**IN THE SUPREME COURT OF FLORIDA**

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Case No. SC19-1371
Lower Tribunal Case No. 2D17-4372

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

Petitioners,

v.

**U.S. HOME CORPORATION,**

Respondent.

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# INITIAL BRIEF OF PETITIONERS SHANE R. HAYSLIP and LAURA M. HAYSLIP

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ON DISCRETIONARY REVIEW OF
AN OPINION OF THE SECOND DISTRICT COURT OF APPEAL

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## PRELIMINARY STATEMENT

Petitioners, Shane R. Hayslip and Laura M. Hayslip, shall be referred to herein as the "Hayslips."

Respondent, U.S. Home Corporation, shall be referred to herein as "U.S. Home."

References to the record shall be referred to herein as "R. at ___."

References to the appendix shall be referred to herein as "A. at ___."

## STATEMENT OF THE CASE AND FACTS

### *Background*

The. Hayslips currently own the home located at 12898 Stone Tower Loop, Fort Myers, Florida 33913 (the "Home"). In 2007, the Home was constructed by U.S. Home and sold by U.S. Home to David and Luisa Kennison (the "Kennisons"), with transfer of title being conveyed from U.S. Home to the Kennisons via special warranty deed (the "Original Deed"). (A. at 3). The Original Deed contained the following provision (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.

(A. at 4).

In 2010, the Kennisons sold the Home to the Hayslips. In 2017, the Hayslips filed a lawsuit against U.S. Home pursuant to section 553.84, Florida Statutes, alleging that U.S. Home inadequately and improperly installed the stucco system on the Home in violation of the Florida Building Codes Act. (A. at 10-11). In response, U.S. Home filed a Motion to Dismiss or Stay and Compel Arbitration, based on the Arbitration Provision in the Original Deed. (A. at 13). Although the Hayslips were subsequent purchasers of the Home and not parties to the Original Deed, U.S. Home argued that the Arbitration Provision ran with the land as a real covenant and was,

therefore, binding on the Hayslips as subsequent purchasers of the Home. (A. at 16). The Hayslips contended that the Arbitration Provision was merely a personal covenant between the Kennisons and U.S. Home—the parties to the Original Deed—and, therefore, did not bind the Hayslips as subsequent purchasers of the Home.

***Trial Court Proceedings***

The Hayslips filed a complaint in the Circuit Court of the Twentieth Judicial Circuit of Florida, against U.S. Home, asserting a construction defect action, pursuant to Section 553.84, Florida Statutes, regarding the Home's defective stucco system. (A. at 9-11). In response, U.S. Home filed a Motion to Dismiss or Stay and Compel Arbitration, based on the Arbitration Provision within the Original Deed. (A. at 13-21). On August 14, 2017, the General Magistrate Kimberly Davis Bocelli heard arguments of counsel, and issued a Report and Recommendation denying U.S. Home's request to dismiss the action and granting U.S. Home's request to stay the action and compel arbitration. (A. at 22-26). The Magistrate further recommended that the trial court judge order the Hayslips to "maintain their claim, if at all, in mediation and then arbitration as set forth more particularly in the Deed." (A. at 26). On October 5, 2017, the Honorable Alane C. Laboda, the trial court judge, entered an Order adopting the Report and Recommendation of the Magistrate. (A. at 28). In ruling that the Arbitration Provision contained in the Original Deed conveyed

from U.S. Home to the Kennisons was binding upon the Hayslips, as subsequent purchasers of the Home, the trial court stated:

> [T]he 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.

(A. at 25-26).

***Appellate Proceedings***

The Hayslips appealed the trial court's non-final Order referring the parties to binding arbitration to the Second District Court of Appeal. (R. at 0007). The issues on appeal were whether the Arbitration Provision in the Original Deed constituted a valid written arbitration agreement as to subsequent purchasers of the Home and whether the Arbitration Provision was a covenant running with the land, and thus, whether it was binding upon subsequent purchasers of the Home. (A. at 32, 34).

The Second District held that a valid arbitration agreement existed, that it was a covenant running with the land, and affirmed the trial court's non-final Order. (A. at 34, 42). The Second District certified the following question to this Court as one of great public importance:

> DOES A MANDATORY ARTBITRATION PROVISION CONTAINED WITHIN A RESTIDENTIAL 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?

(A. at 42). The Court accepted jurisdiction, and this appeal follows.

## ISSUE ON APPEAL

### As Framed by the Second District Court of Appeal

DOES A MANDATORY ARTBITRATION 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?

### As Re-Framed by Petitioners

WHETHER A MANDATORY, BINDING ARTBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL REAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER CREATES A VALID WRITTEN AGREEMENT TO ARBITRATE BETWEEN THE HOME BUILDER AND SUBSEQUENT PURCHASERS WHO WERE NOT PARTIES TO THE RESIDENTIAL WARRANTY DEED AND WHO WERE NOT OTHERWISE IN PRIVITY WITH THE HOME BUILDER, AND WHETHER THE ARBITRATION PROVISION IS A REAL COVENANT THAT TOUCHES AND CONCERNS THE LAND, AND THEREFORE RUNS WITH THE LAND (EVEN THOUGH THE ARBITRATION PROVISION DOES NOT AFFECT WHAT CAN OR CANNOT BE DONE ON, TO OR WITH THE LAND) SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHO WERE ONLY ON CONSTRUCTIVE NOTICE OF THE ARBITRATION PROVISION BASED ON IT HAVING BEEN RECORDED IN THE PUBLIC RECORDS AND EVEN THOUGH IT WOULD INFRINGE UPON THE SUBSEQUENT PURCHASERS' CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS AND RIGHT TO A JURY TRIAL?

## STANDARD OF REVIEW

Orders compelling arbitration are subject to *de novo* review, as questions of law. Mora v. Abraham Chevrolet-Tampa, Inc., 913 So. 2d 32, 33 (Fla. 2d DCA 2005). Under the *de novo* standard, no deference is given to the decisions of the lower courts. D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003).

## SUMMARY OF THE ARGUMENT

This appeal concerns a challenge by the Hayslips, subsequent purchasers of the Home, to the Arbitration Provision contained in the Original Deed conveying the Home from the home builder, U.S. Home, to the original purchasers, the Kennisons. As subsequent purchasers of the Home, the Hayslips were not parties to the Original Deed. The Hayslips did not agree to be bound by the Arbitration Provision contained in the Original Deed. There is no contractual privity between the Hayslips and U.S. Home. The Hayslips did not enter into any agreement with U.S. Home, and specifically did not enter into any agreement to arbitrate with U.S. Home. No valid written agreement to arbitrate between the Hayslips and U.S. Home exists, and accordingly, the Hayslips cannot be forced to arbitrate with U.S. Home.

U.S. Home contends that the Arbitration Provision in the Original Deed nevertheless binds the Hayslips, arguing that the Arbitration Provision is a restrictive covenant that runs with the land. Only restrictive covenants that "touch and concern" the land may run with the land to bind successors; this type of restrictive covenant is called a "real covenant." Restrictive covenants that are only enforceable between parties with contractual privity are called "personal covenants." The Arbitration Provision in the Deed does not "touch and concern" the land, and therefore, does not run with the land. Rather, the Arbitration Provision was merely a personal covenant between only U.S. Home and the Kennisons; the Arbitration

Provision between U.S. Home and the Kennisons is not binding on the Hayslips. The Arbitration Provision is not a real covenant that binds successors. If the Court were to determine that the Arbitration Provision *is* a real covenant, it would effectively eviscerate the "touch and concern" requirement upheld by decades of Florida case law and render it completely meaningless. If the Court were to determine that the Arbitration Provision *is* a real covenant, each and every provision, obligation and restriction included in all prior deeds for a piece of real property would conceivably bind every subsequent owner, placing an unfair and onerous burden on homebuyers, and real estate professionals, including title companies and mortgage companies.

To enforce the Arbitration Provision against the Hayslips would be to bind the Hayslips to a contract to which they did not knowingly and voluntarily enter. Not only would it be inconsistent with established Florida case law, but any attempt to enforce the Arbitration Provision against the Hayslips would render the provision unconscionable.

Moreover, significant public policy concerns are implicated in this case. Binding successors to an arbitration provision to which they did not consent and for which they did not have actual notice is to deny them their constitutionally protected right of access to the courts and right to a jury trial. Constructive notice is not sufficient for the courts of this state to deem that citizens of this state have waived

important and valuable constitutional rights and protections. Enforcing arbitration provisions against subsequent owners would also cause a significant burden on landowners due to the slippery slope it would cause—any and every provision included in a deed could then bind decades and decades of unsuspecting subsequent purchasers. Based on both case law and Florida public policy concerns, the Hayslips should not be bound by the Arbitration Provision contained within the Original Deed to which the Hayslips were not party and to which the Hayslips did not affirmatively and actually agree to be bound.

## ARGUMENT

### I. NO VALID WRITTEN AGREEMENT TO ARBITRATE EXISTS BETWEEN THE HAYSLIPS AND U.S. HOME.

There is no valid written agreement between the Hayslips and U.S. Home, and therefore, the Hayslips cannot be involuntarily, forced to arbitrate with U.S. Home. See Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999). In Seifert, this Court established the three-prong test to determine the validity of an arbitration provision: (1) whether a valid written agreement to arbitrate exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitrate was waived. Seifert v. U.S. Home Corp., 750 So. 2d at 636; see also Jackson v. Shakespeare Foundation, Inc., 108 So. 3d 587, 593 (Fla. 2013); Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 464 (Fla. 2011)(quoting Seifert); Nunez v. Westfield Homes of Florida, Inc., 925 So. 2d 1108, 1110-11 (Fla. 2d DCA 2006) In the instant case, the first prong of

this test has not been satisfied. The first prong of the test is a bright-line, objective test. No valid written agreement to arbitrate exists between the Hayslips and U.S. Home; it is that clear, and it is that simple. The Hayslips never agreed to arbitrate.

The Arbitration Provision was a personal covenant between U.S. Home and the Kennisons, the original owners of the Home, and accordingly, the Arbitration Provision is not enforceable against the Hayslips as subsequent purchasers of the Home, and non-parties to the Arbitration Provision. See American Int'l Group v. Cornerstone Businesses, Inc., 872 So. 2d 333, 336 (Fla. 2d DCA 2004). In American Int'l Group, the Second District Court of Appeal stated: "**Arbitration provisions are personal covenants, usually binding only upon the parties to the covenant.** For instance, in a contract where one party is a corporation, its successor in interest is not usually bound to its terms." Id. (emphasis added). Although American Int'l dealt with the area of corporate law, it emphasizes the fact that arbitration provisions are personal covenants, contractual in nature and only binding on the actual parties to the contract. See id.

"In Florida, an arbitration clause in a contract involving interstate commerce is subject to the Florida Arbitration Code (FAC), to the extent the FAC is not in conflict with the [Federal Arbitration Act]." Shotts, 86 So. 3d at 463-64. The Revised Florida Arbitration Code (the "Florida Arbitration Code"), Chapter 682, Florida Statutes, specifically requires that there be an "**agreement** to arbitrate."

§682.03 (1)-(3), Florida Statutes. Section 682.03, Florida Statutes, entitled "Proceedings to compel and to stay arbitration" provides in relevant part:

> (1) On motion of a person **showing an agreement to arbitrate** and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> (a) If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate.
>
> (b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate **unless it finds that there is no enforceable agreement to arbitrate**.
>
> (2) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is **no agreement to arbitrate**, the court shall proceed summarily to decide the issue. If the court finds that there is **an enforceable agreement to arbitrate**, it shall order the parties to arbitrate.
>
> (3) If the court finds that there is **no enforceable agreement to arbitrate**, it ***may not* order the parties to arbitrate** pursuant to subsection (1) or subsection (2).

(Emphasis added). The Hayslips never entered any agreement to arbitrate, and accordingly, pursuant to section 682.03(3), the Hayslips may not be ordered to arbitrate.

In Seifert, this Court stated:

> Today, arbitration provisions are common, and their use generally favored by the courts. However, **because arbitration provisions are contractual in nature, construction of such provisions and the contracts in which they appear remains a**

> **matter of contract interpretation.** Accordingly, the determination of whether an arbitration clause requires arbitration of a particular dispute necessarily "rests on the intent of the parties." **A natural corollary of this rule is that no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate**. See Seaboard Coast Line, 690 F.2d at 1352 (***holding that the federal policy favoring arbitration "cannot serve to stretch a contract beyond the scope originally intended by the parties"***); *see also Tracer Research Corp. v. National Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir.1994); *Miller v. Roberts*, 682 So.2d 691, 692 (Fla. 5th DCA 1996) ("The general rule is that where an arbitration agreement exists between the parties, ***arbitration is required only of those controversies or disputes which the parties have agreed to submit to arbitration.***"); *Regency Group, Inc.*, 647 So.2d at 193 ("***Only those claims which the parties have agreed are arbitrable may be subject to arbitration***.").

(Emphasis added)(citations omitted).

In the instant case, the Second District Court of Appeal analyzed whether a valid written agreement to arbitrate existed, but the Second District only analyzed whether there was a valid written agreement to arbitrate between the original homeowners, the Kennisons, and U.S. Home. (A. at 31-35). The Second District Court of Appeal ignored the critical fact that there was no valid written agreement to arbitrate between the Hayslips and U.S. Home. The absence of a valid written arbitration agreement between the Hayslips and U.S. Home is dispositive, and requires that the trial court's order compelling arbitration be reversed, and that this action be remanded to proceed in state court.

## II. ENFORCING THE ARBITRATION PROVISION AGAINST THE HAYSLIPS WOULD SUBMIT THE HAYSLIPS TO A CONTRACT TO WHICH THEY DID NOT BIND THEMSELVES.

### A. Binding the Hayslips, as subsequent purchasers, to the Arbitration Provision contained within the Original Deed would violate principles of contract law.

The contractual nature of arbitration provisions makes arbitration provisions inserted into a prior deed unenforceable against subsequent purchasers. See Seifert, 750 So. 2d at 636 ("[B]ecause arbitration provisions are contractual in nature, construction of such provisions and the contracts in which they appear remains a matter of contract interpretation"); Eugene W. Kelsey & Son, Inc. v. Architectural Openings, Inc., 484 So. 2d 610, 611 (Fla. 5th DCA 1986)("Under Florida law, arbitration agreements are contractual in nature and therefore they must fulfill the requirements of a contract to be enforceable"). The Eugene Court stated: "In order for a dispute to be arbitrable, a written contract must show the parties' intent to submit to arbitration." Eugene, 484 So. 2d at 611 (citing § 682.03, Fla. Stat.). Mere constructive notice, by its very nature, indicates that the subsequent purchaser did not possess the requisite intent to bind themselves to an arbitration provision.

The distinct, contractual nature of arbitration provisions necessitates the requirement of affirmative, knowing, voluntary assent, to bind a subsequent purchaser to an arbitration provision contained in a prior deed. For a binding contract to exist, an offer must have been *accepted*. See Koplin v. Bennett, 155 So.

2d 568, 573 (Fla. 1st DCA 1963). "Generally, the acceptance of an offer which results in a contract must be absolute and unconditional …." Cheverie v. Geisser, 783 So. 2d 1115, 1119 (Fla. 4th DCA 2001). In the instant case, the Hayslips never accepted an offer to bind themselves to arbitration. Accordingly, based on Florida contract law, the Hayslips cannot be bound by the Arbitration Provision contained in the Original Deed to which the Hayslips were never a party.

U.S. Home argues that Section J of the Original Deed accepted by the original purchasers of the Home—but not accepted by the Hayslips—binds the Hayslips, based on the following language: "Grantee, by acceptance of this Deed, automatically agrees for itself, and its heirs, personal representatives, successors and assigns, to observe and to be bound by all of the terms and conditions set forth in this Deed." (R. at 0175); (A. at 5, 15-16)(emphasis added). However, Florida case law provides otherwise: "Given the principle that **a party can be forced to arbitrate only those matters one has specifically agreed to arbitrate**, courts should avoid engaging in interpretation of the agreements of other parties in order to require non-parties to arbitrate." Morgan Stanley DW Inc. v. Halliday, 873 So. 2d 400, 405 (Fla. 4th DCA 2004)(emphasis added)(citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945 (1920)). In Global Travel Marketing, Inc. v. Shea, 908 So. 2d 392, 397 (Fla. 2005), this Court reiterated the importance of requiring an actual agreement for arbitration: "'[The Federal Arbitration Act] does not require parties to

arbitrate when they have not agreed to do so.'" Global Travel, 908 So. 2d at 397 (quoting E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 293 (2002)); see also Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)("[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so . . ."). In the instant case, the Hayslips did not intend to or agree to arbitrate.

Despite U.S. Home's attempt to bind successors through the Original Deed's language, the Hayslips, as non-parties to the Original Deed, cannot and should not be bound by the Arbitration Provision in the Original Deed between U.S. Home and the Kennisons, the original purchasers. (A. at 15-16.). Based on this Court's established refusal to force a party into arbitration when the party did not contractually bind itself to arbitrate, the Hayslips should not be required to arbitrate. See Seifert, 750 So. 2d at 636; Eugene, 484 So. 2d at 611; Global Travel, 908 So. 2d at 397; Morgan Stanley, 873 So. 2d at 405.

**B. Regardless of judicial support for arbitration, contract principles prevail against the enforcement of the Arbitration Provision against the Hayslips.**

Admittedly, arbitration is a preferred method of dispute resolution by the courts; however, only when the parties themselves have knowingly and voluntarily contractually agreed to arbitrate. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 351-52 (2011)(upholding an arbitration provision in a cellphone contract);

Perdido Key Island Resort Development, L.L.P. v. Regions Bank, 102 So. 3d 1, 3, 9 (Fla. 1st DCA 2012)(upholding an arbitration provision in a signed promissory note). Unlike the facts in AT&T Mobility and Perdido Key Island, the Hayslips did not contractually agree to arbitrate. See AT&T Mobility, 563 U.S. 333; Perdido Key, 102 So. 3d 1. Judicial preferences for arbitration do not permit the courts to manufacture, fictional contractual obligations to arbitrate when such obligations were never knowingly accepted and voluntarily undertaken.

In Seifert v. U.S. Home Corp., this Court made clear that "no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate." Seifert, 750 So. 2d at 636. U.S. Home's reliance on Perdido Key to support the judicial preference toward arbitration is misplaced. (A. at 14). Indeed, the Perdido Key Court quoted Seifert and stated: "Although arbitration is favored, as the Florida Supreme Court explained in Seifert v. U.S. Home Corp . . . 'no party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate.'" Perdido Key, 102 So. 3d at 3 (quoting Seifert, 750 So. 2d at 636). Notably, in Perdido Key, unlike the instant case, the parties contractually agreed to the arbitration provision through the signing of a promissory note that contained an arbitration provision. Perdido Key, 102 So. 3d at 2-3.

The United States Supreme Court, in Granite Rock Co. v. International Broth. of Teamsters, 561 U.S. 287, 299 (2010), stated that a federal policy favoring

arbitration had been overread from precedents and that arbitration is **"strictly 'a matter of consent.'"** (Emphasis added)(quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)). Additionally underscoring the contractual nature of arbitration provisions, the Granite Rock Court further stated: "As we have explained, this "policy" is merely an acknowledgement of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as *other contracts*.'" Id. at 302 (emphasis added) (quoting Volt, 489 U.S. at 478).

AT&T Mobility likewise confirmed that: **"Arbitration is a matter of contract** . . . ." 563 U.S. at 339 (emphasis added)(citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 69 (2010)). In Seaboard Coast Line R. Co. v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982), the Eleventh Circuit Court of Appeals similarly acknowledged that arbitration is a matter of contract:

> Although Federal policy requires us to resolve any doubt about the application of an arbitration clause in favor of arbitration, **the Federal policy cannot serve to stretch a contract beyond the scope originally intended by the parties**.

(Emphasis added)(citation omitted). The Hayslips should not be bound by contractual provisions to which they were not a party and to which the Hayslips never affirmatively, knowingly or voluntarily agreed. U.S. Home's contract with

the original purchasers of the Home should not be stretched to encompass, and impose restrictions and obligations on, non-contracting parties, such as the Hayslips or any subsequent purchaser of the Home. The trial court order compelling arbitration should be reversed, and this case should be remanded to proceed in state court.

## III. THE ARBITRATION PROVISION CONTAINED WITHIN THE ORIGINAL DEED DOES NOT BIND THE HAYSLIPS AS SUBSEQUENT PURCHASERS, BECAUSE THE ARBITRATION PROVISION IS MERELY A PERSONAL COVENANT AND NOT A REAL COVENANT.

A provision within a deed conveying real property can only be enforced against subsequent purchasers if the provision is a real covenant: a covenant that runs with the land. Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261, 264 (Fla. 4th DCA 2007)(quoting Alternative Networking, Inc. v. Solid Waste Authority of Palm Beach County, 758 So. 2d 1209, 1211 (Fla. 4th DCA 2000)). In contrast to real covenants, a personal covenant binds only the original covenanting parties. Id. In the instant case, the Arbitration Provision is merely a personal covenant, not a real covenant, and therefore, it does not bind the Hayslips.

U.S. Home contends that the Arbitration Provision is a real covenant, running with the land, relying upon Section G of the Original Deed between U.S. Home and the Kennisons to support this contention: "All covenants, conditions and restrictions contained in this Deed are equitable servitudes, perpetual and run with the land

including, without limitation, Sections H [Chapter 558, Florida Statutes], I [the Arbitration Provision], and J [Jury Trial Waiver]." (R. at 0174); (A. at 15). While this language demonstrates U.S. Home's *desire* to create a real covenant, the inclusion of this language does not *establish* such a covenant, as the requirements for a real covenant have not been met. See Winn-Dixie, 964 So. 2d at 265. Simply put, just because U.S. Home says it is so does not make it so.

To be a real covenant running with the land, the provision must: (1) **touch and concern** the land, (2) there must be an **intent** for it to run with the land, **and** (3) the party against whom it is to be enforced must have had **notice** of the restriction. See id. (identifying the first element as "touches and involves"); PGA North II of Florida, LLC v. Division of Admin., State of Florida Dept. of Transp., 126 So. 2d 1150, 1153 (Fla. 4th DCA 2012)("In order to establish a covenant that runs with the land, the following must be shown: the covenant touches and concerns the land; intent; and notice"); Maule Indus., Inc. v. Sheffield Steel Prods., Inc., 105 So. 2d 798, 801 (Fla. 4th DCA 1958)(stating that for a covenant to run with the land, *its performance* must "touch and concern" the land). If any of these three elements is missing, the provision is not a real covenant, and it does not run with the land.

### A. The Arbitration Provision in the instant case is not a real covenant, running with the land to bind the Hayslips as subsequent purchasers, because it does not "touch and concern" the land.

The Arbitration Provision also cannot be applied to the Hayslips because it is not a real covenant as it lacks the "touch and concern" element required for a covenant to run with the land. See Winn-Dixie, 964 So. 2d at 265 (stating for a covenant to run with the land, it must touch and involve the land); Maule Indus, 105 So. 2d at 801. If a covenant does not touch and concern the land, then it is not a real covenant running with the land to bind successors; it is merely a personal covenant. See 964 So. 2d at 165; 105 So. 2d at 801.

The distinction between a real covenant running with the land and a mere personal covenant has been addressed by multiple Florida courts:

> "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 . . . [the covenant's] performance must touch and concern the land or some right or easement annexed or appurtenant thereto . . . ."

Hagan v. Sabal Palms, Inc., 186 So. 2d 302, 310-11 (Fla. 2d DCA 1966) (quoting 14 Am. Jur. 2d *Covenants, Conditions and Restrictions*, § 20 (2020))(emphasis added); see also Maule Indus., 105 So. 2d at 801. In the instant case, the Arbitration Provision does not immediately concern the land. The Arbitration Provision does not restrict what can be done on, to or with the land or how one may enjoy the land.

Rather, the Arbitration Provision merely provides for the forum to pursue potential future claims for monetary damages related to the original construction of the Home on the land—a "collateral" concern. See Hagan, 186 So. 2d at 310.

In Winn-Dixie, the Fourth District Court of Appeal held that a covenant granting the exclusive right to sell groceries in a shopping plaza touched and concerned the land because it "'affects the mode of enjoyment of the premises.'" Winn-Dixie, 964 So. 2d at 265 (quoting Dunn, 16 Fla. at 771). In Dunn, the Court found that a covenant, which restricted the premises from being used as a public bar, ran with the land because it affected the "mode of enjoyment of the premises." 16 Fla. 765 at 771; see also Two Islands Development Corp. v. Clark, 239 So.3d 115, 126 (Fla. 3d DCA 2018)("A covenant running with the land must create an interest in the property itself and affect the mode and use or enjoyment of the premises").

Unlike the covenants in Winn-Dixie and Dunn, the Arbitration Provision in the instant case does not restrict one's activities on, or the way in which one uses the premises, or the "mode of enjoyment of the premises." Winn-Dixie, 964 So. 2d at 265; Dunn, 16 Fla. at 771. While covenants, such as land use and building restrictions, would clearly touch and concern the land, an arbitration provision does not possess a similar relation to or impact on the land. The Arbitration Provision does not touch and concern the land, and therefore, the Arbitration Provision does not run with the land.

Despite the evident differences between Winn-Dixie and Dunn and the instant case, the Second District Court of Appeal improperly likened the covenants in Winn-Dixie and Dunn to the Arbitration Provision in the instant case. (A. at 36-37). In an attempt to force a likeness between these dissimilar cases and force the proverbial square peg into the round hole, the Second District Court of Appeal in the instant case below stated:

> 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.

(A. at 37); Winn-Dixie, 964 So. 2d at 262; Dunn, 16 Fla. at 766. However, the Arbitration Provision in the instant case does not "impact" the Home; it only impacts the forum in which the homeowner may seek monetary damages. Not only did the Second District Court of Appeal below improperly twist the "occupation and enjoyment" analysis from Hagan, but it also failed to apply the entirety of the Hagan analysis to differentiate between real covenants and personal covenants. (A. at 37); see Hagan, 186 So. 2d at 310. For Hagan to be properly applied, the articulated rule must be considered as a whole: "'A 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, 186 So. 2d at 310 (emphasis added)(quoting Maule, 105 So. 2d at 801).

Applying the complete Hagan rule to the instant case, it becomes clear that the Arbitration Provision fits into the latter category—merely a personal covenant—as it is "not immediately concerned with the property granted," but rather, is "collateral" to the property. Id. In contrast, the covenants in Winn-Dixie and Dunn concerned what could and could not be done with the property conveyed. See Winn-Dixie, 964 So. 2d at 262; Dunn, 16 Fla. at 766. The Arbitration Provision in the instant case has nothing to do with what can and cannot be done with the Home going forward; it only purports to dictate the method of seeking recourse against the builder of the Home going forward. The Arbitration Provision does not touch or concern the land; it has no effect on the occupation or enjoyment of the land, and it does not immediately concern the land.

The instant case is similar to Caulk v. Orange County, 661 So. 2d 932 (Fla. 5th DCA 1995) and Suniland Associates, Ltd. v. Wilbenka, Inc., 656 So. 2d 1356 (Fla. 3d DCA 1995). The Second District Court of Appeal below suggested that the instant case differs from Caulk, because the covenant in Caulk did not include language indicating an intent for it to run with the land. (A. at 38-39). However, it

is the "touch and concern" element, *not* the "intent" element, which is of concern and which makes the instant case similar to Caulk. See Caulk, 661 So. 2d at 934. In Caulk, a dispute arose over the apportionment of a condemnation award for real property. Id. at 933. Caulk had conveyed land to Hibbard via a deed that included a provision that entitled Caulk to proceeds arising out of potential future condemnation. Id. When Orange County sought to condemn a portion of the property from a subsequent owner, Caulk claimed she was entitled to the condemnation proceeds based on the deed provision. Id. The Fifth District Court of Appeal held that the deed did not touch and concern the land, and reasoned as follows:

> Although the covenant 'concerns' the land, it does so only tangentially. *Unlike covenants respecting mineral rights and crops, for example, which directly impact the use of the land,* **the covenant in the instant case has no effect whatever on the land**. **The only thing the covenant in the instant case really 'touches' and 'concerns' is the intangible personal property, *namely cash***, that may be paid by a condemnor.

Id. at 934 (emphasis added). In Caulk, the covenant's mere tangential relation to the land was insufficient to find that it touched and concerned the land. Id. Similarly, the Arbitration Provision in the instant case does not affect the land. Rather, the Arbitration Provision seeks to govern the method of dispute resolution arising from the original construction conducted on the land—a tangential relationship to the land, at best. The covenant in Caulk touched and concerned intangible personal

property (*i.e.*, cash)—not the land. Id. at 934. In the instant case, the Arbitration Provision touches and concerns a method of dispute resolution—not the land.

In Suniland Associates, Ltd. v. Wilbenka, Inc., 656 So. 2d at 1359-59, the Third District Court of Appeal held that an agreement to assign rents and profits was not a covenant running with the land because it created no "interest in the property itself." Instead, the Suniland agreement created "mere contractual rights" that did not run with the land and therefore was not enforceable against the subsequent owner. Id. Again, in Florida, arbitration clauses are contractual in nature. See Seifert, 750 So. 2d at 636. Therefore, applying Suniland to the instant case, the Arbitration Provision is precluded from running with the land, as it creates mere contractual rights, establishing a personal covenant, not a real covenant. See Suniland, 656 So. 2d at 1358-59. Additionally, the Arbitration Provision in the instant case creates no interest in the land, itself, but merely provides a mechanism for dispute resolution and the seeking of monetary damages. See id.

Consistent with Caulk and Suniland, as well as the definitions of "touch and concern" provided in Winn-Dixie and Hagan, the Arbitration Provision in the instant case, does not touch and concern the land and therefore is not a real covenant, but rather a personal covenant. See Caulk, 661 So. 2d at 934; Suniland, 656 So. 2d at 1359; Winn-Dixie, 964 So.2d at 265; Hagan, 186 So. 2d at 310. Accordingly, the Arbitration Provision cannot bind the Hayslips, as subsequent purchasers.

**B. The Arbitration Provision in the instant case is not a real covenant, running with the land to bind the Hayslips as subsequent purchasers, because it does not tend to enhance the value of the land or render it more convenient or beneficial.**

In addition to touching and concerning the land, the performance of the covenant must "'tend necessarily to enhance its value or render it more convenient and beneficial to the owner or occupant.'" Hagan, 186 So. 2d at 311 (quoting Maule, 105 So. 2d at 801). The Second District in the instant case below noted that the Florida legislature has deemed alternative methods of dispute resolution to be beneficial and attempted to improperly stretch "beneficial to the legislature" into a satisfaction of the "beneficial to the owner" requirement. (A. at 37) (citing § 558.001, Fla. Stat.). That is a stretch way too far. It cannot be properly argued that there is essentially a legislative intent or preference for construction defect claims, like that involved in the instant case, to be arbitrated when the legislature itself did not include a mandatory, binding arbitration requirement in Chapter 558, Florida Statutes.

The Hayslips were already required to participate in the mandatory pre-suit process established by the Florida legislature under Chapter 558, Florida Statutes, prior to initiating this lawsuit against U.S. Home for monetary damages. See § 558.004, Fla. Stat. While an *option* to engage in alternative dispute resolution might be beneficial, the same cannot be said for an exclusive *mandate* to participate in binding alternative dispute resolution. It is clear, from their challenge to the

Arbitration Provision, that the Hayslips find the Arbitration Provision to be neither convenient nor beneficial. The Arbitration Provision fails the additional requirement of enhancing the land value or making it more beneficial or convenient as articulated in Hagan and Maule. Hagan, 186 So. 2d at 311; Maule, 105 So. 2d at 801.

## IV. CASE LAW FROM OTHER STATES REGARDING THE "TOUCH AND CONCERN" REQUIREMENT SHOULD NOT BE APPLIED TO THE INSTANT CASE.

Although the issue in this case is one of first impression in Florida, Florida case law *does* exist to guide and govern its ultimate resolution. See Hagan, 186 So. 2d at 310-11; Maule Industries, 105 So. 2d at 801; Dunn, 16 Fla. at 771; Winn-Dixie, 964 So. 2d at 265. In the Second District Court of Appeal, U.S. Home relied on case law from Oklahoma, Oregon and California. (R. at 0177-82); see Baker v. Conoco Pipeline Co., 280 F. Supp. 2d 1285 (N.D. Okla. 2003); Abbott v. Bob's U-Drive, 352 P.2d 598 (Or. 1960); Kelly v. Tri-Cities Broadcasting, Inc., 147 Cal. App. 3d 666 (1983). These out-of-state cases that found an arbitration provision ran with the land are directly inconsistent with both existing Florida case law and Florida public policy. In Powertel, Inc. v. Bexley, 743 So. 2d 570, 574 (Fla. 1st DCA 1999), the First District Court of Appeal held that "the validity of an arbitration clause is…an issue of **state** contract law." (Emphasis added). Accordingly, as the validity of an arbitration clause is at issue, the rules articulated in the Florida cases, not those of Oklahoma, Oregon or California, should govern the resolution of the instant case.

U.S. Home relies upon out-of-state case law to support its contention that the Arbitration Provision is a real covenant that runs with the land. However, Florida case law exists to guide the resolution of the ultimate issue. See Dunn, 16 Fla. at 771, Hagan, 186 So. 2d at 310-11, Winn-Dixie, 964 So. 2d at 265; Caulk, 661 So. 2d at 934; Suniland, 656 So. 2d at 1359; Maule Indus., 105 So. 2d at 801. Moreover, this existing Florida case law supports a finding that the Arbitration Provision in the instant case is merely a personal covenant, *not* a real covenant running with the land.

The Second District Court of Appeal in the instant case below, cited a federal trial court order from the Southern District of Illinois, 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), where an arbitration provision in a deed was found to bind successors. (A. at 39-40). Not only was the resolution of J&JB not based on Florida law, but the covenant involved in J&JB was distinctly different from the Arbitration Provision in the instant case. No. 14-cv-1318-SMY-RJD, 2017 WL 396174 at *1. In J&JB, the deed contained a provision that reserved the property's mineral rights to the original grantor. Id. This *same* provision also stated that the grantor would pay for damages caused by mineral extraction and that disputes over such damages would be resolved through arbitration. Id.

In J&JB, the Southern District of Illinois trial court found that the mineral reservations provision, which *included* the covenant to pay for damages to the

surface land from mineral excavation touched and concerned the land. Id. at *4. The federal trial court then stated: "The arbitration clause sets forth the procedure by which the damages referenced in the reservations will be determined. There is no basis for separating out or severing the arbitration clause from the reservations provision in fact or effect." Id. Rather than delving into an analysis of whether an arbitration provision touches and concerns land, the Illinois federal trial court in J&JB essentially allowed the arbitration clause to ride the coattails of the rest of the provision. Id. In the instant case, no such situation exists.

U.S. Home also relies on the Oregon case of Abbott v. Bob's U-Drive, 352 P.2d 598 (Or. 1960), which held, contrary to Florida law, that the arbitration provision in a lease touched and concerned the land because the underlying dispute over rental payments touched and concerned the land. (R. at 0177, 0179, 0181-82); Id. at 604. In Suniland, the Third District Court of Appeal held that a covenant regarding the assignment of rents and profits did *not* run with the land—evidencing a clear contrast between Florida and Oregon law, regarding covenants. See 656 So. 2d 1356. The court in Abbott focused on the underlying issue—the rental payment—rather than focusing on the actual covenant—the arbitration agreement. Abbott, 352 P.2d at 604.

Under Florida law, for a covenant to run with the land, the covenant itself must touch and concern the land. See Caulk, 661 So. 2d at 934 (citing Hagan, 186

So. 2d at 310) ("[T]he thing required to be done must be something which touches [the] land…."). When considering an arbitration provision, the "thing required to be done" is to arbitrate—a process that has nothing to do with the land and certainly does not touch and concern the land. See id. While Abbott focused on the underlying dispute, Florida law focuses on the act of arbitration itself, in determining whether the covenant to arbitrate touches and concerns the land. Abbott, 352 P.2d at 604; see Caulk, 661 So. 2d at 934. In Kelly, the California court relied on Abbott's improper rationale. See Kelly, 147 Cal. App. 3d at 679; Abbott 352 P.2d at 604. Abbott and Kelly are inconsistent with Florida law and should not be applied to the instant case. See Kelly, 147 Cal. App. 3d at 679; Abbott 352 P.2d at 604.

Relying on Baker v. Conoco Pipeline Co., 280 F. Supp. 2d 1285 (N.D. Okla. 2003), a federal trial court order from Oklahoma, U.S. Home asserted that both Oklahoma and Florida apply the same elements to determine whether a covenant runs with the land. (R. at 0179). However, the actual issue is the interpretation of those elements, specifically, the interpretation of "touch and concern."

In Baker, the federal trial court in Oklahoma held that an arbitration agreement in a recorded easement touched and concerned 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 1298 (citing Beattie v. State ex rel. Grand River Dam Authority, 41 P.3d 377, 388-89 (Okla.

2002) (Opala, J., concurring)). In the Beattie concurrence, Justice Opala, wrote that the "touch and concern" element requires a "logical connection between the benefit to be derived from enforcement of the covenant and the property." 41 P.3d at 388. The Baker holding was based on this broad definition of "touch and concern." 280 F. Supp. 2d at 1297.

In contrast, Florida case law contains much more narrowly tailored tests for "touch and concern." See Dunn, 16 Fla. at 771 (stating that for a covenant to run with the land, it must affect the "mode of enjoyment of the premises"); Winn-Dixie, 964 So. 2d at 265 (same); Hagan, 186 So. 2d at 310-11 (framing the "primary test" for whether a covenant runs with the land as "whether it concerns the thing granted and the occupation or enjoyment thereof or is a collateral or personal covenant not immediately concerning the thing granted"); Caulk, 661 So. 2d at 934 (finding that a covenant with a "tangential" relation to the land does not touch and concern the land); Suniland, 656 So. 2d at 1359 (holding that an agreement to assign rents and profits did not run with the land because it created no "interest in the property itself"); Maule Indus., 105 So. 2d at 801 (stating that a personal covenant has merely a collateral relation to the land, not immediately concerning the thing granted). When the rules from these Florida cases are viewed together, they provide that for a covenant to "touch and concern" the land, the covenant must create an interest in the property and affect the "mode of enjoyment of the premises," having not a mere

tangential or collateral relation to the land, but rather, immediately concerning the property. See Dunn, 16 Fla. at 771; Winn-Dixie, 964 So. 2d at 265; Hagan, 186 So. 2d at 310-11; Caulk, 661 So. 2d at 934; Suniland, 656 So. 2d at 1359; Maule Indus., 105 So. 2d at 801.

## V. MERE CONSTRUCTIVE NOTICE IS INSUFFICIENT TO BIND THE HAYSLIPS, AS SUBSEQUENT PURCHASERS, TO THE ARBITRATION PROVISION AS IT WOULD INFRINGE UPON CONSTITUTIONAL PROTECTIONS AND VIOLATE PUBLIC POLICY.

U.S. Home contends that the Hayslips had constructive notice of the Arbitration Provision because the Original Deed was recorded. (R. at 14, 17-18). However, permitting constructive notice to be sufficient to bind subsequent purchasers to an arbitration provision would infringe upon constitutional protections and violate public policy. While constructive notice might be sufficient to bind subsequent purchasers to certain covenants in deeds, an arbitration provision is unique, in that it acts as a waiver of Florida Constitutional rights, including the right of access to the courts and the right to a trial by jury. See Hagan, 186 So. 2d 302, 311 (Fla. 2d DCA 1966)(stating that a property owner must have either actual or constructive notice to be bound by a restrictive covenant); Terminix Intern. Vo., LP v. Ponzio, 693 So. 2d 104, 109 (Fla. 5th DCA 1997)(holding that consent to arbitration is a waiver of the Florida right to jury trial and right to access to courts); Art. I, §§ 21-22, Fla. Const.

The Hagan covenant, that restricted the construction on a certain piece of land to only residential buildings, was notably different than the Arbitration Provision in the instant case. Hagan, 186 at 306. Unlike the covenant in Hagan, the Arbitration Provision in the instant case infringes upon constitutionally protected rights and does not "touch and concern the land." See Art. I, §§ 21-22, Fla. Const.; Winn-Dixie, 964 So. 2d at 265; Maule, 105 So. 2d at 801. The unique nature of an arbitration provision warrants a unique approach to the notice that is required for it to run with the land—requiring *actual*, not constructive, notice. See Hagan, 186 So. 2d at 311.

Additionally, the significant burden that is created by an arbitration provision within a property's original deed warrants more than constructive notice. Theoretically, the fifth, or even the fifteenth homeowner in a long line of subsequent purchasers could have unknowingly waived their access to courts through the simple act of purchasing their home. Enforcing an arbitration provision, like the Arbitration Provision in the instant case, would effectively create a requirement that each potential purchaser must now personally perform a title search and review and analyze the language in each and every deed within the property's chain of title, including the initial, original deed, in order to determine whether their constitutional rights were already previously waived years earlier by unknown third parties with whom the potential purchasers had no privity. Art. I, §§ 21-22, Fla. Const.

The burden that this could have on title insurance companies, mortgage companies and property insurance companies would be onerous and placing such a burden on the average homebuyer would be contrary to public policy. Constructive notice is insufficient. A provision that places such a burden on home purchasers and restricts their Constitutionally protected rights of access to courts and a trial by jury should require *actual* notice and affirmative, voluntary, knowing, informed consent.

## VI. BINDING SUBSEQUENT PURCHASERS TO AN ARBITRATION PROVISION TO WHICH THEY DID NOT CONTRACTUALLY AGREE IS CONTRARY TO THE FLORIDA CONSTITUTION.

### A. Enforcing the Arbitration Provision against the Hayslips as subsequent purchasers would violate their Florida Constitutional rights of access to the courts and the right to a jury trial.

The Florida Constitution's right of access to the courts, as well as the right to a trial by jury, serve as significant considerations in the instant case, specifically in the context of public policy concerns. Art. I, §§ 21-22, Fla. Const. In Seifert, another case involving U.S. Home, this Court emphasized these constitutional concerns regarding arbitration. See Seifert, 750 So. 2d at 642. Upon holding that certain claims fell outside the scope of a contract's arbitration provision, this Court stated:

> **Moreover, public policy also supports the result we reach in this case . . . to require petitioner to submit her tort claim to binding arbitration would deprive her of her rights to a trial by jury, due process, and access to the courts . . . "It is wrong to stretch contractual interpretations to uphold a purported arbitration agreement where such an agreement would waive constitutional rights." Neither the statutes validating**

> **arbitration clauses nor the policy favoring such provisions should be used a shield to block a party's access to a judicial forum in every case . . . We do not think that the legislature in enacting section 682.02 Florida Statutes (1999), nor the courts in adopting any general policy favoring arbitration, intended such a result.**

Id. (emphasis added)(citation omitted)(quoting Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 Tul. L. Rev. 1, 48 (1997)*). The significant public policy concerns implicated in the instant case overshadow any preference that the courts may place on arbitration. 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**….")(emphasis added)(quoting Hagan, 186 So. 2d at 308-09)). To bind all subsequent purchasers to an arbitration provision contained in a property's original deed would effectively deprive countless Floridians of their Constitutional rights to a trial by jury, due process, and access to the courts, in violation of the Florida and United States Constitutions. See id.; Amend. XIV, U.S. Const.; Art. I, §§ 21-22, Fla. Const.

The Florida Constitution provides: "The Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or

delay." Art. I, § 21, Fla. Const. Binding subsequent homeowners to an arbitration provision in the home's original deed would improperly infringe upon Floridians' constitutionally protected right of access to the courts by eliminating their ability to bring suit through the courts.

Moreover, agreeing to arbitrate is a waiver of one's constitutionally guaranteed right to a jury trial. Art. I, § 22, Fla. Const. Section J of the Deed provides, in part, "GRANTEE AND GRANTOR HEREBY WAIVE THEIR RESPECTIVE RIGHT TO A JURY TRIAL." (A. at 5). Notably, the language of the Original Deed purports to waive the right to a jury trial not only on behalf of the Kennisons, but also on behalf of subsequent purchasers, such as the Hayslips, as well. Id. Additionally, this attempt to waive subsequent purchasers' right to a jury trial should be deemed invalid, ineffective and unenforceable. See Allyn v. Western United Life Assur. Co., 347 F. Supp. 2d 1246, 1251 (M.D. Fla. 2004); Tucker v. State, 559 So. 2d 218, 219 (Fla. 1990).

In Florida, the right to a jury trial can be contractually waived. See Fla. R. Civ. P. 1.430(d); see also Vista Centre Venture v. Unlike Anything, Inc., 603 So. 2d 576, 578 (Fla. 5th DCA 1992) ("Waivers of the right to jury trial by contract are enforceable and will be upheld"). However, both Florida and federal case law provide instruction on determining the validity of such a waiver. In Tucker v. State, this Court stated: "An effective waiver of a constitutional right must be voluntary,

knowing, and intelligent." 559 So. 2d at 219. The Allyn Court also stated that "it must be shown that the waiver was assented to knowingly, voluntarily, and intelligently." Allyn, 347 F. Supp. 2d at 1251. Allyn further provided factors to consider when determining whether the waiver was entered "knowingly, voluntarily and intelligently," including the conspicuousness of the provision, the sophistication of the parties, the opportunity to negotiate, the bargaining power of each party, and whether the waiving party had legal representation. Id. at 1252. Here, the Hayslips were never a party to a contract with U.S. Home. Accordingly, there is no conceivable way that the Hayslips could have knowingly, voluntarily, and intelligently contracted with U.S. Home to waive their right to a jury trial. If it is contended that the Hayslips' purchase of the Home constituted this contractual waiver, this would also be invalid, based on the factors enumerated by Allyn. Id. The Hayslips had no opportunity to negotiate, nor any relationship with U.S. Home at the time the Original Deed was executed. (A. at 6). Additionally, even if the Hayslips had known about the Arbitration Provision, the Hayslips had no bargaining power to alter the Original Deed.

In Ginsberg v. Silversea Cruises Ltd., No. 03-62141-Civ, 2004 WL 3656827, at *1 (S.D. Fla. Mar. 18, 2004), the Southern District Court of Florida stated: "The Seventh Amendment right to a jury trial is fundamental and can only be relinquished knowingly and intentionally. **A presumption exists against waiving the right to**

**a jury trial.** Because waiver of this right implicates constitutionally-protected interests, the burden of proving that a waiver was knowing and intentional rests with the party attempting to enforce the purported waiver." (Emphasis added). Based on the Hayslips' lack of contractual assent to waive their right to a jury trial, it is clear that the Hayslips did not waive their jury trial right via consent to arbitration. See Allyn, 347 F. Supp. 2d at 1251; Tucker v. State, 559 So. 2d at 219; Ginsberg, 2004 WL 3656827, at *1.

### B. Florida has consistently recognized the importance of the right of access to the courts and the right to a jury trial.

Florida courts have consistently upheld and emphasized the importance of Floridians' right of access to the courts and to a civil jury trial. "Waiver of the right to a jury trial is to be strictly construed and not to be lightly inferred." Boston Rug Galleries, Inc. v. William Iselin & Co., 212 So. 2d 58, 61 (Fla. 4th DCA 1968) (citing Loiselle v. Gladfelter, 160 So. 2d 740, 742 (Fla. 3d DCA 1964)). In Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65, 71 (Fla. 1975), this Court stated: "Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions." See Amend. VII, U.S. Const.; Amend. XIV, U.S. Const.; Art. I, § 22, Fla. Const.

Similarly, in Terminix Intern. Vo., LP v. Ponzio, 693 So. 2d at 109, the Fifth District Court of Appeal held that a jury trial waiver can be implied when a party

agrees to arbitrate, however, the Hayslips did *not* agree to arbitrate. It would be improper to infer the Haylsips' waiver of the right to a jury trial from their act of purchasing a home, merely based upon the Arbitration Provision in the Original Deed, as it would improperly deny a Constitutional guarantee, the importance of which Florida courts have consistently upheld. See Boston Rug, 212 So. 2d at 61; Hollywood, Inc., 321 So. 2d at 71.

## VII. ENFORCEMENT OF THE ARBITRATION PROVISION IN THE ORIGINAL DEED AGAINST THE HAYSLIPS AS SUBSEQUENT PURCHASERS WOULD IMPLICATE SIGNIFICANT PUBLIC POLICY CONCERNS.

### A. To enforce the Arbitration Provision against the Hayslips as subsequent purchasers, would limit their avenues for redress in violation of public policy.

In Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 459 (Fla. 2011), a case that dealt with an arbitration provision that limited remedies by a patient against a nursing home, this Court held: "In light of the recognized need for these remedies and the salutary purpose they serve, we conclude that any arbitration agreement that substantially diminishes or circumvents these remedies stands in violation of the public policy of the State of Florida and is unenforceable." Shotts further underscores the importance that Florida places on ensuring full access to the courts for redress. Shotts, and similar cases, specifically dealt with public policy concerns regarding arbitration provisions enforced in the context of nursing home claims because of the importance that Florida places on redress for nursing home issues.

See Shotts, 86 So. 3d at 459; see also Lacey v. Healthcare and Retirement Corp. of America, 918 So. 2d 333, 334-35 (Fla. 4th DCA 2005) (holding that an arbitration provision in a nursing home agreement that contained a $250,000 cap on non-economic damages and a waiver of punitive damages, was unenforceable); Romano v. Manor Care, Inc., 861 So. 2d 59, 61-64 (Fla. 4th DCA 2003) (holding that an arbitration provision in a nursing home agreement that limited depositions to experts only, stipulated that the arbitrator be a former judge, provided that neither party was entitled to attorneys' fees, excluded punitive damages and limited noneconomic damages to $250,000, was unenforceable).

Like the plight of Florida's elderly population confined to residential nursing homes, construction defect issues in Florida raise public policy concerns for the citizens of the state who are confined to reside in defectively constructed homes despite having invested their life savings. Florida is riddled with defective construction issues, particularly defective stucco. See WTSP Staff, *Florida's billion-dollar stucco problem*, WTSP (June 25, 2015), https://www.wtsp.com/article/news/investigations/floridas-billion-dollar-stucco-problem/67-236457939. Just as Florida has a public policy interest in ensuring that its older population has access to courts for claims against nursing homes, Florida also has a significant interest in protecting the rights of citizens whose homes are afflicted with these defective construction issues. See id. In addition to upholding

the Constitutional rights of Florida citizens, ensuring access to courts and a jury trial, finding the Arbitration Provision unenforceable would also provide the opportunity for greater public attention on construction issues within our state's court system, alerting future homebuyers to this serious concern, rather than sweeping the problem under the rug and allowing home builders to universally hide in a private arbitration proceeding, outside the view of the consuming public. See id.

Public policy concerns regarding arbitration clauses have been specifically addressed in other Florida cases, as well. See Global Travel Marketing, Inc. v. Shea, 908 So.2d 392 (Fla. 2005); Anderson v. Taylor Morrison of Florida, Inc., 223 So. 3d 1088 (Fla. 2d DCA 2017). In Global Travel, this Court stated: "No valid agreement exists if the arbitration clause is unenforceable on public policy grounds." Global Travel, 908 So.2d at 398. In Anderson, the Second District Court of Appeal addressed public policy concerns with arbitration provisions specifically limiting claims under section 553.84, Florida Statutes, the very statute under which the Hayslips are seeking access to the courts for relief in the instant case. The Anderson court stated:

> An arbitration agreement is unenforceable for public policy reasons when it defeats the remedial purpose of a statute or prohibits the plaintiff from obtaining meaningful relief under the statutory scheme . . . Section 553.84 is a remedial statute because it provides for relief for a person whose home has been built in violation of the building code, "[n]otwithstanding any other remedies available."

Anderson, 223 So. 3d at 1091 (citing S.D.S. Autos, Inc. v. Chrzanowski, 976 So. 2d 600, 606 (Fla. 1st DCA 2007) (quoting § 553.84, Fla. Stat.). In Anderson, the arbitration provision, contained in a warranty, mandated arbitration for all claims covered under warranty and essentially barred those not covered by the warranty. Anderson, 223 So. 3d at 1089. Despite the Andersons' consent to this provision, through their signing of an acknowledgement that they received and agreed to the warranty, the Second District Court of Appeal still found it to be void as against public policy. Id. at 1092.

In the instant case, the Arbitration Provision, as written by U.S. Home and inserted into the Original Deed, mandates arbitration for all claims from the date of the Original Deed until the end of time, or any applicable statute of limitations, whichever comes first. (A. at 4). The Hayslips, unlike the Andersons, never consented to the Arbitration Provision, therefore making the Arbitration Provision in the instant case even more egregious than the one voided by the court in Anderson. 223 So. 3d at 1089.

**B. Unconscionability**

Arbitration agreements are contractual in nature and, as such, are governed by contract principles. See Seifert, 750 So. 2d at 636. In Florida Holdings III, LLC v. Duerst, 198 So. 3d 834, 838 (Fla. 2d DCA 2016), the Second District Court of Appeal stated:

> Arbitration is a matter of contract, and agreements to arbitrate are thus subject to state law defenses to the enforcement of contracts. One such defense is the doctrine of unconscionability, which "has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."

(citation omitted)(quoting Basulto v. Hialeah Auto., 141 So.3d 1145, 1157 (Fla. 2014)). To establish unconscionability, the agreement must have been both procedurally and substantively unconscionable. See Tampa HCP, LLC v. Bachor, 72 So. 3d 323, 326 (Fla. 2d DCA 2011)("To succeed in an unconscionability argument, both procedural and substantive unconscionability must be shown") (citing Bland, ex rel. Coker v. Health Care & Ret. Corp of Am., 927 So. 2d 252, 256 (Fla. 2d DCA 2006)).

The court in Gainesville Health Care Center, Inc. v. Weston, 857 So. 2d 278, 284 (Fla. 1st DCA 2003), provided guidance in determining whether a contract is procedurally unconscionable:

> [A] court must look to the "circumstances surrounding the transaction" to determine **whether the complaining party had a "meaningful choice" at the time the contract was entered**. Among the factors to be considered are **whether the complaining party had a realistic opportunity to bargain regarding the terms of the contract**, or whether the terms were merely presented on a "take-it-or-leave-it" basis; and **whether he or she had a reasonable opportunity to understand the terms of the contract**.

(Emphasis added) (citation omitted) (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)). If the Arbitration Provision were to be enforced, the "parties" to the purported contract would be U.S. Home and the Hayslips. Therefore, to determine whether there was procedural unconscionability, the question is whether the Hayslips (the "complaining party") had a meaningful choice regarding the Arbitration Provision when the Hayslips purchased the Home. See Gainesville Health, 857 So. 2d at 284. The answer would be, "No," as the Hayslips had no choice regarding any provision, including the Arbitration Provision, contained in any previous deed, including the Original Deed, to which the Hayslips were not a party.

In Woebse v. Health Care and Retirement Corp of America, 977 So. 2d 630, 633-34 (Fla. 2d DCA 2008), the Second District Court of Appeal found an arbitration provision in a nursing home admission agreement to be procedurally unconscionable. In Woebse, Ms. Wright was presented with a physical agreement that contained the arbitration provision and signed the admission agreement to admit her father into the nursing home. Id. Despite Ms. Wright signing the admission agreement, Woebse found that there was procedural unconscionability, as the existence of the arbitration provision was not made known to or explained to Ms. Wright prior to her signing the admission agreement. Id.

Unlike Ms. Wright in Woebse, in the instant case, the Hayslips were not even provided with the Original Deed, nor were the Hayslips informed of the existence of the Arbitration Provision contained within the Original Deed. Additionally, the Hayslips had no interactions or relationship with U.S. Home and, thus, no "opportunity to bargain" with U.S Home. Gainesville Health, 857 So. 2d at 284. The complete lack of any information conveyed to the Hayslips, regarding the Arbitration Provision, compounded by the absence of any meaningful choice by the Hayslips, regarding the Arbitration Provision, created a circumstance of significant procedural unconscionability. See id; Woebse, 977 So. 2d at 633-34.

A contract is substantively unconscionable if the "terms are so 'outrageously unfair' as to 'shock the judicial conscience.'" Woebse, 977 So. 2d at 632 (quoting Gainesville Health, 857 So. 2d at 285). In the instant case, substantive unconscionability is established given the attempt to eliminate the Hayslips' access to courts and a jury trial, two constitutionally protected rights. Art. I, §§ 21-22, Fla. Const. This Court has held that procedural unconscionability and substantive unconscionability are often intertwined and, therefore, a "sliding scale" approach is the preferred and prevailing view in Florida. Basulto v. Hialeah Auto., 141 So. 3d at 1159. The sliding scale approach provides that substantive and procedural unconscionability need not be present to the same degree. Id. To constitute overall unconscionability, the more that a contract is procedurally unconscionable, the less

substantive unconscionability must be present, and *vice versa*. Id. (citing Romano, 861 So. 2d at 62).

In the instant case, given the significant amount of procedural unconscionability, the substantive unconscionability need only be moderately present. Surely, in the instant case, the denial of rights to the Hayslips provided by the Florida Constitution rises to the level required to satisfy substantive unconscionability, especially given the considerable extent of procedural unconscionability present. See Basulto, 141 So. 3d 1145. As both procedural and substantive unconscionability are present in the instant case, the Arbitration Provision, as it relates to the Hayslips, is unconscionable.

### C. Binding subsequent homeowners to the Arbitration Provision within the Original Deed is paving the beginning of a slippery slope.

If the Court were to determine that the Arbitration Provision "touches and concerns" the land, it would eviscerate the definition of "touch and concern" beyond all conceivably reasonable bounds and pave the way for an unlimited type and number of provisions to clutter deeds and burden property owners and real estate professionals throughout the entire state of Florida. To extend the scope of touch and concern in such a manner would grease the road to a very slippery slope. If the Court were to find that the Arbitration Provision "touches and concerns" the land, there would be no limit as to what types of covenants "touch and concern" the land.

The "touch and concern" requirement for a covenant to run with the land would be rendered meaningless and become a legal nullity.

In this same regard, U.S. Home's effort to enforce the Arbitration Provision against the Hayslips is not U.S. Home's only attempt to bind the Hayslips to a contract to which the Hayslips did not agree by way of the Original Deed. U.S. Home also included a provision within the Original Deed regarding the shifting of attorneys' fees. Section I(5) of the Original Deed (the "Attorneys' Fee Provision") provides:

> 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.

(A. at 5)(emphasis added). Indeed, in an attempt to enforce this Attorneys' Fee Provision against the Hayslips, U.S. Home filed a Motion to Tax Attorneys' Fees and Costs on October 18, 2017. (R. at 0202).

However, in Florida, it is well-settled that a party cannot recover attorney's fees from another party, unless it is either provided for by statute or contract. See Prince v. Tyler, 890 So. 2d 246, 251 (Fla. 2004)("'[A]ttorney's fees incurred while prosecuting or defending a claim are not recoverable in the absence of a statute or **contractual** agreement authorizing their recovery'")(emphasis added)(quoting Bidon v. Department of Professional Regulation, Florida Real Estate Com'n, 596 So. 2d 450, 452 (Fla. 1992)); Pepper's Steel & Alloys, Inc. v. U.S., 850 So. 2d 462, 465 (Fla. 2003)("Under Florida law, each party generally bears its own attorneys' fees unless a **contract** or statute provides otherwise") (emphasis added); see also § 57.105(7), Fla. Stat. U.S. Home's inclusion of this Attorneys' Fee Provision in the Original Deed is yet another example of U.S. Home's improper attempt to bind the Hayslips, as subsequent purchasers, to a contract to which the Hayslips did not agree.

If U.S. Home's "touch and concern" argument were to prevail, anything and everything slipped into a deed at the whim of a grantor, would bind not only the grantee in the deed, but also bind every subsequent purchaser of the property. That should not be the law in Florida.

## CONCLUSION

For all of the aforementioned reasons, the Court should hold that the Arbitration Provision contained within the Original Deed did not create a valid written agreement to arbitrate between the Hayslips and U.S. Home. The Court should further hold that the Arbitration Provision is a personal covenant and not a real covenant because it does not touch and concern the land, and therefore, the Arbitration Provision does not run with the land, and is not binding on the Hayslips as subsequent purchasers. The Court should disapprove the decision of the Second District Court of Appeal, reverse the trial court's order compelling arbitration, and remand for this action to proceed in state court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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