EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	CASE NO.: 2023-CP-02-01719
	)	
Deborah Denise Harley,	)	
	)	
Plaintiff,	)	
	)	**ORDER DENYING D.R. HORTON INC.'S MOTION TO COMPEL ARBITRATION**
vs.	)	
	)	
D.R. Horton, Inc., and Plumbing Solutions, LLC,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on September 4, 2024, by way of Defendant, D.R. Horton, Inc.'s ("D.R. Horton"), Motion to Stay Action and Compel Arbitration ("Arbitration Motion").[1] Having reviewed the parties' submissions and hearing oral arguments, this Court finds that D.R. Horton's arbitration clause is unenforceable for the following, singular and collective reasons:

1. D.R. Horton's arbitration provision is unenforceable because it is unconscionable under *Smith* and contains essentially the same intertwined references and incorporates disclaimers of any and all implied warranties and monetary damages of any kind;

2. D.R. Horton's arbitration provision is not severable from other unconscionable terms and enforcing D.R. Horton's general severability clause would violate South Carolina public policy under *Damico*;

3. D.R. Horton's arbitration provision is unenforceable because it lacks mutuality and improperly limits the arbitrator's rights;

Accordingly, the Court **DENIES** D.R. Horton's Arbitration Motion, which in turn renders D.R. Horton's Motion to Stay moot.

PERTINENT FACTS

[1] At the September 4th hearing, Robert Lyles with Lyles & Associates, LLC appeared on behalf of Plaintiff. Kim Wooten with Kenison, Dudley & Crawford Law Firm appeared on behalf of D.R. Horton.

A. Harley's Purchase Contract and Deed

Plaintiff Harley ("Harley") executed the purchase contract for her home on April 21, 2021 (Purchase Contract). Harley's Purchase Contract is a boiler-plate contract that D.R. Horton offered to Harley on a take-it-or-leave-it basis. The contract also contains the following arbitration provision in Paragraph 15 that references D.R. Horton's Warranties[2] and Disclaimers in Paragraph 14:

> **15. MANDATORY BINDING ARBITRATION**. PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS AGREEMENT AND/OR THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING: (A) SELLER'S CONSTRUCTION AND DELIVERY OF THE HOUSE; (B) SELLER'S PERFORMANCE UNDER ANY PUNCH LIST OR INSPECTION AGREEMENT; AND (C) THE LIMITED WARRANTY PURSUANT TO SECTION 14 ABOVE. THE ARBITRATION SHALL TAKE PLACE IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED. THE PROCEEDING SHALL BE CONDUCTED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND TO THE EXTENT POSSIBLE, UNDER RULES WHICH PROVIDE FOR AN EXPEDITED HEARING. THE FILING FEE FOR THE ARBITRATION SHALL BE PAID BY THE PARTY FILING THE ARBITRATION DEMAND, BUT THE ARBITRATOR SHALL HAVE THE TO 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 SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION AWARD. NOTWITHSTANDING ANY OTHER PROVISION HEREIN, ANY DISPUTES ARISING UNDER THE LIMITED WARRANTY SHALL BE MEDIATED, ARBITRATED AND/OR JUDICIALLY RESOLVED PURSUANT TO THE TERMS, CONDITIONS, PROCEDURES AND RULES OF THAT WARRANTY.
> NOTWITHSTANDING THE FOREGOING, SELLER SHALL HAVE THE RIGHT TO INTERPLEAD ALL OR ANY PART OF THE EARNEST MONEY INTO A COURT OF COMPETENT JURISDICTION AS PROVIDED FOR IN SECTION 4 HEREIN.

[2] These "Warranties" are RWC's Ten Year Warranty and all Manufacturer Warranties which are provided to homeowners after they sign their purchase agreement at closing. (Purchase Contract).

(Purchase Contract).

Paragraph 14 describes the Warranties, wrongfully attempts to disclaim all implied warranties,[3] and unconscionably attempts to relieve D.R. Horton of all liability for "monetary damages of any kind":

> **14. WARRANTIES AND DISCLAIMER.**
>
> **a. Ten-Year Limited Warranty.** Seller shall provide Buyer with a written, ten-year limited warranty on the House administered by Residential Warranty Corporation ("RWC") which shall be effective as of the Closing Date. The terms and conditions of, and exclusions from, the ten-year limited warranty shall be as set forth in that document published by RWC, entitled "LIMITED WARRANTY, 10 YEAR LIMITED WARRANTY FOR NEW HOMES," and referred to herein as the "Limited Warranty". At Closing, Seller shall deliver to Buyer the documentation necessary for Buyer to obtain the actual Limited Warranty for the House from RWC.
>
> **b. Manufacturers' Warranties.** At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the house.
>
> **c. Disclaimer and Limitation on Seller's Liability.** THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14(a) ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND **SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE**. . . **AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY** OR OBLIGATON TO PURCHASER OF ANY NATURE WHATSOEVER EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 9(d) ABOVE AND IN SELLER'S DEED TO PURCHASER. EXCEPT AS OTHERWISE PROVIDED IN THE LIMITED WARRANTY, **SELLER SHALL NOT BE LIABLE FOR ANY REASON, UNDER ANY CIRCUMSTANCES, TO PURCHASER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND**, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL

[3] *See, e.g., Kirkman v. Parex, Inc.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006) (finding that disclaimers of the warranty of habitability are disfavored and ineffective in most circumstances).

OR INDIRECT DAMAGES.

(Purchase Contract) (emphasis added). Paragraphs 14 and 15 do not contain a survival or severability clause. *Id.* Nor is there any other applicable survival clause found anywhere in the Purchase Contract. *Id.*

Following the execution of her Purchase Contract, Harley received her deed when she closed in 2021 (Harley Deed). Harley's deed does not contain an arbitration provision. *Id.*

B. Procedural Background

Harley filed her Complaint on July 21, 2023, and it asserts the following claims against D.R. Horton: Negligence/Gross Negligence, Breach of Implied Warranties, and Violations of the South Carolina Unfair Trade Practices Act ("SCUPTA"). *See* Complaint.

D.R. Horton filed a Motion to Stay and Compel Arbitration and a Motion to Stay pursuant to South Carolina's Right to Cure Act on October 11, 2023. S.C. Code §40-59-810, *et seq*. Following an agreement between counsel, D.R. Horton conducted its "Right to Cure" inspections on February 28, 2024. As part of that agreement, D.R. Horton was allowed thirty (30) days following the inspections to respond to the Complaint. D.R. Horton made no offer to cure in the applicable timeframe set forth in the statute.

Rather, D.R. Horton re-filed its Arbitration Motion on March 29, 2024, and the parties proceeded to file their respective memorandums on August 29, 2024 (D.R. Horton Supp. Memo) and September 3, 2024 (Pl. Opp Memo) (Arbitration Motion). D.R. Horton contends the Purchase Contract between Harley and D.R. Horton contains an agreement to arbitrate the claims made by Harley.

The matter was heard via Webex on September 4, 2024, where D.R. Horton's and Harley's counsel appeared virtually and made arguments. I have considered those arguments together with all the written submissions of the parties.

THE ARBITRATION AGREEMENT AT ISSUE

I. The Arbitration Provision is Unenforceable Because it is Unconscionable

This Court finds that arbitration is unenforceable because Harley's Purchase Contract is an adhesion contract, and its arbitration provision contains oppressive terms. *Smith v. D.R. Horton*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) ("[U]nconscionability is. . .the absence of meaningful choice. . .due to one-sided contract provisions, together with [oppressive] terms. . .").

A. Plaintiff Lacked a Meaningful Choice

First, this Court finds that Harley's Purchase Contract is an adhesion contract, and she lacked a meaningful choice in her ability to negotiate arbitration. This is supported by the following facts:

- The Purchase Contract is a boilerplate contract that D.R. Horton offered to Harley on a take-it-or-leave-it basis;
- Harley is an unsophisticated purchaser whereas D.R. Horton is a sophisticated developer that has constructed nearly 800,000 homes in the United States; and,
- Similar D.R. Horton contracts have been found to be adhesion contracts by our courts.[4]

[4] *Smith, supra*; *see also Upchurch v. D.R. Horton*, 2005 WL 5621497, at *3 (S.C. Com. Pl.) (Judge Barber Sept. 28, 2005 Order Denying Horton's Arbitration Motion) (Richland County); *Zitek v. D.R. Horton, et al*, Case No. 2019-CP-04-01942 (S.C. Com. Pl.) (Judge Sprouse January 27, 2021 Order) (Anderson County) ("[T]his Court finds the agreement's arbitration provision contains oppressive terms that disclaim all implied warranties and waive Horton's liability 'for monetary damages of any kind.' The arbitration provision consists of Paragraphs 14 and 15 because, like *Smith*, cross-references 'intertwine' these provisions"); *Baddorf, et al. v. D.R. Horton*, Case No. 2022-CP-23-03974) (S.C. Com. Pl.) (Judge Gravely April 25, 2023 Order Denying Horton's Arbitration Motion) (Greenville County) ("The Arbitration Provision (Paragraph 15) in the Purchase Agreements here still references those unconscionable provisions of what is now Paragraph 14. Thus, the unconscionable provisions are still 'intertwined' with the arbitration provisions, making the Arbitration Provision referencing them unenforceable").

B. The Arbitration Provision Contains Oppressive Terms

Second, this Court finds that this adhesive Purchase Contract's arbitration provision contains oppressive terms that disclaim all implied warranties and waive D.R. Horton's liability "for monetary damages of any kind." (Purchase Contract).

1. The Arbitration Provision Includes Paragraphs 14 and 15

The arbitration provision consists of Paragraphs 14 and 15 because it is the combination of these two paragraphs that define the scope of arbitration;[5] and, like *Smith*, cross-references "intertwine" these provisions. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4.[6]

First, Paragraph 15 references and excludes from its applicability any dispute that arises under the Warranty granted in Paragraph "14 above" which means that one must go to Paragraph 14 to determine the applicability of Paragraph 15. Stated differently, the scope of arbitration under Paragraph 15 is incomplete without taking Paragraph 14 into account and therefore it is the combination of these two paragraphs that constitute the arbitration agreement.[7] Further, this Court, like the *Smith* Court, finds that *Prima Paint* does not preclude courts from considering provisions

[5] *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 609, 879 S.E.2d 746, 753 (2022) (courts must first define the scope of an arbitration agreement before considering whether that agreement is unconscionable).

[6] *See also Zitek* and *Baddorf*; *Mirmow v. Great Southern Homes, Inc.*, 2019 WL 7611604, *2 (S.C. Com. Pl.) (Judge Kessley Dec. 9, 2019 Order Denying Arb. Motion) (Lexington County) (finding the arbitration agreement in limited warranty unconscionable under *Smith* based on "related" warranty and liability disclaimers).

[7] Otherwise, the parties did not come to an agreement on arbitration, invalidating the arbitration provision all together.

that are "referenced by" an express arbitration provision.[8] *Smith*, 417 S.C. 48-49, S.E. 2d at 4 ("The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision. Thus, in accordance with the *Prima Paint* doctrine, we find that in determining whether the arbitration agreement is unconscionable, we may properly consider the entirety of paragraph 14.").

Second, the only pertinent differences between *Smith* and here is that D.R. Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and (2) its disclaimers from Paragraph 14(i) to Paragraph 14(c). However, the relocation of these provisions does not negate *Smith*'s applicability. A comparison of Smith's paragraphs to Harley's paragraphs shows that they contain the same cross-references.[9]

II. The Arbitration Provision Is Not Severable and is Against Public Policy

The Court also finds that Paragraph 15 is not severable from Paragraph 14. This is supported by the fact that neither Paragraphs 14 nor 15 contain a severability clause. (Purchase Contract). This is also supported by *Smith*:

> We conclude the arbitration clause. . .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. . ."

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[8] *Prima Paint* stands for the proposition that a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967). So long as there is a challenge to the arbitration provision, like here, then courts can decide the "arbitrability" issue and, in doing so, can also consider both the arbitration provision and its affiliated provisions. *See also Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126 n.3, 713 S.E.2d 799, 804 n.3 (Ct. App. 2011) (". . .Appellants contended this court is bound to reviewing the terms of the arbitration clause itself in determining its validity. We disagree. The South Carolina Supreme Court has looked outside the language of the arbitration clause to determine its enforceability.") (emphasis added), *partially vacated on other grounds by, Davis v. K.B. Home of S.C. Inc.*, 292 S.C. 634, 636, 842 S.E.2d 653, 654 (2014) ("We. . .vacate part II of the Court of Appeals' opinion addressing the issue of waiver"); *see also Brady v. Brady*, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952) ("[I]t is proper to read together the different provisions therein dealing with the same subject matter. . .").

[9] *See* (Pl. Memo. Opposing Arb., p. 9) (charts showing similarities between Smith and Harley).

Smith, 403 S.C. at 18, 742 S.E.2d at 41, *aff'd,* 417 S.C. at 49, 790 S.E.2d at 4 (emphasis added).

Further, since *Smith*, our Supreme Court decided *Damico v. Lennar Carolinas*, 437 S.C. 596, 619-622 879 S.E.2d 746, 759-760 (2022). In *Damico*, the court considered whether a purchase agreement's arbitration provision should be severed from other unconscionable provisions of that agreement. Not only did the *Damico* court find that severance was impossible, it also found that the agreement's severance clause, itself, was void as a matter of South Carolina public policy:

> We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon" parties to the arbitration proceeding. We decline to blue-pencil that provision. . .
>
> Blue-pencilling an agreement is, of course, within the Court's discretion. Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement. . .Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.
>
> There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. . .
>
> The second additional consideration of which we take note is that this contract involves a consumer transaction. . .More specifically, this contract involves the purchase of a new home. South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. . .As we stated over thirty years ago, it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce." . . .
>
> Generally, courts will not enforce contracts that violate public policy. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).
>
> A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. . .
>
> Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically

> concerned that honoring the severability clause here creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer.

Id. (internal citations omitted) (emphasis added).

This Court, like *Smith*, finds that Paragraph 15 is a not severable from Paragraph 14 and, like *Damico*, refuses to enforce Horton's general severability clause to "rescue" D.R. Horton from the consequences of its unconscionable drafting as a matter of public policy. *Id.*[10]

III. The Arbitration Provision in Harley's Purchase Contract Lacks Mutuality and Improperly Limits the Arbitrator's Rights

This Court further finds the arbitration provision in Harley's Purchase Contract, standing alone, is unconscionable for two other reasons.

First D.R. Horton seeks to limit the rights of home purchasers to arbitration while at the same time reserving its own right to litigate if it so choses:

> . . .SELLER SHALL HAVE THE RIGHT TO INTERPLEAD ALL OR ANY PART OF THE EARNEST MONEY INTO A COURT OF COMPETENT JURISDICTION. . .NOTWITHSTANDING THE FOREGOING, THE ARBITRATION PROVISIONS OF THIS SUBSECTION (B) SHALL NOT APPLY IN THE EVENT THAT THE DISPUTE RELATES TO A DEFAULT BY THE SELLER. . .

[10] This Court further finds that our Supreme Court's recent decision in *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 360 (2023) does not control the severability analysis here because Harley's arbitration provision mirrors the arbitration clause rejected by our Supreme Court in *Smith*. *Id.* at 318, 893 S.E.2d at 367 ("The standalone arbitration clause here differs from those found unconscionable in South Carolina cases considering adhesion contracts between sophisticated builders and new homeowners."). *Mart* is further distinguishable because in that case, unlike *Damico* and *Smith*, the trial court's ruling involved two, separate arbitration clauses in two, separate documents – Mart's purchase contract and Mart's post-closing Limited Warranty – neither of which Mart challenged. *Id.* at 316, 893 S.E.2d at 366 (noting that the Court was handcuffed because Mart did not challenge the arbitration provision "as unconscionable or lacking material terms.").

(Purchase Contract). This non-mutual arbitration obligation itself, on its face, is unconscionable. *Damico v. Lennar Carolinas*, 437 S.C. 596, 615, 879 S.E.2d 746, 757 (2022) (citing 17A Am. Jur. 2d *Contracts* § 272) ("Mutuality [ ] is a paramount consideration when assessing the substantive unconscionability of a contract term."); *see also Hooters of Am., Inc. v. Phillips*, 39 F.Supp.2d 582 (D.S.C. 1998), *aff'd and remanded*, 173 F3d 933, 940 (4th Cir. 1999) (finding decision to be the appropriate remedy where *Hooters* promulgated so biased arbitration rules that the contract created a "sham system unworthy of the name of arbitration.").

Second, D.R. Horton seeks to limit the authority of any arbitrator that may decide a "post-closing" dispute by disclaiming its own liability beforehand:

> AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR OBLIGATON TO PURCHASER OF ANY NATURE WHATSOEVER EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 9(d) ABOVE AND IN SELLER'S DEED TO PURCHASER. EXCEPT AS OTHERWISE PROVIDED IN THE LIMITED WARRANTY, SELLER SHALL NOT BE LIABLE FOR ANY REASON, UNDER ANY CIRCUMSTANCES, TO PURCHASER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND. . .

(Purchase Contract).

This language that purports to prevent the arbitrator from finding D.R. Horton liable for any type of monetary award prevents the arbitrator from making a fair, unbiased decision and is therefore invalid. *Damico* 437 S.C. at 611, 879 S.E.2d at 755 ("In analyzing claims of unconscionability in the context of arbitration agreements. . .courts. . . focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker."); *see also Smith*, 417 S.C. at 50, 790 S.E.2d at 5 (finding arbitration provision unconscionable and unenforceable where relief was left "to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate.").

CONCLUSION

Having found that the arbitration provision in D.R. Horton's Purchase Contract is unenforceable, this Court **DENIES** D.R. Horton's Arbitration Motion.

AND IT IS SO ORDERED!

Electronic Signature of Judge Fant to Follow

Aiken, South Carolina _____

Aiken Common Pleas

Case Caption:	Deborah Denise Harley , plaintiff, et al VS Dr Horton Inc , defendant, et al
Case Number:	2023CP0201719
Type:	Order/Other

So Ordered

Patrick C. Fant, III