IN THE SUPREME COURT OF THE STATE OF NEVADA

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 ORTEGA-GOMEZ and ELVIRA GOMEZ-ORTEGA, individually; JOHN J. and IRMA A. OLSON, individually; OMAR PONCE, individually; BRANDON WEAVER, individually; JON YATES, individually; and MINTESNOT WOLDETSADIK, individually,

Respondents.

CASE NO. 68810

Eighth Judicial District Case No. A-15-714219-D

RESPONDENTS' SUPPLEMENTAL BRIEF

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The Federal Arbitration Act ("FAA") provides that a "written provisions 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 . . . 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 (Emphasis added). The Nevada Home Builders Association ("NHBA") argues that the FAA governs agreements to arbitrate contained within purchase and sales agreements and CC&Rs. *See* NHBA's Amicus Brief at 1.

A. The PSAs do not involve commerce

As previously argued by homeowner Respondents, the PSAs by and between U.S. Home Corporation ("U.S. Home") and original homeowner Respondents do not evidence commerce as they are contracts for the purchase of completed homes on land located in Nevada, not the construction of the homes

(the actual construction contracts for the homes were between U.S. Home and subcontractors). *See* Respondents' Answering Brief at 11-14.

B. CC&Rs are not "contracts", but gratuitous covenants or promises running with the land

First, the CC&Rs should not be deemed a "contract". There is no offer, acceptance, consideration and/or privity or mutuality as between the original declarant U.S. Home and original home purchaser or any subsequent home purchaser as the CC&Rs are typically recorded prior to the first owner purchasing within the community. *See generally Rickey Land Cattle Co. v. Henry Wood*, 218 U.S. 258, 31 S.Ct. 11, 54 L.Ed. 1032 (1910). The yet unidentified purchaser of a home located within a common-interest community does not have any power to negotiate the provisions of the CC&Rs as they are not in existence at the time of the "contract". There is no consideration, or negotiation[1], as between declarant U.S. Home and any original or subsequent purchaser of the home as the home purchaser must agree to the recorded CC&Rs as drafted. The documents, as recorded, are intended to maintain, restrict use and provide for the payment of fees for the benefit of the common-interest community, or are gratuitous promises from homeowners to restrict their use, to maintain, and to pay association fees for the

[1] *See Merrill v. DeMott*, 113 Nev. 1390, 951 P.2d 1040 (1997).

property purchased within a common-interest community. *See* NEV. REV. STAT. "NRS" 116.1201 *et seq.*; *see also Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 28, 183 P.3d 895 (2008). As such, the arbitration provisions regarding individual construction defect claims should not be enforced as no privity or mutuality existed between the parties, and even if privity or mutuality were present, they were not in the reasonable expectation of the homeowner when purchasing within a common-interest community.

As 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", the arbitration provisions within the Association's CC&Rs should not be enforced as they relate to construction defect claims. *See AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); *see also Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409, __ (1960). The FAA "required courts to enforce ***privately negotiated agreements to arbitrate***, like other contracts, in accordance with their terms." (Emphasis added). *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). As previously stated, the Association's CC&Rs are not privately negotiated

agreements to arbitrate, but are covenants/use restrictions that run with the land to benefit the unit owners and/or the common-interest community.

If the Association's CC&Rs are not considered "contracts", then the FAA does not apply to the arbitration provisions contained therein. The Court is requested to find that the Association's CC&Rs are not "contracts", but covenants regarding land use restrictions, maintenance, and payment of Association's fees that run with the land. Any such arbitration provisions cannot be enforced as arbitration is a matter of contract. *See Mitri, et al v. Arnel Management Company, et al.*, 157 Cal.App.4th 1164, 69 Cal.Rptr.3d 223 (Cal.Ct.App. 2007).

Even if the Association's CC&Rs are considered "contracts", declarant U.S. Home would no longer be a party able to enforce the terms as it no longer owns any portion/units of the common interest community and/or loses control of the activities of the association, thereby losing standing to enforce any arbitration provision. After ownership of a common-interest property ceases, which would derive benefit from continuance of restrictions, the former owner would have no standing to complain of breach of conditions or to enforce such covenants. *See McLeod v. Baptiste*, 433 S.E.2d 834 (S.C. 1993); *Sanborn v. Rice*, 129 Mass. 387 (Mass. 1880); *Meigs v. Milligan*, 177 Pa. 66, 35 A. 600 (Pa. 1896); *Kent v. Koch*,

166 Cal.App.2d 579 (Cal.Ct.App. 1958); *see also* Nevada Justice Association's ("NJA") Amicus Brief at 4.

C. CC&Rs for an association located within the state of Nevada do not involve commerce

Second, the CC&Rs do not evidence a "transaction involving commerce". The CC&Rs are covenants running with the land concerning the restricted use, maintenance or payment of fees to an association for the benefit of a common-interest community exclusively within the purview of state law and applying only to common-interest communities within the state of Nevada, NRS 116.1201 *et seq.* The FAA would not apply to promises or covenants having nothing to do with commerce or even implicated under Congress' broad commerce power, regarding the ***governance*** of a common-interest community within the state of Nevada and regulated by Nevada statute.

II. EVEN IF THE FAA APPLIES TO ARBITRATION PROVISIONS IN PURCHASE AND SALES AGREEMENTS ("PSAS") AND/OR CC&RS, THE ARBITRATION PROVISIONS SHOULD NOT BE ENFORCED AS UNCONSCIONABLE

If the Court finds that the FAA or Nevada law favoring arbitration applies, then the Court is requested to find the arbitration provisions in the purchase and sales agreements as unconscionable. *See* Respondents' Answering Brief at 21-26;

31-34. Contract defenses, such as unconscionability, do not contravene the FAA. *See Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

The arbitration provisions in the CC&Rs are unenforceable as they relate to construction defect claims from homeowners against declarant/ U.S. Home because they are also unconscionable. *See* Respondents' Answering Brief at 19-21; 27-30. An association's CC&Rs were historically created and maintained to benefit the lot owners within the common-interest community and attached as equitable servitudes, or restrictions common to all the parcels. *See Alderson v. Cutting*, 163 Cal. 503 (Cal. 1912); *Wing v. Forest Lawn Cemetery Assn.*, 15 Cal.2d 472, 480, 101 P.2d 1099 (Cal. 1940). Although an association's CC&Rs have been enforced by courts utilizing contractual principles, those conditions germane to the use/maintenance/character and operation of a homeowners' association should be the only reasonable conditions enforced. The arbitration provisions pertaining to construction defect claims, which are unrelated to the use/maintenance/character and operation of the association, inserted by declarant in the CC&Rs are absolutely unreasonable and unconscionable.

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Arbitration is a matter of "consent, not coercion". *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010).

A. Vast disparity in bargaining power as between a home purchaser and Developer Declarant U.S. Home

In addition, the unsophisticated home purchaser has no bargaining power, is given the CC&Rs on a "take it or leave it basis". The declarant U.S. Home is the more powerful, drafting party. The transaction related to the recordation of the CC&Rs involves gratuitous promises by homeowners to restrict the use or maintenance of a home purchased within a common-interest community, and not simply a consumer product or service that can be easily returned or terminated. Accordingly, arbitration provisions embedded within the voluminous CC&Rs unrelated to the governance of the common-interest community should not be enforced as unconscionable.

B. Conscionability analysis focusing on conspicuousness of a contract provision as a component not applied only to arbitration provisions

The analysis of whether the arbitration provisions in the PSAs or CC&Rs are unconscionable are not applied to "discriminate" against arbitration provisions as argued by the NHBA. *See* NHBA's Amicus Brief at 13.

NHBA erroneously asserts that the Court sets forth conscionability

requirements that only apply to arbitration clauses. *See* NHBA's Amicus Brief at 13. Similar conscionability assessments have been performed as they pertain to other waivers. *See* further arguments, *infra*. Arbitration provisions effectively waive a party's right to seek redress of a dispute in a court of law, but instead mandates dispute resolution through arbitration by agreement. The conspicuousness requirement serves as one prong of the unconscionability analysis, and failure to satisfy such requirement does not solely invalidate an arbitration provision. *See Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

Other terms in Nevada contracts, aside from arbitration provisions, are required to be conspicuous or noticeable. NRS § 104.1201(10) (in the context of the Uniform Commercial Code) states that "[a] term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . Language in the body of a form is 'conspicuous' if it is ***in larger or other contrasting type or color***." (Emphasis added). The official comment 10 notes that "the test is whether attention can reasonably be expected to be called to it."

The Nevada Supreme Court has conducted conscionability analysis in

determining whether a contractual waiver of the right to jury trials and included whether the provisions or terms were conspicuous to enforce such provisions. *See Lowe Enterprises v. Dist. Ct.*, 118 Nev. 92, 40 P.3d 405 (2002). The *Lowe Enterprises* Court adopted the position of the court in *Whirlpool Financial Corp. v. Sevaux* for factors to consider in determining whether a contractual waiver of the right to jury trial was entered into knowingly, voluntarily or intentionally: "1) the parties' negotiations concerning the waiver provision, if any, (2) the ***conspicuousness*** of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to review the agreement." *Lowe Enterprises*, 40 P.3d at 411, *citing Whirlpool Financial Corp. v. Sevaux,* 866 F.Supp. 1102, 1105 (N.D.Ill. 1994) (Emphasis added). The Nevada Supreme Court has addressed the conspicuousness of the waiver of jury trial provision to determine its enforceability. Therefore, the conspicuousness requirement of the arbitration provision is not applied against arbitration provisions only nor is it unreasonable.

Further, NRS § 116.4115 states that an 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 in the provision of a contract

to determine whether such exclusion of warranty would be enforced. In the warranty context, the purpose of the warranty waiver under the Uniform Commercial Code is to "protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise." NRS § 104.2316 (comment one). Similarly, emphasizing, calling a purchaser's attention to the arbitration provisions, or making such provisions conspicuous, would not be requirements that only apply to arbitration provisions in a contract, but also to warranty disclaimers. *See also Sierra Diesel Injection Service, Inc. v. Burroughs Corp., Inc.*, 890 F.2d 108, 115 (9th Cir. 1989) (Court held that disclaimer clauses were not conspicuous and therefore ineffective); *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 89 Nev. 414, 514 P.2d 654 (1973) (Court found that language of disclaimer was conspicuous, written in capital letters, and specifically mentioned fitness and merchantability as between the same bargaining power merchants in a commercial setting). Therefore, the conspicuousness requirement[2] of arbitration provisions are not discriminatory and applicable only to arbitration provisions, but applied to other contractual waiver

[2] *See Gonski v. Dist. Ct.*, 126 Nev. 551, 245 P.3d 1164, 1170 (2010).

provisions.

Accordingly, the district court's finding of unconscionability based, in part, upon the inconspicuousness of the arbitration provisions is proper. (Vol. II, JA461-463)

III. ARBITRATION PROVISIONS IN THE CC&Rs WHICH ARE UNRELATED TO THE ENFORCEMENT OF THE CC&RS SHOULD BE DEEMED *PER SE* UNCONSCIONABLE

The NHBA seemingly argues that employees subject to a collective bargaining agreement are somehow analogous to homeowners within a common-interest community. *See* NHBA's Amicus Brief at 9. However, the collective bargaining agreement is the contract whereby the employee authorizes the collective bargainer to act on his behalf (an agency). This is not the case with the Association's CC&Rs as there is no agency relationship from a potential homebuyer to a collective body to act on his behalf, and certainly not as it pertains to construction defects claims regarding the homebuyer's own home. The insertion by declarants of self-serving and unfair provisions within the CC&Rs binding any homeowner who purchases within the common-interest community to arbitrate claims for construction defects should be deemed *per se* unconscionable. *See* NJA's Amicus Brief at 11. Mandatory arbitration provisions embedded within the

CC&Rs are certainly not "appropriate" or beneficial to the common-interest community as they relate to individual claims for constructional defects against the builder of homes within the community.

A. Court should not adopt the *Pinnacle* case as it is distinguishable

Further, NHBA cites to *Pinnacle Museum Tower Assn v. Pinnacle Mkt. Dev.*, 282 P.3d 1217, 1227-28 (Cal. 2012), to support its contention that the enforcement of an arbitration provision contained within a common-interest community's CC&Rs is enforceable. *See* NHBA's Amicus Brief at 5. However, the Court should not adopt the *Pinnacle* case as it is distinguishable from the present matter, and is a decision from another state's jurisdiction with different statutory application. *See* Respondents' Answering Brief at 7-9. The *Pinnacle* case involved a homeowners' association of a condominium with shared walls/airspace applying California's statutory provision governing an association's construction defect claims against the builder within the Davis-Stirling Act, CAL. CIV. CODE §§ 4000-6150, (California's common-interest community statute which includes construction defect provisions within it, §§ 6000-6150). In contrast, the present lawsuit involves construction defect claims of individuals under Nevada's separate construction defect statute, NRS 40.600-40.695, concerning detached homes on

private lots, and not within the Nevada statutory provisions for a common-interest community. *See* NRS 116.1201 *et seq.*

Furthermore, the *Pinnacle* case is different in application from the case at bar because the court held that the arbitration provision may be enforced by a developer, or declarant, against an ***owners' association***, not against the individual unit owners for construction defects in their homes. *See Pinnacle*, 55 Cal.4th at 232. An owner's association, as an organized entity with a presumably knowledgeable manager, has more bargaining power or is more sophisticated than a typical homebuyer.

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CONCLUSION

For the foregoing reasons, this Court is requested to sustain the Order of denial of U.S. Home's Motion to Compel Arbitration based upon lack of agreement to arbitrate, and/or the unconscionability of the arbitration provisions contained in U.S. Home's Purchase and Sales Agreements and/or the Association's Covenants, Conditions and Restrictions.

Respectfully submitted this 8th day of March, 2017.

SHINNICK & RYAN NV P.C.

By: _____

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AFFIDAVIT OF COURTNEY K. LEE

1. I am over the age of 21 years, am of sound mind, and have personal knowledge of all matters attested to herein.

2. I am counsel of record for Plaintiffs in *The Michael Ballesteros Trust, et al. v. U.S. Home Corporation*, Case No. A-15-714219-D, pending in the Eighth Judicial District Court, and for Respondents in the current Appeal, Case No. 68810.

3. The matters stated in homeowner Respondents' Supplemental Brief are accurate to the best of my knowledge, information and belief.

FURTHER AFFIANT SAYETH NAUGHT.

COURTNEY K. LEE

Sworn and subscribed before me this
8th day of March, 2017.

Notary Public

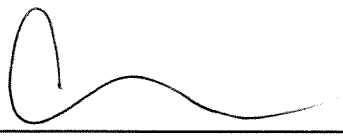
JESSICA J. WHITE
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 12-11-2018
Certificate No: 10-3071-1

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Supplemental 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 Supplemental Brief has been prepared in a proportionally spaced typeface (14-point Times New Roman) in MS Word and contains 2,594 words (less than the 7,000 word limit, and less than the 15 page limit).

2. I further certify that I have read this Supplemental 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 Supplemental Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the Supplemental Brief regarding matters in the record be supported by a reference to those portions of the record, if any, where the matter relied upon is to be found. I understand that I may be subject to sanctions if this Supplemental Brief does not comply with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 6th day of March, 2017.



COURTNEY K. LEE

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondents' Supplemental Brief were electronically served this 8th day of March, 2017, upon all counsel of record in *The Michael Ballesteros Trust, et al. v. U.S. Home Corporation,* Case No. A-15-714219-D (Eighth Judicial District Court), and Appeal Case No. 68810 through the Court's electronic filing program and by first-class U.S. Mail, postage prepaid, upon:

Honorable Joanna Kishner
District Judge, Eighth Judicial District Court
Regional Justice Center, Department 31
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Las Vegas, NV 89155

/s/ Jessica White
Jessica White
An Employee of SHINNICK & RYAN NV P.C.