

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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Edgar Warren Dickson, Circuit Court Judge

S.C. Supreme Court

Opinion No. 5118 (S.C. Ct. App. filed April 17, 2013)

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the Petitioner

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Appellant.

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STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
GREGORY W. SMITH AND STEPHANIE
SMITH,

Plaintiffs.

vs.

D.R. HORTON, INC., TOM'S VINYL SIDING,
LLC, LUTZEN CONSTRUCTION COMPANY,
INC., BOOZER LUMBER COMPANY, ALL
AMERICAN ROOFING, INC., AND MYERS
LANDSCAPING, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO: 2010-CP-18-641

ORDER DENYING DEFENDANT D.R.
HORTON, INC.'S MOTION TO COMPEL
ARBITRATION AND TO STAY
PROCEEDINGS, OR, ALTERNATIVELY,
TO DISMISS

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2011 APR 12 AM 10:20
Clerk of Court
DORCHESTER COUNTY

This matter came before the court on September 9, 2010, upon Defendant D.R. Horton, Inc.'s Motion to Compel Arbitration and to Stay Proceedings, or, Alternatively, to Dismiss. Present on behalf of the Plaintiffs was Phillip W. Segui, Jr., Esquire. Present on behalf of Defendant D.R. Horton, Inc. was Michael M. Shetterly, Esquire.

FACTS

This case arises out of alleged construction defects to a single-family home in Summerville, South Carolina. Plaintiffs purchased their home from the Defendant D. R. Horton and have alleged a variety of defects with their home including improperly installed siding, windows, structural framing and concrete slab as well as failure to properly install various flashings so as to prevent moisture intrusion into their home which have led to damage to their home. Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable and fail for lack of inclusion in the deed under the Doctrine of Merger.

ARGUMENT

In the contract for the purchase of the residence at issue, in addition to the attempts to disclaim various warranties within the body of the contract, there is within the

1 of 4
[Signature]

Warranties and Dispute Resolution in Section 14 beginning on page 7 in which it is referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies available to the Plaintiffs.

The recent Supreme Court case of Simpson v. MSA of Myrtle Beach, 373 S.C. 14 (2007), addressed a very similar set of circumstances in which it held that despite application of the Federal Arbitration Act, that the arbitration clause between the parties was unconscionable and unenforceable in its entirety. In addition to analyzing the lack of conspicuousness of the arbitration provisions which were similar to those at issue in the present case, the Court focused on the other provisions of the contract limiting the recovery and claims available under its terms. Specifically, because the provisions of the contract in the Simpson case violated statutory law in that it prevented Simpson from receiving the mandatory statutory remedies to which she may have been entitled in her underlying SCUTPA and Dealers Act claims and that it allowed her to waive statutory remedies which were contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest, the Court found that these provisions were oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, the Court found that these provisions were an unconscionable waiver of statutory rights, and therefore, unenforceable. Although it was argued in the Simpson case that these offending provisions should simply be severed, the Court stated:

In this case, we 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. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.

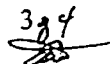
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The Contract between the parties in the instant case likewise has oppressive and one-sided provisions which our courts have held cannot be disclaimed. Specifically, in Kirkman v. Parex, Inc. 369 S.C. 477 (2006), the Court held that where an attempted disclaimer of the implied warranty of habitability is not (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for, that such disclaimer is void. The court went further to state that "this standard is to be applied strictly and will be met only in rare circumstances." Given that such circumstances were not met nor even attempted, any attempts to disclaim these implied warranty claims, like in the Simpson case, are unenforceable and unconscionable. Likewise, and perhaps even more stark are the provisions in the Limitations of Liability in sub-section (i) on page 9 in which, in addition to the attempted waiver of various important remedies of the Plaintiffs in violation of the Kirkman requirements, the following is set forth in the last sentence:

SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

Clearly, the provisions that the Court in Simpson found objectionable enough to require striking the entire arbitration clause pale in comparison to the waivers set forth by Defendant D.R. Horton, Inc. in which every reasonably suitable remedy otherwise available at law is waived.

As an additional matter as to whether the Arbitration Clause is enforceable, Plaintiff asserts that because the only arbitration requirement is found in the contract of sale, and not the Deed (attached), under the Doctrine of Merger, the arbitration clause contained in the contract is null and void. South Carolina Law, like the general rule in other states, is clear that when there is a contract of sale and a subsequent deed, the subsequent deed becomes the contract. Accordingly, the Doctrine of Merger essentially means that the

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if the language relied upon (in this case the Arbitration Clause) does not exist in the latter contract (the Deed), it is extinguished. As the Court has stated:

"The Doctrine of Merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution delivering and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract and generally the rights of the parties are fixed by their expressions as contained in the deed. (emphasis supplied). Wilson v. Landstrom, 281 SC 260, 315 S.E.2d 130 (S.C. Ct App 1984)."

Lastly, because the Defendant and the Plaintiffs are both residents of South Carolina, the construction at issue occurred in South Carolina, and any out-of-state transactional involvement is merely tangential, Plaintiffs contend that the Federal Arbitration Act does not apply and that the South Carolina Uniform Arbitration Act (§ 15-48-10) applies instead such that, for an additional reason beyond those above, the arbitration provisions in this matter further fail for the lack of conspicuousness as required under the South Carolina Act.

CONCLUSION

Given that (1) the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions; (2) that the Deed at issue and which controls the relationship between the parties does not contain an arbitration provision; and (3) that the arbitration provisions fail to meet the South Carolina Uniform Arbitration Act, it is proper that Defendant's Motion to Compel Arbitration and to Stay Proceedings, or, Alternatively, to Dismiss is DENIED.

AND IT IS SO ORDERED this 7th day of April, 2011 at Orangeburg, South Carolina.



Honorable Edgar Warren Dickson
Presiding Judge
First Judicial Circuit

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STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

GREGORY W. SMITH AND STEPHANIE
SMITH,

Plaintiffs.

vs.

D.R. HORTON, INC., TOM'S VINYL
SIDING, LLC, LUTZEN CONSTRUCTION
COMPANY, INC., BOOZER LUMBER
COMPANY, ALL AMERICAN ROOFING,
INC., AND MYERS LANDSCAPING, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO: 2010-CP-18-641

ORDER DENYING DEFENDANT D.R.
HORTON, INC.'S MOTION FOR
RECONSIDERATION OF D.R. HORTON,
INC.'S MOTION TO COMPEL
ARBITRATION.

2011 DEC - 1 PM 2:45
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CLERK OF COURT
DORCHESTER COUNTY

This matter came before the Court on August 1, 2011, upon Defendant D.R. Horton, Inc.'s Motion for Reconsideration of this Court's prior denial of D.R. Horton's Motion to Compel Arbitration. Present on behalf of the Plaintiffs were Phillip W. Segui, Jr., Esquire and John T. Chakeris, Esquire. Present on behalf of Defendant D.R. Horton, Inc. was Collie W. Lehn, Jr., Esquire.

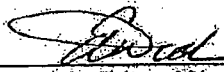
This case arises out of alleged construction defects to a single-family home in Summerville, South Carolina. Plaintiffs purchased their home from the Defendant D. R. Horton and have alleged a variety of defects with their home including improperly installed siding, windows, structural framing and concrete slab as well as failure to properly install various flashings so as to prevent moisture intrusion into their home which have led to damage to their home. Plaintiffs believe that the arbitration clause in the contract for the purchase of the residence at issue is unconscionable and unenforceable.

In the contract for the purchase of the residence at issue, in addition to the attempts to disclaim various warranties within the body of the contract, there is within the Warranties and Dispute Resolution in Section 14 beginning on page 7 in which it is referenced that certain disputes are to be resolved by mandatory binding arbitration along

with an entire host of attempted waivers of important legal remedies available to the Plaintiffs. These issues were addressed in detail in the Court's prior Order.

After hearing arguments of counsel and reviewing memorandum filed by counsel, the Court finds that (1) given that the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions and that the form of the contract seems to be that of a contract of adhesion, which is not favored by South Carolina law; and (2) that the parties involved are not parties of equal bargaining power and that there is no consideration given in exchange for the sacrifice of certain rights of the Plaintiffs who have considerably less bargaining power and these provisions cannot be conscionably enforced against them, it is proper that Defendant's Motion to Reconsider this Court's prior denial of D.R. Horton's Motion to Compel Arbitration is DENIED.

AND IT IS SO ORDERED this 22nd day of November, 2011 at Orangeburg, South Carolina.



Honorable Edgar Warren Dickson
Presiding Judge
First Judicial Circuit

2/


STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

GREGORY W. SMITH AND
STEPHANIE SMITH,

Plaintiffs,

v.

D.R. HORTON, INC., AND TOM'S
VINYL SIDING, LLC, LUTZEN
CONSTRUCTION, INC., BOOZER
LUMBER COMPANY, ALL
AMERICAN ROOFING, INC., AND
MYERS LANDSCAPING, INC.,

Defendants.

IN THE COURT OF
COMMON PLEAS

CASE NO.: 2010-CP-18-641

AMENDED COMPLAINT

(Jury Trial Demanded)

2010 APR 26 PM 1:36
CLERK OF COURT
DORCHESTER COUNTY

The Plaintiffs above named, complaining of the Defendants above named, would
allege and show as follows:

PARTIES

1. The Plaintiffs are citizens and residents of the County of
Dorchester, State of South Carolina and at all times hereinafter mentioned, own the
residence located at 4830 Harvest Moon, Summerville, South Carolina.

2. That, upon information and belief, Defendant, D.R. Horton, Inc., is
a corporation organized in the State of South Carolina conducting business in Dorchester
County, State of South Carolina and at all times relevant hereto was engaged in the
design, development, construction and/or repair of residential housing and specifically,
constructed and/or repaired the Plaintiffs' residence located at 4830 Harvest Moon,
Summerville, South Carolina.

3. That, upon information and belief, the Defendant, Tom's Vinyl Siding, LLC, is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence specifically installed the siding to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

4. That, upon information and belief, the Defendant, Lutzen Construction, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence specifically installed the slab to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

5. That, upon information and belief, the Defendant, Boozer Lumber Company, is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence specifically installed the framing to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

6. That, upon information and belief, the Defendant, All American Roofing, Inc., is a corporation organized and existing under the laws of the State of North Carolina, and conducted business in this State and that at all relevant times herein and was engaged in the design, building and construction of

the Plaintiffs' residence specifically installed the roof and related flashings to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

7. That, upon information and belief, the Defendant, Myers Landscaping, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County and that at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence and at all times relevant was engaged in the grading and landscaping of the land located at 4830 Harvest Moon, Summerville, South Carolina.

JURISDICTION

8. The Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises all involve the residence of the Plaintiffs located in the County of Dorchester, State of South Carolina.

FACTUAL BACKGROUND

9. That the Defendant, D.R. Horton, Inc., designed, developed and constructed the residence located at 4830 Harvest Moon, Summerville, South Carolina.

10. That the Plaintiffs purchased the home from the Defendant, D.R. Horton, Inc., on or about August 2005, and recently became aware of defects and deficiencies that include but are not limited to the installation of the siding, floors and other construction deficiencies that D.R. Horton, Inc., has attempted to repair on numerous occasions.

11. That as a result of the various defects and deficiencies relative to the construction of this home, the Plaintiffs have been damaged and will be required to expend large sums of money to repair, correct and replace various parts and components of the residence and reconstruct major portions of the residence, have been exposed to and will be subject to loss of use, enjoyment and depreciation of the value of their property.

FOR A FIRST CAUSE OF ACTION

(Negligence)

**(As To D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc.,
Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping,
Inc.,)**

12. Each and every allegation contained in Paragraphs 1 through 11 above are incorporated herein by express reference as though fully set forth.

13. At all times material hereto, the Defendant, D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping, Inc., by and through its agents, servants and employees undertook and were under a duty to design, develop, construct and/or repair the residence and to provide materials and services in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards.

14. The Defendant, D.R. Horton, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, developing, designing, supervising and inspecting the subject residence and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and

industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

- a. In failing to use due care in the design, development, construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors or specialty contractors;
- d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- e. In constructing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices.
- f. In improperly installing vinyl siding;
- g. in improperly installing the siding, windows, and flashings in violation of the building code, standard building practices and accepted construction industry standards and practices;
- h. In failing to properly install the moisture barrier;
- i. In constructing the subject residence in such a manner that water entered the dwelling;
- j. In failing to properly install the framing;
- k. In improperly installing the slab and lack of proper vapor barrier under the slab;
- l. Other deficiencies or failures as will be proven at trial.

15. That the Defendant Tom's Vinyl Siding, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, installing siding, remodeling, supervising and inspecting the subject residence and in failing to construct and/or repair said residence in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been

corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling of the subject residence;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors, specialty contractors, and/or employees;
- d. In failing to adequately and competently supervise and/or train said subcontractors, specialty contractors and/or employees;
- e. In constructing, repairing and/or remodeling subject residence in violation of applicable building-codes, standard building practices, relevant product specifications and accepted construction industry standards and practices.
- f. In improperly installing the siding and related flashings;
- g. In improperly installing a weather barrier;
In improperly installing the siding in violation of the building code, manufacturer's recommendations, standard building practices, and accepted construction industry standards and practices
- h. In other deficiencies as will be proven at trial.

16. The defendant Lutzen Construction, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, supervising and inspecting the subject residence and in failing to construct and/or repair said residence in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling and in installing the foundation, block work, slab and driveway of the subject residence and its components;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the slab and driveway of the subject residence;
- c. In failing to hire competent subcontractors, specialty contractors or employees;
- d. In failing to adequately and competently supervise and/or train said subcontractors, specialty contractors or employees;
- e. In constructing, repairing and/or remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- f. In failing to properly install and pour the foundation, and slab; and
- g. In other deficiencies as will be proven at trial.

17. The Defendant, Boozer Lumber Company, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, framing, supervising and inspecting the subject residence and in failing to construct, repair and/or remodel said residence and specifically the framing, in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling and framing of the subject residence;
- b. In failing to adequately supervise the work and construction, repair, remodeling and framing of the subject residence;
- c. In failing to hire competent subcontractors, specialty contractors, and/or employees;
- d. In failing to adequately and competently supervise and/or train said subcontractors;

- e. In constructing, repairing and/or remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- f. In failing to properly frame the residence;
- g. In installing the framing, on and to the home which failed to provide a sufficient barrier against the intrusion of water;
- h. In failing to properly install windows and doors and related flashings;
- i. In constructing, repairing and/or remodeling the subject residence in such a manner that water entered the dwelling;
- j. In failing to use due care in constructing, repairing and/or remodeling the residence in such a fashion as to permit excessive moisture to enter subject residence;
- k. In other deficiencies as will be proven at trial.

18. The Defendant, All American Roofing, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, supervising and inspecting the subject residence and in failing to construct and/or repair said residence and specifically the installation of the roof and related flashings, in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling and in installing the roof on the subject residence;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors or specialty contractors;
- d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;

- e. In failing to use proper accessories and/or flashings in the installation of the roof;
- f. In constructing, repairing, remodeling and installing the roof on subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- g. Other deficiencies or failures will be proved at trial.

19. The Defendant, Myers Landscaping, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, designing, supervising and inspecting the subject lot and in failing to design, construct and/or repair said residence in accordance with applicable building code, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

- a. In failing to adequately supervise the work and construction of the subject residence;
- b. In failing to hire competent employees, subcontractors or specialty contractors;
- c. In failing to adequately and competently supervise and/or train said employees, subcontractors or specialty contractors;
- d. In constructing the subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- e. In failing to properly grade the lot;
- f. Other deficiencies or failures as will be proved at trial.

20. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendants, D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber

Company, All American Roofing, Inc., and Myers Landscaping, Inc., the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that slab, cladding, structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish, structural elements and building components of Plaintiffs' home. All of which will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR A SECOND CAUSE OF ACTION
(Breach of Contract)
(As to D.R. Horton, Inc.)**

21. Each and every allegation contained in Paragraphs 1 through 20 above are incorporated herein by express reference as though fully set forth.

22. That at all times herein, the Plaintiffs entered into a contract with the Defendant D.R. Horton, Inc., for the design, development, construction and purchase of her residence located at 4830 Harvest Moon, Summerville, South Carolina.

23. That at all relevant times herein, the Defendant, D.R. Horton, Inc., by and through its agents, servants and employees had an obligation and duty to construct and/or repair the residence and to provide materials and services in accordance with the

terms and conditions of the contract, applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards.

24. That the Defendant, D.R. Horton, Inc., breached the contract with the Plaintiffs by failing to develop, construct and/or repair said residence in accordance with the terms and conditions of the contract, applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence which will need to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breach includes but is not limited to the following particulars, to wit:

- a. In failing to use due care in the design, development, construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the work and construction; repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors or specialty contractors;
- d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- e. In constructing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- f. In improperly installing vinyl siding;
- g. in improperly installing the siding, windows, and flashings in violation of the building code, standard building practices and accepted construction industry standards and practices;
- h. In failing to properly install the moisture barrier;
- i. In constructing the subject residence in such a manner that water entered the dwelling;
- j. In failing to properly install the framing;
- k. In improperly installing the slab and lack of proper vapor barrier under the slab;
- l. Other deficiencies or failures as will be proven at trial.

25. That as a direct and proximate result of the Defendant, D. R. Horton, Inc.'s, breach of contract with the Plaintiffs, the Plaintiffs have suffered actual, direct,

incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and their having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that slab, cladding, structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements and building components of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid

FOR A THIRD CAUSE OF ACTION

**(Breach of Warranty of Habitability, Breach of Warranty of Workmanlike Services,
Breach of Warranty for Fitness for a Particular Purpose, Breach of Warranty of
Merchantability and Breach of Warranty Against Latent Defects)
(As To D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc.,
Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping,
Inc.)**

26. Each and every allegation contained in Paragraphs 1 through 25 above are incorporated herein by express reference as though fully set forth.

27. That Defendants, D.R. Horton, Inc., and Toms Vinyl Siding, LLC, implicitly and/or expressly warranted that the subject residence and its components would be habitable and fit for its intended uses as a single family residence and home, that said residence and its components would be sold, designed, manufactured, constructed, installed, repaired and remodeled in a fit, serviceable, good and

workmanlike fashion in accordance with the applicable building codes, product specifications, accepted building component manufacturing standards and accepted construction industry standards applicable thereto and that the subject residence and/or the manufactured components installed into and/or onto said residence would be merchantable, free from latent defects and fit for the particular purpose for which it was sold.

28. That Defendant, D.R. Horton, Inc., and Toms Vinyl Siding, LLC, **Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping, Inc.**, breached said warranties by designing, developing, manufacturing, selling, constructing, remodeling or repairing subject residence and/or the manufactured components installed into and/or onto said residence in such manner as to be in violation of applicable building codes, standard building practices, relevant product specifications, accepted building component manufacturing standards and accepted construction industry standards and practices.

29. As a direct and proximate result of the Defendants, D.R. Horton, Inc., and Toms Vinyl Siding, LLC, **Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping, Inc.**, breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home

and excessive water and moisture exists and continues to exist and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements and building components of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices)**

**(As To D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc.,
Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping,
Inc.,)**

30. Each and every allegation contained in Paragraphs 1 through 29 above are incorporated herein by express reference as though fully set forth.

31. The Defendants, D.R. Horton, Inc., and Tom's Vinyl Siding, LLC are "persons" within the meaning of South Carolina Code § 39-5-10(a), and the Defendant by its actions in designing, developing, manufacturing, selling, constructing, remodeling or repairing subject residence and/or the manufactured components installed into and/or onto said residence are engaged in commerce within the meaning of South Carolina Code §29-5-10(b).

32. The Defendants by their action(s) described herein above, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

33. The Defendants' act(s) is capable of repetition and, upon information and belief, have been repeated.

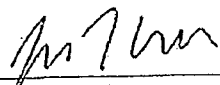
34. The Defendants' conduct affects the public interest of the people of South Carolina.

35. The Defendants knew or should have reasonably known, that its conduct violated the Unfair Trade Practices Act. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements and building components of Plaintiffs' home. All of which will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

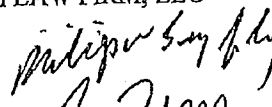
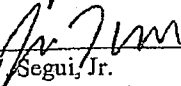
WHEREFORE, the Plaintiffs pray for judgment against the Defendants, **D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping, Inc.**, in a reasonable amount of actual, punitive and treble damages to be determined by the jury; for the attorneys fees and cost of this action; for a prejudgment or post-judgment interest

on Plaintiffs' damages; and for such other and further relief as this Court may deem just and proper.

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Attorneys for Plaintiffs

Charleston, South Carolina
Dated: 4/15, 2010

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

FIRST JUDICIAL CIRCUIT

GREGORY W. SMITH AND
STEPHANIE SMITH,

Plaintiffs,

C.A. No.: 2010-CP-18-641

v.

D.R. Horton, Inc., Tom's Vinyl Siding,
LLC, Lutzen Construction, Inc., Boozer
Lumber Company, All American Roofing,
Inc., and Myers Landscaping, Inc.,

Defendants.

CERTIFIED COPY
2010 JUN -2 PM 5:00
Clerk of Court
DORCHESTER COUNTY

**ANSWER TO AMENDED COMPLAINT AND CROSS-CLAIMS
ON BEHALF OF D.R. HORTON, INC.**

NOW COMES the Defendant, D.R. Horton, Inc., by and through its undersigned counsel, and, answering the Amended Complaint of the Plaintiffs and cross-claiming, would respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

1. Defendant, D.R. Horton, Inc. (hereinafter "DRH" or "Defendant"), denies each and every allegation contained in the Amended Complaint not expressly admitted, explained, or modified herein.

2. Responding to paragraph 1 of the Amended Complaint, DRH admits the allegations contained therein, upon information and belief.

3. Responding to paragraph 2 of the Amended Complaint, DRH affirmatively states that it is a Delaware corporation with a principal place of business in the State of Texas and that it is licensed to conduct business, and conducts business, in the State of South Carolina, has from

time to time conducted business in Dorchester County, that it constructed the subject property located at 4830 Harvest Moon, Summerville, South Carolina, and that it performed certain work on the property after conveyance at Plaintiffs' request. DRH denies any and all remaining allegations and inferences set forth in paragraph 2.

4. Responding to paragraph 3 of the Amended Complaint, DRH affirmatively states that Tom's Vinyl Siding, LLC ("Tom's Vinyl") provided labor and materials for the construction of the subject property specifically including, among other things, the exterior siding for the residence. Defendant admits the remaining allegations upon information and belief.

5. Responding to paragraph 4 of the Amended Complaint, DRH affirmatively states that Lutzen Construction, Inc., ("Lutzen") provided labor and materials for the construction of the subject property, specifically including, among other things, the slab foundation. Defendant admits the remaining allegations upon information and belief.

6. Responding to paragraph 5 of the Amended Complaint, DRH affirmatively states that Boozer Lumber Company ("Boozer") provided labor and materials for the construction of the subject property, specifically including, among other things, framing and supply, setting and installation of windows and exterior doors for the residence. Defendant admits the remaining allegations upon information and belief.

7. Responding to paragraph 6 of the Amended Complaint, DRH affirmatively states that All American Roofing, Inc., ("All American") provided labor and materials for the construction of the subject property, specifically including, among other things, the roofing and related flashings of the residence. Defendant admits the remaining allegations upon information and belief.

8. Responding to paragraph 7 of the Amended Complaint, DRH affirmatively states that Myers Landscaping, Inc., ("Myers") provided labor and materials for the construction of the subject property, specifically including, among other things, the clearing, grading, excavating and site development for the subject property. Defendant admits the remaining allegations upon information and belief.

9. Responding to paragraph 8 of the Amended Complaint, Defendant is not presently aware of an objection to jurisdiction of this Court over the above captioned lawsuit.

10. Responding to paragraph 9 of the Amended Complaint, DRH affirmatively states that it built the subject property. Defendant denies any and all remaining allegations and inferences contained in paragraph 9.

11. Responding to paragraph 10 of the Amended Complaint, DRH affirmatively states that Defendant conveyed the subject property to Plaintiffs via closing which took place on August 29, 2005 and that it performed certain work on the property after conveyance at the Plaintiffs' request. Defendant denies and all remaining allegations and inferences contained in paragraph 10.

12. Responding to paragraph 11 of the Amended Complaint, DRH denies the allegations contained therein.

13. Responding to paragraph 12 of the Amended Complaint, DRH incorporates its responses to paragraphs 1 through 11 as if restated verbatim herein.

14. Responding to paragraph 13 of the Amended Complaint, DRH affirmatively states that the various other defendants participated in the construction of the subject property as stated in paragraphs 3 through 8, above. Responding to so much of the allegations contained in paragraph 13 as assert one or more conclusions of law, DRH avers that no response is required

thereto, but denies those allegations insofar as a response may be required. DRH denies any and all remaining allegations and inferences contained in paragraph 13.

15. Responding to paragraphs 14, 15, 16, 17, 18, 19 and 20 of the Amended Complaint, including all sub-parts, DRH denies the allegations contained therein.

16. Responding to paragraph 21 of the Amended Complaint, DRH incorporates its responses to paragraphs 1 through 20 as if restated verbatim herein.

17. Responding to paragraph 22 of the Amended Complaint, DRH affirmatively states that Defendant and Plaintiffs entered into a Purchase Agreement dated March 11, 2005 concerning the subject property. DRH craves reference to the contract document for its terms, and denies so much of the allegations contained within paragraph 22 as are inconsistent with the true and accurate contents thereof. DRH denies any and all remaining allegations and inferences contained in paragraph 22.

18. Responding to paragraph 23 of the Amended Complaint, DRH asserts that paragraph 23 contains no allegations of fact but asserts only conclusions of law, to which no response from Defendant is required, but denies those allegations insofar as a response may be required. DRH denies any and all remaining allegations and inferences contained in paragraph 23.

19. Responding to paragraph 24 of the Amended Complaint, including all subparts, DRH denies the allegations contained therein.

20. Responding to paragraph 25 of the Amended Complaint, DRH denies the allegations contained therein.

21. Responding to paragraph 26 of the Amended Complaint, DRH incorporates its responses to paragraphs 1 through 25 as if restated verbatim herein.

22. Responding to paragraph 27 of the Amended Complaint, DRH asserts that so much of the allegations as purport to allege the existence of one or more implied warranties do not contain any allegations of fact, but set forth only one or more conclusions of law, to which no response from Defendant is required, but DRH denies those allegations insofar as a response may be required. Responding to so much of the allegations as allege one or more express warranties given by DRH, the Defendant craves reference to the document alleged to evidence such express warranties, and denies so much of the allegations as are inconsistent with the true and accurate contents of the same. Responding to so much of the allegations as allege one or more express warranties given by any other party, DRH lacks knowledge or information sufficient to admit or deny the allegations, and therefore denies the same. DRH denies any and all remaining allegations and inferences contained in paragraph 27.

23. Responding to paragraph 28 of the Amended Complaint, DRH lacks knowledge or information sufficient to admit or deny so much of the allegations as may be predicated on the terms of any express warranty given by any other defendant, and therefore denies the same. DRH denies any and all remaining allegations and inferences contained in paragraph 28.

24. Responding to paragraph 29 of the Amended Complaint, DRH denies the allegations contained therein.

25. Responding to paragraph 30 of the Amended Complaint, DRH incorporates its responses to paragraphs 1 through 29 as if restated verbatim herein.

26. Responding to paragraph 31 of the Amended Complaint, DRH affirmatively states that it is a "person" within the meaning of S.C. Code Ann. § 39-5-10(a). DRH denies any and all remaining allegations and inferences contained in paragraph 31 which are directed to it. DRH is not required to and does not respond on behalf of any other defendant.

27. Responding to paragraphs 32, 33 and 34 of the Amended Complaint, DRH denies so much of the allegations as are directed to it. DRH is not required to and does not respond on behalf of any other defendant.

28. Responding to paragraph 35 of the Amended Complaint, DRH is not required to and does not respond to so much of the allegations as are directed to what any other defendant knew or should have known about its own conduct. DRH denies any and all remaining allegations and inferences contained in paragraph 35.

29. Responding to that portion of the Amended Complaint which purports to assert a prayer for relief, DRH denies that Plaintiffs are entitled to any of the relief requested therein.

FOR A SECOND DEFENSE

30. The Amended Complaint, in whole or in part, fails to state facts sufficient to constitute a cause of action, and it should be dismissed pursuant to SCRCP 12(b)(6).

FOR A THIRD DEFENSE

31. Plaintiffs' claims are barred by the applicable statute of limitations, and should be dismissed.

FOR A FOURTH DEFENSE

32. Plaintiffs' claims are barred by the doctrine of laches, and should be dismissed.

FOR A FIFTH DEFENSE

33. Plaintiffs have failed to mitigate their alleged damages, if any, as required by law.

FOR A SIXTH DEFENSE

34. Any recovery by Plaintiffs, their entitlement to which is denied, should be reduced or barred pursuant to the doctrine of comparative negligence.

FOR A SEVENTH DEFENSE

35. If Plaintiffs have incurred damages, which are denied, such damages are the result of the acts or omissions of one or more third parties, over which DRH does not have authority or control.

FOR AN EIGHTH DEFENSE

36. Plaintiffs' claims for breach of express or implied warranty are barred as the result of Plaintiffs' failure to provide DRH with notice and opportunity to cure.

FOR A NINTH DEFENSE

37. Certain of the damages alleged by Plaintiffs are barred by the economic loss rule.

FOR A TENTH DEFENSE

38. Plaintiffs' claim for punitive damages seeks a remedy that is unconstitutional.

FOR AN ELEVENTH DEFENSE

39. Plaintiffs' claims are barred by the doctrines of waiver and estoppel.

FOR A TWELFTH DEFENSE

40. If Plaintiffs have incurred damages, which are denied, such damages are the result of the intervening or supervening conduct of one or more third parties, for which DRH is not responsible, and but for which, no such damages would have been incurred.

FOR A THIRTEENTH DEFENSE

41. Plaintiffs have failed to provide DRH with adequate notice and opportunity to cure pursuant to S.C. Code Ann. § 40-59-810 *et seq.*, and Plaintiffs' claims should be stayed until such time as Plaintiffs have satisfied the statutory requirements and for ninety (90) days thereafter.

FOR A FOURTEENTH DEFENSE

42. Plaintiffs' claims are subject to mandatory, binding arbitration, and should be dismissed.

FOR A FIFTEENTH DEFENSE

43. DRH reserves and does not waive any and all other defenses which may be available to it.

**FOR A SIXTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
TOM'S VINYL SIDING, LLC**

44. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

45. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Amended Complaint in this case.

46. DRH and Tom's Vinyl Siding, LLC (hereinafter "Tom's Vinyl") entered into an Independent Contractor Agreement pursuant to which Tom's Vinyl agreed to provide, among other things, labor and materials for exterior siding for certain properties (hereinafter "the Contract").

47. Tom's Vinyl provided labor and materials for the exterior siding of the property that is the subject of the Plaintiffs' Amended Complaint. Tom's Vinyl provided such labor and materials pursuant to and subject to the Contract.

**FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)**

48. At the times relevant to this case, Tom's Vinyl acted in the capacity of a subcontractor to DRH and provided labor and materials for the exterior siding of the subject property.

49. As a result, a special relationship exists between DRH and Tom's Vinyl such that Tom's Vinyl is obligated by equity to indemnify DRH.

50. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Tom's Vinyl, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Tom's Vinyl or its agents and not a result of any actions or omissions on the part of DRH.

51. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Tom's Vinyl in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Tom's Vinyl should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

52. Tom's Vinyl entered into the Contract with DRH pursuant to which Tom's Vinyl agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Tom's Vinyl's performance under the Contract and caused in whole or in part by Tom's Vinyl's conduct.

53. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Tom's Vinyl or its agents in connection with Tom's Vinyl's performance under the Contract and

were a direct and proximate result of the wrongful acts and omissions of Tom's Vinyl or its agents and not a result of any actions or omissions on the part of DRH.

54. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Tom's Vinyl in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

**FOR A SEVENTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT LUTZEN CONSTRUCTION, INC.**

55. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

56. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Amended Complaint in this case.

57. DRH and Lutzen Construction, Inc. (hereinafter "Lutzen") entered into an Independent Contractor Agreement pursuant to which Lutzen agreed to provide, among other things, labor and materials for concrete foundations and slabs for certain properties (hereinafter "the Contract").

58. Lutzen provided labor and materials for the slab foundation of the property that is the subject of the Plaintiffs' Amended Complaint. Lutzen provided such labor and materials pursuant to and subject to the Contract.

**FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)**

59. At the times relevant to this case, Lutzen acted in the capacity of a subcontractor to DRH and provided labor and materials for the slab foundation of the subject property.

60. As a result, a special relationship exists between DRH and Lutzen such that Lutzen is obligated by equity to indemnify DRH.

61. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Lutzen, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Lutzen or its agents and not a result of any actions or omissions on the part of DRH.

62. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Lutzen in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Lutzen should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

63. Lutzen entered into the Contract with DRH pursuant to which Lutzen agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Lutzen's performance under the Contract and caused in whole or in part by Lutzen's conduct.

64. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, DRH alleges that any

damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Lutzen or its agents in connection with Lutzen's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Lutzen or its agents and not a result of any actions or omissions on the part of DRH.

65. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Lutzen in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

**FOR AN EIGHTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT BOOZER LUMBER COMPANY**

66. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

67. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Amended Complaint in this case.

68. DRH and Boozer Lumber Company (hereinafter "Boozer") entered into an Independent Contractor Agreement pursuant to which Boozer agreed to provide, among other things, labor and materials for turnkey framing, which scope of work included framing and supply, setting and of installation of windows and exteriors doors, for certain properties (hereinafter "the Contract").

69. Boozer provided labor and materials for the framing and supply, setting and installation of windows and exterior doors of the property that is the subject of the Plaintiffs' Amended Complaint. Boozer provided such labor and materials pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

70. At the times relevant to this case, Boozer acted in the capacity of a subcontractor to DRH and provided labor and materials for the framing and supply, setting and installation of windows and exterior doors for the subject property.

71. As a result, a special relationship exists between DRH and Boozer such that Boozer is obligated by equity to indemnify DRH.

72. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Boozer, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Boozer or its agents and not a result of any actions or omissions on the part of DRH.

73. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Boozer in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Boozer should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

74. Boozer entered into the Contract with DRH pursuant to which Boozer agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Boozer's performance under the Contract and caused in whole or in part by Boozer's conduct.

75. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Boozer or its agents in connection with Boozer's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Boozer or its agents and not a result of any actions or omissions on the part of DRH.

76. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Boozer in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A NINETEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT ALL AMERICAN ROOFING, INC.

77. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

78. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Amended Complaint in this case.

79. DRH and All American Roofing, Inc., (hereinafter "All American") entered into an Independent Contractor Agreement pursuant to which American agreed to provide, among

other things, labor and materials for installation of residential roofs for certain properties (hereinafter "the Contract").

80. All American provided labor and materials for the roof and related flashings for the property that is the subject of the Plaintiffs' Amended Complaint. All American provided such labor and materials pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

81. At the times relevant to this case, All American acted in the capacity of a subcontractor to DRH and provided labor and materials for the roof and related flashings for the subject property.

82. As a result, a special relationship exists between DRH and All American such that All American is obligated by equity to indemnify DRH.

83. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of All American, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of All American or its agents and not a result of any actions or omissions on the part of DRH.

84. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against All American in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is

ultimately exonerated or not, All American should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

85. All American entered into the Contract with DRH pursuant to which All American agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to All American's performance under the Contract and caused in whole or in part by All American's conduct.

86. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of All American or its agents in connection with All American's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of All American or its agents and not a result of any actions or omissions on the part of DRH.

87. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against All American in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A TWENTIETH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT MYERS LANDSCAPING, INC.

88. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

89. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Amended Complaint in this case.

90. DRH and Myers Landscaping, Inc., (hereinafter "Myers") entered into an Independent Contractor Agreement pursuant to which Myers agreed to provide, among other things, labor and materials for clearing, grading, excavating and site development for certain properties (hereinafter "the Contract").

91. Myers provided labor and materials for clearing, grading, excavating and site development for the property that is the subject of the Plaintiffs' Amended Complaint. Myers provided such labor and materials pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

92. At the times relevant to this case, Myers acted in the capacity of a subcontractor to DRH and provided labor and materials for the clearing, grading, excavating and site development for the subject property.

93. As a result, a special relationship exists between DRH and Myers such that Myers is obligated by equity to indemnify DRH:

94. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Myers, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Myers or its agents and not a result of any actions or omissions on the part of DRH.

95. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Myers in the same

amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Myers should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

96. Myers entered into the Contract with DRH pursuant to which Myers agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Myers' performance under the Contract and caused in whole or in part by Myers' conduct.

97. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Myers or its agents in connection with Myers' performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Myers or its agents and not a result of any actions or omissions on the part of DRH.

98. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Myer in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

WHEREFORE, having fully answered the Plaintiffs' Amended Complaint, and having asserted its Cross-claims, DRH prays this Court enter the following relief:

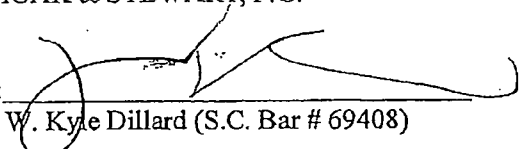
- a. Dismiss Plaintiffs' Amended Complaint with prejudice;

- b. Grant the relief requested pursuant to DRH's Cross-claims against Tom's Vinyl, Lutzen, Boozer, All American and Myers;
- c. Award DRH attorneys' fees and costs to defend this action; and
- d. For all such other and further relief this Court deems just and proper.

Dated this 1 day of June, 2010.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: 

W. Kyle Dillard (S.C. Bar # 69408)

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Greenville, South Carolina 29602
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Attorneys for Defendant,
D.R. Horton, Inc.

8677078.1 (OGLETREE)

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

GREGORY W. SMITH AND
STEPHANIE SMITH,

Plaintiffs,

v.

D.R. HORTON, INC., AND TOM'S
VINYL SIDING, LLC, LUTZEN
CONSTRUCTION, INC., BOOZER
LUMBER COMPANY, ALL
AMERICAN ROOFING, INC., AND
MYERS LANDSCAPING, INC.,
SMITH'S HEATING & AIR
CONDITIONING CO., INC., AND
JESUS DEMELO, INDIVIDUALLY

Defendants.

IN THE COURT OF
COMMON PLEAS

CASE NO.: 2010-CP-18-641

SECOND AMENDED COMPLAINT

(Jury Trial Demanded)

Christy Johnson
CLERK OF COURT
DORCHESTER COUNTY
2011 MAY 12 PM 2:51
CERTIFIED COPY

The Plaintiffs above named, complaining of the Defendants above named, would allege and show as follows:

PARTIES

1. The Plaintiffs are citizens and residents of the County of Dorchester, State of South Carolina and at all times hereinafter mentioned, own the residence located at 4830 Harvest Moon, Summerville, South Carolina.

2. That, upon information and belief, Defendant, D.R. Horton, Inc., is a corporation organized in the State of South Carolina conducting business in Dorchester County, State of South Carolina and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically, constructed and/or repaired the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

3. That, upon information and belief, the Defendant, Tom's Vinyl Siding, LLC, is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence specifically installed the siding to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

4. That, upon information and belief, the Defendant, Lutzen Construction, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence specifically installed the slab to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

5. That, upon information and belief, the Defendant, Boozer Lumber Company, is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence specifically installed the framing to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

6. That, upon information and belief, the Defendant, All American Roofing, Inc., is a corporation organized and existing under the laws of the State of North Carolina, and conducted business in this State and that at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence

specifically installed the roof and related flashings to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

7. That, upon information and belief, the Defendant, Myers Landscaping, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County and that at all relevant times herein and was engaged in the design, building and construction of the Plaintiffs' residence and at all times relevant was engaged in the grading and landscaping of the land located at 4830 Harvest Moon, Summerville, South Carolina.

8. That upon information and belief, the Defendant, Smith's Heating & Air Conditioning Co., Inc., is a corporation organized and existing under the laws of the State of South Carolina, and conducted business in Dorchester County and that at all relevant times herein performed installation, repairs and maintenance of the heating and air conditioning system located in the Plaintiffs' residence.

9. That, upon information and belief, the Defendant, Jesus Demelo, Individually, is a citizen and resident of Charleston County and conducts business in Dorchester County was engaged in the design, building and construction of the Plaintiffs' residence and specifically installed the siding to the Plaintiffs' residence located at 4830 Harvest Moon, Summerville, South Carolina.

JURISDICTION

10. The Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises all involve the residence of the Plaintiffs located in the County of Dorchester, State of South Carolina.

FACTUAL BACKGROUND

11. That the Defendant, D.R. Horton, Inc., designed, developed and constructed the residence located at 4830 Harvest Moon, Summerville, South Carolina.

12. That the Plaintiffs purchased the home from the Defendant, D.R. Horton, Inc., on or about August 2005, and recently became aware of defects and deficiencies that include but are not limited to the installation of the siding, floors and other construction deficiencies that D.R. Horton, Inc., has attempted to repair on numerous occasions.

13. That as a result of the various defects and deficiencies relative to the construction of this home, the Plaintiffs have been damaged and will be required to expend large sums of money to repair, correct and replace various parts and components of the residence and reconstruct major portions of the residence, have been exposed to and will be subject to loss of use, enjoyment and depreciation of the value of their property.

FOR A FIRST CAUSE OF ACTION

(Negligence)

(As To D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., Smith's Heating & Air Conditioning Co., Inc., and Jesus Demelo, Individually.)

14. Each and every allegation contained in Paragraphs 1 through 13 above are incorporated herein by express reference as though fully set forth.

15. At all times material hereto, the Defendant, D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., **Smith's Heating & Air Conditioning Co., Inc., and Jesus Demelo, Individually**, by and through its agents, servants and employees undertook and were under a duty to design, develop, construct and/or repair the residence and to provide materials and services in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards.

16. The Defendant, D.R. Horton, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, developing, designing, supervising and inspecting the subject residence and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

- a. In failing to use due care in the design, development, construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors or specialty contractors;
- d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;

- e. In constructing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices.
- f. In improperly installing vinyl siding;
- g. in improperly installing the siding, windows, and flashings in violation of the building code, standard building practices and accepted construction industry standards and practices;
- h. In failing to properly install the moisture barrier;
- i. In constructing the subject residence in such a manner that water entered the dwelling;
- j. In failing to properly install the framing;
- k. In improperly installing the slab and lack of proper vapor barrier under the slab;
- l. Other deficiencies or failures as will be proven at trial.

17. That the Defendant Tom's Vinyl Siding, LLC, and Jesus Demelo, Individually, were negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, installing siding, remodeling, supervising and inspecting the subject residence and in failing to construct and/or repair said residence in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling of the subject residence;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors, specialty contractors, and/or employees;
- d. In failing to adequately and competently supervise and/or train said subcontractors, specialty contractors and/or employees;
- e. In constructing, repairing and/or remodeling subject residence in violation of applicable building codes, standard building practices,

relevant product specifications and accepted construction industry standards and practices.

- f. In improperly installing the siding and related flashings;
- g. In improperly installing a weather barrier;
In improperly installing the siding in violation of the building code, manufacturer's recommendations, standard building practices, and accepted construction industry standards and practices
- h. In other deficiencies as will be proven at trial.

18. The defendant Lutzen Construction, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, supervising and inspecting the subject residence and in failing to construct and/or repair said residence in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling and in installing the foundation, block work, slab and driveway of the subject residence and its components;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the slab and driveway of the subject residence;
- c. In failing to hire competent subcontractors, specialty contractors or employees;
- d. In failing to adequately and competently supervise and/or train said subcontractors, specialty contractors or employees;
- e. In constructing, repairing and/or remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- f. In failing to properly install and pour the foundation, and slab; and
- g. In other deficiencies as will be proven at trial.

19. The Defendant, Boozer Lumber Company, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, framing, supervising and inspecting the subject residence and in failing to construct, repair and/or remodel said residence and specifically the framing, in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling and framing of the subject residence;
- b. In failing to adequately supervise the work and construction, repair, remodeling and framing of the subject residence;
- c. In failing to hire competent subcontractors, specialty contractors, and/or employees;
- d. In failing to adequately and competently supervise and/or train said subcontractors;
- e. In constructing, repairing and/or remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- f. In failing to properly frame the residence;
- g. In installing the framing, on and to the home which failed to provide a sufficient barrier against the intrusion of water;
- h. In failing to properly install windows and doors and related flashings;
- i. In constructing, repairing and/or remodeling the subject residence in such a manner that water entered the dwelling;
- j. In failing to use due care in constructing, repairing and/or remodeling the residence in such a fashion as to permit excessive moisture to enter subject residence;
- k. In other deficiencies as will be proven at trial.

20. The Defendant, All American Roofing, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, supervising and inspecting the subject residence and in failing to construct and/or repair said residence and specifically the installation of the roof and related flashings, in accordance with the applicable building codes, manufacturers' recommendations, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes but is not limited to the following particulars, to-wit:

- a. In failing to use due care in the construction, repair, remodeling and in installing the roof on the subject residence;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors or specialty contractors;
- d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- e. In failing to use proper accessories and/or flashings in the installation of the roof;
- f. In constructing, repairing, remodeling and installing the roof on subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- g. Other deficiencies or failures will be proved at trial.

21. The Defendant, Myers Landscaping, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, designing, supervising and inspecting the subject lot and in failing to design, construct and/or repair said residence in accordance with applicable building code, and in conformance with accepted construction and industry standards, all of which have directly and proximately caused

defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

- a. In failing to adequately supervise the work and construction of the subject residence;
- b. In failing to hire competent employees, subcontractors or specialty contractors;
- c. In failing to adequately and competently supervise and/or train said employees, subcontractors or specialty contractors;
- d. In constructing the subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- e. In failing to properly grade the lot;
- f. Other deficiencies or failures as will be proved at trial.

22. That the Defendant, Smith's Heating & Air Conditioning Co., Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in the construction, installation and supervision of the installation of the heating and air conditioning system in the Plaintiffs' residence and in failing to design and install heating and air conditioning system in accordance with the applicable building codes, accepted construction, heating and air conditioning and industry standards, all of which have directly and proximately caused defects and deficiencies which will need to be corrected, repaired and remediated. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness, include but is not limited to the following particulars:

- a. in failing to use due care in the design and installation of the heating and air conditioning system installed in subject residence;
- b. in failing to properly train, supervise and hire competent agents, subcontractors or specialty contractors;

- c. in failing to design and install a heating and air conditioning system in violation of applicable building codes, standard and heating and air conditioning practices, relevant product specifications, and accepted heating and air conditioning and construction industry standards and practices;
- d. other deficiencies or failures as will be proved at trial.

23. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendants, D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., **Smith's Heating & Air Conditioning Co., Inc.**, and **Jesus Demelo, Individually**, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that slab, cladding, structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish, structural elements and building components of Plaintiffs' home. All of which will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR A SECOND CAUSE OF ACTION
(Breach of Contract)
(As to D.R. Horton, Inc.)**

24. Each and every allegation contained in Paragraphs 1 through 23 above are incorporated herein by express reference as though fully set forth.

25. That at all times herein, the Plaintiffs entered into a contract with the Defendant D.R. Horton, Inc., for the design, development, construction and purchase of her residence located at 4830 Harvest Moon, Summerville, South Carolina.

26. That at all relevant times herein, the Defendant, D.R. Horton, Inc., by and through its agents, servants and employees had an obligation and duty to construct and/or repair the residence and to provide materials and services in accordance with the terms and conditions of the contract, applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards.

27. That the Defendant, D.R. Horton, Inc., breached the contract with the Plaintiffs by failing to develop, construct and/or repair said residence in accordance with the terms and conditions of the contract, applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence which will need to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breach includes but is not limited to the following particulars, to wit:

- a. In failing to use due care in the design, development, construction, repair and remodeling of the subject residence;
- b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
- c. In failing to hire competent subcontractors or specialty contractors;

- d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
- e. In constructing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;
- f. In improperly installing vinyl siding;
- g. in improperly installing the siding, windows, and flashings in violation of the building code, standard building practices and accepted construction industry standards and practices;
- h. In failing to properly install the moisture barrier;
- i. In constructing the subject residence in such a manner that water entered the dwelling;
- j. In failing to properly install the framing;
- k. In improperly installing the slab and lack of proper vapor barrier under the slab;
- l. Other deficiencies or failures as will be proven at trial.

28. That as a direct and proximate result of the Defendant, D. R. Horton, Inc.'s, breach of contract with the Plaintiffs, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and their having to spend substantial sums of money in order to renovate, correct, repair and restore their residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that slab, cladding, structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements and building components of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property as well as loss of value in depreciation by virtue of the defects and damages aforesaid

FOR A THIRD CAUSE OF ACTION

**(Breach of Warranty of Habitability, Breach of Warranty of Workmanlike Services,
Breach of Warranty for Fitness for a Particular Purpose, Breach of Warranty of
Merchantability and Breach of Warranty Against Latent Defects)
(As To D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc.,
Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc.,
and Smith's Heating & Air Conditioning Co., Inc., and Jesus Demelo, Individually,)**

29. Each and every allegation contained in Paragraphs 1 through 28 above are incorporated herein by express reference as though fully set forth.

30. That Defendants, D.R. Horton, Inc., and Toms Vinyl Siding, LLC, implicitly and/or expressly warranted that the subject residence and its components would be habitable and fit for its intended uses as a single family residence and home, that said residence and its components would be sold, designed, manufactured, constructed, installed, repaired and remodeled in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, product specifications, accepted building component manufacturing standards and accepted construction industry standards applicable thereto and that the subject residence and/or the manufactured components installed into and/or onto said residence would be merchantable, free from latent defects and fit for the particular purpose for which it was sold.

31. That Defendants, D.R. Horton, Inc., and Toms Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., Smith's Heating & Air Conditioning Co., Inc., and Jesus Demelo, Individually, breached said warranties by designing, developing, manufacturing, selling, constructing, remodeling or repairing subject residence and/or the manufactured components installed into and/or onto said residence in such manner as to be in violation

of applicable building codes, standard building practices, relevant product specifications, accepted building component manufacturing standards and accepted construction industry standards and practices.

32. As a direct and proximate result of the Defendants, D.R. Horton, Inc., and Toms Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., and Smith's Heating & Air Conditioning Co., Inc., and Jesus Demelo, Individually's, breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiffs have been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements and building components of Plaintiffs' home. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

**FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices)**

(As To D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc.,
Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc.,
Smith's Heating & Air Conditioning Co., Inc., and Jesus Demelo, Individually,)

33. Each and every allegation contained in Paragraphs 1 through 32 above are incorporated herein by express reference as though fully set forth.

34. The Defendants, D.R. Horton, Inc., and Tom's Vinyl Siding, LLC Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., **Smith's Heating & Air Conditioning Co., Inc.**, and Jesus Demelo, **Individually**, are "persons" within the meaning of South Carolina Code § 39-5-10(a), and the Defendants by its actions in designing, developing, manufacturing, selling, constructing, remodeling or repairing subject residence and/or the manufactured components installed into and/or onto said residence are engaged in commerce within the meaning of South Carolina Code §29-5-10(b).

35. The Defendants by their action(s) described herein above, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

36. The Defendants' act(s) is capable of repetition and, upon information and belief, have been repeated.

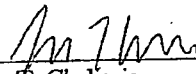
37. The Defendants' conduct affects the public interest of the people of South Carolina.

38. The Defendants knew or should have reasonably known that its conduct violated the Unfair Trade Practices Act. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally,

Plaintiffs have been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements and building components of Plaintiffs' home. All of which will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

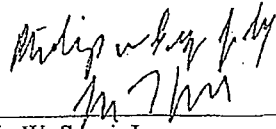
WHEREFORE, the Plaintiffs pray for judgment against the Defendants, D.R. Horton, Inc., and Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Booser Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., Smith's Heating & Air Conditioning Co., Inc., and Jesus Demelo, Individually, in a reasonable amount of actual, punitive and treble damages to be determined by the jury; for the attorneys fees and cost of this action; for a prejudgment or post-judgment interest on Plaintiffs' damages; and for such other and further relief as this Court may deem just and proper.

THE CHAKERIS LAW FIRM

By: 

John T. Chakeris
231 Calhoun Street
P. O. Box 397
Charleston, SC 29402
(843) 853-5678

SEGUI LAW FIRM, LLC

By: 
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Dated: 5/5, 2011

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Gregory W. Smith and Stephanie Smith,

Plaintiffs,

v.

D.R. Horton, Inc., and Tom's Vinyl Siding,
LLC, Lutzen Construction, Inc., Boozer
Lumber Company, All American Roofing,
Inc., Myers Landscaping, Inc., Smith's
Heating & Air Conditioning Co., Inc., and
Jesus DeMelo, Individually,

Defendants.

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

**ANSWER TO SECOND AMENDED
COMPLAINT AND CROSS-CLAIMS ON
BEHALF OF D.R. HORTON, INC.**

C.A. No.: 2010-CP-18-641

NOW COMES the Defendant, D.R. Horton, Inc., by and through its undersigned counsel,
and, answering the Second Amended Complaint of the Plaintiffs and cross-claiming, would
respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

1. Defendant, D.R. Horton, Inc. (hereinafter "DRH" or "Defendant"), denies each and every allegation contained in the Second Amended Complaint not expressly admitted, explained, or modified herein.

2. Responding to paragraph 1 of the Second Amended Complaint, DRH admits the allegations contained therein, upon information and belief.

3. Responding to paragraph 2 of the Second Amended Complaint, DRH affirmatively states that it is a Delaware corporation with a principal place of business in the State of Texas and that it is licensed to conduct business, and conducts business, in the State of South Carolina, has from time to time conducted business in Dorchester County, that it constructed the subject property located at 4830 Harvest Moon, Summerville, South Carolina,

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DORCHESTER COUNTY

and that it performed certain work on the property after conveyance at Plaintiffs' request. DRH denies any and all remaining allegations and inferences set forth in paragraph 2.

4. Responding to paragraph 3 of the Second Amended Complaint, DRH affirmatively states that Tom's Vinyl Siding, LLC ("Tom's Vinyl") provided labor and materials for the construction of the subject property specifically including, among other things, the exterior siding for the residence. Defendant admits the remaining allegations upon information and belief.

5. Responding to paragraph 4 of the Second Amended Complaint, DRH affirmatively states that Lutzen Construction, Inc., ("Lutzen") provided labor and materials for the construction of the subject property, specifically including, among other things, the slab foundation. Defendant admits the remaining allegations upon information and belief.

6. Responding to paragraph 5 of the Second Amended Complaint, DRH affirmatively states that Boozer Lumber Company ("Boozer") provided labor and materials for the construction of the subject property, specifically including, among other things, framing and supply, setting and installation of windows and exterior doors for the residence. Defendant admits the remaining allegations upon information and belief.

7. Responding to paragraph 6 of the Second Amended Complaint, DRH affirmatively states that All American Roofing, Inc., ("All American") provided labor and materials for the construction of the subject property, specifically including, among other things, the roofing and related flashings of the residence. Defendant admits the remaining allegations upon information and belief.

8. Responding to paragraph 7 of the Second Amended Complaint, DRH affirmatively states that Myers Landscaping, Inc., ("Myers") provided labor and materials for the

construction of the subject property, specifically including, among other things, the clearing, grading, excavating and site development for the subject property. Defendant admits the remaining allegations upon information and belief.

9. Responding to paragraph 8 of the Second Amended Complaint, DRH affirmatively states that Smith's Heating & Air Conditioning Co., Inc., ("Smith's") provided labor and materials for the construction of the subject property, specifically including, installation of the heating and air conditioning system of the residence. Defendant admits the remaining allegations upon information and belief.

10. Responding to paragraph 9 of the Second Amended Complaint, DRH is informed and believes that Jesus DeMelo ("DeMelo") provided labor and materials for the installation of vinyl siding and shutters for the residence at the direction of Tom's Vinyl, and DRH therefore admits the allegations upon information and belief.

11. Responding to paragraph 10 of the Second Amended Complaint, Defendant is not presently aware of an objection to jurisdiction of this Court over the above captioned lawsuit.

12. Responding to paragraph 11 of the Second Amended Complaint, DRH affirmatively states that it built the subject property. Defendant denies any and all remaining allegations and inferences contained in paragraph 11.

13. Responding to paragraph 12 of the Second Amended Complaint, DRH affirmatively states that Defendant conveyed the subject property to Plaintiffs via closing which took place on August 29, 2005 and that it performed certain work on the property after conveyance at the Plaintiffs' request. Defendant denies and all remaining allegations and inferences contained in paragraph 12.

14. Responding to paragraph 13 of the Second Amended Complaint, DRH denies the allegations contained therein.

15. Responding to paragraph 14 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 13 as if restated verbatim herein.

16. Responding to paragraph 15 of the Second Amended Complaint, DRH affirmatively states that the various other defendants participated in the construction of the subject property as stated in paragraphs 3 through 10, above. Responding to so much of the allegations contained in paragraph 15 as assert one or more conclusions of law, DRH avers that no response is required thereto, but denies those allegations insofar as a response may be required. DRH denies any and all remaining allegations and inferences contained in paragraph 15.

17. Responding to paragraphs 16, 17, 18, 19, 20, 21, 22, and 23 of the Second Amended Complaint, including all sub-parts, DRH denies the allegations contained therein.

18. Responding to paragraph 24 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 23 as if restated verbatim herein.

19. Responding to paragraph 25 of the Second Amended Complaint, DRH affirmatively states that Defendant and Plaintiffs entered into a Purchase Agreement dated March 11, 2005 concerning the subject property. DRH craves reference to the contract document for its terms, and denies so much of the allegations contained within paragraph 25 as are inconsistent with the true and accurate contents thereof. DRH denies any and all remaining allegations and inferences contained in paragraph 25.

20. Responding to paragraph 26 of the Second Amended Complaint, DRH asserts that paragraph 26 contains no allegations of fact but asserts only conclusions of law, to which no

response from Defendant is required, but denies those allegations insofar as a response may be required. DRH denies any and all remaining allegations and inferences contained in paragraph 26.

21. Responding to paragraph 27 of the Second Amended Complaint, including all subparts, DRH denies the allegations contained therein.

22. Responding to paragraph 28 of the Second Amended Complaint, DRH denies the allegations contained therein.

23. Responding to paragraph 29 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 28 as if restated verbatim herein.

24. Responding to paragraph 30 of the Second Amended Complaint, DRH asserts that so much of the allegations as purport to allege the existence of one or more implied warranties do not contain any allegations of fact, but set forth only one or more conclusions of law, to which no response from Defendant is required, but DRH denies those allegations insofar as a response may be required. Responding to so much of the allegations as allege one or more express warranties given by DRH, the Defendant craves reference to the document alleged to evidence such express warranties, and denies so much of the allegations as are inconsistent with the true and accurate contents of the same. Responding to so much of the allegations as allege one or more express warranties given by any other party, DRH lacks knowledge or information sufficient to admit or deny the allegations, and therefore denies the same. DRH denies any and all remaining allegations and inferences contained in paragraph 30.

25. Responding to paragraph 31 of the Second Amended Complaint, DRH lacks knowledge or information sufficient to admit or deny so much of the allegations as may be predicated on the terms of any express warranty given by any other defendant, and therefore

denies the same. DRH denies any and all remaining allegations and inferences contained in paragraph 31.

26. Responding to paragraph 32 of the Second Amended Complaint, DRH denies the allegations contained therein.

27. Responding to paragraph 33 of the Second Amended Complaint, DRH incorporates its responses to paragraphs 1 through 32 as if restated verbatim herein.

28. Responding to paragraph 34 of the Second Amended Complaint, DRH affirmatively states that it is a "person" within the meaning of S.C. Code Ann. § 39-5-10(a). DRH denies any and all remaining allegations and inferences contained in paragraph 34 which are directed to it. DRH is not required to and does not respond on behalf of any other defendant.

29. Responding to paragraphs 35, 36 and 37 of the Second Amended Complaint, DRH denies so much of the allegations as are directed to it. DRH is not required to and does not respond on behalf of any other defendant.

30. Responding to paragraph 38 of the Second Amended Complaint, DRH is not required to and does not respond to so much of the allegations as are directed to what any other defendant knew or should have known about its own conduct. DRH denies any and all remaining allegations and inferences contained in paragraph 38.

31. Responding to that portion of the Second Amended Complaint which purports to assert a prayer for relief, DRH denies that Plaintiffs are entitled to any of the relief requested therein.

Further, without assuming any burden of proof, persuasion, or production not otherwise legally assigned to it as to any element of the claims alleged in the Second Amended Complaint, DRH asserts the following additional defenses:

FOR A SECOND DEFENSE

32. The Second Amended Complaint, in whole or in part, fails to state facts sufficient to constitute a cause of action, and it should be dismissed pursuant to SCRCP 12(b)(6).

FOR A THIRD DEFENSE

33. Plaintiffs' claims are barred by the applicable statute of limitations, and should be dismissed.

FOR A FOURTH DEFENSE

34. Plaintiffs' claims are barred by the doctrine of laches, and should be dismissed.

FOR A FIFTH DEFENSE

35. Plaintiffs have failed to mitigate their alleged damages, if any, as required by law.

FOR A SIXTH DEFENSE

36. Any recovery by Plaintiffs, their entitlement to which is denied, should be reduced or barred pursuant to the doctrine of comparative negligence.

FOR A SEVENTH DEFENSE

37. If Plaintiffs have incurred damages, which are denied, such damages are the result of the acts or omissions of one or more third parties, over which DRH does not have authority or control.

FOR AN EIGHTH DEFENSE

38. Plaintiffs' claims for breach of express or implied warranty are barred as the result of Plaintiffs' failure to provide DRH with notice and opportunity to cure.

FOR A NINTH DEFENSE

39. Certain of the damages alleged by Plaintiffs are barred by the economic loss rule.

FOR A TENTH DEFENSE

40. Plaintiffs' claim for punitive damages seeks a remedy that is unconstitutional.

FOR AN ELEVENTH DEFENSE

41. Plaintiffs' claims are barred by the doctrines of waiver and estoppel.

FOR A TWELFTH DEFENSE

42. If Plaintiffs have incurred damages, which are denied, such damages are the result of the intervening or supervening conduct of one or more third parties, for which DRH is not responsible, and but for which, no such damages would have been incurred.

FOR A THIRTEENTH DEFENSE

43. Plaintiffs have failed to provide DRH with adequate notice and opportunity to cure pursuant to S.C. Code Ann. § 40-59-810 *et seq.*, and Plaintiffs' claims should be stayed until such time as Plaintiffs have satisfied the statutory requirements and for ninety (90) days thereafter.

FOR A FOURTEENTH DEFENSE

44. Plaintiffs' claims are subject to mandatory, binding arbitration, and should be dismissed.

FOR A FIFTEENTH DEFENSE

45. DRH reserves and does not waive any and all other defenses which may be available to it.

**FOR A SIXTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
TOM'S VINYL SIDING, LLC**

46. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

47. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

48. DRH and Tom's Vinyl Siding, LLC (hereinafter "Tom's Vinyl") entered into an Independent Contractor Agreement pursuant to which Tom's Vinyl agreed to provide, among other things, labor and materials for exterior siding for certain properties (hereinafter "the Contract").

49. In addition, the Contract states:

"If Contractor subcontracts any of the Work to the extent permitted under the [Contract], [Tom's Vinyl] guarantees such third party shall indemnify [DRH] and meet all insurance requirements set forth [in the Contract]. Prior to the subcontractor's commencement of the Work, [Tom's Vinyl] shall obtain a signed agreement from such third party indemnifying [DRH] and provide to [DRH] evidence of satisfactory insurance. In addition, [Tom's Vinyl] shall require that each supplier or subcontractor indemnify [DRH] from all losses arising from any materials or labor incorporated into the Work. [Tom's Vinyl] shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth herein. [Tom's Vinyl] understands and agrees that for all purposes including the purposes of this [Contract] [Tom's Vinyl] shall be fully responsible for any and all of the actions of any subcontractor engaged by [Tom's Vinyl] or who performs any part of the Work, and all obligations of [Tom's Vinyl] under this [Contract] shall be deemed to be the obligation of such subcontractors to [DRH], for which [Tom's Vinyl] shall be fully responsible to [DRH]."

(Contract, p. 3, ¶ 14, "Subcontractors").

50. Tom's Vinyl provided labor and materials for the exterior siding of the property that is the subject of the Plaintiffs' Second Amended Complaint. Tom's Vinyl provided such labor and materials pursuant to and subject to the Contract.

51. Upon information and belief, Tom's Vinyl subcontracted out some or all of its obligations under the Contract to a subcontractor, namely Defendant Jesus DeMelo ("DeMelo").

52. Tom's Vinyl failed to obtain a signed agreement from DeMelo indemnifying DRH and providing DRH evidence of satisfactory insurance prior to subcontracting work on the Smiths' residence to DeMelo.

53. Likewise, Tom's Vinyl has failed to require DeMelo to defend or indemnify DRH from losses arising from the incorporation of materials and labor incorporated into the subject property.

54. Further, Tom's Vinyl failed to require DeMelo to submit to binding arbitration pursuant to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

55. At the times relevant to this case, Tom's Vinyl acted in the capacity of a subcontractor to DRH and provided labor and materials for the exterior siding of the subject property.

56. As a result, a special relationship exists between DRH and Tom's Vinyl such that Tom's Vinyl is obligated by equity to indemnify DRH.

57. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Tom's Vinyl, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Tom's Vinyl or its agents and not a result of any actions or omissions on the part of DRH.

58. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Tom's Vinyl in the

same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Tom's Vinyl should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

59. Tom's Vinyl entered into the Contract with DRH pursuant to which Tom's Vinyl agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Tom's Vinyl's performance under the Contract and caused in whole or in part by Tom's Vinyl's conduct.

60. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Tom's Vinyl or its agents/subcontractors in connection with Tom's Vinyl's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Tom's Vinyl or its agents and not a result of any actions or omissions on the part of DRH.

61. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Tom's Vinyl in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

62. Pursuant to the Contract with DRH, Tom's Vinyl agreed to defend and indemnify DRH against claims such those alleged in Plaintiffs' Second Amended Complaint, including

those related to Tom's Vinyl's own acts or omissions and/or those acts or omissions of Tom's Vinyl's subcontractors.

63. Likewise, pursuant to the Contract with DRH, Tom's Vinyl agreed to ensure that subcontractors, including DeMelo, with respect to the acts or omissions of any such subcontractors, would: a) meet certain insurance coverage requirements, b) defend and indemnify DRH against claims such as those alleged in Plaintiffs' Second Amended Complaint, and c) submit to binding arbitration pursuant to the Contract.

64. Upon information and belief, Tom's Vinyl subcontracted out some or all of its obligations under the Contract to DeMelo.

65. Regardless, Tom's Vinyl failed to satisfy any of the requirements for so doing pursuant to the Contract.

66. DRH has given notice to Tom's Vinyl of its demand for defense and indemnity in connection with this matter. Despite DRH's due demand, Tom's Vinyl has failed to defend or indemnify DRH, and has thereby breached the contract.

67. Likewise, Tom's Vinyl has failed to secure a defense or indemnity of DRH from DeMelo, and has thereby breached the contract.

68. As the proximate result of Tom's Vinyl's breaches as described above, DRH has been and will continue to be forced to incur attorneys' fees and expenses and will be exposed to liability to the Plaintiffs.

69. Pursuant to the Contract and as a result of Tom Vinyl's breaches thereof, DRH is entitled to be reimbursed and indemnified for its attorneys' fees and defense costs as well as any amounts it may become required to pay in order to resolve the Plaintiffs' claims or in satisfaction of any judgment on Plaintiffs' behalf. DRH is further entitled to an award of all other damages

incurred as a consequence of Tom's Vinyl's breaches, to include the attorneys' fees and costs associated with the prosecution of its third party claims against Tom's Vinyl.

**FOR A SEVENTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT LUTZEN CONSTRUCTION, INC.**

70. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

71. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

72. DRH and Lutzen Construction, Inc. (hereinafter "Lutzen") entered into an Independent Contractor Agreement pursuant to which Lutzen agreed to provide, among other things, labor and materials for concrete foundations and slabs for certain properties (hereinafter "the Contract").

73. Lutzen provided labor and materials for the slab foundation of the property that is the subject of the Plaintiffs' Second Amended Complaint. Lutzen provided such labor and materials pursuant to and subject to the Contract.

**FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)**

74. At the times relevant to this case, Lutzen acted in the capacity of a subcontractor to DRH and provided labor and materials for the slab foundation of the subject property.

75. As a result, a special relationship exists between DRH and Lutzen such that Lutzen is obligated by equity to indemnify DRH.

76. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that

the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Lutzen, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Lutzen or its agents and not a result of any actions or omissions on the part of DRH.

77. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Lutzen in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Lutzen should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

78. Lutzen entered into the Contract with DRH pursuant to which Lutzen agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Lutzen's performance under the Contract and caused in whole or in part by Lutzen's conduct.

79. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Lutzen or its agents in connection with Lutzen's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Lutzen or its agents and not a result of any actions or omissions on the part of DRH.

80. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Lutzen in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

81. Pursuant to the Contract with DRH, Lutzen agreed to defend and indemnify DRH against claims such those alleged in Plaintiffs Second Amended Complaint.

82. DRH has given notice to Lutzen's of its demand for defense and indemnity in connection with this matter. Despite DRH's due demand, Lutzen has failed to defend or indemnify DRH, and has thereby breached the contract.

83. As the proximate result of Lutzen's breach as described above, DRH has been and will continue to be forced to incur attorneys' fees and expenses and will be exposed to liability to the Plaintiffs.

84. Pursuant to the Contract and as a result of Lutzen's breach thereof, DRH is entitled to be reimbursed and indemnified for its attorneys' fees and defense costs as well as any amounts it may become required to pay in order to resolve the Plaintiffs' claims or in satisfaction of any judgment on Plaintiffs' behalf. DRH is further entitled to an award of all other damages incurred as a consequence of Lutzen's breach, to include the attorneys' fees and costs associated with the prosecution of its third party claims against Lutzen.

FOR AN EIGHTEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT BOOZER LUMBER COMPANY

85. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

86. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

87. DRH and Boozer Lumber Company (hereinafter "Boozer") entered into an Independent Contractor Agreement pursuant to which Boozer agreed to provide, among other things, labor and materials for turnkey framing, which scope of work included framing and supply, setting and of installation of windows and exteriors doors, for certain properties (hereinafter "the Contract").

88. Boozer provided labor and materials for the framing and supply, setting and installation of windows and exterior doors of the property that is the subject of the Plaintiffs' Second Amended Complaint. Boozer provided such labor and materials pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

89. At the times relevant to this case, Boozer acted in the capacity of a subcontractor to DRH and provided labor and materials for the framing and supply, setting and installation of windows and exterior doors for the subject property.

90. As a result, a special relationship exists between DRH and Boozer such that Boozer is obligated by equity to indemnify DRH.

91. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Boozer, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful

acts and omissions of Boozer or its agents and not a result of any actions or omissions on the part of DRH.

92. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Boozer in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Boozer should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

93. Boozer entered into the Contract with DRH pursuant to which Boozer agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Boozer's performance under the Contract and caused in whole or in part by Boozer's conduct.

94. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Boozer or its agents in connection with Boozer's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Boozer or its agents and not a result of any actions or omissions on the part of DRH.

95. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Boozer in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

96. Pursuant to the Contract with DRH, Boozer agreed to defend and indemnify DRH against claims such those alleged in Plaintiffs Second Amended Complaint.

97. DRH has given notice to Boozer of its demand for defense and indemnity in connection with this matter. Despite DRH's due demand, Boozer has failed to defend or indemnify DRH, and has thereby breached the contract.

98. As the proximate result of Boozer's breach as described above, DRH has been and will continue to be forced to incur attorneys' fees and expenses and will be exposed to liability to the Plaintiffs.

99. Pursuant to the Contract and as a result of Boozer's breach thereof, DRH is entitled to be reimbursed and indemnified for its attorneys' fees and defense costs as well as any amounts it may become required to pay in order to resolve the Plaintiffs' claims or in satisfaction of any judgment on Plaintiffs' behalf. DRH is further entitled to an award of all other damages incurred as a consequence of Boozer's breach, to include the attorneys' fees and costs associated with the prosecution of its third party claims against Boozer.

FOR A NINETEENTH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT ALL AMERICAN ROOFING, INC.

100. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

101. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

102. DRH and All American Roofing, Inc., (hereinafter "All American") entered into an Independent Contractor Agreement pursuant to which American agreed to provide, among other things, labor and materials for installation of residential roofs for certain properties (hereinafter "the Contract").

103. All American provided labor and materials for the roof and related flashings for the property that is the subject of the Plaintiffs' Second Amended Complaint. All American provided such labor and materials pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

104. At the times relevant to this case, All American acted in the capacity of a subcontractor to DRH and provided labor and materials for the roof and related flashings for the subject property.

105. As a result, a special relationship exists between DRH and All American such that All American is obligated by equity to indemnify DRH.

106. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of All American, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of All American or its agents and not a result of any actions or omissions on the part of DRH.

107. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against All American in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified

for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, All American should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

108. All American entered into the Contract with DRH pursuant to which All American agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to All American's performance under the Contract and caused in whole or in part by All American's conduct.

109. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of All American or its agents in connection with All American's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of All American or its agents and not a result of any actions or omissions on the part of DRH.

110. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against All American in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

111. Pursuant to the Contract with DRH, All American agreed to defend and indemnify DRH against claims such those alleged in Plaintiffs Second Amended Complaint.

112. DRH has given notice to All American of its demand for defense and indemnity in connection with this matter. Despite DRH's due demand, All American has failed to defend or indemnify DRH, and has thereby breached the contract.

113. As the proximate result of All American's breach as described above, DRH has been and will continue to be forced to incur attorneys' fees and expenses and will be exposed to liability to the Plaintiffs.

114. Pursuant to the Contract and as a result of All American's breach thereof, DRH is entitled to be reimbursed and indemnified for its attorneys' fees and defense costs as well as any amounts it may become required to pay in order to resolve the Plaintiffs' claims or in satisfaction of any judgment on Plaintiffs' behalf. DRH is further entitled to an award of all other damages incurred as a consequence of All American's breach, to include the attorneys' fees and costs associated with the prosecution of its third party claims against All American.

**FOR A TWENTIETH DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT MYERS LANDSCAPING, INC.**

115. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

116. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

117. DRH and Myers Landscaping, Inc., (hereinafter "Myers") entered into an Independent Contractor Agreement pursuant to which Myers agreed to provide, among other things, labor and materials for clearing, grading, excavating and site development for certain properties (hereinafter "the Contract").

118. Myers provided labor and materials for clearing, grading, excavating, and site development for the property that is the subject of the Plaintiffs' Second Amended Complaint. Myers provided such labor and materials pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

119. At the times relevant to this case, Myers acted in the capacity of a subcontractor to DRH and provided labor and materials for the clearing, grading, excavating, and site development for the subject property.

120. As a result, a special relationship exists between DRH and Myers such that Myers is obligated by equity to indemnify DRH.

121. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Myers, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Myers or its agents and not a result of any actions or omissions on the part of DRH.

122. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Myers in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Myers should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

123. Myers entered into the Contract with DRH pursuant to which Myers agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not limited to claims for property damage, pertaining to Myers' performance under the Contract and caused in whole or in part by Myers' conduct.

124. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Myers or its agents in connection with Myers' performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Myers or its agents and not a result of any actions or omissions on the part of DRH.

125. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Myers in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

126. Pursuant to the Contract with DRH, Myers agreed to defend and indemnify DRH against claims such those alleged in Plaintiffs Second Amended Complaint.

127. DRH has given notice to Myers of its demand for defense and indemnity in connection with this matter. Despite DRH's due demand, Myers has failed to defend or indemnify DRH, and has thereby breached the contract.

128. As the proximate result of Myers' breach as described above, DRH has been and will continue to be forced to incur attorneys' fees and expenses and will be exposed to liability to the Plaintiffs.

129. Pursuant to the Contract and as a result of Myers' breach thereof, DRH is entitled to be reimbursed and indemnified for its attorneys' fees and defense costs as well as any amounts it may become required to pay in order to resolve the Plaintiffs' claims or in satisfaction of any judgment on Plaintiffs' behalf. DRH is further entitled to an award of all other damages incurred as a consequence of Myers' breach, to include the attorneys' fees and costs associated with the prosecution of its third party claims against Myers.

**FOR A TWENTY-FIRST DEFENSE AND BY WAY OF CROSS-CLAIM AGAINST
DEFENDANT SMITH'S HEATING & AIR CONDITIONING, CO., INC.**

130. DRH incorporates herein the allegations of the first through fifteenth defenses that are consistent with this defense.

131. This Court has jurisdiction over the parties and subject matter of this cross-claim to the extent that the Court has jurisdiction over the Plaintiffs' Second Amended Complaint in this case.

132. DRH and Smith's Heating & Air Conditioning Co., Inc., (hereinafter "Smith's") entered into an Independent Contractor Agreement pursuant to which Smith's agreed to provide, among other things, labor and materials for the installation of the heating and air conditioning system of the residence (hereinafter "the Contract").

133. Smith's provided labor and materials for the installation of the heating and air conditioning system of the residence that is the subject of the Plaintiffs' Second Amended Complaint. Smith's provided such labor and materials pursuant to and subject to the Contract.

FOR A FIRST CAUSE OF ACTION
(Equitable Indemnity)

134. At the times relevant to this case, Smith's acted in the capacity of a subcontractor to DRH and provided labor and materials for the installation of the heating and air conditioning system of the residence.

135. As a result, a special relationship exists between DRH and Smith's such that Smith's is obligated by equity to indemnify DRH.

136. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the work performed by or other acts and/or omissions of Smith's, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Smith's or its agents and not a result of any actions or omissions on the part of DRH.

137. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to equitable indemnity against Smith's in the same amount. Additionally, DRH further alleges that it should be reimbursed and indemnified for any settlement amounts it pays Plaintiffs in this action, if any. Finally, whether DRH is ultimately exonerated or not, Smith's should reimburse it for the costs of this action, including but not limited to attorneys fees and costs.

FOR A SECOND CAUSE OF ACTION
(Contractual Indemnity)

138. Smith's entered into the Contract with DRH pursuant to which Smith's agreed to hold DRH harmless against any and all claims, losses, costs, and damages, including but not

limited to claims for property damage, pertaining to Smith's performance under the Contract and caused in whole or in part by Smith's conduct.

139. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action arose out of the conduct of Smith's or its agents in connection with Smith's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of Smith's or its agents and not a result of any actions or omissions on the part of DRH.

140. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against Smith's in the same amount. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys fees and costs.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract)

141. Pursuant to the Contract with DRH, Smith's agreed to defend and indemnify DRH against claims such those alleged in Plaintiffs Second Amended Complaint.

142. Smith's has failed to defend or indemnify DRH, and has thereby breached the contract.

143. As the proximate result of Smith's breach as described above, DRH has been and will continue to be forced to incur attorneys' fees and expenses and will be exposed to liability to the Plaintiffs.

144. Pursuant to the Contract and as a result of Smith's breach thereof, DRH is entitled to be reimbursed and indemnified for its attorneys' fees and defense costs as well as any amounts it may become required to pay in order to resolve the Plaintiffs' claims or in satisfaction of any

judgment on Plaintiffs' behalf. DRH is further entitled to an award of all other damages incurred as a consequence of Smith's breach, to include the attorneys' fees and costs associated with the prosecution of its third party claims against Smith's.

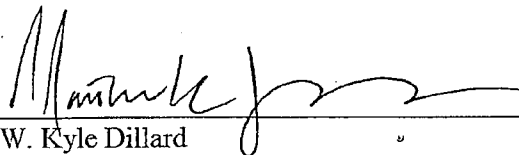
WHEREFORE, having fully answered the Plaintiffs' Second Amended Complaint, and having asserted its Cross-claims, DRH prays this Court enter the following relief:

- a. Refer Plaintiffs' claims against it to binding arbitration pursuant to the contract between Plaintiffs' and DRH, and dismiss this action or stay it pending the same; and, alternatively,
- b. Dismiss Plaintiffs' Second Amended Complaint with prejudice;
- c. Grant the relief requested pursuant to DRH's Cross-claims against Tom's Vinyl, Lutzen, Boozer, All American, and Smith's;
- d. Award DRH attorneys' fees and costs to defend this action; and
- e. For all such other and further relief this Court deems just and proper.

Dated this 20th day of May, 2011.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



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Matthew K. Johnson
P.O. Box 2757
Greenville, SC 29602
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Facsimile: 864.235.4754
kyle.dillard@odnss.com
matthew.johnson@odnss.com

Attorneys for Defendant D.R. Horton, Inc.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
GREGORY W. SMITH AND	)	
STEPHANIE SMITH,	)	
	)	
Plaintiffs,	)	C.A. No.: 2010-CP-18-641
	)	
v.	)	
	)	
D.R. Horton, Inc., Tom's Vinyl Siding,	)	
LLC, Lutzen Construction, Inc., Boozer	)	
Lumber Company, All American Roofing,	)	
Inc., and Myers Landscaping, Inc.,	)	
	)	
Defendants.	)	

CERTIFIED COPY
 2010 JUL 23 PM 3:53
 Clerk of Court
 DORCHESTER COUNTY

NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION

TO: PLAINTIFFS, GREGORY W. SMITH AND STEPHANIE SMITH, AND THEIR ATTORNEYS, PHILLIP W. SEGUL, JR., ESQ., AND JOHN T. CHAKERIS, ESQ.

YOU WILL PLEASE TAKE NOTICE that Defendant, D.R. Horton, Inc., (hereinafter "DRH") will, ten (10) days from the date of service of this motion or at such time as the Court may determine, move the Court for an order pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, or alternatively, the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.*, compelling arbitration of all claims asserted by the Plaintiffs against DRH in the above captioned action.

DRH certifies that it attempted, without success, to resolve the matters giving rise to this motion by letters to Plaintiffs' counsel, copies of which are attached as Exhibits A and B to this motion, and that Plaintiffs have refused, either expressly or through lack of response, DRH's demand for arbitration.

This motion is further based on the statutory and case law of the State of South Carolina and the United States of America, the South Carolina Rules of Civil Procedure, and any

memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument that might be submitted by counsel at the hearing.

Dated this 20th day of July, 2010.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____

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Attorneys for Defendant,
D.R. Horton, Inc.

Exhibit A



OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Attorneys at Law

The Ogletree Building
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www.ogletreedeakins.com

W. Kyle Dillard
864.240.8317
kyle.dillard@ogletreedeakins.com

June 1, 2010

Phillip W. Segui, Jr.
864 Lowcountry Blvd., Suite A
Mount Pleasant, SC 29464

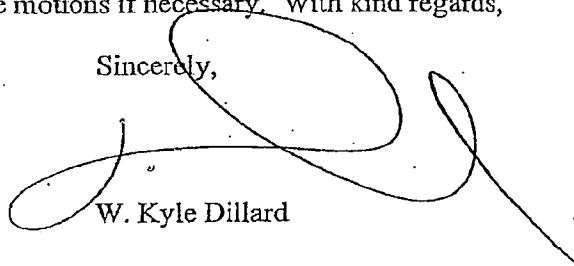
RE: Gregory W. Smith and Stephanie Smith vs. D.R. Horton, Inc., et al.
Case No. 2010-CP-18-641

Dear Phillip:

Concerning the above-referenced case, it appears that the Smiths' lawsuit is subject to arbitration under the terms of the Home Purchase Agreement between D.R. Horton and themselves. It also appears that D.R. Horton did not receive statutory notice under the Notice of Opportunity to Cure Construction Dwelling Defects Act prior to the commencement of this lawsuit and, therefore, the case is subject to being stayed.

Please accept this letter as D.R. Horton, Inc.'s request that the case be referred to binding arbitration and its effort to consult concerning the matter of the stay. I would expect that if we can agree to arbitrate the case, that would obviate the need for a motion to stay. Please let me know at your earliest opportunity what your clients' position will be on these two issues so that we can make plans to file the appropriate motions if necessary. With kind regards,

Sincerely,



W. Kyle Dillard

WKD/dkr

cc: Mr. David Morice
Mr. Jay Henderson

Exhibit B



OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Attorneys at Law

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W. Kyle Dillard
kyle.dillard@ogletreedeakins.com

July 8, 2010

Phillip W. Segui, Jr., Esq.
864 Lowcountry Blvd., Suite A
Mount Pleasant, SC 29464

RE: *Gregory W. Smith and Stephanie Smith v. D. R. Horton, Inc., et al.*
Case No. 2010-CP-18-641

Dear Phillip:

We wrote on June 1, 2010 requesting that (1) Plaintiffs agree to submit this case to binding arbitration pursuant to the home purchase agreement between D. R. Horton and themselves; and (2) Plaintiffs agree to stay the case pursuant to the provisions of the South Carolina Notice and Opportunity to Cure statute. As I recall, you and I spoke a week or so ago with regard to both issues.

Regarding arbitration, you asked us to send you a copy of the purchase contract. I assume that since Plaintiffs have alleged a claim for breach of contract, you are already in possession of your clients' copy of the contract and have had an opportunity to review it.

However, we are nevertheless enclosing our copy of the same. It appears that for some reason someone along the line highlighted the Plaintiffs' signatures and initials in a color that translated as black marks when copied, thereby to some extent obscuring the signatures. However, it is obvious that they are the signatures of the Plaintiffs. While I would not expect that these marks could give rise to any legitimate issue as to the authenticity of the document, I will nevertheless try to find the original so that a clearer copy can be produced. I would also expect that the Plaintiffs' copy would serve this purpose and hopefully we could get that from you.

With regard to the issue of a stay, it was my recollection that you suggested that the parties treat Bob Sisnroy's report as the notice required under the statute and that we would discuss entering into a stay once the report was produced. I am in receipt of the report as of today and, per our conversation, suggest that we agree to stay the case for 90 days from today (unless we agree to arbitrate, in which case it will be unnecessary).

Atlanta • Austin • Birmingham • Bloomfield Hills • Boston • Charleston • Charlotte • Chicago • Cleveland • Columbia • Dallas • Denver • Greensboro
Greenville • Houston • Indianapolis • Jackson • Kansas City • Las Vegas • Los Angeles • Memphis • Miami • Minneapolis • Mooresville • Nashville • New Orleans
Orange County • Philadelphia • Phoenix • Pittsburgh • Portland • San Antonio • San Francisco • Tampa • Torrance • Tucson • Washington

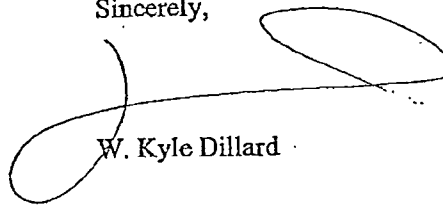
Phillip W. Segui, Jr., Esq.
July 8, 2010
Page 2

I don't think there is any question about the mandatory nature of the agreement to arbitrate contained in the contract and I would expect that we should be able to either agree to arbitrate or agree to disagree fairly quickly. If it is going to be necessary for us to file a motion, I would like to go ahead and get it before the court.

Accordingly, I would appreciate it if you would let me know your position by the end of the day on Friday, July 15, 2010. If you are not inclined to agree to arbitrate, please let me know whether you will sign a consent motion to stay the case, or if I will need to file a motion to compel the stay, as well.

Thank you for your attention to this matter. With kind regards,

Sincerely,



W. Kyle Dillard

WKD/gep
Enclosure

cc: John T. Chakeris, Esq. (w/enc.)

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

GREGORY W. SMITH AND
STEPHANIE SMITH,)

Plaintiffs,)

v.)

D.R. Horton, Inc., Tom's Vinyl Siding,
LLC, Lutzen Construction, Inc., Boozer
Lumber Company, All American Roofing,
Inc., and Myers Landscaping, Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

C.A. No.: 2010-CP-18-641

CLERK OF COURT
DORCHESTER COUNTY

2010 SEP -8 PM 3:36

CERTIFIED COPY

**DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
ARBITRATION AND TO STAY PROCEEDINGS, OR ALTERNATIVELY,
TO DISMISS**

I Introduction

Plaintiffs, Gregory W. Smith and Stephanie Smith ("Smiths" or "Plaintiffs") commenced this action against Defendant D.R. Horton, Inc. ("DRH" or "Defendant"), alleging causes of action for negligence, breach of contract, breaches of implied warranties, and unfair trade practices. All of these claims are premised upon allegations of construction defects within a house sold by DRH to the Smiths. DRH denies the material allegations of the Complaint, and further denies any and all alleged liability to the Smiths.

DRH respectfully submits this Memorandum of Law in support of its Motion to Compel Arbitration and to Stay Proceedings, or Alternatively, to Dismiss, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.*

II. The Agreement to Arbitrate

Smiths purchased a residence from DRH pursuant to a Purchase Agreement dated March 11, 2005 (hereinafter "the Agreement"). A true and accurate copy of the Agreement is attached hereto as Exhibit 1. Paragraph 14(g) of the Agreement, which contains the operative portion of the Agreement for the purposes of this motion, reads as follows:

Mandatory Binding Arbitration. Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. *The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.*

(emphasis added).

The plain meaning of the language of the Agreement unequivocally encompasses all claims arising from the construction of the property and DRH's performance under any warranty. All of the claims for damages alleged by the Smiths fall within this description. Accordingly, it is indisputable that the matters alleged in the Complaint are subject to the mandatory arbitration provisions contained within the Agreement.

III. Relevant Law

The arbitration provision at issue is enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, ("the FAA"). Alternatively, it is also enforceable under the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.* ("the SCUAA"). Each will be addressed in turn below.

A. The FAA

It is settled and widely recognized that agreements to arbitrate under the FAA are favored. As Judge Wilkinson stated writing for the Fourth Circuit in *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002):

The FAA reflects a liberal federal policy favoring arbitration agreements. Underlying this policy is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation. Accordingly, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.

The FAA requires a court to stay any suit or proceeding pending arbitration of any issue referable to arbitration under an agreement in writing for such arbitration. This stay-of-litigation provision is mandatory. A district court therefore has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview.

Id. at 500 (internal citations omitted). There is, therefore, "a clear federal directive in support of arbitration." *Id.*

A court should compel arbitration pursuant to the FAA where (1) there is a dispute between the parties; (2) there is a written agreement that includes an arbitration provision which purports to cover the dispute; (3) there is a relationship of the transaction at issue to interstate commerce; and (4) one party has refused to arbitrate the dispute. *Id.* at 500-501. The existence of a dispute is obvious, in that the parties are now embroiled in litigation. The Plaintiffs' refusal to arbitrate is also apparent. DRH, through counsel, twice asked Plaintiffs in writing to refer this case to arbitration, and they have declined. *See*, Exhibits A and B to Defendant's Motion. Only the second and third elements require further discussion, and are addressed below.

1. The Arbitration Provisions of the Purchase Agreement Constitute a Valid Agreement that Covers the Dispute Between the Parties

The fact that the parties entered into the Agreement is beyond question, and by its plain language, the Agreement clearly includes an agreement to arbitrate. It is also indisputable that

the Agreement is supported by valid consideration. In fact, consideration can be found at two levels.

First, the agreement to arbitrate was made as part of the contract to purchase and sell real estate. Therefore, it is supported by mutual consideration in the exchange of money for the residence.

Second, the mutual promises to arbitrate, themselves, constitute sufficient consideration. Paragraph 14(g) of the Agreement plainly states that "Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves." DRII agrees to be bound equally with the Smiths to use arbitration as its exclusive remedy to address any dispute covered by the arbitration provision. The sufficiency of mutual promises to arbitrate as consideration is well-settled law. *See, e.g., Adkins*, 303 F.3d at 501; *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 275 (4th Cir. 1997); *Tenaglia v. Ryan's Family Steak Houses, Inc.*, 2003 U.S. Dist. LEXIS 26322, *33 (D.S.C. 2003).

It is also clear that the arbitration provision covers the matters at issue in this case. As noted above, all of Plaintiffs' claims for damages are of the type described within Paragraph 14(g). "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Tenaglia*, 2003 U.S. Dist. LEXIS at *37 (*quoting, Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)). "A party's request to arbitrate an issue may not be denied 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id.* In this case, there is no question as to application. The express applicability of the arbitration provision to the claims asserted could not be more direct. However, even if Plaintiffs could argue that such a question exists, it would have to be resolved in favor of arbitration.

The Agreement is clearly one which was validly entered into by both parties. It is supported by consideration, and it plainly applies to the matters in dispute. Therefore, the second element, the existence of an agreement to arbitrate the dispute, is easily satisfied.

2. The Transaction at Issue Involves Interstate Commerce and Is Therefore Subject to the FAA

The transaction at issue is, very simply, the construction and sale of the subject residence. Plaintiffs, as alleged in the Complaint, are citizens and residents of South Carolina. Complaint at ¶ 1. DRH is a Delaware corporation that maintains its principal place of business in the state of Texas. Affidavit of Brian Gardner at ¶3, attached as Exhibit 2. DRH conducts business in the residential construction industry in approximately twenty-seven states. Gardner Aff. At ¶ 4. As part of its operations, DRH routinely engages in interstate activities, including procurement of materials and labor on an interstate basis. Gardner Aff. At ¶ 5. With respect to the subject property in particular, materials were obtained from out of state for at least the following components of the residence: 1 joists, studs, wood framing materials, oriented strand board (wall sheathing), windows, gypsum drywall, shingles, cabinets, carpet, sheet vinyl flooring, plumbing fixtures, lighting hardware, and appliances. Affidavit of Jay M. Henderson at ¶ 4, attached as Exhibit 3.

It is well settled that the interstate character of a defendant's business is sufficient to bring an arbitration agreement within interstate commerce. *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (holding that FAA governed arbitration agreement between pest control agency and homeowner because company operated interstate and used raw materials purchased from out of state.) *See also, Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370 (11th Cir. 2005) (citing, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (where an employer's "overall employment practices affect commerce, the *Commerce Clause* requirement

is satisfied because “Congress’ *Commerce Clause* power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control”); *Brown v. Ryan’s Family Steak Houses, Inc.*, 2004 U.S. Dist. LEXIS 27456 (D.S.C. 2004). Additionally, South Carolina courts have specifically held that construction and architectural projects taking place within South Carolina affect commerce when services or materials used for the project are obtained from out of state. *New Hope Missionary Baptist Church v. Paragon Builders*, Opinion No. 4433 (S.C. App. August 27, 2008); *Blanton v. Stathos*, 570 S.E.2d 565 (S.C. App. 2002); *Circle S. Enterprises, Inc., v. Stanley Smith & Sons*, 343 S.E.2d 45 (S.C. App. 1986).

The interstate character of DRH’s business is analogous to that of the defendants whose operations were analyzed in the above cited cases. As such, DRH’s business occurs on an interstate basis, and accordingly involves interstate commerce. Moreover, the construction of the subject property, itself, substantially affected interstate commerce. Well settled law therefore plainly provides that the arbitration provisions within the Agreement must be enforced in this case under the FAA.

3. Conclusion as to Application of the FAA

As demonstrated above, DRH can conclusively establish that each of the factors set forth by the Fourth Circuit in *Adkins* as necessary to compel the arbitration of Plaintiffs’ claims is met. Accordingly, DRH requests this Court’s order compelling the arbitration of this case. Pursuant to Section 3 of the FAA, DRH further requests that this action be stayed pending the completion of arbitration. Alternatively, DRH requests that this action be dismissed. *See, Choice Hotels Int’l, Inc., v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 710 (4th Cir. 2001) (dismissal is the proper remedy when all of the issues presented in a lawsuit are arbitrable).

B. The SCUAA

Even if the Court were to determine that the FAA is not applicable to the Plaintiffs' claims, arbitration is still appropriate pursuant to the SCUAA. Just like federal policy, South Carolina public policy strongly favors the arbitration of disputes. *Chassereau v. Global Sun Pools, Inc.*, 644 S.E.2d 718 (S.C. 2007). A court should order arbitration, unless the court can say with positive assurance that the arbitration clause is not susceptible to any interpretation covering the dispute. *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001). "To decide whether an arbitration agreement encompasses a dispute a 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." *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 437 S.E.2d 22, 25 (S.C. 1993). "Any doubts concerning the scope of the arbitration clause should be resolved in favor of arbitration." *Id.* "A broadly-worded arbitration agreement applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." 553 S.E.2d at 119.

As noted above in the discussion of the FAA, the arbitration clause contained within the Agreement, on its face, clearly encompasses the claims for damages alleged by the Plaintiffs. Even without the benefit of the liberal application of the terms of the provision that is mandated under South Carolina law, the provision applies in this action. The controlling legal principles set forth above underscore the arbitrability of Plaintiffs' claims.

Accordingly, Defendant is entitled to the referral of this action to binding arbitration, with the case being stayed pending the same pursuant to S.C. Code Ann. § 15-48-20(d).

C. Impact of Presence of Co-Defendants

It is anticipated that one or more co-defendants may object to arbitration of the claims that concern them or that Plaintiffs may assert that the presence of co-defendants should militate against arbitration of their claims against Defendant because it might result in multiple proceedings. However, each of the co-defendants to this case is bound by contract to accede to DRH's demand to arbitrate. The Independent Contractor Agreements with each are presented through the Affidavit of Jay M. Henderson. Each such contract contains the same paragraph 22 which provides in pertinent part that (1) the co-defendant agrees that any disputes with DRH shall be subject to arbitration under the FAA; and (2) that the co-defendant agrees to be bound by and to participate in any arbitration between DRH and a third party. Therefore, all of the co-defendants have expressly and unequivocally agreed that they must be bound by and participate in the arbitration of Plaintiffs' claims. There is therefore no legitimate basis upon which the presence of the co-defendants in this lawsuit should stand as an impediment to its being referred to arbitration in accord with the contract documents.

IV. Conclusion

Based on the foregoing, the instant matter should be referred to binding arbitration as required by the FAA. This lawsuit should be stayed upon referral, or alternatively, dismissed. In the event that the Court should determine that this matter is not subject to the FAA, the case should nevertheless be stayed and referred to binding arbitration pursuant to the SCUAA.

Dated this 1th day of September, 2010.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____

W. Kyle Dillard (SC Bar # 69408)
300 North Main Street
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Facsimile: (864) 235-8806
kyle.dillard@odnss.com

Attorneys for Defendant,
D.R. Horton, Inc.

Exhibit 1

HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

D. R. Horton, Inc.
Purchase Agreement

**THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION
PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT**

Date: 03/16/2005

1. PARTIES. D.R. Horton, Inc., ("Seller") agrees to sell to Greg Smith, Stephanie Macrelli ("Purchaser") and Purchaser agrees to buy all that tract or parcel of land, with such improvements as are located thereon, described as follows:

All that tract of land being known as (Address) 4830 Harvest Moon Court, being more particularly described as Lot 0085, Phase ____ of Parkwood Subdivision, as depicted in the plat recorded in Plat Book ____, Page ____ in the Register of Deeds Office for Charleston/Dorchester/Berkeley County, South Carolina, together with all lighting fixtures attached thereto, all electrical, mechanical, plumbing, air-conditioning, and any other systems or fixtures as are attached thereto and now a part thereof, together with all the improvements thereon and all appurtenances thereto (the "Property"). The full legal description of the Property is as stated on the Plat referenced above. The conveyance shall be subject to all easements and restrictions of record on the Closing Date.

2. PURCHASE PRICE AND METHOD OF PAYMENT. The Purchase Price of the Property shall be \$233,390 to be paid as set forth in subparagraph 2(b) below:

(a) All Cash at Closing (No financing contingency). Purchaser to pay all usual and customary closing costs. Purchaser agrees to provide Seller written documentation from a financial institution verifying Purchaser's funds to close. If an appraisal is desired, Purchaser is responsible for requesting from a licensed appraiser. If this subparagraph is checked, subparagraph 2(b) shall not apply.

(b) Where New Loan is to be Obtained:

- i. Purchaser shall obtain a loan in the principal amount of 100% of the Purchase Price (reduced to the next lowest hundred dollars) to be secured by a first priority mortgage on the Property; said loan to be paid in consecutive monthly installments of principal and interest of a term of not less than 30 years. This loan shall be:

- (1) Conventional Loan, with a market interest rate, as of the Closing Date.
- (2) Adjustable Rate Mortgage ("ARM") Loan, with an initial interest rate of not more than market interest rate as of the Closing Date. The interest rate payable to lender by Purchaser may increase or decrease according to the terms of said loan, and as a result the monthly installments of principal and interest payable by Purchaser may increase or decrease.
- (3) FHA or VA Loan: It is expressly agreed upon that notwithstanding any other provisions of this contract the purchaser shall not be obligated to complete the purchase of the property described herein, incur any penalty by forfeiture of earnest money deposit, or otherwise unless the purchaser has been given, in accordance with HUD / FHA or VA requirements, a written statement issued by the Federal Housing Commissioner, Veterans Administration, or a Direct Endorsement lender setting forth the Appraised value of the property (excluding closing costs) of not less than the sales price. The purchaser shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised evaluation. The appraised valuation is intended to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or the condition of the property. The purchaser should satisfy himself / herself that the price and condition of the property are acceptable.

FHA REAL ESTATE CERTIFICATION: We, the Seller, Borrower and Real Estate Broker, or Agent involved in this loan transaction, do hereby certify that the terms of the sales contract are true to the best of our knowledge and belief. All agreements entered into by any of the following parties are fully disclosed and attached to the sales contract.

- (4) Seller is participating in the Dreammaker Program.

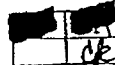
(5) Other:

- ii. Provided that Purchaser obtains a first mortgage loan and closes through Seller's approved lender and Seller's preferred closing agent, Seller shall contribute up to \$4,000 towards Purchaser's closing costs, including statutory recording fees, surveys, lender's attorney's fees, and any other costs required by Seller's approved lender and closing agent, including discount points, interim interest and prepaid items excluding HOA fees, approved by the lender. Purchaser is responsible for any remaining closing costs including but not limited to prepaids, discount points, buy down, subsidies, lock-in fees and any other fees used to control the interest rate. The total amount of closing costs paid by the seller for the buyer, which would also include any fees which buyer is prohibited from paying by the Veterans Administration, Department of Housing or Regulatory Agencies. The Purchaser acknowledges that The Seller has agreed to provide The Purchaser with the above only if The Purchaser uses DHI Mortgage Company as the Purchaser's lender and the Seller's preferred closing agent. This incentive will not be credited to The Purchaser as closing if The Purchaser uses any other lender or Attorney for The Purchaser's mortgage requirements. Private Mortgage Insurance Premiums, if required by the lender, shall be paid by Purchaser, in cash at Closing or through monthly payments, as may be required by the lender.

- iii. Purchaser shall apply for this loan within seven (7) business days from date of acceptance of this Agreement and pursue the application diligently and in good faith. Purchaser shall be presumed to have satisfied this condition and obtain loan approval unless Purchaser notifies Seller within thirty (30) days of the date of acceptance in writing that Purchaser has not been able to obtain the loan referred to in this Section. In the event Purchaser timely notifies Seller of its failure to obtain loan approval, Seller shall have the right to contact Purchaser's lender to determine the status of Purchaser's loan application and loan approval.

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Purchaser: Greg Smith, Stephanie Macrelli Community: Parkwood Phase ____ Lot: 0085



HOME PURCHASE AGREEMENT BC40-0085

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GENERAL TERMS AND CONDITIONS

If Seller determines, in its sole discretion, that Purchaser failed to diligently and in good faith pursue its loan application, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other. Within thirty (30) days, Purchaser agrees to provide Seller with a letter from Purchaser's lender confirming that Purchaser has been approved for the loan referred to in this Section. Purchaser understands and acknowledges that loan/credit approvals are valid for up to 120 days. Furthermore, Buyer agrees to update loan/credit approval documentation as needed in order to maintain current loan approval up until the date of closing. If Seller determines, in its sole discretion, that Purchaser failed to diligently pursue or maintain its loan/credit approval, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other. Purchaser agrees to execute all papers and perform all other actions necessary to obtain this loan and to accept such a loan if approved by lender. Purchaser shall, in addition to the payment of principal and interest on said loan, pay at Closing each amount as may be required by the lender to establish or maintain an escrow for insurance, property taxes or private mortgage insurance. Unless specifically disclosed in writing in this Agreement, Purchaser warrants that this Agreement is not contingent upon the sale or closing of other property owned by Purchaser and that, at the time of Closing, Purchaser will have sufficient cash available (together with the loan referred to above) to complete the purchase and shall immediately disclose to Listing Broker the name(s) of the lender(s) with which the Purchase has applied.

Purchaser Initial (s):

- iv. Purchaser acknowledges that there are many different loan programs available from many different lenders. If Purchaser is unable to obtain a mortgage loan commitment on the type of loan chosen on page 1 of this Agreement, Purchaser agrees to apply and secure an approval on a different loan program for which Buyer can obtain an approval. If the loan obtained by Purchaser contains any contingencies, Seller may require the satisfaction of those contingencies within the thirty (30) day time period specified in this Agreement for obtaining the loan approval and terminate this Agreement if those contingencies are not waived or satisfied. If Seller determines, in its sole discretion, that Purchaser failed to diligently and in good faith remove any loan contingencies, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other.
- v. Purchaser may apply for a loan with different terms and conditions and close the transaction provided (a) all other terms and conditions of this Agreement are fulfilled; and (b) the new loan does not increase the closing costs charged to Seller or delay the Closing. Purchaser shall be obligated to close this transaction if Purchaser qualifies for a loan with terms described in the above Section or in this Section.
- vi. The proceeds of the loan, together with the balance of the Purchase Price, shall be paid to Seller, in cash or its equivalent, by Purchaser at Closing.
- vii. The Purchaser acknowledges and agrees that our financial situation may affect our ability to obtain a loan and/or purchase this property. We further acknowledge and agree that it is important for the Seller to know our financial situation and our ability to obtain financing. In consideration for the Seller entering into this agreement, we do hereby grant permission for the Seller to contact any mortgage company or financial institution to which we may apply for a loan and discuss our financial situation and the likelihood of obtaining a loan. We further authorize DHI Mortgage Company, or any other mortgage company or financial institution from which we may seek a loan, to discuss our financial status with the Seller and to provide the Seller with any documentation supporting our financial status.
- viii. The Purchaser acknowledges and agrees that the Seller is not responsible for interest rate locks and will not guarantee interest rate locks due to Seller's failure to meet the scheduled closing date.

Purchaser Initial (s):

3. EARNEST MONEY Deposit. Purchaser has paid to Seller \$ 3000 ("Earnest Money") by check or money order made payable to D.R. Horton receipt of which is acknowledged by Seller. If the Earnest Money deposit is for a home under construction that may close within 60 days, the Purchaser agrees to furnish the Seller with a certified check WITHIN 24 HOURS UPON PURCHASER SIGNING THIS PURCHASE AGREEMENT. The parties agree that the Earnest Money is to be deposited in Seller's trust account upon acceptance of this Agreement by Seller. The parties agree that the Earnest Money shall be applied as a credit at Closing, unless otherwise provided by this Agreement.

- a. Disbursement. The Earnest Money shall be retained by Seller except: (1) upon failure of loan approval during the thirty (30) days following acceptance of this Agreement, the Earnest Money shall be disbursed to Purchaser, unless Seller determines that Purchaser did not diligently and in good faith pursue its loan application as set forth in Section 2; and (2) as otherwise specifically set out in this Agreement. If any dispute arises between Purchaser and Seller as to the final disposition of all or part of the Earnest Money, Seller may, but is not required to, interplead all or any disputed part of the Earnest Money into court. Purchaser and Seller agree that if Seller interpleads the Earnest Money into court, Seller shall be entitled to recover the costs of such interpleader, including reasonable attorney's fees and expenses incurred in connection with the interpleader, from the Earnest Money. If Seller decides not to interplead, Seller may make a disbursement of the Earnest Money upon a reasonable interpretation of this Agreement. It may take up to thirty (30) business days for Earnest Money to be refunded.

Purchaser Initial (s):

- b. Liquidated Damages. The parties agree that if this transaction fails to close for any reason, the amount of damages suffered by Seller would be difficult to determine and Seller shall be entitled to retain the Earnest Money as a reasonable estimate of Seller's damages.

4. WARRANTY OF TITLE. Seller agrees to convey good and marketable fee simple title to the Property to Purchaser at Closing.

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Purchaser: Greg Smith, Stephanie Murrells Community: Parkwood Phase Lot: 0085

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HOME PURCHASE AGREEMENT BC40-0085

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by general limited warranty deed, subject only to: (a) zoning ordinances affecting said Property; (b) general utility, drainage and other easements of record upon which the dwelling does not encroach; (c) subdivision easements and restrictions of record; (d) subdivision covenants, conditions and restrictions; (e) matters shown on the final plat for the subdivision where the Property is located, as of the Closing Date; and (f) any other matters specified in this Agreement. "Marketable Title" shall mean title which a title insurance company licensed to do business in South Carolina will insure at its regular rates, subject only to standard exceptions.

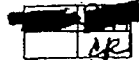
5. **TITLE EXAMINATION.** Purchaser shall have a reasonable time after acceptance of this Agreement to examine title and to furnish Seller with a written statement of objections affecting the marketability of said title. If Seller cannot satisfy Purchaser's valid objections within a reasonable time, Purchaser shall have the right to terminate this Agreement and receive a refund of the Earnest Money. If Seller is contributing to Purchaser's closing costs pursuant to subparagraph 2(b) above, Seller will cause a title report to be prepared and delivered to the lender making the mortgage loan to Purchaser. At Closing, Seller shall cause its closing agent to issue the lender a title insurance commitment and subsequent lender's title insurance policy.
6. **DESTRUCTION.** If the home built on the Property is either totally destroyed or substantially damaged before Closing, either party may terminate this Agreement by written notice to the other within ten (10) days of the date of such casualty.
7. **CONDITION OF THE PROPERTY.** The Property shall be completed in accordance with all applicable governmental regulations, ordinances and codes. A certificate of occupancy shall be proof of compliance with this requirement and the property shall be deemed complete upon certificate of occupancy issuance by the proper authority.
8. **INSPECTION.** At the appropriate stage of construction, Seller shall cause the appropriate utility services to be operational so that Purchaser may complete Purchaser's inspections under this Agreement. Purchaser or Purchaser's agents or representatives, at Purchaser's expense and at reasonable times during normal business hours, shall have the right to enter upon the Property for the purpose of inspecting, extending, testing, and surveying the Property. Such inspections shall only be with prior notice to Seller at such times, as Seller shall reasonably permit. Purchaser shall have the privilege of inspecting the Property with Seller or Seller's representative immediately prior to Closing. Seller's obligation to complete any "punch list" items, which it has agreed to complete, shall survive Closing. Seller shall not be obligated to complete any items from a private inspection other than through the procedures in this Section; Seller is obligated to complete only those items it has agreed to correct in writing. Should the Seller, in its sole opinion of the President thereof, determine that it could not satisfy the requirements of the Purchaser for the completion of the improvements or should Purchaser attempt to delay the closing for completion of punchlist items, then the Seller, at its option, may void this Contract and refund to the Buyer their Earnest Money. If voided, the Seller shall have absolutely no further obligation to the Purchaser. Should Purchaser choose to conduct an independent professional inspection of the Property prior to Closing, Purchaser will contact Seller at least seven (7) business days prior to that inspection for an appointment with Seller's Agent who must accompany Purchaser or Purchaser's Inspector. Purchaser shall cause Purchaser's Inspector to furnish Seller with proof that Purchaser's Inspector has a \$300,000 General Liability Insurance Policy which names Seller as additional insured prior to site inspection, a copy of the Inspector's business license, and if applicable, a copy of Inspector's State license certificate. Seller is only required to complete items on the Inspector's list that is a violation of the building code, RWC guidelines, outline specifications, or performance specifications as outlined in, "Foundations" warranty guide. Such inspections survive closing and cannot delay a closing on behalf of the Purchaser. Purchaser assumes all responsibility for the acts of Purchaser, Purchaser's agents or representatives in exercising Purchaser's rights under this Section, and Purchaser hereby indemnifies Seller from any loss or expense it may suffer for any claim, which arises directly or indirectly from a breach of this Section.

D.R. HORTON HOME INSPECTION POLICY

- a. **Home Inspection:** D.R. Horton recognizes that buyers may desire that a home inspector review their home prior to closing. D.R. Horton agrees to allow such inspections with the following provisions:
 1. D.R. Horton reserves the right to have an appointed representative accompany the Home Inspector at its discretion. Private inspections may delay completion of homes, and as a result, closing dates may need to be extended at the seller's discretion.
 2. All inspections must be scheduled through the Community Sales Manager. These inspections must be scheduled one week in advance and are to take place during normal working hours (Mon. - Fri. 8:00AM to 4:00PM) and must be in accordance with the Community Field Manager's production schedule.
 3. Only Inspector recommendations pertaining to building codes per the governing municipality will be addressed.
 4. Inspection firm must be licensed to do business in the local jurisdiction and by the State of South Carolina.
 5. Inspection firm must be bonded/insured against damage or liability while on D.R. Horton property.
 6. Buyer shall pay for all inspections initiated by buyer.
 7. D.R. Horton reserves the right to refuse access to the property to anyone at any time.

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Purchaser: Greg Smith, Stephanie Maxwell Community: Parkwood Phase _____ Lot 0085



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8. Inspector must provide D. R. Horton with proof of required Liability Insurance and Workman's Compensation Insurance prior to entering property.

We understand that if an Inspector does not have an appointment ONE week prior to the private inspection, the Inspector will not be allowed to perform the inspection and will be instructed to reschedule.

D. R. Horton will not miss construction waiting for the rescheduled appointment.

Purchaser Initial (S):  

9. RESPONSIBILITY TO COOPERATE. Seller and Purchaser agree to sign at Closing such papers as may be necessary to carry out the terms of this Agreement.

10. REAL ESTATE BROKER AND COMMISSION. Purchaser represents there are no co-brokers or Purchaser's agents ("Co-Broker") except: Lhas Constant Line Constant-Prudential, who represents Purchaser. (Note: Commission to Broker and Co-Broker to be handled by separate document to be presented simultaneously with this Agreement).

Purchaser Initial (T):  

11. DISCLAIMER. Seller and Purchaser acknowledge that they have not relied upon the advice or representations, if any, of Seller, Broker, or their associated salespersons relative to the legal and tax consequences of this Agreement, the terms and conditions of financing, and other such matters. Purchaser acknowledges that if such matters have been of concern to Purchaser, they have sought and obtained independent advice relative thereto.

12. WOOD INFESTATION REPORT. At the time of Closing, Seller shall provide Purchaser with a soil treatment report from a pest control company licensed in the South Carolina stating that the Property has been treated for subterranean termites infestation within one (1) year of the Closing. If required by Purchaser's lender, Purchaser may obtain at its expense a South Carolina Wood Infestation Report performed by a South Carolina, licensed post-inspection company. In the event such Wood Infestation Report identifies any wood infestation, or recommends that repairs be made to the Property, Seller shall either: (1) eliminate such infestation and complete such repairs prior to Closing, or (2) escrow funds sufficient to eliminate such infestation and complete such repairs following Closing.

13. TESTING. Purchaser acknowledges that Seller has made no tests or surveys of the Property or to the improvements and makes no representation or warranty with respect to toxic waste, radon, hazardous materials or undesirable substances and specifically excludes these matters from any warranties given under this Agreement.

14. WARRANTIES AND DISPUTE RESOLUTION.

- a. Structural Warranty. At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from Residential Warranty Corporation ("RWC") or such other national warranty provider as Seller may reasonably elect (the "RWC Warranty"). This RWC Warranty will provide, at a minimum, a ten (10) year structural warranty. The RWC Warranty referred to in this paragraph is the only warranty being made by Seller, except for such warranties which may not be disclaimed by State or Federal law. In addition, Seller hereby assigns to Purchaser all warranties, expressed or implied, which arise or are given by the manufacturer of any products installed in the home built on the Property.
- b. RWC Warranty. Purchaser has been, or will be prior to Closing, provided with a copy of the RWC Warranty book on the Ten Year Limited Warranty, which is administered by Residential Warranty Corporation. Validation of the RWC Warranty is conditioned upon Seller's compliance with all RWC's enrollment procedures and upon Seller remaining in good standing in the RWC Program.
- c. The RWC Warranty is provided by Seller to Purchaser in lieu of all other warranties, verbal agreements, or representations and Seller makes no warranty, express or implied, as to quality, fitness for a particular purpose, merchantability, habitability or otherwise, except as is expressly set forth in the Program or as otherwise required by Federal or State law. Particularly, Purchaser understands and agrees that any and all complaints of any nature in regard to the property that arise more than 365 days after closing must be submitted to RWC. Purchaser understands and agrees that the warranties of all appliances and other consumer products installed in the home are those of the manufacturer or supplier and same are assigned to Purchaser, effective on the date of Closing. In any event, Seller shall not be liable for any personal injury or other consequential or secondary damages and/or losses, which may arise from or out of any and all defects. Except for purchases of FHA or VA financed homes, Purchaser acknowledges and understands that the RWC Warranty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration. Purchaser has been, or will be given prior to Closing, provided with a copy of the D. R. Horton Warranty manual "Foundations". Purchaser understands and agrees to all warranties to their extent as outlined in said manual. Purchaser shall execute an acknowledgment that Seller makes no warranties express or implied, as to fitness for a particular purpose, merchantability, and habitability as set forth above at Closing, which statement shall be affixed to Purchaser's deed.

Purchaser Initial (S):  

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Purchaser: Greg Smith, Stephanie Marcella Constructors; Parkwood Phase Lot 0085



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- d. **Exclusions.** The following are excluded from all warranties provided by Seller: (i) those matters excluded in the RWC Warranty document; (ii) those matters excluded in sub-paragraph (f) below; and (iii) the following matters:

Landscaping. Including trees, shrubs, grass and flowers are not covered by any warranty. All grading, fill, landscaping, disposition of trees and control of water flow shall be constructed and maintained at the sole discretion of Seller prior to Closing. Grading and drainage are not covered by any warranty nor will they be maintained or modified by Seller after closing in any way whatsoever UNLESS the grading or drainage is found to be in violation of the applicable provision of the South Carolina Residential Construction Standards. Many areas will be left in their natural state and will not be landscaped in any way. As of the date and time of the Closing, Seller shall have no further responsibility for soil erosion, the growth of grass, death of trees, grass or shrubbery, or soil conditions. Seller is not liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees, which will exist, on the Property after construction. Seller will plant grass seeds or install sod, as the case may be, as part of its construction. Because the growth of grass seeds and the health of sod is dependent on Purchaser's care and maintenance, no warranty is provided and all grass is installed "as-is". Because prevention of erosion is dependent on Purchaser's proper maintenance of the grass and sod, Seller provides no warranty for erosion. Purchaser's closing of the sale constitutes an acceptance of Seller's drainage and erosion controls for the Property, except for matters noted on Purchaser's "Punch list". Seller shall not be responsible for the correction of any leakage or seepage caused by (i) damaged water pipes or mains, (ii) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (iii) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose or improperly maintained gutters or down spouts. Seller will not warrant any cosmetic defect post-closing unless this condition is listed on the "punch list" prior to Closing. Examples of "cosmetic defects" include shoe-rock ding, dimples and nail pops, paint discoloration, chips or irregularities in marble, Formica, or tile. Unless a defect is noted on the "punch list", Seller does not warrant the installation or the quality of any carpet or flooring product (however, note that Seller assigns the manufacturer's warranties to Purchaser at Closing).

Purchaser Initial (s) 

- e. **Existing Trees:** D.R. Horton will make every effort to save as many existing trees as possible during the construction process. Those trees that must be removed will be removed at the sole discretion of the Area Manager and their Field Manager. D.R. Horton reserves the right to remove any trees, which in their judgment may have the roots damaged by construction to the extent that the tree would not be expected to live. Those trees that are in or within close vicinity of the home's footprint or a concrete sidewalk area will be removed. Additionally, trees that impede the drainage of the site, or overall community drainage plan will be removed. D.R. Horton does not guarantee the health, survival or growth of any tree after closing. Repairs to living trees and removal or replacement of dead trees at any time after closing is the responsibility of the buyer unless requested before closing, agreed upon, and noted in writing at the "Pre-settlement Orientation Inspection."

Purchaser Initial (s) 

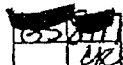
- f. **Landscaping:** D.R. Horton does not guarantee the continued health, growth or life of any landscape components after closing. Survival of landscaping components (trees, bushes, plants, sod, seed etc.) after closing is the buyer's responsibility. No landscaping items will be replaced or repaired after closing unless noted in writing and agreed upon at the "Pre-settlement Orientation Inspection". Landscaping requires a continuous maintenance program, which includes proper watering, fertilization, mowing and weed control. Definitions, other than those noted prior to closing, will not be warranted by D.R. Horton. Upon closing all maintenance is the responsibility of the buyer. The buyer is responsible for any damage due to neglect or inadequate maintenance. Wetland, wetland buffers and wooded natural areas throughout the Community will be left "as is". Buyer understands that "standing water" beyond 40"-0" of the home may occur in wetland, wetland buffers and wooded natural areas. Maintenance and repair of the aforementioned areas are the sole responsibility of the Buyer after closing. Clearing and disturbance of natural areas in order to provide underground utility services to the home may be necessary. These areas will be left un-landscaped and allowed to return to their natural state. The remaining undisturbed area will be left in its natural state.

Purchaser's Initial(s) 

- g. **MANDATORY BINDING ARBITRATION.** Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claims arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

1. If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser shall control.
2. If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Berkeley/Berkeley County, South Carolina. The arbitration shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the

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Purchaser: Grog Smith, Stephanie Masella Community: Parkwood Phase Lot: 0085

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arbitration as a part of the arbitrator's final order. The arbitrator referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

Purchaser Initial(s): 

1. In addition to the rights and obligations of each party specified in subparagraphs (a) - (d) above, in the event that a bona fide dispute, as determined by the Seller, should arise between Purchaser and Seller prior to the Closing Date, and such dispute cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days after the beginning of the dispute, then Seller shall have the right, upon written notice to Purchaser, to terminate this Agreement and return the Earnest Money to Purchaser, and no cause of action shall accrue on behalf of Purchaser because of such termination.

2. **Limitation of Liability.** EXCEPT FOR THE RWC WARRANTY, AND EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE, AND EXCEPT FOR ANY WARRANTIES IMPOSED BY LAW, WHICH CANNOT BE DISCLAIMED, SELLER MAKES NO OTHER WARRANTY OF ANY KIND. ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY SELLER. SELLER MAKES NO WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EITHER EXPRESSED OR IMPLIED. THE EXCLUSIVE REMEDY FOR ANY DEFECT OF ANY ITEM OR CLAIMED DEFECT IN THE HOME IS BY WRITTEN NOTIFICATION PRIOR TO THE EXPIRATION OF THIS WARRANTY PERIOD. SELLER'S OBLIGATION SHALL BE THE CORRECTION OF SUCH DEFECT BY REPAIR OR REPLACEMENT, IN ITS DISCRETION. NO SUCH ACTIONS TAKEN BY SELLER TO REPAIR OR REPLACE A DEFECT SHALL EXTEND THE WARRANTY PERIOD. SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

3. Requests for warranty service within the first 365 days after closing, must be in writing and faxed, mailed, or delivered to Seller at Seller's address as indicated below Seller's signature on this Agreement. Verbal requests to Seller's staff are not acceptable. Such requests must comply with all applicable law and must state the nature of the problem with particularity. Seller has 30 days to determine whether such request will be fulfilled.

15. **SURVIVAL OF AGREEMENT.** Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled. (Closing Attorney is directed to transfer this paragraph to the closing statement.)

16. **CLOSING.** Seller shall set closing date and notify Purchaser a minimum of (7) seven days prior to that closing date. If Seller chooses to do so, Seller may ask or request that Purchaser set a closing date. Such a request must be complied within (15) fifteen days. If it is not, Seller may, at its option, cancel the contract by written notice and return earnest money to Purchaser. In the event that the closing date should change, Seller will notify purchaser within 48 hours of previously scheduled closing. Seller does not guarantee loan locks or extensions, doing so is at the sole discretion of the purchaser. Seller shall deliver to Purchaser at Closing, a Certificate Of Occupancy, or the appropriate equivalent or substitute. If Purchaser does not close on the Closing date set forth by the Seller, Seller may in its discretion collect liquidated damages in the amount of \$5000.00 per day from Purchaser at Closing. Purchaser acknowledges that such amount represents Seller's liquidated damages and is not a penalty or fine. In addition, Seller may in its discretion require additional earnest money be paid by Purchaser, the amount to be determined at the discretion of the Seller. Purchaser acknowledges and agrees that Seller is not responsible for interest rate locks and will not guarantee interest rate locks based upon Seller's failure to meet the scheduled closing date.

Purchaser Initial(s): 

Seller shall grant possession of the Property to Purchaser at time of Closing. Purchaser agrees to transfer utilities into Purchaser's name within three (3) business days after Closing. Punch List items shall not delay the Closing. Purchaser shall not move its goods or property onto the Property prior to Closing. Real estate taxes on the Property for the calendar year in which the sale is closed shall be prorated as of the date of Closing. Seller shall pay South Carolina statutory filing fee, formerly known as the documentary stamp tax. Purchaser shall be responsible for any municipal or county transfer fees. To the maximum extent allowed by state law, Seller shall have the right to approve the place of Closing.

Final inspection and approval of the subject land and improvements thereon by the lender's agent, the FHA or the VA, whichever is applicable, or final inspection of approval for occupancy by the appropriate governmental inspector, shall constitute complete performance by Seller of its obligations under this paragraph. Buyer understands and agrees that all agreements or representations, whether oral or written, or relating to the date of completion of construction shall not be relied upon by Buyer or shall not be binding upon Seller. Seller does not warrant completion by any given date.

Purchaser Initial(s): 

If this Agreement is for the construction of a new home (i.e., a pre-sale or a home which is to be built), in addition to the above provisions, Seller shall not be obligated to start home construction (the "Construction Start Date") until the following conditions are met: (1) mortgage approval has been obtained to Seller's satisfaction; (2) Purchaser has paid all amounts due; (3) Purchaser selections have been completed; and (4) all contingencies have been removed by Purchaser to Seller's satisfaction. The transaction contemplated in this Agreement shall be consummated (Closing) at the office of the Seller's preferred attorney, at a time designated by Seller, no later than five (5) business days after receipt of Certificate Of Occupancy on that home (the "Closing Date").

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© 1999 D. R. Harris, Inc., Torrey, Revised March 16, 2005 Torrey File #124600.00

Purchaser: Greg Smith, Stephanie Manetti Conjointly; Parkwood Place; Lot 0085

HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

Because of these factors, the "Closing Date" listed above is only an estimate of the actual Closing Date, please refer to Item 16. CLOSING, on the Home Purchase Agreement.

Purchaser Initial(s):

17. **HOUSE PLAN.** The Purchase Price is for the Garrett 1904A, to be built on a (1 1/2) slab, or () basement, or () crawl space. Purchaser acknowledges that each home is handmade and unique, and although this home is based on the plans indicated above, variations in layout will occur. Closing the sale of this home without any objection to conformance with the plans. Seller shall not be responsible for any variation from the plans unless that variation causes a failure of the structural integrity in the home as constructed. Seller agrees to complete the construction of this home in accordance with the quality standards, materials and finish, as set otherwise being used by Seller in construction of new homes in this subdivision. If this Agreement is for a home for which construction has not started, this Agreement (a) is subject to Seller's ability to place that home on the designated lot (b) is subject to Seller's ability to build that home on the designated lot without obtaining variances for setback rules, (c) is subject to Seller's ability to build that home on the designated lot without incurring special costs for foundation, slab or structural support walls, and (d) is subject to Seller's discretion as to the orientation and placement of that home on the designated lot; (e) is subject to Seller's ability to close on said lot with the developer. In the event Seller determines that it cannot build the home within those conditions, Seller shall have the right to terminate this Agreement by written notice to Purchaser and in that event Seller shall return Purchaser's Earnest Money. If this Agreement is for a home for which construction has already begun, Purchaser agrees to accept all color selections, appliances, driveway placement, all options, framing dimensions and included features installed in the Home "as is" completed by Seller for installation in the home as of the Agreement date.

Purchaser Initial(s):

18. **OPTIONS.** Seller will include options ("Options") at the prices indicated. Purchaser acknowledges that certain Options may require a nonrefundable payment for those Options (the "Option Money") simultaneously with this Agreement and/or at the Color Selection Meeting. All non-standard / custom option price requests will require a non-refundable \$250.00 administrative fee to be paid at the time of contract or at the time of color selections. In the event Seller amends the installation of any optional item, Seller's responsibility shall be limited to a refund of the fixed price or allowance. Any such amendment shall not invalidate this Agreement, constitute a breach of its terms, nor give rise to any claim for damages against Seller. Purchaser agrees that the Option Money shall be delivered to Seller simultaneously with the addition of options at the Color Selection Meeting. The Option Money shall not be held in escrow, shall be non-refundable and, in the event of Purchaser's default under the Agreement, Seller may retain the Option Money, together with the Earnest Money (as specified in the Agreement) as Seller's liquidated damages. The parties acknowledge that it is impossible to estimate more precisely the damages Seller might incur in the event of Purchaser's default, and the Option Money, together with the Earnest Money, are a reasonable estimate of the damages Seller may incur. The Option Money paid to Seller shall be credited against the Purchase Price at Closing. See Exhibit A for Options.

Purchaser Initial (s)

19. MISCELLANEOUS.

- a. **Inquiries.** Purchaser agrees to direct all inquiries and questions to the closing coordinator, who will provide Purchaser with a timely response; however, the closing coordinator does not have the authority to change the terms of this Agreement. Changes may only be made by a written amendment, at or prior to selection meeting which must be executed by an authorized representative of the Seller. Purchaser acknowledges that Seller's sales associates, superintendents, closing staff, warranty staff and other employees do not have authority to modify this Agreement. Only a corporate officer of Seller has authority to modify this Agreement.

Purchaser Initial (s)

- b. **Color Selection Meeting.** The color selection meeting is for the purpose of ensuring that a mutual understanding exists between Seller and Purchaser of all relevant details as regards the finishes and completion of the construction of the home. This meeting must be scheduled and held within 14 days of acceptance of this Agreement or the Agreement may be terminated at the option of Seller. Color Selection Meetings are held Monday through Friday at 9:00am, 11:00am, and 2:00pm, and are scheduled on a first come first serve basis. Once the selection meeting is complete, all selections will be final. No additional selections / changes will be allowed after the selection meeting. If Seller determines, in its sole discretion, that Purchaser failed to diligently and in good faith schedule and attend a selection meeting, Seller may terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other.
- c. **Substitutions.** Seller reserves the right to make substitutions of construction materials used in the construction of the home with materials, which are of equal or comparable value. Determination of equal or comparable value will be in Seller's sole option. Purchaser acknowledges that any delay as a result of back order or out-of-stock selections must be promptly remedied; Seller may make substitutions as may be necessary. Purchaser acknowledges that, in some instances, installations shall occur subsequent to Closing. Purchaser understands that all furniture, decor items, special landscaping, and other items displayed in or about Seller's model homes (a) are for marketing purposes and do not constitute representations, assurances or warranties as to the Home you are purchasing and are not a part of this Agreement.
- d. **Promotions.** Purchaser agrees that Seller may photograph the interior and exterior of the home and the Property, and may use those photographs for advertising and marketing purposes without restriction for up to two (2) years from the

Page 10
© 1999 D. A. Harris, Inc. - Revised March 16, 2005 Form 626-112005.00

Purchaser: Greg Smith, Stephanie Mancilla Community: Parkwood Phase Lot: 0085



HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

Closing Date. Seller shall have the right, from time to time, to place marketing and directional signs along a five (5') foot strip of land adjacent to the street on the Property for a period of two (2) years from the Closing Date.

- c. Contractors. All work and materials shall be provided or performed by Seller's personnel and vendors. Purchaser shall not have the right to have any work performed on the Property or supplies delivered to the Property prior to Closing.
- f. Manufacturers. Purchaser reserves the right to install or complete any aspect of the property as they see fit. Failure to comply with manufacturers specifications will not give rise to any liability on the part of the Seller. Seller only warrants that property that meets state, county, town and city or other applicable laws or codes. Manufacturer specifications are not guaranteed.

20. COVENANTS AND HOMEOWNER'S ASSOCIATION. Purchaser acknowledges that a copy of the Farm Declaration of Covenants, Conditions and Restrictions (the "Covenants") has been made available to Purchaser, and Purchaser agrees that the Covenants may be amended or updated by the Declarant or Seller from time to time. Purchaser acknowledges that the restrictive covenants governing this subdivision require the payment of an initiation fee in the amount of \$ 250 at Closing, as well as annual dues (presently, \$ 400), payable annually, provided at Closing for the year of the Closing.

21. SURVEY & PROPERTY BOUNDARIES. Purchaser shall be responsible for reviewing the survey and determining the boundaries of the Property. Neither Seller, nor Broker, nor their agents and employees are authorized to make any representation to Purchaser about such matters.

22. COMPLETION. Seller shall complete the construction of the home located on the Property by the Closing Date (as that date may be extended pursuant to the terms of this Agreement). Seller shall deliver to Purchaser, at Closing, a Certificate Of Occupancy, or the appropriate equivalent or substitution.

23. HEATING AND AIR-CONDITIONING. The Property shall be adequately and efficiently heated and air-conditioned with equipment having at least the minimum specifications for the Property as established by Load Calculations, Manual J, of the Air-Conditioning Contractors of America, current edition. The clothes dryer vent shall be installed to the outside.

24. LOT PREMIUM. Purchaser acknowledges that certain of Seller's lots in the subdivision are believed by Seller to have more value than others, or may have higher construction or development costs than others and accordingly a "Lot Premium" or price adjustment has been incorporated into the Purchase Price on these lots. Purchaser acknowledges that Seller's inclusion of a lot premium in the Purchase Price does not make any warranty or promise to Purchaser about any particular feature of the lot.

25. DELAYS. Seller shall have no liability for any delays in construction caused by strikes or acts of God, delays in the delivery of materials, delays caused by Seller's inability to obtain a building permit or architectural approval, delays which are the result of matters which are beyond Seller's control, or delays caused by Purchaser's change orders or selection of materials. In the event of such delays, Seller may extend the date in this Agreement by the number of days resulting from such delays upon notice to Purchaser.

26. INSULATION. Insulation has been installed (or will be installed prior to Closing) in at least the following minimum standards: (a) exterior walls, excluding exterior garage walls with BATT insulation to a thickness of 1.52 inches which will, according to the manufacturer, yield an R-value of 13; (b) ceilings below attic areas are insulated with BLOWN insulation to a thickness of 12 inches which will, according to the manufacturer, yield an R-value of 10; (c) vaulted ceilings are insulated with BATT insulation to a thickness of 6.14 inches which will, according to the manufacturer, yield an R-value of 13; and (d) floor overhangs are insulated with BATT insulation to a thickness of 3.58 inches which will, according to the manufacturer, yield an R-value of 13.

27. TIME IS OF THE ESSENCE. Time is of the essence as to this Agreement.

28. SUCCESSORS AND ASSIGNS. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto, their heirs, successors, administrators, executors and assigns. Purchaser shall not have the right to assign Purchaser's interest in this Agreement without written consent of Seller.

29. ENTIRE AGREEMENT. This document contains the sole and entire agreement between the parties hereto and no modification of this Agreement shall be binding unless attached hereto and signed by all parties to this Agreement. Any prior agreements, written or oral, are superseded by this Agreement. Purchaser acknowledges that they are not relying upon any promises, agreements or representation made by the Seller, Seller's Salespersons, Seller's agents, Seller's subcontractors, Seller's partners, or Seller's employees (Seller's Representatives) concerning the Home or any land adjacent to or near the Home or the Community, except as expressly set forth in this Agreement. All prior discussions have been merged into this Agreement. No representation, promise, or inducement not included in this Agreement shall be binding upon any party hereto. This agreement may be changed only by a written document signed by both Purchaser and a corporate officer of the Seller.

Purchaser Initial (s): [Signature]

30. AGENCY DISCLOSURE. Purchaser acknowledges receiving, reading and understanding the South Carolina Real Estate Commission Agency Disclosure Form and understands that they will be considered a "Customer" in this transaction.

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© 1999 D. E. Harlan, Inc. - Terry, Ryland/Koch PL 1000 Turney FDR 1230000

Purchaser: Greg Smith, Stephanie Maxwell Community: Parkwood Phase Lot 0015



HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

Purchaser understands that as a "Customer" D. R. Horton or its Representatives and/or Licensees will not act as your agent. Purchaser understands that they have a right to Buyer's Representation. In addition, you cannot ask D. R. Horton or its Representatives to promote your best interest, or to keep bargaining information confidential.

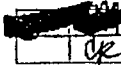
Purchaser Initial (s): [Redacted]

31. ADDENDUMS. The following Addendums, Special Stipulations or Exhibits are attached to this Agreement and are made a part of this Agreement.

32. SPECIAL STIPULATIONS: _____

WHEN SIGNED BY YOU AND OUR AUTHORIZED AGENT, THIS AGREEMENT WILL BECOME A LEGALLY BINDING AGREEMENT. PLEASE MAKE SURE THAT ALL PROVISIONS ARE READ AND UNDERSTOOD BEFORE SIGNING. IF YOU DO NOT UNDERSTAND ANY PROVISION, YOU SHOULD SEEK LEGAL ADVICE.

Purchaser Initial (s): [Redacted]



HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

Page: 13 of 28

GENERAL TERMS AND CONDITIONS

Please print parties name and sign below.

Purchaser:

[Redacted]

Purchaser's Signature: [Redacted]

Purchaser's Signature: [Redacted]

Date: 3/16/05 Time: 3:36 PM

[Redacted]

Purchaser's Name: [Redacted]

Purchaser's Signature: [Redacted]

Purchaser's Signature: [Redacted]

Date: 3/16/05 Time: 3:36 PM

[Redacted]

Seller:

D.R. Horton, Inc.

By: Cindy Rogers

Date: 3-28-05

Time: 3:43 PM

Seller's Address: 503 Wade Park Blvd, Suite 200

Mt. Pleasant, SC 29464

Seller's Phone: (843) 284-5000

Seller's Fax: (843) 284-5010

Seller's FMLS/MLS Code: 1429

Co-Broker:

By: Lina Costanzo

Co-Broker or Co-Broker's Associated Salesperson:

Co-Broker's Phone: 843.814.1291

Co-Broker's Fax: 843.222.8490

Co-Broker's FMLS/MLS Code: 1579/5223

Purchaser's Current Mailing Address:

90 Perkins Street

Springfield, MA 01118

Purchaser's Email: nick101004@aol.com

Purchaser's Phone: 413.739.1998

Purchaser's Work Phone: [Redacted]

Purchaser's Cell Phone: [Redacted]

Purchaser's Fax: 413.967.9542

Purchaser's FMLS/MLS Code: [Redacted]

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© 1999 D. R. Horton, Inc. • Twenty-Second March 16, 2005 Twenty-Nine (1300123)

Purchaser: Greg Sabin, Stephanie Merenda Community: Parkwood Phase Lot: 0085

Exhibit 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
GREGORY W. SMITH AND	)	
STEPHANIE SMITH,	)	
	)	
Plaintiffs,	)	C.A. No.: 2010-CP-18-641
	)	
v.	)	
	)	
D.R. Horton, Inc., Tom's Vinyl Siding,	)	
LLC, Lutzen Construction, Inc., Boozer	)	
Lumber Company, All American Roofing,	)	
Inc., and Myers Landscaping, Inc.,	)	
	)	
Defendants.	)	

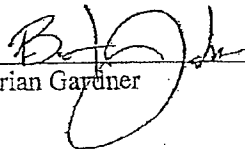
AFFIDAVIT OF BRIAN GARDNER

I, Brian Gardner, having been duly sworn, hereby depose and state the following:

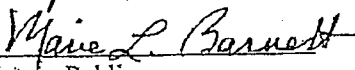
1. I am over the age of 18 and competent to give this Affidavit. All information contained herein is based upon my personal knowledge and/or represents my opinion based upon my professional judgment.
2. I am employed as Division President of the Coastal Carolina Division of D.R. Horton, Inc. (hereinafter "DRH").
3. DRH is a Delaware corporation with its principal place of business in Texas.
4. DRH participates in the residential construction business in approximately twenty-seven states.
5. As part of its operations, DRH routinely engages in interstate activities, including procurement of materials and labor on an interstate basis.

{ATTESTATION ON FOLLOWING PAGE}

Executed this 1st day of September, 2010.


Brian Gardner

Sworn to and subscribed
before me this 1st day
of September, 2010.


Notary Public

My Commission Expires: 9/29/15

9114425.1 (OGLETREE)

Exhibit 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	FIRST JUDICIAL CIRCUIT
	)	
GREGORY W. SMITH AND	)	
STEPHANIE SMITH,	)	
	)	
Plaintiffs,	)	C.A. No.: 2010-CP-18-641
	)	
v.	)	
	)	
D.R. Horton, Inc., Tom's Vinyl Siding,	)	
LLC, Lutzen Construction, Inc., Boozer	)	
Lumber Company, All American Roofing,	)	
Inc., and Myers Landscaping, Inc.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JAY M. HENDERSON

I, Jay M. Henderson, having been duly sworn, hereby depose and state the following:

1. I am over the age of 18 and competent to give this Affidavit. All information contained herein is based upon my personal knowledge and/or review of relevant company records and/or represents my opinion based upon my professional judgment.

2. I am employed as an Assistant Vice President of D.R. Horton, Inc. (hereinafter "DRH").

3. As the result of my regular duties, I have knowledge of DRH's practices and records concerning trade contractors and suppliers.

4. Numerous materials which were used in the construction of the residence located at 4830 Harvest Moon, Summerville, South Carolina, and which were incorporated therein were obtained from suppliers outside of South Carolina. These

materials include, but are not limited to, rebar, I joists, studs, other wood framing materials, oriented strand board (wall sheathing), windows, gypsum drywall, shingles, cabinets, carpet, sheet vinyl flooring, plumbing fixtures, lighting hardware, and appliances.

5. DRH enters into at-will contracts with trade contractors, which apply to all jobs assigned unless and until that contract is terminated or superseded. It does not enter into separate contracts for individual jobs.

6. Exhibit A to this affidavit is a true and accurate copy of the Independent Contractor Agreement between DRH and Myers Landscaping, Inc., that was effective when the subject property was built and pursuant to which Myers performed work on the subject property.

7. Exhibit B to this affidavit is a true and accurate copy of the Independent Contractor Agreement between DRH and Lutzen Construction, Inc., that was effective when the subject property was built and pursuant to which Lutzen performed work on the subject property.

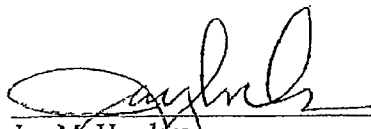
8. Exhibit C to this affidavit is a true and accurate copy of the Independent Contractor Agreement between DRH and Boozer Lumber Company, that was effective when the subject property was built and pursuant to which Boozer performed work on the subject property.

9. Exhibit D to this affidavit is a true and accurate copy of the Independent Contractor Agreement between DRH and All American Roofing, Inc., that was effective when the subject property was built and pursuant to which All American performed work on the subject property.

10. Exhibit E to this affidavit is a true and accurate copy of the Independent Contractor Agreement between DRH and Thomas M. Brown d/b/a Tom's Vinyl Siding, that was effective when the subject property was built and pursuant to which Brown performed work on the subject property.

11. Exhibit F to this affidavit is a true and accurate copy of the Independent Contractor Agreement between DRH and Smith's Heating and Air Conditioning Co, Inc., that was effective when the subject property was built and pursuant to which Smith performed work on the subject property.

Executed this 7th day of September, 2010.


Jay M. Henderson

Sworn to and subscribed
before me this 7th day
of September, 2010.


Notary Public

My Commission Expires: 9/29/15

9114489.1 (OGLETREE)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	CASE NO: 2010-CP-18-641
GREGORY W. SMITH AND	)	
STEPHANIE SMITH,	)	
	)	
Plaintiffs,	)	MEMORANDUM IN OPPOSITION
	)	TO DEFENDANT D.R. HORTON,
vs.	)	INC.'S MOTION TO COMPEL
	)	ARBITRATION
D.R. HORTON, INC., AND TOM'S	)	
VINYL SIDING, LLC, LUTZEN	)	
CONSTRUCTION COMPANY, INC.,	)	
BOOZER LUMBER COMPANY, ALL	)	
AMERICAN ROOFING, INC., AND	)	
MYERS LANDSCAPING, INC.,	)	
	)	
Defendants.	)	

TO
KYLE

TO: DEFENDANT D.R. HORTON, INC. AND ITS ATTORNEY W. KYLE DILLARD, ESQUIRE

The following Memorandum is in opposition to Defendant's Motion to Compel Arbitration.

FACTS

This case arises out of alleged construction defects to a single-family home in Summerville, South Carolina. The Plaintiffs purchased their home from the Defendant D. R. Horton and have alleged a variety of defects with their home including improperly installed siding, windows, structural framing and concrete slab as well as failure to properly install various flashings so as to prevent moisture intrusion into their home which have led to damage to their home. Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable and fail for lack of inclusion in the deed under the Doctrine of Merger.

DISCUSSION AND ARGUMENT

In the contract for the purchase of the residence at issue, in addition to the attempts to disclaim various warranties within the body of the contract, there is within the Warranties and Dispute Resolution in Section 14 beginning on page 7 in which it is referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies available to the Plaintiffs.

The recent Supreme Court case of Simpson v. MSA of Myrtle Beach, 373 S.C. 14 (2007), addressed a very similar set of circumstances in which it held that despite application of the Federal Arbitration Act, that the arbitration clause between the parties was unconscionable and unenforceable in its entirety. In addition to analyzing the lack of conspicuousness of the arbitration provisions which were similar to those at issue in the present case, the Court focused on the other provisions of the contract limiting the recovery and claims available under its terms. Specifically, because the provisions of the contract in the Simpson case violated statutory law in that it prevented Simpson from receiving the mandatory statutory remedies to which she may have been entitled in her underlying SCUTPA and Dealers Act claims and that it allowed her to waive statutory remedies which were contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest, the Court found that these provisions were oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, the Court found that these provisions were an unconscionable waiver of statutory rights, and therefore, unenforceable. Although it was argued in the Simpson case that these offending provisions should simply be severed, the Court stated:

In this case, we 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. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its

entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.

The Contract between the parties in the instant case likewise has oppressive and one-sided provisions which our courts have held cannot be disclaimed. Specifically, in Kirkman v. Parex, Inc. 369 S.C. 477 (2006), the Court held that where an attempted disclaimer of the implied warranty of habitability is not (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for, that such disclaimer is void. The court went further to state that "this standard is to be applied strictly and will be met only in rare circumstances." Given that such circumstances were not met nor even attempted, any attempts to disclaim these implied warranty claims, like in the Simpson case, are unenforceable and unconscionable. Likewise, and perhaps even more stark are the provisions in the Limitations of Liability in sub-section (i) on page 9 in which, in addition to the attempted waiver of various important remedies of the Plaintiffs in violation of the Kirkman requirements, the following is set forth in the last sentence:

SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

Clearly, the provisions that the Court in Simpson found objectionable enough to require striking the entire arbitration clause pale in comparison to the waivers set forth by Defendant D.R. Horton, Inc. in which every reasonably suitable remedy otherwise available at law is waived.

As an additional matter as to whether the Arbitration Clause is enforceable, Plaintiff asserts that because the only arbitration requirement is found in the contract of sale, and not the Deed (attached), under the Doctrine of Merger, the arbitration clause contained in the contract is null and void. South Carolina Law, like the general rule in other states, is clear that when there is a contract of sale and a subsequent deed, the subsequent deed becomes the contract.

Accordingly, the Doctrine of Merger essentially means that the if the language relied upon (in this case the Arbitration Clause) does not exist in the latter contract (the Deed), it is extinguished.

As the Court has stated:

“The Doctrine of Merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution delivering and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract and generally the rights of the parties are fixed by their expressions as contained in the deed. (emphasis supplied). Wilson v. Landstrom, 281 SC 260, 315 S.E.2d 130 (S.C. Ct App 1984).”

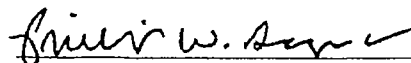
Lastly, because the Defendant and the Plaintiffs are both residents of South Carolina, the construction at issue occurred in South Carolina, and any out-of-state transactional involvement is merely tangential, Plaintiffs contend that the Federal Arbitration Act does not apply and that the South Carolina Uniform Arbitration Act (§ 15-48-10) applies instead such that, for an additional reason beyond those above, the arbitration provisions in this matter further fail for the lack of conspicuousness as required under the South Carolina Act.

CONCLUSION

Given that (1) the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions; (2) that the Deed at issue and which controls the relationship between the parties does not contain an arbitration provision; and (3) that the arbitration provisions fail to meet the South Carolina Uniform Arbitration Act, it is proper that Defendant's Motion to Compel Arbitration be denied.

Respectfully Submitted,

SEGUI LAW FIRM PC



Phillip W. Segui, Jr., Esquire
864 Lowcountry Blvd.
Suite A
Mt. Pleasant, SC 29464
(843) 884-1865
psegui@seguilawfirm.com

CHAKERIS LAW FIRM, LLC

John T. Chakeris
Attorney for Plaintiffs
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Mt. Pleasant, South Carolina
September 8, 2010

IN THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) FOR THE FIRST JUDICIAL CIRCUIT

Gregory W. Smith and Stephanie Smith,)
Plaintiff,)

v.)

D.R. Horton, Inc., Tom's Vinyl Siding, LLC,)
Lutzen Construction, Inc., Boozer Lumber)
Company, All American Roofing, Inc., and)
Myers Landscaping, Inc.,)

Defendants.)

C.A. NO. 2010-CP-18-641

**NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
OF D.R. HORTON, INC.'S MOTION
TO COMPEL ARBITRATION**

2011 APR 28 AM 11:48
CERTIFIED COPY
DORCHESTER COUNTY
COURT

TO: PLAINTIFFS, GREGORY W. SMITH AND STEPHANIE SMITH, AND THEIR
ATTORNEYS, PHILLIP W. SEGUI, JR., ESQ. AND JOHN T. CHAKERIS, ESQ.

YOU WILL PLEASE TAKE NOTICE that Defendant D.R. Horton, Inc. (hereinafter "DRH") will, ten (10) days from the date of service of this motion or at such time as the Court may determine, move the Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider its ruling (*i.e.*, alter or amend its Order) on DRH's Motion to Compel Arbitration and to Stay Proceedings, or Alternatively, to Dismiss, and to grant the same.

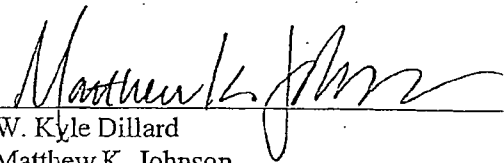
This motion is based on the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10, *et seq.*, the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, applicable state and federal case law, the South Carolina Rules of Civil Procedure, affidavits previously submitted in conjunction with DRH's Motion to Compel Arbitration, the memoranda of law filed with or submitted prior to the hearing on this motion, and any oral argument submitted by counsel at the hearing.

DRH certifies that it has communicated with opposing counsel to request again an agreement to arbitrate and has received no response; therefore, further consultation with opposing counsel on this Motion for Reconsideration would serve no useful purpose.

Dated this 22nd day of April, 2011.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

A handwritten signature in black ink, appearing to read "Matthew K. Johnson", is written over a horizontal line.

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Attorneys for Defendant D.R. Horton, Inc.

IN THE STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

Gregory W. Smith and Stephanie Smith,
Plaintiff,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC,
Lutzen Construction, Inc., Boozar Lumber
Company, All American Roofing, Inc., and
Myers Landscaping, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS
)
) FIRST JUDICIAL CIRCUIT

C.A. NO. 2010-CP-18-641
DEFENDANT D.R. HORTON, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION

2011 APR 22 AM 11:48
CERTIFIED COPY
J. R. HORTON, JR.
CLERK OF COURT
DORCHESTER COUNTY

TO: PLAINTIFFS, GREGORY W. SMITH AND STEPHANIE SMITH, AND THEIR
ATTORNEYS, PHILLIP W. SEGUI, JR., ESQ. AND JOHN T. CHAKERIS, ESQ.

I. INTRODUCTION

Plaintiffs, Gregory W. Smith and Stephanie Smith ("Smiths" or "Plaintiffs"), commenced this action against Defendant D.R. Horton, Inc. ("DRH" or "Defendant"), alleging causes of action for negligence, breach of contract, breaches of implied warranties, and unfair trade practices. All of these claims are premised upon allegations of construction defects within a house sold by DRH to the Smiths. DRH denies the material allegations of the Amended Complaint and further denies any and all alleged liability to the Smiths.

DRH filed a Motion to Compel Arbitration and to Stay Proceedings, or Alternatively, to Dismiss (hereinafter "Motion to Compel Arbitration"), pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, and the South Carolina Uniform Arbitration Act ("UAA"), S.C. Code Ann. §§ 15-48-10, *et seq.* After briefing and oral argument, this Court denied the motion. DRH received written notice of the entry of the order denying the motion on April 14, 2011.

DRH filed the instant Motion to Alter or Amend the Court's Order (or "Motion for Reconsideration"), pursuant to Rule 59(e) SCRPC, on April 22, 2011.

DRH respectfully submits this Memorandum of Law in support of its Motion for Reconsideration of its Motion to Compel Arbitration. The Court denied Defendant's Motion to Compel Arbitration because "the arbitration provisions fail to meet the South Carolina Uniform Arbitration Act," the "relevant arbitration provisions are wholly unconscionable based on the cumulative effect of a number of oppressive and one-sided provisions," and the arbitration clause in the purchase agreement was extinguished by the doctrine of merger by deed. (Order Denying DRH's Motion to Compel Arbitration, p. 4.) Each of these issues will be addressed in turn.

II. THE AGREEMENT TO ARBITRATE

Plaintiffs purchased a residence from DRH pursuant to a Home Purchase Agreement dated March 11, 2005 (hereinafter "Purchase Agreement"). A true and accurate copy of the Purchase Agreement is attached hereto as Exhibit 1. Paragraph 14(g) contains the arbitration clause at issue, which reads as follows:

MANDATORY BINDING ARBITRATION. Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

- I. If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser shall control.
- II. If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitration shall be conducted by an arbitrator or panel of

arbitrators agreed upon by the parties, and to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as a part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

This arbitration clause encompasses "any claim arising out of [DRH's] construction of the home" and "[DRH's] performance under any warranty contained in this Agreement or otherwise." Thus, all of Plaintiffs' claims fall within the scope of the agreement to arbitrate and are subject to mandatory arbitration.

III. THE ARBITRATION NOTICE SATISFIES THE UAA, AND THE ARBITRATION CLAUSE IS VALID AND ENFORCEABLE WHETHER THE UAA OR FAA GOVERNS

DRH has argued that the arbitration agreement is valid and enforceable whether the UAA or FAA applies. In opposing Defendant's motion to compel arbitration, Plaintiffs argued that that the UAA governs the arbitration agreement, rather than the FAA, because Plaintiffs and Defendant reside in South Carolina,¹ the construction occurred in South Carolina, and "any out-of-state transactional involvement is merely tangential." (Plaintiffs' Memorandum in Opposition, p. 4.) Plaintiffs contended that the arbitration agreement is unenforceable because the arbitration provisions "fail for the lack of conspicuousness" under the UAA. (Id.) The Court evidently agreed with Plaintiffs that the UAA governs, rather than the FAA, and denied

¹ DRH does not reside in South Carolina. As stated in the uncontradicted Affidavit of Brian Gardner at ¶ 3, previously submitted as Exhibit 2 to Defendant's Memorandum in Support of Motion to Compel Arbitration, DRH is a Delaware corporation with its principal place of business in Texas. The only indication to the contrary before the Court is the unsubstantiated and unsworn allegation in Plaintiffs' Amended Complaint, which DRH has denied and, more importantly, is contradicted by the only sworn testimony admissible before the Court on this issue.

Defendant's motion to compel arbitration because, among other reasons, "the arbitration provisions fail to meet the South Carolina Uniform Arbitration Act."² (Order, p. 4.) However, neither Plaintiffs nor the Court cited any specific basis for concluding that the arbitration notice or arbitration clause lacked conspicuousness or was deficient under the UAA. Defendant contends that (A) the arbitration notice meets the notice requirements of the UAA and is valid and enforceable thereunder, and (B) even if the arbitration agreement were invalid and unenforceable under state law for failure to meet the technical notice requirements of the UAA, the FAA would preempt state law and the arbitration agreement would be enforceable under federal law.

A. The arbitration notice satisfies the notice requirements of the UAA, and the arbitration agreement is valid and enforceable thereunder.

The parties to a contract are free to agree that the South Carolina UAA will apply, even if interstate commerce is involved and the FAA would otherwise apply. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 538 n.2, 542 S.E.2d 360, 363 n.2 (2001) (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (holding California statute not preempted by FAA where the parties agreed their arbitration agreement would be governed by California law)). Here, the Purchase Agreement provides that the UAA applies. The arbitration notice, in underlined capital letters at the top of the first page of the Purchase Agreement, states, "THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT." The Purchase Agreement does not mention the FAA. The

² The Court's Order implied, but did not expressly state in the Conclusion, that the UAA governs rather than the FAA. DRH respectfully requests clarification of the Court's ruling on this issue.

arbitration clause itself (§ 14(g)) is silent as to whether the UAA or FAA applies. The Purchase Agreement contains no choice of law clause. While the transaction indisputably involves and affects interstate commerce (discussed below), bringing it within the scope of the FAA, the parties agreed that arbitration would be pursuant to the South Carolina UAA.

Plaintiffs argued that the arbitration clause lacks the “conspicuousness” required by the UAA, but they did not identify any deficiencies in the arbitration notice or cite any authority to support their argument. Nor did the Court cite any deficiencies in the notice in concluding that “the arbitration provisions fail to meet the South Carolina Uniform Arbitration Act.” (Order, p. 4.)

The UAA’s sole “conspicuousness” requirement is the notice requirement of S.C. Code Ann. § 15-48-10(a), which provides:

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.

(emphasis added). Here, the Purchase Agreement states in typed underlined capital letters at the top of the first page, “THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.” (See Exhibit 1.) This arbitration notice clearly satisfies § 15-48-10(a), because it specifically references the UAA and is “typed in underlined capital letters ... on the first page of the contract.”

The Supreme Court of South Carolina has required strict compliance with the technicalities of § 15-48-10(a). In *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454,

476 S.E.2d 149 (1996), the Supreme Court, reversing the Court of Appeals, held that an arbitration notice, though it appeared on the first page of the contract typed in all capital letters, failed to meet the requirement of § 15-48-10(a) because it was not underlined. The Court of Appeals majority below had broadly interpreted the statutory term “underlined” and found the notice satisfactory. *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 317 S.C. 274, 453 S.E.2d 253 (S.C. Ct. App. 1994) *aff’d in result*, 323 S.C. 454, 476 S.E.2d 149 (1996). Justifying its broad interpretation of “underlined,” the majority suggested a number of absurdities which would result from an overly strict construction of § 15-48-10(a), one being that any arbitration notice “printed” by a word processor or computer, as opposed to being “typed on a typewriter,” would fail to meet the notice requirement. In his dissent, Chief Judge Howell of the Court of Appeals argued that the word “underlined” must be given its plain and ordinary meaning, but he disagreed with the majority’s view that a strict construction of the word “typed” would dictate that the notice must be typed with a typewriter. He wrote, “The plain meaning of ‘typed’ in today’s high technology environment includes documents produced by a word processor and printer. The arbitration clause at issue was typed in capital letters but was not underlined, as required by the statute.” 317 S.C. at 279-80, 453 S.E.2d at 257. While the Supreme Court in *Soil Remediation* sided with Chief Judge Howell of the Court of Appeals and made clear that it would insist on compliance with the literal meaning of the UAA’s notice requirement with respect to underlining required for conspicuous notice, it did not discuss or decide the meaning of the word “typed.”

Later, in *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001), the Supreme Court held that a partnership agreement providing for arbitration did not satisfy the notice requirement of § 15-48-10(a) because there was no notice of arbitration on the first page

of the contract. The *Zabinski* Court cited *Soil Remediation* for the proposition that “the terms of section 15-48-10(a) are clear, and those terms must be applied according to their literal meaning.” 346 S.C. at 588-89, 553 S.E.2d at 114. The Court commented that the *Soil Remediation* notice provision failed to meet the statutory requirement “because it was laser-printed and written in all capital letters on the first page of the contract.” *Id.* In light of this comment, one might argue that a laser-printed notice fails to meet the statutory requirement, but, in fact, neither *Soil Remediation* nor *Zabinski* decided the meaning of the statutory term “typed” or held that a laser-printed notice is insufficient. Rather, it appears that the *Zabinski* Court, in dicta, may have misstated the *Soil Remediation* holding, which hinged not on the notice being laser-printed, but on its not being “underlined.”

Assuming that a printed notice satisfies the requirement of § 15-48-10(a) that the notice be “typed,” the only reasonable interpretation in this modern era of computing, the present arbitration agreement is valid and enforceable under the UAA.

B. If the arbitration agreement were invalid under the UAA for failure to meet the notice requirement, the FAA would preempt the UAA, and the arbitration agreement would be valid and enforceable under federal law.

While the parties may agree that state law (the UAA) rather than the FAA will govern an arbitration agreement, “the FAA will preempt any state law that completely invalidates the parties’ agreement to arbitrate.” *Zabinski*, 346 S.C. at 592 (citing *Volt, supra*, and *Munoz, supra* n.2); see *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempted a Montana statute which conditioned the enforceability of an arbitration clause on compliance with special notice requirements [substantially similar to those of § 15-48-10(a)] and that courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration agreements

[such as the UAA]]. Here, if the arbitration agreement were governed by the UAA, and if the agreement were invalidated by the special notice provisions of § 15-48-10(a), then, provided the transaction involved interstate commerce, the FAA would preempt the UAA and the arbitration agreement would be valid and enforceable.

The purchase and sale of Plaintiffs' residence undoubtedly involves and affects interstate commerce, bringing this arbitration agreement within the scope of the FAA. According to our Supreme Court in *Zabinski*,

Beginning in the mid-1980's, the United States Supreme Court, interpreting the FAA, essentially "federalized" the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause. The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)

The FAA, section 2, provides that a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 273, 115 S.Ct. at 839 (quoting 9 U.S.C. § 2 (1988)) (emphasis added). The United States Supreme Court has interpreted the words "involving commerce" broadly. According to the Supreme Court in *Dobson*, the words "involving commerce" are the functional equivalent of "affecting commerce," which typically indicates Congress' intent to exercise its commerce power in full. *Id.* at 274, 115 S.Ct. at 839. The Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. *Id.*; see also *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999). In other words, the transaction must turn out, in fact, to have involved interstate commerce.

346 S.C. at 590-91 (emphasis added) (footnotes and some internal citations omitted) (holding the sale and development of real property on Hilton Head Island involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors). Contracts involve or affect interstate commerce where equipment and materials are

procured from out of state. *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977); *Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 n. 1 (Ct. App. 1986).

DRH relies on the uncontradicted affidavits of Brian Gardner and Jay Henderson (previously submitted in conjunction with the underlying Motion to Compel Arbitration) to establish that (1) DRH is engaged in the residential construction business in approximately twenty-seven states and (2) materials used in the construction of Plaintiffs' residence were obtained from out of state, including I-joists, studs, wood framing materials, oriented strand board (wall sheathing), windows, gypsum drywall, shingles, cabinets, carpet, sheet vinyl flooring, plumbing fixtures, lighting hardware, and appliances. *See Circle S. Enters., Inc.*, 288 S.C. at 431 (noting that both the United States Supreme Court and our Supreme Court have relied upon affidavits in determining whether a construction transaction involved interstate commerce).

Because the construction and purchase and sale of Plaintiffs' residence involved interstate commerce, the arbitration agreement falls within the scope of the FAA. If the arbitration agreement is invalid under the UAA, then the FAA preempts state law and renders the arbitration agreement enforceable.

IV. THE AGREEMENT TO ARBITRATE IS NOT UNCONSCIONABLE

Plaintiffs argued that the entire "Contract" (Purchase Agreement)—not merely the arbitration clause—is unconscionable. (Plaintiffs' Memorandum, p. 3.) The Court concluded that "the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." (Order, p. 4

(emphasis added).) Defendant contends that neither the arbitration agreement nor the entire Purchase Agreement is unconscionable.

“There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663 (2007) (citing *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (S.C. Ct. App. 1999)). However, “arbitration is a matter of contract law,” and “a party may seek revocation of the contract under ‘such grounds as exist at law or in equity,’ including fraud, duress, and unconscionability.” *Simpson*, 373 S.C. at 24 (citing S.C. Code Ann. § 15-48-10(a)).

“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.” *Herron*, 387 S.C. at 532 (emphasis added); *Simpson*, 373 S.C. at 24-25. “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. In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.” *Herron*, 387 S.C. at 532; *Simpson*, 373 S.C. at 25.

In their Memorandum, Plaintiffs made no argument that they had “no meaningful choice” in negotiating and accepting the terms of the arbitration clause or any other portion of the

Purchase Agreement, nor is there any competent evidence before the Court that they had no meaningful choice. Plaintiffs did not allege that they were unaware of, or surprised by, the arbitration clause, or that they lacked the bargaining power or the opportunity to negotiate the terms of the Purchase Agreement, including the arbitration provisions.

To the extent that Plaintiffs relied upon *Simpson* to persuade the Court that they had an absence of meaningful choice, their reliance is misplaced. The *Simpson* Court found that a car buyer lacked a meaningful choice in agreeing to arbitrate because (1) the "arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page," (2) the automobile trade-in contract was an adhesion contract (defined in South Carolina as a standard form contract offered on a take-it-or-leave-it basis with terms that are not negotiable), (3) automobile sales contracts between consumers and retailers are to be viewed by South Carolina courts with "considerable skepticism" due to a substantial disparity in bargaining power, (4) Simpson claimed she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement and she did not have a lawyer present to assist her in understanding the contract, and (5) Simpson alleged that the contract was "hastily" presented for her signature. 373 S.C. at 26-28. Here, by contrast, the Smiths negotiated and signed a Purchase Agreement which gave clear notice in underlined capital letters at the top of the first page that the contract was subject to mandatory binding arbitration. The Smiths each placed their initials directly beneath the arbitration clause to indicate their acknowledgement and agreement. There is no evidence that the Smiths were not afforded ample time to review the contract or that they could not understand the arbitration clause. Nor is there any evidence that they were at a bargaining disadvantage, or that the

contract was offered on a take-it-or-leave-it basis, or that the arbitration clause was nonnegotiable. In sum, there is no evidence to suggest that the Smiths lacked meaningful choice.

Again, Plaintiffs argued that the entire “Contract”—not the arbitration clause—is unconscionable because it contains “oppressive and one-sided provisions.” (Plaintiffs’ Memorandum, p. 3.) Unlike the one-sided arbitration clause in *Simpson* (which required the car buyer to arbitrate all claims but exempted from arbitration certain claims brought by the dealer against the customer, and which expressly prohibited the arbitrator from awarding punitive, exemplary, double or treble damages), the arbitration clause here (quoted above at pp. 2-3) is even-handed, not one-sided, not giving an advantage, whether procedural or substantive, to either party. Because the fairness of the arbitration clause is unassailable, Plaintiffs instead attacked a separate provision limiting DRH’s liability in an effort to persuade the Court to invalidate the entire contract on the basis of unconscionability. Yet, the Court, without discussing the terms of the arbitration clause, concluded that “the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions.” (Order, p. 4.)

The provisions Plaintiffs claimed are “oppressive and one-sided” are found not in the arbitration clause (§ 14(g)) but in the “Limitations of Liability” clause (§ 14(i)), which purports to disclaim all warranties, except for the “RWC Warranty” (10-year structural warranty) and the title warranties, and to limit DRH’s liability to its duty to repair or replace any defect or defective item under the RWC Warranty. (Plaintiffs’ Memorandum, p. 3.) Paragraph 14(i) provides:

EXCEPT FOR THE RWC WARRANTY, AND EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE, AND EXCEPT FOR ANY WARRANTIES IMPOSED BY LAW, WHICH CANNOT BE DISCLAIMED, SELLER MAKES NO OTHER WARRANTY OF ANY KIND. ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY SELLER. SELLER MAKES NO WARRANTY AS TO

MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EITHER EXPRESSED OR IMPLIED. THE EXCLUSIVE REMEDY FOR ANY DEFECT OF ANY ITEM OR CLAIMED DEFECT IN THE HOME IS BY WRITTEN NOTIFICATION PRIOR TO THE EXPIRATION OF THE WARRANTY PERIOD. SELLER'S OBLIGATION SHALL BE THE CORRECTION OF SUCH DEFECT BY REPAIR OR REPLACEMENT, IN ITS DISCRETION. NO SUCH ACTIONS TAKEN BY SELLER TO REPAIR OR REPLACE A DEFECT SHALL EXTEND THE WARRANTY PERIOD. SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

Plaintiffs correctly noted that, under *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006), a disclaimer of the implied warranty of habitability, to be valid, "must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." Plaintiffs argued that paragraph 14(i) is not a valid disclaimer of the implied warranty of habitability under *Kirkman*.

That argument is really beside the point. Plaintiffs drew a bogus analogy between the allegedly ineffective disclaimer of the implied warranty of habitability here and the *Simpson* arbitration clause, which the Supreme Court declared invalid because it violated statutory law and public policy by prohibiting the arbitrator from awarding "punitive, exemplary, double, or treble damages." Simpson's complaint had alleged, among other things, violations of the South Carolina Unfair Trade Practices Act (SCUPTA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). The SCUPTA requires a court to award treble damages for violations of the statute, and, similarly, the Dealers Act requires a court to award double damages for violations of the statute. The *Simpson* Court held that the provision prohibiting the arbitrator from awarding statutorily-mandated double and treble damages was "oppressive" and "one-sided" and was "an unconscionable waiver of statutory rights." 373 S.C. at 30, 644 S.E.2d at 671. The "unconscionable waiver of statutory rights" in *Simpson* bears no analogy whatsoever to the disclaimer of warranties here. Unlike the arbitration clause in

Simpson, the arbitration agreement in the Purchase Agreement contains no limitation on the Plaintiffs' right to recover statutory damages, whether double, treble, or otherwise.

Nor does the *Simpson* arbitration clause bear any analogy to the provision above disclaiming monetary damages and limiting DRH's liability to its obligation to repair or replace defects under the RWC Warranty. Such limitations of liability are ubiquitous in all sorts of contracts (residential construction contracts and otherwise) which provide an express warranty to the consumer or purchaser, and courts generally do not find them to be unconscionable. The "Limitation of Liability" clause here does not constitute a waiver of any statutory rights or causes of action, nor does it purport to limit the arbitrator's legal authority, as did the arbitration clause in *Simpson*. In fact, under this agreement, an arbitrator would have the same authority and prerogative as any state or federal court to declare the limitation of liability clause unconscionable and invalid and to sever it from the contract. Despite their appeal to *Simpson*, Plaintiffs have not demonstrated that enforcement of the arbitration clause would strip them of any remedy that they could access through litigation in state or federal court.

For the reasons stated, neither the arbitration clause nor the entire Purchase Agreement is unconscionable.

V. AGREEMENT TO ARBITRATE NOT EXTINGUISHED BY THE DOCTRINE OF MERGER BY DEED

Plaintiffs argued that the arbitration clause was extinguished by the doctrine of merger by deed, and the Court denied Defendant's motion to compel arbitration on the grounds, among others, that "the Deed at issue and which controls the relationship between the parties does not contain an arbitration provision." (Order, p. 4.) Plaintiffs correctly noted that South Carolina recognizes the doctrine of merger by deed, which provides that "the execution, delivery, and

acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.” *Charleston & Western Carolina Railway Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187, 192 (S.C. 1957); *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130, 132 (S.C. Ct. App. 1984). (Plaintiff’s Memorandum, p. 4.)

However, Plaintiffs failed to mention that South Carolina courts also recognize several exceptions to the doctrine of merger. Our Supreme Court held in 1993, “Where a deed constitutes only part performance of a preceding contract, other distinct and unperformed provisions of the contract are not merged in the deed.” *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993) (emphasis added) (citing 26 C.J.S. Deeds § 91 (1956)). See also *Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (S.C. Ct. App. 1984) (noting that South Carolina recognizes the “contrary intent” exception to the merger doctrine).

As South Carolina and numerous courts have recognized, “The doctrine of merger is not absolute.” *In re Tribby*, 241 B.R. 380, 383 (E.D. Va. 1999). The principle was well articulated in *In re Tribby*:

Certainly, the deed is final as to every subject which it undertakes to deal with. Typically, however, a deed represents only that aspect of the contract dealing with the transfer of title, and while a deed may cover other aspects of the title, it rarely purports to cover all elements of the original contract for sale. Thus, while the deed is proof of the “fact of conveyance,” other documents, including the executory contract, may be considered to determine obligations collateral to the fact of conveyance. Accordingly, the doctrine of merger only applies to (i) subject matter specifically covered by the deed, and (ii) subject matter that is not “collateral to the passage of title.”

Id. (citing *Empire Mgmt. & Dev. Co. v. Greenville Assocs.*, 255 Va. 49, 54, 496 S.E.2d 440, 443 (1998)) (emphasis added). See also Charles S. Parnell, Annotation, *Deed as superseding or*

merging provisions of antecedent contract imposing obligations upon the vendor, 38 A.L.R.2d 1310 § 6 (1954) (“[I]t may be stated as a general rule that where the antecedent contract contains provisions imposing obligations upon the vendor other than those relating to title or possession, and so far collateral thereto as to indicate that their omission from the deed was without any deliberate intent to preclude their survival of that instrument, such collateral provisions will be held to survive the deed.”)

It appears that the narrow question of whether the doctrine of merger by deed operates to defeat an arbitration clause in a real estate transaction is a matter of first impression in South Carolina. However, under common law, an arbitration clause is presumed to survive the merger of a contract unless there is express or implied evidence that the parties intended to override the presumption. *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1998) (citing *Nolde Bros. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 255 (1977)); see also *Primex Int’l Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594, 679 N.E.2d 624, 657 N.Y.S.2d 385 (N.Y. 1997) (holding that, despite the merger clause in a contract that did not contain an arbitration clause, arbitration clauses in prior, expired agreements were enforceable).

Here, in the purchase and sale of the Smiths’ residence, it is readily apparent that the deed constitutes only part performance of the preceding contract (the Purchase Agreement) and that other distinct and unperformed (i.e., post-closing) provisions of the Purchase Agreement, which define certain obligations collateral to the fact of the conveyance of land, were not intended to be merged in the deed. Some of the provisions and obligations of the Purchase Agreement intended by the parties to continue beyond closing include:

- DRH’s obligation to complete “punch list” items (§ 8);

- DRH's obligation to complete any repairs due to wood infestation (§ 12);
- The parties' agreement to arbitrate "all disputes between themselves," including, but not limited to, "(1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement [obviously referring to DRH's post-closing performance]; (3) Seller's performance under any warranty contained in this Agreement or otherwise [again, obviously referring to DRH's post-closing performance] ..." (§ 14(g)); and
- Purchasers' obligation to make written requests for warranty service within the first 365 days after closing (§ 14(j)).

All of these provisions were and are "distinct," "unperformed" (at the time of closing), and "collateral to the fact of the conveyance of land" and, thus, were not extinguished by the doctrine of merger. The Purchase Agreement also contained a "Survival" clause, which expressly provided, "Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled." (§ 15.) The arbitration agreement, in particular, must be presumed to survive the merger at closing in the absence of any express or implied evidence that the parties intended to override the presumption. Here, there is no evidence whatsoever that the parties intended their arbitration agreement to expire upon closing. Therefore, it is clear that the parties' agreement to arbitrate was not extinguished by the doctrine of merger by deed.

VI. CONCLUSION

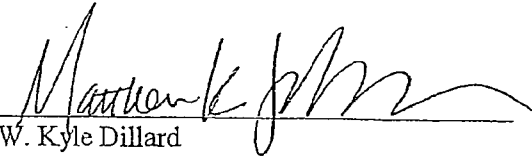
For the reasons stated, DRH's Rule 59(e) Motion to Alter or Amend the Court's Order Denying DRH'S Motion to Compel Arbitration should be granted, and, accordingly, the Court should grant DRH's Motion to Compel Arbitration.

Dated this 22nd day of April, 2011.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,

SMOAK & STEWART, P.C.

A handwritten signature in black ink, appearing to read "Matthew K. Johnson", written over a horizontal line.

W. Kyle Dillard

Matthew K. Johnson

P.O. Box 2757

Greenville, SC 29602

Telephone: 864.271.1300

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Attorneys for Defendant D.R. Horton, Inc.

**Gregory W. Smith and Stephanie
Smith, Plaintiffs v. D.R. Horton,
Inc., et al., Defendants**

C.A. NO. 2010-CP-18-641

Exhibit 1

HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

D. R. Horton, Inc.
Purchase Agreement

**THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION
PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT**

Date: 03/11/2005

1. PARTIES. D.R. Horton, Inc., ("Seller") agrees to sell to Greg Smith, Stephanie Mirella ("Purchaser") and Purchaser agrees to buy all that tract or parcel of land, with such improvements as are located thereon, described as follows:

All that tract of land being known as (Address) 4330 Harvest Moon Court, being more particularly described as Lot 0085, Phase ____ of Parkwood subdivision, as depicted in the plat recorded in Plat Book ____, Page ____, in the Register of Deeds Office for Charleston/Dorchester/Berkeley County, South Carolina, together with all lighting fixtures attached thereto, all electrical, mechanical, plumbing, air-conditioning, and any other systems or fixtures as are attached thereto and now a part thereof, together with all the improvements thereon and all appurtenances thereto (the "Property"). The full legal description of the Property is as stated on the Plat referenced above. The conveyance shall be subject to all easements and restrictions of record on the Closing Date.

2. PURCHASE PRICE AND METHOD OF PAYMENT. The Purchase Price of the Property shall be \$233,390 to be paid as set forth in subparagraph 4.1 below.

3. All Cash at Closing (No financing contingency). Purchaser to pay all usual and customary closing costs. Purchaser agrees to provide Seller written documentation from a financial institution verifying Purchaser's funds to close. If an appraisal is desired, Purchaser is responsible for requesting from a licensed appraiser. If this subparagraph is checked, subparagraph 2(b) shall not apply.

4. Where New Loan Is to Be Obtained:

i. Purchaser shall obtain a loan in the principal amount of 100% of the Purchase Price (reduced to the next lowest hundred dollars) to be secured by a first priority mortgage on the Property; said loan to be paid in consecutive monthly installments of principal and interest of a term of not less than 30 years. This loan shall be as:

(1) Conventional Loan, with a market interest rate, as of the Closing Date.

(2) Adjustable Rate Mortgage ("ARM") Loan, with an initial interest rate of not more than market interest rate as of the Closing Date. The interest rate payable to lender by Purchaser may increase or decrease according to the terms of said loan, and as a result the monthly installments of principal and interest payable by Purchaser may increase or decrease.

(3) FHA or VA Loan: It is expressly agreed upon that not withstanding any other provisions of this contract the purchaser shall not be obligated to complete the purchase of the property described herein, incur any penalty by forfeiture of earnest money deposits, or otherwise unless the purchaser has been given, in accordance with HUD / FHA or VA requirements, a written statement issued by the Federal Housing Commissioner, Veterans Administration, or a Direct Endorsement lender setting forth the Appraised value of the property (excluding closing costs) of not less than the sales price. The purchaser shall have the privilege and option of proceeding with consummation of the contract without regard to the amount of the appraised evaluation. The appraised valuation is arrived to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or the condition of the property. The purchaser should satisfy himself/herself that the price and condition of the property are acceptable.

FHA REAL ESTATE CERTIFICATION: We, the Seller, Borrower and Real Estate Broker, or Agent involved in this loan transaction, do hereby certify that the terms of the sales contract are true to the best of our knowledge and belief. All agreements entered into by any of the following parties are fully disclosed and attached to the sales contract.

(4) Seller is participating in the Dreammaker Program.

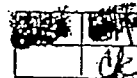
(5) Other:

ii. Provided that Purchaser obtains a first mortgage loan and closes through Seller's approved lender and Seller's preferred closing agent, Seller shall contribute up to \$4,000 towards Purchaser's closing costs, including statutory recording fees, surveys, lender's attorney's fees, and any other costs required by Seller's approved lender and closing agent, including discount points, interim interest and prepaid items excluding HOA fees, approved by the lender. Purchaser is responsible for any remaining closing costs including but not limited to prepaids, discount points, buy downs, subsidies, lock-in fees and any other fees used to control the interest rate. The total amount of closing costs paid by the seller for the buyer, which would also include any fees which buyer is prohibited from paying by the Veterans Administration, Department of Housing or Regulatory Agencies. The Purchaser acknowledges that The Seller has agreed to provide The Purchaser with the above only if The Purchaser uses DHI Mortgage Company as the Purchaser's lender and the Seller's preferred closing agent. This incentive will not be Credited to The Purchaser at closing if The Purchaser uses any other lender or Attorney for The Purchaser's mortgage requirements. Private Mortgage Insurance Premiums, if required by the lender, shall be paid by Purchaser, in cash at Closing or through monthly payments, as may be required by the lender.

iii. Purchaser shall apply for this loan within seven (7) business days from date of acceptance of this Agreement and pursue the application diligently and in good faith. Purchaser shall be presumed to have satisfied this condition and obtain loan approval unless Purchaser notifies Seller within thirty (30) days of the date of acceptance in writing that Purchaser has not been able to obtain the loan referred to in this Section. In the event Purchaser timely notifies Seller of its failure to obtain loan approval, Seller shall have the right to contact Purchaser's lender to determine the status of Purchaser's loan application and loan approval.

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Purchaser: Greg Smith, Stephanie Mirella Community: Parkwood Phase ____ Lot: 0085



HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

If Seller determines, in its sole discretion, that Purchaser failed to diligently and in good faith pursue its loan application, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other. Within thirty (30) days, Purchaser agrees to provide Seller with a letter from Purchaser's lender confirming that Purchaser has been approved for the loan referred to in this Section. Purchaser understands and acknowledges that loan/credit approvals are valid for up to 120 days. Furthermore, Buyer agrees to update loan/credit approval documentation as needed in order to maintain current loan approval up until the date of closing. If Seller determines, in its sole discretion, that Purchaser failed to diligently pursue or maintain its loan/credit approval, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other. Purchaser agrees to execute all papers and perform all other actions necessary to obtain this loan and to accept such a loan if approved by lender. Purchaser shall, in addition to the payment of principal and interest upon said loan, pay at Closing such amounts as may be required by the lender to establish or maintain an escrow for insurance, property taxes or private mortgage insurance. Unless specifically disclosed in writing in this Agreement, Purchaser warrants that this Agreement is not contingent upon the sale or closing of other property owned by Purchaser and that, at the time of Closing, Purchaser will have sufficient cash available (together with the loan referred to above) to complete the purchase and shall immediately disclose to Listing Broker the name(s) of the lender(s) with which the Purchaser has applied.

Purchaser Initial (s):

- iv. Purchaser acknowledges that there are many different loan programs available from many different lenders. If Purchaser is unable to obtain a mortgage loan commitment on the type of loan chosen on page 1 of this Agreement, Purchaser agrees to apply and secure an approval on a different loan program for which Buyer can obtain an approval. If the loan obtained by Purchaser contains any contingencies, Seller may require the satisfaction of those contingencies within the thirty (30) day time period specified in this Agreement for obtaining the loan approval and terminate this Agreement if those contingencies are not waived or satisfied. If Seller determines, in its sole discretion, that Purchaser failed to diligently and in good faith remove any loan contingencies, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other.
- v. Purchaser may apply for a loan with different terms and conditions and close the transaction provided: (a) all other terms and conditions of this Agreement are fulfilled; and (b) the new loan does not increase the closing costs charged to Seller or delay the Closing. Purchaser shall be obligated to close this transaction if Purchaser qualifies for a loan with terms described in the above Section or in this Section.
- vi. The proceeds of the loan, together with the balance of the Purchase Price, shall be paid to Seller, in cash or its equivalent, by Purchaser at Closing.
- vii. The Purchaser acknowledges and agrees that our financial situation may affect our ability to obtain a loan and/or purchase this property. We further acknowledge and agree that it is important for the Seller to know our financial situation and our ability to obtain financing. In consideration for the Seller entering into this agreement, we do hereby grant permission for the Seller to contact any mortgage company or financial institution to which we may apply for a loan and discuss our financial situation and the likelihood of obtaining a loan. We further authorize DHI Mortgage Company, or any other mortgage company or financial institution from which we may seek a loan, to discuss our financial status with the Seller and to provide the Seller with any documentation supporting our financial status.
- viii. The Purchaser acknowledges and agrees that the Seller is not responsible for interest rate locks and will not guarantee interest rate locks due to Seller's failure to meet the scheduled closing date.

Purchaser Initial (s):

3. **EARNEST MONEY Deposit.** Purchaser has paid to Seller \$ 3000 ("Earnest Money") by check or money order made payable to D.R. Horton receipt of which is acknowledged by Seller. If the Earnest money deposit is for a home under construction that may close within 60 days, the Purchaser agrees to furnish the Seller with a certified check WITHIN 24 HOURS UPON PURCHASER SIGNING THE PURCHASE AGREEMENT. The parties agree that the Earnest Money is to be deposited in Seller's trust account upon acceptance of this Agreement by Seller. The parties agree that the Earnest Money shall be applied as a credit at Closing, unless otherwise provided by this Agreement.

- a. **Disbursement.** The Earnest Money shall be retained by Seller except: (1) upon failure of loan approval during the thirty (30) days following acceptance of this Agreement, the Earnest Money shall be disbursed to Purchaser, unless Seller determines that Purchaser did not diligently and in good faith pursue its loan application as set forth in Section 2; and (2) as otherwise specifically set out in this Agreement. If any dispute arises between Purchaser and Seller as to the final disposition of all or part of the Earnest Money, Seller may, but is not required to, interplead all or any disputed part of the Earnest Money into court. Purchaser and Seller agree that if Seller interpleads the Earnest Money into court, Seller shall be entitled to recover the costs of such interpleader, including reasonable attorney's fees and expenses incurred in connection with the interpleader, from the Earnest Money. If Seller decides not to interplead, Seller may make a disbursement of the Earnest Money upon a reasonable interpretation of this Agreement. It may take up to thirty (30) business days for Earnest Money to be refunded.

Purchaser Initial (s):

- b. **Liquidated Damages.** The parties agree that if this transaction fails to close for any reason, the amount of damages suffered by Seller would be difficult to determine and Seller shall be entitled to retain the Earnest Money as a reasonable estimate of Seller's damages.

4. **WARRANTY OF TITLE.** Seller agrees to convey good and marketable fee simple title to the Property to Purchaser at Closing.

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Purchaser: Greg Smith, Stephanie Marsella Community Parkwood Phase Lot: 0085

HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

by general limited warranty deed, subject only to: (a) zoning ordinances affecting said Property; (b) general utility, drainage and other easements of record upon which the dwelling does not encroach; (c) subdivision easements and restrictions of record; (d) subdivision covenants, conditions and restrictions; (e) matters shown on the final plat for the subdivision where the Property is located, as of the Closing Date; and (f) any other matters specified in this Agreement. "Marketable Title" shall mean title which a title insurance company licensed to do business in South Carolina will insure at its regular rates, subject only to standard exceptions.

5. **TITLE EXAMINATION.** Purchaser shall have a reasonable time after acceptance of this Agreement to examine title and to furnish Seller with a written statement of objections affecting the marketability of said title. If Seller cannot satisfy Purchaser's valid objections within a reasonable time, Purchaser shall have the right to terminate this Agreement and receive a refund of the Earnest Money. If Seller is contributing to Purchaser's closing costs pursuant to subparagraph 2(b) above, Seller will cause a title report to be prepared and delivered to the lender making the mortgage loan to Purchaser. At Closing, Seller shall cause its closing agent to issue the lender a title insurance commitment and subsequent lender's title insurance policy.

6. **DESTRUCTION.** If the home built on the Property is either totally destroyed or substantially damaged before Closing, either party may terminate this Agreement by written notice to the other within ten (10) days of the date of such casualty.

7. **CONDITION OF THE PROPERTY.** The Property shall be completed in accordance with all applicable governmental regulations, ordinances and codes. A certificate of occupancy shall be proof of compliance with this requirement and the property shall be deemed complete upon certificate of occupancy issuance by the proper authority.

8. **INSPECTION.** At the appropriate stage of construction, Seller shall cause the appropriate utility services to be operational so that Purchaser may complete Purchaser's inspections under this Agreement. Purchaser or Purchaser's agents or representatives, at Purchaser's expense and at reasonable times during normal business hours, shall have the right to enter upon the Property for the purpose of inspecting, examining, testing, and surveying the Property. Such inspections shall only be with prior notice to Seller at such times, as Seller shall reasonably permit.

Purchaser shall have the privilege of inspecting the Property with Seller or Seller's representative immediately prior to Closing. Seller's obligation to complete any "punch list" items, which it has agreed to complete, shall survive Closing. Seller shall not be obligated to complete any items from a private inspection other than through the procedures in this Section; Seller is obligated to complete only those items it has agreed to correct in writing. Should the Seller, in its sole opinion of the President thereof, determine that it could not satisfy the requirements of the Purchaser for the completion of the improvements or should Purchaser attempt to delay the closing for completion of punchlist items, then the Seller, at its option, may void this Contract and refund to the Buyer their Earnest Money. If voided, the Seller shall have absolutely no further obligation to the Purchaser.

Should Purchaser choose to conduct an independent professional inspection of the Property prior to Closing, Purchaser will contact Seller at least seven (7) business days prior to that inspection for an appointment with Seller's agent who must accompany Purchaser or Purchaser's inspector. Purchaser shall cause Purchaser's inspector to furnish Seller with proof that Purchaser's inspector has a \$300,000 General Liability Insurance Policy which names Seller as additional insured prior to site inspection, a copy of the inspector's business license, and if applicable, a copy of inspector's State license certificate. Seller is only required to complete items on the inspector's list that is a violation of the building code, RWC guidelines, outline specifications, or performance specifications as outlined in, "Foundations" warranty guide.

Such inspections survive closing and cannot delay a closing on behalf of the Purchaser.

Purchaser assumes all responsibility for the acts of Purchaser, Purchaser's agents or representatives in exercising Purchaser's rights under this Section, and Purchaser hereby indemnifies Seller from any loss or expense it may suffer for any claim, which arises directly or indirectly from a breach of this Section.

D.R. HORTON HOME INSPECTION POLICY

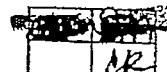
a. Home Inspection:

D.R. Horton recognizes that buyers may desire that a home inspector review their home prior to closing. D.R. Horton agrees to allow such inspections with the following provisions:

1. D.R. Horton reserves the right to have an appointed representative accompany the Home Inspector at its discretion. Private inspections may delay completion of homes, and as a result, closing dates may need to be extended at the seller's discretion.
2. All inspections must be scheduled through the Community Sales Manager. These inspections must be scheduled one week in advance and are to take place during normal working hours (Mon. - Fri. 8:00AM to 4:00PM) and must be in accordance with the Community Field Manager's production schedule.
3. Only inspector recommendations pertaining to building codes per the governing municipality will be addressed.
4. Inspection firm must be licensed to do business in the local jurisdiction and by the State of South Carolina.
5. Inspection firm must be bonded/insured against damage or liability while on D.R. Horton property.
6. Buyer shall pay for all inspections initiated by buyer.
7. D.R. Horton reserves the right to refuse access to the property to anyone at any time.

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Purchaser: Greg Smith, Stephanie Marcelle Community: Parkwood Phase Lot 0085



HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

8. Inspector must provide D. R. Horton with proof of required Liability Insurance and Workman's Compensation Insurance prior to entering property.

We understand that if an Inspector does not have an appointment ONE week prior to the private inspection, the Inspector will not be allowed to perform the inspections and will be instructed to reschedule.

D. R. Horton will not pause construction waiting for the rescheduled appointment.

Purchaser Initial (s): [Signature] [Signature]

9. **RESPONSIBILITY TO COOPERATE.** Seller and Purchaser agree to sign at Closing such papers as may be necessary to carry out the terms of this Agreement.

10. **REAL ESTATE BROKER AND COMMISSION.** Purchaser represents there are no co-brokers or Purchaser's agents ("Co-Broker") except Lina Costanza Lina Costanza-Prudential, who represents Purchaser. (Note: Commission to Broker and Co-Broker to be handled by separate document to be presented simultaneously with this Agreement).

Purchaser Initial (s): [Signature] [Signature]

11. **DISCLAIMER.** Seller and Purchaser acknowledge that they have not relied upon the advice or representations, if any, of Seller, Broker, or their associated salespersons relative to the legal and tax consequences of this Agreement, the terms and conditions of financing, and other such matters. Purchaser acknowledges that if such matters have been of concern to Purchaser, they have sought and obtained independent advice relative thereto.

12. **WOOD INFESTATION REPORT.** At the time of Closing, Seller shall provide Purchaser with a soil treatment report from a pest control company licensed in the South Carolina stating that the Property has been treated for subterranean termite infestation within one (1) year of the Closing. If required by Purchaser's lender, Purchaser may obtain at its expense a South Carolina Wood Infestation Report performed by a South Carolina, licensed pest-inspection company. In the event such Wood Infestation Report identifies any wood infestation, or recommends that repairs be made to the Property, Seller shall either: (1) eliminate such infestation and complete such repairs prior to Closing, or (2) escrow funds sufficient to eliminate such infestation and complete such repairs following Closing.

13. **TESTING.** Purchaser acknowledges that Seller has made no tests or surveys of the Property or to the improvements and makes no representation or warranty with respect to toxic waste, radon, hazardous materials or undesirable substances and specifically excludes these matters from any warranties given under this Agreement.

14. WARRANTIES AND DISPUTE RESOLUTION.

- Structural Warranty.** At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from Residential Warranty Corporation ("RWC") or such other national warranty provider as Seller may reasonably select (the "RWC Warranty"). This RWC Warranty will provide, at a minimum, a ten (10) year structural warranty. The RWC Warranty referred to in this paragraph is the only warranty being made by Seller, except for such warranties which may not be disclaimed by State or Federal law. In addition, Seller hereby assigns to Purchaser all warranties, expressed or implied, which arise or are given by the manufacturer of any product installed in the home built on the Property.
- RWC Warranty.** Purchaser has been, or will be prior to Closing, provided with a copy of the RWC Warranty book on the Ten Year Limited Warranty, which is administered by Residential Warranty Corporation. Validation of the RWC Warranty is conditioned upon Seller's compliance with all RWC's enrollment procedures and upon Seller remaining in good standing in the RWC Program.
- The RWC Warranty is provided by Seller to Purchaser in lieu of all other warranties, verbal agreements, or representations and Seller makes no warranty, express or implied, as to quality, fitness for a particular purpose, merchantability, habitability or otherwise, except as is expressly set forth in the Program or as otherwise required by Federal or State law. Particularly, Purchaser understands and agrees that any and all complaints of any nature in regard to the property that arise more than 365 days after closing must be submitted to RWC. Purchaser understands and agrees that the warranties of all appliances and other consumer products installed in the home are those of the manufacturer or supplier and same are assigned to Purchaser, effective on the date of Closing. In any event, Seller shall not be liable for any personal injury or other consequential or secondary damages and/or losses, which may arise from or out of any and all defects. Except for purchasers of FHA or VA financed homes, Purchaser acknowledges and understands that the RWC Warranty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration. Purchaser has been, or will be given prior to Closing, provided with a copy of the D. R. Horton Warranty manual, "Foundations". Purchaser understands and agrees to all warranties to their extent as outlined in said manual. Purchaser shall execute an acknowledgment that Seller makes no warranties express or implied, as to fitness for a particular purpose, merchantability, and habitability as set forth above at Closing, which statement shall be affixed to Purchaser's deed.**

Purchaser Initial (s): [Signature] [Signature]

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Purchaser: Greg Smith, Stephanie Marsella Community: Parkwood Phase Lot: 0085

HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

GENERAL TERMS AND CONDITIONS

- d. **Exclusions.** The following are excluded from all warranties provided by Seller: (i) those matters excluded in the RWC Warranty documents; (ii) those matters excluded in sub-paragraph (f) below, and (iii) the following matters:

Landscaping, including trees, shrubs, grass and flowers are not covered by any warranty. All grading, fill, landscaping, disposition of trees and control of water flow shall be constructed and maintained at the sole discretion of Seller prior to Closing. Grading and drainage are not covered by any warranty nor will they be maintained or modified by Seller after closing in any way whatsoever UNLESS the grading or drainage is found to be in violation of the applicable provision of the South Carolina Residential Construction Standards. Many areas will be left in their natural state and will not be landscaped in any way. As of the date and time of the Closing, Seller shall have no further responsibility for soil erosion, the growth of grass, death of trees, grass or shrubbery, or soil conditions. Seller is not liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees, which will exist, on the Property after construction. Seller will plant grass seeds or install sod, as the case may be, as part of its construction. Because the growth of grass seeds and the health of sod is dependent on Purchaser's care and maintenance, no warranty is provided and all grass is installed "as-is". Because prevention of erosion is dependent on Purchaser's proper maintenance of the grass and sod, Seller provides no warranty for erosion. Purchaser's closing of the sale constitutes an acceptance of Seller's drainage and erosion controls for the Property, except for matters noted on Purchaser's "Punch list". Seller shall not be responsible for the correction of any leakage or seepage caused by (i) damaged water pipes or mains, (ii) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (iii) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose or improperly maintained gutters or down spouts. Seller will not warrant any cosmetic defect post-closing unless this condition is listed on the "punch list" prior to Closing. Examples of "cosmetic defects" include sheetrock dings, dimples and nail pops, paint discoloration, chips or irregularities in marble, Formica, or tile. Unless a defect is noted on the "punch list", Seller does not warrant the installation or the quality of any carpet or flooring product (however, note that Seller assigns the manufacturer warranties to Purchaser at Closing).

Purchaser Initial (a)

- e. **Existing Trees:** D.R. Horton will make every effort to save as many existing trees as possible during the construction process. Those trees that must be removed will be removed at the sole discretion of the Area Manager and their Field Manager. D.R. Horton reserves the right to remove any trees, which in their judgment may have the roots damaged by construction to the extent that the tree would not be expected to live. Those trees that are in or within close vicinity of the home's footprint or a concrete slabwork area will be removed. Additionally, trees that impede the drainage of the site, or overall community drainage plan will be removed. D.R. Horton does not guarantee the health, survival or growth of any tree after closing. Repairs to living trees and removal or replacement of dead trees at any time after closing is the responsibility of the buyer unless requested before closing, agreed upon, and noted in writing at the "Pre-settlement Orientation Inspection."

Purchaser Initial (a)

- f. **Landscaping:** D.R. Horton does not guarantee the continued health, growth or life of any landscape components after closing. Survival of landscaping components (trees, bushes, plants, sod, seed etc.) after closing is the buyer's responsibility. No landscaping items will be replaced or repaired after closing unless noted in writing and agreed upon at the "Pre-settlement Orientation Inspection". Landscaping requires a continuous maintenance program, which includes proper watering, fertilization, mowing and weed control. Deficiencies, other than those noted prior to closing, will not be warranted by D.R. Horton. Upon closing all maintenance is the responsibility of the buyer. The buyer is responsible for any damage due to neglect or inadequate maintenance. Wetland, wetland buffer and wooded natural areas throughout the Community will be left "as is". Buyer understands that "standing water" beyond 48"-0" of the home may occur in wetland, wetland buffers and wooded natural areas. Maintenance and repair of the aforementioned areas are the sole responsibility of the Buyer after closing. Clearing and disturbance of natural areas in order to provide underground utility services to the home may be necessary. These areas will be left on-landscaped and allowed to return to their natural state. The remaining undisturbed area will be left in its natural state.

Purchaser's Initial (a)

- g. **MANDATORY BINDING ARBITRATION.** Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

- i. If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser shall control.
- ii. If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitration shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and (to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the

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Purchaser: Greg Smith, Stephanie Mitchell Community: Parkwood Phase Lot: 0085

03/16/05
DRH

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arbitration as a part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

Purchaser Initial(s): CSM

- h. In addition to the rights and obligations of each party specified in subparagraphs (a) - (d) above, in the event that a bona fide dispute, as determined by the Seller, should arise between Purchaser and Seller prior to the Closing Date, and such dispute cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days after the beginning of the dispute, then Seller shall have the right, upon written notice to Purchaser, to terminate this Agreement and return the Earnest Money to Purchaser, and no cause of action shall accrue on behalf of Purchaser because of such termination.
- i. **Limitation of Liability.** EXCEPT FOR THE RWC WARRANTY, AND EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE, AND EXCEPT FOR ANY WARRANTIES IMPOSED BY LAW, WHICH CANNOT BE DISCLAIMED, SELLER MAKES NO OTHER WARRANTY OF ANY KIND, ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY SELLER. SELLER MAKES NO WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EITHER EXPRESSED OR IMPLIED. THE EXCLUSIVE REMEDY FOR ANY DEFECT OF ANY ITEM OR CLAIMED DEFECT IN THE HOME IS BY WRITTEN NOTIFICATION PRIOR TO THE EXPIRATION OF THE WARRANTY PERIOD. SELLER'S OBLIGATION SHALL BE THE CORRECTION OF SUCH DEFECT BY REPAIR OR REPLACEMENT, IN ITS DISCRETION. NO SUCH ACTIONS TAKEN BY SELLER TO REPAIR OR REPLACE A DEFECT SHALL EXTEND THE WARRANTY PERIOD. SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.
- j. Requests for warranty service within the first 365 days after closing, must be in writing and faxed, mailed, or delivered to Seller at Seller's address as indicated below Seller's signature on this Agreement. Verbal requests to Seller's staff are not acceptable. Such requests must comply with all applicable law and must state the nature of the problem with particularity. Seller has 30 days to determine whether such request will be fulfilled.

15. **SURVIVAL OF AGREEMENT.** Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled. (Closing Attorney is directed to transfer this paragraph to the closing statement.)

16. **CLOSING.** Seller shall set closing date and notify Purchaser a minimum of (7) seven days prior to that closing date. If Seller chooses to do so, Seller may ask or request that Purchaser set a closing date. Such a request must be completed within (15) fifteen days. If it is not, Seller may, at its option cancel the contract by written notice and return earnest money to Purchaser. In the event that the closing date should change, Seller will notify purchaser within 48 hours of the previously scheduled closing. Seller does not guarantee late locks or extensions, doing so is at the sole discretion of the purchaser. Seller shall deliver to Purchaser at Closing, a Certificate Of Occupancy, or the appropriate equivalent or substitute. If Purchaser does not close on the Closing date set forth by the Seller, Seller may in its discretion collect liquidated damages in the amount of \$500.00 per day from Purchaser at Closing. Purchaser acknowledges that such amount represents Seller's liquidated damages and is not a penalty or fine. In addition, Seller may in its discretion require additional earnest money be paid by Purchaser, the amount to be determined at the discretion of the Seller. Purchaser acknowledges and agrees that Seller is not responsible for interest rate locks and will not guarantee interest rate locks based upon Seller's failure to meet the scheduled closing date.

Purchaser Initial (s) CSM

Seller shall grant possession of the Property to Purchaser at time of Closing. Purchaser agrees to transfer utilities into Purchaser's name within three (3) business days after Closing. Purchaser shall not delay the Closing. Purchaser shall not move its goods or property onto the Property prior to Closing. Real estate taxes on the Property for the calendar year in which the sale is closed shall be prorated as of the date of Closing. Seller shall pay South Carolina statutory filing fee, formerly known as the documentary stamp tax. Purchaser shall be responsible for any municipal or county transfer fees. To the maximum extent allowed by state law, Seller shall have the right to approve the place of Closing.

Final inspection and approval of the subject land and improvements thereon by the lender's agent, the FHA or the VA, whichever is applicable, or final inspection of approval for occupancy by the appropriate governmental inspector, shall constitute complete performance by Seller of its obligations under this paragraph. Buyer understands and agrees that all agreements or representations, whether oral or written, or relating to the date of completion of construction shall not be relied upon by Buyer or shall not be binding upon Seller. Seller does not guarantee completion by any given date.

Purchaser Initial(s): CSM

If this Agreement is for the construction of a new home (i.e., a pre-sale or a home which is to be built), in addition to the above provisions, Seller shall not be obligated to start home construction (the "Construction Start Date") until the following conditions are met: (1) mortgage approval has been obtained to Seller's satisfaction; (2) Purchaser has paid all amounts due; (3) Purchaser selections have been completed; and (4) all contingencies have been removed by Purchaser to Seller's satisfaction. The transaction contemplated in this Agreement shall be consummated (Closing) at the office of the Seller's preferred attorney, at a time designated by Seller, no later than five (5) business days after receipt of Certificate Of Occupancy on that home (the "Closing Date").

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Because of these factors, the "Closing Date" listed above is only an estimate of the actual Closing Date, please refer to Item 16. CLOSING, in the Home Purchase Agreement.

Purchaser Initial(s):

17. **HOUSE PLAN.** The Purchase Price is for the Garrett 1204A, to be built on a (✓) slab, or () basement, or () crawl space. Purchaser acknowledges that each home is handmade and unique, and although this home is based on the plans indicated above, variations in layout will occur. Closing the sale of this home waives any objection to conformance with the plans. Seller shall not be responsible for any variation from the plans unless that variation causes a failure of the structural integrity in the home as constructed. Seller agrees to complete the construction of this home in accordance with the quality standards, materials and finish as are otherwise being used by Seller in construction of new homes in this subdivision. If this Agreement is for a home for which construction has not started, this Agreement: (a) is subject to Seller's ability to place that home on the designated lot; (b) is subject to Seller's ability to build that home on the designated lot without obtaining variances for setback rules; (c) is subject to Seller's ability to build that home on the designated lot without incurring special costs for foundation, slab or structural support walls; and (d) is subject to Seller's discretion as to the orientation and placement of that home on the designated lot; (e) is subject to Seller's ability to close on said lot with the develop. In the event Seller determines that it cannot build the home within those conditions, Seller shall have the right to terminate this Agreement by written notice to Purchaser and in that event Seller shall return Purchaser's Earnest Money. If this Agreement is for a home for which construction has already begun, Purchaser agrees to accept all color selections, appliances, driveway placement, all options, framing dimensions and included features installed in the Home "as is" or ordered by Seller for installation in the home as of the Agreement date.

Purchaser Initial(s):

18. **OPTIONS.** Seller will include options ("Options") at the prices indicated. Purchaser acknowledges that certain Options may require a non-refundable payment for those Options (the "Option Money") simultaneously with this Agreement and/or at the Color Selection Meeting. All non-standard / custom option price requests will require a non-refundable \$150.00 administrative fee to be paid at the time of contract or at the time of color selections. In the event Seller omits the installation of any optional item, Seller's responsibility shall be limited to a refund of the listed price or allowance. Any such omission shall not invalidate this Agreement, constitute a breach of its terms, nor give rise to any claim for damages against Seller. Purchaser agrees that the Option Money shall be delivered to Seller simultaneously with the addition of options at the Color Selection Meeting. The Option Money shall not be held in escrow, shall be non-refundable and, in the event of Purchaser's default under the Agreement, Seller may retain the Option Money, together with the Earnest Money (as specified in the Agreement) as Seller's liquidated damages. The parties acknowledge that it is impossible to estimate more precisely the damages Seller might incur in the event of Purchaser's default, and the Option Money, together with the Earnest Money, are a reasonable estimate of the damages Seller may incur. The Option Money paid to Seller shall be credited against the Purchase Price, at Closing. See Exhibit A for Options.

Purchaser Initial (s)

19. MISCELLANEOUS.

a. **Inquiries.** Purchaser agrees to direct all inquiries and questions to the closing coordinator, who will provide Purchaser with a timely response; however, the closing coordinator does not have the authority to change the terms of this Agreement. Changes may only be made by a written amendment, at or prior to selection meeting which must be executed by an authorized representative of the Seller. Purchaser acknowledges that Seller's sales associates, superintendents, closing staff, warranty staff and other employees do not have authority to modify this Agreement. Only a corporate officer of Seller has authority to modify this Agreement.

Purchaser Initial (s)

b. **Color Selection Meeting.** The color selection meeting is for the purpose of ensuring that a mutual understanding exists between Seller and Purchaser of all relevant details as regards the finishes and completion of the construction of the home. This meeting must be scheduled and held within 14 days of acceptance of this Agreement or the Agreement may be terminated at the option of Seller. Color Selection Meetings are held Monday through Friday at 9:00am, 11:00am, and 2:00pm, and are scheduled on a first come first serve basis. Once the selection meeting is complete, all selections will be final. No additional delegations / changes will be allowed after the selection meeting. If Seller determines, in its sole discretion, that Purchaser failed to diligently and in good faith schedule and attend a selection meeting, Seller may terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other.

c. **Substitutions.** Seller reserves the right to make substitutions of construction materials used in the construction of the home with materials, which are of equal or comparable value. Determination of equal or comparable value will be in Seller's sole opinion. Purchaser acknowledges that any delay as a result of back order or out-of-stock selections must be promptly remedied; Seller may make substitutions as may be necessary; Purchaser acknowledges that, in some instances, installations shall occur subsequent to Closing. Purchaser understands that all furniture, decorator items, special landscaping, and other items displayed in or about Seller's model home (s) are for marketing purposes and do not constitute representations, assurances or warranties as to the Home you are purchasing and are not a part of this Agreement.

d. **Promotions.** Purchaser agrees that Seller may photograph the interior and exterior of the home and the Property, and may use those photographs for advertising and marketing purposes without restriction for up to two (2) years from the

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Purchaser: Greg Smith, Stephanie Marsella Community Parkwood Phase Loc 6065

HOME PURCHASE AGREEMENT BC40-0085

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Closing Date. Seller shall have the right, from time to time, to place marketing and directional signs along a five (5') foot strip of land adjacent to the street on the Property for a period of two (2) years from the Closing Date.

e. Contractors. All work and materials shall be provided or performed by Seller's personnel and vendors. Purchaser shall not have the right to have any work performed on the Property or supplies delivered to the Property prior to Closing.

f. Manufacturers. Purchaser reserves the right to install or complete any aspect of the property as they see fit. Failure to comply with manufacturers specifications will not give rise to any liability on the part of the Seller. Seller only warrants that property that meets state, county, town and city or other applicable laws or codes. Manufacturer specifications are not guaranteed.

20. COVENANTS AND HOMEOWNER'S ASSOCIATION. Purchaser acknowledges that a copy of the Farm Declaration of Covenants, Conditions and Restrictions (the "Covenants") has been made available to Purchaser, and Purchaser agrees that the Covenants may be amended or updated by the Declarant or Seller from time to time. Purchaser acknowledges that the restrictive covenants governing this subdivision require the payment of an initiation fee in the amount of \$ 250 at Closing, as well as annual dues (presently, \$ 400), payable annually, prorated at Closing for the year of the Closing.

21. SURVEY & PROPERTY BOUNDARIES. Purchaser shall be responsible for reviewing the survey and determining the boundaries of the Property. Neither Seller, nor Broker, nor their agents and employees are authorized to make any representation to Purchaser about such matters.

22. COMPLETION. Seller shall complete the construction of the home located on the Property by the Closing Date (at that date may be extended pursuant to the terms of this Agreement). Seller shall deliver to Purchaser, at Closing, a Certificate Of Occupancy, or the appropriate equivalent or substitute.

23. HEATING AND AIR-CONDITIONING. The Property shall be adequately and efficiently heated and air-conditioned with equipment having at least the minimum specifications for the Property as established by Load Calculations, Manual J, of the Air-Conditioning Contractors of America, current edition. The clothes dryer vent shall be installed to the outside.

24. LOT PREMIUM. Purchaser acknowledges that certain of Seller's lots in the subdivision are believed by Seller to have more value than others, or may have higher construction or development costs than others and accordingly a "Lot Premium" or price adjustment has been incorporated into the Purchase Price on these lots. Purchaser acknowledges that Seller's inclusion of a lot premium in the Purchase Price does not make any warranty or promise to Purchaser about any particular feature of the lot.

25. DELAYS. Seller shall have no liability for any delays in construction caused by strikes or acts of God, delays in the delivery of materials, delays caused by Seller's inability to obtain a building permit or architectural approval, delays which are the result of matters which are beyond Seller's control, or delays caused by Purchaser's change orders or selection of materials. In the event of such delays, Seller may extend the dates in this Agreement by the number of days resulting from such delays upon notice to Purchaser.

26. INSULATION. Insulation has been installed (or will be installed prior to Closing) in at least the following minimum standards: (a) exterior walls, excluding exterior garage walls with BATT insulation to a thickness of 2 5/8 inches which will, according to the manufacturer, yield an R-value of 13; (b) ceilings below attic areas are insulated with BLOWN insulation to a thickness of 11 inches which will, according to the manufacturer, yield an R-value of 30; (c) vaulted ceilings are insulated with BATT insulation to a thickness of 6 1/4 inches which will, according to the manufacturer, yield an R-value of 18; and (d) floor overhangs are insulated with BATT insulation to a thickness of 2 3/4 inches which will, according to the manufacturer, yield an R-value of 13.

27. TIME IS OF THE ESSENCE. Time is of the essence as to this Agreement.

28. SUCCESSORS AND ASSIGNS. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto, their heirs, successors, administrators, executors and assigns. Purchaser shall not have the right to assign Purchaser's interest in this Agreement without written consent of Seller.

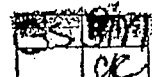
29. ENTIRE AGREEMENT. This document contains the sole and entire agreement between the parties hereto and no modification of this Agreement shall be binding unless attached hereto and signed by all parties to this Agreement. Any prior agreements, written or oral, are superseded by this Agreement. Purchaser acknowledges that they are not relying upon any promises, agreements or representation made by the Seller, Seller's Salespersons, Seller's agents, Seller's subcontractors, Seller's partners, or Seller's employees (Seller's Representatives) concerning the Home or any land adjacent to or near the Home or the Community, except as expressly set forth in this Agreement. All prior discussions have been merged into this Agreement. No representation, promise, or inducement not included in this Agreement shall be binding upon any party hereto. This agreement may be changed only by a written document signed by both Purchaser and a corporate officer of the Seller.

Purchaser Initial (s): [Signature]

30. AGENCY DISCLOSURE. Purchaser acknowledges receiving, reading and understanding the South Carolina Real Estate Commission Agency Disclosure Form and understands that they will be considered a "Customer" in this transaction.

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Purchaser: Greg Smith, Stephanie Marrella Community: Parkwood Phase Lot: 0085



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Date: 3/16/05 3:36 PM

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Purchaser understands that as a "Customer" D. R. Horton or its Representatives and/or Licensees will not act as your agent. Purchaser understands that they have a right to Buyer's Representation. In addition, you cannot ask D. R. Horton or its Representatives to promote your best interest, or to keep bargaining information confidential.

Purchaser Initial(s): [Signature]

31. ADDENDUMS. The following Addendums, Special Stipulations or Exhibits are attached to this Agreement and are made a part of this Agreement.

32. SPECIAL STIPULATIONS: _____

WHEN SIGNED BY YOU AND OUR AUTHORIZED AGENT, THIS AGREEMENT WILL BECOME A LEGALLY BINDING AGREEMENT. PLEASE MAKE SURE THAT ALL PROVISIONS ARE READ AND UNDERSTOOD BEFORE SIGNING. IF YOU DO NOT UNDERSTAND ANY PROVISION, YOU SHOULD SEEK LEGAL ADVICE.

Purchaser Initial(s): [Signature]

HOME PURCHASE AGREEMENT BC40-0085

Date: 3/16/05 3:36 PM

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GENERAL TERMS AND CONDITIONS

Please print parties name and sign below.

Purchaser:

Purchaser's Name:

Purchaser's Signature:

Date:

Time:

Purchaser's Name:

Purchaser's Signature:

Date:

Time:

Seller:

D.R. Horton, Inc.

By:

Date:

Time:

Seller's Address: 503 Wando Park Blvd, Suite 200

Mt. Pleasant, SC 29464

Seller's Phone: (843) 284-5000

Seller's Fax: (843) 284-5010

Seller's FMLS/MLS Code: 1429

Co-Broker:

By:

Co-Broker or Co-Broker's Associated Salesperson

Co-Broker's Phone:

Co-Broker's Fax:

Co-Broker's FMLS/MLS Code:

Purchaser's Current Mailing Address:

90 Perkins Street
Springfield, MA 01118

Purchaser's Email:

Purchaser's Phone:

Purchaser's Work Phone:

Purchaser's Cell Phone:

Purchaser's Fax:

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Purchaser: Greg Smith, Stoplane Marcella Community; Parkwood Phase Lot: 0085

IN THE STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

Gregory W. Smith and Stephanie Smith,)

Plaintiff,)

v.)

D.R. Horton, Inc., Tom's Vinyl Siding, LLC,)
Lutzen Construction, Inc., Boozer Lumber)
Company, All American Roofing, Inc., and)
Myers Landscaping, Inc.,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FOR THE FIRST JUDICIAL CIRCUIT

C.A. NO. 2010-CP-18-641

**DEFENDANT D.R. HORTON, INC.'S
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION FOR
RECONSIDERATION**

CERTIFIED COPY
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CLERK OF COURT
DORCHESTER COUNTY

TO: PLAINTIFFS, GREGORY W. SMITH AND STEPHANIE SMITH, AND THEIR
ATTORNEYS, PHILLIP W. SEGUI, JR., ESQ. AND JOHN T. CHAKERIS, ESQ.

I. INTRODUCTION

This Court denied Defendant D.R. Horton, Inc.'s ("DRH") Motion to Compel Arbitration and to Stay Proceedings, or Alternatively, to Dismiss ("Motion to Compel Arbitration") by Order dated April 7, 2011. Thereafter, DRH timely filed the instant Motion to Alter or Amend the Court's Order ("Motion for Reconsideration"), pursuant to Rule 59(e) SCRCP, on April 22, 2011. DRH hereby respectfully submits this Supplemental Memorandum of Law in support of its Motion for Reconsideration.

II. THE *PRIMA PAINT* DOCTRINE

Plaintiffs argued that the entire "Contract" (Purchase Agreement)—not the arbitration clause in particular—is unconscionable because it contains "oppressive and one-sided provisions." (Plaintiffs' Memorandum in Opposition to DRH's Motion to Compel Arbitration, p. 3.) The Court, without discussing the terms of the arbitration clause, ruled that "the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative

effect of a number of oppressive and one-sided provisions.” (Order Denying DRH’s Motion to Compel Arbitration, p. 4 (emphasis added).) The provisions Plaintiffs claimed are “oppressive and one-sided” are found not in the arbitration clause (§ 14(g)) but in the “Limitation of Liability” clause (§ 14(i)) (disclaiming all warranties, except for the “RWC Warranty” (10-year structural warranty) and the title warranties, and limiting DRH’s liability to its duty to repair or replace any defect or defective item under the RWC Warranty). (Plaintiffs’ Memorandum, p. 3.) Although the arbitration clause and the “Limitation of Liability” clause are both found in Section 14 of the Purchase Agreement (entitled “Warranties and Dispute Resolution”), the two clauses are indisputably separate and distinct.

DRH argued in its Memorandum of Law in Support of Motion for Reconsideration that neither the arbitration agreement nor the entire Purchase Agreement is unconscionable. (Memorandum, pp. 9-14.) DRH now supplements its earlier argument and would show the Court that under the precedents of the United States Supreme Court and the South Carolina Supreme Court, a party may not avoid arbitration through rescission of the entire contract on the basis of illegality or unconscionability when there is no independent challenge to the arbitration clause.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the U.S. Supreme Court addressed the issue of whether, under the Federal Arbitration Act (“FAA”), a claim of fraud in the inducement of the entire contract—as opposed to the arbitration clause itself—is to be resolved by the federal court or referred to an arbitrator. The Court held that “a federal court may consider only issues relating to the making and performance of the agreement to arbitrate” and cannot, therefore, “consider claims of fraud in the inducement of the contract generally.” 388 U.S. at 404. Some courts sought to limit the holding

of *Prima Paint* to challenges based upon fraud in the inducement, but other courts held that the *Prima Paint* doctrine extends to *all* challenges to a contract. South Carolina joined the latter jurisdictions in rejecting attempts to limit the holding of *Prima Paint* in *South Carolina Pub. Serv. Auth. v. Great Western Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993). The South Carolina Supreme Court held, “A party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause The arbitration clause is separable from the contract.” 312 S.C. at 562-63. Soon thereafter, the Supreme Court reaffirmed its holding in *Great Western* in *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994). See also *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (S.C. Ct. App. 2008) (following *Jackson Mills*) and *The Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 588 S.E.2d 617 (S.C. Ct. App. 2003) (following *Jackson Mills* and *Great Western*).

Thus, “precedent forces a distinction to be drawn between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged.” *New Hope Missionary Baptist Church*, 379 S.C. at 631 (contrasting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007) (holding the trial court was the proper forum for determining the enforceability of an arbitration clause challenged on the grounds of unconscionability) and *Cornerstone Hous.*, 356 S.C. 338-42, 588 S.E.2d at 622-24 (holding the legality and enforceability of two contracts was for the arbitrator to decide where the arbitration agreement in the contracts was not directly challenged)).

Here, Plaintiffs argued that the “Contract”—not the arbitration clause—is unconscionable because it contains “oppressive and one-sided provisions” within the one clause entitled “Limitation on Liability” (§ 14(i)), which is separate and distinct from the arbitration clause

(¶ 14(g)). Hence, under the *Prima Paint* doctrine as applied by the South Carolina courts, Plaintiffs cannot avoid arbitration by claiming that the contract is unconscionable, and this Court should not refuse to enforce the arbitration agreement on the basis that the contract is unconscionable. Rather, the issue of whether or not the contract is unconscionable should be determined by an arbitrator.¹

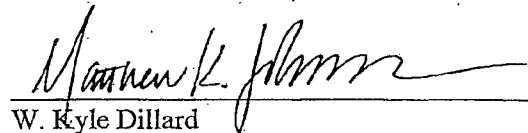
III. CONCLUSION

For the reasons stated herein and in DRH's earlier Memorandum of Law in Support of Motion for Reconsideration, this Court should grant DRH's Motion for Reconsideration, and, accordingly, DRH's Motion to Compel Arbitration.

Dated this 13th day of May, 2011.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



W. Kyle Dillard
Matthew K. Johnson
P.O. Box 2757
Greenville, SC 29602
Telephone: 864.271.1300
Facsimile: 864.235.4754
kyle.dillard@odnss.com
matthew.johnson@odnss.com

Attorneys for Defendant D.R. Horton, Inc.

¹ Plaintiffs also argued that the arbitration clause was extinguished by the doctrine of merger by deed, which constitutes a direct challenge to the arbitration agreement itself. DRH acknowledges that the *Prima Paint* doctrine does not preclude this Court from deciding the issue of whether or not the doctrine of merger operates to extinguish the arbitration clause. DRH stands by its earlier argument that the doctrine of merger by deed does not apply.

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
GREGORY W. SMITH AND STEPHANIE
SMITH,

Plaintiffs,

vs.

D.R. HORTON, INC., AND TOM'S VINYL
SIDING, LLC, LUTZEN CONSTRUCTION
COMPANY, INC., BOOZER LUMBER
COMPANY, ALL AMERICAN ROOFING,
INC., AND MYERS LANDSCAPING, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO: 2010-CP-18-641

PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT D.R.
HORTON, INC.'S MOTION FOR

RECONSIDERATION OF D.R. HORTON'S
MOTION TO COMPEL ARBITRATION

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2011 AUG -1 PM 1:40
Clerk of Court
DORCHESTER COUNTY

TO: DEFENDANT D.R. HORTON, INC. AND ITS ATTORNEYS W. KYLE DILLARD,
ESQUIRE AND MATTHEW K. JOHNSON, ESQUIRE

The following Memorandum is in opposition to Defendant's Motion for
Reconsideration of D.R. Horton's Motion to Compel Arbitration.

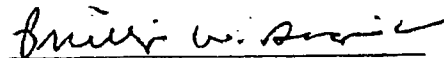
In addressing Rule 59(e) SCRPC the South Carolina Supreme Court held in Lon, L.L.C. v. Town Of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) that "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. E.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993); Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989); see also Rules 52(b) and 59(e), SCRPC." Further, "a party cannot use Rule 59 (e), SCRPC, to present to the trial court an issue the party could have raised prior to judgment but did not." Crary v. Diebelli, 321 S.C. 38, 43, 467 S.E.2d 128, 131-32 (Ct.App. 1995), *rev'd on other grounds*, 329 S.C. 385, 496 S.E.2d 21 (1998).

Defendant D. R. Horton's Memorandum in Support of Motion for Reconsideration fails to point out any issues raised at the original hearing of this matter that were not ruled

upon in the Court's order and is therefore asking for relief under Rule 59(e) SCRCP that is not contemplated under the rule. Further, Defendant Horton is likewise attempting to improperly raise new issues that were not argued or briefed at the original hearing. Accordingly, given that no matters eligible to be addressed under Rule 59(e) SCRCP are properly before the court and that Defendant Horton is merely attempting to re-argue matters already ruled upon, Plaintiffs respectfully request that Defendant Horton's Motion be denied.

Respectfully Submitted,

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August 1, 2011

COURT OF COMMON PLEAS

FIRST JUDICIAL CIRCUIT

GREGORY W. SMITH AND STEPHANIE SMITH) CASE NO. 2010-CP-18-641

PLAINTIFFS

versus

D. R. HORTON, INC., TOM'S VINYL)
SIDING, LLC, LUTZEN CONSTRUCTION,)
INC., ROOZER LUMBER COMPANY, ALL)
AMERICAN ROOFING, INC., MYERS LAND-)
SCAPING, INC., SMITH'S HEATING & AIR)
CONDITIONING CO., INC., AND JESUS)
DEMELO, INDIVIDUALLY,)

) MOTION TO COMPEL
) ARBITRATION
) TRANSCRIPT OF RECORD

DATE:

SEPTEMBER 9, 2010

DEFENDANTS

BEFORE:

HONORABLE EDGAR W. DICKSON, PRESIDING JUDGE

APPEARANCES:

PHILLIP W. SEGUI, JR., ESQUIRE
ATTORNEY FOR THE PLAINTIFFS

MICHAEL SHETTERLY, ESQUIRE
ATTORNEY FOR THE DEFENDANT,
D. R. HORTON, INC.

JAMES A. ATKINS, ESQUIRE
ATTORNEY FOR THE DEFENDANT,
TOM'S VINYL SIDING, LLC

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1 DATE:

2 SEPTEMBER 9, 2010

3 THE COURT: And this is a Motion to Compel
4 Arbitration?

5 MR. SHETTERLY: Yes, sir.

6 MS. FITZHENRY: Yes, sir. And a Motion to Stay, and
7 a Motion for Leave.

8 THE COURT: A motion just to leave Court? Okay.
9 Okay, will it help, does it matter which order I hear

10 these motions?

11 MR. SHETTERLY: Potentially, Your Honor.

12 THE COURT: Okay, well, let's -- tell me which one I
13 need to hear first then, please, sir.

14 MR. SHETTERLY: Unless there's an objection from the
15 other side, I guess the Motion to Compel Arbitration.

16 THE COURT: Okay.

17 MR. SHETTERLY: Other than that, it would be our --
18 we may not care about what happens if the State Court
19 stays it open for other defendants.

20 THE COURT: Alright, sir.

21 ARGUMENT BY MR. SHETTERLY:

22 MR. SHETTERLY: My name is Mike Shetterly, I'm with
23 the firm of Ogletree Deakins. I represent a company, D.
24 R. Horton, Inc. They're a residential home builder doing
25 business here in the State of South Carolina. There are

1 other defendants in the case, Your Honor. Those other
2 defendants that are currently in the case are all direct
3 subcontractors of D. R. Horton who helped them build a
4 particular house.

5 THE COURT: Alright, sir.

6 MR. SHETTERLY: That house was purchased by Gregory
7 and Stephanie Smith, they're the plaintiffs in the case.

8 THE COURT: Alright, sir.

9 MR. SHETTERLY: And they've brought the law suit

10 that's the subject matter that we're talking about today
11 based on several causes of action, but the gravamen of
12 each claim concerns construction defects with the house
13 that they purchased.

14 THE COURT: Alright, sir.

15 MR. SHETTERLY: The formal relationship between the
16 Smiths and D. R. Horton was formed through a Contract of
17 Sale, that's the document that required the construction
18 and the sale of the home to them. That document has an
19 arbitration clause in it. It's Fourteen, G, Your Honor,
20 we Fed-exed a Brief together with Affidavits and
21 attachments on Tuesday. Do you have that?

22 THE COURT: Okay.

23 MR. SHETTERLY: I think we also e-mailed it to Your
24 Honor. I can give you my copy. I understand the last
25 part of it didn't seem to make it either.

1 THE COURT: Okay.

2 MR. SHETTERLY: It could be the courthouse change.
3 It's been long enough since I've been here that I
4 actually went and knocked on the door of the other one.

5 THE COURT: Okay.

6 MR. SHETTERLY: I can hand it up. You guys got it
7 through e-mail, didn't you?

8 THE COURT: Okay. Let's just make sure. Okay.

9 MR. SHETTERLY: Your Honor, it's going to be hard to

10 read Exhibit Number One, but in Exhibit Number One is the
11 actual purchase document, in Fourteen, G, it discusses
12 the arbitration clause. And if the Court will note,
13 there is a notice on the first page that the contract was
14 going to be subject to arbitration. If you look at the
15 actual arbitration clause it basically says that the
16 parties agree to arbitrate all claims between one
17 another, and then it goes on to specifically describe
18 some to make sure that everybody understood that those
19 would be included in the types of claims that would be
20 arbitrated. And those included claims of both
21 construction and warranty. And that is the -- the claims
22 that were brought either relate to warranties that the
23 Smiths believe they're entitled to enforce, or
24 construction issues with the house. I believe they all
25 concern that. Despite the clear language in the

1 agreement and the fact that an agreement exists saying it
2 was supposed to be arbitrated, the Smiths don't want to
3 arbitrate the claim, and they have refused to submit the
4 case to arbitration voluntarily, which is why D. R.
5 Horton is seeking the Court's assistance to mandate
6 arbitration and stay the case as it relates to D. R.
7 Horton.

8 Now, and I don't, no disrespect to the Court, I'm
9 just going to explain for the purposes of putting on the
10 record that there are two arbitration acts, one is the
11 Federal Arbitration Act and one is the State Arbitration
12 Act. D. R. Horton's position is, is that the Federal
13 Arbitration Act applies because either through D. R.
14 Horton's business in and of itself or through the
15 transaction itself, which was the construction and sale
16 of a home, it touched upon interstate commerce. Under
17 the Federal Arbitration Act there aren't too many
18 elements. The reason for that is obviously there's a
19 strong public policy favoring arbitration and an
20 inclination of the Courts to compel arbitration where the
21 arbitration does, or appears to touch on the subject
22 matter of the controversy. First you have to show
23 there's a dispute, which is evidenced by the fact that we
24 have a claim; that there's an arbitration clause touching
25 upon the dispute, which the arbitration clause in

1 Fourteen, G, here, says basically that any claims related
2 to construction or warranty shall be arbitrated; that
3 the, either D. R. Horton's business itself, or the
4 transaction between the parties touches upon interstate
5 commerce, and there, Your Honor, I've attached two
6 Affidavits, one is Exhibit Two, that is the Affidavit of
7 Bryan Gardner, he is the Division President of D. R.
8 Horton here in South Carolina, where he describes D. R.
9 Horton's business as being in half the states in the

10 United States. And it is a large company. And then the
11 other Affidavit, which is Exhibit Three, is an Affidavit
12 by J. Henderson, and his Affidavit touches more upon the
13 actual transaction itself, which was the construction of
14 the home. And he goes through and inventories for the
15 Court which materials or which tradesmen came out of
16 state, across state lines for the purpose of helping to
17 build this home. So, we think those two Affidavits,
18 together with the attachments to those Affidavits,
19 evidence the fact that interstate commerce is impacted.
20 And if all those line up, then really, the only thing
21 that I have to show is a refusal to arbitrate, which I'm
22 not the primary counsel dealing with the plaintiffs
23 directly, that is my partner, Kyle Dillard, but I
24 believe, and I'm not sure it's disputed, that there's
25 generally a dispute over, or the Smiths don't want to

1 arbitrate this claim.

2 THE COURT: They'd rather go to trial.

3 MR. SHETTERLY: Huh?

4 THE COURT: They'd rather go to trial.

5 MR. SHETTERLY: I think they'd rather be in front of
6 a jury. They would get a trial either way. But the only
7 other thing that I can think to touch upon for the Court
8 for its consideration is, I believe the primary reason
9 why, and I may be speaking out of turn, they'll speak

10 more directly to it, but just for the sake of time, I
11 believe the primary claim, or the reason why they don't
12 want to arbitrate is because they brought these claims
13 against subcontractors, and they don't want to have to
14 bifurcate their claim against D. R. Horton and the claim
15 against the subcontractors. I'm not sure that's a
16 relevant inquiry on whether the arbitration clause
17 between D. R. Horton and the Smiths is enforceable, but
18 if it's the subject matter that interests the Court,
19 attached to J. Henderson's Affidavit on Exhibit Three
20 there are the subcontract agreements between D. R. Horton
21 and all the subcontractors who are currently named in the
22 suit. And as to all of those, they all have arbitration
23 clauses, too. Now, their arbitration clauses are a
24 little bit more detailed in this respect: First, it says
25 that any claims between D. R. Horton and the

1 subcontractors, we're required to arbitrate it and
2 they're required to arbitrate it. And it goes on further
3 and it says that any claims where a third party sues D.
4 R. Horton, which is what has happened here, they're
5 required to participate in that arbitration. So, to the
6 extent that, you know, there is a perceived inefficiency
7 in compelling arbitration all the parties that are
8 currently subjects of the suit can be brought into the
9 arbitration through those clauses. So, I mean, if

10 there's an inefficiency being created it's one of their
11 own making for not wanting to have to arbitrate the
12 claims with the subcontractors in front of an arbitrator.
13 It's pretty simple compared to the other motions you've
14 heard, and I believe I'm done for now.

15 THE COURT: Okay. Thank you, sir.

16 Alright, yes, sir, your name, please?

17 ARGUMENT BY MR. SEGUI:

18 MR. SEGUI: Phillip Segui, S-E-G-U-I. I'm co-
19 counsel with Mr. Chakeris.

20 COURT REPORTER: S-E-G...

21 MR. SEGUI: U-I. Phillip, two Ls, ma'am. And Your
22 Honor, if it pleases the Court, I've got some, I've got a
23 Memorandum on our position. These have not, have not
24 been filed, Your Honor, because I just finished it this
25 morning.

1 THE COURT: Okay.

2 MR. SEGUI: I was in mediation all day in a
3 construction case yesterday. So, that's what my brain's
4 still working.

5 THE COURT: Okay, Mr. Segui.

6 MR. SEGUI: We do, Your Honor, oppose arbitration.
7 I have a relatively concise argument. It's grounded in
8 two matters. The first arises out of a case, a
9 relatively recent case of Simpson v. MSA of Myrtle Beach,

10 and in that case the underpinnings, the facts dealt with
11 a transaction of an automobile purchase from a dealership
12 and some allegations of some things that were not done
13 correctly on that. And the claim against the dealership
14 was bought, the dealer tried to move it to arbitration,
15 and the Court looked at the underlying contract, and they
16 really went through an interesting analysis, they went on
17 to say, of course, that you need arbitration when you
18 can, but they looked at a number of factors.

19 THE COURT: Well, wasn't that -- and I don't mean to
20 interrupt you, but wasn't this the case where they
21 substituted a car? Wasn't this a substitution of a car
22 case?

23 MR. SEGUI: Something of that nature, Your Honor,
24 and it doesn't go into much facts in the Opinion, as I've
25 read it.

1 THE COURT: Okay.

2 MR. SEGUI: But it was something -- clearly, it was
3 something they did that was wrong, at least alleged to be
4 wrong and outside the scope of what you normally expect.

5 THE COURT: Right.

6 MR. SEGUI: And I'll try to draw a parallel to the
7 gross violations of the minimum standard of the building
8 code that we allege in this case, but - - -

9 THE COURT: Okay.

10 MR. SEGUI: --- the Court, the reason I cite this
11 case is, the Court really did two, a two pronged
12 analysis. They looked at basically a contract of
13 adhesion between a large commercial entity and a normal
14 person, to put it in basic terms, and they looked for,
15 they have a heading in the case, an absence of a
16 meaningful choice. And they also looked for any
17 oppressive or one sided terms. And in that there were a
18 number of unconscionable terms, for lack of a better
19 word, and they go into that, and the argument was made,
20 okay, well, we have these unconscionable terms in here
21 but let's just sever out those that the Court deems are
22 bad, - - -

23 THE COURT: Right.

24 MR. SEGUI: --- the arbitration clause should still
25 be enforceable by itself. And the Court said, no, that's

1 not the way we look at it, and they threw out the
2 arbitration clause as part of the package of a one sided,
3 oppressive, unconscionable type terms. In the case we
4 have here, Your Honor, we've alleged a number of things,
5 that all construction defects are gross violations of
6 some of the minimum standards, and the Smiths have a
7 whole list of problems. As referenced by defense
8 counsel, we've got innumerable pages, maybe we can number
9 them, but a very fine printed contract, and we likewise
10 allege that the terms of that contract are oppressive and
11 one sided.

12 And there's another case, Your Honor, you may be
13 familiar with it, and you may not be, is Kirkland versus
14 Perricks, which was a Two thousand six case, and that
15 case had to do with a bank that, I guess, repossessed a
16 piece of property or foreclosed upon it that was in
17 construction, and when they subsequently sold it to the
18 downstream purchaser they put in a bunch of terms in the
19 contract that said, you're waiving your implied
20 warranties, in that case I think it was habitability,
21 which is an important part of our case, Your Honor. The
22 homeowners, as you might imagine, found a bunch of
23 problems with the case, I mean, with the house, similar
24 kind of construction defects, and brought a claim, and
25 the Court looked at the disclaimer, or the attempted

1 disclaimer of the implied warranty of habitability and
2 said, there's three things that you have to meet, and you
3 have to meet all three of them, and this is on Page Three
4 of my Brief, Your Honor, that if you're going to disclaim
5 something as important as that it's got to be
6 conspicuous, it's got to be specifically known to the
7 buyer, and it has to be specifically argued for. And
8 some of the, the similars I go to, to use an analogy,
9 they've got to give me a new Cadillac or, in exchange for

10 you waiving this thing. We have some of those same
11 attempts by D. R. Horton in this contract of adhesion
12 buried in there, and I picked up the one that was the
13 most important to me, which is, and I've typed it, and
14 it's in the middle of Page Three, they get them to waive
15 basically everything under the sun, but then on top of
16 that they say, you're going to have this little expressed
17 structural warranty, but everything else is waived. And
18 then they go on to say that the Seller shall not be
19 liable for monetary damages of any kind, including
20 secondary consequential, punitive, general, special or
21 indirect damages. And I saw that, I tried to think, well,
22 what kind of damages could be left? And I couldn't
23 really think of any, but there might be some, Your Honor.

24 THE COURT: So, what you're saying is that if these
25 go to arbitration and the person who's doing the

1 arbitration is bound under the contract to not find any
2 of these damages, that's the reason it would be
3 unconscionable?

4 MR. SEGUI: Yes, sir. And I'm using that MSA case
5 under the same analysis that when it's put in as a total
6 package of taking away the person's rights you need to
7 throw it all out. And that's probably the main part of
8 our argument.

9 We also have the doctrine of merger that's cited in
10 my Brief, which basically says that when you have a deed
11 subsequent to a contract, if it doesn't survive into the
12 deed it's gone. And I'd just like to get that on the
13 record because I think that applies.

14 And thirdly, we find direct to a jury trial is dear
15 to our hearts, and certainly it's really dear to our
16 clients' hearts, and we certainly, if somehow we were to
17 not have them against the general contractor and
18 developer, we certainly want to hold onto those against
19 the subcontractors, the people that actually made the
20 mistakes that led to the problems in this case, Your
21 Honor. So, I think in looking at the broad sweep of
22 things, to have -- the venues and justice kind of defeats
23 the purpose.

24 THE COURT: Alright, sir. Tell me where in the
25 Contract is that paragraph that says, limitation of

1 liability, on Page Nine. Since I've got, is there -- I
2 can read the paragraph numbers but I can't ...

3 MR. SEGUI: Bottom left hand corner, Your Honor,
4 it's fine print, even finer than the language in it. It
5 -- I'll give you my copy, Your Honor, I have it turned to
6 it.

7 MR. SHETTERLY: And Your Honor, if I may, while
8 he's looking at it, -- --

9 THE COURT: Yes, sir.

10 MR. SHETTERLY: --- the, I mean, I just want to
11 clarify for the record that it looks like fine print
12 because it's a legal sized document, and it's been
13 severely reduced.

14 THE COURT: Oh, it's smaller. No, I understand. Is
15 it Paragraph Number Eleven?

16 MR. SEGUI: If you don't mind, I'll put my finger
17 ...

18 THE COURT: Oh, you point, come over here and point
19 to it. Just watch your step right there.

20 MR. SHETTERLY: May I approach with him?

21 THE COURT: Oh, sure, yeah, sure.

22 MR. SHETTERLY: Because I gave you my only copy.

23 THE COURT: Yeah. Okay. Okay, they're just going
24 to point, and they're watching out.

25 MR. SEGUI: I think, Your Honor, the last sentence

1 there, just pick up that line.

2 THE COURT: You look and I'll see if I've got -- I
3 just want to look at my contract law here.

4 MR. SHETTERLY: Do you want me to read it into the
5 record? Can you read that?

6 MR. SEGUI: Well, I wasn't going to read the whole
7 paragraph. That was the last sentence that starts ...

8 THE COURT: Hold on one second. Okay, now I see
9 it. Okay, make sure she can hear you if you're going to

10 read it into the record. Okay?

11 MR. SEGUI: Okay. Well, I read it earlier, but I'll
12 read it again, and I'll say it slowly. Okay?

13 MR. SHETTERLY: I would want the whole thing read
14 in, just to put it in context.

15 THE COURT: I know where it is, you don't have to
16 read it into the record. But that is the paragraph we're
17 talking about?

18 MR. SEGUI: Yes, Your Honor.

19 THE COURT: But I think it's actually J,K.

20 MR. SEGUI: If I said, I, it looks like it should be
21 L.

22 THE COURT: I think - We know where it is, though.

23 MR. SHETTERLY: Yeah.

24 MR. SEGUI: Yes, sir, I think so. On the bottom of
25 the page, and that last sentence says, "Seller shall not

1 be liable for monetary damages of any kind, including
2 secondary, consequential, punitive, general, special or
3 indirect damages."

4 THE COURT: Okay. And I know you want me to read the
5 whole paragraph.

6 MR. SHETTERLY: Yes, sir.

7 MR. SEGUI: Well, and Your Honor, just - - -

8 MR. SHETTERLY: I don't need you to read it into the
9 record.

10 THE COURT: No, I've got it, I know where we're
11 talking about.

12 MR. SEGUI: Your Honor, and there's a whole host of
13 -- and it's implied warranty habitability based on this
14 current, it's sort of similar to the homeowners' remedies
15 in this State, and that would grow out of the Columbia
16 Lumber case, Kennedy versus Columbia Lumber, which really
17 set a lot of these implied warranties into motion, and
18 based on the -- the Court has reiterated that the home
19 buyers are not going to be left without a remedy, except
20 in just extreme special circumstances, and for them, D.
21 R. Horton since Kennedy versus Columbia Lumber, which is
22 an old case, to come in and try to undermine that, and
23 then do the arbitration together, I think in the light,
24 looking at the Simpson case, the arbitration clause
25 should not stand in this case, Your Honor. Thank you.

1 THE COURT: Okay. One other thing. What I'm
2 looking at, at the first of this it says, except for any
3 warranties imposed by law." Weren't you asking for
4 habitability and things like that?

5 MR. SEGUI: Yes, sir.

6 THE COURT: Okay. I would think that those would be
7 imposed by law, wouldn't they?

8 MR. SEGUI: I sure hope so, Your Honor.

9 THE COURT: Yeah, me, too. Okay.

10 MR. SEGUI: But I think just the fact that they're
11 trying to disclaim it at all and limit remedies and do
12 all of that, I know they put that in there as a sort of a
13 catch all maybe to keep them out of a bad spot, but I
14 think the mere -- under that Simpson case, the mere
15 effort to try to undermine things is unconscionable.

16 THE COURT: Okay. Well, let me ask you a question.
17 If that, if that didn't apply, if the damages limitation
18 didn't apply, would you still be opposed to arbitration?

19 MR. SEGUI: I'd have a weaker argument, but yes, I
20 just don't want to be in arbitration.

21 THE COURT: Okay. You want a trial. Okay. I
22 understand, I just wanted to make sure.

23 MR. SEGUI: Yes, and just back on the merger by deed
24 claim going forward, Your Honor. Thank you.

25 THE COURT: Okay. Thank you, sir. Anything in

1 reply?

2 ARGUMENT IN REPLY BY MR. SHETTERLY:

3 MR. SHETTERLY: Well, you're just -- I'll just touch
4 on it very briefly, I don't want to take up anymore of
5 the Court's time. I mean, first, on merger by deed, I
6 think if the Court goes back and looks at merger by deed,
7 because I've tried to argue it in the past at other
8 times, and the things that are merged into a deed, either
9 impliedly or expressly, are things the deed touches upon.

10 So, if they were bringing a claim for something dealing
11 with quiet title, those types of things, those are the
12 kind of things that, they've got to be in the deed or
13 they're expunged. But something like an implied warranty
14 of habitability or workman-like manner, those things
15 always survive the deed, because obviously, the deed
16 doesn't touch those either. So, I think it's sort of a
17 double edged sword that they're arguing there. I've
18 never heard any Court take the position that merger by
19 deed kills an arbitration clause in a sales contract
20 unless it's again reinforced in the arbitration -- in the
21 deed.

22 As to unconscionability, Your honor, I think I'll --
23 the reason why I wanted the Court to read into the record
24 the entire paragraph is, actually this is in conjunction
25 with a lot of additional warranties that D. R. Horton

1 does provide during the first year that not every
2 residential builder is provided or required to provide,
3 including the RWC warranty and that type of thing. So,
4 what this is, I think if you read it as a whole it
5 disclaims damages for those types of things that they're
6 warranting and saying that they'll come in and fix during
7 that first year. I don't think that that paragraph is
8 interpreted the way that they're claiming it to be
9 interpreted. Even if that one specific provision has as

10 much teeth as they're giving it, and perhaps I hope it
11 does under a legal definition, but I don't think they've
12 come in with a complete argument for unconscionability.
13 If you go back and look at the actual cases that they've
14 cited, and forgive me, Your Honor, I just got it, so I
15 haven't read them in detail, but the language in the
16 three suggest that there has to be a showing of a lack of
17 meaningful choice. There's no Affidavit that's been
18 presented saying that the Smiths weren't allowed to
19 change any provision of the contract or strike through
20 something or haggle their own deal if they wanted to.
21 And I would say that the lack of meaningful choice,
22 there's plenty of home builders out there, particularly
23 back in the Two thousand five time period that they were
24 buying this house, that was at the height of it, I think
25 everybody, even my dentist was a home builder back then,

1 there was plenty of choice for the Smiths at the time.

2 If they didn't like this deal they could have gone
3 elsewhere. I don't see anything in the agreement that is
4 oppressive and one sided, and I think if the Court reads
5 it as a whole it's actually a pretty fair deal. There
6 are provisions in the contract that say, hey, if you
7 don't like this within ten days let us know, those types
8 of things that would have let them out of the agreement.
9 And if you actually look at the arbitration clause

10 itself, it discusses how the arbitrator, if he or she is
11 so inclined upon making the final decisions, is actually
12 allowed to allocate the cost of the arbitration to
13 whomever the arbitrator deems fit based on the ruling or
14 the finding of the arbitrator. And also, it says it's
15 supposed to be geared towards an expedited trial so the
16 Smiths won't have to spend a year, if they want to
17 structure it that way, they won't have to spend a year
18 waiting on their trial, they can get it sooner. So, I
19 think if you look at it as a whole, this is not an
20 unconscionability type case and I don't think that
21 they've come with all, meeting all the elements of
22 unconscionability, even if the Court adopts their
23 interpretation of the one clause.

24 THE COURT: Alright, sir.

25 MR. SHETTERLY: Your Honor, -- is this yours?

1 MR. SEGUI: I think so.

2 THE COURT: Alright. You also have a Motion to Stay
3 Proceedings?

4 MR. SHETTERLY: Well, Your Honor, I think -- I was a
5 little bit confused by the dual Motions because I think
6 if the Court stays the case to compel arbitration there's
7 no need to stay the case under the - - -

8 THE COURT: Okay. So, you want me to decide the
9 arbitration and then you'll hold the rest of these up in
10 the air, or what do you want to do?

11 MR. SEGUI: Well, Your Honor, we've consented to the
12 -- first we consented to a thirty day stay after we gave
13 them the expert's report and then they said, well, you've
14 got to do ninety days, and I just sent something in the
15 other day saying we can do the ninety day starting now.

16 THE COURT: Okay, so, this is the only Motion today?

17 MR. SEGUI: Yes. But I'm consenting to the ninety
18 day, I just want it to start.

19 THE COURT: Okay.

20 MR. ATKINS: Your Honor, Jim Atkins for one of the
21 co-defendants, - - -

22 THE COURT: Yes, sir.

23 MR. ATKINS: Tom's Vinyl. We've got a Motion to add
24 a third party - - -

25 THE COURT: Okay.

1 MR. ATKINS: --- that was filed, and I think that
2 just needs to just wait until you make a decision on
3 this.

4 THE COURT: On the arbitration?

5 MR. ATKINS: We had a subcontractor that we
6 subcontracted the labor for our work, - - -

7 THE COURT: Okay.

8 MR. ATKINS: --- and we want to bring them in as a
9 party.

10 THE COURT: Okay. So, you need to wait until I
11 decide this and we won't hear that until that time?

12 MR. ATKINS: Yes, sir, I think whatever way you rule
13 that may take care of that as well.

14 THE COURT: Alright, well, if y'all -- I'll go back
15 and I will read these over and think about it and get to
16 y'all with my decision.

17 MR. SHEETTERLY: Okay.

18 MR. SEGUI: Thank you, Your Honor.

19 THE COURT: Thank y'all.

20 END OF TRANSCRIPT.

CERTIFICATE

I, the undersigned, Mrs. Harry A. Walker, of Rowesville, South Carolina, Official Court Reporter for the First Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned cause, relative to appeal, in the Court of Common Pleas for Dorchester County, South Carolina, on the Ninth day of September, Two thousand ten.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

DATE: March 9, 2012

Harry A. Walker

(MRS.) HARRY A. WALKER

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF DORCHESTER FIRST JUDICIAL CIRCUIT

CASE NO. 2010-CP-18-641
GREGORY W. SMITH AND STEPHANIE SMITH)
) MOTION FOR
) RECONSIDERATION
PLAINTIFFS)
) TRANSCRIPT OF
) RECORD
versus)
) DATE:
D. R. HORTON, INC., TOM'S VINYL)
SIDING, LLC, LUTZEN CONSTRUCTION,) AUGUST 1, 2011
INC., BOOZER LUMBER COMPANY, ALL)
AMERICAN ROOFING, INC., MYERS LAND-)
SCAPING, INC., SMITH'S HEATING & AIR)
CONDITIONING CO., INC., AND JESUS)
DEMELO, INDIVIDUALLY,)
) DEFENDANTS)

BEFORE:

HONORABLE EDGAR W. DICKSON, PRESIDING JUDGE

APPEARANCES:

PHILLIP W. SEGUI, JR., ESQUIRE
ATTORNEY FOR THE PLAINTIFFS

COLLIE W. LEHN, JR., ESQUIRE
ATTORNEY FOR THE DEFENDANT,
D. R. HORTON, INC.

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

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1 DATE:

2 AUGUST 1, 2011

3 THE COURT: Alright, Ms. Harry Dot, this is Case
4 Number 2010-CP-18-644, Gregory Smith and Stephanie Smith,
5 Plaintiffs, versus D. R. Horton, Inc., and others as
6 Defendants. And this is a reconsideration of my earlier
7 Order denying Defendants' Motion to Compel Arbitration or
8 Stay Proceedings, or alternately to dismiss. And they
9 want me to reconsider it. Obviously, there was some

10 misapprehension the last time when I ruled, so, yes, sir.

11 MR. LEHN: Thank you, Your Honor.

12 THE COURT: Yes, sir.

13 MR. LEHN: I'm Trip Lehn, OF Ogletree-Deakins, on
14 behalf of D. R. Horton, Inc.

15 THE COURT: Yes, sir.

16 MR. LEHN: And Your Honor, I would just explain that
17 you heard this motion on September the Ninth of last
18 year. And we received Plaintiffs' Memorandum in
19 Opposition either that day or the day before, but without
20 enough notice to brief and argue the issues that they
21 raised.

22 THE COURT: Okay.

23 MR. LEHN: And so, with all due respect, Your Honor,

24 - - -

25 THE COURT: Sure.

1 MR. LEHN: --- we could easily have been arguing
2 this same motion about ten months ago. We, I'd like to
3 hand up and mark a couple of exhibits to begin with.

4 MR. SUGUI: You know, just because I don't want to
5 do anything but follow the rules that may require
6 contemporaneous objection, and I outlined this in my
7 Brief, I think Rule Fifty-nine, E, is only to address
8 some part of the case that you failed to rule on, which I

9 don't think is the case, and certainly, I think the case
10 I've cited says they can't reargue what was here before.
11 I think they're limited to only the things that were on
12 the record and only the things that you failed to rule
13 on. And I just wanted to get that on the record just to
14 clear the record, Your Honor.

15 THE COURT: Okay. The record is protected.

16 MR. LEHN: Do I need to respond to that, Your
17 Honor?

18 THE COURT: No, just go ahead and give me the stuff.
19 I understand what he's asking. That's preserved. I can
20 understand why we're here today.

21 MR. LEHN: Alright.

22 THE COURT: You've got copies for him as well?

23 MR. LEHN: These are six exhibits, Your Honor, I'd
24 like to premark and give copies for your clerk as well.

25 THE COURT: Okay.

1 (Defendants' Exhibits One through Six
2 premarked.)

3 THE COURT: Is it working, Ms. Harry Dot?

4 COURT REPORTER: This one is. I'm just doing the
5 best I can until they find out what the problem is. I'm
6 not sure if it's mine or theirs.

7 THE COURT: Okay. We'll blame it on them.

8 COURT REPORTER: Thank you, Judge, I appreciate
9 that.

10 THE COURT: We've got a lot of that.

11 Mr. Lehn, are you ready to go forward?

12 MR. LEHN: Yes, sir. May it please the Court?

13 THE COURT: Yes, sir.

14 ARGUMENT BY MR. LEHN:

15 MR. LEHN: Alright, Your Honor, the Motion to
16 reconsider your ruling on our Motion to Compel
17 Arbitration, according to your Order which is attached as
18 Exhibit One, the Court denied D. R. Horton's Motion to
19 Compel Arbitration on three grounds: that the arbitration
20 provisions failed to meet the South Carolina Uniform
21 Arbitration Act and presumably meaning the notice
22 requirement of the UAA; the relevant arbitration
23 provisions are wholly unconscionable and unenforceable
24 based on the cumulative effect of the number of
25 oppressive and one sided provisions; and thirdly, the

1 deed does not contain an arbitration provision, hence,
2 the arbitration clause in the purchase agreement was
3 extinguished by the Doctrine of Merger by Deed.

4 I'd like to take the issue of the notice requirement
5 of UAA first.

6 THE COURT: Okay.

7 MR. LEHN: Plaintiffs argued that the Arbitration
8 Agreement is unenforceable because it was not conspicuous
9 under the UAA, and the Court evidently agreed with that
10 argument. However, neither Plaintiffs nor the Court
11 specified how the arbitration notice on the first page of
12 the Contract or the arbitration clause itself within the
13 contract lacked conspicuousness or was deficient under
14 the UAA. The word, conspicuous does not appear in the
15 UAA, but the UAA does contain a notice requirement, and
16 that's at Section Fifteen, Forty-eight, Ten, A. And that
17 section provides, "Notice that a contract is subject to
18 arbitration pursuant to this chapter shall be typed in
19 underlined capital letters or rubber stamped prominently
20 on the first page of the contract, and unless such notice
21 is displayed there on the contract, shall not be subject
22 to arbitration." The UAA does not contain any other
23 requirement regarding the conspicuousness of an
24 arbitration clause. Here the purchase agreement, which
25 is attached, it's Exhibit One to our Memorandum which I

1 believe is Exhibit Three, -- there should be a copy of
2 the purchase agreement and it's Exhibit Three. And
3 Exhibit Two as well. There's actually two copies. The
4 first page of Exhibit Two. And just to point Your
5 Honor's attention to the top of the first page of the
6 purchase agreement, you will see there that in typed,
7 underlined, capital letters at the top of the first page,
8 it says, "This contract is subject to mandatory binding
9 arbitration."

10 THE COURT: And I don't mean to interrupt you, Mr.
11 Lehn, but the way this contract gets into Interstate
12 Commerce is because some materials -- this is a house
13 that was built in Summerville, right?

14 MR. LEHN: Yes, sir.

15 THE COURT: Okay. And Horton, D. R. Horton came to
16 Summerville and decided to start building houses here?

17 MR. LEHN: Yes, sir.

18 THE COURT: And selling them to people here in
19 Summerville, is that correct?

20 MR. LEHN: I believe so, yes, sir.

21 THE COURT: Okay. And the way this gets under
22 Interstate Commerce is because you think, the argument is
23 that some of the materials or maybe all of the materials
24 came to the builder supply place from some place else?

25 MR. LEHN: Yes, sir. According to the Commerce In

1 Fact test that the United States Supreme Court applied,
2 interstate -- materials that are procured from out of
3 state mean that the Commerce In Fact test has been
4 satisfied.

5 THE COURT: Well, tell me, how was the arbitration
6 provision, how was that bargained for? What credit do
7 the builder and the buyer get for agreeing to that?

8 MR. LEHN: Well, all of the terms of the contract
9 were in exchange for the price paid for the house. I

10 mean, presumably if some of these terms were not included
11 that D. R. Horton includes in the contract then the price
12 would not have been the same.

13 THE COURT: Would it have been higher or lower?

14 MR. LEHN: Well, in the case that they're -- this is
15 an example, I don't have any, we don't have any facts in
16 the record about this - - -

17 THE COURT: Okay.

18 MR. LEHN: --- but if D. R. Horton were facing civil
19 litigation in the State Court with every house that it
20 builds then it's cost of construction may be higher and
21 the price may have been higher. I'm not saying that
22 there's evidence in the record that the arbitration
23 provision its was specifically negotiated, neither is
24 there any record that the provision itself was non-
25 negotiable.

1 THE COURT: Okay. Alright, sir. Go ahead, I didn't
2 mean to interrupt you. And if you'd rather me ask
3 questions at the end I'll be glad to do that.

4 MR. LEHN: Oh, no, that's quite alright, as you see
5 fit.

6 THE COURT: Okay. Thank you, sir..

7 MR. LEHN: There's two cases that I would refer the
8 Court to that I have in my notes and I have in my

9 Memorandum which held that if that arbitration notice is
10 sufficient under the UAA, but the transaction involved
11 Interstate Commerce, then the FAA would pre-empt the UAA,
12 and those cases both followed the U. S. Supreme Court
13 case, Doctors Associates v. Cassarado in Nineteen ninety-
14 six. And that is all cited in my Memorandum.

15 THE COURT: Yes, sir. I've got it.

16 MR. LEHN: And also, just to save time, if the Court
17 is interested in the argument about Interstate Commerce
18 and this transaction falling within the scope of the FAA,
19 that argument is all laid out in the Memorandum in
20 support of the motion. And then there are Affidavits of
21 Bryan Gardner and Dave Henderson of D. R. Horton which
22 established that these materials were procured from out
23 of state. Those are attached here as Exhibits Four and
24 Five.

25 THE COURT: Yes, sir.

1 MR. LEHN: Alright, so moving on from the notice
2 argument to the argument of unconscionability, this Court
3 is, according to the precedents of our Supreme Court and
4 the United States Supreme Court, not the proper forum to
5 decide the issue of whether the entire contract is
6 unconscionable, when Plaintiffs have not directly
7 challenged the arbitration clause itself as being
8 unconscionable. Now, when you read the Memorandum in

9 opposition to our Motion to Compel that the Plaintiffs
10 filed immediately prior to the hearing last September,
11 the argument is focused on the unconscionability of
12 certain waivers of remedies in a clause called the
13 Limitation of Liability Clause in the contract at
14 Paragraph Fourteen, I. The Arbitration Clause is at
15 Paragraph Fourteen, G, and it has nothing to do with the
16 waiver of any remedies.

17 THE COURT: So, if you go to arbitration those
18 remedies were not waived?

19 MR. LEHN: Well, that would be for the arbitrator to
20 decide, I mean, whether or not that provision of the
21 contract was enforceable. They could certainly argue to
22 the arbitrator that that clause was illegal or
23 unconscionable, but it's -- so, the references, the
24 citations for the doctrine would be from Prima Paint
25 Corp. versus Flood & Conklin Manufacturing Company,

1 that's a U. S. Supreme Court Decision of Nineteen sixty-
2 seven. The Court said that the party claiming there was
3 fraud in the inducement for the entire contract could not
4 have the Trial Court decide that issue when they were not
5 challenging the arbitration clause itself, they were
6 challenging the entire contract. So, subsequently courts
7 around the country, some sought to limit the holding of
8 Prima Paint to challenges based on fraud in the

9 ~~inducement but other courts held that Prima Paint~~
10 Doctrine should extend to all challenges to a contract,
11 and South Carolina joined the latter jurisdictions in the
12 case of Great Western Coal in Nineteen Ninety-three,
13 which held that a party could not avoid arbitration
14 through rescission of the entire contract when there is not
15 independent challenge to the arbitration clause. And
16 subsequent South Carolina decisions have followed Great
17 Western Coal in holding that arbitration cannot be
18 avoided when a party opposed to arbitration alleges only
19 a problem with the contract as a whole and not with the
20 arbitration agreement itself. There are a couple of
21 additional cases that I've cited for the Court in the
22 Memorandum. The Plaintiffs argue that the, there's a
23 limitation on liability clause at Paragraph Fourteen, I,
24 which is separate and distinct from the arbitration
25 clause, was unconscionable, and the Plaintiffs drew an

1 analogy to some waiver of remedies in the Simpson case,
2 and that was the primary case that they relied on in
3 their argument, and I'll get to that in just a minute,
4 but the Limitation on Liability Clause disclaims all
5 warranties except for an express warranty which is a ten
6 year structural warranty on a house and the title
7 warranty, and it limits D. R. Horton's liability to its
8 duty to repair or replace any defect or defective item
9 under the express warranty. This clause does not mention
10 arbitration and the arbitration clause doesn't mention
11 any waiver of remedy or statutory rights. It's well
12 established in South Carolina law that arbitration
13 clauses are separable from the contracts in which they
14 are imbedded. And that's from Jackson Mills, a South
15 Carolina Supreme Court case from, I believe, Nineteen
16 Ninety-four, which is also cited in the Memo. And that
17 decision relies on Prima Paint, the U. S. Supreme Court
18 decision. Therefore, under Prima Paint, as repeatedly
19 and consistently applied by the South Carolina Courts,
20 Plaintiffs cannot avoid arbitration by claiming the
21 Limitation of Liability Clause is unconscionable when
22 they have not directly challenged the arbitration clause
23 itself.

24 The next argument is, should the Court reject this
25 foregoing argument and go on to decide the issue of

1 unconscionability? The Court should find that neither
2 the contract as a whole nor the Limitation of Liability
3 Clause nor the arbitration clause is unconscionable. I
4 won't go through all the Doctrine of Unconscionability, I
5 know the Court is very familiar with that, the absence of
6 meaningful choice, the one sided contract provisions, the
7 other terms, so oppressive that no reasonable person
8 would make, that a fair and honest person would accept
9 them. There are a couple of recent Supreme Court
10 decisions on this doctrine regarding arbitration
11 agreements, the Herring versus Sentry BMW case of Two
12 thousand and Ten, and then Simpson versus MSA, Myrtle
13 Beach, which is a Supreme Court decision from Two
14 thousand and Seven. In their Memorandum in opposition to
15 our Motion to Compel Arbitration the Plaintiffs made no
16 argument that they had no meaningful choice in
17 negotiating and accepting the terms of the arbitration
18 clause or any portion of the purchase agreement, nor is
19 there any competent evidence before the Court that they
20 had no meaningful choice. The Plaintiffs did not allege
21 that they were unaware of or surprised by the arbitration
22 clause, or that they lacked the bargaining power or the
23 opportunity to negotiate the terms of the purchase
24 agreement, including the arbitration provisions. To the
25 extent that the Plaintiffs relied upon the Simpson case

1 to persuade the Court that they had an absence of
2 meaningful choice, their reliance is misplaced. The
3 Simpson court found that the car buyer lacked a
4 meaningful choice in agreeing to arbitrate for a number
5 of reasons which are very dissimilar to the case here.
6 The arbitration clause was written in small standard
7 print imbedded in a contract, there was no notice on the
8 first page like there is here, the automobile trading

9 contract was an adhesion contract which is defined in
10 South Carolina as a standard form contract offered on a
11 take it or leave it bases with terms that are not
12 negotiable. Automobile sales contracts the Supreme Court
13 said are to be viewed by South Carolina Courts with
14 considerable skepticism, and the Simpson decision.
15 referenced Ohio's decision which laid out that rule of
16 skepticism specifically with automobile contracts.
17 Simpson claimed that she did not possess the business
18 judgement necessary to make her aware of the implications
19 of the arbitration agreement, she didn't have a lawyer
20 present to assist her in understanding the contract, she
21 alleged that the contract was hastily presented for her
22 signature. So, all these reasons were cited by the Court
23 for an absence of meaningful choice which don't pertain
24 here. Here, by contrast, the Smiths negotiated and
25 signed a purchase agreement which gave clear notice in

underlined, capital letters at the top of the first page of the contract that it was subject to mandatory binding arbitration. The Smiths each placed their initials directly beneath the arbitration clause to indicate their acknowledgment and agreement. There is no evidence that they were not afforded ample time to review the contract or that they could not understand the arbitration clause, nor is there any evidence that they were at a bargaining disadvantage or that the contract was offered on a take it or leave it basis, or that the arbitration clause was non-negotiable. In sum, there is no evidence to suggest that they lacked meaningful choice. But even if there were, the arbitration clause is not one sided or oppressive in the least. Unlike the one sided arbitration clause in Simpson which required the car buyer to arbitrate all claims, but exempted from arbitration certain claims brought by the dealer against the customer and which expressly prohibited the arbitrator from awarding punitive, exemplary, double or treble damages which were required by statute, the arbitration clause here is even handed, it's not one sided, it doesn't give an advantage whether procedural or substantive to either party. Because the fairness of the arbitration clause is unassailable the Plaintiffs instead attack the separate limitation of liability clause in an

1 effort to persuade the Court to invalidate the entire
2 contract as being unconscionable. The Court, without
3 discussing the terms of the arbitration clause, concluded
4 that the relevant arbitration provisions are wholly
5 unconscionable and unenforceable based on the cumulative
6 effect of a number of oppressive and one sided
7 provisions. As I've stated, those provisions were not in
8 the arbitration clause but in the Limitation of Liability
9 ~~Clause. And in contending that the Limitation of~~
10 Liability Clause is unconscionable, the Plaintiffs relied
11 on the case of Kirkland v. Paris, that's a Supreme Court
12 case of Two thousand and Six, which held that a
13 disclaimer of the implied warranty of habitability to be
14 valid must be conspicuous, has to be known to the buyer
15 and specifically bargained. Plaintiffs argued that
16 Paragraph Fourteen, I, is not a valid disclaimer of the
17 implied warrant of habitability under Kirkland, but that
18 argument is really beside the point. An invalid
19 disclaimer of the implied warranty of habitability would
20 not render the entire clause unconscionable. And the
21 Plaintiffs drew a bogus analogy between this allegedly
22 invalid disclaimer of the implied warranty of
23 habitability and the Simpson arbitration clause which the
24 Supreme Court declared invalid because it violated
25 statutory law and public policy by prohibiting the

1 arbitrator from awarding punitive, exemplary, double or
2 triple damages. In that case the Simpson's Complaint had
3 alleged violations of the South Carolina Unfair Trade
4 Practices Act and the Dealers Act, and those Acts require
5 a Court to award triple or double damages for violations
6 of statutes. And that the Court said you cannot waive,
7 that would be unconscionable. The unconscionable waiver
8 of statutory rights in Simpson bears no analogy

9 ~~whatsoever to the disclaimers of warranties here. Unlike~~
10 the arbitration clause in Simpson, the arbitration clause
11 here contains no limitations on the arbitrator's
12 authority to award damages. An arbitrator would have the
13 same authority as a Court to declare the Limitation of
14 Liability Clause unconscionable and invalid and to sever,
15 it from the contract. Despite their appeal to Simpson
16 the Plaintiffs have not demonstrated that enforcement of
17 the arbitration clause would strip them of any remedies
18 that they may have in Court, and that being the case it
19 would be premature for this Court to decide the legality
20 of the Limitation of Liability Clause.

21 The last argument, Your Honor, has to do with the
22 Doctrine of Merger by Deed. The deed is attached as
23 Exhibit Six. The deed does not contain any reference to
the arbitration clause in the purchase agreement. The
Plaintiffs rightly pointed out in their Memorandum in

1 Opposition that South Carolina recognizes the Doctrine of
2 Merger by Deed, which provides that the execution,
3 delivery and acceptance of a deed varying from the terms
4 of the antecedent contract indicates an amendment of the
5 original contract and generally the rights of the parties
6 are fixed by their expressions as contained in the deed.
7 That's only half the story of the law, that's not even
8 the whole law on the subject. South Carolina Courts

9 ~~recognize several exceptions to the Doctrine of Merger.~~

10 There is the part performance exception. Our Supreme
11 Court held in Nineteen ninety-three where a deed
12 constitutes only part performance of a preceding
13 contract, other distinct and unperformed provisions of
14 the contract are not merged into the deed. And that's
15 New Prospect Area Fire District v. New Prospect Ruritan
16 Club, Three-Eleven, South Carolina, Four O Two, in
17 Nineteen Ninety-three. There's another exception called
18 the contrary intent exception. In the absence of fraud
19 or mistake and in the absence of contractual provisions
20 or agreements which are not intended to be merged into
21 the deed, upon the acceptance of the deed tendered and
22 performance of an agreement conveyed the written or oral
23 agreement is merged in the deed. A deed executed
24 subsequent to the making of an executory contract for the
25 sale of land supercedes that contract not only as to

1 provisions made pursuant to the terms of the contract,
2 but also as to the stipulations in the contract of which
3 the conveyance is not a performance if the parties
4 intended to surrender them, but they are not to supercede
5 it if the parties did not intend to surrender them.
6 That's Charleston Western Carolina Railway. The South
7 Carolina courts and other courts have recognized that the
8 Doctrine of Merger is not absolute. But that statement
9 of this principle of law that I've found has been in Re
10 Tribby which in this Virginia case in the eastern
11 district of Virginia in Nineteen Ninety-nine says this:
12 "Certainly the deed is final as to every subject which it
13 undertakes to deal with. Typically, however, a deed
14 represents only that aspect of the contract dealing with
15 the transfer of title. And while a deed may cover other
16 aspects of the title it rarely purports to cover all
17 elements of the original contract of sale. Thus, while
18 the deed is proof of the "fact of conveyance", other
19 documents, including the executory contract here to
20 purchase which may be considered to determine obligations
21 collateral to the fact of the conveyance. Accordingly,
22 the Doctrine of Merger applies only to: Number One,
23 subject matter specifically covered by the deed; and
24 Number Two, subject matter that is not "collateral to the
25 passage of the title." The narrow question of whether

1 the Doctrine of Merger by Deed operates to defeat an
2 arbitration clause in a real estate contract appears to
3 be a matter of first impression in South Carolina.
4 However, other courts have held that an arbitration
5 clause is presumed to survive the merger of contract
6 unless there is expressed or implied evidence that the
7 parties intended to override the presumption. There
8 are a number of cases that I've cited, one is a Tenth
9 Circuit case, Nineteen ninety eight, Riley
10 Manufacturing, that's in the Memorandum, and several
11 other cases cited.

12 THE COURT: Yes, sir.

13 MR. LEHN: Here, in the purchase and sale of the
14 Smiths' residence it's readily apparent that the deed
15 constitutes only part performance of the preceding
16 contract, the purchase agreement; that other distinct and
17 unperformed provisions, in other words, post closing
18 provision of the purchase agreement, which define certain
19 obligations collateral to the fact of the conveyance of
20 land, were not intended to be merged into the deed. Some
21 of the provisions and obligations the purchase agreement
22 intended by the parties to continue beyond closing
23 include the following: D. R. Horton had an obligation to
24 complete punch list items if they were not finished by
25 the date of closing; D. R. Horton had the obligation to

1 complete any repairs due to wood infestation; the parties
2 had an agreement to arbitrate all disputes between
3 themselves including but not limited to any claim arising
4 out of the seller's construction of the home; seller's
5 performance under any punch list or inspection agreement
6 which obviously refers to D. R. Horton's post closing
7 performance; and the seller's performance under any
8 warranty contained in this agreement or otherwise for the
9 ~~life of the warranty; and also purchaser had the~~

10 obligation to make any requests for warranty service
11 within a certain number of days after closing. All of
12 these provisions were, and are distinct and unperformed
13 as of the time of closing, and they're all collateral to
14 the fact of the conveyance of land, and therefore, they
15 fall within the part performance exception to the
16 Doctrine of Merger. They also fall within the contrary
17 intent exception to the Doctrine of Merger, because the
18 purchase agreement itself contains clear and convincing
19 evidence that the parties intended the arbitrator to make
20 the decision.

21 COURT REPORTER: One moment, please. I need to
22 insert another tape. Thank you.

23 Mr. Lehn: Thank you, Your Honor..

24 THE COURT: Alright. Mr. Segui.

25 MR. SEGUI: Thank you, Judge.

1 ARGUMENT BY MR. SEGUI:

2 MR. SEGUI: This one, Your Honor, this is Page Three
3 of our original Brief that was argued last year, "Seller
4 shall not be liable for monetary damages of any kind,
5 including secondary, consequential, punitive, general,
6 special or indirect damages. I don't think you get any
7 more one-sided than that, Your Honor. So, I want to take
8 the position that Simpson was a departure often
9 ~~sidestepped by opposing counsel and including other~~
10 jurisdictions, it really doesn't apply to Simpson. I
11 would also point out that it has nothing to do directly
12 with this case. The Supreme Court just issued another
13 opinion, and one -- two of the three grounds were, one of
14 them was similar to this case, was, unconscionability of
15 terms. They didn't reach that, yet they threw out the
16 arbitration clause due to waiver. So, we don't know what
17 they would have done on that, but they didn't take the
18 opportunity to set the record straight that Simpson
19 didn't apply, which they could have done. In fact, they
20 just remained silent on it, they tossed arbitration under
21 the waiver to discovery.

22 Also briefly, Your Honor, we'll touch on the
23 Doctrine of Merger by Deed. I have argued this before,
24 and I paid particular attention to the survivability
25 clause of this contract, and I have seen well tailored

1 ones where an attempt is made to provide all of their
2 rights and remedies and disclaimers to survive the
3 issuance of a deed. It's clearly they're contemplating
4 it because it's the law in South Carolina, as all these
5 contracts should. I would bring Your Honor's attention
6 to Paragraph Fifteen of the contract itself, which is
7 Exhibit Two of the Defendant's Brief, that it's only for
8 unfulfilled conditions such as maybe punch list items
9 ~~that he used as an example. Clearly, a punch list is an~~
10 unfulfilled condition. When they drafted this contract
11 that they wanted all these other things that they're
12 trying to enforce at this point to survive they should
13 have said so in their contract. They didn't do that, the
14 law in South Carolina was clear at the time they wrote
15 this contract, that's their omission, and I think the
16 regular doctrine still that you found in this case along
17 with all of Your Honor's other rulings.

18 Thank you, Your Honor.

19 THE COURT: Thank you, sir.

20 MR. LEHN: Just briefly, Your Honor?

21 THE COURT: Yes, sir.

22 MR. LEHN: Thank you, Your Honor.

23 ARGUMENT IN REPLY BY MR. LEHN:

24 MR. LEHN: There's nothing wrong with the Simpson
25 case, and the Simpson case did not change the pre-

1 obtained doctrine or how it's applied in the State of
2 South Carolina. The thing that the Plaintiffs are
3 missing here is that in Simpson they challenged the
4 arbitration clause. They said the arbitration clause is
5 unconscionable. It has all these draconian waivers of
6 statutory remedies and it limits the power of the
7 arbitrator to give justice to the parties. That's
8 totally different than what we have here which I think
9 the Court understands at this stage, that what is being
10 challenged as oppressive and one sided is a Limitation of
11 Liability Clause, which by the way is so common in all
12 sorts of contracts. Whether or not the Court or an
13 arbitrator may see that as unconscionable, those clauses
14 are -- in consumer contracts and real estate contracts,
15 and as far as D. R. Horton is concerned, there's nothing
16 unconscionable about that. The buyer is given an express
17 warranty.

18 THE COURT: Mr. Lehn, I just want to be sure, D. R.
19 Horton doesn't see anything wrong with that Limitation of
20 Liability Clause?

21 MR. LEHN: No, because what is provided in this
22 contract is a warranty, it's an express warranty. They
23 have a ten year structural warranty. Just like when you
buy a car you're given a warranty for three years or
Thirty-six thousand miles, that's your remedy if

1 something goes wrong with that car. And now, the law, it
2 says you have to do certain things to disclaim implied
3 warranties, and then you can have effective disclaimers
4 and ineffective disclaimers. Sometimes if an express
5 warranty fails of its essential purchase then the Court
6 has the power to say, look, I'm going to give relief to
7 this aggrieved party. But I don't think there's anything
8 unfair or unconscionable about an express warranty in a
9 ~~purchase agreement. And that's the position that my~~
10 client would take. But the key thing here is where,
11 which forum is it that is supposed to decide the issue of
12 unconscionability if the attack is on the entire
13 contract or a part of the contract that's separate from
14 the arbitration clause? Both the United States Supreme
15 Court and the South Carolina Court, Supreme Court and
16 Court of Appeals have consistently said that the
17 arbitrator is to rule on, decide the issue of
18 unconscionability for the contract as a whole or for
19 other parts of the contract. If the challenge is to the
20 fairness, the unconscionability of, or the legality of
21 the arbitration clause itself then it's the Court's
22 obligation to decide that. But it's clear that here they
23 have not challenged the arbitration clause. The
24 arbitration clause is not one sided, it's not oppressive,
25 it's even-handed.

1 The Doctrine of Merger by Deed, again, I mean, the
2 Plaintiffs have not given the Court any reason to, to
3 rule that the, both of the exceptions would not apply
4 here, the partial performance exception and the contrary
5 intent exception. I mean, it just, it's strange
6 credulity to look at this, the circumstances of this
7 transaction and say, all of the parties' obligations were
8 supposed to be included in the deed itself. I mean, if
9 ~~that were the case then the Smiths could not enforce any~~
10 warranty obligation after the closing. It just, that is
11 ludicrous, with all due respect, Your Honor.

12 THE COURT: Alright. Thank you, sir.

13 MR. SUGUI: Your Honor, just one final point.

14 ARGUMENT IN REPLY BY MR. SUGUI:

15 MR. SUGUI: He's trying to make a distinction from
16 the Simpson case and indicated that the one sided
17 provisions and the arbitration provisions are in two
18 different spheres in this case. It's all tied to
19 Paragraph Fourteen, Your Honor, where they attempt to
20 deny the remedies and also try to force them into
21 arbitration, all Paragraph Fourteen. Thank you, Your
22 Honor, nothing further.

23 THE COURT: Yes, sir. Thank y'all. I appreciate
24 it. I'll review this and get back to you.

25 MR. LEHN: Thank you, Your Honor.

CERTIFICATE

I, the undersigned, Mrs. Harry A. Walker, of
Rowesville, South Carolina, Official Court Reporter for
the First Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate, and complete transcript of record of all the
proceedings had and evidence introduced in the captioned
cause, relative to appeal, in the Court of Common Pleas
for ~~Dorchester County, South Carolina, on the First day~~
of August, 2011.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

DATE: March 9, 2012

Harry A. Walker

(MRS.) HARRY A. WALKER

Patton, Gay

From: Johnson, Matthew K.
Sent: Friday, November 04, 2011 9:44 AM
To: 'edicksonlc@sccourts.org'
Cc: 'Phillip Ward Segui Jr.'; 'John Chakeris'; 'Bob Martin'; 'Sharon Strubel'; 'Barbara Porter'; 'Kathryn Mixson'; 'Jenifer Canaday'; 'Karyn Strickland'; 'Cathy Gwyn'; 'Nina Moats'; 'Anissa Terpstra'; 'Ellie Martin'; 'Christi Petit'; 'Lisa Cassidy'; 'Jim Atkins'; 'Charles Blackburn'; 'Jeff Ross'; 'John Hayes IV'; 'mfitzhenry@hayeslaw.org'; 'dchard@knology.net'; 'Markey Stubbs'; 'Tom Keaveny'; Lehn, Trip; Dillard, W. Kyle
Subject: RE: Smith v. D.R. Horton, Inc., et al / case no. 2010-CP-18-641

Judge Dickson:

I am writing on behalf of our client, Defendant D.R. Horton, Inc., with respect to the proposed order denying its motion to reconsider sent to you by mail yesterday by counsel for the Smiths, Phillip Segui. Specifically, we wanted to point out a potential discrepancy in the order as requested by your law clerk's e-mail of November 2nd and the proposed order circulated by Mr. Segui.

The order as requested by your law clerk, states that "[t]he contract in question contains multiple oppressive and one-sided clauses that render the same unconscionable." On the other hand, the original order denying our motion concludes that "the relevant arbitration provisions are wholly unconscionable and unenforceable" and "fail to meet the South Carolina Uniform Arbitration Act." As indicated in the Supplemental Memorandum in support of D.R. Horton, Inc.'s motion to reconsider, whether the Court's decision is based upon the unconscionability of the contract as a whole or merely the unconscionability of the arbitration provisions makes a significant difference with respect to the *Prima Paint* doctrine and a subsequent appeal. Accordingly, we respectfully request that the Court clarify whether the decision on the unconscionability argument is one related to the contract as a whole or limited to the arbitration provisions.

In addition, your original order denying D.R. Horton's motion contained two additional specific grounds in addition to the unconscionability issue, namely the Smiths' merger by deed argument and the conclusion that the arbitration provisions do not meet the requirements of the South Carolina Uniform Arbitration Act. For the sake of clarifying potential issues on appeal, we respectfully request clarification in this order on whether the Court's intent is to reverse on these issues, thereby leaving only the unconscionability issue for appeal, or whether the Court intended to affirm those issues.

Thank you for your consideration.

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From: Lisa Cassidy [<mailto:lcassidy@seguilawfirm.com>]
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Cathy Gwyn; Nina Moats; Anissa Terpstra; Ellie Martin; John Chakeris; Christi Petit; Phillip Ward Segui Jr.
Subject: Smith v. D.R. Horton, Inc., et al / case no. 2010-CP-18-641

Dear Counsel,

Please find attached the proposed Order Denying D.R. Horton, Inc.'s Motion for Reconsideration of D.R. Horton's Motion to Compel Arbitration. The original has been mailed to Judge Dickson.

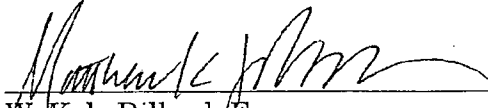
Best regards,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

August 24, 2012



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Appellant.

FINAL BRIEF OF APPELLANT

September 14, 2012

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in finding the arbitration provision unenforceable under the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10–15-48-240 (2005)?
2. Did the circuit court err in finding the arbitration clause is unconscionable?
3. Did the circuit court err in finding the arbitration clause was unenforceable under an unequal-bargaining-power theory?
4. Did the circuit court err in finding the arbitration clause was unenforceable under a lack-of-consideration theory?
5. Did the circuit court err in finding the arbitration provision is not enforceable under the Federal Arbitration Act, 9 U.S.C. §§ 1–307?
6. Did the circuit court err in finding the arbitration clause null and void under a merger-by-deed theory?

STATEMENT OF THE CASE

1. The parties and their contract.

Appellant D.R. Horton, Inc. built the house at 4830 Harvest Moon Court, Summerville, South Carolina 29420. Respondents Gregory W. Smith and Stephanie Smith bought the house from D.R. Horton. D.R. Horton and the Smiths executed a purchase agreement dated March 11, 2005. (R. 147–156). The purchase agreement’s first page contains this notice, as required by the South Carolina Uniform Arbitration Act (“SCUAA”), S.C. Code Ann. §§ 15-48-10–15-48-240 (2005):

THIS CONTRACT IS SUBJECT TO MANDATORY
BINDING ARBITRATION PURSUANT TO THE SOUTH
CAROLINA UNIFORM ARBITRATION ACT.

(R. 147).

The arbitration clause is contained in the purchase agreement’s “Warranties and Dispute Resolution” section. (R. 150–152). Paragraphs 14(a)–(f), contain warranty information. The arbitration clause is in Paragraph 14(g), and it reads:

Mandatory Binding Arbitration. [The Smiths] and [D.R. Horton] each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of [D.R. Horton]’s construction of the home; (2) [D.R. Horton]’s performance under any Punch List or Inspection Agreement; (3) [D.R. Horton]’s performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [Homeowners] and [D.R. Horton] agree to arbitrate.

- I. If the arbitration arises out of a claim arising under the [Residential Warranty Corporation ("RWC")] Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to [Homeowners] shall control.
- II. If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitration shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as a part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

(R. 151–152).

2. Procedural history.

A. The Smiths sue D.R. Horton.

The Smiths sued D.R. Horton alleging their house had construction defects and asserting claims for negligence, breach of contract, breaches of implied warranties, and unfair trade practices. They filed their original complaint on March 5, 2010, an amended complaint on April 26, 2010 (R. 7–22), and a second amended complaint on May 12, 2011. (R. 42–59). The Smiths allege that D.R. Horton “designed, developed and constructed” the house, that there were “various defects and deficiencies relative to the construction of [the house]” and that D.R. Horton was “negligent, grossly negligence, care-

less, reckless, willful and wanton in constructing [the house]." (R. 9, ¶ 9; R. 10, ¶ 11; R. 10–11, ¶ 14; R. 45, ¶¶ 11 & 13; R. 46–47, ¶ 16).

B. D.R. Horton unsuccessfully moves to compel arbitration.

The arbitration clause in the Smith's purchase agreement encompasses "any claim arising out of [D.R. Horton's] construction of the home" and "[D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise." (R. 151). Thus, because the Smiths' claims involve construction defects, D.R. Horton moved to compel arbitration on July 23, 2010. (R. 87–88).

D.R. Horton's motion to compel was based on the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–307, and the SCUAA. The circuit court denied D.R. Horton's motion in an order dated April 7, 2011, and filed April 12, 2011. (R. 1–4). The court denied the motion for three reasons:

- (1) the arbitration provisions supposedly fail to meet the SCUAA;
- (2) the arbitration provisions are allegedly unconscionable "based on the cumulative effect of a number of oppressive and one-sided provisions"; and
- (3) the arbitration clause in the purchase agreement was purportedly extinguished by the doctrine of merger by deed.

(R. 4).

C. D.R. Horton moves the circuit court to reconsider.

D.R. Horton filed a Rule 59(e) Motion to Alter or Amend the Court's Order ("motion for reconsideration") on April 22, 2011. (R. 126–127). Before

the circuit court ruled on the motion, D.R. Horton's counsel emailed the trial judge about the proposed order submitted by the Smiths' counsel. (R. 214-215). The email's purpose was to obtain clarification on two questions raised by the wording of the Smiths' proposed order denying the motion for reconsideration:

- (1) Did the court find the entire purchase agreement unconscionable, or just the arbitration clause?
- (2) Was the Smiths' proposed order correct insofar as it gave additional bases, beyond those stated in the original order denying the motion to compel arbitration?

The circuit court did not respond to this email and executed the Smiths' proposed order as drafted by the Smiths' attorneys and without clarification as requested. Hence, D.R. Horton will address in this brief all grounds for denial in the circuit court's orders on both the motion to compel and motion for reconsideration.

The circuit court's order denying D.R. Horton's motion for reconsideration is dated November 22, 2011, and it was filed December 1, 2011. (R. 5-6).

The court denied the motion because:

- (1) "the relevant arbitration provisions are wholly unconscionable based on the cumulative effect of a number of oppressive and one-sided provisions and that the form of the contract seems to be that of a contract of adhesion"; and
- (2) "the parties involved are not parties of equal bargaining power and there is not consideration given in exchange for the sacrifice of certain rights of [the Smiths] . . . and the provisions cannot be conscionably enforced against them."

(R. 6).

D.R. Horton's Notice of Appeal was served on December 7, 2011, and filed on December 8, 2011.

STANDARD OF REVIEW

Unless the parties otherwise provide, the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitrability determinations are subject to *de novo* review. *Lucey v. Meyer*, Op. No. 4960 (Ct. App. Mar. 28, 2012) (Shearouse Adv. Sh. No. 11 at 75); *Davis v. KB Home of S.C.*, 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). However, a circuit court's factual findings will not be reversed if there is any evidence reasonably supporting the findings. *Lucey*, Op. No. 4960 at 80. See also *MBNA Am. Bank v. Christianson*, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008).

ARGUMENT

Plaintiffs did not produce any evidence supporting the circuit court's finding. Thus, the circuit court's determination must be reversed. Because public policy favors arbitration, there is a strong presumption in favor of an arbitration agreement's validity. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010), *vacated on other grounds by Sonic Auto., Inc. v. Watts*, 131 S. Ct. 2872 (2011). The pro-arbitration policy is particularly strong in South Carolina. *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172–73, 644 S.E.2d 718, 720–21 (Ct. App. 2007) (“[W]e are constrained to resolve

all doubts in favor of arbitration”). Thus, a court should order arbitration unless it can say with positive assurance that the arbitration clause does not cover the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. Here, the arbitration clause applies directly to the controversy—the construction and sale of the Smiths’ house. The Smiths have not suggested otherwise, nor did the circuit court hold to the contrary. Instead, the circuit court held the arbitration agreement is unenforceable for a variety of reasons, none of which can withstand scrutiny.

ISSUE ONE

Did the circuit court err in finding the arbitration provision unenforceable under the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10–15-48-240 (2005)?

- 1. The circuit court erred in finding the arbitration provision unenforceable under South Carolina’s Uniform Arbitration Act.**

The circuit court ruled that “the arbitration provisions fail to meet the [SCUAA].” (R. 4).¹ The only imaginable basis for that holding is the notion that the purchase agreement somehow did not satisfy the SCUAA’s notice requirement. The SCUAA requires that a contract with an arbitration clause give notice of that fact on the first page: “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 Ann. § 15-48-10(a) (2005).

¹ This same finding was not included in the subsequent order denying D.R. Horton’s motion for reconsideration.

The purchase agreement for the Smiths' house contained the required notice in underlined, all capital letters on the first page of the agreement. (R. 104). Nonetheless, the Smiths insist that the arbitration clause is not conspicuous. (R. 121–25). More significantly, although the circuit court refused to compel arbitration because the purchase agreement's arbitration provisions supposedly "fail to meet the [SCUAA]," it did not identify any deficiencies in the arbitration notice or the arbitration clause itself. (R. 4).

Perhaps the circuit court concluded the arbitration notice on the purchase agreement's first page does not satisfy the SCUAA's requirements because it was not "typed" with a typewriter. The South Carolina Supreme Court has required strict compliance with S.C. Code Ann. § 15-48-10(a) (2005). *See, e.g., Zabinski*, 346 S.C. at 588–90, 553 S.E.2d at 114–15 (section 15-48-10(a) not satisfied because no notice of arbitration on contract's first page); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996) (arbitration notice did not satisfy § 15-48-10(a) because it was not underlined).

The court in *Zabinski* commented that the notice in *Soil Remediation* did not meet the statutory requirement "because it was laser-printed and written in all capital letters on the first page of the contract." *Zabinski*, 346 S.C. at 588–89, 553 S.E.2d at 114. Taking this dictum out of context, one conceivably could argue that a laser-printed notice fails to meet the statutory requirement. But the problem with the notice in *Soil Remediation* was that it

was not underlined, not that it was laser-printed. *Soil Remediation*, 323 S.C. at 457, 476 S.E.2d at 150–51 (disagreeing with the court of appeals’ reasoning “that one of the definitions of ‘underline’ is ‘to emphasize or cause to stand out,’ which was met under the present facts through the use of the capitalized notice provision”). And given modern realities, it is unthinkable that a laser-printed notice in underlined and capitalized letters does not satisfy § 15-48-10(a)’s requirement that the notice be “typed.”

The arbitration notice on the front page of the Smiths’ purchase agreement satisfied the SCUAA’s notice requirement, and there is no other imaginable basis for holding that the arbitration agreement is unenforceable under the SCUAA. The circuit court therefore erred in holding the agreement unenforceable under that act.

ISSUE TWO

Did the circuit court err in finding the arbitration clause is unconscionable?

- 2. The circuit court erred in finding the arbitration clause is unconscionable.**

The circuit court found that “the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions.” (R. 4, 6). The court also stated “the form of the contract *seems to be* that of a contract of adhesion.” (R. 6) (emphasis added). There is no evidence to support these findings.

A. There is no evidence the agreement is an adhesion contract.

A contract may not be avoided on unconscionability grounds unless it is first shown to be an adhesion contract. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901–02 (Ct. App. 1998) (stating that determining whether a contract is an adhesion contract is “the beginning point in the [unconscionability] analysis”). An adhesion contract is a standard form contract offered on a “take-it-or-leave-it” basis with nonnegotiable terms. *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 669. In short, the offeree has two options: “complete adherence or outright rejection.” *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901.

The circuit court made no factual findings to support the notion that the Smiths’ purchase agreement is an adhesion contract. The court’s only comment, in the order denying D.R. Horton’s motion for reconsideration, was that the agreement “seems to be” an adhesion contract. (R. 6). The Smiths, however, presented no evidence that the agreement was nonnegotiable or offered on a “take-it-or-leave-it” basis. Thus, if the circuit court did indeed find the purchase agreement to be an adhesion contract, it erred.

Because there was no basis on which the circuit court could find the purchase agreement was an adhesion contract, the unconscionability analysis must end here, as a contract cannot be deemed unconscionable unless it is first found to be an adhesion contract. *Lackey*, 330 S.C. at 388, 498 S.E.2d at

901–902. Nonetheless, D.R. Horton will address the Smiths’ other unconscionability theories below.

B. There is no evidence the agreement was unconscionable.

The circuit court’s unconscionability holding is somewhat mystifying. If its holding is based on a portion of the purchase agreement other than the arbitration clause, then the court violated the United States Supreme Court’s long-held *Prima Paint* rule. If the circuit court’s holding is that the arbitration clause itself is unconscionable, then there is no factual or legal basis for its holding.

i. The circuit court violated the *Prima Paint* rule.

The circuit court concluded that “the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions.” (R. 4, 6). For that holding, the court relied on the Limitation of Liability section at Paragraph 14(i), as opposed to the arbitration clause at Paragraph 14(g). It thus appears that the court intended to find the purchase agreement as a whole unconscionable.

Under United States Supreme Court and South Carolina Supreme Court precedent, a party may not avoid arbitration by seeking to rescind the entire contract on the basis of illegality or unconscionability when there is no independent challenge to the arbitration clause; rather, the arbitration clause itself must be found to be illegal or unconscionable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24–25 (1993).

In *Prima Paint*, the United States Supreme Court addressed whether, under the FAA, a claim of fraud in the inducement of the entire contract—as opposed to the arbitration clause itself—is to be resolved by the court or referred to an arbitrator. The Court held that “a federal court may consider only issues relating to the making and performance of the agreement to arbitrate” and cannot, therefore, “consider claims of fraud in the inducement of the contract generally.” *Prima Paint Corp.*, 388 U.S. at 404. Some courts sought to limit *Prima Paint*’s holding to fraud in the inducement challenges, but others held that *Prima Paint* extends to *all* challenges to a contract.

South Carolina joined the latter jurisdictions in rejecting attempts to limit *Prima Paint*. See *Great W. Coal, Inc.*, 312 S.C. at 562–63, 437 S.E.2d at 24–25. “A party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. . . . The arbitration clause is separable from the contract.” *Id.* at 562–63, 437 S.E.2d at 24. See also *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008); *Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003).

Thus, “precedent forces a distinction to be drawn between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged.” *New Hope Missionary Baptist*

Church, 379 S.C. at 631, 667 S.E.2d at 6. Compare *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (holding the circuit court was the proper forum for determining the enforceability of an arbitration clause challenged on the grounds of unconscionability) with *Cornerstone Hous.*, 356 S.C. at 338–42, 588 S.E.2d at 622–24 (holding the legality and enforceability of two contracts was for the arbitrator to decide where the arbitration agreement in the contracts was not directly challenged).

Here, the circuit court's conclusion was that the "oppressive and one-sided provisions" were in the "Limitation on Liability" clause at ¶ 14(i)), which is separate and distinct from the arbitration clause at ¶ 14(g). (R. 151–152, ¶ 14(g), (i)). Hence, the court appears to have found the purchase agreement unconscionable, as opposed to the arbitration clause. And under the *Prima Paint* doctrine as applied by South Carolina courts, the Smiths cannot avoid arbitration on that basis. Whether the agreement as a whole is unconscionable must be determined by an arbitrator, not by the circuit court.

ii. The circuit court could not properly hold the arbitration clause itself unconscionable.

There is no basis to conclude the circuit court held the arbitration clause itself unconscionable. Again, the provisions the circuit court said are "oppressive and one-sided" are not found in the arbitration subparagraph, which is captioned "Mandatory Binding Arbitration." (R. 151–152, ¶ 14(g)). Instead, the provisions the court found objectionable are in the "Limitation of Liability" clause. (R. 152, ¶ 14(i)). The only relationship between the arbitra-

tion clause and the Limitation of Liability clause is one of arrangement of the document. The circuit court never identified any language in the separate arbitration clause that was unconscionable.

Furthermore, the arbitration clause is not unconscionable. Unconscionability is 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. *Herron*, 387 S.C. at 532, 693 S.E.2d at 398; *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668.

The South Carolina Supreme Court has explained that “absence of meaningful choice” involves the fundamental fairness of the bargaining process. South Carolina courts consider the (i) disparity in the parties’ bargaining power, (ii) the parties’ relative sophistication, (iii) the nature of the injuries suffered by the plaintiff, (iv) whether the plaintiff is a substantial business concern, (v) whether there is an element of surprise in the inclusion of the challenged clause, and (vi) the conspicuousness of the clause. *Herron*, 387 S.C. at 532, 693 S.E.2d at 398; *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

The circuit court’s order denying the motion to compel references a lack of “meaningful choice,” but makes no specific findings in this regard. (R. 2). And there was no evidence that the Smiths had no meaningful choice in negotiating and accepting the arbitration clause or any other portion of the purchase agreement. Nor did the Smiths allege that they were unaware of, or

surprised by, the arbitration clause, or that they lacked the bargaining power or opportunity to negotiate the purchase agreement's terms.

To the extent the circuit court relied on *Simpson*, it erred. *Simpson* held that a car buyer lacked a meaningful choice because:

- (1) the "arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten of sixteen total paragraphs included on the page;"
- (2) the automobile trade-in contract was an adhesion contract,
- (3) automobile sales contracts between consumers and retailers are to be viewed by South Carolina courts with "considerable skepticism" due to a substantial disparity in bargaining power,
- (4) Simpson claimed she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement and she did not have a lawyer present to assist her in understanding the contract, and
- (5) Simpson alleged that the contract was "hastily" presented for her signature.

Simpson, 373 S.C. at 26–28, 644 S.E.2d at 669–670.

The Smiths offered no such evidence. The purchase agreement gave clear notice in underlined, capital letters at the top of the first page that the contract was subject to mandatory binding arbitration. (R. 147). The Smiths each placed their initials directly beneath the arbitration clause to indicate their acknowledgement and agreement. (R. 151–152, ¶ 14(g)). There is no evidence that they lacked sufficient business judgment, legal counsel, or the advice of a realtor. There is no evidence that the Smiths were not afforded ample time to review the contract or that they could not understand the arbitra-

tion clause. Nor is there any evidence that they were at a bargaining disadvantage, that the contract was offered on a take-it-or-leave-it basis, or that the arbitration clause was nonnegotiable. In sum, there is no evidence to that the Smiths lacked meaningful choice.

Further, the arbitration clause in *Simpson* required the plaintiff to arbitrate all claims but exempted certain claims brought by the defendant dealer against the customer. It also prohibited the arbitrator from awarding punitive, exemplary, or double or treble damages. *Simpson*, 373 S.C. at 28, 644 S.E.2d at 670. The arbitration clause here is not one-sided and gives no advantage, whether procedural or substantive, to either party.

iii. The arbitration clause is not made unconscionable by other provisions in the purchase agreement.

The circuit court's order denying D.R. Horton's motion to compel arbitration references *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006). The sole issue in *Kirkman* was the implied warranty of habitability, i.e., Paragraph 14(i) of the Agreement, not the arbitration clause in Paragraph 14(g). In *Kirkman*, the South Carolina Supreme Court held that to be valid, a disclaimer of the implied warranty of habitability must be (i) conspicuous, (ii) known to the buyer, and (iii) specifically bargained for. The circuit court appears to suggest in its order that paragraph 14(i) is not a valid disclaimer of the implied warranty of habitability under *Kirkman*.

The Smiths tried to draw an analogy between the disclaimer of the implied warranty of habitability in their purchase agreement and the *Simpson*

arbitration clause, which the South Carolina Supreme Court declared invalid because it violated statutory law and public policy by prohibiting the arbitrator from awarding “punitive, exemplary, double, or treble damages.” (R. 122). The plaintiff in *Simpson* asserted claims under the South Carolina Unfair Trade Practices Act (“SCUPTA”) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (“Dealers Act”) both of which involve mandatory statutory remedies. *Simpson*, 373 S.C. at 28–29, 644 S.E.2d at 670–71.

The SCUPTA *requires* a court to award treble damages for violations of the statute. Similarly, the Dealers Act *requires* a court to award double damages for violations of the statute. The court in *Simpson* held that a provision prohibiting the arbitrator from awarding these statutorily-mandated double and treble damages was “oppressive,” “one-sided,” and “an unconscionable waiver of statutory rights.” *Simpson*, 373 S.C. at 30, 644 S.E.2d at 671. The waiver of statutory rights in *Simpson* bears no analogy whatsoever to the disclaimer of warranties here. Unlike the arbitration clause in *Simpson*, the arbitration clause in the Smiths’ purchase agreement contains no limitation on their right to recover statutory damages, whether double, treble, or otherwise.

Similarly, the *Simpson* arbitration clause does not bear any analogy to the provision in the Smiths’ purchase agreement disclaiming monetary damages and limiting D.R. Horton’s liability to its obligation to repair or replace

defects under the Residential Warranty Corporation ("RWC") Warranty. (R. 152, ¶ 14(i)). These liability limitations are common in contracts (residential construction contracts and otherwise) that provide an express warranty to the consumer or purchaser, and courts generally do not find them to be unconscionable.² The "Limitation of Liability" clause here does not constitute a waiver of any statutory rights or causes of action, nor does it purport to limit the arbitrator's legal authority, as did the arbitration clause in *Simpson*.

In fact, under this agreement, an arbitrator would have the same authority and prerogative as any state or federal court to declare the limitation of liability clause unconscionable and invalid and to sever it from the contract. Despite their attempts to fit within the holding in *Simpson*, the Smiths have not demonstrated that enforcement of the arbitration clause would strip them of any remedy that they could access through litigation in state or federal court.

² See, e.g., *Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 168 n.4, 621 S.E.2d 38, 40 n.4 (2005) (citing defendant's repair-or-replace remedy with approval, stating "Article 2 permits parties to agree to 'remedies in addition to or in substitution for those provided in [article 2] and [] limit or alter the measure of damages recoverable under [article 2], as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of the nonconforming goods or parts.'" (citing S.C. Code Ann. § 36-2-719(a)(1) (2003)) (emphasis added); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (enforcing an insurance agreement's repair-or-replace provision, reasoning "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."); *Div. of Gen. Servs. v. Ulmer*, 256 S.C. 523, 533, 183 S.E.2d 315, 319 (1971) (enforcing a repair-or-replace provision in an insurance agreement covering a school building), *rev'd on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

For the reasons stated, neither the arbitration clause nor the entire Agreement is unconscionable and the circuit court committed error in essentially adopting the Smiths' argument and incorporating it into the orders denying D.R. Horton's motion to compel and its motion for reconsideration.

ISSUE THREE

Did the circuit court err in finding the arbitration clause unenforceable under an unequal-bargaining-power theory?

- 3. The circuit court erred in finding the arbitration clause unenforceable on an unequal-bargaining-power basis.**

In its order denying D.R. Horton's motion for reconsideration, the circuit court concluded the parties were not of "equal bargaining power." Inequality of bargaining power alone will not invalidate an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable"). *See also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 n.5 (2011) ("Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held . . . that agreements to arbitrate in that context are enforceable.") (citing *Gilmer*, 500 U.S. at 33). Thus, the circuit court's ruling cannot be sustained on this ground alone, and as shown throughout this brief, there are no other grounds for invalidating the parties' arbitration agreement.

ISSUE FOUR

Did the circuit court err in finding the arbitration clause unenforceable under a lack-of-consideration theory?

- 4. The circuit court erred in finding the arbitration clause was unenforceable because no consideration was given.**

In denying D.R. Horton's motion for reconsideration, the circuit court found that no consideration was given "in exchange for the sacrifice of certain rights." (R. 6). The circuit court's order identifies no facts or evidence supporting this conclusion. Instead, it refers back to the order denying the motion to compel, which likewise contains no factual finding supporting a lack of consideration.

The purchase agreement was supported by valid consideration on two levels. First, the arbitration agreement was part of the contract to purchase and sell real estate. Therefore, the agreement was supported by mutual consideration in the exchange of money for the residence. Neither the Smiths nor the circuit court have suggested that the Smiths did not receive their house as part of the transaction reflected in the purchase agreement, which contained the arbitration agreement.

Second, mutual promises to arbitrate are sufficient consideration. The Smiths and D.R. Horton each agreed that, "to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves." (R. 151, ¶ 14(g)). The sufficiency of mutual promises to arbitrate as consideration is well-settled. *See, e.g., Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997);

Tenaglia v. Ryan's Family Steak Houses, Inc., 2003 U.S. Dist. LEXIS 26322, *33 (D.S.C. May 8, 2003).

The parties' mutually binding promises to arbitrate were sufficient consideration. The circuit court therefore erred in concluding that the parties' arbitration agreement fails for lack of consideration.

ISSUE FIVE

Did the circuit court err in finding the arbitration provision was not enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.?

5. **The circuit court erred in finding the arbitration provision is not enforceable under the Federal Arbitration Act.**

There is "a clear federal directive in support of arbitration." *Adkins*, 303 F.3d at 500. Thus, a court must compel arbitration under the FAA where: (1) there is a dispute between the parties; (2) there is a written agreement that includes an arbitration provision covering the dispute; (3) there is a relationship of the transaction at issue to interstate commerce; and (4) one party has refused to arbitrate the dispute. *Id.* at 500–501.

The first element of the *Adkins* test is met, as there is a dispute between the parties, as evidenced by the Smiths' lawsuit. The purchase agreement is a written agreement including an arbitration provision. Additionally, there has been no suggestion by either the Smiths or the circuit court that the dispute is outside the arbitration agreement's scope.³ Therefore, the se-

³ And if there were any doubt on this point, "[t]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open

cond element of the *Adkins* test is met. Finally, the fourth element of the *Adkins* test is met, as the Smiths have refused to arbitrate despite the purchase agreement's arbitration clause and despite D.R. Horton's requests to arbitrate. (See, e.g., R. 90, 92–93).

Thus, the only issue requiring any discussion is whether the third element of the *Adkins* test is met: whether the transaction at issue implicated interstate commerce.

The circuit court refused to compel arbitration under the FAA because “[D.R. Horton] and [the Smiths] are both residents of South Carolina, the construction at issue took place in South Carolina, and any out-of-state transactional involvement is merely tangential.” (R. 4). The Smiths’ house is located in South Carolina, but the circuit court erred in concluding that D.R. Horton is a South Carolina resident and that the dispute does not sufficiently implicate interstate commerce.

The transaction at issue is the construction and sale of the Smiths’ house. The Smiths contend that the house was defectively constructed by D.R. Horton. D.R. Horton is a Delaware corporation that maintains its principal place of business in the state of Texas. (R. 115, ¶ 3). D.R. Horton builds houses in approximately twenty-seven states. (R. 115, ¶ 4). D.R. Horton routinely engages in interstate activities, including procurement of materials

to question, a court must decide the question in favor of arbitration.” *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001).

and labor on an interstate basis. (R. 115, ¶ 5). Numerous materials for the Smiths' house were obtained from out of state. (R. 118–119, ¶ 4).

The interstate character of a defendant's business will bring an arbitration agreement within interstate commerce. *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (holding that FAA governed arbitration agreement between pest control agency and homeowner because company operated interstate and used raw materials purchased from out of state). Additionally, South Carolina construction projects affect interstate commerce when, as here, services or materials for the project are obtained from out of state. See, e.g., *Zabinski*, 346 S.C. at 595–596, 553 S.E.2d at 118; *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977); *New Hope Missionary Baptist Church*, 379 S.C. at 626–27, 667 S.E.2d at 4 (Ct. App. 2008); *Blanton v. Stathos*, 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002); *Circle S. Enters., Inc., v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986).

The interstate character of D.R. Horton's business is analogous to that of the defendants whose operations were analyzed in the above-cited cases. As such, D.R. Horton's business occurs on an interstate basis and involves interstate commerce. Further, the construction of the Smiths' house, out of which this dispute arises, involved interstate commerce. Thus, in light of "the FAA's expansive view of interstate commerce," *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118, the circuit court erred in holding that the FAA does not apply.

Because the FAA applies, the arbitration agreement must be enforced even if it does not satisfy the SCUAA's requirements. *Id.* at 594, 553 S.E.2d at 117 ("Under the facts of the instant case, we find the FAA controls and compel[s] arbitration. On its facts, the instant arbitration agreement is not enforceable under South Carolina law."). *See also Concepcion*, 131 S. Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA"); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) ("[T]he FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction") (citations omitted).

ISSUE SIX

Did the circuit court err in finding the arbitration clause null and void under a merger-by-deed theory?

6. **The circuit court erred in finding the arbitration clause was null and void due to the doctrine of merger by deed.**

In denying D.R. Horton's motion to compel, the circuit court declared: "[T]he Deed at issue and which controls the relationship between the parties does not contain an arbitration provision." (R. 4). Apparently, the court agreed with the untenable merger-by-deed theory for invalidating the arbitration agreement set forth in the Smiths' memorandum in opposition to D.R. Horton's motion to compel. (See R. 123-24). South Carolina recognizes the merger-by-deed doctrine, but it does not apply here.

Under this doctrine, when parties execute and accept a deed that varies from the terms of the antecedent contract, their rights generally are “fixed by their expressions as contained in the deed.” *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957) (citations omitted). But where a deed is only part performance of a preceding contract, “other distinct and unperformed provisions of the contract are not merged in the deed.” *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993). See also *Hughes v. Greenville Cnty. Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984) (noting that South Carolina recognizes “contrary intent” exception to merger doctrine).

The doctrine of merger “is not absolute.” *Meurer v. Tribby* (In re Tribby), 241 B.R. 380, 383 (Bankr. E.D. Va. 1999) (citation omitted). The court in *Tribby* explained that the deed is final as to every subject it undertakes to deal with, but typically a deed represents only that part of the contract dealing with transfer of title. The deed “rarely purports to cover all elements of the original contract for sale. *Id.* at 383. Thus, other documents, including the executory contract, “may be considered to determine obligations collateral to the fact of conveyance.” *Id.*⁴

⁴ See also Charles S. Parnell, Annotation, *Deed as Superseding or Merging Provisions of Antecedent Contract Imposing Obligations upon the Vendor*, 38 A.L.R.2d 1310 § 6 (1954) (“where the antecedent contract contains provisions imposing obligations upon the vendor other than those relating to title or possession, and so far collateral thereto as to indicate that their omission from the deed was without any deliberate intent to preclude their sur-

An arbitration clause is presumed to survive the merger of a contract unless there is express or implied evidence that the parties intended to override the presumption. *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1998) (citing *Nolde Bros. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 255 (1977)). See also *Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594 (1997) (holding that, despite merger clause in contract that did not contain an arbitration clause, arbitration clauses in prior, expired agreements were enforceable).

Here, the deed was only part performance of the preceding contract, i.e., the purchase agreement. Other distinct and unperformed (i.e., post-closing) provisions of the agreement, which define certain obligations collateral to the fact of the conveyance of land, were not intended to be merged in the deed. Those provisions and obligations intended by the parties to continue beyond closing include:

- D.R. Horton's obligation to complete "punch list" items (R. 106, ¶ 8);
- D.R. Horton's obligation to complete any repairs due to wood infestation (R. 107, ¶ 12);
- The parties' agreement to arbitrate "all disputes between themselves," including, but not limited to, "(1) any claim arising out of [D.R. Horton]'s construction of the home; (2) [D.R. Horton]'s performance under any Punch List or Inspection Agreement [obviously referring to D.R. Horton's post-closing performance]; (3) [D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise [again, obviously referring to

vival of that instrument, such collateral provisions will be held to survive the deed").

D.R. Horton's post-closing performance].” (R. 108–109, ¶ 14(g)); and

- [The Smiths'] obligation to make written requests for warranty service within the first 365 days after closing (R. 109, ¶ 14(j)).

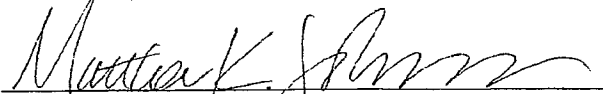
All of these provisions were “distinct,” “unperformed” (at the time of closing), and “collateral to the fact of the conveyance of land” and, thus, were not extinguished by the doctrine of merger.

Further, the Agreement contained a “Survival” clause: “Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled.” (R. 152, ¶ 15). The arbitration clause must be presumed to survive the merger at closing absent any evidence that the parties intended to override the presumption. There is no evidence that the Smiths and D.R. Horton intended the purchase agreement, or the arbitration clause in particular, to expire upon closing. Thus, if the circuit court’s intent was to deny the motion to compel based on the arbitration clause having been extinguished by the doctrine of merger by deed, it was in error.

CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court’s denial of D.R. Horton’s Motion to Compel and/or the circuit court’s denial of D.R. Horton’s Motion for Reconsideration, and Respondents’ claims should be referred to binding arbitration under the SCUAA and/or the FAA consistent with the parties’ agreement.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Matthew K. Johnson", written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

Gregory W. Smith and Stephanie Smith, ... Respondents,

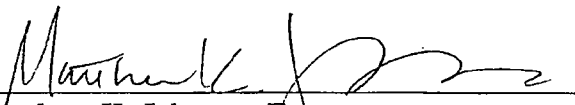
v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Appellant.

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

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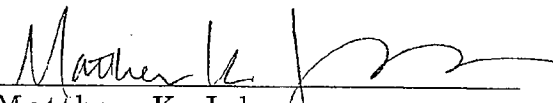
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of whom D.R. Horton, Inc., is the,..... Appellant.

PROOF OF SERVICE

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September 14, 2012


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
The Honorable Edgar Warren Dickson, Circuit Court Judge

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Gregory W. Smith and Stephanie Smith,.....Respondents,

v.

D.R. Horton, Inc., and Tom's Vinyl
Siding, LLC, Lutzen Construction Company,
Inc., Boozer Lumber Company, All American
Roofing, Inc. and Myers Landscaping,
Inc.,.....Defendants,

of whom D.R. Horton, Inc. is the.....Appellant.

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STATEMENT OF THE ISSUES ON APPEAL

- I. IS THE CIRCUIT COURT THE PROPER FORUM TO DETERMINE THE GATEWAY ISSUE OF WHETHER AN AGREEMENT TO ARBITRATE EXISTED BETWEEN THE PARTIES TO THIS APPEAL?
- II. DID THE CIRCUIT COURT PROPERLY DETERMINE THAT AN ADHESION CONTRACT'S ARBITRATION PROVISION IS UNCONSCIONABLE AND UNENFORCEABLE?
- III. DID THE CIRCUIT COURT PROPERLY DETERMINE THAT THE MANDATORY REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT WERE NOT SATISFIED?
- IV. DID THE CIRCUIT COURT PROPERLY DETERMINE THAT THE DOCTRINE OF MERGER EXTINGUISHED THE ARBITRATION PROVISION WHERE IT WAS NOT INCORPORATED INTO THE DEED AT CLOSING?

STATEMENT OF THE CASE

This is a construction defect case concerning a newly-constructed home purchased by Gregory and Stephanie Smith ("Respondents") from Appellant, D.R. Horton, Inc. Respondents commenced this action in the Dorchester Court of Common Pleas against several defendants, including Appellant, alleging deficiencies in the construction of the home.¹ The suit alleges causes of action for negligence, gross negligence, recklessness, breach of contract, breach of implied warranties, and violations of South Carolina's Unfair Trade Practices Act. (R. pp. 42-59) Respondents seek actual, compensatory, and statutory and punitive damages.

On July 23, 2010, Appellant moved to compel the matter to arbitration, citing a purported arbitration provision within its contract with Respondents. (R. pp. 87-88) In response, Respondents submitted a Memorandum in Opposition to Appellant's Motion challenging the enforceability of the arbitration provision. (R. pp. 121-125) On September 9, 2010, the Honorable Edgar Warren Dickson conducted a hearing to determine the

¹ The Summons and Complaint were filed on March 5, 2010. Respondents filed an Amended Complaint on April 26, 2010 and a Second Amended Complaint on May 12, 2011.

enforceability of the arbitration provision. Thereafter, on April 12, 2011, the circuit court entered an Order denying Appellant's Motion to Compel, finding, among other things, that the arbitration provision is unconscionable and unenforceable. (R. pp. 1-4) Respondents thereafter moved the circuit court pursuant to Rule 59(e), SCRCP, to reconsider, alter or amend its prior Order. (R. pp. 126-127) A second hearing was held on August 1, 2011, and the circuit court thereafter affirmed its prior decision. The Order denying Appellant's Motion for Reconsideration was entered on December 1, 2011. (R. pp. 5-6) This appeal follows.

STATEMENT OF THE FACTS

Because discovery has not occurred in this action, the salient facts are limited. In March² of 2005, Respondents entered into a Home Purchase Agreement (the "Purchase Agreement") with Appellant. (R. pp. 104-113) The Purchase Agreement provided for the purchase of a new home at 4830 Harvest Moon Court, in Summerville, South Carolina. The particular home style was Appellant's "Garrett 1904A" house plan. (R. p. 110)

Respondents commenced this action after discovering numerous problems in the home as described in the Second Amended Complaint. The deficiencies include improperly installed siding, windows, structural framing and concrete slab, defective flashings, violations of applicable construction codes, and failures by Appellant to follow manufacturer's instructions in assembling or installing components of the home. (R. pp. 42-59)

At issue in this appeal is the enforceability of an arbitration provision set forth within the terms of the Purchase Agreement. Specifically, the arbitration language is found in Paragraph 14, entitled "Warranties and Dispute Resolution." This Paragraph spans three pages

² There are various dates reflected on the Purchase Agreement, ranging from March 11, 2005 to March 28, 2005.

of the Purchase Agreement, from page 7 to page 9. Respondents contend Paragraph 14 of the Purchase Agreement, including the arbitration language therein, is unconscionable and unenforceable. Having twice considered the matter, the circuit court agrees.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT AND CITATION OF AUTHORITY

The circuit court found the arbitration provision was unenforceable, and upon rehearing and reconsideration of Appellant's arguments, re-affirmed its initial conclusion. As set forth herein, the circuit court correctly determined the issues before it and properly found the arbitration agreement was unconscionable and unenforceable.

I. RESPONDENTS SPECIFICALLY CHALLENGED THE ARBITRATION PROVISION IN QUESTION, AND THE CIRCUIT COURT WAS THE PROPER FORUM TO DETERMINE ITS VALIDITY AND ENFORCEABILITY.

Beginning with its Motion for Reconsideration and continuing with its Brief before this Court, Appellant argues that Respondents have challenged the entire contract rather than the arbitration provision. (R. p. 196, lines 8-16; p. 211, lines 19-23; p. 212, lines 15-22; pp.139-141) Accordingly, Appellant argues that under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), Respondents improperly attacked the arbitration provision. This

argument fails for two reasons: It is not preserved, and it completely misstates Respondents' position.

Appellant did not advance this argument prior to its Motion for Reconsideration under Rule 59(e). It is settled law that, "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994). *Accord McMillan v. S.C. Dep't of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (finding issues not preserved because they cannot be raised for the first time in a motion for reconsideration). Respondents timely objected to the inclusion of new materials for the first time in connection with the Motion for Reconsideration. (R. p. 190) In keeping with this rule, Appellant cannot rely on an argument that it failed to initially raise to the circuit court. Regardless, Appellant's interpretation of Respondents' challenge is completely incorrect.

From the outset, Respondents have specifically attacked the arbitration provision in question and argued that it (not the whole contract) is unconscionable and unenforceable. On the very first page of Respondents' Memorandum in Opposition, they argued, "Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable...." (R. p. 121) Respondents continued to advance this argument throughout the proceedings below.³ (R. p. 172, line 6 –

³ For sake of clarity, references to the "Original Trans." relate to the hearing on the Motion to Compel conducted September 9, 2010. References to the "Reconsideration Trans." relate to the hearing on Appellant's Motion for Reconsideration held August 1, 2011. [This footnote was included in Respondents' Initial Brief to add clarity to record cites prior to the preparation of the record on appeal. This footnote has no importance in this Final Brief, but is included to avoid making changes in the brief as directed by Rule 211, SCACR].

176, line 23; p. 179, lines 12-25; p. 212, lines 15-24). The circuit court understood and twice found that Respondents had challenged the arbitration provision. (R. pp. 1-6) (“Plaintiffs believe that the arbitration clause in the contract for the purchase of the residence at issue is unconscionable and unenforceable.”). Respondents have never attacked the enforceability of the whole contract. In fact, Respondents asserted a claim for breach of contract against Appellant, which would not lie if the entire agreement was unenforceable. (R. pp. 53-54) Therefore, Appellant’s reliance upon *Prima Paint* is misplaced—*Prima Paint* does not apply because, *inter alia*, Respondents challenged the arbitration provision itself.

Appellant belatedly argues that each particular subpart or subsection of Paragraph 14 should stand alone and in isolation from the surrounding, interrelated provisions relating to dispute resolution. This argument lacks merit and puts form above function. Because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause’s applicability. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). This includes the well-settled tenet of contract construction that a court should construe different provisions together that **deal with the same subject matter**. *Buice v. WMA Secs., Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008); *Skull Creek Club Ltd. P’ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). The entirety of Paragraph 14 purports to contain the substance of the parties’ agreements relating to disputes between them, including the applicable warranties, limitations on liability, bars against claims for various implied warranties, a bar against the recovery of any monetary award, and, as an integrated part and parcel thereof, the arbitrability of claims.

Appellant tries to isolate the arbitration language as though it were not an integral part of the Dispute Resolution terms in Paragraph 14. However, this effort misses the point. Arguably, the only difference between the lengthy, *single paragraph* arbitration provision in *Simpson* and the lengthy provisions of Paragraph 14 of the Purchase Agreement is that Appellant separated the interrelated portions of Paragraph 14 into subparts with the letters (a) through (j) assigned to each. Appellant cannot avoid the collective unconscionability of its Dispute Resolution terms so easily, and there is nothing in the Court's analysis or reasoning in *Simpson* that suggests the Supreme Court would have allowed that unconscionable provision to stand if only the dealership had broken up the problematic content into separately numbered subparts. Such a holding would lead to an absurd result. Moreover, by rejecting the dealership's suggestion to sever only those provisions the Court found unconscionable, it is apparent the *Simpson* Court would not embrace Appellant's attempt to separate the wheat from the chaff as it tries to do in this case. *Simpson*, 373 S.C. at 33-34, 644 S.E.2d at 673-74 (striking the entire arbitration clause due to the cumulative effect of a number of oppressive and one-sided provisions contained therein).

Lest there is any doubt, a careful reading of Subparagraph 14(g) quickly reveals that Appellant did not truly intend for it to operate independently of the remaining provisions of Dispute Resolution Paragraph 14. Paragraph 14 begins with a discussion concerning the "RWC Warranty." Subparagraph 14(c) provides that the RWC Warranty⁴ will contain its *own* arbitration clause (which Appellants did *not* introduce into the record). That same

⁴ Interestingly, although Appellant was to provide the RWC Warranty at closing, subparagraph 14(b) indicates that the warranty is only valid for so long as *Appellant* is in good standing with the RWC Program. The contract says nothing about what remedy Respondents would have if Appellant chose not remain involved in the RWC Program, invalidating the warranty.

subparagraph also provides that Appellant is making “no warranties, express or implied, as to fitness for a particular purpose, merchantability, **and habitability....**” (R. p. 107) (Emphasis added). In other words, the RWC Warranty covers both arbitration issues and purportedly disclaimed warranties otherwise available to Respondents by law. Those provisions lie in the same subparagraph, and are related in subject matter to the general issue of dispute resolution. This is important because Subparagraph 14(g) expressly intertwines itself with the RWC Warranty provisions by calling for the arbitration of “Seller’s performance under any warranty contained in this Agreement or otherwise...” (R. pp. 108-109) In the very least, this cross-reference bootstraps the RWC Warranty and Appellant’s attempted exclusion of implied warranties into the arbitration provision, demonstrating that subparagraph 14(g) does not operate in isolation within Paragraph 14.

There is more. The “Punch List” and “Inspection Agreement” provisions that are referenced, *inter alia*, in subparagraphs 14(d), (e), and (f) are likewise expressly incorporated into the arbitration provision as well. (R. pp. 108-109) Appellant admits the arbitration provision applies to these other matters, which are found elsewhere in Paragraph 14. (R. p. 167, lines 6-24; pp. 168, line 24 – p. 167, line 2) The pattern continues with the Limitations of Liability set out in subparagraph 14(i), which expressly cross-references the warranty provisions from elsewhere within Paragraph 14 in the same breath as it excludes any monetary damages and again attempts to disclaim various warranties otherwise available to Respondents by law. To suggest these provisions (or subparts, rather) are not all related and are not intertwined is to ignore the cross-references expressly written into these provisions by Appellant as well as their practical effect upon Respondents when read together. *Buice*, 380 S.C. at 156-157, 668 S.E.2d at 434. When these provisions are read together, the cumulative,

oppressive result is plainly evident. *Simpson*, 373 S.C. at 33-34, 644 S.E.2d at 673-74. This analysis is evident from the four corners of the Purchase Agreement, which evidence supports the circuit court's decision.

II. THE CIRCUIT COURT PROPERLY DETERMINED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THAT THE ARBITRATION PROVISION IS UNCONSCIONABLE AND UNENFORCEABLE.

In South Carolina, there is a strong presumption in favor of the validity of arbitration clauses. *Towles*, 338 S.C. at 37, 524 S.E.2d at 844. Despite this presumption, it is well-settled that "arbitration is a matter of contract law and is available only when the parties involved contractually agree to arbitrate." *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. See also *Aiken v. World Fin. Corp. of S. C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing *Zabinski*, at 596, 553 S.E.2d at 118). Thus, if it is determined that no agreement to arbitrate existed, arbitration must be denied. *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. That is exactly the case here. Appellants argue this decision should be made by the arbitrator, not the court. As explained herein, Appellant's argument falls short.

A. The Circuit Court Correctly Applied a "Gateway" Analysis in Determining that No Valid Agreement to Arbitrate Existed Between the Parties.

Contrary to Appellant's assertion, the determination of whether an arbitration agreement exists is a matter for the circuit court to decide. *The Housing Authority of the City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). The United States Supreme Court has stated that in limited circumstances, courts must "assume that parties intended the courts, not arbitrators, to decide a particular arbitration-

related matter.” *Green Tree Fin. Corp. v. Bazzle*, 156 L. Ed. 2d 414, 123 S. Ct. 2402, 2407 (2003). As an example, the US Supreme Court stated, “[Such limited circumstances] include certain gateway matters, such as whether the parties have a valid arbitration agreement at all” *Id.* That is precisely the case here. Only where there is “clear and unmistakable” evidence to the contrary” will courts find that such threshold decisions were intended to be decided by an arbitrator. *Id.* See also *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (noting that where a party challenges the validity of the arbitration agreement on the grounds that it is unconscionable, there is no “clear and unmistakable” evidence that the parties agreed to arbitrate such gateway matters). Accord S.C. Code Ann. 15-48-20(a) (providing that the court should decide a challenge brought by an opponent who denies the existence of the agreement to arbitrate). Appellant admits this is the correct result, and as discussed above it is clear the validity of the arbitration provision was challenged. (R. p. 211, lines 19-22) Having established that it was for the circuit court to decide whether a valid agreement to arbitrate exists in this case, the analysis turns to the invalidity of the applicable provisions.

B. The Purported Arbitration Agreement is Unconscionable, Oppressive, and One-Sided and, Therefore, Unenforceable.

Courts should apply ordinary state-law principles that govern the formation of contracts in determining whether an agreement to arbitrate exists. *Housing Authority*, at 334, 588 S.E.2d at 620; *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Consistent with basic principles of contract law, a party may challenge the enforceability of an agreement to arbitrate under “such grounds as exist at law or in equity” including fraud, duress, and unconscionability. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. Accord S.C. Code Ann. § 15-48-10(a) (providing that an arbitration provision may be set aside “upon such grounds as exist at law or in equity for the revocation of any contract”).

1. Respondents Lacked Meaningful Choice in the Negotiation of the Purchase Agreement, Which is an Adhesion Contract.

The absence of meaningful choice in the negotiation of a contract generally speaks to the fundamental fairness of the bargaining process of the contract in question. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citing *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989)). In determining whether a contract is "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. *Id.* (quoting *Carlson*, 883 F.2d at 293). See also *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.") (quoting *17A Am.Jur.2d Contracts* § 279 (2004)). The facts and circumstances of this case begin with the understanding that this was the purchase of a new home by a couple who dealt with a large corporation.

For sake of comparison, the South Carolina Supreme Court has stated that the purchase of a vehicle intended for use as primary transportation is "critically important in modern day society." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. It is easy to conclude that a home is at least as important to a consumer as the purchase of a car. In fact, our Supreme Court precedent has made clear the importance of properly constructed homes in South Carolina. See *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730 (1989) ("We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce.") (emphasis added). The allegations of the Second Amended

Complaint⁵ cite a myriad of defects in the home constructed and sold by Appellant to Respondents and further alleges that Appellant engaged in unfair and deceptive trade practices. Frequently, as is the case here, these issues arise in a commercial setting where the respective bargaining power of the contracting parties is unequal. Therefore, the first step in the process is to consider whether the Purchase Agreement in question is an adhesion contract, because that is the beginning point in the analysis of whether the contract is unconscionable. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

(a) The Purchase Agreement is an Adhesion Contract

An adhesion contract is offered on a “take-it-or-leave-it” basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not *per se* unconscionable, but in proper contexts may be viewed with “considerable skepticism.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Here, the record reveals that the Purchase Agreement is an adhesion contract, which Respondents argued below. (R. p. 175, lines 10-23) It is obvious that the Purchase Agreement is a pre-printed form containing boilerplate language crafted by a large, multi-state business entity. (R. pp. 104-113; p 115-116; p.169, lines 7-10). In many, but noticeably not all, sections of the Purchase Agreement, there are boxes to check or blanks for Respondents’ initials, but that is their only contribution to the form. There is only one place where Purchase Agreement provides space for handwritten “Special Stipulations.” This section remains blank. (R. p 112). Every page of the document states “General Terms and Conditions” in the header at the top.

Further proof that this is an adhesion contract lies throughout the various pages and terms of the Purchase Agreement. For example, Paragraph 2 of the Purchase Agreement

⁵ For sake of brevity herein, Respondents cite only to the most recent pleading, i.e., the Second Amended Complaint. However, Respondents specifically incorporate in every such instance the allegations of all prior pleadings filed by them.

plainly applies to a variety of purchase transactions and methods of financing, indicative of the fact that this form agreement can be used with *any* potential buyer, who merely checks the boxes that apply to him or her. Paragraphs 3 through 13 of this document are all pre-printed, with the sole exception of designating the amount of the earnest money deposit. Paragraph 16 states in part, “**If this Agreement is for the construction of a new home....**” (Emphasis added.) In other words, this pre-printed document can apply to any number of circumstances—it is not particular to Respondents’ home and the overall terms plainly reveal that Respondents must conform to the way Appellant does business (*See, e.g.*, Purchase Agreement, ¶ 8 (demanding strict adherence to Appellant’s rules if Respondents want to have a home inspector check on Appellant’s work); ¶ 19 (giving Respondents only 14 days to make color selections and offering to meet only on certain days and times on a first-come-first-served basis among all other customers)) (R. pp. 106, 110-111) It cannot reasonably be disputed that the Purchase Agreement is anything other than a pre-printed, form agreement offered by Appellant without any meaningful negotiation by Respondents. If there is any doubt, during oral arguments on the Motion to Compel, counsel for Appellant tellingly pointed out, “**If [Respondents] didn’t like this deal they could have gone elsewhere.**”⁶ (R. p. 183, lines 2-3) (emphasis added).

Appellant’s admission represents the epitome of a “take-it-or-leave-it” contract offering. This is significant, because “the presumption in favor of arbitration clauses is

⁶ In the context of counsel’s statement, Appellant pointed out that there were “plenty of home builders out there” and Respondents could have dealt with someone else if they wanted to. (R. p. 182, line 21 – p. 183, line 1) Again, this misses the mark and is not indicative of “meaningful choice.” What matters is the lack of meaningful choice as to the terms of the Purchase Contract **in the context of Respondents’ dealings with Appellant.** *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (“The absence of meaningful choice in the negotiation of a contract generally speaks to the fundamental fairness of the bargaining process of the **contract in question.**”) (emphasis added). That another builder might have dealt with Respondents more fairly is not only irrelevant, but mere conjecture.

substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation 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 (quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 1998 Ohio 294, 700 N.E.2d 859, 866 (Ohio 1998)).

(b) There is Disparity in Bargaining Power Between the Parties.

Insofar as the arbitration provision is concerned, there is no evidence whatsoever in the record that Respondents were offered options or alternatives for dispute resolution that differed from the predetermined terms imposed by Appellant. This, too, is admitted by Appellant. (R. p. 194, lines 21-25) Finally, it must be remembered that Appellant is a self-described large corporation with operations in twenty-seven states. (R. p. 115-116; p. 169, lines 5-10) It cannot reasonably be disputed that ordinary consumers like Respondents are not on equal footing with a corporation the size of Appellant in terms of bargaining power. Thus, the circuit court properly recognized the disparity in bargaining power that permeated the transaction.

Contrary to Appellant's contention that the Purchase Agreement was negotiated between the parties, the record readily reveals a different story. As mentioned above, the Purchase Agreement is a pre-printed form with blanks in certain areas simply to fill in basic factual information. Even as to such matters as interior finish selections, Respondents, like all other buyers, had little power. For example, under the Purchase Agreement the buyer must accept the home "as-is" (including finishes and options) if construction has already started. (R. p. 110) Under Paragraph 19, Respondents had just 14 days from the date the Purchase Agreement was signed to choose all color sections, otherwise Appellant could cancel the entire transaction and retain all of Respondent's earnest money. Once a selection was made,

Respondents had no power to change their mind as to such simple matters as paint colors for their own home. In stark contrast, Paragraph 19 gave *Appellant* the right to make substitutions in the home in its sole opinion should it desire to do so. It is clear Appellant leveraged its bargaining power and controlled all aspects of the transaction. In other words, there was no meaningful choice in agreeing to arbitrate. A limited choice as to paint and tile colors does not constitute meaningful negotiation of the parties' legal relationship.

(c) *The Arbitration Language is Inconspicuous in Light of the Resulting Consequences under the Purchase Agreement.*

While it is understood that parties are always free to contract away certain rights, the conspicuousness of an arbitration provision is a factor in the analysis of a lack of meaningful choice. *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670. Here, the arbitration provision was inconspicuous in nature and drafted by the superior party, as found by the circuit court. Appellant challenges the circuit court's perceived lack of reasoning, but one need only refer to the Purchase Agreement for proof that the arbitration language was not conspicuous. The first word of the title of the Paragraph 14, in which the arbitration clause is contained, is "Warranties," and the first several provisions that follow are all related to warranties. Without a close reading to decipher the interrelation of these first provisions with those that follow, there is nothing to alert Respondents to the fact that an arbitration clause is at hand.

Paragraph 14 continues on the following page with a lengthy discussion of various exclusions related to trees, landscaping, punch lists, inspection agreements, and the like. All of these ultimately play a role in the arbitration provision at hand, but that is not apparent at first blush. Paragraph 14 carries over to yet another page of the Purchase Agreement with a discussion of additional warranty information as well as Appellant's purported "Limitation of

Liability” clause. Inserted among these various lengthy boilerplate provisions are the sentences relied upon by Appellant for its assertion that there was a negotiated agreement to arbitrate. The language is in the same size and style font used in all of the surrounding provisions of Paragraph 14, except the Limitation of Liability language, which is set out in capitalized letters. Appellant demonstrated the ability and knowhow to use such conspicuous drafting techniques, yet inexplicably chose not to apply them in connection with the arbitration language within the same Paragraph. In fact, Paragraph 14, which spans three pages, is easily the single longest section of related terms in the entire Purchase Agreement. That it contains the arbitration provision in standard font is telling of its inconspicuous nature.

In finding an arbitration clause unenforceable, the *Simpson* Court relied upon similar facts, such as the fact that certain phrases within other provisions of the additional terms and conditions were printed in all capital letters, but the arbitration clause was written in the standard small print and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. *Simpson*, 373 S.C. at 27-27; 644 S.E.2d at 670. “Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law.” *Id.*

2. The Dispute Resolution Terms Set Forth in Paragraph 14 of the Purchase Agreement Are Oppressive and One-Sided.

Presumably, there is no debate that the forfeiture of a right to a trial by jury is a substantial right that is lost to Respondents’ if Appellant’s Dispute Resolution provision is upheld. When it is considered that through Paragraph 14 Appellant also seeks to avoid various implied warranties, including the implied warranty of habitability, and to be relieved of any

monetary damages of any kind, it is apparent that Paragraph 14 is designed to strip away the remedies Respondents ordinarily would have in connection with the single largest investment most consumers will ever make. *Compare id.* at 27, 644 S.E.2d at 670 (noting that the stricken arbitration provision not only resulted in a loss of a right to a jury trial, but also required the plaintiff's to forego certain remedies provided by statute).

Respondents also allege that Appellant engaged in unfair and deceptive trade practices in violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), which provides for statutory treble damages. *See* S.C. Code Ann. § 39-5-10 *et seq.* If it is shown that Appellant is guilty of such violations, the effect of Paragraph 14 is to deny Respondents the award to which they are statutorily allowed in a court of law because all monetary damages are removed for Appellant. Appellant's Dispute Resolution provisions plainly violate the public policy behind the remedies available under SCUTPA, and Courts must not enforce an adhesion contract that has the effect of denying the weaker party remedies to which it is statutorily entitled. *Simpson*, at 30, 644 S.E.2d at 671.

Appellant belatedly argues that the arbitrator could simply decide that this provision is unconscionable and sever just that portion of the Dispute Resolution clause from the Purchase Agreement. (R. p. 203, lines 12-15) This argument was never made to the circuit court prior to Appellant's Motion for Reconsideration. *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482 (noting a party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not). In addition, Appellant's argument misses the point—there is no agreement to arbitrate when the relevant provisions are unconscionable to begin with. That is precisely the "gateway" analysis that the US Supreme Court said must be done by the courts. *Green Tree*, 123 S. Ct. at 2407. And *Simpson* advises that where the entirety of the relevant

provisions are laced with unconscionable terms, it is not appropriate for the Court to attempt to re-write the agreement by severing away multiple unenforceable terms. *Simpson*, 373 S.C. at 33-35, 644 S.E.2d at 673-74.

Considering the attempts to disclaim remedies otherwise available at law along with a complete bar against recovery of any monetary damages, including those allowed under SCUTPA in the interest of public policy, it is evident that unconscionable, one-sided provisions pervade Paragraph 14. The circuit court quickly understood that this point was made by Respondents. (R. p. 175, line 24 – p. 176, line 8) When these unconscionable provisions are read in light of the remaining, intertwined provisions of the Dispute Resolution Paragraph, *including the arbitration provisions*, the “considerable skepticism” that should blanket this adhesion contract and the subparagraphs in question takes effect and demands that the arbitration provision must fail. Just as in *Simpson*, the cumulative effect of the unconscionable and one-side provisions of Appellant’s Dispute Resolution section cannot be severed, requiring that the circuit court be affirmed.

Although less significant than the concerns addressed above, it bears mentioning that there also exists a disparity in remedies under the Dispute Resolution provisions of Paragraph 14. Prior to the closing (the point at which Appellant is paid for the home and title is transferred), Paragraph 14 provides that if there is an unresolved dispute between the parties Appellant can, in its sole discretion, simply terminate the Purchase Agreement. Respondents have no such right under the Purchase Agreement and, if Appellant chooses to terminate, Respondents presumably would not even be able to compel arbitration of a pre-closing matter in dispute in an effort to protect their interest in owning the home they selected. This is simply another oppressive, unconscionable provision within Paragraph 14, all of which is plainly

evident within the four corners of the Purchase Agreement. Considering the cumulative effect of the problems described herein, Appellants' disparate remedies render the provision one-sided and oppressive. *Simpson*, 373 S.C. at 28-33, 644 S.E.2d at 670-673. (R. p. 174, line 9 – p. 176, line 8)

III. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE ARBITRATION PROVISION FAILS TO SATISFY THE REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, AND THE FEDERAL ARBITRATION ACT DOES NOT APPLY.

The Purchase Agreement in question provides, "THIS CONTRACT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT." When drafting the Purchase Agreement, Appellant chose for the provisions of the South Carolina Uniform Arbitration Act (the "UAA") to apply. In its Statement of the Case, however, Appellant argues, "D.R. Horton's motion to compel was based on the Federal Arbitration Act ("FAA"), 9 U.S.C. 1-307 and the SCUAA." The Purchase Agreement violates the UAA, and there is no reference to the FAA therein.

A. The Arbitration Provision Violates the UAA.

The UAA provides in part that, "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 Ann. § 15-48-10(a) (emphasis added). The South Carolina Supreme Court has consistently held that these requirements must be strictly followed. See *Zabinski*, 346 S.C. at 588-90, 553 S.E.2d at 114-15; *Soil Remediation Co. v. Nu-Way Envtl., Inc.* 323 S.C. 454, 476 S.E.2d 149 (1996). Failure to meet these mandatory requirements is fatal to the enforceability of the clause, as stated in Section 15-48-10(a).

The Purchase Agreement was carefully reviewed by the circuit court during the underlying proceedings. (R. p. 166, lines 15-22; p. 167, lines 6-24; p. 176, line 24 – p. 179, line 11) Reference is drawn to the page on which Appellant attempted to satisfy the requirements of Section 15-48-10(a) by inclusion of the notice of arbitration pursuant to the UAA. In the bottom left-hand corner of the page is plainly written “Page 4.” (R. p. 104) The following pages of the Purchase Agreement are numbered five through thirteen, sequentially, inferring this was not a scrivener’s error. Appellant did not provide the circuit court with any evidence of the terms or contents set forth on pages one, two and three of these papers.

Giving plain meaning to Appellant’s own contract pagination, Appellant’s attempt to satisfy the requirements of the UAA must fail, because the notice falls on the fourth page, not the first page. While Appellant may point to the contract terms on page four and invite this court to believe that the “agreement” began at that point, there is nothing in the record to establish the content of the first three pages of the materials. Without such information, this Court cannot evaluate any such argument, because only pages four through thirteen of the Purchase Agreement were entered into the record. *See State v. 192 Coin Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) (Appellant has the burden of providing the Court with an adequate record upon which it can make a decision). Nevertheless, nothing in Section 15-48-10(a) suggests that the legislature intended that “first page” should mean anything other than what it is says. The fact that Appellant’s notice clearly falls on page “four” of whatever materials were offered to Respondents establishes the nonconformity of the notice to the rule.

In addition, the notice is not “typed,” or rubber stamped, which Appellant concedes. Contrary to Appellant’s suggestion, this, too, is forbidden by the UAA, and the Court’s

comments in *Zabinski* are not dictum. The analysis starts with *Soil Remediation*, where the notice in question was written in all capital letters, but neither typed, rubber stamped, nor underlined. *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 476 S.E.2d 149 (1996). A divided Court of Appeals upheld the notice, reasoning that substance should apply over form in order to avoid absurd results. On further review, the Supreme Court overturned this analysis. *Id.* at 457, 476 S.E.2d at 150-51. Specifically, the Supreme Court pointed out in its decision that the notice was laser-printed. The Court went on to hold that, "The terms of the statute are clear; therefore, the court must apply those terms according to their literal meaning." *Id.* The Supreme Court also agreed with Chief Judge Howell's dissent to the extent that if a literal interpretation of the statute led to a result not intended by the contracting parties, "**it is a matter for the legislature to act upon.**" *Id.* (emphasis added). That is as true today as it was in 1996 when *Soil Remediation* was decided.

When *Zabinski* was decided, the Supreme Court revisited its analysis in *Soil Remediation*. In its decision, the Supreme Court removed any question about whether the fact that the notice in *Soil Remediation* was laser-printed had an impact on the analysis. The Justices stated:

The notice provision in the *Soil Remediation* contract did not meet the statutory requirement **because it was laser-printed** and written in all capital letters on the first page of the contract. **The notice provision must be typed** in underlined capital letters, or **rubber-stamped prominently**, on the first page of the contract. **No other variation is acceptable.**

Zabinski, 346 S.C. at 588-89, 553 S.E.2d at 114 (emphasis added). This is not dictum. If in today's society such requirements are not business-minded or practical, it is for the legislature to address, not the courts. See *Vaughan v. McLeod Regional Medical Center*, 372 S.C. 505,

510, 642 S.E.2d 744, 747 (2007) (“[W]here the language [of a statute] is clear and explicit, the courts cannot rewrite the statute and inject matters into the statute which are not in the legislature’s language.”). The failure of the notice provision to meet the statutory requirements of the UAA serves as an independent and additional basis to affirm⁷ the circuit court’s Order.

B. The FAA Does Not Apply.

There is no mention of the FAA in the Purchase Agreement. To the contrary, Appellant made the conscious, express decision to rely upon the applicability of the UAA, as stated in its flawed notice provision. By selecting the applicability of the UAA without reference to the FAA, it is assumed that Appellant intended to exclude the applicability of the FAA. *See 16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 2012 S.C. LEXIS 73 (Supreme Court Op. No. 27107) (the Canon of construction “*expressio unius est exclusion alterius*” or “*inclusio unius est exclusion alterius*” holds that to express or include one thing implies the exclusion of another). “General contact principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citing *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364).

Regardless, the FAA applies only to valid arbitration agreements. “[T]he FAA does not require parties to arbitrate when they have not agreed to do so” *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116. “[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” *Id.* (citations omitted). Here, the circuit court made the gateway determination that no privately negotiated, enforceable agreement existed because the applicable provisions of the Purchase Agreement

⁷ *See Hossenlopp v. Cannon*, 285 S.C. 367, 329 S.E.2d 438 (1985) (noting this Court may affirm upon any ground appearing in the record).

were unconscionable and unenforceable. In the absence of a valid agreement to arbitrate, the FAA has no application to this case whatsoever.

IV. AS AN ADDITIONAL SUSTAINING GROUND, THE CIRCUIT COURT PROPERLY DETERMINED THAT THE ARBITRATION CLAUSE WAS EXTINGUISHED BY THE DOCTRINE OF MERGER BY DEED.

As an independent and additional ground upon which to deny Appellant's Motion to Compel, the circuit court determined that the Doctrine of Merger barred the enforcement of the arbitration clause. It is undisputed that the Deed given by Appellant to Respondents at the closing did not contain an arbitration provision. Citing to *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984), the circuit court determined that the Deed extinguished the arbitration agreement because it contained terms that varied from the Purchase Agreement. Appellant points to several authorities suggesting that, in this instance, the Deed should not extinguish the arbitration provision. However, these authorities are misplaced and Appellant's logic falls short.

Appellant set out examples in its Purchase Agreement of when it intended matters to survive the closing. For example, in Paragraph 8, Appellant wrote, "Seller's obligation to complete any 'punch list' items, which it has agreed to complete, **shall survive closing.**" (R. p. 106) (Emphasis added.) The same is true of repairs relating to the wood infestation report under Paragraph 12 of the Purchase Agreement, which provides that Appellant may "complete such repairs **following closing.**"⁸ (R. p. 107) Unlike these matters, Appellant did

⁸ It is obvious reading these several provisions together that Appellant did not want to delay the closing for reasons relating to any obligations it had not yet completed. Thus, it specifically and expressly contracted that these matters would survive the closing.

not expressly provide that the arbitration provision would survive closing. Having demonstrated its intent in one instance, the later exclusion of similar language is telling.

Appellant argues that unperformed provisions of the underlying Purchase Agreement were not merged into the Deed. But, Appellant's focus on this general proposition ignores the explicit and implicit intent that is to be gleaned from the Purchase Agreement itself, including from within Paragraph 14.

As mentioned above, "punch list" items (if agreed to Appellant) survived the closing. In contrast, a review of the various parts of Paragraph 14 reveals that the closing was the end date of Appellant's obligations in many regards. (R. p. 108, ¶ 14(d), (e), (f)) (noting no guarantees after closing unless specifically agreed to prior to closing; Appellant is not responsible for various problems after closing, etc.). More particularly, the "RWC Warranty" as it is described in Paragraph 14 was a separate document to be given to Respondents at the closing. "At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from [RWC]" (R. p. 107, ¶ 14(a)). Plainly, this was a document to be executed and delivered separate and apart from the Purchase Agreement and even the Deed. We know this because Paragraph 14 later provides that "Purchaser acknowledges and understands⁹ that the RWC Warranty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration." Plainly this was a stand-alone agreement to be delivered at closing.

Also interesting is the fact that Paragraph 14 expressly provides that "Purchaser shall execute an acknowledgement that Seller makes no warranties express or implied, as to fitness

⁹ It is curious how Respondents could have "understood" anything about the purported RWC Warranty and its alleged arbitration agreement considering the document was not to be delivered until the closing that occurred months after the Purchase Agreement was signed.

for particular purpose, merchantability, and **habitability** as set forth in the above at Closing, which statement shall be affixed to Purchaser's deed." (R. p. 107, ¶ 14(c)). Thus, despite the Limitation of Liability language in the Purchase Agreement, Appellant expressly provided in the Purchase Agreement that Respondents would execute a separate statement that was to be attached to the Deed. Again, Appellants have demonstrated their procedure for ensuring such provisions survive the Deed—either it attaches a statement to the Deed or delivers a separate document at closing. A pattern is quickly revealed.

At the closing, Respondents were to receive a separate warranty agreement containing whatever that document might say about arbitration. That document is not in the record before the Court, but ostensibly would stand alone as new and independent agreement, if enforceable. *192 Coin Operated Video Game Machines*, 338 S.C. at 195, 525 S.E.2d at 882 (Appellant has the burden of providing the Court with an adequate record). Further, Appellant apparently intended to have a separate statement regarding the waiver of various implied warranties.¹⁰ Although Appellant sought to introduce the Deed for the first time as part of its Rule 59(e) Motion for Reconsideration, the aforementioned statement is not included in the Court's record, if it exists. What is important from this exercise is that Appellant demonstrated its practice for ensuring that "unperformed" matters survive the closing, and it did so by and through the delivery of separate written instruments or purported attachments to the Deed itself. The record contains no evidence whatsoever that Appellant included the arbitration

¹⁰ If the statement was to include a waiver of the implied warranty of habitability, as Paragraph 14(c) suggests, and was going to be given by Respondents at closing (i.e., the last step in the deal), it is hard to imagine how it would have been specifically bargained for at that point. See *Kirkman v. Parax, Inc.*, 369 S.C. 477, 632 S.E.2d 477 (2006) (disclaimer or warranty of habitability must be specifically bargained for, among other strict requirements) (R. p. 174, line 12 – p. 175, line 7)

provision from the Purchase Agreement in the Deed, as an attachment thereto, or in any other instrument delivered at the closing, despite the fact that it was their practice to do so. When viewed in this manner, Appellant's argument that the arbitration provision is simply an unperformed obligation that survived the closing loses steam and must be rejected.

It appears that no South Carolina appellate court has specifically addressed the applicability of the Doctrine of Merger to an arbitration provision in an antecedent contract. Even if such precedent existed, the validity and enforceability of an arbitration provision must be determined on a case by case basis. *Simpson*, 373 S.C. at 36, 644 S.E.3d at 674. Considering the instant facts, there is more than enough evidence in the record to affirm the circuit court's decision to deny arbitration. Even if this Court determines that the Doctrine of Merger should not apply here, that does not affect the ultimate result in this case as discussed elsewhere herein. *Moorhead v. First Piedmont Bank and Trust*, 273 S.C. 356, 256 S.E.2d 414 (1979) ("No principle in the disposition of appeals is more firmly established than that a right decision upon a wrong ground will be affirmed.").¹¹

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the ruling of the circuit court and remand this action for further proceedings and, ultimately, a trial by jury in the circuit court.

Signature of Counsel to Follow

¹¹ This same principle would apply to Appellant's criticism of the circuit court for finding that it is a resident of South Carolina. Even if this is not the case, the result must be affirmed for the several other reasons set forth herein.

Respectfully submitted,

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September 17, 2012
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc. is the, ... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS IN REPLY

The Statement of the Facts provided by Respondents Gregory W. Smith and Stephanie Smith (hereinafter "the Smiths") is flawed to the extent they suggest this appeal involves a limited number of "salient facts" and in their characterization as "facts" allegations concerning their home.

First, the Smiths suggest that "the salient facts are limited" because "discovery has not occurred." (Resp'ts' Br. 2). However, the salient facts are more than sufficient to show that the parties that entered into a Purchase Agreement with a valid, conspicuous arbitration provision that the circuit court erred in not enforcing. To the extent any "salient facts" are missing, this is because the Smiths failed to provide any evidence by way of affidavits or otherwise to support their claims. In that regard, there is no evidence in the record that the Smiths sought to undertake any discovery during the pendency of this case prior to appeal.

The Smiths had every right and opportunity to present evidence by affidavit or otherwise to support their claims, and the circuit court's conclusion, concerning the enforceability of the parties' arbitration agreement. The Smiths failed to do so and, accordingly, we are left with the Purchase Agreement itself, which is sufficient.

Finally, the Smiths' characterize as "facts" their allegations concerning "numerous problems in the home." (Resp'ts' Br. 2). To the contrary, these are

merely unproven allegations without evidentiary support in the record in this appeal or elsewhere.

ARGUMENT IN REPLY

Without restating the issues and arguments set forth in its opening brief, Appellant D.R. Horton, Inc. (hereinafter "D.R. Horton") offers the following points of clarification and rebuttal to the arguments raised by the Smiths:

A. The FAA applies, even if the SCUAA does not.

The Smiths argue the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, is not mentioned in the Purchase Agreement and was excluded by the Purchase Agreement's notice provision's reference to the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. §§ 15-48-10 (2005), *et seq.* (Resp'ts' Br. 21-22). These arguments fail for a number of reasons, perhaps the most important of which is the South Carolina Supreme Court's recent decision in *Bradley v. Brentwood Homes, Inc.*, 2012 WL 2847616 (S.C. July 11, 2012).

1. *Bradley v. Brentwood Homes* requires application of the FAA.

In its Motion to Compel Arbitration, D.R. Horton argued that the circuit court should compel arbitration pursuant to the FAA or, alternatively, the SCUAA. (R. 87-88). D.R. Horton's position is consistent with the South Carolina Supreme Court's *Bradley* decision. As in this case, a home purchaser initiated a lawsuit due to alleged construction defects. *Bradley*, 2012 WL 2847616 at *1. Unlike this case, the homebuilder conceded the Purchase

Agreement did not meet the technical requirements of S.C. Code Ann. §15-48-10 (2005). *Id.* at *2. Nevertheless, our Supreme Court noted “[t]his concession, however, is not dispositive.” *Id.*

Our Supreme Court went on to state that the “FAA is intended to ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Id.* See also *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (“[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straight forward: The conflicting rule is displaced by the FAA.”) (citing *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)); *Volt Info v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989) (“[T]he federal policy [of the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate”). As such, “the FAA would preempt an application of our state law to the extent it invalidated the arbitration agreement, if interstate commerce is involved.” *Bradley*, 2012 WL 2847616 at *3. See also *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 n.2, 542 S.E.2d 360, 363 n.2 (2001).

Accordingly, because the application of South Carolina state law would have invalidated the agreement, the only question concerning arbitrability that remained in *Bradley* was whether or not interstate commerce existed. On this issue, the current case is distinguishable. The South Carolina Su-

preme Court in *Bradley* held that interstate commerce was not involved because the Purchase Agreement was merely for the purchase of a completed dwelling rather than a contract for construction. *Bradley*, 2012 WL 2847616 at **5–6. Even so, the South Carolina Supreme Court emphasized 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.” *Id.* at *6 n.8.

In this case, the Smiths themselves have defined the scope of the dispute to include the construction of the residence. Their breach of contract claim specifically states that “at all times herein, [the Smiths] entered into a contract with [D.R. Horton] for the . . . construction, and purchase” of their residence. (R. 53, ¶ 25) (emphasis added). The Smiths further allege that D.R. Horton breached the contract “by failing to . . . construct . . . said residence in accordance with the terms and conditions of the contract.” (R. 53–54, ¶ 27).

Not only do the Smiths’ allegations confirm that the Purchase Agreement was a contract for construction, the Purchase Agreement also makes this clear. Section 7 regarding “Condition of the Property,” states that “[t]he property shall be completed in accordance with all applicable governmental regulations, ordinances, and codes.” (R. 149, ¶ 7) [hereinafter, “Purchase Agreement”] (emphasis added). Section 8 contemplates inspections at “appropriate stage[s] of construction.” (R. 149, ¶ 8). Section 14 notes that D.R. Hor-

ton “will make every effort to save as many existing trees as possible during the construction process.” (R. 151, ¶ 14(e)). Further, the Smiths initialed several sections in the Purchase Agreement related to the type of house to be constructed and options related thereto, including color selection, “substitutions” of “construction materials used in the construction of the home, and the use of various contractors and manufacturers during the construction process. (R. 153–54, ¶¶ 17, 18, 19(b), 19(c), 19(e), & 19(f)). The Purchase Agreement specifically contemplates completion of construction by the closing date and delays in construction. (R. 154, ¶¶ 22 & 25).

Given the Smiths’ allegations concerning construction and the language of the Purchase Agreement itself, it is clear that this Purchase Agreement “actually encompassed the construction of the residence.” *Bradley*, 2012 WL 2847616 at *6 n.8. As such, if the SCUAA is insufficient to compel arbitration itself, which D.R. Horton further denies, *Bradley* requires the application of the FAA in compelling arbitration.

2. The Smiths’ argument that the Purchase Agreement does not specifically reference the FAA fails.

The Smiths suggest that failure to mention the FAA in the Purchase Agreement is fatal. (Resp’ts’ Br. 21). Based on the South Carolina Supreme Court’s decision in *Bradley*, this is not the case. In that case, the parties’ agreement only referenced the South Carolina or North Carolina Uniform Arbitration Act, but did not reference the FAA. *Bradley*, 2012 WL 2847616 at *1 n.4. Regardless, had interstate commerce been present, it is clear that the

Supreme Court would have required arbitration under the FAA, despite the fact that it was never mentioned. *Id.* at **2–4. Accordingly, the Smiths’ argument concerning the canon of construction “*expressio unius est exclusio alterius*” is meaningless.

This argument also fails because the case upon which the Smiths rely, *16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 2012 S.C. LEXIS 73 (S.C. Apr. 4, 2012), merely cites this canon in the context of construction of a legislative statute. That case did not involve the construction of a contractual agreement, or more specifically an arbitration provision, as in this instance.

Lastly, the Smiths have argued that D.R. Horton cannot raise case law in support of its position that was not raised prior to its Motion for Reconsideration. (Resp’ts’ Br. 4). As argued in the section below, the cases cited by the Smiths do not yield this result. However, to the extent they do, the Smiths argument based upon *16 Jade Street* and the previously referenced canon of construction, that D.R. Horton’s failure to specifically refer to the FAA in the Purchase Agreement is fatal, is similarly untimely. The Smiths have not raised this issue previously at the circuit court level, in response to D.R. Horton’s Motion to Compel Arbitration or D.R. Horton’s Motion for Reconsideration.

B. D.R. Horton’s *Prima Paint* argument was timely and necessary.

D.R. Horton previously argued that it was unclear whether the circuit court found unconscionability in the arbitration provision itself, or elsewhere in the Purchase Agreement. (Appellant’s Br. 11). Whether the flaw is found in

the arbitration provision itself, or elsewhere in the Purchase Agreement, is a key point per *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Although the Smiths argue they challenged the arbitration provision itself (Resp'ts' Br. 5), the basis for the circuit court's Order denying the Motion to Compel Arbitration is less certain. If it were clearly based solely on the arbitration provision itself, the Smiths would be correct that a *Prima Paint* analysis would be unnecessary. Because it was not clear to D.R. Horton at the time the circuit court's Order denying the Motion to Compel Arbitration, D.R. Horton's *Prima Paint* argument was timely and necessary in the Motion for Reconsideration.

1. The *Prima Paint* argument was timely.

The Smiths argue that D.R. Horton's *Prima Paint* argument was untimely because it was not argued prior to the Motion for Reconsideration below. (Resp'ts' Br. 4). While factually accurate, this misses the point. The issue did not arise until the circuit court issued its Order denying the Motion to Compel Arbitration, which identified several allegedly "unenforceable and unconscionable" provisions other than the arbitration provision in Paragraph 14(g) of the Purchase Agreement. (R. 2-3).

Also, the cases cited by the Smiths stating that a party cannot use a motion to reconsider to present an issue the party should have raised previously are inapplicable in this case. For instance, in *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994),

the hospital sought to recover for services provided to the defendant's deceased wife. The hospital raised additional grounds for recovery in its motion to reconsider, after judgment. *Id.* Accordingly, the hospital was essentially seeking to add an entirely new cause of action, which is simply not the case here.

Similarly, in *McMillan v. South Carolina Dept. of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005), *rev'd on other grounds by* 380 S.C. 212, 670 S.E.2d 368 (2008), the defendant raised the issue of exhaustion of administrative remedies, after a special referee's initial findings, in its Rule 52(b) motion to amend. Unlike this case, the defendant was attempting to raise an affirmative defense that it had not previously raised. Similarly, in *Hickman v. Hickman*, 301 S.C. 455, 457, 392 S.E.2d 481, 482 (Ct. App. 1990), the wife sought to have the family court apportion the husband's civil service retirement fund after the family court order equitably dividing the marital property by way of Rule 59(e).

Unlike this situation, those cases each involved a party seeking relief on grounds that existed from the onset. Here, the grounds for a *Prima Paint* argument did not exist until the circuit court's Order denying the Motion to Compel Arbitration was issued, at which time the issue was raised in the Motion for Reconsideration.

2. The *Prima Paint* argument was necessary.

Whether the circuit court found fault with “the Contract” as a whole, with the unrelated limitations of liability sections¹ (see, e.g., R. 150–152, ¶ 14(c)–(f) & 14(i)), or “the relevant arbitration provisions” exclusively, was unclear when the circuit court issued its Order denying the Motion to Compel Arbitration. (R. 3–4). Thus, *Prima Paint* was raised in D.R. Horton’s Motion for Reconsideration. (See R. 157–160).

The necessity of this argument became ever more apparent given the Order denying the Motion for Reconsideration contained similarly inconsistent language stating the arbitration provision was “unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions.” (R. 5–6). The circuit court did not clarify what these “oppressive and one-sided provisions” were, although the original Order denying the Motion to Compel Arbitration and the Order denying the Motion for Reconsideration each refer to “an entire host of attempted waivers of important legal remedies” contained in the Paragraph 14 generally. (R. 1–2, 5–6).

¹ The Smiths argue at length that these separate provisions in Paragraph 14 unrelated to the parties’ arbitration agreement must be interpreted together rather than standing alone. (Resp’ts’ Br. 5–8). However, the legal authorities cited for their position involve the determination of the parties’ intention in the face of ambiguity. See *Buice v. WMA Sec., Inc.*, 380 S.C. 149, 156–57, 668 S.E.2d 430, 434 (Ct. App. 2008); *Skull Creek Club Ltd. P’ship, v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). Here, the parties’ intent is clear and these cases are inapplicable.

C. The Purchase Agreement is not an “adhesion contract.”

In support of their claim that the Purchase Agreement is unconscionable, the Smiths argue it is an adhesion contract. (Resp’ts’ Br. 11–13). The Smiths appropriately define an adhesion contract as one offered on a “take-it-or-leave-it” basis with terms that are not negotiable. However, the Smiths have identified no evidence in the record, other than the Purchase Agreement itself, to support this claim.

As to the Purchase Agreement, the Smiths have noted it provides space for hand-written “Special Stipulations,” in addition to “boxes to check or blanks for Respondents’ initials.” (Resp’ts’ Br. 11–12). Although the Smiths argue the “Special Stipulations” section remained blank, there is no evidence in the record as to why it remained blank, or whether the Smiths could have, or even wanted to, include such stipulations.

Perhaps more significantly, the Smiths overlook the fact that the purchase price indicated in Paragraph 2, which was originally typed into the document, was stricken through and a different purchase price was hand-written into the document. (R. 147, ¶ 2). Further, the principal amount of the home loan, the term for the home loan, the amount of earnest money, and the initiation fee and dues for the homeowners association were hand-written into the document. (R. 147–148, ¶¶ 2(b), & 3; R. 154, ¶ 20). The Smiths overlook these important hand-written additions when arguing the “boilerplate” nature of the agreement. (Resp’ts’ Br. 11–12). Had the Smiths truly been giv-

en the Purchase Agreement on a “take-it-or-leave-it” basis, they could have, and should have, provided testimony of this fact by affidavit or otherwise.

As it stands, the record consists only of the Purchase Agreement and the hand-written, key terms that plainly were negotiated therein. The Smiths submitted no affirmative evidence that the Purchase Agreement was presented on a “take it or leave it,” non-negotiable basis.

D. There is no evidence of disparity in bargaining power.

The Smiths argue there was a disparity in bargaining power between the parties to support their claim that they lacked “meaningful choice” pursuant to *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2006). In *Simpson*, unconscionability was analyzed from two perspectives: (1) absence of meaningful choice, and (2) oppressive, one-sided terms. (Resp’ts’ Br. 13–14). To support their claim of lack of meaningful choice, the Smiths have not presented any dispositive evidence in this regard. They merely argue that D.R. Horton is a “self-described large corporation,” which is irrelevant, and that the Purchase Agreement was “pre-printed” with blanks merely to “fill in basic factual information,” which is also incorrect. (Resp’ts’ Br. 13–14).

Interestingly, the Smiths have not previously argued D.R. Horton’s size as relevant to the parties’ relative bargaining power in this transaction. Accordingly, this argument is untimely and not preserved by the Smiths’ own claims that arguments cannot be raised that were not raised prior to the Motion for Reconsideration. (Resp’ts’ Br. 4). Unlike the timing of D.R. Horton’s

Prima Paint argument, which did not arise until the Order denying the Motion to Compel Arbitration, the Smiths' could have, and should have, raised this argument previously. Regardless, even if correct, relative size does not necessitate disparity in bargaining power.

The circuit court and the South Carolina Supreme Court based a finding of absence of meaningful choice supporting unconscionability in *Simpson* in part on affirmative evidence presented by the plaintiff. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. For instance, the plaintiff claimed she did not possess "the business judgment necessary to make her[self] aware of the implications of the arbitration agreement," she did not have a lawyer present to provide counsel, and the contract was "hastily" presented to her. *Id.* at 27, 644 S.E.2d at 670. The Smiths have provided no such affirmative evidence and could easily have provided an affidavit or other testimony on this regard.

The Smiths' argument that the Purchase Agreement was "pre-printed" with blanks merely to "fill in basic factual information," misstates the reality. As discussed above with respect to the Smiths' claim that the Purchase Agreement was a contract of adhesion (*see* pp. 13–14, *supra*), they overlook a number of things. The Smiths clearly negotiated the purchase price and the principal amount of the home loan, the term for the home loan, the amount of earnest money, and the initiation fee and dues for the homeowners association were hand-written into the document. (R. 147–48, ¶¶ 2, 2(b), & 3; R. 154, ¶ 20). While the Purchase Agreement was "pre-printed," like contracts gener-

ally in the modern era, there were important hand-written additions the Smiths overlook and they do not suggest disparity in bargaining power.

E. The arbitration agreement did not fail for lack of conspicuousness.

As stated previously, the FAA would apply pursuant to *Bradley v. Brentwood Homes*, even if the parties' agreement to arbitrate failed because the arbitration notice was "inconspicuous" pursuant to S.C. Code Ann. § 15-48-10(a) (2005). Accordingly, the Smiths' argument that placement of the arbitration provision in Paragraph 14 (Resp'ts' Br. 14) and the alleged failure of the arbitration notice to meet the conspicuous requirements of S.C. Code Ann. § 15-48-10(a) (2005) (Resp'ts' Br. 18-21) are irrelevant. Even so, they each fail on their own merit, particularly when the Smiths have never submitted any evidence by affidavit or otherwise that they were unaware of the arbitration provision.

1. The arbitration provision at Paragraph 14(g) is obvious.

The Smiths argue that the arbitration provision is inconspicuous given that it is contained in Paragraph 14 of the Purchase Agreement in a section of which the "first word of the title" is "Warranties." (Resp'ts' Br. 14). However, this is misleading. This section is actually entitled "WARRANTIES AND DISPUTE RESOLUTION." (R. 150, ¶ 14) (capitalization in original, underlining added). In addition, the actual arbitration agreement found at Paragraph 14(g), under which the Smiths both initialed, is entitled, "MANDATORY BINDING ARBITRATION." (R. 151, ¶ 14(g)) (capitalization in original).

Despite these signals, the Smiths claim that “there is nothing to alert Respondents to the fact that an arbitration clause is at hand.” (Resp’ts’ Br. 14). This is simply ludicrous, particularly when the beginning of the Purchase Agreement contains notice that it is subject to “MANDATORY BINDING ARBITRATION.” (R. 147).

2. The arbitration notice is “conspicuous” pursuant to S.C. Code Ann. § 15-48-10(a).

The Smiths also argue that the arbitration notice on the first page of the Purchase Agreement violates the requirements of S.C. Code Ann. § 15-48-10(a) (2005) because it is not typed or rubber stamped prominently, in capitalized and underlined letters, “on the first page” of the Purchase Agreement. (Resp’ts’ Br. 18–21). Again, although the Smiths generally argued lack of conspicuousness, and the circuit court found a general lack of conspicuousness, neither the Smiths nor the circuit court have ever articulated any specific grounds for this lack of conspicuousness. Regardless, both arguments fail and, even if they do not, the South Carolina Supreme Court’s *Bradley v. Brentwood Homes* decision would require arbitration as stated previously. (See pp. 5–8, *supra*).

a. A laser-printed arbitration notice satisfies S.C. Code Ann. § 15-48-10(a).

The arbitration notice on the first page of the Purchase Agreement appears to be laser-printed, but not typed on a typewriter or rubber-stamped, although the Smiths never specifically argued this point, nor is there any affirmative evidence in this regard. Even if true, this does not mean the arbi-

tration notice is inconspicuous pursuant to S.C. Code Ann. § 15-48-10(a) (2005). The Smiths appropriately refer to the Supreme Court decisions in *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996), and *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001), as the controlling cases. The Smiths have simply misinterpreted these cases.

D.R. Horton previously argued that these decisions did not turn upon whether the arbitration notice was “typed.” (Appellant’s Br. 8–9). Rather, *Zabinski* turned upon whether the notice appeared on the contract’s first page and *Soil Remediation Co.* turned upon what the fact that the notice was not underlined. See *Zabinski*, 346 S.C. at 588–90, 553 S.E.2d at 114–15; *Soil Remediation Co.*, 323 S.C. at 457, 476 S.E.2d at 151.

The Smiths appear to interpret *Soil Remediation Co.* as being decided on the issue of whether the agreement was laser-printed. (Resp’ts’ Br. 20). Based on the South Carolina Supreme Court’s analysis of the definition of “underlined” in *Soil Remediation Co.*, it merely overruled the Court of Appeals practical “form over substance” decision that “underlined” could also mean “to emphasize or cause to stand out,” in addition to meaning “to draw a line under.” *Soil Remediation Co.*, 323 S.C. at 456–57, 476 S.E.2d at 150. The *Soil Remediation Co.* decision did apply a “literal meaning” analysis, but not

as to whether laser-printing can meet the “typed” requirement of S.C. Code Ann. § 15-48-10(a).²

Neither *Soil Remediation Co., Zabinski*, nor any of the other cases cited by the Smiths, state that a laser-printed arbitration notice that otherwise meets the requirements of § 15-48-10(a) (i.e., it is on the first page, is underlined, and is in all capital letters) is not conspicuous. Such a finding would result in an absurd holding, namely that every contract with an arbitration provision that is not physically typed with a typewriter (which are uncommon) or physically rubber-stamped (which are also uncommon), are not conspicuous and, and therefore, are not arbitrable. It is all the more absurd in the context of legislative history. In 1978, when the South Carolina Legislature adopted the Uniform Arbitration Act, “typed or rubber-stamped” were the available options—not laser-printed documents. S. 464, 102nd Leg. (S.C. 1978).

b. The Smiths cannot argue the arbitration notice is not on the “first page.”

The Smiths argument that the arbitration notice is not on the “first page” also fails. The Smiths have never denied that the arbitration notice ap-

² Indeed, none of the cases analyzing the conspicuous of arbitration notices and contracts cited in the *Soil Remediation Co.* suggest that a laser-printed contract with a laser printed arbitration notice or by definition inconspicuous. *Soil Remediation*, 323 S.C. at 457–58, 476, S.E.2d at 150–51. See also *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 424, 434 S.E.2d 281, 282–83 (1993); *Timms v. Green*, 310 S.C. 469, 472, 427 S.E.2d 642, 643 (1993); *Circle S Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 429 n.1, 343 S.E.2d 45, 46 n.1 (Ct. App. 1986) (holding arbitration notice not conspicuous where not contained on first page).

pears on the first page, nor do the circuit court's Order Denying Motion to Compel or Order Denying Motion for Reconsideration suggest a finding to the contrary. The Smiths' argument is simply untimely.

Not only have the Smiths not previously denied that the arbitration notice is on the first page of the parties agreement, there is insufficient evidence to the contrary, despite the Smiths' argument that the exhibit before the circuit court had "Page 4" in the bottom corner of the Purchase Agreement. There is no testimony on the record on this issue upon which the Smiths can make this argument or upon which the circuit court could have made such a finding, which is presumably why no such argument or finding was made prior to this appeal.

F. The doctrine of merger by deed is inapplicable.

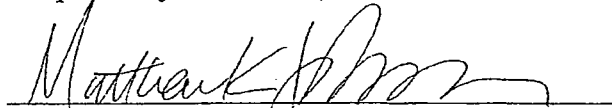
The Smiths appear to argue that because the Purchase Agreement specifically referenced certain matters to survive the closing, and therefore would not be distinguished by the merger by deed, the failure to specifically identify other items, such as the arbitration provision, means they would not survive the closing. (Resp'ts' Br. 22-23). In addition to those argument made in its Brief of Appellant (see Appellant's Br. 25-28), D.R. Horton would show that the Smiths have failed to identify the specific section of the Purchase Agreement concerning survival, which states that "[a]ny condition or stipulation not fulfilled at the time of Closing, shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled." (R. 152, ¶ 15) (emphasis added).

This section displays broad intent for conditions remaining unfulfilled at the time of closing to survive the closing. Because ownership of the residence would not attach until the closing, the arbitrability of construction defects related to the house must necessarily survive beyond the closing. Similarly, other aspects of the Purchase Agreement such as the Warranty of Title (R. 148–149, ¶ 4), conditions pertaining to existing trees (R. 151, ¶ 14(e)), conditions related to heating and air-conditioning (R. 154, ¶ 23), and conditions relating to insulation (R. 154, ¶ 26), would be “merged” into the deed under the Smiths’ theory. If this were the case, purchasers like the Smiths would lose significant rights, which result is unintended by the doctrine of merger by deed.

CONCLUSION

For the foregoing reasons, and for the reasons stated in D.R. Horton’s Brief of Appellant, the Court should reverse the circuit court’s denial of D.R. Horton’s Motion to Compel and/or the circuit court’s denial of D.R. Horton’s Motion for Reconsideration, and Respondents’ claims should be referred to binding arbitration under the FAA and/or the SCUAA consistent with the parties’ agreement.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew K. Johnson", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

Gregory W. Smith and Stephanie Smith, ... Respondents,

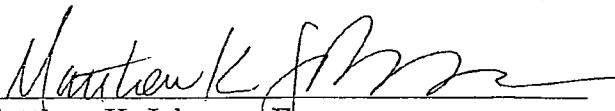
v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Appellant.

CERTIFICATE OF COUNSEL

I certify that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

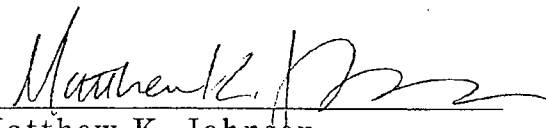
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Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant D.R. Horton, Inc., on Respondents Gregory W. Smith and Stephanie Smith by sending to their attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: Phillip W. Segui, Jr., Esq., Segui Law Firm, PC, 864 Lowcountry Blvd., Suite A, Mt. Pleasant, SC 29464; John T. Chakeris, Esq., 231 Calhoun Street, P.O. Box 397, Charleston, SC 29402; and Michael A. Timbes, Esq., Thurmond, Kirchner, Timbes & Yelverton, P.A., 15 Mid-Atlantic Wharf, Suite 101, Charleston, SC 29401.

September 14, 2012


Matthew K. Johnson
S.C. Bar No. 12284

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory W. Smith and Stephanie Smith, Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., and Myers Landscaping, Inc.,
Defendants,

Of whom D.R. Horton, Inc. is the Appellant.

Appellate Case No. 2011-204347

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5118
Heard February 14, 2013 – Filed April 17, 2013

AFFIRMED

Matthew Kinard Johnson and W. Kyle Dillard, both of
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Respondents.

SHORT, J.: D.R. Horton, Inc. (Horton) appeals the circuit court's order denying its motion to compel arbitration in this construction defects action filed by Gregory and Stephanie Smith. Horton argues the circuit court erred in finding the arbitration clause unenforceable: (1) under the South Carolina Uniform Arbitration Act (SCUAA); (2) as unconscionable; (3) under an unequal-bargaining-power theory; (4) under a lack-of-consideration theory; (5) under the Federal Arbitration Act (FAA); and (6) under a merger-by-deed theory. We affirm.

I. FACTS

The Smiths purchased a house built by Horton in Summerville, South Carolina. The arbitration clause was included in the purchase agreement in Section 14, entitled "Warranties and Dispute Resolution." Section 14(a) provided for a warranty from Residential Warranty Corporation (RWC), which purported to be the only warranty extended by Horton, except for such warranties as cannot be disclaimed by law. Section 14(b) provided that validation of the RWC warranty was conditioned on Horton's compliance with all RWC's enrollment procedures and upon Horton remaining in good standing in the RWC program. Section 14(c) purported to disclaim all other warranties, express or implied, as to quality, fitness for a particular purpose, merchantability, and habitability. Section 14(c) further provided all disputes under the RWC warranty were subject to binding arbitration. Sections 14(d)-(f) provided exclusions to the warranty for landscaping. Section 14(g) addressed arbitration and provided the following:

Mandatory Binding Arbitration: [The Smiths] and [Horton] each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of [Horton's] construction of the home; (2) [Horton's] performance under any Punch List or Inspection Agreement; (3) [Horton's] performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [the Smiths and Horton] agree to arbitrate.

Section 14(h) provided that if a dispute arose prior to the closing date, Horton had the right to terminate the agreement, return the earnest money, and "no cause of

action shall accrue on behalf of [the Smiths] because of such termination." Section 14(i), prefaced "Limitation of Liability," disclaimed warranties except for those specifically provided or imposed by law, including "as to merchantability or fitness for a particular purpose, either expressed or implied. . . . [Horton] shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." The final clause in the "Warranties and Dispute Resolution" section of the purchase agreement, section 14(j), provided the method of notice for requests of warranty service.

Alleging extensive defects in the home, the Smiths filed this action against Horton and numerous subcontractors, asserting claims for negligence, breach of contract, breach of warranties, and unfair trade practices. Horton moved to compel arbitration. After a hearing, the circuit court denied the motion, finding the following: (1) the arbitration provision was unconscionable; (2) the purchase agreement was merged into the deed, which did not contain an arbitration provision; and (3) the arbitration provision failed to meet the SCUAA. In an order denying Horton's motion for reconsideration, the court also found the parties were not of equal bargaining power, and there was no consideration given in exchange for the Smiths' sacrifice of certain rights. This appeal follows.

II. STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). However, the trial court's "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)). "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted). "In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Id.* at 394, 498 S.E.2d at 901 (citation omitted).

III. APPLICABLE LAW

A. Unconscionability

Horton argues the circuit court erred in denying the motion to compel arbitration based on unconscionability. We disagree.

"Arbitration is a matter of contract and controlled by contract law." *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citation omitted). "[A] party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (quoting S.C. Code Ann. § 15-48-10(a) (2005)). When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties. *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 610 (D.S.C. 1998), *aff'd and remanded*, 173 F.3d 933, 941 (4th Cir. 1999); *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

"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." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668 (citing *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 [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668. Our supreme court adopted the Fourth Circuit's view, and noted "[i]t is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

In *Simpson*, the plaintiff sued the defendant auto dealer for alleged violations of the South Carolina Unfair Trade Practices Act, among other causes of action. *Id.* at 21, 644 S.E.2d at 666. The plaintiff signed a contract that included an arbitration clause, and the auto dealer sought to stay the court proceeding and compel arbitration. *Id.* at 19-21, 644 S.E.2d at 666. Our supreme court upheld a denial of

the auto dealer's motion to compel arbitration finding, *inter alia*, a lack of mutuality of remedy because the defendant had the right to proceed in court while "completely disregard[ing] any pending consumer claims that require[d] arbitration." *Id.* at 31, 644 S.E.2d at 672. The court emphasized that lack of mutuality of remedy alone does not make an arbitration agreement unconscionable. *Id.* The court noted, "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. . . . Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

In this case, the circuit court viewed the Warranties and Dispute Resolution Section 14 as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies" The court found the attempts to disclaim implied warranty claims were oppressive and unconscionable. The court also found "perhaps even more stark are the provisions in the Limitations of Liability in subsection [14](i) . . . in addition to the attempted waiver of various important remedies" in which Horton claimed it could not be liable for monetary damages of any kind. The court concluded the relevant arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions."

Relying on the supreme court's analysis in *Simpson*, we affirm the trial court's finding of unconscionability, particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages.

B. Severability

Horton next argues the arbitration clause is not made unconscionable by the other allegedly unconscionable provisions in the agreement, and it should be severed from any unconscionable terms of the agreement. We disagree.

"[A]n 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." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). However, "a party cannot avoid arbitration

through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Great W. Coal (Kentucky), Inc.*, 312 S.C. at 562-63, 437 S.E.2d at 24. Our supreme court acknowledged that "in light of the state and federal policies favoring arbitration, 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." *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9. However, the court found invalidation of the arbitration clause in its entirety was the appropriate remedy because there were three unconscionable provisions, and two of the provisions were unconscionable because they contravened state and federal consumer protection law. *Id.* The court concluded, "The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision occurred not once, but *twice*, requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy." *Id.* The supreme court also stated the following:

[L]egislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C. Code Ann. § 36-2-302(1) (2003).

At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

Id. at 34, 644 S.E.2d at 673-74; *see also Hooters of Am., Inc.*, 173 F.3d at 940 (finding rescission to be the appropriate remedy where Hooters promulgated so many biased arbitration rules that the contract created "a sham system unworthy even of the name of arbitration").

We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for "monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." Because we affirm the finding of unconscionability and find the provision should not be severed, we need not reach the issue of whether the SCUAA or the FAA applies. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

IV. CONCLUSION

Because we affirm the circuit court's finding of unconscionability and find the arbitration clause should not be severed from the purchase agreement, we decline to address Horton's arguments regarding unequal bargaining power, lack of consideration, and merger-by-deed. *See id.* (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

AFFIRMED.

THOMAS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2011-204347

Opinion No. 5118

Heard February 14, 2013 -- Filed April 17, 2013

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Appellant.

PETITION FOR REHEARING

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CERTIFICATE OF COUNSEL

Counsel for Appellant D.R. Horton, Inc., certifies that the Opinion upon which this Petition for Rehearing is based was filed by the Court of Appeals on April 17, 2013, and that this Petition for Rehearing has been filed within 15 days pursuant to Rule 221(a), *SCACR*.

QUESTIONS PRESENTED

1. Whether the Court of Appeals failed to address the threshold issue of whether the Purchase Agreement was a contract of adhesion or whether the Smiths lacked meaningful choice?
2. Whether the arbitration provision itself was unconscionable?
3. Whether the Court of Appeals misapplied or ignored the *Prima Paint* doctrine?

STATEMENT OF THE CASE

Respondents, Gregory W. Smith and Stephanie Smith ("the Smiths") brought the underlying action alleging construction defect claims against Appellant D.R. Horton, Inc. ("D.R. Horton"), related to their residence. (R. 9, ¶ 9; R. 10, ¶ 11; R. 10-11, ¶ 14; R. 45, ¶¶ 11 & 13; R. 46-47, ¶ 16). D.R. Horton and the Smiths executed a Purchase Agreement for their residence. (R. 147-156).

The Purchase Agreement contained a Section 14 captioned, "Warranties and Dispute Resolution." (R. 150-152). Paragraphs 14(a)-(f) contained warranty information, including a Residential Warranty Corporation ("RWC") structural warranty that was provided at no additional cost to the Smiths. (R. 150-151). Paragraph 14(g), entitled "Mandatory Binding Arbitra-

tion,” was the arbitration provision. (R. 151–152). Pursuant to the arbitration provision: 1) the parties unambiguously agreed to arbitrate this dispute arising out of D.R. Horton’s construction of the Smith’s home;¹ 2) the arbitration would be conducted near the Smith’s home in Charleston, Dorchester, or Berkeley County, South Carolina; 3) the arbitration would be conducted by an arbitrator or arbitration panel agreed upon by the Smiths; 4) to the extent possible, the Smiths would be entitled to an expedited hearing; and 5) the arbitrator would be entitled to assess filing fees and any other costs of the arbitration to either party. (R. 151–152). Paragraph 14(h) was a termination provision that allowed D.R. Horton to terminate the Purchase Agreement prior to closing in the case of a bona fide dispute with the Smiths, subject to a 10-day good faith resolution period, written notice, and return of earnest money paid by the Smiths, thus making them whole. (R. 152). Paragraph 14(i) contained a limitation of warranties, subject to the RWC warranty and title warranty (§ 4), and imposition of an obligation on D.R. Horton to “repair or replace”² any defects as opposed to monetary damages. (R. 152; R. 148–149).

¹ This Mandatory Binding Arbitration provision applied to “any claim arising out of [D.R. Horton]’s construction of the home,” D.R. Horton’s “performance under any warranty contained in [the Purchase] Agreement or otherwise,” and “any other matters as to which [the Smiths] and [D.R. Horton] agree to arbitrate.” There has been no argument that the arbitration provision did not cover the allegations contained in the Smith’s underlying complaints. See Amended Complaint (R. 7–16) and Second Amended Complaint (R. 42–59).

² “Repair or replace” remedies have been approved and enforced under South Carolina law. See, e.g., *Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 168 n.4, 621 S.E.2d 38, 40 n.4 (2005); *Schulmeyer*

D.R. Horton moved the circuit court to compel arbitration. (R. 87–88).

The circuit court denied D.R. Horton's motion because:

- (1) the arbitration provision supposedly failed to meet the [South Carolina Uniform Arbitration Act];
- (2) the arbitration provision was allegedly unconscionable "based on the cumulative effect of a number of oppressive and one-sided provisions"; and
- (3) the arbitration provision was purportedly extinguished by the doctrine of merger by deed.

(R. 1–4) (emphasis added).³ All of these issues were raised on appeal, but the Court of Appeals addressed only the second. (App't's Br. 1).

D.R. Horton filed a Rule 59(e) Motion to Alter or Amend the Court's Order ("motion for reconsideration"). (R. 126–127). The circuit court denied D.R. Horton's motion for reconsideration because:

- (1) "the relevant arbitration provisions are wholly unconscionable based on the cumulative effect of a number of oppressive and one-sided provisions and that the form of the contract seems to be that of a contract of adhesion"; and
- (2) "the parties involved are not parties of equal bargaining power and there is no consideration given in exchange for the sacrifice of certain rights of [the Smiths] . . . and the provisions cannot be conscionably enforced against them."

v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *Div. of Gen. Servs. v. Ulmer*, 256 S.C. 523, 533, 183 S.E.2d 315, 319 (1971), *rev'd on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

³ D.R. Horton's argument that the arbitration provision was also enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–307, was not addressed by the circuit court or the Court of Appeals.

(R. 6)(emphasis added). Again, these issues were raised on appeal, but the Court of Appeals addressed only part of the first issue—whether there was a contract of adhesion issue or the second issue regarding equal bargaining power or consideration were not addressed. (App’t’s Br. 1; 9–11).

This appeal was perfected and oral argument was heard on February 14, 2013. The Court of Appeals subsequently affirmed the judgment of the circuit court. *Smith v. D.R. Horton, Inc., et al.*, Op. No. 5118 (S.C. Ct. App. filed April 17, 2013)(Shearouse Adv. Sh. No. 17 at 60). D.R. Horton seeks a rehearing of that decision. All documents referenced herein other than the Opinion at issue are contained in the previously filed Record on Appeal and are cited as such.

ARGUMENT

A central component of D.R. Horton’s argument, and the analysis of unconscionability itself, concerns whether or not the Purchase Agreement is a contract of adhesion. The Court of Appeals never addressed this fundamental issue. The circuit court merely concluded “that the form of the contract seems to be that of a contract of adhesion” but made no factual findings in that regard. (R. 4)(emphasis added).

The Court of Appeals relied upon *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), in finding unconscionability. *Simpson* plainly states that unconscionability involves the absence of meaningful choice and terms that are so oppressive that no reasonable person would

make them and no fair and honest person would accept them. See *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668–669; *Herron v. Century BMW*, 387 S.C. 525, 532, 693 S.E.2d 394, 398 (2010). Despite the fact that the Smiths did not produce any evidence to support the circuit court’s finding that the Purchase Agreement was an adhesion contract or that they otherwise lacked meaningful choice in agreeing to arbitrate—half of the unconscionability analysis—the Court of Appeals improperly affirmed a finding of unconscionability.

The Court of Appeals’ unconscionability analysis dealt exclusively with its finding that the “Limitation of Liability” language in ¶ 14(i) was “oppressive and unconscionable” and lacked “mutuality of remedy,” as well as its implied argument that the termination language in ¶ 14(h) was one-sided. *Smith v. D.R. Horton, Inc., et al.*, Op. No. 5118, pp. 62, 64 (S.C. Ct. App. filed April 17, 2013)(Shearouse Adv. Sh. No. 17 at 60). This ignores half of the unconscionability analysis as set forth in *Simpson*, whether the Smiths lacked meaningful choice in the agreement to arbitrate. Further, as stated further below, with respect to the remainder of the *Simpson* analysis, ¶ 14(h) and ¶ 14(i) are not so “oppressive” or “one-sided” that they render the agreement to arbitrate unconscionable.

In addition, by looking to ¶ 14(h) and ¶ 14(i) in finding unconscionability and failing to analyze unconscionability solely in terms of the arbitration provision in ¶ 14(g), the Court of Appeals misapplied or ignored the United States Supreme Court’s holding in *Prima Paint Corp. v. Flood & Conklin*

Mfg. Co., 388 U.S. 395 (1967) (“the *Prima Paint* doctrine”). See *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993)(“[A] party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. . . . The arbitration clause is separable from the contract.”).⁴ Similarly, the Court of Appeals’ decision appears to confuse the “separability” analysis required by *Prima Paint* with a “severability” argument,⁵ which was not raised by the parties.

1. **THE COURT OF APPEALS FAILED TO ADDRESS THE THRESHOLD ISSUE OF WHETHER THE PURCHASE AGREEMENT WAS A CONTRACT OF ADHESION OR WHETHER THE SMITHS LACKED MEANINGFUL CHOICE**

The Court of Appeals did not address the question as to whether the Purchase Agreement was a contract of adhesion, defined as a “take-it-or-leave-it” contract for which the Smith’s only options were “complete adherence or outright rejection.” See, *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 669; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901

⁴ See also *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008); *Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003).

⁵ “Severability” was raised in *Simpson*, 373 S.C. at 27–30, 644 S.E.2d at 673–674, but properly so. The “unconscionable” terms in *Simpson* were within the arbitration clause itself, unlike this case. Further, the parties raised the issue of severability because the defendant asked the trial court to rewrite the arbitration clause by severing the unconscionable language. Here, because the arbitration provision is separate and distinct from any arguably “unconscionable” terms, severability is unnecessary.

(Ct. App. 1998). The circuit court made no factual findings upon which the Court of Appeals could have made such a finding. The circuit court's only comment, in the order denying D.R. Horton's motion for reconsideration, was that the agreement "seems to be" an adhesion contract. (R. 6). The Smiths presented no evidence in this regard.

At most, the only evidence on this issue is the Purchase Agreement itself, which clearly contains evidence that it was not an adhesion contract. Indeed, the first page of the Purchase Agreement plainly shows that the purchase price was stricken through and written in by hand in a different amount. (R. 147, ¶ 2). Further, the principal amount of the home loan, the term for the home loan, the amount of earnest money, and the initiation fee and dues for the homeowners association were handwritten into the document. (R. 147-148, ¶¶ 2(b), & 3; R. 154, ¶ 20). Finally, the Smiths' own brief points out that the Purchase Agreement "provides space for handwritten 'Special Stipulations.'" (Resp'ts' Br. 11; R. 155). In the absence of any evidence to the contrary, the only legitimate inference that can be drawn from the omission of such "special stipulations" from the Purchase Agreement is that none were requested by the Smiths.

As argued below, a contract may not be avoided on unconscionability grounds unless the court has first considered whether it is one of adhesion. *See Lackey*, 330 S.C. at 395, 498 S.E.2d at 901-902. Specifically, the Court of Appeals has previously stated that whether a contract is an adhesion con-

tract is "the beginning point in the [unconscionability] analysis." *Lackey*, 330 S.C. at 395, 498 S.E.2d at 901-902. As a matter of fact, the Smiths have asserted "the first step in the process is to consider whether the Purchase Agreement in question is an adhesion contract, because that is the beginning point in the analysis of whether the contract is unconscionable." (Resp'ts' Br. 11, citing *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902).

In failing to analyze the adhesion contract question, the Court of Appeals has not addressed a significant component of the unconscionability analysis, which bears directly on the absence of meaningful choice. As noted in the Court of Appeals' decision, unconscionability involves the absence of meaningful choice and 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*, Op. No. 5118, p. 63. See *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668-669; *Herron*, 387 S.C. at 532, 693 S.E.2d at 398. While the Court of Appeals has alluded to portions of the Purchase Contract that it suggests lack "mutuality of remedy" and that were "oppressive and unconscionable, the absence of meaningful choice element remains unaddressed. *Smith v. D.R. Horton*, Op. No. 5118, p. 64. Absent such a finding, for which there is no evidence in the record (and which is contradicted by evidence that would show handwritten, negotiated terms in the Purchase Agreement), there can be no determination of unconscionability.

2. THE ARBITRATION PROVISION ITSELF WAS NOT UNCONSCIONABLE

Even assuming that there was evidence in the record supporting a finding that the Purchase Agreement was an adhesion contract, or that there was an absence of meaningful choice otherwise, the remainder of the unconscionability analysis must still be satisfied to deny D.R. Horton the right to arbitrate pursuant to the arbitration provision. The arbitration provision must contain one-sided 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 24-25, 644 S.E.2d at 668-669. Although the circuit court and the Court of Appeals found that the Purchase Agreement as a whole contained unconscionable terms, there has been no finding concerning the arbitration provision itself. As will be explained further below in the context of the *Prima Paint* doctrine, the asserted unconscionability of terms within the Purchase Agreement is irrelevant unless it relates to the arbitration provision itself, at ¶ 14(g). *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 14 (Ct. App. 2008), citing *Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003) ("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.") (emphasis added).

In this case, the provisions the circuit court said are “oppressive and one-sided” are not found in the arbitration provision, which is captioned “Mandatory Binding Arbitration.” (R. 1–4; R. 5–6; R. 151–152, ¶ 14(g)). Instead, the provisions the circuit court found objectionable were in the separate “Limitation of Liability” clause. (R. 1–4; R. 5–6; R. 152, ¶ 14(i)). The Court of Appeals did not identify any other “unconscionable” terms. At most, the Court of Appeals has suggested, without explanation, that the circuit court “viewed the Warranties and Dispute Resolution Section 14 as a whole,” without any factual finding to support this claim. *Smith v. D.R. Horton*, Op. No. 5118, p. 64.

Furthermore, no legal precedent has been cited by the circuit court or the Court of Appeals to support conflating the separate and distinct provisions within Section 14. As argued previously, the only relationship between the Mandatory Binding Arbitration provision and the Limitation of Liability clause is one of arrangement of the document. (App’t’s Br. 13–14).

Arrangement alone is insufficient to construe all of the various provisions in Section 14 together, particularly when they involve wholly unrelated issues. Assuming arrangement alone is the basis for the circuit court’s finding, or the Court of Appeals’ affirmation thereof, this interpretation produces an absurd result. For instance, it must be assumed that if Paragraphs 14(a)–(j) were instead either Paragraphs 14–24 or renumbered as Paragraphs 4–7, 12–13, 17, and 22–24 the result might be different, despite the fact that the

intent, content, and meaning of the arbitration clause would remain identical.

For example, the RWC Warranty discussed at ¶¶ 14 (a)–(d) is unrelated to the discussion of trees to be saved during construction at ¶ 14(e), the survival of landscaping components after closing in ¶ 14(f), or instructions on requesting warranty service in ¶ 14(j). Indeed, the Smiths separately acknowledged and initialed ¶¶ 14(a)–(c), ¶ 14(d), ¶ 14(e), ¶ 14(f), and ¶ 14(g). (R. 150–152). Nevertheless, the circuit court and the Court of Appeals unnecessarily and improperly combined all of the separate and distinct provisions of Section 14 rather than focusing on whether the arbitration provision in ¶ 14(g) itself was unconscionable.

Had the circuit court or the Court of Appeals engaged in an analysis of whether ¶ 14(g) was itself unconscionable, the result would necessarily be different.

Unlike *Simpson*, the arbitration provision here has no limitations or liability, no limitations on available damages, or other one-sided provisions. See *Simpson*, 373 S.C. at 19–21, 27–33 644 S.E.2d at 666, 670–673. Rather, as stated previously, the arbitration provision agreed to by the parties required arbitration to be conducted near the Smith’s home in Charleston, Dorchester, or Berkeley County, South Carolina, by an arbitrator or arbitration panel agreed upon by the Smiths, who could assess filing fees and any other costs of the arbitration to either party. Further, the arbitration provision al-

lowed for the Smiths to receive an expedited hearing. (R. 151–152). There were no oppressive or one-sided provisions within ¶ 14(g).

Neither the circuit court nor Court of Appeals provided any argument as to why each of these disparate provisions should be read “as a whole.” *Smith v. D.R. Horton*, Op. No. 5118, p. 64. The Smiths belatedly argued that the separate and distinct provisions of Section 14 that are unrelated to the parties’ agreement to arbitrate must be interpreted together rather than standing alone, but had not previously raised this argument before the circuit court. (Resp’ts’ Br. 5–8). However, the only legal authorities cited for this position are contractual construction cases that involve the determination of the parties’ intent in the face of an ambiguity. *See Buice v. WMA Sec., Inc.*, 380 S.C. 149, 156–57, 668 S.E.2d 430, 434 (Ct. App. 2008); *Skull Creek Club Ltd. P’ship, v. Cook & Book, Inc.*, 313 S.C. 283, 286; 437 S.E.2d 163, 165 (Ct. App. 1993). Here, the parties’ intent is clear, so there is no ambiguity and no need to engage in contractual construction. As such, these cases are inapplicable and there is no basis upon which to construe Section 14 as a whole.

A. The Court of Appeals’ Reliance on the Limitation of Liability Provision is Misplaced

The Court of Appeals did not identify specifically why the termination provision in ¶ 14(h) the limitation of liability provision in ¶ 14(i) rendered either the arbitration provision at ¶ 14(g) or the entire Purchase Agreement

unconscionable other than to imply that ¶14(h)⁶ and ¶ 14(i) resulted in “lack of mutuality of remedy.” As discussed above, even assuming *arguendo* that this were true, there is no evidence of the other element of unconscionability—lack of meaningful choice. Furthermore, these commonplace contractual terms do not render either the entire Purchase Agreement, or specifically the arbitration provision at ¶14(g), unconscionable due to being “one-sided” or “oppressive” for at least two reasons.

First, a recent South Carolina Supreme Court illustrates a proper analysis with respect to the limitation of liability in ¶ 14(i). In *Gladden v. Boykin*, Op. No. 27236 (S.C.Sup.Ct. filed Mar. 27, 2013)(Shearouse Adv. Sh. No. 14 at 50), the Supreme Court stated, in the context of a home inspection contract containing limitations of liability:

Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

⁶ Unfortunately, the Court of Appeals never explicitly states why ¶ 14(h) is problematic other than to note that if D.R. Horton terminate prior to the closing, “no cause of action shall accrue on behalf of [the Smiths....” It is difficult to see why this would be “unconscionable” when it is only contemplated in the case of a bona fide dispute and subject to a 10-day good faith resolution period, written notice, and return of earnest all money to the Smiths. Additionally, since this provision clearly does not survive the closing and therefore would not limit the Smiths in pursuing any remedy or damages related to their home, it is immaterial to the analysis.

Gladden v. Boykin, Op. No. 27236, p. 55)(emphasis added). Here there is no evidence of inequality of bargaining power or other evidence that would suggest the Smiths “cannot be said to have consented to the contract.”

As our Supreme Court recognized, limitations of liability “are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it.” *Gladden v. Boykin*, Op. No. 27236, p. 54), citing, *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748-49 (Tex. App. 2005). Indeed, the Supreme Court concluded that it could not say that a limitation of liability clause in that circumstance was “so oppressive that no reasonable person would make it and no fair and honest person would accept it.” *Gladden v. Boykin*, Op. No. 27236, p. 54. The Supreme Court refused even to go further and address the issues of whether the plaintiff lacked meaningful choice due to one-sided contract provisions. *Gladden v. Boykin*, Op. No. 27236, p. 54.

In *Gladden*, the limitation on liability section limited damages to the amount the plaintiffs paid for the home inspection and report. *Gladden v. Boykin*, Op. No. 27236, p. 54. This is not qualitatively different than the Purchase Agreement at hand, which disclaims certain warranties, but replaces them with the RWC Warranty, and limits monetary liability to a “repair or replace” remedy. As the Supreme Court concluded in *Gladden*, the mere presence of a limitation of liability clause does not make this circumstance

“so oppressive that no reasonable person would make it and no fair and honest person would accept it.” *Gladden v. Boykin*, Op. No. 27236, p. 54. Likewise, here when there is no evidence in the record regarding the circumstances of the Smiths execution of the Purchase Agreement other than an indication of the existence of handwritten, negotiated terms, and the mere existence of limitations of liability, there is no basis upon which to conclude that they were “so oppressive that no reasonable person would make it and no fair and honest person would accept it” other than the fact that the Smiths did.

In addition, the circuit court and the Court of Appeals have done little more than cite to the existence of the Limitations of Liability as evidence of unconscionability. In truth, the limitations of liability in ¶ 14(i) have no bearing on the purpose of analyzing claims of unconscionability in the context of arbitration agreements, which is to “focus generally on whether the arbitration clause is geared towards an unbiased decision by a neutral decision-maker.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669; citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). Nothing in the arbitration provision would suggest anything other than an unbiased decision by a neutral decision-maker.

In this case, the arbitration provision does not constitute a waiver of any statutory rights or causes of action, nor does it purport to limit the arbitrator’s legal authority, as did the arbitration clause in *Simpson*. In truth, the Purchase Agreement would afford an arbitrator the same authority and pre-

rogative as any state or federal court to declare the limitation of liability in ¶ 14(i) unconscionable and to refuse to enforce it. Accordingly, the circuit court and the Court of Appeals improperly relied upon the limitation of liability in ¶ 14(i) in finding unconscionability.

3. **THE COURT OF APPEALS MISAPPLIED OR IGNORED THE *PRIMA PAINT* DOCTRINE**

Not only was it unnecessary to interpret the arbitration provision in the context of the other unrelated terms, it was improper to do so. To the extent the circuit court concluded that “the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions” unrelated to the arbitration provision itself, it did so in violation of the *Prima Paint* doctrine. (R. 4, 6). Similarly, the Court of Appeals appears to have misapplied or ignored the *Prima Paint* doctrine in its finding, without explanation, that the circuit court “viewed the Warranties and Dispute Resolution Section 14 as a whole” and the Court of Appeals apparent affirmation of that viewpoint. *Smith v. D.R. Horton*, Op. No. 5118, p. 64.

B. **The Prima Paint Analysis**

In *Prima Paint*, the United States Supreme Court addressed whether, under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., a claim of fraud in the inducement of the entire contract—as opposed to the arbitration provision itself—is to be resolved by the court or referred to an arbitrator. The Court held that “a federal court may consider only issues relating to the making

and performance of the agreement to arbitrate” and cannot, therefore, “consider claims of fraud in the inducement of the contract generally.” *Prima Paint Corp.*, 388 U.S. at 404. Some courts sought to limit *Prima Paint*’s holding to fraud in the inducement challenges, but others held that *Prima Paint* extends to *all* challenges to a contract.

South Carolina joined the latter jurisdictions in rejecting attempts to limit *Prima Paint*. See *Great W. Coal, Inc.*, 312 S.C. at 562–63, 437 S.E.2d at 24–25. “A party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. . . . The arbitration clause is separable from the contract.” *Id.* at 562–63, 437 S.E.2d at 24. See also *Jackson Mills, Inc.*, 312 S.C. at 403, 440 S.E.2d at 879 (“Arbitration clauses are separable from the contracts in which they are imbedded.”); *New Hope Missionary*, 379 S.C. at 630, 667 S.E.2d at 6; *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623.

Thus, “precedent forces a distinction to be drawn between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged.” *New Hope Missionary Baptist Church*, 379 S.C. at 631, 667 S.E.2d at 6. Compare *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (holding the circuit court was the proper forum for determining the enforceability of an arbitration clause challenged on the grounds of unconscionability) with *Cornerstone Hous.*, 356 S.C. at 338–42, 588 S.E.2d at 622–24 (holding the legality

and enforceability of two contracts was for the arbitrator to decide where the arbitration agreement in the contracts was not directly challenged).

Here, the circuit court's determination of unconscionability was based on its finding that of "oppressive and one-sided provisions," which the circuit court identified were in the "Limitation on Liability" provision at ¶ 14(i)), which is separate and distinct from the arbitration provision at ¶ 14(g). (R. 2-3; R. 151-152, ¶ 14(g), (i)). The circuit court later generally alluded to "an entire host of attempted waivers of important legal remedies" in denying D.R. Horton's motion for reconsideration, without specifically identifying the offending language. (R. 4-5). Regardless, such language does not appear in the arbitration provision. Hence, the circuit court appears to have found unconscionability only within the Purchase Agreement at large rather than in the arbitration provision itself. The Court of Appeals has cited no other offending language other than at ¶ 14(h) or ¶ 14(i) upon which to affirm. Under the *Prima Paint* doctrine as applied by South Carolina courts, the Smiths cannot avoid arbitration on that basis.

C. A "Severability" Analysis is Inapplicable

The Court of Appeals draws heavily upon *Simpson* in concluding that the arbitration provision "should not be severed from the numerous unconscionable provisions contained in the limitations of liability section within the Purchase Agreement. However, reliance upon *Simpson* and this severability analysis is misplaced for at least two reasons. First, neither D.R. Horton nor

the Smiths raised the severability issue addressed in *Simpson*. Further, the severability issue raised in *Simpson* is inapplicable.

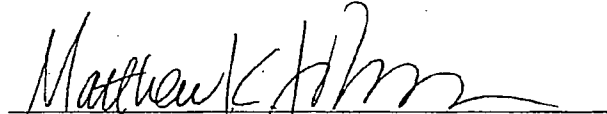
In *Simpson*, the Supreme Court was faced with a significantly different scenario. There, the severability issue involved a single paragraph within the automobile trade-in contract for which the automobile dealership sought to enforce arbitration against its customer. *Simpson*, 373 S.C. at 19–21, 644 S.E.2d at 666. The single paragraph at issue there was an arbitration provision that included within the arbitration language itself numerous limitations of liability and one-sided provisions favoring the automobile dealership. Because the “unconscionable” provisions were within the arbitration provision itself, *Prima Paint* did not apply, and was not addressed, in *Simpson*. On the other hand, the structure of the Purchase Agreement at hand contains separate and distinct sections with respect to arbitration and the limitations of liability that the circuit court and the Court of Appeals have found “unconscionable.” Because they are maintained in separate and distinct sections, *Prima Paint* applies.

As addressed above, *Prima Paint* is not a “severability” doctrine—it is a “separability” doctrine that limits judicial determination to an analysis of the arbitration provision itself. Accordingly, because the parties have not raised the issue of severability, but have raised the *Prima Paint* doctrine, the Court of Appeals analysis should have focused on that issue.

CONCLUSION

For the foregoing reasons, the Court of Appeals should grant Appellant
D.R. Horton, Inc.'s Petition for Rehearing.

Respectfully submitted,



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D.R. HORTON, INC.

May 2, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

RECEIVED

MAY 02 2013

SC Court of Appeals

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

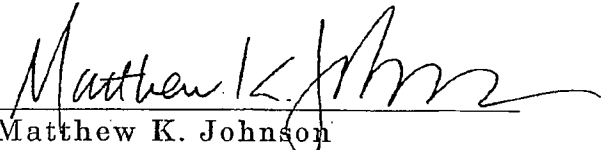
D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Appellant.

PROOF OF SERVICE

I certify that I have served the *Petition for Rehearing* of Appellant D.R. Horton, Inc., on Respondents Gregory W. Smith and Stephanie Smith by sending to their attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: Phillip W. Segui, Jr., Esq., Segui Law Firm, PC, 864 Lowcountry Blvd., Suite A, Mt. Pleasant, SC 29464; John T. Chakeris, Esq., 231 Calhoun Street, P.O. Box 397, Charleston, SC 29402; and Michael A. Timbes, Esq., Thurmond, Kirchner, Timbes & Yelverton, P.A., 15 Mid-Atlantic Wharf, Suite 101, Charleston, SC 29401

May 2, 2013


Matthew K. Johnson
S.C. Bar No. 12284

The South Carolina Court of Appeals

Gregory W. Smith and Stephanie Smith, Respondents,

v.

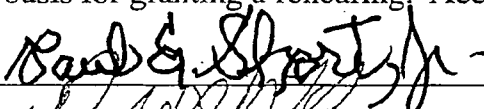
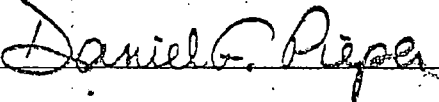
D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc.,
Defendants;

Of whom D.R. Horton, Inc. is the Appellant.

Appellate Case No. 2011-204347

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:

Matthew Kinard Johnson
John T. Chakeris
W. Kyle Dillard
Phillip Ward Segui, Jr.
Michael A. Timbes

FILED

23 May 2013