EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2023-CP-08-02903
Donna Brunetti, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT D.R. HORTON, INC.'S MOTION TO COMPEL ARBITRATION**
v.	)	
D.R. Horton, Inc.; Alternative Septic Services, LLC and John Doe #1-15,	)	
Defendants.	)	

This matter came before the Court by WebEx on March 10, 2025, on D.R. Horton, Inc.'s ("Horton") Motion to Compel Arbitration, which was filed on February 6, 2025.[1] Upon considering the oral arguments and the parties' written submissions, this Court **DENIES** Defendants' Motion to Compel Arbitration. The Court finds that the arbitration provision in Plaintiff's purchase contract is unenforceable because:

(1) Horton's arbitration provision is unconscionable and unenforceable pursuant to the South Carolina Supreme Court's *Smith* decision;

(2) Horton's arbitration provision lacks mutuality and improperly limits the arbitrator's authority; and

(3) Horton's arbitration provision violates South Carolina public policy exemplified in *Damico* and *Huskins*.

Accordingly, the Court DENIES Defendant's Motion to Compel Arbitration.

PERTINENT FACTS

A. French Quarter Creek Overview

French Quarter Creek ("FQC") is a subdivision in Huger, South Carolina, with 247 single-

[1] Justin Lucey and Ben Traywick, both of the Charleston County Bar, appeared and argued for Plaintiff. Kim Wooten of the Greenville County Bar appeared and argued for Horton.

family homes which were or are in the process of being developed and built out by Horton and its subcontractors. (Compl. at ¶¶ 1, 7). Brunetti is the owner of one of these homes, and alleges her yard has a failing septic system and inadequate drainage that is causing stormwater and effluent to saturate her property (collectively "Drainage Defects" or "Defects"). Brunetti brought this proposed class action against Horton and its primary septic installer subcontractor, Alternative Septic Services, LLC ("Alternative"),[2] because of these alleged Defects.

B. Brunetti's Purchase Agreement and Deed

Brunetti executed the purchase agreement for her home on October 18, 2021. (*See* Brunetti's Contract). Brunetti's agreement is a boilerplate contract that Horton offered on a take-it-or-leave-it basis. (*See* Brunetti Aff., para. 4). The agreement contains an arbitration provision in Paragraph 15 that references Horton's Warranties[3] and Disclaimers in Paragraph 14:

> **15. MANDATORY BINDING ARBITRATION**. PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS CONTRACT AND/OR THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING: (A) SELLER'S CONSTRUCTION AND DELIVERY OF THE HOME; (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 TO RIGHT TO ASSESS OR ALLOCATE THE FILING FEES AND ANY OTHER COSTS OF THE ARBITRATION AS A PART OF THE ARBITRATOR'S FINAL ORDER. THE ARBITRATION SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION

[2] Alternative is a South Carolina limited liability company and the septic system installer for FQC.
[3] These "Warranties" are actually third-party warranties: RWC's Ten Year Warranty and all Manufacturer Warranties, which are provided to homeowners after they sign their purchase agreement at closing. (*See* Brunetti's Contract).

AWARD. **NOTWITHSTANDING ANY OTHER PROVISION HEREIN, ANY DISPUTES ARISING UNDER THE LIMITED WARRANTY SHALL BE MEDIATED, ARBITRATED AND/OR JUDICIALLY RESOLVED PURSUANT TO THE TERMS, CONDITIONS, PROCEDURES AND RULES OF THAT WARRANTY PROGRAM.** 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. NOTWITHSTANDING THE FOREGOING, THE ARBITRATIONPROVISIONS OF THIS SUBSECTION (B) SHALL NOT APPLY IN THE EVENT THAT THE DISPUTE RELATES TO A DEFAULT BY THE SELLER UNDER SECTION 16(F) OF THIS AGREEMENT.

(*See* Brunetti's Contract) (emphasis added). Paragraph 15 requires reference to Paragraph 14 to determine the scope of Paragraph 15; and Paragraph 14 describes the third-party Warranties, attempts to disclaim all implied warranties, and attempts to relieve Horton of all liability for "monetary damages of any kind":

14. WARRANTIES AND DISCLAIMER.

a. Ten-Year Limited Warranty. Seller shall provide Buyer with a written, ten-year limited warranty on the House administered by Residential Warranty Corporation ("RWC") which shall be effective as of the Closing Date. The terms and conditions of, and exclusions from, the ten-year limited warranty shall be as set forth in that document published by RWC, entitled "LIMITED WARRANTY, 10 YEAR LIMITED WARRANTY FOR NEW HOMES," and referred to herein as the "Limited Warranty". At Closing, Seller shall deliver to Buyer the actual limited warranty for the House, to be validated by RWC after Closing.

b. Manufacturers' Warranties. At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the House.

c. Disclaimer and Limitation on Seller's Liability. THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14(a) ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND **SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR**

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

(*See* Brunetti's Contract) (emphasis added). Paragraphs 14 and 15 do not contain a severability clause. *Id*.

C. Procedural History

Brunetti filed her Complaint on October 16, 2023, and asserted the following claims against Horton: negligence/gross negligence, breach of implied warranties, and unfair trade practices. Horton filed its Motion to Stay and Compel Arbitration on February 6, 2025. Plaintiff filed her Memorandum Opposing Horton's Motion to Compel Arbitration on March 6, 2025. Plaintiff alleges that Horton's arbitration provision is unenforceable due to unconscionability and unenforceability pursuant to the *Smith* case. Plaintiff alleges that the contract lacks mutuality, improperly limits the arbitrator's authority, and the contract provision violates South Carolina public policy.

The Court heard arguments from counsel on March 10, 2025, via WebEx. On March 31, 2025, the Court issued a Form 4 Order denying Horton's Motion. This more formal Order follows.

THE ARBITRATION AGREEMENT AT ISSUE

A. Horton's Arbitration Provision is Unenforceable Because it is Unconscionable

The Court finds that Horton cannot compel arbitration because Horton's purchase contract and the arbitration provision therein ("Arbitration Provision") is/are contracts of adhesion. As both contain oppressive terms, that give Horton an unfair advantage over unsophisticated homeowners, they are unconscionable. *Smith v. D.R. Horton*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) ("[U]nconscionability is. . .the absence of meaningful choice. . .due to one-sided contract provisions, together with [oppressive] terms. . .").

1. Arbitrability and Unconscionability

In South Carolina, contract defenses such as fraud, duress, and unconscionability apply to a court's evaluation of the enforceability of an arbitration clause governed under the SCUAA or the FAA.[4] Thus, if this Court finds an arbitration clause unconscionable, the Court may refuse to enforce the clause or otherwise limit its application to avoid an unconscionable result. S.C. Code § 36-3-302(1) (allowing courts to refuse to enforce unconscionable contractual terms).

2. Horton's Purchase Contract is an Adhesion Contract

The Court finds that Horton's Arbitration Provision is unenforceable because it is contained within an adhesion contract and the Arbitration Provision itself contains oppressive and unconscionable terms that are not severable. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (defining unconscionability as the absence of meaningful choice…together with [oppressive] terms…").

a. Plaintiff Lacked a Meaningful Choice

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

- The Purchase Contract is a boilerplate contract that Horton offered to Brunetti on a take-it-or-leave-it basis;

[4] *See also* 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."); S.C. Code § 15-48-10(a) (containing similar language to that of the FAA).

- Brunetti is an unsophisticated purchaser whereas Horton is a sophisticated developer that has constructed nearly 800,000 homes in the United States; and,

- Similar Horton contracts have been found to be adhesion contracts by our courts.[5]

This Court finds that Horton's contract is one of adhesion, properly subject to heightened scrutiny due to the disparity in bargaining position between Horton and these homeowners.

Here, like *Smith*, there is no evidence that Brunetti "enjoyed a substantially stronger bargaining position against D.R. Horton than the average homebuyer" or that Brunetti "[was] represented by independent counsel." *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. Brunetti is an unsophisticated purchaser whereas Horton is a large, commercial developer that annually constructs nearly 800,000 homes throughout the United States. *Id*. *See also* (Horton Website).[6]

---

[5] *See Smith*, 417 S.C. 42, 790 S.E.2d 1; *Upchurch v. D.R. Horton*, 2005 WL 5621497, at *3 (S.C. Com. Pl.) (Judge Barber Sept. 28, 2005 Order Denying Horton's Arbitration Motion) (Richland County); *Zitek v. D.R. Horton, et al*, Case No. 2019-CP-04-01942 (S.C. Com. Pl.) (Judge Sprouse January 27, 2021 Order) (Anderson County) ("[T]his Court finds the agreement's arbitration provision contains oppressive terms that disclaim all implied warranties and waive Horton's liability 'for monetary damages of any kind.' The arbitration provision consists of Paragraphs 14 and 15 because, like *Smith*, cross-references 'intertwine' these provisions"); *Baddorf, et al. v. D.R. Horton*, *et al*, Case No. 2022-CP-23-03974 (S.C. Com. Pl.) (Judge Gravely April 25, 2023 Order Denying Horton's Arbitration Motion) (Greenville County) ("The Arbitration Provision (Paragraph 15) in the Purchase Agreements here still references those unconscionable provisions of what is now Paragraph 14. Thus, the unconscionable provisions are still 'intertwined' with the arbitration provisions, making the Arbitration Provision referencing them unenforceable"); *Harley v. D.R. Horton*, Case No. 2023-CP-02-01719 (S.C. Com. Pl.) (Judge Fant 11/27/2024 Order Denying Horton's Arbitration Motion) (Aiken County) ("The arbitration provision consists of Paragraphs 14 and 15 because it is the combination of these two paragraphs that define the scope of arbitration; and, like *Smith*, cross-references 'intertwine' these provisions."). The arbitration terms overruled by Judge Gravely and Judge Fant are identical to the arbitration terms at issue in this case.

[6] The force of this doctrine was recently highlighted by the Court of Appeals in a slightly different context. The Court of Appeals recently invalidated one-sided terms in a contract *between two sophisticated parties* – a material supplier and an installer – because it found:

Further, an unsophisticated purchaser like Brunetti is certainly in a more disparate bargaining position than the installer in *Retreat at Charleston Nat'l*. Like *Smith*, Brunetti is "not a substantial business concern of D.R. Horton" because Brunetti does "not comprise a large portion of D.R. Horton's clientele." *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. As such, this Court should find that Brunetti "lacked a meaningful choice in [their] ability to negotiate the arbitration clause." *Id.; see also 315 Conley,* 444 S.C. at 531, 908 S.E.2d at 897.

b. The Arbitration Provision Includes Paragraphs 14 and 15

The Arbitration Provision consists of Paragraphs 14 and 15 as Paragraph 15 expressly requires one to consider Paragraph 14 to determine scope of arbitration. (*See* Brunetti's Contract). Paragraph 14 is loaded with unfair terms. The *Smith* court found that the express cross-references between these Paragraphs (previously formatted differently) "intertwine" them "so as to constitute a single [arbitration] provision." *Smith,* 417 S.C. at 49, 790 S.E.2d at 4 (emphasis added).

It is hornbook law that an arbitration agreement must be a valid agreement in order to compel arbitration. Under *Prima Paint*, there must be an independent challenge to the arbitration provision (not to the contract as a whole) for the courts to determine arbitrability. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). To evaluate challenges to a purported arbitration agreement, the portions of the contract that constitute the arbitration agreement must be determined. S*ee Damico v. Lennar Carolinas, LL*C, 437 S.C. 596, 609, 879 S.E.2d 746, 753

> [I]t inconceivable that [an installer] with even a semblance of bargaining power who understood the implications of the language in these agreements would sign them unless there existed a total absence of meaningful choice.

Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC, No. 2021-001050, 2025 WL 466562 (S.C. Ct. App. Feb. 12, 2025) (emphasis added).

(2022) (courts must first define the scope of an arbitration agreement before considering whether that agreement is unconscionable).

Paragraph 15 references and excludes from its applicability any dispute that arises under the Warranty granted in Paragraph "14 above" which means that one must go to Paragraph 14 to determine the applicability of Paragraph 15. Stated differently, the *scope* of the arbitration agreement under Paragraph 15 is incomplete without taking Paragraph 14 into account, and therefore it is the combination of these two paragraphs that constitute the arbitration agreement.[7]

Further, this Court, like the *Smith* court, finds that *Prima Paint* does not preclude courts from considering provisions that are "referenced by" an express arbitration provision.[8] *Smith*, 417 S.C. at 48-49, 790 S.E.2d at 4 ("The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision. Thus, in accordance with the *Prima Paint* doctrine, we find that in determining whether the arbitration agreement is unconscionable, we may properly consider the entirety of paragraph 14.").

The only pertinent differences between *Smith* and this case are that Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and (2) its disclaimers and

---

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

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

limitations from Paragraph 14(i) to Paragraph 14(c). Horton appears to have relocated these provisions to circumvent *Smith*'s holding and to avail itself of *Prima Paint's* holding. However, the relocation of these provisions does not negate *Smith's* applicability. A comparison of *Smith*'s paragraphs to Brunetti's paragraph shows that they contain the same cross-references.[9]

Accordingly, the Court finds that *Smith* controls this case involving a restructured version of the same disclaimers considered by the *Smith* court; and the Arbitration Provision is unconscionable.

B. The Arbitration Provision in Brunetti's Purchase Contract Lacks Mutuality and Improperly Limits the Arbitrator's Authority

This Court additionally finds that the Arbitration Provision in Brunetti's purchase contract is unconscionable for two additional reasons.

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

> SELLER HEREBY DISCLAIMS ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. . . . **AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR 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 . . . .

(*See* Brunetti's Contract, para. 14(c))(emphasis added). This language is invalid under *Damico* because it purports to prevent the arbitrator from finding Horton liable for any type of monetary award which prevents the arbitrator from making a fair, unbiased decision. *See Damico*, 437 S.C.

[9] *See* Pl. Memo. Opp. Arb., pp. 9-10 (charts showing similarities between Smith and Brunetti).

at 611, 879 S.E.2d at 755 (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668-69 (2007)) ("In analyzing claims of unconscionability in the context of arbitration agreements…courts…focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.")); *see also Smith*, 417 S.C. at 50, 790 S.E.2d at 5 (finding arbitration provision unconscionable and unenforceable where the relief was left "to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate").

Second, the Court finds Horton seeks to limit the rights of home purchasers to arbitration while at the same time reserving its own right to litigate if it so chooses:

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

(*See* Brunetti's Contract). These two arbitration exclusions in favor of Horton create non-mutual obligations and are further indica of unconscionability. *Damico*, 437 S.C. at 615, 879 S.E.2d at 757 (citing 17A Am. Jur. 2d *Contracts* § 272) ("Mutuality [ ] is a paramount consideration when assessing the substantive unconscionability of a contract term."); *see also Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 940 (4th Cir. 1999) (finding recission to be the appropriate remedy where Hooters promulgated such biased arbitration rules that the contract created a "sham system unworthy even of the name of arbitration.").

As reiterated by *Smith*, and as perhaps first eloquently stated by the Fourth Circuit in *Hooters*, the essence of the Court's analysis of an arbitration provision is to determine whether its terms promote a level playing field or stack the deck against disadvantaged parties such as Brunetti.

See Smith, 417 S.C. at 49, 790 S.E.2d at 4; *Hooters*, 173 F.3d at 940. Here, Horton's Arbitration Provision stacks the deck against these homeowners in multiple ways.

Accordingly, the Court finds that Horton's Arbitration Provision lacks mutuality and improperly limits the arbitrator's authority.

C. The Arbitration Provision is Not Severable and is Against Public Policy

The Court also finds that offending provisions of Paragraphs 14 and 15 are not severable from the Arbitration Provision. This is supported by *Smith*, where the cross-references between these Paragraphs "intertwine" them into one provision. *Smith*, 417 S.C. at 49, 90 S.E.2d at 4. This is also supported by the *Smith* court of appeals decision:

> We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for "monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages."

Smith v. D.R. Horton, Inc., 403 S.C. 10, 17, 742 S.E.2d 37, 41 (Ct. App. 2013) (emphasis added), *aff'd*, 417 S.C. 42, 790 S.E.2d 1 (2016).

Although Brunetti's contract contains a general severability provision in Paragraph 23, Paragraphs 14 and 15 are still so intertwined that they cannot be severed from each other. After *Smith*, our Supreme Court furthered the discussion regarding whether a purchase agreement's arbitration provision should be severed from other unconscionable provisions of that agreement:

> We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon" parties to the arbitration proceeding. We decline to blue-pencil that provision.
>
> It goes without saying that the clause of a contract that names the persons or entities that may properly be joined as parties to proceedings arising from any dispute involving that contract is a material term of the agreement. . . . Were we to sever such a clause from the arbitration agreement here, it would be the opposite of excising an 'ancillary logistical concern." Rather, we would be materially rewriting the contract by controlling who will—or will not—participate in arbitration.

> Blue-penciling an agreement is, of course, within the Court's discretion. Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement. . . .
>
> There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. . . .
>
> The second additional consideration of which we take note is that this contract involves a consumer transaction. . . . **More specifically, this contract involves the purchase of a new home, South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.** . . . As we stated over thirty years ago, **it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce.**" . . . Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction.
>
> Generally, courts will not enforce contracts that violate public policy. . . .
>
> > A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. . . .
>
> Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. **We are specifically concerned that honoring the severability clause here creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer.**

Damico, 437 S.C. at 619-22, 879 S.E.2d at 759-60 (emphasis added) (internal citations omitted).

The South Carolina Supreme Court recently applied the *Damico* holding in *Huskins*. *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 910 S.E.2d 474 (2024), *reh'g denied* (Jan. 16, 2025). The *Huskins* court similarly refused to sever unconscionable language from an arbitration provision in an adhesion contract because:

> [P]arties who impose standard form adhesion contracts on weaker parties would have no downside to throwing blatantly illegal terms betting they will go unchallenged or, at worst, that courts will throw them out and enforce the rest.

Id. at 598, 910 S.E.2d at 478 (citing *Damico*, 437 S.C. at 622, 879 S.E.2d at 760). *See also Retreat at Charleston Nat'l*, 2025 WL 466562, at *14 (finding in a commercial context "provisions… replete with terms that violate South Carolina law and public policy" could not be "effectively severed.").

In doing so, the *Huskins* court upheld South Carolina's longstanding public policy of protecting homebuyers. *Huskins*, 444 S.C. at 597, 910 S.E.2d at 477 (citing *Dillon v. BMO Harris Bank NA*, 856 F.3d 330, 337 (4th Cir. 2017) ("When a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract").

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

D. Neither *Mart* nor *Dixon* Supports Severability in This Case

Horton's reliance on *Mart*[10] and *Dixon*[11] is misplaced. Neither *Mart* nor *Dixon* dealt with a Horton purchase contract. *Mart*, for example, involved two separate arbitration clauses in two separate documents: Mart's purchase contract and Mart's post-closing Limited Warranty. The *Mart* court ultimately upheld the arbitration clause in Mart's purchase contract because unlike here:

- Mart's arbitration clause was a stand-alone clause that did not reference other terms in the contract;
- Mart's arbitration clause was mutual and geared towards an unbiased decision by a neutral decision maker;

[10] *Mart v. Great Southern Homes*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023).
[11] *Dixon v. Pattee*, 442 S.C. 233, 898 S.E.2d 158 (Ct. App. 2023).

- Mart's arbitration clause did not attempt to disclaim "all monetary damages of any kind;" and

- Mart did not challenge the arbitration clause "as unconscionable or as lacking material terms."

Mart, 441 S.C. at 316, 893 S.E.2d at 366 (emphasis added).

The *Mart* court therefore "was handcuffed" in its ability to judge the validity of the clause's waiver of implied warranties and had no choice but to compel arbitration. *Id*. ("Because Mart did not separately challenge the standalone arbitration provision in the GSH Sales Contract as unconscionable or as lacking material terms, we are handcuffed with respect to Mart's challenge of the validity of the waiver of implied warranties.").[12]

Significantly, the *Mart* court also noted that Mart's arbitration clause materially differed from Horton's arbitration clause in the *Smith* case. *Id.* at 318, 893 S.E.2d at 367 (citing *Smith*, 417 S.C. at 50, 790 S.E.2d at 5) ("The standalone arbitration clause here differs from those found unconscionable in South Carolina cases considering adhesion contracts between sophisticated builders and individual new home purchasers.").

Mart also acknowledged that "*Damico* governs [the] inquiry in this dispute". *Mart*, 441 S.C. at 314, 893 S.E.2d at 366. The *Damico* court refused to compel arbitration because the arbitration provision—standing alone—contained oppressive and one-sided terms rendering the provisions unconscionable and against public policy. *Damico*, 437 at 604, 879 S.E.2d at 751.

[12] The court in *Dixon* was similarly constrained because the plaintiffs in that case did not preserve their unconscionability argument. *Dixon*, 442 S.C. at 262-63, 898 S.E.2d at 173-74 (citations omitted) ("[The Dixons] cite to no authority or specific provisions in the Agreement or Warranty that are oppressive or one-sided. As a result, we find their unconscionability argument is not preserved for our consideration…").

In contrast to *Mart*, the Arbitration Provision here contains the same one-sided and oppressive terms as the arbitration clause in the *Smith* case; and severing any of these terms would contravene public policy as found by the *Smith* and *Damico* courts. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5; *Damico*, 437 S.C. at 624, 879 S.E.2d at 761.

E. Horton Cannot Compel Downstream Purchasers to Arbitrate; and *Dixon* does Not Say Otherwise

Additionally, downstream class members are not parties to any arbitration agreements and are not suing on contracts or warranties containing arbitration agreements. Horton does not have a purchase contract with the many putative class members who are downstream purchasers. Horton therefore cannot compel arbitration, under either the FAA or the SCUAA, as to this portion of the class. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (2012) (citing *Int'l Paper Co v. Schwabedissen Maschinen & Analgen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000)) ("Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").

The *Dixon* decision does not change this result. In *Dixon*, the court held that an arbitration clause can be enforced against a non-signatory who asserts an express warranty claim arising out of a contract which contains an arbitration agreement:

> When a claim depends on the contract's existence and cannot stand independently—that is, the alleged liability, "arises solely from the contract or must be determined by reference to it"—equity prevents a person from avoiding the arbitration clause that was part of that agreement. But "when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law," direct-benefits estoppel is NOT implicated even if the claim refers to or relates to the contract or would not have arisen "but for" the contract's existence.
>
> *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (emphasis added by court) (quoting *Jody James Farms JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 537 (Tex. 2018)).
>
> The arbitration provisions contained in the Agreement and Warranty are enforceable against the Dixons because, while they are not parties or signatories to

> the relevant agreements, the Dixons expressly rely on the Agreement and Warranty in alleging their breach of warranty claim against Weekley… They cannot therefore repudiate the arbitration provisions contained therein on the basis of being nonsignatories.

Dixon, 442 S.C. at 257-59, 898 S.E.2d at 171 (emphasis added).[13]

As expressly recognized by the *Dixon* court, a non-signatory who has not alleged a direct benefit from a contract by, e.g., asserting a breach of express warranty claim cannot be compelled to arbitration. Our Court of Appeals recently confirmed this in *Blackwell v. Mary Black Health System, LLC*:

> South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174. Equitable estoppel "estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has 'exploited' other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability." *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272.
>
> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.
>
> *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).
>
> "[U]nder the [theory of equitable estoppel], a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement

[13] The *Wilson* court cited by the *Dixon* court found that a nonsignatory could not be compelled to arbitrate and emphasized that "[e]quitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." *Wilson v. Willis*, 426 S.C. 326, 345, 827 S.E.2d 167, 177 (2019) (citing *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 52 (2013)) (observing equitable estoppel should be used sparingly to compel arbitration and noting it "is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration"); *see also Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2007) (emphasis added) ("Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, *a presumption against arbitration arises*").

> containing an arbitration clause, and receives benefits flowing directly from the agreement." *Wilson*, 426 S.C. at 340-41, 827 S.E.2d at 175 (quoting *Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 977 N.Y.S.2d 685, 999 N.E.2d 1130, 1134 (2013)). "A benefit is direct if it flows directly from the agreement." *Id.* at 343, 827 S.E.2d at 176. "In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties but does not exploit (and thereby assume) the agreement itself." *Id*.
>
> "Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *Pearson*, 400 S.C. at 291, 733 S.E.2d at 602 (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)).

911 S.E.2d 147, 153, 2024 WL 4234719 *4 (Ct. App. 2024) (emphasis added and in original), *reh'g denied* (Jan. 27, 2025).

In *Griffin*, the Fourth Circuit confronted the same claims asserted here and refused to invoke equitable estoppel to compel arbitration against non-signatories. *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 165 (4th Cir. 2004) (concluding that the plaintiffs, who asserted negligence and breach of implied warranty claims, did not seek a direct benefit from the contract and thus equitable estoppel was inapplicable).[14]

This Court finds that, like *Blackwell* and *Griffin*, the non-signatories (i.e., the proposed class of downstream purchasers) do not assert any express warranty claims, as evidenced by the Complaint. (*See* Complaint). The downstream purchasers assert only negligence,[15] breach of

[14] In so concluding, the Fourth Circuit emphasized that when a builder enters into a contract to build a house, the builder assumes "two sets of duties: one arises out of its role as a builder, and the other arises out of its construction contract…" *R.J. Griffin & Co.*, 384 F.3d at 162.

[15] A negligence claim is, by definition, a claim for a breach of a duty imposed by law and is the quintessential tort claim. *See, e.g.*, *Shaw v. Psychmedics Corp.*, 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019); Black's Law Dictionary 1061 (8th ed. 2004) (defining "negligence" as "a tort").

implied warranties,[16] and South Carolina Unfair Trade Practices Act claims[17]—each of which arises independently of any contractual obligations. Therefore, no downstream purchaser relies on, nor directly benefit from, Horton's purchase agreement and Horton cannot compel any downstream purchaser to arbitrate. *See Dixon*, 442 S.C. at 258, 898 S.E.2d at 171 (quoting *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176) ("'[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts, and other common law duties, or federal law,' direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or *would not have arisen 'but for' the contract's existence*.").

CONCLUSION

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

AND IT IS SO ORDERED.

[SIGNATURE PAGE FOLLOWS]

[16] South Carolina law imposes a duty on a builder to construct a "home[] fit for its intended use as a dwelling,…in a workmanlike manner, and…free of latent defects." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561, 658 S.E.2d 80, 88-89 (2008); *see also Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 344, 463 S.E.2d 730, 736 (1989) ("We have been steadfast in holding that privity of contract as a defense to an implied warranty action is abolished in this state….Hence, a purchaser may sue a builder on his implied warranty of service, despite the purchaser's lack of contractual privity.").

[17] An Unfair Trade Practices claim is a statutory claim that exists independent of any contract between the parties. *See* S.C. Code § 39-5-10, *et seq*.

_____
The Honorable Judge S. B. Doby
Circuit Court Judge – Third Judicial Circuit

This _____ day of _____, 2025

_____, South Carolina

Berkeley Common Pleas

Case Caption: Donna Brunetti VS D.R. Horton, Inc. , defendant, et al

Case Number: 2023CP0802903

Type: Order/Other

So Ordered

S. Bryan Doby, Circuit Court Judge, No. 2784