

**RECEIVED**

**Feb 20 2025**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
The Honorable Martha M. Rivers

---

Circuit Court Case No. 2024-CP-40-03510  
Appellate Case No. 2024-001963

---

Sherman and Claudia Howell, .....Respondents,

v.

D.R. Horton, Inc., .....Appellant.

AND

D.R. Horton, Inc., .....Third-Party Plaintiff,

v.

Jenkins Plumbing Company, LLC, Caryl  
Mechanicals II, Inc., L&M Electric, Inc.,  
Unique Stone Creations, M&L General  
Construction, Inc., Alpha Omega Construction  
Group, Inc., and ASC Services and Supply, Inc., .....Third-Party Defendants.

---

INITIAL BRIEF OF APPELLANT

---

**TABLE OF CONTENTS**

Table of Contents ..... ii

Table of Authorities..... iii

Statement of Issues on Appeal ..... 1

Introduction and Statement of the Case ..... 2

Statement of Facts ..... 3

Standard of Review ..... 6

Arguments ..... 6

    1.    The Federal Arbitration Act Applies ..... 7

    2.    The Arbitration Agreement is Not Unconscionable..... 12

    3.    The Arbitration Provision Did Not Merge with the Deed. .... 24

Conclusion ..... 31

## TABLE OF AUTHORITIES

### CASES

<i>315 Corley CW LLC v. Palmetto Bluff Dev., LLC</i> , 444 S.C. 521, 908 S.E.2d 892 (Ct. App. 2024) .....	10
<i>Allied-Bruce Terminix Companies, Inc. v. Dobson</i> , 513 U.S. 265 (1995) .....	12
<i>Bernstein v. Pulte Home Co.</i> , No. 0:19-cv-02805-JFA, 2019 U.S. Dist. LEXIS 227884 (D.S.C. Dec. 23, 2019).....	7
<i>Bradley v. Brentwood Homes, Inc.</i> , 398 S.C. 447, 730 S.E.2d 312 (2012).....	8, 12
<i>Buckey Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006) .....	20
<i>Bushman v. Inv. Props., Ltd v. DBSI E-470 E. LLC</i> , No. 09-cv-00674-MSK-KLM, 2010 U.S. Dist. LEXIS 21011 (D. Colo. Feb. 15, 2010) .....	25, 26
<i>Carlson v. S.C. State Plastering, LLC</i> , 404 S.C. 250, 743 S.E.2d 868 (2013) .....	29
<i>Charleston &amp; W. Carolina Ry. Co. v. Joyce</i> , 231 S.C. 493, 99 S.E.2d 187 (1957).....	24
<i>Damico v. Lennar Carolinas, LLC</i> , 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020), <i>rev'd on other grounds</i> , 437 S.C. 596, 879 S.E.2d 746 (2022) .....	16
<i>Damico v. Lennar Carolinas, LLC</i> , 437 S.C. 596, 879 S.E.2d 746 (2022)..	7, 9, 16, 17, 18, 19, 21, 22, 23, 31
<i>Doctor's Assocs. v. Casarotto</i> , 517 U.S. 681 (1996).....	11
<i>Doe v. TCSC, LLC</i> , 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020).....	14
<i>Dudek v. Commonwealth Land Title Ins. Co.</i> , 466 F. Supp. 3d 610 (D.S.C. 2020) .....	25, 29, 30
<i>Episcopal Housing. Corp. v. Fed. Ins. Co.</i> , 269 S.C. 631, 239 S.E.2d 647 (1977) .....	8
<i>Holmes v. Worthey</i> , 282 S.E.2d 919 (Ga. Ct. App. 1981) .....	30
<i>Hooters of Am., Inc. v. Phillips</i> , 173 F.3d 933 (4th Cir. 1999).....	22

<i>Hughes v. Greenville Country Club</i> , 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984).....	29
<i>Huskins v. Mungo Homes, LLC</i> , Op. No. 28245, slip op. 2024 S.C. LEXIS 207 (S.C. Sup. Ct. filed Dec. 11, 2024) (Howard Adv. Sh. No. 48).....	23
<i>LaPoint v. John Wieland Homes &amp; Neighborhoods of the Carolinas, Inc.</i> , No. 0:08-3553-CMC, 2009 U.S. Dist. LEXIS 146577 (D.S.C. Dec. 1, 2009).....	22
<i>Mart v. Great Southern Homes, Inc.</i> , 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023)10, 16, 17, 18, 19	
<i>Munoz v. Green Tree Financial Corp.</i> , 343 S.C. 531, 542 S.E.2d 360 (2001) .....	21, 22
<i>New Prospect Area Fire District v. New Prospect Ruritan Club</i> , 311 S.C. 402, 429 S.E.2d 791 (1993).....	28, 30
<i>One Belle Hall Prop. Owners Ass’n v. Trammell Crow Residential Co.</i> , 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016) .....	21
<i>Prima Paint Corp. v. Flood &amp; Conklin Mfg. Co.</i> , 388 U.S. 395 (1967).....	14, 15, 19
<i>Rent-A-Ctr., W., Inc. v. Jackson</i> , 561 U.S. 63 (2010).....	13, 14, 17, 18, 19
<i>Saneii v. Robards</i> , 289 F. Supp. 2d 855 (W.D. Ky. 2003).....	8
<i>Shoney’s, Inc. v. Cooke</i> , 291 S.C. 307, 353 S.E.2d 300 (Ct. App. 1987) .....	24, 25, 30
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 644 S.E.2d 663 (2007).....	6
<i>Smith v. D.R. Horton, Inc.</i> , 417 S.C. 42, 790 S.E.2d 1 (2016).....	14, 15, 18, 19, 20
<i>Soil Remediation Co. v. Nu-Way Env’tl., Inc.</i> , 323 S.C. 454, 476 S.E.2d 149 (1996) .....	11
<i>Stanford Dev. Corp v. Stanford Condo. Owners Ass’n</i> , 285 S.W.3d 45 (Tex. App. 2009) 25, 27, 28	
<i>Thomas v. Sloan Homes, LLC</i> , 81 So. 3d 309 (Ala. 2011).....	25, 26, 27
<i>Toler’s Cove Homeowners Ass’n v. Trident Construction Co.</i> , 355 S.C. 605, 586 S.E.2d 581 (2003).....	10, 11

<i>Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.</i> , 489 U.S. 468 (1989).....	11
<i>Whitman v. Legal Helpers Debt Resolution, LLC</i> , No.: 4:12-cv-00144-RBH, 2012 U.S. Dist. LEXIS 176480 (D.S.C. Dec. 13, 2012) .....	23
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 553 S.E.2d 110 (2001) .....	7, 9, 11

**STATUTES**

9 U.S.C. § 2.....	7, 20
9 U.S.C. §§1-16 .....	6, 7, 8, 9, 10, 11, 12, 31
S.C. Code Ann. § 15-48-10 -240.....	7, 9, 10, 11, 12
S.C. Code Ann. § 15-48-10(a) .....	10, 11

**OTHER AUTHORITIES**

Ballentine’s Law Dictionary (3d ed. 1969).....	25
--	----

**TREATISES**

Restatement (Fourth) of Property § 2.5 .....	25
--	----

## STATEMENT OF ISSUES ON APPEAL

1. The circuit court erred by not applying the Federal Arbitration Act and federal law to determine whether the parties' dispute should be arbitrated, and by misunderstanding the meaning of "interstate commerce," the notice requirements of the South Carolina Uniform Arbitration Act, and the law of arbitrability thereunder.
2. The circuit court erred by ruling that the parties' agreement to arbitrate was unconscionable and unenforceable by relying on the "fiction" that the arbitration agreement contained provisions outside the four corners of the agreement.
3. The circuit court erred by ruling that the parties' obligations under their contract for the construction and purchase of a new home should be ignored by misapplying the doctrine of merger from the law of real estate.

## INTRODUCTION AND STATEMENT OF THE CASE

In December 2021, Sherman and Claudia Howell purchased their home at 564 Pine Knot Drive, Blythewood, South Carolina (the “Home”) from D.R. Horton, Inc. (hereinafter “D.R. Horton”). On June 10, 2024, the Howells filed suit against D.R. Horton alleging defective construction of their Home. (Compl. ¶ 8.) As part of their purchase, the Howells entered into an agreement with D.R. Horton (the “Home Purchase Agreement”). (D.R. Horton’s Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. A.) The Home Purchase Agreement contains an arbitration clause. (*Id.* § 15.)

On August 9, 2024, D.R. Horton answered the complaint, denied the Howells’ allegations, and filed a third-party complaint against its implicated subcontractors. (D.R. Horton’s Answer & Third-Party Compl., Aug. 9, 2024.) D.R. Horton’s third-party claims are subject to arbitration pursuant to independent contractor agreements (“ICAs”) between D.R. Horton and its subcontractors. (D.R. Horton’s Mem. Supp. Mot. Stay Action & Compel Arbitration at 3–4 & n.1, Ex. B.)

Concurrently with answering the complaint, D.R. Horton moved pursuant to the Home Purchase Agreement and ICAs to stay the action and compel arbitration. (Mot. Stay Action & Compel Arbitration, Aug. 9, 2024.) The lower court heard D.R. Horton’s motion to compel arbitration via WebEx on September 4, 2024. (Transcript.) On October 22, 2024, the lower court denied D.R. Horton’s motion to compel arbitration. (Order, Oct. 22, 2024.) D.R. Horton filed a Notice of Appeal on November 15, 2024. (Notice of Appeal.) This appeal followed.

## STATEMENT OF FACTS

In December 2021, Sherman and Claudia Howell entered into the Home Purchase Agreement with D.R. Horton to purchase the Home, located in Richland County. As part of the Home Purchase Agreement, the Howells and D.R. Horton agreed to arbitrate any and all disputes related to construction of the Home. (Home Purchase Agreement § 15.) The Howells signed the Home Purchase Agreement and specifically initialed the arbitration provision. (Home Purchase Agreement at 7, 11.)

The entirety of the arbitration provision provides as follows:

**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 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 the limited 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.

(D.R. Horton’s Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. A, § 15 (formatting altered).)<sup>1</sup>

The Howells filed this lawsuit complaining of defects in the construction of their Home and damages related to the same. The Howells allege that certain components, including but not limited to the second floor i-joists, roof, roof flashing, roof trusses, siding, and stone veneer exterior, were not constructed in accordance with applicable building codes and construction industry standards. (Compl. ¶ 8; *see* Compl. ¶ 17; *see also, e.g.*, Compl. ¶¶ 45–46.) The Howells also allege certain claims regarding fraud and misrepresentation related to the alleged defects in the Home. (Compl. ¶¶ 12–43.) Every cause of action asserted by the Howells arises out of the construction of the Home.

Cause of Action	Basis of Allegation
Negligence/Gross Negligence	“In failing to properly construct the [Home] by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry,” (Compl. ¶ 46(a)).
Breach of Express and Implied Warranties	Express and implied warranties that the Home would be free of construction defects, (Compl. ¶¶ 49–50).  “In failing to properly construct the [Home] by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry,” (Compl. ¶ 51(a)).
Breach of Contract	“Defendant [D.R. Horton] breached the Contract by failing to construct the [Home] consistent with the terms of the Contract, including, but not limited to, constructing the [Home] as specified and in compliance with the International Residential Code.” (Compl. ¶ 58.)

---

<sup>1</sup> The arbitration agreement cited in briefing to the trial court contained minor typographical errors and an additional sentence that is not in the parties’ arbitration agreement. These errors, none of which impacted the substance of Defendant’s argument, have been corrected here.

<p>Violation of Unfair Trade Practices</p>	<p>“[T]he following practices of Defendant [D.R. Horton] are unfair and deceptive in the trade of construction services and are unlawful: Marketing the [Home] with construction and/or design defects as top-quality knowing that the homes had construction and/or design defects,” (Compl. ¶ 69(a)).</p>
<p>Breach of Contract Accompanied by Fraudulent Act</p>	<p>“Defendant [D.R. Horton] breached the Contract by failing to construct the [Home] consistent with the terms of the Contract, including, but not limited to, constructing the [Home] as specified and in compliance with the International Residential Code.” (Compl. ¶ 76.)</p> <p>“Defendant [D.R. Horton] had a fraudulent intent in entering into the Contract, as the Defendant [D.R. Horton] knew or had reason to know that the [Home] did not comply with the specifications and the International Building Code at the time that the [Home] was transferred to the Plaintiffs.” (Compl. ¶ 77.)</p>
<p>Constructive Fraud</p>	<p>“Defendant [D.R. Horton] represented to the Plaintiffs that it builds top-quality homes in accordance with specifications and the International Building Code.” (Compl. ¶ 81.)</p> <p>“Defendant [D.R. Horton] should have known that these representations were false, in that the Defendant [D.R. Horton] knew that its subcontractors cut the i-joint in at least one home without following the specifications and the International Building Code and the same subcontractors completed the construction of the remaining homes in the Community.” (Compl. ¶ 83.)</p>
<p>Fraud and Misrepresentation</p>	<p>“Defendant [D.R. Horton] represented that it builds top-quality homes in accordance with specifications and the International Building Code to the Plaintiffs.” (Compl. ¶ 91.)</p> <p>“Defendant [D.R. Horton] knew or had reckless disregard for the truth or falsity of these representations, in that the Defendant [D.R. Horton] knew that its subcontractors cut the i-joint in at least one home without following the specifications and the International Building Code and the same subcontractors completed the construction of the remaining homes in the Community.” (Compl. ¶ 94.)</p>

Because all the Howells' claims arise out of the construction of the Home, these disputes should be submitted to binding arbitration pursuant to the Home Purchase Agreement.<sup>2</sup>

### STANDARD OF REVIEW

The Court reviews legal conclusions about arbitrability de novo. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). The trial court's factual findings are reviewed under an "any evidence" standard and will be reversed only if no evidence "reasonably supports" them. *Id.*

However, the underlying facts of this case are not in dispute. The trial court's decision hinged on its interpretation and application of relevant law. Therefore, this Court is free to correct the lower court's errors without deference to the trial court's opinion.

### ARGUMENTS

The lower court improperly denied D.R. Horton's motion to compel arbitration based on its erroneous rulings that (1) the Federal Arbitration Act does not apply to the Home Purchase Agreement; (2) the arbitration agreement is unconscionable; and (3) the merger doctrine merged the arbitration agreement out of existence upon transfer of title to the Home to the Howells.

---

<sup>2</sup> Notably, D.R. Horton did not perform the allegedly defective construction complained of by Plaintiffs. That work was completed by D.R. Horton's subcontractors pursuant to ICAs, each of which contained its own arbitration provision. (Mem. Supp. Mot. Stay Action & Compel Arbitration at 3–4 & n.1, Ex. B.) Those agreements stipulate that disputes "shall be submitted to binding arbitration under the [FAA]." (*Id.* at 3 & 4 n.1; *see also id.* Ex. B, § 13.3.) Therefore, arbitration of Plaintiffs' claims is necessary to efficiently resolve the dispute among all parties.

## 1. THE FEDERAL ARBITRATION ACT APPLIES

The Federal Arbitration Act (“FAA”), 9 U.S.C. §§1–16, applies to this dispute because the parties’ transaction involves interstate commerce, the parties did not agree to arbitrate under different rules, and the FAA preempts relevant state law. The trial court erred in holding otherwise.

The trial court’s analysis largely ignored the FAA, concluding that the South Carolina Uniform Arbitration Act (“SCUAA”), S.C. Code Ann. § 15-48-10 -240, applied. The court based its decision on the Home Purchase Agreement’s statement on its first page that it is subject to arbitration under the SCUAA. (Order at 6.) However, this is not a true choice of law provision, nor does it pull the agreement outside of the FAA as a matter of law. That statement is simply the notice required by the SCUAA because the Home is in South Carolina. In any event, to the extent application of the SCUAA would prevent enforcement of a valid arbitration agreement, the FAA preempts the SCUAA.

The FAA applies to any written agreement to arbitrate in a “contract evidencing a transaction involving commerce.” 9 U.S.C. § 2. Courts have interpreted “the words ‘involving commerce’ [as] the functional equivalent of ‘affecting commerce,’ which typically indicates Congress’ intent to exercise its commerce power in full.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001). Therefore, a dispute is subject to the FAA where there is a written agreement to arbitrate that encompasses it and the transaction at issue relates to foreign or interstate commerce. *See, e.g., Bernstein v. Pulte Home Co.*, No. 0:19-cv-02805-JFA, 2019 U.S. Dist. LEXIS 227884, at \*6 (D.S.C. Dec. 23, 2019) (describing when a party can compel arbitration under the FAA).

The South Carolina Supreme Court has repeatedly held that an agreement for the construction of a new home built to a party’s specifications “manifestly involve[s] interstate commerce.” *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022).

A party could not construct a new home “with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.” *Episcopal Housing. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977). In contrast, an agreement to purchase an existing, previously constructed house is of an intrastate nature and would not necessarily implicate the FAA. *See Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 316–17 (2012) (discussing the “historical” and “inherently intrastate” nature of real estate transactions). This is because “[c]ontracts strictly for the sale of residential real estate focus entirely on a commodity—the land—which is firmly planted in one particular state.” *Id.* at 457, 730 S.E.2d at 317 (quoting *Saneii v. Robards*, 289 F. Supp. 2d 855, 858 (W.D. Ky. 2003)).

The trial court incorrectly found that the “essential character” of the transaction at issue here was the purchase of a completed building and, therefore, it did not involve interstate commerce. (Order at 6 (quoting *Bradley*, 398 S.C. at 459, 730 S.E.2d at 318).) The record contains no evidence to support this finding, as the Home Purchase Agreement shows that Plaintiffs agreed to pay for the construction of a new home, not the purchase of an existing one.

In *Bradley*, for instance, the court found it crucial that the buyer did not sign portions of the contract dealing with new construction—where the buyer could select additional options and personalize the home. 398 S.C. at 458, 730 S.E.2d at 318. The parties’ contract even included a provision acknowledging “that [the] [p]urchaser [was] buying a completed dwelling and that [the] [s]eller [was] not acting as a contractor for [the] [p]urchaser in the construction of a dwelling.” *Id.* at 450 n.3, 730 S.E.2d at 313 n.3. In contrast, here the Home Purchase Agreement includes an exhibit listing “House Features and Options” selected by Plaintiffs. (Home Purchase Agreement Ex. A.) Plaintiffs selected four pages of optional features, many of which came with an additional cost, totaling \$11,750. (*Id.* at 1–4.) These features included an optional study (\$2,250), (*id.* at 1),

an additional irrigation zone (\$750), (*id.* at 2), a deluxe bath package (\$2,500), (*id.*), blinds (\$1,350), (*id.* at 3), and a covered porch slab (\$4,900), (*id.* at 4). Plaintiffs separately signed for these features. (*Id.* at 5.) Plaintiffs also agreed to remove a glass shower door from the scope of work, which reduced the purchase price by \$1,000. (Home Purchase Agreement Add. 6.)

The Home Purchase Agreement also contains numerous provisions that make sense only in the context of new-home construction. For instance, the contract includes a provision for a walkthrough by the purchaser and D.R. Horton “[a]fter substantial completion of the House but prior to Closing,” after which the parties are to create “a written list of items on the Property that the parties agree should be corrected, repaired or replaced.” (Home Purchase Agreement § 9(d).) The agreement also contains numerous references to the *construction* of a *new* home. (*E.g.*, Home Purchase Agreement § 14(a) (identifying a “WARRANTY FOR NEW HOMES”); *id.* Add. 2, ¶ 1 (“Prior to Closing, Seller *shall construct* or complete construction of a single-family . . . residence . . . on the Lot.” (emphasis added)); *id.* Add. 2, ¶ 2 (“Seller *shall construct the House* according to the Columbia Carolina Plan, Elevation C, including those features and options listed on Exhibit A to the Agreement . . . .” (emphasis altered)); *id.* D.R. Horton Smart Home Disclosure (discussing features of the purchaser’s “*new home*” (emphasis added)).) The Home Purchase Agreement therefore “involved the construction of [a] new home[] built to [Plaintiffs’] specifications,” and the FAA applies. *Damico*, 437 S.C. at 608, 879 S.E.2d at 753.

The trial court also erred in concluding that the parties stipulated that the SCUAA should control this dispute. It is well established that “[p]arties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA.” *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116. However, Plaintiffs and D.R. Horton did not agree that the SCUAA should apply *to the exclusion of* the FAA.

As the trial court noted, the Home Purchase Agreement acknowledges that disputes are subject to arbitration under the SCUAA. (Order at 6.) That is simply the notice that the SCUAA requires before a dispute *can* be arbitrated under the SCUAA. *See* S.C. Code Ann. § 15-48-10(a). The SCUAA notice is not even part of the parties’ agreement, which starts after the notice where the parties state that they “agree *as follows*.” (Home Purchase Agreement at 1 (emphasis added).) In *Toler’s Cove Homeowners Ass’n v. Trident Construction Co.*, the South Carolina Supreme Court interpreted a contract that, like the Home Purchase Agreement, prominently stated it was “subject to arbitration under [the SCUAA].” 355 S.C. 605, 609, 586 S.E.2d 581, 583 (2003) (formatting altered). Nonetheless, the court stated that the agreement did not include a choice of law provision and therefore did not resolve the question of whether the FAA or the SCUAA applied. *Id.* at 610, 586 S.E.2d at 584. The lower court held that the transaction involved interstate commerce and the FAA applied; that ruling was not challenged and therefore was the law of the case. *Id.*

Similarly, in *Mart v. Great Southern Homes, Inc.*, the parties’ agreement stipulated that they would select arbitrators pursuant to the SCUAA. 441 S.C. 304, 307–08, 893 S.E.2d 360, 361–62 (Ct. App. 2023). However, Great Southern Homes (“GSH”) argued that the FAA applied and preempted the SCUAA. *Id.* at 311 n.5, 893 S.E.2d at 363 n.5. In support, GSH presented evidence of the interstate nature of the transaction and pointed to a separate limited warranty that called for arbitration under the FAA. *Id.* The court apparently agreed and analyzed the agreement under the FAA. *Id.* at 313–17 & n.7, 893 S.E.2d at 364–67 & n.7.<sup>3</sup>

---

<sup>3</sup> It appears that this point of law may not be entirely settled. The South Carolina Court of Appeals has also found that an agreement with a header stating that the agreement was subject to the SCUAA “contain[ed] more than a generic choice of law provision.” *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 529, 908 S.E.2d 892, 896 (Ct. App. 2024). In that case, the Court held that the SCUAA, not the FAA, applied to the parties’ dispute. *Id.* This opinion

Even if the SCUAA applies, courts are still required to follow the FAA. “[P]arties may agree to enforce arbitration agreements under state rules rather than FAA rules, [but] the FAA will preempt any state law that completely invalidates the parties’ agreement to arbitrate.” *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116. Therefore, if the parties so agree, courts will enforce “state *procedural* rules that do not undermine the enforceability of an otherwise valid contract to arbitrate.” *Id.* at 593, 553 S.E.2d at 116 (emphasis added).

For example, the FAA does not preempt a state rule that “call[s] for arbitration to be stayed pending the resolution of a related judicial proceeding” because such a rule “determine[s] only the efficient order of proceedings.” *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477–78 (1989) (concluding that “application of [a California law] to stay arbitration under [a] contract in interstate commerce, in accordance with the terms of the arbitration agreement itself,” did not “undermine the goals and policies of the FAA”). In contrast, where a “State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally,” the state law is preempted by the FAA. *Casarotto*, 517 U.S. at 687; *see also Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 459–61, 476 S.E.2d 149, 152–53 (1996) (applying *Casarotto*, finding that because the agreement related to interstate commerce the FAA applied, and holding that the FAA preempted the notice requirement in the SCUAA, S.C. Code Ann. § 15-48-10(a)).

The Home Purchase Agreement directly concerns the construction of a new home and clearly implicates interstate commerce. As such, the arbitration provision in the Home Purchase

---

seems to contradict the South Carolina Supreme Court’s ruling in *Toler’s Cove Homeowners Ass’n v. Trident Construction Co.*

Agreement should be analyzed under the FAA. The trial court erred in concluding that “the essential character” of the Home Purchase Agreement was the purchase of a completed home, which was intrastate in nature and governed only by the SCUAA. (Order at 6 (quoting *Bradley*, 398 S.C. at 459, 730 S.E.2d at 318).) The Court’s review of arbitrability is properly governed by the FAA.

Applying the FAA, the Court should have enforced the parties’ arbitration provision in the Home Purchase Agreement. As the United States Supreme Court stated in *Allied-Bruce*, “[f]irst, the basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate.” *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995). In *Allied-Bruce* the Supreme Court clarified that the term “involving commerce” extended to the full reach of Congress’ commerce power and that should be applied here. The Home was newly constructed in the stream of interstate commerce with materials from many states throughout the United States and with the Howells choosing their specific options. The agreements with the contractors and subcontractors to construct the Home also require arbitration under the FAA. The FAA aims to enforce the type of private arbitration provision in the Home Purchase Agreement in both state and federal courts and preempts state laws that would thwart its application. Accordingly, the FAA compels arbitration in this case.

## 2. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE.

The trial court further erred by expanding the arbitration agreement in section 15 of the Home Purchase Agreement to include unrelated provisions in section 14 and concluding that terms in section 14 rendered the arbitration agreement unconscionable. When the arbitration agreement is properly limited to section 15, it becomes clear that it is not unconscionable.

Significantly, the Howells do not challenge any specific provision of the arbitration agreement in section 15 as unconscionable. The Howells challenge only terms of the warranty provision in section 14. Challenges to contractual provisions outside of the arbitration agreement do not prevent enforcement of the parties' agreement to arbitrate. *See, e.g., Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010) (“[A] party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. [A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” (second alteration in original) (citation and internal quotation marks omitted)).

The entirety of the arbitration agreement is found in section 15 of the Home Purchase Agreement:

**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 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 the limited 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.

(D.R. Horton’s Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. A, § 15

(formatting altered).)<sup>4</sup>

Nothing in the arbitration agreement is unconscionable and would justify a court in refusing to enforce it.

**A. The Arbitration Agreement Consists only of Section 15.**

The trial court erred by not limiting its arbitrability review to section 15 of the Home Purchase Agreement. Under the *Prima Paint*<sup>5</sup> doctrine, “the first task of a court is to separate the arbitration provision from the rest of the contract.” *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). A court can consider only “challenges specifically [to] the validity of the agreement to arbitrate.” *Rent-A-Ctr.*, 561 U.S. at 70 (citation omitted). “[A] party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.” *Id.* In other words, “a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable.” *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016). Plaintiffs (and the trial court) avoided this limitation by imputing allegedly unconscionable terms from other sections of the contract into the arbitration agreement. (*See, e.g.*, Order at 9.)

The trial court relied heavily on *Smith* in finding that the arbitration agreement was not limited to section 15. (*See* Order at 9–14.) In *Smith*, the South Carolina Supreme Court reviewed

---

<sup>4</sup> The arbitration agreement cited in briefing to the trial court contained minor typographical errors and an additional sentence that is not in the parties’ arbitration agreement. These errors have been corrected here. *See supra* note 1.

<sup>5</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

a paragraph called “Warranties and Dispute Resolution,” with “more than 1,800 words” and “ten separately denominated subparagraphs.” 417 S.C. at 53, 60, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting). Subparagraph (g) was specifically identified as “MANDATORY BINDING ARBITRATION” and detailed the parties’ obligation to arbitrate their disputes. *Id.* at 57–58, 790 S.E.2d at 9. Notably, the agreement did not contain a severability clause. *Id.* at 50 n.6, 790 S.E.2d at 5 n.6 (majority opinion).

The parties, and the justices, in *Smith* disagreed as to whether the ten subparagraphs should be read together as the “arbitration agreement,” or only the specifically labeled arbitration subparagraph (g). *Id.* at 48, 790 S.E.2d at 4. The majority concluded that “[t]he subparagraphs . . . contain[ed] numerous cross-references to one another” and therefore were “intertwin[ed] . . . so as to constitute a single provision.” *Id.* In a 3–2 decision, the court held that warranty disclaimers and damages limitations in various subparagraphs rendered the arbitration agreement unenforceable. *Id.* at 50, 790 S.E.2d at 5. Justice Kittredge filed a lengthy dissent, in which he noted that the plaintiffs “[did] not contend the specific agreement to arbitrate was unconscionable,” and criticized the majority for relying on “the fiction that the arbitration provision [was] the entirety of Paragraph 14.” *Id.* at 53, 59, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting).

The trial court’s decision below is based on a similar fiction—that section 15 is so intertwined with other provisions of the Home Purchase Agreement that those provisions combine with section 15 to form the arbitration agreement. (*See* Order at 9–11, 14–16, 20.) In particular, the trial court held that section 15 was intertwined with section 14, which immediately precedes the arbitration provision and addresses warranties. (Order at 16.) Recent decisions from the South Carolina Supreme Court and South Carolina Court of Appeals have rejected this as an overreach of the law.

In *Damico v. Lennar Carolinas, LLC*, the court addressed a contract with “ten, numbered paragraphs setting forth the arbitration agreement” in a section called “Mediation/Arbitration of Disputes.” 437 S.C. 596, 605, 879 S.E.2d 746, 751 (2022). The trial court held that the arbitration agreement “consisted of the entirety of the purchase and sale agreement and the [associated] limited warranty booklet” because “extensive cross-references between the two contracts combined them into a single agreement.” *Id.* at 606–07, 879 S.E.2d at 752. This Court reversed, finding that “the arbitration agreement . . . was contained in a distinct, separate section of the [contract]” and “the circuit court erred by considering the contract as a whole.” *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 198–99, 844 S.E.2d 66, 72 (Ct. App. 2020), *rev’d on other grounds*, 437 S.C. 596, 879 S.E.2d 746 (2022). The South Carolina Supreme Court affirmed the Court on that ground, concluding that the section with the arbitration agreement was a standalone provision that “deal[t] solely with the scope of arbitration and the requisite formalities accompanying an arbitration proceeding.” *Damico*, 437 S.C. at 610, 879 S.E.2d at 754. Moreover, because the arbitration agreements in both the contract and the related warranty booklet were standalone provisions, in their own sections, “it [was] legally irrelevant that the portions of the contracts outside of the arbitration agreements extensively cross-reference[d] one another and incorporate[d] one another by reference.” *Id.* at 610 n.6, 879 S.E.2d at 754 n.6.

This Court acknowledged this standard recently in *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023). *Mart* involved an arbitration provision “in an unnumbered, standalone paragraph.” *Id.* at 307, 893 S.E.2d at 361. Other unnumbered paragraphs included a limited warranty that disclaimed all other warranties, as well as liability for consequential and punitive damages. *Id.* at 308, 893 S.E.2d at 362. The buyer “agree[d] to accept [the] limited warranty in lieu of all other rights or remedies, whether base[d] on contract or tort.”

*Id.* (third alteration in original) (emphasis removed). At closing, the buyer was provided with a warranty application and warranty that contained its own arbitration provision, and which likewise disclaimed all other warranties and precluded recovery of incidental and consequential damages. *Id.* at 309–11, 893 S.E.2d at 363. On appeal, the Court considered whether the trial court erred by incorporating provisions from this separate limited warranty into the parties’ sales contract. *Id.* at 312, 893 S.E.2d at 364.

The *Mart* Court looked to the South Carolina Supreme Court’s conclusion in *Damico* that “the circuit court impermissibly considered the terms found in the limited warranty booklet’ when analyzing the arbitration provision of the purchase and sales agreement.” *Id.* at 315, 893 S.E.2d at 365 (quoting *Damico*, 437 S.C. at 607, 879 S.E.2d at 753). The Court added that “controlling case law [did] not permit [it] to consider the language of the separate limited Warranty or the propriety of the waiver of implied warranties in analyzing the standalone arbitration language of the Sales Contract.” *Id.* at 315, 893 S.E.2d at 365. To demonstrate that the arbitration provision was unconscionable and, therefore, unenforceable, the plaintiff “was required to show that the language *in the arbitration section alone* was unconscionable.” *Id.* at 315–16, 893 S.E.2d at 366 (emphasis added). The plaintiff failed to do that because although “[c]hallenged terms [could] be found elsewhere in the Sales Contract and/or the Warranty agreement,” the arbitration provision itself “contain[ed] no such . . . term[s].” *Id.* at 315, 893 S.E.2d at 365.

*Damico* and *Mart* are consistent with the United States Supreme Court’s holding in *Rent-A-Center*, where a company sought to enforce a delegation provision that gave the arbitrator “exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of th[e] Agreement.” *Rent-A-Ctr.*, 561 U.S. at 66 (citation omitted). Notably, “the underlying contract [was] itself an arbitration agreement” entitled “Mutual

Agreement to Arbitrate Claims.” *Id.* at 65, 72. The *Rent-A-Center* Court clarified that “[a]pplication of the severability rule [of *Prima Paint*] does not depend on the substance of the remainder of the contract.” *Id.* at 72. No matter the underlying contract, when ruling on arbitrability a court can consider only challenges *specifically* to the provision providing for arbitration. *Id.* The *Rent-A-Center* plaintiff’s unconscionability arguments—that the agreement “was one-sided” and contained a “fee-splitting arrangement” and “limitations on discovery”—were directed at the arbitration agreement *as a whole*. *Id.* at 73–74. The plaintiff “did not make any arguments *specific to the delegation provision*” or “contest the validity of *the delegation provision in particular*.” *Id.* at 74 (emphasis added). *Rent-A-Center* makes clear that this is what the law requires.

In this case, the Home Purchase Agreement bears more in common with the separate arbitration provisions in *Damico* and *Mart* than the combined warranty and dispute resolution paragraph in *Smith*. As in *Rent-A-Center*, here the arbitration clause is a standalone provision located in section 15 of the Home Purchase Agreement, whereas warranties and related disclaimers are in section 14. The trial court erred by concluding that the arbitration provision “incorporates by reference section 14 and its warranty provisions.” (Order at 16.) The trial court made much of the fact that section 15 provides for claims under the limited warranty to be resolved according to the terms of that warranty, which is found in section 14. (Order at 5, 16.) However, the arbitration provision in *Damico* stated that it applied to “any Dispute,” including claims “arising by virtue of any . . . warranties alleged to have been made.” 437 S.C. at 605, 879 S.E.2d at 751–52 (ellipsis in original). Nevertheless, as noted above, both this Court and the South Carolina Supreme Court concluded that the arbitration agreement was a standalone provision that must be interpreted on its

own—despite its reference to warranties and the existence of an outside limited warranty booklet. *Id.* at 607, 879 S.E.2d at 752–53.

Similarly, the arbitration agreement in *Mart* applied to “[a]ny dispute between the parties . . . arising out of [the] contract.” 441 S.C. at 307, 893 S.E.2d at 361. “Any dispute” is broad enough to encompass warranty claims, which the agreement addressed (and severely restricted) shortly before the arbitration provision. *Id.* at 308, 893 S.E.2d at 362. Nonetheless, this Court refused to read these terms into the arbitration provision. *See id.* at 315–16, 893 S.E.2d at 366.

Under “federal law, the relevant arbitration provision consists of only that portion of [section 15] in which the parties agree[d] to arbitrate any controversies.” *Smith*, 417 S.C. at 62, 790 S.E.2d at 11 (Kittredge, J., dissenting); *see also Prima Paint Corp.*, 388 U.S. at 404 (holding that when ruling on arbitrability, a court “may consider only issues relating to the making and performance of the agreement to arbitrate”). The arbitration provision in both *Damico* and *Mart* referred to warranty claims; the arbitration provision in *Damico* did so explicitly. Nonetheless, in both cases courts concluded that it was improper to read the terms of the warranty into the arbitration provision. In this case, the relevant arbitration provision consists of the stipulation in section 15 that the “purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding th[e] agreement and/or the property.” (Mem. Supp. Mot. Compel Arbitration Ex. A, § 15 (capitalization altered).) The Court should follow *Damico* and *Mart* and refuse to read extraneous provisions into a standalone, unchallenged arbitration provision. Plaintiffs’ challenges to those other provisions in the Home Purchase Agreement are “for the arbitrator.” *Rent-A-Ctr.*, 561 U.S. at 72.

Moreover, section 15 is severable from the rest of the Home Purchase Agreement. *See Buckey Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”). “A severable contract is one . . . susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.” *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (citation omitted). On the other hand, a contract should be treated as a single, integrated agreement “when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent.” *Id.* (citation omitted). Whether or not a contract is severable “depends primarily upon the intent of the parties.” *Id.* (citation omitted).

Here, the evidence suggests that the parties intended to treat section 15 as separate from the rest of the Home Purchase Agreement. Plaintiffs “separately initialed [section 15] titled ‘MANDATORY BINDING ARBITRATION,’” which “indicates the parties themselves viewed these terms as distinct contractual provisions to which they separately consented.” *Smith*, 417 S.C. at 61, 790 S.E.2d at 11 (Kittredge, J., dissenting). The Court should follow suit and treat section 15 as a separate, distinct provision.

#### **B. The Arbitration Agreement Contains No Unconscionable Terms.**

The FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2; *see also* S.C. Code Ann. § 15-48-10(a). Therefore, “courts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability.”

*One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (citation and internal quotation marks omitted). “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 v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). In short, an agreement is unconscionable if it both reflects “an absence of meaningful choice” *and* contains “oppressive, one-sided terms.” *Id.* at 25, 644 S.E.2d at 669.

“The touchstone of the analysis begins with the presence or absence of meaningful choice.” *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. This requires courts to “consider, among all facts and circumstances, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant.” *Id.* at 613, 879 S.E.2d at 755.

The trial court analyzed the Home Purchase Agreement as an “adhesion contract” and concluded that Plaintiffs lacked a meaningful choice in accepting it. (Order at 18–19.) “Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable.” *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). D.R. Horton disputes that the Home Purchase Agreement was an adhesion contract. Plaintiffs were free to purchase a home from another builder, to purchase a pre-existing home from a homeowner, or to purchase no home at all. Moreover, as discussed above, Plaintiffs were able to personalize the contract by selecting various options that were offered. Plaintiffs freely chose to assent to D.R. Horton’s contractual terms, including arbitration of construction disputes, and there was nothing inherently unfair about this bargaining process.

However, assuming *arguendo* that the trial court was correct, “[a]dhesion contracts . . . are not per se unconscionable.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; *cf. Munoz* at 541 n.5, 542 S.E.2d at 365 n.5 (noting that, under federal law, “[i]nequality of bargaining power alone will not invalidate an arbitration agreement”). As the South Carolina Supreme Court has made clear, “adhesive contracts are not unconscionable . . . so long as the terms are even-handed.” *Damico*, 437 S.C. at 614, 879 S.E.2d at 756 (emphases removed).

When analyzing conscionability in the context of arbitration agreements, “the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. That is the “general rubric” a court must use to “determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.” *Id.* at 25, 644 S.E.2d at 669. However, “there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability.” *Id.* at 36, 644 S.E.2d at 674. Rather, courts should examine arbitration clauses for conscionability on a “case-by-case” basis. *Id.*

Here, the arbitration provision in the Home Purchase Agreement is a far cry from provisions that courts have found to be unconscionable. “On the rare occasion when a court has determined that arbitral procedures render an arbitration agreement unenforceable, the one-sided provisions have been so pervasive and extreme that the arbitration provision created a ‘sham system unworthy even of the name of arbitration.’” *LaPoint v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, No. 0:08-3553-CMC, 2009 U.S. Dist. LEXIS 146577, at \*18–19 (D.S.C. Dec. 1, 2009) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999)). For example, in *Damico*, the court concluded that the arbitration agreement was

unconscionable because it gave the homebuilder too much control over the process: only the homebuilder could join contractors and other third parties, and findings would not be binding in other proceedings without mutuality of parties, which the homebuilder had unilateral power to prevent. 437 S.C. at 615–16, 879 S.E.2d at 757. Recently, in *Huskins v. Mungo Homes, LLC*, the South Carolina Supreme Court declared that a provision in an arbitration agreement purporting to shorten the statute of limitations was “void and illegal as a matter of public policy.” Op. No. 28245, slip op. at 3, 2024 S.C. LEXIS 207, at \*3 (S.C. Sup. Ct. filed Dec. 11, 2024) (Howard Adv. Sh. No. 48 at 8, 10).

In contrast, the arbitration provision in the Home Purchase Agreement easily satisfies the fairness standard discussed above. In relevant part, the arbitration provision (1) binds both D.R. Horton and Plaintiffs to arbitrate construction defect disputes; (2) provides for arbitration in Plaintiffs’ home county; (3) provides for American Arbitration Association (“AAA”)<sup>6</sup> rules and an expedited hearing schedule; (4) gives the arbitrator discretion to assess the filing fees and costs against D.R. Horton;<sup>7</sup> and (5) allows any party to seek judicial enforcement of the arbitrator’s

---

<sup>6</sup> The AAA is a “well-known arbitration forum[.]” that courts have recognized as “consumer friendly and affordable.” *Whitman v. Legal Helpers Debt Resolution, LLC*, No.: 4:12-cv-00144-RBH, 2012 U.S. Dist. LEXIS 176480, at \*8 (D.S.C. Dec. 13, 2012) (citation omitted).

<sup>7</sup> According to the trial court, the fact that the arbitration agreement requires the party that initiates arbitration to pay the initial filing fee is a “one-side term” that contributed to the agreement’s unconscionability. (Order at 19.) However, a plaintiff in a civil action must similarly pay a filing fee to the court, with certain exceptions. *See* Rule 3(b), SCRCPP. There is no evidence in the record as to what the filing fee would be for Plaintiffs to initiate arbitration against D.R. Horton or how it compares to the fee a plaintiff is required to pay to initiate a judicial proceeding. However, as noted above, the AAA has been recognized as “consumer friendly and affordable.” *Whitman*, 2012 U.S. Dist. LEXIS 176480, at \*8 (citation omitted). Moreover, the arbitration agreement explicitly gives the arbitrator authority to allocate the fees and costs of arbitration among the parties, (Home Purchase Agreement § 15), which mitigates this already speculative hardship. Therefore, there is no basis for concluding that this requirement, among others, had the “cumulative effect” of rendering the arbitration agreement unenforceable. (Order at 19.)

decision. There is nothing “so oppressive” about these terms such “that no reasonable person would make them and no fair and honest person would accept them.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. To the contrary, these are reasonable and customary terms in an arbitration agreement and should be enforced.<sup>8</sup>

3. THE ARBITRATION PROVISION DID NOT MERGE WITH THE DEED.

The trial court held that, even if the arbitration provision was not unconscionable, the agreement merged with the deed after closing and therefore, all obligations in the arbitration provision were extinguished. (Order at 22.) However, the merger by deed doctrine should not—and does not—apply in the context of arbitration agreements in new-home sales contracts. To the extent the doctrine is applicable, there are exceptions, two of which are relevant here. Whether the Court concludes that the doctrine is not applicable in the first instance or determines that an exception applies, the result is the same: the provision did not merge and the trial court’s decision should be reversed.

**A. The Merger Doctrine Is Not Applicable.**

Under the merger by deed doctrine, “[t]he execution, delivery, and acceptance of a deed varying from the terms of [an] 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.” *Shoney’s, Inc. v. Cooke*, 291 S.C. 307, 311, 353 S.E.2d 300, 303 (Ct. App. 1987) (quoting *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957)). “The doctrine . . . is founded upon the privilege, which parties always possess, of changing their contract

---

<sup>8</sup> Moreover, because the Home Purchase Agreement contains a severability clause (Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. A, § 23), to the extent the Court disagrees, it can sever any provisions it finds unconscionable.

obligations by further agreements prior to performance.” *Id.* at 310, 353 S.E.2d at 303 (quoting *Joyce*, 231 S.C. at 504, 99 S.E.2d at 193). In other words, as courts across the United States have recognized, “the contract’s promises . . . ‘merge’ into the deed’s representations.” *Bushman v. Inv. Props., Ltd v. DBSI E-470 E. LLC*, No. 09-cv-00674-MSK-KLM, 2010 U.S. Dist. LEXIS 21011, at \*15 (D. Colo. Feb. 15, 2010).

Application of the doctrine is not always straight forward: it “is a complex legal doctrine that has received disparate treatment from courts throughout South Carolina,” which “recognizes at least three broad exceptions to the doctrine.” *Dudek v. Commonwealth Land Title Ins. Co.*, 466 F. Supp. 3d 610, 625 (D.S.C. 2020). Other courts have come closer to establishing a bright line rule that the doctrine applies *only* to “covenants in [a] contract that relate to title, quantity, possession, or emblements<sup>9</sup> of the land.” *Bushman*, 2010 U.S. Dist. LEXIS 21011, at \*15. Otherwise, “agreements in the contract that do not relate to these subjects, which are not necessarily satisfied by the execution and delivery of the deed, are not merged and remain enforceable following delivery of the deed.” *Id.* at \*16.

Agreements to arbitrate are clearly outside the scope of obligations that merge with a deed, as numerous courts have so held. *E.g.*, *Bushman*, 2010 U.S. Dist. LEXIS 21011, at \*15–16; *Thomas v. Sloan Homes, LLC*, 81 So. 3d 309, 313–14 (Ala. 2011); *Dress Co. v. Osburg*, 144 S.W.3d 831, 832–33 (Ky. Ct. App. 2003); *Stanford Dev. Corp v. Stanford Condo. Owners Ass’n*, 285 S.W.3d 45, 51–52 (Tex. App. 2009). Notably none of these decisions depended on the presence of express survival language in the arbitration provision.

---

<sup>9</sup> “Emblements” refers to crops that are produced annually, such as corn and wheat. Ballentine’s Law Dictionary (3d ed. 1969). In this context, it relates to the right of a (former) tenant to enter onto land and harvest crops that the tenant planted earlier in the year. *See* Restatement (Fourth) of Property § 2.5 (Tentative Draft).

In *Dress Co.*, the Kentucky Court of Appeals reviewed an agreement “for the construction and purchase of a new home with . . . a multi-state developer and builder of residential communities.” 144 S.W.3d at 832. When the purchasers later installed an above-ground pool, the builder/developer informed them that it violated restrictive covenants on the property. *Id.* The homeowners filed suit, claiming they had been misled about the covenants. *Id.* The builder moved to stay or dismiss and compel arbitration; the trial court denied the request on the basis the purchase agreement merged with the deed, which did not contain an arbitration provision. *Id.* The court of appeals reversed, noting that the arbitration provision “had nothing to do with the title, possession, quantity, or emblements of the property.” *Id.* at 833. The court also hinted at the commonsense nature of this ruling because “disputes, after all, frequently arise after closing.” *Id.* Therefore, “it is reasonable to suppose that the parties intended post-closing performance of [an arbitration] clause.” *Id.*

In *Bushman*, the United States District Court for the District of Colorado similarly explained that merger does not apply to arbitration agreements in real estate contracts. 2010 U.S. Dist. LEXIS 21011, at \*15-16. As the court noted, an “arbitration agreement is not a covenant relating to the title, quantity, possession, or emblements of the property itself; it is, quite obviously, not an agreement that can be satisfied by execution and delivery of the deed.” *Id.* at \*16. Therefore, it does not merge with the deed and remains enforceable. *Id.*

The Alabama Supreme Court in *Thomas* likewise analyzed the merger doctrine in the context of an arbitration agreement in a new residential home purchase agreement. 81 So. 3d at 309–10. After closing, the purchasers received a general warranty deed that contained typical provisions, such as “a description of the property, a recitation of the purchase price, language of conveyance describing the nature of the estate conveyed, and covenants and warranties pertaining

to the quality of title held by the grantor and conveyed to the grantees.” *Id.* at 311. There was “no mention of the sales contract and [the deed] contained none of the other terms that were in the sales contract, including the arbitration clause.” *Id.* The purchasers relied on that in seeking to avoid arbitration. *See id.* at 312.

The Alabama Supreme Court rejected that argument, noting the “limitation of the merger doctrine.” *Id.* at 313. “The rational basis for the merger rule is that where parties enter into a final contract all prior negotiations, understandings and agreements *on the same subject* are merged into the final contract, and are accordingly extinguished.” *Id.* (emphasis added) (citation and internal quotation marks omitted). However, where a contract

clearly provide[s] for agreements or stipulations to build or construct as well as an agreement to convey, it is plain that the actual transfer of the deed, which is performance only of the agreement to convey, does not extinguish any duties and obligations arising out of the agreement to build.

*Id.* (citation omitted). Therefore, “disputes regarding the manner and quality of the construction of the home” are “governed by the arbitration clause in the sales contract,” which is “not altered by the delivery of an ordinary warranty deed and the conveyance of title accomplished thereby.” *Id.* at 313–14.

Similarly, the Texas Court of Appeals in *Stanford Dev. Corp.* analyzed an arbitration agreement and the merger argument in a construction defect suit brought by a homeowners’ association against a builder/developer. 285 S.W.3d at 46–47. The builder moved to compel arbitration based on provisions in the homeowners’ earnest money contracts. *Id.* at 47. The trial court expressed reservations as to whether the arbitration provision survived issuance of the deed. *Id.* at 51. The court of appeals clarified that “the merger doctrine *does not apply* to a deed that constitutes only partial performance of the preceding contract.” *Id.* (emphasis added). Where an agreement for the sale of land creates rights and obligations unrelated to the transfer of land, such

as for the completion of construction, those rights and obligations “survive[] a deed that is silent with respect to” them. *Id.* Therefore, the court of appeals held that the merger doctrine was “not applicable” because the arbitration provision “created rights independent of the conveyance, and, as such, were not merged out of existence by the subsequent deeds.” *Id.* at 52.

The South Carolina Supreme Court applied similar reasoning in *New Prospect Area Fire District v. New Prospect Ruritan Club*, where a Ruritan Club deeded land to a fire district under the condition that the district would eventually deed the land back. 311 S.C. 402, 403, 429 S.E.2d 791, 792 (1993). Specifically, under the agreement the club would deed the lot to the fire district; the fire district could construct a building on the lot, for which the club would pay 40% of the construction costs, plus interest; when there was no loan or mortgage on the property, the fire district would return the lot to the club; and the fire district would retain the right to use the building for fire district purposes. *Id.* A dispute arose after the fire district terminated the club’s use of the building for the club’s monthly meetings. *Id.* at 404, 429 S.E.2d at 792. The trial court concluded that the “agreement d[id] not reserve a right of reverter because it was ‘merged’ in the subsequent deed.” *Id.* The South Carolina Supreme Court reversed, stating that “[w]here a deed constitutes only part performance of a preceding contract, *other distinct and unperformed provisions of the contract are not merged* in the deed.” *Id.* at 405, 429 S.E.2d at 792 (emphasis added). Therefore, the court held that the merger doctrine did not apply. *Id.*

The Court should apply the same logic here and conclude that the arbitration provision did not merge, as it is not the type of agreement that is encompassed by the merger doctrine.

### **B. An Exception to the Merger Doctrine Applies.**

Even if the Court concludes that the merger doctrine would otherwise be applicable, there are exceptions to its application in this instance. There are at least three exceptions to the merger

rule. *See Dudek*, 466 F.Supp.3d at 624. The first exception, “mistake or fraud in the execution of the deed,” *id.*, is not relevant here. The second exception is that “the party denying merger” can enforce the provisions of a pre-deed contract if it “prov[es] by clear and convincing evidence that merger was not intended.” *Hughes v. Greenville Country Club*, 283 S.C. 448, 451, 322 S.E.2d 827, 828 (Ct. App. 1984). This is known as “the contrary intent exception to the merger doctrine.” *Id.* at 450–51, 322 S.E.2d at 828.

In *Carlson v. S.C. State Plastering, LLC*, the South Carolina Court of Appeals applied this exception under facts similar to those in this case: plaintiff homeowners executed a purchase agreement that included an arbitration clause; a deed was subsequently issued that did not provide for arbitration; and the plaintiffs brought claims alleging construction defects with their home. 404 S.C. 250, 254, 743 S.E.2d 868, 870–71 (Ct. App. 2013). The plaintiffs argued that their claims were not subject to arbitration “because the deed, which contained no arbitration clause, superseded the purchase agreement.” *Id.* at 260, 743 S.E.2d at 874. This Court disagreed and found that survival language in the agreement provided “clear and convincing evidence” that “the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed.” *Id.* at 261, 743 S.E.2d at 874.

Here, the Home Purchase Agreement contains a number of provisions that similarly evince the parties’ intent not to merge the terms of the Home Purchase Agreement with the deed. (*E.g.*, Ex. A §§ 14 (warranty), 15 (arbitration of *future* disputes regarding the agreement *and* the property), 18 (post-closing remedies).) Significantly, finding the merger doctrine applicable would mean that D.R. Horton’s obligations to Plaintiffs under the agreement would also be merged out of existence, which would largely foreclose Plaintiffs’ claims. (*See, e.g.*, Compl. ¶ 49 (alleging a cause of action for breach of express warranties arising out of the Home Purchase Agreement), *id.*

¶¶ 53–59 (alleging a cause of action for breach of contract based on the Home Purchase Agreement.) It is clear that the parties could not have intended this result. *See Holmes v. Worthey*, 282 S.E.2d 919, 923 (Ga. Ct. App. 1981) (stating that where a contract contains “agreements or stipulations to build or construct *as well as* an agreement to convey, *it is plain* that the actual transfer of the deed, which is performance only of the agreement to convey does not extinguish any duties and obligations arising out of the agreement to build” and “*the intention of the parties ought not to be in question*” (second and third emphases added)), *aff’d*, 287 S.E.2d 9 (Ga. 1982); *cf. Dress Co.*, 144 S.W.3d at 833 (noting that “it is reasonable to suppose that the parties intended post-closing performance of [an arbitration] clause” because “disputes, after all, frequently arise after closing”).

The third exception to the doctrine of merger is the “collateral agreement” exception. *See Dudek*, 466 F. Supp. 3d at 624. Under the collateral agreement exception, the party opposing merger must show “by clear and convincing evidence” that the agreement in question is “independent and distinct from the main contract,” is “consistent with the provisions of the main contract,” and is “such an agreement as the parties could not reasonably be expected to embody in the main contract but would naturally make as a separate agreement.” *Shoney’s*, 291 S.C. at 312, 353 S.E.2d at 304; *cf. New Prospect*, 311 S.C. at 405, 429 S.E.2d at 792 (“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.”).

In the present case, the deed addressed only so much of the Home Purchase Agreement as related to the sale and transfer of the underlying land; the deed does not cover any aspect of the construction of the Home, post-closing dispute resolution, or warranties to be provided by D.R. Horton and the manufacturers. The arbitration provision is a separate agreement dealing solely

with disputes under the Home Purchase Agreement. It is also consistent with the Home Purchase Agreement's terms. Finally, as discussed above, it is such an agreement as the parties could not reasonably have been expected to place into the deed. It is difficult to imagine a deed incorporating the language of an arbitration provision addressing home construction and warranty obligations. Indeed, in *Damico*, the South Carolina Supreme Court described as "absurd" and "grossly oppressive" the homebuilder's attempt to place an arbitration provision in the purchasers' deeds characterized "as an 'equitable servitude' that runs with the land in perpetuity." 437 S.C. at 617, 879 S.E.2ds at 758.

In sum, there is no authority, either in South Carolina or otherwise, that justifies use of the merger doctrine to preclude arbitration in this case.

### **CONCLUSION**

For the reasons expressed above, the trial court erred in denying D.R. Horton's motion to compel arbitration. The Home Purchase Agreement involves interstate commerce and is governed by the Federal Arbitration Act. Under the Act, when assessing a conscionability challenge, a court can consider only the terms of the arbitration provision itself. The arbitration provision here contains no unconscionable terms and provides for a fair resolution by a neutral decisionmaker. Moreover, the arbitration provision was not superseded by the deed to Plaintiffs' home. Whether in the first instance or by exception, the merger by deed doctrine has no role in this case. The FAA compels arbitration in this case. Therefore, D.R. Horton asks the Court to reverse the trial court and direct the court to enter an order compelling arbitration of Plaintiffs' claims.

s/ David L. Paavola

John T. Crawford Jr., SC Bar No.: 69682

Kimila L. Wooten, SC Bar No.: 64516

David L. Paavola, SC Bar No.: 100714

W. Jacob Henerey, SC Bar No.: 102268

Amelia Farmer, SC Bar No.: 105750

KENISON, DUDLEY & CRAWFORD, LLC

325 McBee Ave., Suite 301

Greenville, SC 29601

(864) 242-4899

(864) 242-4844

[crawford@conlaw.com](mailto:crawford@conlaw.com)

[wooten@conlaw.com](mailto:wooten@conlaw.com)

[paavola@conlaw.com](mailto:paavola@conlaw.com)

[henerey@conlaw.com](mailto:henerey@conlaw.com)

[farmer@conlaw.com](mailto:farmer@conlaw.com)

*Attorneys for Appellant*

Greenville, South Carolina

February 20, 2025