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.

APPENDIX TO U.S. HOME CORPORATION'S ANSWER BRIEF

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Counsel for the Respondent
U.S. Home Corporation

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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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The Real Property, Probate & Trust Law Section of The Florida Bar

/s/ C. David Harper
C. David Harper

/s/ David M. Gersten
David M. Gersten
Marie H. Kim
Ryan M. Wolis

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION

SHANE R. HAYSLIP and LAURA M. HAYSLIP,

Case No.: 17-CA-000048

Plaintiff,

v.

U.S. HOME CORPORATION,

Defendant.
_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, SHANE R. HAYSLIP and LAURA M. HAYSLIP, by and through his undersigned counsel, hereby sues Defendant, U.S. Home Corporation, and allege as follows:

JURISDICTION, PARTIES AND VENUE

1. This is an action for damages in excess of $15,000.00, exclusive of interest, costs and attorneys' fees.

2. Plaintiffs, Shane R. Hayslip and Laura M. Hayslip, are residents of Lee County, Florida.

3. Defendant, U.S. Home Corporation, is a Delaware corporation authorized to conduct business in the State of Florida. Defendant builds homes in Lee County, Florida, and is operating, conducting, engaging in, and carrying on a business or business ventures in Lee County, Florida, and has an office or agency in Lee County, Florida.

4. Venue for this action is properly in Lee County, Florida, pursuant to section 47.051, Florida Statutes, as Defendant has an agent or other representative in Lee County, Florida, the causes of action set forth herein accrued in Lee County, Florida, and the subject real property is located in Lee County, Florida.

GENERAL ALLEGATIONS

5. Plaintiffs own the home located at 12898 Stone Tower Loop, Fort Myers, Florida, 33913 (the "Home").

6. Defendant is the contractor that built the Home.

7. Subsequent to the construction of the Home, certain design and construction deficiencies were observed at the Home, which include, but are not limited to, inadequately and improperly installed stucco system.

8. Plaintiffs seek recovery herein for damages proximately caused by the improper design and/or construction of the Home, which resulted in the numerous defects and deficiencies in various systems and components at the Home, including violations of local and national building codes.

9. The existence or causes of the defects are not readily recognizable by Plaintiffs, who lacks special knowledge or training, hidden by components or finishes, are latent in nature, and are defects that require special knowledge or training to ascertain and determine the nature and cases of the defects.

10. All conditions precedent to the maintenance of this action have occurred, have been performed or have been waived, including but not limited to the requirements of section 558.004, Florida Statutes.

VIOLATION OF SECTION 553.84, FLORIDA STATUTES

11. Plaintiffs adopt, reallege and incorporate by reference the allegations contained in paragraphs 1 through 10 above as though fully set forth herein.

12. Section 553.84, Florida Statutes, expressly creates a statutory cause of action on

behalf of any person damaged as result of a violation of the Florida Building Codes Act (Sections 553.70, *et. Seq.*, Florida Statutes), against the party or parties committing the violations.

13. Defendant was thus under a statutory duty to Plaintiffs, pursuant to the Florida Building Codes Act, to construct and deliver the Home in compliance will all applicable local, state, and national building codes and regulations.

14. Defendant in inspecting, constructing, and delivering the Home, failed to comply with all applicable local, state, and national building codes and regulations, including, but not limited to The Florida Building Code, in contravention of the Florida Building Codes Act.

15. Defendant in inspecting, constructing, and delivering the Home, failed to comply with all applicable local, state, and national building codes and regulations, knew or should have known that they were in violation of The Florida Building Code and in contravention of the Florida Building Codes Act.

16. Due to Defendant's failure in complying with the aforementioned statutes and codes, Plaintiff has suffered from construction defects and deficiencies.

17. As a direct and proximate result of the construction defects and violations, Plaintiffs have suffered damages not only to the exterior stucco of the Home, but also to the underlying wire lath, water resistive barriers, sheathing, interior walls, interior floors and/or other property.

18. As a direct and proximate result of the construction defects and violations, Plaintiffs have been damaged in that the defects and violations substantially reduce the value of the Home and/or require significant repairs and renovations to correct such defects and violations.

WHEREFORE, Plaintiffs respectfully request the Court to enter final judgment against Defendant for damages, together with interest, costs and such other and further relief as the Court deems just and appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all issues so triable.

NOTICE OF FILING DESIGNATION OF E-MAIL ADDRESSES

Pursuant to Fla. R. Civ. P. 1.080 and Fla. R. Jud. Admin. 2.516, undersigned counsel's designation of e-mail addresses for service of Court papers are as follows:

Primary E-mail: lreeder@bwrfirm.com

Secondary E-mail: zlaboy@bwrfirm.com

Tertiary E-mail: mreimann@bwrfirm.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished together with the Summons as of the date so indicated on the corresponding Return of Service.

/s/ M. Lee Reeder

M. LEE REEDER, ESQ.
Florida Bar No.: 54071
BURNETT WILSON REEDER
200 N. Pierce Street
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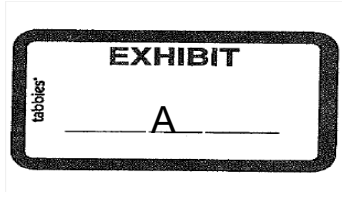
Attorneys for Plaintiffs

INSTR # 2007000079624, Doc Type D, Pages 4, Recorded 03/12/2007 at 10:43 AM, Charlie Green, Lee County Clerk of Circuit Court, Deed Doc. D $2583.70 Rec. Fee $35.50 Deputy Clerk WMILLER

Return to (via enclosed envelope)
North American Title Company
7051 Cypress Terrace, Suite 201
Ft. Myers, Florida 33907

This Instrument Prepared
under the supervision of:
Ambarina A. Perez, Esq.
North American Title Company
700 NW 107 Avenue, Suite 240
Miami, Florida 33172

Property Appraiser's Folio No.:
31-44-26-28-0000B.0110



11608-07-00079

SPECIAL WARRANTY DEED

THIS SPECIAL WARRANTY DEED (this "Deed") is made as of the 7th day of February, 2007 by and between U.S. Home Corporation, a Delaware corporation ("Grantor") having a mailing address of 10481 Six Mile Cypress Pkwy, Fort Myers, FL 33912 and David S. Kennison and Luisa F. Kennison, husband and wife ("Grantee") whose mailing address is 12898 Stone Tower Loop Fort Myers, FL 33912.

WITNESSETH:

THAT Grantor, for and in consideration of the sum of Ten and No/100 Dollars ($10.00), and other good and valuable consideration, the receipt of which is hereby acknowledged, by these presents does grant, bargain and sell unto Grantee, and Grantee's heirs, successors and assigns forever, all the right, title, interest, claim and demand that Grantor has in and to the following described real property (the "Property") located and situate in the County of Lee, State of Florida, to wit:

Lot 11, Block B, STONEYBROOK AT GATEWAY - UNIT 3, according to the plat thereof recorded in Plat Book 80, page 51, of the Public Records of Lee County, Florida.

The Property is conveyed subject to the following:

A. Conditions, restrictions, limitations, reservations, easements and other agreements of record affecting the Property, if any; but this provision shall not operate to reimpose the same.

B. Any community development, recreation, water control, water conservation, watershed improvement or special taxing districts affecting the Property including, without limitation, the obligation to pay maintenance assessments, capital assessments and/or taxes in connection therewith, if any.

C. Applicable zoning, land use and subdivision ordinances, restrictions and/or agreements.

D. Real estate, ad valorem and non ad valorem taxes and/or assessments, for this and subsequent years not yet due and payable.

E. Validly existing rights of adjoining owners in any walls and fences situated on a common boundary, if any.

F. All provisions of the following documents which may include, without limitation, restrictions, covenants, conditions, easements, lien rights, obligations to pay assessments and architectural restrictions: (i) Declaration(s) governing the community at large in which the home is located (the "Master Declaration"); (ii) club covenants and/or a club plan for the community in which the Property is located (the "Club Covenants"); and (iii) Declaration(s) governing any subdivision of which the Property is a part (the "Neighborhood Declaration"), all as amended and modified from time to time, all of which are recorded in the public records of Lee County, Florida, and all of which are incorporated by reference in their entirety into this Deed.

G. 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.

H. The requirements of Chapter 558 of the Florida Statutes (2005) as it may be renumbered and/or amended from time to time.

I. Grantor and Grantee specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§1 et seq.) and not by or in a court of law 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 (with the exception of "consumer products" as defined by the Magnuson-Moss Warranty-Federal Trade Commission Act, 15 U.S.C. §2301 et seq., and the regulations promulgated thereunder); (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.

(1) Any and all mediations commenced by Grantor or Grantee shall be filed with and administered by the American Arbitration Association or any successor thereto ("AAA") in accordance with the AAA's Supplementary Mediation Procedures for Residential Construction Disputes in effect on the date of the request. If there are no Supplementary Mediation Procedures for Residential Construction Disputes currently in effect, then the AAA's Construction Industry Mediation Rules in effect on the date of such request shall be utilized. Unless mutually waived in writing by the Grantor and Grantee, submission to mediation is a condition precedent to either party taking further action with regard to any matter covered hereunder.

(2) If the Dispute is not fully resolved by mediation, the Dispute shall be submitted to binding arbitration and administered by the AAA in accordance with the AAA's Supplementary Arbitration Procedures for Residential Construction Disputes in effect on the date of the request. If there are no Supplementary Arbitration Procedures for Residential Construction Disputes currently in effect, then the AAA's Construction Industry Arbitration Rules in effect on the date of such request shall be utilized. Any judgment upon the award rendered by the arbitrator may be entered in and enforced by any court having jurisdiction over such Dispute. Unless the Grantor and Grantee otherwise agree, claims in excess of $10,000.00 but less than $500,000.00 shall utilize the Regular Track Procedures of the Construction Industry Arbitration Rules, as modified by the Supplementary Arbitration Procedures for Residential Construction. If the claimed amount exceeds $250,000.00 or includes a demand for punitive damages, the Dispute shall be heard and determined by three arbitrators; however, if mutually agreed to by the Grantor and Grantee, then the Dispute shall be heard and determined by one arbitrator. Arbitrators shall have expertise in the area(s) of Dispute, which may include legal expertise if legal issues are involved. All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s). At the request of any party, the award of the arbitrator(s) shall be accompanied by detailed written findings of fact and conclusions of law. Except as may be required by law or for confirmation of an award, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both Grantor and Grantee.

(3) The waiver or invalidity of any portion of this Section I shall not affect the validity or enforceability of the remaining portions of Section I of the Deed. Grantee and Grantor further agree (1) that any Dispute involving Grantor's affiliates, directors, officers, employees and agents shall also be subject to mediation and arbitration as set forth herein, and shall not be pursued in a court of law or equity; (2) that Grantor may, at its sole election, include Grantor's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and (3) that the mediation and arbitration will be limited to the parties specified herein.

(4) To the fullest extent permitted by applicable law, Grantor and Grantee agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any other arbitration, judicial, or similar proceeding shall be given preclusive or collateral estoppel effect in any arbitration hereunder unless there is mutuality of parties. In addition, Grantor and Grantee further agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any arbitration hereunder shall be given preclusive or collateral estoppel effect in any other arbitration, judicial, or similar proceeding unless there is mutuality of parties.

(5) Unless otherwise recoverable by law or statute, each party shall bear its own costs and expenses, including attorneys' fees and paraprofessional fees, for any mediation and arbitration. Notwithstanding the foregoing, if a party unsuccessfully contests the validity or scope of arbitration in a court of law or equity, the noncontesting party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in defending such contest, including such fees and costs associated with any appellate proceedings. In addition, if a party fails to abide by the terms of a mediation settlement or arbitration award, the other party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in enforcing such settlement or award.

(6) Grantee may obtain additional information concerning the rules of the AAA by visiting its website at www.adr.org or by writing the AAA at 335 Madison Avenue, New York, New York 10017.

(7) Grantor supports the principals set forth in the Consumer Due Process Protocol developed by the National Consumer Dispute Advisory Committee and agrees to the following:

(8) Notwithstanding the requirements of arbitration stated in Section I(2) of this Deed, Grantee shall have the option, after pursuing mediation as provided herein, to seek relief in a small claims court for disputes or claims within the scope of the court's jurisdiction in lieu of proceeding to arbitration. This option does not apply to any appeal from a decision by a small claims court.

(9) Grantor agrees to pay for one (1) day of mediation (mediator fees plus any administrative fees relating to the mediation). Any mediator and associated administrative fees incurred thereafter shall be shared equally by Grantor and Grantee.

(10) The fees for any claim pursued via arbitration in an amount of $10,000.00 or less shall be apportioned as provided in the Supplementary Rules for Residential Construction Disputes of the AAA or other applicable rules. Unless provided otherwise by the Supplementary Rules for Residential Construction Disputes of the AAA or other applicable rules, for claims that exceed $10,000.00, the filing party shall pay up to the first $750.00 of any initial filing fee to initiate arbitration. Under the following conditions, Grantor agrees to pay up to the next $2,000.00 of any initial filing fee: (1) Grantee has participated in mediation prior to initiating the arbitration; (2) the Grantor and Grantee have mutually agreed to waive mediation; or (3) Grantor is the filing party. The portion of any filing fee not covered above, and any case service fee, management fee or fees of arbitrator(s), shall be shared equally by the Grantor and Grantee.

(11) Notwithstanding the foregoing, if either Grantor or Grantee seeks injunctive relief, and not monetary damages, from a court because irreparable damage or harm would otherwise be suffered by either party before mediation or arbitration could be conducted, such actions shall not be interpreted to indicate that either party has waived the right to mediate or arbitrate. The right to mediate and arbitrate should also not be considered waived by the filing of a counterclaim by either party once a claim for injunctive relief had been filed with a court.

J. Notwithstanding the Grantor and Grantee's obligation to submit any Dispute to mediation and arbitration, in the event that a particular dispute is not subject to the mediation or the arbitration provisions of Section I of this Deed, then the Grantor and Grantee agree to the following provisions: GRANTEE ACKNOWLEDGES THAT JUSTICE WILL BEST BE SERVED IF ISSUES REGARDING THIS DEED ARE HEARD BY A JUDGE IN A COURT PROCEEDING, AND NOT A JURY. GRANTEE AND GRANTOR AGREE THAT ANY DISPUTE, CLAIM, DEMAND. ACTION, OR CAUSE OF ACTION SHALL BE HEARD BY A JUDGE IN A COURT PROCEEDING AND NOT A JURY. GRANTEE AND GRANTOR HEREBY WAIVE THEIR RESPECTIVE RIGHT TO A JURY TRIAL.

Grantor does hereby warrant, and will defend, the title to the Property hereby conveyed, subject as aforesaid, against the lawful claims of all persons claiming by, through or under Grantor, but none other.

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 and in the documents identified above, all exhibits attached thereto, and all future amendments thereof including, without limitation, the provisions of the Master Declaration, Club Covenants and the Neighborhood Declaration, if any, applicable to the Property.

IN WITNESS WHEREOF, Grantor has caused these presents to be executed and its seal to be affixed the day and year first above written.

WITNESSES:

Karla Scanland
Print Name: Karla Scanland

Nancy M Stanton
Print Name: Nancy M Stanton

U.S. Home Corporation, a Delaware corporation

By: _____
Name: Andy Sorensen
Title: Division President

(SEAL)

STATE OF FLORIDA)
) ss.:
COUNTY OF LEE)

The foregoing instrument was acknowledged before me this 7th day of February, 2007 by Andy Sorensen as Division President of U.S. Home Corporation, a Delaware corporation, who is personally known to me ~~or who produced~~ _____ ~~as identification,~~ on behalf of the corporation.

Sandra Warnke
NOTARY PUBLIC, State of Florida at Large

My Commission Expires:

NOTARY PUBLIC-STATE OF FLORIDA
Sandra Warnke
Commission # DD457558
Expires: SEP. 24, 2009
Bonded Thru Atlantic Bonding Co., Inc.

Sandra Warnke
Print Name

INSTR # 2010000140169, Doc Type D, Pages 2, Recorded 06/04/2010 at 10:37 AM, Charlie Green, Lee County Clerk of Circuit Court, Deed Doc. D $1344.00 Rec. Fee $18.50 Deputy Clerk PSMITH

Prepared By and Return To:
Title Junction, LLC
6313 Corporate Ct Suite C
Fort Myers Fl 33919

File No. 10-00754-RT

Property Appraiser's Parcel I.D. (folio) Number(s)
31-44-26-28-0000B.0110

WARRANTY DEED

THIS WARRANTY DEED dated May 28, 2010, by Summit REO Services, LLC a Florida limited liability company, whose post office address is 8359 Beacon Blvd., Suite 604, Fort Myers, FL. 33907, hereinafter called the grantor, to Shane R. Hayslip, a married man joined by his wife laura m hayslip, whose post office address is 12898 Stone Tower Loop, Fort Myers, FL. 33913, hereinafter called the grantee:

(Wherever used herein the terms "grantor" and "grantee" include all the parties to this instrument and the heirs, legal representatives and assigns of individuals, and the successors and assigns of corporations)

WITNESSETH: That the grantor, for and in consideration of the sum of $ and other valuable consideration, receipt whereof is hereby acknowledged, hereby grants, bargains, sells, aliens, remises, releases, conveys, and confirms unto the grantee, all the certain land situated in Lee County, Florida, to wit:

Lot 11, Block B, Stoneybrook at Gateway-Unit 3, a subdivision according to the plat thereof recorded at Plat Book 80, Page 51, in the Public Records of Lee County, Florida.

Subject to easements, restrictions, reservations and limitations of record, if any.

TO HAVE AND TO HOLD the same in Fee Simple forever.

AND the grantor hereby covenants with said grantee that the grantor is lawfully seized of said land in fee simple; that the grantor has good right and lawful authority to sell and convey said land; that the grantor hereby fully warrants the title to said land and will defend the same against the lawful claims of all persons whomsoever; and that said land is free of all encumbrances, except taxes accruing subsequent to: December 31, 2009

WARRANTY DEED
(Continued)

IN WITNESS WHEREOF, the said grantor has signed and sealed these presents the day and year first above written.

Signed, sealed and delivered in the presence of:

(Witness Signature)
Jennifer Ferri

(Witness Signature)
Vicki Gillions

Summit REO Services, LLC

BY: ~~James R. Reader~~, manager
John Debiletto

8359 Beacon Blvd., Suite 604
(Address)

Fort Myers, FL. 33907
(Address)

STATE OF Florida

COUNTY OF Lee

I, Jennifer Ferri, a Notary Public of the County and State first above written, do hereby certify that John Debiletto manager of Summit reo services llc. personally appeared before me this day and acknowledged the due execution of the foregoing instrument along with personally known as identification.

Witness my hand and official seal, this the 28 day of May 2010.

Notary Public

My Commission Expires:

(SEAL)

JENNIFER FERRI
MY COMMISSION # DD 592034
EXPIRES: September 30, 2010
Bonded thru Notary Public Underwriters

Warranty Deed (Individual to Individual)

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND LEE COUNTY, FLORIDA
CIVIL DIVISION

SHANE R. HAYSLIP and
LAURA M. HAYSLIP,

Plaintiffs,

vs.

Case No.: 17-CA-000048

U.S. HOME CORPORATION,

Defendant.

_____/

U.S. HOME CORPORATION'S MOTION TO DISMISS OR STAY AND COMPEL ARBITRATION

The defendant, U.S. Home Corporation ("U.S. Home"), through its undersigned counsel, hereby moves the Court to enter its Order (a) dismissing or staying the claim asserted herein by the plaintiffs, Shane and Laura Hayslip (collectively, the "Plaintiffs"); and (b) directing the Plaintiffs to pursue their claim, if at all, in arbitration. The grounds for this Motion are as follows:

I. Background

1. The Plaintiffs initiated this action on or about January 5, 2017, alleging a claim against U.S. Home for relief pursuant to *Florida Statutes* § 553.84. To support the claim, the Plaintiffs allege that:

a. They own the home located at 12898 Stone Tower Loop, Fort Myers, Florida 33913 (the "Home"), which was built by U.S. Home;

b. "[I]n inspecting, constructing, and delivering the Home, [U.S. Home] failed to comply with all applicable local, state, and national building codes and regulations, including, but not limited to The Florida Building Code"; and

c. "As a direct and proximate result of the construction defects and violations," the Plaintiffs have suffered damages.

(*See* Complaint, ¶¶ 5-7, 14, and 17.)

2. The Plaintiffs must pursue their claim, if at all, in arbitration.

II. Argument

3. To determine if a claim is subject to arbitration, a court must consider three elements: (a) whether a valid written agreement to arbitrate exists; (b) whether an arbitrable issue exists; and (c) whether the right to arbitration has been waived. *See*, *e.g.*, *Perdido Key Island Resort Dev., L.L.P. v. Regions Bank*, 102 So. 3d 1, 3-4 (Fla. 1st DCA 2012).

4. Further, because both federal and Florida law favor arbitration, any doubts should be resolved in favor of arbitration. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011) (recognizing that the Federal Arbitration Act "was designed to promote arbitration," and embodies "[a] national policy favoring arbitration," and "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." (internal citations omitted); and *Perdido Key*, 102 So. 3d at 3-4 (noting that Florida courts "have previously applied the rule of maximum breadth so that arbitration clauses are given the 'broadest possible interpretation in order to accomplish the purpose of resolving controversies out of court.'") (internal citation omitted).

5. Here, all of the requisite elements are satisfied in favor of arbitration.

A. An Agreement to Arbitrate Exists

6. The Plaintiffs are not the original owners of the Home.

7. However, the Plaintiffs' claim is subject to arbitration pursuant to the original Special Warranty Deed (the "Deed") for the Home, which was recorded in the Official Records of Lee County, Florida on March 12, 2007. A copy of the Deed is attached hereto as **Exhibit A**.

8. Pursuant to the Deed, U.S. Home conveyed, and David and Luisa Kennison (collectively, the "Original Purchasers") accepted, the Home subject to various covenants, conditions, and restrictions, including the following (the "Arbitration Provision"):

> 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 [American Arbitration Association]. . . . *All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s)*. . . .

(*See* Deed, §§ I and I(2).)

9. The Deed also provides that:

> 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.
>
> . . .
>
> 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]. . . .

(*Id*. at §§ G and J.)

10. Thus, the Arbitration Provision is a covenant which runs with the Home, and is binding on the Original Purchasers, and all subsequent owners, including the Plaintiffs.

11. Under Florida law, a restrictive covenant runs with the land when (a) the original parties intended that the covenant run with the land; (b) the party against whom enforcement is sought took the property with notice of the covenant; and (c) the covenant touches and concerns the land. *See*, *e.g.*, *Winn-Dixie Stores Inc. v. Dolgencorp, Inc*., 964 So. 2d 261, 265 (Fla. 4th DCA 2014); and *PGA N. II of Fla., LLC v. Div. of Admin., State of Florida Dep't of Transp*., 126 So. 3d 1150, 1153 (Fla. 4th DCA 2012). All of these elements are satisfied here.

Intent

24. The first element of the analysis is easily satisfied: The clear and unambiguous language of the Deed establishes that U.S. Home and the Original Purchasers intended that the Arbitration Provision run with the Home.

25. That is, the Deed expressly provides that "[a]ll covenants, conditions, and restrictions contained in this Deed are *equitable servitudes, perpetual and run with the land*, including, without limitation, Sections H, I [*the Arbitration Provision*], and J." (Deed, § G.)

26. The Arbitration Provision also states that it is binding upon the Original Purchasers, as well as their "successors and assigns" and all "other occupants" of the Home. (*See id*., § I and p. 3.) An "occupant" is a person "who has possessory rights in, or control over, certain property or premises," or "[o]ne who acquires title by occupancy." *Black's Law Dictionary* 1106 (7th ed. 1999).

27. The Plaintiffs are both successor owners, and an "other occupants," of the Home. Thus, the Plaintiffs fall within the specific class of persons or entities that U.S. Home and the Original Purchasers intended be subject to the Arbitration Provision. This simply cannot be disputed.

Notice

28. There also can be no reasonable dispute that, as a matter of law, the Plaintiffs took title to the Home with notice of the Arbitration Provision.

29. In *Hagen v. Sabal Palms Inc*., 186 So. 2d 302, 311-12 (Fla. 1966), the Florida Supreme Court stated the applicable rule as follows:

> [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 if the deed from the original grantor.*
>
> . . .
>
> Thus, . . . a restrictive covenant in a *purchaser's chain of title* charges him with notice of a mutually covenanted community scheme.

30. Similarly, in *U.S. Bank Nat. Ass'n v. Rios*, 166 So. 3d 202, 210 (Fla. 2d DCA 2015) the Second District recognized 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." *See also Cape Sable Corp. v. McClurg*, 74 So. 2d 883, 885 (Fla. 1954).

31. Here, there is no dispute that the Deed is a matter of public record, and is in the Plaintiffs' chain of title. At minimum, then, the Plaintiffs had constructive notice of the Arbitration Provision, and there can be no credible contrary contention.

The Deed Arbitration Provision Touches and Concerns the Home

32. The final element of the analysis is whether the Arbitration Provision touches and concerns the Home. Although Florida appellate courts have not directly addressed this issue in the context of an arbitration provision, this exact issue has been addressed by federal and other state courts. And, those courts have determined that arbitration provisions *are* covenants which touch and concern the land.

33. For example, in *Baker v. Conoco Pipeline Co*., 280 F. Supp. 2d 1285 (N.D. Oklahoma 2003), a property owner granted an easement to Ajax Pipeline Company ("Ajax") for the purpose of laying pipelines across the property. Mr. and Mrs. Baker subsequently acquired the property, and Conoco Pipeline Company ("Conoco") became the successor to the rights of Ajax under the easement. Conoco performed certain clearing work across the property, which it claimed was necessary to maintain its pipelines.

34. The Bakers then filed a lawsuit against Conoco, alleging that the clearing work damaged various trees and other vegetation on the property. Conoco argued that the Bakers' claims should be maintained in arbitration pursuant to an arbitration provision contained in the easement. The court agreed, finding and reasoning as follows:

> 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*.

Baker, 280 F. Supp. 2d at 1294-98 (internal citations omitted).

35. Importantly, Oklahoma and Florida apply the same basic elements to determine whether a covenant runs with the land. *Compare Winn-Dixie*, 964 So. 2d at 265, and *PGA*, 126 So. 3d at 1153, *with Baker*, 280 F. Supp. 2d at 1297. Accordingly, *Baker* is highly persuasive, and instructs that the Arbitration Provision touches and concerns the Home.

36. Other states that have dealt with this issue, including Oregon and California, are in accord with this jurisprudence. In *Abbott v. Bob's U-Drive*, 352 P.2d 598, 604 (1960), the Oregon Supreme Court held that a covenant to arbitrate *was* a covenant which ran with the land. *See* 352 P.2d at 604. And, in *Kelly v. Tri-Cities Broad., Inc*., 147 Cal. App. 3d 666, 679 (Cal. Ct. App. 1983), the California appellate court agreed:

> As to the nature of a covenant to submit to arbitration, case authority is sparse. . . . *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.

147 Cal. App. 3d at 679.

37. Again, then, these decisions instruct that the Arbitration Provision necessarily touches upon or concerns the land, and therefore is binding upon the Plaintiffs.

B. Arbitrable Issues Exist

38. As noted above, the Arbitration Provisions requires mediation and arbitration of all disputes (whether contract, warranty, tort, statutory or otherwise), including, among other things, those arising under, or related to, the Home or any alleged damage to the Home. (*See* Deed, § I.)

39. The Plaintiffs' claim falls squarely within the scope of the referenced arbitration provisions.

40. Further, and in any event, § I(2) of the Deed provides as follows: "[a]ll decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s)." Thus, even if there were a dispute concerning the arbitrability of the Plaintiffs' claim, the dispute would have to be resolved in arbitration – not by a court. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010); *Parnell v. Cashcall, Inc.*, 804 F.3d 1142, 1144 (11th Cir. 2015); *Angels Senior Living at Connerton Court, LLC*, 210 So. 3d 257, 258-59 (Fla. 2d DCA 2017); *Mercedes Homes, Inc. v. Rosario*, 920 So. 2d 1254, 1256 (Fla. 2d DCA 2006); and *Mercedes Homes, Inc. v. Colon*, 966 So. 2d 10, 12-14 (Fla. 5th DCA 2007).

C. U.S. Home Has Not Waved its Right to Arbitration

41. The third, and final, issue to be decided in connection with this Motion is whether U.S. Home has waived its right to arbitration. U.S. Home has not done so, and there simply can be no credible contention to the contrary.

III. Conclusion

42. Given all of the foregoing, the Court should order the Plaintiffs to submit their claim to arbitration.

WHEREFORE, U.S. Home respectfully requests that the Court enter its Order (a) staying or dismissing this action, and directing the Plaintiffs to submit their claim, or any dispute concerning the arbitrability of the claim, to mediation and arbitration before the American Arbitration Association; (b) awarding U.S. Home its attorneys' fees and costs incurred in connection with this Motion (to the extent recoverable); and (c) granting such other and further relief as the Court deems proper.

/s/ *Evan M. Malloy*
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Telephone: 813.229.2300
Facsimile: 813.221.4210
Attorneys for U.S. Home Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 4, 2017, the foregoing Motion was electronically filed through ePortal, which will provide electronic notice to all counsel of record.

/s/ *Evan M. Malloy*
Attorney

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION

SHANE R. HAYSLIP and
LAURA M. HAYSLIP,

Plaintiffs,

vs.

U.S. HOME CORPORATION,

Defendant.

_____ /

Case No.: 17-CA-000048

Judge: Hon. Alane C. Laboda

REPORT AND RECOMMENDATION OF GENERAL MAGISTRATE

THIS CAUSE came before the undersigned General Magistrate for hearing on August 14, 2017, on the following motion: U.S. Home Corporation's Motion to Dismiss or Stay and Compel Arbitration filed May 4, 2017 (hereinafter the "Motion").

Present: ☒ Counsel for Plaintiffs: M. Lee Reeder, Esq.

☒ Counsel for Defendant: Colton M. Peterson, Esq. and Evan M. Malloy, Esq.

The Magistrate has jurisdiction over this proceeding pursuant to the Order of Referral to **Magistrate Kimberly Davis Bocelli** dated May 30, 2017. No objection to the Order of Referral to the Magistrate was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having fully considered the arguments and presentations of counsel for the respective parties in open Court, as well as those stated in the Motion and related memoranda, the undersigned Magistrate makes the following findings of fact and conclusions of law:

1. The Plaintiffs, Shane and Laura Hayslip (collectively, the "Plaintiffs"), have alleged a claim against Defendant, U.S. Home Corporation ("U.S. Home"), pursuant to Section 553.84, Florida Statutes. Plaintiffs' claim arises out of, or relates to, alleged building code violations in their home located at 12898 Stone Tower Loop, Fort Myers, Florida 33913 (the "Property").

2. U.S. Home contends that Plaintiffs must pursue their claim, if at all, in mediation and then arbitration before the American Arbitration Association, and Plaintiffs disagree.

3. To determine if a claim is subject to arbitration, a court must consider three elements: (a) whether a valid written agreement to arbitrate exists; (b) whether an arbitrable issue exists; and (c) whether the right to arbitration has been waived. *See, e.g., Perdido Key Island*

EXHIBIT A

Respondent's Appendix 23

Resort Dev., L.L.P. v. Regions Bank, 102 So. 3d 1, 3-4 (Fla. 1st DCA 2012). Moreover, because Florida and federal law favor arbitration, any doubts should be resolved in favor of arbitration. *See id.*; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011).

4. Here, all of the requisite elements are satisfied in favor of arbitration.

5. There is an agreement to arbitrate in the initial Special Warranty Deed (the "Deed") for the Property.

6. U.S. Home conveyed the Property to David and Luisa Kennison (collectively, the "Original Purchasers") by the Deed, which was recorded in the public records of Lee County, Florida, on March 12, 2007. Pursuant to the Deed, U.S. Home conveyed, and the Original Purchasers accepted, the Property subject to various covenants, conditions, and restrictions, including a provision which requires arbitration of all disputes (whether contract, warranty, tort, statutory or otherwise) arising under, or related to, the Property or relating to any alleged damage to the Property ("Arbitration Provision").

7. Plaintiffs accepted the Property "subject to easements, restrictions, reservations and limitations of record, if any," by the Warranty Deed recorded in the public records of Lee County, Florida, on June 4, 2010.

8. The Arbitration Provision states in Section I of the Deed, in relevant part:

> 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.
>
> . . .
>
> (2) If the Dispute is not fully resolved by mediation, the Dispute shall be submitted to binding arbitration and administered by the [American Arbitration Association]. . . . All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s).

9. Section G of the Deed states that "All covenants, conditions and restrictions contained in this Deed are equitable servitudes, perpetual and run with the land including, without limitation, Section H, I, and J."

10. Section J of the Deed further states, in relevant part, that "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 . . . ."

11. Under Florida law, a restrictive covenant runs with the land when (a) the original parties intended that the covenant run with the land; (b) the party against whom enforcement is sought took the property with notice of the covenant; and (c) the covenant touches and concerns the land. *See, e.g., Winn-Dixie Stores Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261, 265 (Fla. 4th DCA 2014); *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).

12. A property owner will be bound by a restrictive covenant if he has either actual or constructive notice of same. *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 311 (Fla. 2d DCA 1966); *U.S. Bank Nat. Ass'n v. Rios*, 166 So. 3d 202, 210 (Fla. 2d DCA 2015) ("[A] purchaser takes title subject to defects, liens, incumbrances, and all matters of which he has notice, or of which he could obtain knowledge in the exercise of ordinary prudence and caution." (quoting *Cape Sable Corp. v. McClurg*, 74 So. 2d 883, 885 (Fla. 1954) (emphasis omitted)). Constructive notice may be provided by way of a recorded deed or plat, even if the restriction is not stated in the immediate deed by which the current owner has taken title. *Hagan*, 186 So. 2d at 311-12.

13. The parties agreed that *Maule Industries, Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798 (Fla. 3d DCA 1958), sets forth the standard for determining whether a covenant runs with the land or is merely personal. Specifically,

> 'The primary test whether the covenant runs with the land or is merely personal is whether it concerns the thing granted and the occupation or enjoyment thereof or is a collateral or a personal covenant not immediately concerning the thing granted. 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.
>
> * * * * * *
>
> '* * * The question whether a covenant runs with the land does not depend upon its being performed upon the land itself; its performance must touch and concern the land or some right or easement annexed or appurtenant thereto and tend necessarily to enhance its value or render it more convenient and beneficial to the owner or occupant. * * *'

Id. at 801 (quoting 14 Am. Jur., Covenants, Conditions and Restrictions § 20, p. 496-97).

14. Although Florida appellate courts have not directly addressed this issue in the context of an arbitration provision, other states have addressed the issue and determined that arbitration provisions are covenants that touch or concern the land. *See, e.g., Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285 (N.D. Oklahoma 2003), *Abbott v. Bob's U-Drive*, 352 P.2d 598, 604 (1960); *Kelly v. Tri-Cities Broad., Inc.*, 147 Cal. App. 3d 666, 679 (Cal. Ct. App. 1983).

15. The instant action is analogous to *Baker*, where the United States District Court for the Northern District of Oklahoma found that an arbitration provision contained within an easement touches and concerns the land because it provides "the exclusive procedure for resolving disputes over damage to crops, fences, and timber, which clearly 'touch and concern' the real property." 280 F. Supp. 2d at 1297-98.

16. Although the instant action does not involve an easement or lease agreement as in the cases cited by U.S. Home, to the extent the Arbitration Provision provides the exclusive procedure for resolving disputes arising under, or related to, the Property or relating to any alleged damage to the Property, it clearly touches and concerns the Property and should run with the land.

17. Although Plaintiffs assert that the Arbitration Provision does not tend to enhance the Property's value or render it more convenient and beneficial to the owner or occupant, the Court acknowledges some of the recognized benefits of arbitration, including that it is a more efficient and cost-effective substitute for court litigation. *Sterling Condo. Ass'n, Inc. v. Herrera*, 690 So. 2d 703, 704 (Fla. 3d DCA 1997) (citing § 718.1255(3), Fla. Stat.); *Breckenridge v. Farber*, 640 So. 2d 208, 212 (Fla. 4th DCA 1994). Additionally, U.S. Home pointed out that the Arbitration Provision requires U.S. Home to pay for certain costs and filing fees associated with mediation and/or arbitration. Accordingly, Plaintiffs may be able to resolve their disputes with U.S. Home in a more efficient and cost-effective manner through arbitration, which tends to enhance the Property's value or render it more convenient and beneficial to Plaintiffs.

18. It is unnecessary to determine whether the Arbitration Provision touches and concerns the Property such that it should run with the land with respect to other types of disputes that may arise between Plaintiffs and U.S. Home as described in the Arbitration Provision (such as personal injury claims or disputes unrelated to the Property), because Plaintiffs have not asserted any such claims or disputes.

19. Plaintiffs have alleged in this action that U.S. Home had a statutory duty to Plaintiffs to construct and deliver the Property in compliance with all applicable local, state and national building codes and regulations, the existence of certain design and construction deficiencies which Plaintiffs assert constitute violations of the Florida Building Codes Act, and that Plaintiffs have suffered damages proximately caused by the improper design and/or construction of the Property by U.S. Home. Pl. Compl. at ¶¶ 6-8, 12-18.

20. In light of the foregoing, the Arbitration Provision is a covenant which runs with the Property because (a) the language of the Deed (Section G) indicates that the original parties intended, and in fact expressly says, that the Arbitration Provision runs with the land, (b) Plaintiffs took title to the Property with at least constructive notice of the Arbitration Provision by way of the recorded Deed which was intended to bind the Original Purchasers' successors and assigns, including Plaintiffs, and (c) the Arbitration Provision touches and concerns the Property with

respect to disputes arising under, or related to, the Property or relating to any alleged damage to the Property.

21. There was no dispute that arbitrable issues exist in this case. In any event, the Court finds that the Arbitration Provision at issue is broad, and covers Plaintiffs' claim in this case.

22. Finally, there was no contention that U.S. Home has waived its right to arbitration. In any event, the Court finds that U.S. Home has not waived its right to arbitration.

23. Accordingly, the Motion should be granted as to U.S. Home's request to stay this action as set forth more particularly in the Recommendation below.

24. **All parties have ___ / have NOT _X_ [check one] waived the ten (10) day period in which to file exceptions to this Report and Recommendation of General Magistrate.**

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Court enter its Order Adopting the Report and Recommendation of the General Magistrate, and order as follows:

1. The Motion is DENIED as to U.S. Home's request to dismiss this action, and is GRANTED as to U.S. Home's request to stay this action.

2. Plaintiffs shall maintain their claim, if at all, in mediation and then arbitration as set forth more particularly in the Deed.

3. This action is hereby stayed pending completion of such mediation and/or arbitration.

4. Plaintiffs shall file a notice setting forth the status of mediation and/or arbitration within ninety (90) days of the date of the Order adopting this Report and Recommendation and every sixty (60) days thereafter.

REPORT AND RECOMMENDATION submitted this 19th of September, 2017.

Kimberly Davis Bocelli
General Magistrate, Civil Division

PLEASE READ CAREFULLY (Language in Bold is Required by Fla. R. Civ. P. 1.490):

IF YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH FLORIDA RULE OF CIVIL PROCEDURE 1.490(i). YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT

PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

The hearing before the Magistrate was electronically recorded by the Court. A party may request an electronic certified copy of the proceeding on CD, at that party's expense, and may then have the recording transcribed, at that party's expense. Providing the Court with a copy of the CD, instead of a certified written transcript, is insufficient for review by the Court of exceptions. Media request forms, procedures, and fees, and a list of approved Transcriptionists are available on the Court's website, www.ca.cjis20.org , or by calling the Court's Electronic Court Reporting Department at 239-533-8207.

One of the parties elected to retain, at that party's own expense, a live Court Reporter who was present for the purpose of creating the official record of the proceeding. Accordingly, any request for a transcript of the proceeding must be submitted to that Court Reporter. The Court Reporter who created the official record of the proceeding is as follows:

Veritext Legal Solutions
201 North Franklin Street, Suite 1950
Tampa, Florida 33602
(800) 726-7007

CERTIFICATE OF SERVICE

I certify that a copy of this document was mailed to all parties or counsel, if represented, as listed below, at their designated e-mail addresses, on September 19, 2017.

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Attorneys for the Defendant

Adela Tomas, Assistant to Magistrate

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA CIVIL DIVISION

HAYSLIP, SHANE R et al
Plaintiff
vs
US HOME CORPORATION
Defendant

Case No.: 17-CA-000048 Div H
Judge: Alane C Laboda

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before this Court on the Report and Recommendation of the General Magistrate dated September 19, 2017, on U.S. Home Corporation's Motion to Dismiss or Stay and Compel Arbitration filed May 4, 2017 (hereinafter the "Motion"), and previously filed with the Court. The Court, having fully reviewed and considered the Magistrate's Findings of Fact, Conclusions of Law and Recommendations, it is hereby

ORDERED AND ADJUDGED:

1. The Report & Recommendation of the General Magistrate dated September 19, 2017, is hereby ratified and approved, incorporated by reference, adopted and made a part hereof.

2. The Court adopts each and every Finding and Recommendation contained in the Report and Recommendation of the Magistrate as the Order and Judgment of this Court, as if fully set forth herein and made part hereof.

DONE AND ORDERED at Fort Myers, Lee County, Florida this _____ day of _____, 20____.

The original of this document was filed on
OCT 05 2017
by Alane C. Laboda
Circuit Court Judge

Alane C Laboda, Circuit Judge

CERTIFICATE OF SERVICE

I certify that a copy of this document was mailed to all parties or counsel, if represented, as listed below, at their designated mailing addresses, on OCT 05 2017, 20____.

Matthew Lee Reeder	Esq.	200 N Pierce St Fl 1 Tampa FL 33602-5021
Evan M. Malloy	Esq.	100 N Tampa St Ste 2700 Tampa FL 33602-5810

/s/Kathleen Schneider

Judicial Assistant

EXHIBIT A

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION

SHANE R. HAYSLIP and LAURA M. HAYSLIP,

Case No.: 17-CA-000048

Plaintiff,

v.

U.S. HOME CORPORATION,

Defendant.
_____/

PLAINTIFFS' NOTICE OF APPEAL

Notice is given that the Plaintiffs appeal to the Florida Second District Court of Appeal the Report and Recommendation of General Magistrate dated September 19, 2017. The nature of the order is a denial of Defendant's Motion to Dismiss, and granting as to Defendant's request to stay this action pending completion of mediation and/or arbitration (attached hereto as Exhibit A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Courts E-filing Portal to ***C. David Harper, Esquire,*** and ***Colton M. Peterson, Esquire***, Foley & Lardner, LLP, 100 North Tampa Street, Suite 2700, Tampa, Florida 33602, on this 18th day of October 2017.

/s/ M. Lee Reeder
M. LEE REEDER
Florida Bar No.: 54071
BURNETT WILSON REEDER
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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA
CIVIL DIVISION

SHANE R. HAYSLIP and
LAURA M. HAYSLIP,

Plaintiffs,

vs.

U.S. HOME CORPORATION,

Defendant.

_____ /

Case No.: 17-CA-000048

Judge: Hon. Alane C. Laboda

REPORT AND RECOMMENDATION OF GENERAL MAGISTRATE

THIS CAUSE came before the undersigned General Magistrate for hearing on August 14, 2017, on the following motion: U.S. Home Corporation's Motion to Dismiss or Stay and Compel Arbitration filed May 4, 2017 (hereinafter the "Motion").

Present: ☒ Counsel for Plaintiffs: M. Lee Reeder, Esq.

☒ Counsel for Defendant: Colton M. Peterson, Esq. and Evan M. Malloy, Esq.

The Magistrate has jurisdiction over this proceeding pursuant to the Order of Referral to **Magistrate Kimberly Davis Bocelli** dated May 30, 2017. No objection to the Order of Referral to the Magistrate was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having fully considered the arguments and presentations of counsel for the respective parties in open Court, as well as those stated in the Motion and related memoranda, the undersigned Magistrate makes the following findings of fact and conclusions of law:

1. The Plaintiffs, Shane and Laura Hayslip (collectively, the "Plaintiffs"), have alleged a claim against Defendant, U.S. Home Corporation ("U.S. Home"), pursuant to Section 553.84, Florida Statutes. Plaintiffs' claim arises out of, or relates to, alleged building code violations in their home located at 12898 Stone Tower Loop, Fort Myers, Florida 33913 (the "Property").

2. U.S. Home contends that Plaintiffs must pursue their claim, if at all, in mediation and then arbitration before the American Arbitration Association, and Plaintiffs disagree.

3. To determine if a claim is subject to arbitration, a court must consider three elements: (a) whether a valid written agreement to arbitrate exists; (b) whether an arbitrable issue exists; and (c) whether the right to arbitration has been waived. *See, e.g., Perdido Key Island*

EXHIBIT A

Resort Dev., L.L.P. v. Regions Bank, 102 So. 3d 1, 3-4 (Fla. 1st DCA 2012). Moreover, because Florida and federal law favor arbitration, any doubts should be resolved in favor of arbitration. *See id.*; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011).

4. Here, all of the requisite elements are satisfied in favor of arbitration.

5. There is an agreement to arbitrate in the initial Special Warranty Deed (the "Deed") for the Property.

6. U.S. Home conveyed the Property to David and Luisa Kennison (collectively, the "Original Purchasers") by the Deed, which was recorded in the public records of Lee County, Florida, on March 12, 2007. Pursuant to the Deed, U.S. Home conveyed, and the Original Purchasers accepted, the Property subject to various covenants, conditions, and restrictions, including a provision which requires arbitration of all disputes (whether contract, warranty, tort, statutory or otherwise) arising under, or related to, the Property or relating to any alleged damage to the Property ("Arbitration Provision").

7. Plaintiffs accepted the Property "subject to easements, restrictions, reservations and limitations of record, if any," by the Warranty Deed recorded in the public records of Lee County, Florida, on June 4, 2010.

8. The Arbitration Provision states in Section I of the Deed, in relevant part:

> 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.
>
> . . .
>
> (2) If the Dispute is not fully resolved by mediation, the Dispute shall be submitted to binding arbitration and administered by the [American Arbitration Association]. . . . All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s).

9. Section G of the Deed states that "All covenants, conditions and restrictions contained in this Deed are equitable servitudes, perpetual and run with the land including, without limitation, Section H, I, and J."

10. Section J of the Deed further states, in relevant part, that "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 . . . ."

11. Under Florida law, a restrictive covenant runs with the land when (a) the original parties intended that the covenant run with the land; (b) the party against whom enforcement is sought took the property with notice of the covenant; and (c) the covenant touches and concerns the land. *See, e.g., Winn-Dixie Stores Inc. v. Dolgencorp, Inc.*, 964 So. 2d 261, 265 (Fla. 4th DCA 2014); *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).

12. A property owner will be bound by a restrictive covenant if he has either actual or constructive notice of same. *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 311 (Fla. 2d DCA 1966); *U.S. Bank Nat. Ass'n v. Rios*, 166 So. 3d 202, 210 (Fla. 2d DCA 2015) ("[A] purchaser takes title subject to defects, liens, incumbrances, and all matters of which he has notice, or of which he could obtain knowledge in the exercise of ordinary prudence and caution." (quoting *Cape Sable Corp. v. McClurg*, 74 So. 2d 883, 885 (Fla. 1954) (emphasis omitted)). Constructive notice may be provided by way of a recorded deed or plat, even if the restriction is not stated in the immediate deed by which the current owner has taken title. *Hagan*, 186 So. 2d at 311-12.

13. The parties agreed that *Maule Industries, Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798 (Fla. 3d DCA 1958), sets forth the standard for determining whether a covenant runs with the land or is merely personal. Specifically,

> 'The primary test whether the covenant runs with the land or is merely personal is whether it concerns the thing granted and the occupation or enjoyment thereof or is a collateral or a personal covenant not immediately concerning the thing granted. 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.
>
> * * * * * *
>
> '* * * The question whether a covenant runs with the land does not depend upon its being performed upon the land itself; its performance must touch and concern the land or some right or easement annexed or appurtenant thereto and tend necessarily to enhance its value or render it more convenient and beneficial to the owner or occupant. * * *'

Id. at 801 (quoting 14 Am. Jur., Covenants, Conditions and Restrictions § 20, p. 496-97).

14. Although Florida appellate courts have not directly addressed this issue in the context of an arbitration provision, other states have addressed the issue and determined that arbitration provisions are covenants that touch or concern the land. *See, e.g., Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285 (N.D. Oklahoma 2003), *Abbott v. Bob's U-Drive*, 352 P.2d 598, 604 (1960); *Kelly v. Tri-Cities Broad., Inc.*, 147 Cal. App. 3d 666, 679 (Cal. Ct. App. 1983).

15. The instant action is analogous to *Baker*, where the United States District Court for the Northern District of Oklahoma found that an arbitration provision contained within an easement touches and concerns the land because it provides "the exclusive procedure for resolving disputes over damage to crops, fences, and timber, which clearly 'touch and concern' the real property." 280 F. Supp. 2d at 1297-98.

16. Although the instant action does not involve an easement or lease agreement as in the cases cited by U.S. Home, to the extent the Arbitration Provision provides the exclusive procedure for resolving disputes arising under, or related to, the Property or relating to any alleged damage to the Property, it clearly touches and concerns the Property and should run with the land.

17. Although Plaintiffs assert that the Arbitration Provision does not tend to enhance the Property's value or render it more convenient and beneficial to the owner or occupant, the Court acknowledges some of the recognized benefits of arbitration, including that it is a more efficient and cost-effective substitute for court litigation. *Sterling Condo. Ass'n, Inc. v. Herrera*, 690 So. 2d 703, 704 (Fla. 3d DCA 1997) (citing § 718.1255(3), Fla. Stat.); *Breckenridge v. Farber*, 640 So. 2d 208, 212 (Fla. 4th DCA 1994). Additionally, U.S. Home pointed out that the Arbitration Provision requires U.S. Home to pay for certain costs and filing fees associated with mediation and/or arbitration. Accordingly, Plaintiffs may be able to resolve their disputes with U.S. Home in a more efficient and cost-effective manner through arbitration, which tends to enhance the Property's value or render it more convenient and beneficial to Plaintiffs.

18. It is unnecessary to determine whether the Arbitration Provision touches and concerns the Property such that it should run with the land with respect to other types of disputes that may arise between Plaintiffs and U.S. Home as described in the Arbitration Provision (such as personal injury claims or disputes unrelated to the Property), because Plaintiffs have not asserted any such claims or disputes.

19. Plaintiffs have alleged in this action that U.S. Home had a statutory duty to Plaintiffs to construct and deliver the Property in compliance with all applicable local, state and national building codes and regulations, the existence of certain design and construction deficiencies which Plaintiffs assert constitute violations of the Florida Building Codes Act, and that Plaintiffs have suffered damages proximately caused by the improper design and/or construction of the Property by U.S. Home. Pl. Compl. at ¶¶ 6-8, 12-18.

20. In light of the foregoing, the Arbitration Provision is a covenant which runs with the Property because (a) the language of the Deed (Section G) indicates that the original parties intended, and in fact expressly says, that the Arbitration Provision runs with the land, (b) Plaintiffs took title to the Property with at least constructive notice of the Arbitration Provision by way of the recorded Deed which was intended to bind the Original Purchasers' successors and assigns, including Plaintiffs, and (c) the Arbitration Provision touches and concerns the Property with

respect to disputes arising under, or related to, the Property or relating to any alleged damage to the Property.

21. There was no dispute that arbitrable issues exist in this case. In any event, the Court finds that the Arbitration Provision at issue is broad, and covers Plaintiffs' claim in this case.

22. Finally, there was no contention that U.S. Home has waived its right to arbitration. In any event, the Court finds that U.S. Home has not waived its right to arbitration.

23. Accordingly, the Motion should be granted as to U.S. Home's request to stay this action as set forth more particularly in the Recommendation below.

24. **All parties have ___ / have NOT _X_ [check one] waived the ten (10) day period in which to file exceptions to this Report and Recommendation of General Magistrate.**

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the Court enter its Order Adopting the Report and Recommendation of the General Magistrate, and order as follows:

1. The Motion is DENIED as to U.S. Home's request to dismiss this action, and is GRANTED as to U.S. Home's request to stay this action.

2. Plaintiffs shall maintain their claim, if at all, in mediation and then arbitration as set forth more particularly in the Deed.

3. This action is hereby stayed pending completion of such mediation and/or arbitration.

4. Plaintiffs shall file a notice setting forth the status of mediation and/or arbitration within ninety (90) days of the date of the Order adopting this Report and Recommendation and every sixty (60) days thereafter.

REPORT AND RECOMMENDATION submitted this 19th of September, 2017.

Kimberly Davis Bocelli
General Magistrate, Civil Division

PLEASE READ CAREFULLY (Language in Bold is Required by Fla. R. Civ. P. 1.490):

IF YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH FLORIDA RULE OF CIVIL PROCEDURE 1.490(i). YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT

PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW.

The hearing before the Magistrate was electronically recorded by the Court. A party may request an electronic certified copy of the proceeding on CD, at that party's expense, and may then have the recording transcribed, at that party's expense. Providing the Court with a copy of the CD, instead of a certified written transcript, is insufficient for review by the Court of exceptions. Media request forms, procedures, and fees, and a list of approved Transcriptionists are available on the Court's website, www.ca.cjis20.org , or by calling the Court's Electronic Court Reporting Department at 239-533-8207.

One of the parties elected to retain, at that party's own expense, a live Court Reporter who was present for the purpose of creating the official record of the proceeding. Accordingly, any request for a transcript of the proceeding must be submitted to that Court Reporter. The Court Reporter who created the official record of the proceeding is as follows:

Veritext Legal Solutions
201 North Franklin Street, Suite 1950
Tampa, Florida 33602
(800) 726-7007

CERTIFICATE OF SERVICE

I certify that a copy of this document was mailed to all parties or counsel, if represented, as listed below, at their designated e-mail addresses, on September 19, 2017.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

February 01, 2019

CASE NO.: 2D17-4372
L.T. No.: 17-CA-000048

SHANE R. HAYSLIP & LAURA M. HAYSLIP	v.	U S HOME CORPORATION
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

This case is provisionally set for oral argument on **TUESDAY, MARCH 26, 2019**, at **9:30 A.M.**, before: Judge Craig C. Villanti, Judge Anthony K. Black, Judge J. Andrew Atkinson. Oral argument will occur at the Second District Court of Appeal, Tampa Branch Headquarters, in the courtroom of the Stetson University College Of Law, Tampa Campus, First Floor, 1700 North Tampa Street, Tampa, Florida. The court calendars can be viewed on this court's website at www.2dca.org. Counsel or parties are requested to make their presence known to the receptionist by fifteen minutes prior to the time listed above.

The panel is subject to change without notice. Should the assigned panel of judges decide that the court will not benefit from oral argument in this proceeding, the attorneys or parties will be notified by order no less than two weeks before the scheduled date.

Please review the notice regarding oral argument in the Second District Court of Appeal. A copy has been furnished with this order and may also be found on this court's website.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Joshua E. Burnett, Esq.	C. David Harper, Esq.	David M. Greene, Esq.
Lawrence J. Dougherty, Esq.	David M. Gersten, Esq.	Colton M. Peterson, Esq.
Shane R. Hayslip	Laura M. Hayslip	

jc

Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SHANE R. HAYSLIP and LAURA M. HAYSLIP, Appellants, v. U.S. HOME CORPORATION, Appellee.	)	Case No. 2D17-4372

Opinion filed July 10, 2019.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Lee County; Alane C. Laboda, Judge.

M. Lee Reeder of Burnett Wilson Reeder, Tampa (withdrew after briefing); David M. Greene and Joshua E. Burnett of Burnett Law, P.A., Tampa (substituted as counsel of record), for Appellants.

David M. Gersten of Gordon Rees Scully Mansukhani LLP, Miami; and Lawrence J. Dougherty, C. David Harper, and Adam R. Alaee of Foley & Lardner LLP, Tampa, for Appellee.

BLACK, Judge.

Shane and Laura Hayslip appeal a nonfinal order granting U.S. Home Corporation's motion to stay the Hayslips' claim for relief under section 553.84, Florida Statutes (2016), of the Florida Building Codes Act and to compel arbitration pursuant to the original special warranty deed. The Hayslips argue that the arbitration provision contained in the original special warranty deed is invalid; alternatively, if the arbitration provision is valid, the Hayslips assert that as subsequent purchasers of the home they are not bound by it because it is not a covenant running with the land but is merely a personal covenant binding only upon the original purchasers of the home. We hold that a valid arbitration agreement exists and that as a restrictive covenant running with the land, the arbitration provision contained in the original special warranty deed is binding upon the Hayslips as subsequent purchasers of the home. Therefore, we affirm the circuit court's order compelling arbitration. As this case presents an issue of first impression in Florida, we certify a question of great public importance.

In 2007, David and Luisa Kennison entered into an agreement with U.S. Home for the purchase of a newly-built home in Lee County. U.S. Home conveyed the home to the Kennisons by special warranty deed, which was recorded in the public records of Lee County. The special warranty deed was executed by a U.S. Home representative in the presence of two witnesses but was not signed by the Kennisons. The special warranty deed contains various covenants, conditions, and restrictions, including a provision requiring arbitration of disputes arising under or related to the home. Specifically, the deed provides, in part, as follows:

> G. 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.

. . . .

> I. 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.

Section J further provides, in part, that "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."

In 2010, the Hayslips purchased the home from the Kennisons. The 2010 warranty deed, which was not signed by the Hayslips, did not contain any express provisions regarding arbitration but did provide that the conveyance of the home was "[s]ubject to easements, restrictions, reservations and limitations, if any." In January 2017, the Hayslips filed a lawsuit against U.S. Home, alleging that U.S. Home inadequately and improperly installed the stucco system on the home in violation of the Florida Building Codes Act. See § 553.84. U.S. Home moved to stay the court

proceedings and compel arbitration pursuant to the language of the original special warranty deed conveying the home to the Kennisons. Following a hearing, the general magistrate concluded that the arbitration provision in the original special warranty deed is a covenant running with the land and therefore binding on the Hayslips, who were properly noticed of the condition. The general magistrate recommended that the Hayslips' lawsuit be stayed pending mediation and/or arbitration. The circuit court adopted the general magistrate's report and recommendation, and the Hayslips appealed.

It has been repeatedly held that "courts are required to indulge every reasonable presumption in favor of arbitration, recognizing it as a favored means of dispute resolution." Am. Int'l Grp., Inc. v. Cornerstone Buss., Inc., 872 So. 2d 333, 338 (Fla. 2d DCA 2004) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)); accord Perdido Key Island Resort Dev., L.L.P. v. Regions Bank, 102 So. 3d 1, 3 (Fla. 1st DCA 2012) ("Florida law favors arbitration, often holding that any doubt regarding the arbitrability of a claim should be resolved in favor of arbitration."). With this general proposition in mind, we turn to the Hayslips' first issue regarding the validity of the arbitration provision contained in the original special warranty deed. To determine whether a claim is subject to arbitration, we "must determine (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Perdido Key Island Resort Dev., L.L.P., 102 So. 3d at 3-4 (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999)). The Hayslips dispute only the existence of a valid arbitration

agreement, arguing that because the original special warranty deed was not signed by the Kennisons it does not reflect their intent to be bound, rendering it invalid.

"[T]he existence of a valid agreement to arbitrate is a question of law, [and] we review the trial court's determination de novo." Lowe v. Nissan of Brandon, Inc., 235 So. 3d 1021, 1024 (Fla. 2d DCA 2018) (alterations in original) (quoting Avatar Props., Inc. v. Greetham, 27 So. 3d 764, 766 (Fla. 2d DCA 2010)). "Absent a valid written agreement to arbitrate, no party may be forced to arbitrate a claim." Id. (citing Seifert, 750 So. 2d at 636). However, neither the Federal Arbitration Act nor the Florida Arbitration Code require an arbitration agreement to be signed to be enforceable. Santos v. Gen. Dynamics Aviation Servs. Corp., 984 So. 2d 658, 660 (Fla. 4th DCA 2008). Rather, a party's conduct can demonstrate intent to be bound by the agreement. Id. at 661. Here, it is undisputed that the Kennisons were on notice of the original special warranty deed's covenants and restrictions, and by taking title to and possession of the home, they acquiesced to the arbitration provision. See Bessemer v. Gersten, 381 So. 2d 1344, 1348 n.6 (Fla. 1980) (noting that by accepting a deed the grantee agrees to fulfill the conditions of the covenant contained therein (quoting 1 R. Boyer, Fla. Real Estate Transactions, § 24.03, at 574 (1977))); cf. Santos, 984 So. 2d at 659, 661 (concluding that Mr. Santos's continued employment with General Dynamics after receipt of the dispute resolution policy—which provided that all employment claims must be submitted to arbitration—sufficiently demonstrated his consent to the arbitration agreement); BDO Seidman, LLP v. Bee, 970 So. 2d 869, 872, 875 (Fla. 4th DCA 2007) (concluding that Mr. Bee's continued employment with BDO Seidman after the implementation of the amended partnership agreement, which mandated arbitration for

all disputes under the agreement, demonstrated his consent to the arbitration agreement). Further, Florida law does not require that the home buyer sign the warranty deed in order to be bound by it. See Bessemer, 381 So. 2d at 1348 n.6 ("In Florida it is standard practice for only the grantor to sign the deed . . . ." (quoting Boyer, supra, at 574)); 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. v. Vanness, 34 So. 884, 887-88 (Fla. 1903))). The deed must only be signed by the seller in the presence of two witnesses. See § 689.01, Fla. Stat. (2016) ("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 . . . ."). We therefore find no merit in the Hayslips' first issue on appeal; the language in the original special warranty deed creates a valid arbitration agreement.

The Hayslips next contend that if a valid arbitration agreement exists, it is a personal covenant between U.S. Home and the Kennisons and not a covenant running with land and binding upon them as subsequent purchasers. The Hayslips contend that the arbitration provision does not touch and concern the land, a necessary requirement to be characterized as a covenant running with the land or real covenant.

"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 County v. Cove Club Inv'rs Ltd., 734 So. 2d 379, 382 n.4 (Fla.

1999) (quoting 19 Fla. Jur. 2d Deeds § 168 (1998)). 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." Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 310 (Fla. 2d DCA 1966) (citations omitted) (quoting Maule Indus., Inc. v. Sheffield Steel Prods., Inc., 105 So. 2d 798, 801 (Fla. 3d DCA 1958)); accord Caulk v. Orange County, 661 So. 2d 932, 933-34 (Fla. 5th DCA 1995). "A real covenant binds the heirs and assigns of the original covenantor, while a person[al] covenant does not." Palm Beach County, 734 So. 2d at 382 n.4 (quoting 19 Fla. Jur. 2d Deeds § 174).

> The primary test whether the covenant runs with the land or is merely personal is whether it concerns the thing granted and the occupation or enjoyment thereof or is a collateral or a personal covenant not immediately concerning the thing granted. 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.

Hagan, 186 So. 2d at 310 (quoting Maule Indus., Inc., 105 So. 2d at 801); accord Caulk, 661 So. 2d at 934. Therefore, "to establish a valid and enforceable covenant running with the land . . . , a plaintiff must show (1) the existence of a covenant that touches and involves the land, (2) an intention that the covenant run with the land, and (3) notice of the restriction on the part of the party against whom enforcement is sought." Winn-Dixie

Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 265 (Fla. 4th DCA 2007). In this case, the Hayslips have challenged only the first element.[1]

Although no Florida appellate court has considered whether an arbitration provision contained within a deed touches and concerns the land such that it is binding on subsequent purchasers like the Hayslips, we find the following cases to be instructive. In Winn-Dixie Stores, Inc., Winn-Dixie, a tenant in a shopping plaza, sued the landlord and Dolgencorp, Inc., another tenant in the same shopping plaza, based upon a covenant in its recorded lease granting Winn-Dixie the exclusive right to sell groceries. 964 So. 2d at 263. The Fourth District concluded that the grocery exclusive was a covenant that "touched and involved" the land because it "affects the mode of enjoyment of the premises." Id. at 265 (quoting Dunn v. Barton, 16 Fla. 765, 771 (Fla. 1878)). In Dunn, John Dunn assigned a commercial lease to Mary Barton, who agreed not to permit the leased premises to be used as a bar because Mr. Dunn owned the adjoining bar and sought to limit his competition. 16 Fla. at 770. Ms. Barton then

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[1]Even had the Hayslips challenged the second and third elements, it is readily apparent that under the facts of this case they would not have prevailed. The intent that the covenant run with the land is evident in the language of the original special warranty deed: "All covenants, conditions and restrictions contained in this Deed are equitable servitudes, perpetual and run with the land including, without limitation, Section[] . . . I, [the arbitration provision] . . . ." Cf. Caulk, 661 So. 2d at 934 ("[N]othing in the deed suggests it was intended to [run with the land]. Rather, the language suggests the opposite."). Moreover, the Hayslips were, at a minimum, on constructive notice of the arbitration provision contained in the recorded original special warranty deed. See Hagan, 186 So. 2d at 311; 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.' ").

leased the premises to Annie Hazelton, who opened a bar and restaurant. Id. Mr. Dunn sued both Ms. Barton and Ms. Hazelton to enforce his agreement with Ms. Barton. As indicated by the court in Winn-Dixie, "[t]he supreme court characterized the Dunn/Barton use restriction as a covenant which ran with the land, because it affected 'the mode of enjoyment of the premises.' " 964 So. 2d at 264 (quoting Dunn, 16 Fla. at 771). "[T]he covenant was enforceable against Hazelton, who, as sublessee, was 'subject to the covenants running with the land in the hands of her lessor.' " Id. (quoting Dunn, 16 Fla. at 772).

Much like the covenants in Winn-Dixie and Dunn, the performance of the covenant here affects "the occupation and enjoyment" of the home, see Hagan, 186 So. 2d at 310, 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. Additionally, "[i]f the performance of the covenant must touch and involve the land or some right or easement annexed and appurtenant thereto, and tends necessarily to . . . render[] [the property] more convenient and beneficial to the owner, it is a covenant running with the land." Hagan, 186 So. 2d at 310 (quoting Maule Indus., Inc., 105 So. 2d at 801). In Florida the legislature has deemed alternative dispute resolution to be a beneficial and effective mechanism by which to resolve construction defect disputes. § 558.001, Fla. Stat. (2016); accord Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 232 So. 3d 273, 278 (Fla. 2017); see also § 558.002(3) (" 'Claimant' means a property

owner, including a subsequent purchaser . . ., who asserts a claim for damages against a contractor . . . concerning a construction defect . . . ."); § 558.002(5)(b) (" 'Construction defect' means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from . . . [a] violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84.").[2]

The Hayslips rely on Caulk in reaching the contrary conclusion; Caulk, however, is distinguishable. In that case, the deed of conveyance reflected the grantor's reservation of the right to condemnation proceeds arising from the taking of a portion of the property conveyed. 661 So. 2d at 933. A few years after a subsequent purchaser acquired the property, Orange County filed suit seeking condemnation of a portion of the property. Id. The grantor learned of the pending condemnation proceeding and sought to intervene, claiming an interest in the proceeds based on the original deed. Id. The language of the covenant did not express an intent that it run with the land or state that it was binding on heirs and assigns. Id. at 934. Importantly, the Fifth District concluded that the covenant was "incapable of running with the land" because it had "no effect whatever on the land" and only " 'touche[d]' and 'concern[ed]' .

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[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. See Waterview Towers Condo. Ass'n v. City of West 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)); cf. Anderson v. Taylor Morrison of Fla., Inc., 223 So. 3d 1088, 1089 (Fla. 2d DCA 2017).

. . intangible personal property." Id. While the covenant at issue in Caulk was triggered by the taking of the land, it otherwise did not concern the land but rather the money flowing from its taking; it was merely a promise between the grantor and original grantee. See id.; see also Suniland Assocs. v. Wilbenka, Inc., 656 So. 2d 1356, 1358-59 (Fla. 3d DCA 1995) (holding "that an agreement to assign rents and profits creates no interest in the property itself" and therefore is not a covenant running with the land).[3]

As U.S. Homes points out, several other state and federal courts have concluded that arbitration provisions such as the one in this case were real covenants that touch and concern the land. In J&JB Timberlands, LLC v. Woolsey Energy II, LLC, No. 14-cv-1318-SMY-RJD, 2017 WL 396174, at *1-2 (S.D. Ill. Jan. 30, 2017), the surface of the property at issue—a "pristine floodplain forest"—was conveyed by warranty deed to William E. Puckett while reserving the mineral rights to the property. The reservation in the deed provided "that the Grantor shall pay for damages caused by mineral extraction activity, and that if no agreement on the amount of damages is reached within ninety (90) days, 'the amount of damage shall be determined by arbitration.' " Id. at *1. Mr. Puckett conveyed the surface property to J&JB Timberlands, LLC (J&JB), subject to the reservation in the prior deed. Id. at *2. Global Geophysical Services conducted a seismic survey on the property at the direction of the Woolsey

[3]We acknowledge that this court has previously recognized that arbitration provisions are generally characterized as personal covenants; importantly, however, our recognition and application of that general proposition was within a completely different context than this case. See Am. Int'l Grp., Inc., 872 So. 2d at 336 (quoting Federated Title Insurers, Inc. v. Ward, 538 So. 2d 890, 891 (Fla. 4th DCA 1989)). Unlike the personal contract at issue in American International Group, which could not bind or be enforced by a nonsignatory to the contract, the particular language of the arbitration provision within the original special warranty deed in this case establishes that it is a covenant running with the land and binding upon subsequent purchasers of the home.

defendants, resulting in, according to J&JB, "extensive, measurable, long-term habitat loss and tree and plant damage . . . Rutting and other damage to the forest floor which will require years to restore." Id. at *1. J&JB filed suit, and the defendants moved to stay the court proceedings pending arbitration pursuant to the arbitration provision in the deed. Id. J&JB asserted that it was not bound by the arbitration provision because it was a personal covenant that did not run with the land. Id. at *3. Under Illinois law, "[a] covenant touches and concerns the land if it affects the use, value, and enjoyment of the property." Id. at *4 (quoting Bank of Am., N.A. v. Cannonball LLC, 12 N.E.3d 841, 848 (Ill. App. Ct. 2014)). The federal court concluded that "the 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.

Similarly, in Baker v. Conoco Pipeline Co., 280 F. Supp. 2d 1285, 1292, 1294 (N.D. Okla. 2003), a previous property owner granted an easement to Ajax Pipeline Company to lay petroleum pipelines across the property. The Bakers subsequently acquired the property, and Conoco Pipeline Company became the successor to Ajax's easement rights. Id. at 1291-92, 1295. As part of the operation of its pipeline, Conoco performed "easement clearing activities" on the land over the pipeline. Id. at 1292. As a result, the Bakers sued Conoco claiming that it damaged trees and other vegetation on the property. Id. Conoco moved to stay the court proceedings and compel arbitration based on the arbitration provision in the recorded easement on the property. Id. The arbitration provision in the easement set forth a

procedure for dealing with "damage to crops, fences and timber, which may arise from laying, maintaining, operating or removing such pipe lines":

> Said damage, if not mutually agreed upon, to be ascertained and determined by three disinterested persons; one to be appointed by the [Grantor], his heirs or assigns; one by the Grantee, its successors or assigns, and the third by the two persons aforesaid, and the award of such three persons, or any two of them, shall be final and conclusive.

Id. at 1292. The Bakers argued that the arbitration agreement was a personal covenant binding only on the original parties to the agreement. Id. at 1295. The federal court ruled in favor of Conoco, determining that the arbitration provision "satisfies the requirements of a covenant running with the land" because it "affects the method for recovery of damage to crops, fences, and timber, and thus 'touches and concerns the land.' " Id. at 1296. In other words, because it provided the exclusive procedure for resolving disputes concerning damage to the property it "clearly 'touch[ed] and concern[ed]' the real property." Id. at 1298.

Finally, in Kelly v. Tri-Cities Broadcasting, Inc., 195 Cal. Rptr. 303, 304 (Cal. Ct. App. 1983), Tri-Cities Broadcasting, Inc. (Tri-Cities), purchased a radio station from Far West Broadcasting Corp. (Far West). In conjunction with the purchase of the radio station, Tri-Cities was assigned the lease to the land upon which the station operated. Id. By the terms of the lease, Tri-Cities was required to provide the lessor with free radio time in lieu of rent payments, and any disputes arising out of the lease were to be arbitrated. Id. at 305. Noting that the case law was sparse regarding the nature of a covenant to submit to arbitration and relying on Abbott v. Bob's U-Drive, 352 P.2d 598 (Or. 1960), the California appellate court concluded that the covenant to arbitrate ran with the land:

> "In the case at bar the covenant to arbitrate is invoked to require the lessee to submit to arbitration a matter relating to rental payments under the lease. 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 required as relating to the property interests of the original covenanting parties as lessor and lessee. . . . '[T]here would seem to be no reason for applying the rules of touching and concerning in an overtechnical manner, which is unreal from the standpoint of the parties themselves.' "
>
> 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."

Kelly, 195 Cal. Rptr. at 310-11 (quoting Abbott, 352 P.2d at 604).

In this case, the circuit court properly characterized the arbitration provision in the original special warranty deed mandating mediation and/or arbitration as a covenant running with the land, binding upon the Hayslips as subsequent purchasers of the home. However, because this case presents an issue of first impression with potentially wide-ranging effect, we certify the following question as one of great public importance:

> DOES A MANDATORY ARBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER RUN WITH THE LAND SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHERE THE INTENDED NATURE OF THE PROVISION IS CLEAR AND THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WAS ON NOTICE OF THE PROVISION?

Affirmed; question certified.

VILLANTI and ATKINSON, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

SHANE R. HAYSLIP and LAURA M. HAYSLIP, Plaintiffs/Petitioners,	Case No. 2D17-4372 LT Case No.: 2017-CA-000048
v.	NOTICE TO INVOKE DISCRETIONARY JURISDICTION
U.S. HOME CORPORATION, Defendant/Respondent.	

NOTICE IS GIVEN that Shane R. Hayslip and Laura M. Hayslip, Petitioners, invoke the discretionary jurisdiction of the supreme court under Fla. R. App. P. 9.030(a)(2)(A)(v) to review the decision of this court rendered July 10, 2019. The decision passes on a question certified to be of great public importance.

/s/*David M. Greene*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email through the e-portal, per designation to ***C. David Harper, Esquire, Lawrence J. Dougherty, Esquire,*** and ***Adam R. Alaee, Esquire***, Foley & Lardner, LLP, 100 North Tampa Street, Suite 2700, Tampa, Florida 33602, and ***David M. Gersten, Esquire***, Gordon Rees Scully Mansukhani LLP, Miami Tower, 100 SE Second St., Ste. 3900, Miami, FL 33131, on this 8th day of August, 2019.

/s/David M. Greene
Attorney for Petitioners
Shane and Laura Hayslip

Supreme Court of Florida

THURSDAY, OCTOBER 8, 2020

CASE NO.: SC19-1371
Lower Tribunal No(s).:
2D17-4372;
362017CA000048A001CH

SHANE R. HAYSLIP, ET AL. vs. U. S. HOME CORPORATION

Petitioner(s) Respondent(s)

The Court accepts jurisdiction of this case.

Petitioner's initial brief on the merits must be served on or before October 28, 2020; respondent's answer brief on the merits must be served thirty days after service of petitioner's initial brief on the merits; and petitioner's reply brief on the merits must be served thirty days after service of respondent's answer brief on the merits.

The Clerk of the Second District Court of Appeal must file the record which must be properly indexed and paginated on or before December 8, 2020. The Clerk may provide the record in the format as currently maintained at the district court, either paper or electronic.

As jurisdiction has been accepted in the above cause, any movant who wishes to follow through on a previously-filed Notice of Intent to Appear as