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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI FROM THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Supreme Court Case No. 2023-000452
Case No.: 2017-CP-40-03697

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

v.

Mungo Homes, LLC .....Respondent.

FINAL BRIEF OF PETITIONERS

Charles H. McDonald [SC Bar # 11580]
Belser Law Firm, P.A.
Post Office Box 96
Columbia, South Carolina 29202
chuck@belserpa.com
(803) 999-1260

Matthew A. Nickles [SC Bar # 80364]
Rogers, Patrick, Westbrook & Brickman, LLC
1513 Hampton Street, 1st Floor
Columbia, SC 29201
mnickles@rpwb.com
(843) 727-6500

Beth B. Richardson [SC Bar # 69552]
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

brichardson@robinsongray.com
(803) 929-1400

Attorneys for Petitioners Amanda Leigh Huskins and Jay R. Huskins

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2. In an adhesion contract for the purchase of a new home, did the Court of Appeals violate the common law and the public policy expressed under *Damico v. Lennar Carolinas, LLC*, by severing unconscionable, material terms in an arbitration clause to enforce the remainder?

STATEMENT OF THE CASE

On June 14, 2017, Petitioners commenced this action by filing a Complaint in the Richland County Court of Common Pleas. (R. pp. 21-41.) The Complaint asserted several causes of action against the Respondent Mungo Homes, LLC ("Mungo") regarding Mungo's disclaimer of the warranty of habitability associated with its sale of property with a new residence thereon to Petitioners Amanda and Jay Huskins, without having separately bargained for the benefit of the disclaimer to it ("Mungo Contract"). The Complaint included causes of action for monetary and injunctive relief. (*Id.*) On July 17, 2017, Mungo filed a Motion to Dismiss and to Compel Arbitration. (R. pp. 68-74.) On March 13, 2018, the Circuit Court granted Mungo's Motion to Dismiss based upon the existence of a contractual arbitration agreement ("Arbitration Clause") and, on April 16, 2018, denied the Huskins' Motion to Alter of Amend the Court's Order by a Form 4 Order. (R. pp. 4-20.)

On May 11, 2018, Petitioners filed a Notice of Appeal. Oral arguments were heard before the Court of Appeals on May 5, 2021. The Court of Appeals issued its initial decision on June 1,

2022, affirming the ruling of the Circuit Court with modifications. The Court of Appeals found terms in the Arbitration Clause in the Mungo Contract unconscionable, one-sided, and oppressive. Even though there was no provision for severability, the Court of Appeals severed the unconscionable terms to save the remainder of and enforce the Arbitration Clause.

On June 15, 2022, Petitioners filed a Petition for Rehearing. During the pendency of the Petition, this Court issued its opinion in *Damico v. Lennar Carolinas*, 437 S.C. 596, 879 S.E.2d 746 (2022), where the court, in its discretion and as a matter of public policy, declined to exercise a severability provision in a contract of adhesion for the purchase of a new home, and sever unconscionable terms in an arbitration clause to save the remainder. Pursuant to Rule 208(b)(7), SCACR, Petitioners supplemented their petition by notifying the Court of Appeals of the *Lennar* opinion. On February 15, 2023, the Court of Appeals withdrew its prior opinion and issued a new opinion clarifying its decision to sever the unconscionable provisions contained in the Arbitration Clause and enforce the remainder to compel arbitration.

Petitioners sought a Writ of Certiorari to review the Court of Appeals' Opinion on March 17, 2023. The Petition argued that the Court of Appeals' Opinion conflicted with this Court's precedent in *Smith v. D.R. Horton*, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016). In *D.R. Horton*, the Court refused to sever unconscionable terms in an arbitration clause to save the remainder in a contract to purchase a new home because the contract lacked a severability provision. 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6. Petitioners also argued that the Court of Appeals' Opinion conflicted with this Court's precedent in *Damico v. Lennar Carolinas, LLC*, refusing to exercise its discretion to sever unconscionable terms in an arbitration agreement, even though the contract provided for severability, where the unconscionable terms were material and set forth in a contract of adhesion in the homebuyer context. 437 S.C. at 624, 879 S.E.2d at 761. Finally, Petitioners argued that the

Court of Appeals' reliance on and application of sections 36-2-302 and 15-3-140 of the South Carolina Code of Laws to sever unconscionable terms in an arbitration clause in a contract of adhesion for the purchase of real estate with a new home thereon that did not contain a provision for severability was clear error of law.

Respondent filed a Return, arguing that this matter did not raise any issue warranting further review under Rule 242(b), SCACR. Petitioners filed a Reply responding to the arguments made in the Return. This Court granted Petitioners' Writ of Certiorari on February 7, 2024.

STATEMENT OF THE FACTS

On the merits, this case involves protecting the most fundamental warranty extended upon the sale of every new home in South Carolina—the warranty of habitability. Like many large, volume builders, Mungo takes advantage of its superior sophistication and bargaining power and disclaims the warranty of habitability within its new-residential-property purchase contract. (R. pp. 31-41.) Mungo's Contract sells a "tract of land, together with the dwelling and improvement to be constructed thereon (the "Property")," and disclaims the fundamental warranty of habitability associated with the dwelling thereon, without providing new-home buyers, like Petitioners Amanda and Jay Huskins, the opportunity to receive a separately bargained-for benefit for this disclaimer. (R. p. 32.)

Petitioners bring this action asserting Mungo's conduct, disclaiming the warranty of habitability associated with the sale of a new home without specifically bargaining for such benefit

to it, is against the law and public policy of the State of South Carolina.[1] The Complaint asks the court to declare that, as a matter of law, Mungo cannot disclaim the implied warranty of habitability without providing its home buyers with adequate consideration specific to such waiver, and prays for a jury to determine the fair value of that waiver to which Mungo unjustly extracted for itself. (R. pp. 21-41.)

Procedurally, the Mungo Contract also requires new-home buyers to resolve all matters arising out of, or in any way related to, the contract through final and binding arbitration. To this end, the Mungo Contract contains a one-paragraph "Arbitration and Claims" provision (hereinafter "Arbitration Clause") outlining the terms for final and binding arbitration.

The Arbitration Clause unconscionably limits the time for new-home buyers to seek relief for matters arising out of, or in any way related to, the Mungo Contract. The Arbitration Clause requires parties to make a written demand for arbitration within ninety days, and in some cases within thirty days, of the time in which any matter broadly associated with the Mungo Contract arises. Under South Carolina statutory law though, new-home buyers are afforded three years to assert any contractual claims.

At the top of the third page of the Mungo Contract, there is a provision for "Arbitration and Claims" as follows:

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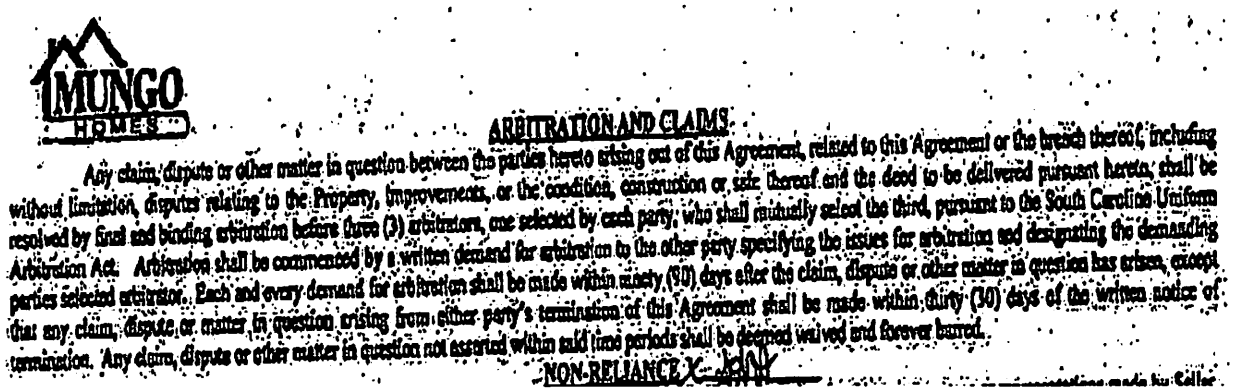
[1] *Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006) (ruling that the seller of a new home cannot effectively disclaim the implied warranty of habitability unless the disclaimer is "(1) conspicuous, (2) known the to the buyer, and (3) specifically bargained for." *See also Damico v. Lennar Carolinas,* 437 S.C. 596, 617, 879 S.E.2d 746, 758 (2022) (emphasis added in the original) (finding "absurd, factually incorrect, and grossly oppressive" term in homebuyer contract that attempted to assert home buyer "*expressly negotiated and bargain for the waiver of the implied warranty of habitability [for] valuable consideration . . . **in the amount of $0.***"



ARBITRATION AND CLAIMS:

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

NON-RELIANCE X JDW

(R. p. 33.) The Arbitration Clause is thus set forth in small uniform print and in a total of four sentences. The first sentence defines expansively the issues which must be resolved by final and binding arbitration, encompassing "any claim, dispute, or other matter in question between the parties arising out of this Agreement, related to this Agreement or breach thereof, including, without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant thereto." The first sentence states that these issues "shall be resolved by final and binding arbitration." (*Id.*)

The last three sentences of the Arbitration Clause then provide: "Arbitration shall be commenced by written demand for arbitration to the other party specifying the issues for arbitration and designated the demanding parties selected arbitrator." (*Id.*) As to the written demand for arbitration, the Mungo Contract instructs home buyers: "Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination." And, if there was any question about the strict time limitations placed on new-residential-real-estate buyers who may need to seek relief, the final sentence of the Arbitration Clause reads: "Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred." (*Id.*)

The Mungo Contract does not include any severability provision, which would normally state that the terms of the contract are independent of one another so that the rest of the contract will remain in force should a court declare one or more of its provisions void or unenforceable. The Mungo Contract also contains provisions titled, "Nonreliance" and "Miscellaneous," explaining, albeit in different ways, that the Mungo Contract "embodies the entire Agreement between Seller and Purchaser with respect to the Property. No amendment or modification . . . shall be valid unless contained in writing executed by both parties." (R. p. 30).

The Circuit Court determined that the South Carolina Uniform Arbitration Act governed this dispute because the Mungo Contract expressly provided for the same. (R. p. 9.) The Court of Appeals' Opinion noted that application of the SCUAA, as opposed to the FAA, did not affect the analysis, as "even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." (R. p. 272 n.4 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22 n.1, 644 S.E.2d 663, 667 n.1 (2007)).

The Court of Appeals disagreed with the circuit court's analysis of the conscionability of the Arbitration Clause in the Mungo Contract. The Court of Appeals found the Arbitration Clause in the Mungo Contract unconscionable as written, particularly the terms requiring a party to demand in writing arbitration of any matter arising out of, or related in any way to, the Mungo Contract, within ninety days, and in some cases thirty days, of the date in which the matter arose. (R. pp. 274-75.) The Court of Appeals ruled that the Mungo Contract was one of adhesion. Appellants lacked any meaningful choice to agree to the Mungo Contract or to the Arbitrate Clause in the Mungo Contract. Appellants were "average purchasers of residential real estate, were not represented by independent counsel, and were not a substantial business concern to Mungo such that they possessed more bargaining power than any other average homebuyer would." (R. p. 274.)

The Court of Appeals ruled the final two sentences of the Arbitration Clause were materially one-sided and oppressive, violating sections 15-3-140 and -530 of the South Carolina Code of Laws' three-year statute of limitations. The terms "disproportionately affected a homebuyer's ability to bring a claim" and were "not geared towards achieving an unbiased decision by a neutral decision maker." (R. pp. 274-75 (internal quotation marks omitted).)

Rather than considering the one-paragraph Arbitration Clause unconscionable in its entirety though and despite the absence of a severability provision, the Court of Appeals determined that it had the authority to, and would properly exercise discretion to, blue-pencil the materially unconscionable terms, severing two out of four sentences. The Court of Appeals saved and enforced the first two sentences of the Arbitration Clause, claiming that those two sentences manifested and left intact the parties' agreement to arbitrate, without affecting the basis of the bargain. (R. p. 276.) For the authority to do so, the Court of Appeals relied on section 36-2-302(1) of the South Carolina Code of Laws relating to contracts concerning commercial goods and sales falling under the Uniform Commercial Code. The Court of Appeals stated, "Although title 36 concern commercial goods and sales, . . . our supreme court recently cited section 36-2-302 for the proposition that unconscionable provisions could be severed in the residential home agreement context." (R. p. 276 (citing *Lennar*, 437 S.C. at 618, 879 S.E.2d at 758). The Court of Appeals then affirmed the trial court's decision to compel arbitration as modified. (R. pp. 275-76 & nn. 5 & 6.)

STANDARD OF REVIEW

Whether a claim is subject to arbitration is subject to *de novo* review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). "Arbitration clauses are separable from the contracts in which they are embedded." *Hous. Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328,

338, 588 S.E.2d 617, 622 (Ct. App. 2003) (internal quotation marks omitted). "[C]ourts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." *Lennar,* 437 S.C. at 608, 879 S.E.2d at 753 (internal quotation marks omitted); *see also generally Prima Paint Corp. v. Flood & Conlin Mfg. Co.*, 388 U.S. 395, 403-06, 87 S. Ct. 1801, 18 L.Ed.2d 1270 (1967).

Ordinary state law principles governing the formation of contracts, including principles concerning the "validity, revocability, or enforceability of contracts generally," are applied to arbitration agreements. *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987)). A court may invalidate an arbitration clause based on South Carolina's defense of unconscionability to contracts. *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). The conscionability of an arbitration clause must "focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Hallmarks of unconscionability are the absence of meaningful choice on the part of one party due to the one-sided provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

ARGUMENT

The Court of Appeals' Opinion directly conflicts with this Court's ruling in *Smith v. D.R. Horton, Inc.*, where the Court refused to sever unconscionable terms from an alleged agreement to arbitrate in a contract of adhesion involving the purchase of a new home when the contract lacked a severability provision. The Court of Appeals' Opinion also conflicts with this Court's ruling in

Damico v. Lennar Carolinas, LLC, where the Court refused to enforce a severability clause against unconscionable terms set forth in an arbitration clause to save the remainder, when the contract was one of adhesion involving the purchase of a new home pursuant to South Carolina common law and public policy. Finally, the Court of Appeals erroneously relied on section 36-2-302(1) of the South Carolina Code of Laws, applicable to the sale of goods under the South Carolina Uniform Commercial Code, to afford itself the authority to sever. However, this case involves the sale of a new home affixed to real estate and therefore is outside the scope of section 36-2-302(1).

I. THE COURT OF APPEALS ERRED IN SEVERING UNCONSCIONABLE, MATERIAL TERMS OF AN ARBITRATION CLAUSE TO SAVE THE REMAINDER WHERE THE CONTRACT LACKED A SEVERABILITY PROVISION AND WAS A CONTRACT OF ADHESION WITH A NEW-HOME BUYER.

Petitioners bring this appeal of the Court of Appeals' Opinion severing unconscionable, material sentences set forth in an arbitration clause to save and enforce the remainder, in the narrow context of adhesion contracts involving new-home buyers and where there is no provision for severability.

As the Court of Appeals found, the Mungo Contract and Arbitration Clause was a take-it-or-leave-it proposal, where Petitioners, the Huskins, had no meaningful choice as to its terms, and therefore did not truly agree to it. Petitioners are "average purchasers of residential real estate, were not represented by independent counsel, and were not a substantial business concern to Mungo such that they possessed more bargaining power than any other average homebuyer would." (R. p. 274.)

Mungo, the sophisticated party and drafter of the Mungo Contract, included oppressive and one-sided terms in the Arbitration Clause set forth in the Mungo Contract that were not designed to achieve an unbiased decision by a neutral decision maker, and, at the same time, left out any

provision for severability. The final two sentences of the Arbitration Clause limited the time in which Petitioners could bring any matter arising out of, or related in any way to, the Mungo Contract to ninety days, and in some cases thirty days, violating sections 15-3-530 of the South Carolina Code of Laws' three-year statute of limitations applicable to contract actions. As the Court of Appeals found, these terms "disproportionately affect a homebuyer's ability to bring a claim," and were "not geared towards achieving an unbiased decision by a neutral decision maker." (R. pp. 274-75 (internal quotation marks omitted).)

Notwithstanding these findings in the context of a contract of adhesion for the purchase of a new home, the Court of Appeals determined that it "could simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement." (R. p. 276.) The Court of Appeals' Opinion contravenes this Court's precedent in *D.R. Horton* and *Lennar*, was erroneously divorced from its findings that the Mungo Contract was one of adhesion involving innocent new-home buyers, and incorrectly concluded that the final two materially unconscionable sentences of the Arbitration Clause could simply be severed without rewriting the parties' agreement. The Court of Appeals' reliance on section 36-2-302(1), as providing it authority and discretion to sever in this instance, is entirely misplaced.

A. IN *SMITH V. D.R. HORTON*, THE COURT SPECIFICALLY REFUSED TO SEVER UNCONSCIONABLE TERMS TO SAVE THE REMAINDER OF AN ARBITRATION CLAUSE IN A CONTRACT OF ADHESION INVOLVING A NEW-HOME BUYER BECAUSE THE CONTRACT LACKED A SEVERABILITY PROVISION.

In *Smith v. D.R. Horton*, this Court refused to consider severing unconscionable provisions from an arbitration clause in the absence of a specific severability clause. 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6. This Court gave the following sound reasoning for such refusal:

> Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike

> unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions.

Id.; *cf. also Lennar*, 437 S.C. at 619, 879 S.E.2d at 758 ("In exercising . . . discretion, courts should be guided by the parties' intent."); *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("There is . . . no public policy—federal or state—favoring arbitration. The courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. . . . The Court is but the instrument through which . . . effect can be given to the [parties'] will."). Just as in *D.R. Horton*, there is no severability clause in the Mungo Contract, either in the contract itself or the Arbitration Clause. It was an error of law therefore for the Court of Appeals to even consider severing the unconscionable terms drafted by Mungo in the one-paragraph Arbitration Clause.

Before the Court of Appeals' Opinion, there was no precedent in South Carolina for severing unconscionable terms from an arbitration clause in a contract of adhesion, much less a contract of adhesion involving the purchase of a new home, where a contract lacked a severability provision. In every published authority in South Carolina, where the court severed an unconscionable provision in an arbitration clause to save the remainder in any contract of adhesion, the contract itself included a severability clause. *See, e.g.*, *Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2021) (severing unconscionable provisions in a contract of adhesion for the purchase of a vehicle to save the remainder of an arbitration clause because "**[t]he Agreement here contains a severability clause, reflecting that if any part of the contract is found unenforceable for any reason, the remainder shall remain enforceable. Given this intent and** our belief that removing the unconscionable clause does not disrupt the core of the parties' bargain, we disagree with the circuit court that the entire Agreement must fall." (emphasis

added)); *cf. also One Belle Hall Prop. Owners Assoc., Inc. at al. v. Trammell Crow Residential Co., et al.*, 418 S.C. 51, 63-64, 791 S.E.2d 286, 292-94 (Ct. App. 2016) (finding no unconscionability because the arbitration clause itself "continuously used language to the effect that any attempted disclaimer or limitation did not apply to purchasers in jurisdiction that disallowed them," and noting too that "unlike the arbitration agreement in *D.R. Horton*," the contract included a severability provision); *Simpson.*, 373 S.C. at 34-35, 644 S.E.2d at 673-74 (recognizing that severability may be an appropriate remedy to address an unconscionable provision in an arbitration clause when there is a provision for severability because the court would be effecting the intent of the parties, but nevertheless concluding in a contract of adhesion for the purchase of a vehicle, despite a provision for severability, severance was not a proper remedy given the multitude of one-sided terms and illegality that pervaded the agreement).

The Court of Appeals' Opinion not only conflicts with the precedent espoused in *D.R. Horton* and other cases addressing this issue in South Carolina common law, but also creates and invites litigation over a new, unnecessary slippery slope in South Carolina law. Should the Court of Appeals' Opinion stand, courts will have to make a discretionary judgment going forward in cases involving unconscionable terms in an arbitration clause set forth in a contract of adhesion for the purchase of a new home that lacks a provision for severability. Courts will have to determine in these cases, despite there being no provision for severability, whether "the invalidation of the arbitration clause in its entirety [such as allegedly was the case in *D.R. Horton* was] the more appropriate remedy . . . notwithstanding the lack of a severability clause," or "it is possible for this court to simply delete the offending language without affecting the basis of the parties bargain or rewriting their agreement." (R. p. 276.)

As the *D.R. Horton* Court stated, where an arbitration clause contains a materially unconscionable term and lacks a severability clause, the court cannot engage in an analysis over whether offending provisions can be severed to save the remainder. Such judicial activity would be tantamount to rewriting the parties' contract and especially inappropriate in the context of a contract of adhesion involving new-home buyers. *D.R. Horton*'s holding should ring especially true in this case where the Mungo Contract provided in two different provisions, albeit in different expressions, that the Mungo Contract "embodies the entire Agreement between Seller and Purchaser with respect to the Property. No amendment or modification . . . shall be valid unless contained in writing executed by both parties." (R. p. 30 "Nonreliance" and "Miscellaneous" sections).

B. THE COURT OF APPEALS VIOLATED SOUTH CAROLINA COMMON LAW AND PUBLIC POLICY, AS SET FORTH BY THIS COURT IN *DAMICO V. LENNAR CAROLINAS, LLC*, BY INTERPRETING THE MUNGO CONTRACT WITHOUT REGARD FOR ITS ADHESIVE NATURE OR THE SPECIAL CONSIDERATION AFFORDED NEW-HOME BUYERS IN SOUTH CAROLINA.

Notwithstanding that the Mungo Contract lacked a provision for severability, the Court of Appeals' Opinion that it "could simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement" was in error for three reasons. First, the Court of Appeals failed to consider severance in the context of a contract of adhesion. Second, the Court of Appeals failed to consider the materiality of the unconscionable terms at issue and their effect on the Arbitration Clause as a whole. Under the common law, where an unconscionable term is material to an agreement, there can be no meeting of the minds and severability is tantamount to rewriting the agreement. Third, the Court of Appeals failed to consider severance of a materially unconscionable term in a contract of adhesion involving an innocent new-home buyer, who has

long been afforded special protection under South Carolina common law and the public policy flowing therefrom.[2]

i. The Court of Appeals erroneously failed to consider severability in the context of a contract of adhesion.

In considering whether to sever unconscionable terms from an arbitration clause, it is important to consider whether the "arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion." *Lennar*, 437 S.C. at 620, 879 S.E.2d at 760. Adhesion contracts "are subject to considerable skepticism upon review, due to the disparity in the bargaining positions of the parties." *Lennar*, 437 S.C. at 620-21, 879 S.E.2d at 760.

The Court of Appeals' Opinion regarding severability, however, was inexplicably divorced from its findings that the Arbitration Clause was a contract of adhesion, containing material, one-sided and oppressive terms, not geared toward obtaining an unbiased and fair decision in any arbitral forum. In its severability analysis, the Court of Appeals did not even mention that this case involved a contract of adhesion.

South Carolina courts have long recognized the disparity in parties' bargaining positions in adhesion contracts and subjected arbitration "agreements" therein to "considerable skepticism." *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 ("While adhesion contracts are not unconscionable per se, courts tend to look upon them with 'considerable skepticism' because they give rise to 'considerable doubt that any true agreement ever existed to submit disputes to arbitration.'"); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 (same).

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[2] Additionally, in deciding to sever in this case, this Court should not ignore that the Mungo Contract espoused the agreement repeatedly, albeit in two different ways, that the Mungo Contract "embodies the entire Agreement between Seller and Purchaser with respect to the Property. No amendment or modification . . . shall be valid unless contained in writing executed by both parties." (R. p. 30 "Nonreliance" and "Miscellaneous" sections).

The Court of Appeals correctly found:

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

(R. p. 274.). Thus, the starting point for any court reviewing the Arbitration Clause is that the parties did not truly agree to it. Petitioners, the Huskins, had no hand in drafting or negotiating any of the language in the arbitration agreement. While severing the unconscionable terms in the Arbitration Clause presumably best effectuated the intent of Mungo, the drafter of the agreement, it is considerably doubtful that enforcing the Arbitration Clause effectuates Petitioners' intent, too. *Lennar*, 437 S.C. at 619 n.11, 879 S.E.2d at 760 n.11 (noting that an adhesion contract likely reflects the drafter's intent, but it is "'considerably doubtful'" the agreement expresses *both* parties' intent"). The Court of Appeals therefore erred in concluding that severance in this case would effectuate the parties' bargain without consideration that the agreement to arbitrate in the Mungo Contract should be subject to "considerable skepticism" in the first place.

ii. The Court of Appeals failed to consider the materiality of the unconscionable terms and their effect on the Arbitration Clause as a whole.

The Arbitration Clause was one paragraph consisting of four sentences, all in the same uniform, small print on the last page of the contract and none set apart from one another. The Court of Appeals severed the last two sentences, claiming it could "simply delete the offending language without affecting the basis of the parties' bargain or rewriting the contract." (R. p. 276.) The Court of Appeals erred in this conclusion because severance of the last two, materially unconscionable, sentences changed the meaning of the Arbitration Clause as a whole.

The first sentence of the Arbitration Clause defined the scope of claims covered under final and binding arbitration and outlined part of the arbitral procedure. The Arbitration Clause broadly subjected all matters arising out of or related to the Mungo Contract to final and binding arbitration.

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

(R. p. 91.) The last three sentences of the Arbitration Clause provided further for the procedure for arbitration. The second sentence provided: "Arbitration shall be commenced by written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties [sic] selected arbitrator." The final two sentences, the ones the Court of Appeals severed from the one-paragraph Arbitration Clause, provided that the written demand required by the second sentence must be made within the unconscionable time frame discussed above or be deemed waived and forever barred.

> Each and every damage for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

(*Id.*) As written, the Arbitration Clause required the resolution of matters falling under it to be made by a specific written demand submitted within the unconscionable time limitations or be waived or forever barred.

In striking the last two sentences of the Arbitration Clause, the Court of Appeals did not simply leave intact the meaning of the first two sentences of the Arbitration Clause. The scope of claims subjected to final and binding arbitration set forth in the first sentence and the written

demand necessary to initiate arbitration set forth in the second sentence were integrally tied to the final two sentences of the Arbitration Clause circumscribing the time in which those claims would be brought and by which written demand for arbitration must be made. By severing the final two sentences of the Arbitration Clause, the Court of Appeals changed the intent of Mungo in drafting the Arbitration Clause as whole. Thus, notwithstanding that there was no provision to sever and that this was a contract of adhesion for the purchase of a new home, the Court of Appeals also erred in believing that it could sever the materially unconscionable terms in the Arbitration Clause without affecting the meaning of the remainder.

Finding error on this ground comports with this Court's general rule that "'whether unconscionable terms can be severed from [an arbitration clause] or whether the entire [arbitration clause] should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the [arbitration clause].'" *Lennar*, 437 S.C. at 619, 879 S.E.2d at 760 (declining to excise a material term of an arbitration agreement and enforce the remaining fragmented part and quoting 17A Am. Jur. 2d *Contracts* § 273)). "'Where [a particular term] has implication that may substantially affect the substantive outcome of the resolution, . . . it is neither logistical or ancillary.'" *Id.* (quoting *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131-32, 678 S.E.2d 435, 439 (2009)). To be valid and enforceable, an [arbitration agreement] "'requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.'" *Id.* at 620, 879 S.E.2d at 760 (quoting *Stevens & Wilkinson of S.C., Inc., v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) and other cases therein for the same proposition). *Cf. also generally Beach Co. v. Tillman, Ltd.*, 351 S.C. 56, 65, 566 S.E.2d 863, 867 (Ct. App. 2002) (affirming severability of an unconscionable term in a single paragraph because

Tillman's right to a jury trial and its right to assert a compulsory counterclaim are separate and distinct rights).

There can be no doubt that circumscribing the time a contracting party can otherwise assert a claim under applicable statutory law, from three years to ninety, and in some cases thirty, days substantially affects the outcome afforded to a party in a matter. (R. p. 274-75 (finding terms "disproportionately affect[ing] a homebuyer's ability to bring a claim," and were "not geared towards achieving an unbiased decision by a neutral decision maker" (internal quotation marks omitted).) Such drastic limitation on the time to bring a claim under the contract, in utter disregard of South Carolina statutory law, is as material to the agreement to arbitrate in this case, as was the unconscionable provision at issue in *Lennar*. The Court in *Lennar* found materially unconscionable an arbitration term that stripped the home buyer of the "ability to name the parties against whom they are asserting their claims in the arbitration proceeding." *Id.* at 624, 879 S.E.2d at 761. Severing these materially offending terms will by definition rewrite the parties' alleged agreement to arbitrate. *Id.* at 618-20, 879 S.E.2d at 759-60 (concluding that severance of an unconscionable, material provision in an arbitration agreement is a rewriting of the contract).[3]

[3] In distinguishing *Lennar* in a footnote, the Court of Appeals placed undue emphasis on the number of unconscionable terms that must be found in an arbitration clause to justify a court's refusal to sever or finding that severance would rewrite the agreement. (R. p. 276 n.6.) There is no litmus test in South Carolina to this end. While there may have been other potentially oppressive terms in the arbitration clause examined by the Court in *Lennar*, the Court only focused on one unconscionable term when declining to apply the severability provision included in the arbitration clause. *Lennar*, 437 S.C. at 615, 879 S.E.2d at 757. For the reasons provided above, the unconscionable term in this case is not materially less significant to the substantive outcome of any dispute than the material term discussed in *Lennar*. One unconscionable term, if material, is one too many to justify the exercise of discretion to sever and save the remainder of an arbitration clause in a contract of adhesion in the new-home buyer context. *See id.* at 619-24, 879 S.E.2d at 759-762.

iii. The Court of Appeals failed to consider severance of a materially unconscionable term in a contract of adhesion in the context of an innocent new-home buyer, who has long been afforded special protection under South Carolina common law and the public policy flowing therefrom.

Notwithstanding the lack of a severability provision, the Court of Appeals' Opinion also erred in failing to consider severability of a materially unconscionable term in a contract of adhesion in the context of an innocent new-home buyer. South Carolina has a deeply-rooted and long-standing public policy of protecting the purchasers of new homes and this must factor in any court's severability analysis. *Lennar*, 437 S.C. at 621-22, 879 S.E.2d at 760 ("Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction"). "Public policy may be expressed in constitutional or statutory authority or in judicial decisions." *Lennar*, 437 S.C. at 622, 879 S.E.2d at 760. Courts have emphasized protecting new-home buyers in the law for over thirty years now. *Id.* (citing *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) (stating "it is intolerable to allow builders to place defective and inferior construction into the steam of commerce" (citing *Rogers v. Scyphers*, 251 S.C. 128, 135-36, 161 S.E.2d 81, 84 (1968))). For this reason, where there is reason and opportunity, courts have expanded rules to protect new-home buyers in the common law. *Id.* (citing, *Kennedy*, 299 S.C. at 341-44, 384 S.E.2d at 734-36, and *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976), as examples where courts have responded to new scenarios, not properly disposed of by any present set of rules, and expanded rules to provide innocent new-home buyers with further protection).

Although Petitioners sought such public policy considerations, the Court of Appeals failed to even mention our common law history expanding protections for new-home buyers in its

severability analysis or consider how its opinion would fall in line with this precedent. In *Lennar*, the Court expressly refused to sever a materially unconscionable term from an arbitration clause in a contract of adhesion involving a new-home buyer as violative of public policy. *Lennar*, 437 S.C. at 624, 879 S.E.2d at 761 ("Given that the subject matter of the contract involves new-home construction, and South Carolina has an extensive history of expanding its common law on contracts so as to protect new-home buyers, we find honoring the severability clause here—particularly because it goes to a material term of the arbitration agreement—would violate public policy"). The *Lennar* Court explained that two considerations in this context were particularly controlling. First, the contract at issue was one of adhesion where it was "considerably doubtful" both parties truly intended a court to sever an unconscionable provision and enforce the remainder. *Id.* The Mungo Contract notably does not even include a provision for severability. Second, the court's refusal to enforce the severability clause against the unconscionable terms set forth in the arbitration clause will further the public policy established in the common law in the new-home buyer context. *Id.*

The Court stated: "It is clear Lennar furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause. We refuse to reward such misconduct, particularly in the home construction setting." *Id.* at 624, 879 S.E.2d at 762. Severing under these circumstances only serves to undermine the rights of homebuyers "for every [arbitration agreement] that finds its way to court, there are thousands that exercise in terrorem effect on [homebuyers] who respect their contractual obligations." *Lennar*, 437 S.C. at 623, 879 S.E.2d at 761 (internal quotation marks omitted). "[M]ost [homebuyers] simply comply with their [arbitration agreements], rather than challenging them in courts." *Id.*

(internal quotation marks omitted). Thus, "the argument goes, the law should provide a strong incentive for [home builders] not to overreach." *Id.* (internal quotation marks omitted).

Unconscionable provisions like those found in Mungo's Arbitration Clause have an *in terrorem* effect on home buyers like the Huskins. *Lennar*, 437 S.C. at 623, 879 S.E.2d at 761. The typical purchaser of a home from Mungo is unlikely to be in the position to "ignore" the one-sided and oppressive time limitations set forth therein. It is not known at this time just how many Mungo home buyers have been adversely affected by the unconscionable time limitations included in the Arbitration Clause. However, it is obvious that Mungo, the far more sophisticated party vis-à-vis its average purchaser like the Huskins, inserted the unconscionable time limitations for asserting claims solely for its own benefit to the great disadvantage of its buyers. This outrageous conduct should not be rewarded by severing the unconscionable terms and enforcing the remainder of the arbitration clause as the Court of Appeals elected to do.

Like the misconduct of the home builder in *Lennar*, Mungo is one of the largest home builders in South Carolina. Section 15-3-530 of the South Carolina Code of Laws has been in effect for decades. Surely, the Mungo Contract was drafted with the assistance of counsel as well. Yet, the Arbitration Clause drastically limited the time in which a home buyer can otherwise statutorily bring a contract claim against Mungo. The Arbitration Clause sets forth these materially unconscionable terms without any suggestion that the time limitations may violate or be void under South Carolina law. *Cf. One Belle Hall*, 418 S.C. at 63-64, 791 S.E.2d at 292-94 (finding no unconscionability in part because the arbitration clause itself "continuously used language to the effect that any attempted disclaimer or limitation did not apply to purchasers in jurisdiction that disallowed them"). And the unconscionable sentences are not set apart from or set forth in any conspicuous manner, but expressed in the same uniform, small print as the rest of the four sentence,

one-paragraph Arbitration Clause on the last page of the Mungo Contract.[4] The Court of Appeals' indifference to Mungo's inclusion of these materially unconscionable terms in this inconspicuous manner in the context of a contract of adhesion involving a new home buyer cannot be left to stand. The Court of Appeals' Opinion conflicts with this Court's holding in *Lennar* and undermines South Carolina's public policy protecting innocent new-home buyers.

Generally, in South Carolina law, where there is a provision to sever (which there is not in this case), South Carolina courts have uniformly refrained from rewriting contracts and held the drafter to live or die by its own pen, where the contractual context involves unconscionable, material terms and important public policy considerations. *See Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 629, 799 S.E.2d 318, 322 (Ct. App. 2017) ("South Carolina does not follow the 'blue pencil' rule and, thus, 'restrictions in a [noncompete] clause [in an employment contract] cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms.'") (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)). *See also Simpson.*, 373 S.C. at 34-35, 644 S.E.2d at 673-74 (striking down in a contract of adhesion involving a car buyer, despite there being a provision for severance, an arbitration clause which limited mandatory state statutory remedies under the South Carolina Unfair Trade Practices Act and the Dealers Act as unconscionable and violative of public policy, stating "[t]his Court will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.").

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[4] It is worth noting that when read in conjunction with the Mungo Contract as a whole, the arbitration clause is entirely one-sided in its application. It only applies to home buyers. Mungo would never have a matter to submit to arbitration under the Mungo Contract. Before closing, Mungo considers and affords itself a remedy for every instance in which the parties could default or terminate the contract. (R. p. 32 "DEFAULT AND TERMINATION".) Then, Mungo is fully paid at closing and prohibits the withholding of the purchase price for any reason. (R. p. 32 "CLOSING".)

Finally, the Court of Appeals' attempt to distinguish this case from *Lennar* by reference to section 15-3-140, a statute rendering unenforceable contractual provisions circumventing statutes of limitations, is unpersuasive. The Court of Appeals stated: "Section 15-3-140 [of the South Carolina Code of Laws] was not at issue in *Lennar*, and that statute essentially instructs [the Court of Appeals] to ignore the developer's attempt to shorten the limitations period." (R. p. 276.) Section 15-3-140, however, is not "at issue" in this case. Section 15-3-530(1) of the South Carolina Code of Laws provides for the three-year statute of limitations in an action upon contract. It is this statutory section in which the Mungo Contract, particularly, the Arbitration Clause, attempts to circumvent in violation of South Carolina law.

Section 15-3-140 merely addresses the effect of any person attempting to defend against suit by reference to a contractual provision that circumscribes a statute of limitation.

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

As an example, section 15-3-140 provides that any contract term circumscribing the three-year statute of limitations set forth in section 15-3-530(1) cannot in fact be used as a defense to bar any action. Section 15-3-140 protects the application of any statute of limitations and makes clear that statutes of limitations are important public policy considerations in South Carolina.

The statute in no way instructs courts to ignore attempts by parties to circumvent statute of limitations in conducting any severability analysis. To this end, the Court of Appeals erroneously conflates two issues. On the one hand, section 15-3-140 may prevent Mungo from successfully raising as a defense to a party's written demand for arbitration that the demand was made outside

the ninety- or thirty-days' contractual limitation, as opposed to the three years afforded by statute. On the other hand, section 15-3-140 does nothing to suggest that courts should just ignore Mungo's misconduct in any severability analysis, much less sever unconscionable terms in an arbitration clause to save the remainder in a take-it-or-leave-it consumer transaction involving a new-home buyer, and a contract that lacks a provision for severability.

For all the reasons set forth above, particularly respecting the precedent set by this Court in *D.R Horton* and *Lennar* and the history of public policy protecting new-home buyers, this Court should reverse the Court of Appeals, and hold that the Arbitration Clause containing materially unconscionable terms set forth in a contract of adhesion involving the purchase of a new home and lacking a severability provision is unenforceable as a matter of law.

C. THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE DID NOT PROVIDE THE COURT OF APPEALS AUTHORITY TO SEVER THE UNCONSCIONABLE TERMS IN THE ARBITRATION CLAUSE IN THIS CONTRACT OF ADHESION FOR THE PURCHASE OF A NEW HOME.

The Court of Appeals relied on section 36-2-302(1) of the South Carolina Code of Laws relating to contracts concerning commercial goods and sales falling under the Uniform Commercial Code as providing it the authority to sever the unconscionable terms in the Arbitration Clause, notwithstanding the lack of a severability provision. The Court of Appeals stated, "Although title 36 concern commercial goods and sales, . . . our supreme court recently cited section 36-2-302 for the proposition that unconscionable provisions could be severed in the residential home agreement context." (R. p. 276 (citing *Lennar*, 437 S.C. at 618, 879 S.E.2d at 758).

The contract at issue in this matter, however, is a residential real estate sales contract in which Mungo sold the Huskins a completed new home affixed to the property on which it was situated. (R. pp. 28-30, Purchase Agreement (see "PROPERTY" and "Miscellaneous (k)").

Section 36-2-302(1) is contained within Chapter 2 of South Carolina's Uniform Commercial Code. Chapter 2 applies to contracts for the sale of commercial goods which are moveable and not to the sale of new homes affixed to the realty in which it is sold. S.C. Code Ann. § 36-2-102 ("[T]his Chapter applies to transactions in goods . . . ."); § 36-2-105 (defining "goods" as "all things . . . which are movable at the time of identification to the contract to sale" and also includes "unborn young animal and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty"); § 36-2-107 (excluding only those items to be "severed" from the realty). Mungo's Purchase Agreement from a completed dwelling affixed to real estate therefore falls outside of section 2 of South Carolina's Uniform Commercial Code. And the Court of Appeals plainly erred in relying upon section 36-2-302(1) as authority to support severing the offending provisions of the arbitration clause in this case. *See also Conran v. Yager*, 263 S.C. 417, 421-22, 211 S.E.2d 228, 229 (1975) ("Article 2 of the Uniform Commercial Code is inapplicable to real estate sales"); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 504, 229 S.E.2d 728, 731 (1976) (noting UCC does not apply to sale of buildings); *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 565, 658 S.E.2d 80, 91 (2008) ("In our view, a general contractor building a home performs a service and does not sell a product.").

The Court of Appeals' supposition that the Court in *Lennar* "cited section 36-2-302 for the proposition that unconscionable provisions could be severed in a residential home agreement context" is misplaced, too. The applicability of section 36-2-302 to a contract of adhesion in the home buyer context was not before the Court in *Lennar*. In that case, the Court refused to exercise its discretion to sever unconscionable provisions in an arbitration clause that contained a provision for severability. The *Lennar* Court's reference to section 36-2-302 was merely to provide a general reference to instances where courts have the authority to find a contract clause unconscionable and

then determine in its discretion whether it is best to "refuse to enforce the contract clause, or . . . limit the application of the unconscionable clause so as to avoid and possible unconscionable result." *Lennar*, 437 S.C. at 618, 879 S.E.2d at 758 (citing S.C. Code Ann. § 36-2-302(1) (2003); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998); and 17A Am. Jur. 2d Contracts § 313). After reference to this statutory section and other authorities for this general proposition, the *Lennar* Court went on discuss that "severability is not always appropriate to remedy unconscionable provisions," discussing severability in the more specific context of a contract of adhesion involving a new-home buyer. The *Lennar* Court never cited section 36-2-302(1) in its opinion again. To this end, the *Lennar* Court in no way implied that section 36-2-302(1) may serve as the authority for courts to sever unconscionable provisions in an arbitration clause in a contract of adhesion for the purchase of a new home that lacks a severability provision. It was error of law for the Court of Appeals to read this Court's reference to Section 36-2-302(1) in *Lennar* so broadly in this manner, and in any event then proceed to a severability analysis divorced from any consideration that this arbitration clause involved a contract of adhesion in the new-home buyer context, containing a materially unconscionable terms that pervaded the Arbitration Clause as a whole.

CONCLUSION

The Court of Appeals' Opinion contradicts the precedent expressed by this Court in *D.R. Horton* and *Lennar*. *D.R. Horton* refused to engage in a severability analysis regarding materially unconscionable terms in an arbitration clause in a contract of adhesion involving the purchase of a new home, where the contract lacked a severability clause. Despite the presence of a provision to sever, *Lennar* refused to sever an unconscionable, material term from an arbitration clause to save the remainder in a contract of adhesion with a new-home buyer as a matter of law and public

policy. The effect of the Court of Appeals' Opinion is to unjustly excuse, and one could say incentivize, Mungo's efforts to avoid liability to its purchasers by inserting unconscionable provisions within the Arbitration Clause. If the Court of Appeals' Opinion stands, Mungo will suffer no meaningful consequence for its inclusion of unconscionable terms in the Arbitration Clause solely for the benefit Mungo. Moreover, the Court of Appeals' Opinion will undermine and cause confusion as to the precedent set in *D.R. Horton* and *Lennar*, and whether our courts will continue to respect South Carolina's deeply rooted and long-standing public policy protecting innocent purchasers of new homes. Finally, the Court of Appeals' application of sections 36-2-302(1) and 15-3-140 of the South Carolina Code is misplaced in this case for the reasons discussed above, and, in any event, in contravention to the precedent expressed in *D.R. Horton* and *Lennar*.

For all these reasons, Petitioners respectfully ask this Court to reverse the Court of Appeals, hold the Arbitration Clause in the Mungo Contract is unconscionable and unenforceable as a matter of law and public policy, and deny Mungo's Motion to Dismiss and to Compel Arbitration.

(Signature Page Follows)

Beth B. Richardson

Beth B. Richardson [SC Bar # 69552]
Robinson Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
brichardson@robinsongray.com

Charles H. McDonald [SC Bar # 11580]
Belser & Belser, P.A.
P.O. Box 96
Columbia, South Carolina 29202
(803) 999-1260
chuck@belserpa.com

Matthew A. Nickles [SC Bar # 80364]
Rogers, Patrick, Westbrook & Brickman, LLC
P.O. Box 1368
Barnwell, SC 29812
(803) 541-7850
mnickles@rpwb.com

Attorneys for Petitioner

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