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THE STATE OF SOUTH CAROLINA
In Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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Appellate Case No. 2018-000889
Case No. 2017-CP-40-03697

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

v.

Mungo Homes, LLC, .....Respondent.

---

# APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Mungo Homes, LLC, .....Respondent.

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**RECORD ON APPEAL**

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| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND | ) | IN THE CIRCUIT COURT<br>FOR THE FIFTH JUDICIAL<br>CIRCUIT |
| Amanda Leigh Huskins and Jay R. Huskins,<br>Plaintiffs,<br>v.<br>Mungo Homes, LLC,<br>Defendant. | ) | CASE NO. 2017-CP-40-03697<br>**ORDER** |

## INTRODUCTION

This matter comes before the Court upon Mungo Homes' Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on November 8, 2017 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, and arguments of counsel and issues the following Order to **GRANT** the Defendant's Motion to Dismiss and Compel Arbitration.

## FACTS

The Huskins are residential buyers who executed a Purchase Agreement with Mungo Homes, a national builder on June 29, 2015. Compl. ¶ 1. The Purchase Agreement was for the sale of a tract of land, the construction of a dwelling, and any improvements constructed on the property. Pl.'s Exh. 1. The Purchase Agreement categorizes the transaction as a "Building Job." *Id.* A Building Job gave the purchasers [the Huskins], an opportunity to inspect any Addendums added to the Purchase Agreement for improvements on the property. *Id.* The Purchase Agreement includes an Addendum where the Huskins requested the placement of the driveway on the right side of the property. *Id.* The improvements specified in the Purchase Agreement

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Addendum began in August 21, 2015. *Id.* The Addendum includes a Development Rider explaining that factors such as weather and local municipalities may cause delays during the construction and completion of the home. *Id.* Mungo Homes obtained a permit from Richland County classifying the improvement as "residential new construction" for a "single family residence." *Id.* In addition, a Certificate of Occupancy was issued for the property on January 19, 2016. *Id.*

There are two provisions in the Purchase Agreement that are of importance in this lawsuit. First, is the "Limited Warranty" provision, located on page two of the Purchase Agreement. In this provision, Mungo Homes disclaims the implied warranty of habitability, suitability for residential purposes, merchantability, or fitness for particular purpose. *Id.* Mungo Homes also disclaims liability for consequential, or punitive damages. *Id.* A third-party corporation is responsible for any warranties or damages claims. *Id.*

Second, is the "Arbitration and Claims" provision, which is located at the top of page three of the Purchase Agreement. This provision subjects any claims or disputes arising out of, or relating to the Purchase Agreement to arbitration. *Id.* The provision sets a ninety-day period in which a party can demand arbitration after a claim or dispute arises. *Id.* The Arbitration and Claims Provision states:

> "Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction, or sale thereof and the deed to be delivered pursuant hereto, shall be *resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act.* Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding party's arbitrator. *Each and every demand for arbitration shall be made within 90 days after the claim,* dispute or other mater in question has arisen . . . or else any claim, dispute or other matter

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in question not asserted within said time periods shall be deemed waived and forever barred." *Id.*

The Huskins filed a Complaint on June 14, 2017 alleging four causes of action for (1) breach of contract; (2) unjust enrichment; (3) declaratory relief; and (4) violation of the South Carolina Unfair Trade Practices Act. Compl. ¶ 23, 27, 32, 34. Mungo Homes filed a Motion to Dismiss and Compel Arbitration on July 20, 2017. Def. Mot. to Dismiss at 1.

The Huskins put forth three main arguments. First, they argue that the Purchase Agreement involves the sale of a new home. Pl.'s Mem. in Opp'n at 4. Under South Carolina law, the sale of a new home involves *intrastate* commerce; it does not involve interstate commerce. *Id.* The Federal Arbitration Act does not govern this transaction because interstate commerce is not involved. *Id.* Rather, the South Carolina Uniform Arbitration Act applies to this transaction. *Id.* at 5. Second, they argue the "Arbitration and Claims" provision is unconscionable because they had no meaningful choice to negotiate the terms of the arbitration provision and the provision truncates the statute of limitations for when the Huskins may bring a claim arising out of, or related to the Purchase Agreement. Pl.'s Mot. in Opp'n at 7-8. This violates public policy. *Id.* Third, the Huskins argue South Carolina precedent requires the court to analyze the "Limited Warranty" and "Arbitration and Claims" provisions *together* to determine whether the arbitration provision is unconscionable. *Id.*

The Defendants argue that the Purchase Agreement involves the sale of property and the construction of a dwelling, or improvements to a dwelling. Def. Mot. to Dismiss at 2. The transaction involved the construction of real estate, which necessarily involves *interstate* commerce according to South Carolina law. *Id.* at 3. The Federal Arbitration Act governs agreements that involve interstate commerce. *Id.* Arbitration of claims subject to the Federal Arbitration Act require the court to analyze the validity of the arbitration provision in isolation



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from the remainder of the underlying agreement. Def. Reply Mot. at 3. Mungo Homes argues the "Arbitration and Claims" provision is not unconscionable because the Huskins received an opportunity to review and make changes to the Purchase Agreement and Addendum. Def. Reply Mot. at 4. Further, the "Arbitration and Claims" provision merely sets a time frame for when either party may demand arbitration; it does not shorten the statute of limitations to file a claim arising out of the Purchase Agreement. *Id.* at 5.

## I. INTERSTATE COMMERCE: COMMERCE-IN-FACT TEST

The Federal Arbitration Act Section 2 provides that a controversy or claim subject to arbitration arising out of a contract *involving commerce* is valid, irrevocable, and enforceable except upon grounds for revocation of any contract that exists at law or in equity. 9 U.S.C. § 2 (1988). South Carolina has a strong policy favoring arbitration. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

Section 2 of the Federal Arbitration Act is generally binding on state claims where parties agree to arbitrate if the underlying transaction involved interstate commerce. South Carolina courts utilize a "commerce-in-fact" test to determine whether a transaction involves interstate commerce and subjects arbitration agreements to federal arbitration. *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 111. Alternatively phrased, the transaction "must turn out, in fact, to have involved interstate commerce." *Id.* The South Carolina Supreme Court instructs the courts to "examine the agreement, the complaint, and the surrounding facts," to determine whether the transaction involved interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (noting South Carolina courts consistently look to the essential character of the contract when applying the Federal Arbitration Act).



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To determine whether interstate commerce is involved, the Court must determine whether the transaction was for the sale of a residential home, or a contract for the development or construction of a home. A contract for the sale of residential real estate does not involve interstate commerce. *Bradley*, 398 S.C. at 457, 730 S.E.2d at 317. South Carolina courts accept that construction projects generally involve interstate travel, purchase of materials, or other activities across state borders. *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 118.

This Court analyzed the agreement, the complaint, and the facts to determine whether the Purchase Agreement involved interstate commerce. Looking to the Purchase Agreement, there is one fact that distinguishes this case from *Bradley* in that the Purchase Agreement in *Bradley* was undisputedly for a "*completed dwelling*". *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. In this case, the parties contest whether this contract was for a completed home. The language of the Purchase Agreement states the transaction involved improvements to a piece of property and the Purchase Agreement Addendum indicates a driveway was constructed. Pl.'s Exh. 1.

Other language in the Purchase Agreement in this case points to the involvement of construction. For instance, the Development Rider states that factors such as weather or local municipalities, may affect the construction start date or completion of the home. Pl.'s Exh. 1. Also, Richland County issued a permit on the property as "residential new construction" for a "single family residence." *Id.* The Purchase Agreement in *Bradley* checked "N/A" for options such as: "new construction, house plan, options, and color selection." *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. Applying the commerce-in-fact analysis set forth in *Bradley*, the essential character of the Purchase Agreement was for the purchase and improvement of a piece of property, which involved some level of construction, which likely involved interstate commerce.

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Although the Purchase Agreement in Huskins is distinguishable from the contract in *Bradley*, arbitration is grounded in principles of contract law. Parties are generally free to structure their arbitration agreements as they see fit. *Volt Info. Sci., Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). As such, parties are free to enter contracts providing for arbitration under rules established by state law rather than rules established by the Federal Arbitration Act, even if interstate commerce is involved. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 n.2 (2000). The Federal Arbitration Act preempts any state procedural law that completely invalidates the parties' agreement to arbitrate. *Id.* at 343 S.C. at 540, S.E.2d at 364 (invalidating the notice requirement contained in South Carolina's Uniform Arbitration Act because its application would have made the arbitration agreement completely unenforceable).

The "Arbitration and Claims" provision in this case subjects any controversies arising out of the Purchase Agreement to arbitration governed by the South Carolina Uniform Arbitration Act. Pl.'s Exh. 1. Although the Purchase Agreement may have involved interstate commerce, the parties freely agreed that the South Carolina Uniform Arbitration Act would govern. Pl.'s Exh. 1. One of the basic principles of arbitration is to ensure that private agreements to arbitrate are enforced according to their terms. *Volt*, 489 U.S. at 109. It follows that the specific terms of the arbitration provision should be upheld; the South Carolina Uniform Arbitration Act governs this dispute. *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-4 (Ct. App. 2013) (applying the South Carolina Uniform Arbitration Act as agreed upon in the purchase agreement between residential buyer and builder).

## II. UNCONSCIONABILITY

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The South Carolina Uniform Arbitration Act generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement to arbitrate exists in the first place. S.C. CODE ANN. § 15–48–20(a) (2005). If no agreement is found to exist, the court must deny any application to arbitrate. *Id.* To determine whether an agreement to arbitrate is valid, or exists, the trial court should apply ordinary state-law principles that govern the formation of contracts. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22-23 644, S.E.2d 663, 667-68 (2007).

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016); *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. Unconscionability requires courts to focus generally on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. If a court finds that any clause of a contract was unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. CODE ANN. § 36–2–302(1) (2003); *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. A determination of unconscionability requires an evaluation of the facts and circumstances surrounding the particular case. *Id.*

**a. The Huskins lacked meaningful choice to arbitrate their claims because they do not possess business judgment, did not hire counsel, and were not a substantial business concern.**

Whether one party lacks a meaningful choice to enter an arbitration agreement typically speaks to the fundamental fairness of the bargaining process. *Smith*, 417 S.C. at 49, 790 S.E.2d at

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4. "In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Considering the factors set forth in *Simpson*, the Court finds that the Huskins lacked a meaningful choice to arbitrate. First, the Huskins do not have business knowledge and did not hire outside counsel. Pl.'s Mem. in Opp'n at 7. The Huskins are homebuyers that did not enjoy substantially stronger bargaining power against a residential builder than any other average homebuyer. *Smith*, 417 S.C. at 50, 790 S.E.2d at 4–5. The Court in *Simpson* acknowledged that a lack of business judgment leaves the buyer without knowledge of the arbitration agreement's consequences. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Second, The Huskins did not hire independent counsel to discuss the terms of the Purchase Agreement. Pl.'s Mem. in Opp'n at 7; *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. The Huskins, like the buyer in *Simpson*, were customers negotiating with a commercial entity that drafted the contract and held substantially more bargaining power. Compl. ¶ 6-7.; *Simpson* 373 S.C. at 26, 644 S.E.2d at 670. [1]

Further, the Huskins lacked a meaningful choice to arbitrate because they were not a substantial business concern to Mungo Homes. A homebuyer that is a single client to a national builder is not considered a substantial business concern. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. The Huskins executed a Purchase Agreement with Mungo Homes that pertained to one tract of land. Pl.'s Mem. in Opp'n at 7; Compl. ¶ 6-7. The Court finds that the Huskins lacked a

[1] The Huskins purchased a "critically important" item from Mungo Homes like the buyer in *Simpson* who purchased a car from the dealership; a home, like a car, is a modern-day necessity. Compl. ¶ 1; *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670.

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meaningful choice to arbitrate because they did not hire independent counsel, they lacked business knowledge, and they were not a substantial business concern to Mungo Homes.

**b. The arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision because the warranty provision is clearly outside of the arbitration provision.**

When determining the validity of an arbitration provision, courts generally analyze the arbitration provision in isolation from the rest of the contract. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873–74 (Ct. App. 2013); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016). The Court will analyze the arbitration provision in conjunction with other provisions of the contract when the arbitration provision cross-references other provisions in the contract. *Smith*, 417 S.C. at 45, 790 S.E.2d at 2.

The Court finds that the "Limited Warranty Provision" exists outside of the "Arbitration and Claims" provision. In *One Belle*, the contract contained a warranty provision that limited the warranty's transferability to a roof manufacturer for shingles it produced and contained an arbitration provision on a separate page. *One Belle*, 418 S.C. at 59, 791 S.E.2d at 290. The court found the warranty provisions *[were] clearly outside the arbitration agreement* and as such the court would only consider the arbitration agreement in an unconscionability analysis. *One Belle*, 418 S.C. at 64, 791 S.E.2d at 293. In the Huskins' case, the "Limited Warranty" provision is located on the second page of the Purchase Agreement whereas the "Arbitration and Claims" provision is located at the top of page three, which indicates the "Limited Warranty" provision is outside the arbitration agreement and should not be considered in the unconscionability analysis Pl.'s Exh. 1.; *see also Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74 (determining the unconscionability of an arbitration agreement required the court to analyze the arbitration







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provision separate from other provisions in the purchase agreement such as a provision limiting the statute of limitations to bring a claim).

Further, the arbitration provision does not reference the "Limited Warranty" provision contained in the Purchase Agreement. The arbitration provision in *Smith* was intertwined within a complex paragraph titled "Warranties and Dispute Resolution." *Smith*, 417 S.C. at 45, 790 S.E.2d at 2. The "Warranties and Dispute Resolution" paragraph contained numerous sub-paragraphs which cross-referenced once another. *Id.* To determine whether the arbitration agreement was unconscionable, the Court in *Smith* analyzed the "Warranties and Dispute Resolution" paragraph as a whole because the arbitration provision could not be extracted from the "Warranties and Dispute Resolution" paragraph. *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Unlike the arbitration provision in *Smith*, the arbitration provision in this case is not intertwined with the "Limited Warranty" provision. Pl.'s Exh. 1; *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

This Court, in general, is tasked with whether the *arbitration agreement* is invalid, not whether the *contract as a whole* is invalid. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). The "Limited Warranty" provision is clearly outside of the "Arbitration and Claims" provision as both provisions are located on separate pages and headings of the contract and do not cross reference one another. Pl.'s Exh.1. The Court will not consider the "Limited Warranty" provision to determine the unconscionability of the arbitration provision.

**c. The arbitration agreement is not one sided and oppressive because it does not limit the Huskins' statutory remedies, it is clearly labeled, and it applies mutually to both parties.**

To determine whether an arbitration agreement is one-sided and oppressive the courts look at a variety of factors. An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 29-30, 644 S.E.2d at 671. An arbitration provision that

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stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 31, 644 S.E.2d at 672. An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 33, 644 S.E.2d at 673. A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson,* 404 S.C. at 254, 743 S.E.2d at 870.

An arbitration clause that limits statutory remedies is an indicator of a one-sided and oppressive arbitration clause. *Simpson,* 373 S.C. at 29-30, 644 S.E.2d at 671. The arbitration provision in the case at hand sets a time frame of ninety days after any claim or dispute arises in which a party can demand arbitration. Pl.'s Exh. 1. The Huskins filed an action on June 14, 2017 and Mungo Homes filed a Motion to Compel Arbitration on July 20, 2017, within the ninety- day time frame. Compl. ¶ 1; Def. Mot. to Dismiss at 1. The ninety-day time frame to demand arbitration does not limit the Huskins' ability to arbitrate claims for damages unlike an arbitration provision that limits the buyer's ability to arbitrate any double and treble damages available under the South Carolina Uniform Trade Practices Act. *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666.

An arbitration provision that stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims is an indicator of a one- sided and oppressive arbitration clause. *Simpson,* 373 S.C. at 31, 644 S.E.2d at 672. In *Simpson*, the arbitration clause subjected all claims or controversies between the dealer and customer to arbitration. *Id.* The arbitration clause included an exception where claims between the dealer against the customer were not stayed pending the outcome of arbitration. *Id.* The Court found the arbitration provision was one-



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sided and oppressive because the dealer's judicial remedies superseded the consumer's arbitral remedies. *Id.* The Court envisioned a scenario where the dealer could initiate a claim in court, complete the claim, and sell the contested vehicle prior to an arbitrator's determination of the consumer's rights in the same vehicle. *Simpson*, 373 S.C. at 32, 644 S.E.2d at 672."

In contrast to the unequal stay of one party's claims over another's in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims equally. Pl.'s Exh. 1. The arbitration provision calls for binding arbitration before a panel consisting of three arbitrators: one selected by the Huskins, one selected by Mungo Homes, and one mutually selected by the arbitrator chosen by each party. *Id.* Unlike the arbitration provision in *Simpson*, the arbitration provision in the Huskins' case allows both parties to arbitrate the claims or disputes and includes a process for neutrally selecting the arbitrators. Pl.'s Exh. 1.; *Simpson* 373 S.C. at 31, 644 S.E.2d at 672.

An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum is an indicator of a one-sided and oppressive arbitration provision. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The arbitration clause in *Simpson* claimed that "any and all disputes" including "automobile warranty" and "any consumer protection statute" may be resolved *only* by "binding arbitration" which was unenforceable as a matter of public policy for precluding the buyer from filing claims under the Magnuson Moss Warranty Act. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The "Arbitration and Claims" provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting.[2] It

[2] The Purchase Agreement contains a separate "Limited Warranty" provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages. Pl.'s Exh. 1. This provision is outside the "Arbitration and Claims" provision of the contract and is discussed in detail in Section II of this Order. *See* Section II(b).

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requires that all claims and disputes arising out of the Purchase Agreement are subject to arbitration. Pl.'s Exh. 1.

A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870 (Ct. App. 2013). The arbitration agreement at hand is clearly labeled and underlined at the top of the page. Pl.'s Exh. 1. *But see Simpson*, 373 S.C. at 28, 644 S.E.2d at 670 (finding the arbitration agreement was unconscionable and noting the inconspicuous nature of the location of the arbitration clause as paragraph ten out of sixteen on the page). In *Carlson*, the arbitration provision did not waive any rights or remedies otherwise available by law. *Id.* Similarly, the "Arbitration and Claims" provision in the Huskins' case does not preclude their ability to file warranty claims. Pl.'s Exh. 1. Like the arbitration agreement in *Carlson*, the Huskins' case applies to both parties and allows each party to choose a neutral arbitrator. Pl.'s Exh. 1.; *Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74.

The "Arbitration and Claims" provision in the Huskins' case is distinguishable from the arbitration provision in *Simpson* because the arbitration provision here does not stay one party's claims over the other party's claims, it does not preclude the Huskins' from filing a warranty claim, and it does not divest the Huskins of a right available by statute. Pl.'s Exh. 1. On the contrary, it is clearly labeled and applies to both parties mutually. *Id.*; *see generally Carlson, v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). This "Arbitration and Claims" provision is not one-sided and oppressive.

## CONCLUSION

The arbitration clause under the Purchase Agreement is governed by the South Carolina Uniform Arbitration Act because the parties included a choice-of-law provision. There is a valid



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agreement to arbitrate the Huskins' claims because the "Arbitration and Claims" provision is not unconscionable. Although the Huskins' lacked a meaningful choice to negotiate the terms of the arbitration provision, when analyzing the "Arbitration and Claims" provision in isolation from the underlying agreement, the Court finds that the "Arbitration and Claims" provision is not one-sided and oppressive.

For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED.**

**IT IS SO ORDERED.**

Columbia, South Carolina
March 7, 2018

The Honorable DeAndrea Gist Benjamin
Judge, Court of Common Pleas
Fifth Judicial Circuit



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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4003697

Amanda Leigh Huskins et al
PLAINTIFF(S)

Mungo Homes LLC
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

The Plaintiff's Motion to Alter or Amend the Court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration is Denied.

**ORDER INFORMATION**

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/16/2018

Jay R Huskins

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**



ELECTRONICALLY FILED - 2018 Apr 16 12:46 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4003697

**Court Reporter:**

**E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

ELECTRONICALLY FILED - 2018 Apr 16 12:46 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4003697

ELECTRONICALLY FILED - 2018 Apr 16 12:46 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4003697

Richland Common Pleas

**Case Caption:** Amanda Leigh Huskins , plaintiff, et al vs Mungo Homes LLC

**Case Number:** 2017CP4003697

**Type:** Order/Electronic Form 4

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2018-04-16 12:36:10 page 3 of 3

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND )
)
Amanda Leigh Huskins and Jay R. Huskins, ) CIVIL ACTION COVERSHEET
Plaintiff(s) )
) 2017-CP - 40- 03697
vs. )
)
Mungo Homes, LLC, )
)
Defendant(s) )


Submitted By: Charles H. McDonald SC Bar #: 11580
Address: Belser & Belser, P.A., P.O. Box 96, Columbia, SC 29202 Telephone #: 803-929-0096
Fax #: 803-929-0196
Other:
E-mail: chuck@belserpa.com


NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

**DOCKETING INFORMATION** (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

**NATURE OF ACTION** (*Check One Box Below*)

| Contracts | Torts - Professional Malpractice | Torts – Personal Injury | Real Property |
|---|---|---|---|
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Slander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | Previous Notice of Intent Case # | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | 20___-NI-_____-_____ | ☐ Products Liability (340) | ☐ Partition (440) |
| ☒ Other (199) | ☐ Notice/ File Med Mal (230) | ☐ Personal Injury (350) | ☐ Possession (450) |
| | ☐ Other (299) | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☐ Other (499) |

| Inmate Petitions | Administrative Law/Relief | Judgments/Settlements | Appeals |
|---|---|---|---|
| ☐ PCR (500) | ☐ Reinstate Drv. License (800) | ☐ Death Settlement (700) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Judicial Review (810) | ☐ Foreign Judgment (710) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Relief (820) | ☐ Magistrate's Judgment (720) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Permanent Injunction (830) | ☐ Minor Settlement (730) | ☐ Municipal (930) |
| | ☐ Forfeiture-Petition (840) | ☐ Transcript Judgment (740) | ☐ Probate Court (940) |
| | ☐ Forfeiture—Consent Order (850) | ☐ Lis Pendens (750) | ☐ SCDOT (950) |
| | ☐ Other (899) | ☐ Transfer of Structured Settlement Payment Rights Application (760) | ☐ Worker's Comp (960) |
| | | | ☐ Zoning Board (970) |
| | | | ☐ Public Service Comm. (990) |
| | | ☐ Confession of Judgment (770) | ☐ Employment Security Comm (991) |
| | | ☐ Petition for Workers Compensation Settlement Approval (780) | ☐ Other (999) |
| | | ☐ Other (799) | |

| Special/Complex /Other | |
|---|---|
| ☐ Environmental (600) | ☐ Pharmaceuticals (630) |
| ☐ Automobile Arb. (610) | ☐ Unfair Trade Practices (640) |
| ☐ Medical (620) | ☐ Out-of State Depositions (650) |
| ☐ Other (699) | ☐ Motion to Quash Subpoena in an Out-of-County Action (660) |
| **Vehicle damage** | ☐ Sexual Predator (510) |

**Submitting Party Signature:** **Date: June 13, 2017**

**Note:** Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

## FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note:** **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | FIFTH JUDICIAL CIRCUIT |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | Civil Action No. 2017-CP-40-_____ |
| Plaintiffs, | ) | |
| vs. | ) | **SUMMONS** |
| Mungo Homes, LLC, | ) | |
| Defendant. | ) | |

2017 JUN 14 PM 2:09

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Subscriber at his office, 1901 Main Street, Suite 1550, Columbia, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff herein will apply to the Court for default judgment for the relief demanded in the Complaint.

**BELSER & BELSER, P.A.**

Charles H. McDonald, Esquire
H. Freeman Belser, Esquire
William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202
Telephone: (803) 929-0096
Facsimile: (803) 929-0196

***Counsel for Plaintiffs***

Columbia, South Carolina
June 13, 2017

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | FIFTH JUDICIAL CIRCUIT |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | Civil Action No. 2017-CP-40-_____ |
| Plaintiffs, | ) | |
| vs. | ) | **COMPLAINT (JURY TRIAL DEMANDED)** |
| Mungo Homes, LLC, | ) | |
| Defendant. | ) | |

2017 JUL 11 P 1:09

Plaintiffs Amanda Leigh Huskins and Jay R. Huskins, complaining of the Defendant Mungo Homes, LLC ("Mungo") would respectfully show as follows:

**PARTIES AND JURISDICTION**

1. Plaintiffs, who are husband and wife, reside in Richland County, South Carolina, having purchased a new home from Mungo Homes, LLC in the Westcott Ridge subdivision in Richland County in 2016.

2. Mungo is a large residential homebuilder headquartered in Irmo, South Carolina, and is the largest component of the Mungo Homes conglomerate which is one of the largest homebuilding enterprises in the United States.

3. The matters complained of herein arise from Mungo's conduct and actions with respect to the sale of a new home to Plaintiffs.

4. This Court has jurisdiction over the parties and the subject matter of this action.

5. Venue is proper as Mungo is headquartered in Richland County.

## FACTS

### Mungo's Purchase Agreement & Sales Practices

6. To purchase a new home from Mungo, Plaintiffs were required to execute Mungo's proprietary "Purchase Agreement." A true and correct copy of the Mungo Purchase Agreement executed by Plaintiffs is attached hereto as Exhibit 1.

7. This Purchase Agreement contains a disclaimer of critical warranty rights implied by law in South Carolina and designed to protect the new homebuyer, who the law recognizes is at a significant disadvantage in sophistication and bargaining power with a large volume homebuilder such as Mungo.

8. One of the implied warranties that Mungo requires that its purchasers waive is the implied warranty of habitability which is the most essential warranty that exists with respect to the sale of a new home. The implied warranty of habitability ensures, among other things, that the home purchased by the new homebuyer is free from substantial defects which could render the home unsuitable for habitation.

9. Consistent with its scheme to avoid standing behind its residential homes, Mungo also disclaims and refuses to warrant that its homes are even suitable for a "residential purpose."

10. South Carolina courts have long recognized the importance of guarding and protecting the rights of innocent homebuyers against defective construction placed into the stream of commerce by volume builders such as Mungo.

11. In lieu of the critical and essential implied warranties that Mungo makes its purchasers waive in the Purchase Agreement, Mungo substitutes a dubious and very limited warranty through a third-party warranty company.

12. Through this sophisticated scheme, Mungo does not directly warrant any part of the construction of the new homes it sells to purchasers.

13. The "Limited Warranty" which a purchaser of a Mungo home receives is usually from Quality Builders Warranty. This warranty is indeed limited as it excludes material matters such as building code violations and incomplete construction items.

14. The "Limited Warranty" also requires purchasers of a Mungo home to pay for the first $500 of repair costs for a defect in the home. This fee is in-artfully called a "deductible" in the Limited Warranty foisted upon Mungo's unsuspecting customers. This "deductible" is not a one-time cost, it applies each time there is something wrong with the home.

15. Mungo does not provide its potential purchasers with a copy of the Limited Warranty until closing. Mungo only offers the opportunity for the purchaser to review a copy at Mungo's office prior to closing if they so desire.

16. Despite requiring its purchasers to give up substantial warranty rights as a condition of purchasing a new home, Mungo provides no reduction in price or separate benefit to the purchaser who is giving up such critical rights.

17. Mungo's warranty scheme in its Purchase Agreement is unfair and deceptive, contrary to South Carolina law, and benefits only Mungo and its affiliates at the expense of homebuyers.

**Waiver of the Implied Warranty of Habitability in South Carolina**

18. In 2006, in *Kirkman v. Parex*, 369 S.C. 477, 632 S.E.2d 854 (2006), the South Carolina Supreme Court ruled that the seller of a new home could not effectively disclaim the implied warranty of habitability unless the disclaimer was "(1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." *Id.* at 485, 632 S.E.2d at 858.

19. Specifically, the South Carolina Supreme Court stated:

> We agree with the Supreme Court of Alabama "that the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability." To maintain the protection of purchasers, however, disclaimer can be permitted only if strict conditions are satisfied. We adopt the requirements set forth by the Washington Court of Appeals: the disclaimer must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for.

*Parex*, 369 S.C. at 485, 632 S.E.2d at 858 (internal quotation marks and citations omitted).

20. Mungo and its agents have had actual or constructive knowledge of this ruling since 2006, yet Mungo and its agents continue to operate its improper warranty scheme described above all to the detriment of the purchaser of a Mungo home.

## CAUSES OF ACTION

### For a First Cause of Action: Breach of Contract/Breach of Implied Covenant of Good Faith and Fair Dealing

21. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.

22. Plaintiffs entered into an enforceable and valid contract with Mungo by executing Mungo's form Purchase Agreement in connection with their purchase of a new Mungo home for which Plaintiffs paid valuable consideration.

23. The actions and conduct of Mungo constitute a breach of the duty of good faith and fair dealing implied in every contract, including the Mungo Purchase Agreement.

24. As a direct and proximate result of Mungo's actions, Plaintiffs have suffered actual damages in the form of the fair value of the waiver of the implied warranty of habitability which Mungo intentionally avoided paying the Plaintiffs through its scheme set forth above.

25. Plaintiffs are entitled to judgment against Mungo in such amount as shall be proven at trial together with interest thereon as provided by law.

**For a Second Cause of Action: Unjust Enrichment**

26. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.

27. Mungo has received a significant benefit from the Plaintiffs in the form of a waiver and release of important warranty rights including the warranty of habitability implied in every sale of a new home.

28. Mungo has realized the full benefit of Plaintiffs' waiver and release of these fundamental warranty rights.

29. It would be a gross injustice for Mungo to continue to reap the benefit of this "bargain" with Plaintiffs without paying fair value for Plaintiffs' waiver and release of important warranty rights and specifically the warranty of habitability.

30. Plaintiffs are entitled to recover such fair value from Mungo and seek judgment against Mungo in such amount as the Court finds just and proper under the circumstances.

**For a Third Cause of Action: Declaratory Relief**

31. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.

32. Plaintiffs pray that the Court inquire into the matters set forth above and issue its ruling declaring the relative rights of the parties with respect to the following:

a. The validity of the waiver and release of warranty rights contained in the Mungo Purchase Agreement; and

b. The validity of Mungo's purported transfer of all remaining warranty obligations to a third party.

**For a Fourth Caused of Action: Violation of South Carolina's Unfair Trade Practice Act**

33. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.

34. Mungo's actions and conduct with respect to its proprietary Purchase Agreement and its "bait and switch" warranty scheme, constitute unfair and deceptive conduct actionable under S.C. Code Ann. § 39-5-20 *et seq.*

35. As Mungo is a volume builder who sells hundreds of homes to purchasers in South Carolina utilizing its proprietary Purchase Agreement, the actions and conduct of Mungo at issue are capable of repetition and affect the public interest.

36. As a direct and proximate result of Mungo's unfair and deceptive trade practices, the Plaintiffs have suffered actual damages in the form of lost compensation for the waiver of critical implied warranty rights and in such further amounts as may be shown at trial.

37. Plaintiffs are entitled to judgment against Mungo in such amounts as shall be proven at trial together with their attorney's fees pursuant to S.C. Code Ann. § 39-5-140. In addition, because Mungo willfully and knowingly used and employed unfair and deceptive acts in its dealings with the Plaintiffs, the Plaintiffs are entitled to an award of treble damages pursuant to S.C. Code Ann. §39-5-140.

**PRAYER FOR RELIEF**

WHEREFORE, having complained of the Defendant Mungo and other entities for which Mungo Homes is legally responsible, Plaintiffs request the following relief:

a. Pursuant to the First and Second Causes of Action: (i) an award of actual and compensatory damages for Plaintiffs in the amounts established at trial together with interest thereon as permitted by law; and

b. Pursuant to the Third Cause of Action, a declaration regarding the validity of the waiver and release of certain warranty rights contained in the Mungo Purchase Agreement; and

c. Pursuant to the Fourth Cause of action, an award of actual and compensatory damages for Plaintiffs in the amounts established at trial, attorney's fees, and an award of treble damages pursuant to S.C. Code Ann. § 39-5-140; and

e. For such other relief as the Court may deem appropriate.

BELSER & BELSER, PA

By: _____

Charles H. McDonald, Esquire
H. Freeman Belser, Esquire
William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202
Telephone: (803) 929-0096
Facsimile: (803) 929-0196

***Counsel for Plaintiffs***

Columbia, South Carolina
June 13, 2017

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ

# PURCHASE AGREEMENT

MUNGO HOMES, INC.
441 Western Lane
Irmo, SC 29063
(803)749-9000
www.mungo.com
06/29/2015

THIS PURCHASE AGREEMENT is entered into between Mungo Homes, Inc., a South Carolina corporation ("Seller") and Amanda L. Huskins ("Purchaser", whether one or more), Purchaser's phone numbers (Home) (706) 566-7655 (Work) , (Mobile) , (Email) ahuskins@atlas.com.
Title (Deed) to be in Amanda L. Huskins

## PROPERTY

Seller agrees to sell and Purchaser agrees to buy, on the terms and conditions contained herein, that certain tract of land, together with the dwelling and improvements constructed or to be constructed thereon (the "Property"), situated in Richland County, and described as Lot 221 in the Westcott Ridge Community, also known as TBD, Chapin, SC 29036 (Property Address).

## IMPROVEMENTS

(Check either Field Model or Building Job)

( ) FIELD MODEL The improvements on the Property are under construction in accordance with Plan VICTOR, Elevation B, and any Change Orders issued prior to or with this Agreement. Purchaser's selection items, if any, shall be shown on the attached Customer Selection Sheet. Any changes must be accepted by the Seller by written Change Order. To the extent any improvements are constructed as of the date hereof, Purchaser has inspected the improvements and is buying based upon this inspection and not in reliance upon any model, plans or other material.

(X ) BUILDING JOB The improvements shall be constructed on the Property substantially in accordance with Plan VICTOR, Elevation B, and the Start Sheet Addendum and Customer Selection Addendum, attached hereto, plus any written Change Orders accepted by the Seller. Said plans and addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller.

Said plans and Addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller. Seller reserves the right to substitute materials of similar pattern, design and quality.

## PRICE

| | | | | |
|---|---|---|---|---|
| Total Sales Price | $ 243,625.00 | | | |
| Earnest Money (All earnest money paid to Mungo Homes, Inc.) | $ 3,000.00 | Earnest Money Received | | 2,500.00 |
| | | Additional Earnest Money Due 06/22/2015 | | 500.00 |

## FINANCING CONTINGENCY AND TERMINATION

Is this Purchase Agreement contingent upon the Purchaser obtaining a mortgage loan? Yes X No____

Is this home to be owner occupied? Yes X No____
If not owner occupied, then a minimum of $_____ earnest money is required.

Purchaser will apply for said loan to Ameris Bank SB within five (5) business days. Purchaser to pay all fees or costs required by the lender in connection with the loan application or its processing and will promptly supply all documents or other information required by the Lender.

If Purchaser does not obtain loan approval by 07/29/2015, (loan approval may be conditioned upon an appraisal of at least the Purchase Price) Purchaser may, within seven (7) days thereafter, terminate this Agreement by written notice to the Seller, and Seller shall within thirty (30) days thereafter return the Earnest Money to the Purchaser, after the return of Earnest Money neither party shall have any liability to the other. If Purchaser fails to give Seller such notice of termination within the time specified, this financing or loan contingency shall be deemed waived and of no further effect, except in the event loan approval was conditioned upon an appraisal and the property fails to appraise for at least the Purchase Price. Seller, at its sole option, may extend the time for loan approval and closing for such period or periods as Seller in its sole discretion elects in order to allow the Purchaser to obtain financing. Purchaser consents to any such extension and agrees to be fully bound by this Agreement during any such extension(s). If Purchaser obtains loan approval and refuses to close or fails timely and in good faith to apply for said loan, then Purchaser shall be deemed to be in default entitling Seller to the remedies proved herein. "Good faith" application for said loan shall include, but not be limited to, applying for a loan with the usual and customary term, interest rate and down payment prevailing at the time of application. This contingency will be satisfied by Purchaser obtaining loan approval from any lender.

Nothing herein shall be construed as any representation or warranty by the Seller that the Property meets the requirements for any type of loan or of any lender.

If this transaction is contingent upon the Purchaser obtaining a loan insured by the Federal Housing Administration ("FHA") or guaranteed by the Department of Veterans' Affairs ("VA"), then it is expressly understood that, notwithstanding any other provisions of this Agreement, the Purchaser shall not be obligated to complete the purchase of the Property herein described or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Seller has delivered to the Purchaser a written statement issued by the FHA or VA setting forth the appraised value of the Property, excluding closing cost, for mortgage insurance or guaranty purposes of not less than $ 243,625.00 which statement the Seller hereby agrees to deliver to the Purchaser promptly after such appraised value is made available to the Seller. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this Agreement without regard to the amount of the appraised valuation made by the FHA or VA. The appraised valuation is arrived at to determine the maximum mortgage the FHA or VA will insure or guaranty. Neither the FHA nor VA warrants the value or the condition of the Property. The Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.

EXHIBIT 1

MUNGO HOMES

## CLOSING

Closing shall be on or before __ or 90 __ days from pre-construction meeting, subject to such extensions as provided herein. If closing is extended Seller will notify the Purchaser of the extended closing date at least ten (10) days prior thereto, unless the reason for the delay arises within ten (10) days of closing in which case Seller shall provide notice which is reasonable under the circumstances. Closing to be extended, at Seller's sole option, for any delays beyond Seller's control including, but not limited to acts of God, inclement weather, labor disputes, difficulty in obtaining labor or materials, difficulty or delays in obtaining or the issuance of governmental permits or approvals, or inclement weather.

Issuance of a certificate of occupancy by any governmental authority, or final inspection and approval by the Federal Housing Administration, the Veteran's Administration or mortgage lender shall constitute certification of completion of the improvements in substantial conformity with the terms hereof.

At closing, Purchaser shall pay to Seller in cash the total purchase price and all other sums payable to Seller hereunder. No portion of the purchase price may be withheld from Seller, or deposited in escrow for any reason. Seller will deliver possession of the Property to Purchaser at closing.

Upon payment in full, Seller will deliver to Purchaser a Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property subject to the lien for current taxes; reservations, conditions, right-of-way and easements of record; and matters to which this Agreement is subject.

If closing is delayed through no fault of Seller, Seller may at its option charge Purchaser an extension fee equal to one-thirtieth of one percent (1/30%) of purchase price per day.

## CLOSING COSTS AND PRO-RATIONS

TAXES and ASSESSMENTS shall be pro-rated between the Seller and Purchaser as of the date of closing. DEED preparation shall be paid by Seller.
PREPAID ITEMS (e.g. interim interest, insurance premiums, and tax and insurance escrows) shall be paid by the Purchaser.
MORTGAGE INSURANCE: First year PMI, FHA-MIP, or VA Funding Fee shall be paid by the Purchaser.
ALL OTHER CLOSING COSTS, including DEED STAMPS and or TRANSFER TAXES, shall be paid by Purchaser, except that if the Closing Cost Addendum is attached, Seller shall pay the costs provided therein.

## CHANGE ORDERS

No alterations, changes or additions shall be made in the construction of the improvements provided herein, nor shall any extra work be performed or materials be provided or added by the Purchaser unless approved by the Seller, in its sole discretion, in a written Purchase Agreement Change Order, signed by both parties. Except as provided herein, Purchaser shall pay a $250 Change Order fee, plus the added cost of the change or alteration at the time the request for the Purchase Agreement Change Order is made. ___ Purchaser's Initials

## RESTRICTIVE COVENANTS

The Property is subject to restrictive covenants and to the jurisdiction of a homeowners' association which charges annual assessments. The Purchaser acknowledges that the documents pertaining to such restrictions or associations have been made available to him (her) and that he (she) has read, understands and accept same.
Copy received. ___ Purchaser's Initials

## HOMEOWNERS' ASSOCIATIONS

The Association Board of Directors set dues amounts annually. The annual dues are currently $ 450/year, plus $150.00, one time contribution fee, paid at closing . Any structure, including fences and outbuildings must be approved by the Architectural Control Board prior to construction. Any provision for these structures in this Agreement does not constitute approval by the Architectural Control Board. It is the purchaser's responsibility to obtain this approval.

## LIMITED WARRANTY

The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

## TERMITE PROTECTION

Seller will furnish the Purchaser with a one (1) year termite protection bond effective at time of treatment. Seller shall have no liability for damages caused by termites or other wood boring insects beyond the furnishing of this bond. Renewals of the bond shall be at Purchaser's expense. In the event the bond is not renewed, Seller shall not be liable for any damages, including water damage, which could have been discovered and minimized by periodic termite inspections.

## DEFAULT AND TERMINATION

If this Agreement is not performed by Purchaser in accordance with its terms, it may be terminated by Seller, by written notice to Purchaser, and upon such termination Seller may retain all amounts paid by Purchaser hereunder as liquidated damages, after which neither part shall have any liability to the other. Such damages are not a penalty, but represent actual damages which Seller will sustain upon a default by Purchaser, which damages will be substantial but not capable of precise determination. In such event, Purchaser will not assert any claim against Seller seeking the return of any portion of the payments made under this Agreement or any reduction in the amount of such liquidated damages.

If this Agreement is not performed by Seller in accordance with its terms, Seller being in default and Purchaser not being in default hereunder, Purchaser may terminate this Agreement by giving prompt written notice thereof to Seller. Seller, upon receipt of such notice of termination, shall within thirty (30) days return to Purchaser all sums heretofore paid by Purchaser to Seller hereunder and pay $250 to Purchaser, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. After said payment neither party shall have any liability to the other. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Agreement) shall in any case be collectible, enforceable or available to Purchaser.

Notwithstanding the foregoing, Seller, in its sole discretion, without being in default, may terminate this Agreement by written notice to the Purchaser and the payment to the Purchaser of a sum equal to one percent (1%) of the Purchase Price of the Property. Upon the tender of said payment, whether accepted or not, neither party shall have any liability to the other.

Upon either party giving a written notice of termination as provided herein, the Seller shall be entitled to offer for sale and sell the Property to any other person unfettered by any claim of the Purchaser. The parties specifically agree that after any notice of termination is given by either party to the other any claims shall be limited solely to the payment of the sums provided herein and no other claim shall be asserted against the either party or the Property.

MUNGO HOMES

## ARBITRATION AND CLAIMS

Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

## NON-RELIANCE X JDW

Purchaser hereby represents to Seller that Purchaser has not relied and is not relying upon any warranties, promises, guarantees or representations made by Seller, any agent of Seller, or anyone else acting or claiming to act on behalf of Seller with respect to the purchase by Purchaser of the Property or the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

## MISCELLANEOUS

a. This Agreement will be binding and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns; provided that Purchaser shall not assign or transfer this Agreement or any of Purchaser's rights hereunder, and any prohibited assignment shall be null and void and Seller may at Seller's option, immediately terminate this Agreement.

b. In the event of a total destruction of the dwelling by fire, windstorm, hail, earthquake, explosion or other casualty prior to the closing, Purchaser or Seller may terminate this Agreement if the dwelling cannot be restored prior to the Completion Date.

c. This Agreement embodies the entire Agreement between Seller and Purchaser with respect to the Property. No amendment or modification of this Agreement (including contracts for changes in construction of "extras") shall be valid unless contained in writing executed by both parties.

d. Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations.

e. All notices and demands to be given or served pursuant to the terms of this Agreement shall be given by certified or registered mail, return receipt requested, addressed to the parties at their respective addresses set forth herein and will be deemed delivered and received three (3) days after deposit into the United States mail with sufficient postage.

f. If two or more persons are named as Purchaser herein, any one of them is authorized to act as agent for, with the right to bind, the other(s) in all matters of every kind or nature with respect to this Agreement.

g. Purchaser is prohibited from recording this Agreement or any memorandum hereof and upon attempted recordation this Agreement shall at Seller's option, become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

h. Seller agrees to disclose to Purchaser in writing prior to or at closing or post conspicuously on the Property, the type, thickness and R-value of all insulation installed or to be installed in the dwelling.

i. PURCHASER REALIZES AND ACKNOWLEDGES THAT ENTRY UPON THE PROJECT OR THE PROPERTY DURING CONSTRUCTION CAN BE DANGEROUS AND THAT HAZARDS MAY EXIST WHICH ARE NOT OBSERVABLE. PURCHASER'S ENTRY SHALL BE SOLELY AT HIS OWN RISK. PURCHASER DOES HEREBY WAIVE ANY AND ALL CLAIMS AGAINST SELLER FOR INJURY OR LOSS TO PERSON OR PROPERTY ARISING OUT OF OR IN CONNECTION WITH SUCH ENTRY BY PURCHASER OR ANY OTHER PERSON ACCOMPANYING HIM OR ENTERING AT HIS DIRECTION OR PERMISSION.

j. The provisions of this Agreement shall survive closing and not merge in the deed.

k. It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon its completion.

l. Each lot is unique in size, shape and various characteristics. Purchaser understands and agrees that the size of the lot, the exact location of sidewalks and driveways (if any) and the drainage patterns of the lot will differ from the model home plans, drawings or renderings that Purchaser may have examined.

m. Land adjacent to or surrounding the Property which is not owned by Seller is not within Seller's control. Seller will not be liable to Purchaser for any use or condition of adjacent or surrounding land for commercial, industrial, institutional, multi-family or non-residential purposes.

n. PURCHASER HEREBY RELEASES AND RELINQUISHES ALL CLAIMS AGAINST SELLER FOR DAMAGES TO PROPERTY OR PERSONAL INJURY ARISING AFTER THE DATE OF THIS AGREEMENT RELATING TO ANY OF THE FOLLOWING:
(1) environmental or ecological conditions or events such as weather conditions, atmospheric conditions, terrestrial conditions, acts of God or other natural or man-made conditions or occurrences, occurring beyond the reasonable control of Seller.
(2) consequential damages or expenses resulting from a termination of this Agreement or to delays in closing, such as lodging, storage, moving, meals or travel expenses.
(3) any claims for repairs or modifications to the Property except as specifically covered by Seller's limited home warranty. This waiver will be binding upon Purchaser and the heirs, successors, assigns, guests and invitees of Purchaser. Purchaser acknowledges that Seller shall be entitled to rely upon this waiver as a complete defense against any claim asserted by Purchaser or anyone claiming through Purchaser. The deed conveying the Property to Purchaser may contain a reference to this waiver.

IN WITNESS whereof the parties have set their hands and seals and PURCHASER CERTIFIES THAT THIS AGREEMENT HAS BEEN FULLY READ AND UNDERSTOOD.

Witness:

Jill Sanders

MUNGO HOMES, INC.

By: _____ Agent 7/9/15

PURCHASER

PURCHASER

Are you working with a Buyer's Agent? Yes ____ No X

Initial (s): _____ Date: 6/29/15

If yes, please fill out information below:

Buyer's Agent Name Office Address

Agency Name

Office Phone # Cell Phone # Fax#

Agency Code _____ Agent Code Agent's E-Mail Address

Purchaser's current address is: 839 Burnview Lane, Chapin, SC 29036

MUNGO HOMES Community Sales Manager Jill Sanders

MUNGO HOMES

## CONTINGENCY ADDENDUM

PURCHASER Amanda L. Huskins
LOT 221 COMMUNITY Westcott Ridge DATE 06/29/2015

PURCHASER UNDERSTANDS AND AGREES THAT THIS CONTRACT IS CONTINGENT UPON:

Purchasers request driveway to be on the right side.

PURCHASER _____ DATE 7/3/15

PURCHASER _____ DATE _____

Mungo Homes, Inc.
SELLER

BY: _____ DATE 7/3/15

06/29/2015

Lot: 221
Community: Westcott Ridge

MUNGO HOMES

# START DATE ADDENDUM

**The requested Start Date is** 8/21/15 **and will be confirmed after both parties ratify the *Purchase Agreement*. Actual construction will begin after your Pre-construction Meeting. The Pre-construction Meeting is typically scheduled for the week following your Start Date.**

**Purchaser Responsibilities:**

1. Meet with the Design Consultant and have your *Color Selections* completed on or before 8/17/15 (4 days before the Start Date), or you must move to the next available Start Date.
2. Make loan application within five (5) days of your *Purchase Agreement*.
3. Be current on all earnest money commitments prior to your Start Date.
4. Be available to attend a Pre-construction Meeting the week following your Start Date.

**Changes:**

1. Any change (addition/modification/deletion) that requires modifications to the construction drawings must be ratified by both parties prior to 25 days before your chosen Start Date, or you must move to the next available Start Date.
   a. If the changes are ratified more than 25 days before your Start Date, no Change Order Fees will apply.
   b. Examples of changes that require plan modifications include but are not limited to the following: foundations, garages, screen porches, bonus rooms, floor plan options, vaulted ceilings, tray ceilings, bath tub or shower options, bay windows, fireplaces, changes to vanities, adding or deleting doors, brick or stone options, windows, laundry sink, dormers or extra concrete patios or driveways.
2. In the twenty-one (21) days between the 25th and 4th days prior to your Start Date, it is possible to change the items enumerated in 1.b. above, but a Preparation Fee will be charged along with the cost of the change itself.
   a. Changing your choice of floor plan, elevation, home site or any of the other options listed in 1.b. above within this 21 day window will cost $500 to help offset the expense of re-permitting, surveying and drafting.
   b. This will require you to move to the next available Start Date.
   c. The $500 fee will not be added to *the purchase agreement* amount, but will be collected by check or debit card prior to initiating the change. The $500 will be non-refundable.
3. Changes that do not affect the construction drawings are permitted up to 4 days before the Start Date.
   a. If the changes are ratified more than 4 days before your Start Date, no Change Order Fees will apply.
   b. Examples of changes that do not require plan modifications include but are not limited to the following: garage door openers, finished garages, upgraded roof shingles, trim options, railings, designer paint schemes, cabinets, flooring, fireplace surrounds, closet shelving, landscaping, irrigation, plumbing fixtures, mirrors, shower doors, siding, security, vacuums, appliances, blinds, hose bibs, decks, home theater and audio, structured wiring, lighting packages, door hardware, countertops, electrical options or fences.
   c. Notwithstanding the above, all color selections must be made in the design appointment with the Design Consultant. Any changes permitted after that design appointment will include a $250 Change Order Fee, plus the cost of the change itself.
4. 4 days before the Start Date is when all changes must be complete. After this date, no changes are permitted without prior approval from Mungo Homes, and may not be permitted.
   a. If a change is permitted, any *Purchase Agreement Change Order* after this date will include a $250 Change Order Fee, plus the cost of the change itself.
   b. The $250 fee will not be added to *the purchase agreement* amount, but will be collected by check or debit card prior to initiating the change. The $250 will be non-refundable.
5. Although the changes are possible as described above, the process works best when all options are included in the initial *Purchase Agreement*.

**Purchaser's Acknowledgement:**

I have read the above addendum, understand and agree the content therein.

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Start Date Addendum.doc 2/18/13

MUNGO HOMES

# Start Calendar

Lot: 221 Community: Westcott Ridge

| | Mon | Tue | Wed | Thur | Fri | Sat | Sun |
|---|---|---|---|---|---|---|---|
| Week 1 | -25 Days No more structural changes 7/27/15 | | | | | | |
| Week 2 | | | | | | | |
| Week 3 | | | | | | | |
| Week 4 | 8/17/15 -4 Days Selections due and no more non-structural changes | | | | Start Date 8/21/15 | | |
| Week 5 | | Pre-construction meeting 8/25/17 | | | | | |

**THE THREE (3) CUT OFF DATES LISTED ABOVE FOR STRUCTURAL CHANGES, SELECTIONS AND NON-STRUCTURAL CHANGES ARE THE DATES THAT THE APPLICABLE PAPERWORK MUST BE RECEIVED, EXECUTED AND PROCESSED BY MUNGO HOMES.**

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

_____ 7/3/15

Mungo Homes

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Build Jobs/Start Calendar.xls 6/26/2015

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Lot #: 221

Community: Westcott Ridge

MUNGO HOMES

# STRUCTURAL AND/OR NON-STRUCTURAL CHANGES

**Examples of changes that require plan modifications include but are not limited to the following (structural changes):**

- Garages
- Screen porches
- Bonus rooms
- Floor plan options
- Vaulted ceilings
- Tray ceilings
- Bath tub or shower options
- Bay windows
- Fireplaces
- Changes to vanities
- Adding or deleting doors
- Brick or stone options
- Windows
- Laundry sink
- Additional concrete
- Dormers

7/27/15
Date

**Examples of changes that do not require plan modifications include but are not limited to the following (non-structural changes):**

- Garage door openers
- Finished garages
- Upgraded roof shingles
- Trim options
- Railings
- Designer paint schemes
- Cabinets
- Flooring
- Fireplace surrounds
- Closet shelving
- Landscaping
- Irrigation
- Plumbing fixtures
- Mirrors
- Shower doors
- Siding
- Security
- Vacuums
- Appliances
- Blinds
- Hose bibs
- Decks
- Home theater and audio
- Structured wiring
- Lighting
- Door hardware
- Countertops
- Electrical options
- Fences

8/17/15
Date

Purchaser 7/29/15 Date

Purchaser Date

Mungo Homes 7/31/15 Date

m:\mungo homes\all things sales\mungo contract forms\structural non structural.doc 2/5/13

Lot 221
Community Westcott Ridge
Date 06/29/2015

## Development Rider

441 Western Lane, Irmo, SC 29063
(803) 749-9000
www.mungo.com

When developing the infrastructure of a community, there are a number of factors that are directly impacted by weather and local municipalities. As a developer, The Mungo Company has a very good idea about the time frame required to complete the construction, inspection and approval process for the community roads and utilities. However, since every project is unique, there are sometimes unexpected delays in the construction process. These may be as a result of:

- Unusually bad weather
- Extensive underground rock
- Municipal approval process
- DHEC approval process
- Utility company's installation of power
- Utility company's installation of water
- Utility company's installation of gas (if applicable)
- Cold weather effects on concrete or paving

Some weather problems and external delays are common, so we factor some time in our schedule to account for these. It is possible however, that Mungo Homes will not be able to begin construction or complete your home when we expect to, due to unusual conditions beyond our control or the control of the developer.

Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration.

By reading and signing this document, you acknowledge the possibility of delays to the construction start or completion of your home.

In all cases, your satisfaction is our top priority, and you will be kept informed of any changes in our schedule that affect the construction of your home.

Mungo Homes Community
Sales Manager _____

Date: 6/29/15 _____ Purchaser

Date: _____ Purchaser

Date: 7/2/15 _____ Seller's Authorized Signature

06/29/2015

MUNGO HOMES

Lot 221
Community Westcott Ridge
Date 06/29/2015

## Non-Owned Lot Addendum

Seller is in the process of acquiring the Property upon which the dwelling and other improvements are to be constructed and sold to the Purchaser pursuant to the terms and conditions of the Purchase Agreement to which this Addendum is attached. Seller anticipates acquiring the Property; however, cannot warrant or guarantee that it will be able to do so. Therefore, Purchaser agrees that if Seller does not acquire the Property for any reason, Purchaser may elect to: substitute other property which the Seller has available for sale, recognizing that such substitution may require adjustments to price, time and other provisions of the Agreement, or terminate the Agreement and receive a refund of any Earnest Money paid to the Seller. Such election must be made within ten (10) days after Seller notifies Purchaser that it is not acquiring the Property. If Purchaser fails to elect within said time, Purchaser shall be deemed to have elected to terminate the Agreement. Seller shall have no other liability of any nature whatsoever for its failure to acquire title to the Property for any reason.

Seller: _____

By: 7/3/15

Purchaser

Purchaser

MUNGO HOMES

# CLOSING COST ADDENDUM

| | | | |
|---|---|---|---|
| **Job #** | **Westcott Ridge 221** | **Date** | **06/29/2015** |
| **Purchaser** | **Amanda L. Huskins** | **Address** | **TBD Chapin, SC 29036** |

Seller has established Marketing Agreements with Ameris Bank, BB&T, and Starkey Mortgage. Under the terms of these Marketing Agreements these lenders are promoted on Seller's website and permitted to display promotional materials in Seller's sales centers. These lenders offer a broad range of loan programs including, but not limited to, programs which provide for the elimination and/or deferral of closing costs into their loan program. Please contact one or more of these lenders to learn more about the financing options available to you.

"Closing Costs" are fees or charges associated with loan origination, appraisal, processing, closing, underwriting, credit report, tax service, flood certification, lender's title insurance, attorney and recording.

**Purchaser will not be responsible for deed stamps, transfer taxes and intangible taxes when (1) the closing is handled by attorney selected by Seller AND (2) one of the lenders listed above are used or Purchaser does not require financing (i.e. cash closing).** Purchaser may be required and agrees to execute a waiver of conflict or similar document by the closing attorney selected by the Seller.

Purchaser will be responsible for all Lender costs associated with "optional" or "elective" programs such as interest rate buy-downs, discount points and other special loan programs. Purchaser shall also be responsible for all other closing costs and pre-paid items including, but not limited to, survey, attorney's courier charges to send the loan package to the Lender, owner's title insurance, hazard insurance, per diem interest on Purchaser's loan, Lender-required escrows, and homeowners' association dues and charges.

Purchaser understands that Purchaser may not make any change in mortgage company or loan program in the 30 days prior to closing date.

**Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration.** Purchaser acknowledges that the purchase price is based on closing by the date agreed to in the Purchase Agreement. **Should Purchaser fail to close on that date, Seller will be entitled to and the Purchaser agrees to pay carrying costs at the rate defined in the Purchase Agreement from that date until the day of the actual closing. This amount will be charged on a monthly basis and prorated daily. Seller will require that this amount be paid in advance.**

Purchaser specifically acknowledges and consents to Seller providing a copy of Purchase Agreement, attachments and addendums to lenders listed above.

**Nothing herein guarantees that Purchasers will qualify for any specific financing.**

**SELLER:** _____ **PURCHASER:** _____

**PURCHASER:** _____

MUNGO HOMES

06/29/2015

LOT: 221 COMMUNITY: Westcott Ridge

ADDRESS: TBD

PURCHASER (S) Jay + Amanda Huskins

## HOMEOWNER'S RESPONSIBILITY

- Complete the *Customer Selection Sheet* completed at least 21 days before your Start Date.
- Make appointment with a mortgage company immediately upon receipt of accepted contract.
- Meet with Project Manager for Pre-construction meeting. (Project Manager will call to schedule).
- Two weeks prior to closing make arrangements for homeowner's insurance. Notify closing attorney's office with information. Also, verify closing date & time with Closing Coordinator at Mungo Homes.
- Put utilities (electricity, gas, water & sewer) in your name. Will be changed from Mungo Homes at closing.
- Day before closing, obtain amount of funds needed to close from Closing Attorney. If funds are less than $4000, a cashier's check will be accepted. If funds exceed $4000, arrange for wire transfer of funds to closing attorney's office. Funds must be deposited into attorney's account and available for disbursement from the attorney's account to complete closing, and release reimbursements, checks to agents, and keys to customer.
- David Ross is our preferred closing attorney. He can be reached for your final closing figures 48 hours prior to closing.

## HOMEOWNER'S MANUAL ACCEPTANCE

Your signature below acknowledges receipt of your MUNGO HOMES HOMEOWNER'S MANUAL. It also indicates that you have reviewed this information with your Community Sales Manager.

You are discouraged from making any large purchases such as a new car, boat, motorcycle, etc., between the time of signing the sales agreement and closing of the home. Large purchases can affect your credit report and ultimately the ability to purchase your new home.

**ACCEPTANCE OF HOMEOWNER'S RESPONSIBILITY AND HOMEOWNER MANUAL:**

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

Community Sales Manager Lee Sanders Date 6/29/15

**PLEASE REMEMBER TO BRING YOUR HOMEOWNER MANUAL TO ALL MEETINGS CONCERNING YOUR NEW HOME**

| | |
|---|---|
| STATE OF SOUTH CAROLINA | |
| | COURT OF COMMON PLEAS |
| County of Richland | 2017-CP-40-03697 |
| AMANDA LEIGH HUSKINS AND JAY R. HUSKINS, | |
| PLAINTIFFS, | |
| vs. | TRANSCRIPT OF RECORD |
| MUNGO HOMES, LLC., | |
| DEFENDANT, | |

November 8, 2017
Columbia, South Carolina

*BEFORE*:

THE HONORABLE DEANDREA GIST BENJAMIN, JUDGE.

*APPEARANCES*:

CHARLES H. MCDONALD, ESQ.
Attorney for the Plaintiffs

STEVEN KROPSKI, ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

**C O N T E N T S**

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

THE COURT: All right. This is a motion to dismiss and compel arbitration.

(Off the record).

(Pause).

This is a motion to dismiss and compel arbitration --

MR. KROPSKI: That's correct, Your Honor.

THE COURT: -- filed by the defendant.

All right. Yes, sir.

MR. KROPSKI: Your Honor, we brought the -- the motion to compel arbitration. That is a lawsuit filed by the Huskins which were -- are homeowners.

They bought a new construction home from Mungo Homes. The contract was signed June 29th, 2015. A Certificate of Occupancy was issued January 19th, 2016. In the contract, there is, as is customary in many new build contracts, a disclaimer of various warranties.

Plaintiffs -- they don't allege that there is anything wrong with the house. They don't allege there's damages, construction defects. What they're saying is they should have gotten consideration for disclaiming these warranties, a reduced price, some sort of consideration.

So there is nothing wrong with the house. They just want some money for the disclaimer of the warranties. In the contract on page three, the purchase agreement, there

is a paragraph titled arbitration and claims.

It's a very broad arbitration provision, and it says any claim, any dispute arising out of this contract is subject to arbitration. Arbitration rules would be plaintiffs pick an arbitrator; defendants pick an arbitrator. Then those two arbitrators pick a third they can agree on. So it's a neutral playing field. Each side gets an arbitrator, and then a third is an independent.

On the front page, there is a notice in capital letters underlined as is required by the statute that says this contract is subject to arbitration.

Underneath the arbitration provision in the contract, the plaintiffs initialed the arbitration provision. So by our count, that's conspicuous. They knew what they were getting into.

Because this was a new construction house, the Supreme Court has held pretty consistently that when there's materials and other businesses from outside the State that involves interstate commerce, and in that circumstance, the FAA applies.

I don't know that it really makes much of a difference here because we do have the provision on the front of the contract, the notice, but in any event, under the FAA, arbitration provisions are looked at separable from the rest of the contract.

So what the court looks at is this arbitration provision. An agreement to arbitrate, does it encompass the claims? Well, obviously, this claim is coming out of the contract, and the arbitration provision would certainly involve that claim.

I believe the plaintiffs argue that there's various other provisions in this contract that would leave it unconscionable: Warranty disclaimers, disclaimers of things like punitive damages and other things.

Our position is that these are in different paragraphs, and the only paragraph the Court looks at in looking at a motion to compel arbitration is the arbitration claims paragraph.

The courts have said when looking at conscionability of an arbitration provision what you're looking at is does it provide for an unbiased arbitration in front of a neutral arbitration committee or an arbitrator? In this case, it definitely does. It abides by the rules in the South Carolina Uniform Arbitration Act. The three arbitrators, they're neutral.

So our position is that this claim needs to be submitted to arbitration, and the rest of the contract needs to be interpreted by those arbitrators.

THE COURT: All right. Thank you.

Yes, sir.

MR. MCDONALD: Thank you, Your Honor. May it please the Court, Chuck McDonald. I'm going to have a little more to say than that.

Your Honor, with me are co-counsel, haven't made a formal appearance but Mr. Terry Richardson and Biff Sowell are assisting on this case.

Your Honor handed up -- we submitted a memo. I don't know if the Court has had an opportunity to review it, but I think it would helpful in resolving this motion if the Court at some point would be able to read that memo.

THE COURT: I have.

MR. MCDONALD: Your Honor, this case is about protecting the rights of a purchaser of a new home, and that's what the case is about. What's what this motion is about.

For many, many years, the South Carolina courts have made it clear the policy is to protect the rights of the purchaser of a new home.

As far as back as 1979 with Justice Toal in the Kennedy vs. Columbia Lumber case, she made clear it's the policy of South Carolina to protect a new home buyer. That's what we're asking the court to do here is to deny this motion.

The contract at issue is an adhesion contract. It's a take-it-or-leave-it contract. It has oppressive terms,

and there clearly is no agreement, meaningful agreement, of the parties to submit disputes to arbitration.

I need to give you a little background, Your Honor, about the purchase agreement. It's important to sort of understand some things about that to resolve this motion. It's attached as an exhibit to the complaint and also as an exhibit to our memo.

Your Honor, this is not a construction contract. It is a contract to purchase real estate, and that is made clear by the terms of the purchase agreement.

The very first paragraph identifies Mungo as the seller, not the builder, the seller; the Huskins as the purchaser. It says under the first paragraph: "Property: Seller agrees to sell and purchaser agrees to buy a certain tract of land and dwelling with improvements in Richland County, the proper."

It goes on to say in the miscellaneous provisions, Subsection K, "It is understood that purchaser is buying a completed dwelling and that seller is not acting as a contractor or purchaser in the construction of the dwelling." So it couldn't be more clear that this is not a new-build contract. That is a contract to buy real estate, buy a new house.

Looking further at the purchase agreement, the material terms, Your Honor, there is a section: Limited

warranty, and under this limited warranty section, there are broad disclaimers of key warranties.

They disclaim the implied warranty of applicability to say the house is -- we're not warrantying the house as habitable. They disclaim any warranty that the house is suitable for a residential purpose even though they're selling a new house. They disclaim all other warranties.

They proceed then to limit significantly and severely any remedies. You can't recover any consequential punitive damages. You waive all of your rights and remedies whether based in contract or tort, and essentially, your only remedy is to go under some third-party warranty that may provide some relief in fixing something that's wrong with your house.

Going back to what this case is really about is the waiver of the implied warranty of habitability. Your Honor, that's a fundamental warranty that springs from the sale of a new house.

In 2006, the our State Supreme Court addressed this issue head on in the case of Kirkman v. Parex. Justice, I think, Pleicones issued that opinion, and the issue in that case was with -- given our strong policy in South Carolina of protecting the new home buyer, are we even going to allow as a matter of policy a waiver of the implied warranty of habitability.

The court in Kirkman v. Parex said we will, but only under strict conditions. The waiver has to be conspicuous. The waiver has to be known to the buyer, and there has to be separate consideration given for the waiver. It has to be separately bargained for.

In fact, that case gives the example of a reduction in the purchase price of the home. So that case makes clear you don't get this waiver for free, Builder. You have to give something separate for it, and that's what this case is about. That doesn't happen.

And so the purchaser signs away these rights without receiving anything in return which is required by, we say, Kirkman v. Parex. So that's the crux of the case and why that warranty is so critical, and that's the relief we're seeking in the case.

Now, as a threshold matter, the court needs to determine what are we -- what are -- under the FAA or under South Carolina law, the Federal Arbitration Act would apply if there were interstate commerce involved.

Well, there's not, Your Honor. As I pointed out, this is a -- not a contract to build a house. That is clear from the plain language of the purchase agreement. It's a contract to buy real estate in a residence dwelling point.

In 2012, Justice Beatty hit this head on. He

addressed this very issue in the case of Bradley vs. Brentwood Homes.

We had the same type of purchase agreement. The Brentwood Homes was identified as the seller. The Bradleys were the purchaser. We had the same disclaimer language in the Brentwood Homes contract that said you recognize I'm not acting as your builder or contractor. I'm selling you a home, same thing we have in Mungo's purchase agreement.

Justice Beatty looked at that and analyzed it under the applicable law and concluded right then that this is not interstate commerce. It's purely intrastate commerce.

So when we're dealing with a purchase contract to buy a new home and convey real estate as we have here in this case, the FAA simply doesn't apply. I mean, it couldn't be clearer.

So we're under South Carolina law. There is no application of Federal Arbitration Act or any cases arising under it. So what we've got to do is look at what is the South Carolina law here, and we've already got the answer.

Last year in the summer of 2016, the Supreme Court, South Carolina Supreme Court, issued its opinion in Smith v. DR Horton. Your Honor, this -- this case is strikingly similar to that case. It's almost as if you just change

the names. You could substitute the Huskins for the Smiths and Mungo for DR Horton. It's the same situation, same analysis.

In that case, the Smiths brought a lawsuit against DR Horton. This is the nation's largest builder. DR Horton moved for appellate arbitration, and the trial court denied the motion finding that the arbitration provision was unconscionable; that the Smiths lacked a meaningful choice as to the agreement to arbitrate, and the terms were oppressive and one sided.

So the trial court refused to grant that motion and refused to enforce the arbitration clause, went up to the Court of Appeals. They affirmed the trial court. DR Horton petitioned the South Carolina Supreme Court, went up, and Justice Toal issued an excellent opinion in which she affirmed the ruling of the trial court and found that the arbitration provision was unconscionable and unenforceable. Very, very similar situation, same sort of criteria in the DR Horton purchase agreement that we have here with Mungo.

In DR Horton, they had severe limitations of remedies which we have here. They excluded all warranties which we have here, and so the court in Smith v. DR Horton concluded when you have got an individual buyer like the Smiths dealing with a large national builder like DR

Horton, that is per se unequal bargaining power.

We have an adhesion contract, a take-it-or-leave-it contract which is -- the courts have said is suspect on its face as to whether that's truly a meaningful agreement to arbitrate. Then -- excuse me, Your Honor. The Court looks further and says one of the factors is there really a meaningful choice? Did the buyer really have a choice to negotiate this arbitration clause, or was it a take it or leave it situation where if I want the house, I just have to sign here?

In Smith, they found it was an adhesion contract. They found it was take it or leave it. They found that the Smiths had no meaningful choice; that it was a disparity in bargaining power and sophistication because you had homeowners against a large builder, and they said no meaningful choice. Then they looked at the second prong: Are the terms oppressive and one sided?

Interestingly, Your Honor, DR Horton made the same argument as Mungo is making here. Don't look at anything other than the isolated arbitration provision, and this Court in Smith said no, we're going to look at other related provisions.

We're going to consider the disclaimer of warranties. We're going to consider the limitation of remedies as a whole provision, as part of the analysis of this

arbitration agreement. They did that, and they found these terms are oppressive. They're one sided, and that renders the arbitration agreement unconscionable.

Your Honor, we have the same thing here, there is no difference. We have the Huskins who were a young couple dealing with the nation's 37th largest builder, Mungo. There is no meaningful choice. This is a take-it-or-leave-it contract as to the arbitration agreement.

They weren't represented by counsel. All of the same factors that were present in Smith are present here. Same thing with the terms. All oppressive terms -- and counsel, it's an interesting statement. It is standard for these national builders to put these things in there but it's unconscionable.

Just as the court in Smith said we're not going to -- we're not going to uphold those in South Carolina. It's against our policy of protecting the new home buyer. They didn't do it in Smith. Your Honor, we submit it shouldn't be done here. The same terms, the same disclaimer of the implied warranty of habitability. The same severe limitations on remedies are present here.

So, Your Honor, there was no meaningful choice by the Huskins as to this arbitration agreement, and considering as the court did in Smith v. DR Horton, the other relevant

provisions which are contained in the limited warranty paragraph in the Mungo purchase agreement, it renders the arbitration agreement unenforceable. It's unconscionable.

Then finally, Your Honor, if you were only to -- if you were to accept Mungo's argument and only look at the paragraph that says arbitration, on its face by itself that's unconscionable because there's part of this that Mungo has failed to point out to the court. It's a very important part. The second part of that paragraph, arbitration claims, contains an illegal and severely restrictive time limit on making a claim.

It says that if you don't make a demand for arbitration within 90 days after the claim arose, then that claim, in quoting the language, shall be deemed waived and forever barred, 90 days, Your Honor.

Well, we know that's not enforceable because that's in violation of Title 15 chapter 3 section 140 of South Carolina Code of Laws which says you can't in a contract curtail the statute of limitations. We know that. I submit to the court that Mungo knows that or should know that.

It's important to note who doesn't know that, Your Honor. It's the innocent purchaser. They don't know that. So why is it in there? Why is it in there?

It's in there because it's oppressive. It's one

sided. It's unfair and it's unenforceable, and to suggest -- to the extent there's any suggestion that we ought to just ignore that, ought to just treat it as if it didn't exist, that's a little too late for that, Your Honor. This has been in their contract for years, and it's in the contract that we're dealing with today.

The only purpose of that provision is to unfairly and improperly limit the time for making a claim. So on its own, it's -- it's oppressive and one sided, unconscionable on its -- on its own.

And lastly, Your Honor, you can't save it. There may be an argument -- there's been -- DR Horton made this argument in Smith. They said, Court, don't throw out the arbitration provision. It's in the paragraph 14(g). All of these other provisions are in the other parts of the contract, just -- just blue pencil those, strike those out and keep the arbitration clause in there.

The court in Smith said no, we can't do that. We can't blue pencil this. We can't rewrite your contract. We can't save it. There is no separate severability provision in the arbitration clause, and there isn't one here.

So, Your Honor, simply put, we stand in the shoes of the Smiths, and the Supreme Court has spoken. We would just ask this court to follow that precedent. Deny the

this motion and allow the Huskins to proceed in court. Thank you, Your Honor.

THE COURT: Thank you.

MR. KROPSKI: Your Honor, I'm sure you imagine I have a few responses.

THE COURT: Yes, sir.

MR. KROPSKI: I first want to address the Smith case which is -- has been referenced by the plaintiff's counsel quite a bit. That was in 2015. After that, in 2016, the case Parsons vs. John Wieland Homes which is 418 SC 1 upheld an arbitration provision. The Court of Appeals relied on Smith. The Supreme Court said you didn't get it right, okay.

What happened in Smith is all of these allegedly unconscionable provisions were included in the claims and dispute resolutions section. So the Supreme Court said we -- we have to look at all of these when looking at the arbitration provision.

What we're looking at here is a very clear one paragraph arbitration and claims paragraph. All of these other issues that are discussed by plaintiff's counsel are in separate paragraphs, clearly delineated paragraphs. Those are questions for the arbitrator. No one is saying that they can't make these claims, and no one is saying that maybe an arbitrator is going to say you are entitled

to compensation for these waivers.

The situation here is that has to be done in arbitration. What we're dealing with is a small paragraph, and that paragraph is very clear. No one is asserting the statute of limitations here. There is no statute of limitations issue.

Even if you strike out that last part where we have conflicting viewpoints on what that might mean, whether it's 90 days to demand arbitration which we did after the claim was brought, it really doesn't matter.

There is no statute of limitations argument happening. Even if you take out that last sentence, we're still left with the same arbitration provision that says you submit disputes under this contract to an arbitrator or two to three arbitrators in an unbiased forum in front of unbiased arbitrators. That's what we're dealing with here.

In terms of South Carolina versus interstate commerce, I do want to address that, as well. This contract could not be more clear. The front of it has an X next to building job.

The addendum identifies a change negotiated by the plaintiffs to have the driveway installed on the right side of the home. There is a start date addendum. There is a calendar for construction. There is a structural and

nonstructural changes sheet. There is a development rider and a non-owned lot addendum which says we don't even own this lot yet. We're going to get it, and then we're going to build your house on it.

This is very clearly a construction. This is a new built home, and to say it was just the sale of a house would defy logic. Nonetheless, even if that were the case in the contract, the federal -- the law is very clear, Nunes vs. Green Tree Financial Corp. -- Corporation which is 343 SC 531 says even if the parties did not intend for it to be interstate commerce, if this transaction does actually hit interstate commerce, then the FAA applies.

What we have here, we have an affidavit from Mungo Homes that says this was obviously a new build. It included businesses and materials from outside the State of South Carolina. That brings the FAA into this.

The FAA and South Carolina generally have the same rules concerning an arbitration provision, though. We look at the paragraph by itself. The paragraph by itself doesn't have any -- any waivers, any sort of unfair application in front of an arbitrator that says you submit your claim to the arbitrators and then you bring all of your cause of action there.

There is nothing that they're going lose by having this in arbitration. South Carolina says if there is ever

a doubt from -- whether it's subject to arbitration or it's to remain in circuit court, you err on the side of arbitration. It always goes to arbitration.

So the arguments that are being made concerning an adhesion contract, those are for arbitration. Arguments concerning the fairness of a warranty waiver, those are for arbitration. Everything that's claimed in this complaint is for arbitration, and that's our position.

THE COURT: What about the -- you may have addressed this. In his position regarding the 90 day -- 90 day -- the demand or that contract regarding his 90-day demand, his argument that -- the argument regarding the -- I guess it being imposed statute of limitations in -- in a contract on the 90-day. Each and every demand for arbitration shall be made within 90 days after the claim dispute or other matter in question.

MR. KROPSKI: Right. And Your Honor, the way I read that is if we did demand arbitration 90 days after we filed the lawsuit, I look at that as a waiver of new demand for arbitration. I don't think we did that.

In any event, even if it's read as a -- as an attempt to limit the statute of limitations, the statute is very clear that any contractual provision that tries to limit the statute of limitations is just void ab initio. It's as if it never happened.

We're not making the claim for the statute of limitations. There is no -- there is no oppression. There is no prejudice that the Huskins have by this provision.

I will concede to you I think that's ambiguous, but there's -- in this case, there is no application. Bringing that up is, I guess, a red herring, but there is no application. No reasserting the statute of limitations.

Finally, what the Smith court said about severing provisions in an arbitration, you can sever them, but if it leaves the whole thing meaningless, then there is no point in severing.

If there is no return in the arbitration agreement, then it makes no sense. Here, it's the last sentence. You strike that out, it doesn't make any difference whatsoever whether these claims are going forward in arbitration. It's the exactly same claims. If you strike out that last sentence, we're in the same position as we are today.

THE COURT: All right. Thank you.

MR. MCDONALD: Your Honor, may I briefly respond to just a few things?

THE COURT: Yes.

MR. MCDONALD: As to the issue of the FAA, I'm not

trying to defy logic. I'm just reading the plain language of the contract, and it couldn't be more clear.

It says it's to buy a completed dwelling, and seller is not acting as a contractor for purchaser in the construction of a dwelling. Mungo's words, not mine, couldn't be more clear.

The Brentwood case is right on point. In that case, Brentwood Homes did the same thing. They filed an affidavit trying to say oh judge, this is interstate commerce. The court said no, it's not. So that case is absolutely on point and clearly leaves no other finding that the FAA doesn't apply here.

THE COURT: Real quick, what about his position regarding the addendum, the driveway that -- how does that affect interstate --

MR. MCDONALD: It doesn't have any affect because it's -- this is -- this is a contract to buy real estate and a house. It is culminated in a closing with a deed conveyed.

It's not like I bought the lot, hired the builder, hired an architect to build my plans, so none of that matters. The nature of the transaction is a purchase agreement to buy real estate, and it's squarely within Justice Beatty's analysis in the Brentwood Homes case.

Your Honor, as to -- as to the issue of the Smith

case, first of all it is, in fact, a 2016 case. It is filed July 6th, 2016, and the Parsons' case cited by counsel in no way overrules, overturns. I don't even believe it addresses this. So the Parsons' case was decided a month or two later, but it in no way overrules, supersedes Smith v. DR Horton. In fact, it's not even a case about unconscionability. That's not even the issue before the court in the Parsons' case, and I would commend that to Your Honor if you could review it, you'll see that.

It has some small -- the issue of unconscionability was an additional sustaining ground which the court, the Supreme Court, dismissed with no analysis.

By comparison, we have an extensive analysis in Smith vs. DR Norton of the exact situation we have here, and the conclusion in that case is what we believe is the proper one here. This is an unenforceable arbitration agreement.

Lastly, you can't blue pencil, Your Honor. It's an interesting argument to say now oh, we know this last two sentences don't really -- it's clear what it means. It couldn't be more clear. There is no ambiguity.

It says if you don't make a claim within 90 days, that is -- shall be deemed waived and forever barred. It's a door closing mechanism on claims. It's improper and to come to court now and say oh, it doesn't matter.

We can just strike that. Well, why is it in there, and it's been in there? It's unfair and it's oppressive, and it's a heck of an argument to come into court now and say oh well, we can just treat it like it doesn't exist.

I have no idea how many people -- I don't know. We don't know standing here today how many people have been told you're out of time on the claim. I don't know, but it's clearly in there. You can't blue pencil it, Your Honor. That's just not the law for the Court to rewrite the contract and specifically the arbitration agreement.

Lastly, what prejudice will we suffer? Your Honor, you know, right now this case is in the posture of an individual case. It may, either this case or other cases because of the prevailing -- the nature of this contract and how long it's going to run, there may be a class. That -- to arbitrate would close a door on that.

So while that, you know, the issue here we have a single case, but that would be -- that would be a significant prejudice. So I've made all of the arguments I've got, Your Honor. I think we have certainly -- it is more articulately put in our brief. I think we're squarely under Smith vs. DR Horton, and I just ask the Court to apply that and deny the motion. Thank you.

MR. KROPSKI: Your Honor, I apologize for belaboring on this point.

THE COURT: Go ahead.

MR. KROPSKI: To respond to a few things. I'll repeat the case law that I cited. Even if it's not the intent of the parties to involve interstate commerce, if it ultimately does involve interstate commerce, then the FAA applies.

I don't think there is any question here that there might be a miscellaneous statement that this contract is talking about a new built home. Even if there was in that provision of the contract, and it was the only provision in the contract, it did ultimately involve a new built home. Under the law, that brings in the FAA.

Nonetheless -- and they said, I don't think it's that much of a difference under the FAA or South Carolina law. We still only look at the arbitration provision. In the Parsons' case, that's what it's talking about. It says the Circuit Court improperly looked at other provisions in the contract to determine that this was unconscionable.

They said you can't do that. You can only look at the arbitration provision. When they looked at the arbitration provision, they said it has got to go to arbitration, the left -- the rest of it is left for arbitration.

In doing that, they cite case law. Arbitration clauses are separable from the contracts in which they are

in effect. This is very clearly a separate paragraph. Finally, in terms of severing what plaintiffs have alleged is an unconscionable 90-day limit, SC code 36-2-302(1) --

THE COURT: One more time.

MR. KROPSKI: 36-2-301 allows a court -- expressly allows a Court to sever any provision that's unconscionable.

As I said, what the court in Smith said was if we do that, then this provision has no meaning. It's completely gutted. If we remove this provision which isn't even at issue in this case, then there is no gutting of the arbitration provision.

Lastly, I don't know what class component might come with this, but what we're here today on is the Huskins claim, and the Huskins claim is an individual claim. I don't think hypothetical class action lawsuits is a reason to deny a motion to compel arbitration.

THE COURT: All right. Thank you.

MR. KROPSKI: Thank you.

THE COURT: All right. I'll take a look at it and try to get something to you all as soon as possible.

MR. KROPSKI: Thank you, Judge.

MR. MCDONALD: Thank you, Your Honor.

(Whereupon, the proceedings were concluded.)

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 8th day of November, 2017.

June 29, 2018

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

AMANDA LEIGH HUSKINS AND JAY R. HUSKINS,

☐ Plaintiff,

vs.

MUNGO HOMES, LLC,

■ Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-40-3697

**MOTION INFORMATION FORM AND COVER SHEET**

**Check box above indicating submitting party.**

| Plaintiffs' Counsel | Attorneys for Defendant MUNGO HOMES, LLC |
|---|---|
| CHARLES H. MCDONALD, ESQ.<br>H. FREEMAN BELSER, ESQ.<br>WILLIAM C. DILLARD, JR., ESQ.<br>BELSER & BELSER, PA<br>P.O. BOX 96<br>COLUMBIA, SC 29202 | David W. Overstreet, Esq.<br>State Bar No.: 16965<br>Steven R. Kropski, Esq.<br>State Bar No.: 101441<br>Earhart Overstreet LLC<br>P.O. Box 22528<br>Charleston, SC 29413<br>(843) 972-9400 |

FILED
2017 JUL 20 PM 12:16
JEANNETTE W. McBRIDE
C.C.P. & G.S.

■ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

**SECTION I: Hearing Information**

Nature of Motion: NOTICE OF MOTION AND MOTION TO DISMISS AND COMPEL ARBITRATION
Estimated Time Needed: 15mins Court Reporter Needed: yes

**SECTION II: Motion Type**

■ Written motion attached
☐ Form Motion

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Defendants — Date: 7/19/17

**SECTION III: Motion Fee**

■ PAID - AMOUNT: $25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE
CODE: _____ Date: _____

**CLERK'S VERIFICATION**

Collected by: _____
(print name)
DATE FILED 7/20/17
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND | ) | CASE NO.: 2017-CP-40-03697 |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | |
| Plaintiffs, | ) | NOTICE OF MOTION AND MOTION TO DISMISS AND COMPEL ARBITRATION |
| vs. | ) | |
| Mungo Homes, LLC, | ) | |

RICHLAND COUNTY FILED
2017 JUL 20 PM 12:16
JEANNETTE W. WALKER C.C.P. & G.S.

TO: CHARLES H. MCDONALD, ESQUIRE, H. FREEMAN BELSER, ESQUIRE AND WILLIAM C. DILLARD, JR., ESQUIRE: ATTORNEYS FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant Mungo Homes, LLC ("Defendants"), by and through their undersigned attorneys, will move as soon as practicable before this Honorable Court to dismiss the Complaint pursuant to Rule 12(b)(6), SCRCP, because Plaintiffs are bound by an arbitration clause requiring them to submit the instant dispute to binding arbitration.

These motions are based upon the pleadings filed in this matter, the Rules of the Court, all state and federal statutes, memoranda of law, any other information this Court accepts or is submitted by Defendant as part of the hearing on this matter.

**ARGUMENT**

**I. PLAINTIFFS' EXLUSIVE REMEDY IS THROUGH BINDING ARBITRATION**

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "It is the policy of this state and federal law to favor arbitration[,] and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery*

*Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct.App.2015).

Plaintiffs entered into a contract to purchase a home to be built by the defendant. (Compl. Ex. 1, "the Contract").) The Contract contains an arbitration clause that reads:

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act.

Furthermore, The first page of the Contract contains the following provision in bold, underlined, capital letters: "**THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. UNIFORM ARBITRATION ACT, S.C. CODE 15-48-10 et seq.**" (Ex. 1, at 1.)

In their Complaint, Plaintiffs allege that the inclusion of a disclaimer of the implied warranty of habitability in the Contract (1) constitutes a breach of defendants duty of good faith and fair dealing; (2) unjustly enriched defendant; and (4) constitute an unfair trade practice by the defendant. Plaintiffs also seek a declaratory judgment concerning their warranty rights under the contract. Clearly these allegations fall squarely within the Contract's requirement that "any claim, dispute or other matter in question between the parties hereto arising out of this agreement...shall be resolved by final and binding arbitration." (Ex 1, at 3).

Here, to the extent the South Carolina Uniform Arbitration Act controls, the arbitration provision is indisputably valid. S.C. Code §15-48-10 expressly states that:

> a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid,

> enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon, the contract shall not be subject to arbitration.

S.C. Code §15-48-10 (emphasis added).

That said, the Supreme Court of South Carolina has repeatedly held that a contract providing for construction will inherently touch on interstate commerce for no other reason than it is implausible to suggest that the building materials will be fabricated exclusively in South Carolina. *See Zabinski*, 346 S.C. at 594-95, 553 S.E.2d at 117-18 (utilization of out-of-state materials, contractors and investors implicates interstate commerce); *Episcopal Housing v. Fed. Ins. Co.* 269 S.C. 631, 640, 239 S.E.2d 647, 652 (use of labor, supplies, and materials from out-of-state sources indicates interstate commerce); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App.2002) (finding consultation with out-of-state technicians is an indicator of interstate commerce).

Thus, although the Contract itself identifies the South Carolina Uniform Arbitration Act, the Federal Arbitration Act preempts state law. *See Muñoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001) (holding that although parties may not have contemplated an interstate transaction at the time of contract formation, if their contractual relationship in fact involves interstate commerce, then the FAA nonetheless applies); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277-78, 115 S.Ct. 834 (rejecting the argument that the FAA applies only where the parties contemplated an interstate transaction and finding the FAA applies where an agreement that contains an arbitration provision, on the whole, evidences a transaction that in fact affected interstate commerce); *Zabinski* 346 S.C. at 591, 553

S.E.2d at 115 ("The [United States] Supreme Court utilizes a 'commerce in fact' test to determine if the transaction involves interstate commerce for the FAA to apply.").

As the FAA applies, the FAA requires that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court has construed Section 2 of the FAA as permitting "agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011).

Moreover, according to the United States Supreme Court "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

In the current dispute, the Plaintiffs do not suggest that the arbitration provision is unenforceable[1]. Rather, the Plaintiffs seek to attack a single provision in the Contract dealing with the waiver of the implied warranty of habitability. See, Compl. ¶¶7, 8, 11, 18-20). This is a subject exclusively in the purview of the arbitrator, as it relates to a "dispute or other matter in question between the parties hereto arising out of [the Contract]" (Ex. 1 at 3); *See Cardegna*, 546 U.S. at 445-46, 126 S.Ct. 1204.

[1] It is unclear *how* the Plaintiff could allege the arbitration agreement is unenforceable. It is separately labeled in bold, underlined and capital letter, and the Plaintiffs initialed immediately below the arbitration provision.

## CONCLUSION

For the reasons stated herein, the Complaint should be dismissed, and the Court should enter an order compelling the parties to arbitrate this dispute.

This 14 day of July, 2017.

Respectfully submitted,

EARHART OVERSTREET LLC

By: _____
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Charleston, SC 29413
843-972-9400

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | CASE NO.: 2017-CP-40-03697 |
| | ) | |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | |
| | ) | |
| Plaintiffs, | ) | CERTIFICATE OF SERVICE |
| | ) | |
| vs. | ) | |
| | ) | |
| Mungo Homes, LLC, | ) | |
| | ) | |

JEANNETTE W. MCBRIDE
C.C.P. & G.S.
2017 JUL 20 PM 12:
RICHLAND
FILED

I hereby certify that I have this day served a copy of the within ***Notice of Motion and Motion to Dismiss and Compel Arbitration*** pleading upon all parties to this matter by depositing a true copy of same via electronic mail addressed to counsel of record as follows:

Charles H. McDonald, Esq.
H. Freeman Belser, Esq.
William C. Dillard, Jr., Esq.
Belser & Belser, PA
P.O. Box 96
Columbia, South Carolina 29202
**Counsel for Plaintiffs**

This 17th day of July, 2017.

Legal Assistant to Steven R. Kropski

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | FIFTH JUDICIAL CIRCUIT |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | Civil Action No. 2017-CP-40-03697 |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | |
| | ) | **PLAINTIFFS' OPPOSITION TO DEFENDANT MUNGO HOMES, LLC'S MOTION TO DISMISS AND COMPEL ARBITRATION** |
| Mungo Homes, LLC, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |
| | ) | |

Plaintiffs Amanda Leigh Huskins and Jay R. Huskins ("the Huskins") respectfully submit this response to Defendant Mungo Homes, LLC's ("Mungo" or "Mungo Homes") Motion to Dismiss and Compel Arbitration pursuant to Rule 12(b)(6), SCRCP.

The present motion concerns Mungo Homes' effort to avoid this Court's jurisdiction and instead send this case to arbitration pursuant to its flawed and unfair "Purchase Agreement" that it requires all its homebuyers, such as the Huskins, to sign on a take-it-or-leave-it basis. In its motion, Mungo Homes argues that the Federal Arbitration Act ("FAA") requires this Court to dismiss the Huskins' complaint and send the current dispute to arbitration. However, as set forth below, Mungo Homes is wrong. First, the FAA does not apply to the present dispute – rather, the Court should apply the South Carolina Uniform Arbitration Act ("SCUAA") and South Carolina contract law. Second, South Carolina law provides that Mungo Homes' arbitration provision is unconscionable and therefore unenforceable. Accordingly, the Court should deny Defendant's motion, strike the offending arbitration provision in its entirety, and retain jurisdiction over this important matter.

## INTRODUCTION AND NATURE OF THE ACTION

Mungo Homes builds and sells new homes in South Carolina and advertises itself as the "37th largest builder in the country."[1] In June 2015, Mungo Homes sold a new home to the Huskins located in Richland County, South Carolina. In Mungo Home's proprietary "Purchase Agreement," Mungo Homes forced the Huskins to waive, without consideration, fundamental warranty rights including the implied warranty of habitability. The Huskins now bring this action, asking the Court to declare as a matter of law that Mungo Homes cannot waive the implied warranty of habitability, without adequate consideration, in the Mungo Homes Purchase Agreement and to determine that Mungo Homes' business practice gives rise to a right of recovery against Mungo Homes for the fair value of this waiver.

Under well-established law, the "warranty of habitability" is implied in the sale of all new homes in South Carolina. Recognizing the importance of this implied warranty, and the relative sophistication of homebuilders such as Mungo vis-à-vis a new home buyer, the South Carolina Supreme Court has recognized that the warranty of habitability cannot be waived or disclaimed unless the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. *See Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). Nevertheless, in contravention to this long-standing precedent, Mungo operates its business uniformly to require all new home buyers, including the Huskins, to waive the warranty of habitability *without* providing these homebuyers any compensation or separate consideration for such waiver as is required by South Carolina law.

[1] *See* Mungo Homes About Page, *available at* http://www.mungo.com/about/ (last visited October 20, 2017).

## MUNGO'S PURCHASE AGREEMENT

Mungo requires purchasers of its homes to execute Mungo's proprietary "Purchase Agreement."[2] This Purchase Agreement contains a disclaimer of fundamental warranty rights implied by law in South Carolina in connection with the sale of a new home. One of the implied warranties that Mungo requires that its purchasers waive is the implied warranty of habitability. In lieu of the implied warranties, Mungo instead substitutes a limited warranty through a third-party warranty company. Through this scheme, Mungo does not directly warrant any part of the new homes it sells to purchasers. The Limited Warranty is provided by Quality Builders Warranty.

In addition to the broad disclaimer of warranty rights, Mungo's Purchase Agreement contains other significant limitations on the rights and remedies afforded to the buyer of a Mungo home. For instance, Mungo Homes declares that its customers can *never* sue it for money damages for *any* reason. Further, Mungo Homes demands that all claims related to its homes must be sent to arbitration. Moreover, all demands for arbitration must be made *within 90 days* of when the claim arises or else the customer is forever barred from bringing that claim against Mungo.

## ARGUMENT

The Court should deny Defendant's motion because the arbitration agreement contained in its Purchase Agreement is unconscionable and unenforceable. As an initial matter, in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), the Court held that a contract for the sale of a new home involves solely intrastate commerce. As such, the SCUAA and South Carolina law applies here – not the FAA as Defendant contends. Second, under South Carolina law, and as stated in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), the arbitration

[2] A copy of the Purchase Agreement between Mungo Homes and the Huskins is attached as Exhibit A.

provision at issue is unenforceable because the Huskins had no meaningful choice and its terms are oppressive and one-sided..

## I. South Carolina law, not the FAA, applies to the present case because the sale of a completed home is solely "intrastate" commerce.

The Court should reject Defendant's argument that the FAA applies here because our Supreme Court has held that the purchase of a completed residential home is solely "intrastate" commerce. In *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), a builder moved to compel arbitration against a buyer under a purchase agreement for a home it sold in Myrtle Beach. In that case, the Supreme Court faced the issue whether the purchase of a completed residence involved "interstate commerce" such that the FAA applied, or rather involved "intrastate commerce" such that the FAA was inapplicable and state law applied. After reviewing law from other jurisdictions, the Court held the FAA was inapplicable because the agreement was for the "purchase of a completed residential dwelling and not the construction" and "these types of transactions have historically been deemed to involve intrastate commerce." *Id.* at 459, 730 S.E.2d at 318. Thus, the Court applied state law rather than the FAA when construing the arbitration provision at issue..

The Court's holding in *Brentwood Homes* applies perfectly here. Just like the agreement at issue in *Brentwood Homes*, the Mungo Homes' Purchase Agreement is specifically for the purchase and sale of a completed home located in South Carolina, not its construction—an entirely intrastate activity. The Mungo Purchase Agreement provides: "It is understood that Purchaser [Plaintiffs] is buying a completed dwelling and that Seller [Mungo Homes] is not acting as a contractor for Purchaser [Plaintiffs] in the construction of a dwelling." (Ex. A, Purchase Agreement, Section Miscellaneous ¶ k).) Under these circumstances, the purchase and sale of the new home situated in South Carolina under the Mungo Homes Purchase Agreement is

unquestionably *intrastate* commerce. Any arbitration provision in the Mungo Homes' Purchase Agreement must therefore be construed under the SCUAA. Contrary to Mungo Home's assertion in its Motion to Compel arbitration, the FAA is inapplicable to the Court's analysis and the validity of Mungo Homes' Purchase Agreement is governed entirely by South Carolina law.

The cases Defendant cites in support of applying the FAA are inapplicable here because they do not involve the purchase of a completed residential home, but rather concern the construction, development, and design of buildings. For instance, *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 586, 553 S.E.2d 110, 113 (2001), involved a partnership agreement for the development and construction of apartments on Hilton Head. Similarly, *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 633, 239 S.E.2d 647, 648 (1977), involved a contract for the construction of an apartment building in Columbia. Finally, *Blanton v. Stathos*, 351 S.C. 534, 537, 570 S.E.2d 565, 567 (Ct. App. 2002), involved an agreement to provide design, drawing, and architectural services for the construction of a restaurant in Seneca, South Carolina. In contrast to the cases Defendant cites, the present agreement is expressly *not* for construction, but rather for purchase of a completed dwelling. As such, *Brentwood Homes* is controlling here and the Defendant's cases are inapplicable.

## II. The arbitration provision in Mungo Homes' Purchase Agreement is unconscionable because [1] the Huskins had no meaningful choice and [2] the contract contains oppressive and one-sided terms.

Under South Carolina law, the arbitration provision in Mungo Homes' Purchase Agreement is unconscionable and therefore unenforceable. The factors set forth in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), along with the Court's recent holding in *Smith v. D.R. Horton*, show that the Huskins had no meaningful choice and that the terms of the Purchase Agreement are so one-sided and oppressive as to be unenforceable by this

Court. Finally, because the Purchase Agreement lacks any "severability" clause, the Court should strike the offending clause in its entirety.

To determine whether an arbitration provision is enforceable under South Carolina law, courts must consider whether, independent from the contract in its entirety, the arbitration provision is unconscionable. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (finding adhesive arbitration clause unconscionable). When an arbitration clause is connected to other provisions of a contract, however, such as other warranties and remedies, those contractual provisions must be read together. *See Smith*, 417 S.C. at 48-49, 790 S.E.2d at 4 (holding that "all the subparagraphs of paragraph 14 [entitled Warranties and Dispute Resolution] must be read as a whole to understand the scope of the warranties and how different disputes are to be handled").

"In South Carolina, unconscionability is defined as (1) the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (S.C. 2007). Courts have considered the following factors regarding whether a party had a "meaningful choice": "[i] the nature of the injuries suffered by the plaintiff; [ii] whether the plaintiff is a substantial business concern; [iii] the relative disparity in the parties' bargaining power; [iv] the parties' relative sophistication; [v] whether there is an element of surprise in the inclusion of the challenged clause; and [vi] the conspicuousness of the clause," and whether the product at issue is a "necessity." *Id.* at 25, 644 S.E.2d at 669; *see also Smith*, 417 S.C at 49, 790 S.E.2d at 4. To decide whether terms are "oppressive," courts consider, for example, whether terms are one-sided and whether there are limitations placed on a consumer's remedies. *Simpson*, 373 S.C. at 28-33, 644 S.E.2d at 670-73. Moreover, if the arbitration clause at issue has no severability provision, courts must refuse to

enforce the entire clause rather than just striking the offending terms within the clause. *See Smith*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n 6.

**a. The Huskins had no meaningful choice in signing the arbitration provision.**

The Court's recent decision in *Smith* shows that the Huskins lacked any "meaningful choice" in the transaction at issue. As in the present case, *Smith* involved whether an arbitration provision contained within an agreement for the purchase of a new home from a sophisticated homebuilder – D.R. Horton – was enforceable under South Carolina law. In that case, the Court considered the factors stated in *Simpson* and held that the Smiths lacked any meaningful choice in entering into the arbitration agreement with D.R. Horton. Specifically, the Court recognized (1) the agreement was an adhesive "take-it-or-leave-it contract, (2) that the Smiths were in an unequal bargaining position as against the seller D.R. Horton[3], (3) that no evidence existed that the Smiths were represented by independent counsel, and (4) that the Smiths were merely the purchaser of one home and thus not a substantial business concern of D.R. Horton which constructed hundreds of homes in multiple states.

The Court's holding in *Smith* applies to the facts here. Indeed, the Huskins stand in exactly the same position against Mungo Homes as did the Smiths against D.R. Horton. Like in *Smith*, the Huskins (1) were given an adhesive contract, (2) were in an unequal bargaining position vis-à-vis Mungo Homes, (3) there is no evidence here that the Huskins had independent counsel (they did not) and (4) the Huskins were merely the purchasers of a single home and thus not a major business concern of the nation's 37th largest homebuilder with operations throughout the

[3] The Court took judicial notice of this fact because it had already decided that the purchaser of a new home is in an unequal bargaining position against the seller/builder as stated in *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989).

Southeast.[4] This Court should therefore follow *Smith* and hold that the Huskins lacked any meaningful choice in this transaction.

**b. The terms of the Purchase Agreement's arbitration provision are oppressive.**

Similarly, this Court should follow *Smith* and conclude that the terms of the arbitration provision of the Purchase Agreement at issue are oppressive. First, as did the Court in *Smith*, this Court should consider the limitations of remedies provisions of the Purchase Agreement when construing the arbitration provision. However, even if the Court focuses solely on the paragraph labeled "Arbitration and Claims," the terms therein are so one-sided and oppressive that the Court should still hold it unconscionable.

**i. The Court should consider the limitations on remedies together with the arbitration provision and declare the arbitration provision one-sided and oppressive.**

As an initial matter, this Court should follow *Smith* and conclude that it should consider the Purchase Agreement's limitations on warranties and remedies when construing the arbitration provision at issue. Because the limitations in Mungo's Purchase Agreement mirror those the Court found oppressive in *Smith*, this Court should strike the arbitration provision here. Finally, the court of appeals' decision in *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016), is inapplicable to the present case and should not affect this Court's analysis.

In *Smith*, D.R. Horton argued that the Court should consider only those terms of its agreement located in subparagraph 14(g) titled "MANDATORY BINDING ARBITRATION"

[4] Moreover, a home is certainly a "necessity" of modern life, a factor which also shows the Huskins lacked meaningful choice. *See Simpson*, 373 S.C. at 26-27, 644 S.E.2d at 669-70 (describing an automobile as a necessity in modern society)

when determining whether the arbitration provision was unconscionable and must ignore the provisions of subparagraphs 14(c) and 14(i) that contained D.R. Horton's limitation of remedies, including waiver of the warranty of habitability and preclusion of all money damages against it. The Court disagreed with D.R. Horton. It held that D.R. Horton's arbitration provision and the limitation provisions must be read together in order "to understand the scope of warranties and how different disputes are to be handled." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

Similarly, here, the Court should read the "Arbitration and Claims" paragraph of the Purchase Agreement in conjunction with the limitation on remedies provisions contained under separate paragraphs "as a whole." *See Smith*, 417 S.C. at 48-49, 790 S.E.2d at 4 (holding that "all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled.") For example, as in *Smith*, Mungo Homes expressly disclaims all warranties, including the warranty of habitability, as well as completely absolves itself from ever paying any money damages to the Huskins. The fact that these severe limits on the Huskins' rights are contained in subsections outside the paragraph specifically titled "Arbitration" is irrelevant – this Court must read the paragraphs together in order to understand exactly what claims are subject to being arbitrated and what potential remedies would be available in that arbitration. Only if these provision are read together can the Court "understand the scope of warranties and how different disputes are to be handled." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Thus, as in *Smith*, the Court should consider the limitations on remedies foisted upon the Huskins when determining whether Mungo Homes' arbitration provision is unconscionable.

Considering the limitations on remedies in Mungo Home's Purchase Agreement, the Court should clearly decide that the arbitration provision at issue is unconscionable. As noted above, D.R. Horton in *Smith* disclaimed all warranties on the home, including the implied warranty of

habitability, and also declared that it "shall not be liable for monetary damages of any kind." *Id.* at 45, 790 S.E.2d at 2. The *Smith* Court held that these terms were one-sided and oppressive and therefore agreed with the trial court that the arbitration provision was unconscionable. *Id.* at 50, 790 S.E.2d at 5. Similarly, here, Mungo Homes has expressly disclaimed all warranties, including the warranty of habitability. Furthermore, Mungo Homes also has disclaimed any liability for money damages, stating "Seller shall in no event be liable for consequential or punitive damages of any kind" and that its customers have waived all "rights or remedies, whether based in contract or tort." Thus, Mungo Homes' agreement mirrors that of D.R. Horton's in *Smith*. Accordingly, the Court should follow *Smith* and hold that the terms of the arbitration agreement here are oppressive and one-sided.

Finally, the court of appeals' decision in *One Belle Hall* does not apply here because that case applied the FAA and because the agreement at issue there contained a severability clause, while the contract in *Smith* and Mungo's Purchase Agreement do not. In *One Belle Hall*, the issue was whether an arbitration provision contained within a warranty issued by a manufacturer of roof shingles was enforceable. Among other provisions, the agreement there contained a "legal remedies" section that waived certain warranty rights. Importantly however, that section also included a severability clause that stated the waivers would not be applied in states that disallowed such waivers. In reaching its decision on the enforceability of arbitration, the court first found the FAA applied, and then held that the purchaser had no meaningful choice in the transaction. The court then analyzed the "legal remedies" section to determine whether the terms were oppressive. In so doing, the court of appeals distinguished *Smith* because the agreement at issue contained a severability clause while the agreement in *Smith* did not. *One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293 ("Moreover, unlike the arbitration agreement in [*Smith v. D.R. Horton*], the legal

remedies paragraph contains a severability clause."). Because the severability clause could allow the arbitrator to ignore the waivers, the court of appeals found the limitations were not oppressive. *Id.*

Accordingly, the present case is like *Smith* and not like *One Belle Hall*. As in *Smith*, Mungo's Purchase Agreement does not contain a severability clause which might revoke the extreme limits placed on the Huskins' rights. Thus, the court of appeals' analysis in *One Belle Hall* is inapplicable and this Court should instead follow the Court's reasoning in *Smith*.

**ii. The terms of the paragraph titled "Arbitration and Claims" are oppressive and one-sided**

Even if the Court looks to only the terms in the paragraph titled "Arbitration and Claims" it should find its terms oppressive and one-sided. The Purchase Agreement's arbitration clause contains the following severe, and unlawful, time limitation for asserting a claim against Mungo Homes:

> Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen . . . Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

(Ex. A, Purchase Agreement Section Arbitration and Claims.). The time in which the Huskins have under state law to assert the claims at issue here, however, is three years. *See* S.C. Code Ann. § 15-3-530. And South Carolina law provides: "No clause, provision or agreement in any contract . . . 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 with a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action . . . ." *See* S.C. Code Ann. § 15-3-140. The term in the Mungo Homes' arbitration clause, purporting to limit the time the Huskins have to bring their claims against Mungo Homes from three years to 90 days violates

South Carolina public policy to safeguard the applicable statutory limitations period for asserting claims.

In addition, because Mungo Homes requires full payment for the home at closing, Mungo Homes would have little to no reason to assert a claim against an individual home buyer after the closing. The time limitations in the arbitration clause thus have no real application to any rights of Mungo Homes and are clearly a one-sided provision to deprive the individual home buyer a reasonable time to pursue claims against Mungo Homes. In contrast, Plaintiffs' claims, which relate to the Purchase Agreement's unlawful waiver of the implied warranty of habitability without separate and adequate consideration, arose upon the Huskins' execution of the Purchase Agreement. Yet, the Purchase Agreement drafted by Mungo Homes, a sophisticated commercial enterprise with ready access to its own legal counsel, includes no information that, in signing the Purchase Agreement, the Huskins were entitled to separate and adequate consideration regarding the waiver of the implied warranty of habitability. Under the terms of the Purchase Agreement's 90-day limit on claims, moreover, the Huskins claims would now be barred. These one-sided, oppressive, and unseverable terms within an arbitration clause presents this court with a classic example of arbitration clauses which South Carolina courts have held unconscionable and refused to enforce in the past. *See Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (finding adhesive arbitration clause which also contained unseverable and one-sided limitation on a consumer's statutory remedies unconscionable and unenforceable).

## CONCLUSION

Based on the reasoning and authorities set forth above, Mungo's arbitration agreement is unconscionable and unenforceable. Accordingly, Mungo's Motion to Dismiss and Compel Arbitration must be denied.

BELSER & BELSER, PA

By: _____

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***Counsel for Plaintiffs***

Columbia, South Carolina
October 30, 2017

# EXHIBIT A

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ

# PURCHASE AGREEMENT

MUNGO HOMES, INC.
441 Western Lane
Irmo, SC 29063
(803)749-9000
www.mungo.com
06/29/2015

THIS PURCHASE AGREEMENT is entered into between Mungo Homes, Inc., a South Carolina corporation ("Seller") and Amanda L. Huskins ("Purchaser", whether one or more), Purchaser's phone numbers (Home) (706) 566-7655 (Work) , (Mobile) , (Email) ahuskins@aflac.com.
Title (Deed) to be in Amanda L. Huskins.

## PROPERTY

Seller agrees to sell and Purchaser agrees to buy, on the terms and conditions contained herein, that certain tract of land, together with the dwelling and improvements constructed or to be constructed thereon (the "Property"), situated in Richland County, and described as Lot 221 in the Westcott Ridge Community, also known as TBD, Chanin, SC 29036 (Property Address).

## IMPROVEMENTS

(Check either Field Model or Building Job)

( ) FIELD MODEL The improvements on the Property are under construction in accordance with Plan VICTOR, Elevation B, and any Change Orders issued prior to or with this Agreement. Purchaser's selection items, if any, shall be shown on the attached Customer Selection Sheet. Any changes must be accepted by the Seller by written Change Order. To the extent any improvements are constructed as of the date hereof, Purchaser has inspected the improvements and is buying based upon this inspection and not in reliance upon any model, plans or other material.

(X ) BUILDING JOB The improvements shall be constructed on the Property substantially in accordance with Plan VICTOR, Elevation B, and the Start Sheet Addendum and Customer Selection Addendum, attached hereto, plus any written Change Orders accepted by the Seller. Said plans and addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller.

Said plans and Addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller. Seller reserves the right to substitute materials of similar pattern, design and quality.

## PRICE

| | | | |
|---|---|---|---|
| Total Sales Price | $ 243,625.00 | | |
| Earnest Money (All earnest money paid to Mungo Homes, Inc.) | $ 3,000.00 | Earnest Money Received | 2,500.00 |
| | | Additional Earnest Money Due 06/22/2015 | 500.00 |

## FINANCING CONTINGENCY AND TERMINATION

Is this Purchase Agreement contingent upon the Purchaser obtaining a mortgage loan? Yes X No____

Is this home to be owner occupied? Yes X No____
If not owner occupied, then a minimum of $_____ earnest money is required.

Purchaser will apply for said loan to Ameris Bank SB within five (5) business days. Purchaser to pay all fees or costs required by the lender in connection with the loan application or its processing and will promptly supply all documents or other information required by the Lender.

If Purchaser does not obtain loan approval by 07/29/2015, (loan approval may be conditioned upon an appraisal of at least the Purchase Price) Purchaser may, within seven (7) days thereafter, terminate this Agreement by written notice to the Seller, and Seller shall within thirty (30) days thereafter return the Earnest Money to the Purchaser, after the return of Earnest Money neither party shall have any liability to the other. If Purchaser fails to give Seller such notice of termination within the time specified, this financing or loan contingency shall be deemed waived and of no further effect, except in the event loan approval was conditioned upon an appraisal and the property fails to appraise for at least the Purchase Price. Seller, at its sole option, may extend the time for loan approval and closing for such period or periods as Seller in its sole discretion elects in order to allow the Purchaser to obtain financing. Purchaser consents to any such extension and agrees to be fully bound by this Agreement during any such extension(s). If Purchaser obtains loan approval and refuses to close or fails timely and in good faith to apply for said loan, then Purchaser shall be deemed to be in default entitling Seller to the remedies proved herein. "Good faith" application for said loan shall include, but not be limited to, applying for a loan with the usual and customary term, interest rate and down payment prevailing at the time of application. This contingency will be satisfied by Purchaser obtaining loan approval from any lender.

Nothing herein shall be construed as any representation or warranty by the Seller that the Property meets the requirements for any type of loan or of any lender.

If this transaction is contingent upon the Purchaser obtaining a loan insured by the Federal Housing Administration ("FHA") or guaranteed by the Department of Veterans' Affairs ("VA"), then it is expressly understood that, notwithstanding any other provisions of this Agreement, the Purchaser shall not be obligated to complete the purchase of the Property herein described or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Seller has delivered to the Purchaser a written statement issued by the FHA or VA setting forth the appraised value of the Property, excluding closing cost, for mortgage insurance or guaranty purposes of not less than $ 243,625.00 which statement the Seller hereby agrees to deliver to the Purchaser promptly after such appraised value is made available to the Seller. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this Agreement without regard to the amount of the appraised valuation made by the FHA or VA. The appraised valuation is arrived at to determine the maximum mortgage the FHA or VA will insure or guaranty. Neither the FHA nor VA warrants the value or the condition of the Property. The Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.

EXHIBIT 1

MUNGO HOMES

## CLOSING

Closing shall be on or before _ or 90 days from pre-construction meeting, subject to such extensions as provided herein. If closing is extended Seller will notify the Purchaser of the extended closing date at least ten (10) days prior thereto, unless the reason for the delay arises within ten (10) days of closing in which case Seller shall provide notice which is reasonable under the circumstances. Closing to be extended, at Seller's sole option, for any delays beyond Seller's control including, but not limited to acts of God, inclement weather, labor disputes, difficulty in obtaining labor or materials, difficulty or delays in obtaining or the issuance of governmental permits or approvals, or inclement weather.

Issuance of a certificate of occupancy by any governmental authority, or final inspection and approval by the Federal Housing Administration, the Veteran's Administration or mortgage lender shall constitute certification of completion of the improvements in substantial conformity with the terms hereof.

At closing, Purchaser shall pay to Seller in cash the total purchase price and all other sums payable to Seller hereunder. No portion of the purchase price may be withheld from Seller or deposited in escrow for any reason. Seller will deliver possession of the Property to Purchaser at closing.

Upon payment in full, Seller will deliver to Purchaser a Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property subject to the lien for current taxes, reservations, conditions, right-of-way and easements of record; and matters to which this Agreement is subject.

If closing is delayed through no fault of Seller, Seller may at its option charge Purchaser an extension fee equal to one-thirtieth of one percent (1/30%) of purchase price per day.

## CLOSING COSTS AND PRO-RATIONS

TAXES and ASSESSMENTS shall be pro-rated between the Seller and Purchaser as of the date of closing. DEED preparation shall be paid by Seller.
PREPAID ITEMS (e.g. interim interest, insurance premiums, and tax and insurance escrows) shall be paid by the Purchaser.
MORTGAGE INSURANCE: First year PMI, FHA-MIP, or VA Funding Fee shall be paid by the Purchaser.
ALL OTHER CLOSING COSTS, including DEED STAMPS and or TRANSFER TAXES, shall be paid by Purchaser, except that if the Closing Cost Addendum is attached, Seller shall pay the costs provided therein.

## CHANGE ORDERS

No alterations, changes or additions shall be made in the construction of the improvements provided herein, nor shall any extra work be performed or materials be provided or added by the Purchaser unless approved by the Seller, in its sole discretion, in a written Purchase Agreement Change Order, signed by both parties. Except as provided herein, Purchaser shall pay a $250 Change Order fee, plus the added cost of the change or alteration at the time the request for the Purchase Agreement Change Order is made. _____ Purchaser's initials

## RESTRICTIVE COVENANTS

The Property is subject to restrictive covenants and to the jurisdiction of a homeowners' association which charges annual assessments. The Purchaser acknowledges that the documents pertaining to such restrictions or associations have been made available to him (her) and that he (she) has read, understands and accept same.
Copy received. _____ Purchaser's Initials

## HOMEOWNERS' ASSOCIATIONS

The Association Board of Directors set dues amounts annually. The annual dues are currently $ 450/year, plus $150.00 one time contribution fee, paid at closing . Any structure, including fences and outbuildings must be approved by the Architectural Control Board prior to construction. Any provision for these structures in this Agreement does not constitute approval by the Architectural Control Board. It is the purchaser's responsibility to obtain this approval.

## LIMITED WARRANTY

The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

## TERMITE PROTECTION

Seller will furnish the Purchaser with a one (1) year termite protection bond effective at time of treatment. Seller shall have no liability for damages caused by termites or other wood boring insects beyond the furnishing of this bond. Renewals of the bond shall be at Purchaser's expense. In the event the bond is not renewed, Seller shall not be liable for any damages, including water damage, which could have been discovered and minimized by periodic termite inspections.

## DEFAULT AND TERMINATION

If this Agreement is not performed by Purchaser in accordance with its terms, it may be terminated by Seller, by written notice to Purchaser, and upon such termination Seller may retain all amounts paid by Purchaser hereunder as liquidated damages, after which neither part shall have any liability to the other. Such damages are not a penalty, but represent actual damages which Seller will sustain upon a default by Purchaser, which damages will be substantial but not capable of precise determination. In such event, Purchaser will not assert any claim against Seller seeking the return of any portion of the payments made under this Agreement or any reduction in the amount of such liquidated damages.

If this Agreement is not performed by Seller in accordance with its terms, Seller being in default and Purchaser not being in default hereunder, Purchaser may terminate this Agreement by giving prompt written notice thereof to Seller. Seller, upon receipt of such notice of termination, shall within thirty (30) days return to Purchaser all sums heretofore paid by Purchaser to Seller hereunder and pay $250 to Purchaser, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. After said payment neither party shall have any liability to the other. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Agreement) shall in any case be collectible, enforceable or available to Purchaser.

Notwithstanding the foregoing, Seller, in its sole discretion, without being in default, may terminate this Agreement by written notice to the Purchaser and the payment to the Purchaser of a sum equal to one percent (1%) of the Purchase Price of the Property. Upon the tender of said payment, whether accepted or not, neither party shall have any liability to the other.

Upon either party giving a written notice of termination as provided herein, the Seller shall be entitled to offer for sale and sell the Property to any other person unfettered by any claim of the Purchaser. The parties specifically agree that after any notice of termination is given by either party to the other any claims shall be limited solely to the payment of the sums provided herein and no other claims shall be asserted against the either party or the Property.

MUNGO HOMES

## ARBITRATION AND CLAIMS

Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

## NON-RELIANCE

Purchaser hereby represents to Seller that Purchaser has not relied and is not relying upon any warranties, promises, guarantees or representations made by Seller, any agent of Seller, or anyone else acting or claiming to act on behalf of Seller with respect to the purchase by Purchaser of the Property or the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

## MISCELLANEOUS

a. This Agreement will be binding and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns; provided that Purchaser shall not assign or transfer this Agreement or any of Purchaser's rights hereunder, and any prohibited assignment shall be null and void and Seller may at Seller's option, immediately terminate this Agreement.

b. In the event of a total destruction of the dwelling by fire, windstorm, hail, earthquake, explosion or other casualty prior to the closing, Purchaser or Seller may terminate this Agreement if the dwelling cannot be restored prior to the Completion Date.

c. This Agreement embodies the entire Agreement between Seller and Purchaser with respect to the Property. No amendment or modification of this Agreement (including contracts for charges in construction of "extras") shall be valid unless contained in writing executed by both parties.

d. Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations.

e. All notices and demands to be given or served pursuant to the terms of this Agreement shall be given by certified or registered mail, return receipt requested, addressed to the parties at their respective addresses set forth herein and will be deemed delivered and received three (3) days after deposit into the United States mail with sufficient postage.

f. If two or more persons are named as Purchaser herein, any one of them is authorized to act as agent for, with the right to bind, the other(s) in all matters of every kind or nature with respect to this Agreement.

g. Purchaser is prohibited from recording this Agreement or any memorandum hereof and upon attempted recordation this Agreement shall at Seller's option, become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

h. Seller agrees to disclose to Purchaser in writing prior to or at closing or post conspicuously on the Property, the type, thickness and R-value of all insulation installed or to be installed in the dwelling.

i. PURCHASER REALIZES AND ACKNOWLEDGES THAT ENTRY UPON THE PROJECT OR THE PROPERTY DURING CONSTRUCTION CAN BE DANGEROUS AND THAT HAZARDS MAY EXIST WHICH ARE NOT OBSERVABLE. PURCHASER'S ENTRY SHALL BE SOLELY AT HIS OWN RISK. PURCHASER DOES HEREBY WAIVE ANY AND ALL CLAIMS AGAINST SELLER FOR INJURY OR LOSS TO PERSON OR PROPERTY ARISING OUT OF OR IN CONNECTION WITH SUCH ENTRY BY PURCHASER OR ANY OTHER PERSON ACCOMPANYING HIM OR ENTERING AT HIS DIRECTION OR PERMISSION.

j. The provisions of this Agreement shall survive closing and not merge in the deed.

k. It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon its completion.

l. Each lot is unique in size, shape and various characteristics. Purchaser understands and agrees that the size of the lot, the exact location of sidewalks and driveways (if any) and the drainage patterns of the lot will differ from the model home plans, drawings or renderings that Purchaser may have examined.

m. Land adjacent to or surrounding the Property which is not owned by Seller is not within Seller's control. Seller will not be liable to Purchaser for any use or condition of adjacent or surrounding land for commercial, industrial, institutional, multi-family or non-residential purposes.

n. PURCHASER HEREBY RELEASES AND RELINQUISHES ALL CLAIMS AGAINST SELLER FOR DAMAGES TO PROPERTY OR PERSONAL INJURY ARISING AFTER THE DATE OF THIS AGREEMENT RELATING TO ANY OF THE FOLLOWING:

(1) environmental or ecological conditions or events such as weather conditions, atmospheric conditions, terrestrial conditions, acts of God or other natural or man-made conditions or occurrences, occurring beyond the reasonable control of Seller.

(2) consequential damages or expenses resulting from a termination of this Agreement or to delays in closing, such as lodging, storage, moving, meals or travel expenses.

(3) any claims for repairs or modifications to the Property except as specifically covered by Seller's limited home warranty. This waiver will be binding upon Purchaser and the heirs, successors, assigns, guests and invitees of Purchaser. Purchaser acknowledges that Seller shall be entitled to rely upon this waiver as a complete defense against any claim asserted by Purchaser or anyone claiming through Purchaser. The deed conveying the Property to Purchaser may contain a reference to this waiver.

IN WITNESS whereof the parties have set their hands and seals and PURCHASER CERTIFIES THAT THIS AGREEMENT HAS BEEN FULLY READ AND UNDERSTOOD.

Witness:

Jill Sanders

MUNGO HOMES, INC.

By: _____ 7/9/15 Agent

PURCHASER

PURCHASER

Are you working with a Buyer's Agent? Yes ____ No X Initial (s): _____ Date: 6/29/15

If yes, please fill out information below:

Buyer's Agent Name Office Address

Agency Name

Office Phone # Cell Phone # Fax#

Agency Code _____ Agent Code Agent's E-Mail Address

Purchaser's current address is: 839 Burnview Lane, Chapin, SC 29036

MUNGO HOMES Community Sales Manager Jill Sanders

06/29/2015

MUNGO HOMES

CONTINGENCY ADDENDUM

PURCHASER Amanda L. Huskins
LOT 221 COMMUNITY Westcott Ridge DATE 06/29/2015

PURCHASER UNDERSTANDS AND AGREES THAT THIS CONTRACT IS CONTINGENT UPON:

Purchasers request driveway to be on the right side.

PURCHASER _____ DATE 7/3/15

PURCHASER _____ DATE _____

Mungo Homes, Inc.
SELLER

BY: _____ DATE 7/3/15

06/29/2015

Lot: 221
Community: Westcott Ridge

MUNGO HOMES

# START DATE ADDENDUM

The requested Start Date is 8/21/15 and will be confirmed after both parties ratify the *Purchase Agreement*. Actual construction will begin after your Pre-construction Meeting. The Pre-construction Meeting is typically scheduled for the week following your Start Date.

**Purchaser Responsibilities:**

1. Meet with the Design Consultant and have your *Color Selections* completed on or before 8/17/15 (4 days before the Start Date), or you must move to the next available Start Date.
2. Make loan application within five (5) days of your *Purchase Agreement*.
3. Be current on all earnest money commitments prior to your Start Date.
4. Be available to attend a Pre-construction Meeting the week following your Start Date.

**Changes:**

1. Any change (addition/modification/deletion) that requires modifications to the construction drawings must be ratified by both parties prior to 25 days before your chosen Start Date, or you must move to the next available Start Date.
   a. If the changes are ratified more than 25 days before your Start Date, no Change Order Fees will apply.
   b. Examples of changes that require plan modifications include but are not limited to the following: foundations, garages, screen porches, bonus rooms, floor plan options, vaulted ceilings, tray ceilings, bath tub or shower options, bay windows, fireplaces, changes to vanities, adding or deleting doors, brick or stone options, windows, laundry sink, dormers or extra concrete patios or driveways.
2. In the twenty-one (21) days between the 25th and 4th days prior to your Start Date, it is possible to change the items enumerated in 1.b. above, but a Preparation Fee will be charged along with the cost of the change itself.
   a. Changing your choice of floor plan, elevation, home site or any of the other options listed in 1.b. above within this 21 day window will cost $500 to help offset the expense of re-permitting, surveying and drafting.
   b. This will require you to move to the next available Start Date.
   c. The $500 fee will not be added to *the purchase agreement* amount, but will be collected by check or debit card prior to initiating the change. The $500 will be non-refundable.
3. Changes that do not affect the construction drawings are permitted up to 4 days before the Start Date.
   a. If the changes are ratified more than 4 days before your Start Date, no Change Order Fees will apply.
   b. Examples of changes that do not require plan modifications include but are not limited to the following: garage door openers, finished garages, upgraded roof shingles, trim options, railings, designer paint schemes, cabinets, flooring, fireplace surrounds, closet shelving, landscaping, irrigation, plumbing fixtures, mirrors, shower doors, siding, security, vacuums, appliances, blinds, hose bibs, decks, home theater and audio, structured wiring, lighting packages, door hardware, countertops, electrical options or fences.
   c. Notwithstanding the above, all color selections must be made in the design appointment with the Design Consultant. Any changes permitted after that design appointment will include a $250 Change Order Fee, plus the cost of the change itself.
4. 4 days before the Start Date is when all changes must be complete. After this date, no changes are permitted without prior approval from Mungo Homes, and may not be permitted.
   a. If a change is permitted, any *Purchase Agreement Change Order* after this date will include a $250 Change Order Fee, plus the cost of the change itself.
   b. The $250 fee will not be added to *the purchase agreement* amount, but will be collected by check or debit card prior to initiating the change. The $250 will be non-refundable.
5. Although the changes are possible as described above, the process works best when all options are included in the initial *Purchase Agreement*.

**Purchaser's Acknowledgement:**

I have read the above addendum, understand and agree the content therein.

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Start Date Addendum.doc 2/18/13

MUNGO HOMES

# Start Calendar

Lot: 221 Community: Westcott Ridge

| | Mon | Tue | Wed | Thur | Fri | Sat | Sun |
|---|---|---|---|---|---|---|---|
| Week 1 | -25 Days No more structural changes 7/27/15 | | | | | | |
| Week 2 | | | | | | | |
| Week 3 | | | | | | | |
| Week 4 | 8/17/15 -4 Days Selections due and no more non-structural changes | | | | Start Date 8/21/15 | | |
| Week 5 | | Pre-construction meeting 8/25/17 | | | | | |

THE THREE (3) CUT OFF DATES LISTED ABOVE FOR STRUCTURAL CHANGES, SELECTIONS AND NON-STRUCTURAL CHANGES ARE THE DATES THAT THE APPLICABLE PAPERWORK MUST BE RECEIVED, EXECUTED AND PROCESSED BY MUNGO HOMES.

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

_____ 7/3/15

Mungo Homes

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Build Jobs/Start Calendar.xls 6/26/2015

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Lot #: 221

Community: Westcott Ridge

MUNGO HOMES

# STRUCTURAL AND/OR NON-STRUCTURAL CHANGES

**Examples of changes that require plan modifications include but are not limited to the following (structural changes):**

- Garages
- Screen porches
- Bonus rooms
- Floor plan options
- Vaulted ceilings
- Tray ceilings
- Bath tub or shower options
- Bay windows
- Fireplaces
- Changes to vanities
- Adding or deleting doors
- Brick or stone options
- Windows
- Laundry sink
- Additional concrete
- Dormers

7/27/15
Date

**Examples of changes that do not require plan modifications include but are not limited to the following (non-structural changes):**

- Garage door openers
- Finished garages
- Upgraded roof shingles
- Trim options
- Railings
- Designer paint schemes
- Cabinets
- Flooring
- Fireplace surrounds
- Closet shelving
- Landscaping
- Irrigation
- Plumbing fixtures
- Mirrors
- Shower doors
- Siding
- Security
- Vacuums
- Appliances
- Blinds
- Hose bibs
- Decks
- Home theater and audio
- Structured wiring
- Lighting
- Door hardware
- Countertops
- Electrical options
- Fences

8/17/15
Date

Purchaser 8/29/15 Date

Purchaser Date

Mungo Homes 7/3/15 Date

m:\mungo homes\all things sales\mungo contract forms\structural non structural.doc 2/5/13

Lot 221
Community Westcott Ridge
Date 06/29/2015

## Development Rider

441 Western Lane, Irmo, SC 29063
(803) 749-9000
www.mungo.com

When developing the infrastructure of a community, there are a number of factors that are directly impacted by weather and local municipalities. As a developer, The Mungo Company has a very good idea about the time frame required to complete the construction, inspection and approval process for the community roads and utilities. However, since every project is unique, there are sometimes unexpected delays in the construction process. These may be as a result of:

- Unusually bad weather
- Extensive underground rock
- Municipal approval process
- DHEC approval process
- Utility company's installation of power
- Utility company's installation of water
- Utility company's installation of gas (if applicable)
- Cold weather effects on concrete or paving

Some weather problems and external delays are common, so we factor some time in our schedule to account for these. It is possible however, that Mungo Homes will not be able to begin construction or complete your home when we expect to, due to unusual conditions beyond our control or the control of the developer.

Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration.

By reading and signing this document, you acknowledge the possibility of delays to the construction start or completion of your home.

In all cases, your satisfaction is our top priority, and you will be kept informed of any changes in our schedule that affect the construction of your home.

Mungo Homes Community
Sales Manager _____

Date: 6/29/15 _____ Purchaser

Date: _____ Purchaser

Date: 7/3/15 _____ Seller's Authorized Signature

MUNGO HOMES

Lot 221
Community Westcott Ridge
Date 06/29/2015

## Non-Owned Lot Addendum

Seller is in the process of acquiring the Property upon which the dwelling and other improvements are to be constructed and sold to the Purchaser pursuant to the terms and conditions of the Purchase Agreement to which this Addendum is attached. Seller anticipates acquiring the Property; however, cannot warrant or guarantee that it will be able to do so. Therefore, Purchaser agrees that if Seller does not acquire the Property for any reason, Purchaser may elect to: substitute other property which the Seller has available for sale, recognizing that such substitution may require adjustments to price, time and other provisions of the Agreement, or terminate the Agreement and receive a refund of any Earnest Money paid to the Seller. Such election must be made within ten (10) days after Seller notifies Purchaser that it is not acquiring the Property. If Purchaser fails to elect within said time, Purchaser shall be deemed to have elected to terminate the Agreement. Seller shall have no other liability of any nature whatsoever for its failure to acquire title to the Property for any reason.

Seller: _____

By: 7/3/15

Purchaser

Purchaser

MUNGO HOMES

# CLOSING COST ADDENDUM

| | | | |
|---|---|---|---|
| Job # | Westcott Ridge 221 | Date | 06/29/2015 |
| Purchaser | Amanda L. Huskins | Address | TBD Chapin, SC 29036 |

Seller has established Marketing Agreements with Ameris Bank, BB&T, and Starkey Mortgage. Under the terms of these Marketing Agreements these lenders are promoted on Seller's website and permitted to display promotional materials in Seller's sales centers. These lenders offer a broad range of loan programs including, but not limited to, programs which provide for the elimination and/or deferral of closing costs into their loan program. Please contact one or more of these lenders to learn more about the financing options available to you.

"Closing Costs" are fees or charges associated with loan origination, appraisal, processing, closing, underwriting, credit report, tax service, flood certification, lender's title insurance, attorney and recording.

**Purchaser will not be responsible for deed stamps, transfer taxes and intangible taxes when (1) the closing is handled by attorney selected by Seller AND (2) one of the lenders listed above are used or Purchaser does not require financing (i.e. cash closing).** Purchaser may be required and agrees to execute a waiver of conflict or similar document by the closing attorney selected by the Seller.

Purchaser will be responsible for all Lender costs associated with "optional" or "elective" programs such as interest rate buy-downs, discount points and other special loan programs. Purchaser shall also be responsible for all other closing costs and pre-paid items including, but not limited to, survey, attorney's courier charges to send the loan package to the Lender, owner's title insurance, hazard insurance, per diem interest on Purchaser's loan, Lender-required escrows, and homeowners' association dues and charges.

Purchaser understands that Purchaser may not make any change in mortgage company or loan program in the 30 days prior to closing date.

Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration. Purchaser acknowledges that the purchase price is based on closing by the date agreed to in the Purchase Agreement. Should Purchaser fail to close on that date, Seller will be entitled to and the Purchaser agrees to pay carrying costs at the rate defined in the Purchase Agreement from that date until the day of the actual closing. This amount will be charged on a monthly basis and prorated daily. Seller will require that this amount be paid in advance.

Purchaser specifically acknowledges and consents to Seller providing a copy of Purchase Agreement, attachments and addendums to lenders listed above.

**Nothing herein guarantees that Purchasers will qualify for any specific financing.**

SELLER: _____ 7/3/15

PURCHASER: _____

PURCHASER: _____

MUNGO HOMES

06/29/2015

MUNGO HOMES

LOT: 221 COMMUNITY: Westcott Ridge

ADDRESS: TBD

PURCHASER (S) Jay + Amanda Huskins

## *HOMEOWNER'S RESPONSIBILITY*

- Complete the *Customer Selection Sheet* completed at least 21 days before your Start Date.
- Make appointment with a mortgage company immediately upon receipt of accepted contract.
- Meet with Project Manager for Pre-construction meeting. (Project Manager will call to schedule).
- Two weeks prior to closing make arrangements for homeowner's insurance. Notify closing attorney's office with information. Also, verify closing date & time with Closing Coordinator at Mungo Homes.
- Put utilities (electricity, gas, water & sewer) in your name. Will be changed from Mungo Homes at closing.
- Day before closing, obtain amount of funds needed to close from Closing Attorney. If funds are less than $4000, a cashier's check will be accepted. If funds exceed $4000, arrange for wire transfer of funds to closing attorney's office. Funds must be deposited into attorney's account and available for disbursement from the attorney's account to complete closing, and release reimbursements, checks to agents, and keys to customer.
- David Ross is our preferred closing attorney. He can be reached for your final closing figures 48 hours prior to closing.

## *HOMEOWNER'S MANUAL ACCEPTANCE*

Your signature below acknowledges receipt of your MUNGO HOMES HOMEOWNER'S MANUAL. It also indicates that you have reviewed this information with your Community Sales Manager.

You are discouraged from making any large purchases such as a new car, boat, motorcycle, etc., between the time of signing the sales agreement and closing of the home. Large purchases can affect your credit report and ultimately the ability to purchase your new home.

**ACCEPTANCE OF HOMEOWNER'S RESPONSIBILITY AND HOMEOWNER MANUAL:**

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

Community Sales Manager _____ Date 6/29/15

**PLEASE REMEMBER TO BRING YOUR HOMEOWNER MANUAL TO ALL MEETINGS CONCERNING YOUR NEW HOME**

| | |
|---|---|
| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND | CASE NO.: 2017-CP-40-03697 |
| Amanda Leigh Huskins and Jay R. Huskins,<br><br>Plaintiffs,<br><br>vs.<br><br>Mungo Homes, LLC, | REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND COMPEL ARBITRATION |

RICHLAND COUNTY
FILED
2017 NOV -9 AM 8:49
JEANNETTE W. McBRIDE
C.C.P. & G.S.

TO: CHARLES H. MCDONALD, ESQUIRE, H. FREEMAN BELSER, ESQUIRE AND WILLIAM C. DILLARD, JR., ESQUIRE: ATTORNEYS FOR PLAINTIFF

## ARGUMENT

In response to the motion to dismiss and compel arbitration filed by Mungo Homes, Inc., incorrectly named as Mungo Homes, LLC, Plaintiffs argue that (1) the FAA does not apply since the subject residence was not a new build home; and (2) under South Carolina law, the arbitration provision is unconscionable and unenforceable. Both of these assertions are factually and legally without merit.

### I. PLAINTIFFS' HOME WAS A NEW BUILD HOME AND IS SUBJECT TO THE FEDERAL ARBITATION ACT

In a confusing attempt to circumvent the Federal Arbitration Act, Plaintiffs incorrectly suggest that the residence that is the subject of this dispute was not a newly constructed home[1]. In support of their position, Plaintiffs rely on the Supreme Court's decision in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012) that held a contract for the sale of real estate does not involve interstate commerce. However, contrary to Plaintiffs' unfounded assertion, it is

[1] It is unclear how Plaintiffs can take this position. The contract was signed on June 29, 2015 by the purchaser. A certificate of occupancy affirming substantial completion of construction was issued on January 19, 2016.

undisputed that the subject home was constructed after entering into the purchase agreement with Mungo Homes, Inc. ("Purchase Agreement"). Indeed, the Purchase Agreement was signed on June 29, 2015. (Exhibit A, "Purchase Agreement"). On January 19th, 2016 a Certificate of Occupancy was issued. (Exhibit B, "Permit and Certificate of Occupancy"). Moreover, the plain language of the contract identifies that the Huskins' home was a "Build Job" not a "Field Model." (See, Exhibit A, "Purchase Agreement" pg. 1). Furthermore, the Addendum to the Purchase Agreement contained a contingency stating that "purchasers request driveway to be on the right side." (See, Exhibit A at Addendum). Any argument that the home was not a new construction home is without merit.

As a newly constructed home, the *Brentwood Homes* decision does not apply to the current dispute. Nonetheless, the *Brentwood Homes* court expressly recognized that a new construction home will always affect interstate commerce, and thus be subject to the FAA. In footnote 8, the *Brentwood Homes* Court stated:

> We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA. *See, e.g., Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (holding that performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct.App.2008) (finding contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builders' affidavit swearing the project would involve businesses and supplies from outside of South Carolina).

398 S.C. at fn. 8, 730 S.E.2d at fn 8 (emphasis added).

Here, it is indisputable that the home was a newly constructed residence. Accordingly, the arbitration provision must be interpreted according to the FAA. Therefore, "the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 592, 553 S.E.2d 110 (2001).

## II. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). According to the United States Supreme Court, "[w]e have ... rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.... because so long as the prospective litigant effectively may vindicate his or her [] cause of action in the arbitral forum, the statute serves its functions." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 121 S.Ct. 513, 521, 148 L.Ed.2d 373 (2000) (internal quotations and citations omitted). "As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract . . . unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

Contrary to Plaintiffs' contention, it is well established law that enforcement of an arbitration agreement must be viewed on its own, *not* in connection with the other terms of the contract. Moreover, the Federal Arbitration Act ("FAA") permits arbitration agreements to be invalidated only by "generally applicable contract defenses," such as fraud, duress, or unconscionability, but not by defenses that apply solely to arbitration or that derive their meaning

from the fact that an agreement to arbitrate is at issue. *AT&T Mobility, LLC v. Concepcion*, 563 S.C. 333, 339, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011).

Here, neither the arbitration provision nor the Purchase Agreement is unconscionable. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). Specifically relating to arbitration agreements, the South Carolina Supreme Court has instructed that "unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker". *Parsons v. John Weiland Homes and Neighborhoods of the Carolinas*, 481 S.C. 1, 12, 791 S.E.2d 128 (2016).

As evidenced by the addendum to the Purchase Agreement amending the terms of the Purchase Agreement at the request of the Plaintiffs, clearly the Plaintiffs had a meaningful choice concerning the contract terms, and were able to negotiate amendments to the Purchase Agreement. Furthermore, Plaintiffs point to no facts that compelled them to enter into the Purchase Agreement. At no point were the Plaintiffs required to sign the Purchase Agreement, as they were always free to find a different house or contract with a different builder.

Additionally, there was no "element of surprise in the inclusion of the challenged clause," and the arbitration provision was clearly conspicuous. *See generally, Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005). Plaintiffs initialed directly below the arbitration provision. (See, Exhibit A, "Purchase Agreement", pg. 3). Furthermore, the heading "ARBITRATION AND CLAIMS" is in bold, underlined, and capital letters and the front page of the contract states "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO

S.C. CODE 15-48-10 ET SEQ." *See,* S.C. Code §15-48-10 (under the SCUAA, an agreement containing the required notice is presumptively valid).

Furthermore, the arbitration agreement unequivocally provides for an unbiased decision by a neutral decision-maker. The subject arbitration provision calls for binding arbitration before a three arbitrator panel; one selected by the Plaintiff, one selected by the Defendant, and one selected mutually by the arbitrator selected by each party. (See, Exhibit A, "Purchase Agreement", pg. 3).

Similarly unavailing is Plaintiffs' contention that a general presumption of unequal bargaining power between a new home buyer and a residential builder results in unenforceability of an arbitration provision in the Purchase Agreement. Such a presumption would put the arbitration agreement on unequal footing as it is not a "generally applicable contract defense." See, *Concepcion*, 563 S.C. at 339, 131 S.Ct. at 1746. Moreover, this argument was expressly rejected by the Supreme Court of South Carolina. *John Weiland Homes,* 481 S.C. at fn 6, 791 S.E.2d 128 (rejecting the dissent's proposition that the Supreme Court's judicial notice "that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller" can be applied to arbitration provisions in a contract for construction of a new home).

Finally, Plaintiffs' assertion that a provision in the arbitration provision requiring a demand for arbitration within ninety (90) days of a claim does not render the arbitration agreement against public policy. As an initial matter, this action was filed on June 14, 2017. (See, Compl.). The Defendant filed this motion to dismiss and compel arbitration on July 20, 2017-well within the ninety (90) requirement. Moreover, this provision does not purport to prescribe an unlawful statute of limitations, rather, it provides a deadline on when arbitration of claims must be demanded.

Furthermore, even if the subject provision did attempt to decrease the statute of limitation, S.C. Code. §15-3-140 does not render the entire agreement unenforceable. S.C. Code §15-3-140 states:

> 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.

S.C. Code §15-3-140. In other words, a contractual provision purporting to shorten the statute of limitations is void *ab initio*. Thus, it is treated as if it was never a provision in the contract. Accordingly, even accepting Plaintiffs' strained interpretation of the arbitration agreement, the arbitration agreement stands and the statutes of limitations set forth in S.C. Code §15-3-20 et seq. apply.

Accordingly, Plaintiffs have failed to identify facts showing that they will not be able to assert their claims in an unbiased arbitration before unbiased arbitrators. Given South Carolina's heavy presumption in favor of arbitrability, this court must decide the current motion in favor of arbitration. *See, Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996) (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989))).

## CONCLUSION

For the reasons stated herein, the Complaint should be dismissed, and the Court should enter an order compelling the parties to arbitrate this dispute.

This 7 day of November, 2017.

Respectfully submitted,

EARHART OVERSTREET LLC

By: _____
DAVID W. OVERSTREET
State Bar No.: 16965

STEVEN R. KROPSKI
State Bar No.: 101441

Attorneys for Defendant

P.O. Box 22528
Charleston, SC 29413
843-972-9400

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF RICHLAND | ) | CASE NO.: 2017-CP-40-03697 |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | |
| Plaintiffs, | ) | CERTIFICATE OF SERVICE |
| vs. | ) | |
| Mungo Homes, LLC, | ) | |

I hereby certify that I have this day served a copy of the within ***Reply Memorandum in Support of Motion to Dismiss and Compel Arbitration*** upon all parties to this matter by depositing a true copy of same via United States and electronic mail addressed to counsel of record as follows:

Charles H. McDonald, Esq.
H. Freeman Belser, Esq.
William C. Dillard, Jr., Esq.
Belser & Belser, PA
P.O. Box 96
Columbia, South Carolina 29202
chuck@belserpa.com
**Counsel for Plaintiffs**

This 7th day of November, 2017.

Legal Assistant to Steven R. Kropski

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ

PURCHASE AGREEMENT

MUNGO HOMES, INC.
441 Western Lane
Irmo, SC 29063
(803)749-9000
www.mungo.com
06/29/2015

THIS PURCHASE AGREEMENT is entered into between Mungo Homes, Inc., a South Carolina corporation ("Seller") and Amanda L. Huskins ("Purchaser", whether one or more), Purchaser's phone numbers (Home) (706) 566-7655 (Work) , (Mobile) , (Email) ahuskins@aflac.com .
Title (Deed) to be in Amanda L. Huskins.

## PROPERTY

Seller agrees to sell and Purchaser agrees to buy, on the terms and conditions contained herein, that certain tract of land, together with the dwelling and improvements constructed or to be constructed thereon (the "Property"), situated in Richland County, and described as Lot 221 in the Westcott Ridge Community, also known as TBD, Chanin, SC 29036 (Property Address).

## IMPROVEMENTS

(Check either Field Model or Building Job)

( ) FIELD MODEL. The improvements on the Property are under construction in accordance with Plan VICTOR, Elevation B, and any Change Orders issued prior to or with this Agreement. Purchaser's selection items, if any, shall be shown on the attached Customer Selection Sheet. Any changes must be accepted by the Seller by written Change Order. To the extent any improvements are constructed as of the date hereof, Purchaser has inspected the improvements and is buying based upon this inspection and not in reliance upon any model, plans or other material.

(X ) BUILDING JOB. The improvements shall be constructed on the Property substantially in accordance with Plan VICTOR, Elevation B, and the Start Sheet Addendum and Customer Selection Addendum, attached hereto, plus any written Change Orders accepted by the Seller. Said plans and addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller.

Said plans and Addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller. Seller reserves the right to substitute materials of similar pattern, design and quality.

## PRICE

| | | | | |
|---|---|---|---|---|
| Total Sales Price | $ | 243,625.00 | | |
| Earnest Money (All earnest money paid to Mungo Homes, Inc.) | $ | 3,000.00 | Earnest Money Received | 2,500.00 |
| | | | Additional Earnest Money Due 06/22/2015 | 500.00 |

## FINANCING CONTINGENCY AND TERMINATION

Is this Purchase Agreement contingent upon the Purchaser obtaining a mortgage loan? Yes X No____

Is this home to be owner occupied? Yes X No____
If not owner occupied, then a minimum of $_____ earnest money is required.

Purchaser will apply for said loan to Ameris Bank SB within five (5) business days. Purchaser to pay all fees or costs required by the lender in connection with the loan application or its processing and will promptly supply all documents or other information required by the Lender.

If Purchaser does not obtain loan approval by 07/29/2015 (loan approval may be conditioned upon an appraisal of at least the Purchase Price) Purchaser may, within seven (7) days thereafter, terminate this Agreement by written notice to the Seller, and Seller shall within thirty (30) days thereafter return the Earnest Money to the Purchaser, after the return of Earnest Money neither party shall have any liability to the other. If Purchaser fails to give Seller such notice of termination within the time specified, this financing or loan contingency shall be deemed waived and of no further effect, except in the event loan approval was conditioned upon an appraisal and the property fails to appraise for at least the Purchase Price. Seller, at its sole option, may extend the time for loan approval and closing for such period or periods as Seller in its sole discretion elects in order to allow the Purchaser to obtain financing. Purchaser consents to any such extension and agrees to be fully bound by this Agreement during any such extension(s). If Purchaser obtains loan approval and refuses to close or fails timely and in good faith to apply for said loan, then Purchaser shall be deemed to be in default entitling Seller to the remedies proved herein. "Good faith" application for said loan shall include, but not be limited to, applying for a loan with the usual and customary term, interest rate and down payment prevailing at the time of application. This contingency will be satisfied by Purchaser obtaining loan approval from any lender.

Nothing herein shall be construed as any representation or warranty by the Seller that the Property meets the requirements for any type of loan or of any lender.

If this transaction is contingent upon the Purchaser obtaining a loan insured by the Federal Housing Administration ("FHA") or guaranteed by the Department of Veterans' Affairs ("VA"), then it is expressly understood that, notwithstanding any other provisions of this Agreement, the Purchaser shall not be obligated to complete the purchase of the Property herein described or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Seller has delivered to the Purchaser a written statement issued by the FHA or VA setting forth the appraised value of the Property, excluding closing cost, for mortgage insurance or guaranty purposes of not less than $ 243,625.00 which statement the Seller hereby agrees to deliver to the Purchaser promptly after such appraised value is made available to the Seller. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this Agreement without regard to the amount of the appraised valuation made by the FHA or VA. The appraised valuation is arrived at to determine the maximum mortgage the FHA or VA will insure or guaranty. Neither the FHA nor VA warrants the value or the condition of the Property. The Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.

EXHIBIT
A

MUNGO HOMES

## CLOSING

Closing shall be on or before _ or 90 days from pre-construction meeting, subject to such extensions as provided herein. If closing is extended Seller will notify the Purchaser of the extended closing date at least ten (10) days prior thereto, unless the reason for the delay arises within ten (10) days of closing in which case Seller shall provide notice which is reasonable under the circumstances. Closing to be extended, at Seller's sole option, for any delays beyond Seller's control including, but not limited to acts of God, inclement weather, labor disputes, difficulty in obtaining labor or materials, difficulty or delays in obtaining or the issuance of governmental permits or approvals, or inclement weather.

Issuance of a certificate of occupancy by any governmental authority, or final inspection and approval by the Federal Housing Administration, the Veteran's Administration or mortgage lender shall constitute certification of completion of the improvements in substantial conformity with the terms hereof.

At closing, Purchaser shall pay to Seller in cash the total purchase price and all other sums payable to Seller hereunder. No portion of the purchase price may be withheld from Seller, or deposited in escrow for any reason. Seller will deliver possession of the Property to Purchaser at closing.

Upon payment in full, Seller will deliver to Purchaser a Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property subject to the lien for current taxes; reservations, conditions, right-of-way and easements of record; and matters to which this Agreement is subject.

If closing is delayed through no fault of Seller, Seller may at its option charge Purchaser an extension fee equal to one-thirtieth of one percent (1/30%) of purchase price per day.

## CLOSING COSTS AND PRO-RATIONS

TAXES and ASSESSMENTS shall be pro-rated between the Seller and Purchaser as of the date of closing. DEED preparation shall be paid by Seller.
PREPAID ITEMS (e.g. interim interest, insurance premiums, and tax and insurance escrows) shall be paid by the Purchaser.
MORTGAGE INSURANCE: First year PMI, FHA-MIP, or VA Funding Fee shall be paid by the Purchaser.
ALL OTHER CLOSING COSTS, including DEED STAMPS and or TRANSFER TAXES, shall be paid by Purchaser, except that if the Closing Cost Addendum is attached, Seller shall pay the costs provided therein.

## CHANGE ORDERS

No alterations, changes or additions shall be made in the construction of the improvements provided herein, nor shall any extra work be performed or materials be provided or added by the Purchaser unless approved by the Seller, in its sole discretion, in a written Purchase Agreement Change Order, signed by both parties. Except as provided herein, Purchaser shall pay a $250 Change Order fee, plus the added cost of the change or alteration at the time the request for the Purchase Agreement Change Order is made. Purchaser's initials

## RESTRICTIVE COVENANTS

The Property is subject to restrictive covenants and to the jurisdiction of a homeowners' association which charges annual assessments. The Purchaser acknowledges that the documents pertaining to such restrictions or associations have been made available to him (her) and that he (she) has read, understands and accept same.
Copy received. Purchaser's initials

## HOMEOWNERS' ASSOCIATIONS

The Association Board of Directors set dues amounts annually. The annual dues are currently $ 450/year, plus $150.00, one time contribution fee, paid at closing . Any structure, including fences and outbuildings must be approved by the Architectural Control Board prior to construction. Any provision for these structures in this Agreement does not constitute approval by the Architectural Control Board. It is the purchaser's responsibility to obtain this approval.

## LIMITED WARRANTY

The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.

THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

## TERMITE PROTECTION

Seller will furnish the Purchaser with a one (1) year termite protection bond effective at time of treatment. Seller shall have no liability for damages caused by termites or other wood boring insects beyond the furnishing of this bond. Renewals of the bond shall be at Purchaser's expense. In the event the bond is not renewed, Seller shall not be liable for any damages, including water damage, which could have been discovered and minimized by periodic termite inspections.

## DEFAULT AND TERMINATION

If this Agreement is not performed by Purchaser in accordance with its terms, it may be terminated by Seller, by written notice to Purchaser, and upon such termination Seller may retain all amounts paid by Purchaser hereunder as liquidated damages, after which neither part shall have any liability to the other. Such damages are not a penalty, but represent actual damages which Seller will sustain upon a default by Purchaser, which damages will be substantial but not capable of precise determination. In such event, Purchaser will not assert any claim against Seller seeking the return of any portion of the payments made under this Agreement or any reduction in the amount of such liquidated damages.

If this Agreement is not performed by Seller in accordance with its terms, Seller being in default and Purchaser not being in default hereunder, Purchaser may terminate this Agreement by giving prompt written notice thereof to Seller. Seller, upon receipt of such notice of termination, shall within thirty (30) days return to Purchaser all sums heretofore paid by Purchaser to Seller hereunder and pay $250 to Purchaser, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. After said payment neither party shall have any liability to the other. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Agreement) shall in any case be collectible, enforceable or available to Purchaser.

Notwithstanding the foregoing, Seller, in its sole discretion, without being in default, may terminate this Agreement by written notice to the Purchaser and the payment to the Purchaser of a sum equal to one percent (1%) of the Purchase Price of the Property. Upon the tender of said payment, whether accepted or not, neither party shall have any liability to the other.

Upon either party giving a written notice of termination as provided herein, the Seller shall be entitled to offer for sale and sell the Property to any other person unfettered by any claim of the Purchaser. The parties specifically agree that after any notice of termination is given by either party to the other any claims shall be limited solely to the payment of the sums provided herein and no other claim shall be asserted against the other party or the Property.

MUNGO HOMES

## ARBITRATION AND CLAIMS

Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

## NON-RELIANCE X: JDW

Purchaser hereby represents to Seller that Purchaser has not relied and is not relying upon any warranties, promises, guarantees or representations made by Seller, any agent of Seller, or anyone else acting or claiming to act on behalf of Seller with respect to the purchase by Purchaser of the Property or the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

## MISCELLANEOUS

a. This Agreement will be binding and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns; provided that Purchaser shall not assign or transfer this Agreement or any of Purchaser's rights hereunder, and any prohibited assignment shall be null and void and Seller may at Seller's option, immediately terminate this Agreement.

b. In the event of a total destruction of the dwelling by fire, windstorm, hail, earthquake, explosion or other casualty prior to the closing, Purchaser or Seller may terminate this Agreement if the dwelling cannot be restored prior to the Completion Date.

c. This Agreement embodies the entire Agreement between Seller and Purchaser with respect to the Property. No amendment or modification of this Agreement (including contracts for changes in construction of "extras") shall be valid unless contained in writing executed by both parties.

d. Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations.

e. All notices and demands to be given or served pursuant to the terms of this Agreement shall be given by certified or registered mail, return receipt requested, addressed to the parties at their respective addresses set forth herein and will be deemed delivered and received three (3) days after deposit into the United States mail with sufficient postage.

f. If two or more persons are named as Purchaser herein, any one of them is authorized to act as agent for, with the right to bind, the other(s) in all matters of every kind or nature with respect to this Agreement.

g. Purchaser is prohibited from recording this Agreement or any memorandum hereof and upon attempted recordation this Agreement shall at Seller's option, become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

h. Seller agrees to disclose to Purchaser in writing prior to or at closing or post conspicuously on the Property, the type, thickness and R-value of all insulation installed or to be installed in the dwelling.

i. PURCHASER REALIZES AND ACKNOWLEDGES THAT ENTRY UPON THE PROJECT OR THE PROPERTY DURING CONSTRUCTION CAN BE DANGEROUS AND THAT HAZARDS MAY EXIST WHICH ARE NOT OBSERVABLE. PURCHASER'S ENTRY SHALL BE SOLELY AT HIS OWN RISK. PURCHASER DOES HEREBY WAIVE ANY AND ALL CLAIMS AGAINST SELLER FOR INJURY OR LOSS TO PERSON OR PROPERTY ARISING OUT OF OR IN CONNECTION WITH SUCH ENTRY BY PURCHASER OR ANY OTHER PERSON ACCOMPANYING HIM OR ENTERING AT HIS DIRECTION OR PERMISSION.

j. The provisions of this Agreement shall survive closing and not merge in the deed.

k. It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon its completion.

l. Each lot is unique in size, shape and various characteristics. Purchaser understands and agrees that the size of the lot, the exact location of sidewalks and driveways (if any) and the drainage patterns of the lot will differ from the model home plans, drawings or renderings that Purchaser may have examined.

m. Land adjacent to or surrounding the Property which is not owned by Seller is not within Seller's control. Seller will not be liable to Purchaser for any use or condition of adjacent or surrounding land for commercial, industrial, institutional, multi-family or non-residential purposes.

n. PURCHASER HEREBY RELEASES AND RELINQUISHES ALL CLAIMS AGAINST SELLER FOR DAMAGES TO PROPERTY OR PERSONAL INJURY ARISING AFTER THE DATE OF THIS AGREEMENT RELATING TO ANY OF THE FOLLOWING:
(1) environmental or ecological conditions or events such as weather conditions, atmospheric conditions, terrestrial conditions, acts of God or other natural or man-made conditions or occurrences, occurring beyond the reasonable control of Seller.
(2) consequential damages or expenses resulting from a termination of this Agreement or to delays in closing, such as lodging, storage, moving, meals or travel expenses.
(3) any claims for repairs or modifications to the Property except as specifically covered by Seller's limited home warranty. This waiver will be binding upon Purchaser and the heirs, successors, assigns, guests and invitees of Purchaser. Purchaser acknowledges that Seller shall be entitled to rely upon this waiver as a complete defense against any claim asserted by Purchaser or anyone claiming through Purchaser. The deed conveying the Property to Purchaser may contain a reference to this waiver.

IN WITNESS whereof the parties have set their hands and seals and PURCHASER CERTIFIES THAT THIS AGREEMENT HAS BEEN FULLY READ AND UNDERSTOOD.

Witness: Jill Sanders

MUNGO HOMES, INC.

By: _____ Agent 7/9/15

PURCHASER

PURCHASER

Are you working with a Buyer's Agent? Yes ____ No X Initial (s): _____ Date: 6/29/15

If yes, please fill out information below:
Buyer's Agent Name Office Address
Agency Name
Office Phone # Cell Phone # Fax#
Agency Code Agent Code Agent's E-Mail Address

Purchaser's current address is: 839 Burnview Lane, Chapin, SC 29036
MUNGO HOMES Community Sales Manager Jill Sanders

06/29/2015

MUNGO HOMES

CONTINGENCY ADDENDUM

PURCHASER Amanda L. Huskins
LOT 221 COMMUNITY Westcott Ridge DATE 06/29/2015

PURCHASER UNDERSTANDS AND AGREES THAT THIS CONTRACT IS CONTINGENT UPON:

Purchasers request driveway to be on the right side.

PURCHASER 7/3/15 DATE

PURCHASER DATE

Mungo Homes, Inc.
SELLER

BY: 7/3/15 DATE

06/29/2015

Lot: 221
Community: Westcott Ridge

MUNGO HOMES

# START DATE ADDENDUM

The requested Start Date is 8/21/15 and will be confirmed after both parties ratify the *Purchase Agreement*. Actual construction will begin after your Pre-construction Meeting. The Pre-construction Meeting is typically scheduled for the week following your Start Date.

Purchaser Responsibilities:

1. Meet with the Design Consultant and have your *Color Selections* completed on or before 8/17/15 (4 days before the Start Date), or you must move to the next available Start Date.
2. Make loan application within five (5) days of your *Purchase Agreement*.
3. Be current on all earnest money commitments prior to your Start Date.
4. Be available to attend a Pre-construction Meeting the week following your Start Date.

Changes:

1. Any change (addition/modification/deletion) that requires modifications to the construction drawings must be ratified by both parties prior to 25 days before your chosen Start Date, or you must move to the next available Start Date.
   a. If the changes are ratified more than 25 days before your Start Date, no Change Order Fees will apply.
   b. Examples of changes that require plan modifications include but are not limited to the following: foundations, garages, screen porches, bonus rooms, floor plan options, vaulted ceilings, tray ceilings, bath tub or shower options, bay windows, fireplaces, changes to vanities, adding or deleting doors, brick or stone options, windows, laundry sink, dormers or extra concrete patios or driveways.
2. In the twenty-one (21) days between the 25th and 4th days prior to your Start Date, it is possible to change the items enumerated in 1.b. above, but a Preparation Fee will be charged along with the cost of the change itself.
   a. Changing your choice of floor plan, elevation, home site or any of the other options listed in 1.b. above within this 21 day window will cost $500 to help offset the expense of re-permitting, surveying and drafting.
   b. This will require you to move to the next available Start Date.
   c. The $500 fee will not be added to *the purchase agreement* amount, but will be collected by check or debit card prior to initiating the change. The $500 will be non-refundable.
3. Changes that do not affect the construction drawings are permitted up to 4 days before the Start Date.
   a. If the changes are ratified more than 4 days before your Start Date, no Change Order Fees will apply.
   b. Examples of changes that do not require plan modifications include but are not limited to the following: garage door openers, finished garages, upgraded roof shingles, trim options, railings, designer paint schemes, cabinets, flooring, fireplace surrounds, closet shelving, landscaping, irrigation, plumbing fixtures, mirrors, shower doors, siding, security, vacuums, appliances, blinds, hose bibs, decks, home theater and audio, structured wiring, lighting packages, door hardware, countertops, electrical options or fences.
   c. Notwithstanding the above, all color selections must be made in the design appointment with the Design Consultant. Any changes permitted after that design appointment will include a $250 Change Order Fee, plus the cost of the change itself.
4. 4 days before the Start Date is when all changes must be complete. After this date, no changes are permitted without prior approval from Mungo Homes, and may not be permitted.
   a. If a change is permitted, any *Purchase Agreement Change Order* after this date will include a $250 Change Order Fee, plus the cost of the change itself.
   b. The $250 fee will not be added to *the purchase agreement* amount, but will be collected by check or debit card prior to initiating the change. The $250 will be non-refundable.
5. Although the changes are possible as described above, the process works best when all options are included in the initial *Purchase Agreement*.

**Purchaser's Acknowledgement:**

I have read the above addendum, understand and agree the content therein.

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Start Date Addendum.doc 2/18/13

MUNGO HOMES

# Start Calendar

Lot: 221 Community: Westcott Ridge

| | Mon | Tue | Wed | Thur | Fri | Sat | Sun |
|---|---|---|---|---|---|---|---|
| Week 1 | -25 Days No more structural changes 7/27/15 | | | | | | |
| Week 2 | | | | | | | |
| Week 3 | | | | | | | |
| Week 4 | 8/17/15 Days Selections due and no more non-structural changes | | | | Start Date 8/21/15 | | |
| Week 5 | | Pre-construction meeting 8/25/17 | | | | | |

THE THREE (3) CUT OFF DATES LISTED ABOVE FOR STRUCTURAL CHANGES, SELECTIONS AND NON-STRUCTURAL CHANGES ARE THE DATES THAT THE APPLICABLE PAPERWORK MUST BE RECEIVED, EXECUTED AND PROCESSED BY MUNGO HOMES.

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

Mungo Homes 7/3/15

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Build Jobs/Start Calendar.xls 6/26/2015

110

Lot #: 221

Community: Westcott Ridge

MUNGO HOMES

# STRUCTURAL AND/OR NON-STRUCTURAL CHANGES

**Examples of changes that require plan modifications include but are not limited to the following (structural changes):**

- Garages
- Screen porches
- Bonus rooms
- Floor plan options
- Vaulted ceilings
- Tray ceilings
- Bath tub or shower options
- Bay windows
- Fireplaces
- Changes to vanities
- Adding or deleting doors
- Brick or stone options
- Windows
- Laundry sink
- Additional concrete
- Dormers

7/27/15
Date

**Examples of changes that do not require plan modifications include but are not limited to the following (non-structural changes):**

- Garage door openers
- Finished garages
- Upgraded roof shingles
- Trim options
- Railings
- Designer paint schemes
- Cabinets
- Flooring
- Fireplace surrounds
- Closet shelving
- Landscaping
- Irrigation
- Plumbing fixtures
- Mirrors
- Shower doors
- Siding
- Security
- Vacuums
- Appliances
- Blinds
- Hose bibs
- Decks
- Home theater and audio
- Structured wiring
- Lighting
- Door hardware
- Countertops
- Electrical options
- Fences

8/17/15
Date

Purchaser 7/29/15 Date

Purchaser Date

Mungo Homes 7/3/15 Date

m:\mungo homes\all things sales\mungo contract forms\structural non structural.doc 2/5/13

Lot 221
Community Westcott Ridge
Date 06/29/2015

## Development Rider

443 Western Lane, Irmo, SC 29063
(803) 749-9000
www.mungo.com

When developing the infrastructure of a community, there are a number of factors that are directly impacted by weather and local municipalities. As a developer, The Mungo Company has a very good idea about the time frame required to complete the construction, inspection and approval process for the community roads and utilities. However, since every project is unique, there are sometimes unexpected delays in the construction process. These may be as a result of:

- Unusually bad weather
- Extensive underground rock
- Municipal approval process
- DHEC approval process
- Utility company's installation of power
- Utility company's installation of water
- Utility company's installation of gas (if applicable)
- Cold weather effects on concrete or paving

Some weather problems and external delays are common, so we factor some time in our schedule to account for these. It is possible however, that Mungo Homes will not be able to begin construction or complete your home when we expect to, due to unusual conditions beyond our control or the control of the developer.

Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration.

By reading and signing this document, you acknowledge the possibility of delays to the construction start or completion of your home.

In all cases, your satisfaction is our top priority, and you will be kept informed of any changes in our schedule that affect the construction of your home.

Mungo Homes Community
Sales Manager _____

Date: 6/29/15 _____ Purchaser

Date: _____ _____ Purchaser

Date: 7/2/15 _____ Seller's Authorized Signature

06/29/2015

Lot 221
Community Westcott Ridge
Date 06/29/2015

## Non-Owned Lot Addendum

Seller is in the process of acquiring the Property upon which the dwelling and other improvements are to be constructed and sold to the Purchaser pursuant to the terms and conditions of the Purchase Agreement to which this Addendum is attached. Seller anticipates acquiring the Property; however, cannot warrant or guarantee that it will be able to do so. Therefore, Purchaser agrees that if Seller does not acquire the Property for any reason, Purchaser may elect to: substitute other property which the Seller has available for sale, recognizing that such substitution may require adjustments to price, time and other provisions of the Agreement, or terminate the Agreement and receive a refund of any Earnest Money paid to the Seller. Such election must be made within ten (10) days after Seller notifies Purchaser that it is not acquiring the Property. If Purchaser fails to elect within said time, Purchaser shall be deemed to have elected to terminate the Agreement. Seller shall have no other liability of any nature whatsoever for its failure to acquire title to the Property for any reason.

Seller: _____

By: 7/3/15

Purchaser

Purchaser

06/29/2015

MUNGO HOMES

# CLOSING COST ADDENDUM

| | | | |
|---|---|---|---|
| Job # | Westcott Ridge 221 | Date | 06/29/2015 |
| Purchaser | Amanda L. Huskins | Address | TBD Chapin, SC 29036 |

Seller has established Marketing Agreements with Ameris Bank, BB&T, and Starkey Mortgage. Under the terms of these Marketing Agreements these lenders are promoted on Seller's website and permitted to display promotional materials in Seller's sales centers. These lenders offer a broad range of loan programs including, but not limited to, programs which provide for the elimination and/or deferral of closing costs into their loan program. Please contact one or more of these lenders to learn more about the financing options available to you.

"Closing Costs" are fees or charges associated with loan origination, appraisal, processing, closing, underwriting, credit report, tax service, flood certification, lender's title insurance, attorney and recording.

**Purchaser will not be responsible for deed stamps, transfer taxes and intangible taxes when (1) the closing is handled by attorney selected by Seller AND (2) one of the lenders listed above are used or Purchaser does not require financing (i.e. cash closing).** Purchaser may be required and agrees to execute a waiver of conflict or similar document by the closing attorney selected by the Seller.

Purchaser will be responsible for all Lender costs associated with "optional" or "elective" programs such as interest rate buy-downs, discount points and other special loan programs. Purchaser shall also be responsible for all other closing costs and pre-paid items including, but not limited to, survey, attorney's courier charges to send the loan package to the Lender, owner's title insurance, hazard insurance, per diem interest on Purchaser's loan, Lender-required escrows, and homeowners' association dues and charges.

Purchaser understands that Purchaser may not make any change in mortgage company or loan program in the 30 days prior to closing date.

Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration. Purchaser acknowledges that the purchase price is based on closing by the date agreed to in the Purchase Agreement. Should Purchaser fail to close on that date, Seller will be entitled to and the Purchaser agrees to pay carrying costs at the rate defined in the Purchase Agreement from that date until the day of the actual closing. This amount will be charged on a monthly basis and prorated daily. Seller will require that this amount be paid in advance.

Purchaser specifically acknowledges and consents to Seller providing a copy of Purchase Agreement, attachments and addendums to lenders listed above.

Nothing herein guarantees that Purchasers will qualify for any specific financing.

SELLER: _____ 7/3/15

PURCHASER: _____

PURCHASER: _____

MUNGO HOMES

06/29/2015

MUNGO HOMES

LOT: 221 COMMUNITY: Westcott Ridge

ADDRESS: TBD

PURCHASER (S) Jay + Amanda Huskins

## HOMEOWNER'S RESPONSIBILITY

- Complete the *Customer Selection Sheet* completed at least 21 days before your Start Date.
- Make appointment with a mortgage company immediately upon receipt of accepted contract.
- Meet with Project Manager for Pre-construction meeting. (Project Manager will call to schedule).
- Two weeks prior to closing make arrangements for homeowner's insurance. Notify closing attorney's office with information. Also, verify closing date & time with Closing Coordinator at Mungo Homes.
- Put utilities (electricity, gas, water & sewer) in your name. Will be changed from Mungo Homes at closing.
- Day before closing, obtain amount of funds needed to close from Closing Attorney. If funds are less than $4000, a cashier's check will be accepted. If funds exceed $4000, arrange for wire transfer of funds to closing attorney's office. Funds must be deposited into attorney's account and available for disbursement from the attorney's account to complete closing, and release reimbursements, checks to agents, and keys to customer.
- David Ross is our preferred closing attorney. He can be reached for your final closing figures 48 hours prior to closing.

## HOMEOWNER'S MANUAL ACCEPTANCE

Your signature below acknowledges receipt of your MUNGO HOMES HOMEOWNER'S MANUAL. It also indicates that you have reviewed this information with your Community Sales Manager.

You are discouraged from making any large purchases such as a new car, boat, motorcycle, etc., between the time of signing the sales agreement and closing of the home. Large purchases can affect your credit report and ultimately the ability to purchase your new home.

**ACCEPTANCE OF HOMEOWNER'S RESPONSIBILITY AND HOMEOWNER MANUAL:**

Purchaser _____ Date 6/29/15

Purchaser _____ Date _____

Community Sales Manager _____ Date 6/29/15

**PLEASE REMEMBER TO BRING YOUR HOMEOWNER MANUAL TO ALL MEETINGS CONCERNING YOUR NEW HOME**

Richland Development Services
Progressive • Timely • Professional

# PERMIT CARD

## Permit #

# RBD15-01224

**Applicant** MUNGO HOMES INC
**Address** 298 MASSEY CIR CHAPIN, SC 29036
**Permit Description** RESIDENTIAL NEW CONSTRUCTION
SINGLE FAMILY RES
**Date Issued** 8/18/2015

Richland County
South Carolina
2020 Hampton Street
P.O.Box 192
Columbia, SC 29201

**NOTICE TO OWNER OR POSSESSOR**

1. The issuance of this Permit does not relieve the Contractor, Engineer, or Owner from the responsibility to comply with all Codes and Ordinances of Richland County, SC.
2. This Permit may be revoked by the Richland County Officials for non-compliance of Codes and Ordinances of Richland County, SC.
3. The permit or copy thereof shall be kept on site until the project is deemed completed by Richland County, SC.

EXHIBIT B

116

Richland
Development Services
Progressive • Timely • Professional

BUILDING INSPECTIONS

# RESIDENTIAL CERTIFICATE OF OCCUPANCY

## Permit #

# RBD15-01224

Site Address 298 MASSEY CIR
CHAPIN, SC 29036

Parcel R02600-09-01

Permit Type RESIDENTIAL NEW CONSTRUCTION

Permit Sub Type SINGLE FAMILY RES

Permit Description single family dwelling

Occupancy Type R-3 RESIDENTIAL - ONE & TWO FAMILY

Construction Type V8 Code Editions 2012

Automatic Sprinkler NO Req NO Design Occupant Load 0

CO Issued Date 1/19/2016

Owner MUNGO HOMES INC

Address 441 WESTERN LANE
IRMO, SC 29063

**BUILDING OFFICIAL**

Donny Phipps

This Certificate issued pursuant to the requirements of the International Codes certifying that at the time of issuance this structure was in compliance with the various ordinances of the County regulating building construction or use.

Richland County, South Carolina
2020 Hampton Street
P.O.Box 192
Columbia, SC 29201
803-576-2140

117

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | CASE NO.: 2017-CP-40-03697 |
| | ) | |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | |
| | ) | |
| Plaintiffs, | ) | AFFIDAVIT OF CHRISTOPHER CONDON |
| | ) | |
| vs. | ) | |
| | ) | |
| Mungo Homes, LLC, | ) | |
| | ) | |

RICHLAND COUN
FILED
2017 NOV -8 AM 8:49
JEANNETTE W. McBRIDE
C.P. & G.S.

PERSONALLY APPEARED BEFORE ME, Christopher Condon, who being duly sworn, deposes and says as follows:

1. I am of sound mind to give this Affidavit.
2. I am employed by Mungo Homes, Inc. in the capacity of Division President.
3. I have personal knowledge of the facts and circumstances of this dispute, including the execution of the Purchase Agreement between the Plaintiffs and Mungo Homes, Inc. and the construction of the Plaintiffs' residence located in Richland County, South Carolina and described as Lot 221 in the Westcott Ridge Community.
4. At the time the Purchase Agreement was executed by the Plaintiffs, June 29, 2015, the Plaintiffs' residence was not erected on the lot.
5. The Plaintiffs' residence was constructed by Mungo Homes, Inc. following execution of the Purchase Agreement.
6. Construction of the Plaintiffs' residence involved businesses and the use of materials and supplies from outside of the State of South Carolina.

7. A certificate of occupancy for the Plaintiffs' residence was issued by Richland Development Services on January 19, 2016.

FURTHER AFFIANT SAYETH NOT.

Christopher Condon

SWORN to before me this 7 day
Of November, 2017.

Kathryn Muskovin
Notary Public/State of South Carolina
My Commission Expires: 3.3.20

KATHRYN T. MUSKOVIN
My Commission Expires
NOTARY PUBLIC
03.03.2020
SOUTH CAROLINA

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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | FIFTH JUDICIAL CIRCUIT |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | Civil Action No. 2017-CP-40-03697 |
| Plaintiffs, | ) | |
| | ) | **PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT TO ALTER OR AMEND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION** |
| vs. | ) | |
| Mungo Homes, LLC, | ) | |
| Defendant. | ) | |

Pursuant to Rules 52(b) and 59(e), SCRCP, Plaintiffs Amanda Leigh Huskins and Jay R. Huskins ("the Huskins") hereby move to alter or amend the order of court granting Defendant Mungo Homes, LLC's ("Mungo") Motion to Dismiss and Compel Arbitration. Specifically, the Order should be altered or amended to deny Mungo's motion to dismiss and compel arbitration and strike the offending arbitration provision in its entirety to retain jurisdiction over this important matter on the following grounds set forth below.

## STANDARD OF REVIEW

In South Carolina, "[a] party may wish to file [a motion to reconsider] when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S. Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphases in original).

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## ARGUMENT

I. **The Court correctly concluded that the South Carolina Uniform Arbitration Act governs the arbitrability of this Purchase Agreement because the parties' "Arbitration and Claims" provision provides for the same, but the Court should amend its Order to find the following facts supported its conclusion, too.**

- Similar to the "Arbitration and Claims" provision itself, the first page of the Purchase Agreement also provides in all caps and underline: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ." This fact was not found by the Court and is additional evidence of the parties' agreement to arbitrate under the South Carolina Uniform Arbitration Act.

- In addition, paragraph (k) of the MISCELLANEOUS section of the Mungo Purchase Agreement provides:

> It is understood that Purchaser is buying a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon its completion.
>
> [Complaint, Ex. 1]

The Court did not refer to this paragraph to support further its conclusion that the parties agreed to arbitrate under the South Carolina Uniform Arbitration Act. As the court noted, the South Carolina Supreme Court in *Zabinski v. Bright Acres Asoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) ruled that a contract for the sale of residential real estate does not involve interstate commerce. And a year later, the South Carolina Supreme Court further solidified this principle, ruling that a purchase agreement for the sale of a "completed dwelling" also did not involve interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). It is no coincidence then that

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paragraph (k) of the Miscellaneous section of the Purchases Agreement incorporates the *Bradley* Court's meaningful phrase, "completed dwelling," to make clear the parties agreed by contract that the Purchase Agreement was for the sale of a "completed dwelling," not a contract for construction of the same.[1] Stated another way, no matter what the other circumstances-in-fact may be in and surrounding the Purchase Agreement, by use of the words "completed dwelling" in paragraph (k) of the Miscellaneous provision, the parties agreed by contract that the Purchase Agreement involved only intrastate commerce under *Bradley* and was subject to the South Carolina Uniform Arbitration Act.

**II. While the Court correctly concluded that the Huskins lacked meaningful choice to arbitrate their claims for the reasons stated in the Order, the Court erred in finding that the "Arbitration and Claims" paragraph was not oppressive and one-sided.**

**A. As an initial matter, the Court erred in determining that the "Limited Warranty" should be analyzed in isolation.**

The Court concluded that the "Limited Warranty" claim should be analyzed in isolation because the "Limited Warranty" provision and the "Arbitration and Claims" provision are set apart by different headings in the Purchase Agreement, and the "Arbitration and Claims" provision does not specifically reference the "Limited Warranty" provision. (Order at 10.) The Court's analysis elevates form over substance, on the one hand, and fails to apply the plain language of the contractual provisions, on the other hand.

In construing a written contract, if the language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d

[1] In fact, paragraph (k) in the Miscellaneous section of Mungo's Purchase Agreement is, with minor exception, the exact same language contained in the purchase agreement at issue in *Bradley v. Brentwood Homes* upon which that court relied in finding the transaction involved only intrastate commerce. *See id.* 398 S.C. at 450, 730 S.E.2d at 313, FN 3.

705, 706 (1993). At the outset, as to the "headings" in the Purchase Agreement, the Court should not give undue weight to manipulative contract drafting by Mungo's lawyers and their use of mere labels and "headings" in an adhesion contract at the expense of much less sophisticated purchasers in the residential home context. The Court must apply the plain language of the "Arbitration and Claims" provision itself. The "Arbitration and Claims" provision in the Purchase Agreement is expansive and broad in scope, and plainly includes warranty claims. The "Arbitration and Claims" provision states in pertinent part: "Any claim, dispute or other matter . . . between the parties . . . arising out of this Agreement, related to this Agreement or breach thereof, including without limitation, disputes related to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration." The "Arbitration and Claims" provision makes no exception for warranty claims of any kind, and applies to any claim, dispute, or other matter, and need only arise out of or relate to the Purchase Agreement or breach thereof. By way of example, an implied warranty of habitability claim under the Huskins' Purchase Agreement certainly would constitute a "dispute[] relating to the Property" as referenced in the "Arbitration and Claims" provision. "Property" being defined as "that certain tract of land, together with the dwelling" on the first page of the Purchase Agreement. An implied warranty of habitability claim would also constitute a "dispute[] relating to the Property . . . or condition . . . thereof" as referenced in the "Arbitration and Claims" provision.

In addition, the "Limited Warranty" and "Arbitration and Claim" provisions cross-reference one another. The "Limited Warranty" provision states: "This limited warranty will be incorporated in the deed delivered at closing." The "Arbitration and Claims" provision applies to "disputes relating to . . . the deed to be delivered" pursuant to the Purchase Agreement. Stated



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another way, the "Limited Warranty" provision is explicitly merged into the deed delivered at closing, and claims, disputes or other matters related to the Deed are specifically referred to in and included as subject to the mandatory and binding arbitration provided under the "Arbitration and Claims" provision.

Finally, although the contract language is plain and should be enforced as substantively provided above, to the extent that there is any ambiguity as to the scope of the arbitration agreement and its inclusion of all warranty claims under the "Limited Warranty" provision, the Court must construe any doubts and ambiguities against the drafter. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). "This rule applies with particular force in cases involving a contract of adhesion." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27 (2003). Mungo, moreover, did not make any representation to the Court, either in its written briefs or at the hearing on its motion, much less submit any evidence that warranty claims under the Purchase Agreement would not be subject to mandatory arbitration under the "Arbitration and Claims" provision. Because the Court is obligated to apply the plain language of the arbitration provision at issue and also construe any ambiguity or provision susceptible to more than one interpretation against its drafter, the "Arbitration and Claims" provision cannot be extracted or isolated from the "Limited Warranty" provision in the Purchase Agreement. The two provisions are in substance intertwined.

**B. Second, when elevating substance over form and construing the "Limited Warranty" provision and the "Arbitration and Claims" provision in harmony with one another, the Court should amend and alter its prior determination that the "Arbitration and Claims" provision does not prevent purchasers from bringing warranty claims in a judicial forum and recognize that the "Arbitration and Claims" provision in fact does so, indicating one-sidedness and oppressiveness.**

As discussed above, the plain language of the "Arbitration and Claims" provision is sweeping, and subjects all claims, disputes, or matters arising out of or relating to the Purchase

Agreement, Property or condition thereof, or deed, among other matters, to mandatory arbitration. The "Arbitration and Claims" provision, moreover, includes no exception for warranty or warranty-related claims, disputes or other matters. As the Court noted in its Order, "[a]n arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness." (Order at 11.) Such a limitation is unenforceable as a matter of public policy as it precludes buyers from filing claims under the Magnuson Moss Warranty Act. (Order at 12.)

Because all warranty or warranty-related claims are subject to mandatory arbitration, this court must reverse its determination that the "Arbitration and Claims" provision does not prevent purchasers from bring warranty claims in a judicial forum and find that the "Arbitration and Claims" provision in fact does so, indicating one-sidedness and oppressiveness.

**C. Third, when elevating substance over form, the Court should amend and alter its prior determination that the "Arbitration and Claims" provision does not one-sidedly and oppressively limit purchasers' remedies at law.**

As established above, under the "Arbitration and Claims" provision, any warranty claim, dispute or other matter arising out of or related to the Property or Condition thereof is subject to mandatory arbitration under the "Arbitration and Claims" provision. The "Limited Warranty" provision, therefore, cannot be read in isolation from the "Arbitration and Claims" provision, and the two provisions must be read in harmony with one another. Together, the "Arbitration and Claims" and "Limited Warranty" provisions prohibit any purchaser with any kind of warranty claim, dispute, or other matter from recovering damages, consequential or punitive. These damages would otherwise be recoverable in warranty matters by law. This limitation on remedies is just like the terms found to be one-sided and oppressive in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016), wherein D.R. Horton expressly disclaimed all warranties,



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including the warranty of habitability, as well as completely absolved itself from ever paying any money damages. Indeed, this Court acknowledged in its Order that an arbitration provision which limits remedies otherwise available by law indicates a one-sided and oppressive arbitration agreement. (Order at 10 ("An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness.").)

Pursuant to the reasoning above, the Huskins respectfully request that the Court amend and alter its Order to reflect that the "Arbitration and Claims" provision in this case limits purchasers' remedies at law and is therefore oppressive and one-sided.

**D. Fourth, the Court failed to apply the plain language of the "Arbitration and Claims" provision and erred when it concluded that the ninety-day time frame to demand arbitration does not circumscribe the Huskins' ability to assert claims related to the Property or Purchase Agreement within the longer time frame allowed by South Carolina law and therefore was not one-sided or oppressive.**

The Court mistakenly concluded that the ninety-day "limitations period" set forth in the "Arbitration and Claims" provision relates to how long Mungo has to move to dismiss a judicial action and compel arbitration. (Order at 11.). As discussed above, the first sentence of this provision defines the expansive scope of any claims, disputes, or other matters to which the mandatory and binding arbitration "shall" apply and the circumstances in which the mandatory and binding arbitration shall take place. Then, the "Arbitration and Claims" provision outlines how the party with the claims, disputes, or other matters in need of resolution subject to mandatory and binding arbitration shall "commence[]" arbitration, noting that such process must be by written demand, specifying the issues and designating an arbitrator. Most importantly, the "Arbitration and Claims" provision then states in pertinent part:

> Each and every demand shall be made *within ninety (90) days after the claim, dispute or other matter in question has arisen,* except for any claim, dispute or matter in question arising from either party's termination of this Agreement which

shall be made within thirty (30) days of the written notice of termination. *Any claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred.*

(emphasis added). Pursuant to the language quoted above, the "Arbitration and Claims" provision circumscribes the time frame in which a party with claims, disputes, or other matters falling within the scope of the mandatory and binding arbitration provision can demand resolution. Depending on the circumstances, those claims, disputes, or other matters must be demanded for resolution through arbitration within 90 or 30 days of the date upon which those claims, disputes, or other issues arise, or such claims will be lost forever. The last sentence of the paragraph leaves no room for any other interpretation, noting "[a]ny claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred." In other words, the clause operates as a 90 or 30-day limitations period for an aggrieved party to bring a claim once that claim has arisen.

Contrary to the Court's finding, this language has nothing to do with the time in which Mungo has to move to dismiss this judicial action and seek to compel arbitration. Mungo is not "commenc[ing]" any arbitration against the Huskins by moving to dismiss this action and compel arbitration. Mungo seeks only to foreclose this judicial forum to the Huskins and require the Huskins, not Mungo, to "commence" **their claims** in mandatory and binding arbitration under the "Arbitration and Claims" provision. It is irrelevant how long it took Mungo to file a motion to compel arbitration. The ninety-day and thirty-day limitations period in Mungo's arbitration clause relates solely to the party asserting a claim, which, in this case, is the Huskins. Accordingly, the arbitration provision, by its plain language, seeks to bar any claim asserted more than 90 days after the claim arose. The Court should not lose sight of the context in which Mungo seeks to impose this severe time limitation on asserting a claim—the purchase of a new home which, for most, is



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the largest financial investment of their lives. Viewed in this light, the severe limitation of the right to assert a claim for relief is oppressive in the extreme.

Moreover, the "Arbitration and Claims" provision violates South Carolina law because it drastically shortens (from three years to 90 or, in some instances, 30 days) the time in which a party is allowed to bring a claim, dispute, or other matter under the contract. *See* S.C. Code Ann. § 15-3-140.[2] The Court should recognize that Mungo, a sophisticated entity and one of the nation's largest sellers of new homes, either knows or certainly should know that it cannot legally shorten the applicable statute of limitations in South Carolina. Nevertheless, Mungo includes such a provision in its standard-form Purchase Agreement presented to its numerous customers. Mungo circumscribes the purchasing party's rights despite (or perhaps because of) the average purchaser's relative lack of sophistication. Because Mungo's arbitration provision violates South Carolina public policy to safeguard the applicable statutory limitations period for asserting claims as set forth in § 15-3-140, it is not only one-sided and oppressive but unenforceable as a matter of state contract law. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 29-31, 644 S.E.2d 663, 671 (2007).

The Court sets a dangerous precedent by approving Mungo's one-sided and oppressive arbitration provision and not striking the provision in its entirety. By upholding Mungo's 30- and 90-day limitations period, the Court sends a clear message to the business community that such restrictive limitations periods in arbitration clauses – although illegal – may nevertheless be included in standard-form contracts without fear that such arbitration provisions will be stricken

[2] S.C. Code Ann. § 13-4-140: "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."



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or not enforced. Businesses are thus incentivized to include such illegal and restrictive limitations periods in their standard-form contracts, and thereby mislead unwary consumers into believing that their claims are barred and cannot be pursued because those claims have passed the restrictive limitations period included in their contracts. Instead of creating this harmful precedent, the Court should rule (a) South Carolina's public policy set forth in S.C. Code § 15-3-140 makes Mungo's 30- and 90-day limitations period illegal and unenforceable; (b) Mungo should not be allowed to violate South Carolina law without consequence; and (iii) Mungo's arbitration provision must therefore be stricken in its entirety because to hold otherwise would only incentivize businesses to include illegal and overly-restrictive limitations provisions in all their arbitration clauses to the detriment of South Carolina's citizens.

**E. Fifth, Mungo's Arbitration Clause is one-sided and oppressive because it applies exclusively to claims asserted by the Purchaser after the sale of the home is closed.**

The Court mistakenly construes Mungo's arbitration provision as applying mutually to Mungo and its purchasers. However, any belief that Mungo would assert a claim and demand arbitration against a Purchaser is illusory, particularly with respect to any claims after the closing of the sale of a residential home to a purchaser. Because Mungo requires full payment for the home at closing, Mungo would have no reason to assert a claim against an individual home buyer after the closing. The time limitations in the arbitration clause thus have no real application to any rights of Mungo and are clearly a one-sided and oppressive provision designed to deprive the individual home buyer of a reasonable time to pursue claims against Mungo.

In sum, Mungo's unlawful circumscription of the time allowed by South Carolina law for purchasers to assert claims related to the Property or Purchase Agreement is sufficient to strike down the "Arbitration and Claims" provision alone. Certainly, however, the cumulative effect of

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all the one-sided and oppressive terms in the "Arbitration and Claims" provision taken together is sufficient to declare the provision unconscionable and unenforceable. The "Arbitration and Claims" provision in the Purchase Agreement is one-sided and oppressive on many grounds. It prevents purchasers from bringing warranty claims in a judicial forum. It prevents purchasers from obtaining any money damages otherwise available at law for violations of warranty laws. It circumscribes purchasers' otherwise lawful assertion of claims related to the Property or Purchase Agreement within the longer time frame allowed by South Carolina law. And, for all practical applications, it does not apply mutually to the parties to the Purchase Agreement. As the Court stated in *Simpson*, "[W]e find the arbitration clause in the adhesion contract . . . wholly unconscionable and unenforceable based **on the cumulative effect** of a number of oppressive and one-sided provisions contained within the **entire** clause." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674 (emphasis added).

**III. Even if the Court did not alter or amend its conclusion that the "Limited Warranty" provision must be read in isolation from the "Arbitration and Claims" provision, the Court erred in granting Mungo's Motion to Dismiss, as according to the Court's analysis, the Huskins' claims would fall under the "Limited Warranty" provision, outside the "Arbitration and Claims" provision, and therefore appropriately asserted in this judicial forum.**

While counsel for the Huskins disagrees with the Court's determination that the "Limited Warranty" and "Arbitration and Claims" provisions should be read in isolation for the reasons noted above, pursuant to the court's analysis, the Court determined that "[t]he 'Arbitration and Claims' provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting." (Order at 12.) The Court noted: "The Purchase Agreement contains a separate "Limited Warranty" provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages." (Order at 12 n. 2.)

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The Huskins' Complaint asserts claims related to Mungo's inconspicuous and unlawful disclaimer of the implied warranty of habitability in the "Limited Warranty" provision. Specifically, the Huskins assert breach of contract (the covenant of good faith and fair dealing), unjust enrichment, and request declaratory relief all relating to Mungo's disclaimer of the implied warranty of habitability, without separate and adequate consideration, in the "Limited Warranty" provision. (*See* Complaint.) According to the Court's Order, claims pursuant to the "Limited Warranty" provision fall outside the "Arbitration and Claims" provision and therefore should be allowed to proceed in Circuit Court. Accordingly, at a minimum, the Huskins' claims related to breach of the "Limited Warranty" provision, particularly the covenant of good faith and fair dealing; unjust enrichment by the unlawful disclaimer of the implied warranty of habitability without separate and adequate consideration for the same; and finally, for declaratory relief regarding the legality of the "Limited Warranty" provision under such circumstances should not be dismissed and should proceed in this forum. The Huskins respectfully request, therefore, that the Court deny Mungo's motion to dismiss because the claims asserted in the Complaint are related to the disclaimer of the implied warranty of habitability found in the "Limited Warranty" provision and therefore fall outside the "Arbitration and Claims" provision. The Huskins' claims brought pursuant to the limited warranty provision are appropriately before this judicial forum.

**CONCLUSION**

For the reasons set forth above, counsel for the Huskins respectfully request that this Court alter and amend its Order entered on March 13, 2018, granting Mungo's Motion to Dismiss and Compel Arbitration. Specifically, the Huskins ask that the Court deny Mungo's Motion to Dismiss and Compel Arbitration, strike the offending unconscionable arbitration provision in its entirety, and retain jurisdiction over this important matter for all the reasons outlined above. Or, without

waiving any right to appeal the Court's decision granting Mungo's Motion to Dismiss and Compel Arbitration for reasons related to the unconscionability of the "Arbitration and Claims" provision, the Huskins ask that the Court retain jurisdiction over this case because the claims involve matters which fall under the "Limited Warranty" provision, which are outside the scope of the "Arbitration and Claims" provision in the Purchase Agreement.

BELSER & BELSER, P.A.

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Columbia, South Carolina
March 23, 2018



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| | | |
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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | CASE NO.: 2017-CP-40-03697 |
| | ) | |
| Amanda Leigh Huskins and Jay R. Huskins, | ) | |
| | ) | |
| Plaintiffs, | ) | **DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND THE ORDER DISMISSING THE CASE AND COMPELLING ARBITRATION** |
| | ) | |
| vs. | ) | |
| | ) | |
| Mungo Homes, LLC, | ) | |
| | ) | |

TO: CHARLES H. MCDONALD, ESQUIRE, H. FREEMAN BELSER, ESQUIRE, AND WILLIAM C. DILLARD, JR., ESQUIRE: ATTORNEYS FOR PLAINTIFF

Defendant Mungo Homes, Inc., incorrectly named as Mungo Homes, LLC, hereby submits this memorandum of law in opposition to Plaintiff's motion to reconsider and/or alter or amend this Court's order granting Mungo Homes, Inc's motion to dismiss and compel arbitration.

## PRELIMINARY STATEMENT

By order granted March 7, 2018 and entered March 13, 2018, this Court issued a fourteen page comprehensive and well-reasoned decision compelling the Plaintiffs to submit their lawsuit to arbitration as required by the parties' agreement. ("Order"). The Order addressed in detail each of the parties' positions, and engaged in a thorough discussion of the large body of applicable caselaw related to the enforcement of arbitration agreements. In other words, the Court's order was carefully thought out, and did not fail to fully consider or overlook any arguments, nor did it contain a misapplication of prevailing law as required to support a motion under Rule 59(e), SCRCP. Accordingly, the motion should be denied.

## ARGUMENT

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Pye v. Estate*



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*of Fox*, 369 S.C. 555, 633 S.E.2d 505, 511 (2006) (*quoting Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 842 (1992)). A party may request that a trial court reconsider its prior ruling where the party believes the trial court misunderstood, failed to fully consider, or overlooked an argument or issue. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772, 780 (2004).

**I. Paragraph (k) does not alter the Court's decision compelling arbitration**

In their Rule 59(e) motion, Plaintiffs argue that paragraph (k) of the Purchase Agreement controls the interstate vs. intrastate nature of the transaction. This argument is without merit.

While the Court found that the South Carolina Arbitration Act applies *based on the agreement of the parties within the arbitration agreement itself*, the Court expressly held that the overall nature of the transaction between the Huskins and Mungo Homes met the commerce-in-fact test and inherently involved interstate commerce. The Court carefully addressed this exact argument in its discussion of the "completed dwelling" argument by distinguishing the current transaction from the authority cited by Plaintiffs. The Court stated:

> Looking to the Purchase Agreement, there is one fact that distinguishes this case from *Bradley* in that the Purchase Agreement in *Bradley* was undisputedly for a "*completed dwelling.*" In this case, the parties contest whether this contract was for a completed home. The language of the Purchase Agreement states the transaction involved improvements to a piece of property and the Purchase Agreement Addendum indicates a driveway was constructed.
>
> Other language in the Purchase Agreement in this case point to the involvement of construction. For instance, the Development Rider states that factors such as weather and local municipalities, may affect the construction start date or completion of the home. Also, Richland County issued a permit on the property as "residential new construction" for a "single family residence." The Purchase Agreement in *Bradley* check "N/A" for options such as "new construction, house plan, options, or color selection.

(Order pg. 5)(internal citations omitted).

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Accordingly, the Court should deny Plaintiffs' attempt to insert Paragraph (k) as alleged additional supporting grounds for application of the South Carolina Uniform Arbitration Act, as it is incompatible with controlling Supreme Court authority. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001)(explaining the commerce-in-fact test).

**II. The Court correctly determined that the arbitration agreement must be read in isolation from the remainder of the Purchase Agreement**

Plaintiffs, without supporting authority or a legal basis, aver that the clearly delineated and separate arbitration agreement should be disregarded and that the arbitration agreement should not be read in isolation from the remainder of the Purchase Agreement. In doing so, Plaintiffs aver that the Order calls for reading the Limited Warranty section of the Purchase Agreement in isolation. This assertion conflates the Courts holding--that the arbitration agreement must be read in isolation, with a suggestion that each paragraph of a contract must be read in isolation. This argument ignores years of binding jurisprudence concerning the isolated nature of arbitration agreement.

It is hornbook law that arbitration agreements are considered separate agreements from the remainder of a contract, and must be analyzed in isolation of any other contractual provision. *Prima Paint Cor. V. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993)(" A party cannot avoid arbitration through rescission of an entire contract when there is no independent challenge to the arbitration clause itself. There must be fraud in the inducement of the arbitration agreement to avoid arbitration of the contract").

Here, the Court's Order notes that it is indisputable the Limited Warranty paragraph is not contained within the Arbitration and Claims paragraph. (Order pg. 10). Thus, it has no impact on the enforceability of the arbitration agreement. Moreover, Plaintiffs' strained contention that the

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Limited Warranty is cross-referenced in the arbitration agreement is entirely inconsistent with the unequivocal language of the arbitration agreement[1]. The arbitration agreement *never* cross references any other provision or paragraph in the Purchase Agreement. *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003)("The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous").

Similarly, to the extent that the Plaintiffs argue that Limited Warranty claims were somehow excluded from the arbitration agreement (Part III of Pl. Mem. in Support of Motion to Alter or Amend), this argument is also without merit.

The arbitration agreement unambiguously covers "any claim, dispute or other matter in question between the parties hereto arising out of this Agreement." As the Limited Warranty provision (and any questions about its enforceability or a breach thereof) arises out of the Purchase Agreement, it is within the scope of the arbitration agreement.

Moreover, even if there was an ambiguity about the inclusion of Limited Warranty claims within the arbitration agreement, it is well established by the South Carolina Supreme Court that all doubts concerning whether a claim is subject to arbitration must be resolved in favor of arbitration. Our Supreme Court has held:

> **A clause which provides for arbitration of all disputes arising out of or relating to the contract is construed broadly**. Courts have held that such broad clauses are capable of an expansive reach. Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not

[1] Defining the *types* of claims subject to arbitration as those "arising out of this Agreement" or "arising out of the deed" is not tantamount to a cross-reference. In any event, the Limited Warranty is never cross-referenced in the arbitration agreement.

> limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship.

*Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-214 (2013)(internal citations omitted and emphasis added)

Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers Id.* Moreover, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

Here, the arbitration agreement is unambiguous and broad, and covers all disputes between the parties, including those related to the Limited Warranty. Accordingly, the Court properly determined that the claims brought by Plaintiffs are subject to arbitration.

**III. The arbitration agreement does not preclude warranty claims**

In their Rule 59(e) motion, Plaintiffs additionally suggest that this Court's reference to *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14 (2007) implies that warranty claims are universally excluded from arbitration and must be brought in a court. Neither this Court's Order nor the *Simpson* decision support this proposition.

In *Simpson*, a car dealer required a consumer to arbitrate all claims of the consumer's claims, however, the dealer reserved its own claims against the consumer for prosecution in court. Moreover, the arbitration provision also stated that claims brought by the dealer against the consumer in court had priority over the consumer's claims brought in arbitration. *See id.* Clearly, this arrangement lacks the mutuality required to uphold an arbitration agreement. *Id. Simpson* does not suggest that there is a wholesale bar on subjecting warranty claims to arbitration.



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Here, both parties must submit all claims to arbitration, and there is no lack of mutuality on the availability of redress. As this Court found:

> In contrast to the unequal stay of one party's claims over another's in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims equally.

(Order pg. 12).

Accordingly, the inclusion of warranty claims as those that are to brought in arbitration is not unconscionable, oppressive, or one sided.

**IV. The Court correctly found that the requirements in the arbitration agreement are mutual and the arbitration process is equal and unbiased**

Plaintiffs similarly suggest that use of the word "their" in the arbitration agreement makes the agreement one sided, as it places certain requirements on only the Plaintiffs. More specifically, Plaintiffs point to a provision stating that "arbitration shall be commenced by a written demand for arbitration *to the other party*...each and every demand for arbitration shall be made within ninety days (90) days after the claim, dispute or other matter in question has arisen, except that any claim dispute or matter in question arising *from either party's* termination of this Agreement shall be made within thirty days (30) of written notice of termination."

It is unclear how Plaintiffs read the arbitration provision to be applicable only to the Plaintiffs. The arbitration agreement unambiguously subjects *both* parties to arbitration for all claims, and moreover, the specific provision cited by the Plaintiffs references its application to both parties on more than one occasion. Accordingly, it is indisputable that all requirements of the arbitration provision are mutual, and thus, not one-sided or oppressive. The arbitration agreement simply does not limit any of Plaintiffs' remedies.

Furthermore, Plaintiffs' argument that an arbitration conducted pursuant to the arbitration agreement is inherently one-sided is equally without merit. As the Court set forth in detail in its

order compelling arbitration, the arbitration agreement does not foreclose any claims that could be brought by Plaintiffs, and it sets forth a neutral, unbiased tribunal in which each and every claim can be brought. The arbitration agreement calls for appointment of a three-arbitrator panel; one selected by Plaintiffs, one selected by Mungo, and one mutually agreeable to the arbitrators selected by the respective parties.

It is difficult to conceive of a more neutral and unbiased process. Indeed, the process set forth in the arbitration agreement is identical to the process for appointing arbitrators prescribed within the South Carolina Uniform Arbitration Act. *See*, S.C. Code §15-48-30. Accordingly, the Court correctly determined that the arbitration agreement is not one-sided or oppressive.

**CONCLUSION**

For the reasons stated herein, the Court's March 7, 2018 Order did not misunderstand, fail to fully consider, or overlook any argument or issue. Accordingly, the Court should affirm its decision in its entirety, and deny Plaintiffs' motion to alter and/or amend.

This 9 day of April, 2018.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge.

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Case No. 2017-CP-40-03697

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

v.

Mungo Homes, LLC, ..... Respondent.

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**NOTICE OF APPEAL**

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Amanda Leigh Huskins and Jay R. Huskins appeal the orders of the Honorable DeAndrea Gist Benjamin dated March 13, 2108 (*Order Granting Defendant's Motion to Dismiss and Compel Arbitration)* and April 16, 2018 (*Order on Motion to Alter or Amend the Court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration).* Appellants received written notice of entry of the final order on April 16, 2018. The Orders are attached.

May 11, 2018

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| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND | IN THE CIRCUIT COURT<br>FOR THE FIFTH JUDICIAL<br>CIRCUIT |
| Amanda Leigh Huskins and Jay R. Huskins,<br><br>Plaintiffs,<br><br>v.<br><br>Mungo Homes, LLC,<br>Defendant. | CASE NO. 2017-CP-40-03697<br><br>**ORDER** |

## INTRODUCTION

This matter comes before the Court upon Mungo Homes' Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on November 8, 2017 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, and arguments of counsel and issues the following Order to **GRANT** the Defendant's Motion to Dismiss and Compel Arbitration.

## FACTS

The Huskins are residential buyers who executed a Purchase Agreement with Mungo Homes, a national builder on June 29, 2015. Compl. ¶ 1. The Purchase Agreement was for the sale of a tract of land, the construction of a dwelling, and any improvements constructed on the property. Pl.'s Exh. 1. The Purchase Agreement categorizes the transaction as a "Building Job." *Id.* A Building Job gave the purchasers [the Huskins], an opportunity to inspect any Addendums added to the Purchase Agreement for improvements on the property. *Id.* The Purchase Agreement includes an Addendum where the Huskins requested the placement of the driveway on the right side of the property. *Id.* The improvements specified in the Purchase Agreement

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Addendum began in August 21, 2015. *Id.* The Addendum includes a Development Rider explaining that factors such as weather and local municipalities may cause delays during the construction and completion of the home. *Id.* Mungo Homes obtained a permit from Richland County classifying the improvement as "residential new construction" for a "single family residence." *Id.* In addition, a Certificate of Occupancy was issued for the property on January 19, 2016. *Id.*

There are two provisions in the Purchase Agreement that are of importance in this lawsuit. First, is the "Limited Warranty" provision, located on page two of the Purchase Agreement. In this provision, Mungo Homes disclaims the implied warranty of habitability, suitability for residential purposes, merchantability, or fitness for particular purpose. *Id.* Mungo Homes also disclaims liability for consequential, or punitive damages. *Id.* A third-party corporation is responsible for any warranties or damages claims. *Id.*

Second, is the "Arbitration and Claims" provision, which is located at the top of page three of the Purchase Agreement. This provision subjects any claims or disputes arising out of, or relating to the Purchase Agreement to arbitration. *Id.* The provision sets a ninety-day period in which a party can demand arbitration after a claim or dispute arises. *Id.* The Arbitration and Claims Provision states:

> "Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction, or sale thereof and the deed to be delivered pursuant hereto, shall be *resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act.* Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding party's arbitrator. *Each and every demand for arbitration shall be made within 90 days after the claim,* dispute or other mater in question has arisen . . . or else any claim, dispute or other matter

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in question not asserted within said time periods shall be deemed waived and forever barred." *Id.*

The Huskins filed a Complaint on June 14, 2017 alleging four causes of action for (1) breach of contract; (2) unjust enrichment; (3) declaratory relief; and (4) violation of the South Carolina Unfair Trade Practices Act. Compl. ¶ 23, 27, 32, 34. Mungo Homes filed a Motion to Dismiss and Compel Arbitration on July 20, 2017. Def. Mot. to Dismiss at 1.

The Huskins put forth three main arguments. First, they argue that the Purchase Agreement involves the sale of a new home. Pl.'s Mem. in Opp'n at 4. Under South Carolina law, the sale of a new home involves *intrastate* commerce; it does not involve interstate commerce. *Id.* The Federal Arbitration Act does not govern this transaction because interstate commerce is not involved. *Id.* Rather, the South Carolina Uniform Arbitration Act applies to this transaction. *Id.* at 5. Second, they argue the "Arbitration and Claims" provision is unconscionable because they had no meaningful choice to negotiate the terms of the arbitration provision and the provision truncates the statute of limitations for when the Huskins may bring a claim arising out of, or related to the Purchase Agreement. Pl.'s Mot. in Opp'n at 7-8. This violates public policy. *Id.* Third, the Huskins argue South Carolina precedent requires the court to analyze the "Limited Warranty" and "Arbitration and Claims" provisions *together* to determine whether the arbitration provision is unconscionable. *Id.*

The Defendants argue that the Purchase Agreement involves the sale of property and the construction of a dwelling, or improvements to a dwelling. Def. Mot. to Dismiss at 2. The transaction involved the construction of real estate, which necessarily involves *interstate* commerce according to South Carolina law. *Id.* at 3. The Federal Arbitration Act governs agreements that involve interstate commerce. *Id.* Arbitration of claims subject to the Federal Arbitration Act require the court to analyze the validity of the arbitration provision in isolation

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from the remainder of the underlying agreement. Def. Reply Mot. at 3. Mungo Homes argues the "Arbitration and Claims" provision is not unconscionable because the Huskins received an opportunity to review and make changes to the Purchase Agreement and Addendum. Def. Reply Mot. at 4. Further, the "Arbitration and Claims" provision merely sets a time frame for when either party may demand arbitration; it does not shorten the statute of limitations to file a claim arising out of the Purchase Agreement. *Id.* at 5.

## I. INTERSTATE COMMERCE: COMMERCE-IN-FACT TEST

The Federal Arbitration Act Section 2 provides that a controversy or claim subject to arbitration arising out of a contract *involving commerce* is valid, irrevocable, and enforceable except upon grounds for revocation of any contract that exists at law or in equity. 9 U.S.C. § 2 (1988). South Carolina has a strong policy favoring arbitration. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

Section 2 of the Federal Arbitration Act is generally binding on state claims where parties agree to arbitrate if the underlying transaction involved interstate commerce. South Carolina courts utilize a "commerce-in-fact" test to determine whether a transaction involves interstate commerce and subjects arbitration agreements to federal arbitration. *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 111. Alternatively phrased, the transaction "must turn out, in fact, to have involved interstate commerce." *Id.* The South Carolina Supreme Court instructs the courts to "examine the agreement, the complaint, and the surrounding facts," to determine whether the transaction involved interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (noting South Carolina courts consistently look to the essential character of the contract when applying the Federal Arbitration Act).

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To determine whether interstate commerce is involved, the Court must determine whether the transaction was for the sale of a residential home, or a contract for the development or construction of a home. A contract for the sale of residential real estate does not involve interstate commerce. *Bradley*, 398 S.C. at 457, 730 S.E.2d at 317. South Carolina courts accept that construction projects generally involve interstate travel, purchase of materials, or other activities across state borders. *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 118.

This Court analyzed the agreement, the complaint, and the facts to determine whether the Purchase Agreement involved interstate commerce. Looking to the Purchase Agreement, there is one fact that distinguishes this case from *Bradley* in that the Purchase Agreement in *Bradley* was undisputedly for a "*completed dwelling*". *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. In this case, the parties contest whether this contract was for a completed home. The language of the Purchase Agreement states the transaction involved improvements to a piece of property and the Purchase Agreement Addendum indicates a driveway was constructed. Pl.'s Exh. 1.

Other language in the Purchase Agreement in this case points to the involvement of construction. For instance, the Development Rider states that factors such as weather or local municipalities, may affect the construction start date or completion of the home. Pl.'s Exh. 1. Also, Richland County issued a permit on the property as "residential new construction" for a "single family residence." *Id.* The Purchase Agreement in *Bradley* checked "N/A" for options such as: "new construction, house plan, options, and color selection." *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. Applying the commerce-in-fact analysis set forth in *Bradley*, the essential character of the Purchase Agreement was for the purchase and improvement of a piece of property, which involved some level of construction, which likely involved interstate commerce.

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Although the Purchase Agreement in Huskins is distinguishable from the contract in *Bradley*, arbitration is grounded in principles of contract law. Parties are generally free to structure their arbitration agreements as they see fit. *Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). As such, parties are free to enter contracts providing for arbitration under rules established by state law rather than rules established by the Federal Arbitration Act, even if interstate commerce is involved. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 n.2 (2000). The Federal Arbitration Act preempts any state procedural law that completely invalidates the parties' agreement to arbitrate. *Id.* at 343 S.C. at 540, S.E.2d at 364 (invalidating the notice requirement contained in South Carolina's Uniform Arbitration Act because its application would have made the arbitration agreement completely unenforceable).

The "Arbitration and Claims" provision in this case subjects any controversies arising out of the Purchase Agreement to arbitration governed by the South Carolina Uniform Arbitration Act. Pl.'s Exh. 1. Although the Purchase Agreement may have involved interstate commerce, the parties freely agreed that the South Carolina Uniform Arbitration Act would govern. Pl.'s Exh. 1. One of the basic principles of arbitration is to ensure that private agreements to arbitrate are enforced according to their terms. *Volt*, 489 U.S. at 109. It follows that the specific terms of the arbitration provision should be upheld; the South Carolina Uniform Arbitration Act governs this dispute. *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-4 (Ct. App. 2013) (applying the South Carolina Uniform Arbitration Act as agreed upon in the purchase agreement between residential buyer and builder).

## II. UNCONSCIONABILITY

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The South Carolina Uniform Arbitration Act generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement to arbitrate exists in the first place. S.C. CODE ANN. § 15–48–20(a) (2005). If no agreement is found to exist, the court must deny any application to arbitrate. *Id.* To determine whether an agreement to arbitrate is valid, or exists, the trial court should apply ordinary state-law principles that govern the formation of contracts. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22-23 644, S.E.2d 663, 667-68 (2007).

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016); *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. Unconscionability requires courts to focus generally on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. If a court finds that any clause of a contract was unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. CODE ANN. § 36–2–302(1) (2003); *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. A determination of unconscionability requires an evaluation of the facts and circumstances surrounding the particular case. *Id.*

**a. The Huskins lacked meaningful choice to arbitrate their claims because they do not possess business judgment, did not hire counsel, and were not a substantial business concern.**

Whether one party lacks a meaningful choice to enter an arbitration agreement typically speaks to the fundamental fairness of the bargaining process. *Smith*, 417 S.C. at 49, 790 S.E.2d at

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4. "In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Considering the factors set forth in *Simpson*, the Court finds that the Huskins lacked a meaningful choice to arbitrate. First, the Huskins do not have business knowledge and did not hire outside counsel. Pl.'s Mem. in Opp'n at 7. The Huskins are homebuyers that did not enjoy substantially stronger bargaining power against a residential builder than any other average homebuyer. *Smith*, 417 S.C. at 50, 790 S.E.2d at 4-5. The Court in *Simpson* acknowledged that a lack of business judgment leaves the buyer without knowledge of the arbitration agreement's consequences. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Second, The Huskins did not hire independent counsel to discuss the terms of the Purchase Agreement. Pl.'s Mem. in Opp'n at 7; *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. The Huskins, like the buyer in *Simpson*, were customers negotiating with a commercial entity that drafted the contract and held substantially more bargaining power. Compl. ¶ 6-7.; *Simpson* 373 S.C. at 26, 644 S.E.2d at 670. [1]

Further, the Huskins lacked a meaningful choice to arbitrate because they were not a substantial business concern to Mungo Homes. A homebuyer that is a single client to a national builder is not considered a substantial business concern. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. The Huskins executed a Purchase Agreement with Mungo Homes that pertained to one tract of land. Pl.'s Mem. in Opp'n at 7; Compl. ¶ 6-7. The Court finds that the Huskins lacked a

[1] The Huskins purchased a "critically important" item from Mungo Homes like the buyer in *Simpson* who purchased a car from the dealership; a home, like a car, is a modern-day necessity. Compl. ¶.1; *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670.

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meaningful choice to arbitrate because they did not hire independent counsel, they lacked business knowledge, and they were not a substantial business concern to Mungo Homes.

**b. The arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision because the warranty provision is clearly outside of the arbitration provision.**

When determining the validity of an arbitration provision, courts generally analyze the arbitration provision in isolation from the rest of the contract. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873–74 (Ct. App. 2013); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016). The Court will analyze the arbitration provision in conjunction with other provisions of the contract when the arbitration provision cross-references other provisions in the contract. *Smith*, 417 S.C. at 45, 790 S.E.2d at 2.

The Court finds that the "Limited Warranty Provision" exists outside of the "Arbitration and Claims" provision. In *One Belle*, the contract contained a warranty provision that limited the warranty's transferability to a roof manufacturer for shingles it produced and contained an arbitration provision on a separate page. *One Belle*, 418 S.C. at 59, 791 S.E.2d at 290. The court found the warranty provisions *[were] clearly outside the arbitration agreement* and as such the court would only consider the arbitration agreement in an unconscionability analysis. *One Belle*, 418 S.C. at 64, 791 S.E.2d at 293. In the Huskins' case, the "Limited Warranty" provision is located on the second page of the Purchase Agreement whereas the "Arbitration and Claims" provision is located at the top of page three, which indicates the "Limited Warranty" provision is outside the arbitration agreement and should not be considered in the unconscionability analysis Pl.'s Exh. 1.; *see also Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74 (determining the unconscionability of an arbitration agreement required the court to analyze the arbitration

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provision separate from other provisions in the purchase agreement such as a provision limiting the statute of limitations to bring a claim).

Further, the arbitration provision does not reference the "Limited Warranty" provision contained in the Purchase Agreement. The arbitration provision in *Smith* was intertwined within a complex paragraph titled "Warranties and Dispute Resolution." *Smith*, 417 S.C. at 45, 790 S.E.2d at 2. The "Warranties and Dispute Resolution" paragraph contained numerous sub-paragraphs which cross-referenced once another. *Id.* To determine whether the arbitration agreement was unconscionable, the Court in *Smith* analyzed the "Warranties and Dispute Resolution" paragraph as a whole because the arbitration provision could not be extracted from the "Warranties and Dispute Resolution" paragraph. *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Unlike the arbitration provision in *Smith*, the arbitration provision in this case is not intertwined with the "Limited Warranty" provision. Pl.'s Exh. 1; *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

This Court, in general, is tasked with whether the *arbitration agreement* is invalid, not whether the *contract as a whole* is invalid. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). The "Limited Warranty" provision is clearly outside of the "Arbitration and Claims" provision as both provisions are located on separate pages and headings of the contract and do not cross reference one another. Pl.'s Exh.1. The Court will not consider the "Limited Warranty" provision to determine the unconscionability of the arbitration provision.

**c. The arbitration agreement is not one sided and oppressive because it does not limit the Huskins' statutory remedies, it is clearly labeled, and it applies mutually to both parties.**

To determine whether an arbitration agreement is one-sided and oppressive the courts look at a variety of factors. An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. An arbitration provision that

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stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870.

An arbitration clause that limits statutory remedies is an indicator of a one-sided and oppressive arbitration clause. *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. The arbitration provision in the case at hand sets a time frame of ninety days after any claim or dispute arises in which a party can demand arbitration. Pl.'s Exh. 1. The Huskins filed an action on June 14, 2017 and Mungo Homes filed a Motion to Compel Arbitration on July 20, 2017, within the ninety- day time frame. Compl. ¶ 1; Def. Mot. to Dismiss at 1. The ninety-day time frame to demand arbitration does not limit the Huskins' ability to arbitrate claims for damages unlike an arbitration provision that limits the buyer's ability to arbitrate any double and treble damages available under the South Carolina Uniform Trade Practices Act. *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666.

An arbitration provision that stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims is an indicator of a one- sided and oppressive arbitration clause. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. In *Simpson*, the arbitration clause subjected all claims or controversies between the dealer and customer to arbitration. *Id.* The arbitration clause included an exception where claims between the dealer against the customer were not stayed pending the outcome of arbitration. *Id.* The Court found the arbitration provision was one-

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sided and oppressive because the dealer's judicial remedies superseded the consumer's arbitral remedies. *Id.* The Court envisioned a scenario where the dealer could initiate a claim in court, complete the claim, and sell the contested vehicle prior to an arbitrator's determination of the consumer's rights in the same vehicle. *Simpson*, 373 S.C. at 32, 644 S.E.2d at 672.

In contrast to the unequal stay of one party's claims over another's in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims equally. Pl.'s Exh. 1. The arbitration provision calls for binding arbitration before a panel consisting of three arbitrators: one selected by the Huskins, one selected by Mungo Homes, and one mutually selected by the arbitrator chosen by each party. *Id.* Unlike the arbitration provision in *Simpson*, the arbitration provision in the Huskins' case allows both parties to arbitrate the claims or disputes and includes a process for neutrally selecting the arbitrators. Pl.'s Exh. 1.; *Simpson* 373 S.C. at 31, 644 S.E.2d at 672.

An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum is an indicator of a one-sided and oppressive arbitration provision. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The arbitration clause in *Simpson* claimed that "any and all disputes" including "automobile warranty" and "any consumer protection statute" may be resolved *only* by "binding arbitration" which was unenforceable as a matter of public policy for precluding the buyer from filing claims under the Magnuson Moss Warranty Act. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The "Arbitration and Claims" provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting.[2] It

[2] The Purchase Agreement contains a separate "Limited Warranty" provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages. Pl.'s Exh. 1. This provision is outside the "Arbitration and Claims" provision of the contract and is discussed in detail in Section II of this Order. *See* Section II(b).

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requires that all claims and disputes arising out of the Purchase Agreement are subject to arbitration. Pl.'s Exh. 1.

A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870 (Ct. App. 2013). The arbitration agreement at hand is clearly labeled and underlined at the top of the page. Pl.'s Exh. 1. *But see Simpson*, 373 S.C. at 28, 644 S.E.2d at 670 (finding the arbitration agreement was unconscionable and noting the inconspicuous nature of the location of the arbitration clause as paragraph ten out of sixteen on the page). In *Carlson*, the arbitration provision did not waive any rights or remedies otherwise available by law. *Id.* Similarly, the "Arbitration and Claims" provision in the Huskins' case does not preclude their ability to file warranty claims. Pl.'s Exh. 1. Like the arbitration agreement in *Carlson*, the Huskins' case applies to both parties and allows each party to choose a neutral arbitrator. Pl.'s Exh. 1.; *Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74.

The "Arbitration and Claims" provision in the Huskins' case is distinguishable from the arbitration provision in *Simpson* because the arbitration provision here does not stay one party's claims over the other party's claims, it does not preclude the Huskins' from filing a warranty claim, and it does not divest the Huskins of a right available by statute. Pl.'s Exh. 1. On the contrary, it is clearly labeled and applies to both parties mutually. *Id.*; *see generally Carlson, v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). This "Arbitration and Claims" provision is not one-sided and oppressive.

## CONCLUSION

The arbitration clause under the Purchase Agreement is governed by the South Carolina Uniform Arbitration Act because the parties included a choice-of-law provision. There is a valid

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agreement to arbitrate the Huskins' claims because the "Arbitration and Claims" provision is not unconscionable. Although the Huskins' lacked a meaningful choice to negotiate the terms of the arbitration provision, when analyzing the "Arbitration and Claims" provision in isolation from the underlying agreement, the Court finds that the "Arbitration and Claims" provision is not one-sided and oppressive.

For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED.**

**IT IS SO ORDERED.**

Columbia, South Carolina
March 7, 2018

The Honorable DeAndrea Gist Benjamin
Judge, Court of Common Pleas
Fifth Judicial Circuit

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4003697

Amanda Leigh Huskins et al
PLAINTIFF(S)

Mungo Homes LLC
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other.

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other.

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

The Plaintiff's Motion to Alter or Amend the Court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration is Denied.

**ORDER INFORMATION**

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/16/2018

Jay R Huskins

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

SCRCP Form 4CE (08/31/2017)

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**Court Reporter:**

**E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

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Richland Common Pleas

**Case Caption:** Amanda Leigh Huskins , plaintiff, et al vs Mungo Homes LLC

**Case Number:** 2017CP4003697

**Type:** Order/Electronic Form 4

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2018-04-16 12:36:10 page 3 of 3

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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APR 16 2019
SC Court of Appeals

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Case No. 2017-CP-40-03697
Appellate Case No. 2018-000889

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

v.

Mungo Homes, LLC,.....Respondent.

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# BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in construing the plain language of the Purchase Agreement's "Arbitration and Claims" provision as restricting the time for Mungo Homes to move to compel arbitration rather than restricting the statutory time otherwise afforded to the Huskins to assert a claim related to the contract, all to find that the "Arbitration and Claims" provision itself was not one-sided, oppressive, and unconscionable?

II. Did the circuit court err in finding that the arbitration provision applied mutually to Mungo Homes and its purchasers when Mungo would have no reason to assert a claim against a purchaser after receiving full payment at closing?

III. When the Purchase Agreement's "Arbitration and Claims" provision is expansive in scope, including claims arising under and related to the Purchase Agreement's "Limited Warranty" provision, and when these two provisions also cross-reference one another, did the circuit court err in failing to consider the one-sided and oppressive terms of the "Limited Warranty" provision as part of the agreement to arbitrate and correspondingly find the agreement to arbitrate one-sided, oppressive, and unconscionable?

IV. If the Purchase Agreement's "Arbitration and Claims" provision does not include claims arising under the "Limited Warranty" provision, did the circuit court err in granting Respondent's motion to dismiss Appellants' action that involves claims falling under the "Limited Warranty" provision?

## STATEMENT OF THE CASE

Appellants Amanda Leigh Huskins and Jay R. Huskins ("Huskins") filed this action in the Richland County Court of Common Pleas seeking monetary and declaratory relief based upon certain warranty waivers in Mungo Homes' proprietary "Purchase Agreement" on June 14, 2017. In response, Mungo Homes filed its Motion to Dismiss and to Compel Arbitration on July 17, 2017. The Honorable DeAndrea Gist Benjamin then heard Mungo's Motion to Dismiss and Compel Arbitration on November 8, 2017, and issued an Order granting Mungo's Motion to Dismiss and Compel Arbitration on March 13, 2018. The Huskins filed their Motion to Alter or Amend the Judgment pursuant to Rules 52(b) and 59(e), SCRCP, to which Judge Benjamin issued a Form 4 Order denying the Huskins' Motion for Reconsideration on April 16, 2018. The Huskins

filed and served their Notice of Appeal on May 11, 2018, seeking review of the trial court's grant of Mungo's Motion to Dismiss and Compel Arbitration and the court's denial of the Huskins' Motion for Reconsideration.

## STATEMENT OF FACTS

Amanda and Jay Huskins are purchasers of a new home from Mungo Homes, a large builder and seller of homes in South Carolina. (R. p. 21, Complaint.) On June 29, 2015, the Huskins executed Mungo Home's proprietary "Purchase Agreement" for the purchase of real property with a new home situated thereon to be built by Mungo in Richland County, South Carolina. (R. pp. 28-38, Complaint, Ex. 1.) The Purchase Agreement disclaims fundamental warranty rights implied by law in South Carolina in connection with the sale of a new home. One of the implied warranties that Mungo requires its purchasers waive is the implied warranty of habitability.

Specifically, the Purchase Agreement's "LIMITED WARRANTY" provides:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
>
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSES IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE, OR UTILITIES. PURCAHSER AGREES TO ACCEPT LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES,

WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

(R. p. 29, Complaint, Ex. 1.)

As the Complaint alleges, under well-established law, the "warranty of habitability" is implied in the sale of all new homes in South Carolina. Recognizing the importance of this implied warranty, and the relative sophistication of homebuilders such as Mungo vis-à-vis a new home buyer, the South Carolina Supreme Court pronounced that the warranty of habitability cannot be waived or disclaimed unless the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. *Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). Nevertheless, in contravention to this long-standing precedent, Mungo requires all new home buyers, including the Huskins, to waive the warranty of habitability without providing these homebuyers any compensation or separate consideration for such waiver. (R. p. 29, Complaint, Ex. 1 at "Limited Warranty".)[1] In their Complaint, the Huskins ask: (1) the Court to declare as a matter of law that Mungo cannot waive the implied warranty of habitability without paying its customers such as the Huskins adequate consideration for such waiver, and (2) a jury to determine that the Huskins may recover the fair value of the waiver to which Mungo unjustly enriched itself or extracted in breach of the covenant of good faith and fair dealing in contract. (R. pp. 21-27, Complaint.)

In addition to the broad disclaimer of warranty rights, Mungo's Purchase Agreement contains other significant limitations on the rights and remedies afforded to the purchaser of a Mungo home. Mungo's Purchase Agreement requires that all claims related to the Purchase

[1] Although not the subject of this action, consistent with its scheme to avoid standing behind its residential homes, Mungo also disclaims and refuses to warrant that its homes are even suitable for a "residential purpose." (R. p. 29, Complaint, Exhibit 1 at "Limited Warranty.")

Agreement be sent to arbitration. (R. p. 30, Complaint.) Specifically, the "ARBITRATION AND CLAIMS PROVISION" provides:

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. *Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.*

(R. p. 30, Complaint, Ex. 1 (emphasis added).)

Pursuant to this "Arbitration and Claims" provision, Mungo Homes filed its motion to dismiss and compel arbitration. The Huskins opposed the motion because the "Arbitration and Claims" provision was unconscionable and therefore unenforceable. Specifically, the Huskins argued the Purchase Agreement was a contract of adhesion and one-sidedly and oppressively limited the scope of remedies and time to assert causes of action otherwise available to the Huskins at law and was not mutually applicable to the parties. However, the trial court granted Mungo Homes' motion, ruling that although the Huskins lacked meaningful choice to arbitrate their claims because they do not possess business judgment, did not have counsel, and were not a substantial business concern, the arbitration agreement was not one-sided and oppressive. (R. pp. 1-14, Order.) In concluding that the "Arbitration and Claims" provision was not one-sided and oppressive, the Court found (1) the "Arbitration and Claims" and "Limited Warranty" provisions should be analyzed in isolation from one another and therefore the "Arbitration and Claims"

provision does not limit the Huskins' from asserting warranty claims in a judicial forum, (2) the 90-day limitation set forth in the "Arbitration and Claims" provision applied to Mungo Homes' time to move to dismiss or stay a judicial action and compel arbitration, and not to the time in which a party could bring a claim related to the Purchase Agreement in arbitration, and (3) that the procedures set forth for arbitration of a claim applied equally to both parties. (R. pp. 10-13, Order.)

## STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to *de novo* review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). A circuit court's factual findings, if any, however, will not be reversed on appeal if any evidence reasonably supports the findings. *See Aiken v. World Fin. Corp. of South Carolina,* 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

## ARGUMENT

For decades, South Carolina's courts have made clear that protecting the rights of the new home buyer is an important public policy of this State. *See, e.g.*, *Kennedy v. Columbia Lumber Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 49, 229 S.E.2d 728 (1976). Our courts have also recognized "that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Kennedy*, 299 S.C. at 343, 384 S.E.2d at 735-36. The Huskins now come before this Court seeking the same judicial protections that have historically been afforded new home purchasers like themselves when dealing with a sophisticated seller of new homes such as Mungo. In deciding this appeal, this Court should protect the Huskins from the harm that would be suffered by the application of the one-sided and oppressive terms of Mungo's "take it or leave it" Purchase Agreement and reverse the trial court's erroneous ruling allowing enforcement of Mungo's unconscionable arbitration clause.

**I. The circuit court erred in construing the plain language of the Purchase Agreement's "Arbitration and Claims" provision as restricting the time for Mungo to move to compel arbitration rather than restricting the statutory time otherwise afforded to the Huskins to assert a claim related to the contract, leading to an erroneous finding that the "Arbitration and Claims" provision itself was not one-sided, oppressive and unconscionable as a matter of law.**

The Court mistakenly concluded that the ninety-day "limitations period" set forth in the "Arbitration and Claims" provision related only to the time Mungo had to move to compel arbitration after the Huskins filed their Complaint. (R. p. 11, Order.). The plain language of the "Arbitration and Claims" provision does not allow for such interpretation. Clearly, this provision creates a time limit for a party, such as the Huskins, to bring a claim once the claim has arisen. Furthermore, to the extent this provision could be considered ambiguous, it must be construed against its drafter, Mungo Homes, and in favor of the Huskins.

The plain language of the "Arbitration and Claims" provision shows it is a time limit for the Huskins to bring their claim. The first sentence of the "Arbitration and Claims" provision defines the expansive scope of any claims, disputes, or other matters to which the mandatory and binding arbitration "shall" apply and the circumstances in which the mandatory and binding arbitration shall take place. Then, the "Arbitration and Claims" provision outlines how the party with the claims, disputes, or other matters in need of resolution subject to mandatory and binding arbitration shall "commence[]" arbitration, noting that such process must be by written demand, specifying the issues and designating an arbitrator. Importantly, the "Arbitration and Claims" provision then sets the deadline for a party to make a claim:

> Each and every demand shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except for any claim, dispute or matter in question arising from either party's termination of this Agreement which shall be made within thirty (30) days of the written notice of termination. *Any*

*claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred.*

(R. p. 30, Complaint, Ex. 1 (emphasis added).) The "Arbitration and Claims" provision thus plainly restricts the time frame in which a party with claims, disputes, or other matters falling within the scope of the mandatory and binding arbitration provision can demand resolution. Depending on the circumstances, those claims, disputes, or other matters must be demanded for resolution through arbitration within 90 or 30 days of the date on which those claims, disputes, or other issues arose, or such claims will be lost forever. The last sentence of the paragraph leaves no room for any other interpretation, noting "[a]ny claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred." In other words, the clause operates as a 90 or 30-day limitations period for an aggrieved party to bring a claim once that claim has arisen.

However, the trial court found this clause defined only when Mungo must move to compel arbitration after a case has been filed in court. Specifically, the court construed this clause to mean that Mungo had 90 days to file a motion to dismiss or compel arbitration after the Huskins filed their Complaint. (R. p. 11, Order). Contrary to the court's finding, however, this language has nothing to do with the time in which Mungo must move to compel arbitration after being served with a Complaint. Mungo is not "commenc[ing]" any arbitration against the Huskins by moving to dismiss this action and compel arbitration. Mungo seeks only to foreclose this judicial forum to the Huskins and require the Huskins, not Mungo, to "commence" their claims in mandatory and binding arbitration under the "Arbitration and Claims" provision. It is irrelevant how long it took Mungo to file its motion to compel arbitration. The ninety- and thirty-day limitation periods in Mungo's arbitration clause relates solely to the party asserting a claim, which, in this case, is the

Huskins. Accordingly, the arbitration provision, by its plain language, seeks to bar any claim asserted more than 90 or 30 days after the claim arose.

Although the contract language is clear, to the extent there is any ambiguity as to the meaning of the 90- and 30-day limitation periods in the "Arbitration and Claims" provision, the Court must construe any doubts and ambiguities against the drafter. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). "This rule applies with particular force in cases involving a contract of adhesion." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27 (2003). Because the plain language of the arbitration provision controls and any ambiguity must be construed against its drafter, this Court should find that the circuit court erred in construing the Purchase Agreement's "Arbitration and Claims" provision as restricting the time for Mungo to move to compel arbitration rather than restricting the statutory time otherwise afforded to the Huskins to assert a claim related to the contract.

Importantly, Mungo's oppressive 90-day limitation period violates South Carolina law. *See* S.C. Code Ann. § 15-3-140. That statute provides that a party may not restrict through contract South Carolina's statute of limitations period for bringing a claim. *See also Scott v. Guardsmark Security*, 874 F. Supp. 117, 121 (D.S.C. 1995) (holding that a contractual provision reducing a statute of limitations is void pursuant to S.C. Code Ann. § 15-3-140 and further finding that the defendant's efforts to shorten a federally mandated time limit for asserting claims was "abhorrent to public policy."). Here, that is exactly what Mungo is trying to do. Mungo, in its form contract, is improperly restricting the limitations period for its customers to bring a claim from three years to 90 days.

Because the "Arbitration and Claims" provision violates South Carolina law and drastically shortens (from three years to 90 or, in some instances, 30 days) the time in which a party may bring a claim, dispute, or other matter under the contract, the trial court erred in concluding that the "Arbitration and Claims" provision was not one-sided, oppressive, and unconscionable. The Court should recognize that Mungo, a sophisticated entity and one of the nation's largest sellers of new homes, either knows or certainly should know that it cannot legally shorten the applicable statute of limitations in South Carolina. Nevertheless, Mungo includes such a provision in its standard-form Purchase Agreement presented to its numerous customers. Because Mungo's arbitration provision violates South Carolina public policy to safeguard the applicable statutory limitations period for asserting claims as set forth in § 15-3-140, it is not only one-sided and oppressive but unconscionable and unenforceable as a matter of law. *See Scott, supra; see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6 (2016) (concluding that oppressive and one-sided terms in arbitration clause could not be severed to save the rest where no severability clause was included therein).

Furthermore, while the trial court correctly concluded that a "clearly identified, mutual arbitration provision that does not limit remedies available by law" is indicative of a non-oppressive arbitration clause, (R. p. 11, Order.), such is not the case here. Mungo's unlawful restriction on the time limit for bringing a claim for relief is an extreme limitation on **all** remedies available at law. Imposing such a short time frame for a purchaser to make a claim for relief is clearly an intentional (and unconscionable) effort by Mungo to significantly limit its liability at the expense of the new home purchaser. Moreover, the case relied upon by the trial court as support for its finding, *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013), is instructive as to this issue. In *Carlson*, the Court of Appeals refused to

consider whether a contractual provision limiting the statute of limitations for bringing claims to two years was relevant to the determination of whether the arbitration clause at issue was unconscionable on the grounds that such provision was not a part of the contract's arbitration clause. *See Carlson*, 404 S.C. at 260, 743 S.E.2d at 873-74. However, unlike the time restriction at issue in *Carlson*, Mungo's provision shortening the statute of limitations is a prominent part of Mungo's arbitration clause. In addition, the unconscionable nature of Mungo's 90-day (or 30-day) time limitation is made even clearer when contrasting it to the one present in *Carlson* which at least provided a two-year period for bringing a claim against the builder. *See id.*

Lastly, while the issue of whether a limitations period set forth in an arbitration clause renders the clause unconscionable appears to be a matter of first impression in South Carolina's appellate courts, other jurisdictions have squarely addressed this issue. *See Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1137 (Wash. 2013) (finding 30-day limitations period in arbitration clause to be substantively unconscionable); *see also Davis v. OMelveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) (finding one-year notice provision in arbitration clause to be substantively unconscionable). The Supreme Court of Washington's opinion in *Gandee* is particularly instructive and on point. In *Gandee*, the Court rejected the contention that the time limit set forth in the arbitration clause was simply a time frame for a party to seek to compel arbitration. *Gandee*, 293 P.2d at 1201. As this Court should do when construing Mungo's arbitration clause, the *Gandee* court found "no ambiguity in the clause" and further found that "[a] plain language reading of this provision indicates that Gandee supposedly had 30 days within which to bring her claim." *Id.* The *Gandee* court went on to hold that the provision in the arbitration clause at issue shortening the applicable limitations period from the statutorily mandated four years to 30 days was substantively unconscionable. *Id.* Likewise, in *Davis v.*

*O'Melveny & Myers*, the Ninth Circuit Court of Appeals found that language similar to that used in Mungo's arbitration clause seeking to affect a waiver of a claimant's rights if notice of a claim was not given within a shortened limitations period was substantively unconscionable. *Davis*, 485 F.3d at 1076-78. This Court should follow the well-reasoned opinions of *Gandee* and *Davis* and find that the unreasonably short time limitations set forth in Mungo's arbitration provision renders the entire arbitration clause unconscionable and unenforceable.

## II. The circuit court erred in finding that the arbitration provision applied mutually to Mungo and its purchasers when Mungo would have no reason to assert a claim against a purchaser after receiving full payment at closing.

The trial court mistakenly construed Mungo's arbitration provision as applying mutually to Mungo and its purchasers. Because Mungo requires full payment for the home and property at closing and prohibits the withholding of any of the purchase price for any reason, Mungo would have no reason to assert a claim against the purchaser after the closing. (R. p. 29, Complaint, Ex. 1 at "Closing.") In addition, as to pre-closing matters, the Purchase Agreement grants Mungo broad rights to terminate the Purchase Agreement for purchaser default or even for its own convenience and defines the exclusive rights and obligations for such actions which do not require arbitration. (R. p. 29, Complaint, Ex. 1 at "Default and Termination.") Therefore, any belief that Mungo would assert a claim and demand arbitration against a purchaser is illusory. For all practical effect, the "Arbitration and Claims" provision applies singularly to purchasers who have claims arising under or related to the Purchase Agreement arising after closing. *See Jiminez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. Ct. App. 2015) ("[w]here the practical effect of an arbitration agreement binds only one of the parties to arbitration, it lacks mutuality of promise . . ."). This lack of mutuality is further indicative of the one-sided and oppressive nature of Mungo's "Arbitration and Claims" provision.

## III. The circuit court erred in failing to consider the one-sided and oppressive terms of the "Limited Warranty" provision as part of the agreement to arbitrate when the "Arbitration and Claims" provision was expansive in scope, included claims arising under and related to the "Limited Warranty" and cross-referenced the "Limited Warranty."

The "Limited Warranty" and "Arbitration and Claims" provisions must be read together because the "Arbitration and Claims" provision includes warranty claims and because the provisions cross-reference each other and are substantively intertwined. However, the trial court concluded that the arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision because the warranty provision is found outside of the arbitration provision. (R. p. 9, Order.) Specifically, the trial court noted that the "Arbitration and Claims" provision and the "Limited Warranty" provision are set apart by different headings in the Purchase Agreement, and the "Arbitration and Claims" provision does not specifically reference the "Limited Warranty" provision. (R. p. 10, Order.) Because the court concluded the "Limited Warranty" provision "is outside the 'Arbitration and Claims' provision of the contract," moreover, the court found that the "Arbitration and Claims" provision in this case "does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting." (R. p. 12, Order, n. 2.) The court's analysis elevates form over substance, on the one hand, and fails to apply the plain language of the contractual provisions, on the other hand.

In construing a written contract, if the language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 706 (1993). At the outset, as to the "headings" in the Purchase Agreement, the Court should not give undue weight to manipulative contract drafting by Mungo and its use of mere labels and

"headings" in an adhesion contract at the expense of much less sophisticated purchasers in the residential home context.

Mungo Homes agrees the "Arbitration and Claims" provision in the Purchase Agreement is expansive and broad in scope, and plainly includes warranty claims. (*See also* R. pp. 136-137, Mungo Home's Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend the Order Dismissing the Case and Compelling Arbitration at 4, 5 ("The arbitration agreement unambiguously covers 'any claim, dispute or other matter in question between the parties hereto arising out of this Agreement.' As the Limited Warranty provision (and any questions about its enforceability or a breach thereof) arising out of the Purchase Agreement, it is within the scope of the arbitration agreement.").) The "Arbitration and Claims" provision states in pertinent part: "Any claim, dispute or other matter . . . between the parties . . . arising out of this Agreement, related to this Agreement or breach thereof, including without limitation, disputes related to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration." (R. p. 30, Complaint, Ex. 1.) The "Arbitration and Claims" provision makes no exception for warranty claims of any kind, and applies to any claim, dispute, or other matter, and need only arise out of or relate to the Purchase Agreement or breach thereof.

By way of example, an implied warranty of habitability claim under the Huskins' Purchase Agreement constitutes a "dispute[] relating to the Property" as referenced in the "Arbitration and Claims" provision. "Property" being defined as "that certain tract of land, together with the dwelling" on the first page of the Purchase Agreement. (R. p. 28, Complaint, Ex. 1.) An implied warranty of habitability claim would also constitute a "dispute[] relating to the Property . . . or condition . . . thereof" as referenced in the "Arbitration and Claims" provision.

In addition, the "Limited Warranty" and "Arbitration and Claim" provisions cross-reference one another and are substantively intertwined. The "Limited Warranty" provision states: "This limited warranty will be incorporated in the deed delivered at closing." (R. p. 29, Complaint, Ex. 1.) The "Arbitration and Claims" provision applies to "disputes relating to . . . the deed to be delivered" pursuant to the Purchase Agreement. (R. p. 30, Complaint, Ex. 1.) Stated another way, the "Limited Warranty" provision is explicitly merged into the deed delivered at closing, and claims, disputes or other matters related to the Deed are specifically referred to in and included as subject to the mandatory and binding arbitration provided under the "Arbitration and Claims" provision. The two provisions are in substance intertwined, and the "Arbitration and Claims" provision cannot be extracted or isolated from the "Limited Warranty" provision in the Purchase Agreement. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (holding that the warranty and dispute resolution provisions "must be read as a whole" and were so intertwined "as to constitute a single provision"). Notably too, the "Arbitration and Claims" provision includes no exception for warranty or warranty-related claims, disputes or other matters. Therefore, it was error for the trial court not to consider the one-sided and oppressive limitation on remedies contained in the "Limited Warranty" provision in construing the unconscionability of the "Arbitration and Claims" provision and for the court to conclude that the "Arbitration and Claims" provision does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting." (R. p. 12, Order.)

As established above, under the "Arbitration and Claims" provision, any warranty claim, dispute or other matter arising out of or related to the Property or Condition thereof is subject to mandatory arbitration under the "Arbitration and Claims" provision. The "Limited Warranty" provision, therefore, cannot be read in isolation from the "Arbitration and Claims" provision, and

the two provisions must be read in harmony with one another. Together, the "Arbitration and Claims" and "Limited Warranty" provisions prohibit any purchaser with any kind of warranty claim, dispute, or other matter from recovering damages, consequential or punitive. These damages would otherwise be recoverable in warranty matters by law. This limitation on remedies is just like the terms found to be one-sided and oppressive in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016), wherein D.R. Horton expressly disclaimed all warranties, including the warranty of habitability, as well as completely absolved itself from ever paying any money damages. Indeed, the trial court acknowledged in its Order that an arbitration provision which limits remedies otherwise available by law indicates a one-sided and oppressive arbitration agreement. (R. p. 10, Order ("An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness.").) Further, the court noted in its Order: "An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness" too. (R. p. 11, Order.) Such a limitation is unenforceable as a matter of public policy as it precludes buyers from filing claims under the Magnuson Moss Warranty Act. (R. p. 12, Order.) The parties' agreement to arbitrate thus one-sidedly and oppressively bars all money damages of any kind, which are significant remedies otherwise available to a party at law, and precludes buyers from filing claims under the Magnuson Moss Warranty Act. Taken together, along with the "Arbitration and Claims" provision's unlawful restriction of the statutory time in which a party may assert claims arising under or related to a contract, the circuit court erred in failing to find the "Arbitration and Claims" provision in this contract one-sided, oppressive, and unconscionable. As the South Carolina Supreme Court stated in *Simpson v. MSA of Myrtle Beach, Inc.*, "[W]e find the arbitration clause in the adhesion contract . . . wholly unconscionable and unenforceable based **on the cumulative effect** of a number of

oppressive and one-sided provisions contained within the **entire** clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 674 (2007) (emphasis added). Such is the case here.

## IV. Based on the circuit court's finding that the Purchase Agreement's "Arbitration and Claims" provision does not include claims arising under the "Limited Warranty" provision, the circuit court erred in granting Mungo's motion to dismiss the Huskins' claims that fall under the "Limited Warranty" provision.

The circuit court erred in determining the "Limited Warranty" and "Arbitration and Claims" provisions should be read in isolation for the reasons above. However, to the extent the Court of Appeals agrees with the circuit court on this point, then the circuit court also determined pursuant to that analysis that "[t]he 'Arbitration and Claims' provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting." (Order at 12.) The Court noted: "The Purchase Agreement contains a separate "Limited Warranty" provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages." (R. p. 12, Order n. 2.) According to the circuit court, therefore, claims pursuant to the "Limited Warranty" provision fall outside the "Arbitration and Claims" provision and therefore should be allowed to proceed in circuit court. The circuit court, however, erroneously granted Mungo Home's motion to dismiss the claims asserted in the Complaint to this end, as the Complaint asserts claims related to the "Limited Warranty" provision.[2]

The Huskins' Complaint asserts claims related to Mungo's unlawful disclaimer of the implied warranty of habitability in the "Limited Warranty" provision. Specifically, the Huskins

[2] The circuit court did not provide any rationale for the inconsistency in its Order, where, on the one hand, it found the purchase agreement permitted claims relating to the Limited Warranty to be raised in a judicial forum but, on the other hand, those circumstances were presumably lacking in this case. It denied the Huskins' motion to alter or amend the Order raising this point by Form 4 Order only.

assert breach of contract (the covenant of good faith and fair dealing), unjust enrichment, and request declaratory relief all relating to Mungo's disclaimer of the implied warranty of habitability, without separate and adequate consideration, in the "Limited Warranty" provision. (R. pp. 21-27, Complaint.) At a minimum, the Huskins' claims related to breach of the "Limited Warranty" provision, particularly the covenant of good faith and fair dealing; unjust enrichment by the unlawful disclaimer of the implied warranty of habitability without separate and adequate consideration for the same; and finally, for declaratory relief regarding the legality of the "Limited Warranty" provision under such circumstances should not be dismissed and should proceed in this forum. Because the claims asserted in the Complaint are related to the disclaimer of the implied warranty of habitability found in the "Limited Warranty" provision, which the circuit court found falls outside of the "Arbitration and Claims" provision, this matter is appropriately before a judicial forum and the circuit court erred in dismissing the Complaint to compel arbitration of these claims.

## CONCLUSION

For the reasons set forth above, the Huskins respectfully request that this Court reverse the circuit court's grant of Mungo Home's motion to dismiss and compel arbitration. This Court should find as a matter of law instead that the "Arbitration and Claims" provision is unconscionable and unenforceable for all the reasons discussed above, and that this matter may proceed in the Circuit Court. In the alternative, the Huskins respectfully request that this Court find the Circuit Court retains jurisdiction over this case because the claims involve matters falling under the "Limited Warranty" provision which are outside the scope of the "Arbitration and Claims" provision in the Purchase Agreement.

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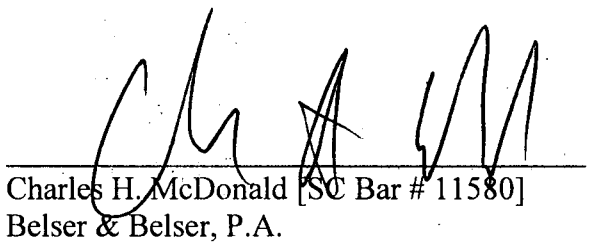

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April 15, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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Case No.: 2017-CP-40-03697
Appellate Case No. 2018-000889

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

v.

Mungo Homes, LLC,.....Respondent.

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# FINAL BRIEF OF RESPONDENT MUNGO HOMES, LLC

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court's Order compelling arbitration of the parties' dispute is immediately appealable.

2. If the Circuit Court's Order compelling arbitration of the parties' dispute is immediately appealable, did the Circuit Court err in compelling arbitration of Appellants' claims concerning the enforceability of limited warranty provisions in the parties' contract.

## STATEMENT OF THE CASE

In this appeal, Appellants Amanda Leigh Huskins and Jay R. Huskins (collectively the "Huskins") appeal the trial court's order compelling arbitration of their claims alleging that the limited warranty provision in a contract for the sale and construction of a home is unenforceable.

Mungo Homes, LLC ("Mungo") and the Huskins entered into a contract titled "Purchase Agreement" (the "Contract") for the sale and construction of a new home in Richland County, South Carolina. The Contract contains fifteen (15) separately identified paragraphs, including a "Limited Warranty" paragraph, and an "Arbitration and Claims" paragraph.

The "Arbitration and Claims" paragraph states that any "claim dispute, or other matter in question between the parties hereto arising out of this Agreement...shall be resolved by final and binding arbitration."

The "Limited Warranty" paragraph provides that the seller (Mungo), at its expense is to provide a warranty issued by Quality Builders Warranty Corporation. All other warranties, whether express or implied related to the subject property are expressly disclaimed in all capital letters.

The Huskins filed suit alleging that the disclaimer of implied warranties in the Contract is unenforceable. Mungo moved to dismiss the lawsuit and compel arbitration asserting that the enforceability of the waiver of implied warranties is a matter to be decided through binding arbitration. The Huskins averred that their claims arising out of the "Limited Warranty" paragraph of the Contract were not subject to arbitration.

By Order filed on March 13, 2018, the Circuit Court, Hon. DeAndrea Gist Benjamin, granted Mungo's motion. Judge Benjamin held that the Arbitration and Claims paragraph was clearly separate and distinct from the other paragraphs of the Contract, including the Limited

Warranty paragraph, and the Huskins' claims related to the enforceability of certain waivers of implied warranties were to be decided by the arbitrator. Appellants filed a motion to reconsider, which was denied by order dated April 16, 2018.

The parties have not arbitrated the claims nor have the Huskins made an arbitration demand. Appellants instead served a Notice of Appeal on May 11, 2018 seeking to immediately appeal the order of the Circuit Court compelling arbitration.

## INTRODUCTION

### A. The Contract

On June 29, 2015, the Huskins entered into an agreement to purchase a new construction home from Mungo. (R. 28-30) At the top of the first page of the Contract, entitled "Purchase Agreement," and written in all underlined capital letters reads: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 et seq." (R. 28)

The Contract contains fifteen distinct paragraphs, separated by unique headings and written in bold, underlined capital letters reading: (1) **PROPERTY;** (2) **IMPROVEMENTS;** (3) **PRICE;** (4) **FINANCING CONTINGENCY AND TERMINATION;** (5) **CLOSING;** (6) **CLOSING COSTS AND PRO-RATIONS;** (7) **CHANGE ORDERS;** (8) **RESTRICTIVE COVENANTS;** (9)**HOMEOWNERS ASSOCIATION;** (10) **LIMITED WARRANTY;** (11) **TERMITE PROTECTION;** (12) **DEFAULT AND TERMINATION;** (13) **ARBITRATION AND CLAIMS;** (14) **NON-RELIANCE;** and (15) **MISCELLANEOUS**. (R. 28-30)

At issue in this appeal are the thirteenth paragraph of the Contract labeled "Arbitration and Claims" (the "Arbitration Agreement") and the tenth paragraph of the Contract labeled "Limited Warranty." The thirteenth paragraph, a separately labeled Arbitration Agreement, reads in relevant part:

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act.

(R. 30). The Huskins initialed directly below the Arbitration Agreement. (R. 30)

The tenth paragraph, separately labeled "Limited Warranty" reads:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

(R. 29).

**B. Appellants File Suit in Circuit Court**

On June 14, 2017, Appellants filed a lawsuit alleging four causes of action; (1) breach of contract, (2) unjust enrichment, (3) declaratory relief, and (4) violation of the South Carolina Unfair Trade Practices Act. (R. 21-27). Appellants' four causes of action each arise out of allegations that the Contract disclaims certain implied warranties, substituting in its place a limited warranty from a third-party company. Appellants allege the disclaimer of implied warranties provides "no reduction in price or separate benefit to the purchaser." (R. 25). Appellants seek a

declaration that the waiver of implied warranties in the Contract is unenforceable and an award of the "fair value of the waiver of the implied warranty of habitability." (R. 24-26).

**C. The Circuit Court compels arbitration**

After initiating the lawsuit, Mungo moved for an order enforcing the Arbitration Agreement as all four causes of action arise directly out of the Contract. (R. 65-71). The Circuit Court heard Oral Arguments on November 8, 2017. (R 39-64.). By order filed on March 13, 2018, the Circuit Court granted Mungo's motion. (R. 1-14). The Circuit Court determined that the Arbitration Agreement should be analyzed in isolation from the remainder of the Contract, noting that the Arbitration Agreement is separately labeled, located on a different page from the "Limited Warranty" paragraph, and does not cross-reference other paragraphs of the Contract. (R. 9-10). The Circuit Court then determined that the Arbitration Agreement was not one sided or oppressive (R. 10-13), and was enforceable.

Thereafter, Appellants did not demand arbitration, but instead directly appealed the Circuit Court's order.

## LEGAL STANDARD

Under South Carolina law, those orders related to arbitration that are immediately appealable are found in S.C. Code §15-48-200(a). All orders related to arbitration that are not mentioned in S.C. Code §15-48-200(a) are not immediately appealable. *Toler's Cove Homeowners Assoc., Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003).

ARGUMENT

## I. Orders compelling arbitration are not immediately appealable, and this appeal should be dismissed

It is well established in South Carolina that an order compelling arbitration is not immediately appealable. S.C. Code §15-48-200(a) states:

> (a) An appeal may be taken from:
>
> (1) An order denying an application to compel arbitration made under § 15-48-20;
>
> (2) An order granting an application to stay arbitration made under § 15-48-20(b);
>
> (3) An order confirming or denying confirmation of an award;
>
> (4) An order modifying or correcting an award;
>
> (5) An order vacating an award without directing a rehearing; or
>
> (6) A judgment or decree entered pursuant to the provisions of this chapter.
>
> (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

As is clear from the plain language of the statute, while an order *denying* a motion to compel arbitration is immediately appealable, an order granting a motion to compel arbitration is not immediately appealable. S.C. Code §15-48-200. This is confirmed as the Supreme Court of South Carolina has repeatedly recognized that an order compelling arbitration is not immediately appealable. *See, Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584; *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004).

Here, each of Appellants' first three issues on appeal exclusively address whether the Circuit Court correctly held that the Arbitration Agreement was not one-sided, oppressive or

unconscionable. (App. Brief at pg. 1). These three issues are not immediately appealable as they challenge an order compelling arbitration.

Appellants' fourth issue on appeal seeks to challenge the Circuit Court's finding that the Appellants' claims challenging the "Limited Warranty" paragraph of the Contract fell within the broad scope of the Arbitration Agreement. (Id.). This issue is likewise not immediately appealable as it challenges an order compelling arbitration of Appellant's alleged "Limited Warranty" claims.

In all respects, all four of Appellants' issues on appeal seek to immediately appeal the Circuit Court's order holding that Appellants' claims must be arbitrated. These issues are not immediately appealable.

Finally, as the Appellants have not identified *any* immediately appealable issue in their statement of issues on appeal, this appeal must be dismissed in its entirety. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing Rule 208(b)(1)(B), SCACR)( "no point will be considered which is not set forth in the statement of issues on appeal.").

## II. Although the Circuit Court's order is not immediately appealable, the Circuit Court did not err in finding the Appellants' claims subject to arbitration

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "It is the policy of this state and federal law to favor arbitration[,] and `any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for

arbitration." *Hall v. Green Tree Servicing, LLC,* 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

Here, Appellants entered into a contract to purchase a home to be built by Mungo that contains a broad arbitration clause covering "[a]ny claim, dispute, or other matter in question between the parties hereto arising out of this Agreement." (R. 30). Moreover, the first page of the Contract contains the following provision in bold, underlined, capital letters: **"THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE S.C. UNIFORM ARBITRATION ACT, S.C. CODE 15-48-10 et seq."** (R. 28). The Arbitration Agreement is conspicuous, in compliance with South Carolina law, and broadly covers all disputes between the parties related to the Contract and the real property that is the subject of the Contract.

### A. The Circuit Court correctly determined that the Arbitration Agreement is not one-sided, oppressive, or unconscionable

#### i. The Circuit Court correctly read the Arbitration Agreement in isolation of the rest of the Contract

It is well established that where a contract contains a separate and isolated arbitration agreement, the arbitration agreement is read in isolation of the remainder of the Contract. Only the arbitration agreement itself is to be analyzed by a court, with all other issues, including the conscionability of the remainder of the Contract, to be decided by the arbitrator.

"An arbitration clause's validity is distinct from the substantive validity of the contract as a whole." *Housing Auth. of the City of Columbia v. Cornerstone Housing.,* 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003) (citing *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)); *see also Parsons v. John Weiland Homes and Neighborhoods of the Carolinas,* 418 S.C. 1, 12, 791 S.E.2d 128 (2016)("Arbitration clauses are separable from the contracts in which they are imbedded"). "Even if the overall contract is unenforceable, the

arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Cornerstone Housing.*, 356 S.C. at 340, 588 S.E.2d at 623. The argument that the entire Contract is invalid is for consideration at the arbitration itself, not for determination by the Court. *Id.* at 340, 588 S.E.2d at 623; *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453, 123 S.Ct. 2402 (2003)(noting arbitrators are well suited to address issues such as contract interpretation and arbitration procedures).

Here the Arbitration Agreement is separate and distinct from the remainder of the Contract, and the Circuit Court correctly analyzed only the Arbitration Agreement itself to assess the conscionability of the Arbitration Agreement.

Appellants, however, contend that the "Limited Warranty" paragraph of the Contract is unconscionable, and should be read together with the Arbitration Agreement. This argument is contrary to well established South Carolina law, and without merit.

In the order granting Mungo's motion, the Circuit Court correctly identified that "the "Limited Warranty" provision is located on the second page of the Purchase Agreement whereas the "Arbitration and Claims" provision is located at the top of page three." (R. 9). Likewise, the Circuit Court noted that "the arbitration provision does not [cross] reference the "Limited Warranty" provision contained in the Purchase Agreement." (R. 10). Consistent with well established law, the Circuit Court correctly found that when an Arbitration Agreement is separately identified, and does not cross-reference other provisions in the Contract, the Arbitration Agreement is read in isolation. *See, One Belle Hall Property Owners Assoc., Inc. v. Trammell Crow Residential Company,* 418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016).

Likewise unavailing is Appellants' argument that the Arbitration Agreement's broad scope which encompasses "disputes relating to the Property, Improvements, or the condition,

construction or sale [of the Property] and the deed to be delivered pursuant hereto" (R. 30) operates as a "cross-reference" to the "Limited Warranty" provision.

Appellants cite no legal authority to support this position, and furthermore, ignore the plain and unambiguous language of the Arbitration Agreement. While the Arbitration Agreement broadly covers all disputes between the parties related to the Contract or the Property, it unequivocally *does not* cross-reference the "Limited Warranty" paragraph. Accordingly, the Circuit Court correctly rejected Appellants' argument. *C.A.N. Enters. v. S.C. Health & Human Servs. Finance Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988)(courts "are without authority to alter a contract by construction or to make new contracts for the parties.").

**ii. The Arbitration Agreement is not unconscionable**

In South Carolina, unconscionability is defined as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them." *Carolina Care*, 361 S.C. at 554, 606 S.E.2d at 757. Specifically relating to arbitration agreements, the South Carolina Supreme Court has instructed that "unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker". *Parsons*, 418 S.C. at 12, 791 S.E.2d at 134.

Here, there was no "element of surprise in the inclusion of the challenged clause," the arbitration provision was clearly conspicuous, and there is no merit to the suggestion that no reasonable person would enter into the Arbitration Agreement. *See generally, Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005). Appellants initialed directly below the Arbitration Agreement. (R. 30). Furthermore, the heading "ARBITRATION AND CLAIMS" is in bold, underlined, and in capital letters and the front page of the contract states

"THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ." (R. 28, 30). *See,* S.C. Code §15-48-10 (under the SCUAA, an agreement containing the required notice is presumptively valid).

Moreover, as the Circuit Court recognized, the Arbitration Agreement unequivocally provides for an unbiased decision by a neutral decision-maker, is mutual, and does not limit the remedies available by law. This indicates a non-oppressive or one-sided arbitration agreement. (R. 11). The Arbitration Agreement calls for binding arbitration before a three-arbitrator panel; one selected by the Plaintiff, one selected by the Defendant, and one selected mutually by the parties' respective arbitrators. (R. 11). Likewise, the Arbitration Agreement applies equally to any and all claims asserted by the Appellants just as it applies to any and all claims asserted by Mungo. The Circuit Court correctly found that Arbitration Agreement is not one-sided or oppressive. (R. 10-13).

Appellants further contend that a "general presumption of unequal bargaining power between a new home buyer and a residential builder" results in an unenforceable Arbitration Agreement. However, this argument is again unsupported by legal authority and simply misstates the law. Such a presumption is contrary to South Carolina law as it would put the Arbitration Agreement on unequal footing with any other contract clause. A "presumption of unequal bargaining power" is not a "generally applicable contract defense." See, *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct., 1740, 1746 (2011).

More importantly, Appellants' exact argument was expressly rejected by the Supreme Court of South Carolina. *Parsons,* 418 S.C. at fn 6, 791 S.E.2d 128 (rejecting the dissent's proposition that the Supreme Court's judicial notice "that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller" can be applied to an

arbitration agreement in a contract for the construction of a new home). Accordingly, there is no judicially noted presumption of unequal bargaining power between a new home buyer and the homebuilder when reviewing the enforceability of an arbitration agreement.

Finally, the provision in the Arbitration Agreement requiring a demand for arbitration within ninety (90) days of the date a claim arises does not render the Arbitration Agreement against public policy. As the Circuit Court noted, this action was filed on June 14, 2017. (R. 11). Mungo filed this motion to compel arbitration on July 20, 2017--well within the ninety (90) day requirement. (R. 11). Moreover, contrary to Appellants' contention, this provision does not purport to create an unlawful statute of limitations, rather, it provides a deadline on when arbitration of claims must be demanded.

Nonetheless, assuming, *arguendo,* that the subject provision did attempt to alter the statute of limitations, the provision has no bearing on the enforceability of the Arbitration Agreement. Rather, even if the subject provision is struck from the Arbitration Agreement, the substance of the Arbitration Agreement is wholly unaffected. S.C. Code §15-3-140 states:

> 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.

S.C. Code §15-3-140. In other words, a contractual provision purporting to shorten the statute of limitations is void *ab initio.* Thus, it is treated as if it was never part of the Contract.

Here, even if these two sentences are removed from the Arbitration Agreement, the obligation of the parties to submit all claims to arbitration is left wholly intact. As the Appellants

only challenge the last two sentences of the Arbitration Agreement, striking this provision would not "rewrite" the Arbitration Agreement. Indeed, the Arbitration Agreement would still read as a full and complete mutual obligation to submit all claims to arbitration. *See generally, One Belle Hall,* 418 S.C. at 63-64, 791 S.E.2d at 293, *cf Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 33-34, 644 S.E.2d 663, 673 (2007)(declining to sever unconscionable terms of an arbitration agreement because only a disintegrated fragment of the agreement would remain).

Accordingly, even accepting Appellants' strained interpretation of the Arbitration Agreement as true, the Arbitration Agreement is not presumptively unenforceable as the statutes of limitations set forth in S.C. Code §15-3-20 et seq. applies to this action. The two sentences identified by the Appellants have no bearing on the parties' mutual agreement to submit claims to binding arbitration.

In summary, the Appellants failed to identify facts showing that they will not be able to assert their claims in an unbiased arbitration before unbiased arbitrators. Given South Carolina's heavy presumption in favor of arbitrability, the Circuit Court correctly decided the current motion in favor of arbitration. *See, Landers* 402 S.C. at 109, 739 S.E.2d at 213 quoting *Am. Recovery Corp.*, 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989))).

### B. The Circuit Court correctly held that the Appellants' "Limited Warranty" claims were subject to arbitration

"Arbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *New Hope Missionary Baptist Church v. Paragon Builder's,* 379 S.C. 620, 627, 667 S.E.2d 1, 4 (Ct. App. 2008). "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers*

402 S.C. at 109, 739 S.E.2d at 213–14 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

Courts have consistently held that broad arbitration clauses "appl[y] to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." *Id.* at 109, 739 S.E.2d at 214. "Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract but embraces every dispute between the parties having a significant relationship to the contract." *Id.* (alterations and internal quotation marks omitted). Accordingly, the "court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 118.

In her order, Judge Benjamin held that all four causes of action initiated by the Appellants were subject to mandatory arbitration under the broad Arbitration Agreement. This includes Appellants' claim that the Limited Warranty contained within the Contract is unenforceable. (R.1-14).

Appellants now argue that the Circuit Court's decision to read the Arbitration Agreement in isolation of the rest of the Contract meant that the Circuit Court decided "Limited Warranty" claims fell outside of the Arbitration Agreement, and thus, may be pursued outside of arbitration. However, the Circuit Court did not hold that "Limited Warranty" claims fell outside of the Arbitration Agreement. Notably, Appellants fail to identify any portion of the Circuit Court's order suggesting as much.

Although the Circuit Court examined the Arbitration Agreement in isolation of the "Limited Warranty" paragraph for purposes of her conscionability analysis, she did not determine that "Limited Warranty" claims were not encompassed by the broad arbitration provision. Indeed,

the Circuit Court's order is unambiguous and clear; all causes of action asserted by the Appellants must be submitted to binding arbitration.

As Appellants' claims regarding the validity of the "Limited Warranty" provision arise out of the Contract, the Circuit Court correctly determined that Appellants' challenges to the "Limited Warranty" paragraph are to be determined through arbitration.

## CONCLUSION

Appellants have failed to identify any issue that would support an immediate appeal of the Circuit Court's order enforcing the Arbitration Agreement. Accordingly, this appeal should be dismissed in its entirety.

Moreover, the claims asserted against Mungo arise directly out of a Contract that requires all such claims be submitted to binding arbitration. The Arbitration Agreement is separate, distinct and inconspicuous. Likewise, the Arbitration Agreement is not one-sided, oppressive or unconscionable. Accordingly, Appellants' claims must be pursued through arbitration.

Although this appeal should be dismissed as not immediately appealable, on the merits, the Circuit Court correctly compelled arbitration.

Respectfully submitted,

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April 12, 2019

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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Appellate Case No. 2018-000889

Case No. 2017-CP-40-03697

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

v.

Mungo Homes, LLC, .....Respondent.

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# REPLY BRIEF OF APPELLANTS

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## ARGUMENT

### I. The circuit court's Order granting Mungo's "Motion to Dismiss and Compel Arbitration" is subject to immediate appeal.

An Order dismissing an action and compelling arbitration, such as the circumstance presented here, is subject to immediate appeal under South Carolina law. While this Court has already ruled on this issue and denied Respondent Mungo Homes' Motion to Dismiss this Appeal, the Appellants will set forth the reasons why Mungo's argument is without merit because Mungo raises this issue again in its brief.

In *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), this Court held as a matter of first impression that an order dismissing an action without prejudice and allowing the parties to pursue arbitration was immediately appealable. The exact same situation is present here. The trial court's order was based on Mungo's "Motion to Dismiss and Compel Arbitration." (R. pp. 65-71, Motion to Dismiss.) In its motion, Mungo specifically requested that the circuit court "dismiss the Complaint pursuant to Rule 12(b)(6), SCRCP, because Plaintiffs are bound by an arbitration clause requiring them to submit the instant dispute to binding arbitration." (R. p. 66, Motion to Dismiss at p.1). As for the relief sought in its motion, Mungo requested that "the Complaint should be dismissed, and the Court should enter an order compelling the parties to arbitrate this dispute." (R. p. 70, Motion to Dismiss at p. 5). Rather than seeking a stay of the case, Mungo sought outright dismissal of the Complaint and the trial court granted that requested relief. (R. p. 14, Order).

*Widener* makes clear that under these circumstances, where a dismissal of an action was granted rather than a stay, the Huskins may appeal the trial court's order. Further, the jurisdiction of South Carolina's appellate courts clearly extends to an order dismissing a complaint pursuant

to Rule 12(b)(6). *See, e.g., Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001) ("Dismissal of an action pursuant to Rule 12(b)(6) is appealable.")

While Mungo cites cases holding that an appeal may not be taken from an order staying a case and compelling arbitration, such circumstance is not presented here. As set forth above, the trial court's order dismissing the Complaint in its entirety is immediately appealable. Because this Court has jurisdiction of this appeal, this Court should address the issues raised by the Huskins at this time. The parties have now fully briefed the issues and they are ripe for appellate review. The interests of judicial economy would certainly be best served by hearing these issues now rather than, as Mungo seems to suggest, requiring the Huskins to engage in arbitration with Mungo on the merits only to come back to this very same Court at a much later date to argue whether Mungo's arbitration agreement is enforceable.

## II. Before this Court can determine whether the arbitration agreement in Mungo's Purchase Agreement is unconscionable, it must first determine what provisions of the Purchase Agreement constitute the arbitration agreement.

Mungo argues that the trial court correctly isolated its "Arbitration and Claims" provision from the rest of the Purchase Agreement's terms in conducting the unconscionability analysis of the arbitration agreement. However, in certain cases, what constitutes the arbitration agreement itself can, and should, be construed broadly for purposes of determining whether the agreement is unconscionable. *See Smith v. D.R. Horton*, 417 S.C. at 48-49, 790 S.E.2d at 3-4.

In this instance, the circuit court erred by applying a very narrow and limited view as to what constituted the collective arbitration agreement contained within Mungo's Purchase Agreement. By refusing to consider any terms outside of the provision with the heading "Arbitration and Claims", the circuit court ignored clauses that our Supreme Court has deemed relevant to the analysis of whether an arbitration agreement contains one-sided and oppressive

terms. The circuit court thus erred by failing to adopt the more expansive view taken by the Supreme Court in cases such as *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), and *Smith v. D.R. Horton*, 417 S.C. 42, 790 S.E2d 1 (2016), when considering what clauses are inextricable from the analysis of whether an arbitration provision is enforceable.

For example, the arbitration agreement at issue in *Simpson* was expansive and contained far more than just a requirement for arbitration of disputes. *Simpson*, 373 S.C. at 28-36, 644 S.E.2d at 670-74. It contained a forum selection clause as well as clauses limiting warranty claims and the arbitrator's authority to award punitive or treble damages. *See id.* at 19-21, 644 S.E.2d at 666. The South Carolina Supreme Court took those clauses into consideration in its analysis of whether the terms of the arbitration agreement were one-sided and oppressive. *See id.* at 28-36, 644 S.E.2d at 670-74. The Court stated: "[W]e find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based **on the cumulative effect** of a number of oppressive and one-sided provisions contained within the **entire** clause." *See id.* at 35, 644 S.E.2d at 674 (emphasis added). Likewise, in *Smith v. D.R. Horton*, the South Carolina Supreme Court recognized that limitations on remedies set forth outside a discrete arbitration provision can be an inextricable part of any analysis of whether the terms of the collective arbitration provision are one sided and oppressive. *See Smith v. D.R. Horton*, 417 S.C. at 48-49, 790 S.E.2d at 3-4.

Just because Mungo did not include its unfair limitations on remedies under the provision labeled "Arbitration and Claims" does not render those limitations irrelevant for purposes of an unconscionability analysis. For the circuit court to exclude from its analysis the very type of clauses that were relevant to the South Carolina Supreme Court's analysis in *Simpson* and *Smith* simply because such clauses are not contained within Mungo's limited "Arbitration and Claims"

provision is difficult to reconcile. Why are such clauses relevant when included in expansive arbitration clauses like those found in *Simpson* and *Smith*, but not relevant here when located outside of a much more limited arbitration clause? Such a construction unfairly awards clever contract drafting by the sophisticated party at the expense of its much less sophisticated purchasers and elevates form over substance. Rather than following cases with limited application and obvious differences to this matter, this Court should follow the guidance of our Supreme Court in similar cases such as *Simpson* and *Smith* and find that the limitations on remedies set forth in the "Limited Warranty" section of Mungo's Purchase Agreement is part of the **entire** arbitration agreement and must be part of the analysis of whether the arbitration agreement is enforceable. In doing so, this Court should then reach the same conclusion as the South Carolina Supreme Court in *Simpson* and *Smith* and find Mungo's entire arbitration agreement one-sided and oppressive.

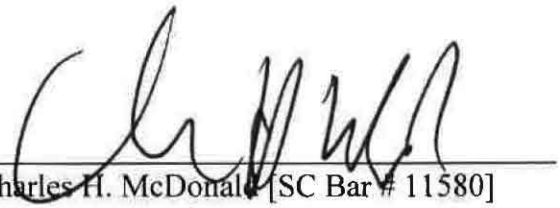
## III. In the absence of a severability clause in Mungo's "Arbitration and Claims" provision, this Court cannot sever the offending provisions and enforce the remainder of this provision.

In a Hail Mary effort to save its arbitration provision, Mungo requests that this Court sever the offending portions of Mungo's arbitration provision and enforce the remainder of this provision. However, South Carolina law is clear that courts cannot save offending contract provisions by rewriting the parties' contract for them. *Smith v. D.R. Horton*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6 (2016); *see also Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 673(2007). In *Smith v. D.R. Horton*, a case similar to this one in terms of the contractual arbitration provisions, the South Carolina Supreme Court refused to sever offending provisions from an arbitration agreement. *Smith* 417 at 50 n.6, 790 at 5 n.6. The 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.* There is no severability clause in Mungo's "Arbitration and Claims" provision. Accordingly, as in *Smith*, this Court should refuse to sever the offending provisions of Mungo's "Arbitration and Claims" provision and find the entire provision unconscionable and unenforceable.

Mungo further argues that because S.C. Code Ann. § 15-3-140 renders any contractual provision shortening the applicable statute of limitations unenforceable, this Court should treat the offending provisions of Mungo's "Arbitration and Claims" provision as if they were never part of the parties' contract. While the provisions drastically shortening the limitations period for bringing a claim against Mungo are indeed unenforceable, Mungo's efforts to further avoid liability to its purchasers by inserting such an unconscionable provision within its arbitration agreement cannot be ignored. As a large, sophisticated seller of new homes, Mungo should not be permitted to absolve itself from any liability arising out of the sale of a new home to its purchaser. This Court should not reward Mungo's unconscionable efforts to shed liability for the sale of a new home by accepting the invitation to pretend the offending provisions of Mungo's "Arbitration and Claims" provision do not exist.



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April 15, 2019

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Amanda Leigh Huskins and Jay R. Huskins, Appellants,

v.

Mungo Homes, LLC, Respondent.

Appellate Case No. 2018-000889

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Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

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Opinion No. 5916
Heard May 5, 2021 – Filed June 1, 2022

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**AFFIRMED AS MODIFIED**

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Charles Harry McDonald, of Belser & Belser, PA; Beth B. Richardson, of Robinson Gray Stepp & Laffitte, LLC; Brady Ryan Thomas, of Richardson, Thomas, Haltiwanger, Moore & Lewis; and Matthew Anderson Nickles, of Rogers, Patrick, Westbrook & Brickman, LLC, all of Columbia; and Terry E. Richardson, Jr., of Richardson, Thomas, Haltiwanger, Moore & Lewis, of Barnwell, all for Appellants.

Steven Raymond Kropski and David W. Overstreet, both of Earhart Overstreet, LLC, of Charleston, for Respondent.

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**LOCKEMY, A.J.:** Amanda Leigh Huskins and Jay R. Huskins (collectively, the Huskinses) appeal the circuit court's order granting Mungo Homes, LLC's (Mungo's) motion to dismiss and compel arbitration. The Huskinses argue the circuit court erred in (1) finding the limitations period contained in the arbitration provision was not one-sided, oppressive, and unconscionable; (2) finding the arbitration provision applied mutually to Mungo and the Huskinses; (3) failing to consider the one-sided and oppressive terms of a limited warranty provision in determining whether the arbitration agreement was unconscionable; and (4) granting the motion to dismiss the Huskinses' claims involving the limited warranty provision even though it concluded the arbitration provision did not include claims arising under the limited warranty provision. We affirm the circuit court's order as modified.

## FACTS AND PROCEDURAL HISTORY

The Huskinses entered into a purchase agreement (the Purchase Agreement) with Mungo in June 2015 for the purchase of a new home in the Westcott Ridge subdivision in Irmo. The Purchase Agreement consisted of three pages. The top of the first page provided: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ."[1] The second page included a paragraph with the heading "LIMITED WARRANTY" (the Limited Warranty provision), which stated the following:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
>
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY

[1] *See* S.C. Code Ann. § 15-48-10 to -240 (2005) (establishing the South Carolina Uniform Arbitration Act (the UAA)).

FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

The next page contains a paragraph with the heading "ARBITRATION AND CLAIMS" and states,

Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and

> designating the demanding parties [sic] selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

In July 2017, the Huskinses filed an action against Mungo alleging the Purchase Agreement violated South Carolina law by disclaiming certain implied warranties without providing a reduction in sales price or other benefit to the purchaser for relinquishing such rights. The Huskinses alleged causes of action for (1) breach of contract and the implied covenant of good faith and fair dealing, (2) unjust enrichment, (3) violation of the South Carolina Unfair Trade Practices Act (SCUTPA),[2] and (4) declaratory relief regarding the validity of the waiver and release of warranty rights and the validity of Mungo's purported transfer of all remaining warranty obligations to a third party. They did not allege any problems with the home.

Mungo filed a motion to dismiss and compel arbitration, arguing the Huskinses' claims were subject to arbitration pursuant to the Arbitration and Claims provision (the Arbitration Clause) contained in the Purchase Agreement. The Huskinses filed a memorandum opposing the motion, arguing the Arbitration Clause was unconscionable and unenforceable. They asserted the court should consider the Purchase Agreement's limitations on warranties as part of the agreement to arbitrate and thus find the Arbitration Clause was unconscionable. In addition, the Huskinses argued a provision contained in the Arbitration Clause that limited the time to bring a claim to thirty or ninety days was unconscionable, could not be severed, and rendered the entire Arbitration Clause unenforceable.

After hearing the motion, the circuit court issued an order granting the motion to dismiss and compelling arbitration. The circuit court found that although the Huskinses lacked a meaningful choice, the terms of the Arbitration Clause were not one-sided and oppressive, and the Arbitration Clause was therefore not unconscionable. In considering whether the terms were one-sided and oppressive,

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[2] S.C. Code Ann. § 39-5-10 to -730 (1976 & Supp. 2021).

the circuit court found that (1) the Limited Warranty provision must be read in isolation from the Arbitration Clause, and (2) the terms in the Arbitration Clause pertaining to the ninety-day time limit were not one-sided and oppressive because they did not waive any rights or remedies otherwise available by law. The Huskinses filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court summarily denied. This appeal followed.

## ISSUES ON APPEAL

1. Did the circuit court err in finding the provision limiting the time in which to bring a claim was not one-sided, oppressive, and unconscionable?

2. Did the circuit court err in failing to consider the Limited Warranty provision as part of the Arbitration Clause and thus failing to find the Arbitration Clause unconscionable?

3. Did the circuit court err by granting Mungo's motion to dismiss the Huskinses' action when it involved claims falling under the Limited Warranty provision?

## STANDARD OF REVIEW

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Id.*

"Arbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citation omitted).

## LAW AND ANALYSIS

## I. APPEALABILITY

As an initial matter, Mungo maintains the circuit court's order is not immediately appealable. The Huskinses argue that under *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), the order was immediately appealable because it granted Mungo's Rule 12(b)(6), SCRCP, motion to dismiss. We agree.

Our supreme court has held our state procedural rules—rather than the Federal Arbitration Act (FAA)—govern appealability of arbitration orders.[3] *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding that "because South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, [wa]s applicable, the court's order compelling arbitration [wa]s not immediately appealable"). Ordinarily, an order granting a motion to compel arbitration is not immediately appealable. *See* § 15-48-200(a) (providing that "[a]n appeal may be taken from: (1) An order denying an application to compel arbitration . . . ; (2) An order granting an application to stay arbitration . . . ; (3) An order confirming or denying confirmation of an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of th[e UAA]"). However, the "[d]ismissal of an action pursuant to Rule 12(b)(6) is appealable." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

In *Widener*, this court held an order dismissing the action without prejudice and ordering arbitration was immediately appealable, reasoning that "[b]y dismissing [the] action, the [circuit] court finally determined the rights of the parties[, and] therefore, [this court had] jurisdiction pursuant to section 14-3-330 of the South Carolina Code [(2017)]." 381 S.C. at 524, 674 S.E.2d at 173-74; *see also* § 14-3-330(2) (providing the appellate courts have jurisdiction in an appeal from "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, . . . or (c) strikes out . . . any pleading in any action"). The appellant in *Widener* argued the dismissal of the action prejudiced him because the statute of limitations would bar him from bringing any future action after the conclusion of the arbitration proceedings. *Id.* at 525, 674 S.E.2d at 174. This court did not decide the merits of the case but reversed and remanded the matter to the trial court to vacate the dismissal and enter an order staying the action "pending the outcome of the arbitration proceedings." *Id.* In contrast, the court in *Toler's Cove*—which did not involve a Rule 12(b)(6) dismissal—found the

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[3] *See* 9 U.S.C. § 16(a)(3) (providing that under the FAA, an appeal may be taken from "a final decision with respect to an arbitration"); *see also Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (holding "when a district court compels arbitration in a proceeding in which there are no other issues before the court, that order is final . . . because the court has disposed of the whole case on the merits").

order compelling arbitration was not immediately appealable but addressed the merits of the appeal "because [the] issues [we]re capable of repetition and need[ed] to be addressed." 355 S.C. at 611, 586 S.E.2d at 584-85.

Here, as in *Widener*, the Huskinses appeal an order dismissing the case, which is an appealable order. *See Williams*, 347 S.C. at 233, 553 S.E.2d at 500 (stating an order dismissing an action pursuant to Rule 12(b)(6) is immediately appealable). In dismissing the Huskinses' claims, the circuit court addressed only the issue of the enforceability of the Arbitration Clause. Unlike the appellant in *Widener*, the Huskinses do not argue the dismissal prejudiced them; rather, they ask this court to address the merits of the circuit court's decision as to the enforceability of the Arbitration Clause and reverse the order compelling arbitration. We find the order granting the motion to dismiss and compelling arbitration is appealable, and we address the merits because the issue is capable of repetition. *See Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584-85 (finding an order compelling arbitration was not immediately appealable but reviewing the issues on the merits because they were "capable of repetition and need[ed] to be addressed").

## II. ENFORCEABILITY OF ARBITRATION AGREEMENT

The Huskinses argue the Arbitration Clause was unenforceable because it included unconscionable terms that cannot be severed, including the Limited Warranty provision and a "limitation of claims" provision. We address each of these arguments in turn.

### A. Limited Warranty Provision

The Huskinses challenge the validity of the Limited Warranty provision and assert it must be read together with the Arbitration Clause because it encompassed warranty claims and the provisions cross-referenced one another and were thus substantively intertwined. We disagree.

"Arbitration clauses are separable from the contracts in which they are imbedded." *Hous. Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003) (quoting *Jackson Mills Inc. v. BT Cap. Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994)). "[T]he issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." *Id.* (alteration in original) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the

overall contract is unenforceable specifically relates to the arbitration provision."[4] *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (quoting *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (noting the "*Prima Paint* doctrine" required that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

In *D.R. Horton*, instead of considering the arbitration agreement separately from the entire contract, our supreme court considered the warranty provisions and the arbitration provisions of the contract together and construed "the entirety of paragraph 14, entitled 'Warranties and Dispute Resolution,' as the arbitration agreement." 417 S.C. at 48, 790 S.E.2d at 4. The court stated,

> As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

*Id.* The Arbitration Clause in this case differs from that in *D.R. Horton*. Although *D.R. Horton* also involved a home purchase agreement, there, Paragraph 14 of the agreement was titled "Warranties *and Dispute Resolution*" and consisted of subparagraphs 14(a) through 14(j). *Id.* at 45, 790 S.E.2d at 2 (emphasis added). Two of the subparagraphs stated the parties agreed to arbitrate any disputes related to the warranties contained in the purchase agreement and any claims arising out of the construction of the home. *Id.* In most of the remaining subparagraphs of Paragraph 14, D.R. Horton expressly disclaimed all warranties except for a ten-year structural warranty, and subparagraph 14(i) stipulated D.R. Horton was

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[4] Although the circuit court determined the UAA governed the parties' dispute, the application of the UAA as opposed to the FAA does not affect our analysis. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole."); *Simpson*, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1 (noting that "even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause").

not "liable for monetary damages of any kind." *Id.* Here, however, the Limited Warranty provision is a completely separate provision in the Purchase Agreement and contains no reference to arbitration or the Arbitration Clause. Further, the Arbitration Clause contains no cross references to the Limited Warranty provision. Because the two provisions were completely separate and did not cross-reference one another, this court need not construe them together to determine the scope of the warranties or how different disputes were to be handled. This case is therefore distinguishable from *D.R. Horton*, and the circuit court did not err in reviewing the Arbitration Clause in isolation from the remainder of the Purchase Agreement, including the Limited Warranty provision.

**B. Limitation of Claims Provision**

The Huskinses argue the Arbitration Clause was unenforceable because it required a demand for arbitration to be filed within ninety days of the date the claim, dispute, or other matter arose, or within thirty days if the claim, dispute, or other matter arose from either party's termination of the Purchase Agreement or such claims would be forever barred. They assert this "limitation of claims" provision restricted the statutory limitations period from three years to ninety days and was not severable from the Arbitration Clause. The Huskinses additionally contend that, as a practical matter, this provision applied only to purchasers and such "lack of mutuality" further demonstrated the "one-sided and oppressive nature" of the arbitration clause. We agree this provision abbreviates the statute of limitations period and is one-sided and oppressive. Nevertheless, we find the arbitration clause is enforceable because the unconscionable provision is severable.

"Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *see also Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), ("[W]hen considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration."), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021. "[A] contract may be invalid—and courts may properly refuse to enforce it—when it is unconscionable. A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability." *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "Unconscionability has been recognized as

the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

**1. Unconscionability**

**a. Absence of Meaningful Choice**

We conclude the evidence showed the absence of a meaningful choice on the part of the Huskinses. *See id.* at 25, 644 S.E.2d at 669 ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989))); *id.* ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue."). 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.

**b. Oppressive and One-Sided Terms**

Next, we conclude the evidence does not support the circuit court's finding that the terms contained in the limitation of claims provision were not one-sided and oppressive.

South Carolina provides for a three-year statute of limitations in an "action upon a contract, obligation, or liability, express or implied." S.C. Code Ann. § 1-3-530(1) (2005). 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.

The final two sentences of the Arbitration Clause effectively shorten the statutory period to ninety days and provide an even shorter period of thirty days when the "claim, dispute[,] or matter in question" arises from either party's termination of the Purchase Agreement. Even though this provision purports to apply equally to both parties, as a practical matter, it would disproportionately affect the homebuyer's ability to bring a claim. Further, it is not "geared towards achieving an unbiased decision by a neutral decision-maker." *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. We conclude this provision violates sections 15-3-140 and 15-3-530 and is therefore unconscionable and unenforceable. *See id.* at 29-30, 644 S.E.2d at 671 ("The general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution."). We next consider whether this provision is severable or renders the entire Arbitration Clause unenforceable.

**2. Severability**

Although the Arbitration Clause contains no severability clause, section 36-2-302(1) allows this court to effectively sever the unconscionable provision. *See* S.C. Code Ann. § 36-2-302(1) (2003) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); *see also Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result."); *see also Doe*, 430 S.C. at 615, 846 S.E.2d at 880 ("Courts have discretion though to decide whether a[n arbitration clause] is so infected with unconscionability that it must be scrapped

entirely, or to sever the offending terms so the remainder may survive."); *cf. D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 (declining to consider "whether the unconscionable provisions [we]re severable" when the agreement lacked a severability clause and because "doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions").

As we stated, we find the final two sentences of the Arbitration Clause shortening the statutory limitations period were unconscionable. Nevertheless, we conclude sections 15-3-540 and 36-2-302(1) operate to sever this portion of the Arbitration Clause. Here, as in *D.R. Horton*, the Arbitration Clause did not contain a severability clause. On the other hand, unlike *D.R. Horton*, the offending provision is distinct and constitutes the final two sentences of the Arbitration Clause. Thus, notwithstanding the lack of a severability clause, it is possible for this court to simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement. Based on the foregoing, we sever the final two sentences from the remainder of the Arbitration Clause and we affirm the circuit court's order compelling arbitration as modified.

## III. DISMISSAL OF WARRANTY CLAIMS

Finally, we find the Huskinses' contention that the circuit court erred in dismissing claims related to the Limited Warranty provision when it found the Limited Warranty "f[ell] outside" of the Arbitration Clause is without merit. The circuit court did not find such claims fell outside of the scope of the Arbitration Clause. Rather, in considering the enforceability of the Arbitration Clause, the circuit court concluded the Limited Warranty provision was separable and that the Arbitration Clause did not specifically limit the Huskinses' ability to bring a warranty action in a judicial setting. The circuit court additionally concluded the Arbitration Clause provided that all claims and disputes arising out of the Purchase Agreement were subject to arbitration. Thus, we conclude this argument is without merit.

## CONCLUSION

For the foregoing reasons, we find the order dismissing the Huskinses' complaint and compelling arbitration was immediately appealable. We affirm, as modified, the order dismissing the complaint and compelling arbitration.

**AFFIRMED AS MODIFIED.**

**MCDONALD and HEWITT, JJ., concur.**

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Jun 15 2022
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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Appellate Case No. 2018-000889

Case No. 2017-CP-40-03697

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

v.

Mungo Homes, LLC, .....Respondent.

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**PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT**

---

Appellants Amanda Leigh Huskins and Jay R. Huskins respectfully petition this Court pursuant to Rule 221, SCACR, for rehearing of the above-captioned matter.

**SUMMARY**

This matter regards the court's authority to sever unconscionable and oppressive provisions in an adhesive, take-it-or-leave-it arbitration clause when Respondent Mungo Homes ("Mungo"), the drafter, failed to include any severability provision. In severing the one-sided and

oppressive provisions from the arbitration clause and enforcing the remainder against the Huskins who lacked any meaningful opportunity to agree to such clause in the first instance, this Court's opinion of June 1, 2022, (the "Opinion") disregards South Carolina common law contract principles giving considerable skepticism to such agreements to arbitrate, construing contracts against their drafters, and refusing to rewrite parties' contracts without any express intent of the parties to do so. The Court instead relies on inapplicable statutory authority and departs from the previous position of the South Carolina Supreme Court refusing to sever unconscionable provisions in an arbitration clause contained within a large homebuilder's residential sales contract absent a specific severability clause.

## ARGUMENT

### I. THIS COURT SHOULD RECONSIDER ITS DECISION TO SEVER UNCONSCIONABLE PROVISIONS IN THIS ADHESIVE ARBITRATION CLAUSE AND ENFORCE THE REMAINDER WHEN THE DRAFTER FAILED TO INCLUDE THE POWER TO SEVER.

This case involves a contract of adhesion to sell a new home and is not subject to any statutory provision related to severability of unconscionable terms in contracts falling under the scope of the Uniform Commercial Code. Further, no other South Carolina statute provides the court authority to sever unconscionable provisions in an arbitration provision in a new home buyer agreement without the express intent of the parties. The severability of any portion of the arbitration clause at issue is subject to South Carolina common law contract principles. As the court noted, "Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016).

Here, Mungo drafted the Purchase Agreement and failed to include any severability clause within the Agreement, including the arbitration clause at issue. Therefore, the parties, and more specifically the drafter Mungo, did not express any intent to sever any provision of the arbitration clause to save the remainder. The Huskins, moreover, lacked any meaningful choice to enter into this contract with an arbitration clause in the first instance. Such alleged agreement therefore should be given "considerable skepticism" by this Court. *See Smith v. D.R. Horton*, *infra.* Because Mungo drafted the arbitration clause without any severability clause, this Court should not read any such provision into the contract in the drafter's favor.

### A. THE COURT'S DECISION TO SEVER THE UNCONSCIONABLE PROVISIONS OF THE ARBITRATION CLAUSE WAS PREMISED UPON STATUTORY AUTHORITY THAT (1) IS NOT APPLICABLE TO THE ARBITRATION CLAUSE AT ISSUE IN THIS MATTER AND (2) IS UNRELATED TO THE ISSUE OF SEVERABILITY.

In severing the offending provisions of the arbitration clause in this contract of adhesion, the Court erroneously relies upon two South Carolina statutes, neither of which is applicable to the contract at issue. First, the Court cites section 36-2-302(1) of the South Carolina Code of Laws as providing it the authority to sever the unconscionable provisions from the arbitration clause in this case. However, 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 this Court 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.").

This Court further relies upon section 15-3-140 of the South Carolina Code of Laws[1] as authority for its decision to sever the unconscionable provisions of the arbitration clause. This statute, however, is unrelated to the issue of whether an arbitration clause can be saved by severing unconscionable provisions within it. Nothing within the statutory language of section 15-3-140 provides the court the authority to rewrite an arbitration clause in a contract of adhesion in the new homebuyer context by severing provisions that offend the statute itself.

### B. IN ABSENCE OF A SEVERABILITY CLAUSE WITHIN AN ADHESIVE ARBITRATION CLAUSE, THE COURT ERRED IN DECIDING TO SEVER THE UNCONSCIONABLE PROVISIONS AND ENFORCE THE REMAINDER.

The court should not and cannot step in to rewrite the arbitration clause in Mungo's favor. Such judicial activity contravenes the South Carolina Supreme Court's ruling in *Smith v.*

[1] The Opinion cites section 15-3-540 of the South Carolina Code of Laws. Petitioners presume the reference to section 15-3-540 is a scrivener's error and the Court intended to rely upon section 15-3-140 instead, which was at issue on this appeal and prohibits any party from drafting a contract that restricts the statute of limitations for contractual causes of action.

*D.R. Horton*, exceeds the authority exercised by this Court in *Doe v. TCSC, LLC*, and is generally repugnant to South Carolina common law related to contracts of adhesion in several respects. In *Smith v. D.R. Horton*, the South Carolina Supreme 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. The 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 this Court acknowledged, 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, this Court has engaged in rewriting the parties' contract in contravention of well-established South Carolina law—something that the South Carolina Supreme Court specifically refused to do in *Smith v. D.R. Horton.*

This Court cites with approval instead a court of appeals opinion in *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2021), for the proposition that courts have discretion to sever offending provisions in a contract and enforce the remaining terms. In *Doe*, however, the contract contained a severability clause and the court of appeals specifically relied on this severability provision for providing it the authority to sever unconscionable provisions from the arbitration provision to give effect to the remainder. *Doe*, 430 S.C. at 615, 846 S.E.2d at 880-81 ("The Agreement here contains a severability clause, reflecting that if any part of the contract is found 'unenforceable for any reason, the remainder shall remain enforceable.' **Given this intent <u>and</u>** our belief that removing the unconscionable clause does not disrupt the core of the parties'

bargain, we disagree with the circuit court that the entire Agreement must fall.") (emphasis added). Thus, in *Doe*, it was not enough that the court believed removing the unconscionable clause would not disrupt the core of the parties' bargain. The court also required that the intent to sever be expressed in plain terms by the parties to the contract. Because Mungo failed to include a severability clause anywhere in its Purchase Agreement, the *Doe* court's decision to sever the offending provisions from the arbitration clause and save the remainder is inapposite to this case. Rather, *Smith v. D.R. Horton* is controlling. *See also*, *e.g.*, *One Belle Hall Property Owners Assoc., Inc. et al. v. Trammell Crow Residential Co. et al.*, 418 S.C. 51, 63-64, 791 S.E.2d 286, 292-94 (Ct. App. 2016) (before severing offending provisions from an arbitration clause, stating "unlike the arbitration agreement in D.R. Horton," the contract included a severability clause); *Simpson v. MSA of Myrtle Beach, Inc. et al.*, 373 S.C. 14, 34-35, 644 S.E.2d 663, 673-74 (severing the entire arbitration clause where there was a severability clause, and portions of the arbitration clause were unenforceable).

Further, this court's 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 this Court 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. 10, "a. Absence of Meaningful Choice"). Thus, the starting point for this 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, this Court's 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.").

In the context of an adhesion contract, such favoritism is particularly unjust because Mungo included this arbitration clause in standard small print on the last page of the Purchase

Agreement. Mungo also failed to suggest in the adhesive arbitration provision that some provisions set forth therein may violate South Carolina law or note that in such case the limitation would be inapplicable. None of its purchasers therefore have been on notice that Mungo's unconscionable restrictions could, and indeed attempt to, circumvent South Carolina statutory law regarding the time for which to assert claims against Mungo. Mungo knew or should have known that this provision violated South Carolina statutory law when it drafted this arbitration provision. Sections 15-3-140 and 530 of the South Carolina Code of Laws have been in effect for decades. For all of the above reasons, this Court's decision to sever the unconscionable provisions from the adhesive arbitration clause to enforce the remainder, when the drafter, Mungo, failed to include any authority to sever such provision, was in error.

## CONCLUSION

The statutes relied upon by this Court to sever the unconscionable provisions Mungo's adhesive arbitration clause are inapplicable. In addition, this Court's Opinion departs from the South Carolina Supreme Court's refusal to sever unconscionable provisions in an arbitration clause from the remainder absent the parties' inclusion of a provision to sever. The effect of this Court's decision to sever the offending provisions from the arbitration clause is to unjustly excuse the drafter Mungo's intentional efforts to avoid liability to its purchasers by inserting unconscionable provisions within its arbitration clause. If this Court's Opinion stands, Mungo will suffer no meaningful consequences for its inclusion of unconscionable terms in its arbitration clause solely to benefit Mungo. Moreover, such a result is squarely at odds with South Carolina's long-standing policy of protecting the rights of purchasers of new residential construction. *See, e.g., Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 341-42, 384 S.E.2d 730, 734-35 (1989).

For these reasons, this Petition should be granted, and the Opinion should be withdrawn and substituted with a new opinion refusing to sever the unconscionable provisions in this adhesive arbitration clause and finding the entire arbitration clause unenforceable.

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APPEAL FROM RICHLAND COUNTY
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Case No.: 2017-CP-40-03697
Appellate Case No. 2018-000889

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

v.

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**RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR REHEARING**

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Pursuant to Rule 221(a), SCACR, Respondent Mungo Homes, LLC ("Respondent") hereby submits this return to Appellants' Petition for Rehearing.

## INTRODUCTION

Appellants seek rehearing of this Court's decision on a single issue; this Court's unanimous decision to sever the final two sentences of the parties' arbitration agreement, which this Court determined sought to reduce the statute of limitations for claims under the contract. As explained more fully below, rehearing of this matter is not warranted under Rule 221 because this Court's unanimous opinion is correct under the law, and does not overlook or misapprehend any points of fact or law. Indeed, the single issue that is the subject of the petition for rehearing was "considered and expressly decided against the [appellant] by this Court in the opinion filed." *Clemmons v.*

*Nicholson*, 188 S.C. 124, 132 198 S.E. 180, 183 (1938). Therefore, Respondent respectfully requests that this Court deny Appellants' petition for rehearing.

## STANDARD OF REVIEW

In order to prevail on a petition for rehearing, the petitioner must demonstrate the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Retirement Sys*., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The purpose of a petition for rehearing "is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Herron* at 466, 719 S.E.2d at 643 (quoting *Kennedy v. S.C. Retirement Sys*., 349 S.C. at 532, 564 S.E.2d at 322). Thus, our appellate courts will deny a petition for rehearing whenever "the points set forth in the petition have all been considered and expressly decided against the respondent by this Court in the opinion filed." *Clemmons* 188 S.C. at 132, 198 S.E. at 183 (1938).

## ARGUMENT

In their petition for rehearing, Appellants reassert the same arguments previously made to this Court. Appellants assert, without legal support, that unconscionable terms in arbitration agreements are not severable in the absence of a severability provision contained within the arbitration agreement. (See, App. Final Reply Brief at Sec. III). Accordingly, the petition for rehearing does not identify an issue overlooked or misapprehended by this Court, but simply repeats arguments previously made and rejected by this Court with which the Appellants disagree. For this reason, the petition should be denied.

Furthermore, while the petition for rehearing is procedurally defective, the arguments made by Appellants are likewise without merit.

First, it is indisputable that S.C. Code Section 15-3-140 unambiguously applies to *all* contracts in South Carolina. The statute does not contain a carve out making it inapplicable to arbitration agreements.

Moreover, this Court correctly held that it could sever unconscionable provisions in an arbitration agreement in the absence of a severability provision where the clear intention of the parties to arbitrate would not be disturbed.

Accordingly, this Court's well-reasoned decision should remain and the petition for rehearing should be denied.

## I. This Court correctly held that S.C. Code section 15-3-140 applies to *all* contracts in South Carolina, including arbitration agreements.

In its filed decision, this Court relied on S.C. Code section 15-3-140 to sever the final two sentences of the subject arbitration agreement. The statutes states:

> 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.

*Id.* (emphasis added).

Here, the Court determined that the final two sentences of the arbitration agreement attempted to do that which is subject to Section 15-3-140; shorten the statute of limitations. Section 15-3-140 is unambiguous in that it applies equally to "*any contract of whatsoever nature*." An arbitration agreement is unquestionably included in "*any contract of whatsoever nature*."

Nonetheless, Appellants argue, without any legal authority, that arbitration agreement are excluded from Section 15-3-140. This argument is pure conjecture and contrary to the

unambiguous text of the statute. Thus, Appellants' argument that arbitration agreements are not subject to Section 15-3-140 is without merit.

Furthermore, the contract between the parties was for the construction of a new construction home that was not yet built. (R. p. 28). In this respect, it is indisputable that the Federal Arbitration Act ("FAA") applies to the contract. *See*, *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 594-595, 553 S.E.2d 110, 117-118 (2001).

As the United States Supreme Court has held, a state's law cannot place arbitration agreements on unequal grounds with all other contracts in the State. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011). In Appellant's petition for rehearing, they advocate for a reading of Section 15-3-140 that puts arbitration agreement on unequal grounds with all other contracts in South Carolina. This is expressly prohibited by the Federal Arbitration Act and the United States Supreme Court.

Accordingly, this Court correctly held that Section 15-3-140 served to sever the final two sentences of the arbitration agreement and left the remainder of the arbitration agreement intact because it did not "defeat the essential purpose" of the arbitration agreement.

## II. The absence of a severability provision within the arbitration agreement does not prohibit severability of unconscionable clauses

In their petition for rehearing, Appellants argue that severing of the final two sentences of the arbitration agreement is "rewriting" the arbitration agreement between the parties. This argument, however, is without merit. Indeed, this Court's filed decision expressly recognizes that severing the final two sentences (as required by section 15-3-140) *does not* rewrite the parties clear and unambiguous agreement to arbitrate all claims arising under the contract between the parties.

In fact, this Court's decision does not rewrite anything at all. It simply removed two final sentences that have no relationship to the intention of the parties to arbitrate their claims and were deemed by this Court to be unenforceable in the first place.

Additionally, Appellants argue that South Carolina law prohibits the severing of contract provisions where no severability clause is contained within the contract. Supporting this argument, Appellants rely on a single footnote in *Smith v. D.R. Horton* advising that the Court did not undertake to analyze whether unconscionable provisions in an arbitration agreement should be severed. *See, Smith v. D.R. Horton*, 417 S.C. 42, 50 fn. 6, 790 S.E.2d 1, 5 fn. 6 (2016). However, Appellants' broad sweeping argument is not the holding in *Smith v. D.R. Horton,* nor is it consistent with long standing common law principled relied on by this Court in its filed decision.

The *Smith v. D.R. Horton* Court did not hold that contract provisions are inseverable absent a severability clause. Instead, the Court determined that the unconscionable provisions *in that case* were so intertwined with the agreement to arbitrate that it declined to analyze whether unconscionable provisions were severable. *Id.*

Here, as recognized by this Court's unanimous opinion, the agreement to arbitrate in this case is not intertwined with other provision of the contract, and there are no cross-references. Instead, there is standalone agreement to arbitrate. Thus, the footnote in *Smith v. D.R. Horton*--to the extent a footnote is precedential--is not applicable to this case.

Rather, this Court correctly recognized that it is well established under South Carolina law that a Court may sever unconscionable provisions in a contract where it does not disrupt the intentions of the parties, or where striking the entire contract would lead to an unconscionable result. *See, Doe v. TCSC LLC,* 430 S.C. 602, 615, 846 S.E.2d 874 (Ct. App. 2020)("courts have discretion though to decide whether a contract is so infected with unconscionability that it must be

scrapped entirely, or to sever the offending terms so the remainder may survive.") citing, *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) ("The entirety or severability of a contract depends primarily upon the intent of the parties . . . ."); and *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result.").

In the matter at bar, Appellants cite to no legal authority, other than their broad interpretation of footnote 6 in *Smith v. D.R. Horton*, demonstrating that Courts are unable to strike unconscionable provisions in a contract absent a severability clause. Indeed, Respondent is unaware of any such authority. Striking an entire contract based upon a single unconscionable clause that does not affect the intention of the parties to the contract would lead to unconscionable results[1].

Here, the intention of the parties to arbitrate all claims is clear and unambiguous. Striking the final two sentences of the arbitration agreement does not change this clear and unambiguous intention of the parties. Accordingly, the Court correctly determined that the final two sentences of the arbitration agreement could be severed, as required by S.C. Code section 15-3-140, without disturbing the clear intention of the parties to arbitrate all claims.

[1] Appellants reliance on cases dealing with non-competition provisions is without merit. First, the agreement at issue in this case is an arbitration agreement, not a non-competition agreement. Moreover, the law concerning non-competition agreements does not rely on whether there is a severability provision. Rather, the law concerning non-competition agreements states that a court may not insert its own language into the non-compete agreement to make the provision conscionable. For instance, a court cannot rewrite the geographic restriction of a non-compete where the geographic restriction in the agreement between the parties is overly broad. This is applicable to a non-competition agreement even where the agreement contains a severability provision. Here, the Court need not rewrite any provisions in the contract. Striking the last two sentences of the arbitration agreement does nothing to alter the parties' intention to arbitrate all disputes arising out of the contract.

## CONCLUSION

Appellants' petition for rehearing merely restates the same arguments made to this Court previously, which the Court correctly rejected in its filed decision.

Furthermore, this Court correctly determined that it could sever the last two sentences of the arbitration agreement without affecting the intention of the parties' agreement to arbitrate.

Accordingly, this Court did not overlook or misapprehend any facts or issues in its filed opinion, and the petition for rehearing should be denied.

This 4th day of July, 2022.

Respectfully submitted by,

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**REPLY TO RETURN TO PETITION FOR REHEARING**

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Pursuant to Rule 240, SCACR, Appellants Amanda Leigh Huskins and Jay R. Huskins submit this reply to Respondent's return in opposition to their petition for rehearing of the above-captioned matter. Tellingly, Respondents fail to refute the issue and errors of law Appellants raised in their Petition for Rehearing.

First, Respondents do not deny that the issue regards this Court's authority to sever unconscionable and oppressive provisions in an adhesive, take-it-or-leave-it arbitration clause when Respondent Mungo Homes ("Mungo"), the drafter, failed to include any severability provision.

Second, Respondents do not deny that in severing the one-sided and oppressive provisions from the arbitration clause and enforcing the remainder against the Huskins who

lacked any meaningful opportunity to agree to such clause in the first instance, this Court's June 1, 2022 Opinion fails to account for several principles of contract law in its reasoning, including:

(1) South Carolina common law contract principles give considerable skepticism to adhesive, one-sided and oppressive agreements to arbitrate, and the Court did not afford due skepticism to the adhesive arbitration clause at issue in this matter;

(2) South Carolina common law contract principles construe contracts against their drafters, and the court impermissibly construed the adhesive arbitration clause at issue in this matter in the drafter's favor by taking the position that, setting the unconscionable sentences aside, the core of the parties' agreement remained intact when in fact the parties did not truly bargain for the paragraph in the first instance;

(3) South Carolina common law refuses to step in and actively rewrite parties' contracts without any express intent of the parties to do so, and the Court impermissibly rewrote the arbitration clause by striking out two unconscionable sentences within the adhesive arbitration paragraph when there was no authority expressed by the parties in the contract for the court to do so in such circumstances.

"Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016).

Third, remaining faithful to the common law principles of contract stated above, Respondents fail to discuss, much less refute, in any meaningful manner the fact that no South Carolina court has ever struck out (or blue penciled) unconscionable sentences within an adhesive arbitration paragraph to save the remainder, without that arbitration paragraph or the contract as a whole expressing the parties' intent to do so under such circumstances.

To this end, Respondents do not even address the Court's error in relying on section 36-2-302(1) of the South Carolina Code of Laws from the Uniform Commercial Code as providing it the authority to sever the unconscionable sentences from the adhesive arbitration clause in this case. That error in and of itself is grounds to grant Appellants' Petition.

Further, Respondents' discussion of section 15-3-140 of the South Carolina Code of Laws misses the mark. Appellants agree that this statute applies to all contracts. What it does not do is provide authority for the court to strike out or blue pencil two sentences set within an adhesive, one-sided, and oppressive arbitration clause, where the drafter of the contract made no provision for the same. And Respondents provide no authority to refute Appellants' position related to this statute in this regard.

Moreover, Respondents' attempt to disavow the binding authority expressed in *Smith v. D.R. Horton*, is unavailing. There is no canon of construction that allows this court to disavow the opinion of the South Carolina Supreme Court just because it may be expressed in a footnote rather than in the body of an opinion. Whether set forth in the body of the opinion or in a footnote, the South Carolina Supreme Court's decision in *D.R. Horton* is binding authority for any lower court. The Supreme Court in *D.R. Horton* clearly affirmed that a court should not sever offending provisions from an arbitration clause in the absence of a specific severability clause. 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6.

Fatally though too, Respondents fail to resolve, much less mention, the issue raised to this Court regarding *Doe v. TCSC, LLC,* 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2021). The court in *Doe* specifically stated that it could sever the offending provisions at issue in that case because (1) removing unconscionable clauses would not disrupt the core of the parties' bargain, and (2) the parties plainly express the intent to sever in such circumstances in the contract. But

Mungo failed to include a severability clause anywhere in its Purchase Agreement, and this Court does not account for that difference when relying on *Doe* for its authority to sever the unconscionable sentences from the adhesive arbitration paragraph.

Rather, Respondents encourage this Court to make new common law in South Carolina related to contract interpretation and enforceability. Respondents encourage this Court to uphold its decision and go further than the court in *Doe* (and any other court in South Carolina for that matter, including in derogation of the South Carolina Supreme Court in *D.R. Horton*), by striking provisions within a contract without the authority expressed by the parties within the contract for the court to do so, so long as the court finds that doing so will not disturb the core of the parties' bargain. South Carolina courts should not get into the business of determining what is the "core" of the parties' bargain in a contract. Such ruling could easily extend to contractual terms well beyond adhesive arbitration agreements and will be a slippery slope deteriorating long-standing principles of common law contract principles. Contracts are supposed to be interpreted and enforced pursuant to the plain language of the four corners of the contract in any regard. Mungo, the drafter, did not include any provision to sever unconscionable terms from the whole, and accordingly, the court should find that it has no authority to sever the unconscionable sentences from this adhesive arbitration clause, and thus the entire adhesive arbitration paragraph must fail.

Finally, such favoritism for the drafter of a contract of adhesion has no place in South Carolina common law and is unjust when considering that:

(1) Mungo included this arbitration clause in standard small print on the last page of the Purchase Agreement; and

(2) Mungo failed to suggest anywhere in the adhesive arbitration provision or elsewhere in the contract that some provisions set forth therein may violate South Carolina law or in such case be considered illegal and inapplicable; and

(3) Mungo, unlike the Huskins, certainly knew or should have known the unconscionable sentences at issue in this matter violated South Carolina law when it drafted the arbitration provision.

For these reasons and those set forth in the Petition for Rehearing, this Petition should be granted, and the Opinion should be withdrawn and substituted with a new opinion refusing to sever the unconscionable provisions in this adhesive arbitration clause and finding the entire arbitration clause unenforceable.

Respectfully submitted,

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SC Court of Appeals

September 21, 2022

**VIA E-FILING**
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
ctappfilings@sccourts.org

**Re: Amanda Leigh Huskins and Jay R. Huskins v. Mungo Homes, LLC**
Appellate Case No. 2018-000889; Case No. 2017-CP-40-03697

Dear Madam Clerk:

Relevant new authority has arisen since the filing of the initial briefs in this case and the issuance of the Court's opinion on June 1, 2022. Appellant's Petition for Rehearing is pending before the Court and the following authority is relevant to the Petition for Rehearing and the Court's consideration of same. We therefore wish to bring this new authority to the Court's attention, pursuant to Rule 208(b)(7), SCACR.

The South Carolina Supreme Court recently issued its opinion in the matter of Damico *et al.* v. Lennar Carolinas, LLC; Opinion No. 28114 (filed September 14, 2022). One of the holdings of the court in the *Damico* opinion was to refuse to sever unconscionable provisions of an arbitration clause on substantive contract grounds and as a matter of public policy. These same issues are the crux of the appeal in this matter and form the basis for the Appellant's Petition for Rehearing.

Very Truly Yours,

Charles H. McDonald

CHM/rhs
Attachment

cc: Steven Raymond Kropski, Esq.
David W. Overstreet, Esq.

2022 WL 4231032
Only the Westlaw citation is currently available.
Supreme Court of South Carolina.

Patricia **DAMICO** and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

**LENNAR** CAROLINAS, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

**Lennar** Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

of whom Patricia **Damico**, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

Appellate Case No. 2020-001048
|
Opinion No. 28114
|
Heard February 1, 2022
|
Filed September 14, 2022

**Synopsis**

**Background:** Homeowners in development brought action against developer and general contractor alleging defective construction. The Circuit Court, Berkeley County, J. C. Nicholson, J., 2016 WL 11549619, denied developer's motion to compel arbitration. Developer appealed. The Court of Appeals, 430 S.C. 188, 844 S.E.2d 66, reversed and remanded. Homeowners petitioned for writ of certiorari, which was granted.

**Holdings:** The Supreme Court, Kittredge, J., held that:

[1] Federal Arbitration Act (FAA) governed whether homeowners could be compelled to arbitrate;

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[2] only one section of purchase and sale agreements entitled "Mediation/Arbitration of Disputes," as opposed to entirety of purchase and sale agreements and limited home warranty agreements, would be considered for purposes of unconscionability analysis;

[3] arbitration agreement was unconscionable; and

[4] severability clause in purchase and sale agreements was unenforceable as matter of public policy with respect to unconscionable provisions of arbitration agreement.

Affirmed in part, reversed in part, and remanded.

**Procedural Posture(s):** Petition for Writ of Certiorari; On Appeal; Motion to Compel Arbitration.

West Headnotes (22)

**[1] Alternative Dispute Resolution**

Purchase and sale agreements between homeowners and developer that contained arbitration clauses involved interstate commerce, and thus, Federal Arbitration Act (FAA) governed whether homeowners could be compelled to arbitrate their defective construction claims, since subject transactions involved construction of new homes built to homeowners' specifications rather than purchase of pre-existing homes. 9 U.S.C.A. § 1 et seq.

**[2] Alternative Dispute Resolution**

In determining whether arbitration agreements between homeowners and developer were unconscionable, only one section of purchase and sale agreements entitled "Mediation/Arbitration of Disputes," as opposed to entirety of purchase and sale agreements and limited home warranty agreements, would be considered; subject section set forth entirety of arbitration agreement by dealing solely with scope of arbitration and requisite formalities accompanying an arbitration proceeding, including procedural rules and number of arbitrators required to resolve any dispute, and section itself did not refer to limited warranty or incorporate it by reference, despite other portions of agreements extensively cross-referencing one another and incorporating one another by reference.

**[3] Alternative Dispute Resolution**

Federal Arbitration Act (FAA) requires courts to separate validity of arbitration clause from validity of contract in which it is embedded. 9 U.S.C.A. § 1 et seq.

**[4] Alternative Dispute Resolution**

Validity of arbitration clause is matter for courts, whereas validity of contract as whole is matter for arbitrator.

**[5] Alternative Dispute Resolution**

In conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.

**[6] Alternative Dispute Resolution**

Court must first define scope of arbitration agreement before considering whether that agreement is unconscionable.

**[7] Alternative Dispute Resolution**

Arbitration agreement contained in purchase and sale agreements between homeowners and developer was unconscionable; purchase and sale agreements were contracts of adhesion given to all buyers with only few blank spaces to fill in, including buyer's name, relevant property address, and purchase price, developer was significantly more sophisticated than buyers in home-buying transactions, and number of provisions contained egregiously one-sided terms, including provision that allowed developer, at its sole election, to include or exclude subcontractors in arbitration

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proceedings, thereby stripping homeowners of right to be sole decider of whom to sue for any injuries.

**[8] Alternative Dispute Resolution**

Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

**[9] Contracts**

"Unconscionability" is the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.

**[10] Contracts**

A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case.

**[11] Contracts**

The same principles of unconscionability apply to contract terms and arbitration provisions alike.

**[12] Contracts**

The touchstone of the analysis of whether a contract is unconscionable begins with the presence or absence of meaningful choice.

**[13] Contracts**

In determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, and renders it unconscionable, courts must consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant.

**[14] Contracts**

Adhesion contracts are not per se unconscionable.

**[15] Contracts**

Adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed.

**[16] Action**

The plaintiff is master of his own complaint and is sole decider of whom to sue for his injuries.

**[17] Alternative Dispute Resolution**

Severability clause in purchase and sale agreements between homeowners and developer was unenforceable as matter of public policy with respect to unconscionable provisions of arbitration agreement; unconscionable provision governing persons or entities that could properly be joined as parties to arbitration proceedings was material term of agreement, such that severance would result in materially rewriting contract, agreement was adhesion contract, such that it was doubtful any true agreement ever existed to sever any oppressive provisions from arbitration agreement, contract involved consumer transaction of construction and sale of new home, and South Carolina had deeply-rooted and long-standing policy of protecting new home buyers.

**[18] Contracts**

If court finds contract clause unconscionable, court may refuse to enforce contract clause, or it may limit application of unconscionable clause so as to avoid any possible unconscionable result.

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**[19] Contracts**

In exercising discretion to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever offending terms so remainder may survive, courts should be guided by parties' intent.

**[20] Contracts**

Blue-penciling an unconscionable agreement is within the court's discretion.

**[21] Contracts**

Generally, courts will not enforce contracts that violate public policy.

**[22] Contracts**

Public policy, as grounds for refusing to enforce a contract, may be expressed in constitutional or statutory authority or in judicial decisions.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal from Berkeley County, J.C. Nicholson Jr., Circuit Court Judge

**Attorneys and Law Firms**

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James Lynn Werner, Jenna Brooke Kiziah McGee, and Katon Edwards Dawson Jr., all of Parker Poe Adams & Bernstein LLP, of Columbia, for Respondent **Lennar** Carolinas, LLC; Robert Trippett Boineau, Heath McAlvin Stewart III, and John Adam Ribock, all of McAngus, Goudelock & Courie, LLC, of Columbia, for Respondent Spring Grove Plantation Development, Inc.; Carmen Ganjehsani, James H. Elliott Jr., and Francis Heyward Grimball, all of Richardson, Plowden, & Robinson, of Columbia, for Respondents Manale Landscaping, LLC and Decor Corporation; Samia Hanafi Nettles, of Richardson Plowden & Robinson, PA, of Charleston, for Respondent Decor Corporation; Theodore L. Manos, of Robertson Hollingsworth Manos & Rahn, LLC for Respondent Super Concrete of SC; David Cooper Cleveland and Trey Matthew Nicolette, both of Clawson and Staubes, LLC, of Charleston, for Respondent Myers Landscaping, Inc.; Rogers Edward Harrell III, of Murphy & Grantland, PA, of Columbia, for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.; Steven L. Smith and Zachary James Closser, both of Smith Closser, of Charleston, and Samuel Melvil Wheeler, of Whitfield-Cargile Law, PLLC, of Brevard, NC, all for Respondent Knight's Concrete Products, Inc.; Brent M. Boyd and Timothy J. Newton, both of Murphy & Grantland, PA, of Columbia, for Respondents Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC; Alan Ross Belcher Jr. and Elizabeth Wieters, both of Hall Booth Smith, PC, of Mount Pleasant, and Christine Companion Varnado, of Siebels Law Firm, of Charleston, all for Respondent Guaranteed Framing, LLC; Erin DuBose Dean, of Tupper, Grimsley, Dean & Canaday, PA, of Beaufort, for Respondents LA New Enterprises Construction, Inc. and Raul Martinez Masonry; Stephen Lynwood Brown and Catherine Holland Chase, both of Clement Rivers, LLP, of Charleston, and Preston Bruce Dawkins Jr., of Aiken Bridges Elliott Tyler & Saleeby, PA, of Florence, all for Respondent Alpha Omega Construction Group, Inc.; and Jenny Costa Honeycutt, of Best Honeycutt, PA, of Charleston, for Respondent South Carolina Exteriors, LLC; Clarke W. DuBose, of Haynsworth Sinkler Boyd, PA, of Columbia, for Respondent Southern Green, Inc.; Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Builders Firstsource-Southeast Group, LLC; Ronald G. Tate Jr., of Gallivan, White & Boyd, PA, and Robert Batten Farrar, of Rogers Townsend, LLC, both of Greenville, for Respondent Volkmar Consulting Services, LLC; Sidney Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent DVS, Inc.; David Shuler Black, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent TJB Trucking/Leasing, LLC; Shanna Milcetich Stephens and Wade Coleman Lawrimore, both of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent A.C.&A. Concrete, Inc.; John Elliott Rogers II, of Ward Law Firm, PA, of Spartanburg, for Respondent Land/Site Services, Inc.; David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, for Respondent Construction Applicators Charleston, LLC; Kathy Aboe Carlsten, of Copeland, Stair, Valz & Lovell, LLP, and N. Keith Emge Jr., of Resnick &

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Louis, PC, both of Charleston, for Respondent Civil Site Environmental, Inc.; Scott Harris Winograd, Jeffrey A. Ross, and Philip Paul Cristaldi III, all of Ross & Cristaldi, LLC, of Mount Pleasant, for Respondent Ozzy Construction, LLC.

**Opinion**

JUSTICE KITTREDGE:

***1** This case arises out of a construction defect suit brought by a number of homeowners (Petitioners) against their homebuilder and general contractor, **Lennar** Carolinas, LLC (**Lennar**). **Lennar** moved to compel arbitration, citing the arbitration provisions in a series of contracts signed by Petitioners at the time they purchased their homes. As we will explain, those contracts were contracts of adhesion. Petitioners pointed to purportedly unconscionable provisions in the contracts generally and in the arbitration provision specifically. Citing a number of oppressive terms in the contracts, and without delineating between the contracts generally and the arbitration provision specifically, the circuit court denied **Lennar's** motion to compel, finding the contracts were grossly one-sided and unconscionable and, thus, the arbitration provisions contained within those contracts were unenforceable. The court of appeals reversed, explaining that the United States Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* forbids consideration of unconscionable terms outside of an arbitration provision (the *Prima Paint* doctrine).[1] ***Damico*** *v.* ***Lennar*** *Carolinas, LLC*, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020). The court of appeals found the circuit court's analysis ran afoul of the *Prima Paint* doctrine as it relied on the oppressive nature of terms outside of the arbitration provisions.

While we agree with the court of appeals that the circuit court violated the *Prima Paint* doctrine, we nonetheless agree with Petitioners and find the arbitration provisions—standing alone—contain a number of oppressive and one-sided terms, thereby rendering the provisions unconscionable and unenforceable under South Carolina law. We further decline to sever the unconscionable terms from the remainder of the arbitration provisions for two reasons. First, doing so would require us to blue-pencil the agreement regarding a material term of the contract, a result strongly disfavored in contract disputes. Second, as a matter of policy, we find severing terms from an unconscionable contract of adhesion (in this case, an arbitration provision) discourages fair, arms-length transactions. Rather, were we to honor the severability clause in contracts such as these, it would encourage sophisticated parties to intentionally insert unconscionable terms—that often go unchallenged—throughout their contracts, believing the courts would step in and rescue the party from its gross overreach. This is not to say severability clauses in general should not be honored, because of course we are constrained to enforce a contract in accordance with the parties' intent. Rather, we merely recognize that where a contract would remain one-sided and be fragmented after severance, the better policy is to decline the invitation for judicial severance. We therefore affirm in part and reverse in part the court of appeals' decision and reinstate the circuit court's denial of **Lennar's** motion to compel.

## I.

***2** The Abbey is a subdivision in the Spring Grove Plantation neighborhood located in Berkeley County and consists of sixty-nine single-family homes constructed between 2010 and 2015. The lots in the Abbey were originally owned and developed by Spring Grove Plantation Development, Inc. (Spring Grove), which graded the area and constructed the storm drainage system and roads. Spring Grove in turn sold the partially-developed subdivision to **Lennar**, which completed construction with the help of a number of subcontractors and sold all sixty-nine homes.

In the course of development, Petitioners contracted with **Lennar** to build new homes to their specifications in The Abbey.[2] As part of those transactions, **Lennar** and Petitioners executed individual form contracts (the purchase and sale agreement) containing an arbitration provision. Section 16 of the purchase and sale agreement, titled "Mediation/Arbitration of Disputes," contains ten, numbered paragraphs setting forth the arbitration agreement. In relevant part, paragraph 1 states:

> The parties to this [purchase and sale a]greement specifically agree that this transaction involves interstate commerce and that any Dispute ... shall first be submitted to ... binding arbitration as provided by the Federal Arbitration Act .... "Disputes" (whether contract, warranty, tort, statutory or otherwise)

> [ ] shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this [purchase and sale a]greement, the Property, the Community or any dealings between Buyer and [**Lennar**]; (2) arising by virtue of any ... warranties alleged to have been made by [**Lennar**] or [**Lennar's**] representatives; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community. Buyer has executed this [purchase and sale a]greement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby.

Paragraph 4 further provides "that [**Lennar**] may, at its sole election, include [**Lennar's**] contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration" and "that the mediation and arbitration will be limited to the parties specified herein." Finally, paragraph 5 states, "Buyer and [**Lennar**] further agree that no finding or stipulation of fact, no conclusion of law, and no arbitration award in any arbitration hereunder shall be given preclusive or collateral estoppel effect in any other arbitration, judicial, or similar proceeding unless there is mutuality of parties."

After closing on their new homes, Petitioners became aware of damage to their properties, which they attributed to Spring Grove, **Lennar**, and the subcontractors (collectively, Respondents). As a result, they filed a construction defect suit against Respondents for, among other things, negligence, breach of contract, and breach of various warranties.

Subsequently, **Lennar** moved to compel arbitration under either the Federal Arbitration Act (FAA)[3] or the South Carolina Uniform Arbitration Act (SCUAA).[4] As is relevant to this appeal, **Lennar** argued Petitioners were required to arbitrate under two different contracts: (1) the purchase and sale agreement; and (2) a limited home warranty agreement (the limited warranty booklet). The arbitration provisions within both contracts are virtually identical, so for ease of reference, we will refer only to the terms in the purchase and sale agreement unless otherwise noted. Petitioners opposed **Lennar's** motion to compel arbitration, claiming, among other things, that the arbitration agreement was unconscionable.

***3** Ultimately, the circuit court denied **Lennar's** motion to compel. Initially, the circuit court found the "arbitration agreement" consisted of the entirety of the purchase and sale agreement and the limited warranty booklet, explaining the extensive cross-references between the two contracts combined them into a single agreement akin to that found in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016) (holding an arbitration agreement was not merely a standalone provision but was instead embedded in multiple contract terms, including ones dealing with a limited home warranty). Likewise, the circuit court held the contracts were unconscionable, citing a number of oppressive, one-sided provisions. The court declined to sever the unconscionable provisions because the oppressive terms pervaded the entirety of the contracts, "thereby rendering 'severability' impractical, if not impossible."[5]

**Lennar** appealed, and the court of appeals reversed. In relevant part, the court of appeals found the arbitration agreement between Petitioners and **Lennar** consisted only of Section 16 of the purchase and sale agreement. Relying on the *Prima Paint* doctrine, the court of appeals held the circuit court wrongly considered terms outside of the actual arbitration agreement. In particular, the court of appeals distinguished the "intertwined" arbitration agreement in *D.R. Horton* from the "distinct, separate" arbitration agreement in the purchase and sale agreement, and found the circuit court impermissibly considered the terms found in the limited warranty booklet. However, the court of appeals ended its analysis upon concluding that the arbitration agreement was composed entirely of Section 16 of the purchase and sale agreement.

While we agree with the court of appeals in that regard, we find it necessary to continue the analysis to determine whether any terms within Section 16 of the purchase and sale agreement were unconscionable in and of themselves. We therefore granted Petitioners' petition for a writ of certiorari.

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## II.

**[1]** As an initial matter, Petitioners argue the contracts at issue do not involve interstate commerce, and therefore **Lennar** cannot compel Petitioners to arbitrate under federal law, namely, the FAA. We disagree. The transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes. *See, e.g.*, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("[O]ur appellate courts have consistently recognized that contracts for construction are governed by the FAA."); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (explaining that contracts requiring the construction of a new building implicate interstate commerce because it would be "virtually impossible" to construct the building "with materials, equipment[,] and supplies all produced and manufactured solely within the State of South Carolina"). Because federal law preempts state law in this instance, we need not decide whether **Lennar** could also compel arbitration under the SCUAA.

## III.

***4** **[2]** Petitioners present two challenges to the court of appeals' opinion. First, Petitioners defend the circuit court's reliance on *D.R. Horton*, asserting the court of appeals erred in limiting the scope of the arbitration agreement to Section 16 of the purchase and sale agreement alone. Specifically, Petitioners claim the purchase and sale agreement and the limited warranty booklet expressly incorporate one another by reference and extensively cross-reference one another such that one cannot be read without the other. Petitioners therefore contend the two contracts should be read as one large arbitration agreement rather than two separate contracts. We agree with the court of appeals and reject Petitioners' first argument.

**[3]** **[4]** Pursuant to the *Prima Paint* doctrine, the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint*, 388 U.S. at 395, 87 S.Ct. 1801). The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").

**[5]** **[6]** As a result, as we stated in *D.R. Horton*, "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." 417 S.C. at 48, 790 S.E.2d at 4. Necessarily, then, the Court must first define the scope of the arbitration agreement before considering whether that agreement is unconscionable. *Id.* at 48 n.4, 790 S.E.2d at 3 n.4 (explaining the scope of the arbitration agreement must first be determined "because it controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis").

In *D.R. Horton*, one of the central issues involved defining the scope of the arbitration agreement. *Id.* at 48, 790 S.E.2d at 4. The plaintiff-homeowners claimed the arbitration agreement comprised the entire section of the contract titled "Warranties and Dispute Resolution"; the defendant-homebuilder claimed the arbitration agreement was contained solely within one subparagraph of that section. *Id.* A majority of the Court ultimately agreed with the plaintiffs, finding the arbitration agreement broadly encompassed the entirety of the "Warranties and Dispute Resolution" section of the contract. *Id.* The Court explained the various subparagraphs in the "Warranties and Dispute Resolution" section "contain[ed] numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.* Therefore, the Court concluded that the section as a whole—including the subparagraphs relating to arbitration *and* those relating to warranties—"must be read [together] to understand the scope of the warranties and how different disputes are to be handled." *Id.*

Here, in contrast to *D.R. Horton*, there is a distinct section of the purchase and sale agreement that sets forth the entirety of the arbitration agreement. As correctly noted by the court of appeals, Section 16 of the agreement—titled "Mediation/


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Arbitration of Disputes"—deals solely with the scope of arbitration and the requisite formalities accompanying an arbitration proceeding, such as the procedural rules and the number of arbitrators required to resolve the dispute. Within Section 16, there is nothing that refers to the limited warranty booklet or incorporates it by reference. Rather, Section 16 is a standalone arbitration provision, dissimilar from that in *D.R. Horton*.

***5** We therefore find the arbitration agreement is contained solely within Section 16 of the purchase and sale agreement. [6]

## IV.

**[7]** Petitioners' second argument posits that even assuming the court of appeals correctly narrowed the scope of the arbitration agreement to Section 16 of the purchase and sale agreement, it nonetheless erred in failing to analyze whether Section 16 contained unconscionable terms that would render the agreement to arbitrate unenforceable. Petitioners contend they lacked a meaningful choice with respect to Section 16 and that certain terms in Section 16 are so oppressive that no reasonable person would have agreed to them. We agree and now turn to the general law of unconscionability.

**[8]** Section 2 of the FAA provides that any arbitration provision contained within a written contract involving interstate commerce must be enforced except for "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

**[9]** At its core, unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am. Jur. 2d *Contracts* § 272 (2016) (characterizing these two prongs as procedural and substantive unconscionability, respectively); *see also id.* § 271 ("Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices ....").

This general description of unconscionability applies to all contract terms, not merely arbitration provisions. *Cf. AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (noting that while arbitration agreements may be invalidated by generally applicable contract defenses, including unconscionability, they may not be invalidated by "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue"). *Compare Fanning*, 322 S.C. at 403, 472 S.E.2d at 245 (involving an unconscionability analysis of a contract that did not contain an arbitration provision), *with Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007) (involving a similar unconscionability analysis for a contract that contained an arbitration provision).

***6** **[10]** A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case. *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012) (citation omitted). Indeed, we have previously "emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Compare Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (holding an adhesion contract between an automobile dealership and a customer was unconscionable), *with Munoz*, 343 S.C. at 541–42, 542 S.E.2d at 365 (declining to find unconscionable an adhesion contract between a consumer and a lender). "In analyzing claims of unconscionability in the context of arbitration agreements, the [United States Court of Appeals for the] Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999)).

As explained further below, a take-it-or-leave-it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice. *See generally* 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9 & n.9 (2020) (collecting cases). Rather, to constitute unconscionability, the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Fanning*,

322 S.C. at 403, 472 S.E.2d at 245; *see also* 17A Am. Jur. 2d *Contracts* § 272 ("Although procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, both need not be present to the same degree; the agreement may be judged on a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. In an exceptional case, however, a court may find that a contract provision is so outrageous as to warrant holding it unenforceable on the grounds of substantive unconscionability alone." (footnotes omitted)). In this case, we do not hesitate in upholding the finding of unconscionability concerning Section 16 of the purchase and sale agreement.

**A.**

**[11]** **[12]** **[13]** As noted, under South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike. The touchstone of the analysis begins with the presence or absence of meaningful choice. *See* *Fanning*, 322 S.C. at 403, 472 S.E.2d at 245; *see also* *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (explaining that a party seeking to prove an arbitration agreement is unconscionable must allege he lacked a meaningful choice as to the arbitration clause specifically, not merely that he lacked a meaningful choice as to the contract as a whole). "Whether one party lacks a meaningful choice ... typically speaks to the fundamental fairness of the bargaining process." *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (citation omitted). Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669; *see generally* 17A Am Jur. 2d *Contracts* § 272 (listing a number of factors that courts may considering in conducting an unconscionability analysis); 17 C.J.S. *Contracts* § 10 (same).

***7** Parties frequently claim they lack a meaningful choice when a contract of adhesion is involved. *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (explaining adhesion contracts are "standard form contracts offered on a take-it or leave-it basis with terms that are not negotiable" (internal alteration marks omitted) (citation omitted)). Because contracts of adhesion are non-negotiable, "[a]n offeree faced with such a contract has two choices: complete adherence or outright rejection." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted).

**[14]** Adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9 & n.9 (collecting cases). However, given that one party to an adhesion contract "has virtually no voice in the formulation of the[ ] terms and language" used in the contract, *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901, courts tend to view adhesive arbitration agreements with "considerable skepticism," as it remains doubtful "any true agreement ever existed to submit disputes to arbitration," *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citations omitted). *See also* 17A Am. Jur. 2d *Contracts* § 274 (noting that "[c]ontracts of adhesion are enforceable unless they are unconscionable," but "[n]evertheless, the fact that a contract is one of adhesion is a strong indicator that [there was] an absence of meaningful choice"); 17 C.J.S. *Contracts* § 9 ("A consumer transaction which is essentially a contract of adhesion may be examined by the courts with special scrutiny to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting.").

**[15]** The distinction between a contract of adhesion and unconscionability is worth emphasizing: *adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***. Nevertheless, and regrettably, it is common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue. Such a specious argument does not advance the party's position and instead detracts from other legitimate arguments the party may have. After all, unconscionability requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms. Thus, an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter's case.

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Here, we find it manifest that the purchase and sale agreement is a contract of adhesion given by **Lennar** to all of the homebuyers in the Abbey, with only a few blank spaces to fill in, including the buyer's name, the relevant property address, and the purchase price. Other than those type of minor blank spaces, the terms of the purchase and sale agreement—particularly those of any consequence to **Lennar**—are non-negotiable, with some terms not even applying to specific homebuyers. [7]

Moreover, the sophistication of Petitioners, as individual homebuyers, pales in comparison to **Lennar**. Given that **Lennar** has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize **Lennar** as significantly more sophisticated than Petitioners in home buying transactions. These factors combine to highlight the significant disparity in the parties' bargaining power, with **Lennar** enjoying a much stronger bargaining position than Petitioners. We therefore find Petitioners lacked a meaningful choice in their ability to negotiate the arbitration agreement. *See* *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) ("We have [ ] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.").

**B.**

***8** Within Section 16, Petitioners point to three provisions that are allegedly so one-sided and unreasonable as to render the agreement unconscionable. Specifically, Petitioners claim provisions in paragraphs 1, 4, and 5 require the Court to invalidate the arbitration agreement. We agree. Because paragraph 4 of Section 16 of the purchase and sale agreement contains the most egregious term, we focus our attention there. [8]

**[16]** In particular, paragraph 4 states, "Seller may, *at its sole election*, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and ... the mediation and arbitration will be limited to the parties specified herein." (Emphasis added.) It is a fundamental principle of law that the plaintiff is the master of his own complaint and is the sole decider of whom to sue for his injuries. *Myles v. United States*, 416 F.3d 551, 552 (7th Cir. 2005) ("[L]itigants are masters of their own complaints and may choose who to sue—or not to sue."); 71 C.J.S. *Pleading* § 149 (Supp. 2021) (citation omitted). Giving **Lennar** the "sole election" to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle. *Cf.* 17A Am. Jur. 2d *Contracts* § 272 ("Mutuality [ ] is a paramount consideration when assessing the substantive unconscionability of a contract term.").

It is equally concerning that paragraph 4, in conjunction with paragraph 5, creates the possibility of inconsistent factual findings that would preclude Petitioners from recovery on a purely procedural (rather than a merit) basis—a legal defense to which neither **Lennar** nor the other Respondents are entitled. In particular, paragraph 5 states the parties agree no factual or legal finding made in arbitration is binding in any other arbitral or judicial proceeding "unless there is mutuality of parties." However, **Lennar** can ensure there is never a "mutuality of parties" by exercising its "sole election" in paragraph 4 to choose the parties to the arbitration. Suppose **Lennar** is unable or—of more concern—unwilling to compel the other named defendants to arbitrate, instead forcing Petitioners to litigate with the remaining defendants in circuit court. In that case, it is possible for the arbitration defendants to blame the remaining circuit-court defendants for Petitioners' damages, and vice versa. Were the respective fact finders to agree with the defendants' arguments to that effect, Petitioners could lose in both forums merely because the fact finder believes the absent defendants to be at fault, and, critically, *it is not Petitioners' choice that those defendants are absent.* Compounding the problem, paragraph 5 prevents any findings of fact or conclusions of law in the arbitration to be binding in any subsequent arbitral or judicial proceeding instituted by Petitioners to recover their damages fully. Thus, Petitioners could not even use the fact that the arbitrator had found **Lennar** was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa.

This creation of a procedural defense to liability for **Lennar** is wholly unreasonable and oppressive to Petitioners. Moreover, the likelihood of inconsistent factual findings due to paragraphs 4 and 5 of the arbitration agreement—and the resultant, inherent unfairness to Petitioners—has become probable, rather than merely theoretically possible. We say this because, as it stands now, Spring Grove and a significant number of the subcontractors are not required to arbitrate with

Lennar and Petitioners because either (1) their contracts with Lennar do not contain an arbitration provision; or (2) their contracts with Lennar (including the arbitration agreements therein) were executed after Petitioners filed their lawsuit, i.e., after the subcontractors had completed the work on Petitioners' homes and the Abbey in general; or (3) they did not have a contract with Lennar at all—much less an arbitration agreement.

***9** As a result, we hold the arbitration agreement is unconscionable and unenforceable as written.

Ordinarily, the question of unconscionability beyond the arbitration provision would be determined in the arbitral forum. *See* *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71–72, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010). However, in agreeing with the circuit court concerning the unconscionability of the arbitration provision, we note our additional agreement with the circuit court that unconscionability pervades the various agreements between the parties. An example of the oppressive, one-sided nature of the parties' agreement includes a provision that Petitioners "*expressly negotiated and bargained for the waiver of the implied warranty of habitability [for] valuable consideration ...* ***in the amount of $0***." (Emphasis added.) Lennar also specifically states the "[l]oss of use of all or a portion of your Home" is not covered by its warranty to new homebuyers. [9] Likewise, another provision of the adhesive contract states, "[T]his Agreement shall be construed as if both parties jointly prepared it"—a blatant falsehood—"and no presumption against one party or the other shall govern the interpretation or construction of any of the provisions of this Agreement." Yet another provision asserts, "Buyer acknowledges that *justice will best be served* if issues regarding this agreement are heard by a judge in a court proceeding, and not a jury." (Original emphasis omitted, new emphasis added.) This is not even to mention the fact that Lennar attempted to insert an arbitration agreement in Petitioners' deeds, characterizing the arbitration agreement as an "equitable servitude" that runs with the land in perpetuity.

We find these and other terms of the contracts to be absurd, factually incorrect, and grossly oppressive. While none of these terms factor into our unconscionability analysis for the arbitration agreement, we recognize that although the circuit court failed to honor the *Prima Paint* doctrine, it certainly hit the nail on the head in characterizing the contracts as unquestionably unconscionable.

## V.

**[17]** Lennar does not argue to this Court that, should we find any provision of the arbitration agreement unconscionable, we should sever that portion of the agreement in accordance with the severability clause found in the arbitration agreement. [10] However, because Lennar made a severability argument to the circuit court and court of appeals, we assume Lennar views it as an additional sustaining ground and therefore address it in the interest of judicial economy. As we will explain, we decline to sever the unconscionable provisions of the arbitration agreement.

***10 [18]** If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003); *Lackey*, 330 S.C. at 397, 498 S.E.2d at 903; 17A Am. Jur. 2d *Contracts* § 313. However, severability is not always appropriate to remedy unconscionable contractual provisions. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673; 17A Am Jur. 2d *Contracts* § 314. In particular, courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement "such that only a disintegrated fragment would remain after hacking away the unenforceable parts." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); *see also* 17A Am Jur. 2d *Contracts* § 314. In those cases, judicial severing "look[s] more like rewriting the contract than fulfilling the intent of the parties." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); *see also* 17A Am Jur. 2d *Contracts* § 313.

**[19]** Thus, "[c]ourts have discretion [ ] to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." *Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020); *see also* *Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (noting there is no specific set of factual circumstances indicating when complete invalidation of the contract is a better option than merely excising the offending clauses). In exercising their discretion, courts should be guided by the parties' intent. *Doe*, 430 S.C. at 615, 846 S.E.2d at 880; 17A Am. Jur. 2d *Contracts* §§ 313–14; *see also* 17A Am. Jur. 2d *Contracts* § 273 ("To

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assess whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract.").

**A.**

We first note the unconscionable portion of the agreement **Lennar** presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon" [11] parties to the arbitration proceeding. We decline to blue-pencil that provision.

It goes without saying that the clause of a contract that names the persons or entities that may properly be joined as parties to proceedings arising from any dispute involving that contract is a material term of the agreement. *Cf.* *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131–32, 678 S.E.2d 435, 439 (2009) (discussing when a term is integral to a contract, as compared to an "ancillary logistical concern," and explaining courts must look to the "essence" of the arbitration agreement; "[w]here [a particular term] has implications *that may substantially affect the substantive outcome of the resolution*, we believe that it is neither 'logistical' nor 'ancillary.' " (emphasis added)). Were we to sever such a clause from the arbitration agreement here, it would be the opposite of excising an "ancillary logistical concern." Rather, we would be materially rewriting the contract by controlling who will—or will not—participate in arbitration.

**[20]** Blue-pencilling an agreement is, of course, within the Court's discretion. Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." (citation omitted)); *cf. id.* at 579, 762 S.E.2d at 701 (noting even when parties manifest an intent to be bound, an indefinite material term may invalidate the agreement (quoting 1 Corbin on Contracts § 2.8 (Rev. ed. 1993))); *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 478 (Fla. 2011) ("Further, if the [unconscionable] provision were severed, the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other—particularly[ ] when those legal promises are viewed through the eyes of the contracting parties." (internal quotation marks omitted) (internal citation omitted)). Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.

**B.**

***11** There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. As mentioned above, adhesion contracts "are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted); *see also* 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9. In particular, when a contract of adhesion is at issue, "there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Similarly, given the adhesive nature of the contract here, we find it "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. *See Doe*, 430 S.C. at 615, 846 S.E.2d at 880 (explaining that when exercising its discretion to sever portions of the agreement, a court must be guided by the parties' intent).

The second additional consideration of which we take note is that this contract involves a consumer transaction. *See* *Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (placing emphasis on the need for a case-by-case analysis in cases involving consumer transactions so as to address the unique circumstances inherent in those types of contacts). More specifically, this contract involves the purchase of a new home. South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. *Kennedy*, 299 S.C. at 341–44, 384 S.E.2d at 734–36 (rejecting a result in which "a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions"; and explaining that in the past, when


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the Court is confronted with a new scenario "not properly disposed of by our present set of rules," it "[o]nce more[ ] respond[s] by expanding our rules to provide the innocent buyer with protection" (citing *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976))). As we stated over thirty years ago, it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce." *Id.* at 344, 384 S.E.2d at 736 (citing *Rogers v. Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968)). Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction.

**[21]** **[22]** Generally, courts will not enforce contracts that violate public policy. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).

> A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole.

17A Am. Jur. 2d *Contracts* § 238 (Supp. 2021) (citation omitted). Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); *see also* 17A Am. Jur. 2d *Contracts* § 238 (2016) (explaining courts may consider, *inter alia*, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically concerned that honoring the severability clause here creates an incentive for **Lennar** and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer. *Cf.* Maria Kalogredis et al., *Addressing Increasing Uncertainty in the Law of Non-Competes*, Ass'n Corp. Couns. 36 (Apr. 2018), https://www.hangley.com/wp-content/uploads/2018/04/ Addressing-Increasing-Uncertainty-in-the-Law-of-Non-Competes.pdf (expressing a similar concern in the context of non-compete agreements); *Shotts*, 86 So. 3d at 478 (explaining it did not "make sense for a court to remake [the arbitration] agreement to excise the offending provisions. Given the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer form contracts that fully comply with [the law], not to revise them when they are challenged to make them compliant. *Otherwise, nursing homes have no incentive to proffer a fair form agreement.*" (emphasis added) (citation omitted)); *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79, 81 (1972) (declining to blue-pencil an overly restrictive non-compete agreement because it would encourage employers to "fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too." (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 683 (1960))) [12]; *see also* *Howard Schultz & Assocs. of the Se., Inc. v. Broniec*, 239 Ga. 181, 236 S.E.2d 265, 269 (1977) ("It is these very requests which are the reason for rejecting severability of employee covenants not to compete. Employers covenant for more than is necessary, hope their employees will thereby be deterred from competing, and rely on the courts to rewrite the agreements so as to make them enforceable if their employees do compete. When courts adopt severability of covenants not to compete, employee competition will be deterred even more than it is at present by these overly broad covenants against competition.").

***12** Moreover, we do not doubt that "for every [arbitration agreement] that finds its way to court, there are thousands that exercise an *in terrorem* effect on [homebuyers] who respect their contractual obligations." Kalogredis, *supra*, at 36 (quoting Blake, *supra*, at 682). "Because most [homebuyers] simply comply with their [arbitration agreements] rather than challenging them in court, the argument goes, the law should provide a strong incentive for [home builders] not to overreach." *Id.*

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**C.**

Given that the subject matter of the contract involves new home construction, and South Carolina has an extensive history of expanding its common law on contracts so as to protect new homebuyers, we find honoring the severability clause here—particularly because it goes to a material term of the arbitration agreement—would violate public policy. Our holding is based primarily upon two factors. First, the contract at issue is a contract of adhesion, in which it is "considerably doubtful" both parties truly intended a court to sever an unconscionable provision and enforce the remainder of the agreement. Second, with respect to the public policy considerations inherent in this type of consumer transaction (homebuying), "the likelihood that refusal to enforce the bargain or term will further [public] policy" is, we hope, high. *See* 17A Am. Jur. 2d *Contracts* § 238.

**VI.**

In sum, we hold the court of appeals correctly limited the scope of the arbitration agreement to Section 16 of the purchase and sale agreement, in accordance with the *Prima Paint* doctrine. However, while the court of appeals declined to address the matter, there are several unconscionable provisions within Section 16, the most egregious of which strips Petitioners of their ability to name the parties against whom they are asserting their claims in the arbitration proceeding. Because this is a contract of adhesion, and because the transaction involves new home construction, we decline to sever the unconscionable provisions for public policy reasons. It is clear **Lennar** furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause. We refuse to reward such misconduct, particularly in a home construction setting. We therefore affirm in part and reverse in part the decision of the court of appeals and reinstate the circuit court's denial of **Lennar's** motion to compel. The matter is remanded to the circuit court.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

BEATTY, C.J., HEARN, FEW, JJ., and Acting Justice Blake A. Hewitt, concur.

**All Citations**

--- S.E.2d ----, 2022 WL 4231032

## Footnotes

1 *See generally* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–06, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (explaining that under the Federal Arbitration Act, courts may "consider only issues relating to the making and performance of the agreement to arbitrate," rather than those affecting the contract as a whole); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (holding *Prima Paint* applied not only to claims of fraud in the inducement of an arbitration agreement, but to all contract defenses, including unconscionability, and stating that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause").

2 We note Petitioner Lenna Lucas bought a pre-owned home built by **Lennar** in the Abbey, so there is no direct contract between Petitioner Lucas and **Lennar**.

3 9 U.S.C. §§ 1–16 (2021).

4 S.C. Code Ann. §§ 15-48-10 to -240 (2005).

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5 The circuit court additionally held arbitration could not be compelled under federal or state law. Specifically, the court determined the contracts involved intrastate commerce, rather than interstate commerce, and therefore the FAA did not apply. Further, the circuit court determined the arbitration agreement did not comply with the SCUAA, specifically, section 15-48-10(a). *See* S.C. Code Ann. § 15-48-10(a) ("Notice that a contract is subject to arbitration pursuant to [the SCUAA] shall be typed in underlined capital letters ... on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration [pursuant to the SCUAA].").

6 As noted above, the limited warranty booklet contains an arbitration agreement that uses identical language to Section 16 of the purchase and sale agreement. Because the arbitration agreements in both contracts are standalone provisions, it is legally irrelevant that the portions of the contracts outside of the arbitration agreements extensively cross-reference one another and incorporate one another by reference. *See* *Buckeye Check Cashing, Inc.*, 546 U.S. at 445–46, 126 S.Ct. 1204 ("*Prima Paint* and *Southland* [*Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984),] ... establish[ed] three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity [as a whole] is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.").

7 For example, Section 4 of the purchase and sale agreement lists two financing options that are mutually exclusive with one another, with checkboxes to mark which of the two options applies for any particular client.

8 We note **Lennar** made no attempt in its brief to defend paragraph 4 from Petitioners' unconscionability challenge.

9 Apparently, for **Lennar** to even *consider* repairing any defects in the homes they construct and sell, the defects must be minor and become apparent very quickly after the sale date. Otherwise, **Lennar** is off the hook for the defective housing, and the innocent homebuyers are out of luck. After all, **Lennar** specifically disclaims any responsibility to fix major problems to the home that result in the homebuyers losing partial or complete use of their (not-inexpensive) home.

10 Paragraph 4 of Section 16 of the purchase and sale agreement states, "The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section."

11 We say "agreed upon" in quotation marks to emphasize that this is an adhesion contract, making it "considerably doubtful" the agreement truly encapsulates *both* parties' intent. *See* *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Nonetheless, because **Lennar** drafted the adhesion contract, we assume it does accurately represent **Lennar's** intent.

12 We note that prior to 2012, Georgia courts prohibited blue-penciling non-compete agreements under the common law. However, in 2012, Georgia's legislature enacted sections 13-8-53 and 13-8-54, permitting—but not requiring—courts to blue-pencil such agreements. Ga. Code Ann. §§ 13-8-53(d) (2022) ("[A] court *may* modify a covenant that is otherwise void and unenforceable ...." (emphasis added)); *id.* § 13-8-54(b) (2022) ("[I]f a court finds that a contractually specified restraint does not comply with [the law], then the court *may* modify the restraint provision ...." (emphasis added)). Following the statutory enactments, Georgia courts have remained reluctant to modify overly burdensome non-compete agreements to make them enforceable, as "unreasonable restrictive covenants are against Georgia public policy." *Belt Power, LLC v. Reed*, 354 Ga.App. 289, 840 S.E.2d 765, 770–71 (2020) (finding significant that sections 13-8-53(d) and

13-8-54(b) gave the court discretion whether to blue-pencil an agreement, and upholding the trial court's refusal to blue-pencil the burdensome non-compete agreement in that case).

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RECEIVED
Sep 28 2022
SC Court of Appeals

September 28, 2022

**VIA E-Filing**
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
ctappfilings@sccourts.org

Re: Huskins v. Mungo Homes, LLC
Appellate Case No.: 2018-000889

Dear Ms. Kitchens:

By letter dated September 21, 2022, Appellants submitted additional authority purporting to support its Petition for Rehearing. While Respondents are hesitant to make any additional submissions unless requested by the Court, the authority cited and argued by Appellants is not analogous to the issues presented in the Petition for Rehearing. Contrary to Appellants' argument in its letter, the severability issue is distinguishable from the holding in *Damico et al v. Lennar Carolinas, LLC*; Opinion No. 28114 (filed September 14, 2022) as severing the final portion of the arbitration agreement would not leave a fragmented arbitration agreement, nor is the arbitration agreement one-sided in favor of the Respondent. Similarly, to refuse to apply S.C. Code § 15-3-140 to the arbitration agreement would put arbitration agreements on unequal footing with other contracts in South Carolina.

If the Court would like additional briefing on these issues, Respondents will happily provide supplemental briefing. Thank you for your consideration.

Sincerely,

STEVEN R. KROPSKI

# The South Carolina Court of Appeals

Amanda Leigh Huskins and Jay R. Huskins, Appellants,

v.

Mungo Homes, LLC, Respondent.

Appellate Case No. 2018-000889

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ORDER

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The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

Stephanie P. McDonald J.

J.

James E. Lockemy A.J.

Columbia, South Carolina

FILED
Feb 15 2023

cc:
Charles Harry McDonald, Esquire
David W. Overstreet, Esquire
Steven Raymond Kropski, Esquire
Terry E. Richardson, Jr., Esquire
Matthew Anderson Nickles, Esquire
Brady Ryan Thomas, Esquire

Beth B. Richardson, Esquire
The Honorable DeAndrea G. Benjamin

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Amanda Leigh Huskins and Jay R. Huskins, Appellants,

v.

Mungo Homes, LLC, Respondent.

Appellate Case No. 2018-000889

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Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

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Opinion No. 5916
Heard May 5, 2021 – Filed June 1, 2022
Withdrawn, Substituted, and Refiled February 15, 2023

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**AFFIRMED AS MODIFIED**

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Charles Harry McDonald, of Belser & Belser, PA; Beth B. Richardson, of Robinson Gray Stepp & Laffitte, LLC; Brady Ryan Thomas, of Richardson, Thomas, Haltiwanger, Moore & Lewis; and Matthew Anderson Nickles, of Rogers, Patrick, Westbrook & Brickman, LLC, all of Columbia; and Terry E. Richardson, Jr., of Richardson, Thomas, Haltiwanger, Moore & Lewis, of Barnwell, all for Appellants.

Steven Raymond Kropski and David W. Overstreet, both of Earhart Overstreet, LLC, of Charleston, for Respondent.

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**LOCKEMY, A.J.:** Amanda Leigh Huskins and Jay R. Huskins (collectively, the Huskinses) appeal the circuit court's order granting Mungo Homes, LLC's (Mungo's) motion to dismiss and compel arbitration. The Huskinses argue the circuit court erred in (1) finding the limitations period contained in the arbitration provision was not one-sided, oppressive, and unconscionable; (2) finding the arbitration provision applied mutually to Mungo and the Huskinses; (3) failing to consider the one-sided and oppressive terms of a limited warranty provision in determining whether the arbitration agreement was unconscionable; and (4) granting the motion to dismiss the Huskinses' claims involving the limited warranty provision even though it concluded the arbitration provision did not include claims arising under the limited warranty provision. We affirm the circuit court's order as modified.

## FACTS AND PROCEDURAL HISTORY

The Huskinses entered into a purchase agreement (the Purchase Agreement) with Mungo in June 2015 for the purchase of a new home in the Westcott Ridge subdivision in Irmo. The Purchase Agreement consisted of three pages. The top of the first page provided: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ."[1] The second page included a paragraph with the heading "LIMITED WARRANTY" (the Limited Warranty provision), which stated the following:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
>
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. ANY WARRANTY OF HABITABILITY, SUITABILITY

[1] *See* S.C. Code Ann. § 15-48-10 to -240 (2005) (establishing the South Carolina Uniform Arbitration Act (the UAA)).

> FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.
>
> The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

The next page contains a paragraph with the heading "ARBITRATION AND CLAIMS" and states,

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and

> designating the demanding parties [sic] selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

In July 2017, the Huskinses filed an action against Mungo alleging the Purchase Agreement violated South Carolina law by disclaiming certain implied warranties without providing a reduction in sales price or other benefit to the purchaser for relinquishing such rights. The Huskinses alleged causes of action for (1) breach of contract and the implied covenant of good faith and fair dealing, (2) unjust enrichment, (3) violation of the South Carolina Unfair Trade Practices Act (SCUTPA),[2] and (4) declaratory relief regarding the validity of the waiver and release of warranty rights and the validity of Mungo's purported transfer of all remaining warranty obligations to a third party. They did not allege any problems with the home.

Mungo filed a motion to dismiss and compel arbitration, arguing the Huskinses' claims were subject to arbitration pursuant to the Arbitration and Claims provision (the Arbitration Clause) contained in the Purchase Agreement. The Huskinses filed a memorandum opposing the motion, arguing the Arbitration Clause was unconscionable and unenforceable. They asserted the court should consider the Purchase Agreement's limitations on warranties as part of the agreement to arbitrate and thus find the Arbitration Clause was unconscionable. In addition, the Huskinses argued a provision contained in the Arbitration Clause that limited the time to bring a claim to thirty or ninety days was unconscionable, could not be severed, and rendered the entire Arbitration Clause unenforceable.

After hearing the motion, the circuit court issued an order granting the motion to dismiss and compelling arbitration. The circuit court found that although the Huskinses lacked a meaningful choice, the terms of the Arbitration Clause were not one-sided and oppressive, and the Arbitration Clause was therefore not unconscionable. In considering whether the terms were one-sided and oppressive,

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[2] S.C. Code Ann. § 39-5-10 to -730 (1976 & Supp. 2021).

the circuit court found that (1) the Limited Warranty provision must be read in isolation from the Arbitration Clause, and (2) the terms in the Arbitration Clause pertaining to the ninety-day time limit were not one-sided and oppressive because they did not waive any rights or remedies otherwise available by law. The Huskinses filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court summarily denied. This appeal followed.

## ISSUES ON APPEAL

1. Did the circuit court err in finding the provision limiting the time in which to bring a claim was not one-sided, oppressive, and unconscionable?

2. Did the circuit court err in failing to consider the Limited Warranty provision as part of the Arbitration Clause and thus failing to find the Arbitration Clause unconscionable?

3. Did the circuit court err by granting Mungo's motion to dismiss the Huskinses' action when it involved claims falling under the Limited Warranty provision?

## STANDARD OF REVIEW

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Id.*

"Arbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citation omitted).

## LAW AND ANALYSIS

### I. APPEALABILITY

As an initial matter, Mungo maintains the circuit court's order is not immediately appealable. The Huskinses argue that under *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), the order was immediately appealable because it granted Mungo's Rule 12(b)(6), SCRCP, motion to dismiss. We agree.

Our supreme court has held our state procedural rules—rather than the Federal Arbitration Act (FAA)—govern appealability of arbitration orders.[3] *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding that "because South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, [wa]s applicable, the court's order compelling arbitration [wa]s not immediately appealable"). Ordinarily, an order granting a motion to compel arbitration is not immediately appealable. *See* § 15-48-200(a) (providing that "[a]n appeal may be taken from: (1) An order denying an application to compel arbitration . . . ; (2) An order granting an application to stay arbitration . . . ; (3) An order confirming or denying confirmation of an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of th[e UAA]"). However, the "[d]ismissal of an action pursuant to Rule 12(b)(6) is appealable." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

In *Widener*, this court held an order dismissing the action without prejudice and ordering arbitration was immediately appealable, reasoning that "[b]y dismissing [the] action, the [circuit] court finally determined the rights of the parties[, and] therefore, [this court had] jurisdiction pursuant to section 14-3-330 of the South Carolina Code [(2017)]." 381 S.C. at 524, 674 S.E.2d at 173-74; *see also* § 14-3-330(2) (providing the appellate courts have jurisdiction in an appeal from "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, . . . or (c) strikes out . . . any pleading in any action"). The appellant in *Widener* argued the dismissal of the action prejudiced him because the statute of limitations would bar him from bringing any future action after the conclusion of the arbitration proceedings. *Id.* at 525, 674 S.E.2d at 174. This court did not decide the merits of the case but reversed and remanded the matter to the trial court to vacate the dismissal and enter an order staying the action "pending the outcome of the arbitration proceedings." *Id.* In contrast, the court in *Toler's Cove*—which did not involve a Rule 12(b)(6) dismissal—found the

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[3] *See* 9 U.S.C. § 16(a)(3) (providing that under the FAA, an appeal may be taken from "a final decision with respect to an arbitration"); *see also Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (holding "when a district court compels arbitration in a proceeding in which there are no other issues before the court, that order is final . . . because the court has disposed of the whole case on the merits").

order compelling arbitration was not immediately appealable but addressed the merits of the appeal "because [the] issues [we]re capable of repetition and need[ed] to be addressed." 355 S.C. at 611, 586 S.E.2d at 584-85.

Here, as in *Widener*, the Huskinses appeal an order dismissing the case, which is an appealable order. *See Williams*, 347 S.C. at 233, 553 S.E.2d at 500 (stating an order dismissing an action pursuant to Rule 12(b)(6) is immediately appealable). In dismissing the Huskinses' claims, the circuit court addressed only the issue of the enforceability of the Arbitration Clause. Unlike the appellant in *Widener*, the Huskinses do not argue the dismissal prejudiced them; rather, they ask this court to address the merits of the circuit court's decision as to the enforceability of the Arbitration Clause and reverse the order compelling arbitration. We find the order granting the motion to dismiss and compelling arbitration is appealable, and we address the merits because the issue is capable of repetition. *See Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584-85 (finding an order compelling arbitration was not immediately appealable but reviewing the issues on the merits because they were "capable of repetition and need[ed] to be addressed").

## II. ENFORCEABILITY OF ARBITRATION AGREEMENT

The Huskinses argue the Arbitration Clause was unenforceable because it included unconscionable terms that cannot be severed, including the Limited Warranty provision and a "limitation of claims" provision. We address each of these arguments in turn.

### A. Limited Warranty Provision

The Huskinses challenge the validity of the Limited Warranty provision and assert it must be read together with the Arbitration Clause because it encompassed warranty claims and the provisions cross-referenced one another and were thus substantively intertwined. We disagree.

"Arbitration clauses are separable from the contracts in which they are imbedded." *Hous. Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003) (quoting *Jackson Mills Inc. v. BT Cap. Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994)). "[T]he issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." *Id.* (alteration in original) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the

overall contract is unenforceable specifically relates to the arbitration provision."[4] *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (quoting *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (noting the "*Prima Paint* doctrine" required that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

In *D.R. Horton*, instead of considering the arbitration agreement separately from the entire contract, our supreme court considered the warranty provisions and the arbitration provisions of the contract together and construed "the entirety of paragraph 14, entitled 'Warranties and Dispute Resolution,' as the arbitration agreement." 417 S.C. at 48, 790 S.E.2d at 4. The court stated,

> As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

*Id.* The Arbitration Clause in this case differs from that in *D.R. Horton*. Although *D.R. Horton* also involved a home purchase agreement, there, Paragraph 14 of the agreement was titled "Warranties *and Dispute Resolution*" and consisted of subparagraphs 14(a) through 14(j). *Id.* at 45, 790 S.E.2d at 2 (emphasis added). Two of the subparagraphs stated the parties agreed to arbitrate any disputes related to the warranties contained in the purchase agreement and any claims arising out of the construction of the home. *Id.* In most of the remaining subparagraphs of Paragraph 14, D.R. Horton expressly disclaimed all warranties except for a ten-year structural warranty, and subparagraph 14(i) stipulated D.R. Horton was

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[4] Although the circuit court determined the UAA governed the parties' dispute, the application of the UAA as opposed to the FAA does not affect our analysis. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole."); *Simpson*, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1 (noting that "even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause").

not "liable for monetary damages of any kind." *Id.* Here, however, the Limited Warranty provision is a completely separate provision in the Purchase Agreement and contains no reference to arbitration or the Arbitration Clause. Further, the Arbitration Clause contains no cross references to the Limited Warranty provision. Because the two provisions were completely separate and did not cross-reference one another, this court need not construe them together to determine the scope of the warranties or how different disputes were to be handled. This case is therefore distinguishable from *D.R. Horton*, and the circuit court did not err in reviewing the Arbitration Clause in isolation from the remainder of the Purchase Agreement, including the Limited Warranty provision.

**B. Limitation of Claims Provision**

The Huskinses argue the Arbitration Clause was unenforceable because it required a demand for arbitration to be filed within ninety days of the date the claim, dispute, or other matter arose, or within thirty days if the claim, dispute, or other matter arose from either party's termination of the Purchase Agreement or such claims would be forever barred. They assert this "limitation of claims" provision restricted the statutory limitations period from three years to ninety days and was not severable from the Arbitration Clause. The Huskinses additionally contend that, as a practical matter, this provision applied only to purchasers and such "lack of mutuality" further demonstrated the "one-sided and oppressive nature" of the arbitration clause. We agree this provision abbreviates the statute of limitations period and is one-sided and oppressive. Nevertheless, we find the arbitration clause is enforceable because the unconscionable provision is severable.

"Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *see also Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), ("[W]hen considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration."), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021. "[A] contract may be invalid—and courts may properly refuse to enforce it—when it is unconscionable. A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability." *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "Unconscionability has been recognized as

the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

**1. Unconscionability**

**a. Absence of Meaningful Choice**

We conclude the evidence showed the absence of a meaningful choice on the part of the Huskinses. *See id.* at 25, 644 S.E.2d at 669 ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989))); *id.* ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue."). 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.

**b. Oppressive and One-Sided Terms**

Next, we conclude the evidence does not support the circuit court's finding that the terms contained in the limitation of claims provision were not one-sided and oppressive.

South Carolina provides for a three-year statute of limitations in an "action upon a contract, obligation, or liability, express or implied." S.C. Code Ann. § 15-3-530(1) (2005). 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.

The final two sentences of the Arbitration Clause effectively shorten the statutory period to ninety days and provide an even shorter period of thirty days when the "claim, dispute[,] or matter in question" arises from either party's termination of the Purchase Agreement. Even though this provision purports to apply equally to both parties, as a practical matter, it would disproportionately affect the homebuyer's ability to bring a claim. Further, it is not "geared towards achieving an unbiased decision by a neutral decision-maker." *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. We conclude this provision violates sections 15-3-140 and 15-3-530 and is therefore unconscionable and unenforceable. *See id.* at 29-30, 644 S.E.2d at 671 ("The general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution."). We next consider whether this provision is severable or renders the entire Arbitration Clause unenforceable.

**2. Severability**

Although the Arbitration Clause contains no severability clause, section 36-2-302(1) allows this court to effectively sever the unconscionable provision.[5] *See* S.C. Code Ann. § 36-2-302(1) (2003) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); *see also Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law

[5] Although title 36 concerns commercial goods and sales, we note our supreme court recently cited section 36-2-302 for the proposition that unconscionable provisions could be severed in a residential home agreement context. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result."); *see also Doe*, 430 S.C. at 615, 846 S.E.2d at 880 ("Courts have discretion though to decide whether a[n arbitration clause] is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive."); *cf. D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 (declining to consider "whether the unconscionable provisions [we]re severable" when the agreement lacked a severability clause and because "doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions").

As we stated, we find the final two sentences of the Arbitration Clause shortening the statutory limitations period were unconscionable. Nevertheless, we conclude sections 15-3-140 and 36-2-302(1) operate to sever this portion of the Arbitration Clause. *See Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9 (acknowledging "many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause"). We find the present case is distinguishable from those cases prescribing severability such that the invalidation of the arbitration clause in its entirety is the more appropriate remedy. Here, as in *D.R. Horton*, the Arbitration Clause did not contain a severability clause. On the other hand, unlike *D.R. Horton*, the offending provision is distinct and constitutes the final two sentences of the Arbitration Clause. Thus, notwithstanding the lack of a severability clause, it is possible for this court to simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement. Based on the foregoing, we sever the final two sentences from the remainder of the Arbitration Clause and we affirm the circuit court's order compelling arbitration as modified.[6]

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[6] During the pendency of this case's petition for rehearing, our supreme court issued *Lennar*, 437 S.C. 596, 879 S.E.2d 746. The Huskinses contend *Lennar* controls this case. We respectfully disagree. The Huskinses claim that here, as there, the agreement with the developer had multiple provisions that were one-sided and unreasonable. We are constrained to look only at the arbitration clause because, as we noted earlier, the warranty provisions are separate from the arbitration clause. Section 15-3-140 was not at issue in *Lennar*, and that statute essentially instructs us to ignore the developer's attempt to shorten the limitations period. When we do that, we believe we are left with a valid arbitration clause, not a broken and unenforceable one. There are no other one-sided and unreasonable terms in the arbitration clause, as there were in *Lennar*.

## III. DISMISSAL OF WARRANTY CLAIMS

Finally, we find the Huskinses' contention that the circuit court erred in dismissing claims related to the Limited Warranty provision when it found the Limited Warranty "f[ell] outside" of the Arbitration Clause is without merit. The circuit court did not find such claims fell outside of the scope of the Arbitration Clause. Rather, in considering the enforceability of the Arbitration Clause, the circuit court concluded the Limited Warranty provision was separable and that the Arbitration Clause did not specifically limit the Huskinses' ability to bring a warranty action in a judicial setting. The circuit court additionally concluded the Arbitration Clause provided that all claims and disputes arising out of the Purchase Agreement were subject to arbitration. Thus, we conclude this argument is without merit.

## CONCLUSION

For the foregoing reasons, we find the order dismissing the Huskinses' complaint and compelling arbitration was immediately appealable. We affirm, as modified, the order dismissing the complaint and compelling arbitration.

**AFFIRMED AS MODIFIED.**

**MCDONALD and HEWITT, JJ., concur.**