IN THE SUPREME COURT OF THE STATE OF NEVADA

GREYSTONE NEVADA, LLC, a Delaware Corporation,

Appellant,

v.

OLIVER M. MCCOY, JR., Individually; SEAN AND FELICIA DELAPA, Individually; JOHN B. DAVIS, Individually; NEHAMA KRAMS, Individually; GABRIELA DIETZ, Individually; ERIK ELDER, Individually; TOMER HAZUT, Individually; KIM NICKELL, Individually; EDO PELLACH, Individually; and YUVADEE PHUMACHART, Individually,

Respondents,

U.S. HOME CORPORATION, a Delaware Corporation,

Appellant,

v.

THE MICHAEL BALLESTEROS TRUST; RODRIGO ASANION, Individually; FEDERICO AGUAYO, Individually; FELIPE ENRIQUEZ, Individually; JIMMY FOSTER, JR., Individually; THE GARCIA FAMILY TRUST; ARNULFO ORTEGO-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,

Supreme Court No.: 68769
District Court No. : A-15-714219-D

Supreme Court No.: 68810
District Court No. : A-15-713587-D

NEVADA HOME BUILDERS ASSOCIATION'S MOTION FOR PERMISSION TO EXCEED PAGE LIMITATION FOR *AMICUS CURIAE* BRIEF

COMES NOW, Nevada Home Builders Association, by and through its counsel, the law firm of WOOD, SMITH, HENNING & BERMAN LLP, and moves this Court for permission to exceed the page limitation for its *amicus curiae* brief pursuant to NRAP 32(a)(7)(D).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As authorized by NRAP 32(a)(7)(D), Nevada Home Builders Association ("NHBA") respectfully submits this Motion for Permission to Exceed the Page Limitation by 4 pages and a copy of the proposed brief is attached as ***Exhibit A***.

II. LEGAL ARGUMENT

NRAP 29(e) provides that an *amicus curiae* brief cannot be more than one-half the maximum length authorized by the Nevada Rules of Appellate Procedure for a party's brief; in this case, 15-pages. NRAP 32(a)(7)(D), however, allows a party to seek permission from this Court to exceed the page limit upon a showing of diligence and good cause. Here, good cause exists to permit NHAB to exceed the Court's 15 page limit so that NHAB could fully and adequately address the complex and multiple issues raised by this Court's December 9, 2016 Order inviting *amicus curiae* briefs.

NHAB's *amicus curiae* brief addresses two separate but related appeals. Further, due to the significant issues involved concerning the enforcement of agreements to arbitrate construction defect claims arising out of the purchase and sale of residential property in Nevada common-interest communities, each of the parties' briefs exceeded the Court's page limitations and utilized the type-volume exception within NRAP 32(a)(7)(A)(ii). In total, the parties submitted more than 200 pages of arguments before this Court regarding the issues presented, and the parties'

submissions highlight the complexity and numerous issues presented. In comparison, NHBA's *amicus curiae* brief is only 19 pages, and contains only 4,337 words (approximately half the number of words used in any of the parties' opening briefs).

Further, the Court's December 9, 2016 Order inviting *amicus curiae* briefs identified five very complex issues that the Court requested briefing:

1. Whether the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (FAA), applies to the agreements to arbitrate contained in the CC&Rs involved in these appeals;

2. Whether an enforceable agreement to arbitrate can arise from a common-interest community's CC&Rs;

3. Whether the agreements or common-interest community CC&Rs involved in these appeals are unenforceable as unconscionable generally under *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654 (1973), or under cases such as *Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 49 P.3d 647 (2002), *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d 1159 (2004), and *Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 245 P.3d 1164 (2010), and, if so:

    a. The extent to which, if at all, the law respecting unconscionability articulated in these cases is inconsistent with the FAA as interpreted in cases such as *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); and

    b. Weather a substantive unconscionability challenge to an arbitration agreement on the grounds its procedural remedies, damages, and cost and fee provisions conflict with NRS Chapter 40 is for the arbitrator to decide in determining applicable law or for the court to decide in determining the enforceability of the arbitration agreement.

In order to effectively address these five complex topics, and to allow for fair discussion of the issues, a small increase of the number of pages permitted is necessary.

As demonstrated in the attached Declaration of Anthony S. Wong, Esq., and shown by the proposed brief attached to this Motion as ***Exhibit A***, NHBA have diligently attempted to comply with the Court's page limit and made every good faith effort to minimize the length of its *amicus curiae* brief. However, due to the numerous issues presented and their complexity, NHBA is unable to reduce the length of its brief without adversely effecting its ability to address the issues identified by the Court's Order.[1] NHBA has endeavored to ensure that the length of the attached *amicus curiae* brief is no longer than needed to fairly and competently respond to the complex issues in these two appeals. Indeed, NHBA is not requesting an excessive number of additional pages, but rather only four (4) additional pages in order to address effectively the issues presented.

[1] *Cf. Hernandez v. State*, 117 Nev. 463, 465, 24 P.3d 767, 768 (2001) (denying motion for leave to file 124-page opening brief because "[t]he proposed brief [was] so long that it [did] not meet counsel's duty to submit a cogent, effective brief which will best serve the interests of her client" but allowing an 80-page brief).

III. CONCLUSION

For the foregoing reasons, NHBA respectfully requests an extension of NRAP 29's 15-page limit to set forth sufficient discussion of the issues identified by this Court's Order. NHBA submits that good cause exists to grant permission to exceed the page limit by 4 pages, for a total of 19 pages.

DATED: January 23, 2017

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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AFFIDAVIT OF ANTHONY S. WONG, ESQ. IN SUPPORT OF NEVADA HOME BUILDERS ASSOCIATION'S MOTION FOR PERMISSION TO EXCEED PAGE LIMITATION FOR *AMICUS CURIAE* BRIEF

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

ANTHONY S. WONG, Esq., being first duly sworn, does hereby swear under penalty of perjury that the following assertions are true to the best of my knowledge and belief:

1. Affiant is an adult, legally competent to testify to the matters contained herein, and has personal knowledge of the facts contained herein;
2. Affiant is a licensed attorney with the law firm of Wood, Smith, Henning & Berman, LLP, counsel of record for Nevada Home Builders Association in the above-captioned matter. Affiant has personal knowledge of the following and can and do competently testify thereto;
3. The Supreme Court of Nevada issued an Order inviting *amicus curiae* briefs on December 9, 2016. The Court invited *amicus curiae* briefs so that these briefs "may be of assistance to the Court on" five very complex topics.
4. NRAP 29(e) provides that an *amicus curiae* brief may not be more than one-half the maximum length for a party's brief without leave of the Court.
5. NRAP 29(e) and NRAP 32(a)(7)(D) allow a party to seek permission to exceed the page limitation upon a showing of diligence and good cause.
6. Affiant has been diligently drafting and revising the *amicus curiae* brief. The current brief consists of 19 pages and represents the most concise and succinct brief that also sufficiently addresses the issues presented. The total number of pages in the *amicus curiae* brief is reasonable under the circumstances.

7. Affiant has made every good faith effort to minimize the length of the *amicus curiae* brief. Affiant has endeavored to ensure that the current length is no longer than needed to fairly and competently respond to the complex matters in this case.
8. NHBA requests an extension of NRAP 32(a)(7)(A)(i) and NRAP 29(e)'s 15-page limit to set forth all of the arguments invited by the Nevada Supreme Court. Therefore, good cause exists to grant permission to exceed the page limitation by 4 pages, for a total of 19 pages.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 23 day of January, 2017.

ANTHONY S. WONG

SUBSCRIBED AND SWORN to before me
this 23rd day of January, 2017

NOTARY PUBLIC in and for said
County and State

MICHELLE N. LEDESMA
Notary Public, State of Nevada
Appointment No. 07-1191-1
My Appt. Expires February 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of January, 2017, a true and correct copy of this completed **NEVADA HOME BUILDERS ASSOCIATION'S MOTION FOR PERMISSION TO EXCEED PAGE LIMITATION FOR AMICUS CURIAE BRIEF** upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By _____

Michelle N. Ledesma,an Employee of
WOOD, SMITH, HENNING &
BERMAN LLP

EXHIBIT A

Case No. 68769

SUPREME COURT
OF THE STATE OF NEVADA

GREYSTONE NEVADA, LLC, A DELAWARE CORPORATION,

Appellant,

vs.

OLIVER M. MCCOY, JR., INDIVIDUALLY; SEAN AND FELICIA DELAPA, INDIVIDUALLY; JOHN B. DAVIS, INDIVIDUALLY; NEHAMA KRAMS, INDIVIDUALLY; GABRIELA DIETZ, INDIVIDUALLY; ERIK ELDER, INDIVIDUALLY; TOMER HAZUT, INDIVIDUALLY; KIM NICKELL, INDIVIDUALLY; EDO PELLACH, INDIVIDUALLY; AND YUVADEE PHUMPACHART, INDIVIDUALLY,

Respondents,

Case No. 68810

U.S. HOME CORPORATION, A DELAWARE CORPORATION,

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vs.

THE MICHAEL BALLESTEROS TRUST; RODRIGO ASANION, INDIVIDUALLY; FEDERICO AGUAYO, INDIVIDUALLY; FELIPE ENRIQUEZ, INDIVIDUALLY; JIMMY FOSTER, JR., INDIVIDUALLY; THE GARCIA FAMILY TRUST; ARNULFO ORTEGO-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 Eight Judicial District Court,

Clark County, Nevada, Cases No. A-15-714219-D, and A-15-713587-D

NEVADA HOME BUILDERS ASSOCIATION'S AMICUS BRIEF IN SUPPORT OF GREYSTONE NEVADA, LLC AND U.S. HOME CORPORATION FOR REVERSAL

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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. Amicus Curiae Nevada Home Builders Association has no parent company, and no publicly traded entity owns 10% or more of its stock.

2. Janice M. Michaels, Esq., T. Blake Gross, Esq. and Anthony S. Wong, Esq. of Wood, Smith, Henning & Berman LLP will represent Amicus Curiae Nevada Home Builders Association before this Court.

DATED: January ___, 2017

WOOD, SMITH, HENNING & BERMAN LLP

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INTEREST OF AMICUS CURIAE

The Nevada Home Builders Association ("NHBA") is a non-profit organization dedicated to enhancing Nevada citizens' quality of life by meeting their housing and community development needs. It represents the residential construction industry across the state and is committed to protecting the rights of Nevada's homeowners and homebuilders.

NHBA seeks leave to submit this amicus brief, pursuant to NRAP 29(c) and this Court's invitation, to ensure the interests of homeowners and homebuilders are represented in this important proceeding, to protect the right of homeowners and homebuilders to resolve disputes by arbitration, and to secure the protection of the rights afforded to homeowners, homeowner associations and declarants under Nevada's Uniform Common-Interest Ownership Act and the Federal Arbitration Act ("FAA").

I. THE FEDERAL ARBITRATION ACT ("FAA") GOVERNS AGREEMENTS TO ARBITRATE CONTAINED WITHIN PURCHASE AND SALES AGREEMENTS AND CC&Rs

In response to the widespread judicial hostility towards arbitration agreements and "to overcome courts' refusals to enforce agreements to arbitrate," Congress enacted the FAA in 1925 to set forth "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*, 563 U.S. 333, 346 (2011)(internal citations and quotations omitted); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995).

To effectuate this goal and policy Congress provided, in relevant part, that

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

9 U.S.C. § 2. On its face, the FAA applies if there is (1) a written agreement to arbitrate,[1] and (2) a contract or transaction "involve[ing] commerce." *Id.*

[1] In light of the parties' apparent agreement that the Purchase and Sale Agreements ("PSAs") do contain an agreement to arbitrate, NHBA will not address whether an agreement to arbitrate exists within the PSAs. Further, as the FAA merely requires a written agreement to arbitrate, to the extent this Court finds that an agreement to arbitrate exists, the Covenants, Conditions, and Restrictions ("CC&Rs") satisfies the statute's requirement for a written agreement.

A. The Purchase and Sale of Residential Property "Involves Commerce"

The United States Supreme Court has repeatedly held that "the term 'involving commerce' in the FAA 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. Because the statute provides for 'the enforcement of arbitration agreements within the full reach of the Commerce Clause,' it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce'-that is, 'within the flow of interstate commerce.'" *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003)(internal citations omitted).

As this Court recently recognized, the FAA applies whenever a contract containing an agreement to arbitrate evidences some transaction that involves or affects commerce.[2] *Tallman v. District Court,* 131 Nev. __, 359 P.3d 113, 121 (2015). The FAA can apply even where individual transactions themselves do not affect 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; *Brookdale Sr. Living v. Stacy*, 27 F. Supp. 3d 776, 792 (E.D. Ky. 2014)[3]; *see*

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[2] It is also important to note that the relevant analysis is whether the activity at issue is subject to Congress' Commerce Clause power and not whether the dispute at issue involves commerce. *Shepard v. Edward Mackay Enterprises, Inc.*, 56 Cal. Rptr. 3d 326, 332 (Cal. App. 2007).

[3] The Court held that the FAA applies to a residency agreement between the operator of a senior living community and a resident because "the "general activity" of

also, *Wickard v. Filburn*, 317 U.S. 111, 114-15, and 128 (1942). In other words, the FAA applies to any transaction that Congress could regulate under its Commerce Clause power.[4]

Pursuant to these principles, Courts in multiple jurisdictions have held that the FAA applies to arbitration provisions contained in contracts for the development, construction, and sale of homes, since those activities invariably involve goods and materials shipped in commerce and often involve multi-state financing and parties to the transaction itself. *See, e.g., 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).

In *Greystone Nevada, LLC v. Anthem Highlands Cmty. Ass 'n*, 549 F. App'x 621 (9th Cir. 2013), the Ninth Circuit considered the applicability of the FAA to arbitration agreements in PSAs that are virtually identical to those involved in the instant case. It held that the FAA applied to the arbitration clauses because those contracts "'evidenc[e] a transaction'—development by an out-of-state developer,

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providing healthcare ... even if contained to an intrastate market ... is without a doubt the kind of activity that in the aggregate is subject to federal control under the Commerce Clause."

[4] In contrast, the cases cited by Respondents, one of which has been implicitly overruled by *Greystone*, are clearly erroneous because they failed to consider whether the transactions at issue were subject to Congress' Commerce Clause Power.

construction by an out-of-state contractor, and the sale of homes assembled with out-of-state materials—`involving commerce.'" *Id.*

Furthermore, the application of the FAA is not limited to developments by out-of-state developers. Instead, the FAA applies to all sales and resales of homes regardless of whether an out-of-state developer is involved. This is because transactions involving and/or the sale and resale of homes in the aggregate affect interstate commerce and are subject to Congress' Commerce Clause power.

Congress' ability to regulate the intrastate sale and resale of homes under the Commerce Clause power is well settled. In 1968, Congress enacted the Fair Housing Act ("FHA") to prohibit discrimination on the basis of race, color, religion, sex or national origin in housing sales, rentals or financing pursuant to its Commerce Clause power. 42 U.S.C. §3601 *et seq.*

In *Groome Resources Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), the Fifth Circuit considered whether Congress could regulate the purchase, sale, or rental of residential housing. After conducting a detailed Commerce Clause analysis, it held that the FHA was indeed a valid exercise of Congress' Commerce Clause power because the purchase, sale and rental of residential housing affects commerce in the aggregate. *Id.* at 205-06. Notably, the FHA's prohibition on discrimination applies to intrastate transactions of real property regardless of whether

the purchasers and sellers are from different states, or whether the homes are brand new or existing properties. 42 U.S.C. §3604.

As such, the transactions at issue in these appeals, the purchases, sales, and resales of residential housing, "involv[es] commerce" as interpreted by the United States Supreme Court and these transactions are subject to the FAA.

II. ARBITRATION AGREEMENTS SET FORTH IN CC&Rs ARE BINDING AND ENFORCEABLE

Whether an enforceable agreement to arbitrate can arise from a common-interest community's CC&Rs is an issue of first impression in Nevada. However, the California Supreme Court considered the same issue in *Pinnacle Museum Tower Ass'n v. Pinnacle Market Development US, LLC,* 282 P.3d 1217, 1221-23 (Cal. 2012). After considering the legal and policy issues, the *Pinnacle* Court concluded that an arbitration agreement contained within a common-interest community's CC&Rs is enforceable. NHBA respectfully submits that this Court should adopt the *Pinnacle* rule because it advances the best interests of homeowners, associations and declarants. Additionally, Nevada law independently supports a holding that an enforceable agreement to arbitrate can arise from a common-interest community's CC&Rs.

A. Adoption of the *Pinnacle* Rule is in the Best Interest of Nevada and will Ensure the Success of Nevada's Common-Interest Communities

While the Nevada Legislature adopted the Uniform Common-Interest Ownership Act and the California Legislature adopted the Davis-Sterling Act, the

purpose of both statutes is identical and clear on the faces of the respective statutes: to ensure the success and stability of common-interest communities.

The creation and operation of a common-interest community are governed by statute and the two (2) states have extremely similar statutes governing common interest communities. For example, common interest communities are created in the same manner: by recordation of the community's CC&Rs. *Compare Pinnacle*, 282 P.3d at 1225 *with* NRS 116.2101. Additionally, as with Nevada law, "the declaration must set forth a legal description of the development, the name of the owners association that will own or operate the development's common areas and facilities, and the covenants and use restrictions." *Pinnacle*, 282 P.3d at 1225. The CC&Rs could also "contain any other matters the original signator of the declaration [(e.g., the developer)] or the owners consider appropriate." *Id.* at 1225; *see* NRS 116.2105(2) ("The declaration may contain any other matters the declarant considers appropriate.").

CC&Rs are the foundations upon which common-interest communities rest and are one of the most important documents for the communities. NRS 116.2103. The *Pinnacle* court noted that CC&Rs are "the primary means of achieving the stability and predictability so essential to the success of a shared ownership housing development." 282 P.3d at 1225. "Having a single set of recorded covenants and restrictions that applies to an entire common 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.*

The intent, expectations and wishes of owners are protected because the terms and conditions of the CC&Rs are binding upon all owners in the community and "actual notice is not required for enforcement of a recorded declaration's terms against subsequent purchasers." *Id.* Instead, the recordation of the declaration is sufficient notice to subsequent purchasers and they are deemed to agree to the terms of the declaration by accepting title to the property. *Id.* at 1225-26. Both Nevada's and California's legislatures went to extraordinary lengths to ensure that purchasers are not surprised by the terms of the CC&Rs. *Id.* at 1226; NRS 116.4102 (public offering statement); NRS 116.4108 (purchaser's right to cancel); NRS 116.4109 (requirements for resale of units); NRS 116.41095 (required form of information statement).

The *Pinnacle* Court observed that "[t]here appears no question that ... each owner of a condominium unit either has expressly consented or is deemed by law to have agreed to the terms in a recorded declaration," including the arbitration terms. 282 P.3d at 1228. The Court also concluded that

> even though [a party] did not bargain with Pinnacle over the terms of the Project CC&R's or participate in their drafting, it is settled under the statutory and decisional law pertaining to common interest developments that the covenants and terms in the recorded declaration, including [the arbitration clause], reflect written promises and agreements that are subject to enforcement.

Id. at 1231.

Nevada common-interest communities face the same issues as those common-interest communities in California and similarly expect declarants, associations and owners to abide by the agreements contained within their CC&Rs. The stability of Nevada's common-interest communities would be undermined if subsequent purchasers could pick and choose which portion of the CC&Rs they will follow.

B. Nevada Law Independently Requires the Enforcement of Arbitration Agreements within CC&Rs

It is well established that homeowners', declarants' and Nevadans' rights to arbitration are a "matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Further, arbitration is a matter of contract and "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634, 189 P.3d 656, 660 (2008). However, a party need not be a signatory to an agreement to arbitrate in order to be bound by that agreement. *Id.*

"A non-signatory may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency." *Truck Ins.*, 124 Nev. at 634, 189 P.3d at 660 (internal quotation omitted). This Court has held that non-signatories can be bound to arbitration agreements by: 1) incorporation by reference; 2) assumption; 3)

agency; 4) veil-piercing/alter ego; and 5) estoppel. *Id.* at 634–35, 189 P.3d at 660. Further, this Court has enforced arbitration agreements where the parties are in similar relationships in the collective bargaining context.

Similar to homeowners in a common-interest community, employees subject to a collective bargaining agreement ("CBA") do not have an opportunity to individually negotiate the terms of the CBA. Unlike a homeowner, however, an employee does not have an opportunity to review the terms of the CBA prior to his or her employment. *See Clark Cty. Pub. Employees Ass'n v. Pearson*, 106 Nev. 587, 589, 798 P.2d 136, 137 (1990). In fact, in some cases, an employee could be subject to the terms of the CBA even though he or she may not vote on changes to the CBA. Despite the less protective nature of CBAs, this Court has enforced arbitration agreements contained within a CBA. *Pratt v. Clark Cty. Dep't of Aviation*, No. 62463, 2014 WL 3764865, at *3 (Nev. July 29, 2014) (holding an employee is bound to follow alternate dispute resolution procedure contained within the applicable CBA); *Hulsey v. City of N. Las Vegas*, No. 58548, 2013 WL 3227791, at *1 (Nev. June 14, 2013) (holding an employee does not have standing to compel arbitration under a CBA unless the CBA gives individual employees the right to compel arbitration).

Additionally, while Respondents attempt to distinguish between covenants that run with the land in CC&Rs and those in contracts, this contention places form over substance. A covenant, by its very definition, is "[a] formal agreement or promise, ...

in a contract or deed, to do or not do a particular act." Black's Law Dictionary (10th ed. 2014), covenant. In other words, an arbitration clause within a community's CC&Rs is a formal agreement to arbitrate that runs with the land.

Contrary to Respondents' suggestion, NRS Chapter 116 contemplates that CC&Rs will create a binding agreement between a declarant and homeowners. Specifically, CC&Rs create a tripartite agreement between homeowners, associations and declarants and each of them can enforce the terms of the CC&Rs against each other. *See* NRS 116.4117. NRS 116.41095 also provides that a subsequent unit owner agrees to and is bound by the terms of the CC&Rs by his or her decision to buy a property subject to CC&Rs. Just as a declarant cannot argue that its obligations under the CC&Rs do not extend to subsequent purchasers because there is no "contract" or "agreement" between them, a subsequent purchaser cannot argue that the CC&Rs do not apply to him or her. Otherwise, subsequent purchasers would be free to pick and choose which provision within the CC&Rs applies to them. A holding that CC&Rs do not create a binding agreement between a declarant and a homeowner would undermine the stability of common-interest communities and create uncertainty as to which part of the CC&Rs applies to a subsequent purchaser.

Moreover, inclusion of an arbitration clause is consistent with Nevada's public policy. Under Nevada law, it is a condition precedent to submit any claim relating to "the interpretation, application or enforcement of any covenants, conditions or

restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association" to alternate dispute resolution with the Nevada Real Estate Division. Further, the Legislature has expressed a policy in favor of alternative dispute resolution for construction defect claims by requiring pre-suit mediation. NRS 40.680.

Finally, subsequent purchasers should be estopped from arguing that they are not bound by the CC&Rs. As set forth in *Truck Ins. Exchange*, a party is estopped from "refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause." 124 Nev. at 636, 189 P.3d at 661. In the case of subsequent purchasers, they benefit from the declarant's, the association's and other owners' compliance with the terms and conditions of the CC&Rs and fulfilling their respective obligations.

Accordingly, NHBA respectfully submits that this Court should hold that an enforceable agreement to arbitrate can arise from a common-interest community's CC&Rs both for the reasons set forth in *Pinnacle* and under Nevada law.

III. ARBITRATION AGREEMENTS WITHIN PSAs AND CC&Rs ARE NOT UNCONSCIONABLE

Under both the FAA and Nevada law, a Court may refuse to enforce an arbitration provision if it is unconscionable. In Nevada, a contract is unconscionable if the terms and circumstances existing at the time of the contract are "so one-sided as to oppress or unfairly surprise an innocent party." *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 418, 514 P.2d 654, 657 (1973). "Generally, 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. District Court*, 118 Nev. 438, 443, 49 P.3d 647, 650 (2002).

"A clause or contract 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 effect are not readily ascertainable." *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 554, 96 P.3d 1159, 1162 (2004). However, the mere fact that a contract is adhesive does not by itself render it procedurally unconscionable if 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*, 118 Nev. at 442, 49 P.3d at 649. In contrast, substantive unconscionability focuses on the one-sidedness of the contract. *Id.*

A. Existing Nevada Precedent is Incompatible with More Recent Controlling FAA Precedent

It is well established that "Courts may not ... invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). After this Court's opinion in *Gonski v. Dist. Ct.*, 126 Nev. 551, 245 P.3d 1164 (2010), the United States Supreme Court issued *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

In *Concepcion*, the Court noted that the FAA not only preempts state laws that single out arbitration clauses, but also preempts "grounds traditionally thought to exist

at law or in equity for the revocation of any contract," including unconscionability, if it is applied in a fashion that disfavors arbitration. *Id.* at 341. The Court further held that state-law rules that interfere with arbitration are preempted by the FAA and that states may not take steps that "conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."

The FAA "was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts." *Volt*, 489 U.S. 468, 474. States may not discriminate against arbitration clauses or impose special requirements upon them. *See DIRECTV, Inc. v. Imburgia,* 136 S. Ct. 463, 470 (2015)(holding that a court may not interpret arbitration clauses differently from other contracts); *Casarotto*, 517 U.S. at 687 (holding that state law conditioning the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally to violates the FAA).

While the definitions of procedural and substantive unconscionability in *Green* and *Gonski* are generally applicable to all contracts and all clauses, this Court also set forth conscionability requirements that apply only to arbitration clauses. The Court held that for an arbitration clause to be procedurally conscionable, (1) "an arbitration clause must be conspicuous and clearly put a purchaser on notice that he or she is waiving important rights under Nevada law," (2) the contract must "draw[] the reader's attention" and (3) explain the arbitration provision and its binding effect.

Gonski, 126 Nev. at 559-560, 245 P.3d at 1170-71; *Green*, 120 Nev. at 554-56, 96 P.3d at 1162-65. Notably, the *Gonski* Court found the arbitration clause at issue therein inconspicuous because it was located on page 15 of 18, was identically formatted as other provisions and was not "called out through the use of all capital letters and bolding, and/or required the buyers to specially initial." *Gonski*, 126 Nev. at 560, 245 P.3d at 1170.

Similarly, the Court also set forth substantive unconscionability requirements that only apply to arbitration agreements. In *Green*, the Court noted that significant arbitration costs could be a basis for finding the arbitration agreement unconscionable, even though the sharing of arbitration costs did not give one party more rights than another party. *Green*, 120 Nev. at 558, 96 P.3d at 1165; *see also Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003).[5]

As discussed above, Nevada may not impose special requirements upon arbitration agreements and the special requirements set forth in *Gonski and Green* are incompatible with the FAA.[6]

B. The Arbitration Provisions at Issue are not Unconscionable Under

[5] "[P]arties are free to contract for asymmetrical remedies and arbitration clauses of varying scope ... the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Ting*, 319 F.3d at 1149.

[6] NHBA notes that this Court's procedural unconscionability doctrine imposes a "special notice" requirement for arbitration clauses that is incompatible with the holding of *Casarotto*.

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In the cases at issue, there is nothing in the record to support a finding that the PSAs or the CC&Rs are procedurally or substantively unconscionable. Notably, Respondents do not argue that they did not have a meaningful opportunity to agree to the arbitration clause, *i.e.*, there was inadequate time for them to consider the terms of the PSAs, CC&Rs or the arbitration clause. Instead, they merely contend that the clauses are not more conspicuous than other provisions within the PSAs or the CC&Rs, are difficult to understand, and did not advise them that they were waiving important rights under Nevada law. However, even if this Court accepts the District Courts' finding regarding conspicuousness, which NHBA submits is erroneous, the District Courts' factual findings, nevertheless, do not support a finding of even "slight" procedural unconscionability or substantive unconscionability. *See Gonski*, 126 Nev. at 560, 245 P.3d at 1170-71.

In *Gonski*, this Court found slight procedural unconscionability. However, the Court did not conclude the arbitration clause was procedurally unconscionable merely because the arbitration clause was not more conspicuous than other terms in the contract. *Id.* Instead, the Court noted it was "the circumstances at signing" combined with the conspicuousness of the clause that made it "slightly" procedurally unconscionable. *Id.*

However, the District Courts did not find any circumstances at signing that prevented the Respondents from reviewing the terms of the PSAs or the CC&Rs, which was necessary for this Court's finding of "slight" procedural unconscionability in *Gonski*. Notably, each of the Respondents had five (5) days after they executed their PSAs to seek legal counsel, have the terms of the PSAs and CC&Rs explained to them and cancel if they did not agree to the terms of the PSAs. NRS 116.4108; NRS 116.4109. Additionally, Nevada law specifically warned each of them that they had five (5) days to cancel and each of them are bound by the terms of the CC&Rs "whether or not [they] have read them or had them explained to [them]." NRS 116.41095. As such, Respondents had "a meaningful opportunity" to consider and agree to the terms, and there is nothing in the record to suggest that an arbitration clause would not be within Respondents' reasonable expectations.

The arbitration clauses are also not substantively unconscionable. The clauses merely provide that the parties will resolve their disputes through arbitration and do not affect the individual Respondents' substantive rights under Nevada law. The power of the arbitrator to award attorney's fees and costs, or any other available damages under NRS 40.655, is clear from the PSAs and CC&Rs, and, most importantly, admitted by Appellants. There simply is no abrogation of Respondents' substantive rights under NRS 40.600 *et seq.*

The District Courts also held that the arbitration agreements are substantively unconscionable because (1) the agreements are silent as to the potential for significant arbitration costs, (2) the seller has the option to join subcontractors and suppliers but the buyer may not, and (3) they deprive Respondents of their entitlement for reimbursement of costs if they are the prevailing party. However, federal law prohibits a finding of unconscionability based on an agreement's silence as to arbitration costs, or the existence of arbitration costs. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000); *see also Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1133 (D. Ariz. 2009).

Furthermore, substantive unconscionability requires a "modicum of bilaterality" and does not require complete bilaterality. *Ting*, 319 F.3d at 1149; *see also* 8 Richard A. Lord, *Williston on Contracts* § 18:10 (4th ed. 2010). The District Courts, however, required complete bilaterality, if not advantageous terms for the Respondents. Although they concluded that Respondents' inability to join subcontractors and suppliers is impermissibly one sided, the District Courts provided no analysis or explanation as to why such a term would be "unreasonably favorable to the more powerful party," or why such a term would "impair the integrity of the bargaining process or otherwise contravene the public interest or public policy." *Gonski*, 126 Nev. at 563, 245 P.3d at 1174. This is not a clause that allows Appellants to escape liability. It also does not deprive Respondents of any remedies provided by law and

their inability to join subcontractors or suppliers does not impair their ability to recover all of their damages. NRS 40.640.

Moreover, even if the District Courts are correct regarding whether the prevailing party would be able to recover costs as provided by NRS 18.005 *et seq.*, this term applies equally to both parties, *i.e.*, if Appellants prevail at the arbitration, Appellants would also be precluded from obtaining reimbursement of costs as permitted by NRS Chapter 18.

Accordingly, the arbitration provisions within the PSAs and the CC&Rs are neither procedurally nor substantively unconscionable.

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IV. CONCLUSION.

For the reasons set forth above, amicus curiae requests that this Court protect the right to arbitration and hold that the arbitration provisions contained with the subject PSAs and CC&Rs are valid and enforceable.

DATED: January ___, 2017

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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). This Amicus Brief is submitted concurrently with NHAB's Motion for Permission to Exceed Page Limit Pursuant to NRAP 32(7)(D).

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3. Finally, I hereby certify that I have read this Amicus 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.

DATED: January ___, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of January, 2017, a true and correct copy of this completed upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

By _____
Michelle N. Ledesma, an Employee of
WOOD, SMITH, HENNING &
BERMAN LLP