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/ Chad D. Olsen
Chad D. Olsen, attorney of record for
Appellant U.S. Home Corporation

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ARGUMENT

In their answering brief, Homeowners ignore arguments and evidence raised in U.S. Home's opening brief. Instead, Homeowners' repeat the same arguments they made to the district court, coupled with new arguments and evidence that are not in the record.

Moreover, Homeowners' entire brief is based on arguments that, if accepted, would (1) amount to a complete prohibition against arbitrating construction defect claims, (2) invalidate almost any arbitration agreement in any context, and (3) nullify Homeowners' purchase agreements, even though Homeowners have received direct benefits from them. Accordingly, U.S. Home respectfully requests that this Court reject Homeowners' arguments, place the arbitration provisions in the CC&Rs and the purchase agreements on an equal footing with other provisions, and enforce the arbitration provisions according to their terms.

I. THE CC&RS ARE AN AGREEMENT, AND THE ARBITRATION PROVISIONS GOVERN CONSTRUCTION DEFECT CLAIMS.

Homeowners argue, without any legal support, that the arbitration provisions in the CC&Rs are not enforceable agreements because they are "not contracts" for arbitration that Homeowners "agreed to submit."[1] (Answering Brief at 5.) Their argument appears to be based on the fact that the CC&Rs were not signed by Homeowners. This argument has no merit.

[1] Homeowners argue that the CC&Rs are not contracts but instead "covenants that run with land." (Answering Brief at 5.) It is unclear how this argument helps Homeowners since they are bound by covenants running with land just as they are bound by contracts.

The enforceability of an agreement does not hinge on whether there is a signed, written contract. *See CASS, Inc. v. Prod. Pattern & Foundry Co.*, (Slip Copy) No. 3:13-CV-00701-LRH, 2015 WL 995100, at *5 (D. Nev. Mar. 5, 2015) (quoting *U.S. Fid. & Guar. Co. v. Reno Elec. Works*, 183 P. 386, 387 (Nev. 1919)) ("Courts have long held that parties 'may adopt a written contract, and thus make it binding as though formally executed by both, without signing it.'").

In fact, as discussed in U.S. Home's opening brief, due to the nature of common-interest communities and CC&Rs, Homeowners are bound by the terms in the CC&Rs even if they did not sign them. (Opening Brief at 15-18); *see Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314, 1325 (Cal. Ct. App. 1995) ("[I]f the restrictions are recorded before the sale, the later purchaser is deemed to agree to them. The purchase of property knowing of the restrictions evinces the buyer's intent to accept their burdens and benefits. … This rule has many advantages."). Any other rule would upend NRS 116 and common-interest communities everywhere. *See* NRS 116.2101–116.2124, 116.41095 (allowing the creation of common-interest through the recording of CC&Rs, which bind unit owners "whether or not [the unit owners] have read them or had them explained to [them]").

For this reason, courts recognize that CC&Rs are contracts, and Homeowners have failed to present *any* authority to the contrary. *See, e.g.*, *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1227 (Cal. 2012) (examining the nature of contracts and CC&Rs, and determining that, "[i]n light of the foregoing, it is no surprise that courts have described

recorded declarations as contracts"); *Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573, 586 (Cal. 1986) (CC&Rs as contract between homeowner and homeowners association); *Rensel v. Pinnacle Homeowners' Ass'n*, No. 1 CA-CV 07-0616, 2009 WL 251139, at *6 (Ariz. Ct. App. Feb. 3, 2009) ("CC&Rs constitute a contract"); *Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1054 (1998) (CC&Rs as contract between neighboring property owners); *Franklin v. Marie Antoinette Condominium Owners Ass'n*, 19 Cal. App. 4th 824, 828 (1993) (CC&Rs as agreement between homeowner and homeowners association).

A. The Distinctions Homeowners Attempt to Draw Regarding the *Pinnacle* Case are Either Nonexistent or Immaterial.

Knowing that the *Pinnacle* case directly contradicts the arguments they raise, Homeowners attempt to distinguish *Pinnacle*. The distinctions they attempt to draw, however, are either nonexistent or immaterial to the court's holding in that case.

Homeowners contend that the Davis-Stirling Act is "different" from NRS 116 because it authorizes an association to initiate a common-area construction defect action against a declarant. (Answering Brief at 8.) This is incorrect because NRS 116 also allows an association to bring a common-area construction defect action against a declarant. NRS 116.3102; *see Beazer Homes Holding Corp. v. Eighth Judicial Distr. Ct.*, 291 P.3d 128, 134 (Nev. 2012); *D.R. Horton, Inc. v. Eighth Judicial Distr. Ct.*, 215 P.3d 697, 702–03 (Nev. 2009). More importantly, this associational standing issue was immaterial to *Pinnacle*'s ruling.

Homeowners also argue that *Pinnacle* is distinguishable because it involved a dispute between a developer and a homeowners association, not a developer and

individual unit owners, as in the present case. (Answering Brief at 9.) This is a distinction without a difference. Just as the association in *Pinnacle* was bound by the CC&Rs in that case, Homeowners are bound by the CC&Rs here. CC&Rs are binding on all parties having an interest in the property, regardless of the parties' identity. (*See* App. at 55 ("The protective [CC&Rs] set forth in this Declaration shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties ….").) Therefore, the arbitration provisions in the CC&Rs apply to Homeowners just as equally as they apply to an association.

Further, Homeowners have failed to cite any authority supporting their assertion that a declarant (i.e., U.S. Home) cannot enforce the CC&Rs against a unit owner. In fact, this contention is refuted by the express language of the CC&Rs, which states that they "may be enforced by Declarants or either of them, the Association, each Owner, and their respective heirs, executors and administrators, and successive owners and assigns." (App. at 55.)

B. Homeowners' Other Arguments Lack Merit.

Sensing that their primary argument (i.e., the arbitration provisions are not valid because the CC&Rs are not a signed agreement) will fail, Homeowners present a number of fallback positions.

Homeowners contend that the CC&Rs cannot include an arbitration agreement governing construction-defect claims for individual homes. According to Homeowners, the arbitration provision "has to be germane and reasonable to the creation, maintenance, and governance of [the] common-interest community."

(Answering Brief at 6.) However, Homeowners present *no* legal authority to support this position. That is because it is unsupportable and contrary to Nevada law. Pursuant to NRS 116.2105(2), CC&Rs may contain "any other matters the declarant considers appropriate."

Moreover, even though there is no requirement that arbitration provisions in CC&Rs be "germane" to the creation, maintenance, and governance of the common-interest community, provisions requiring the arbitration of individual claims would easily satisfy any such requirement because the Nevada Supreme Court has held that individual "units are considered a part of the common-interest community." *D.R. Horton*, 215 P.3d at 702.

Homeowners also contend the arbitration provisions are not valid because "[t]he legislature certainly did not intend" for CC&Rs to include provisions requiring arbitration of construction defects. (Answering Brief at 7.) Again, Homeowners fail to present any factual or legal support, including any legislative history, for this bald assertion. If the Nevada legislature did not wish for CC&Rs to include arbitration agreements, it would have so indicated. But the legislature did not do so. Instead, it authorized declarants to include in CC&Rs "any other matters the declarant considers appropriate." NRS 116.2105(2).

Next, Homeowners contend the arbitration provisions are not valid because they "violate state public policy of allowing claimants to bring construction defect complaints under [NRS 40]." (Answering Brief at 7.) However, there is no "state public policy," under NRS 40 or otherwise, for claimants to pursue construction-defect complaints only in district court rather than the arbitral forum, and

Homeowners again cite no legal authority suggesting otherwise. Such a public policy would equate to a complete prohibition against the arbitration of any construction-defect claim, which would fly in the face of the strong federal and Nevada policies in favor of arbitration. *See* NRS 38.219(1); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011); *Phillips v. Parker*, 794 P.2d 716, 718 (Nev. 1990).

As indicated in U.S. Home's opening brief, Homeowners misinterpret the scope of the NRS 40 process. (Opening Brief at 48.) 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 NRS 40 process is complete, assuming no resolution of the claim has been reached.

II. THE FAA APPLIES.

A. The FAA Applies to the CC&Rs Even Though They do not State that it Applies.

Homeowners contend, without citation to any legal authority, that the FAA does not apply to the CC&Rs because "[t]he CC&Rs do not state that the FAA is to apply." (Answering Brief at 10.) However, there is no requirement that for the FAA to apply to an arbitration provision in a contract, the contract must state that the FAA applies. On the contrary, the FAA applies simply when there is "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2.

Here, as established below and in U.S. Home's opening brief (Opening Brief at 20-26), the underlying transactions involved commerce. As such, the FAA applies.

B. The FAA and NRS 116 are not Mutually Exclusive.

Homeowners contend that the FAA does not "substantively apply" to the CC&Rs. Instead, they assert that the provisions of the CC&Rs are "all within the purview of state law, NRS Chapter 116." (Answering Brief at 10-11.) This contention is based on the mistaken belief that the FAA and NRS 116 are mutually exclusive. In other words, Homeowners apparently believe that if NRS 116 applies to the CC&Rs, then the FAA cannot also apply. This is incorrect.

The FAA merely "create[s] a body of federal substantive law *of arbitrability*." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). In other words, "the Act simply creates a body of substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting *id* at n. 32) (internal quotation marks omitted). Once arbitrability is determined and a case proceeds to arbitration, "[f]ederal courts interpreting the FAA … have imposed a duty on arbitrators to follow the [applicable state or federal] substantive law." *Collins v. D.R. Horton, Inc.*, 361 F. Supp. 2d 1085, 1099 (D. Ariz. 2005) aff'd, 505 F.3d 874 (9th Cir. 2007). Thus, the FAA and NRS 116 are not mutually exclusive. Nevertheless, to the extent that they are, the FAA preempts NRS 116. *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) ("The FAA's displacement of conflicting state law is 'now well-established,' … and has been repeatedly reaffirmed.")

C. Homeowners Improperly Narrow the Scope of the FAA.

In arguing that the FAA does not apply, Homeowners improperly narrow the scope of the FAA. The FAA applies when there is "a contract evidencing a

transaction involving commerce." 9 U.S.C. § 2. 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 Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273–74 (1995)). Thus, the FAA applies whenever a contract containing an agreement to arbitrate evidences some transaction that involves or affects interstate commerce. *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113 (Nev. 2015).

Nevertheless, and despite this precedent and the FAA's plain language, Homeowners narrow the scope of the FAA and argue that it does not apply because (1) the transactions "have no *substantial or direct* connection to interstate commerce," (Answering Brief at 13 (emphasis added)), and (2) the "FAA is not implicated in a state constructional defect claim," (*id.* at 12). This is incorrect. As stated, a "substantial or direct connection" to commerce, or transactions that are *in* interstate commerce, are not required. Instead, interstate commerce need only be somehow "involved or affected." (*See* Opening Brief at 13-14.)

Moreover, nothing supports Homeowners' blanket rule that the "FAA is not implicated in a state constructional defect claim." (Answering Brief at 12.) In fact, nothing in the FAA's language or any other authority limits the FAA's application based on the subject matter or forum of the litigation, and the United States Supreme Court has made it clear that the FAA is "applicable in state and federal courts." *Southland Corporation v. Keating*, 465 U.S. 1, 12 (1984); *DIRECTV, Inc.*

v. Imburgia, 136 S. Ct. 463, 468 (2015) ("[T]he judges of every State must follow [the FAA]").

D. Homeowners Ignore the Correct Test for Determining Whether the FAA Applies.

Not only did Homeowners improperly narrow the scope of the FAA, but they ignore the test that is used to determine if the FAA applies. It is well-established that, to determine if the FAA applies, the focus is on the contract containing the arbitration agreement and whether that contract evidences any transaction that merely involves or affects interstate commerce. 9 U.S.C. § 2; (*See* Opening Brief at 13–14.) Homeowners, however, improperly focus on (1) whether state law governs "the legal relationships," (2) the location of the homes and construction, and (3) their alleged intent to contract only for a completed home, but not for the construction materials. (Answering Brief at 13-14.) Thus, Homeowners fail to apply the correct test.

First, the notion that the application of the FAA turns on whether some state law happens to govern "the legal relationships" is absurd. Applicable state law cannot preempt the FAA; the FAA is "the supreme Law of the Land." *Nitro-Lift Technologies, L.L.C. v. Howard,* 133 S. Ct. 500, 503 (2012). Further, it is "well-established" that the FAA will preempt any conflicting state law. *Preston*, 552 at 353. And, as established above, even if some state law or state principle governed the legal relationships in this case, that does not mean the FAA cannot also apply.

Second, there is no support for Homeowners' premise that Congress' Commerce Clause power cannot reach home purchase agreements when the homes at issue are located in, or were constructed in, one state. *See United States v.*

Darby, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. *It extends to those activities intrastate which so affect interstate commerce* ….") (emphasis added). Nor is there any support for Homeowners' belief that only completed homes, but not the "component parts," are relevant in the FAA analysis. (*See* Answering Brief at 14.) Interstate commerce does not "end[] when goods come to rest in the State of destination." *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964). The many transactions evidenced by the CC&Rs and purchase agreements may still involve or affect interstate commerce, even if the end-products (i.e., the completed homes) end up only within one state. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) ("[T]he power of Congress to promote interstate commerce … includes the power to regulate the local incidents …, including local activities in both the States of origin and destination ….").

Third, as shown in the opening brief, Homeowners' belief is belied by the many courts that have held that the FAA applies to home purchase agreements because the transactions involve interstate materials and parties. (Opening Brief at 20-24); *see Greystone Nevada, LLC v. Anthem Highlands Cmty. Ass'n*, 549 F. App'x 621 (9th Cir. 2013) (the FAA applied to arbitration provisions within agreements to purchase Nevada homes). Even the case law that Homeowners rely on shows that the interstate materials and parties are relevant in the FAA analysis. *See, e.g., Zabinski v. Bright Acres Associates*, 553 S.E.2d 110, 117–18 (S.C. 2001) (the FAA applied because "the transaction involved interstate commerce as

contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors").

Finally, Homeowners' alleged intention to contract only for "completed homes," but not for the interstate "component parts," is inconsequential. (Answering Brief at 13-14.) It is well established that the FAA may apply "even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce*, 513 U.S. at 268–81.

E. Homeowners Ignore Evidence that Shows the Transactions Involved Interstate Commerce.

Homeowners contend that "nothing was offered as evidence at the district court level" to indicate that the underlying transactions involved or affected interstate commerce "other than a Declaration by counsel, Sarah Odia, Esq., indicating the subcontractors' names and domicile states." (Answering Brief at 12.) This is incorrect. In truth, Homeowners have simply chosen to ignore or downplay the evidence presented.

First, Homeowners ignore the fact that the CC&Rs and purchase agreements are themselves evidence that the underlying transactions involved or affected interstate commerce because they evidence the development and construction of the Rancho de Paz community and the residences therein. (*See, e.g.*, App. 54 § A ("… Declarant intends to subdivide, develop, construct, market and sell a single family detached residential neighborhood …."); App. 64 § 2.4, and 113 § 14.1(a) (discussion of "construction of the improvements on the Properties" and development, marketing, and sales activities related to properties); App. 144–51 §§ 4, 6, 11, 14, 16, 21 (advising that properties were "construction sites" in light of

the "improvements, equipment and supplies" being utilized during the construction process, and discussing deadline for Homeowners to select options (e.g., carpet, exterior paint, etc.) to be incorporated into the homes).) Homeowners instead assert that the FAA does not apply because the homes were constructed and "sold within the state of Nevada," (Answering Brief at 14), and no evidence was presented to prove that equipment and/or materials were furnished from outside the state of Nevada (Answering Brief at 12). However, as shown in the opening brief, courts routinely recognize that "most building materials pass in interstate commerce," and courts need only consider the nature of the project and the work performed to determine if interstate commerce was involved or affected. (Opening Brief at 21-22.) Indeed, it would be impossible to develop Homeowners' homes with materials, equipment, and supplies all produced and manufactured solely within Nevada. To suggest otherwise would be to ignore reality.

Second, Homeowners fail to refute Ms. Odia's declaration, which is *prima facie* evidence that the transactions involved interstate commerce. Ms. Odia provided evidence that U.S. Home subcontracted with multiple out-of-state entities to build Homeowners' homes. (App. 153-155.) This, together with Homeowners' complaint—where Homeowners indicate that they are "owners of individual residences within … Nevada," and acknowledge that U.S. Home is a Delaware Corporation (App. 3-4)—is evidence that the transactions involved interstate commerce because of the multistate nature of the parties.

Instead of attempting to refute this evidence, Homeowners simply contend that the parties' citizenship is "incidental" and not part of the commerce analysis.

(Answering Brief at 14.) However, nothing supports such a limit on the reach of the Commerce Clause. Indeed, as set forth in the opening brief, numerous courts, including the United States Supreme Court, have stated that the multistate nature of the parties *is* part of the analysis. (Opening Brief at 25-26.)

F. Homeowners' Cases do not Support Their Position.

The cases cited by Homeowners do not support their position. (*See* Answering Brief at 13–14.) As explained in the opening brief, these cases do not involve (1) the construction and sale of new residences, (2) multiple interstate parties, or (3) the parties contractually agreeing that the FAA applied. (Opening Brief at 22–24.) Nor did the courts in those cases consider any aggregate effect on interstate commerce or the effect on the housing market and national lending. (*Id.*)

In addition, Homeowners' cases actually support U.S. Home's position. *See Saneii v. Robards*, 289 F. Supp. 2d 855, 859–60 (W.D. Ky. 2003) (distinguishing its decision regarding the FAA from "more complex transactions" that actually involve "construction" or interstate materials). For instance, in *Zabinski*, the parties entered into an agreement to renovate apartments and purchase land. 553 S.E.2d 110 (S.C. 2001). The court determined that the FAA applied, stating: "[T]he transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors." *Id.* at 117–18; *cf. Bradley v. Brentwood Homes, Inc.*, 730 S.E. 2d 312, 318 (S.C. 2012) ("[H]ad the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA ….").

G. Homeowners do not Dispute that They Agreed the FAA Applies.

With regard to Homeowners Michael Ballesteros and John and Irma A. Olson, U.S. Home asserted in its opening brief that the FAA applies to their purchase agreements because they agreed that it applies. (Opening Brief at 27.) Homeowners do not dispute this. Nevertheless, they contend that this agreement should not be enforced because "any stipulation which is untrue or contrary to public policy should not be enforced." (Answering Brief at 11.) In other words, Homeowners contend that their agreement should not be enforced because stipulating to the application of the FAA is contrary to public policy.

Homeowners' contention is nonsensical. Stipulating to the application of the FAA does not violate public policy, because the FAA is itself an expression of a public policy—a "liberal federal policy favoring arbitration agreements." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

Homeowners' contention is also unfounded. Homeowners cite no legal authority (there is none) that suggests that stipulating to the application of the FAA is contrary to public policy. On the other hand, this Court and others have recognized that such stipulations are enforceable. *See Tallman*, 359 P.3d at 122 ("Petitioners' employment … involves commerce. Indeed, the … 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).

H. Homeowners do not Dispute that the Transactions in the Aggregate Affect Commerce.

In its opening brief, U.S. Home argued that, given the large number of homes constructed, sold, and financed each year, the transactions represent a practice affecting interstate commerce when considered in the aggregate. (Opening Brief at 24–25.) Homeowners ignore this issue, thereby conceding it. *Polk v. State*, 233 P.3d 357, 360 (Nev. 2010) (ignoring an issue on appeal is treated as a confession of error).

III. NOTHING SUPPORTS HOMEOWNERS' BELIEF THAT ARBITRATION PROVISIONS AIMED AT HOME PURCHASERS ARE UNENFORCEABLE.

Homeowners take the extreme position that "arbitration provisions aimed at home purchasers are generally not enforceable." (Answering Brief at 15-17 and 35.) This flies in the face of policies favoring arbitration in all contexts. 9 U.S.C. § 2; NRS 38.219(1). It is also refuted by case law. *Greystone*, 549 F. App'x 621 (affirming the Nevada federal court's order compelling homeowners to arbitrate their construction-defect claims pursuant to arbitration provisions in home purchase agreements). Moreover, if true, such a blanket prohibition would be preempted by the FAA. *Tallman*, 359 P.3d at 122 (courts "cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").

Nor do *Gonski*, *D.R. Horton*, or *Burch*, which Homeowners cite as support, confirm such an extreme, blanket rule. (Answering Brief at 35-37.) The Court in those cases did not apply any blanket rule. Instead, it analyzed the specific facts in each case to determine if the agreements were unconscionable.

Finally, Homeowners' reliance on California's § 1298.7 is misplaced. This rule has no equivalent in Nevada and this statute was preempted by the FAA because it discriminates against arbitration. *Pinnacle*, 282 P.3d at 1224 (Cal. 2012).

IV. HOMEOWNERS FAILED TO PROVE UNCONSCIONABILITY.

Homeowners do not dispute that they bear the burden of proving both procedural and substantive unconscionability. *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe,* 245 P.3d 1164, 1169 (Nev. 2010). Homeowners have failed to carry this burden.

A. The Arbitration Provisions in the CC&Rs are not Procedurally Unconscionable.

Homeowners argue that the CC&Rs are procedurally unconscionable because (1) they did not read or understand the CC&Rs, and (2) the CC&Rs are inconspicuous. (Answering Brief at 20-21.) Homeowners are incorrect.

1. Homeowners fail to refute that compliance with NRS 116 eliminates any argument of procedural unconscionability due to Homeowners' failure to read, sign, understand, or negotiate the CC&Rs.

In its opening brief, U.S. Home argued that the arbitration provisions in the CC&Rs are not procedurally unconscionable because the CC&Rs were recorded in compliance with NRS 116. (Opening Brief at 31-32.) Such compliance eliminates any argument of procedural unconscionability because, by enacting this legislative scheme, the Nevada legislature affirmed that CC&Rs bind homeowners *even when they did not negotiate, sign, understand, or even read them*. *See* NRS 116.41095.

Homeowners do not address, let alone dispute this issue. Therefore, they concede it. *Polk*, 233 P.3d at 360.

2. The Arbitration Provisions are not Inconspicuous.

In addition to not addressing U.S. Home's argument that compliance with NRS 116 is sufficient to counter any evidence of procedural unconscionability, Homeowners also fail to respond to U.S. Home's arguments that show that the font style and location of the arbitration provisions in the CC&Rs do not amount to procedural unconscionability. Instead, Homeowners simply repeat the district court's findings. (Answering Brief at 20-21.) Thus, U.S. Home already addressed Homeowners' arguments in its opening brief. (Opening Brief at 32–35.)

In short, the issue is whether arbitration provisions must be *more* conspicuous than other provisions to be enforceable (as Homeowners suggest), or whether arbitration provisions must be placed on equal footing with other provisions, meaning procedurally unconscionability may exist if the provisions are *less* conspicuous, or written in a way to escape notice (as U.S. Home suggests.) As previously indicated, *all* current authority shows that arbitration provisions may not be singled-out and held to such a heightened standard. (Opening Brief 32-35); *DIRECTV*, 136 S. Ct. at 470–471 (the FAA preempts decisions that "place arbitration contracts 'on equal footing with all other contracts,' …. [And do] not give 'due regard ... to the federal policy favoring arbitration'").

Furthermore, as U.S. Home established in its opening brief, the arbitration provisions in the CC&Rs are not inconspicuous or written in a way to escape notice. (Opening Brief at 32–35.) The provisions are set apart under their own

heading entitled "**Arbitration**," do not contain fine print, and do not contain misleading or difficult language. (*See* App. 53, 76.) The provisions are also specifically identified in the CC&Rs' table of contents. Homeowners acknowledge this, but assert that identifying the arbitration provisions in the table of contents "does not transform the provision into a [procedurally] conscionable one." (Answering Brief at 20.) On the contrary, identifying the provisions in the table of contents (along with the other factors mentioned) does render the provisions procedurally conscionable (i.e., enforceable) because it makes them "readily ascertainable upon a review of the contract." *D.R. Horton*, 96 P.3d at 1162.

B. The Arbitration Provisions in the Purchase Agreements are not Procedurally Unconscionable.

Homeowners argue that the purchase agreements are procedurally unconscionable because (1) the arbitration provisions are inconspicuous, (2) two provisions are confusing, (3) Homeowners were allegedly unaware that there were arbitration provisions in the agreements, (4) Homeowners were given a stack of paperwork to sign or were given incentives to "close quickly," and (5) Homeowners were not given "any true opportunity" to negotiate the purchase agreements. (Answering Brief at 21-26.) Homeowners are incorrect.

1. Plaintiffs apply an incorrect standard to the purchase agreements.

As with the CC&Rs, Homeowners fail to respond to U.S. Home's arguments that show that the font style and location of the arbitration provisions in the purchase agreements do not amount to procedural unconscionability. (*See* Opening Brief at 36-37). Instead, Homeowners again simply repeat the district court's

findings, which amount to a requirement that the arbitration provisions be *more* conspicuous than the other provisions in the purchase agreements. (Answering Brief at 21-26.) U.S. Home has already addressed these issues in its opening brief and established that *all* current authority shows that arbitration provisions may not be singled-out and held to such a heightened standard. (Opening Brief 32-35).

U.S. Home has also already established that the arbitration provisions are not inconspicuous or written in a way to escape notice: (1) the provisions are found under their own, bold, all-caps headings entitled, "**ARBITRATION OF DISPUTES**," (2) the provisions are located before the signature lines, (3) Homeowners initialed the pages containing the provisions, and (4) the provisions are not written in fine print. (App. 144–51 § 18.)

2. The arbitration provisions are not confusing.

Homeowners contend that two provisions of the purchase agreements are confusing: (1) the provision requiring that warranty claims be administered before arbitration, and (2) the provision stating that: "The arbitrator shall have the right to award reasonable attorneys' fees and expenses, including those incurred in mediation, arbitration, trial or on appeal." (Answering Brief at 23-24.) On this basis, Homeowners believe that the entire arbitration requirement is unenforceable. Homeowners are mistaken.

First, Homeowners did not identify any evidence proving the allegedly confusing language caused surprise. Homeowners—who have the burden of proving unconscionability, and who could be attorneys, real estate agents, or other

professionals familiar with such language—presented no evidence showing that they did not understand the arbitration requirement because of confusing language.

Second, Homeowners' contention that the arbitration provisions are unconscionable because it is difficult to ascertain whether claims should be submitted under the warranty is nonsensical. To know when claims should be submitted under the warranty, a party must review the warranty, not the arbitration provision. Therefore, this argument does not even support Homeowners' claim that the arbitration provision is confusing.

Furthermore, the warranty-claim provision is neither confusing nor even relevant. The provision clearly states that claims covered by the warranty should be administered under the warranty before proceeding to arbitration. (App. 146 and 150.) There is nothing confusing about this language. Moreover, U.S. Home is not seeking to enforce this warranty requirement, so the warranty requirement, and whether it is confusing, is a non-issue. U.S. Home addressed this in its opening brief (Opening Brief at 37-38).

Third, the provision allowing the arbitrator to award fees and costs, "including those incurred in mediation, arbitration, trial or on appeal," is not confusing. It clearly states that the arbitrator ultimately has the right to award fees and costs (including NRS 40.655 fees and costs), regardless of where or when those fees and costs were incurred, and even if the claim had previously proceeded through trial or appeal.

3. The arbitration provisions in the purchase agreements are enforceable even if Homeowners failed to read or understand them.

Homeowners suggest that the arbitration provisions in the purchase agreements are procedurally unconscionable because Homeowners "were unaware that there were arbitration provisions" in the agreements. (Answering Brief at 24.) However, as was explained in the opening brief, even if homeowners fail to read or understand an agreement at the time they sign it, they are still bound by it. (Opening Brief at 43-44.)

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 home purchasers are given five days after signing purchase agreements to review them, take the necessary steps to understand their rights, and contemplate their purchase. (*Id.* at 42-43.) Any other rule would allow any party to escape any contract obligation by professing ignorance or, as Mr. Olson admittedly did here, simply choosing not to read the contract. (*See* App. at 354 (where Mr. Olson states: "I did not read the PSA or the CC&Rs before the purchase of the property, as it was too many papers.").)

4. Homeowners had plenty of time to review and sign their agreements, and Homeowners are estopped from arguing otherwise.

Homeowners contend that their agreements are procedurally unconscionable because they "were given a high stack of paperwork to sign and/or were given incentives to close "quickly." (Answering Brief at 25.) This is not true.

First, Homeowners are estopped from raising this argument. In their complaint, each Homeowner asserted that his purchase agreement is valid and

enforceable, which is inconsistent with their current allegation that they are not bound by these same agreements because they were given a "high stack of paperwork" or were given incentives to close quickly. In other words, Homeowners are estopped from making this argument because their conduct clearly shows their assent to the agreements.

Second, as was explained in the opening brief, Homeowners were not rushed because they had five days after execution to review and opt-out of their agreements. (Opening Brief at 43-44.) Thus, Homeowners had plenty of time to understand their rights and contemplate their purchases.

Third, even if the purchase agreements were, at some point, in a "high stack of paperwork," Homeowners signed and initialed the agreements, so they obviously had the chance to review them. The fact that home purchases may require signing various documents (even "stacks" of documents) does not automatically invalidate those documents. Indeed, a party "who signs or accepts a written contract, in the absence of fraud or other wrongful act … is conclusively presumed to know its contents and to assent to them." *Campanelli v. Conservas Altamira, S.A.*, 477 P.2d 870, 872 (Nev. 1970).

5. Homeowners had negotiating power

Homeowners contend that the "U.S. Home purchase contract[s]" are unconscionable because they "were not given any true opportunity to negotiate the terms" and/or were offered the purchase of the homes on a take-it-or-leave-it basis. (Answering Brief at 26.) This argument just repeats the district court's findings,

and U.S. Home addressed this argument in its opening brief. (Opening Brief at 44-46.)

Further, Homeowners' argument is belied by their own complaint and actions in this litigation, which show that Homeowners believe their agreements are valid and enforceable despite their alleged inability to negotiate. (App. 1–13.) It is incongruent and improper for Homeowners to assert claims based on their purchase agreements and homeownership, but then, on appeal, allege that those same agreements are unenforceable because they did not negotiate and were allegedly offered the homes on a take-it-or-leave-it basis.

C. The Arbitration Provisions in the CC&Rs and Purchase Agreements are not Substantively Unconscionable.

Contrary to Homeowners' position, the arbitration provisions in the CC&Rs and the purchase agreements are not substantively unconscionable, because they are not one sided.

1. The arbitration provisions allow recovery of attorney's fees and costs under NRS 40.655.

Homeowners state that the arbitration provisions are unconscionable because Homeowners "seemingly waive Chapter 40 rights to attorneys' fees and costs." (Answering Brief at 34.) This is not true, and this issue was already addressed in U.S. Home's opening brief. (Opening Brief at 48-51.) Further, this argument is belied by Homeowners' admission that the arbitrator will have the right and discretion to award fees and costs. (Answering Brief at 27) (admitting that the "arbitrator has discretion" to award "Chapter 40 rights to recover[] … fees and costs").

2. The arbitrator's discretion to award fees and costs is not unconscionable.

Homeowners contend that the arbitration provisions are unconscionable because the arbitrator has the discretion to award fees and costs. (*Id.* at 25.) In other words, Homeowners believe "fees and costs are … uncertain to be awarded in … arbitration." (*Id.*) This does not prove unconscionability.

In fact, the discretion to award fees and costs complies with NRS 40. Even in traditional litigation, NRS 40.655 fees and costs are not guaranteed, and Homeowners would have to bear their own fees and costs (such as filing fees, deposition expenses, and expert fees) unless and until they were awarded the same under NRS 40.655. *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.").

There is no reason to assume that the arbitrator will disregard NRS 40 in this case. On the contrary, the opposite should be assumed:

> [T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. … [T]here 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); *see Sylver v. Regents Bank, N.A.*, 300 P.3d 718, 722–24 (Nev. 2013) (arbitration awards can be vacated if the arbitrator disregards the law); *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).

3. Homeowners have not proven that arbitration costs are prohibitively expensive.

Homeowners argue that the arbitration agreements are unconscionable because each of them "apparently waives the reasonable costs associated with standard litigation and now must bear the higher costs … of … arbitration." (Answering Brief at 29-30, 32.) Homeowners are mistaken.

First, to support this argument, Homeowners present evidence that they apparently got from "www.adr.org/feeschedule." (*Id.* at 33 and 37.) This is new evidence that is not in the record and that was never before the district court. *Liu v. Christopher Homes, LLC*, 321 P.3d 875, 881 (Nev. 2014) ("We do not resolve … factual issue[s] that the district court did not reach.").

Second, agreements are only unconscionable due to arbitration costs if the party seeking to invalidate the agreements presents evidence showing that the costs are prohibitively expensive. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 80–81 (2000); *D.R. Horton*, 96 P.3d at 1165–66. Thus, it is well-settled that an agreement's mere silence as to arbitration costs is not a sufficient reason for refusing arbitration. *Gonski*, 245 P.3d at 1171. Here, there is no evidence showing that arbitration costs would be prohibitively expensive. Neither of the two declarations submitted by Homeowners mentions costs or their ability to pay such costs. (App. 352-355.)

Third, NRS 40.655 includes a cost-shifting mechanism that allows a claimant to be reimbursed for fees and costs, thereby avoiding any cost-prohibitive expenses. (*See* Opening Brief at 48-51 (showing that Homeowners retain their

NRS 40.655 rights).) Just as in traditional litigation, Homeowners (or their counsel[2]) would bear the initial costs, but could later be reimbursed.

Finally, no authority or evidence supports Homeowners' premise that arbitration leads to "higher costs." (Answering Brief at 30 and 32.) In fact, this premise is belied by Homeowners' own admission: "[P]ublic policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation." (*Id.* at 4); *D.R. Horton*, 96 P.3d at 1162.

4. There is no reason to assume that AAA is biased.

Homeowners contend that this Court should not enforce arbitration because AAA is biased and the arbitrator will not be impartial. (Answering Brief at 28–29 and 34.) Homeowners never raised this issue before the district court. *Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983 (Nev. 1981) ("A point not urged in the trial court … is … waived and will not be considered on appeal.").

Moreover, Homeowners have not carried their burden of proving that AAA is biased. Indeed, the arguments that Homeowners raise to support their position are nonsensical and based on improper and questionable evidence. First, Homeowners cite to some websites that *are not in the record* and that apparently contain anti-arbitration information presented by some consumer activist groups. (Answering Brief at 28-29.) Thus, this Court should not consider this "evidence." *Liu*, 321 P.3d at 881. And even if these consumer activist groups published such

[2] Homeowners admitted that their counsel does not require them to pay initial costs. (Answering Brief at 37.)

information on these websites, that fact would not make such information true or binding on Nevada courts. Nor would it prove that AAA is biased.

Second, Homeowners argue that binding arbitration and unpublished arbitration decisions "seemingly encourage[] bias." (Answering Brief at 29.) This makes no sense. Indeed, Homeowners' theories and opinions are not evidence of bias, and *no* evidence or authority indicates that binding arbitration or unpublished decisions actually promote bias.

Finally, Homeowners' arguments, if accepted, would prohibit all binding arbitrations in Nevada, and it would effectively prohibit any use of AAA in any construction-defect case. This would fly in the face of NRS 40.680(2), wherein the Nevada Legislature explicitly approved using AAA in construction-defect cases. The Court should not uphold such counterintuitive results.

5. Arbitration would not prejudice homeowners.

Homeowners contend that they "would be prejudiced if arbitration is ordered." (Answering Brief at 36.) However, this argument does not prove substantive unconscionability. To the extent there would be any duplication of efforts or separate proceedings, those factors would be bilateral and not one-sided. *D.R. Horton*, 96 P.3d at 1162–63 ("[S]ubstantive unconscionability focuses on the one-sidedness of the contract terms.").

In addition, even if some Homeowners were required to prove their *individual* construction-defect claims in separate proceedings, that does not equate to "prejudice," and is not a basis for refusing to enforce arbitration agreements. *See 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."); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988) ("[C]ourts must grant motions to compel arbitration … *even if inefficient maintenance of separate proceedings in different forums might result*.").

CONCLUSION

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

DATED: January 6, 2016 PAYNE & FEARS LLP

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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 6,987 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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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2016, I deposited a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF** on this date by electronic transmission through the court's electronic filing program.

/s/ Nancy Babas
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4838-3717-6364.3