THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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.

RESPONDENTS' MOTION TO AMEND INITIAL BRIEF OF RESPONDENTS

The Respondents Sherman Howell and Claudia Howell ("Respondents") hereby move to amend their Initial Brief filed on April 30, 2025, pursuant to South Carolina Appellate Court Rules ("SCACR"), Rule 240. Appellant D.R. Horton, Inc. ("Appellant") *does not* oppose this Motion.

The Respondents seek to remove footnote 14 of the Initial Brief ("Footnote"), because it is inconsistent with the documents contained in the Designation of Matter, and the inclusion of the Footnote was a scrivener's error.[1] Removing the Footnote will not cause undue delay, impact the substance of the Respondents' arguments in the Initial Brief, or otherwise affect the pending appeal. Respondents attach the proposed Amended Initial Brief as **Exhibit A**.

THEREFORE, the Respondents request an Order granting leave to file the Amended Initial Brief as proposed herein.

Respectfully submitted,

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[1] As further support, Rule 211, SCACR, allows the parties to correct obvious typographical errors which are contained in the Initial Brief. The Footnote is a typographical error that was included in error.

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May 23, 2025

EXHIBIT

“A”

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AMENDED INITIAL BRIEF OF RESPONDENTS

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INTRODUCTION AND STATEMENT OF THE CASE

The Respondents Sherman Howell and Claudia Howell ("Respondents" or "Howells") brought their construction defect case against D.R. Horton, Inc. ("D.R. Horton" or "Appellant") in connection with a home located in Blythewood, South Carolina (the "Residence").

D.R. Horton's construction of the Residence was completed when the Howells signed the home purchase agreement for the Residence ("Home Purchase Agreement"), and D.R. Horton knew of the defects at the time of sale.[1] (Affidavit of Sherman Howell, pp. 2-3, ¶¶ 4, 9). On June 10, 2024, the Howells filed the complaint against D.R. Horton in the Richland Court of Common Pleas alleging Negligence/Gross Negligence, Breach of Express/Implied Warranties, Breach of Contract, Violation of the South Carolina Unfair Trade Practices Act, Breach of Contract Accompanied by Fraudulent Act, Constructive Fraud, and Fraud/Misrepresentation and sought actual, compensatory, and treble and punitive damages. (Complaint, pp. 9-18).

Appellant moved to stay and compel arbitration on August 9, 2024 ("Motion to Compel"), citing paragraph 15 of the Home Purchase Agreement as the arbitration agreement. (Motion to Compel, pp. 1-2). Respondents filed a Memorandum in Opposition to the Motion to Compel arguing that the arbitration agreement contained in paragraphs 14 and 15 of the Home Purchase Agreement is unconscionable and merged into the deed for the Residence. (Memorandum in Opposition to Motion to Compel, pp. 6, 11). On September 4, 2024, the Honorable Martha M. Rivers held a hearing on the Motion to Compel attended by counsel for the parties. (Order, p. 1). On October 22, 2024, the lower court issued its Order denying Appellant's Motion to Compel (the "Order") holding that the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 *et*

[1] In its Brief, D.R. Horton acknowledges "that the underlying facts of this case are not in dispute." (Appellant's Brief, p. 11).

seq. ("SCUAA") governed the enforceability of the arbitration agreement; that the arbitration agreement (composed of paragraphs 14 and 15 of the Home Purchase Agreement) was unconscionable and unenforceable; and that the arbitration agreement merged into the deed for the Residence. (Order, p. 1). Without asking for reconsideration of the Order under Rule 59(e), D.R. Horton filed this appeal on November 15, 2024.

STATEMENT OF THE FACTS

D.R. Horton is the self-proclaimed "Largest Homebuilder in America" and constructs homes in South Carolina and across the United States. (Affidavit of Sherman Howell, p. 3, ¶ 13).

In its transaction with the Howells, D.R. Horton used the Home Purchase Agreement, a standard form contract drafted by D.R. Horton that includes arbitration terms, limited warranties, and disclaimers. (Home Purchase Agreement, pp. 6-7). The arbitration agreement incorporates by reference the limited warranty terms that dictate the procedures for handling claims and attempts to limit D.R. Horton's liability and relief available. *Id*. Previously, the South Carolina Supreme Court held in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), that a substantially similar arbitration agreement within D.R. Horton's standard form contract incorporated by reference and was necessarily intertwined with unconscionable terms in a superficially separate sub-paragraph. Thus, the Supreme Court determined that the arbitration agreement in *Smith* was unenforceable. Later, when drafting the Howells' Home Purchase Agreement, D.R. Horton moved the identical unconscionable warranties and disclaimers to a different paragraph number, however, just like in *Smith*, those unconscionable terms attempting to limit relief available to homeowners (like the Howells) are still incorporated by reference and intertwined with the arbitration agreement. (Home Purchase Agreement, pp. 6-7).

On or about December 29, 2021, the Howells signed the Home Purchase Agreement

agreeing to buy the Residence that was already constructed by D.R. Horton. (Home Purchase Agreement, p.12; Affidavit of Sherman Howell, p. 2, ¶ 4). Before the Howells' executed the Home Purchase Agreement, D.R. Horton tried to sell the Residence to a different buyer, however, that buyer terminated the home purchase agreement due to defects in the i-joists of the Residence. (Affidavit of Thomas Simmons, p. 4, ¶¶ 17-21).

Indeed, once the Howells inspected behind the sheetrock in their home, they discovered that engineering plans detailing a purported fix for the defects in the i-joists were stapled to one of the defective i-joists (Compl. at ¶ 35), so D.R. Horton knew about the construction defects, (*id.)*, but made no attempt to repair the construction defects (Affidavit of John Wylie, P.E., pp. 2-3, ¶¶ 5-7) before selling the Residence to the Howells. And D.R. Horton lied to the Howells as to the reason for the termination by the earlier prospective purchaser and did not disclose the defects with the i-joists to the Howells. (Affidavit of Sherman Howell, pp. 2-3, ¶ 9).

The Howells were not represented by legal counsel at the time they entered into the Home Purchase Agreement and had no significant experience in real estate, construction, or legal matters. (Affidavit of Sherman Howell, p. 3, ¶ 10.). The Home Purchase Agreement was a standard form contract of adhesion produced by D.R. Horton that was offered to the Howells on a "take it or leave it" basis. (Order, p. 2). Inclusive of its various addendums, the Home Purchase Agreement ran for over thirty pages of single space text. (Home Purchase Agreement, pp. 1-40). Before the Howells signed the Home Purchase Agreement, no one explained the arbitration agreement. (Affidavit of Sherman Howell, p. 3¶ 11). The Howells did not understand the arbitration agreement to govern fraud claims asserted against D.R. Horton. (*Id.)* At the time, home prices were increasing and homes available for sale that suited the Howells' needs were limited. (*Id*. p. 2, ¶ 6).

On or about February 3, 2022, the Howells closed on the Residence. (Deed to Residence,

p. 2). The deed does not reference the Home Purchase Agreement or contain an arbitration provision. (Deed to Residence, pp. 1-2). Following the closing, the Howells began to detect various issues with the Residence which led them to retain counsel and commission a study by a professional engineer. (Affidavit of John Wylie, P.E., Exhibit 2). The engineer's study found that various components of the Residence were constructed in an unworkmanlike fashion, including the defective i-joists. (*Id*. p. 4).

D.R. Horton relies on paragraph 15 of the Home Purchase Agreement to compel arbitration, providing:

> **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 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. . .

(Home Purchase Agreement, pp. 6-7).

Paragraph 15 incorporates by reference and directly proceeds paragraph 14 of the Home Purchase Agreement, which provides as follows:

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 14a 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, MERCHANTABIITY OR FITNESS FOR A PARTICULAR PURPOSE. IN ADDITION, SELLER MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER REGARDING THE PAST, PRESENT OR FUTURE CONDITION OR USE OF ANY LANDS OR AREAS SURROUNDING THE PROPERTY OR IN THE VICINITY OF THE PROPERTY. AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR OBLIGATION 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, OR INDIRECT DAMAGES.

(Home Purchase Agreement, pp. 6-7).

STANDARD OF REVIEW

Generally, "court[s] should determine the threshold validity of [an] arbitration agreement."

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23, 644 S.E.2d 663, 667 (2007); *see also* S.C.

Code Ann. § 15-48-20(a) (providing that it is a court's duty to determine the existence of a valid agreement to arbitrate).

"Arbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1 (2016) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012).

ARGUMENTS

I. The Circuit Court Correctly Held the Putative Arbitration Agreement in the Home Purchase Agreement was Unconscionable and Unenforceable.

In its analysis, the lower court relied heavily on the Supreme Court's decision in *Smith v. D.R. Horton* for instruction on what portions of the Home Purchase Agreement it should consider in analyzing the Howells' claims of unconscionability. Here, the lower court following the directives of *Smith* concluded that under the plain language of the Home Purchase Agreement, both paragraphs 14 and 15 had to be read together to understand the full scope of the arbitration provision and how different disputes were to be handled. And, upon making that correct conclusion, the lower court considered the putative arbitration provision in its entirety and rightly concluded that it was unconscionable and thus unenforceable. This Court should affirm the lower court's ruling and deny D.R. Horton's appeal.

A. The Lower Court Correctly Interpreted the Arbitration Provision in the Home Purchase Agreement.

In *Smith*, the arbitration provision relied on by D.R. Horton was contained within a "subparagraph" of paragraph 14, the "Warranties and Dispute Resolution" provision of its form home purchase agreement. 417 S.C. at 45, 790 S.E.2d at 1. In *Smith*, D.R. Horton argued that "the

arbitration agreement was contained exclusively in subparagraph 14(g)" therefore, D.R. Horton contended "consideration of the allegedly one-sided terms in subparagraph 14(i) was inappropriate" under the United States Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 405, 87 S. Ct. 1801, 1806–07 (1967) (establishing the so-called "*Prima Paint* Doctrine" i.e., that under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*., ("FAA") courts may only consider the threshold question of whether the arbitration agreement is unenforceable, not whether the contract as a whole is invalid). *Smith*, 417 S.C. at 47, 790 S.E.2d at 3.

Paragraph 14(i) of the contract in *Smith* was problematic for D.R. Horton because it contained language "attempt[ing] to disclaim implied warranty claims and prohibit *any* monetary damages" terms that were "clearly one-sided and oppressive." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

Even still, while acknowledging the *Prima Paint* Doctrine in *Smith*, the Supreme Court determined it was necessary to "construe the entirety of paragraph 14," *Smith*, 417 S.C. at 48, 790 S.E.2d at 4, including *both* the putative arbitration provision in subparagraph 14(g) and the "clearly one-sided and oppressive" terms of subparagraph 14(i) referenced above. This was because "all the subparagraphs of paragraph 14 must be read as a whole understand the scope of warranties and how different disputes are to be handled." *Id.* And because "[t]he subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.*

Unsurprisingly, after interpreting the agreement in *Smith* in this fashion, the Supreme Court concluded that in the context of transaction between a new homebuyer and a large residential homebuilder, "the Smiths lacked a meaningful choice in their ability to negotiate" and the "clearly

one-sided and oppressive" terms of subparagraph 14(i) made the arbitration provision "unconscionable and thus unenforceable." *Id.* at 50, 790 S.E.2d at 5.

Following the Supreme Court's decision in *Smith*, D.R. Horton did *not* substantially alter the "clearly-one sided and oppressive" terms within its standard form contract of adhesion, nor did it temper its "unconscionable and thus unenforceable" effect on new homebuyers like the Howells. For instance, the Home Purchase Agreement here still maintains D.R. Horton's disclaimer of implied warranties and like in *Smith* provides that after closing **D.R. Horton "shall not be liable for any reason, under any circumstances**, to" the Howells "**for monetary damages of any kind**, including secondary, consequential, punitive, general, special, or indirect damages." (Home Purchase Agreement, p. 7-8, ¶¶ 14-15) (emphasis added).

Apparently motivated by a desire to avoid *Smith*'s repercussions on the sale of hundreds of homes it sells every year in South Carolina, following the Supreme Court's decision there, D.R. Horton modified the location of the arbitration provision within its standard adhesion contract. D.R. Horton contends that because the Home Purchase Agreement now uses purportedly separate *paragraphs* (instead of the *sub-paragraphs* the Supreme Court already found lacking in *Smith*), the putative arbitration provision in the Home Purchase Agreement and this case are now distinct from *Smith*. *See* (D.R. Horton Initial Brief at 14-15).

But the lower court rightly rejected this argument,

> . . . like in *Smith*, this Court must read additional provisions of the [Home Purchase Agreement] "to understand the scope of the warranties and how different disputes are to be handled. The [different sections of the [Home Purchase Agreement]] contain numerous cross-references to one another intertwining the [sections] so as to constitute a single provision." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4; *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 91, 594 S.E.2d 485, 493 (2004) ("Where one contract explains, amplifies, or limits the other, those provision will be given effect between the parties so that the whole agreement, as actually contracted by the

> parties, may be effected."); 1 COMMERCIAL ARBITRATION § 19:36[2] ("in determining if [a] severed arbitration clause is enforceable under generic principles of contract law, the court may consider the context of the arbitration clause within the four corners of the [broader] contract, looking at other parts of the contract that *relate to, support, or are otherwise entangled with the operation of the arbitration clause*.") (emphasis added).

(Order, p. 9).

The lower court was correct. South Carolina courts have "long recognized" that "*whatever doesn't make any difference, doesn't matter*." *State v. Ostrowski*, 435 S.C. 364, 401, 867 S.E.2d 269, 288 (Ct. App. 2021) (emphasis original). That "commonsense principle," *id.*, is demonstrated here because one must still read both paragraph 14 and 15 "as a whole to understand the scope of warranties and how different disputes are to be handled." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Like *Smith,* the two ~~sub~~paragraphs in the Home Purchase Agreement are in effect one, because they "contain numerous cross-references to one another, intertwining [them] so as to constitute a single provision." *Id. And,* like in *Smith*, the collective consequence of these provisions is to leave a new homebuyer, like the Howells, with "no remedy at all," *id.,* at 50, 790 S.E.2d at 5, in the face of the Howells' expansive allegations of defective construction, breach of warranty, and outright fraud committed by D.R. Horton.

On the other hand, where a "[w]arranty provision *is a completely separate provision* in a [home purchase contract]" from an arbitration provision and they do not "cross-reference one another, [a] court need not construe them together." *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 367, 887 S.E.2d 534, 540 (Ct. App. 2023) (emphasis added), cert. granted (Feb. 7, 2024), rev'd on other grounds, 444 S.C. 592, 910 S.E.2d 474 (2024), reh'g denied (Jan. 16, 2025); *see also Mart v. Great S. Homes, Inc.*, 441 S.C. 304, 315, 893 S.E.2d 360, 366 (Ct. App. 2023) (concluding this

[2] *See also* 1 COMMERCIAL ARBITRATION § 15:41 (3d, 2024 ed.) (same)

Court was "handcuffed" because the plaintiff did not "separately challenge the standalone arbitration provision" as "unconscionable").

Moreover, for decades, the Supreme Court has consistently "reject[ed]" the premise that "a builder who constructs defective housing" for "a group of innocent new home purchasers" can "escape[ ] liability" "because of the imposition of traditional and technical legal distinctions." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 621, 879 S.E.2d 746, 760 (2022) (internal quotations and citations omitted). Instead, "when the Court is confronted with a new scenario not properly disposed of by our present set of rules" it will "'respond by expanding" the "rules to provide the innocent buyer with protection." *Id.* (internal quotations omitted, cleaned up); *see also Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) ("We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce.").

In *Damico*, the Supreme Court carefully distinguished its holding in *Smith* before concluding the arbitration agreement there was unconscionable on other grounds. While urged to rely on *Smith's* application to the facts in *Damico* by the homebuyer petitioner, the Court declined to do so because there was "*nothing*" in the "standalone" arbitration provision in *Damico* "that refer[red] to the limited warranty . . . or incorporate[d] it by reference" and as such, it was "dissimilar from that in [*Smith*]." *Damico*, 437 S.C. at 610, 879 S.E.2d at 754 (emphasis added). An examination of the specific language from the Home Purchase Agreement confirms the lower court reached the right result in applying *Smith* to the facts here and concluding that the Home Purchase Agreement had much more in common with that found in *Smith v. D.R. Horton* than *Damico*.

Paragraph 15 of the Home Purchase Agreement, relied on by D.R. Horton as the "arbitration agreement," is captioned "Mandatory Binding Arbitration" and provides as follows:

> 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.

(Home Purchase Agreement, p. 8, ¶ 15 (emphasis added).

As the above illustrates, rather than contemplate a single "arbitration provision" paragraph 15 instead contemplates distinct types of dispute resolution: for some disputes, "arbitration . . . in the county in which the property is located . . . conducted pursuant to the rules of the American Arbitration Association." On the other hand, "*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." *Id.* (emphasis added).[3] One cannot hope to understand which arbitration agreement applies or the "terms, conditions, [etc.] of the Limited Warranty" without reference to paragraph 14 of the Home Purchase Agreement that paragraph 15 incorporates by reference. In other words, these two paragraphs must "be read as a whole to understand the scope of the warranties and how different disputes are to be handled." *See Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

Paragraph 14 styled "Warranties and Disclaimer" defines the term "Limited Warranty" that is used in paragraph 15 at paragraph 14(a). As referenced above, Paragraph 14(c) of the Home Purchase Agreement nullifies D.R. Horton's liability for any post-closing monetary obligations to Respondents:

> 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.
>
> ***
>
> c. **Disclaimer and limitation on Sellers' Liability**. THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14a 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, MERCHANTABIITY OR FITNESS FOR A PARTICULAR PURPOSE**. IN ADDITION, SELLER MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER REGARDING THE PAST, PRESENT OR FUTURE CONDITION OR USE OF ANY LANDS OR AREAS SURROUNDING THE PROPERTY OR IN THE VICINITY OF THE PROPERTY. **AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR OBLIGATION TO PURCHASER OF ANY NATURE WHATSOEVER**

[3] The "terms, conditions, procedures and rules" (or even the existence) of the Limited Warranty are not evident from the record.

> **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, OR INDIRECT DAMAGES.

(Home Purchase Agreement, p. 7-8, ¶ 14) (emphasis added).

In sum, the lower court was correct to adopt the Supreme Court's reasoning in *Smith* and apply it to the facts here. Because, through the intertwining references made, these two paragraphs constitute a single arbitration agreement that must be analyzed together, D.R. Horton's appeal should be denied.

B. The Lower Court Correctly Determined the Arbitration Provision was Unconscionable

Here, properly construed, the arbitration provision in the Home Purchase Agreement is unconscionable. "[U]nder South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. "'[U]nconscionability is defined as [i.] the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with [ii.] terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.'" *Smith.*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668). In considering whether an arbitration agreement is unconscionable, courts should consider "both prongs" of unconscionability—the lack of "meaningful choice in agreeing to arbitrate" and the "oppressive nature of the terms found in the arbitration agreement." *Smith*, 417 S.C. at 49, n. 5, 790 S.E.2d at 4, n. 5.

In its decision, the lower court carefully analyzed both prongs of the unconscionability analysis and for the reasons discussed below, its holding should not be disturbed.

i. The Lower Court Correctly Concluded the Arbitration Agreement was an Adhesion Contract.

"Adhesion contracts 'are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Damico*, 437 S.C. at 620, 879 S.E.2d at 759–60 (2022) (quoting *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669). This is especially when a "contract involves the purchase of a new home" because of South Carolina's "deeply-rooted and long-standing policy of protecting new home buyers." *Id.* 437 S.C. at 621, 879 S.E.2d at 760; *see also Smith*, 417 S.C. at 50, 790 S.E.2d at 4 (observing that the Supreme Court has "taken judicial cognizance of the fact that the modern buyer of new residential housing is normally in an unequal bargaining position as against the seller").

In its brief, D.R. Horton maintains its assertion that the Home Purchase Agreement was not an "adhesion contract." (D.R. Horton Initial Brief at 21). This is because, D.R. Horton asserts, Respondents were "free to purchase a home from another builder . . . or to purchase no home at all." But this is nothing more than acknowledgment from D.R. Horton that its "standard form contract" the Home Purchase Agreement" was "offered on a take-it or leave-it basis." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). D.R. Horton also contends that there was some semblance of negotiable terms in the Home Purchase Agreement because Respondents had the opportunity to "select[ ] various options that were offered." (D.R. Horton Initial Brief at 21). But even if Respondents could have selected "a deluxe bath package" or "glass shower door" (D.R. Horton Initial Brief at 9) instead of agreeing to buy a *fully constructed home*, what the lower court concluded occurred (Order at 5), D.R. Horton does not assert that such putative negotiable features of the home had any effect on the "terms" of the *arbitration agreement* which D.R. Horton cannot deny were "not negotiable." *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365; *see also Damico*, 437 S.C. at 620, 879 S.E.2d at 760 ("when a contract of adhesion is at issue,

'there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.'") (quoting *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669).

In sum, D.R. Horton's argument that this "particular contract is not one of adhesion when that is plainly untrue" is "specious" and "does not advance [its] position." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756. Thus, in concluding that the Respondents—relatively unsophisticated and unrepresented homebuyers who invested much of their life savings into a significant investment offered to them with terms on a "take it or leave" basis by the largest residential homebuilder in the United States—lacked meaningful choice in entering this contract of adhesion, the lower court did not err and D.R. Horton's appeal should be denied.

ii. The Lower Court Correctly Determined the Putative Arbitration Agreement was Substantively Unconscionable.

D.R. Horton argues that the lower court improperly framed the scope of the arbitration agreement. But its brief does not address the provisions of the arbitration agreement the lower court (and our Supreme Court previously in *Smith*) found unconscionable. Properly and fully considered, the terms of the putative arbitration agreement in the Home Purchase Agreement "disclaim implied warranty claims and prohibit *any* monetary damages" and "the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton." *Smith*, 417 S.C. at 50, 790 S.E.2d at 5 (emphasis original). But "[t]his is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation." *Id.*

D.R. Horton does not suggest, and this Court should not find any reason to distinguish the lower court's ruling here from nearly identical language the Supreme Court has already rejected as unconscionable.

Accordingly, because the lower court properly construed the entirety of the arbitration provision contained in paragraphs 14 and 15 of the Home Purchase Agreement and correctly determined that the arbitration agreement was procedurally and substantively unconscionable, D.R. Horton's appeal should be denied.

II. The Unconscionable Provisions of the Putative Arbitration Provision Should Not be Severed.

In its Order, the lower court correctly concluded that "severance of the unconscionable provisions of the arbitration provision" in the Home Purchase Agreement was "not warranted." (Order at 21). Before the lower court, D.R. Horton did not specifically raise the issue of severing the unconscionable provisions of the arbitration provision. But for the first time now, D.R. Horton asserts that "because the Home Purchase Agreement contains a severability clause . . . [this Court] can sever any provisions it finds unconscionable." (D.R. Horton Initial Brief at 24, n. 8).

While this issue raised for the first time on appeal is not preserved for review, even if it were properly before this Court, D.R. Horton's contention that severance of the unconscionable terms is warranted here should be rejected.

"If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result." *Damico*, 437 S.C. at 618, 879 S.E.2d at 758 (citing S.C. Code Ann. § 36-2-302(1)). But it is "the general principle in this State is that it is not the function of the court to rewrite contracts for parties." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673.

In *Smith,* as here, the "arbitration agreement" at issue "[did] not contain a severability clause." *Smith*, 417 S.C. at 50, n. 6, 790 S.E.2d at 5, n. 6. As a result, the Court concluded that "the parties did not intend for the Court to strike" its "unconscionable provisions" because to do so

would be "the Court rewriting the parties' contract rather than enforcing their stated intentions." *Id.* (citing *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673).

Smith's conclusion that the absence of a severability clause in an arbitration agreement compels a court to respect the parties' agreement is enough. But furthering this holding and "recognizing South Carolina's deeply-rooted and long-standing policy of protecting new home buyers," *Damico*, 437 S.C. at 604, 879 S.E.2d at 751, the South Carolina Supreme Court has recognized the special qualities of a consumer contract "involv[ing] the purchase of a new home." *Id.* 437 S.C. at 623, 879 S.E.2d at 761. In recent decisions implementing this "long-standing policy" the Court has repeatedly declined to sever unconscionable provisions of contracts for the purchase of a new home and instead continued its "extensive history of expanding its common law on contracts so as to protect new homebuyers." *Id.* 437 S.C. at 624, 879 S.E.2d at 761; *see also Simpson*, 373 S.C. at 34, 644 S.E.2d at 674 (declining to enforce the entirety of an arbitration provision even where the broader contract for the sale of an automobile contained a specific severability clause when the arbitration provision was "unconscionable" "unenforceable" and "oppressive and one-sided"); *cf. Barras v. Branch Banking & Tr. Co.* (*In re Checking Account Overdraft Litig. MDL No. 2036)*, 685 F.3d 1269, 1283 (11th Cir. 2012) (applying FAA and South Carolina law and severing "unenforceable cost-and-fee-shifting provision" from arbitration provision where the two provisions were "located in entirely separate portions of the contract" and the "arbitration provision ma[de] no reference to the other provision").

Likewise, with unanimity in *Damico,* even when a severability clause was contained *in an arbitration provision*, the Supreme Court declined to sever these unconscionable provisions contained within a broader "unconscionable, adhesive home construction contract" "as a matter of public policy." *Damico*, 437 S.C. at 622, 879 S.E.2d at 760. "Honoring [a] severability clause" in

circumstances much like those presented here "creates an incentive for . . . 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." *Damico*, 437 S.C. at 622, 879 S.E.2d at 760. "Because most homebuyers simply comply with their arbitration agreements rather than challenging them in court . . . the law should provide a strong incentive for homebuilders not to overreach." *Damico*, 437 S.C. at 623, 879 S.E.2d at 761 (internal substitutions omitted).

In *Huskins v. Mungo Homes, LLC,* 444 S.C. 592, 910 S.E.2d 474 (2024), the Supreme Court reemphasized the "public policy concerns *Damico* so eloquently expressed" and reiterated that the Court has "been *steadfast* in protecting home buyers from unscrupulous and overreaching terms." *Id.* at 597, 910 S.E.2d at 477 (emphasis added).

The logic of *Simpson, Smith, Damico,* and *Huskins* applies with at least equal force here. "[D.R. Horton] insisted upon an adhesion contract so its terms could not be varied and would stick. [D.R. Horton] is stuck with that choice." *Huskins*, 444 S.C. at 598, 910 S.E.2d at 478. Declining to sever the unconscionable terms here is a proportional response to D.R. Horton's shortsighted reaction to *Smith's* holding that it had a "clearly one-sided and oppressive" arbitration agreement that leaves new homebuyers with "no remedy at all." *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. In stating as much, the Court in *Damico* observed that when a "sophisticated" and "repeat transactor" inserts "terms [that] deliberately and egregiously exceed well-established rules" that a policy of "refusing to replace overreaching contractual terms" "enhance[s]" "market efficiency." *Huskins*, 444 S.C. at 598, 910 S.E.2d at 478 (internal citations omitted).[4] Nowhere is this type of

[4] When a dominant market player like D.R. Horton can shield itself from meaningful legal repercussions, it is not just its customers who suffer. For instance, other homebuilders and contractors (who do not insert such oppressive terms into their contracts) are at a distinct

consideration more acute than in litigation involving not just any homebuilder, but "America's Largest Homebuilder" with an ever-looming presence in one of the Nation's fastest growing states and a pattern of drafting adhesive contracts with one-sided and oppressive terms.

D.R. Horton may think that it can maintain its unconscionable contract provisions and that its contumacious approach to drafting will shield its behavior from meaningful judicial scrutiny. But it is mistaken. *Simpson*, *Smith*, *Damico*, and *Huskins* show that the lower court was correct in declining to sever unconscionable provisions of the arbitration agreement. Upholding the lower court's decision here justly denies D.R. Horton the Court's imprimatur on unfair business practices. On these grounds, this Court should decline to alter the lower court's order and D.R. Horton's appeal should be denied.

III. State Law Further Confirms the Lower Court Did Not Err.

In its ruling, the lower court correctly determined that the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 *et seq*. ("SCUAA") applied to this dispute. (Order at 6-7). Even still, the lower court reviewed the arbitration provision and Home Purchase Agreement applying the FAA and *Prima Paint* Doctrine. However, because this case is wholly intrastate in nature, the FAA, and thus, the *Prima Paint* Doctrine are inapplicable. And, because, as explained below, South Carolina law offers additional grounds to sustain the lower court's ruling, D.R. Horton's appeal should be denied.

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competitive disadvantage. And when large numbers of D.R. Horton's tract homes suffer from systematic issues, property values (and appurtenant tax revenue) decrease because of actual or reputational damage to the homes in a community.

A. The Circuit Court Correctly Found that the Putative Arbitration Provision was Governed by South Carolina Law.

Defendant asserts that "[t]he Federal Arbitration Act ["FAA"] . . . applies to this dispute." (Appellant's Brief, p. 12). That is wrong. Instead, the lower court correctly applied the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq*., ("SCUAA") in considering Appellant's motion to compel arbitration.

i. The Lower Court Correctly Concluded that the Home Purchase Agreement Did Not Implicate Interstate Commerce.

"[I]n order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454, 730 S.E.2d 312, 315–16 (2012); *see also* 2 S.C. Jur. Arbitration § 6 ("Interstate commerce is a necessary basis for application of the federal act, and a contract or agreement not so predicated *must be governed by state law*.") (emphasis added).

In considering whether a "transaction involved interstate commerce" a court "must examine the terms of the [contract], the Complaint, and the surrounding facts." *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316. The "burden of proof" to "establish the involvement of interstate commerce" rests upon the moving party. *Id.* 398 S.C. at 458, 730 S.E.2d at 317–18.

Here the lower court found that "[a]t the time of the execution of the [Home Purchase Agreement] the [Residence] was already constructed by D.R. Horton." (Order at 5). As a result, the lower court correctly concluded that the transaction between the Howells and D.R. Horton was intrastate in nature under the "well-established real estate exception to the FAA." *Bradley*, 398 S.C. at 459, 730 S.E.2d at 318; *see also* Order at 6. The "real estate exception" provides that "'[n]otwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate.'" *Id.* at 457, 730 S.E.2d at 317 (quoting *Saneii v. Robards*, 289 F. Supp.

2d 855 (W.D. Ky. 2003)); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 595, 553 S.E.2d 110, 117–18 (2001) ("The development of land within South Carolina borders is the quintessential example of a purely intrastate activity."). Thus, when the "essential character" of a transaction is "for the purchase of a completed residential dwelling and not the construction . . . the FAA does not apply." *Bradley*, 398 S.C. at 459, 730 S.E.2d at 318.[5] Many other jurisdictions and scholars that have considered this question are in accord.[6]

Ample evidence supported the lower court's finding that the Residence was already completed at the time the Home Purchase Agreement was signed. In response to D.R. Horton's motion to compel arbitration, Respondents entered three sworn affidavits into evidence. The affidavit of Sherman Howell, one of the Respondents, provided, "[w]e bought the home *after it was constructed*." (Affidavit of Sherman Howell, ¶ 4) (emphasis added).

Mr. Howell's testimony is corroborated by that of Thomas Simmons, a non-party to this action. Mr. Simmons' affidavit, along with its attachments, describes how months before the Howells purchased the Residence, Mr. Simmons and his wife entered into a similar purchase

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[5] Although not presented as an argument by D.R. Horton here, the commerce clause and thus the FAA are not implicated even when the sale of a home involves a warranty provided by a "national warranty company" or financing secured through "a national financial institution" as these are "tangential to the performance of the [transaction]." *Bradley*, 398 S.C. at 459, 730 S.E.2d at 318.

[6] *See, e.g., Garlock v. 3DS Properties, L.L.C.,* 303 Neb. 521, 531, 930 N.W.2d 503, 511 (2019) (citing *Bradley* and holding that "a simple contract for the sale of residential real estate is an inherently intrastate activity"); *Garrison v. Palmas del Mar Homeowners Ass'n*, 538 F. Supp. 2d 468 (D.P.R. 2008) (FAA generally does not apply to residential real estate transactions having no substantial or direct connection to interstate commerce); *SI V, L.L.C. v. V FMC Corp.*, 223 F. Supp. 2d 1059 (N.D. Cal. 2002) (agreement to sell real estate between in-state buyer and out-of-state seller did not involve interstate commerce); *Cecala v. Moore*, 982 F. Supp. 609 (N.D. Ill. 1997) (lack of out-of-state transactions incident to sale of real estate evidenced no interstate commerce); Craig Tompkins, *Jackson v. Shakespeare Foundation, Inc.: Can Florida Courts Circumvent Precedent Set by the Supreme Courts of the United States and Florida Regarding the Enforcement of Arbitration Provisions?*, 69 U. MIAMI L. REV. 1027, 1055 (2015) ("Congress has not expressed an intent to regulate one-off real estate transfers between two private parties.").

agreement with D.R. Horton while the Residence was still under construction, but later, backed out of that purchase after D.R. Horton repeatedly misled them that repairs made to the Residence were in compliance with the building code. (Affidavit of Thomas Simmons, ¶¶ 2, 20-21).

D.R. Horton did not meet its evidentiary burden by rebutting this sworn testimony with affidavits of its own before the lower court. Fatal to its position, it provided no direct evidence that the Residence was still under construction at the time the Howells signed the Home Purchase Agreement. *Cf. Dixon v. Pattee,* 442 S.C. 233, 254, 898 S.E.2d 158, 169 (Ct. App. 2023) (declining to find a home was already constructed at the time of purchase where plaintiffs did not "provide any affidavits or records in support, merely their attorneys' arguments.").

Instead, rather than rely on direct facts that the Residence was still under construction at the time the Home Purchase Agreement was entered into, D.R. Horton simply argues that the inclusion of the "Features and Options" form in the Home Purchase Agreement is dispositive. (Appellant's Brief, pp. 8-9). But that is not the case. Nothing in the record suggests that these "options" were anything more than a recitation of features already installed in the Residence at the time the Howells signed the Home Purchase Agreement. In other words, the lower court was right to reject D.R. Horton's "attorney['s] arguments" when they were premised on no testimony in the record. *Dixon*, 442 S.C. at 254, 898 S.E.2d at 169. "[A] circuit court's factual findings will not be reversed on appeal if *any evidence* reasonably supports the findings." *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667 (emphasis added); *see also Thompson v. Pruitt Corp*., 416 S.C. 43, 49, 784 S.E.2d 679, 683 (Ct. App. 2016) ("if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings.").

As a result, the trial court correctly determined that the dispute at issue here was intrastate in nature. Supported by sufficient i.e., "any evidence," the lower court's finding of facts should not be disturbed, and D.R. Horton's appeal should be denied.

ii. The Lower Court Correctly Found that the Home Purchase Agreement was Governed by South Carolina Arbitration Law.

Because the Home Purchase Agreement involved an intrastate transaction, the FAA does not apply here.[7] And, the lower court correctly concluded that the Home Purchase Agreement itself called for the application of South Carolina law, including the SCUAA, not the FAA.

Here, as D.R. Horton must concede, the "first page" of the Home Purchase Agreement contains the following text,

> **NOTE: THIS CONTRACT PROVIDES FOR MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, SECTIONS 14-48-10 ET SEQ.,[8] SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED).**

(Home Purchase Agreement, p. 1) (emphasis original).

"Parties 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. The FAA does not prevent '"the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself.'" *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 n.2, 542

[7] In line with the federalist nature of our system of government and the limits on Congress's legislative power, the "federal arbitration statute is based upon *and confined to* the incontestable federal foundations of control over commerce and over admiralty." *Prima Paint Corp.*, 388 U.S. at 405, 87 S. Ct. at 1806–07 (emphasis added). And, despite the U.S. Supreme Court's "expansive interpretation of the FAA, the FAA does *not* reflect a congressional intent to occupy the entire field of arbitration." *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 115–16 (citing *Volt Info. Scis. Inc. v. Board of Trs*., 489 U.S. 468, 109 S.Ct. 1248 (1989). Consistent with this interpretation, "[t]he FAA preempt[s] an application of our state law to the extent it invalidate[s] [an] arbitration agreement, *if interstate commerce is involved*." *Bradley*, 398 S.C. at 453–54, 730 S.E.2d at 315 (emphasis added).

[8] Miscited in the original.

S.E.2d 360, 363 n.2 (2001) (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ*., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255 (1989) (substitution in *Munoz*). Indeed, "such a result would be inimical to the FAA's primary purpose of ensuring that arbitration agreements are enforced according to their terms." *Volt.,* 489 U.S. at 479, 109 S. Ct. at 1256. Put another way, "the dispositive question is whether the parties intended to be bound by federal or state arbitration law." *Osteen v. T.E. Cuttino Const. Co.,* 315 S.C. 422, 426, 434 S.E.2d 281, 283 (1993).

Very recently, this Court found that when the "front page" of an agreement "states, underline and in all capital letters, that [it was subject to the SCUAA]" there could be "no ambiguity whether the parties intended to be bound by federal or state arbitration law." *315 Corley CW LLC v. Palmetto Bluff Dev.*, LLC, 444 S.C. 521, 529, 908 S.E.2d 892, 896 (Ct. App. 2024), reh'g denied (Nov. 13, 2024). When, as here, an agreement so "explicitly requires application of South Carolina arbitration law, [this Court] need not address any requirements for FAA coverage; instead . . . the SCUAA applies." *Id.*

While acknowledging this Court's very recent precedent, D.R. Horton attempts to create daylight between this Court's holding and that of the Supreme Court in *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003); (Appellant's Brief, p. 10). But D.R. Horton did not raise this contention before the lower court in its initial argument and did not file a Rule 59(e) motion either. Because this argument is raised for the first time on appeal, it should be disregarded. *See, e.g.*, *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) ("[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.").

Even if this were an issue properly preserved for appellate review (which it is not), as D.R. Horton concedes, in *Toler's Cove*, it was not in dispute that the "transaction involved interstate

commerce and the FAA applied." (Appellant's Brief, P. 10); *see also Toler's Cove*, 355 S.C. at 610, 586 S.E.2d at 584 (providing that "[t]he lower court, however, took judicial notice of the fact the agreement involves interstate commerce. This finding is the law of the case because neither party has taken issue with that finding."). Thus the Supreme Court's holding that "[t]he parties' agreement" in *Toler's Cove*, did "not include a choice of law provision" was merely *obiter dictum* and not binding authority on this Court.[9]

Even if D.R. Horton's argument was preserved for appellate review and *Toler's Cove* could be read in the fashion it suggests, *Toler's Cove* did not disturb the well-established principle that "[u]nder South Carolina's choice-of-law principles, a contract's 'validity and interpretation is governed by the law of the place where it [was] made, the *lex loci contractus*,' unless the contract expressly provides otherwise." *Koppers Performance Chems, Inc. v. Argonaut-Midwest Ins. Co.,* 105 F.4th 635, 641 (4th Cir. 2024), cert. denied 24-347, 2024 WL 4805913 (Nov. 18, 2024) (quoting *Livingston v. Atl. Coast Line R. Co.*, 176 S.C. 385, 180 S.E. 343, 345 (1935)). As a result, even if D.R. Horton is correct and the Home Purchase Agreement lacks an express "choice of law" provision, South Carolina law would still apply.[10]

For these reasons, regardless of the exclusively intrastate nature of the parties' transaction, the lower court correctly found that face of the Home Purchase Agreement calls for the application

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[9] *See Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904) (dicta is not binding as precedent); *Dennis v. South Carolina Nat'l Bank*, 299 S.C. 34, 39, 382 S.E.2d 237, 240 (Ct.App.1988) (construing language in a case as dicta because it was "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof").

[10] Indeed, rather than suggest adherence to the FAA, the Home Purchase Agreement omits reference to it entirely—a particularly striking omission given that the "Independent Contractor Agreements" entered into by D.R. Horton with its subcontractors specifically provide that any "[d]ispute shall be submitted to binding arbitration under the Federal Arbitration Act,." (Appellant's Memorandum in Support of Motion to Dismiss, p. 3, Exhibit B).

of South Carolina arbitration law. As such, on these grounds, D.R. Horton's appeal should be denied.

B. The Application of Law Confirms the Lower Court Reached the Correct Result in Denying D.R. Horton's Motion to Compel Arbitration.[11]

D.R. Horton relies heavily on *Damico* (Appellant's Brief, p. 16). But that was a case "manifestly involv[ing] interstate commerce" and thus the FAA applied. *Damico*, 437 S.C. at 608, 879 S.E.2d at 753 And, *Smith* was also a dispute over an "arbitration agreement" that was "subject to the FAA." [12] 417 S.C. at 51, 790 S.E.2d at 5 ([C.]J. Kittredge, dissenting); *see also id*. at 45, 780 S.E.2d at 2 (accord). As a result, in both these cases (and others) the Supreme Court has "first define[d] the scope of the arbitration agreement before considering whether that agreement is unconscionable" under the *Prima Paint* Doctrine. *Damico*, 437 S.C. at 609, 879 S.E.2d at 753.

Here, there is no such restraint. This case does not implicate interstate commerce; the FAA therefore does not apply. *See Soil Remediation Co. v. Nu-Way Env't*, 323 S.C. 454, 460, 476 S.E.2d 149, 152 (1996) ("For the Federal [Arbitration] Act to apply, the commerce involved in the contract must be interstate or foreign."); *Bradley*, 398 S.C. at 454, 730 S.E.2d at 315–16 ("in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign."). As a result, this Court need not approach its analysis here in the "odd" "artificial" or "abstract" way that *Prima Paint* compels. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 197,

[11] Under Rule 220(c), SCACR, "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

[12] Interstate commerce and the FAA were also implicated in this Court's recent decision in *Mart.* 441 S.C. at 317, n. 7, 893 S.E.2d at 367, n. 7.

844 S.E.2d 66, 71-72 (Ct. App. 2020) (*aff'd in part*, *rev'd in part*, 437 S.C. 596, 879 S.E.2d 746 (2022)).[13]

Removed from *Prima Paint's* shadow of severance, this Court should apply South Carolina law to determine the putative arbitration agreement's "valid[ity]" and "enforceab[ility]" "upon such grounds as exist at law or in equity for the revocation of any contract" under South Carolina law. S.C. Code Ann. § 15-48-10(a).

Within South Carolina, "[i]t is axiomatic that the intent and purport of a written contract or agreement has to be gathered from the contents of the *entire agreement* and not from any particular clause or provision thereof." *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962) (emphasis added). If this Court considers the Home Purchase Agreement, "the *entire agreement*," as a whole, then it should naturally conclude, for the reasons explained *supra*, that the circumstances of this transaction and the putative arbitration provision leaving the Howells with "no remedy at all," are "unconscionable and thus unenforceable." *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. And, as discussed above, especially in a contract of adhesion involving a new home purchase, the Court should not rewrite the contract by severing unconscionable terms. *See, e.g.*, *Huskins*, 444 S.C. at 598, 910 S.E.2d at 478. ("[D.R. Horton] insisted upon an adhesion contract so its terms could not be varied and would stick. [D.R. Horton] is stuck with that choice.").

[13] Indeed, as this Court recently elaborated, the *Prima Paint* Doctrine is a "counter-intuitive approach" that "requires courts to sever arbitration provisions from the rest of an allegedly invalid contract that is so artificial that 'may be difficult for any lawyer—or any person—to accept.'" *Doe v. TCSC, LLC*, 430 S.C. 602, 618, 846 S.E.2d 874, 882 (Ct. App. 2020) (quoting *Prima Paint*, 561 U.S. at 87, 130 S.Ct. 2772 (Stevens, J., dissenting). No case Respondents have uncovered finds basis for the *Prima Paint* Doctrine under our State's law. In *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.,* 312 S.C. 559, 437 S.E.2d 22 (1993), the Supreme Court appears to first recognize the doctrine, but even then, its analysis relied on *Prima Paint's* application to a dispute arising from multi-year contracts with an apparent out-of-state coal supplier i.e. a dispute necessarily implicating interstate commerce and the application of the FAA.

Reading paragraph 14 and 15 together here is especially important because, while nominally two paragraphs, they both describe and reference the "Limited Warranty," and it is a long-held tenet of South Carolina law that "different provisions" of a contract "dealing with the same subject matter are to be read together." *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993)*; Bolt v. Ligon*, 144 S.C. 218, 142 S.E. 504 (1928) (same).

While D.R. Horton may suggest that even under South Carolina law the putative arbitration provision stands apart from the Home Purchase Agreement, "'[a] contract is entire, and not severable, 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.'" *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (quoting *Packard & Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905)). Here, paragraph 22 of the Home Purchase Agreement explains that the "document contains the *sole and entire agreement* between the parties hereto with regard to the [Residence]" and that it "may not be modified except by a writing signed by both parties." (Home Purchase Agreement, p. 9, ¶ 22) (emphasis added).

"The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016). It would contradict the parties' intent to read the Home Purchase Agreement as containing more than one agreement when the plain language of the Home Purchase Agreement provides that it is the "sole and entire agreement" among the parties that cannot be modified without their written consent. "Even if the 'Entirety'" clause of paragraph 22 of the Home Purchase Agreement "creates an

ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 356, 755 S.E.2d 450, 455 (2014). And this "rule applies with particular force involving a contract of adhesion." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (2002).

Moreover, the South Carolina Supreme Court has recognized that when an arbitration provision is "executed at the same time, by the same parties" alongside a putatively separate contract, the instruments are "for the same purposes, and in the course of the same transaction" and "[u]nless there is a contrary intention" this situation constitutes a "merger" of the two documents. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). But here no contrary intent is present here. Neither paragraph 15, the "arbitration" provision, nor paragraph 22, the "integration" provision of the Home Purchase Agreement "recognize[ ] the 'separatedness' of the [arbitration agreement] and the [Home Purchase Agreement]" and thus "the contracts between these parties [do not] indicate[ ] an intent that the common law doctrine of merger not apply." *Id.* D.R. Horton contends that paragraph 15 of the Home Purchase Agreement provides that the parties must arbitrate "any and all disputes which may arise between them regarding this Agreement and/or the Property," but to which "Agreement" and "Property" does D.R. Horton assert this language refers?[14]

[14] *Cf. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 562, 813 S.E.2d 292, 302 (Ct. App. 2018) (finding that an agreement to arbitrate did not merge when an underlying contract "indicated it was governed by South Carolina law, whereas the" parties' arbitration agreement "stated it was governed by federal law;" the arbitration agreement provided that "[a]ny and all claims or controversies arising out of or in any way *relating to this Agreement or the [underlying contract]*" would be resolved in arbitration; the arbitration agreement "could be revoked within thirty days" while the underlying contract could not; both documents had separate

Even if the putative arbitration provision in paragraph 15 could be considered a "separate" agreement under South Carolina law under S.C. Code Ann. § 15-48-10(a), "one contract may incorporate another by reference . . . " *City of Hardeeville v. Jasper Cnty.*, 443 S.C. 635, 646, 905 S.E.2d 431, 437 (Ct. App. 2024) (quoting *Shaw v. E. Coast Builders of Columbia, Inc.*, 291 S.C. 482, 484, 354 S.E.2d 392, 392 (1987). And "when multiple documents are executed contemporaneously in the course of and as a part of the same transaction, the Court may consider and construe the instruments together in order to ascertain the intention of the parties and the terms of the agreement." *Dixon v. Dixon*, 362 S.C. 388, 396, 608 S.E.2d 849, 852–53 (2005). "Construing contemporaneous instruments together means simply that if there are provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 24; *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 91, 594 S.E.2d 485, 493 (2004) ("Where one contract explains, amplifies, or limits the other, those provision will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effected."). And, even more, "where a contract is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence may be admitted in order to supply a deficiency in the language of the contract and to establish the true intent and meaning of the parties." *U.S. Leasing Corp. v. Janicare, Inc.*, 294 S.C. 312, 318, 364 S.E.2d 202, 205 (Ct. App. 1988).

Nor is there any reason to treat an arbitration provision different from other contracts under South Carolina law. *See, e.g.*, *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C.

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signature pages, and entry into the arbitration agreement was not a precondition to the underlying contract).

633, 639, 856 S.E.2d 150, 153 (2021) ("There is . . . no public policy—federal or state—'favoring' arbitration."); *Lampo v. Amedisys Holding,* LLC, No. 2022-001362, 2024 WL 5444308, at *5 (S.C. Mar. 5, 2025) ("An arbitration contract is like any other contract . . ."). Just like an agreement calling for the "[a]rbitration of disputes . . . may be provided for by reference to outside documents," *First Baptist Church v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 122 (1981), so too may an arbitration agreement just as easily incorporate by "reference . . . outside documents."

Accordingly, for these reasons, whether analyzed under the *Prima Paint* Doctrine or exclusively under South Carolina law, the lower court did not err in denying D.R. Horton's Motion to Compel Arbitration and D.R. Horton's appeal should be denied.

IV. The Arbitration Provision Merged into the Deed.

Even if the arbitration agreement were not unconscionable and thus unenforceable here under both the FAA and South Carolina law, D.R. Horton's appeal should still be denied because the Home Purchase Agreement merged into the deed.

Under the doctrine of merger, "[t]he execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original doctrine, and generally the rights of the parties are fixed by their expressions as contained in the deed." *Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 132 (Ct. App. 1984) (*quoting Charleston & W. C. Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187 (1957)). In other words, once parties execute a deed "the written . . . agreement to convey is merged in the deed, the agreement to convey is discharged or is modified as indicated by the deed, the deed regulates the rights and liabilities of the parties, and [prior] agreement[s] [are] inadmissible." *W. Carolina Ry. Co.*, 231 S.C. at 505, 99

S.E.2d at 193; *Wilson*, 281 S.C. at 264, 315 S.E.2d at 132 ("A deed executed [after a] contract for the sale of land supersedes that contract. . .").

"The party denying merger has the burden of proving by clear and convincing evidence that merger was not intended." *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts *a firm belief* as to the allegations sought to be established." *Anonymous (M-156-90) v. State Bd. of Med. Examiners*, 329 S.C. 371, 375, 496 S.E.2d 17, 18 (1998) (internal citations and quotations omitted) (emphasis added).

In *Carlson*, this Court recognized that an arbitration clause in a purchase and sale agreement for a new home may merge into the deed. At the same time, this Court ruled that the merger doctrine was inapplicable under the facts present in *Carlson* because clear and convincing evidence was submitted 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.

This was because *both* the *Carlson* purchase agreement and its arbitration provision each contained an explicit survival clause,

> "The covenants, disclaimers and agreements contained in this Agreement shall not be deemed to be merged into or waived by the instruments executed at Closing, **but shall expressly survive the closing** and continue to be binding upon both parties. In addition, the arbitration clause in the purchase agreement specifically state[d] that "**after closing**, every controversy or claim arising out of or relating to this Agreement . . . **shall be settled by binding arbitration**."

Id. (ellipsis original, emphasis added).

Accordingly, in *Carlson* this Court concluded that these "clear and unambiguous terms" demonstrated "clear and convincing . . . support[ ]" for a "finding that the parties did not intend for the arbitration clause to be merged into the deed at closing." *Id.*[15]

On the other hand, D.R. Horton can point to no such "clear and convincing" evidence of the parties' mutual intent in the Home Purchase Agreement here. In contrast to the purchase agreement in *Carlson*, the Home Purchase Agreement uses highly restrictive language providing that only those obligations that explicitly and "expressly survive[d] the Closing" are actionable. (Home Purchase Agreement, p. 8, ¶ 18(c)) ("from *and after the closing* each party shall have the right to pursue. . . the other party for breach of any covenant or agreement contained herein **that expressly survives the Closing** . . .") (emphasis added).

Those portions of the Agreement that "expressly survive[ ] the Closing" are limited to the following:

- **Paragraph 9(b)**: Discussing the Howells' indemnification of D.R. Horton for pre-Closing inspections - "Notwithstanding any other provision herein, Purchaser's indemnity of Seller pursuant to this Section ***shall survive Closing*** . . ." (Home Purchase Agreement, p. 5).

- **Paragraph 9(d)**: Discussing D.R. Horton's obligations to make repairs to issues memorialized on a "Punch List" inspection conducted "[a]fter substantial completion of the House *but prior to Closing*" by the "Seller and Purchaser" - "Seller's obligation to

[15] In other contexts, where South Carolina courts have found that an arbitration provision "expressly survives" and is not merged into a separate document, they have consistently applied the same "clear and convincing evidence" standard in evaluating the parties' intentions. *See, e.g., Coleman,* 407 S.C. at 355, 755 S.E.2d at 455 (concluding that language in the admission agreement that "recognize[d] the 'separatedness' of the [arbitration agreement] and the admission agreement" plus a clause allowing the arbitration agreement to "be disclaimed within thirty days of signing while the admission agreement could not" indicated the parties' intention "that the common law doctrine of merger not apply"); *Hodge, LLC*, 422 S.C. at 562-63, 813 S.E.2d at 302 (determining an admission agreement and arbitration agreement did not merge because "the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law," "each document was separately paginated and had its own signature page," and "the Arbitration Agreement stated signing it was not a precondition to admission" evidenced the parties' intention the documents be construed as separate instruments).

correct, repair or replace any items that are listed on the Punch List ***shall survive closing***." (Home Purchase Agreement, p. 5).

- **Paragraph 10**: Providing that the Howells "shall indemnify and hold Seller harmless from and against any and all liabilities, losses, costs, damages and expenses (including attorneys' fees and expenses and costs of litigation) that Seller may suffer or incur because of any claim by any broker, agent or finder, whether or not meritorious, for any compensation with regard to this transaction arising out of any acts or contracts of Purchaser" and that "the provisions of this Section ***shall survive closing*** . . ." (Home Purchase Agreement, p. 5).

Moreover, it seems odd indeed that a large corporation like D.R. Horton would point to "warranties" it would "provide[ ]" to support its position that the merger doctrine does not apply here (D.R. Horton Brief at 30), when the Home Purchase Agreement so plainly provides that it D.R. Horton really has none: "AFTER CLOSING, **SELLER SHALL HAVE NO LIABILITY OR OBLIGATION 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." (Home Purchase Agreement, p. 7-8, ¶ 14) (emphasis added). As noted above, paragraph 9(d) of the Home Purchase Agreement is for "punch-list" items (inapplicable here) and paragraph 14 merely offers that *"*[a]t closing [D.R. Horton] shall deliver to Buyer the documentation necessary for Buyer *to obtain the actual Limited Warranty for the House. . . .*" *Id* (emphasis added).[16]

As a result, the lower court correctly concluded D.R. Horton did not shoulder its heavy burden and present "clear and convincing evidence" that the merger doctrine did not apply. Even still, if there are any ambiguities in the Agreement regarding whether the arbitration provision survived merger with the deed, such ambiguities would be construed against D.R. Horton with

[16] This "Limited Warranty" is not present on the record. Nor is it offered by D.R. Horton but instead "administered by Residential Warranty Corporation." (Home Purchase Agreement, p. 6, ¶ 14(a).

particular force in this contract of adhesion. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455; *S. Atl. Fin. Servs., Inc.*, 349 S.C. at 84, 562 S.E.2d at 486.[17]

Furthermore, D.R. Horton's citation to *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 429 S.E.2d 791 (1993) is not on point. The arrangement between the Fire District and Ruritan Club in that case contemplated the sale by the Ruritan Club to the Fire District of a "*building lot*." Once a mortgage on the "*property*" was free of "any loan or mortgage" the Fire District would "return the *lot* to the Ruritan Club" but the "Fire District w[ould] continue the right to use *said properties* as long as they are used for Fire District purposes." *Id.* at 403, 429 S.E.2d at 792 (emphases original). When the dispute in *New Prospect* arose, the Fire District was still apparently using the *building* "for Fire District purposes," *id.*, but the lot had not yet been reconveyed to the Ruritan Club. "If the lot were reconveyed, Ruritan Club would hold title to the . . . lot and Fire District would own the building" and could continue to use it even after reconveyance 'as long as it is used for [Fire District] purposes.'" *Id.* at 405, 429 S.E.2d at 793 (substitution original). In concluding that "unperformed provisions of the contract" were "not merged in the deed," *Id.,* 311 S.C. at 405, 429 S.E.2d at 792, the Supreme Court necessarily and simply recognized that the original contract necessarily contemplated the potential for ongoing use of the building and the reconveyance of the land from the Fire District back to the Ruritan Club after the initial deed. Such is not the case here.

[17] D.R. Horton tilts at strawmen in contending that the law compels it to deliver a "deed incorporating the language of an arbitration provision addressing home construction and warranty obligations" to preserve arbitration post-closing. (D.R. Horton Brief at 31). This Court issued its opinion in *Carlson* in 2013, the Home Purchase Agreement was signed years later. Certainly, D.R. Horton's response to the *Smith* decision is memorialized in its practices today, so one must wonder why it continues to fail to recognize the import of this Court's decision in *Carlson*.

In sum, the plain language of the Home Purchase Agreement demonstrates that any putative arbitration provision within it was extinguished once the deed for the Residence was "execut[ed], deliver[ed], and accept[ed]." *Wilson*, 281 S.C. at 264, 315 S.E.2d at 132. D.R. Horton's citations to other jurisdictions, while academically informative, fail to recognize that in 1885, the Supreme Court decided *St. Philip's Church v. Zion Presbyterian Church*, 23 S.C. 297 (1885) and the Doctrine of Merger has been consistently affirmed for nearly 150 years since. Accordingly, D.R. Horton has not met, and cannot meet, its burden of proof by clear and convincing evidence and show that the parties intended for the arbitration clause to survive closing. On these grounds too, D.R. Horton's appeal should be denied.

CONCLUSION

The lower court's decision should not be disturbed. Just like in *Smith*, the Home Purchase Agreement here contains an arbitration provision that incorporates by reference and is intertwined with oppressive and one-sided terms that are properly deemed unconscionable and unenforceable in the context of a contract of adhesion between novice and unrepresented homeowners and the largest residential homebuilder in America. Neither the plain language of the arbitration provision or public policy concerns support severance of these unconscionable terms. And while the arbitration provision is unenforceable under the *Prima Paint* Doctrine, the propriety of the lower court's holding if further confirmed by South Carolina law which exclusively applies to this case involving solely intrastate commerce. Finally, even if the putative arbitration agreement were otherwise enforceable, it did not survive, but instead merged with the deed upon closing.

For all these reasons, D.R. Horton's appeal should be denied.

***

Respectfully submitted,

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Columbia, South Carolina
May 22, 2025

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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.

PROOF OF SERVICE

I hereby certify that, on this date, the **RESPONDENTS' MOTION TO AMEND INITIAL BRIEF OF RESPONDENTS** was served on all counsel of record via email delivery, as follows:

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The undersigned certifies that the **RESPONDENTS' MOTION TO AMEND INITIAL BRIEF OF RESPONDENTS** was served by U.S. Mail on the Third-Party Defendants L&M Electric, Inc. and Unique Stone Creations, addressed as follows:

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I further certify that all parties required by Rule to be served have been served.

s/ Ian T. Duggan
Ian T. Duggan, SC Bar No. 80074

May 23, 2025
Columbia, South Carolina

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May 23, 2025

RECEIVED
May 23 2025
SC Court of Appeals

VIA EMAIL: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Re: Sherman and Claudia Howell vs. D.R. Horton, Inc.
Appellate Tracking No. 2024-001963
Our File No. 8835.002

Dear Ms. Kitchings:

Enclosed herewith please find the Respondents' Motion to Amend Initial Brief of Respondents, together with the Proof of Service, in the above-referenced matter. Kindly file the same and return a clocked-in copy of each to the undersigned via return email. My firm's check in the amount of $50.00 as the filing fee for the Motion will be hand-delivered to the Court.

The enclosed documents have been served upon Appellant's counsel and all Third-Party Defendants today via email and first-class mail as indicated in the Proof of Service.

Please feel free to contact me with any questions. Thank you.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

s/ Ian T. Duggan

Ian T. Duggan

ITD:kam
Enclosures

cc: (w/ encl.)

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