

IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1371
Second District Case No. 2D17-4372
Twentieth Circuit Case No. 2017-CA-000048

SHANE R. HAYSLIP and LAURA M. HAYSLIP,
Petitioners,

vs.

U.S. HOME CORPORATION,
Respondent.

**U.S. HOME CORPORATION'S
ANSWER BRIEF**

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I.
INTRODUCTION

Shane R. Hayslip and Laura M. Hayslip (“Petitioners”) seek review of the Second District Court of Appeal’s opinion affirming the trial court’s order granting U.S. Home Corporation’s (“U.S. Home”) Motion to Dismiss or Stay and Compel Arbitration. Petitioners do not want to arbitrate their alleged construction defect claim.

For easy reader orientation, this brief is divided into two sections: 1) “Why The Lower Court Is Right;” and, 2) “Why Petitioners Are Wrong.” Further, U.S. Home’s Appendix/Record is referred to as “R.A. __.”

II.
STATEMENT OF THE FACTS AND CASE

A.
Facts

1.
The Original Purchasers Bought the Property

In 2007, David and Luisa Kennison (“Original Purchasers”), entered into a sales agreement with homebuilder, U.S. Home, to buy a newly built house in Lee County, Florida (“Property”). (R.A. 04.)

U.S. Home sold the Property to Original Purchasers and recorded the deed (“Recorded Deed”) in the Official Records of Lee County, Florida. (R.A. 08–11.) The Recorded Deed contains several covenants, conditions and

restrictions (“CC&Rs”) concerning the Property. (R.A. 08–11.)

These recorded CC&Rs state that they: 1) bind both the Original Purchasers and subsequent purchasers; and, 2) require arbitration (including pre-arbitration mediation) for disputes concerning the Property.

(R.A. 09.) The CC&Rs state:

Grantor and Grantee specifically agree that this transaction **involves interstate commerce** and that **any Dispute** . . . shall first be submitted to mediation and, if not settled during mediation, **shall thereafter be submitted to binding arbitration** as provided by the **Federal Arbitration Act** . . . **and not by or in a court of law or equity**. “Disputes” (whether contract, warranty, tort, **statutory or otherwise**), shall include, but are not limited to, any and **all controversies, disputes or claims** (1) arising under, or **related to**, this Deed, the underlying purchase agreement, **the Property**, the community in which the Property is located or any dealings between Grantee and Grantor . . . (2) arising by virtue of any representations, promises or warranties alleged to have been made by Grantor or Grantor’s representative; and (3) relating to personal injury or **property damage** alleged to have been sustained by Grantee, Grantee’s children **or other occupants of the Property**, or in the community in which the Property is located. Grantee has **accepted** this Deed on behalf of his or her children **and other occupants** of the Property with the **intent that all such parties be bound** hereby.

* * *

If the Dispute is not fully resolved by mediation, **the Dispute shall be submitted to binding arbitration** and administered by the AAA

(R.A. 09, “arbitration covenant,” Recorded Deed, Section I.) (emphasis added).

The Recorded Deed also states that its CC&Rs run with the land:

All covenants, conditions and restrictions **contained** in this **Deed** are equitable servitudes, perpetual and **run with the land**, including, without limitation, Sections H, I, and J.

(R.A. 09, Recorded Deed, Section G.) (emphasis added).

Section J of the Recorded Deed expressly states that acceptance of the Recorded Deed binds successors and assigns to its terms:

Grantee, by acceptance of this Deed, automatically **agrees** for itself, and its heirs, personal representatives, **successors** and **assigns**, to observe and to **be bound** by all of the **terms** and conditions set forth in this Deed

(R.A. 10.) (emphasis added).

2.

Petitioners Subsequently Purchased the Property

In 2010, Petitioners purchased the Property from Original Purchasers and recorded their deed. Petitioners' 2010 deed expressly provides that it is: "[s]ubject to easements, restrictions, reservations and limitations of record."

(R.A. 12–13, 2010 deed) (emphasis added).

B.

Proceedings Below

In January 2017, after using and enjoying the Property for seven years, Petitioners sued U.S. Home pursuant to Section 553.84, Florida Statutes, alleging the Property had defective stucco that violated the Florida Building Code. (R.A. 04–07.) In response, U.S. Home filed a Motion to Dismiss or

Stay and Compel Arbitration pursuant to the Recorded Deed's CC&Rs. (R.A. 14–22.)

After a hearing, the General Magistrate issued a Report and Recommendation granting the motion. (R.A. 23–28.) Petitioners did not file objections or exceptions to the General Magistrate's Report and Recommendation.

Thereafter, the trial court entered its order adopting the General Magistrate's Report and Recommendation in its entirety ("Order"). (R.A. 29.) The Order compelled mediation and, if unsuccessful, arbitration of Petitioners' claim. (R.A. 29.) Petitioners appealed the Order to the Second District and orally argued its merits in March 2019. (R.A. 30–37.)

In July 2019, the Second District issued an Opinion affirming the trial court's Order. *Hayslip v. U.S. Home Corp.*, 276 So. 3d 109 (Fla. 2d DCA 2019); (R.A. 38–52.) The Second District found that:

1) the arbitration covenant was a valid agreement between U.S. Home and Original Purchasers, (R.A. 43.); and,

2) the arbitration covenant was a valid restrictive covenant that ran with the land, and, therefore, bound Petitioners and other subsequent purchasers (R.A. 51.).

After the Second District certified a question to this Court as one of

great public importance, (R.A. 51.), Petitioners sought this Court's discretionary jurisdiction (R.A. 52–53.). In October 2020, this Court accepted jurisdiction. (R.A. 55.)

III. STANDARD OF REVIEW

The existence of an agreement to arbitrate presents a legal question that this Court reviews *de novo*. *Hernandez v. Crespo*, 211 So. 3d 19, 24 (Fla. 2016). Similarly, the determination of the validity of a restrictive covenant requires *de novo* review. See *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003).

IV. SUMMARY OF ARGUMENT

Over a century ago, this Court wrote that a grantee who accepts a deed promises to undertake the obligations imposed on him or her by that deed. See *Silver Springs, Ocala & Gulf R.R. Co. v. Van Ness*, 34 So. 884, 887–88 (Fla. 1903) (noting that when “the grantee accepts a deed and enters into possession of the land conveyed, he is deemed by such acts to have expressly agreed to do what it is stipulated in the deed he should do, even though he did not sign the deed”) (quoted by *Hayslip*, 276 So. 3d at 114). Florida courts have loyally followed this ruling for over 100 years.

Here, the Original Purchasers accepted and recorded their deed which

contained an arbitration covenant. The Recorded Deed provides that the arbitration covenant binds both the Original Purchasers and subsequent purchasers, and, runs with the land. Additionally, the arbitration covenant states that claims, like the one here, involve interstate commerce and must be arbitrated pursuant to the Federal Arbitration Act (“FAA”).

Petitioners, as subsequent purchasers, willingly purchased the Property and accepted title through a deed. Petitioners’ deed expressly stated their Property was: “subject to easements, restrictions, reservations and limitations of record.” One of the CC&Rs was the covenant to arbitrate this claim pursuant to the FAA. Petitioners chose to ignore this covenant.

The Second District correctly determined that Petitioners must arbitrate their claim, holding that the Recorded Deed’s arbitration covenant is valid and: 1) touches, concerns, and runs with the land; and, 2) binds both the Original Purchasers and subsequent purchasers. This holding followed this Court’s precedent and joined federal and sister states’ on-point cases holding that recorded arbitration covenants – like the one here – are valid and enforceable against subsequent purchasers because they touch, concern, and run with the land.

The Second District also correctly determined that pursuant to Florida’s long standing Doctrine of Constructive Notice, Petitioners are charged with

knowledge of the covenants in the Recorded Deed. Accordingly, Petitioners took title to their Property with notice of all covenants contained in the recorded chain of title and are bound by them.

If Petitioners did not want to buy a house with a deeded and recorded arbitration covenant, then they were free to buy any other house. Instead, Petitioners chose to buy this house and accepted title through a recorded deed. Petitioners had notice of, and accepted, what they bargained for . . . including the arbitration covenant.

Further, the Second District correctly analyzed Chapter 558 and followed the Florida Legislature's stated intent and public policy. The Legislature's stated public policy favors alternative dispute resolution for construction defect claims like the one in this case.

Concisely: Petitioners voluntarily purchased the Property, took title to the Property, and recorded their deed. Under Florida's long-standing precedent, by accepting title through the deed, Petitioners knowingly accepted all of the deed's covenants, including the arbitration covenant. Petitioners cannot have their cake and eat it too, by holding title to their Property, while at the same time disavowing their arbitration covenant – a favored form of alternative dispute resolution.

This Court should answer the certified question in the affirmative

because: 1) the arbitration covenant must be enforced under Florida law and the FAA; 2) the Recorded Deed contains a valid arbitration covenant under Florida's Doctrine of Constructive Notice; and, 3) the arbitration covenant is a valid covenant that runs with the land and binds subsequent purchasers.

V. **ARGUMENT**

A. **Why The Lower Court Is Right**

Florida courts consider three elements when ruling on a motion to compel arbitration: 1) whether a valid written agreement to arbitrate exists; 2) whether an arbitrable issue exists; and, 3) whether the right to arbitration was waived. *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013) (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)).

Here, under Florida law, all three elements support enforcing arbitration. First, by accepting the 2010 deed, Petitioners agreed to arbitrate. (R.A. 12–13.) Second, the Recorded Deed mandates arbitration of “any dispute” concerning the Property, which includes arbitrating construction defects. (R.A. 09.) Third, U.S. Home acted consistently with arbitration rights. (Petitioners have not challenged the stated second and third elements). (R.A. 45.)

**1.
The Deed Contains a Valid Agreement to Arbitrate**

**a.
Deeds Are Enforced as Contracts**

Florida courts recognize a deed's contractual nature and apply the same interpretative rules for enforcement. See, e.g., *AT&T Wireless Servs. of Fla., Inc. v. WCI Cmtys., Inc.*, 932 So. 2d 251, 254 (Fla. 4th DCA 2005) (“Deed restrictions on lands are deemed contractual in nature and subject to the same rules of interpretation as are contracts.”).

Here, when Petitioners accepted their 2010 deed, they bound themselves to its covenants, including the arbitration covenant. (R.A. 12–13.) Thus, accepting a deed imposes mutual obligations just like mutually executed contracts. See *id.*

**b.
When Petitioners Accepted the Deed,
They Agreed to Arbitrate Their Claim**

The arbitration covenant, like any other agreement, is formed under ordinary provisions of state contract law. See *BDO Seidman, LLP v. Bee*, 970 So. 2d 869, 874 (Fla. 4th DCA 2007); see also *Grant v. Morgan Stanley Smith Barney LLC*, No. 16-81924-CIV-MARRA, 2017 WL 1044484, at *3 (S.D. Fla. Mar. 20, 2017) (“Florida law permits the offeror to specify the terms and manner of acceptance.” (citing *Dorward v. Macy’s Inc.*, No. 2:10-CV-

669-FTM-29-DNF, 2011 WL 2893118, at *9 (M.D. Fla. July 20, 2011); *Kendel v. Pontious*, 261 So. 2d 167, 170 (Fla. 1972); *Holloway v. Gutman*, 707 So. 2d 356, 357 (Fla. 5th DCA 1998))).

As reflected in the Recorded Deed, Original Purchasers and U.S. Home agreed to arbitrate “any dispute.” (R.A. 09.) The Recorded Deed’s plain language states that by accepting the Recorded Deed, Original Purchasers agreed to perform and be bound by all the covenants contained in the Recorded Deed. (R.A. 09–10.)

The Recorded Deed goes on to state that the arbitration covenant binds all subsequent purchasers and other occupants and runs with the land. (R.A. 09.) The Recorded Deed’s covenants bind all “other occupants” of the Property with respect to, *inter alia*, construction defect and property damage claims. (R.A. 09.)

An “occupant” is a person “who has possessory rights in, or control over, certain property or premises,” or “[s]omeone who acquires title by occupancy.” Black’s Law Dictionary (10th ed. 2014).

Therefore, Petitioners, both as successor owners and as “other occupants” of the Property, are equally bound by the Recorded Deed’s arbitration covenant. (R.A. 08–13.) Additionally, the arbitration covenants specify that the FAA and interstate commerce apply to the transaction. (R.A.

09.)

As the Second District correctly determined, Original Purchasers formed the agreement to arbitrate by their act of accepting and recording the Deed. (R.A. 43.) Simply put, “a party’s conduct can demonstrate intent to be bound by the agreement.” *Hayslip*, 276 So. 3d at 113–14 (citing *Bee*, 970 So. 2d at 874 (Fla. 4th DCA 2007); (R.A. 09.); *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So. 2d 658, 661 (Fla. 4th DCA 2008)). Original Purchasers’ signature on the Recorded Deed was unnecessary.

**C.
Purchasers Do Not Sign Deeds**

Contrary to Petitioners’ suggestion, no Florida statute or case requires a purchaser to sign a deed in order to be bound by a deed’s CC&Rs. See *Hayslip*, 276 So. 3d at 113; (R.A. 09.) (“[N]either the Federal Arbitration Act nor the Florida Arbitration Code require an arbitration agreement to be signed to be enforceable.”)

The only signatures required on a deed are those of the seller and two subscribing witnesses. See § 689.01, Fla. Stat. (“No estate or interest of freehold . . . shall be created, made, granted, transferred or released in any other manner than by instrument in writing, signed in the presence of two subscribing witnesses by the party creating, making, granting, conveying, transferring or releasing such estate”); see *also* 19 Fla. Jur. 2d Deeds

§ 20 (2020) (citing *Tucker v. Cole*, 3 So. 2d 875, 877 (Fla. 1941) (“A deed of land must be signed by the party granting or conveying property or by the party’s lawfully authorized agent.”) (internal citations omitted)); see also *Bessemer v. Gersten*, 381 So. 2d 1344, 1348 n.6 (Fla. 1980) (“In Florida it is standard practice for only the grantor to sign the deed”) (quoting 1 Ralph E. Boyer, *Fla. Real Estate Transactions* § 24.03, at 574 (1977)); *Taylor v. Fla. E. Coast Ry. Co.*, 45 So. 574, 578 (Fla. 1907) (“When the grantee accepts a deed and enters into possession of the land conveyed, he is deemed by such acts to have expressly agreed to do what is stipulated in the deed he should do, even though he did not sign the deed.” (quoting *Silver Springs, O. & G. R. Co.*, 34 So. at 887–88)).

Further, the plain language of § 2 of the FAA, which is applied in the deed, “requires that the arbitration provision be ‘written’ [but] does not, however, require that the agreement to arbitrate be signed by either party; nor does any other provision of the FAA.” *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369–70 (11th Cir. 2005). (R.A. 09.)

Caley stated that the “overwhelming weight of authority” supports the FAA’s lack of a signature requirement and observed that it found “no decision to the contrary.” *Id.* at 1369–70; see *Genesco, Inc. v. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (“As to the unsigned forms it is well-established

that a party may be bound by an agreement to arbitrate even absent a signature.”); *Valero Ref., Inc. v. M/T Lauberhorn*, 813 F.2d 60, 62 (5th Cir. 1987) (“It is established that a party may be bound by an agreement to arbitrate even in the absence of his signature.”).

Succinctly, in a deed, the grantor conveys to the grantee all the privileges and obligations that inhere in the deed and its chain of title. Concomitantly, by accepting a deed, the grantee accepts what has been conveyed, together with its CC&Rs.

Petitioners’ claim that without a purchaser’s signature on a deed, there is no agreement to arbitrate – misinterprets a deed’s function and purpose, and contravenes long-standing Florida law. Thus, a valid covenant to arbitrate exists under the basic principles of Florida contract law.

d.

Other Courts Have Routinely Held That Arbitration Covenants in Deeds Bind Successive Purchasers

Courts across the nation hold that arbitration covenants in deeds contractually bind a party to arbitrate even though the grantee did not sign the deed. *See, e.g., Nestle Waters N. Am., Inc. v. Bollman*, 505 F.3d 498, 506 (6th Cir. 2007) (“[D]eeds are contracts’ in that general principles of contract interpretation apply to deeds and deeds frequently contain covenants which are enforceable like contracts even if the grantee does not

sign the deed[.]”); *Sanum Inv. Ltd. v. San Marco Capital Partners LLC*, 263 F. Supp. 3d 491, 495 (D. Del. 2017) (“Plaintiffs do not dispute that the Deed is a valid and enforceable contract . . . [and] that the Deed contains a broad arbitration clause that would apply to its claims.”); *J&JB Timberlands, LLC v. Woolsey Energy II, LLC*, No. 14-CV-1318-SMY-RJD, 2017 WL 396174, at *3 (S.D. Ill. Jan. 30, 2017) (Where there was “no dispute that both deeds of conveyance are valid, enforceable contracts,” the court found “[u]nder Illinois general contract law, the arbitration clause is binding as to Plaintiff because it is incorporated by reference [in the plaintiff’s deed.]”); *Marriott Ownership Resorts, Inc. v. Serman*, No. 6:14-CV-1400-ORL-41-TBS, 2015 WL 11251946, at *1 & n.2 (M.D. Fla. Jan. 16, 2015) (compelling arbitration pursuant to arbitration clause in master deed).

These cases fortify *Hayslip*’s holding that the arbitration covenant must be enforced without Petitioners’ signatures because, by accepting their deed, Petitioners accepted the arbitration covenant. (R.A. 12–13.)

e.

Florida’s Doctrine of Constructive Notice Binds Petitioners

Florida’s constructive notice doctrine is a bedrock principle that holds Petitioners to covenants of which the law presumes they have notice. See *B.A. Mortgage, LLC v. Baigorria*, 300 So. 3d 198, 201 (Fla. 4th DCA 2020) (citing *Whitburn, LLC v. Wells Fargo Bank, N.A.*, 190 So. 3d 1087, 1091 (Fla.

2d DCA 2015) (“Under the recording statute, ‘[t]he act of recording an instrument in accordance with [Florida's recording] statute constitutes constructive notice of a prior encumbrance on the property which is the subject of the instrument.’”). See also *Bessemer*, 381 So. 2d at 1348 n.6 (noting that by accepting a deed the grantee agrees to fulfill the conditions of the covenant contained therein (quoting 1 Ralph E. Boyer, *Fla. Real Estate Transactions* § 24.03 at 574 (1977))).

Under this doctrine, Petitioners had notice of the contents of the Recorded Deed. (R.A. 45.); see also *Vetzel v. Brown*, 86 So. 2d 138, 140 (Fla. 1956) (“The Vetzels had notice of the restrictions on the use of their property. They had the constructive notice imputed to them by the recordation of the 1947 agreement, and they had ‘implied actual notice’ because of the typed in statement in their deed (which was on a printed form) that the title was ‘subject to easements and restrictions of record.’”).

Thus, Petitioners accepted title to the Property with legal notice of the Recorded Deed’s terms, as a matter of law. As a result of acceptance, Petitioners agreed to the Recorded Deed’s arbitration covenant. See *Hagan v. Sabal Palms Inc.*, 186 So. 2d 302, 311–12 (Fla. 2d DCA 1966) (“Florida has fully adopted the ‘constructive notice’ doctrine . . .”).

More than 50 years ago, the Second District unequivocally stated:

[A] property owner, to be bound by such restrictive covenants, must have either *actual* or *constructive* notice. The phrase “actual or constructive” recurs frequently in the cases and other authorities herein before cited. **The usual instance of constructive notice, is of course, restrictions in a recorded deed or plat. And the authorities are practically unanimous in holding that the recorded deed containing such restriction is not necessarily the immediate deed by which the instant owner takes or has taken title; it may be in an antecedent deed, even the deed from the original common grantor.**

* * *

. . . Thus, it has been **held** that a restrictive **covenant** in a **purchaser’s chain of title charges** him with **notice** of a mutually covenanted community scheme.

Id. (cited in *Hayslip*, 276 So. 3d at 114–15) (emphasis added).

Similarly, this Court has unequivocally stated that: “a purchaser takes title subject to defects, liens, encumbrances, and all matters of which he has notice, or **of which he could obtain knowledge in the exercise of ordinary prudence and caution.**” *Cape Sable Corp. v. McClurg*, 74 So. 2d 883, 885 (Fla. 1954) (emphasis added); see also *AHF-Bay Fund, LLC v. City of Largo*, 227 So. 3d 740, 743 (Fla. 2d DCA 2017); *Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261, 264 (Fla. 4th DCA 2007) (citing *Park Ave. BBQ Grille of Wellington, Inc. v. Coaches Corner, Inc.*, 746 So. 2d 480, 482 (Fla. 4th DCA 1999)). *Accord* 7 Fla. Jur. 2d. Building, Zoning, and Land Controls § 99 (citing *Batman v. Creighton*, 101 So. 2d 587 (Fla. 2d DCA 1958); *Shunk v. Palm Beach Cnty.*, 420 So. 2d 394, 395 (Fla. 4th DCA

1982)).

88 years ago in *Osius v. Barton*, this Court declared:

The two most thoroughly developed theories are: First that these restrictions are enforced as contracts concerning land; and, second, that they are enforced substantially as servitudes or easements of land. The theory adopted in this state is that the contract which embodies the restriction **may be enforced against both the promisor and those who take from him with notice, thereby including amongst those who may enforce the obligation not only the promisee, but those who take from him and those in the neighborhood who may be considered as beneficiaries of the contract.**

147 So. 862, 868 (1933) (emphasis added).

Here, it is uncontroverted that the Recorded Deed's arbitration covenant is: 1) a matter of public record; and, 2) in Petitioners' chain of title. (R.A. 08–13.) Therefore, as a matter of law, Petitioners had notice of the arbitration covenant. *See id.*

Under Florida's notice doctrine, because the Recorded Deed was publicly filed, it was available to Petitioners before they decided to buy the Property. (R.A. 15.) Public policy should not allow purchasers, with notice of deed's covenants, to later avoid them claiming they lacked actual knowledge.

This jurisdictionally embedded doctrine extinguishes Petitioners' protest that they are not bound by the arbitration covenant. Petitioners want this Court to accept their argument, which would eviscerate Florida's long-

standing and orderly notice doctrine. Petitioners' suggestion would throw Florida's reliable notice doctrine into a realm of uncertainty.

f.
**Petitioners Also Had Actual Notice
of Possible Deed CC&Rs**

The deed that Petitioners accepted and recorded also gave them actual notice that the Property could have restrictions or limitations. Specifically, Petitioners' own deed stated that they were taking the Property "[s]ubject to easements, restrictions, reservations, and limitations of record, if any." (R.A. 12.) Thus, Petitioners' own deed placed them on actual notice that CC&Rs could apply to their Property.

g.
**As Buyers, Petitioners Had Choices –
They Chose to Buy this House**

If Petitioners objected to the Recorded Deed's arbitration covenant, then they were free to walk away from buying this house. Though Petitioners were free to buy a different house without a deeded and recorded arbitration covenant, they chose to buy this house.

Petitioners' decision to purchase the Property with both constructive notice of the arbitration covenant, and actual notice of potential deed CC&Rs, binds them to the Recorded Deed's terms. (R.A. 09.) This Court should not sanction Petitioners' efforts to avoid the Recorded Deed's covenants years

after buying the Property because purchasers take title subject to all matters of which they have notice. See *McClurg*, 74 So. 2d at 885.

2.

The Arbitration Covenant Touches and Concerns the Land and, Thus, Runs With the Land

The arbitration covenant binds Petitioners because it is a restrictive covenant that runs with the land. “Covenants are loosely defined as ‘promises in conveyances or other instruments pertaining to real estate’ . . . [and] are divided into two categories, real and personal.” *Palm Beach Cnty. v. Cove Club Inv’rs*, 734 So. 2d 379, 382 n.4 (Fla. 1999) (quoting 19 Fla. Jur. 2d Deeds § 168 (1998)); see also 19 Fla. Jur. 2d Deeds § 168 (2020) (citing *Nolan v. Lunsford*, 196 So. 193 (Fla. 1940); *Zambetti v. Commodores Land Co.*, 136 So. 644 (Fla. 1931); Fla. Jur. 2d Cancellation, Rescission, & Reformation of Instruments §§ 54 to 84 (2020); Am. Jur. 2d Covenants, Conditions, & Restrictions § 6 (2021)).

“A real covenant, or covenant running with the land, “differs from a merely personal covenant in that the former concerns the property conveyed and the occupation and enjoyment thereof, whereas the latter covenant is collateral or is not immediately concerned with the property granted.” *Hayslip*, 276 So. 3d at 114. Also, “[a] real covenant binds the heirs and assigns of the original covenantor, while a person[al] covenant does not.”

Palm Beach Cnty., 734 So. 2d at 382 n.4. (quoting 19 Fla. Jur. 2d Deeds § 174 (1998)).

In Florida, a covenant runs with the land when: 1) the original parties intended that the covenant run with the land; 2) the party against whom enforcement is sought took the property with notice of the covenant; and, 3) the covenant touches and concerns the land. See, e.g., *PGA N. II of Fla., LLC v. Div. of Admin., State of Fla. Dep't of Transp.*, 126 So. 3d 1150, 1153 (Fla. 4th DCA 2012) (“In order to establish a covenant that runs with the land, the following must be shown: the covenant touches and concerns the land; intent; and notice.”); *Winn-Dixie Stores, Inc.*, 964 So. 2d at 265; Ralph E. Boyer, *Survey of the Law and Property* 530 (3d ed. 1981).

In the courts below, Petitioners conceded the first two requirements (and the Second District found that they could not have prevailed on either requirement had they tried). (R.A. 45.); *Hayslip*, 276 So. 3d at 115 & n.1. Petitioners had notice of the covenant as a matter of law, so the next issue is whether the covenant touches and concerns the land.

Petitioners argue that even if there is an agreement to arbitrate, it cannot bind them because it is personal to U.S. Home and Original Purchasers. (Pet'r Initial Br. at 3, 8–9, 11, 19, 21, 24, 26, 29.) The Second District rejected this argument and properly found that the Recorded Deed's

arbitration covenant touches and concerns the land. (R.A. 51.) The Second District’s conclusion is demonstrably correct and consistent with Florida’s longstanding precedent on restrictive covenants.

a.
**Under Florida Law, the Arbitration Covenant
Touches and Concerns the Property**

Petitioners contend that the Recorded Deed’s arbitration covenant is not a restrictive covenant that runs with the land, because it does not touch and concern the Property. (Pet’r Initial Br. at 8, 21–26.) The Second District was Florida’s first appellate court to decide this issue. (R.A. 51.) In rejecting Petitioners’ argument, the Second District joined courts from other states and held that an arbitration agreement touches and concerns land, such that it runs with the land. (R.A. 48–51.)

“The primary test [to determine] whether the covenant runs with the land . . . is whether it **concerns the thing granted and the occupation or enjoyment thereof**.” See *Maule Indus., Inc. v. Sheffield Steel Prods., Inc.*, 105 So. 2d 798, 801 (Fla. 3d DCA 1958) (emphasis added). (“In order that a covenant may run with the land it must have relation to the land or the interest or estate conveyed, and the thing required to be done must be something which touches such land, interest, or estate and the occupation, use, or enjoyment thereof.”).

Here, the arbitration covenant, according to *Maule*, undoubtedly “**concerns the thing granted.**” *Id.* (emphasis added). Petitioners contend that U.S. Home negligently caused damage to the structure built upon a concrete and steel foundation that is buried in the ground. (R.A. 04–07.) That foundation has the normal sewer and electrical connections running underneath the Property, which is physically touching the Property – conveyed by the Recorded Deed. (R.A. 08–11.) Clearly, Petitioners’ claim against U.S. Home concerns the Property.

Further, the arbitration covenant concerns “**the occupation or enjoyment**” of the Property. *Id.* at 801. Petitioners’ allegation of damages affects their diminished occupation or enjoyment of the Property due to alleged damage to the house, which is buried into and touches and concerns the Property. (R.A. 04–07.) The allegedly damaged house is a part of the Property conveyed by the Recorded Deed. (R.A. 08–11.)

The arbitration covenant also touches and concerns the land in a beneficial way. Specifically, *Maule* noted that if “the performance of the covenant . . . **tends necessarily to enhance the value of the property or renders it more convenient and beneficial to the owner, it is a covenant running with the land.**” *Id.* (emphasis added).

The Second District found that under *Maule*, the arbitration covenant

made the Property “more convenient and beneficial to the owner.” (R.A. 46.)

The court correctly stated the convenience and benefits of arbitration.

Arbitration is a less costly, quicker, and more efficient mechanism to adjudicate claims outside the traditional court system. So, the sooner the claim is resolved, the sooner one can enjoy occupying the house. Efficient resolution of a property damage claim necessarily enhances the Property’s value.

Additionally, this arbitration covenant reduces legal fees for both the homebuilder and the homeowner. (R.A. 10.) The builder also shares in the cost of dispute resolution, which benefits the owner. (R.A. 10.)

Here the arbitration covenant concerns the thing granted (*i.e.*, the land and the Property), the occupation or enjoyment thereof, and provides convenience and benefits to the owner. *Maule Indus., Inc.*, 105 So. 2d at 801. The arbitration covenant clearly runs with the land.

b.

**Other Jurisdictions Agree that Deeded Arbitration Covenants
Touch and Concern the Land**

i.

Oklahoma’s Federal Court Supports the *Hayslip* Opinion

In *Baker v. Conoco Pipeline Company*, a property owner granted an easement to Ajax Pipeline Company (“Ajax”) to lay pipelines across the property. 280 F. Supp. 2d 1285, 1292 (N.D. Okla. 2003). Subsequently, the

Bakers acquired the property, and Conoco Pipeline Company (“Conoco”) became the successor to Ajax’s easement rights. *Id.* When Conoco cleared the property to maintain its pipelines, the Bakers sued Conoco claiming that the clearing work damaged the property’s trees and vegetation. *Id.*

In response, Conoco maintained that the Bakers’ claims should be arbitrated pursuant to an arbitration agreement contained in the deeded easement. *See id.* The federal court agreed:

Plaintiffs assert that no agreement to arbitrate exists. Defendant Conoco counters and points to the arbitration provision contained in the easement recorded on the Subject Property . . .

* * *

The agreement was entered into by the owner of the property (grantor) and Conoco’s predecessor Ajax (grantee) on May 12, 1930. The undersigned finds that **an agreement in writing for arbitration clearly exists in the recorded easement on the Subject Property.**

* * *

The undersigned finds that **the arbitration provision within the recorded easement on the Subject Property satisfies the requirements of a covenant running with the land and is enforceable against Plaintiffs.**

* * *

The second requirement for a successor to the covenantee’s estate to compel the performance of the covenant is that the covenant’s benefit must “touch and concern” the land. This element is easily dispensed with in this case because the **arbitration provision** in the easement granting a right-of-way to lay pipelines provides the exclusive procedure for resolving disputes over damage to crops, fences, and timber, which clearly

“touch and concern” the real property.

Id. at 1294–98 (internal citations omitted) (emphasis added).

Importantly, Oklahoma and Florida courts apply the same basic elements to determine whether a covenant runs with the land. See *Winn-Dixie*, 964 So. 2d at 265; see also *PGA*, 126 So. 3d at 1153; cf. *Baker*, 280 F. Supp. 2d at 1297.

The *Baker* court’s analysis applies here: the arbitration covenant provides the exclusive procedure for resolving disputes concerning the Property, or property damage allegedly sustained to the house on the Property, which clearly “touches and concerns” the Property. (R.A. 08–11.)

The Second District agreed with the *Baker* court. *Hayslip*, 276 So. 3d at 117 (noting that the *Baker* arbitration agreement touched and concerned the land because it “affects the method for recovery of *damage* to crops, fences, and timber [located on the land]”). Accordingly, *Baker*, an on-point decision, instructs that the arbitration covenant relating to the alleged damages touches and concerns the land.

ii.

Oregon and California Courts Also Support the *Hayslip* Opinion

Other states that have addressed this issue, including Oregon and California, have ruled that an arbitration agreement touches and concerns the land. See *Abbott v. Bob’s U-Drive*, 352 P.2d 598, 604 (Or. 1960) (“A

covenant to pay rent clearly ‘touches and concerns’ the land. It would seem to follow that a covenant to arbitrate a question with respect to rental payments should also be regarded as relating to the property interests of the original covenanting parties as lessor and lessee.”); *Kelly v. Tri-Cities Broad, Inc.*, 147 Cal. App. 3d 666, 679 (Cal. Ct. App. 1983) (quoting *Abbott*, 352 P.2d at 604) (“The Oregon Supreme Court concluded a covenant to arbitrate was a covenant running with the land. We agree and would treat it as similar to a covenant to pay rent upon which it rests for the conclusion that such a covenant ‘touches and concerns the land.’”); see also *Melchor Inv. Co. v. Rolm Sys.*, 4 Cal. App. 4th 587, 592–93 (Cal. Ct. App. 1992).

Applying *Abbott* and *Kelly*, the Second District concluded that the arbitration covenant touched and concerned the land:

Much like the covenants in *Winn-Dixie* and *Dunn*, the performance of the covenant here affects “the occupation and enjoyment” of the home, as it **dictates the means** by which the Hayslips must seek to **rectify building defects related to the home**. Not only is the covenant triggered when an apparent defect in the home is realized and the homeowners seek recourse from the builder, but **the outcome of the arbitration proceeding necessarily impacts the home as well**. Thus, the arbitration provision touches and concerns the property itself.

(R.A. 46.); *Hayslip*, 276 So. 3d at 115 (internal citations omitted; emphasis added).

Therefore, as a restrictive covenant that touches and concerns the

land, the arbitration covenant runs with the land and binds Petitioners.

c.

Other Recent Cases Detailing How the Arbitration Covenant Touches and Concerns the Property

The Second District cited additional authority supporting its holding. (R.A. 48.) In 2017, Illinois' United States District Court enforced an arbitration clause against a subsequent purchaser because that alternative dispute mechanism touched and concerned the land. See *J&JB Timberlands, LLC*, 2017 U.S. Dist. LEXIS 12502, at *4 (determining that an arbitration provision concerning a covenant to pay for damages to the surface of the land “obviously affects the use, value and enjoyment of the land and, therefore, touches and concerns the land”).

Specifically, the *J&JB* court stated:

[T]he reservations provision which includes a covenant to pay for damages to the surface of the land obviously affects the use, value and enjoyment of the land and, therefore, touches and concerns the land. The arbitration clause sets forth the procedure by which the damages referenced in the reservations will be determined. **There is no basis for separating out or severing the arbitration clause from the reservations provision in fact or effect.**

Id. at *9 (emphasis added).

d.

Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC

In 2012, the California Supreme Court, applying law similar to Florida,

held that subsequent homeowners were bound by a recorded covenant's terms to arbitrate construction defect claims. See *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1222 (Cal. 2012).

In *Pinnacle*, a homeowners association sued a developer for construction defects to the property. See *id.* at 1221. The developer sought arbitration based on a clause in the recorded declarations of covenants, which mandated that construction disputes be resolved by arbitration in accordance with the FAA. See *id.* The *Pinnacle* court determined that the covenants ran with the land because “the recording of a declaration with the county recorder ‘provide[d] sufficient notice to permit the enforcement’ of the covenants and restrictions contained therein” on purchasers and their successors. *Id.* The *Pinnacle* court stated:

In sum, even though the Association 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 those in article XVIII, reflect written promises and agreements that are subject to enforcement against the Association.

Id. at 239, 246.

Pinnacle reaffirms the critical role of recorded declarations in real estate transactions—they are the primary means of achieving the stability and predictability needed for housing development. *Id.* at 237; see also *U.S.*

Home Corp. v. Ballesteros Tr., 415 P.3d 32, 42 (Nev. 2018) (discussing *Pinnacle*, 282 P.3d at 1221–26); *Rachal v. Reitz*, 403 S.W.3d 840, 849 (Tex. 2013) (discussing *Pinnacle*, 282 P.3d at 1217–34); *Mooneyham v. BRSI, LLC*, 682 F. App'x 655, 663 (10th Cir. 2017) (citing *Pinnacle*, 282 P.3d at 1232).

Supported by authorities from Florida, Oklahoma, Oregon, California, Illinois, Texas, and Nevada, this Court should determine that this arbitration covenant touches and concerns the Property and, therefore, runs with the land because it “concerns” both “the thing granted” and “the occupation or enjoyment” of the Property.

e.
**Additionally, Some Courts De-Emphasize
the Touch and Concern Test and Uphold
the Plain Language of Restrictive Covenants**

Some courts and legal scholars focus on the plain language and intent of restrictive covenants and deem the “touch and concern” test to be outmoded. This trend is also in accord with modern real estate development practices. This arbitration covenant also stands under this analysis.

The New Jersey Supreme Court explained that “[r]easonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law” when evaluating “the realities of today’s commercial world and not in the light of out-moded theories developed in a

vastly different commercial environment.” *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 579 A.2d 288, 295 (N.J. 1990). The *Davidson* court found that adequate notice, in the form of a properly recorded restriction in the chain of title, “obliterated any express requirement of ‘touch and concern.’” *Id.* at 292.¹

The Massachusetts Supreme Court adopted the Restatement’s position in upholding an agricultural preservation restriction against a subsequent purchaser. See *Bennett v. Comm’r of Food & Agric.*, 576 N.E.2d 1365, 1368 (Mass. 1991). The *Bennett* court held that the appropriate questions about restrictive covenants are “whether the bargain contravened public policy when it was made and whether its enforcement is consistent with public policy and is reasonable.” *Id.* at 1367; cf. *In re Extraction Oil & Gas, Inc.*, 622 B.R. 581, 599 (Bankr. D. Del. 2020).

Other state courts, while not adopting the Restatement’s position in its entirety, reiterate the Restatement’s focus on the language and intent of restrictive covenants – the notion that a reasonable covenant should be

¹ *Davidson* helped prompt the American Law Institute to discard the touch and concern test in its Restatement (Third) of Property: Servitudes (“Restatement”) § 3.2 (2000), criticizing the test for its “vagueness, its obscurity, [and] its intent-defeating character.” Restatement § 3.2 (cmt. b). The Restatement noted that the appropriate inquiry “is whether the [covenant] arrangement violates public policy.” *Id.* (cmt. a). Thus, whether the covenant violates public policy is the only way to “permit innovative land-development practices using [covenants] without the sometimes irrational impediments imposed by the touch-or-concern doctrine.” *Id.*

enforced. See, e.g., *Griffin v. Tall Timbers Dev., Inc.*, 681 So. 2d 546, 551 (Miss. 1996); *Joslin v. Pine River Dev. Corp.*, 367 A.2d 599, 601 (N.H. 1976).

Accordingly, this covenant to arbitrate should be enforced under both the Restatement and the modern “touch and concern” analyses.

3.

Restrictive Covenants Bind Subsequent Purchasers

a.

For Over a Century, This Court Has Enforced Restrictive Covenants Against Subsequent Purchasers

This Court has enforced restrictive real estate covenants for at least 140 years. See *Dunn v. Barton*, 16 Fla. 765, 772 (1878) (noting that the sublessee had a duty to inform herself of the covenants contained in the original lease, as they run with the land and she is bound by them because of constructive notice) (discussed by *Hayslip*, 276 So. 3d at 115); *Brownson v. Hannah*, 111 So. 731, 734 (Fla. 1927) (holding grantee’s acceptance of a deed containing a covenant transferring liability for a grantor’s mortgage on the property is sufficient to bind grantee, without grantee signing the deed) (citing *Thompson On Real Property* § 1200, for the proposition that acceptance of a deed indicates assent to any covenant contained therein).

In the intervening century, Florida appellate courts have adhered to this Court’s pronouncement concerning the obligations imposed by deeded restrictive covenants. See *Waterview Towers Condo. Ass’n v. City of W.*

Palm Beach, 232 So. 3d 401, 409 (Fla. 4th DCA 2017) (“[R]estrictive covenants are enforced so long as they are not contrary to public policy, do not contravene any statutory or constitutional provisions, and so long as the intention is clear and the restraint is within reasonable bounds.”) (quoting *Hagan*, 186 So. 2d at 308–09); see also *Hagan*, 186 So. 2d at 308–09 (citing *Sinclair Ref. Co. v. Watson*, 65 So. 2d 732 (Fla. 1953); *Ballinger v. Smith*, 54 So. 2d 433 (Fla. 1951); *Moore v. Stevens*, 106 So. 901 (1925)).

b.

**Other States Also Enforce Restrictive Covenants
Against Subsequent Purchasers**

Other state courts recognize that recorded covenants impose contract-like obligations on grantees:

The proposition that CC&Rs create contractual obligations, in addition to imposing equitable servitudes, is widely accepted. . . . “One of the basic principles underlying the Restatement is that the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, as it does with respect to other contractual arrangements.” . . . By accepting the deed or other possessory interest in a unit, the homeowner manifests his or her assent to the CC&Rs.

Ballesteros, 415 P.3d at 36 (emphasis in original) (citing Restatement, ch. 4 intro. note); see also Restatement, ch. 4 intro. note (“One of the basic principles underlying the Restatement is that the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations

of the parties who create servitudes, as it does with respect to other contractual arrangements.”).

Other state courts also recognize the contractual nature of CC&Rs, not only for dispute resolution but additionally for indemnification and restrictions on sale or use. See *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass’n*, 35 P.3d 964, 968 (Nev. 2001), *receded from on other grounds by Horgan v. Felton*, 170 P.3d 982 (Nev. 2007) (“In this case, the CC&Rs constituted a written contract to convey land, but the covenant ‘excepting the easterly 150 feet of the designated landing strip’ created an ambiguity as to the identity of the designated landing strip in light of the recorded plat maps for the subdivision.”); *Ahwatukee Custom Estates Mgmt. Ass’n v. Turner*, 2 P.3d 1276, 1279 (Ariz. Ct. App. 2000) (“Nothing in the record indicates that the trial court abused its discretion, either in determining that the CC&Rs permit recovery of the non-taxable costs or in awarding such costs under the contract terms.”); *Pinnacle Museum Tower Assn.*, 282 P.3d at 1227 (“In *Nahrsted*, . . . 8 Cal. 4th 361, 33 Cal.Rptr. 2d 63, 878 P.2d 1275, we elaborated upon the contractual nature of a declaration and the enforcement of its terms as equitable servitudes under the Davis–Stirling Act.”); *Saguaro Highlands Cmty. Ass’n v. Biltis*, 229 P.3d 1036, 1038 (Ariz. Ct. App. 2010) (“A deed containing a restrictive covenant that runs with the land is a

contract, the interpretation of which is a matter of law.”).

These authorities compel the conclusion that Petitioners are bound by the Recorded Deed’s arbitration covenant found in the Recorded Deed’s chain of title.

**4.
The Federal Arbitration Act
Mandates Enforcing the Arbitration Covenant**

**a.
The FAA Controls Because the Recorded Deed Contemplates
a Transaction Involving Interstate Commerce and Involves the FAA**

The FAA “makes arbitration agreements in contracts ‘involving [interstate] commerce’ ‘valid, irrevocable, and enforceable[.]’” *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009).² The Recorded Deed specifically establishes an interstate transaction and expressly invokes the FAA as follows: “Grantor and Grantee specifically agree that this transaction **involves interstate commerce** and that any Dispute . . . if not settled during

² The FAA “applies where there is ‘a contract evidencing a transaction involving commerce’ . . . **even if** the parties **did not contemplate** an interstate commerce connection.” *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 277 & 281 (1995) (citing 9 U.S.C. § 2) (emphasis added); see also *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360, 363 (S.C. 2001) (“[T]he FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” (citing *Dobson*, 513 U.S. at 265; *Soil Remediation Co. v. Nu-Way Env’tl, Inc.*, 476 S.E.2d 149 (S.C. 1996)).

mediation, shall thereafter be submitted to binding arbitration as provided by the **Federal Arbitration Act**[.]” (emphasis added) (R.A. 09.) Here, the FAA applies because it “requires courts to enforce agreements to arbitrate according to their terms.” *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012).

In recent opinions, the U.S. Supreme Court reaffirmed the strong national policy favoring FAA arbitration. See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (“This Court has said that Congress adopted the [Federal] Arbitration Act in an effort to counteract judicial hostility to arbitration and establish ‘a liberal federal policy favoring arbitration agreements.’” (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))). See also *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418–19 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

This Court **also recognizes** that “[t]he United States Supreme Court has consistently explained that the FAA, which was enacted in 1925 as a response to judicial hostility to arbitration, establishes a liberal federal policy favoring arbitration agreements.” *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1180–81 (Fla. 2013) (citing *CompuCredit Corp.*, 565 U.S. at 98; *AT&T Mobility v. Concepcion*, 563 U.S. 333, 337 (2011); *Gilmer*

v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991)). See also *Shakespeare Found., Inc.*, 108 So. 3d at 593.

The Second District, following this Court's directive, reaffirmed this well-established principle stating: "courts are required to indulge every reasonable presumption in favor of arbitration, recognizing it as a favored means of dispute resolution." *Hayslip*, 276 So. 3d at 113 (citations omitted).

Because the FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution[.]" courts are required to "'rigorously enforce' arbitration agreements according to their terms[.]" *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (citing *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631(1985)); see also *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013).

Accordingly, the U.S. Supreme Court tells us that this Court, as an enforcer of the FAA (made applicable to this case through interstate commerce), must "rigorously enforce" this arbitration agreement. Further, any state law that stands as a barrier to effectuating the purpose and policies of the FAA must be preempted. See *Marmet Health Care Ctr., Inc.*, 565 U.S. at 533; *AT&T Mobility*, 563 U.S. at 352.

b.
**Courts Nationwide Enforce Arbitration Covenants
Under the FAA, Even in the Face of Countervailing
State Consumer Protection Legislation**

Courts across the country “routinely enforce arbitration clauses” under the FAA “even in the face of state consumer protection legislation purporting to invalidate such clauses.” See *James v. Portfolio Recovery Associates, LLC*, No. 14-CV-03889-RMW, 2015 WL 720195, at *5 (N.D. Cal. Feb. 20, 2015) (citing *AT&T Mobility*, 563 U.S. at 339–41). See, e.g., *Munoz*, 542 S.E.2d at 364; *Knight v. Idea Buyer, LLC*, 723 F. App’x 300, 302 (6th Cir. 2018); *Shaffer v. Interbank FX*, No. 3:12-CV-231, 2013 WL 53979, at *4 (E.D. Tenn. Jan. 3, 2013); *The Hassinger Corp. v. Activant Sols. Inc.*, No. 3:09-CV-391, 2010 WL 2710779, at *4 (E.D. Tenn. July 7, 2010); *In re Herrington*, 374 B.R. 133, 138–39 (Bankr. E.D. Pa. 2007); *Bailey v. Diversified Consultants Inc.*, 444 F. Supp. 3d 1330 (N.D. Ala. 2020).

The Eleventh Circuit observes that the U.S. “Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose of the statutes is to protect and inform consumers.” *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1276 (11th Cir. 2002) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 485–86 (1989); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 242 (1987)).

The U.S. Supreme Court explained that “even claims arising under a statute designed to further important social policies may be arbitrated because ‘so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its function.’” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (quoting *Gilmer*, 500 U.S. at 28; *Mitsubishi Motors Corp.*, 473 U.S. at 637).

Further, “Congress, when enacting [the FAA], had the needs of consumers . . . in mind.” *Dobson*, 513 U.S. at 280 (citing S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924)).

c.
**Under the FAA, Courts Must Assess the
Enforceability of the Arbitration Covenant Separately from the
Recorded Deed’s Enforceability**

Petitioners object to enforcing the Recorded Deed’s arbitration covenant. (See *generally* Pet’r Initial Br.) However, “to determine the enforceability of an arbitration clause, the FAA requires a court to conceptually sever the arbitration provisions from the remainder of the contract and analyze the arbitration clause as an individual agreement executed concurrently with the encompassing contract.” *Richardson v. Virgin Islands Port Auth.*, No. 2009-136, 2010 WL 1641154, at *16 (D.V.I. Apr. 21, 2010) (citing *Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99, 106 (3d Cir. 2000)); see also *Bertram v. Beneficial Consumer Disc. Co.*, 286 F. Supp. 2d

453, 457 (M.D. Pa. 2003); *Anderson v. Delta Funding Corp.*, 316 F. Supp. 2d 554, 561 (N.D. Ohio 2004); *Green Tree Fin. Corp.*, 542 S.E.2d at 364.

“The FAA generally requires that courts enforce arbitration agreements, even when embedded in a contract that has been challenged as voidable.” *Anderson*, 316 F. Supp. 2d at 561 (citing *Bertram*, 286 F. Supp. 2d at 457–58). “Thus, even where the validity of the contract is in dispute, [the] statute mandates that courts reserve these issues for the arbitrator.” *Richardson*, 2010 WL 1641154, at *16 (citing *Sandvik*, 220 F.3d at 105; *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 179 (3d Cir. 1999)).³

If this Court conceptually severs the arbitration covenant from the Recorded Deed and analyzes it as a separate agreement, then it would determine that this is an enforceable arbitration covenant. Therefore, Petitioners’ contention that the arbitration covenant in the Recorded Deed is unenforceable fails as a matter of law.

³ Where “a court deems a controverted arbitration clause a valid and enforceable agreement, it must refer questions regarding the enforceability of the terms of the underlying contract to an arbitrator pursuant to section four of the FAA.” *Harris*, 183 F.3d at 179 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 395 (1967); *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 228 (3d Cir. 1997); 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Fed. Prac. & Proc.*, § 3569 (2d ed. 1984)).

5. Estoppel Requires Enforcing This Arbitration Covenant

Courts across the nation have enforced arbitration under a theory of estoppel where, as here, equity dictates enforcing arbitration. “[T]he doctrine of arbitration by estoppel developed under the rationale that ‘although arbitration remains a matter of consent,’ that ‘consent can be implied.’” *Sanum Inv. Ltd.*, 263 F. Supp. 3d at 496–97 (quoting *Gov’t Emp. Ins. Co. v. Grand Med. Supply, Inc.*, 2012 WL 2577577, at *4 (E.D.N.Y. July 4, 2012); citing *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361–62 (2d Cir. 2008)); see also *Pinnacle Museum Tower Ass’n*, 282 P.3d at 1222 (“A signed [arbitration] agreement is not necessary . . . and a party’s acceptance may be implied in fact . . . or be effectuated by delegated consent An arbitration clause within a contract may be binding on a party even if the party never actually read the clause.”).

“In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” *Int’l Paper Co.*, 206 F.3d at 418.

Similarly, “[s]omeone who later complains of inadequate notice of their

duty to arbitrate would face an equitable estoppel argument when the protestant had constructive (if not actual) notice via a recorded instrument.”

1 Oehmke & Brovins, *Commercial Arbitration* § 17:10 (3d ed. 2019).

The privileges and obligations that inhere in this Recorded Deed and its chain of title were conveyed to Petitioners. (R.A. 08–13.) Permitting Petitioners to derive the Recorded Deed’s benefits by owning and using the Property for over 7 years, and simultaneously avoid its covenants, would “disregard equity and contravene the purposes underlying enactment of the Arbitration Act.” *Int’l Paper Co.*, 206 F.3d at 418.

a.

Petitioners Are Able to Enjoy the Extra Benefits of Home Ownership

Petitioners derived multiple benefits from buying the Property. Those benefits are more than just ownership or use.

For example, by owning this house, Petitioners could: 1) amass financial equity instead of paying rent; 2) invoke Homestead Tax exemption and Homestead protections from creditors; 3) deduct mortgage interest and real estate taxes from their federal tax payments; and, 4) obtain capital gains exclusion.

Therefore, from a pure equity perspective, it would be unfair to permit Petitioners to avoid their obligation to arbitrate while at the same time enjoy the benefits of home ownership conveyed by the Recorded Deed.

**6.
Public Policy Favors Enforcing the Arbitration Covenant**

**a.
Chapter 558, Florida Statutes, Reflects Florida's
Legislative Public Policy of Favoring Alternative Dispute Resolution
to Resolve Construction Defect Claims**

In addition to its solid footing in state contract law, the arbitration covenant also finds substantial support in the Florida Legislature's stated public policy contained in Chapter 558 (Florida's construction defect statute).

The Florida Legislature approved Chapter 558 in 2003, finding that "it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners." § 558.001, Fla. Stat. While the statute does not mandate binding arbitration if initial resolution efforts fail, it does reflect legislative public policy favoring alternative dispute resolution in construction defect cases.

First, Chapter 558's stated emphasis on alternative dispute resolution establishes that Florida policy favors alternative resolution measures. Second, Chapter 558's statutory definitions of "action" and "claimant" support the precise operation of the arbitration covenant here.

i.

**The Recorded Deed’s Arbitration Covenant Embodies
Chapter 558’s Public Policy of Alternative Dispute Resolution**

The stated goals of Chapter 558 include: 1) reducing the need for litigation; 2) protecting the rights of property owners; and, 3) providing an opportunity to resolve defect disputes “through confidential settlement negotiations without resort to further legal process.” *Id.*

This Court described Chapter 558 as “a statutorily required presuit process aimed to encourage the claimant and insured to settle claims for construction defects without resorting to litigation,” and “[a]n effective dispute resolution mechanism, intended to be beneficial for reducing construction defect litigation.” *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 232 So. 3d 273, 278 (Fla. 2017) (internal quotation marks omitted).

Below, the Second District conformed to this Court’s pronouncement, finding that the Florida Legislature “has deemed alternative dispute resolution to be a beneficial and effective mechanism by which to resolve construction defect disputes.” (R.A. 46.); *Hayslip*, 276 So. 3d at 115–16 (citing § 558.001, Fla. Stat. and *Crum & Forster*, 232 So. 3d at 278).

ii.

**Chapter 558 Defines a Subsequent Purchaser as an Arbitration
Claimant in Its Prescribed Alternative Dispute Resolution Process**

Chapter 558 contains additional language illustrating that the

arbitration covenant is a valid public policy sanctioned covenant that binds Petitioners. Chapter 558 discusses: 1) “arbitration” in its definition of “action;” and, 2) “subsequent purchaser” in its definition of “claimant.”

The Florida Legislature expressly intended that Chapter 558 classify original purchasers and subsequent purchasers in the same way:

558.002 Definitions.—As used in this chapter, the term:

(1) “**Action**” means any civil action or arbitration proceeding for damages or indemnity asserting a claim for damage to or loss of real or personal property caused by an alleged construction defect . . .

* * *

(3) “**Claimant**” means a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages

§ 558.002, Fla. Stat. (emphasis added) (quoted by *Hayslip*, 276 So. 3d at 116).

Therefore, in Chapter 558 the Legislature made it clear that subsequent purchasers of property are also included under the statute, thus extending the arbitration covenant to Petitioners as legislatively recognized “subsequent purchasers.”

B.
Why Petitioners Are Wrong

1.
**Arbitration Covenants Can Exist in Documents
other than Mutually Signed Contracts**

Petitioners cite no case or statute limiting enforcement of arbitration agreements to only mutually executed contracts because no such authority exists. While Petitioners highlight dicta in *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) discussing the contractual nature of arbitration agreements (Pet'r Initial Br. at 17, 26.), *Seifert* does not restrict arbitration agreements to those only found in mutually signed contracts.

Notably, in *Seifert* this Court found that the wrongful death action at issue was “predicated upon a tort theory of common law negligence unrelated to the rights and obligations arising out of the contract” and, accordingly, it lacked a sufficient nexus to enforce the arbitration provision. *Id.* at 640–42.

The *Seifert* Court further stated that “[i]mportantly, too, the factual allegations in the complaint do not rely on the contract between the Seiferts and U.S. Home.” *Id.* To the contrary, in this case, Petitioners’ claim is predicated upon and contained within the terms of the arbitration covenant. (See R.A. 04–10.)

The *Seifert* Court concluded that the arbitration provision at issue was not applicable because: 1) the underlying tort claim was based upon a duty owed to the general public at large, not a duty owed solely to the contracting parties (unlike Petitioners' stucco claims against U.S. Home); and, 2) the claims were not specifically addressed by the arbitration provision which "create[d] ambiguity and uncertainty as to the intent of the parties." *Seifert*, 750 So. 2d at 641. *Seifert* is not like this case and does not support Petitioners.

By contrast, in *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So. 2d 658, 660 (Fla. 4th DCA 2008), a plaintiff similarly argued that an arbitration agreement was unenforceable because he did not sign it. The *Santos* court explained that, "an arbitration agreement does not need to be signed[.]" *Id.* (citing *H.W. Gay Enters., Inc. v. John Hall Elec. Contracting, Inc.*, 792 So. 2d 580, 581 (Fla. 4th DCA 2001)).

Petitioners' *Seifert* argument does not apply here.

2.

This Court and Florida's District and Trial Courts May and Regularly Rely Upon Non-Florida Case Law

Contrary to Petitioners' argument in their Initial Brief (Pet'r Initial Br. at 28–32.), this Court may and does rely on persuasive authority from other jurisdictions. See *In re Senate Joint Resolution of Legislative Apportionment*

2-B, 89 So. 3d 872, 896 (Fla. 2012) (“At least five other states share a similar constitutional or statutory requirement, but case law from those states applying that standard has been scarce.”); *State v. Abreu*, 837 So. 2d 400, 405 (Fla. 2003) (“Lastly, we note that the State points to and we find no case law or statutes from other states[.] . . . In fact, at least one other state supreme court has held specifically that significant cross-examination in a prior judicial proceeding is not enough[.]”); *Walker v. Va. Ins. Reciprocal*, 842 So. 2d 804, 809 (Fla. 2003) (“As the First District noted, case law from other states supports this interpretation of the Florida statutes.”); *State v. Hoggins*, 718 So. 2d 761, 767 (Fla. 1998) (“Florida case law as well as case law from the United States Supreme Court and other states supports the conclusion[.]”).

Florida courts also regularly rely upon case law from other jurisdictions. See *Munshower v. Kolbenheyer*, 732 So. 2d 385, 386 (Fla. 3d DCA 1999) (“As this court has done in the past, we rely on New York case law as persuasive in this matter.” (citing *Poe & Assocs., Inc. v. Emberton*, 438 So. 2d 1082 (Fla. 3d DCA 1983); *Williams v. Am. Crafts, Inc.*, 129 So. 2d 165 (Fla. 3d DCA 1961); *Denmark v. Ridgell Furniture Co.*, 117 Fla. 244, 157 So. 2d 489 (1934))); *Farina v. State*, 937 So. 2d 612, 633 (Fla. 2006) (“The dissent also relies on two cases from Georgia and Pennsylvania.”).

Here, Petitioners' reliance on *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999) is an unpersuasive attempt to convince this Court to refrain from reviewing non-Florida cases. (Pet'r Initial Br. at 28.) Especially, when other courts have decided the exact issue before this Court.

Petitioners "cherry pick" *Powertel* language to craft an out-of-context argument. Specifically, Petitioners claim that the *Powertel* court "held that 'the validity of an arbitration clause is . . . an issue of state contract law.'" *Id.* (emphasis omitted).

Even a cursory review of *Powertel* reveals that *Powertel* did not suggest, let alone hold, that it was inappropriate to look to other states for guidance on issues of first impression. Instead, *Powertel* followed guidance from the U.S. Supreme Court that tells us that state contract law determines whether a valid arbitration agreement exists.

The fact remains: although Petitioners urge this Court to reject relevant and helpful law from outside this state, they cannot escape the Second District's correct conclusion that courts across the nation interpret deeds like contracts and enforce arbitration covenants within those deeds.

3.

Petitioners' Faulty Analysis of *Baker v. Conoco*

Petitioners attempt to distinguish *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285, 1292 (N.D. Okla. 2003) by claiming that Oklahoma has a

broader “touch and concern” test than Florida and suggesting that Baker should not apply. (Pet’r Initial Br. at 31–32.) However, an analysis of *Baker* reveals that Oklahoma employs a more restrictive touch and concern test and still found that the arbitration provision applies.

Oklahoma’s touch and concern analysis requires “privity of estate” between the parties. *Id.* at 1297. In contrast, as previously discussed, Florida merely requires a covenant to concern “the occupation or enjoyment” of the Property. See *Maule*, 105 So. 2d at 801. Thus, in Florida, because no privity of estate is required, Florida employs a less restrictive requirement than Oklahoma. Regardless, under either standard, the outcome is the same: the Recorded Deed’s arbitration covenant should be enforced.

4.

Petitioners’ Efforts to Distinguish *Abbott v. Bob’s U-Drive* Fail

Petitioners argue that *Abbott v. Bob’s U-Drive*, 352 P.2d 598 (Or. 1960) is inapposite because *Suniland Associates, Ltd. v. Wilbenka, Inc.*, 656 So. 2d 1356, 1357 (Fla. 3d DCA 1995) holds that a covenant regarding the assignment of rent does not run with the land. (Pet’r Initial Br. at 26.) These two cases, however, concern entirely different and unconnected issues.

In *Abbott*, the plaintiff leased a premises to a lessee with an agreement to arbitrate any dispute arising out of the lease. *Id.* at 599–600. The lessee had two businesses that operated on the premises. *Id.*

The lessee in *Abbott* assigned his rights in the lease to one business, but not the other. See *id.* at 600. The plaintiff sued to enforce the arbitration agreement against both entities after a controversy arose concerning the lease. *Id.*

Ultimately, the *Abbott* court held that both entities had assumed the provisions of the lease and therefore, the arbitration agreement could be enforced against both entities. *Id.* at 604.

In contrast, *Suniland*, is a case that did not concern an arbitration covenant. See *Suniland Associates, Ltd.*, 656 So. 2d at 1357. In *Suniland*, a third party owned a shopping center and entered into a termination of lease agreement where the defendant acquired and recorded an assignment of the right to receive rental payments from a tenant at the shopping center. See *id.* The third party's successor in interest subsequently executed a mortgage and a security agreement was recorded three weeks after the assignment of rents was recorded. See *id.*

Thereafter, suit was filed seeking a declaration that the assignment was superior to the later-recorded mortgage. See *id.* at 1358. The Third District Court of Appeal “[held] that an agreement to assign rents and profits creates no interest in the property itself.” *Id.* (citing *Perpetual Fed. Sav. & Loan Ass'n v. Willingham*, 370 S.E.2d 286, 288 (S.C. Ct. App. 1988)).

There is no logical, factual, or even arguable comparison between *Abbott* and *Suniland*. The *Suniland* court navigates a web of transactions, mortgages, and recordations concerning numerous parties at a shopping center. See *Suniland Associates, Ltd.*, 656 So. 2d at 1357. *Suniland* decided whether a business with a conditional lease assignment for rents had a greater interest in the property than a mortgage holder. See *id.* Considering these complex financial circumstances, the *Suniland* court held that an assignment of rents and profits did not create an interest in the property. See *id.* at 1358.

Abbott, however, is a case that focuses on an arbitration provision. In *Abbott*, the Oregon Supreme Court held that a property that had assumed a lease in all aspects except formal execution was bound by the terms of that lease, including its arbitration agreement. See *Abbott*, 352 P.2d at 604. Thus, because *Suniland* evaluated an entirely different issue bearing no resemblance to the *Abbott* dispute, this Court, like the Second District, should view *Abbott* as persuasive authority that an arbitration covenant is a covenant that runs with the land.

The holding of *Suniland* is neither related to, nor inconsistent with *Abbott*.

5.
**The *J&JB Timberlands* Court
Performed a Touch-and-Concern Analysis**

Petitioners' Initial Brief argued that the arbitration provision in *J&JB Timberlands, LLC v. Woolsey Energy II, LLC*, 2017 WL 396174, at *3 (S.D. Ill. Jan. 30, 2017) "rode the coattails" of the rest of the deed's provision and that the *J&JB* court did not delve "into an analysis of whether an arbitration provision touches and concerns the land[.]" (Pet'r Initial Br. at 29–30.) Petitioners' argument is simply incorrect and misleading. As discussed previously in Section (A)(2)(c)(i), the *J&JB* court stated:

[T]he reservations provision which includes a covenant to pay for damages to the surface of the land obviously affects the use, value and enjoyment of the land **and**, therefore, touches and concerns the land.

Id. (emphasis added).

6.
**Petitioners' Argument that the Arbitration Covenant
Can Only Be a Personal Covenant Is Not Supported by Law**

Relying on *Caulk v. Orange County*, 661 So. 2d 932 (Fla. 5th DCA 1995), Petitioners claim that the arbitration covenant is a personal covenant, not a real covenant, and that it only applied to Original Purchasers. (Pet'r Initial Br. at 24–26.) The Second District, however, correctly and deftly distinguished *Caulk* and found it inapplicable. (R.A. 47–48.)

In *Caulk*, the deed's language created a personal covenant, not a

covenant running with the land, because the deed required payment only to the “*grantee herein*.” 661 So. 2d at 934 (emphasis in original). Thus, the payment explicitly applied to only one person—the grantee. See *id.*

Further, the *Caulk* covenant was incapable of running with the land because it concerned a one-time cash payment to one person. *Id.* at 194. Therefore, the *Caulk* court understandably held that “the covenant in the instant case has no effect whatever on the land,” and no application to a subsequent purchaser. *Id.*

The major reason why *Caulk* does not apply to this case is because this Recorded Deed expressly states that it extends to subsequent purchasers as “equitable servitudes, perpetual [that] run with the land” and relates to the land itself, binding on the Original Purchasers as well as their “successors and assigns” and “other occupants” of the Property.⁴ (R.A. 08–09.)

Petitioners also cite *American International Group v. Cornerstone Business, Inc.*, 872 So. 2d 333 (Fla. 2d DCA 2004) for the proposition that arbitration covenants are “usually” binding only on the parties to them. (Pet’r

⁴ Contrary to Petitioners’ argument in their Initial Brief, the difference between this case and *Caulk* is not solely “because the covenant in *Caulk* did not include language indicating an intent for it to run with the land.” (Pet’r Initial Br. at 24.)

Initial Br. at 11.) However, an analysis of *American International Group* does not revolve around a recorded deed's covenants.

Rather, *American International Group* concerned whether a parent company is subject to, or could waive, an arbitration agreement in a contract between a third party and a subsidiary solely by virtue of the parties' parent-subsidiary relationship. See *id.* Thus, the focus concerned corporate relationship issues, not deeds and covenants relating to the land or agreements that explicitly apply to successor owners of real estate.

If this Court agrees with Petitioners' argument that real estate covenants are only binding on Original Purchasers, then the entire established body of real estate law recognizing covenants of record running with the land would be upended. In essence, Petitioners' position would throw the Florida real estate industry into chaos.

7.

Petitioners' Arguments that Public Policy Prevents Enforcement of the Arbitration Covenant Contradict the Law

Finally, presenting new arguments not made in the courts below, Petitioners argue that enforcement of the arbitration covenant is inconsistent with public policy. (Pet'r Initial Br. at 33–35; 40–47.); (R. A. 47.); see *Hayslip*, 276 So. 3d at 116, n.2 (“We note that the Hayslips did **not** advance in the initial brief any policy arguments against arbitration or claim that the

arbitration provision is unconscionable.”) (emphasis added). Regardless, Petitioners’ new arguments are fatally flawed.

a.

Constructive Notice Does Not Restrict Access to Courts

As stated previously, Petitioners agreed to arbitrate their claim by accepting the Recorded Deed with all of its covenants. Putting that fact aside, U.S. Home will address Petitioners’ newly minted arguments.

First, Petitioners claim that constructive notice of the arbitration covenant cannot bind them because their constitutional rights of access to courts and juries are imperiled. (Pet’r Initial Br. at 46–47.) Petitioners claim that even though one has public notice of an arbitration provision, it is not enough notice to vitiate one’s right to a jury trial. (Pet’r Initial Br. at 33–35.)

Petitioners, in essence, are asking this Court to strike down the long-standing doctrine of “constructive notice” because it cannot abrogate a jury trial right. Petitioners, however, are wrong for multiple reasons.

Fact: Under Florida law, an individual can lose their right to a jury trial without notice and without a knowing and voluntary or intentional waiver; automatically. See Fla. R. Civ. P. 1.430(d). Florida Rule of Civil Procedure 1.430(d) instructs that where a party fails to demand a jury trial within 10 days after the service of the final pleading, that party has waived its right to a jury trial. Therefore, without public record notice, lawyers or non-lawyers

alike, will lose their right to a jury trial (automatically) if they do not demand a jury trial within 10 days after serving a final pleading.

Next, even in the criminal context, rights are routinely waived: a right to a lawyer, a jury and a pre-sentence investigation. See *Westberry v. State*, 239 So. 3d 186, 191 (Fla. 3d DCA 2018), *review denied*, No. SC18-286, 2018 WL 1737054 (Fla. Apr. 11, 2018). These rights are indeed waivable, and the waiver may even be made during an oral colloquy. See *id.*

“It is fundamental that constitutional rights [such as the right to a jury trial] which are personal may be waived.” *In re Shambow’s Estate*, 153 Fla. 762, 763 (1943). However, that “waiver may be expressed or implied.” *Id.* (emphasis added).

Applying this Court’s *In re Shambow’s Estate*’s 78 year-old recognition of implied waiver, one waives their jury trial right every time one enters into an arbitration agreement. That waiver is implied even if not expressly waived.

To carry the logic further, if an arbitration covenant is in a recorded deed, this Court’s *In re Shambow’s Estate* case tells us that Petitioners’ jury waiver is at least implied, if not express.

b.
**Petitioners' Argument that the Arbitration Covenant Is
Unconscionable, Outrageous and Shocking Does Not Ring True**

Though never argued below, this case is nothing like the cases Petitioners cite involving nursing home admissions agreements. (Pet'r Init. Br. at 40–42, 45–50.)

Here, the record reveals no pressure, urgency or safety reason compelling Petitioners to buy this particular house. Petitioners could have walked away from this real estate transaction and bought another house.

Contrary to Petitioners' contention, house purchasers are not unduly burdened by having to perform basic due diligence. Part of a buyer's due diligence could easily involve reviewing publicly filed deeds concerning a house they intend to buy in order to see what CC&Rs apply.

Given that a house purchase is a significant expenditure in most persons' lives, it is not unduly burdensome or onerous to assume that purchasers will act as persons of "ordinary prudence and caution", *McClurg*, 74 So. 2d at 885, and access public information to learn about their major purchase.

Petitioners' notion that applying constructive notice to real estate transactions will upend the real estate industry (Pet'r Initial Br. at 9–10, 34–

35, 47.) is simply silly. It is silly because Florida’s real estate industry routinely utilizes constructive notice.

In addition, Petitioners posit that an arbitration covenant affecting their recourse for damages to their house is “unconscionable,” so “outrageously unfair” as to “shock the judicial conscience,” and that they lacked a “meaningful choice” in accepting it. (Pet’r Initial Br. at 43–47.) Petitioners’ protest rings entirely hollow.

Petitioners were not threatened, coerced, or forced to buy this particular house—they could have bought another house. Yet, years later, after enjoying their house, they complain their covenants are shockingly outrageous. If anything, Petitioners claim is outrageous.

Further, arbitration is a long-standing, judicially recognized and well used forum for addressing claims. So, it is hardly a “shock” to the judicial conscience to address claims in an arbitration forum versus a judicial forum.

8.

Arbitration Allows for Judicial Review

Last, if the arbitration process gets derailed, Petitioners have redress in court to set aside the arbitration award. See § 682.13, Fla. Stat. (detailing method to vacate arbitration awards). In fact, every district court in Florida reviews arbitration awards. *Lake City Fire & Rescue Association, Local 2288 v. City of Lake City*, 240 So. 3d 128, 130 (Fla.1st DCA 2018), *review denied*,

2018 WL 6619793 (Fla. Dec. 17, 2018) (“[A]n arbitrator exceeds his or her power under subsection (c) when he or she goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the resolution of the issue submitted to arbitration.”) (citations omitted); *Friendly Homes of the S. Inc. v. Fontice*, 932 So. 2d 634, 637 (Fla. 2d DCA 2006) (“A party's ability to contest an arbitration award is regulated by statute and court rule.”); *Nestor v. Ward*, 163 So. 3d 582, 585 (Fla. 3d DCA 2015) (“In this case, Ward did not file a motion to vacate, modify, or correct the arbitration award. Thus, the trial court was required to confirm the award under section 682.12.”); *Glick v. Retamar*, 922 So. 2d 1108, 1109 (Fla. 4th DCA 2006) (“Here, there was no misconduct on the part of the arbitrator and the arbitrator did not exceed the scope of his authority. Therefore, the award is final and conclusive.”); *Chandra v. Bradstreet*, 727 So. 2d 372 (Fla. 5th DCA 1999), *review denied*, 741 So. 2d 1134 (Fla. 1999) (“An arbitrator exceeds his or her power when he or she goes beyond the authority granted by the parties or the operative documents, and decides an issue not pertinent to the resolution of the issues submitted to arbitration.”).

Accordingly, Petitioners’ unconscionability argument is without merit. When one buys a house, he or she buys it as it lies, complete with all covenants, conditions and restrictions of record.

VI.
CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative, and approve the Second District's opinion.

Respectfully submitted this 22nd day of February, 2021.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on February 22, 2021, a true and correct copy of the foregoing was served to all counsel of record on the service list attached, via electronic email through Florida's E-Portal e-filing system:

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this Initial Brief complies with the font and formatting requirements of Florida Rule of Appellate Procedure 9.045 because it is written in proportionally spaced typeface using Arial 14-point font and contains 12,844 words.

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