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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000889

Case No. 2017-CP-40-03697

Opinion No. 5916 (S.C. Ct. App. Refiled February 15, 2023)

Amanda Leigh Huskins and Jay R. Huskins, ... Appellants,

v.

Mungo Homes, LLC, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on February 15, 2023. The Court of Appeals withdrew its opinion filed on June 1, 2022, and substituted and refiled it on February 15, 2023.

QUESTIONS PRESENTED FOR REVIEW

1. In a contract of adhesion involving the sale of a new home that contains an arbitration clause with an unconscionable, material term, drastically limiting the time in which the homebuyer can bring a claim for relief, and fails to include a severability clause to save the remainder, did the Court of Appeals err in disregarding this Court's refusal to sever the unconscionable term and enforce the remainder under the same circumstances in *Smith v. D.R. Horton*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6 (2016), and instead expand the scope and application of two statutory laws, one relating to contracts subject to the Uniform Commercial Code and the other providing for a three-year statute of limitations in contract actions, so as to allegedly give the Court of Appeals the authority to sever the unconscionable term in the arbitration clause and save the remainder in this particular context?

2. In a contract of adhesion involving the sale of a new home that contains an arbitration clause including an unconscionable, material term, and no severance clause, did the Court of Appeals violate the public policy of this state and the Court's decision in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E2d 746 (2022), by severing the unconscionable, material term to enforce the remainder?

STATEMENT OF THE CASE

At its core, this case involves protecting the rights of purchasers of new residential construction with respect to the most fundamental warranty extended upon the sale a new

home—the warranty of habitability. Like many large, volume builders, Respondent Mungo Homes, LLC ("Mungo") disclaims this warranty of habitability within its proprietary purchase contract. Mungo further takes advantage of its superior sophistication and bargaining power by disclaiming the fundamental warranty of habitability without providing its new home purchasers the opportunity to receive a separately bargained-for benefit for this disclaimer.[1]

Mungo's proprietary new home purchase agreement seeks to have all disputes with its purchasers resolved through arbitration. The unconscionable term in the arbitration clause at issue here drastically limited to ninety days the time in which new home buyers could bring claims for relief under the contract, when in fact new home buyers are afforded three years to assert contractual claims under South Carolina statutory law.

The questions presented in this Petition relate to the Court of Appeals' decision to sever an unconscionable, material term in the arbitration clause to save the remainder when the new home buyer agreement contains no provision to sever. The Court of Appeals severed such unconscionable, material term despite the fact that Mungo, the drafter of the agreement, failed to include any provision to sever, and that this Court refused to sever unconscionable terms in an arbitration agreement to save the remainder where there was no severance clause in *Smith v. D.R. Horton*.

For authority to sever in this context, moreover, the Court of Appeals erroneously expanded the scope and application of two statutory laws, one relating to contracts under the South Carolina Uniform Commercial Code and the other providing for a three-year statute of limitations in contract actions. The Court of Appeals' judicial activism in this regard expands

[1] In commenting on similar contractual provisions in the purchase agreement of Lennar Carolinas, this Court characterized such provisions as "absurd, factually incorrect, and grossly oppressive." *Damico v. Lennar Carolinas,* 437 S.C. 596, 617, 879 S.E.2d 746, 758 (2022).

the application of these statutory laws well beyond their plain language or the purpose of their enactment. The Court of Appeals' decision suggests that parties to a common law contract, falling outside the Uniform Commercial Code (UCC), may now look to the UCC for authority in interpreting contract terms and resolving contractual disputes. Bootstrapping these statutes in this manner has never been recognized as appropriate by this Court, or any other court for that matter. Nor would it be wise for the Court to condone such expansive application of those statutes in this manner, as it would upend the body of law that has been applied to the common law of contracts to date.

The Court of Appeals severed the unconscionable term to save the remainder, moreover, despite the Court's refusal to sever a similarly material and unconscionable term in an arbitration provision in a contract of adhesion in home buyer contract, in *Damico v. Lennar Carolinas*. Even though the home purchase agreement in *Damico* provided a severability clause too, the Court in *Damico* refused to apply the severance clause to save the arbitration clause as a matter of public policy in the home purchase context. 437 S.C. at 621-22, 879 S.E.2d at 760-61. South Carolina has a "deeply-rooted and long-standing policy of protecting new homebuyers." 437 S.C. at 621, 879 S.E.2d at 760.

On June 14, 2017, Petitioners commenced this action by filing a Complaint in the Richland County Court of Common Pleas. (R. pp. 21-38.) The Complaint asserted several causes of action against the Defendant-Respondent Mungo including causes of action for monetary and injunctive relief. (*Id.*) On July 17, 2017, Mungo filed a Motion to Dismiss and to Compel Arbitration. (R. pp. 66-70.) On March 13, 2018, the Circuit Court granted Mungo's Motion to Dismiss based upon the existence of a contractual arbitration agreement. (R. pp. 1-14.)

On May 11, 2018, Petitioners filed a Notice of Appeal. Oral arguments were heard before the Court of Appeals on May 5, 2021. The Court of Appeals issued its initial decision on June 1, 2022, affirming the ruling of the Circuit Court with modifications. The primary holding of the Court of Appeals was to sever unconscionable provisions contained within the arbitration clause of Mungo's proprietary new home purchase contract and to enforce the arbitration clause against new home buyers, the Huskins.

On June 15, 2022, Petitioners filed a Petition for Rehearing. During the pendency of this petition, this Court issued its opinion in *Damico v. Lennar Carolinas*. Pursuant to Rule 208(b)(7), SCACR, Petitioners supplemented their petition by notifying the Court of Appeals of the *Damico* opinion. On February 15, 2023, the Court of Appeals withdrew its prior opinion and issued a new opinion clarifying its decision to sever the unconscionable provisions contained in the arbitration clause and enforce the remainder of the clause by compelling arbitration. *Amanda Leigh Huskins and Jay R. Huskins v. Mungo Homes, LLC*, Opinion No. 5916 (S.C. Ct. App. Refiled Feb. 15, 2023) (Howard Adv. Sh. No. 7 at 36). Petitioners seek a Writ of Certiorari to review the Court of Appeals' Opinion.

ARGUMENT

I. IN THIS ADHESION CONTRACT INVOLVING THE PURCHASE OF A NEW HOME, WHERE THE CONTRACT LACKS A SEVERABILITY CLAUSE, THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN SEVERING THE UNCONSCIONABLE, MATERIAL TERM OF THE ARBITRATION CLAUSE TO SAVE THE REMAINDER, UNDER THE COURT'S HOLDING IN *SMITH V. D.R. HORTON*. THE COURT FURTHER ERRED IN TURNING TO THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE AND THE APPLICABLE SOUTH CAROLINA STATUTE OF LIMITATIONS FOR AUTHORITY TO DO SO IN THIS NEW HOME BUYER PURCHASE AGREEMENT. THE EFFECT OF THESE ERRORS WAS TO REWRITE, WITHOUT AUTHORITY AND AGAINST PUBLIC POLICY, THIS CONTRACT OF ADHESION IN FAVOR OF THE MORE SOPHISTICATED PARTY, MUNGO, AND TO THE DETRIMENT OF A SOUTH CAROLINA HOMEBUYER.

The Court should grant this Petition because the Court of Appeals' Opinion conflicts with this Court's ruling in *Smith v. D.R. Horton*, where the Court refused to sever an unconscionable term from an arbitration clause in a contract of adhesion related to the purchase of a new home where the contract lacked a severability clause. The Court of Appeals' Opinion also conflicts with the Court's holding in *Damico v. Lennar*, where the Court refused to enforce a severability clause in a contract of adhesion related to the purchase of a new home to sever an unconscionable term in an arbitration clause in a homebuyer agreement. The Court of Appeals' Opinion also erroneously expands the scope and application of two statutes, one found in the South Carolina Uniform Commercial Code and the other providing for the three-year statute of limitations in contract cases, to purportedly give itself the authority and discretion to sever the unconscionable term in Mungo's arbitration clause to save the remainder.

The Court of Appeals correctly found that the purchase agreement, including the arbitration agreement, was a contract of adhesion because "the Huskies lacked a meaningful choice in entering the agreement to arbitrate." (Opinion at p. 9, "a. Absence of Meaningful Choice.") The Court of Appeals also correctly found that the final two sentences of Mungo's arbitration clause shortening the statutory limitations period from three years to ninety days was unconscionable. (Opinion at p. 9, "b. Oppressive and One-Sided Terms") (stating the provision would disproportionately affect the homebuyer's ability to bring a claim and that the sentences were "not geared toward achieving an unbiased decision by a neutral decision maker" (internal quotation marks omitted)) However, the Court of Appeals then went on to ignore this Court's holding in *D.R. Horton*, refusing to sever such unconscionable term under the same circumstances where there was no severability clause, and instead "conclude[d] that sections 15-3-140 and 36-2-302(1) operate to sever this portion of the Arbitration Clause." (Opinion at pp.

10-11.) The effect of the Court of Appeals' decision to sever the offending provisions of the Mungo arbitration clause to enforce the remainder under Sections 36-3-201(1) and 15-3-140 was to expand the reach of those statutes well beyond their scope and intent, and unjustly rewrite the arbitration clause in this contract of adhesion against the public policy of this State.

First, Section 36-2-302(1), contained within Chapter 2 of South Carolina's Uniform Commercial Code, applies to contracts for the sale of goods and not to the sale of new homes affixed to the realty in which it is sold. S.C. Code Ann. § 36-2-102 ("[T]his Chapter applies to transactions in goods . . . ."); § 36-2-105 (defining "goods" as "all things . . . which are movable at the time of identification to the contract to sale" and also includes "unborn young animal and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty"); § 36-2-107 (excluding only those items to be "severed" from the realty).

The contract at issue in this matter is a residential real estate sales contract in which Mungo sold the Huskins a completed new home affixed to the property on which it was situated. (R. pp. 28-30, Purchase Agreement (see "PROPERTY" and "Miscellaneous (k)"). Mungo's Purchase Agreement therefore falls outside the Uniform Commercial Code's scope, and the Court of Appeals erred in relying upon section 36-2-302(1) as authority to support severing the offending provisions of the arbitration clause in this case. *See also Conran v. Yager*, 263 S.C. 417, 421-22, 211 S.E.2d 228, 229 (1975) ("Article 2 of the Uniform Commercial Code is inapplicable to real estate sales"); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 504, 229 S.E.2d 728, 731 (1976) (noting UCC does not apply to sale of buildings); *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 565, 658 S.E.2d 80, 91 (2008) ("In our view, a general contractor building a home performs a service and does not sell a product."). In sum, the Court of Appeals

recognized that Article 2 of the UCC does not apply to real estate sales, yet somehow still specifically relied on § 36-2-302(1) as the basis of its authority to blue-pencil the home purchase agreement at issue in this case and save Mungo's offensive arbitration clause. (Opinion at p. 10, n.5.)

The Court of Appeals noted in footnote 5 of its substituted Opinion that "our supreme court recently cited section 36-2-302 for the proposition that unconscionable provisions could be severed in a residential home agreement context" citing to this Court's opinion in *Damico v. Lennar Carolinas.* It is not appropriate to read this Court's opinion in *Damico* as holding that section 36-2-302(1) provides authority to sever an unconscionable term in an arbitration clause in a contract of adhesion in the home buyer context when the drafter of the contract did not provide a severability clause. The Court in *Damico* in no way held that section 36-2-302 should be applied in such an expansive manner. First, this issue was not even before the Court in *Damico,* where the Court decided whether to enforce a severability clause that was set forth in the parties' contract of adhesion and strike the unconscionable term in the arbitration clause to save the remainder. The Court in *Damico* only referred to section 36-2-302 as an example of circumstances where courts have exercised the authority to refuse to enforce a contract clause or limit the application of the unconscionable clause so as to avoid any possible unconscionable result. *Damico,* 437 S.C. at 618, 879 S.E.2d at 758. By reference to section 36-2-302 in this way, the Court in *Damico* in no way suggested that courts may now turn to this statute for authority to sever provisions in a parties' common law contract, falling outside the Uniform Commercial Code. It was error of law for the Court of Appeals to read this Court's reference to Section 36-2-302 in this way and this Court should correct such error. Certainly, this Court does not want parties to turn to the South Carolina Uniform Commercial Code for authority as to how

to interpret non-UCC contracts. Such bootstrapping of the UCC statute onto non-UCC contracts would turn the common law of contracts on its head.

The Court of Appeals further relied upon Section 15-3-140 of the South Carolina Code as authority for its decision to sever the unconscionable provisions of the arbitration clause. Section 15-3-140 of the South Carolina Code (2005) provides:

> No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

Plainly, Section 15-3-140 does not provide the court any authority to sever an unconscionable term in an arbitration clause in a contract of adhesion in the new homebuyer context. The Court of Appeals stated instead that Section 15-3-140 "essentially instructs us to ignore the developer's attempt to shorten the limitations period." (Opinion at p. 11, Note 6.) While Section 15-3-140 might act to render unenforceable Mungo's unconscionable provision shortening the time to assert claims, construing this statute further as requiring a court to sever an unconscionable term to save an arbitration clause in a contract of adhesion in the home buyer context is taking the effect of section 15-3-140 well outside its ambit and intent. As this Court noted in its opinion in *Damico v. Lennar Carolinas,* unconscionable provisions like those found in Mungo's arbitration clause have an *in terrorem* effect on homebuyers like the Huskins. *Damico*, 437 S.C. at 623, 879 S.E.2d at 761. The typical purchaser of a home from Mungo is unlikely to be in the position to "ignore" the unconscionable provisions in Mungo's arbitration clause. Moreover, one wonders just how many purchasers of a home from Mungo have been adversely affected by the

unconscionable time limitation for asserting claims against Mungo included in this arbitration clause. Rather than discouraging overreach by homebuilders in their purchase contracts by refusing to sever this unconscionable, material term in the arbitration clause, the Court of Appeals' decision to sever by reference to Section 15-3-140 in this instance acts to unjustifiably reward such undesirable conduct and undermines public policy behind Section 15-3-140 itself. This is certainly not consistent with the public policy aim of Section 15-3-140 itself or the message that this Court sent in *Damico,* 437 S.C. at 622, 879 S.E.2d at 760.

Such judicial activity also contravenes established authority from this Court and is generally repugnant to South Carolina common law related to contracts of adhesion in several respects. In *Smith v. D.R. Horton*, this Court refused to sever offending provisions from an arbitration clause in the absence of a specific severability clause. *Smith v. D.R. Horton*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6. This Court gave the following sound reasoning for such refusal:

> Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions.

Id. As the Court of Appeals acknowledged below, there is no severability clause in Mungo's "Arbitration and Claims" provision. Accordingly, by severing the unconscionable provisions in the absence of such a clause, the Court of Appeals has gone outside the stated intention of the parties to the contract and engaged in rewriting the parties' contract in contravention of well-established South Carolina law—something that this Court specifically refused to do in *Smith v. D.R. Horton.* In fact, before the Court of Appeals' Opinion, there is no case law severing an unconscionable term from an arbitration clause where the contract contains no provision to sever.

In each published authority in our State where the court has severed an unconscionable provision to save the remainder, the contract itself included a severability clause.

Further, the Court of Appeals' opinion disregards common law principles applicable to contracts generally and contracts of adhesion particularly. Our courts have long recognized the disparity in parties' bargaining positions in adhesion contracts and subjected arbitration "agreements" therein to "considerable skepticism." *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 ("While adhesion contracts are not unconscionable per se, courts tend to look upon them with 'considerable skepticism' because they give rise to 'considerable doubt that any true agreement ever existed to submit disputes to arbitration.'"); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 (same). As the Court of Appeals correctly found:

> The Huskinses were average purchasers of residential real estate, were not represented by independent counsel, and were not a substantial business concern to Mungo such that they possessed more bargaining power than any other average homebuyer would. Therefore, evidence supports the circuit court's finding that the Huskinses lacked a meaningful choice in entering the agreement to arbitrate.

(Opinion at p. 9, "a. Absence of Meaningful Choice"). Thus, the starting point for any court when reviewing this adhesive arbitration clause is that the parties did not truly agree to it, and "simply delet[ing] the offending language" in order to enforce the arbitration clause does not effectuate the basis of the parties' bargain as the parties did not truly bargain for it.

Finally, like in other contexts interpreting contracts under the common law, particularly ones containing unconscionable contractual provisions without any provision for severability, South Carolina courts have refrained from rewriting contracts in any regard and held the drafter to live or die by its own pen. *See Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 629, 799 S.E.2d 318, 322 (Ct. App. 2017) ("South Carolina does not follow the 'blue pencil' rule and,

thus, 'restrictions in a [noncompete] clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms.'") (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)). To this end, the Court of Appeals' opinion sets aside well-standing principles of common law in contract, and unjustly favored the will of the contract drafter, Mungo, over the new homebuyer, the Huskins, who were in an unequal bargaining position and presented with a take-it-or-leave-it arbitration option. *See Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("There is . . . no public policy—federal or state—favoring arbitration. The courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. . . . The Court is but the instrument through which . . . effect can be given to the [parties'] will.").

For all the above reasons, the Court of Appeal's decision to sever the unconscionable term from an arbitration clause in an adhesion contract in the home buyer context and to enforce the remainder, when the contract failed to include a severability clause, was in error, a violation of this Court's holdings in *D.R. Horton* and *Damico,* and an erroneous application of Sections 36-2-302 and 15-3-140. This Court should grant this Petition for a Writ of Certiorari to address and correct these many errors of law.

II. IN THIS ADHESIVE, NEW HOME PURCHASE AGREEMENT THAT DOES NOT CONTAIN A PROVISION TO SEVER BUT INCLUDES AN UNCONSCIONABLE, MATERIAL TERM IN THE ARBITRATION CLAUSE, THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN SEVERING THE UNCONSCIONABLE TERM TO ENFORCE THE REMAINDER. SUCH DECISION IS CONTRARY TO THE PUBLIC POLICY OF THIS STATE AND THE DECISION BY THIS COURT IN *DAMICO v. LENNAR CAROLINAS.*

While the petition for rehearing was pending, this Court issued its opinion in *Damico v. Lennar Carolinas,* 437 S.C. 596, 879 S.E2d 746 (2022). The reasoning and the conclusions

reached by this Court in *Damico* were strikingly similar to the arguments advanced by the Petitioners in their briefs and in the petition for rehearing to the Court of Appeals. Pursuant to Rule 208(b)(7), SCACR, Petitioners brought this Court's decision in *Damico v. Lennar Carolinas* to the attention of the Court of Appeals. Therefore, it was surprising when the Court of Appeals issued its revised opinion acknowledging *Damico* (briefly and only in footnotes) but maintaining its holding that the unconscionable provisions of the arbitration clause can be severed from the clause and the remainder enforced, despite the contract itself lacking any provision for severance in this circumstance. (Opinion at p. 11, Note 6.) In reaching this conclusion, the Court of Appeals erroneously elected to "blue pencil" the adhesive new home buyer purchase agreement in favor of the far more sophisticated party who drafted the contract of adhesion without any provision for severance. Equally troubling is the Court of Appeals' failure to acknowledge and apply the sound public policy set forth in *Damico* of not encouraging sophisticated parties to intentionally insert unconscionable terms in a new home buyer contract in hopes that a reviewing court will simply sever the unconscionable provisions—which is exactly what the Court of Appeals has done in this case.

In reaching its decision in *Damico* to refuse to sever unconscionable provisions in an arbitration clause, this Court set forth two important considerations that are both present in this matter. *See Damico*, 437 S.C. at 620-21, 879 S.E.2d at 759-760 (identifying contracts of adhesion and contracts involving consumer transactions as important considerations that bear on the issue of severability). First, as was the case in *Damico*, this matter involves a contract of adhesion. (Opinion at p. 10.) Second, as in *Damico*, here it is also "'considerably doubtful' any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) (Petitioners) had no hand

in drafting or negotiating any of the language of the arbitration agreement." *Damico,* 437 S.C. at 621, 879 S.E.2d at 760; *see also* Opinion at p. 10.

Next, like the contract at issue in *Damico,* the contract here involves a consumer transaction as it relates to the purchase of a new home. (R. pp. 28-38.) As this Court correctly recognized in *Damico,* South Carolina's "deeply-rooted and long-standing policy of protecting new homebuyers" is an important factor to consider regarding the issue of severing unconscionable provisions of a residential purchase contract and, specifically, provisions of an arbitration agreement contained therein. *Damico,* 437 S.C. at 621, 879 S.E.2d at 760.

Applying the considerations above to Mungo's arbitration clause, the Court of Appeals' holding is squarely at odds with the sound reasoning set forth by this Court in *Damico.* By electing to sever the unconscionable terms contained in Mungo's arbitration clause set forth in an adhesive, new home buyer agreement, the Court of Appeals' holding has absolutely no deterrent effect on homebuilders from including whatever unconscionable provisions they want to effect on new home buyers; and, contrary to the public policy of this State, the Court of Appeals' decision acts to create an incentive for large, sophisticated homebuilders like Mungo "to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer." *Damico,* 437 S.C. at 622, 879 S.E.2d at 760. Certainly, the Court of Appeals' decision too was in disregard of South Carolina's "deeply-rooted and long-standing policy of protecting new homebuyers." *Id.* at 621, 879 S.E.2d at 760.

In distinguishing *Damico* in a footnote, the Court of Appeals places undue emphasis on the number of unconscionable terms that must be found in an arbitration clause to justify a court's refusal to apply a contractual provision to sever. (Opinion at p. 11, n.6.) There is no

litmus test in South Carolina to this end. In fact, while where they may have been other unconscionable terms in the arbitration clause, the Court in *Damico* focused on only one of them. *Damico*, 437 S.C. at 615, 879 S.E.2d at 757. The Court in *Damico* found that the one unconscionable term, material to the agreement to arbitrate, was one term too many to justify its exercise of any authority to sever and save the remainder of an arbitration clause in a contract of adhesion in the homebuyer context. *See id.* at 619-24, 879 S.E.2d at 759-762.

The unconscionable term contained in the arbitration clause in the Mungo home purchase agreement, moreover, limits the time for a home buyer to assert any claims against Mungo to a maximum period of ninety days, as opposed to the three years provided by South Carolina statutory law. This term could hardly be found immaterial to the agreement to arbitrate. Such drastic limitation on the time to bring a claim under the contract, in utter disregard of South Carolina statutory law, is as material to the agreement to arbitrate in this case, as was the unconscionable provision at issue in *Damico*, which stripped the home buyer of the "ability to name the parties against whom they are asserting their claims in the arbitration proceeding." *Id.* at 624, 879 S.E.2d at 761. The holding in *Damico* requires a court to refuse to sever an unconscionable, material term in an arbitration clause to save the remainder in a contract of adhesion in the home buyer context. Accordingly, this Court should grant the Petition for Writ of Certiorari to correct the error of the Court of Appeals and protect the important public policy respecting our State's deeply rooted and long-standing policy of protecting home buyers reaffirmed in *Damico.*

CONCLUSION

The Court of Appeals' decision to sever an unconscionable, material term in the arbitration clause to save the remainder in a contract of adhesion regarding the purchase of a new

home, where the contract itself provided no severability clause, departs from this Court's decisions in *D.R. Horton* and *Damico*. In these cases, the Court in *D.R. Horton* refused to sever unconscionable terms in an arbitration clause to save the remainder, absent a severability clause. This Court in *Damico*, moreover, refused to sever an unconscionable term in and arbitration clause to save the remainder, even when there was a provision to sever, because the unconscionable term was material to the agreement to arbitrate and was set forth in a contract of adhesion in the home buyer context. The effect of the Court of Appeals' decision to sever the offending terms from the arbitration clause under the same circumstances in this case is to unjustly excuse, and one could say incentivize, the drafter homebuilder's intentional efforts to avoid liability to its purchasers by inserting unconscionable provisions within its arbitration clause. If the Court of Appeals' Opinion stands, Mungo will suffer no meaningful consequences for its inclusion of unconscionable terms in its arbitration clause solely to benefit Mungo. Moreover, this case will undermine and cause confusion as to the meaning of *D.R. Horton* and *Damico*. Such result is repugnant to the public policy of the State of South Carolina, and its deeply rooted and long-standing policy to protect home buyers. Finally, the Court of Appeals' application of Sections 36-2-302 and 15-3-140 of the South Carolina Code, the former section relating to contracts subject to the Uniform Commercial Code and the latter section providing for a three-year statute of limitations in contract actions, to provide it the authority to sever an unconscionable term in an arbitration clause in a contract of adhesion related to the purchase of a new home is plain error too and must be corrected by this Court. Those two statutes do not provide the Court of Appeals that authority or discretion, and the Court in *Damico* did not suggest that either, despite the Court of Appeals' suggestion that it did so.

For all these reasons, Petitioners respectfully ask that this Court grant the Petition for Writ of Certiorari, reverse the Court of Appeals' order, and deny Mungo's Motion to Compel Arbitration.

Respectfully Submitted,

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