arbitration agreement is clearly identified in the table of contents at the beginning of the

CC&Rs. Furthermore, the arbitration agreement is very conspicuously entitled "**Arbitration**" in bold, underlined font, and contains no small or fine print. The court also ignored the logic and reasonableness of placing the dispute-resolution provisions of the CC&Rs near the back, after the sections addressing definitions, homeowner property rights, association responsibilities, use restrictions, and maintenance obligations, among other sections.

Similarly, with regard to the arbitration provisions in the purchase agreements, the district court found them to be procedurally unconscionable because they are located on the second page and the text is "not capitalized or bolded." Again, the district court demonstrated a hostility toward arbitration by holding these provisions to a higher standard than other provisions. Contrary to the district court's finding, the arbitration provisions are very conspicuous. They are highlighted with the bold, all-capitalized heading "**ARBITRATION OF DISPUTES.**" They begin on page two of the document, in a location where it could not be missed – immediately above the line where the Homeowners placed their initials, thereby acknowledging their agreement to all the provisions on that page. The agreement is set forth in the same font and print as the other provisions in the purchase agreements.

The district court also found two aspects from the arbitration provisions in the purchase agreements confusing and difficult to understand: (1) the reference to a homeowners' warranty, and (2) the lack of discussion regarding "construction defect" claims. As to the first issue, setting aside the fact that no party is attempting to enforce any warranty-claim provisions, the language is not confusing. It clearly

indicates that, had Homeowners attempted to go through a warranty-claim process, they would have had to do so before proceeding to arbitration. There is no reasonable, alternative interpretation that creates any ambiguity. As to the second issue, there is no dispute or confusion among the parties as to whether the Homeowners' claims for construction defect fall within the scope of the arbitration agreements. They clearly do because they relate to the subject properties, the dealings between the parties, and the purchase agreements.

Lastly, the district court concluded that the arbitration provisions in the purchase agreement do not "clearly state" that Homeowners waived their rights to a jury trial. This is incorrect. Homeowners were informed that they would be waiving their rights to a jury trial because the agreements clearly state that (1) disputes must be submitted to a non-judicial forum for arbitration, and (2) an arbitrator will make the final and binding decision.

None of the district court's conclusions regarding procedurally unconscionability were supported by substantial evidence. Homeowners did not present any evidence indicating that they were unaware or confused about the arbitration agreements *because of* inconspicuousness, font size, location within the CC&Rs and purchase agreements, or confusing terms. Nor was any evidence presented indicating that they were confused by the arbitration process or the rights they were waiving. In short, nothing before the district court supported a finding that Homeowners lacked a meaningful opportunity to agree to the arbitration provisions.

Furthermore, even if some Homeowners failed to read or understand the arbitration agreements at the time they signed them, they are still bound by the

agreements. It well-established that failing to read or understand the contents of an agreement will not excuse a signing party from its legal effects. This is especially true in Nevada, where a home purchaser is given five days after signing the purchase agreement to review the agreement, take the necessary steps to understand his or her rights, and contemplate the purchase. Homeowners could have canceled the agreements in their entirety within those five days, and if they did so, U.S. Home would have returned any payment made by Homeowners.

B. The Arbitration Provisions are not Substantively Unconscionable.

The district court concluded that the arbitration provisions are substantively unconscionable because (1) the arbitration provisions contradict NRS 40, and (2) U.S. Home's ability to join subcontractors in the arbitration is impermissibly one-sided. Again, these findings are not supported by substantial evidence, and the district court's conclusions are incorrect as a matter of law.

First, the term in the CC&Rs requiring the arbitration to be convened no later than 180 days from the date the arbitrator is appointed does not contradict NRS 40. Chapter 40 sets forth the requirements and procedures for addressing construction defect claims *prior to* formal litigation or arbitration. It is not meant to dictate or control the procedures and timeframes after the Chapter 40 process is complete. Once the NRS 40 process ends, the parties are free to resolve the claims through traditional litigation, negotiations, or even alternative dispute resolution procedures such as arbitration. Furthermore, this 180-day provision is completely reasonable and bilateral. It is not one-sided.

Next, the district court's belief that the arbitration provisions strip Homeowners of their right to recover attorney's fees and costs under NRS 40.655 is simply not true. The arbitration agreements in both the CC&Rs and the purchase agreements indicate that the "costs of arbitration shall be borne equally by the parties." However, even in traditional litigation, Homeowners would have to bear their own costs unless and until they are awarded the same under NRS 40.655. The fact that the parties are to bear their own costs during the arbitration does not mean the arbitrator can, or will, disregard the law, including NRS 40.655. There is no basis for assuming that the arbitrator will not follow the law when exercising his discretion to award fees and costs. On the contrary, by pursuing claims in arbitration rather than district court, a party does not forgo substantive rights, including the right to fees and costs. This point is emphasized in the arbitration provision in the purchase agreements which states that the parties are to bear their own arbitration costs "unless otherwise provided by law." (App. 144–51 at § 18.)

Lastly, U.S. Home's ability to join subcontractors does not render the agreements unconscionable. An agreement is not substantively unconscionable simply because it does not provide identical rights and obligations. Here, Homeowners would not be able to join the subcontractors in arbitration *in any event* because they are not parties to arbitration agreements with U.S. Home's subcontractors. Further, Homeowners do not need to pursue claims against subcontractors to obtain complete relief. They are already entitled to complete relief from U.S. Home under NRS 40.640, which provides that contractors are liable for acts and omissions of its subcontractors.

IV. THE ARBITRATOR DECIDES THE ENFORCEABILITY OF THE ARBITRATION PROVISIONS IN THE U.S. HOME PURCHASE AGREEMENTS.

With regard to those Homeowners that signed U.S. Home purchase agreements, the arbitrability issue should be decided by an arbitrator, not this Court. The parties "clearly and unmistakably" delegated arbitrability questions to the arbitrator. Such delegation clauses are enforceable when, like in this case, Homeowners have not argued that the clause, standing alone, is unenforceable for reasons independent of their reasons for invalidating the remainder of the arbitration provisions.

ARGUMENT

I. STRONG FEDERAL AND STATE POLICIES FAVOR ARBITRATION.

The FAA, which embodies a broad, national policy favoring arbitration, applies in this case. Furthermore, Nevada law also favors arbitration and mandates that the arbitration agreements be enforced.

A. The FAA is Far-Reaching and Designed to Promote Arbitration.

The FAA provides that a "written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be … enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Numerous United States Supreme Court "cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as embodying a national policy favoring arbitration and a liberal federal

policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011) (internal citations and quotations omitted). Indeed, "the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995). Accordingly, courts may not "decide that a contract is fair enough to enforce all its basic terms … but not fair enough to enforce its arbitration clause." *Id.* The FAA "makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent." *Id.*

This Court recently noted the far-reaching scope of the FAA when stating that "[s]o long as 'commerce' is involved, the FAA applies." *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71 (2015). Furthermore, "[t]he Supreme Court has made it unmistakably clear that state courts must abide by the FAA, which is the supreme Law of the Land" and that they "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Tallman*, 131 Nev. Adv. Op. 71 (quoting *Concepcion*, 131 S.Ct. at 1753) (internal citations omitted).

B. Nevada Law Favors Arbitration.

Nevada also has a long-standing and "strong public policy favoring contractual provisions requiring arbitration as a dispute resolution mechanism." *Phillips v. Parker*, 794 P.2d 716, 718 (Nev. 1990); *see also* NRS 38.219(1). "Nevada courts resolve all doubts concerning the arbitrability of the subject matter

of a dispute in favor of arbitration." *Int'l Assoc. Firefighters v. City of Las Vegas*, 764 P.2d 478, 480 (Nev. 1988).

II. COMMON-INTEREST COMMUNITIES PROVIDE BENEFITS TO ITS MEMBERS.

Common-interest communities are commonplace in Nevada and throughout the country. The purpose and benefit of creating a common-interest community is to promote and maintain consistency and stability within that community. *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1225–31 (Cal. 2012).

To facilitate the development of common-interest communities within Nevada, in 1991, the Nevada legislature adopted its version of the Uniform Common-Interest Ownership Act ("NRS 116"). NRS 116 sets forth the statutory framework for "all common-interest communities created within this State." NRS 116.1201; *see also Cape Jasmine Court Trust v. Cent. Mortgage Co.*, No. 2:13-CV-1125-APG-CWH, 2014 WL 1305015, at *2 (D. Nev. Mar. 31, 2014).

A. Enforcement of CC&Rs are Critical to the Success of Common-Interest Communities.

A common-interest community is created through the recording of a declaration that sets forth the CC&Rs that are to apply to all homes and properties within the development. *See* NRS 116.2101. Among other things, the CC&Rs identify the many restrictions and limitations imposed on individual unit owners, which are significant and far-reaching. For example, the CC&Rs identify limitations on the use, occupancy, and alienation of the units within the

community. NRS 116.2105(1)(l). The CC&Rs also provide for the organization of a "unit-owners' association," which (1) is to adopt bylaws, rules and regulations applicable to all unit owners, and (2) has the power to collect assessments, impose fines, and charge fees on each of the unit owners and to regulate the use of common elements within the community. NRS 116.3101; NRS 116.3102. And the CC&Rs set forth "any other matters the declarant considers appropriate." NRS 116.2105(2).

The tradeoff for purchasing a home within a common interest community is straightforward – you are forced to abide by the restrictions, limitations and procedures set forth in the CC&Rs. In fact, under Nevada Law, "CC&Rs become a part of the title to [a homeowners'] property." *See* NRS 116.41095. Unit owners are bound by them "whether or not [the unit owners] have read them or had them explained to [them]." *Id*. Further, by enacting a statutory scheme permitting the creation of common-interest communities, the Nevada legislature affirmed that CC&Rs would bind homeowners even when the homeowners did not negotiate the CC&Rs with the declarant. *See Pinnacle*, 282 P.3d at 1227.

The enforcement of CC&Rs is critical to the success of a common-interest community because they are the "primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development." *Id.* at 1225.

> Having a single set of recorded covenants and restrictions that applies to an entire community interest development protects the intent, expectations, and wishes of those buying into the development and the

> community as a whole by ensuring that promises concerning the character and operation of the development are kept.

Id.

Here, consistent with Nevada law, the CC&Rs were duly recorded and provide that they "run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties." (App. 55.)

B. Prospective Buyers are Protected Through Strict Notice Requirments and a Five-Day Period to Cancel.

To protect purchasers of units within common-interest communities from unknowingly agreeing to the restrictions placed upon them by CC&Rs, the Nevada legislature created strict notice requirements applicable to all prospective buyers. These notice requirements are an acknowledgement that the CC&Rs, which are not the subject of individual negotiation, are binding on all unit owners regardless of whether they have read and understood them. *S*ee NRS 116.4101–116.4109. Among other things, an information statement must be provided to each prospective buyer, stating that the "CC&Rs become a part of the title of your property" and that the buyer will be bound by the CC&Rs "whether or not you have read them or had them explained to you." The statement cautions the buyer to "review the CC&Rs, and other governing documents before purchasing to make sure these limitations and controls are acceptable to you." NRS 116.41095; *see also* NRS 116.4103(1)(l) and 116.4109(1)(a).

The Nevada legislature went one step further to protect prospective buyers from the consequences of buying into a common-interest community. Under NRS 116, each prospective buyer is provided a five-day period within which to cancel

the purchase agreement. NRS 116.4108; NRS 116.41095. This right to cancel provides the buyer an additional period of time to consider the consequences of purchasing a unit governed by CC&Rs and ensures that each buyer does so knowingly and willingly. However, at the end of the five-day right-to-cancel period, if the purchase agreement has not been cancelled, the purchase agreement is binding and the new unit owner is bound by the CC&Rs.

Here, Homeowners have not suggested, let alone produced any evidence, that they were not provided the requisite notice of the CC&Rs prior to their purchase of their homes. Nor have they suggested that they are refusing to abide by the other, non-arbitration provisions of the CC&Rs.

III. THE FAA APPLIES TO THE ARBITRATION AGREEMENTS, AND THE DISTRICT COURT ERRED IN RULING OTHERWISE.

When determining whether the FAA applies to an arbitration agreement, the focus is on the contract containing the arbitration agreement and whether it evidences a transaction involving interstate commerce. If it does, the FAA applies, assuming the controversy falls within the scope of the arbitration agreement. 9 U.S.C. § 2. This Court recently summed up the far-reaching scope of the FAA when stating that "[s]o long as 'commerce' is involved, the FAA applies. *Tallman*, 131 Nev. Adv. Op. 71.

Here, when denying U.S. Home's arbitration motion, the district court concluded that the FAA does not apply because, in its view, interstate commerce was not involved in the dispute between the parties. In so ruling, the district court applied an incorrect test for determining the applicability of the FAA. Had the

court applied the correct analysis, it should have concluded that the relevant transactions involved interstate commerce, thereby triggering the FAA. Furthermore, the court ignored the fact that three Homeowners *stipulated* that the FAA applies to their claims.

A. The District Court Used an Incorrect Test to Determine Whether the FAA Applies to the Arbitration Agreements.

When determining the applicability of the FAA, the district court incorrectly focused on the nature of the *Homeowners' claims* being asserted against U.S. Home. (App. 459 at ¶ 12.) This is not the test. Instead, the Court should have looked to the transactions evidenced by the CC&Rs and the purchase agreements, which contain the arbitration agreements. (App. 129 at § 17.16; App. 144–51 at § 18); *see Shepard v. Edward Mackay Enterprises, Inc.*, 56 Cal. Rptr. 3d 326, 332 (Cal. Ct. App. 2007) ("[T]he pertinent question is whether the contract evidences a transaction involving interstate commerce, not whether the dispute arises from the particular part of the transaction involving interstate commerce."). Here, the relevant transactions are the construction and development of the homes within the Rancho de Paz community. These transactions clearly involve interstate commerce, as discussed more fully below.

The district court also ruled that the FAA does not apply because "no federal law is implicated by the construction defect claims." (App. 459 at ¶ 12.) This is also an incorrect analysis. Whether the Homeowners' claims implicate federal law is simply not part of the test and is irrelevant to the question of whether interstate commerce is involved in the transactions.

B. The Underlying Transactions Involve and Affect Interstate Commerce.

The United States Supreme Court has interpreted the term "involving commerce" as "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) (citing *Allied-Bruce*, 513 U.S. at 273–74). Thus, the FAA applies whenever a contract containing an agreement to arbitrate evidences some transaction that involves or affects interstate commerce. *Tallman*, 131 Nev. Adv. Op. 71.

1. The Construction and Sale of the Homes in the Rancho de Paz Common-Interest Community Involved Interstate Commerce.

Courts throughout the country uniformly hold that the FAA applies to arbitration provisions contained within contracts for the construction and sale of homes because construction always involves goods and materials being shipped in commerce, often out-of-state-parties, and the involvement of loans or escrow accounts that concern out-of-state sources. *See Royce Homes, L.P. v. Bates*, 315 S.W.3d 77, 85 (Tex. Ct. App. 2010); *Anderson v. Maronda Homes, Inc. of Florida*, 98 So. 3d 127 (Fla. Dist. Ct. App. 2012); *Elizabeth Homes, L.L.C. v. Cato,* 968 So.2d 1, 4 n. 1 (Ala. 2007); *Sears Roebuck & Co. v. Glenwal Co.*, 325 F. Supp. 86, 90 (S.D.N.Y. 1970) *aff'd*, 442 F.2d 1350 (2d Cir. 1971); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012); *R.A. Bright Const.,*

Inc. v. Weis Builders, Inc., 930 N.E.2d 565, 569 (Ill. Ct. App. 2010); *Satomi Owners Ass'n v. Satomi, LLC*, 225 P.3d 213, 219–22 (Wash. 2009).

In *Greystone Nevada, LLC v. Anthem Highlands Cmty. Ass'n*, the Ninth Circuit considered the applicability of the FAA to U.S. Home arbitration agreements virtually indentical to those at issue here. 549 F. App'x 621 (9th Cir. 2013). In affirming the district court's determination that the FAA applied, the Ninth Circuit stated: "[T]he district court properly applied the FAA to the arbitration clauses in the homeowners' Purchase and Sale Agreements, because those agreements 'evidenc[e] a transaction'—development by an out-of-state developer, construction by an out-of-state contractor, and the sale of homes assembled with out-of-state materials—'involving commerce.'" *Id.* at 624.

In recognizing that the development and sale of homes involves interstate commerce, courts routinely recognize that "most building materials pass in interstate commerce." *See Weise v. Tidal Const. Co., Ins.*, 583 S.E.2d 466, 469 (Ga. Ct. App. 2003). Indeed, in *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647 (S.C. 1977) when addressing whether an agreement to build an apartment building involved interstate commerce, the court stated:

> As an additional ground for holding that the contracts between the parties evidence transactions in commerce, one need only consider the nature of the project and the actual work performed in fulfillment of the contractual obligations. If would be virtually impossible to construct an eighteen (18) story apartment building between 1971 and 1973 with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.

Id. at 652.

The same holds true here. It would be impossible to develop 12 single-family homes in a common-interest community in Las Vegas, Nevada, between 2005 and 2006 with materials, equipment and supplies all produced and manufactured solely within the State of Nevada. To suggest otherwise – that the lumber, granite, marble, stucco, roof tiles, paint, nails, electrical wiring, lighting fixtures, appliances, plumbing components, etc. were all manufactured in Nevada – would be devoid of reality.

2. The Cases Relied Upon by the District Court Relate Solely to the Sale of Real Property, Not the Construction of Homes, and Are Therefore Easily Distinguished.

The cases cited by the district court in support of its conclusion that the FAA does not apply to these arbitration agreements are inapposite and easily distinguished. More specifically, they all relate to the sale of real property, not the construction of homes. Thus none of those cases involve the interstate factors inherent in home construction, discussed above.[2]

For example, the district court relies on the case *Saneii v. Robards*, 187 F. Supp. 2d 710 (W.D. Ky. 2001), which is a Western District of Kentucky case where the court held that the FAA did not apply. However, *Saneii* was a fraudulent inducement and rescission action relating to the sale of an existing residence. *Id.* at 711. It was not a construction-defect action and did not involve the construction and sale of a new residence. Further, while the court in *Saneii* held that Kentucky

[2] In addition, Homeowners' cases pre-date *Concepcion*, which essentially overruled any authority that was impermissibly hostile to arbitration. 131 S.Ct. at 1745–49.

law, and not the FAA, applied, the court distinguished the matter from other, "more complex transactions" that may involve construction or interstate materials – such as the present case. 289 F. Supp. 2d 855, 859–60 (W.D. Ky. 2003).

In addition, the Western District of Kentucky recently limited its decision in *Saneii* to situations where "[t]he fact that one party to a residential real estate sale was an out-of-state commercial entity was the *only* factor incidentally linking the transaction to interstate commerce." *GGNSC Louisville Hillcreek, LLC v. Warner*, 2013 WL 6796421, n.11 (W.D. Ky. Dec. 19, 2013) (emphasis in original). In fact, in *GGNSC*, the court held that the FAA applied because the transaction, like the transactions at issue here, involved (1) multistate parties and (2) materials or supplies that would have been "impracticable … to procure … purely through intrastate channels." *Id.* at *8.

The district court also cites *SI V, LLC v. FMC Corp.*, where the court held that the FAA did not apply to a sale of 75-acres of land. 223 F. Supp. 2d 1059, 1060–64 (N.D. Cal. 2002). However, *SI V* is inapposite because, unlike the present case, (1) *SI V* did not involve construction of any kind, and (2) the parties in *SI V* did not contractually agree that the FAA applied.

Similarly the district court's reference to *Cecala v. Moore*, 982 F. Supp. 609, 612 (N.D. Ill. 1997) is misplaced. There, a homebuyer sued the previous homeowner for failing to disclose flooding issues. The court held that the FAA did not apply because there were no interstate factors, aside from one interstate party. *Id.* Thus, unlike this case, *Cecala* did not involve new construction involving

multiple interstate parties and materials harvested, manufactured, or shipped in interstate commerce.

3. The Construction and Sale of Homes in the Aggregate Affects Interstate Commerce.

The FAA applies because, in the aggregate, the construction and sale of residential properties within an entire community affects interstate commerce.

Because of the FAA's broad reach, the FAA may apply even where individual transactions themselves do not affect interstate commerce. This is because, pursuant to the FAA, "Commerce Clause power may be exercised … without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice ... subject to federal control." *Citizens Bank*, 539 U.S. at 56–57.

For instance, in *Wickard v. Filburn*, the United States Supreme Court held that a farmer growing wheat for consumption on his own farm affected interstate commerce. 317 U.S. 111, 114–15 (1942). The Court stated that, "even if [the farmer's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. The Court also stated that, although the farmer's individual contribution regarding the wheat "may be trivial," the farmer's "contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 128.

With regard to the construction, sale, and even rental of residential properties, courts have recognized the substantial impact that the residential

housing market has upon interstate commerce. *Senior Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1033–34 (11th Cir. 1992) ("We find no merit in plaintiffs' argument that, because the real estate market involves private intrastate transactions, no interstate commerce is involved in residential sales and rentals. … [T]he housing market affects interstate commerce…."); *Slingluff v. Occupational Safety & Health Review Comm'n*, 425 F.3d 861, 867 (10th Cir. 2005) ("[T]he economic activity of stuccoing/construction, as an aggregate, affects interstate commerce."); *Usery v. Lacy*, 628 F.2d 1226, 1229 (9th Cir. 1980) (Construction of a fifteen-unit apartment building "is a business that affects commerce as a matter of law, for it is within the class of activities that it was Congress' intent to regulate, in extending the [OSHA] to employers whose activities in the aggregate affect commerce."). Furthermore, "[a]n impressive array of" federal laws applicable to the construction, sale, and financing of residential homes (OSHA, fair housing laws, HUD regulations, lending laws, etc.) "is substantial evidence" that these transactions involve or affect "important interstate attributes." *See Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 38 (1980) ("[B]anking and related financial activities" possess "important interstate attributes"). Therefore, when the construction of Homeowners' homes is aggregated and taken together with the large number of other homes constructed and sold throughout the country, such transactions affect interstate commerce.

4. The Underlying Transactions Involved Multistate Parties.

The FAA applies because the parties involved in the transactions at issue, i.e., the construction and sale of the Homeowners' homes, are interstate parties.

The multistate nature of the parties is further evidence that the underlying transactions involved interstate commerce. Indeed, the test for determining whether the FAA applies is broad, and numerous courts, including the United States Supreme Court and the Ninth Circuit, have indicated that the multistate nature of the parties is part of the Commerce Clause analysis. *See, e.g.*, *Allied-Bruce*, 513 U.S. at 270 ("In addition to the multistate nature of [the parties], the … material used … came from outside [the state]."); *Greystone Nevada*, 549 F. App'x at 624; *Royce Homes, L.P. v. Bates*, 315 S.W. 3d 77, 85 (Tex. Ct. App. 2010); *R.A. Bright Const., Inc. v. Weis Builders, Inc.*, 930 N.E.2d 565, 569 (Ill. Ct. App. 2010).

Here, the Homeowners indicate in their complaint that they are "owners of individual residences within … Nevada." (App. 3.) U.S. Home, however, is a Delaware corporation. (App. 4.) U.S. Home also subcontracted with the following out-of-state entities to build the subject homes:

Subcontractor	**Trade**	**Domicile State**
1. General Electric Corp.	Appliances	New York
2. Merillat, LP	Cabinets	Delaware
3. Banker Insulation, Inc.	Fireplaces	Arizona
4. Texwood Industries, Inc.	Cabinets	Delaware
5. Quality Built, LLC	Inspections	Delaware
6. Western Shower Door, Inc	Shower Doors	California
7. Ultimate Electronics, Inc.	Security Wiring	Delaware
8. Atrium Window Co.	Windows (supply/install)	Texas

(App. 154–155.)

C. Homeowners who Signed the U.S. Home Purchase Agreements Agreed that the FAA Applies.

The purchase agreements executed by Homeowners Michael Ballesteros and John and Irma A. Olson state: **"**The parties to this Agreement specifically agree that this transaction *involves interstate commerce* and that any dispute … shall hereafter be submitted to binding arbitration *as provided by the Federal Arbitration Act* (9 U.S.C. §§1, *et seq*.) …." (App. 144–51 at § 18) (emphasis added). In other words, the parties have already stipulated that the transactions which are the subject of the purchase agreements (i.e., the construction and sale of the homes) involve interstate commerce and that any related dispute would be subject to arbitration pursuant to the FAA.

This Court has recognized the enforceability of such stipulations. *Tallman*, 131 Nev. Adv. Op. 71 ("Petitioners' employment . . . involves commerce. Indeed, the long-form arbitration agreements so stipulate."); *see also In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. Ct. App. 2002); *Autonation Fin. Servs. Corp. v. Arain*, 592 S.E.2d 96, 98 (Ga. Ct. App. 2003); *Valley Prop. Investments, LLC v. Bank of New York Mellon*, No. CIV S-12-2234 KJM AC, 2012 WL 6560757, at *1 (E.D. Cal. Dec. 14, 2012).

IV. THE ARBITRATION AGREEMENTS ARE NOT UNCONSCIONABLE.

Regardless of whether the FAA applies, Nevada law still favors arbitration. NRS 38.219(1). "Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004). Thus, an

inquiry into the enforceability of an arbitration agreement must "begin with recognition of our state's policy strongly favoring arbitration where the parties have previously agreed to that method of dispute resolution." *County of Clark v. Blanchard Constr. Co.*, 653 P.2d 1217, 1219 (Nev. 982); *Sylver v. Regents Bank, N.A.*, 300 P.3d 718, 721 (Nev. 2013).

A. Homeowners Bear the Burden of Proving Both Procedural and Substantive Unconscionability.

"Both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable." *Burch v. Second Judicial Dist. Court*, 49 P.3d 647, 650 (Nev. 2002). Consequently, if either procedural or substantive unconscionability is missing, the arbitration agreement must be enforced. *See id.* Furthermore, if there is little evidence of one type of unconscionability, then there must be strong evidence of the other type of unconscionability before a court may refuse to enforce the arbitration agreement. *D.R. Horton*, 96 P.3d at 1162; *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe*, 245 P.3d 1164, 1169 (Nev. 2010).

Under Nevada law, the party resisting arbitration bears the burden of proving unconscionability. *Gonski*, 245 P.3d at 1169. "The party opposing arbitration has the burden of showing the arbitration agreement is both procedurally and substantively unconscionable." *Zabelny v. CashCall, Inc.*, No. 2:13-CV-00853-PAL, 2014 WL 67638, at *9 (D. Nev. Jan. 8, 2014) (applying Nevada law).

"Contractual unconscionability involves mixed questions of law and fact." *D.R. Horton*, 96 P.3d at 1162. A "trial court's factual findings in support of a finding of unconscionability are accepted upon review *so long as they are supported by substantial evidence*." *Id.* (emphasis added).[3] However, a trial court's conclusion about whether a contractual provision is unconscionable is subject to a de novo review as a question of law. *Id.*

B. Arbitration Agreements Must be Placed on Equal Footing with Other Agreements.

In determining whether arbitration agreements are procedurally and substantively unconscionable, courts must "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion*, 131 S.Ct. at 1745. (internal citation omitted).

Thus, courts may not hold arbitration agreements to a higher standard than other agreements or provisions. *See Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 746 (Cal. 2015) ("Under the FAA, [unconscionability] may provide grounds for invalidating an arbitration agreement if they are enforced evenhandedly and do not 'interfere [] with fundamental attributes of arbitration.").

C. To the Extent Any Provision is Unconscionable, the Court Should Sever the Provision.

Both the CC&Rs and the purchase agreements contain severance provisions, which allow the Court to sever unenforceable clauses without affecting the

[3] "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff*, 193 P.3d 946, 950 (Nev. 2008).

enforceability of the remainding sections of the arbitration agreements. (App. 124 at § 17.2; App. 144–51 at §§ 18, 23.)

Severance of objectionable provisions is preferred over rendering an entire arbitration agreement unenforceable, as it preserves the intent of the agreement and complies with the policies favoring arbitration. *See Cox v. Station Casinos, LLC*, (Slip Copy) No. 2:14-CV-638-JCM-VCF, 2014 WL 3747605, *4 (D. Nev. June 25, 2014) (citing *Vincent v. Santa Cruz*, 647 P.2d 379, 381 (Nev. 1982)) ("Even if a contract provision is unconscionable, Nevada recognizes the doctrine of severability."). Therefore, to the extent this Court finds any provision unconscionable, the provision should be severed from the otherwise enforceable arbitration agreement.

D. The Agreements are not Procedurally Unconscionable.

"[P]rocedural unconscionability requires oppression or surprise." *See Pinnacle*, 282 P.3d at 1232. "A clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power … or because the clause and its effects are not readily ascertainable upon a review of the contract." *D.R. Horton*, 96 P.3d at 1162. For this reason, "[p]rocedural unconscionability often involves the use of fine print," i.e., print that is smaller than that used in the rest of the agreement. *Id.*; *see Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006).

Here, the district court found that arbitration agreements in both the CC&Rs and the purchase agreements to be procedurally unconscionable. For the reasons set forth below, the district court is incorrect.

1. The District Court Erred in Concluding that the Arbitration Agreement in the CC&Rs is Procedural Unconscionable.

The district court found that the arbitration agreement in the CC&Rs is inconspicuous and, therefore, procedurally unconscionable, because it is located on page 76 of the CC&Rs, "is in the same size font as the rest of the CC&Rs," and "there is nothing to draw attention to the average home buyer." (App. 461 at ¶ 16.) This ruling is incorrect as a matter of law and is not based on substantial evidence.

(a) Compliance with NRS 116 is Sufficient to Counter Evidence of Procedural Unconscionability.

Because the CC&Rs were recorded in compliance with NRS 116, any argument of procedural unconscionability is eliminated.

This very issue was litigated in *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1225–31 (Cal. 2012). In that case, the trial court found the arbitration provisions to be procedurally unconscionable because the homeowners' association had no opportunity to negotiate or participate in the drafting of the CC&Rs. *Id.* at 1232. The California Supreme Court rejected this determination. It noted that an inability to negotiate the CC&Rs is a circumstance required by the Davis-Stirling Act – California's version of the Uniform Common-Interest Ownership Act – which permits landowners to first record CC&Rs and then develop and market their properties subject thereto. *Id.* The court stated that the intent of the Act is to ensure that the terms reflected in the CC&Rs will be respected in accordance with the expectations of all property owners. *Id.* at 1233.

Accordingly, the court held that a developer's procedural compliance with the Act is sufficient to counter any evidence of procedural unconscionability. *Id.*

There is no dispute that the CC&Rs at issue here comply with NRS 116.2101 through 116.2124. This is further demonstrated by the fact that at no time have Homeowners suggested that they are not bound by or complying with any other provisions of the CC&Rs. Instead, Homeowners are only attempting to avoid their obligations to arbitrate. However, the recording of the CC&Rs in compliance with Nevada law prevents them from making this argument, regardless of whether they read or understood the CC&Rs.

(b) The Arbitration Agreement is Just as Conspicuous as the Other Provisions of the CC&Rs, and It Need Not Be More.

The arbitration agreement in the CC&Rs is not inconspicuous. In fact, it is just as conspicuous as the other provisions in the CC&Rs. The arbitration agreement is clearly identified in the first few pages of the CC&Rs in the table of contents. (App. 53.) The table indicates that the arbitration agreement is set apart in its own section, Section 17.16, located on page 76. Furthermore, Section 17.16 is entitled, in bold, underlined font, "**Arbitration.**" The arbitration provision contains no small or fine print when compared to the other provisions of the CC&Rs. (App. 129.)

In ruling that the arbitration agreement is procedurally unconscionable, the district court focused on the fact that the agreement is found on page 76 of the CC&Rs. In so doing, the court ignored the identification of the arbitration

agreement in the table of contents at the front of the CC&Rs. Furthermore, the court failed to recognize that it makes logical sense for the dispute-resolution provision of the CC&Rs to be placed near the end, after the sections addressing, among other things, definitions, homeowner property rights, association responsibilities, use restrictions, and maintenance obligations. It is counterintuitive to set forth the means by which disputes are to be resolved before the responsibilities and obligations of the parties are identified. There is simply no basis for the court's ruling that arbitration provisions must be pushed to the first page of CC&Rs, even when highlighted by an accompanying table of contents.

The district court also concluded that the arbitration agreement is procedurally unconscionable because it "is in the same size font as the other provisions of the CC&Rs." (App. 461 at ¶ 16.) In so doing, the district court violated a directive from the United States Supreme Court that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion*, 131 S.Ct. at 1745 (internal citation omitted); *Allied-Bruce*, 513 U.S. at 270 (a court may not "decide that a contract is fair enough to enforce all its basic terms … but not fair enough to enforce its arbitration clause").

In *D.R. Horton*, this Court stated that an arbitration clause need only be readily ascertainable upon a review of the contract. 96 P.3d at 1162. Therefore, while arbitration provisions may be procedurally unconscionable if they are *less* conspicuous than other provisions, arbitration provisions are not required to be *more conspicuous* than other provisions. *See also Marayonk v. Country Mut. Ins.*

Co., No. 2:12–CV–00017–KJD–PAL, 2012 WL 1898877, *3 (D. Nev. May 23, 2012) ("arbitration provisions … located under a section or subsection with bold or underlined font and are the same size font as the other provisions" held not procedurally unconscionable); *Durbin v. Great Basin Primary Care*, No. 3:11-CV-299-RCJ-WGC, 2012 WL 78158, at *5 (D. Nev. Jan. 10, 2012) (arbitration clause that is "in the same size font as all of the other provisions" held not procedurally unconscionable.).

Accordingly, the district court erred by holding that the arbitration agreement is procedurally unconscionable because the font size is the same as the remainder of the CC&Rs.

(c) The District Court's Finding is not Supported by Substantial Evidence.

The district court's finding that the arbitration agreement in the CC&Rs is procedurally unconscionable because of inconspicuousness is not supported by substantial evidence. Unlike *D.R. Horton*, where the homebuyer presented specific evidence that he did not read the arbitration provision *because* it was in fine print and located after the signature line, Homeowners in this case did not present *any evidence* that the arbitration provisions were inconspicuous. Nothing before the district court showed that Homeowners believed the arbitration provisions were in small font or that they had any difficulty reading them because of the provisions' headings or location within the CC&Rs. (*See* App. 352–55.)

The only evidence submitted by Homeowners to carry their burden of proving unconscionability were the declarations of 2 of 14 Homeowners. But these

declarations do not mention font size, heading styles, or provision location; and they do not even allege that the arbitration provisions were inconspicuous. One declaration states that the Homeowner "did not realize that by signing the original purchase agreement I was waiving my rights to bring a claim for construction defects under Nevada law but was instead agreement to arbitrate those claims." (App. 352.) The other declaration states that the Homeowner "did not read the PSA or the CC&Rs before the purchase of the property, as it was too many papers." (App. 354.) These statements do not support a finding that these two Homeowners – let alone the other 12 Homeowners who presented no evidence – lacked a meaningful opportunity to agree to the arbitration provisions because they were inconspicuous. Given that one homeowner states he never read any of the pertinent documents relating to the purchase of his home, it wouldn't have mattered what font size the arbitration agreement was in.

2. The District Court Erred In Concluding that the Arbitration Provisions in the Purchase Agreements Are Procedurally Unconscionable.

The district court similarly found the arbitration provisions in the purchase agreements to be inconspicuous and, therefore, procedurally unconscionable. This time the court found the placement of the provisions starting on page two of the purchase agreements to be insufficient. The court stated: "The arbitration clauses, like many others within the PSAs, are inconspicuous on page 2 of 4." (App. 461 at ¶ 18.) The court also criticized the text of the arbitration provision clauses for not being "capitalized or bolded to bring attention to such provisions." (*Id.*)

Furthermore, the court identified certain provisions that it found "confusing" with regard to the parties' obligations to arbitrate. (*Id.*) For the reasons discussed below, these rulings are incorrect as a matter of law and are not based on substantial evidence.

(a) The Arbitration Provisions of the Purchase Agreements Are not Inconspicuous.

The arbitration provisions in the purchase agreements are conspicuous. They are highlighted with the bold, all-capitalized heading "**ARBITRATION OF DISPUTES.**" They begin on page two of the document, in a location where it could not be missed – immediately above the line where Homeowners Ballesteros and Olsons placed their initials, thereby acknowledging their agreement to all the provisions on that page. (App. 144–51 § 18.) The provisions are set forth in the same font and print as the other provisions in the purchase agreements. In other words there is no fine print.

In so ruling, the district court held the arbitration provisions to a higher standard than the other provisions of the purchase agreements, thereby demonstrating a hostility toward and prejudice against arbitration that flies in the face of the FAA and the directives from the United States Supreme Court that "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion*, 131 S.Ct. at 1745 (internal citation omitted); *see Hall St Associates, L.L.C v. Mattel, Inc.*, 552 U.S. 576 at 581 (2008); *Allied-Bruce*, 513 U.S. at 270. It also contradicts the

parameters established by this Court for determining the enforceability of arbitration agreements. *See D.R. Horton*, 96 P.3d at 1162.

Furthermore, the district court's ruling is not supported by substantial evidence. As discussed above, the two declarations submitted by Homeowners fail to mention the font size, heading styles, or locations of the arbitration provisions. (App. 35–55.) They don't even allege that the arbitration provisions were inconspicuous. This evidence does not support a finding that these two declarants, let alone the other Homeowners, lacked a meaningful opportunity to agree to the arbitration provisions because they were inconspicuous.

(b) The Arbitration Provisions are not Confusing and Difficult to Understand.

The district court found two lines from the arbitration provisions in the purchase agreements to be confusing and difficult to understand: (1) the reference to the homeowners' warranty, and (2) the lack of discussion regarding "construction defect" claims. (App. 461 at ¶ 18.) The court erred in so ruling.

(i) The clause requiring that warranty claims be administered before arbitration is not confusing, nor is it relevant.

The district court ruled that the arbitration provisions in the purchase agreements are "confusing" because, for those claims covered by the written warranty provided to Homeowners at the time they purchased their homes, the provisions require Homeowners to first proceed through the claim process set forth by the warranty if they intend to pursue a warranty claim. (*Id.*) The arbitration agreement states:

> It is understood and agreed by the parties that in the event the Homeowner' Warranty provided by 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.

(App. 144–51 at § 18.) The district court's ruling is flawed for a number of reasons.

First, this is a non-issue. U.S. Home is not attempting to force Homeowners to go through the warranty-claim process, nor have Homeowners attempted to do so. Because no one is looking to enforce the warranty process, even if it were applicable, it has no bearing on whether Homeowners should arbitrate their claims.

Second, this warranty-process clause is not confusing. The language is simple and easy to understand. It clearly indicates that any claims covered by the written warranty should be first administered by the procedures set forth therein before proceeding to arbitration. There is no reasonable, alternative interpretation that creates any ambiguity. In fact, the district court does not seem to suggest that this provision is difficult to understand. Instead, the court appears to suggest that it is difficult to know *when* to submit claims under the warranty, and when not to. But to know when to (and when not to) submit claims under the warranty, a party must review the written warranty, not the purchase agreements. Here, no evidence relating to the written warranty was submitted to the district court.

Finally, even if this sentence is confusing, both the arbitration provisions and the purchase agreements as a whole contain severability clauses. (App. 124 at § 17.2; App. 144–51 at §§ 18, 23.) Thus, the Court should sever this sentence instead of invaliding the entire arbitration agreement.

(ii) The lack of discussion regarding "construction defect" claims does not create confusion.

The district court also expressed confusion over the fact that "[t]here is no explicit 'construction defect' term mentioned indicating that such claims must be arbitrated." (App. 461 at ¶ 18.) In other words, it seems unclear to the court whether construction defect claims fall within the scope of the arbitration provisions in the purchase agreements.

This statement by the district court is puzzling because earlier in its order the court noted that Homeowners are not contesting that their claims fall within the scope of the arbitration agreements. The court stated:

> Here, [the Homeowners] do not dispute the existence of the arbitration provisions at issue, or that the claims fall within the scope of the arbitration provisions, but rather contend that the arbitration provisions are unenforceable in light of the NRS Chapter 40 protections of homeowners rights, and the fact that the provisions are unconscionable.

(App. 457 at ¶ 6.) Given that this is a not a contested issue between the parties, it was error for the district court to find the arbitration agreements procedurally unconscionable on this basis.

More importantly, the arbitration provisions clearly indicate that construction defect claims are to be arbitrated. They state that "any and all controversies, disputes or claims arising under, or related to, this Agreement, the property, or any dealings between the Buyer and Seller" shall be submitted to binding arbitration. (App. 144–51 at § 18.) There is no ambiguity. Construction defect claims are clearly claims related to the subject properties, the purchase agreements, and/or the dealings between Homeowners and U.S. Home.

(iii) The District Court's Finding is Not Supported By Substantial Evidence.

The district court's finding of confusion is not supported by any evidence, let alone substantial evidence. *D.R. Horton*, 96 P.3d at 1162.

As previously discussed, in opposing the motion to compel arbitration, the Homeowners submitted two declarations. These declarations do not discuss any confusion with regard to the warranty-claim provision or the scope of the arbitration agreements. One declaration states that the Homeowner "did not read the PSA . . . before the purchase of the property, as it was too many papers." (App. 354.) The other declaration simply indicates that the Homeowner "did not realize that by signing the original purchase agreement [he] was waiving [his] rights to bring a claim for construction defects under Nevada law but was instead agreement to arbitrate those claims." (App. 352.) These two statements do not evidence that these two (or any other) Homeowners were confused with regard to the specific provisions in the arbitration agreements. Furthermore, the district court never mentioned these declarations in its August 20, 2015 order, (App. 455–64), its minute order (App. 432–34), or during the June 3 hearing (App. 398–431). Therefore, not only did the district court not rely on these declarations, but no evidence from Homeowners supported the district court's finding.

(c) The Arbitration Provisions "Clearly State" That Homeowners Waived Their Right to a Jury Trial.

The district court ruled that the arbitration provisions in the purchase agreements are procedurally unconscionable because they "lack clarity" in that

they "do not clearly state that the purchaser is waving his right to a jury trial." (App. 462 at ¶ 19.) This ruling was erroneous.

"The failure to advise of the waiver of right to jury trial does not overcome the strong presumption in favor of arbitration." *Lyman v. Mor Furniture For Less, Inc.*, 2007 WL 2300683, at *4 (D. Nev. Aug. 7, 2007). Furthermore, U.S. Home had no specific "duty to explain in detail each and every right that the Home[owners] would be waiving by agreeing to arbitration," so long as the disputed provision is "conspicuous and clearly put[s] a purchaser on notice." *D.R. Horton*, 96 P.3d at 1166.

Nonetheless, Homeowners were informed they were waiving the right to a jury trial. The arbitration provisions clearly state that claims must be submitted to arbitration pursuant to AAA's rules, and that the arbitrator's award will be "binding" and final. (App. 144–51 at § 18.) This clearly informs Homeowners that their claims will be resolved without a jury and "not by or in a court of law." (*Id*.) See *Lyman*, 2007 WL 2300683 at *3 ("Though the arbitration provision … at issue does not state that it acts as a jury waiver, it does specifically state that all disputes … will be settled by arbitration administered by the JAMS' rules …. While not specifically advising Plaintiff she is waiving her right to jury trial, *it clearly informs her that her dispute will be resolved in a forum other than a judicial proceeding*.") (emphasis added).

Furthermore, the district court's ruling is not supported by substantial evidence. The two declarations submitted by Homeowners do not mention anything about their lack of understanding regarding the jury-trial waivers. Nor do they

discuss Homeowners' lack of familiarity with the arbitration procedure in general. Instead, the declarations simply attempt to establish that these two Homeowners were unaware that they had entered into arbitration agreements.

3. After Signing the Agreements, the Homeowners Had Five Days to Review and Opt Out of Them.

Nevada law gave Homeowners five days after entering into their purchase agreements to opt-out and receive a full refund of any paid deposit. NRS 116.4108; NRS 119.182(2). This means that after Homeowners signed the agreements, they had five additional days to review the CC&Rs and purchase agreements, including the accompanying arbitration agreements, to take the steps necessary to understand their rights, and to contemplate their purchase in a non-pressure setting. Accordingly, Homeowners cannot now complain that they were unacquainted with the arbitration agreements in the CC&Rs and the purchase agreements at the time of purchase.

Courts routinely hold that such "opt-out" provisions defeat any claim of procedural unconscionability due to (1) feeling rushed when signing, (2) not reading or understanding the arbitration agreement, or (3) the arbitration agreement being offered on a "take-it-or-leave-it" basis. *See, e.g.*, *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1200 (9th Cir. 2002) (an agreement to arbitrate was not procedurally unconscionable because the party was given an opportunity to opt-out, which meant that he (1) "was not presented with a contract of adhesion," (2) had time to decide whether to agree to the arbitration agreement, and (3) had "ample opportunity to investigate any provisions he did not understand"); *Hodsdon v. Bright House*

Networks, LLC, No. 1:12-CV-01580-AWI, 2013 WL 1091396, at *5 (E.D. Cal. Mar. 15, 2013); *Miller v. Corinthian Colleges, Inc.*, 769 F. Supp. 2d 1336, 1346 (D. Utah 2011).

4. The Arbitration Agreements Are Enforceable Even If Homeowners Failed to Read or Understand Them.

Even if Homeowners failed to read or understand the arbitration agreements, they are bound by them. It is a long accepted tenet of contract law that the failure to read or understand the contents of an agreement will not excuse a signing party from its legal effects. "Any other rule would throw chaos into all contract arrangements because a party could avoid responsibility quite conveniently simply by signing a contract without reading it." 27 Williston on Contracts § 70:113 (4th Ed.).

For example, in *Campanelli v. Conservas Altamira, S.A.*, the plaintiff admitted to signing "the sales contract, but denie[d] any intent to submit any dispute arising out of that contract to arbitration." 477 P.2d 870, 872 (Nev. 1970). This Court, however, ruled that the plaintiff's contention was untenable:

> [W]hen a party to a written contract accepts[,] … he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contends and to assent to them, and there can be no evidence for the jury as to his understanding of its terms.

Id. (internal quotations and citations omitted); *see also Employee Painters' Trust v. J & B Finishes*, 77 F.3d 1188, 1192 (9th Cir. 1996) ("A party who signs a written agreement is bound by its terms, even though the party neither reads the agreement

nor considers the legal consequences of signing it."); *Gage v. Phillips*, 26 P. 60, 61–62 (Nev. 1891) ("The mere statement … that she did not know what she was signing, when she signed … is no excuse in law."); *Pentax Corp. v. Boyd*, 904 P.2d 1024, 1026 (Nev. 1995) ("[P]arties may be held to contracts which they did not read.").

Here, Homeowners do not contend, let alone present any evidence, that U.S. Home committed fraud or a wrongful act. The only evidence submitted by Homeowners – the declarations submitted by two of them – shows that Homeowners simply failed to read or attempt to understand the arbitration agreements. Nonetheless, whether they read them or not, they are still bound by them.

5. Arbitration Agreements Found In Adhesion Agreements Are Enforceable.

The district court ruled that the arbitration agreements in the purchase agreements were "impermissibly adhesive" because Homeowners "were not given the opportunity to negotiate the terms of such provisions." (App. 462 at ¶ 19.) This ruling is incorrect as a matter of law.

First, there is virtually no evidence to support the position that Homeowners were unable to negotiate the terms of the purchase agreements. Two Homeowners submitted declarations stating, in one, "I was given the purchase agreement on a 'take it or leave it' basis," and, in the other, "I did not have an opportunity to change or negotiate the terms of the PSA." (App. 352–54.) However, these self-serving statements fail to provide any details regarding (1) the provisions of the

purchase agreements they wanted to negotiate, (2) how their requests, if any, to negotiate were presented to U.S. Home, and (3) U.S. Home's responses. These statements do not even suggest that they wanted to change or avoid their arbitration obligations in any way. These conclusory statements come far short of meeting the Homeowners' evidentiary burden of proving that their attempts to negotiate the arbitration provisions were rebuffed. *See Woodside Homes of Cal., Inc. v. Superior Court*, 132 Cal. Rptr. 2d 35, 40 (Cal. Ct. App. 2003) (arbitration provision in home purchase agreement was enforceable because "no buyer had stricken [the arbitration provisions.] Nor was there any evidence concerning any buyer's disagreement or attempt to reject the provisions").

However, even if the Homeowners' statement are true, this does not render the agreements unenforceable. "This court permits the enforcement of adhesion contracts where there is plain and clear notification of the terms and an understanding consent[,] and if it falls within the reasonable expectations of the weaker ... party." *Burch*, 49 P.3d at 649; *see Concepcion*, 131 S.Ct. at 1750; *see Stout v. J.D. Byrider*, 228 F.3d 709, 715 (6th Cir. 2000). Here, as discussed above, the arbitration provisions are conspicuous, Homeowners signed the agreements and initialed the pages containing the arbitration provisions, and they had five days after so doing to further review and opt-out of the agreements.

Additionally, Homeowners were free to purchase a home from one of the other numerous developers in Clark County. In *D.R. Horton*, this Court rejected the notion that homebuyers in general do not have bargaining power. 96 P.3d at 1163. This Court agreed with the developer's argument that the large disparity between

the parties' financial strength did *not* mean there was unequal bargaining power. This was because the homebuyers could have chosen to purchase a home from another developer in the same area. *Id*.

E. The Arbitration Agreements Are Not Substantively Unconscionable.

Because the arbitration provisions are not procedurally unconscionable, they are enforceable. *Burch*, 49 P.3d at 650 ("[B]oth procedural and substantive unconscionability must be present."). Therefore, this Court need not address the issue of substantively unconscionability. Nevertheless, the arbitration provisions are also not substantively unconscionable.[4]

"[S]ubstantive unconscionability focuses on the one-sidedness of the contract terms." *D.R. Horton*, 96 P.3d at 1162–63. However, "[n]ot all one-sided contract provisions are unconscionable." *Sanchez*, 353 P.3d at 749 (the provisions must be "*overly* harsh" or "*unduly* oppressive") (emphasis in original). "A contract term is not substantively unconscionable just because it gives one side a greater benefit; rather, it *must be so one-sided as to shock the conscience*." *Pinnacle*, 282 P.3d at 1232 (emphasis added and quotations omitted). Thus, courts have held that, where an arbitration agreement is concerned, the agreement is not unconscionable

[4] It is worth noting that, in another U.S. Home appeal (case no. 64489), which concerned compelling arbitration based on the exact same purchase agreements in this case (App. 144–51), this Court, in a decision issued on July 31, 2015, stated, "Because we conclude that the arbitration provision was not substantively unconscionable, we need not consider whether the provision was procedurally unconscionable." However, this July 31 decision is unpublished, is not be regarded as precedent, and is not legal authority. SCR 123.

if it contains "*a modicum of bilaterality*." *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) (emphasis added.)

Here, the district court concluded that the arbitration provisions are substantively unconscionable because it believed that (1) the arbitration provisions abrogate or contradict NRS 40, and (2) U.S. Home's ability to join subcontractors in the arbitration is impermissibly one-sided. (App. 462–63 at ¶¶ 22–23.) This conclusion, however, is not supported by law or fact.

1. The arbitration agreement in the CC&Rs does not "abrogate" the homeowners' NRS 40 rights by adding a 180-day timeline.

The district court ruled that, because the CC&Rs require "different timelines and/or additional procedures" than those set forth by Nevada's Chapter 40, they are "against public policy" and therefore unconscionable. (App. 129.) More specifically, the court stated that, pursuant to the arbitration agreement, "the arbitration hearing is to be convened no later than one hundred eighty (180) days from the date the arbitrator is appointed. This timeline and procedure is not mandated under NRS Chapter 40." (App. 461 at ¶ 17.) Taken to its logical conclusion, this statement suggests that, in the court's view, arbitration can *never* be allowed for a construction defect claim because Chapter 40 does not provide for arbitration. This ruling demonstrates a hostility toward arbitration that is disallowed by the FAA, the United States Supreme Court, and Nevada law, as previously discussed. *Concepcion*, 131 S. Ct. 1740, 1747 ("When state law

prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").

Furthermore, NRS 40 sets forth the *pre-litigation* requirements and procedures that the parties must adhere to prior to formal litigation. It is not meant to dictate or control the litigation procedures *after* the Chapter 40 process is complete, assuming no resolution of the claim has been reached. For example, Chapter 40 does not instruct the parties on where the claim is to be venued, how the complaint is to be pled or amended, how discovery is to be conducted, or how long the parties have to conduct pre-trial activities. The fact that NRS 40 does not provide for arbitration is no more relevant than the fact that it does provide for the filing of this very appeal! It only dictates the pre-litigation process.

Furthermore, the requirement that the arbitration take place within 180 days is not substantively unconscionable because it is bilateral and reasonable. No argument, let alone evidence, was proffered by Homeowners or the district court indicating how a six-month time limitation is one-sided in U.S. Home's favor. Indeed, it is not. It applies bilaterally to both sides. Nor was any argument or evidence presented to the court demonstrating how a six-month time frame is "overly harsh or unduly oppressive" to Homeowners. *See Pinnacle*, 282 P.3d at 1232 ("A contract term . . . must be so one-sided as to shock the conscience.").

2. The Arbitration Provisions Allow Recovery Pursuant to NRS 40.655 and NRS 18.

In ruling the arbitration agreements to be substantively unconscionable, the district court noted that the CC&Rs state that "costs of arbitration shall be borne

equally by the parties." (App. 462 at ¶ 21.) The court also pointed to the provision in the purchase agreements stating that "cost of mediation and arbitration shall be borne equally by Seller and Buyer." (App. 144–51 at § 18; App. 463 at ¶ 23.) The court concluded that these provisions strip Homeowners of their right to recover attorney's fees and costs under NRS 40.655 and NRS 18. (App. 463 at ¶ 23.) This is simply not true.

Even in traditional litigation, Homeowners pursuing construction defect claims have to bear their own costs, such as filing fees, deposition expenses, and expert fees, unless and until they are awarded the same under NRS 40.655. The only difference is that, in arbitration, the costs are generally much less. *D.R. Horton*, 96 P.3d at 1162 ("[A]rbitration generally avoids the higher costs and longer time periods associated with traditional litigation.").

The fact that the parties are to bear their own costs during the arbitration does not mean the arbitrator can, or will, disregard the law, including NRS 40.655 or NRS 18. Even in traditional litigation, the district court has the discretion to award fees and costs under NRS 40.655. *See Gunderson v. D.R. Horton, Inc.*, 319 P.3d 606, 617 (Nev. 2014) ("While NRS 40.655 permits an award of reasonable attorney fees proximately caused by a construction defect, it does not guarantee it."); *see also Albios v. Horizon Communities, Inc.*, 132 P.3d 1022, 1028 (Nev. 2006). Thus, there is no guarantee that Homeowners will be awarded NRS 40.655 damages in court. More importantly, there is no basis for assuming that the arbitrator will not follow the law when exercising its discretion to award fees and costs. On the contrary, the opposite should be assumed. By pursuing claims in

arbitration rather than district court, a party does not forgo substantive rights, including the right to fees and costs. *D.R. Horton*, 96 P.3d at 1164 ("In general, the right to request attorney fees would still exist in an arbitration proceeding because [b]y agreeing to arbitrate a statutory claim ... , a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

This point is emphasized in the arbitration provision in the purchase agreements, which states that the parties are to bear their own arbitration costs "unless otherwise provided by law." (App. 144–51 at § 18.) In other words, the arbitrator is to follow the substantive law, including NRS 40.655, when considering the award at the conclusion of the arbitration.

Further, arbitration awards can be vacated if the arbitrator disregards the law. *See Sylver*, 300 P.3d at 722–24; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (parties are bound by arbitrator's decision if it is not in "manifest disregard" of the law). The United States Supreme Court has explained:

> [W]e have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. … [W]e have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987).

Lastly, to the extent that the bear-your-own-fees or cost-splitting clauses are deemed unconscionable, they can easily be severed from the arbitration provisions.

(*See* App. 124 at § 17.2; App. 144–51 at §§ 18, 23 (permitting severance).) This would preserve the intent of the arbitration provisions and comply with the strong policies favoring arbitration. *See Cox*, 2014 WL 3747605, *4 (citing *Vincent*, 647 P.2d at 381).

3. U.S. Home's ability to join implicated subcontractors in arbitration is not unconscionable.

The district court concluded that the arbitration provisions in both the CC&Rs and the purchase agreements are substantively unconscionable because they allow U.S. Home to join subcontractors in the arbitrations. (App. 462–63 at ¶¶ 22–23.) The court believed this to be problematic because, in its view, "it divests [Homeowners] of the similar right to include subcontractors and suppliers that [they] would ordinarily be given under NRS Chapter 40." (*Id.*) This holding is flawed.

An agreement is not substantively unconscionable simply because it does not provide identical rights and obligations. *See, e.g.*, *Ticknor v. Choice Hotels Int'l., Inc.*, 265 F.3d 931, 996 (9th Cir. 2001)(arbitration agreements do not need to "contain mutual promises that give parties identical rights and obligations or that the parties must be bound in the exact same manner"). An agreement is not substantively unconscionable if it has a modicum (or small quantity) of bilaterality. *Ting*, 319 F.3d at 1149. It is substantively unconscionable only if it is "so one-sided as to shock the conscience." *Pinnacle*, 282 P.3d at 1232.

U.S. Home's right to bring in subcontractors for indemnity purposes does not render the arbitration agreements so one-sided as to shock the conscience for a

number of reasons. First, the arbitration agreements do not, and could not, divest Homeowners of a "similar right" to include subcontractors in the arbitration because Homeowners have no such right. Homeowners are not parties to arbitration agreements with U.S. Home's subcontractors. Thus, Homeowners never had such a "similar right." This means that the subcontractor-joinder clause in the arbitration provisions does not affect Homeowners' rights one way or another.

Next, Homeowners are entitled to full relief from U.S. Home under NRS 40.640, which provides that developers are liable for acts and omissions of their subcontractors. Accordingly, it is not necessary for Homeowners to pursue claims against subcontractors to be made whole. The subcontractor-joinder clause simply allows U.S. Home to assert its indemnity rights against the subcontractors.

In its ruling, the district court's expressed concern that Homeowners' inability to join subcontractors in the arbitration may lead to inconsistent results. However, this is not a basis for refusing to enforce the arbitration agreements, and neither the district court nor Homeowners have cited any legal authority to suggest that it is. *See generally Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988) ("[I]n *Dean Witter Reynolds, Inc. v. Byrd*, … the Supreme Court held that district courts must grant motions to compel arbitration of pendent arbitrable claims, even if inefficient maintenance of separate proceedings in different forums might result."); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 698 (9th Cir. 1986) (the FAA "requires district courts to compel arbitration even where the result would be the possibly inefficient maintenance of separate proceedings"); *Moses H. Cone Memorial Hospital*, 460 U.S. 1, 20 (1983) ("the

relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.").

V. THE ARBITRATOR SHOULD DECIDE THE ENFORCEABILITY OF THE ARBITRATION PROVISIONS IN THE PURCHASE AGREEMENTS.

With regard to those Homeowners who signed the purchase agreements, the arbitrability issues addressed herein (the applicability of the FAA and the enforceability of the arbitration provisions) should be decided by an arbitrator, not this Court. The purchase agreements state, "All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator." (App. 144–51 § 18.) Delegation clauses such as this are enforceable.

The parties may determine by contract whether the arbitrator or the court decides a particular issue, including the question of whether a particular matter is arbitrable. *Rent–A–Center, West, Inc.*, 561 U.S. 63, 69–70 (2010). Arbitrability is presumptively resolved by the court "[u]nless the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (alteration in original, quotation omitted).

A provision in an arbitration agreement that delegates questions of arbitrability to the arbitrator must be severed by the court from the rest of the arbitration agreement for independent consideration because it constitutes "an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent–A–Center, West, Inc* ., 561 U.S. at 70; *Buckeye*

Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006); *Gibbs-Bolender v. CAG Acceptance, LLC*, (Slip Copy) No. 2:14-CV-01684-APG, 2015 WL 685217, at *3 (D. Nev. Feb. 18, 2015). As a result, if the parties clearly and unmistakably delegate arbitrability questions to the arbitrator, the arbitrator decides arbitrability unless the party resisting arbitration specifically challenges the enforceability of the delegation provision. *Rent–A–Center*, 561 U.S. at 70. "In other words, when a plaintiff's legal challenge is that [an arbitration agreement] as a whole is unenforceable, the arbitrator decides the validity of the contract, including derivatively the validity of its constituent provisions (such as the [delegation] clause)." *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010). "However, when a plaintiff argues that [a delegation] clause, standing alone, is unenforceable—for reasons independent of any reasons the remainder of the contract might be invalid—that is a question to be decided by the court." *Id.* The "material question is whether the challenge to the arbitration provision is severable from the challenge to the contract as a whole." *Id.* at 1001.

Here, these Homeowners and U.S. Home "clearly and unmistakably" delegated arbitrability questions to the arbitrator. *See Rent–A–Center*, 561 U.S. at 70. They agreed that "*[a]ll* decisions respecting the arbitrability of *any* dispute shall be decided by the arbitrator." (App. 53-79, § 18 (emphasis added).) Homeowners have not argued that this delegation clause, standing alone, is unenforceable for reasons independent of their reasons for invalidating the remainder of the arbitration provisions. As such, the delegation clause should be severed from the remainder of arbitration provisions (i.e., separated for

independent consideration) and enforced. In other words, this Court should order that the arbitrability of Homeowners' claims must be decided in arbitration.

CONCLUSION

For the foregoing reasons, U.S. Home respectfully requests that this Court hold that (1) the FAA applies, (2) the arbitration agreement in the CC&Rs requiring the Homeowners to arbitrate their claims is enforceable, and (3) the arbitration provision in the purchase agreements is enforceable.

DATED: November 4, 2015 PAYNE & FEARS LLP

By */s/ Gregory H. King*

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,997 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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ADDENDUM

4827-2501-2010.2

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2015, I deposited a true and correct copy of the above and foregoing, APPELLANTS' OPENING BRIEF, on this date by electronic transmission through the court's electronic filing program.

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

ADDENDUM "1"

ADDENDUM "1"

NRS 38.247 Appeals.

1. An appeal may be taken from:

(a) An order denying a motion to compel arbitration;

(b) An order granting a motion to stay arbitration;

(c) An order confirming or denying confirmation of an award;

(d) An order modifying or correcting an award;

(e) An order vacating an award without directing a rehearing; or

(f) A final judgment entered pursuant to NRS 38.206 to 38.248, inclusive.

2. An appeal under this section must be taken as from an order or a judgment in a civil action.

ADDENDUM "2"

ADDENDUM "2"

NRS 40.655 Limitation on recovery.

1. Except as otherwise provided in NRS 40.650, in a claim governed by NRS 40.600 to 40.695, inclusive, the claimant may recover only the following damages to the extent proximately caused by a constructional defect:

(a) Any reasonable attorney's fees;

(b) The reasonable cost of any repairs already made that were necessary and of any repairs yet to be made that are necessary to cure any constructional defect that the contractor failed to cure and the reasonable expenses of temporary housing reasonably necessary during the repair;

(c) The reduction in market value of the residence or accessory structure, if any, to the extent the reduction is because of structural failure;

(d) The loss of the use of all or any part of the residence;

(e) The reasonable value of any other property damaged by the constructional defect;

(f) Any additional costs reasonably incurred by the claimant, including, but not limited to, any costs and fees incurred for the retention of experts to:

(1) Ascertain the nature and extent of the constructional defects;

(2) Evaluate appropriate corrective measures to estimate the value of loss of use; and

(3) Estimate the value of loss of use, the cost of temporary housing and the reduction of market value of the residence; and

(g) Any interest provided by statute.

2. The amount of any attorney's fees awarded pursuant to this section must be approved by the court.

3. If a contractor complies with the provisions of NRS 40.600 to 40.695, inclusive, the claimant may not recover from the contractor, as a result of the constructional defect, anything other than that which is provided pursuant to NRS 40.600 to 40.695, inclusive.

4. This section must not be construed as impairing any contractual rights between a contractor and a subcontractor, supplier or design professional.

5. As used in this section, "structural failure" means physical damage to the load-bearing portion of a residence or appurtenance caused by a failure of the load-bearing portion of the residence or appurtenance.

ADDENDUM "3"

ADDENDUM "3"

9 U.S.C. § 2

§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.

ADDENDUM "4"

ADDENDUM "4"

NRS 38.219 Validity of agreement to arbitrate.

1. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except as otherwise provided in NRS 597.995 or upon a ground that exists at law or in equity for the revocation of a contract.

2. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

3. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

4. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitral proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

(Added to NRS by 2001, 1275; A 2013, 568)

ADDENDUM "5"

ADDENDUM "5"

NRS 116.1201 Applicability; regulations.

1. Except as otherwise provided in this section and NRS 116.1203, this chapter applies to all common-interest communities created within this State.

2. This chapter does not apply to:

(a) A limited-purpose association, except that a limited-purpose association:

(1) Shall pay the fees required pursuant to NRS 116.31155, except that if the limited-purpose association is created for a rural agricultural residential common-interest community, the limited-purpose association is not required to pay the fee unless the association intends to use the services of the Ombudsman;

(2) Shall register with the Ombudsman pursuant to NRS 116.31158;

(3) Shall comply with the provisions of:

(I) NRS 116.31038;

(II) NRS 116.31083 and 116.31152, unless the limited-purpose association is created for a rural agricultural residential common-interest community;

(III) NRS 116.31073, if the limited-purpose association is created for maintaining the landscape of the common elements of the common-interest community; and

(IV) NRS 116.31075, if the limited-purpose association is created for a rural agricultural residential common-interest community;

(4) Shall comply with the provisions of NRS 116.4101 to 116.412, inclusive, as required by the regulations adopted by the Commission pursuant to paragraph (b) of subsection 5; and

(5) Shall not enforce any restrictions concerning the use of units by the units' owners, unless the limited-purpose association is created for a rural agricultural residential common-interest community.

(b) A planned community in which all units are restricted exclusively to nonresidential use unless the declaration provides that this chapter or a part of this chapter does apply to that planned community pursuant to NRS 116.12075. This chapter applies to a planned community containing both units that are restricted exclusively to nonresidential use and other units that are not so restricted only if the declaration so provides or if the real estate comprising the units that may be used for residential purposes would be a planned community in the absence of the units that may not be used for residential purposes.

(c) Common-interest communities or units located outside of this State, but NRS 116.4102 and 116.4103, and, to the extent applicable, NRS 116.41035 to 116.4107, inclusive, apply to a contract for the disposition of a unit in that common-interest community signed in this State by any party unless exempt under subsection 2 of NRS 116.4101.

(d) A common-interest community that was created before January 1, 1992, is located in a county whose population is less than 55,000, and has less than 50 percent of the units within the community put to residential use, unless a majority of the units' owners otherwise elect in writing.

(e) Except as otherwise provided in this chapter, time shares governed by the provisions of chapter 119A of NRS.

3. The provisions of this chapter do not:

(a) Prohibit a common-interest community created before January 1, 1992, from providing for separate classes of voting for the units' owners;

(b) Require a common-interest community created before January 1, 1992, to comply with the provisions of NRS 116.2101 to 116.2122, inclusive;

(c) Invalidate any assessments that were imposed on or before October 1, 1999, by a common-interest community created before January 1, 1992;

(d) Except as otherwise provided in subsection 8 of NRS 116.31105, prohibit a common-interest community created before January 1, 1992, or a common-interest community described in NRS 116.31105 from providing for a representative form of government, except that, in the election or removal of a member of the executive board, the voting rights of the units' owners may not be exercised by delegates or representatives;

(e) Prohibit a master association which governs a time-share plan created pursuant to chapter 119A of NRS from providing for a representative form of government for the time-share plan; or

(f) Prohibit a master association which governs a planned community containing both units that are restricted exclusively to nonresidential use and other units that are not so restricted and which is exempt from the provisions of this chapter pursuant to paragraph (b) of subsection 2 from providing for a representative form of government.

4. The provisions of chapters 117 and 278A of NRS do not apply to common-interest communities.

5. The Commission shall establish, by regulation:

(a) The criteria for determining whether an association, a limited-purpose association or a common-interest community satisfies the requirements for an exemption or limited exemption from any provision of this chapter; and

(b) The extent to which a limited-purpose association must comply with the provisions of NRS 116.4101 to 116.412, inclusive.

6. As used in this section, "limited-purpose association" means an association that:

(a) Is created for the limited purpose of maintaining:

(1) The landscape of the common elements of a common-interest community;

(2) Facilities for flood control; or

(3) A rural agricultural residential common-interest community; and

(b) Is not authorized by its governing documents to enforce any restrictions concerning the use of units by units' owners, unless the limited-purpose association is created for a rural agricultural residential common-interest community.

ADDENDUM "6"

ADDENDUM "6"

NRS 116.2101 Creation of common-interest communities.

A common-interest community may be created pursuant to this chapter only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every county in which any portion of the common-interest community is located and must be indexed in the grantee's index in the name of the common-interest community and the association and in the grantor's index in the name of each person executing the declaration.

(Added to NRS by 1991, 543)

ADDENDUM "7"

ADDENDUM "7"

NRS 116.2105 Contents of declaration.

1. The declaration must contain:

(a) The names of the common-interest community and the association and a statement that the common-interest community is either a condominium, cooperative or planned community;

(b) The name of every county in which any part of the common-interest community is situated;

(c) A legally sufficient description of the real estate included in the common-interest community;

(d) A statement of the maximum number of units that the declarant reserves the right to create;

(e) In a condominium or planned community, a description of the boundaries of each unit created by the declaration, including the unit's identifying number or, in a cooperative, a description, which may be by plats, of each unit created by the declaration, including the unit's identifying number, its size or number of rooms, and its location within a building if it is within a building containing more than one unit;

(f) A description of any limited common elements, other than those specified in subsections 2 and 4 of NRS 116.2102, as provided in paragraph (g) of subsection 2 of NRS 116.2109 and, in a planned community, any real estate that is or must become common elements;

(g) A description of any real estate, except real estate subject to developmental rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in subsections 2 and 4 of NRS 116.2102, together with a statement that they may be so allocated;

(h) A description of any developmental rights and other special declarant's rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(i) If any developmental right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with:

(1) Either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each developmental right or a statement that no assurances are made in those regards; and

(2) A statement whether, if any developmental right is exercised in any portion of the real estate subject to that developmental right, that developmental right must be exercised in all or in any other portion of the remainder of that real estate;

(j) Any other conditions or limitations under which the rights described in paragraph (h) may be exercised or will lapse;

(k) An allocation to each unit of the allocated interests in the manner described in NRS 116.2107;

(l) Any restrictions:

(1) On use, occupancy and alienation of the units; and

(2) On the amount for which a unit may be sold or on the amount that may be received by a unit's owner on sale, condemnation or casualty to the unit or to the common-interest community, or on termination of the common-interest community;

(m) The file number and book or other information for recorded easements and licenses appurtenant to or included in the common-interest community or to which any portion of the common-interest community is or may become subject by virtue of a reservation in the declaration; and

(n) All matters required by NRS 116.2106 to 116.2109, inclusive, 116.2115, 116.2116 and 116.31032.

2. The declaration may contain any other matters the declarant considers appropriate.

(Added to NRS by 1991, 544; A 1993, 2357; 2009, 1611; 2011, 2421)

ADDENDUM "8"

ADDENDUM "8"

NRS 116.3101 Organization of unit-owners' association.

1. A unit-owners' association must be organized no later than the date the first unit in the common-interest community is conveyed.

2. The membership of the association at all times consists exclusively of all units' owners or, following termination of the common-interest community, of all owners of former units entitled to distributions of proceeds under NRS 116.2118, 116.21183 and 116.21185, or their heirs, successors or assigns.

3. Except for a residential planned community containing not more than 12 units, the association must have an executive board.

4. The association must:

(a) Be organized as a profit or nonprofit corporation, association, limited-liability company, trust, partnership or any other form of organization authorized by the law of this State;

(b) Include in its articles of incorporation, articles of association, articles of organization, certificate of registration, certificate of limited partnership, certificate of trust or other documents of organization, or any amendment thereof, that the purpose of the corporation, association, limited-liability company, trust or partnership is to operate as an association pursuant to this chapter;

(c) Contain in its name the words "common-interest community," "community association," "master association," "homeowners' association" or "unit-owners' association"; and

(d) Comply with the applicable provisions of chapters 78, 81, 82, 86, 87, 87A, 88 and 88A of NRS when filing with the Secretary of State its articles of incorporation, articles of association, articles of organization, certificate of registration, certificate of limited partnership, certificate of trust or other documents of organization, or any amendment thereof.

(Added to NRS by 1991, 556; A 2003, 20th Special Session, 130; 2005, 2590; 2007, 485; 2011, 2427)

ADDENDUM "9"

ADDENDUM "9"

NRS 116.3102 Powers of unit-owners' association; limitations.

1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

(a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.

(b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.

(c) May hire and discharge managing agents and other employees, agents and independent contractors.

(d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.

(e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.

(f) May regulate the use, maintenance, repair, replacement and modification of common elements.

(g) May cause additional improvements to be made as a part of the common elements.

(h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:

(1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and

(2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.

(i) May grant easements, leases, licenses and concessions through or over the common elements.

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

(k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

(l) May impose construction penalties when authorized pursuant to NRS 116.310305.

(m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.

(n) May impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.

(p) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.

(q) May exercise any other powers conferred by the declaration or bylaws.

(r) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with

the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:

(1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or

(2) Poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community.

(t) May exercise any other powers necessary and proper for the governance and operation of the association.

2. The declaration may not limit the power of the association to deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons.

3. The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commence an action for a violation of the declaration, bylaws or rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(a) The association's legal position does not justify taking any or further enforcement action;

(b) The covenant, restriction or rule being enforced is, or is likely to be construed as, inconsistent with current law;

(c) Although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(d) It is not in the association's best interests to pursue an enforcement action.

4. The executive board's decision under subsection 3 not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

5. Notwithstanding any provision of this chapter or the governing documents to the contrary, an association may not impose any assessment pursuant to this chapter or the governing documents on the owner of any property in the common-interest community that is exempt from taxation pursuant to NRS 361.125. For the purposes of this subsection, "assessment" does not include any charge for any utility services, including, without limitation, telecommunications, broadband communications, cable television, electricity, natural gas, sewer services, garbage collection, water or for any other service which is delivered to and used or consumed directly by the property in the common-interest community that is exempt from taxation pursuant to NRS 361.125.

(Added to NRS by 1991, 556; A 1999, 3000; 2003, 2227, 2267; 2005, 2590; 2009, 1009, 2796, 2879, 2911; 2011, 2427)

ADDENDUM "10"

ADDENDUM "10"

ARTICLE 4

PROTECTION OF PURCHASERS

NRS 116.4101 Applicability; exceptions.

1. NRS 116.4101 to 116.412, inclusive, apply to all units subject to this chapter, except as otherwise provided in subsection 2 or as modified or waived by agreement of purchasers of units in a common-interest community in which all units are restricted to nonresidential use.

2. Neither a public offering statement nor a certificate of resale need be prepared or delivered in the case of a:

(a) Gratuitous disposition of a unit;

(b) Disposition pursuant to court order;

(c) Disposition by a government or governmental agency;

(d) Disposition by foreclosure or deed in lieu of foreclosure;

(e) Disposition to a dealer;

(f) Disposition that may be cancelled at any time and for any reason by the purchaser without penalty;

(g) Disposition of a unit in a planned community which contains no more than 12 units if:

(1) The declarant reasonably believes in good faith that the maximum assessment stated in the declaration will be sufficient to pay the expenses of the planned community; and

(2) The declaration cannot be amended to increase the assessment during the period of the declarant's control without the consent of all units' owners; or

(h) Disposition of a unit restricted to nonresidential purposes.

(Added to NRS by 1991, 571; A 1993, 2373; 1997, 3122; 1999, 3012; 2011, 2453)

NRS 116.4102 Liability for preparation and delivery of public offering statement.

1. Except as otherwise provided in subsection 2, a declarant, before offering any interest in a unit to the public, shall prepare a public offering statement conforming to the requirements of NRS 116.4103 to 116.4106, inclusive.

2. A declarant may transfer responsibility for the preparation of all or a part of the public offering statement to a successor declarant pursuant to NRS 116.3104 and 116.31043, or to a dealer who intends to offer units in the common-interest community. In the event of any such transfer, the transferor shall provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection 1.

3. Any declarant or dealer who offers a unit to a purchaser shall deliver a public offering statement in the manner prescribed in subsection 1 of NRS 116.4108. The declarant or his or her transferee under subsection 2 is liable under NRS 116.4108 and 116.4117 for any false or misleading statement set forth therein or for any omission of a material fact therefrom with respect to that portion of the public offering statement which he or she prepared. If a declarant or dealer did not prepare any part of a public offering statement that he or she delivers, he or she is not liable for any false or misleading statement set forth therein or for any omission of a material fact therefrom unless he or she had actual knowledge of the statement or omission or, in the exercise of reasonable care, should have known of the statement or omission.

4. If a unit is part of a common-interest community and is part of any other real estate in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of NRS 116.4103 to 116.4106, inclusive, as those requirements relate to the real estate in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing two or more public offering statements. If the requirements of this chapter conflict with those of another law of this State, the requirements of this chapter prevail.

(Added to NRS by 1991, 571; A 1993, 2374; 2001, 2493)

NRS 116.4103 Public offering statement: General provisions.

1. Except as otherwise provided in NRS 116.41035, a public offering statement must set forth or fully and accurately disclose each of the following:

(a) The name and principal address of the declarant and of the common-interest community, and a statement that the common-interest community is a condominium, cooperative or planned community.

(b) A general description of the common-interest community, including to the extent possible, the types, number and declarant's schedule of commencement and completion of construction of buildings, and amenities that the declarant anticipates including in the common-interest community.

(c) The estimated number of units in the common-interest community.

(d) Copies of the declaration, bylaws, and any rules or regulations of the association, but a plat is not required.

(e) The financial information required by subsection 2.

(f) A description of any services or subsidies being provided by the declarant or an affiliate of the declarant, not reflected in the budget that the declarant provides, or expenses which the declarant pays and which the declarant expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit.

(g) Any initial or special fee due from the purchaser or seller at closing, including, without limitation, any transfer fees, whether payable to the association, the community manager of the association or any third party, together with a description of the purpose and method of calculating the fee.

(h) The terms and significant limitations of any warranties provided by the declarant, including statutory warranties and limitations on the enforcement thereof or on damages.

(i) A statement that unless the purchaser or his or her agent has personally inspected the unit, the purchaser may cancel, by written notice, his or her contract

for purchase until midnight of the fifth calendar day following the date of execution of the contract, and the contract must contain a provision to that effect.

(j) A statement of any unsatisfied judgment or pending action against the association, and the status of any pending action material to the common-interest community of which a declarant has actual knowledge.

(k) Any current or expected fees or charges to be paid by units' owners for the use of the common elements and other facilities related to the common-interest community.

(l) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

(m) Any restraints on alienation of any portion of the common-interest community and any restrictions:

(1) On the leasing or renting of units; and

(2) On the amount for which a unit may be sold or on the amount that may be received by a unit's owner on the sale or condemnation of or casualty loss to the unit or to the common-interest community, or on termination of the common-interest community.

(n) A description of any arrangement described in NRS 116.1209 binding the association.

(o) The information statement set forth in NRS 116.41095.

2. The public offering statement must contain any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for 1 year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include:

(a) A statement of the amount included in the budget as a reserve for repairs, replacement and restoration pursuant to NRS 116.3115;

(b) A statement of any other reserves;

(c) The projected common expense assessment by category of expenditures for the association; and

(d) The projected monthly common expense assessment for each type of unit, including the amount established as reserves pursuant to NRS 116.3115.

3. A declarant is not required to revise a public offering statement more than once each calendar quarter, if the following warning is given prominence in the statement: "THIS PUBLIC OFFERING STATEMENT IS CURRENT AS OF (insert a specified date). RECENT DEVELOPMENTS REGARDING (here refer to particular provisions of NRS 116.4103 and 116.4105) MAY NOT BE REFLECTED IN THIS STATEMENT."

(Added to NRS by 1991, 572; A 1993, 2375; 1997, 3122; 1999, 3012; 2005, 2612; 2009, 1616, 2809; 2011, 2453)

NRS 116.41035 Public offering statement: Limitations for certain small offerings. If a common-interest community composed of not more than 12 units is not subject to any developmental rights and no power is reserved to a declarant to make the common-interest community part of a larger common-interest community, group of common-interest communities or other real estate, a public offering statement may include the information otherwise required by paragraphs (h) and (k) of subsection 1 of NRS 116.4103.

(Added to NRS by 1991, 573; A 1993, 553, 2376; 2011, 2455)

NRS 116.4104 Public offering statement: Common-interest communities subject to developmental rights. If the declaration provides that a common-interest community is subject to any developmental rights, the public offering statement must disclose, in addition to the information required by NRS 116.4103:

1. The maximum number of units that may be created;

2. A statement of how many or what percentage of the units that may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding restrictions of use;

3. A statement of the extent to which any buildings or other improvements that may be erected pursuant to any developmental right in any part of the common-interest community will be compatible with existing buildings and improvements in the common-interest community in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

4. General descriptions of all other improvements that may be made and limited common elements that may be created within any part of the common-interest community pursuant to any developmental right reserved by the declarant, or a statement that no assurances are made in that regard;

5. A statement of any limitations as to the locations of any building or other improvement that may be constructed or made within any part of the common-interest community pursuant to any developmental right reserved by the declarant, or a statement that no assurances are made in that regard;

6. A statement that any limited common elements created pursuant to any developmental right reserved by the declarant will be of the same general types and sizes as the limited common elements within other parts of the common-interest community, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

7. A statement that the proportion of limited common elements to units created pursuant to any developmental right reserved by the declarant will be approximately equal to the proportion existing within other parts of the common-interest community, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

8. A statement that all restrictions in the declaration affecting use, occupancy and alienation of units will apply to any units created pursuant to any developmental right reserved by the declarant, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

9. A statement of the extent to which any assurances made pursuant to this section apply or do not apply if any developmental right is not exercised by the declarant.

(Added to NRS by 1991, 573)

NRS 116.4105 Public offering statement: Time shares. If the declaration provides that ownership or occupancy of any units, is or may be in time shares, the public offering statement shall disclose, in addition to the information required by NRS 116.4103 and 116.41035:

1. The number and identity of units in which time shares may be created;

2. The total number of time shares that may be created;

3. The minimum duration of any time shares that may be created; and

4. The extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in NRS 116.3116 and 116.31162.

(Added to NRS by 1991, 574)

NRS 116.4106 Public offering statement: Common-interest community containing converted building.

1. The public offering statement of a common-interest community containing any converted building must contain, in addition to the information required by NRS 116.4103 and 116.41035:

(a) A statement by the declarant, based on a report prepared by an independent registered architect or licensed professional engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the building;

(b) A list of any outstanding notices of uncured violations of building codes or other municipal regulations, together with the estimated cost of curing those violations; and

(c) The budget to maintain the reserves required pursuant to paragraph (b) of subsection 2 of NRS 116.3115 which must include, without limitation:

(1) The current estimated replacement cost, estimated remaining life and estimated useful life of each major component of the common elements;

(2) As of the end of the fiscal year for which the budget was prepared, the current estimate of the amount of cash reserves that are necessary to repair, replace and restore the major components of the common elements and the current amount of accumulated cash reserves that are set aside for such repairs, replacements and restorations;

(3) A statement as to whether the declarant has determined or anticipates that the levy of one or more special assessments will be required within the next 10 years to repair, replace and restore any major component of the common elements or to provide adequate reserves for that purpose;

(4) A general statement describing the procedures used for the estimation and accumulation of cash reserves described in subparagraph (2), including, without limitation, the qualifications of the person responsible for the preparation of the study of reserves required pursuant to NRS 116.31152; and

(5) The funding plan that is designed to allocate the costs for the repair, replacement and restoration of the major components of the common elements over a period of years.

2. This section applies only to a common-interest community comprised of a converted building or buildings containing more than 12 units that may be occupied for residential use.

(Added to NRS by 1991, 574; A 1997, 1060; 2005, 2613)

NRS 116.4107 Public offering statement: Common-interest community registered with Securities and Exchange Commission or State of Nevada. If an interest in a common-interest community is currently registered with the Securities and Exchange Commission of the United States or with the State of Nevada pursuant to chapter 119, 119A or 119B of NRS, a declarant satisfies all requirements of this chapter relating to the preparation of a public offering statement if the declarant delivers to the purchaser a copy of the public offering statement filed with the Securities and Exchange Commission or the appropriate

Nevada regulatory authority. An interest in a common-interest community is not a security under the provisions of chapter 90 of NRS.

(Added to NRS by 1991, 574)

NRS 116.4108 Purchaser's right to cancel.

1. A person required to deliver a public offering statement pursuant to subsection 3 of NRS 116.4102 shall provide a purchaser with a copy of the current public offering statement not later than the date on which an offer to purchase becomes binding on the purchaser. Unless the purchaser has personally inspected the unit, the purchaser may cancel, by written notice, the contract of purchase until midnight of the fifth calendar day following the date of execution of the contract, and the contract for purchase must contain a provision to that effect.

2. If a purchaser elects to cancel a contract pursuant to subsection 1, the purchaser may do so by hand delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his or her agent for service of process. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly.

3. If a person required to deliver a public offering statement pursuant to subsection 3 of NRS 116.4102 fails to provide a purchaser to whom a unit is conveyed with a current public offering statement, the purchaser is entitled to actual damages, rescission or other relief, but if the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to rescission.

(Added to NRS by 1991, 574; A 1993, 2376; 2003, 2247)

NRS 116.4109 Resales of units.

1. Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under subsection 2 of NRS 116.4101, a unit's owner or his or her authorized agent shall, at the expense of the unit's owner, furnish to a purchaser a resale package containing all of the following:

(a) A copy of the declaration, other than any plats, the bylaws, the rules or regulations of the association and the information statement required by NRS 116.41095.

(b) A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner.

(c) A copy of the current operating budget of the association and current year-to-date financial statement for the association, which must include a summary of the reserves of the association required by NRS 116.31152 and which must include, without limitation, a summary of the information described in paragraphs (a) to (e), inclusive, of subsection 3 of NRS 116.31152.

(d) A statement of any unsatisfied judgments or pending legal actions against the association and the status of any pending legal actions relating to the common-interest community of which the unit's owner has actual knowledge.

(e) A statement of any transfer fees, transaction fees or any other fees associated with the resale of a unit.

(f) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

2. The purchaser may, by written notice, cancel the contract of purchase until midnight of the fifth calendar day following the date of receipt of the resale package described in subsection 1, and the contract for purchase must contain a provision to that effect. If the purchaser elects to cancel a contract pursuant to this subsection, the purchaser must hand deliver the notice of cancellation to the unit's owner or his or her authorized agent or mail the notice of cancellation by prepaid United States mail to the unit's owner or his or her authorized agent. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly. If the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to:

(a) Cancel the contract pursuant to this subsection; or

(b) Damages, rescission or other relief based solely on the ground that the unit's owner or his or her authorized agent failed to furnish the resale package, or any portion thereof, as required by this section.

3. Within 10 days after receipt of a written request by a unit's owner or his or her authorized agent, the association shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package:

(a) Copies of the documents required pursuant to paragraphs (a) and (c) of subsection 1; and

(b) A certificate containing the information necessary to enable the unit's owner to comply with paragraphs (b), (d), (e) and (f) of subsection 1.

4. If the association furnishes the documents and certificate pursuant to subsection 3:

(a) The unit's owner or his or her authorized agent shall include the documents and certificate in the resale package provided to the purchaser, and neither the unit's owner nor his or her authorized agent is liable to the purchaser for any erroneous information provided by the association and included in the documents and certificate.

(b) The association may charge the unit's owner a reasonable fee to cover the cost of preparing the certificate furnished pursuant to subsection 3. Such a fee must be based on the actual cost the association incurs to fulfill the requirements of this section in preparing the certificate. The Commission shall adopt regulations establishing the maximum amount of the fee that an association may charge for preparing the certificate.

(c) The other documents furnished pursuant to subsection 3 must be provided in electronic format to the unit's owner. The association may charge the unit's owner a fee, not to exceed $20, to provide such documents in electronic format. If the association is unable to provide such documents in electronic format, the association may charge the unit's owner a reasonable fee, not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter, to cover the cost of copying.

(d) Except for the fees allowed pursuant to paragraphs (b) and (c), the association may not charge the unit's owner any other fees for preparing or furnishing the documents and certificate pursuant to subsection 3.

5. Neither a purchaser nor the purchaser's interest in a unit is liable for any unpaid assessment or fee greater than the amount set forth in the documents and certificate prepared by the association. If the association fails to furnish the documents and certificate within the 10 days allowed by this section, the purchaser is not liable for the delinquent assessment.

6. Upon the request of a unit's owner or his or her authorized agent, or upon the request of a purchaser to whom the unit's owner has provided a resale package pursuant to this section or his or her authorized agent, the association shall make the entire study of the reserves of the association which is required by NRS 116.31152 reasonably available for the unit's owner, purchaser or authorized agent to inspect, examine, photocopy and audit. The study must be made available at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties.

7. A unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit may request a statement of demand from the association. Not later than 10 days after receipt of a written request from the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit for a statement of demand, the association shall furnish a statement of demand to the person who requested the statement. The association may charge a fee of not more than $150 to prepare and furnish a statement of demand pursuant to this subsection and an additional fee of not more than $100 to furnish a statement of demand within 3 days after receipt of a written request for a statement of demand. The statement of demand:

(a) Must set forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner; and

(b) Remains effective for the period specified in the statement of demand, which must not be less than 15 business days after the date of delivery by the association to the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit, whichever is applicable.

8. If the association becomes aware of an error in a statement of demand furnished pursuant to subsection 7 during the period in which the statement of demand is effective but before the consummation of a resale for which a resale package was furnished pursuant to subsection 1, the association must deliver a replacement statement of demand to the person who requested the statement of demand. Unless the person who requested the statement of demand receives a replacement statement of demand, the person may rely upon the accuracy of the information set forth in the statement of demand provided by the association for the resale. Payment of the amount set forth in the statement of demand constitutes full payment of the amount due from the selling unit's owner.

(Added to NRS by 1991, 575; A 1993, 2376; 1997, 3124; 2001, 2494; 2003, 2247; 2005, 2614; 2009, 1102, 1617, 2810, 2819; 2011, 2047, 2455, 3542; 2013, 3792)

NRS 116.41095 Required form of information statement. The information statement required by NRS 116.4103 and 116.4109 must be in substantially the following form:

BEFORE YOU PURCHASE PROPERTY IN A

COMMON-INTEREST COMMUNITY

DID YOU KNOW . . .

1. YOU GENERALLY HAVE 5 DAYS TO CANCEL THE PURCHASE AGREEMENT?

When you enter into a purchase agreement to buy a home or unit in a common-interest community, in most cases you should receive either a public offering statement, if you are the original purchaser of the home or unit, or a resale package, if you are not the original purchaser. The law generally provides for a 5-day period in which you have the right to cancel the purchase agreement. The 5-day period begins on different starting dates, depending on whether you receive a public offering statement or a resale package. Upon receiving a public offering statement or a resale package, you should make sure you are informed of the deadline for exercising your right to cancel. In order to exercise your right to

cancel, the law generally requires that you hand deliver the notice of cancellation to the seller within the 5-day period, or mail the notice of cancellation to the seller by prepaid United States mail within the 5-day period. For more information regarding your right to cancel, see Nevada Revised Statutes 116.4108, if you received a public offering statement, or Nevada Revised Statutes 116.4109, if you received a resale package.

2. YOU ARE AGREEING TO RESTRICTIONS ON HOW YOU CAN USE YOUR PROPERTY?

These restrictions are contained in a document known as the Declaration of Covenants, Conditions and Restrictions. The CC&Rs become a part of the title to your property. They bind you and every future owner of the property whether or not you have read them or had them explained to you. The CC&Rs, together with other "governing documents" (such as association bylaws and rules and regulations), are intended to preserve the character and value of properties in the community, but may also restrict what you can do to improve or change your property and limit how you use and enjoy your property. By purchasing a property encumbered by CC&Rs, you are agreeing to limitations that could affect your lifestyle and freedom of choice. You should review the CC&Rs, and other governing documents before purchasing to make sure that these limitations and controls are acceptable to you. Certain provisions in the CC&Rs and other governing documents may be superseded by contrary provisions of chapter 116 of the Nevada Revised Statutes. The Nevada Revised Statutes are available at the Internet address http://www.leg.state.nv.us/nrs/.

3. YOU WILL HAVE TO PAY OWNERS' ASSESSMENTS FOR AS LONG AS YOU OWN YOUR PROPERTY?

As an owner in a common-interest community, you are responsible for paying your share of expenses relating to the common elements, such as landscaping, shared amenities and the operation of any homeowners' association. The obligation to pay these assessments binds you and every future owner of the property. Owners' fees are usually assessed by the homeowners' association and due monthly. You have to pay dues whether or not you agree with the way the association is managing the property or spending the assessments. The executive board of the association may have the power to change and increase the amount of the assessment and to levy special assessments against your property to meet extraordinary expenses. In some communities, major components of the common elements of the community such as roofs and private roads must be maintained and replaced by the association. If

the association is not well managed or fails to provide adequate funding for reserves to repair, replace and restore common elements, you may be required to pay large, special assessments to accomplish these tasks.

4. IF YOU FAIL TO PAY OWNERS' ASSESSMENTS, YOU COULD LOSE YOUR HOME?

If you do not pay these assessments when due, the association usually has the power to collect them by selling your property in a nonjudicial foreclosure sale. If fees become delinquent, you may also be required to pay penalties and the association's costs and attorney's fees to become current. If you dispute the obligation or its amount, your only remedy to avoid the loss of your home may be to file a lawsuit and ask a court to intervene in the dispute.

5. YOU MAY BECOME A MEMBER OF A HOMEOWNERS' ASSOCIATION THAT HAS THE POWER TO AFFECT HOW YOU USE AND ENJOY YOUR PROPERTY?

Many common-interest communities have a homeowners' association. In a new development, the association will usually be controlled by the developer until a certain number of units have been sold. After the period of developer control, the association may be controlled by property owners like yourself who are elected by homeowners to sit on an executive board and other boards and committees formed by the association. The association, and its executive board, are responsible for assessing homeowners for the cost of operating the association and the common or shared elements of the community and for the day to day operation and management of the community. Because homeowners sitting on the executive board and other boards and committees of the association may not have the experience or professional background required to understand and carry out the responsibilities of the association properly, the association may hire professional community managers to carry out these responsibilities.

Homeowners' associations operate on democratic principles. Some decisions require all homeowners to vote, some decisions are made by the executive board or other boards or committees established by the association or governing documents. Although the actions of the association and its executive board are governed by state laws, the CC&Rs and other documents that govern the common-interest community, decisions made by these persons will affect your use and enjoyment of your property, your lifestyle and freedom of choice, and your cost of living in the community. You may not agree with decisions made by the association or its

governing bodies even though the decisions are ones which the association is authorized to make. Decisions may be made by a few persons on the executive board or governing bodies that do not necessarily reflect the view of the majority of homeowners in the community. If you do not agree with decisions made by the association, its executive board or other governing bodies, your remedy is typically to attempt to use the democratic processes of the association to seek the election of members of the executive board or other governing bodies that are more responsive to your needs. If you have a dispute with the association, its executive board or other governing bodies, you may be able to resolve the dispute through the complaint, investigation and intervention process administered by the Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels, the Nevada Real Estate Division and the Commission for Common-Interest Communities and Condominium Hotels. However, to resolve some disputes, you may have to mediate or arbitrate the dispute and, if mediation or arbitration is unsuccessful, you may have to file a lawsuit and ask a court to resolve the dispute. In addition to your personal cost in mediation or arbitration, or to prosecute a lawsuit, you may be responsible for paying your share of the association's cost in defending against your claim.

6. YOU ARE REQUIRED TO PROVIDE PROSPECTIVE PURCHASERS OF YOUR PROPERTY WITH INFORMATION ABOUT LIVING IN YOUR COMMON-INTEREST COMMUNITY?

The law requires you to provide a prospective purchaser of your property with a copy of the community's governing documents, including the CC&Rs, association bylaws, and rules and regulations, as well as a copy of this document. You are also required to provide a copy of the association's current year-to-date financial statement, including, without limitation, the most recent audited or reviewed financial statement, a copy of the association's operating budget and information regarding the amount of the monthly assessment for common expenses, including the amount set aside as reserves for the repair, replacement and restoration of common elements. You are also required to inform prospective purchasers of any outstanding judgments or lawsuits pending against the association of which you are aware. For more information regarding these requirements, see Nevada Revised Statutes 116.4109.

7. YOU HAVE CERTAIN RIGHTS REGARDING OWNERSHIP IN A COMMON-INTEREST COMMUNITY THAT ARE GUARANTEED YOU BY THE STATE?

Pursuant to provisions of chapter 116 of Nevada Revised Statutes, you have the right:

(a) To be notified of all meetings of the association and its executive board, except in cases of emergency.

(b) To attend and speak at all meetings of the association and its executive board, except in some cases where the executive board is authorized to meet in closed, executive session.

(c) To request a special meeting of the association upon petition of at least 10 percent of the homeowners.

(d) To inspect, examine, photocopy and audit financial and other records of the association.

(e) To be notified of all changes in the community's rules and regulations and other actions by the association or board that affect you.

8. QUESTIONS?

Although they may be voluminous, you should take the time to read and understand the documents that will control your ownership of a property in a common-interest community. You may wish to ask your real estate professional, lawyer or other person with experience to explain anything you do not understand. You may also request assistance from the Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels, Nevada Real Estate Division, at (telephone number).

Buyer or prospective buyer's initials:_____

Date:_____

(Added to NRS by 1997, 3114; A 1999, 3013; 2003, 2248; 2005, 2616; 2007, 2269; 2009, 1738)

NRS 116.411 Escrow of deposits; furnishing of bond in lieu of deposit.

1. Except as otherwise provided in subsections 2, 3 and 4, a deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to subsection 3 of NRS 116.4102 must be placed in escrow and held either in this State or in the state where the unit is located in an account designated solely for that purpose by a licensed title insurance company, an independent bonded escrow company, or an institution whose accounts are insured by a governmental agency or instrumentality until:

(a) Delivered to the declarant at closing;

(b) Delivered to the declarant because of the purchaser's default under a contract to purchase the unit;

(c) Released to the declarant for an additional item, improvement, optional item or alteration, but the amount so released:

(1) Must not exceed the lesser of the amount due the declarant from the purchaser at the time of the release or the amount expended by the declarant for the purpose; and

(2) Must be credited upon the purchase price; or

(d) Refunded to the purchaser.

2. A deposit or advance payment made for an additional item, improvement, optional item or alteration may be deposited in escrow or delivered directly to the declarant, as the parties may contract.

3. In lieu of placing a deposit in escrow pursuant to subsection 1, the declarant may furnish a bond executed by the declarant as principal and by a corporation qualified under the laws of this State as surety, payable to the State of Nevada, and conditioned upon the performance of the declarant's duties concerning the purchase or reservation of a unit. Each bond must be in a principal sum equal to the amount of the deposit. The bond must be held until:

(a) Delivered to the declarant at closing;

(b) Delivered to the declarant because of the purchaser's default under a contract to purchase the unit; or

(c) Released to the declarant for an additional item, improvement, optional item or alteration, but the amount so released must not exceed the amount due the declarant from the purchaser at the time of the release or the amount expended by the declarant for that purpose, whichever is less.

4. Pursuant to subsection 1, a deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to subsection 3 of NRS 116.4102 is deemed to be placed in escrow and held in this State when the escrow holder has:

(a) The legal right to conduct business in this State;

(b) A registered agent in this State pursuant to subsection 1 of NRS 14.020; and

(c) Consented to the jurisdiction of the courts of this State by:

(1) Maintaining a physical presence in this State; or

(2) Executing a written instrument containing such consent, with respect to any suit or claim, whether brought by the declarant or purchaser, relating to or arising in connection with such sale or the escrow agreement related thereto.

(Added to NRS by 1991, 575; A 1993, 2377; 1995, 1420; 2009, 2931)

NRS 116.4111 Release of liens.

1. In the case of a sale of a unit where delivery of a public offering statement is required pursuant to subsection 3 of NRS 116.4102, a seller:

(a) Before conveying a unit, shall record or furnish to the purchaser releases of all liens, except liens on real estate that a declarant has the right to withdraw from the common-interest community, that the purchaser does not expressly agree to take subject to or assume and that encumber:

(1) In a condominium, that unit and its interest in the common elements; and

(2) In a cooperative or planned community, that unit and any limited common elements assigned thereto; or

(b) Shall provide a surety bond against the lien as provided for liens on real estate in NRS 108.2413 to 108.2425, inclusive.

2. Before conveying real estate to the association, the declarant shall have that real estate released from:

(a) All liens the foreclosure of which would deprive units' owners of any right of access to or easement of support of their units; and

(b) All other liens on that real estate unless the public offering statement describes certain real estate that may be conveyed subject to liens in specified amounts.

(Added to NRS by 1991, 575; A 2003, 2618)

NRS 116.4112 Converted buildings.

1. A declarant of a common-interest community containing converted buildings, and any dealer who intends to offer units in such a common-interest community, shall give each of the residential tenants and any residential subtenant in possession of a portion of a converted building notice of the conversion and provide those persons with the public offering statement no later than 120 days before the tenants and any subtenant in possession are required to vacate. The notice must set forth generally the rights of tenants and subtenants under this section and must be hand-delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 120 days' notice, except by reason of nonpayment of rent, waste or conduct that disturbs other tenants' peaceful enjoyment of the premises, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession. If, during the 6-month period before the recording of a declaration, a majority of the tenants or any subtenants in possession of any portion of the property described in such declaration has been required to vacate for reasons other than nonpayment of rent, waste or conduct that disturbs other tenants' peaceful enjoyment of the premises, a rebuttable presumption is created that the owner of such property intended to offer

the vacated premises as units in a common-interest community at all times during that 6-month period.

2. For 60 days after delivery or mailing of the notice described in subsection 1, the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. If a tenant fails to purchase the unit during that 60-day period, the offeror may not offer to dispose of an interest in that unit during the following 180 days at a price or on terms more favorable to the offeree than the price or terms offered to the tenant. This subsection does not apply to any unit in a converted building if that unit will be restricted exclusively to nonresidential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

3. If a seller, in violation of subsection 2, conveys a unit to a purchaser for value who has no knowledge of the violation, the recordation of the deed conveying the unit or, in a cooperative, the conveyance of the unit, extinguishes any right a tenant may have under subsection 2 to purchase that unit if the deed states that the seller has complied with subsection 2, but the conveyance does not affect the right of a tenant to recover damages from the seller for a violation of subsection 2.

4. If a notice of conversion specifies a date by which a unit or proposed unit must be vacated and otherwise complies with the provisions of NRS 40.251 and 40.280, the notice also constitutes a notice to vacate specified by those sections.

5. This section does not permit termination of a lease by a declarant in violation of its terms.

(Added to NRS by 1991, 576; A 2007, 1280)

NRS 116.4113 Express warranties of quality.

1. Express warranties made by any seller to a purchaser of a unit, if relied upon by the purchaser, are created as follows:

(a) Any affirmation of fact or promise that relates to the unit, its use or rights appurtenant thereto, improvements to the common-interest community that would directly benefit the unit or the right to use or have the benefit of facilities not

located in the common-interest community creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(b) Any model or description of the physical characteristics of the common-interest community, including plans and specifications of or for improvements, creates an express warranty that the common-interest community will reasonably conform to the model or description;

(c) Any description of the quantity or extent of the real estate comprising the common-interest community, including plats or surveys, creates an express warranty that the common-interest community will conform to the description, subject to customary tolerances; and

(d) A provision that a purchaser may put a unit only to a specified use is an express warranty that the specified use is lawful.

2. Neither formal words, such as "warranty" or "guarantee," nor a specific intention to make a warranty is necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

3. Any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.

4. A warranty created by this section may be excluded or modified by agreement of the parties.

(Added to NRS by 1991, 577; A 1993, 2770)

NRS 116.4114 Implied warranties of quality.

1. A declarant and any dealer warrant that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear excepted.

2. A declarant and any dealer impliedly warrant that a unit and the common elements in the common-interest community are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by a declarant or dealer, or made by any person before the creation of the common-interest community, will be:

(a) Free from defective materials; and

(b) Constructed in accordance with applicable law, according to sound standards of engineering and construction, and in a workmanlike manner.

3. A declarant and any dealer warrant to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

4. Warranties imposed by this section may be excluded or modified as specified in NRS 116.4115.

5. For purposes of this section, improvements made or contracted for by an affiliate of a declarant are made or contracted for by the declarant.

6. Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

(Added to NRS by 1991, 577; A 2011, 2457)

NRS 116.4115 Exclusion or modification of warranties of quality.

1. Except as limited by subsection 2 with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

(a) May be excluded or modified by agreement of the parties; and

(b) Are excluded by expression of disclaimer, such as "as is," "with all faults," or other language that in common understanding calls the purchaser's attention to the exclusion of warranties.

2. With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any dealer may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain.

(Added to NRS by 1991, 578)

NRS 116.4116 Statute of limitations for warranties.

1. Unless a period of limitation is tolled under NRS 116.3111 or affected by subsection 4, a judicial proceeding for breach of any obligation arising under NRS 116.4113 or 116.4114 must be commenced within 6 years after the cause of action accrues, but the parties may agree to reduce the period of limitation to not less than 2 years. With respect to a unit that may be occupied for residential use, an agreement to reduce the period of limitation must be evidenced by a separate instrument executed by the purchaser.

2. Subject to subsection 3, a cause of action for breach of warranty of quality, regardless of the purchaser's lack of knowledge of the breach, accrues:

(a) As to a unit, at the time the purchaser to whom the warranty is first made enters into possession if a possessory interest was conveyed or at the time of acceptance of the instrument of conveyance if a nonpossessory interest was conveyed; and

(b) As to each common element, at the time the common element is completed or, if later, as to:

(1) A common element that may be added to the common-interest community or portion thereof, at the time the first unit therein is conveyed to a bona fide purchaser; or

(2) A common element within any other portion of the common-interest community, at the time the first unit is conveyed to a purchaser in good faith.

3. If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the common-interest community, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier.

4. During the period of declarant control, the association may authorize an independent committee of the executive board to evaluate and enforce any warranty claims involving the common elements, and to address those claims. Only members of the executive board elected by units' owners other than the declarant and other persons appointed by those independent members may serve on the committee, and the committee's decision must be free of any control by the

declarant or any member of the executive board or officer appointed by the declarant. All costs reasonably incurred by the committee, including attorney's fees, are common expenses, and must be added to the budget annually adopted by the association in accordance with the requirements of NRS 116.31151. If the committee is so created, the period of limitation for a warranty claim considered by the committee begins to run from the date of the first meeting of the committee.

(Added to NRS by 1991, 578; A 2011, 2457)

NRS 116.4117 Effect of violations on rights of action; civil action for damages for failure or refusal to comply with provisions of chapter or governing documents; members of executive board not personally liable to victims of crimes; circumstances under which punitive damages may be awarded; attorney's fees.

1. Subject to the requirements set forth in subsection 2, if a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a civil action for damages or other appropriate relief.

2. Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:

(a) By the association against:

(1) A declarant;

(2) A community manager; or

(3) A unit's owner.

(b) By a unit's owner against:

(1) The association;

(2) A declarant; or

(3) Another unit's owner of the association.

(c) By a class of units' owners constituting at least 10 percent of the total number of voting members of the association against a community manager.

3. Members of the executive board are not personally liable to the victims of crimes occurring on the property.

4. Except as otherwise provided in subsection 5, punitive damages may be awarded for a willful and material failure to comply with any provision of this chapter if the failure is established by clear and convincing evidence.

5. Punitive damages may not be awarded against:

(a) The association;

(b) The members of the executive board for acts or omissions that occur in their official capacity as members of the executive board; or

(c) The officers of the association for acts or omissions that occur in their capacity as officers of the association.

6. The court may award reasonable attorney's fees to the prevailing party.

7. The civil remedy provided by this section is in addition to, and not exclusive of, any other available remedy or penalty.

8. The provisions of this section do not prohibit the Commission from taking any disciplinary action against a member of an executive board pursuant to NRS 116.745 to 116.795, inclusive.

(Added to NRS by 1991, 578; A 1993, 2377; 1997, 3125; 2009, 2812, 2898; 2011, 2458)

NRS 116.4118 Labeling of promotional material. No promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement that is not in existence unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified either as "MUST BE BUILT" or as "NEED NOT BE BUILT."

(Added to NRS by 1991, 579)

NRS 116.4119 Declarant's obligation to complete and restore.

1. Except for improvements labeled "NEED NOT BE BUILT," the declarant shall complete all improvements depicted on any site plan or other graphic representation, including any plats or plans prepared pursuant to NRS 116.2109, whether or not that site plan or other graphic representation is contained in the public offering statement or in any promotional material distributed by or for the declarant.

2. The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the common-interest community, of any portion of the common-interest community affected by the exercise of rights reserved pursuant to or created by NRS 116.211 to 116.2113, inclusive, 116.2115 or 116.2116.

(Added to NRS by 1991, 579)