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**Aug 11 2025**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM AIKEN COUNTY

Court of Common Pleas

The Honorable Patrick C. Fant, III

Circuit Court Case No. 2023-CP-02-01719

Appellate Case No. 2024-002137

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Deborah Denise Harley,

Respondent,

v.

D.R. Horton, Inc. and Plumbing  
Solutions, LLC,

Defendants,

of Which D.R. Horton, Inc. is the

Appellant.

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RECORD ON APPEAL

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

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

1. D.R. Horton's arbitration provision is unenforceable because it is unconscionable under *Smith* and contains essentially the same intertwined references and incorporates disclaimers of any and all implied warranties and monetary damages of any kind;
2. D.R. Horton's arbitration provision is not severable from other unconscionable terms and enforcing D.R. Horton's general severability clause would violate South Carolina public policy under *Damico*;
3. D.R. Horton's arbitration provision is unenforceable because it lacks mutuality and improperly limits the arbitrator's rights;

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

### **PERTINENT FACTS**

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

**A. Harley's Purchase Contract and Deed**

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

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

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

(Purchase Contract).

Paragraph 14 describes the Warranties, wrongfully attempts to disclaim all implied warranties,<sup>3</sup> and unconscionably attempts to relieve D.R. Horton of all liability for “monetary damages of any kind”:

#### 14. WARRANTIES AND DISCLAIMER.

- a. **Ten-Year Limited Warranty.** Seller shall provide Buyer with a written, ten-year limited warranty on the House administered by Residential Warranty Corporation (“RWC”) which shall be effective as of the Closing Date. The terms and conditions of, and exclusions from, the ten-year limited warranty shall be as set forth in that document published by RWC, entitled “LIMITED WARRANTY, 10 YEAR LIMITED WARRANTY FOR NEW HOMES,” and referred to herein as the “Limited Warranty”. At Closing, Seller shall deliver to Buyer the documentation necessary for Buyer to obtain the actual Limited Warranty for the House from RWC.
- b. **Manufacturers’ Warranties.** At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the house.
- c. **Disclaimer and Limitation on Seller's Liability.** THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14(a) ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. . . AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR 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

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

OR INDIRECT DAMAGES.

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

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

**B. Procedural Background**

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

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

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

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

### **THE ARBITRATION AGREEMENT AT ISSUE**

#### **I. The Arbitration Provision is Unenforceable Because it is Unconscionable**

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

##### **A. Plaintiff Lacked a Meaningful Choice**

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

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

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

**B. The Arbitration Provision Contains Oppressive Terms**

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

**1. The Arbitration Provision Includes Paragraphs 14 and 15**

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

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

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

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

<sup>7</sup> Otherwise, the parties did not come to an agreement on arbitration, invalidating the arbitration provision all together.

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

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

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

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

We conclude the arbitration clause. . .should not be severed from the numerous unconscionable provisions and particularly Horton’s attempt to waive any seller liability for “monetary damages of any kind. . .”

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

<sup>9</sup> *See* (Pl. Memo. Opposing Arb., p. 9) (charts showing similarities between *Smith* and *Harley*).

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

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

We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon" parties to the arbitration proceeding. We decline to blue-pencil that provision. . .

Blue-pencilling an agreement is, of course, within the Court's discretion. Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement. . . Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.

There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. . .

The second additional consideration of which we take note is that this contract involves a consumer transaction. . . More specifically, this contract involves the purchase of a new home. South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. . . As we stated over thirty years ago, it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce." . . .

Generally, courts will not enforce contracts that violate public policy. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).

A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. . .

Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically



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

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

This Court, like *Smith*, finds that Paragraph 15 is not severable from Paragraph 14 and, like *Damico*, refuses to enforce Horton’s general severability clause to “rescue” D.R. Horton from the consequences of its unconscionable drafting as a matter of public policy. *Id.*<sup>10</sup>

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

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

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

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

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

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

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

AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR 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. . .

(Purchase Contract).

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

**CONCLUSION**

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

AND IT IS SO ORDERED!

**Electronic Signature of Judge Fant to Follow**

Aiken, South Carolina

---



Aiken Common Pleas

**Case Caption:** Deborah Denise Harley , plaintiff, et al VS Dr Horton Inc , defendant,  
et al

**Case Number:** 2023CP0201719

**Type:** Order/Other

So Ordered

Patrick C. Fant, III

Electronically signed on 2024-11-27 10:06:21 page 12 of 12

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Deborah Denise Harley,

Plaintiff,

v.

D.R. Horton, Inc., Plumbing Solutions, LLC, and  
John Does 1 – 15,

Defendants.

) IN THE COURT OF COMMON PLEAS  
) FOR THE SECOND JUDICIAL CIRCUIT

) CASE NO.: 2023-CP-02-\_\_\_\_

**SUMMONS**

**TO: THE ABOVE-NAMED DEFENDANTS:**

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscribers, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the complaint.

LYLES & ASSOCIATES, LLC

*s/Robert T. Lyles, Jr.*

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**Counsel for Plaintiff**

Mount Pleasant, South Carolina  
July 31, 2023

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS  
) FOR THE SECOND JUDICIAL CIRCUIT  
)

COUNTY OF AIKEN

) CASE NO.: 2023-CP-02-\_\_\_\_\_  
)

Deborah Denise Harley,

)

)

)

-----Plaintiff,

)

)

v.

)

)

D.R. Horton, Inc., Plumbing Solutions, LLC, and  
John Does 1 – 15,

)

)

)

Defendants.

)

**COMPLAINT**  
**(Defective Construction)**  
**(Jury Trial Demanded)**

Plaintiff, Deborah Denise Harley, complaining of the above-named Defendants, would respectfully allege and show the Court as follows:

**PARTIES AND JURISDICTIONAL STATEMENT**

1. The Abbey at Trolley Run Station subdivision ("The Abbey") is a neighborhood of approximately 207 single-family homes and townhomes located in Aiken County, South Carolina.

2. Plaintiff Deborah Denise Harley ("Plaintiff Harley") is a citizen and resident of Aiken County, South Carolina.

3. Plaintiff Harley owns a home within The Abbey that is located at 321 Donnington Court, Aiken, South Carolina 29801.

4. Plaintiff Harley purchased her home on or about April 21, 2021.

***Developer Defendant***

5. Defendant D.R. Horton, Inc. ("D.R. Horton") is a corporation organized under the laws of the State of Delaware. At all times relevant to this action, D.R. Horton conducted business in Aiken County, South Carolina.

6. D.R. Horton is the developer, builder, and seller of Plaintiff Harley's home in The Abbey ("the Residence"). At all times relevant to this action, D.R. Horton coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale, and/or repair of the Residence.

***Subcontractor Defendant***

7. Plumbing Solutions, LLC ("Plumbing Solutions") is a limited liability company organized under the laws of the State of South Carolina. At all times relevant to this action, Plumbing Solutions conducted business in Aiken County, South Carolina. Plumbing Solutions was a subcontractor of D.R. Horton who supplied materials and labor for plumbing services, and/or performed other work at the Residence.

8. Defendant subcontractors John Does 1 -15 are citizens or entities who supplied materials, labor, and/or services for the construction and/or repair of the Residence, including but not limited to, the waterproofing, grading, framing, exterior window and door installation, HVAC equipment and ductwork installation, and flashings, whose identities are not yet known nor discoverable by Plaintiff but whose identities may be known to one or more of the Defendants.

9. This Honorable Court has jurisdiction over all parties hereto and over all subject matter alleged herein.

10. Venue is proper in Aiken County as the most substantial part of Plaintiff Harley's injuries and D.R. Horton's alleged acts or omissions took place in Aiken County.

**FACTUAL ALLEGATIONS**

11. This matter arises from the design, development, construction, sale and/or repair of the Residence.

12. At the time the Certificate of Occupancy was issued, the Residence contained latent and undisclosed defects which have resulted in failure of the home's building envelope and MEP (mechanical, electrical, and plumbing) deficiencies. These latent and undisclosed defects, in combination with fortuitous weather, and regular and repeated exposure to harmful elements, including but not limited to water intrusion and differential settlement, have resulted in consequential damage to non-defective portions of the Residence and other property.

13. D.R. Horton should have known of the existence of latent defects for many reasons, including their post-construction repair efforts at the Residence.

14. A preliminary inspection of the Residence evidences failure in exterior cladding systems; water intrusion into and through windows, doors, and the exterior building envelope; other defects; and, resulting consequential damage to non-defective building components and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting therefrom.

15. D.R. Horton had a duty to design, develop, and construct the Residence in a workmanlike manner with suitable materials, free from all defects, and in accordance with the applicable building code, permitted building plans, good workmanship, and construction industry and engineering standards.

16. Plaintiff Harley is informed and believes that various building components of the Residence, including those listed above, are not in compliance with applicable building codes, proper workmanship, and industry standards and must be corrected or replaced.

17. D.R. Horton's acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.



18. These deficiencies and resulting damages show that D.R. Horton breached its duties to Plaintiff Harley.

19. Remedying these wrongs will result in additional consequential damages and loss of use.

20. As a direct and proximate result of D.R. Horton's violation of its legal duties, Plaintiff Harley has been proximately damaged in an amount to be determined by the trier of fact and has had to incur reasonable attorneys' fees and costs for the retention of experts to determine the damage and scope of work for repair.

21. Upon information and belief, the occurrences of water intrusion and resulting consequential property damage commenced after completion of the Residence and have occurred and have been occurring since commencement.

**ESTOPPEL FROM PLEADING AND TOLLING OF  
APPLICABLE STATUTES OF LIMITATIONS**

22. D.R. Horton is estopped from relying on any statutes of limitations or repose by virtue of their acts. Upon information and belief, D.R. Horton should have known the Residence was defectively constructed and failed to alert purchasers of the Residence's defective condition.

23. D.R. Horton had a duty to inform purchasers of the defects described herein, which they should have known. Notwithstanding its duty, D.R. Horton never disclosed these defects.

24. Despite exercising reasonable diligence, Plaintiff Harley could not have discovered the defective condition of the Residence.

25. Given D.R. Horton's failure to disclose this non-public information about the defective nature of the Residence – information over which they had exclusive control – and because Plaintiff Harley could not reasonably have known of the Residence's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise

be applicable to the claims asserted herein.

26. As a result, any limitations on the remedies encompassed within Defendants' warranties are unconscionable and unenforceable, and therefore, Defendants are estopped from relying on the same.

27. The equitable tolling doctrine further precludes Defendants from relying on a statute of limitations defense.

**ESTOPPEL FROM ASSERTING SOUTH CAROLINA NOTICE AND OPPORTUNITY  
TO CURE CONSTRUCTION DWELLING DEFECTS ACT**

28. Defendants are estopped/barred from asserting South Carolina's Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code § 40-59-810 *et. seq.*, because Plaintiff Harley complied with the Act prior to filing this lawsuit.

29. Plaintiff Harley gave D.R. Horton notice of the defects at the Residence.

30. D.R. Horton was provided multiple opportunities to inspect and cure the Residence prior to Plaintiff Harley filing this lawsuit.

31. D.R. Horton and its subcontractors failed to cure the defects at the Residence.

32. Therefore, Plaintiff Harley complied with the Act and Defendants are estopped/barred from asserting it.

**ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISION AND WARRANTY  
DISCLAIMERS CONTAINED IN D.R. HORTON'S PURCHASE CONTRACTS**

33. Defendants are estopped/barred from asserting the Arbitration Provision and Warranty Disclaimer Provisions contained in D.R. Horton's purchase contracts because these Provisions are unconscionable and unenforceable.

34. Plaintiff Harley's purchase contract contains the same or similar "Warranties and Disclaimers" and "Arbitration" Provisions that the South Carolina Supreme Court has already

deemed are “clearly one sided and oppressive”. *Smith v. D.R. Horton*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

35. Plaintiff Harley’s purchase contract attempts to disclaim implied warranty claims and prohibits any monetary damage by providing that “SELLER SHALL NOT BE LIABLE FOR ANY REASON, UNDER ANY CIRCUMSTANCES, TO PURCHASE OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OR ANY KIND . . .”

36. Any such provisions purporting to waive all implied warranties and all relief are void pursuant to public policy and South Carolina law.

37. Furthermore, D.R. Horton is further estopped from asserting the anti-suit provisions contained in its Purchase Contract pursuant to South Carolina Law even though the Purchase Contract purports to contain a severability clause. *Damico, et al. v. Lennar Carolinas, LLC, et al.*, 437 S.C. 596, 897 S.E.2d 746 (2022).

38. D.R. Horton’s unconscionable arbitration provisions in its Purchase Contracts contain provisions which have been previously found unconscionable and unenforceable by the Supreme Court of South Carolina.

39. As such, the anti-suit provisions in the purchase contracts are unenforceable against Plaintiff Harley.

40. As a result, D.R. Horton cannot rely on their warranty disclaimers, and cannot compel Plaintiff Harley into arbitration, based on D.R. Horton’s purchase contracts. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. (“We . . . hold the arbitration provision is unconscionable, and thus, unenforceable”).

**ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISIONS AND  
WARRANTY LIMITATIONS IN EXPRESS WARRANTIES**

41. Defendants are estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in their express warranties because Plaintiff Harley does not currently allege a breach of express warranty claim and these Arbitration Provisions and Warranty Limitations merged with Plaintiff Harley's deed at closing.

42. Defendants are also estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in their express warranties or the like because these provisions and limitations are conflicting, procedurally burdensome, unconscionable, and/or not geared towards an unbiased decision by a neutral decision-maker.

43. Defendants are further estopped/barred from relying on Warranty Limitations contained in their express warranties or the like by virtue of their conduct and such warranties' failure to serve its essential purpose.

44. By virtue of Defendants' acts, the work performed at the Residences has not lived up to Defendants' warranties. Given the Residences' defective condition, their building components have not proven to be of reasonable or acceptable quality.

45. Defendants, in the exercise of required diligence, which failed to occur, should have known the Residences were defective, uninhabitable, unfit, and unmerchantable.

46. Defendants' warranties are woefully inadequate to repair and replace failed building components in the Residences; let alone to reimburse for any damage suffered to the underlying components and other property. The remedies available in Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy and fail their essential purpose.

47. As such, Defendants are precluded from relying on the Arbitration Provisions and Warranty Limitations contained in their express warranties or the like as a defense to the claims asserted herein.

48. Additionally, any anti-suit provisions which would limit the remedies available to Plaintiff Harley, including any waiver of consequential damages and implied warranties, are unconscionable, void, and are an affront to the public policy of this state, and Defendants are estopped from asserting that these limitations apply to Plaintiff Harley.

**FOR A FIRST CAUSE OF ACTION**

**(Negligence and Gross Negligence as to All Defendants)**

49. Plaintiff Harley repeats and re-alleges the above paragraphs as if fully set forth verbatim.

50. Defendants, either on their own or through their agents, servants, and employees undertook and owed duties to Plaintiff Harley in connection with the work it performed at the Residence.

51. Defendants had a duty to perform its work at the Residence in accordance with applicable codes, approved plans and specifications, industry standards, and in a careful, diligent, and workmanlike manner, free from defects.

52. Defendants also had a duty to provide accurate information about the Residence's condition and to disclose defective conditions.

53. Defendants breached their duties to Plaintiff Harley in a manner that was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to use due care in developing the Residence;
- b. In failing to provide adequate exterior claddings, windows, doors, structural components and/or other building components for the Residence;

- c. In failing to develop the Residence in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices;
- d. In failing to properly supervise the work performed at the Residence;
- e. In failing to properly coordinate the subcontractors and trades;
- f. In failing to act as a reasonable person would in the circumstances then and there prevailing;
- g. In failing to provide accurate information about the Residence;
- h. In failing to make proper repairs; and,
- i. Other deficiencies or failures as will be proven at trial.

54. Plaintiff Harley has been damaged as a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of Defendants.

55. The violation of applicable building codes constitutes negligence *per se* and may constitute evidence of gross negligence.

56. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, Plaintiff Harley is entitled to an award of punitive damages against Defendants.

57. As a result of Defendants' negligence and/or gross negligence, Plaintiff Harley is entitled to a judgment against Defendants for all actual, direct, indirect, resulting, consequential, and punitive damages in an amount to be determined at the trial of this case.

**FOR A SECOND CAUSE OF ACTION**  
**(Breach of Implied Warranties as to All Defendants)**

58. Plaintiff Harley repeats and re-alleges the above paragraphs as if fully set forth verbatim.

59. Defendants implicitly warranted that the Residence would be developed in a careful, diligent, and workmanlike manner, with suitable materials and components that complied with applicable building codes, industry standards, and industry practice.

60. Defendants implicitly warranted that the Residence would be habitable, merchantable, free from latent defects, and fit for the particular purpose.

61. Defendants breached their implied warranties by developing the Residence in a defective manner as set forth above.

62. As a direct and proximate result of Defendants' breach of their implied warranties, Plaintiff Harley has been damaged and is entitled to a judgment against Defendants for all actual, direct, indirect, resulting, and consequential damages in an amount to be proven at trial.

**FOR A THIRD CAUSE OF ACTION**  
**(Unfair Trade Practices as to D.R. Horton)**

63. Plaintiff Harley repeats and re-alleges the above paragraphs as if fully set forth verbatim.

64. D.R. Horton is a person within the meaning of the South Carolina Unfair Trade Practices Act (the "Act").

65. D.R. Horton developed and sold the Residence and, therefore, engaged in commerce as defined by the Act.

66. D.R. Horton's above-described actions, including placing the defective Residence into the stream of commerce; failing to oversee and control the workmanship and material quality of the Residence; failing to properly repair defective conditions; failing to comply with the building codes, industry standards, and industry practice; attempting to disclaim and eviscerate any and all relief to the owner of the Residence; and, other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices within the meaning of the Act.

67. D.R. Horton knew or should have known that its conduct was in violation of the Act.

68. D.R. Horton's conduct is capable of repetition and, upon information and belief, has been repeated.

69. D.R. Horton's conduct adversely affects the public interest as well as many South Carolina citizens.

70. As a direct, foreseeable, and proximate result of D.R. Horton's unfair and deceptive practices, the owner of the Residence (Plaintiff Harley) has been damaged and is entitled to a judgment against D.R. Horton in amount to be proven at trial.

WHEREFORE, Plaintiff Harley demands a trial by jury and prays for actual and consequential damages and punitive damages, reasonable attorneys' fees, costs of suit, prejudgment interest, and granting of such further relief as the Court deems just and proper.

Respectfully submitted,

LYLES & ASSOCIATES, LLC

*s/Robert T. Lyles, Jr.*

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Joseph D. Winterstein (SC Bar #105344)  
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*Attorneys for Plaintiff*

Charleston, South Carolina  
July 31, 2023



|                                           |   |                                      |
|-------------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS         |
|                                           | ) | FOR THE SECOND JUDICIAL CIRCUIT      |
| COUNTY OF AIKEN                           | ) |                                      |
|                                           | ) | CASE NO.: 2023-CP-02-01719           |
|                                           | ) |                                      |
| Deborah Denise Harley,                    | ) |                                      |
|                                           | ) |                                      |
| Plaintiff,                                | ) | <b>DEFENDANT D.R. HORTON, INC.'S</b> |
|                                           | ) | <b>MOTION TO STAY AND COMPEL</b>     |
| v.                                        | ) | <b>ARBITRATION</b>                   |
|                                           | ) |                                      |
| D.R. Horton, Inc. and Plumbing Solutions, | ) |                                      |
| LLC,                                      | ) |                                      |
|                                           | ) |                                      |
| Defendants.                               | ) |                                      |

**TO: PLAINTIFF, DEBORAH DENISE HARLEY AND COUNSEL FOR PLAINTIFF, ROBERT T. LYLES, ESQUIRE, AND JOSEPH DANIEL WINTERSTEIN, ESQUIRE:**

WILL YOU PLEASE TAKE NOTICE that Defendant D.R. Horton Inc. (hereinafter “Defendant” or “D.R. Horton”), by and through its undersigned counsel, will move this Court for an Order to Stay this Action and Compel Arbitration pursuant to the South Carolina Uniform Arbitration Act and the Federal Arbitration Act, and the grounds set forth in this Motion. Said Motion will be heard within ten (10) days or at such time and place as may be set by the Court thereafter in the Court of Common Pleas, State of South Carolina, County of Aiken, of which you will be notified.

D.R. Horton moves pursuant to the terms of signed contractual agreements for an Order to Stay this Action and Compel Arbitration. In support of this motion, Defendant shows the court as follows:

1. Plaintiff Deborah Harley (“Plaintiff”) entered into a contract (the “Homeowner Contract”) regarding the construction of a home, located in 321 Donnington Court, Aiken, South Carolina 29801 (the “Home”).

2. Plaintiff's Complaint is based upon the allegations relating to or arising out of the Homeowner Contract.

3. Homeowner Contract provides that all disputes will be settled by arbitration.

4. Plaintiff has filed the underlying action, asserting claims against D.R. Horton for alleged defective work/materials during the construction of the Home.

5. D.R. Horton has not engaged in any discovery since the filing of this action.

6. D.R. Horton requests that this action now be submitted to arbitration, as required by the Homeowner Contract, entered into by Plaintiff, and that this matter be stayed pending the resolution of the claims between the parties.

WHEREFORE,

a.) pursuant to the South Carolina Uniform Arbitration Act, the Federal Arbitration Act, the Homeowner Contract entered between the Plaintiff and D.R. Horton regarding this Home, D.R. Horton moves for an Order compelling Plaintiff to arbitrate her claims as required by the Homeowner Contract, staying this action pending such arbitration, and for such other and further relief as the Court deems just and proper.

This Motion is supported by the pleadings on file with this Court, both federal and state laws and statutes, and whatever memoranda of law or certified documents that may be submitted to this Court.

**(SIGNATURE ON THE FOLLOWING PAGE)**

**KENISON, DUDLEY & CRAWFORD, LLC**

John T. Crawford, Jr.

John T. Crawford, Jr. (SC Bar # 69682)

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Greenville, SC 29601

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*Attorneys for Defendant D.R. Horton, Inc.*

October 11, 2023

Greenville, South Carolina

|                                           |   |                                      |
|-------------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS         |
|                                           | ) | FOR THE SECOND JUDICIAL CIRCUIT      |
| COUNTY OF AIKEN                           | ) |                                      |
|                                           | ) | CASE NO.: 2023-CP-02-01719           |
|                                           | ) |                                      |
| Deborah Denise Harley,                    | ) |                                      |
|                                           | ) |                                      |
| Plaintiff,                                | ) | <b>DEFENDANT D.R. HORTON, INC.'S</b> |
|                                           | ) | <b>MOTION TO STAY AND COMPEL</b>     |
| v.                                        | ) | <b>ARBITRATION</b>                   |
|                                           | ) |                                      |
| D.R. Horton, Inc. and Plumbing Solutions, | ) |                                      |
| LLC,                                      | ) |                                      |
|                                           | ) |                                      |
| Defendants.                               | ) |                                      |
| <hr/> Plumbing Solutions, LLC,            | ) |                                      |
|                                           | ) |                                      |
| Third-Party Plaintiff                     | ) |                                      |
|                                           | ) |                                      |
| vs.                                       | ) |                                      |
|                                           | ) |                                      |
| Edin Misael Lima, Carlos A. Urquia a/k/a  | ) |                                      |
| Carlos Urquia Hernandez, and Abel         | ) |                                      |
| Plumbing, LLC a/k/a Hassan Alfredo Abel   | ) |                                      |
| Ramos,                                    | ) |                                      |
|                                           | ) |                                      |
| Third-Party Defendants.                   | ) |                                      |
| <hr/>                                     | ) |                                      |

**TO: PLAINTIFF, DEBORAH DENISE HARLEY AND COUNSEL FOR PLAINTIFF, ROBERT T. LYLES, ESQUIRE, AND JOSEPH DANIEL WINTERSTEIN, ESQUIRE:**

WILL YOU PLEASE TAKE NOTICE that Defendant D.R. Horton Inc. (hereinafter “Defendant” or “D.R. Horton”), by and through its undersigned counsel, will move this Court for an Order to Stay this Action and Compel Arbitration pursuant to the South Carolina Uniform Arbitration Act and the Federal Arbitration Act, and the grounds set forth in this Motion. Said Motion will be heard within ten (10) days or at such time and place as may be set by the Court thereafter in the Court of Common Pleas, State of South Carolina, County of Aiken, of which you will be notified.

D.R. Horton moves pursuant to the terms of signed contractual agreements for an Order to Stay this Action and Compel Arbitration. In support of this motion, Defendant shows the court as follows:

1. Plaintiff Deborah Harley ("Plaintiff") entered into a contract (the "Homeowner Contract") regarding the construction of a home, located in 321 Donnington Court, Aiken, South Carolina 29801 (the "Home").
2. Plaintiff's Complaint is based upon the allegations relating to or arising out of the Homeowner Contract.
3. Homeowner Contract provides that all disputes will be settled by arbitration.
4. Plaintiff has filed the underlying action, asserting claims against D.R. Horton for alleged defective work/materials during the construction of the Home.
5. D.R. Horton has not engaged in any discovery since the filing of this action.
6. D.R. Horton requests that this action now be submitted to arbitration, as required by the Homeowner Contract, entered into by Plaintiff, and that this matter be stayed pending the resolution of the claims between the parties, including but not limited to, discovery in the case until the resolution of this motion.

WHEREFORE,

- a.) pursuant to the South Carolina Uniform Arbitration Act, the Federal Arbitration Act, the Homeowner Contract entered between the Plaintiff and D.R. Horton regarding this Home, D.R. Horton moves for an Order compelling Plaintiff to arbitrate her claims as required by the Homeowner Contract, staying this action pending such arbitration, and for such other and further relief as the Court deems just and proper.

This Motion is supported by the pleadings on file with this Court, both federal and state laws and statutes, and whatever memoranda of law or certified documents that may be submitted to this Court.

**KENISON, DUDLEY & CRAWFORD, LLC**

s/John T. Crawford, Jr.

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*Attorneys for Defendant D.R. Horton, Inc.*

March 29, 2024  
Greenville, South Carolina

|                                           |   |                                      |
|-------------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS         |
|                                           | ) | FOR THE SECOND JUDICIAL CIRCUIT      |
| COUNTY OF AIKEN                           | ) |                                      |
|                                           | ) | CASE NO.: 2023-CP-02-01719           |
|                                           | ) |                                      |
| Deborah Denise Harley,                    | ) |                                      |
|                                           | ) | <b>DEFENDANT D.R. HORTON, INC.'S</b> |
| Plaintiff,                                | ) | <b>MEMORANDUM IN SUPPORT OF</b>      |
|                                           | ) | <b>MOTION TO COMPEL ARBITRATION</b>  |
| v.                                        | ) | <b>AND TO STAY PROCEEDINGS</b>       |
|                                           | ) |                                      |
| D.R. Horton, Inc. and Plumbing Solutions, | ) |                                      |
| LLC,                                      | ) |                                      |
|                                           | ) |                                      |
| Defendants.                               | ) |                                      |
| <hr/> Plumbing Solutions, LLC,            | ) |                                      |
|                                           | ) |                                      |
| Third-Party Plaintiff                     | ) |                                      |
| vs.                                       | ) |                                      |
|                                           | ) |                                      |
| Edin Misael Lima, Carlos A. Urquia a/k/a  | ) |                                      |
| Carlos Urquia Hernandez, and Abel         | ) |                                      |
| Plumbing, LLC a/k/a Hassan Alfredo Abel   | ) |                                      |
| Ramos,                                    | ) |                                      |
|                                           | ) |                                      |
| Third-Party Defendants.                   | ) |                                      |
| <hr/>                                     | ) |                                      |

Defendant D.R. Horton Inc. (“D.R. Horton” or “Defendant”) submits this Memorandum in Support of its Motion to Compel Arbitration and Stay Proceedings pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10, et seq. For the reasons set forth therein, the motion should be GRANTED.

### **FACTUAL BACKGROUND**

On April 21, 2021, Plaintiff Deborah Denise Harley entered into a contract with D.R. Horton (the “Harley Contract”), attached as **Exhibit 1**, for the purchase of a home within The Abbey located at 321 Donnington Court, Aiken, South Carolina (the “Harley Home”).

As part of the Homeowner Contract, Plaintiff and D.R. Horton mutually agreed to submit all disputes between them to binding arbitration. (Ex. 1, ¶ 15). The full arbitration provision provides as follows:

**MANDATORY BINDING ARBITRATION.** PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS AGREEMENT AND/OR THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING: (A) SELLER'S CONSTRUCTION AND DELIVERY OF THE 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 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 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 ARBITRATION PROVISIONS 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.

(Ex. 1, ¶ 15).

Plaintiff has now filed a lawsuit complaining of defects in the construction of the Home, specifically as to the installation of the roofing systems, shingles, and siding, and Plaintiff alleges these components, among others, were not constructed in accordance with building codes and



applicable construction standards. Pursuant to the Homeowner Contract, these construction related disputes should be submitted to binding arbitration.

### **LEGAL STANDARD**

The Federal Arbitration Act (“FAA”) provides that legal proceedings must be stayed when any such issues in the suit are “referrable to arbitration under an agreement in writing.” 9 U.S.C. § 3. “The FAA requires courts to stay a proceeding, pending arbitration, if the court determines that a valid arbitration agreement exists, and that the claims alleged fall within the scope of the arbitration agreement.” LaPoint v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., C/A No. 0:08-3553-CMC, 2009 U.S. Dist. LEXIS 146577, at \*4, 2009 WL 10684895 (D.S.C. Dec. 1, 2009) (citing United States v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001); Whiteside v. Teltech Corp., 940 F.2d 99, 102 (4th Cir. 1991)). “Once these criteria are met, the district court has ‘no choice but to grant a motion to compel arbitration.’” Id. (quoting Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002)).

“Because of the well-established federal policy favoring arbitration of disputes, courts must assess the validity and scope of an arbitration agreement with a heavy presumption in favor of arbitration.” Id. (citing Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989)). “Accordingly, any doubts concerning the scope of arbitrable issues are resolved in favor of arbitration.” Bernstein v. Pulte Home Co., C/A No. 0:19-cv-02805-JFA, 2019 WL 8014404, at \*6 (D.S.C. Dec. 23, 2019) (citing Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005)).

When analyzing arbitrability, the “court must first determine whether the parties’ agreement is governed by the FAA.” Id. “A party can compel arbitration under the FAA by establishing (1) a dispute between the parties; (2) a written agreement that includes an arbitration

provision purporting to cover that dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure, neglect or refusal of the opposing party to arbitrate the dispute.” Id. (citing Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)).

After determining that the FAA applies, “courts must apply state law to decide issues of contract formation” when a party challenges the enforceability of the arbitration agreement. LaPoint, 2009 U.S. Dist. LEXIS 146577, at \*10. “The FAA recognizes arbitration agreements ‘may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.’” Sanders v. Savannah Highway Auto. Co., 2023 S.C. LEXIS 154, 892 S.E.2d 112, 115 (S.C. 2023) (quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010)).

“However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.” Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing AT&T Techs., Inc. v. Commc’n Workers of Am., 475 U.S. 643, 649 (1986)). A court may consider challenges to the arbitration clause itself, but any challenge to the contract as a whole should only be resolved by an arbitrator. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.”).

## **ARGUMENT**

### **I. The Homeowner Contract Satisfies the Notice Provision of the South Carolina Uniform Arbitration Act.**

The arbitration provision in the Homeowner Contract covers disputes regarding the Homeowner Contract and construction of the Home and the contract complies with the notice requirements of the South Carolina Uniform Arbitration Act.

The SCUAA provides that:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

In accordance with the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10(a), the top of the first page of the Homeowner Contract states the following in bold, underlined, and all capital letters: **“NOTE: THIS CONTRACT PROVIDES FOR MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, SECTIONS [15]-48-10 ET SEQ., SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED).”** See Ex. 1.

As set forth below, there is no basis to set aside or revoke the arbitration provision and it must be enforced.

## **II. The Homeowner Contract are Governed by the FAA.**

The Homeowner Contract satisfy all four factors courts analyze to determine whether an arbitration provision is governed by the FAA:

- (1) a dispute between the parties;
- (2) a written agreement that includes an arbitration provision purporting to cover that dispute;
- (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and
- (4) the failure, neglect or refusal of the opposing party to arbitrate the dispute.

### **Dispute Between the Parties**

Plaintiff, entered into a Homeowner Contract with D.R. Horton. Plaintiff now complains of defects in the construction of the home. D.R. Horton has requested that Plaintiff arbitrate this matter, but she has refused to agree to arbitration as her contract requires.

### **Written Agreement Including Arbitration Provision**

The Homeowner Contract's mandatory arbitration provision expressly covers disputes related to alleged defects in the development and construction of the Homes:

**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 HOME . . . .**

(Ex. 1, ¶ 15).

Where an arbitration clause, like the one in this case, provides for the arbitration of “any and all disputes which may arise” between the parties, courts will construe the arbitration clause broadly. Landers v. FDIC, 402 S.C. 100, 109-10, 739 S.E.2d 209, 213-14 (2013); see also, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 398 (1967) (describing an arbitration clause as “broad” where the clause provided that “[a]ny controversy or claim arising out of or relating to . . . [the] Agreement . . . shall be settled by arbitration”). The Supreme Court of the United States, the Fourth Circuit Court of Appeals, and the South Carolina Supreme Court have found broad arbitration clauses to be “capable of an expansive reach.” See, Prima Paint, 388 U.S. at 398; Am. Recovery Corp v. Computerized Thermal Imaging, 96 F.3d 88, 93 (4th Cir. 1996); Landers, 402 S.C. at 109-10, 739 S.E.2d at 213-14.

As such, the language of a broad arbitration clause will apply where there is a “significant relationship” between the claims or disputes and the contract which contains the arbitration clause.

Am. Recovery Corp., 96 F.3d at 93. The arbitration clause will in no way be limited “to the literal interpretation or performance of the contract,” but instead will “embrace[] every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute.” J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988); see also Landers, 402 S.C. at 111, 739 S.E.2d at 214 (“[U]nder the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause.”). Accordingly, Plaintiff’s alleged defects in the development and construction of the Home falls squarely within the Homeowner Contract’s arbitration provision.

### **Transactions Involves Interstate Commerce**

The only remaining factor to analyze is whether the transactions involve interstate commerce. The Homeowner Contract was for the construction of a new home. The FAA provides, in relevant part:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

“The United States Supreme Court has held that the phrase ‘involving commerce’ is the same as ‘affecting commerce,’ which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent.” Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, (1995)). Congress’ broad power in this area thus extends to any transaction “affecting” commerce. Allied-Bruce, 513 U.S. at 273-74; see, also, Gonzales v. Raich, 545 U.S.

1, 17 (2005) (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”). Therefore, for the FAA to apply, a transaction must involve interstate commerce.

The South Carolina Supreme Court has held that construction of new homes “manifestly involve[s] interstate commerce, as they involve the construction of new homes built to [an owner’s] specifications rather than the purchase of pre-existing homes.” Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022); see also Bradley v. Brentwood Homes, Inc. 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) (“[O]ur appellate courts have consistently recognized that Contract for construction are governed by the FAA”); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (observing that new construction implicates interstate commerce because “[i]t would be virtually impossible to construct” the building “with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.”).

The Homeowner Contract clearly covers both the construction and the sale of the Homes. Specifically, Exhibit C “Stages of Construction,” contemplates the construction of the Homes. As another example, Addendum 8 “Variations in Materials and Components,” contains a list of materials to be used to construct the Homes, many of which involve interstate commerce. *See, e.g.*, Ex. 1 at 14, 23; see generally, Episcopal Hous. Corp., 269 S.C. at 640, 239 S.E.2d at 652 (“It would be virtually impossible to construct an eighteen (18) story apartment building . . . with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.”).

Accordingly, the transactions at issue here fall within the FAA and arbitration must be compelled unless there are common law contract defenses that prevent such enforcement.

### III. The Arbitration Provision is Enforceable.

The arbitration clause in the Homeowner Contract is enforceable because there are no general contract defenses that would invalidate the agreement to arbitrate.

After determining that the FAA applies, “courts must apply state law to decide issues of contract formation” when a party challenges the enforceability of the arbitration agreement. LaPoint, 2009 U.S. Dist. LEXIS 146577, at \*10. “The FAA recognizes arbitration agreements ‘may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.’” Sanders, 2023 S.C. LEXIS 154, 892 S.E.2d at 115 (quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010)).

Any challenge to arbitration based on a contract defense must be made specifically to the arbitration clause and not to the contract generally because arbitration clauses are separable. LaPoint, 2009 U.S. Dist. LEXIS 146577, at \*20 (“[I]t is well established that if a claim calls into question not the fairness of the arbitration process specifically, but rather the validity of the entire contract, the arbitrator must rule on the dispute. (citing Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 305 (4th Cir. 2001)). The addition of parties to a matter does not invalidate the arbitration clause. Episcopal Hous. Corp., 269 S.C. at 641, 239 S.E.2d at 652 (citing Hamilton Life Ins. Co. of New York v. Republic Nat’l Life Ins. Co., 408 F.2d 606 (2d Cir. 1969); Hilti, Inc. v. Oldach, 392 F.2d 368 (1st Cir. 1968)) (“Under the Federal Arbitration Act, an agreement between two or more parties to submit their disputes to arbitration is not rendered unenforceable merely because there are additional parties to the disputes who are not bound by an arbitration agreement.”).

**a. The Arbitration Provision Is Not Unconscionable.**

The Homeowner Contract arbitration provision is not unconscionable. “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Smith, 417 S.C. at 49, 790 S.E.2d at 4 (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007)). Inequity of bargaining power is not “on its own, sufficient basis to invalidate an arbitration agreement.” LaPoint, 2009 U.S. Dist. LEXIS 146577, at \*11 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 n.5, S.E.2d 360, 365 n.5 (2001)). “In conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.” Smith, 417 S.C. at 48, 790 S.E.2d at 4.

The Homeowner Contract is significantly different from the contract at issue in Smith v. D.R. Horton. In Smith v. D.R. Horton, Inc., the home purchase agreement contained a section titled “Warranties and Dispute Resolution” containing ten subparagraphs that not only addressed arbitration between the parties, but also the various warranties and warranty exclusions. Smith 471 S.C. at 53-59, 790 S.E.2d at 6-9 (Dissent J. Kittredge) (restating the provisions in their entirety). The parties, and the justices, disagreed on whether these ten paragraphs should be read together as the “arbitration provision,” or whether only the specifically labeled arbitration subparagraph (g) should be reviewed for arbitrability but ultimately a majority of the court determine it should be read as a whole. Id. at 48-49, 790 S.E.2d at 3-4. The arbitration subparagraph (g) was not challenged by the homeowner and not found unconscionable by the court. Smith 471 S.C. at 59, 790 S.E.2d at 10 (Dissent J. Kittredge) (“[I]n opposing arbitration, the Smiths do not challenge any provision of subparagraph (g) titled ‘MANDATORY BINDING ARBITRATION.’”). Rather,



the court determined that a separate subparagraph (i) that disclaimed implied warranty claims and prohibited monetary damages was one-sided and oppressive and therefore unconscionable. Id. at 50, 790 S.E.2d at 5. Because the entire Warranty and Dispute Resolution section was read together, the one offending subparagraph invalidated the entirety of the section, including the requirement to submit all disputes to binding arbitration. Smith, 417 S.C. at 50, 790 S.E.2d at 4-5.

Here, the arbitration clause is a standalone provision found at Section 15 of the Homeowner Contract, titled “**MANDATORY BINDING ARBITRATION.**” Warranties and related disclaimers are separately located in section 14. Therefore, unlike the combined warranty and dispute resolution section Smith that the court determined must be read together, the arbitration provision in the Homeowner Contract is contained in a standalone section and should be reviewed as such and is severable from any other language of the Homeowner Contract under *Prima Paint*. See generally *Prima Paint*, 388 U.S. at 398. This is precisely how the South Carolina Supreme Court distinguished the arbitration provision in Damico from Smith. Damico, 437 S.C. at 610, 879 S.E.2d at 754 (distinguishing a homeowner contract with separate warranty and arbitration sections from the combined Warranties and Dispute Resolution in Smith and finding that the separate arbitration section should be analyzed as a standalone provision).

The questions are: (1) whether Plaintiff lacked meaningful choice and the arbitration provision is one-sided; and (2) whether the terms of the arbitration provision “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. Both questions must be answered in the negative.

First, Plaintiff had a meaningful choice to enter the Homeowner Contract. Plaintiff was free to purchase a home from another builder, purchase a pre-existing home, or purchase no home at all. Plaintiff freely chose to assent to D.R. Horton’s contractual terms, including arbitration of

construction disputes. In addition to choosing home options, home buyers are also generally able to negotiate contract terms such as pricing, closing cost, and interest rates. There is nothing inherently unfair about this bargaining process. Arbitration is binding on both Plaintiff and D.R. Horton. Nothing in the substance of the arbitration provision is one-sided.

Second, the terms of the arbitration provision are not “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. In relevant part, the arbitration provision: (1) binds both D.R. Horton and Plaintiff to arbitration for construction defect disputes; (2) provides for arbitration in Plaintiff’s home county; (3) provides for an expedited hearing schedule; and (4) gives the arbitrator complete discretion to assess the filing fees and costs against D.R. Horton. There is nothing so oppressive about these terms such that no fair and honest person would accept them. To the contrary, these are reasonable and customary terms in an arbitration agreement and should be enforced.

**b. The South Carolina Court of Appeals’ Decision in Mart Supports Arbitration of the Homeowner Contract.**

In December 2023, the South Carolina Court of Appeals reversed the lower court and ordered arbitration in another home construction putative class action, Mart v. Great Southern Homes, Inc., 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023). In Mart, the court enforced an arbitration clause in a home construction contract between a homeowner and a large homebuilder. The purchase agreement in Mart contained both an arbitration clause and limited warranties and disclaimers that are very similar to the D.R. Horton clauses at issue in this case:

**ARBITRATION:** Any dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof, including without limitation, disputes relating to the property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third arbitrator pursuant to the South Carolina Uniform Arbitration Act [(SCUAA)].

LIMITED WARRANTY: The Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller. This limited warranty shall warrant workmanship for One (1) year and warrant the structure itself for Ten (10) years from date of closing. Said limited warranty shall be incorporated in the deed delivered at closing. Purchaser acknowledges that said limited warranty is not a maintenance agreement. FOR QUALITY ASSURANCE PURPOSES WARRANTY VISITS MAY BE VIDEO W/AUDIO TAPED.

**This Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or impli[e]d, any warranty of habitability, suitability for residential purposes, merchantability, or fitness for a particular purpose is hereby excluded and disclaimed. Seller shall in no event be liable for consequential or punitive damages of any kind. There is no warranty whatsoever on trees, shrubs, grass, vegetation or erosion caused by lack thereof, nor on subdivision improvements, including but not limited to, streets, road[s], sidewalks, sewer, drainage or utilities. Purchaser agrees to accept said limited warranty in lieu of all other rights or remedies, whether base[d] on contract or tort.**

Mart, 441 S.C. at 307, 893 S.E.2d at 361.

The lower court read the above arbitration clause and a separate warranty arbitration clause together and ruled that conflicting language in the two clauses indicated a lack of mutual consent to arbitration. Id. at 311-12, 893 S.E.2d at 364. The Mart court reversed, first noting the well-established rule that “[a]rbitration clauses are separable from the Contract in which they are imbedded” and “[e]ven if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision.” Id. at 312-13, 893 S.E.2d at 364 (quoting Huskins v. Mungo Homes, LLC, 439 S.C. 356, 366, 887 S.E.2d 534, 539-40 (Ct. App. 2023) (internal quotation marks omitted)). Pursuant to Damico, the court of appeals concluded that the lower court erred in reading the arbitration clause in the purchase contract and the arbitration clause in the warranty together,

holding that “controlling case law does not permit us to consider the language of the separate limited Warranty or the propriety of the waiver of implied warranties in analyzing the standalone arbitration language of the Sales Contract.” Id. at 315, 893 S.E.2d at 365. Because Mart “did not separately challenge the standalone arbitration provision in the [sales contract] as unconscionable or lacking material terms, [the court was] handcuffed with respect to Mart’s challenge to the validity of the waiver of implied warranties.” Id. at 316, 893 S.E.2d at 366. As such, the lower court erred in considering terms outside of the arbitration clause to deny arbitration.

The court then reviewed the arbitration clause as compared to other clauses in residential home purchase agreements that have been held unconscionable. The court noted that in Damico, the arbitration clause gave the right to arbitrate to the builder at its sole election. The court also looked at the arbitration clause in Smith, in which the D.R. Horton clause was intertwined with the warranty clause in the same paragraph, with no severability clause. Next, the court examined the arbitration clause in Huskins, noting that it contained a provision that shortened the statutory limitations period to ninety days, which that court struck down. Id. at 318, 893 S.E.2d at 367. Ultimately, the court held that the standalone arbitration clause at issue in Mart was enforceable because it did not contain any provisions that South Carolina courts have held to be unconscionable.

Here, the Homeowner Contract standalone arbitration clause does not provide for arbitration at D.R. Horton’s sole election; it is not combined with the warranty provision such that the two cannot be separated easily; and it does not contain any other terms that are oppressive or one-sided. Rather, like the clause in Mart, the present arbitration clause is fair and even-handed, simply providing for arbitration to be agreed to by both parties and providing for which claims should be arbitrated. Under these standards, D.R. Horton’s arbitration clause should stand.

**c. Recent South Carolina Circuit Court Opinion Enforced Identical Provision.**

Most recently, in June 2024, South Carolina Circuit Court Judge Diane S. Goodstein considered the arbitrability of D.R. Horton's homeowner contract with an identical arbitration clause pursuant to D.R. Horton's motion to compel arbitration in a putative class action filed in Berkeley County alleging defective installation and design of septic systems. *Tyler, et al. v. D.R. Horton, et al.*, Civil Action No. 2022-CP-08-02548. The opposing party argued against arbitration on grounds of unconscionability and merger doctrine, among others. In that case, Judge Goodstein ordered arbitration under an identical arbitration provision and confirmed that order in denying a motion to reconsider. (Order Granting D.R. Horton Mot. Compel Arbitration and Order on Motion Reconsider, attached as **Exhibits 2 and 3**). Judge Goodstein rejected all of plaintiff's arguments against arbitration and specifically ruled that the merger doctrine (see below) did not apply to merge the arbitration clause out of existence. This Court should do the same.

**d. The Doctrine of Merger Does Not Invalidate the Arbitration Agreement.**

Despite absolutely no binding precedent, the Plaintiff will likely argue that the "doctrine of merger" operates to extinguish the arbitration clause in the Agreement, because the purchase agreement is "extinguished by the deed." In fact, the **only applicable South Carolina precedent** (see below) has denied the "merger" theory under nearly identical facts, as have the majority of other states faced with this specific question. The fact that some circuit courts are accepting this unfounded argument is of no binding effect and does not make the argument any more sustainable.

The merger by deed doctrine provides that "[t]he execution, delivery, and acceptance of a deed varying from the term of an antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed. *Shoney's, Inc. v. Cooke*, 291 S.C. 307, 353 S.E.2d 300, 303 (Ct. App. 1987) (quoting

Charleston & W Carolina Ry. Co. v. Joyce, 231 S.C. 493, 99 S.E.2d 187, 193 (1957). However, agreements that are not intended to be merged in a deed are not merged into the deed. *See Hughes v Greenville Country Club*, 283 S.C. 448, 450-51, 322 S.E.2d 827, 828 (Ct. App. 1984). In fact, there are three (3) stated exceptions to the “merger” rule in this State. These exceptions are set forth in Dudek v. Commonwealth Land Title Ins. Co., 466 F.Supp.3d 610 (2020) and Shoneys, Inc. v. Cooke, 291 S.C. 307, 353 S.E.2d 300 (1987). The first exception is inapplicable to the present case (mistake or fraud in the execution of the deed). The second exception is that the party denying merger can enforce the provisions of a pre-deed contract if it proves by clear and convincing evidence that merger was not intended. Hughes, *supra*, 322 S.E.2d at 828.

In Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (2013), the court faced the identical issues presented in the present case. The Carlson court applied this second “intent” exception to the merger rule, in part, to defeat the Plaintiff’s argument that the arbitration clause was merged into the deed. The plaintiff in that case, a homeowner, executed a purchase agreement that included an arbitration clause. The deed that was subsequently issued did not provide for arbitration. The Plaintiffs argued that the doctrine of merger precluded arbitration of their claims. Specifically, the Plaintiffs argued that because the deed, which contained no arbitration clause, superseded the purchase agreement, their claims were not subject to arbitration. The Court disagreed. The Courts’ holding was based on the interpretation of the Purchase Agreement: “Pursuant to the clear and unambiguous terms of the purchase agreement, clear and convincing evidence supports a finding that the parties did not intend for the arbitration clause to be merged into the deed at closing.” Id., 404 S.C. at 261.

Here, the Agreement is replete with references to the construction of the home, not just the purchase of the home. In addition to including choices for construction of the home, the Agreement includes, in Paragraph 16(f), a provision that contemplates what happens in case the home is not complete prior to closing:

If the House is not Complete at the time that the Purchaser signs this Agreement, Seller shall Complete the House within 2 years after the date that the Purchaser signs this Agreement, subject to extensions for circumstances reasonably beyond Seller's control as determined by South Carolina law. For purposes of this subsection (f), "Complete" means that the House is ready for occupancy by Purchaser, has all necessary and customary utilities extended to it, and a certificate of occupancy has been issued. Notwithstanding any provision in this Agreement to the contrary, including but not limited to Section 18(b), nothing herein shall limit Purchaser's remedies if Seller defaults under this subsection (f).

See, Exhibit "A" hereto, Para. 16(f). As noted above, the Agreement also includes choices for how the home will be constructed, a ten-year limited warranty, and all manufacturers' warranties. Accordingly, the terms of the Agreement clearly indicate that that the parties did NOT intend for the arbitration clause to be merged into the deed.

The third exception to the "doctrine of merger" is the "collateral agreement" exception. Under that exception, the party opposing merger must show that the agreement in question (here, the arbitration clause) is independent and distinct from the main contract, is consistent with the main contract, and be such an agreement as the parties could not reasonably be expected to embody in the main contract but would naturally make as a separate agreement. Shoney's, supra, 353 S.E.2d at 304. In addition, where a deed constitutes only part performance of a preceding contract, other distinct and unperformed provisions of the contract are not merged in the deed. New Prospect Area Fire Dist. v. New Prospect Ruritan Club, 311 S.C. 402, 429 S.E.2d 791 (1993).

Cases from the majority of other states also hold that the merger doctrine cannot preclude the enforcement of an arbitration clause. For example, in Standford Dev. Corp v. Stanford Condo. Owners Ass'n, 285 S.W.3d 45 (Tex. App—Houston (1<sup>st</sup> Dist) 2009) the court held that the merger doctrine does not apply to a deed that constitutes only partial performance of the preceding contract. The court went on to hold that a contract for the sale of land that creates rights collateral to and independent of the conveyance, such as completion of construction or escrow, survives a deed that is silent on these matters. See also, Hagy v. Demers & Adams, LLC, 2012 U.S. Dist. LEXIS 12699 (S.D. Ohio 2012) (agreements collateral to and independent of the main purpose of the transaction are not merged into the deed).

In the present case, the deed constituted only the part of the Agreement that related to the purchase of the property, and not to the completion of the construction of the dwelling or the warranties to be provided by D.R. Horton and the manufacturers. The arbitration agreement is a separate agreement regarding disputes under the Purchase Agreement. It is also consistent with the Purchase Agreement terms. Finally, it is such an agreement as the parties could not reasonably be expected to employ in the main contract. One can scarcely imagine a more ridiculous proposition that including an arbitration clause applicable to disputes over construction in the body of a deed.

For these reasons, Arbitration should not be precluded due to this exception to the merger rule.

### **CONCLUSION**

D.R. Horton hereby respectfully requests that this Court compel the parties in this matter to submit to binding arbitration as required by the purchase contract. The Homeowner Contract provides for arbitration of matters like those in this case, and both federal and South Carolina



courts strongly favor arbitration. Moreover, the arbitration clause is clearly valid under the FAA and South Carolina Uniform Arbitration Act because it complies with S.C. Code Ann. § 15-48-10(a). Finally, there are no contract defenses that would invalidate the arbitration agreement in the Homeowner Contract. Accordingly, this matter should be submitted to arbitration.

**KENISON, DUDLEY & CRAWFORD, LLC**

s/Kimila L. Wooten

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***Counsel for Defendant D.R. Horton, Inc.***

August 29, 2024

Greenville, South Carolina

**EXHIBIT 1**

Abbey at Trolley Run St 60

28/

466390028

**HOME PURCHASE AGREEMENT**

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

In consideration of the reciprocal covenants stated herein, **D.R. Horton Inc.** ("Seller") and **Deborah Denise Harley** (collectively, "Purchaser") agree as follows:

**1. CONVEYANCE.** Seller shall sell to Purchaser and Purchaser shall purchase from Seller all that certain parcel or tract of land located in **AIKEN** County, **SC**, with a street address of **321 DONNINGTON COURT, AIKEN, SC 29801**, more particularly described as Lot: **28**, in **Abbey at Trolley Run St 60** Subdivision (the "Lot"), together with all improvements thereon and all appurtenances thereto collectively referred to as the "Property."

**2. PURCHASE PRICE AND METHOD OF PAYMENT.** Subject to adjustment as may be provided herein, the Purchase Price for the Property shall be **Two Hundred Seventy Thousand Nine Hundred Thirty and 00/100 Dollars (\$270,930.00)** to be paid in cash as provided herein. The terms of the subsection (a or b) checked below shall also apply.

☐ **a. No Financing Contingency.**

Purchaser shall pay to Seller the Purchase Price in cash at Closing (See Section 16 below). Within five (5) business days of the Effective Date, Purchaser shall provide documentation to Seller that will verify to Seller's reasonable satisfaction that Purchaser has the available funds necessary to purchase the Property according to the terms of this Agreement. If Purchaser does not provide such documentation to Seller within that time period, then Seller may at its option terminate this Agreement by providing written notice to Purchaser of termination, in which event Seller shall retain the Earnest Money (see Section 4 below) and neither party shall have any further obligation or liability to the other hereunder.

☒ **b. Financing Contingency**

(1) Purchaser shall use its best efforts to obtain a loan in the principal amount of no more than **100%** of the Purchase Price, reduced to the next lowest hundred dollars, (the "Loan") to be secured by a first priority mortgage on the Property. The proceeds of the Loan, together with the balance of the Purchase Price, shall be paid to Seller by Purchaser in cash or other immediately available funds at Closing.

(2) Purchaser shall apply for the Loan within three (3) business days after the Effective Date. **Failure by Purchaser to apply for the Loan within that time-period or to pursue approval of the Loan diligently thereafter shall constitute a material breach of this Agreement by Purchaser.** Within seven (7) days after the Effective Date, Purchaser shall provide Seller with written evidence from Purchaser's lender confirming that Purchaser has been prequalified for the Loan (the "Prequalification Letter"). Within twenty-one (21) days of the Effective Date, Purchaser shall provide Seller with a letter from Purchaser's lender confirming that the Loan has been conditionally approved (the "Conditional Approval Letter"). Within thirty (30) days after the Effective Date, Purchaser shall provide Seller with a letter from Purchaser's lender confirming that the Loan has been fully and finally approved, with no conditions or contingencies (the "Final Approval Letter"). If Purchaser fails to provide the Prequalification Letter, the Conditional Approval Letter or the Final Approval Letter to Seller by the respective deadlines stated above, then Seller, at Seller's option, may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money shall be refunded to Purchaser if Purchaser is not in breach of this Agreement, and thereafter neither party shall have any further liability or obligation to the other hereunder.

(3) Purchaser acknowledges that there are many different loan programs available from many different lenders. If the loan approval obtained by Purchaser contains any contingencies, Seller may require the satisfaction of those contingencies within the time period specified for obtaining the Final Approval Letter and terminate this Agreement if those contingencies are not waived or satisfied within that time; in which event, the Earnest Money shall be refunded to Purchaser, and neither party shall thereafter have any further liability or obligation to the other hereunder

(4) Purchaser acknowledges that there are many different loan programs available from many different lenders. Purchaser understands and acknowledges that certain loan/credit approvals are only valid for up to one hundred twenty (120) days. Purchaser shall update loan/credit approval documentation as needed in order to maintain current loan approval up until the date of closing. Purchaser agrees to execute all papers and perform all other actions necessary to obtain the Loan and to accept the Loan if approved by lender. Purchaser shall, in addition to the payment of principal and interest upon the Loan, pay at Closing such amounts as may be required by the lender to establish or maintain an escrow for insurance, property taxes or private mortgage insurance.

**(5) FOR FHA/VA LOANS ONLY:**

(i) **FHA Amendatory Clause.** If Purchaser applies for and obtains a commitment for an FHA-insured loan, then, notwithstanding any other provisions of this Agreement, Purchaser shall not be obligated to complete the purchase of the Property or to incur any penalty, by forfeiture of earnest money or any other deposit, or otherwise, unless Purchaser has been given, in accordance with HUD/FHA requirements, a written statement by the Federal Housing Commissioner or a Direct Endorsement lender setting forth the appraised value of the Property of not less than \$270,930.00. Purchaser shall have the privilege and option of proceeding with consummation of the Agreement without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or condition of the Property. Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.

(ii) **Escape Clause for VA Loans:** It is expressly agreed that, if Purchaser applies for and obtains a commitment for a VA-guaranteed mortgage loan, then, notwithstanding any other provisions of the Agreement, Purchaser shall not incur any penalty, by forfeiture of earnest money or any other deposit, or otherwise, nor shall Purchaser be obligated to complete the purchase of the Property if the Purchase Price or cost exceeds the reasonable value of the Property established by the Department of Veterans Affairs. Purchaser shall, however, have the privilege and option of proceeding with the consummation of the Agreement without regard to the amount of the reasonable value established by the Department of Veterans Affairs (Authority: 38 U.S.C. 501, 3703(c)(1)).

(iii) **Additional Funding:** Purchaser agrees that, should Purchaser elect to complete the purchase of the Property at an amount in excess of the appraised value, Purchaser shall pay such excess amount in cash from a source Purchaser agrees to disclose to the FHA or VA (as applicable) and that Purchaser represents will not be from borrowed funds, except as approved by the FHA or VA (as applicable).

**3. FINANCIAL INFORMATION.** Purchaser acknowledges that Purchaser's financial situation may affect Purchaser's ability to obtain a loan and/or purchase this Property. Purchaser further acknowledges that it is important for the Seller to know Purchaser's financial situation and Purchaser's ability to obtain financing. Purchaser hereby grants permission for the Seller to contact any mortgage company or financial institution to which Purchaser may apply for a loan and to discuss Purchaser's financial situation and prospects of obtaining a loan. Purchaser hereby authorizes any mortgage company or financial institution from which Purchaser may seek a loan to discuss Purchaser's financial status with the Seller and to provide the Seller with any documentation or information regarding said financial status, including but not limited to Purchaser's credit score. **Purchaser hereby authorizes and directs the settlement agent conducting the Closing to disclose to Seller the type of mortgage loan obtained by Purchaser (e.g., FHA, VA, USDA, Conventional) to purchase the Property.**

**4. DEPOSITS.**

**a. Earnest Money.** The parties acknowledge that, as of the Effective Date, Purchaser has deposited with Seller earnest money in the amount shown below (the "Initial Deposit"). Purchaser shall deliver to Seller additional deposits of earnest money in the amounts shown below by the due dates shown below (the "Additional Deposits"). The Initial Deposit and any Additional Deposits are hereinafter referred to as the "Earnest Money," both individually and collectively. Upon execution of this Agreement by Seller, the Earnest Money shall be deposited in a separate account and held in trust until closing or other disposition in accordance with this Agreement. Failure by Purchaser to pay any Additional Deposit by the applicable due date shall constitute a material breach of this Agreement by Purchaser. The schedule of Earnest Money deposits is as follows:

| Earnest Deposits |                              |                |              |                |                   |
|------------------|------------------------------|----------------|--------------|----------------|-------------------|
| Due Date         | Collection Date              | Payment Type   | Check Number | Deposit Amount | Collection Amount |
| 04/21/2021       |                              |                |              | \$2,000.00     | \$2,000.00        |
|                  | 04/21/2021                   | Online Payment |              |                | \$2,000.00        |
|                  | Note: Online Payment via web |                |              |                |                   |
| Total            |                              |                |              | \$2,000.00     | \$2,000.00        |

**b. Disbursement.** The Earnest Money shall be retained by Seller except as otherwise expressly stated in this Agreement. At Closing, the Earnest Money shall be credited to Purchaser against the Purchase Price; otherwise, the Earnest Money shall be disbursed as provided herein. If any dispute arises between Purchaser and Seller as to the final disposition of all or part of the Earnest Money, Seller may, but shall not be required to, interplead all or any disputed part of the Earnest Money into a court of competent jurisdiction. If Seller interpleads the Earnest Money into a court, Seller shall be entitled to recover the costs of such interpleader, including reasonable attorney's fees incurred in connection with the interpleader, from the Earnest Money.

**c. Deposits of VA Borrowers.**

- i. Purchaser Notice Regarding Mortgage Loan. Purchaser hereby represents that it [SELECT ONE] ☐ **DOES** / ☒ **DOES NOT** intend to apply for and obtain a mortgage loan guaranteed by the U.S. Department of Veterans Affairs (a "VA Loan") to purchase the Property. **IF PURCHASER DOES NOT CURRENTLY INTEND TO OBTAIN A VA LOAN, BUT LATER DECIDES TO OBTAIN A VA LOAN, PURCHASER SHALL PROMPTLY NOTIFY SELLER IN WRITING.**
- ii. Trust Account; Disbursement. Notwithstanding any other provision of this Agreement, if Purchaser obtains a VA Loan, then the Earnest Money, Option Money (hereinafter defined), and all other sums deposited by Purchaser pursuant to this Agreement (collectively, the "Deposits") shall be deposited in a trust account that is safeguarded from the claims of creditors of Seller until the Deposits are (A) disbursed at Closing or (B) otherwise applied or disbursed in accordance with the terms of this Agreement.

**5. SURVEY.** At Closing Seller shall provide Purchaser, at no cost to Purchaser, with a plat of survey of the Property performed by an independent, licensed surveyor, showing all structures and other improvements located on the Property as of the date of the survey (the "Survey"). Seller makes no warranty or representation whatsoever regarding the quality, accuracy or reliability of the Survey. Seller makes no warranty or representation whatsoever regarding the quality, accuracy or reliability of any survey of the Property obtained for the benefit Purchaser pursuant to this subsection, and Purchaser shall look solely to the surveyor for same.

**6. WARRANTY OF TITLE.** Seller shall convey insurable fee simple title in and to the Property to Purchaser at Closing by special or limited warranty deed (the "Deed"), subject to: (a) zoning ordinances affecting the Property; (b) utility, drainage and other easements, deed restrictions or other conditions or restrictions of record upon which do not prevent use or enjoyment of the Lot or the House constructed thereon; (c) subdivision covenants, conditions and restrictions; (d) all matters shown on the final plat for the subdivision where the Property is located; (e) all prior conveyances of all rights, titles and interests to all oil, gas, water, petroleum, natural gas, coal, lignite and other minerals and hydrocarbons, and all geothermal energy and resources, located in whole or in part on, in or under the Lot and/or that may be produced or extracted from the Lot; and (f) any matters that would be shown or revealed by a current survey of the Lot. As used in this Agreement, "insurable fee simple title" shall mean title which a title insurance company licensed to do business in South Carolina will insure at its regular rates, subject only to its standard exceptions and those exceptions listed in subsections (a) through (e) above.

**7. TITLE EXAMINATION.** Purchaser shall have until ten (10) days prior to the Closing Date (as defined in Section 16 below) to examine title to the Property and to furnish Seller with a written statement of any exceptions to insurable title. If Purchaser does not serve Seller with notice of exception to insurable title prior to that date, Purchaser shall have waived any objection to title to the Property as it existed as of the Effective Date. If Purchaser does serve such notice on Seller prior to that date, the notice shall specify and itemize the exceptions to insurable title. If Seller does not remove any exceptions to insurable title within a reasonable time, Purchaser shall have the right to terminate this Agreement and to receive a refund of the Earnest Money and Option Money (as defined in Exhibit A

attached hereto), if any, paid to Seller. Under no circumstances shall Seller be obligated or required to remove or cure any exception to title to the Property that is a permissible exception to insurable title as defined in Section 6 above.

**8. DESTRUCTION.** If the home built on the Lot (the "House") is either totally destroyed or substantially damaged (as determined by Seller in its sole discretion) before Closing, either party may terminate this Agreement by written notice to the other within ten (10) days after the date of such destruction. From and after the Closing (see Section 16 below), all risk of loss to the Property shall be upon Purchaser.

## 9. INSPECTION.

**a. Procedure.** Prior to Closing, Seller shall have the right to deny access to the Lot to any person at any time, as Seller determines in its sole discretion. However, Purchaser or a professional home inspector contracted by Purchaser shall have the right to enter upon the Property at reasonable times during normal business hours solely for the purpose of inspecting, examining, testing and surveying the Property, solely at Purchaser's expense, provided that any such inspection must meet the following requirements and conditions (collectively, "Inspections"):

### (1) Inspections by Purchaser:

(a) All Inspections by Purchaser must be scheduled through Seller's sales agent for the Subdivision. These Inspections must be scheduled at least seven (7) days in advance, must be in accordance with Seller's production schedule and must take place during the following timeframe: Monday through Friday, 11 a.m. to 6:00 p.m.

(b) Seller or its appointed representative shall have the right to accompany Purchaser during the Inspections.

### (2) Inspections by an independent professional home inspector:

(a) All Inspections by a professional home inspector must be scheduled through Seller's sales agent for the Subdivision. These Inspections must be scheduled at least seven (7) days in advance, must be in accordance with Seller's production schedule, and must take place during the following timeframe: Monday through Friday, 11 a.m. to 6:00 p.m. IF AN INSPECTOR DOES NOT HAVE AN APPOINTMENT ONE WEEK PRIOR TO THE PROPOSED INSPECTION, THE INSPECTOR WILL NOT BE ALLOWED TO PERFORM THE INSPECTION AND WILL BE INSTRUCTED TO RESCHEDULE. SELLER WILL NOT DELAY CONSTRUCTION OR CLOSING TO ACCOMMODATE INSPECTION APPOINTMENTS.

(b) Seller or its appointed representative shall have the right to accompany the home inspector during the Inspection.

(c) The home inspector must be licensed to do business in the State of South Carolina and must furnish to Seller a copy of the inspector's State License Certificate prior to conducting any Inspections. The home inspector must be a member of the American Society of Home Inspectors or the South Carolina Association of Home Inspectors and shall furnish to Seller, no later than 48 hours prior to any Inspection, written evidence of such membership. The home inspector must be certified by the Council of American Building Officials on the One and Two Family Dwelling Code (International Residential Code), 2000 edition, with South Carolina Amendments, and shall furnish to Seller evidence of such certification prior to any Inspection.

(d) Prior to each Inspection, the home inspector must furnish Seller with proof that the home inspector has: (i) worker's compensation insurance in accordance with applicable law, (ii) an errors and omissions insurance policy with a limit of no less than Three Hundred Thousand Dollars (\$300,000) and otherwise in accordance with applicable law and the guidelines of the Limited Warranty provided pursuant to Section 14(a) below, and (iii) a General Liability Insurance Policy in the amount of at least One Million Dollars (\$1,000,000) naming Seller as an additional insured.

(3) **Failure by Purchaser to follow the procedures set forth in this subsection shall constitute a material breach of this Agreement. Unauthorized entry onto the Lot or unauthorized activities upon the Lot by Purchaser, its agents or contractors shall constitute a material breach of this Agreement by Purchaser. Purchaser specifically acknowledges that Purchaser may not, under any circumstances, install or construct any equipment, fixtures, structures or other improvements upon the Lot, or modify any of the existing equipment, fixtures, structures or other improvements, at any time and any such unauthorized activities shall constitute a material breach of the Agreement by Purchaser. Purchaser shall not interrupt or otherwise interfere with sales or construction within the Subdivision. Upon completion of any Inspection, Purchaser shall restore**

**the Property to its condition prior to the Inspection.**

(4) THE CLOSING SHALL NOT BE DELAYED DUE TO PURCHASER'S FAILURE TO SCHEDULE AND CONDUCT ALL INSPECTIONS SUFFICIENTLY IN ADVANCE OF CLOSING TO ALLOW SELLER TO ADDRESS ISSUES, IF ANY, IDENTIFIED BY THE INSPECTIONS.

**b. Purchaser's Indemnity.** Purchaser assumes all responsibility for the acts of Purchaser, Purchaser's agents, contractors or representatives in exercising Purchaser's rights under this Section, and shall indemnify and hold Seller harmless, to the extent permitted by applicable law, from any loss or expense Seller may suffer as a result of any claim or damage which arises directly or indirectly out of Purchaser's exercise of its rights under this Section. Notwithstanding any other provision herein, Purchaser's indemnity of Seller pursuant to this Section shall survive Closing and the termination of this Agreement for any reason.

**c. Inspection Results.** In the event any inspection by Purchaser or its agents or contractors reveals a purported defect in the Property, Purchaser shall provide Seller with written notice of the claim of defect. If a professional home inspection was performed, the home inspector must prepare a report (including references to any applicable code sections). Purchaser shall deliver to Seller a true and complete copy of any report produced by the home inspector within forty-eight (48) hours of receipt of such report by Purchaser. If Seller determines that Purchaser's claim of defect is valid, Seller shall correct or repair the defect. If Seller determines the claim of defect is not valid, Seller shall notify the Purchaser of that determination within thirty (30) days of receipt of the written notice of claim of defect. Notwithstanding any other provision herein, Seller shall not be required to correct or repair any defect in construction that does not constitute a violation of: (1) the building code of the governing jurisdiction in which the Property is located, or (2) the building guidelines and standards of the provider of the Limited Warranty pursuant to Section 14(a) below. The issuance of a certificate of occupancy, temporary certificate of occupancy, or final inspection certificate for the Property by the applicable governing authority shall be conclusive evidence of compliance with applicable building codes and other applicable regulations and shall constitute substantial completion of the House.

**d. Walkthrough; Punch List:** After substantial completion of the House but prior to Closing, Seller and Purchaser will meet at the Property to conduct a walkthrough inspection and orientation, in accordance with Seller's standard practices (the "Initial Walkthrough"). At the conclusion of the Initial Walkthrough, Purchaser and Seller shall prepare and sign a written list of items on the Property that the parties agree should be corrected, repaired or replaced (hereinafter, the "Punch List"). No items may be added to the Punch List after the Initial Walkthrough. Seller shall thereafter correct, repair or replace the items listed on the Punch List. Under no circumstances shall Seller be required to correct, repair or replace any items on or of the Property that are not listed on the Punch List signed by Seller. Within a reasonable amount of time after the Initial Walkthrough but prior to Closing, Seller and Purchaser shall meet at the Property to conduct a second walkthrough inspection (the "Final Walkthrough") in order to confirm which items on the Punch List have been corrected, repaired or replaced. At the conclusion of the Final Walkthrough, the parties will prepare and sign an updated Punch List reflecting the current status of each item thereon. Seller's obligation to correct, repair or replace any items that are listed on the Punch List shall survive Closing. UNDER NO CIRCUMSTANCES SHALL CLOSING BE DELAYED DUE TO SELLER'S FAILURE TO COMMENCE OR COMPLETE CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST. UNDER NO CIRCUMSTANCES SHALL FUNDS BE ESCROWED AT CLOSING TO COVER THE COST OF CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST. If Purchaser appoints a third party to conduct the Initial Walkthrough on Purchaser's behalf, such appointee must also conduct the Final Walkthrough on behalf of Purchaser.

**10. REAL ESTATE BROKER AND COMMISSION.** SELLER'S SALES AGENTS ARE LICENSED REAL ESTATE AGENTS IN SOUTH CAROLINA. **D.R. Horton Realty of Georgia, Inc., (Firm# 66418; MLS# CPRF01)** an affiliate of Seller, is the listing broker and will be paid a commission by Seller upon Closing (as hereinafter defined). Purchaser acknowledges that Seller's sales agents represent Seller only and do not represent Purchaser or have any duty to Purchaser. Purchaser represents to Seller that Purchaser has not employed any real estate broker, agent or finder in connection with this Agreement, other than **Jeanette Clark**, an agent of **Good Sense Realty** and (collectively, "Co-Broker"). Purchaser 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, other than the Co-Broker named above. Notwithstanding any other provision herein, the provisions of this Section shall survive Closing or termination of this Agreement for any reason. Purchaser acknowledges receipt of a copy of the disclosure titled "Agency Relationships in Real Estate" Disclosure.

**11. NO RELIANCE.** Purchaser acknowledges that it has not relied upon the advice or representations, if any, of Seller or Seller's salespersons or other agents with regard to the legal and tax consequences of this Agreement or the terms and conditions of any proposed financing of the purchase of the Property. Purchaser acknowledges that if such matters are of concern to Purchaser, Purchaser must

obtain independent, professional advice regarding them.

**12. WOOD INFESTATION REPORT.** At the time of Closing, Seller shall provide Purchaser with a letter or a soil treatment report from a pest-control company licensed in South Carolina certifying that the Lot has been treated within one (1) year of the date of Closing for subterranean termite infestation. If required by Purchaser's lender, Purchaser may obtain at Seller's expense a South Carolina Wood Infestation Report performed by a pest-inspection company licensed in South Carolina.

**13. HAZARDOUS SUBSTANCES.** Purchaser acknowledges that Seller makes no representation or warranty with respect to the presence or absence of toxic waste, radon, hazardous materials or other undesirable substances on the Property. SELLER HEREBY DISCLAIMS ANY LIABILITY OR RESPONSIBILITY FOR THE PRESENCE OF ANY SUCH SUBSTANCES IN, ON, UNDER OR ABOUT THE PROPERTY.

#### 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, MERCHANTABILITY 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.

Initials    
Buyer Seller

**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. 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.

Initials    
Buyer Seller

**16. CLOSING.** The following shall constitute the "Closing": (a) receipt by the settlement agent of all funds necessary to close the transaction, (b) receipt by the settlement agent of the fully executed Deed for immediate recording in the office of the clerk of court or register of deeds, as applicable, (c) execution of the Closing Disclosure by Purchaser, Seller and the settlement agent, and (d) payment to Seller of the net proceeds of sale due to Seller. The date on which the Closing Disclosure is executed by all parties is referred to herein as the "Closing Date." Closing shall not be complete until Seller has received full payment of the Purchase Price. Keys to and possession of the Property will not be delivered to Purchaser until the Closing is complete. Closing shall be scheduled and conducted as follows:

**a. Closing Date.** Seller shall give Purchaser notice of the final date and time of Closing (the "Closing Date") at least three (3) business days prior to Closing. PURCHASER'S FAILURE TO CLOSE BY THE CLOSING DATE SET BY SELLER SHALL CONSTITUTE A MATERIAL BREACH, ENTITLING SELLER TO TERMINATE THIS AGREEMENT AND RETAIN THE EARNEST MONEY AND ANY OPTION MONEY. Seller shall exercise good faith and due diligence in completing construction of the House; however, SUBJECT ONLY TO THE PROVISIONS OF THIS SUBSECTION, SELLER SHALL HAVE SOLE DISCRETION IN DETERMINING THE CLOSING DATE. After the Closing Date has been set by Seller, the parties may agree in writing to extend the Closing Date at any time. Subject only to the provisions of Section 27 below, Closing shall occur no later than that date which is two (2) years after the date that Purchaser signs this Agreement.

**b. Purchaser Failure to Close.** PURCHASER'S FAILURE TO CLOSE BY THE CLOSING DATE SET BY SELLER SHALL CONSTITUTE A MATERIAL BREACH, ENTITLING SELLER TO TERMINATE THIS AGREEMENT AND RETAIN THE EARNEST MONEY AND ANY OPTION MONEY. If Purchaser fails to close as required by the terms of this Agreement, Seller shall have the right, in Seller's sole discretion, to either: (1) terminate this Agreement due to Purchaser's default or (2) extend the Closing Date. Seller's election to extend the Closing Date pursuant to this subsection b. shall not be construed as a waiver of Purchaser's default.

**c. Exchange at Closing.** At Closing, Seller shall deliver to Purchaser the Deed for the Property, a certificate of occupancy for the house located on the Property issued by the applicable governmental authority, and, if applicable, a certificate of final approval by the FHA or VA. At Closing, Purchaser shall pay to Seller the Purchase Price in full.

**d. Place of Closing.** The Closing shall take place at the office of the closing attorney selected by Purchaser in South Carolina, or at such other place as the parties may agree in advance. The Purchaser hereby selects **& ASSOCIATES, MCDONNEL, MCDONNELL AND ASSOCIATES, 3720 Executive Center Drive, MARTINEZ, GA** to handle the Closing of the transaction contemplated in this Agreement.

**e. Closing Costs.** Seller shall pay the cost of the Termite Certification. Except as may be prohibited by FHA or VA regulations, Purchaser shall pay for all other costs related to the Closing, including but not limited to cost of any title search, all recording fees, deed and transfer tax (deed stamps) imposed by the State of South Carolina upon the recording of the Deed, the costs for preparation of the Deed, any capital contribution, initial assessment or transfer fee charged by the Association, and any costs and expenses associated with Purchaser's financing of Purchaser's acquisition of the Property.

**f. Prorations.** All real property taxes for the current year, homeowner association dues and assessments for the current assessment period (but not homeowner association capital assessments due at or after the Closing) and hazard insurances premiums (if applicable), shall be prorated as of the Closing Date, using the most accurate information available on the Closing Date.

**17. UTILITIES AND PERSONAL PROPERTY.** Purchaser shall transfer all utilities into Purchaser's name within twenty-four (24) hours after Closing (excluding weekends and holidays). Purchaser shall not move any personal property onto the Property prior to Closing.

**18. DEFAULT; REMEDIES.** The remedies specified below shall be the sole and exclusive remedies available to the parties in the event of breach of this Agreement, and shall be to the exclusion of all other remedies at law or in equity.

**a. Purchaser's Default.** If Purchaser defaults on any of its obligations hereunder prior to Closing, Seller's sole and



exclusive remedy shall be to terminate this Agreement by written notice to Purchaser; whereupon, Seller shall retain all Earnest Money and Option Money (if any) paid by Purchaser to Seller as liquidated damages. Thereafter, neither party shall have any further liability or obligation to the other hereunder.

**b. Seller's Default.** If Seller defaults on any of its obligations hereunder prior to Closing, Purchaser's sole and exclusive remedy shall be either: (a) to terminate this Agreement by written notice to Seller, whereupon Purchaser shall be entitled to recover all Earnest Money and Option Money (if any) paid to Seller, or (b) to seek specific performance of this Agreement by serving written notice of default on Seller and by instituting mandatory binding arbitration of Purchaser's claim of default and demand for specific performance in accordance with Section 15 above. Notwithstanding the foregoing, subject to the provisions of Section 27 below and provided that Seller has not terminated this Agreement as a result of breach by Purchaser, if Seller is obligated by this Agreement to build a single-family residence on the Lot and Seller fails to complete construction of the residence within two (2) years of the date Purchaser signs this Agreement, then Purchaser may pursue whatever remedies it may have against Seller at law or in equity.

**19. TIME/DATE.** The Effective Date of this Agreement shall be the date of signing of this Agreement by Seller. **Time is of the essence** as to the occurrence of all events, the satisfaction of all conditions and the performance of all obligations hereunder.

**20. RESTRICTIVE COVENANTS; HOMEOWNERS ASSOCIATION.** Purchaser acknowledges receipt of a copy of that certain declaration of covenants, conditions and restrictions for **Abbey at Trolley Run St 60** Subdivision, together with all amendments thereto (collectively, the "Declaration"). Purchaser acknowledges that the Property is subject to the Declaration and that, upon purchase of the Property, Purchaser shall personally be subject to all the provisions of the Declaration, including but not limited to provisions requiring membership in and payment of assessments to any homeowners association for the Subdivision (the "Association"). Purchaser further acknowledges that the current regular assessment due to the Association is estimated to be **595** annually. Purchaser acknowledges that, in addition to the regular assessment, Purchaser shall be required to pay an initial fee or assessment to the Association at Closing in the amount of and a Processing Transfer Fee of **TBD**. PURCHASER FURTHER ACKNOWLEDGES THAT THE DECLARATION MAY BE AMENDED FROM TIME TO TIME AS PROVIDED THEREIN, AND THAT THE AMOUNTS TO BE PAID BY PURCHASER TO THE ASSOCIATION MAY CHANGE AT ANY TIME.

**21. SUCCESSORS AND ASSIGNS; INTERPRETATION.** This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their heirs, successors, administrators, executors and assigns. Purchaser shall not have the right to assign Purchaser's interest in this Agreement. As required by context herein, the singular shall include the plural, and the neuter shall include the masculine and the feminine.

**22. ENTIRE AGREEMENT; AMENDMENT.** This document contains the sole and entire agreement between the parties hereto with regard to the Property. All prior discussions have been merged into this Agreement. No representation, statement, promise or inducement shall be binding upon either party hereto unless specifically stated in this Agreement. This Agreement may not be modified except by a writing signed by both parties.

**23. SEVERABILITY.** If any provision of this Agreement shall be declared invalid or unenforceable by laws applicable thereto, or unenforceable as to certain parties, then the performance of such provision shall be excused by the parties hereto and the remaining provisions of this Agreement shall remain in full force and effect.

**24. NO-WAIVER.** Any failure or delay of Purchaser or Seller to enforce any term of this Agreement shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be specifically stated in a writing delivered to the other party in compliance with Section 28 below. Any such waiver by Purchaser or Seller shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

## **25. ADDENDA AND EXHIBITS.**

**a. Addenda.** The following Addenda are attached hereto and incorporated herein:

- ☒ Addendum 1, Builder's Referral Incentives and Contributions Addendum
- ☒ Addendum 2, Construction Addendum and Disclosures
- ☐ Addendum 3, Current Residence Contingency
- ☒ Addendum 4, Co-Broker Commission Addendum
- ☐ Addendum 5, Alternative Incentive Addendum
- ☐ Addendum 6, Special Stipulations

- ☐ Addendum 7, Model House
- ☒ Addendum 8, Variations in Materials and Components
- ☒ Smart Home Disclosure Addendum
- ☐ Community-Specific Addenda

**b. Exhibits.** The following Exhibits are attached hereto and incorporated herein:

- (1) Exhibit A, Home Features and Options

**26. NOTICE.** Except when specifically provided otherwise herein, any notices required to be given hereunder must be in writing. Notice shall be deemed delivered upon receipt or refusal if deposited in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid, properly addressed to the party to be served. Notice shall also be deemed given if delivered to the address for service of notice shown below by Federal Express, UPS or other nationally recognized overnight carrier service, with no signature or receipt required. Notice to Purchaser also shall be deemed given if delivered to the email address for service of notice shown under Purchaser's signature. Each party warrants that its correct mailing address for service of notice is shown below. Purchaser warrants that its correct telephone number and email address are shown below. A party may change its address for service of notice by giving the other party written notice of the change of address.

**27. EXCUSED DELAYS.** Notwithstanding any other provision herein, if Seller is delayed in performing any of its obligations hereunder or meeting any specified completion dates by labor disputes, fire, delays in deliveries, adverse weather conditions, unanticipated damage to or destruction of the Property, governmental controls or moratoria, acts of God or any other causes beyond Seller's reasonable control, then the time-period specified herein for performance of such obligation and/or meeting such completion date shall be extended a sufficient number of working days to enable and allow Seller to perform and/or complete the obligation.

**28. OFFER.** This instrument shall be regarded as an offer by the first party to sign until fully executed by both parties, at which time it shall become binding on both parties.

**29. ELECTRONIC SIGNATURES AND TRANSMISSIONS.** This Agreement may be executed by electronic means via DocuSign. Such signatures shall be deemed to constitute originals for all purposes hereunder. In addition, if either party transmits executed documents in electronic format via facsimile or email, then the other party may rely upon such documents as if they were executed originals.

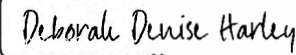
**WHEN SIGNED BY BOTH PARTIES, THIS DOCUMENT WILL BECOME A BINDING CONTRACT IMPOSING LEGALLY ENFORCEABLE OBLIGATIONS UPON YOU. SELLER'S SALES REPRESENTATIVE DOES NOT HAVE AUTHORITY TO EXECUTE THIS CONTRACT ON BEHALF OF SELLER OR OTHERWISE BIND SELLER. IF YOU DO NOT FULLY UNDERSTAND THIS DOCUMENT OR IF YOU DO NOT FEEL IT MEETS YOUR NEEDS, YOU SHOULD CONSULT A SOUTH CAROLINA REAL ESTATE ATTORNEY BEFORE SIGNING IT.**

(Signatures on the Following Page)

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IN WITNESS WHEREOF, the parties hereto have executed this Home Purchase Agreement on the dates indicated below.

**PURCHASER:**

DocuSigned by:  
  
 CF2869BE10AC436... 4/21/2021

**Buyer:** Deborah Denise Harley Date

Purchaser's Current Mailing Address:

2917 Running Creek Lane

Augusta, GA 30907

US

Purchaser's Home Phone:

Mobile Phone: (478) 718-5858

Work Phone:

Purchaser's Email: [deborahdharley@yahoo.com](mailto:deborahdharley@yahoo.com)

Co-Buyer's Current Mailing Address:

Co-Buyer's Home Phone:

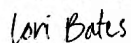
Mobile Phone:

Work Phone:

Co-Buyer's Email:

**SELLER:**

**D.R. Horton Inc.**

DocuSigned by:  
  
 1E047717EF6745C...

Lori Bates

Officer, D.R. Horton

4/23/2021

Date

Seller's Address:

1371 Dogwood Dr. SW

Conyers, GA 30012

*For Internal Purposes Only:*

Seller's Sales Representative:

DocuSigned by:  
  
 g252B1E2643741E...

**Sales Rep:** Jared Paull

4/21/2021

Date

JWPaull@drhorton.com

(803) 800-4476

Sales Rep License Number: **54110**

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466390028

## EXHIBIT A HOUSE FEATURES AND OPTIONS

Community: **Abbey at Trolley Run St 60**Lot: **28**Plan/Elevation: **DENTON Express**Address: **321 DONNINGTON COURT, AIKEN, SC 29801**

**1. OPTIONS SELECTIONS.** Purchaser has selected the features, options and upgrades listed below (collectively, the "Options") to be included in the House. Seller will include the Options in the House at the prices indicated below. In the event Seller omits the installation of any Option in the House, Seller's responsibility for such omission shall be limited to a refund of the applicable price or allowance stated below. Any such omission shall not invalidate this Agreement, constitute a breach of its terms or give rise to any claim for damages against Seller.

The Options are as follows:

### Selected Options

#### AP – Appliances

| AP – Appliances                                                  |               |                  |             |                  |             |                   |                   |
|------------------------------------------------------------------|---------------|------------------|-------------|------------------|-------------|-------------------|-------------------|
| <u>Option #</u>                                                  | <u>Rev. #</u> | <u>Rev. Date</u> | <u>User</u> |                  | <u>Qty.</u> | <u>Unit Price</u> | <u>Ext. Price</u> |
| APWPPFG1                                                         | 0             | 04/21/2021       | Jared Paull |                  | 1.0000      | \$ 0.00           | \$ 0.00           |
| <b>Color:</b>                                                    |               |                  |             | <b>Location:</b> |             |                   |                   |
| WHIRLPOOL PLAT FREE STANDING RANGE GAS APPLIANCE PKG (STAINLESS) |               |                  |             |                  |             |                   |                   |
|                                                                  |               |                  |             |                  |             | <b>Sub-Total</b>  | <b>\$ 0.00</b>    |

#### AR – Area Cost

| AR – Area Cost         |        |            |             |                  |        |                  |                |
|------------------------|--------|------------|-------------|------------------|--------|------------------|----------------|
| Option #               | Rev. # | Rev. Date  | User        |                  | Qty.   | Unit Price       | Ext. Price     |
| AR466390               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00          | \$ 0.00        |
| <b>Color:</b>          |        |            |             | <b>Location:</b> |        |                  |                |
| TROLLY RUN STATION 60' |        |            |             |                  |        |                  |                |
|                        |        |            |             |                  |        | <b>Sub-Total</b> | <b>\$ 0.00</b> |

#### CA – Cabinets

| CA – Cabinets                                                                                                        |        |            |             |        |            |            |   |
|----------------------------------------------------------------------------------------------------------------------|--------|------------|-------------|--------|------------|------------|---|
| Option #                                                                                                             | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
| CA000105                                                                                                             | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| Color:                                                                                                               |        |            | Location:   |        |            |            |   |
| EXPRESS/DRH-E CABINET UPGRADE PACKAGE                                                                                |        |            |             |        |            |            |   |
| UPGRADE FROM 30" TO 36" MAIN UPPER CABINETS WITH STAGGERED 24" CABINET OVER RANGE AND 18" CABINET OVER REFRIGERATOR. |        |            |             |        |            |            |   |
| CA000110                                                                                                             | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| Color:                                                                                                               |        |            | Location:   |        |            |            |   |
| EXPRESS KITCHEN CABINET CROWN MOLD                                                                                   |        |            |             |        |            |            |   |
| Sub-Total                                                                                                            |        |            |             |        |            | \$ 0.00    |   |

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| CT – Countertops                                        |        |            |             |  |        |            |            |
|---------------------------------------------------------|--------|------------|-------------|--|--------|------------|------------|
| Option #                                                | Rev. # | Rev. Date  | User        |  | Qty.   | Unit Price | Ext. Price |
| CT000370                                                | 0      | 04/21/2021 | Jared Paull |  | 1.0000 | \$ 0.00    | \$ 0.00    |
| Color: COLOR DRIVEN BY INTERIOR PKG                     |        |            | Location:   |  |        |            |            |
| NATURAL STONE COUNTERTOP IN KITCHEN W/CONTINUOUS BARTOP |        |            |             |  |        |            |            |

Sub-Total \$ 0.00

| EL – Electrical                                                                        |        |            |             |                  |        |            |            |
|----------------------------------------------------------------------------------------|--------|------------|-------------|------------------|--------|------------|------------|
| Option #                                                                               | Rev. # | Rev. Date  | User        |                  | Qty.   | Unit Price | Ext. Price |
| EL000101                                                                               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 215.00  | \$ 215.00  |
| <b>Color:</b><br>CEILING FAN (FAMILY ROOM)                                             |        |            |             | <b>Location:</b> |        |            |            |
| EL000102                                                                               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 215.00  | \$ 215.00  |
| <b>Color:</b><br>CEILING FAN (MASTER BEDROOM)                                          |        |            |             | <b>Location:</b> |        |            |            |
| EL000215                                                                               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00    | \$ 0.00    |
| <b>Color:</b><br>KITCHEN LIGHTING PACKAGE (LED-DISC LIGHTS)                            |        |            |             | <b>Location:</b> |        |            |            |
| EL000260                                                                               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00    | \$ 0.00    |
| <b>Color:</b><br>PREWIRE GARBAGE DISPOSAL (DO NOT REMOVE WHEN ADDING GARBAGE DISPOSAL) |        |            |             | <b>Location:</b> |        |            |            |
| EL0DEAKO                                                                               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00    | \$ 0.00    |
| <b>Color:</b><br>DEAKO LIGHT SWITCHES                                                  |        |            |             | <b>Location:</b> |        |            |            |

Sub-Total \$ 430.00

| EV – Elevations |               |                  |                  |  |             |                   |                   |
|-----------------|---------------|------------------|------------------|--|-------------|-------------------|-------------------|
| <u>Option #</u> | <u>Rev. #</u> | <u>Rev. Date</u> | <u>User</u>      |  | <u>Qty.</u> | <u>Unit Price</u> | <u>Ext. Price</u> |
| EV017000        | 0             | 04/21/2021       | Jared Paull      |  | 1.0000      | \$ 0.00           | \$ 0.00           |
| <b>Color:</b>   |               |                  | <b>Location:</b> |  |             |                   |                   |
| VINYL Elevation |               |                  |                  |  |             |                   |                   |

Sub-Total \$ 0.00

| EX – Exterior                                                                                                                          |        |            |                  |  |        |            |            |
|----------------------------------------------------------------------------------------------------------------------------------------|--------|------------|------------------|--|--------|------------|------------|
| Option #                                                                                                                               | Rev. # | Rev. Date  | User             |  | Qty.   | Unit Price | Ext. Price |
| COLORAAU                                                                                                                               | 0      | 04/21/2021 | Jared Paull      |  | 1.0000 | \$ 0.00    | \$ 0.00    |
| <b>Color:</b> SHUTTER STYLE PER ELEVATION                                                                                              |        |            | <b>Location:</b> |  |        |            |            |
| Express Aurora Package (Black Gutters)                                                                                                 |        |            |                  |  |        |            |            |
| Vinyl Siding: White Vinyl Shake: White Vinyl Board and Batten: White Paint: Scheme 420 (Siding 7004/Accent 7004) Primary Brick: Capers |        |            |                  |  |        |            |            |
| Island Brick Quions: not applicable Stone: Sawgrass Mortar: Magnolia Buff Roof: Black Shutters: Black Windows: White Soffit Fascia     |        |            |                  |  |        |            |            |
| Garage: White Gutters: Black                                                                                                           |        |            |                  |  |        |            |            |
| EX000290                                                                                                                               | 0      | 04/21/2021 | Jared Paull      |  | 1.0000 | \$ 0.00    | \$ 0.00    |
| <b>Color:</b>                                                                                                                          |        |            | <b>Location:</b> |  |        |            |            |
| GUTTERS ON ALL SIDES                                                                                                                   |        |            |                  |  |        |            |            |

Sub-Total \$ 0.00

| FL – Flooring |        |            |             |  |        |            |            |
|---------------|--------|------------|-------------|--|--------|------------|------------|
| Option #      | Rev. # | Rev. Date  | User        |  | Qty.   | Unit Price | Ext. Price |
| FL001950      | 0      | 04/21/2021 | Jared Paull |  | 1.0000 | \$ 0.00    | \$ 0.00    |

**Color:** COLOR DRIVEN BY INTERIOR PKG  
**Location:** MOHAWK LAMINATE FLOORING 1ST FLOOR (EXCLUDES BEDROOMS)

**Sub-Total** \$ 0.00

**FP – Fireplace**

| Option #                                                          | Rev. # | Rev. Date  | User        | Qty.             | Unit Price | Ext. Price |   |
|-------------------------------------------------------------------|--------|------------|-------------|------------------|------------|------------|---|
| FP000140                                                          | 0      | 04/21/2021 | Jared Paull | 1.0000           | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>DIRECT VENT FIREPLACE FIBER CEMENT (FAMILY ROOM) |        |            |             | <b>Location:</b> |            |            |   |

**Sub-Total** \$ 0.00

**GA – Garage**

| Option #                                                                 | Rev. # | Rev. Date  | User        | Qty.             | Unit Price | Ext. Price |   |
|--------------------------------------------------------------------------|--------|------------|-------------|------------------|------------|------------|---|
| GA000110                                                                 | 0      | 04/21/2021 | Jared Paull | 1.0000           | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>CARRIAGE DOORS WITH DECORATIVEHINGES - FRONT ENTRY ONLY |        |            |             | <b>Location:</b> |            |            |   |

**Sub-Total** \$ 0.00

**IO – Interior Options**

| Option #                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Rev. # | Rev. Date  | User        | Qty.             | Unit Price | Ext. Price |   |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|------------|-------------|------------------|------------|------------|---|
| COLOREW4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 0      | 04/21/2021 | Jared Paull | 1.0000           | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>EXPRESS WHITE - INTERIOR PKG<br>INTERIOR PAINT: SW7029 AGREEABLE GRAY (PAINTERS EDGE), CABINETS: WHITE PAINT, GRANITE KITCHEN (IF APPLICABLE): WHITE FANTASY, BACKSPLASH (IF APPLICABLE): GRAY SUBWAY, LAMINATE COUNTERTOP: PEARL SOAPSTONE MARBLE BATH COUNTEROP (IF APPLICABLE): SOLID WHITE GEL, CARPET: TEMPLE STONE 728, ENGINEERED FLOORING(IF APPLICABLE): MILLSTONE CHESNUT DRW33, HARDWOODS (IF APPLICABLE): GRAPHITE BIRCH DRW18, BATH/LAUNDRY VINYL FLOORING: 591 SILVER SCREEN, BATH TILE (IF APPLICABLE): CA22 CANDIDO |        |            |             | <b>Location:</b> |            |            |   |
| IN000570                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 0      | 04/21/2021 | Jared Paull | 1.0000           | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>BLINDS THROUGHOUT HOUSE (SLAB)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |        |            |             | <b>Location:</b> |            |            |   |

**Sub-Total** \$ 0.00

**LS – Landscape**

| Option #                                                                                                                                                                                                                                                                                                      | Rev. # | Rev. Date  | User        | Qty.             | Unit Price | Ext. Price |   |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|------------|-------------|------------------|------------|------------|---|
| LS000170                                                                                                                                                                                                                                                                                                      | 0      | 04/21/2021 | Jared Paull | 1.0000           | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>UPGRADE TO SILVER LANDSCAPE PACKAGE<br>16 - 3 GALLON PLANTS: 9 - TALL 2 DIFFERENT VARIETIES 7 - SHO RT 2 DIFFERENT VARIETIES 2 - 2" HARDWOOD TREES OAK OR MAPLE:3 GALLON TALL - ANISE, CIEYERA, LIQUSTRUM3 GALLON SHORT - CAR ISSA, RUBY COROPETALUMS,INDIAN HAWTHORNEONE 6' X 12' KIDNEY SH |        |            |             | <b>Location:</b> |            |            |   |

**Sub-Total** \$ 0.00

**PL – Plumbing**

| Option #                          | Rev. # | Rev. Date  | User        | Qty.             | Unit Price | Ext. Price |   |
|-----------------------------------|--------|------------|-------------|------------------|------------|------------|---|
| PL000345                          | 0      | 04/21/2021 | Jared Paull | 1.0000           | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>GARBAGE DISPOSAL |        |            |             | <b>Location:</b> |            |            |   |
| PL000350                          | 0      | 04/21/2021 | Jared Paull | 1.0000           | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b>                     |        |            |             | <b>Location:</b> |            |            |   |

| GAS FOR HEATING AND COOKING          |   |            |             |                  |  |        |         |         |   |
|--------------------------------------|---|------------|-------------|------------------|--|--------|---------|---------|---|
| PL000480                             | 0 | 04/21/2021 | Jared Paull |                  |  | 1.0000 | \$ 0.00 | \$ 0.00 | P |
| <b>Color:</b>                        |   |            |             | <b>Location:</b> |  |        |         |         |   |
| SHOWER DOOR - FIBERGLASS SHOWER UNIT |   |            |             |                  |  |        |         |         |   |
| PL000490                             | 0 | 04/21/2021 | Jared Paull |                  |  | 1.0000 | \$ 0.00 | \$ 0.00 | P |
| <b>Color:</b>                        |   |            |             | <b>Location:</b> |  |        |         |         |   |
| TANKLESS WATER HEATER                |   |            |             |                  |  |        |         |         |   |

Sub-Total \$ 0.00

| SW – Structured Wiring                 |        |            |             |  |        |            |            |
|----------------------------------------|--------|------------|-------------|--|--------|------------|------------|
| Option #                               | Rev. # | Rev. Date  | User        |  | Qty.   | Unit Price | Ext. Price |
| SWHOMCON                               | 0      | 04/21/2021 | Jared Paull |  | 1.0000 | \$ 0.00    | \$ 0.00    |
| Color:                                 |        |            | Location:   |  |        |            |            |
| HOME IS CONNECTED (SMART HOME PACKAGE) |        |            |             |  |        |            |            |

Sub-Total \$ 0.00

| TR – TR         |               |                  |             |                  |             |                   |                   |
|-----------------|---------------|------------------|-------------|------------------|-------------|-------------------|-------------------|
| <u>Option #</u> | <u>Rev. #</u> | <u>Rev. Date</u> | <u>User</u> |                  | <u>Qty.</u> | <u>Unit Price</u> | <u>Ext. Price</u> |
| TR003300        | 0             | 04/21/2021       | Jared Paull |                  | 1.0000      | \$ 0.00           | \$ 0.00           |
| <b>Color:</b>   |               |                  |             | <b>Location:</b> |             |                   |                   |
| EXPRESS TRIM    |               |                  |             |                  |             |                   |                   |

Sub-Total \$ 0.00

Total: \$ 430.00

(No color selections found.)

Base Home Price: **\$267,500.00**  
Options Total: **\$ 430.00**  
Options Incentives: **\$ 0.00**  
Lot Premium: **\$3,000.00**  
**Total Home Price: \$270,930.00**

**2. OPTION MONEY.** The parties hereby acknowledge that Purchaser has paid to Seller \$ **0.00** towards the cost of the Options, and Purchaser shall make additional payments towards the cost of the Options in the amounts shown in the table below by the due dates shown in the table below. Such payments towards the cost of the Options, and any and all future payments made by Purchaser for options in advance of Closing, are collectively referred to in this Agreement as “Option Money.”

(No option deposits found.)

Option Money paid to Seller shall not be held in escrow and shall be nonrefundable to Purchaser, except in the event of material breach of this Agreement by Seller or as otherwise provided in this Agreement. Upon Closing, all Option Money previously paid to Seller shall be credited to Purchaser against the Purchase Price. Any change to the Options shall be subject to additional charges, as set forth in Addendum 2 to the Agreement.

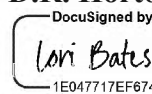
**PURCHASER:**

DocuSigned by:  
  
CF2869BE10AC436...

Buyer: Deborah Denise Harley

4/21/2021  
Date

**SELLER:****D.R. Horton Inc.**

DocuSigned by:  
  
1E047717EF6745C...

Lori Bates

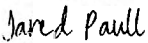
Officer, D.R. Horton

For Internal Purposes Only:

4/23/2021  
Date

Buyer(s): Deborah Denise Harley, Community: Abbey at Trolley Run St 60, Plat: 28//1A, Address: 321 DONNINGTON COURT, Sales Rep: Jared Paull

Job: 466390028  
Printed: 4/21/2021

DocuSigned by:  
  
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4/21/2021

Sales Rep: Jared Paull

Date

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Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
 Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
 Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run**  
**St 60**  
 Lot: **28**  
**466390028**

## **ADDENDUM 2** **CONSTRUCTION ADDENDUM & DISCLOSURES**

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between **Deborah Denise Harley** as Purchaser and **D.R. Horton Inc.**, as Seller, regarding that parcel of land located in **AIKEN** County, **SC**, briefly described as Lot **28**, in **Abbey at Trolley Run St 60** and referred to in the Agreement as the "Lot." All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree as follows:

**1. CONSTRUCTION OF HOUSE.** Prior to Closing, Seller shall construct or complete construction of a single-family ☒ detached ☐ townhouse residence (the "House") on the Lot. Seller shall not be required to commence construction of the House unless and until: (a) the Loan has been approved by Purchaser's lender to Seller's satisfaction (if the Agreement contains a Financing Contingency); (b) Purchaser has paid all amounts then due to Purchaser's lender (if any) and to Seller; and (c) all contingencies to Purchaser's performance hereunder have been satisfied or removed to Seller's satisfaction. Seller's obligation to construct the House shall be contingent on Seller's ability: (a) to place the House on the Lot without obtaining variances from any set-backs or other dimensional requirements, and (b) to construct the House on the Lot without incurring abnormal costs for foundation, slab or structural support walls. If Seller determines that either of these contingencies cannot be satisfied to Seller's satisfaction, then Seller may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money and Option Money (if any) shall be refunded to Purchaser.

**2. HOUSE PLAN.** Seller shall construct the House according to the **DENTON Express** Plan, Elevation **A1**, including those features and options listed on Exhibit A to the Agreement, ☒ on a slab / ☐ over a basement (the "Base Plan"). Purchaser hereby acknowledges and agrees as follows:

- a. Seller shall determine the placement and orientation of the House on the Lot in Seller's sole discretion.
- b. The House shall be handmade and unique, and that although the House shall be based on the Base Plan, variations from the Base Plan will occur. Seller shall not be responsible for such variations from the Base Plan or changes to the Base Plan standard features made prior to Closing. Standard features of the Base Plan are subject to change without notice or obligation.
- c. Brochures, collateral, drawings, renderings and other marketing materials, models and displays used by Seller's sales agents are for general illustrative purposes only, and are not to be relied upon as representations of actual locations, dimensions, specifications, features or finished products.
- d. Seller may locate the heating, wiring and electrical system, hot water heater, all plumbing lines, and gas and electric meters at Seller's sole discretion.
- e. Seller may substitute materials or items to be used in the construction of the House with materials or items of equal or comparable value, in Seller's reasonable discretion.
- f. Seller may remove or retain any trees and other vegetation currently existing on the Property if, in Seller's sole discretion, Seller determines that such removal or retention is necessary or desirable in connection with the development of the Property or the Subdivision.
- g. Seller may use a helicopter during the development and construction phases of the Subdivision. From time to time, there may be helicopter flyovers and/or landings in the Subdivision. Once construction is completed, said flyovers and landings by Seller will cease.
- h. Subject only to the provisions of 9.c and 14 of this Agreement, Closing shall constitute acceptance of the House by Purchaser **AS BUILT**, and Purchaser hereby waives any right to object to any variation in construction from the Base Plan after Closing.

**3. HEATING AND AIR CONDITIONING.** The House shall be adequately and efficiently heated and air-conditioned with equipment having at least the minimum specifications for the House as established by applicable building and construction codes. Purchaser acknowledges that the performance and methods and practices of operating heating and cooling systems can be directly affected by the orientation and location of a room or Home in relation to the sun. Seller shall, therefore, have no obligation other than to install a heating and cooling system at the Property which has been sized and designed based on industry standards for the type and size of House to be

constructed and which functions in accordance with industry standards. No representations are made that the systems in the Property including, by way of example only, heating and air conditioning and electrical systems will operate or perform at a level or standard greater than the minimum specifications of the manufacturer. The clothes dryer shall vent to the outside.

**4. INSULATION.** The type, thickness and R-value of the insulation to be installed in the House, where construction reasonably permits as determined in the sole discretion of Seller, shall be as follows: (a) exterior walls are insulated with batt insulation to a thickness of 3.5 inches or per code, whichever is greater, which will yield an R- value meeting or exceeding applicable building code; (b) ceilings below attic areas are insulated with blown insulation to a thickness of 12 inches or per code, whichever is greater, which will yield an R-value meeting or exceeding applicable building code; (c) vaulted ceilings are insulated with batt insulation to a thickness of 3.5 inches or per code, whichever is greater, which will yield an R-value meeting or exceeding applicable building code; (d) floor overhangs are insulated with batt insulation to a thickness of 3.5 inches or per code, whichever is greater, which will yield an R-value meeting or exceeding building code; (e) notwithstanding the foregoing, Purchaser acknowledges that insulation may be of lesser thickness and R-value than indicated in certain areas based upon normal construction variances in insulation thickness and openings in walls and where the design of the Home does not permit greater thickness. Purchaser further acknowledges that the information above as to R-values is based on the representation of the manufacturer or installer of the insulation and Seller does not warrant the accuracy of such representations. Seller reserves the right to substitute the type, thickness and R-value of the insulation installed in the Home as long as the R-value of the insulation installed in a substantial portion of the Home is not substantially changed.

**5. ALARM SYSTEM OR PREWIRING.** Only the item checked below is part of this Agreement:

- ☐ A. An alarm system shall be or has been INSTALLED on the main floor of the House; however it shall be Purchaser's responsibility to activate the alarm system and secure monitoring for the alarm system. Seller shall not be responsible for any changes made to the alarm system by Purchaser or by any alarm-servicing or monitoring company other than the contractor engaged by Seller to install the system.
- ☐ B. An alarm system shall be or has been PREWIRED on the main floor of the House; however it shall be Purchaser's responsibility to install an alarm system, activate the alarm system, and secure monitoring for the alarm system. Seller shall not be responsible for any changes made to the alarm system prewiring by Purchaser or by anyone other than the contractor engaged by Seller to install the system. Purchaser understands and acknowledge there may be additional costs associated with installation, activation, and/or monitoring of an alarm system. Any additional costs associated with the installation, activation, and/or monitoring of an alarm system are the Purchaser's sole responsibility and are not part of this Agreement.

☒ C. The House shall not be prewired for a security system, nor will an alarm system be installed.

**6. CHANGES.** After the execution of this Agreement, Seller may (but shall not be obligated to) permit Purchaser to change the options to be included House. Seller may withhold approval of any change in its sole discretion. In order to change an option in the House, Purchaser shall pay to Seller a Change Fee in the amount of Five Hundred and 00/100 Dollars (\$500.00) for each such change at the time the request is approved by Seller. Any Change Fee paid shall be nonrefundable and shall not be credited against the Purchase Price. Any changes shall not be effective unless evidenced by a written amendment to this Agreement. At the time of execution of that amendment, Seller may, in its sole discretion, require Purchaser to pay additional Option Money in the amount of the total increase in the Purchase Price resulting from the change. Any Option Money paid to Seller at any time shall not be held in escrow, and shall be nonrefundable to Purchaser except in the event of: (1) breach of this Agreement by Seller, or (2) termination of this Agreement by Seller pursuant to Section 2 above. At Closing, all Option Money previously paid to Seller shall be credited to Purchaser against the Purchase Price. Purchaser acknowledges that any changes may affect the timing of completion of the House. Purchaser acknowledges that the cost of options and upgrades may not result in a commensurate increase in the value of the Property.

**7. COMPLETION.** Subject to the contingencies stated herein, Seller shall complete construction of the House prior to Closing. Seller shall construct the House according to all applicable governmental codes and regulations. Construction of the House shall be deemed complete when a certificate of occupancy is issued for the House by the applicable governmental authority. Seller shall deliver the completed House to Purchaser at Closing in "broom-clean" condition, ready to occupy. The House and Lot shall be free of all trash and debris.

**8. PURCHASER'S INQUIRIES.** Purchaser shall direct all inquiries and questions to Seller's on-site associate. The on-site associate will provide Purchaser with timely responses; however, the associate does not and shall not have authority to change the terms of this Agreement in any manner. This Agreement may be changed or modified only by a written amendment duly executed by both Purchaser and Seller. Purchaser acknowledges that Seller's sales associates, superintendents, closing staff, warranty staff and other employees **do not** have authority to modify this Agreement. Only an authorized corporate officer of Seller may modify this Agreement on Seller's behalf.

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IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATES SHOWN BELOW.

PURCHASER:

DocuSigned by:

Deborah Denise Harley

CF2869BE10AC436...

4/21/2021

Buyer: Deborah Denise Harley

Date

SELLER:

D.R. Horton Inc.

DocuSigned by:

Lori Bates

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4/23/2021

Lori Bates

Date

Officer, D.R. Horton

For Internal Purposes Only

Seller's Sales Representative:

DocuSigned by:

Jared Paull

8252B1E2643741E...

4/21/2021

Sales Rep: Jared Paull

Date



Abbey at Trolley Run St 60

28

466390028

**ADDENDUM 8****VARIATIONS IN MATERIALS AND COMPONENTS**

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between Deborah **Denise** Harley, as Purchaser, and **D.R. Horton Inc.**, as Seller, regarding that parcel of land located in **AIKEN** County, SC, briefly described as Lot **28**, Block/Phase , **Abbey at Trolley Run St 60** subdivision, and referred to in the Agreement as the "Lot." All terms defined in the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree and acknowledge as follows:

1. Many materials, both natural and man-made, used in the construction of homes contain variations and inconsistencies. Such variations and inconsistencies are beyond Seller's control, and Seller shall not be responsible or liable for them. Some of the materials and components which may exhibit variations and inconsistencies are detailed in the sections below.

2. CONCRETE. Purchaser understands and acknowledges that when adding additional concrete to the existing concrete pad, the two pads may not match in color. Also, there may be visible seam between the two pads.

3. INTERIOR PAINT. Seller installs a level 4 drywall/Gypsum Board finish in its homes. White or light color flat paint is recommended for this type of finish and is a standard feature in Seller's homes. Colored, gloss or semi-gloss paint are not recommended as they may magnify joint or patch photographing in critical lighting areas.

4. OUTLET LOCATIONS. Purchaser understands that any cable, phone and/or data outlet locations that are not specifically designated at the initial time of selections will be placed by the construction supervisor, and will not be moved.

5. WOOD.

a. Purchaser understands that wood of the same species will vary in color, mineral streaking, texture, pitch pockets, and grain uniformity, depending on when, where and how the tree grew and the fact that different wood products come from different manufacturers. These characteristics may occur on adjacent cabinets, between pair of doors and/or drawers, with the same cabinet panels, between flooring, stair treads and railings and between flooring and cabinets/vanities. It is these differences, caused by nature, that create the warmth and individuality of fine woods. Darker finishes tend to hide some of these natural characteristics while lighter finishes tend to accentuate the differences. Because of this, the variations in color and contrast may be different than in a display or in a smaller sample.

b. Seller shall not be responsible under any circumstances for damage or wear to hardwood flooring caused in whole or in part by moisture. Please refer to the Limited Warranty administered by Residential Warranty Corporation for terms, conditions, and exclusions pertaining to flooring.

6. STUCCO. The final appearance of your home may be impacted by sunlight angles, shadows from architectural details, application and texturing techniques, environmental surrounding and color lot to color lot variations.

7. BRICK/STONE. Brick and stone products are composed of earthen materials and go through many processes before firing and consequently each run or lot of brick/stone will vary. Photographs, samples and even completed homes are only a representation of the color and each run or lot and even installation can vary from home to home. An exact replication of total color or percentages as displayed by samples or model homes cannot be guaranteed.

Buyer(s): Deborah Denise Harley, Community: Abbey at Trolley Run St 60, Plat: 28//1A, Address: 321 DONNINGTON COURT, Sales Rep: Jared Paull

Job: 466390028  
Printed: 4/21/2021

8. GRANITE/CERAMIC/MARBLE. The materials used in counter tops, fireplace surrounds/hearths, wall and floor tile contain color variations and “veining”, natural blemishes, and grain. Accordingly, consistency *cannot be guaranteed*.

9. In the event of any conflict between the provisions of this Addendum and the provisions of the Agreement, the Agreement shall control. In the event of any conflict between the provisions of this Addendum and the provisions of the Limited Warranty, the Limited Warranty shall control.

IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND UNDERSTOOD THIS ADDENDUM, HEREBY EXECUTE THIS ADDENDUM AS OF THE DATES SHOWN BELOW.

|                                                                                                                                                                                                        |                                                                                                                                                                                                                    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Purchaser:</b><br><div><div>DocuSigned by:<br/><i>Deborah Denise Harley</i><br/>CF2869BE10AC436...</div><div><div>4/21/2021</div><div>Date</div></div></div><br><b>Buyer:</b> Deborah Denise Harley | <b>Seller:</b><br><b>D.R. Horton Inc.</b><br><div><div>DocuSigned by:<br/><i>Lori Bates</i><br/>1E047717EF6745C...</div><div><div>4/23/2021</div><div>Date</div></div></div><br>Lori Bates<br>Officer, D.R. Horton |
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Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
Lender: **DHI MORTAGE** / Lender Agent: **RITZ, MIKE**

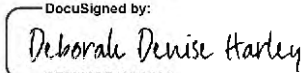
Project: **Abbey at Trolley Run  
St 60**  
Lot: **28**  
466390028

## FHA REAL ESTATE CERTIFICATION

This certification is attached to and made part of that certain Home Purchase Agreement (the “Agreement”) by and between **D.R. Horton Inc.**, as Seller, and **Deborah Denise Harley**, as Purchaser, for the purchase and sale of Lot **28**, Block/Phase , **Abbey at Trolley Run St 60** Subdivision in **AIKEN**, SC. Capitalized terms not otherwise defined herein shall have the same meanings as ascribed to them in the Agreement.

Purchaser, Seller, and Co-Broker hereby certify that (1) the terms and conditions of the Agreement are true to the best of their knowledge and belief, and (2) any other agreement entered into by any of these parties in connection with this real estate transaction is part of, or attached to, the Agreement.

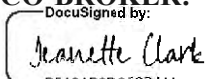
### PURCHASER:

DocuSigned by:  
  
CF2869BE10AC136...  
Buyer: Deborah Denise Harley  
4/21/2021  
Date

### SELLER:

D.R. Horton Inc.  
DocuSigned by:  
  
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Lori Bates  
4/23/2021  
Date  
Officer, D.R. Horton

### CO-BROKER:

DocuSigned by:  
  
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Broker Agent: Jeanette Clark  
4/21/2021  
Date

ELECTRONICALLY FILED - 2024 Aug 29 2:45 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719

Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
 Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paul** / Internal #  
 Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run St 60**  
 Lot: **28**  
**466390028**



#### **ADDENDUM 4** **CO-BROKER COMMISSION ADDENDUM**

|                               |                                                                                                                     |
|-------------------------------|---------------------------------------------------------------------------------------------------------------------|
| Seller:                       | <b>D.R. Horton Inc.</b>                                                                                             |
| Purchaser(s):                 | <b>Deborah Denise Harley</b>                                                                                        |
| Property:                     | <b>321 DONNINGTON COURT, AIKEN, SC 29801</b><br><b>Lot <u>28</u>, <u>Abbey at Trolley Run St 60</u> Subdivision</b> |
| Co-Broker Real Estate Agency: | <b>Good Sense Realty</b>                                                                                            |
| Agency Address:               | <b>3514 Wrightsboro Rd, Augusta, GA 30909, US</b>                                                                   |
| Agency License Number:        |                                                                                                                     |
| Co-Broker Agent:              | <b>Jeanette Clark</b>                                                                                               |
| Co-Broker Agent License No.   | <b>49253</b><br>(706) 294-7844      jjclark@goodsense.biz                                                           |

This Co-Broker Addendum ("Addendum") is being provided pursuant to the Home Purchase Agreement ("Agreement") by and between Seller and Purchaser for the purchase and sale of the above-referenced Property. Capitalized terms not otherwise defined herein shall have the same means as ascribed to them in the Agreement. If any term or condition of this Addendum conflicts with any term or condition of the Agreement, the terms and conditions of this Addendum shall prevail.

- Commission.** Purchaser hereby identifies and designates the above named Sales Agent, Real Estate Broker and Real Estate Agency, collectively, as "Co-Broker," as provided in Section 10 of the Agreement. Subject to the terms and provisions of the Agreement and this Addendum, and provided that Closing actually occurs, Co-Broker will receive a real estate sales commission at Closing determined as **3.00%** multiplied by (b) the "Sale Price of Property" shown on the Closing Disclosure (or "Contract sales price" shown on Line 401 of HUD-1 Settlement Statement) at Closing (the "Base Commission"). For the purposes of this Addendum, the term "Commission" is intended to include the Base Commission and all other commissions, incentives, and bonuses, if any, to be received by Co-Broker in connection with the purchase and sale of the Property pursuant to the Agreement. No commission of any kind shall be earned or due unless and until Closing occurs. The Commission shall be subject to limitations, if any, on total broker commission imposed by Purchaser's lender. The Commission shall be paid at Closing and must be shown on the closing disclosure or settlement statement.
- Bonus Commission.** The subsection checked below shall apply:

☒ No bonus commission shall be due or paid.

**OR**

☐ If Closing occurs on or before , then, at Closing, the Co-Broker shall be paid an additional, bonus commission in the amount specified in the sub-subsection checked below:

☐ **\$0.00**

**AND / OR**

☐ Relocation fee reimbursement up to \$

Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run  
St 60**  
Lot: **28**  
**466390028**

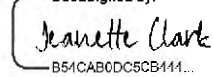
The applicable **D.R. Horton Club Elite** bonus amount pursuant to the **D.R. Horton Club Elite** rules published by the Seller as of the Closing Date shall be paid if eligible.

3. **Real Estate Certification.** Co-Broker hereby certifies as follows:

- The terms, conditions, representations and warranties contained in the Agreement are true, to the best of my knowledge and belief; and
- Any other agreement entered into by any parties in connection with the subject real estate transaction is part of, or attached to, the Agreement.

4. **Warranty of Authority.** The undersigned Sales Agent (or other person signing on behalf of Co-Broker) represents and warrants that he or she has the requisite authority to bind Co-Broker, including the above-named Real Estate Broker and Real Estate Agency as to all matters addressed in this Addendum and to modify any existing commission agreement with respect to the Agreement and under which Co-Broker may be entitled to receive a commission.

**CO-BROKER:**

DocuSigned by:  
  
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**Broker Agent:** Jeanette Clark

4/21/2021  
Date

**Agent License Number:** 49253  
(706) 294-7844  
jjclark@goodsense.biz

**SELLER:**

**D.R. Horton Inc.**

DocuSigned by:  
  
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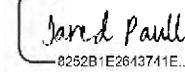
**Lori Bates**

**Officer, D.R. Horton**

4/23/2021  
Date

*For Internal Purposes Only*

**SELLER SALES REP:**

DocuSigned by:  
  
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**Sales Rep: Jared Paull**

(803) 800-4476  
JWPaull@drhorton.com

4/21/2021  
Date

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Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
 Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Pauli** / Internal #  
 Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run St 60**  
 Lot: **28**  
**466390028**



### CO-BROKER CERTIFICATION

Seller: **D.R. Horton Inc.**  
 Purchaser(s): **Deborah Denise Harley**  
 Property: **321 DONNINGTON COURT, AIKEN, SC 29801**  
**Lot 28, Abbey at Trolley Run St 60** Subdivision  
 Co-Broker Real Estate Agency: **Good Sense Realty**  
 Co-Broker Agent: **Jeanette Clark**  
 Co-Broker Agent License No. **49253**

This Co-Broker Certification (this "Certification") is being provided pursuant to the Home Purchase Agreement ("Agreement") by and between Seller and Purchaser in connection with the purchase and sale of the above-referenced Property. Capitalized terms not otherwise defined herein shall have the same means as ascribed to them in the Agreement. If any term or condition of this Addendum conflicts with any term or condition of the Agreement, the terms and conditions of this Addendum shall prevail. As used herein, "Co-Broker" shall refer collectively to the above named Co-Broker Sales Agent, Co-Broker Broker-In-Charge/Qualifying Broker, and Co-Broker Real Estate Agency.

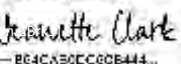
#### 1. Certification.

- a. Co-Broker hereby acknowledges and certifies that it **WILL NOT** pay to Purchaser all or any part of the Commission (as defined in Addendum 4) at Closing. Co-Broker acknowledges and agrees that no payment by Co-Broker of any portion of the Commission will be made directly to, or indirectly on behalf of, Purchaser or any other interested and/or related party, and that no part of the Commission will be used to pay Purchaser costs associated with the purchase and sale of the Property.
- b. Co-Broker certifies that it **HAS NOT** and **WILL NOT** give, pay, or provide any payment or other benefit directly or indirectly (as part of Closing or outside of Closing) to Purchaser or to any other interested and/or related party, or pay any of Purchaser's costs or liabilities to any third party, for the purpose of inducing Purchaser to close on the sale of the Property. Any such inducement payment or benefit and any shared commission are collectively referred to hereinafter as "*Inducements*" or, in the singular, an "*Inducement*."
- c. In the event Co-Broker decides at a later date to pay or give any type of Inducement, Co-Broker agrees to execute an amendment to the Agreement to disclose the terms of such Inducement in order to create transparency with regard to how such Inducement applies to the purchase and sale of the above-referenced Property.
- d. Co-Broker acknowledges that Seller is relying on this Certification as verification of whether any payment of any portion of the Commission to Purchaser is to be made.

2. Warranty of Authority. The undersigned Sales Agent (or other person signing on behalf of Co-Broker) represents and warrants that he or she has the requisite authority to bind Co-Broker, including the above-named Real Estate Broker and Real Estate Agency as to all matters addressed in this Addendum and to modify any existing commission agreement with respect to the Agreement and under which Co-Broker may be entitled to receive a commission.

#### CO-BROKER:

DocuSigned by:

  
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4/21/2021

Broker Agent: Jeanette Clark

Date

Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Pauli** / Internal #  
Lender: **DHI MORTAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run**  
**St 60**  
Lot: **28**  
**466390028**

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Abbey at Trolley Run St 60

28

466390028

**ADDENDUM 1****BUILDER'S REFERRAL BRICA INCENTIVES AND CONTRIBUTIONS ADDENDUM**

This **ADDENDUM** is attached to and made a part of that Home Purchase Agreement between **D.R. Horton Inc.**, as Seller, and **Deborah Denise Harley** as Purchaser (the "Purchase Agreement"), regarding that parcel of real estate located in **AIKEN** County, **SC**, briefly described as Lot **28**, in **Abbey at Trolley Run St 60** subdivision, and referred to in the Purchase Agreement as the "Lot." All terms defined in the main text of the Purchase Agreement shall have the same meanings when used in this Addendum. This Addendum, together with the Purchase Agreement, constitutes the sole and entire agreement between Seller and Purchaser with regard to any incentives, allowances, adjustments, credits, discounts, rebates or other contributions of any kind or amount (collectively, the "Referral Incentives and Contributions") made, or to be made, by Seller to Purchaser in connection with Seller's referral of Purchaser to **SELLER'S PREFERRED MORTGAGE LENDER(S) DESCRIBED BELOW ("PREFERRED LENDER")**, and there are no agreements regarding such Referral Incentives and Contributions, whether written or unwritten, expressed or implied, between the parties except as set forth in this Addendum. In the event of any conflict between the terms and provisions of this Addendum and the terms and provisions of the main text of the Purchase Agreement, the terms and provisions of this Addendum shall control. Purchaser acknowledges receipt of that document entitled "Notice of Seller's Business Affiliations" (the "Affiliation Notice"), and Purchaser confirms its understanding that Seller has an affiliation with **DHI MORTGAGE COMPANY, LTD. ("DHI MORTGAGE")** and that Purchaser is not required to use this affiliated company or any Preferred Lender (described below) as a condition of Purchaser's purchase of the Property or Purchaser's access to settlement services in connection with the purchase of the Property. The parties state, acknowledge and agree as follows:

1. Seller shall provide for the benefit of Purchaser the Referral Incentives and Contributions listed in Section 2 below, provided that Purchaser chooses to use **PREFERRED LENDER** to finance the purchase of the Property and provided that each and all of the following occur:

- a. Purchaser applies to **PREFERRED LENDER** for a mortgage loan to finance the purchase of the Property within the timeframe required under Section 2(b) of this Purchase Agreement;
- b. Purchaser's loan application is approved by **PREFERRED LENDER**, and **PREFERRED LENDER** actually funds the loan and finances the purchase of the Property;
- c. Purchaser closes on the purchase of the Property on or before the final date and time for Closing set by Seller pursuant to subsection 16a of the Purchase Agreement; and
- d. Purchaser uses the closing attorney recommended by Seller to act as settlement agent and close the purchase of the Property.

2. Provided that all the conditions set forth in Section 1 above are satisfied and met in a timely manner, Purchaser shall be entitled to a contribution from Seller towards Purchaser's closing costs in an amount up to **\$5000**. This contribution, up to the applicable limit, shall be applied against closing costs actually charged to Purchaser, in the following order (as applicable): Origination Charge, Origination Fee, Upfront Unfinanced Mortgage Insurance (if applicable).

If any of the maximum amount of contribution remains unapplied after payment of all of the above listed closing costs, then the remainder shall be applied against other usual and customary closing costs actually charged to Purchaser by other settlement service providers. Notwithstanding the foregoing: (i) any contribution by Seller to Purchaser's closing costs shall be subject to Purchaser's loan program and any lender guidelines or restrictions, (ii) no portion of the maximum amount of contribution may be applied as a credit to, or in partial payment of, the Purchase Price of the Property or disbursed to Purchaser, and (iii) any unapplied portion of the maximum amount of contribution shall be forfeited by Purchaser.

3. **Preferred Lender.** The Preferred Lender relating to this Builder's Referral Incentive and Contributions Addendum is **DHI Mortgage**. More information regarding **DHI Mortgage** is available at: [www.dhimortgage.com](http://www.dhimortgage.com).

Purchaser’s decision to use any lender other than PREFERRED LENDER will not affect any concessions, incentives or discounts offered by Seller for the purchase of the Property *other than* the closing cost contribution and builder options allowance (if any) described in Sections 2 and 3 above.

IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATE SHOWN BELOW.

Purchaser:

DocuSigned by:  
*Deborah Denise Harley*  
CF2869BE10AC436...  
\_\_\_\_\_  
Buyer: Deborah Denise Harley                      4/21/2021  
Date

Seller:

D.R. Horton Inc.  
DocuSigned by:  
*Lori Bates*  
1E047717EF6745C...  
\_\_\_\_\_  
Lori Bates                                              4/23/2021  
Officer, D.R. Horton                                              Date

ELECTRONICALLY FILED - 2024 Aug 29 2:45 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719



## GENERAL INCENTIVE ADDENDUM

This General Incentive Addendum ("Addendum") is attached to and made a part of that Home Purchase Agreement between D.R. Horton Inc., as Seller, and **Deborah Denise Harley**, as Purchaser, of even date herewith (the "Agreement"), regarding that parcel of real estate located in **AIKEN** County, **SC**, briefly described as Lot **0028, Abbey at Trolley Run St 60** Subdivision, and, together with all improvements thereon an rights and privileges appurtenant thereto, referred to in the Agreement as the "Property." Seller and Purchaser also agree as follows:

1. This Addendum, together with the Agreement and all addenda and amendments thereto, constitutes the entire agreement between Seller and Purchaser with regard to any cost incentives, allowances, adjustments, credits, discounts, rebates, or other builder concessions of any kind or amount (collectively, "**Incentives**") made, or to be made, by Seller in connection with the sale of the Property to Purchaser under the Agreement, and there are no agreements regarding such Incentives, whether written or unwritten, expressed or implied, between the parties except as set forth in this Addendum and the Agreement. This Addendum replaces and supersedes any previous General Incentive Addendum that details incentives granted to Purchaser for purchase of the Property.
2. Seller has offered in conjunction with Purchaser's use of a preferred lender an incentive as outlined in the Builders Referral Incentive Concessions Addendum (BRICA). In the event Purchaser applies for a loan with a preferred lender identified on the BRICA, **but is denied by said preferred lender**, Seller hereby offers the following incentives to Purchaser upon successful close of this transaction if Purchaser utilizes one of the following alternative lenders to fund the purchase of the Property: New American Funding, Southeast Mortgage, or Homebridge Mortgage.
  - a. **Options Incentive.** Purchaser shall be entitled to an incentive in the amount of up to N/A, which amount may be applied by Purchaser as a credit to the costs owed to the Seller for any optional features, material upgrades, landscape improvements, or decorator items selected by Purchaser and included in the Purchase Price of the Property as set forth in the Agreement and as permitted by Seller pursuant to Addendum 2. No portion of this amount may be disbursed to Purchaser in cash or applied towards the base purchase price of the House.
  - b. **Finance Incentive.** Purchaser shall be entitled to an incentive in the amount of up to **\$1,000.00**, which amount is to be applied towards Purchaser's payment of the closing costs incurred and payable by Purchaser at Closing. Such incentive shall be applied first to the following fees to the extent applicable and in the following order: Origination Charge, Origination Fee, and Upfront Unfinanced Mortgage Insurance (if applicable). If not fully utilized, any remaining finance incentive may be applied towards other usual and customary closing costs charged to Purchaser by other settlement service providers and towards the payment of HOA dues and prepaid taxes and insurance as allowable by the Purchaser's lender. No portion of this amount may be applied as a credit to, or in partial payment of, the Purchase Price of the Property or disbursed to the Purchaser. Any unused amount of the incentive described in this Section 2(b) **may not** be applied or added to the Options Incentive described in Section 2(a) above.
3. Purchaser acknowledges that there are other lenders available to Purchaser and that Purchaser is free to use any lender it chooses to finance the purchase of the Property. However, Purchaser also acknowledges that Purchaser shall not be entitled to the contribution against closing costs described in Section 2 above unless all of the conditions listed and stated in Section 2 above are fully met and satisfied.

THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ THIS GENERAL INCENTIVE AND CONCESSIONS ADDENDUM TO THE AGREEMENT AND AGREE TO THE TERMS, CONDITIONS AND LIMITATIONS CONTAINED HEREIN.

## PURCHASER(S):

DocuSigned by:  
  
 C-20889d6106C428...

Buyer: Deborah Denise Harley

4/21/2021

Date

## SELLER:

D.R. Horton Inc.

DocuSigned by:  
  
 1-24177171515C...

Lori Bates

Officer, D.R. Horton

4/23/2021

Date

**NOTICE OF SELLER'S BUSINESS AFFILIATIONS****TO:** Deborah Denise Harley  
[Homebuyer(s)]**PROPERTY:** 321 DONNINGTON  
COURT, AIKEN, SC  
29801**FROM:** D.R. Horton Inc.  
[Seller]**DATE:** April 21, 2021

This is to give you notice that the above referenced seller has a business relationship with:

**DHI MORTGAGE COMPANY, LTD.**  
207 Pitcarin Way  
Augusta, GA 30909**D.R. HORTON INSURANCE  
AGENCY, INC.**  
1341 Horton Circle  
Arlington, TX 76011**TRAVIS COUNTY TITLE COMPANY, DBA  
DHI TITLE AGENCY/DHI TITLE OF  
GEORGIA, INC.**  
10700 Pecan Park Blvd. Ste #130  
Austin, TX 78750

The nature of this business relationship is that these companies are corporate affiliates, each being 100% wholly owned by, or by a subsidiary of, the same parent corporation. Because of this relationship, this referral may provide seller a financial or other benefit.

Set forth below is the estimated charge or range of charges by each company for settlement services listed. You are **NOT** required to use these companies as a condition of your purchase of the property from seller or as a condition of your application for, or settlement of, a mortgage loan on the property in connection with your purchase. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

| <b>DHI MORTGAGE COMPANY, LTD.</b> |                                                                                            | <b>TRAVIS COUNTY TITLE COMPANY</b>     |                         |
|-----------------------------------|--------------------------------------------------------------------------------------------|----------------------------------------|-------------------------|
| <b>Service</b>                    | <b>Charge</b>                                                                              | <b>Service</b>                         | <b>Charge or Range</b>  |
| Loan Origination Charge:          | 0% of Loan Amount plus \$1,000.00                                                          | Simultaneous Lender's Title Insurance: | \$150.00 - \$250.00     |
|                                   | An additional 2% of the Loan Amount may apply for certain Affordable Housing Loan Programs | Owners Title insurance:                | \$1,355.00 - \$1,470.00 |

Travis County Title Company charge estimates are based on an average home price of \$300,000. Title insurance rates are set by the state. Adjustments to Sales Price, Loan Amount and Lender requirements will impact the cost of your title insurance. Mortgage fees may vary depending upon whether the loan is originated or brokered by DHI Mortgage Company, Ltd.

**Note: If you apply with DHI Mortgage Company, Ltd., a Loan Estimate of all settlement charges will be provided to you by DHI Mortgage Company, Ltd. at or within three business days after loan application.**

**You may be entitled to additional builder discounts/credits paid by the seller to purchase multiple settlement services as set forth in the Builder's Incentive and Concessions Addendum to your purchase contract.**

**D. R. HORTON INSURANCE AGENCY, INC.**

D.R. HORTON INSURANCE AGENCY, INC. is a licensed insurance agent that offers policies of property insurance as agent for one or more insurance companies qualified to transact insurance business in the State of Georgia. You will be provided a separate proposal or quote of the terms and conditions of any policy of insurance offered by D.R. HORTON INSURANCE AGENCY, INC. in which you express an interest. For comparison purposes, the cost for a hazard insurance policy for a home valued at \$300,000 with commonly selected coverage items and deductibles would range between: \$200 and \$3,985 per annum. The specific premium depends on various factors, including but not limited to, the value of the home, the location of the home, deductibles selected, and the amount of coverage selected. The quote will set out the estimated premium and other charges, or range of charges, by D.R. HORTON INSURANCE AGENCY, INC. for its insurance products or services.

**ACKNOWLEDGMENT:**

I/we have read this disclosure form and understand that seller is referring me/us to purchase the above-described settlement services from **DHI MORTGAGE COMPANY, LTD., TRAVIS COUNTY TITLE COMPANY, and D.R. HORTON INSURANCE AGENCY, INC.** and may receive a financial or other benefit as the result of this referral.

DocuSigned by:

*Deborah Denise Harley*

CF2669BE10AC436...

4/21/2021**Buyer:** Deborah Denise Harley**Date**

Buyer: Deborah Denise Harley / Subdivision: Abbey at Trolley Run St 60 / Lot: 28 / Address: 321 DONNINGTON COURT / Project#: 466390000 / Printed by: Jared Paull / Date: 04/21/2021

Project: **Abbey at Trolley Run**  
**St 60**  
 Residential Lot/Unit No.: **28**

### INTEREST RATE ADDENDUM

**BUYER:**

Deborah Denise Harley  
 «BUYER-HOME-ADDRESS1»  
 Augusta, GA 30907

**SELLER:**

D.R. Horton Inc.  
 1371 Dogwood Drive SW  
 Conyers, GA 30012

**ESCROW COMPANY:**

MCDONNELL AND ASSOCIATES  
 & ASSOCIATES, MCDONNELL  
 3720 Executive Center Drive Suite A  
 MARTINEZ, GA 30907  
 (866) 931-8793

**DATE:** April 21, 2021

This Interest Rate Addendum ("Addendum") is attached to and forms a part of the Purchase Agreement and Escrow Instructions ("Purchase Agreement"), executed between Buyer and Seller for the Property described in the Purchase Agreement. Any capitalized terms not otherwise defined herein shall have the meanings as set forth in the Purchase Agreement. If there is a conflict between the Purchase Agreement and the terms and provisions of this Addendum, the terms and provisions of this Addendum shall control.

**1. INTEREST RATE INCENTIVE PROMOTION THROUGH DHI MORTGAGE (THE "PROMOTION"):** This Promotion is offered by Seller through DHI Mortgage. Seller is NOT a lender, but has obtained commitment from DHI Mortgage to provide Seller's eligible customers with pre-purchased interest rates. The availability of the Promotion to Buyer is subject to the satisfaction of each of the following conditions: (i) Buyer chooses to use DHI Mortgage to finance the purchase of the Property; (ii) Buyer applies to DHI Mortgage for a mortgage loan to finance the purchase of the Property within the timeframe provided under the Purchase Agreement; (iii) Buyer's loan application is approved by DHI Mortgage; and DHI Mortgage actually funds the loan and finances the purchase of the Property; (iv) at the time Buyer locks in an interest rate with DHI Mortgage, the pre-purchased interest rate available to Buyer is below the interest rate otherwise available to Buyer through DHI Mortgage; and (v) Buyer closes on the purchase of the Property on or before the Closing Date established pursuant to the terms of the Purchase Agreement.

**2. ADDITIONAL ACKNOWLEDGEMENTS AND LIMITATIONS.** In addition, Buyer acknowledges and understands that: (i) Promotion funds are limited and the interest rate may change or not be available to Buyer at the time a mortgage loan commitment is issued if funds are exhausted; (ii) this is not an offer of any specific interest rate or a commitment to make a loan and only DHI Mortgage (not Seller) can offer a specific interest rate or issue a loan commitment under this Promotion; (iii) the interest rate offered by DHI Mortgage for the Promotion may be adjusted depending on Buyer's credit profile, loan to value ratio, certain property characteristics and/or Buyer's intention to occupy the Property as a primary residence; (iv) the Promotion may require the Buyer to pay discount points to receive the interest rate offered under the Promotion; and (v) Seller's cost associated with obtaining this Promotion rate will be considered an interested party contribution and may result in the Buyer being required to bring additional funds to closing.

**3. FINANCING QUESTIONS.** Buyer is to contact their DHI Mortgage loan originator for financing questions and/or details regarding this Promotion and other requirements and restrictions associated with financing.

**4. COUNTERPARTS.** This Addendum may be executed in counterparts, each of which when taken together, will constitute one fully executed original.

This Addendum has been made and executed as of the date set forth above, but will not be valid until executed by Seller's authorized officer of the company.

DocuSigned by:

*Deborah Denise Harley*

CF2869BE10AC436...

**Buyer: Deborah Denise Harley**

4/21/2021

Date

**D.R. Horton Inc.**

DocuSigned by:

*Lori Bates*

1E047717EF6745C...

**Lori Bates**

**Officer, D.R. Horton**

4/23/2021

Date

Buyer: Deborah Denise Harley / Subdivision: Abbey at Trolley Run St 60 / Lot: 28 / Address: 321 DONNINGTON COURT / Project#: 466390000 / Printed  
by: Jared Paull / Date: 04/21/2021

Project: **Abbey at Trolley Run**

**St 60**

Residential Lot/Unit No.: **28**

ELECTRONICALLY FILED - 2024 Aug 29 2:45 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719



## D.R. Horton Smart Home Disclosure

Congratulations on your new D.R. Horton Smart Home! Your new home is equipped with technology that includes some or all of the following Internet-connected devices: a programmable thermostat; a door lock; a light switch; a touchscreen smart home control device; home security devices such as door and window contacts and motion detectors; a video doorbell; a garage door opener; and a smart speaker (collectively, "**Smart Home Technology**"), all of which are integrated by an automation platform hosted by Alarm.com. Other Smart Home Technology features may be offered for an additional charge. See your D.R. Horton sales representative for complete details on the Smart Home Technology included in your home.

The video doorbell and the smart speaker will be installed by a third party ("**Installer**") after closing. Installation of the touchscreen smart home control device also may occur after closing. At that time, the Installer will activate certain components of the Smart Home Technology, provide training to you on how to use the Smart Home Technology, and provide information to you regarding additional services or products available for purchase.

The Alarm.com home automation-only application (the "**App**") is included at no charge to you for 36 months following the close of escrow on your home. Thereafter, the App may be purchased directly from the Installer for a monthly fee or, if you have contracted with the Installer for security monitoring services, the App is included with such security-monitoring services.

In order to install and activate the Smart Home Technology and to provide you with training on how to use the Smart Home Technology and information regarding additional services or products available for purchase, D.R. Horton will provide your contact information to the Installer so the Installer can get in touch with you via telephone, email or U.S. mail to schedule an appointment. For the Smart Home Technology to work, you must obtain and pay for your own Internet service, and you may need to purchase compatible devices and maintain accounts with third parties for the services. The Installer will discuss these requirements with you prior to the appointment to ensure the installation and activation goes smoothly. D.R. Horton may receive a referral fee from the Installer if you purchase additional services or products from the Installer.

**IMPORTANT INSTALLATION DEADLINE:** You have 120 days from the date you close escrow on your home (the "**Deadline**") to schedule an appointment with the Installer. If you schedule an appointment with the Installer after the Deadline, you will be required to pay the Installer's then-current labor and equipment costs to install and activate certain components of the Smart Home Technology and to train you on how to use the Smart Home Technology.

**PRIVACY DISCLOSURE:** In connection with your purchase of a home from D.R. Horton, we will collect certain personal information from you. To learn more about the categories of personal information we collect, and how we may use or share that personal information, please view our Privacy Policy on our website at [www.drhorton.com](http://www.drhorton.com), as it may change from time to time.

**COLLECTION OF INFORMATION BY DEVICES:** The Smart Home Technology may collect information about you and your use of the device. This information is collected, used and analyzed by the third-party providers of the devices and the Alarm.com automation platform. Use of such information is governed by the terms, conditions, policies and practices of such third-party providers only. D.R. Horton recommends that you carefully review your agreements with, and other terms and conditions published by, these third-party providers, as well as additional information about the Smart Home Technology by visiting [www.drhorton.com/smart-home](http://www.drhorton.com/smart-home). D.R. Horton does not collect any information from these devices about you or your use of the devices.

I acknowledge and agree that D.R. Horton does not make any representations or warranties that any or all of the Smart Home Technology is secure, will meet any of my needs or will provide any level of physical or cyber security for my home or otherwise – even if the Smart Home Technology is working as intended.

Cell Phone #: (478) 718-5858 Work Phone #: Home Phone #:

Email Address (primary): deborahdharley@yahoo.com Email Address (secondary):

My New Home – Address /Direct Mail: 321 DONNINGTON COURT, AIKEN, SC 29801  
Community/Subdivision Name: Abbey at Trolley Run St 60

Projected Closing Date: 06/30/2021

**BUYER(S):**

DocuSigned by:

*Deborah Denise Harley*

CF2869BE10AC436...

4/21/2021

**Buyer:** Deborah Denise Harley

Date

## EXHIBIT 2

|                                                 |   |                                      |
|-------------------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS         |
|                                                 | ) | FOR THE NINTH JUDICIAL CIRCUIT       |
| COUNTY OF BERKELEY                              | ) |                                      |
|                                                 | ) | C.A. No. 2022-CP-08-02548            |
| Andrew Tyler and Justin Vining, individually,   | ) |                                      |
| and on behalf of all others similarly situated, | ) |                                      |
|                                                 | ) |                                      |
|                                                 | ) | <b>ORDER GRANTING DEFENDANT D.R.</b> |
|                                                 | ) | <b>HORTON'S MOTIONS TO COMPEL</b>    |
|                                                 | ) | <b>ARBITRATION AND TO STAY CASE</b>  |
|                                                 | ) | <b>AND TO STAY DISCOVERY</b>         |
| Plaintiff                                       | ) |                                      |
| vs                                              | ) |                                      |
|                                                 | ) |                                      |
| D.R. Horton, Inc; Lowcountry Septic System      | ) |                                      |
| Solutions, LLC; Coastal Soil and Wetland        | ) |                                      |
| Services, LLC; Alternative Septic Services,     | ) |                                      |
| LLC; Mountain Soils, Inc.; Horizon Landscape    | ) |                                      |
| Management, Inc.; BR's Clearing & Grading,      | ) |                                      |
| Inc.; Pleasant Places, Inc; L. Dean Weaver      | ) |                                      |
| Construction Co., Inc.; MV Engineering          | ) |                                      |
| Consultants, LLC; and John                      | ) |                                      |
| Doe # 1-5,                                      | ) |                                      |
| Defendants                                      | ) |                                      |

## INTRODUCTION

This matter came before the Court on December 12, 2023, on Defendant, D.R. Horton Inc.'s Motion to Compel Arbitration and Motion to Stay.

## PROCEDURAL HISTORY

On October 21, 2022, Plaintiff Andrew Tyler ("Plaintiff Tyler") brought a class action lawsuit against D.R. Horton on behalf of himself similarly situated homeowners within Seven Lakes Subdivision (collectively the "Class"). On June 15, 2023, Plaintiff Amended his Complaint to include Plaintiff Justin Vining ("Plaintiff Vining") as an additional proposed class representative, in addition to bringing claims against additional Defendants. In the Amended Complaint, Plaintiffs allege the improper installation and design of the septic systems in the class

members' and representatives' yards. The Complaint contains causes of action for negligence, gross negligence, breach of implied warranties, and unfair trade practices, all of which arise from the alleged defects in the construction of the Property.

On December 12, 2023, this matter came before the Court on Defendant, D.R. Horton Inc.'s Motion to Compel Arbitration and Motion to Stay the Case and Stay Discovery.

### **BACKGROUND**

Tyler executed the purchase agreement for his home on December 29, 2017. The purchase agreement between D.R. Horton and the Plaintiff Tyler provides for arbitration of any and all matters arising under the Agreement, including damages of the type alleged in the Complaint. The Arbitration Agreement in this case, for both parties, is contained within Paragraph 15 of the Agreement. The Agreement provides the following:

**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 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 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 THAT WARRANTY PROGRAM. NOTWITHSTANDING THE FOREGOING,

SELLER SHALL HAVE THE RIGHT TO INTERPLEAD ALL OR ANY PART OF THE EARNST MONEY INTO A COURT OF COMPETENT JURSDICTION AS PROVIDED FOR IN SECTION 4 HEREIN. NOTWITHSTANDING THE FOREGOING, THE ARBITRATION PROVISIONS OF THIS SUBSECTION (B) SHALL NOT APPLY IN THE EVENT THAT THE DISPUTE RELATES TO A DEFAULT BY THE SELLER UNDER SECTION 16(F) OF THIS AGREEMENT.

### **STANDARD OF REVIEW**

#### **A. Doctrine of Merger**

The Plaintiff argues that the doctrine of merger applies to merge the arbitration clause from the purchase agreement into the deed making arbitration unenforceable while the Defendant argues that the doctrine of merger does not apply.

The doctrine of merger provides that “[t]he execution, delivery, and acceptance of a deed varying from the term of an antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.” *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957).

One exception to the doctrine of merger, known as the contrary intent exception, indicates that “agreements that are not intended to be merged in a deed are not merged into the deed.” *See Hughes v. Greenville Country Club*, 283 S.C. 448, 450–51, 322 S.E.2d 827, 828 (Ct.App.1984). Moreover, “the party denying merger has the burden of proving by clear and convincing evidence that merger was not intended.” *Id.*

In *Carlson v. S.C. State Plastering, LLC*, Plaintiff’s, the Carlson’s, entered into a purchase agreement with Defendant, Del Webb, where they agreed to purchase a home in Hilton Head, SC. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (2013). The purchase agreement contained the following arbitration clause:

“Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration

Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act.”

The deed that was subsequently issued did not provide for arbitration. *Id.* The plaintiffs argued that the doctrine of merger precluded arbitration of their claims. *Id.* Specifically, the plaintiffs argued that because the deed, which contained no arbitration clause, superseded the purchase agreement, their claims were not subject to arbitration. *Id.* The Court disagreed. *Id.* The Court found that the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed. *Id.* The Courts’ holding was based on the interpretation of the Purchase Agreement: “Pursuant to the clear and unambiguous terms of the purchase agreement, clear and convincing evidence supports a finding that the parties did not intend for the arbitration clause to be merged into the deed at closing.” *Id.*

Similarly, in the case before the Court, the purchase agreement executed by the plaintiff supports the finding that the parties did not intend for the arbitration clause to merge into the deed. The language of the arbitration clause mandates arbitration as to “*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 home; (b) seller’s performance under any punch list or inspection agreement; and (c) the limited warranty pursuant to section 14 above. Moreover, the Agreement contains references to the construction of the home, not just the purchase of the home. In addition to including choices for construction of the home, the Agreement includes, in Paragraph 16(f), a provision that contemplates what happens in case the home is not complete prior to closing:

If the House is not Complete at the time that the Purchaser signs this Agreement, Seller shall Complete the House within 2 years after the date that the Purchaser signs this Agreement, subject to extensions for circumstances reasonably beyond Seller's control as determined by South Carolina law. For purposes of this subsection (f), "Complete" means that the House is ready for occupancy by Purchaser, has all necessary and customary utilities extended to it, and a certificate of occupancy has been issued. Notwithstanding any provision in this Agreement to the contrary, including but not limited to Section 18(b), nothing herein shall limit Purchaser's remedies if Seller defaults under this subsection (f).

The Agreement also includes choices for how the home will be constructed, a ten-year limited warranty, and all manufacturers' warranties. Accordingly, the terms of the Agreement clearly indicate that the parties did not intend for the arbitration clause to be merged into the deed.

### **CONCLUSION**

After considering all the evidence in light of the applicable facts and law as cited above, the Court finds that the claims asserted in Plaintiffs' Amended Complaint are subject to mandatory and binding arbitration under the terms of the contracts between the parties, and more specifically, the arbitration clauses therein. D.R. Horton is entitled to a stay and a resolution shall be sought through arbitration.

IT IS HEREBY ORDERED that the above-captioned case is hereby stayed until the completion of arbitration and further order of the Court. Discovery shall be stayed, also, and shall be conducted as ordered by the arbitrator(s).

IT IS SO ORDERED!

---

Hon. Diane Schafer Goodstein  
Circuit Court Judge, Presiding  
Berkeley County

March \_\_, 2024  
Berkeley, South Carolina



Berkeley Common Pleas

**Case Caption:** Andrew Tyler , plaintiff, et al VS D.R. Horton, Inc , defendant, et al

**Case Number:** 2022CP0802548

**Type:** Order/Other

It is so Ordered!

s/Diane S. Goodstein

Electronically signed on 2024-03-04 13:11:04 page 6 of 6

ELECTRONICALLY FILED - 2024 Mar 04 1:29 PM - BERKELEY - COMMON PLEAS - CASE#2022CP0802548  
ELECTRONICALLY FILED - 2024 Aug 29 2:45 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719



**EXHIBIT 3**

|                                            |   |                                      |
|--------------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                    | ) | IN THE COURT OF COMMON PLEAS         |
|                                            | ) | FOR THE NINTH JUDICIAL CIRCUIT       |
| COUNTY OF BERKELEY                         | ) | CASE NO.: 2022-CP-08-02548           |
| Andrew Tyler and Justin Vining,            | ) | <b>ORDER ON MOTION TO RECONSIDER</b> |
| individually and on behalf of all others   | ) |                                      |
| similarly situated,                        | ) |                                      |
|                                            | ) |                                      |
|                                            | ) |                                      |
| Plaintiffs,                                | ) |                                      |
|                                            | ) |                                      |
| vs.                                        | ) |                                      |
|                                            | ) |                                      |
| D.R. Horton, Inc.; Lowcountry Septic       | ) |                                      |
| System Solutions, LLC; Coastal Soil and    | ) |                                      |
| Wetland Services, LLC; Alternative Septic  | ) |                                      |
| Services, LLC; Mountain Soils, Inc.;       | ) |                                      |
| Horizon Landscape Management, Inc.; BR's   | ) |                                      |
| Clearing & Grading, Inc.; Pleasant Places, | ) |                                      |
| Inc.; L. Dean Weaver Construction Co.,     | ) |                                      |
| Inc.; MV Engineering Consultants, LLC;     | ) |                                      |
| and John Doe #1-5,                         | ) |                                      |
|                                            | ) |                                      |
| Defendants.                                | ) |                                      |
|                                            | ) |                                      |
| Lowcountry Septic System Solutions, LLC    | ) |                                      |
| and Horizon Landscape Management, LLC,     | ) |                                      |
|                                            | ) |                                      |
| Third-Party Plaintiffs,                    | ) |                                      |
|                                            | ) |                                      |
| vs.                                        | ) |                                      |
|                                            | ) |                                      |
| JSR Clearing and Grading, LLC; Charleston  | ) |                                      |
| Tractor Works, LLC; and Trinity            | ) |                                      |
| Construction, LLC,                         | ) |                                      |
|                                            | ) |                                      |
| Third-Party Defendants.                    | ) |                                      |
|                                            | ) |                                      |

This matter came before the Court on December 12, 2023, on Defendant D.R. Horton Inc.'s Motion to Compel Arbitration and Motion to Stay. The Court reviewed the pleadings and

memorandums filed by the parties and also considered the oral arguments of the parties. The Court took the matter under advisement for further consideration and ultimately determined that the Plaintiff's claims were subject to arbitration. The Court issued an order on March 4, 2024, staying the case and staying discovery until the completion of arbitration.

Plaintiff's subsequently filed a Motion to Reconsider the March 4<sup>th</sup> order on several grounds which can be found in Plaintiff's Motion filed on March 14, 2024.

Upon review of the arguments presented in Plaintiff's motion, and the memorandum in support of the motion, as well as the consideration of Defendant's memorandum in opposition and the supporting case law presented to the Court, the Court finds that as determined in the March 4<sup>th</sup> order, the arbitration clause in the purchase agreement at issue in this case is binding as to the Plaintiffs and D.R. Horton and, therefore, Plaintiffs and D.R. Horton are subject to arbitration and stayed pending the outcome of arbitration.

On March 20, 2024, Defendant, MV Engineering Consultant's LLC, filed a Motion to Alter or Amend the March 4<sup>th</sup> order to limit the scope of the stay to claims by and between the parties to the lawsuit which have arbitration agreements in place.

On March 21, 2024 Plaintiffs filed a Rule 60 Motion to Amend on similar grounds as stated in MV Engineering Consultant's LLC's motion.

Further, on April 26, 2024, Defendant Mountain Soils, Inc. filed a Motion for Relief from Judgment or Order pursuant to Rule 60, SCRCP on similar grounds as stated in Plaintiff's and MV Engineering Consultant's motions.

Upon review of these Rule 60 motions, the Court now clarifies that it did not intend for the language of the March 4<sup>th</sup> order to address matters beyond the arbitrability of the claims between Plaintiffs and D.R. Horton. The claims between Plaintiff and D.R. Horton are stayed

pending arbitration. With regards to discovery the Court order is unintended to stay discovery. Discovery as it relates to the claims between Plaintiffs and D.R. Horton would be for the arbitration. Having addressed the before-mentioned motions, the Court hereby orders:

- (1) The claims between Plaintiffs and D.R. Horton are subject to arbitration and these claims pending before this Court are stayed;
- (2) The issues of discovery between Plaintiff and D.R. Horton are for the arbitrator.

The foregoing expresses the extent of the Court's determination in the motions previously filed.

**AND IT IS SO ORDERED!**

---

Diane S. Goodstein  
Presiding Judge  
Ninth Judicial Circuit

Berkeley, South Carolina  
This \_\_\_\_ day of \_\_\_\_\_, 2024.



Berkeley Common Pleas

**Case Caption:** Andrew Tyler , plaintiff, et al VS D.R. Horton, Inc , defendant, et al

**Case Number:** 2022CP0802548

**Type:** Order/Other

It is so Ordered!

s/Diane S. Goodstein

Electronically signed on 2024-06-24 16:24:32 page 4 of 4

ELECTRONICALLY FILED - 2024 Jun 24 4:50 PM - BERKELEY - COMMON PLEAS - CASE#2022CP0802548  
ELECTRONICALLY FILED - 2024 Aug 29 2:45 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719

|                                                 |   |                                    |
|-------------------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS       |
|                                                 | ) | FOR THE SECOND JUDICIAL CIRCUIT    |
| COUNTY OF AIKEN                                 | ) | CASE NO.: 2023-CP-02-01719         |
|                                                 | ) |                                    |
| Deborah Denise Harley,                          | ) |                                    |
|                                                 | ) |                                    |
| Plaintiff,                                      | ) | <b>PLAINTIFF'S MEMORANDUM IN</b>   |
|                                                 | ) | <b>OPPOSITION TO D.R. HORTON'S</b> |
| v.                                              | ) | <b>MOTION TO STAY AND COMPEL</b>   |
|                                                 | ) | <b>ARBITRATION</b>                 |
| D.R. Horton, Inc., Plumbing Solutions, LLC, and | ) |                                    |
| John Does 1 – 15,                               | ) |                                    |
|                                                 | ) |                                    |
| Defendants.                                     | ) |                                    |

Plaintiff, Deborah Denise Harley (“Harley”), submits this Memorandum In Opposition to Defendant D.R. Horton, Inc.’s (D.R. Horton) Motion to Compel Arbitration (“Arbitration Motion”) and respectfully states as follows:

### **SUMMARY OF ARGUMENT**

The arbitration provision in Harley’s purchase contract is unenforceable for four reasons. First, the arbitration provision is unconscionable under *Smith* because it incorporates disclaimers of “any and all implied warranties and monetary damages of any kind” and our Supreme Court has already ruled that the inclusion of this language is unconscionable and invalidates the arbitration provision. Second, the arbitration provision in Harley’s purchase contract is intended to govern only pre-closing disputes not post-closing disputes such as this one. Third, the arbitration provision lacks mutuality and improperly limits the arbitrator’s rights. Third, the arbitration provision violates South Carolina public policy under *Damico*. Fourth, the arbitration provision no longer exists under the Doctrine of Merger because there was not a survival clause in either the arbitration provision or purchase agreement.

Other South Carolina Courts have repeatedly found that D.R. Horton's arbitration provision is unenforceable for these same reasons. The Honorable Judge Gravely refused to compel arbitration in a similar D.R. Horton case known as "*Eagles Glen*" in Greenville County on April 25, 2023. **The arbitration terms overruled by Judge Gravely in *Eagles Glen* are identical to the arbitration terms at issue in this case.**<sup>1</sup>

### **STATEMENT OF FACTS**

#### **A. Harley's Purchase Agreement and Deed**

Harley executed the purchase agreement for her home on April 21, 2021. (Purchase Contract, Exhibit 1). Harley's agreement is a boilerplate contract that D.R. Horton offered to Harley on a take-it-or-leave-it basis. The agreement contains an arbitration provision in Paragraph 15 that references D.R. Horton's Warranties and Disclaimers in Paragraph 14<sup>2</sup>:

**15. MANDATORY BINDING ARBITRATION.** PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS AGREEMENT AND/OR THE PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING: (A) SELLER'S CONSTRUCTION AND DELIVERY OF THE HOUSE; (B) SELLER'S PERFORMANCE UNDER ANY PUNCH LIST OR INSPECTION AGREEMENT; AND (C) **THE LIMITED WARRANTY PURSUANT TO SECTION 14 ABOVE.** THE ARBITRATION SHALL TAKE PLACE IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED. THE PROCEEDING SHALL BE CONDUCTED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND TO THE EXTENT POSSIBLE, UNDER RULES WHICH PROVIDE FOR AN EXPEDITED HEARING. THE FILING FEE FOR THE ARBITRATION SHALL BE PAID BY THE PARTY FILING THE ARBITRATION DEMAND, BUT THE ARBITRATOR SHALL HAVE THE TO RIGHT TO ASSESS OR ALLOCATE THE FILING FEES AND ANY OTHER COSTS OF THE ARBITRATION AS A PART OF THE ARBITRATOR'S FINAL ORDER. THE ARBITRATION SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION AWARD. **NOTWITHSTANDING ANY OTHER PROVISION HEREIN,**

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<sup>1</sup> The undersigned counsel briefed and argued this Motion with D.R. Horton in *Eagles Glen*.

<sup>2</sup> These "Warranties" are RWC's Ten Year Warranty and all Manufacturer Warranties which are provided to homeowners after they sign their purchase agreement at closing.

**ANY DISPUTES ARISING UNDER THE LIMITED WARRANTY SHALL BE MEDIATED, ARBITRATED AND/OR JUDICIALLY RESOLVED PURSUANT TO THE TERMS, CONDITIONS, PROCEDURES AND RULES OF THAT WARRANTY. NOTWITHSTANDING THE FOREGOING, SELLER SHALL HAVE THE RIGHT TO INTERPLEAD ALL OR ANY PART OF THE EARNEST MONEY INTO A COURT OF COMPETENT JURISDICTION AS PROVIDED FOR IN SECTION 4 HEREIN.**

(Exhibit 1) (emphasis added). Paragraph 14 describes the Warranties, wrongfully attempts to disclaim all implied warranties, and unconscionably attempts to relieve D.R Horton of all liability for “monetary damages of any kind”:

#### **14. WARRANTIES AND DISCLAIMER.**

- a. Ten-Year Limited Warranty.** Seller shall provide Buyer with a written, ten-year limited warranty on the House administered by Residential Warranty Corporation (“*RWC*”) which shall be effective as of the Closing Date. The terms and conditions of, and exclusions from, the ten-year limited warranty shall be as set forth in that document published by RWC, entitled “LIMITED WARRANTY, 10 YEAR LIMITED WARRANTY FOR NEW HOMES,” and referred to herein as the “*Limited Warranty*”. At Closing, Seller shall deliver to Buyer the actual Limited Warranty for the House from RWC.
- b. Manufacturers’ Warranties.** At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the House.
- c. Disclaimer and Limitation on Seller's Liability.** THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14(a) ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND **SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. . . AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY** OR 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.**

(Exhibit 1) (emphasis added). Paragraphs 14 and 15 do not contain a survival or severability clause.

*Id.* Nor is there any other **applicable** survival clause found anywhere in the Purchase Contract.

Following the execution of her purchase contract, Harley received her deed when she closed in 2021. (Harley Deed, Exhibit 2). Harley's deed does not contain an arbitration provision.

*Id.*

**B. Procedural History**

Harley filed her Complaint on July 21, 2023, and asserts the following claims against D.R. Horton, Plumbing Solutions, LLC, and John Does 1-15: Negligence/Gross Negligence, Breach of Implied Warranties, and Violations of the South Carolina Unfair Trade Practices as to D.R. Horton. *See Complaint.*

D.R. Horton filed a Motion to Stay pursuant to South Carolina's Right to Cure Act. S.C. Code §40-59-810, *et seq.*<sup>3</sup> Following an agreement between counsel, D.R. Horton conducted its "Right to Cure" inspections on February 28, 2024. As part of that agreement, D.R. Horton was allowed thirty (30) days following the inspections to respond to the Complaint. D.R. Horton made no offer to cure in the applicable timeframe set forth in the statute. Following the Right to Cure Inspections, D.R. Horton files its Motion to Stay and Compel Arbitration on March 29, 2024. *See Arbitration Motion.*

**ARGUMENTS**

**A. The Arbitration Provision is Unenforceable Because it is Unconscionable**

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<sup>3</sup> The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act.



Harley's arbitration provision is unenforceable because it contains oppressive terms that give D.R. Horton an unfair advantage over unsophisticated homeowners.

# **1. Arbitrability and Unconscionability**

Trial courts decide whether claims should be resolved through arbitration. *See, e.g., Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 569, n. 2 (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) ("The question of arbitrability of a claim is an issue for the courts."). This determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007).

When deciding a motion to compel arbitration, the court is not to rule on the potential merits of the underlying claims. *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (citations omitted). Rather, the court should look to the state law that ordinarily governs the formation and construction of contracts.

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 either the SCUAA or the FAA. 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). 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).

The test for unconscionability is simply whether the arbitration clause creates a fair and impartial forum, or instead is used and intended to give one party an unfair advantage. *Simpson*, 373 S.C. at 25, 644 E.2d at 668-69.

**2. The Arbitration Provision in Harley's Purchase Contract Contains the Same Oppressive Terms Already Found Unconscionable by Many Courts**

This Court, like at least four other courts before it, should find that D.R. Horton's arbitration provision is unenforceable because it is contained within an adhesion contract and the provision, itself, contains oppressive and unconscionable terms that are not severable. *See, e.g., Smith v. D.R. Horton*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (“[U]nconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. . .”); (Exs. 3, 4).

**a. D.R. Horton's Purchase Contract is an Adhesion Contract**

D.R. Horton's contract is one of adhesion, properly subject to heightened scrutiny due to the disparity in bargaining position between D.R. Horton and these homeowners. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)) (“[C]ourts tend to look upon [adhesion contracts] with ‘considerable skepticism’ because they give rise to ‘considerable doubt that any true agreement ever existed to submit disputes to arbitration.’ In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication”).

Here, like *Smith*, there is no evidence that Harley “enjoyed a substantially stronger bargaining position against D.R. Horton than the average homebuyer” or that Harley “was

represented by independent counsel.” *Id.* at 48, 790 S.E.2d at 4. Harley is an unsophisticated purchaser whereas D.R. Horton is a sophisticated developer that annually constructs nearly 800,000 homes throughout the United States. *Id.*; *See also* (D.R. Horton Website, Exhibit 5); *Mirmow v. Great Southern Homes, Inc.*, 2019 WL 7611604, \*2 (S.C. Com. Pl.) (Judge Kessley Dec. 9, 2019 Order Denying Arbitration Motion) (Lexington County) (Exhibit 6). Thus, Harley is “not a substantial business concern of D.R. Horton” because Horton does “not comprise a large portion of D.R. Horton’s clientele.” *Id.* at 48, 790 S.E.2d at 4. As such, this Court should find Harley “lacked a meaningful choice in her ability to negotiate the arbitration clause.” *Id.*

**b. Paragraphs 14 and 15 are “Intertwined” and Contain Unfair Terms**

Also, like *Smith*, Paragraph 15 references Paragraph 14 (which describes the Warranties and includes Horton’s disclaimers of any and all implied warranties and monetary damages of any kind), “intertwining” these paragraphs “so as to constitute a single arbitration provision.” *Id.* at 49, 790 S.E.2d at 4 (emphasis added). As stated by Judge Cordell Maddox:

[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.

*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) (Ex 3); *See also Baddorf, et al. v. D.R. Horton*, Case No. 2022-CP-23-03974) (S.C. Com. Pl.) (Judge Gravely April 25, 2023 Order Denying Horton’s Arbitration Motion) (Greenville County) (Exhibit 4) (“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”).

The only pertinent differences between *Smith* and this case are that D.R. Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and, (2) its disclaimers and limitations from Paragraph 14(i) to Paragraph 14(c). Horton relocated these provisions to try to get around *Smith*'s holding and to avail itself of *Prima Paint*'s holding. However, the relocation of these provisions does not negate *Smith*'s applicability. The *Smith* court found that *Prima Paint* does not preclude courts from considering provisions that are "referenced by" an express arbitration provision.<sup>4</sup>

The below comparison of Smith's paragraphs to Harley's paragraphs shows that the references and disclaimers considered by the *Smith* Court are the same as here: \*\*\*\*\*

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<sup>4</sup> *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 Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967). So long as there is a challenge to the arbitration provision, like here, then courts can decide the "arbitrability" issue and, in doing so, can also consider both the arbitration provision and its affiliated provisions. As Justice Toal aptly explained in the oral arguments for *Smith*, *Prima Paint* "simply says you have to look at the arbitration provision" and "does not stand for the proposition that one can cherry pick out" certain language of a provision one drafted and which includes express references to other provisions. And, since *Prima Paint*, our courts have looked beyond arbitration provisions "themselves" to assess their enforceability. See, e.g., *Smith*, 417 S.C. 42, 790 S.E.2d 1; *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. . .").

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Harley's Paragraph 15:</p> <p>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) <b><u>the Limited Warranty pursuant to Section 14 above. . . Any disputes arising under the [RWC] Warranty shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures and rules of the [RWC] Warranty. . .</u></b></p>                                                  | <p>Smith's Paragraph 14(g):</p> <p>Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) <b><u>Seller's performance under any warranty contained in this Agreement. . . If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty. . . control.</u></b></p> |
| <p>Harley's Paragraph 14(c):</p> <p>The limited warranty given to Purchaser by Seller pursuant to subsection 14a above <b><u>is to the exclusion</u></b> of all other warranties, expressed or implied, and <b><u>Seller hereby disclaims any and all such other warranties</u></b>, express or implied, including but not limited to any warranty of <b><u>habitability</u></b>, merchantability or fitness for a particular purpose. . . <b><u>Seller shall not be liable for any reason under any circumstances to Purchaser or anyone claiming through Purchaser for monetary damages of any kind</u></b>, including secondary, consequential, punitive, general, special or indirect damages.</p> | <p>Smith's Paragraph 14(i):</p> <p><b><u>Except for</u></b> the RWC Warranty. . . Title Warranties, and . . . any warranties imposed by law, which cannot be disclaimed, Seller makes no other warranty of any kind. <b><u>All other such warranties are hereby disclaimed.</u></b> . . Seller makes no warranty as to merchantability or fitness for a particular purpose, either express or implied. . . <b><u>Seller shall not be liable for monetary damages of any kind</u></b>, including secondary, consequential, punitive, general, special or indirect damages.</p>                                                                                               |

This Court cannot discount *Smith's* applicability when this case involves the same disclaimers not physically "within" the same arbitration provision. Any argument by D.R. Horton to the contrary is merely placing form over substance, *i.e.*, D.R. Horton *numerically* separated Paragraph 14 and Paragraph 15, and is without merit.

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

Even if this was not the case, the arbitration provision in Harley's purchase contract, "standing alone," is unconscionable for two other reasons.

First, D.R. Horton incorrectly asserts “[t]here is nothing inherently unfair about this bargaining process. Arbitration is binding on both Plaintiff and D.R. Horton.” (D.R. Horton Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings at p. 12). This is a **blatant misrepresentation of the contract**. D.R. Horton seeks to limit the rights of home purchasers to arbitration while at the same time reserving its own right to litigate if it so chooses:

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

(Exhibit 1). This non-mutual arbitration obligation itself, on its face, is unconscionable. *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*, 39 F.Supp.2d 582 (D.S.C. 1998), *aff’d and remanded*, 173 F3d 933, 940 (4th Cir. 1999) (finding decision to be the appropriate remedy where Hooters promulgated so biased arbitration rules that the contract created a “sham system unworthy of the name of arbitration”).

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

**AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR 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. . .**

(Exhibit 1). This language that purports to prevent the arbitrator from finding D.R. Horton liable for any type of monetary award prevents the arbitrator from making a fair, unbiased decision and is therefore invalid. *Damico* 437 S.C. at 611, 879 S.E.2d at 755 (“In analyzing claims of unconscionability in the context of arbitration agreements. . . courts. . . focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”); *see also Smith*, 417 S.C. at 50, 790 S.E.2d at 5 (finding arbitration provision unconscionable and unenforceable where relief was left “to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate”).

**B. Severance is Improper and Against Public Policy**

Paragraph 15 is not severable from Paragraph 14 because, as in *Smith*, the cross-references between these Paragraphs “intertwine” them into one provision. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (finding “cross-references” “intertwined” Horton’s arbitration and liability limitations paragraph “so as to constitute a single arbitration provision”). Notably, the Court of Appeals in *Smith* acknowledged, like Horton will argue here, that “an arbitration clause is separable from the contract in which it is embedded;” however, the Court did **not** sever its arbitration and liability limitations paragraphs for the same reasons that this Court should not sever the same paragraphs here. *Smith v. D.R. Horton*, 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013), *aff’d*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (“We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly D.R. Horton’s attempt to waive any seller liability for ‘monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.’”) (emphasis added); *see also Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (recognizing that “severability is not always an

appropriate remedy for an unconscionable provision. . . ‘[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. . .’” (citations omitted).

Although Harley’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**. This is exactly what Judge Kittredge made clear in the South Carolina Supreme Court’s recent decision in *Damico v. Lennar Carolinas*, 437 S.C. 596, 619-622 879 S.E.2d 746, 759-760 (2022) (contrary again to what D.R. Horton will argue):

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. *Cf. Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131–32, 678 S.E.2d 435, 439 (2009) (discussing when a term is integral to a contract, as compared to an “ancillary logistical concern,” and explaining courts must look to the “essence” of the arbitration agreement; “[w]here [a particular term] has implications *that may substantially affect the substantive outcome of the resolution*, we believe that it is neither ‘logistical’ nor ‘ancillary.’ ” (emphasis added)). **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-pencilling an agreement is, of course, within the Court’s discretion. **Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement.** *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (“A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” (citation omitted)); *cf. id.* at 579, 762 S.E.2d at 701 (noting even when parties manifest an intent to be bound, an indefinite material term may invalidate the agreement (quoting 1 Corbin on Contracts § 2.8 (Rev. ed. 1993))); *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d



456, 478 (Fla. 2011) (“Further, if the [unconscionable] provision were severed, the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other—particularly[ ] when those legal promises are viewed through the eyes of the contracting parties.” (internal quotation marks omitted) (internal citation omitted)). Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.

**There are two additional, important considerations in this case that bear on severability.** The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. **As mentioned above, adhesion contracts “are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties.”** *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted); *see also* 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9. **In particular, when a contract of adhesion is at issue, “there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.”** *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Similarly, given the adhesive nature of the contract here, we find it “considerably doubtful” any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) (Petitioners) had no hand in drafting or negotiating any of the language of the arbitration agreement. *See Doe*, 430 S.C. at 615, 846 S.E.2d at 880 (explaining that when exercising its discretion to sever portions of the agreement, a court must be guided by the parties’ intent).

**The second additional consideration of which we take note is that this contract involves a consumer transaction.** *See Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (placing emphasis on the need for a case-by-case analysis in cases involving consumer transactions so as to address the unique circumstances inherent in those types of contacts). **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.** *Kennedy*, 299 S.C. at 341–44, 384 S.E.2d at 734–36 (rejecting a result in which “a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions”; and explaining that in the past, when the Court is confronted with a new scenario “not properly disposed of by our present set of rules,” it “[o]nce more[ ] respond[s] by expanding our rules to provide the innocent buyer with protection” (citing *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976))). **As we stated over thirty years ago, it is “intolerable to allow builders to place defective and inferior construction into the stream of commerce.”** *Id.* at 344, 384 S.E.2d at 736 (citing *Rogers v.*

*Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968)). 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. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).

A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. 17A Am. Jur. 2d *Contracts* § 238 (Supp. 2021) (citation omitted). Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); see also 17A Am. Jur. 2d *Contracts* § 238 (2016) (explaining courts may consider, *inter alia*, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

**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.**

Like *Damico*, D.R. Horton has inserted a severability clause in a separate paragraph at the end of the contract with the hope that the court will sever any unconscionable terms if any homebuyer contests them. As Justice Kittredge made clear in *Damico*: **“[Seller] furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause.** We refuse to reward such misconduct, particularly in a home construction setting.” *Id.* at 624, 844 S.E.2d at 762.

This Court should follow the **actual** language of the *Damico* decision and refuse to rescue D.R. Horton from its own overbearing, unfair, and unconscionable contract drafting by unrealistically severing unconscionable provisions from the arbitration provision. D.R. Horton has

continually had similar arbitration provisions struck down by South Carolina Courts. In fact, this **same** arbitration and severability provision was struck down by Judge Gravely in the *Eagles Glen* case. Exhibit 4.

**C. Mart Does Not Support Severability in This Case**

D.R. Horton's reliance on *Mart* is misplaced.<sup>5</sup> First, **Mart did not deal with a D.R. Horton purchase contract.** Our Supreme Court has found that the arbitration provision in these D.R. Horton purchase contracts is unenforceable because it is contained within an adhesion contract, and the arbitration provision itself contains oppressive and unconscionable terms that are not severable. *See, e.g., Smith*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (S.C. 2016) (“[U]nconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. . .”).

Like *Smith*, and many other courts, this Court should find that the arbitration provision in **D.R. Horton's purchase contract** consists of both Paragraph 15 and Paragraph 14 because of express references between the two:

**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. . .**

This cross-referencing “intertwines” these paragraphs “so as to constitute a single arbitration provision.” *Id.* 417 S.C. at 49, 790 S.E.2d 4. (emphasis added); *see also Zitek v. D.R.*

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<sup>5</sup> *Mart v. Great Southern Homes*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023).

*Horton, et al*, Case No. 2019-CP-04-01942 (S.C. Com. Pl.) (Judge Sprouse January 27, 2021 Order) (Anderson County) (Ex 3); *Baddorf, et al. v. D.R. Horton*, Case No. 2022-CP-23-03974 (S.C. Com. Pl.) (Judge Gravely April 25, 2023 Order Denying Horton’s Arbitration Motion) (Greenville County) (Exhibit 4) (“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”).

Like *Smith, Damico, Zitek*, and *Baddorf*, severing Paragraph 15 from Paragraph 14 is impossible because neither Paragraph contain a severability clause, and severance would also contravene both established contract interpretation law and recognized public policy principles. *Baddorf, et al. v. D.R. Horton*, Case No. 2022-CP-23-03974 (S.C. Com. Pl.) (Judge Gravely April 25, 2023 Order Denying Horton’s Arbitration Motion) (Greenville County) (Exhibit 4 pp. 9-10) (citing *Damico v. Lennar Carolinas*, 437 S.C. 596, 619-622, 879 S.E.2d 746, 759-760 (2022)). As Justice Kittredge made clear in *Damico*: **“[Seller] furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause.”** We refuse to reward such misconduct, particularly in a home construction setting.” *Id.* at 624, 844 S.E.2d at 762 (emphasis added).

Notably, even *Mart* acknowledged that “*Damico* governs [the] inquiry in this dispute”. *Mart*, 441 S.C. at 314 (referencing *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022)). 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. *Id.* at 604.

D.R. Horton now tries to explain away these well-supported and correct findings specific to the arbitration provision in D.R. Horton's purchase contract by misrepresented reliance on *Mart* which concerned **entirely different arbitration provisions in entirely different contracts.** Indeed, *Mart* 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;
- 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 lacking material terms."**

*Id.* 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.").

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

unenforceable where relief was left “to the whim of D.R. Horton while simultaneously allowing no monetary [recovery] when, as here, the repairs are simply inadequate.”)).

On the contrary, **the arbitration provision here contains the same one-sided and oppressive terms as the arbitration clause in the *Smith* case** and that are unconscionable, inseverable, and unenforceable for the same reasons the Supreme Court articulated in that case. *Smith* controls – not *Mart* – and this Court should ignore D.R. Horton’s attempt to whitewash the prevailing South Carolina Supreme Court decision that expressly rejected the arbitration provision **in D.R. Horton’s purchase contracts.**

**D. Horton’s Only Material Post-Closing Obligations is Governed by a Separate Warranty That Has a Separate Arbitration Provision that D.R. Horton Does Not Seek to Compel Arbitration Under**

This Court should further find that D.R. Horton’s purchase contract shows that a different arbitration agreement governs post-closing disputes such as this one.

Paragraph 18(b), for example, indicates that Paragraph 15 only applies to pre-closing disputes:

**If [D.R. Horton] defaults on any of its obligations hereunder prior to Closing,** Purchaser’s sole and exclusive remedy shall be either: (a) to terminate this Agreement by written notice to [Horton]. . .or (b) to seek specific performance of this Agreement. . .**by instituting mandatory binding arbitration of Purchaser’s claim of default and demand for specific performance [per Paragraph 15] (§ 18(b)).**

Paragraphs 14(a) and 15 indicate that D.R. Horton will provide a separate warranty with a separate arbitration “at closing” that will govern “any” post-closing disputes:

**At Closing,** [Horton] shall execute and deliver the Purchaser. . .the RWC Warranty. . .Any disputes arising under [the RWC Warranty]. . .**shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures of that warranty program.** (§§ 14(a), 15).

Paragraph 14(c) then emphasizes that D.R. Horton’s “after closing” obligation is limited to this separate warranty and the homeowners’ deeds.

**After Closing**, [Horton] shall have **no liability or obligation** to Purchaser. . . **.except as provided** in [the Warranties]. . . **.and in [Horton's] deed to purchaser.** (§ 14(c)).

D.R. Horton did not move to compel arbitration under these warranties' arbitration provisions and, therefore, this Court should find that its arbitration agreement is moot.<sup>6</sup>

### **E. The Arbitration Provision is Unenforceable Under the Merger Doctrine**

This Court should further find that Harley's arbitration provision is unenforceable because it did not survive closing and is not contained within Harley's deed. Therefore, D.R. Horton has no valid basis to demand arbitration.

#### **1. Merger Doctrine**

The Doctrine of Merger ("Merger Doctrine") provides that deeds supersede all prior agreements leading up to the execution of the deed:

The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.

*Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 132-33 (Ct. App. 1984) *quoting* *Charleston & Western Carolina Railway Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957) (emphasis added). In other words, once parties execute a deed:

. . . [T]he 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 evidence of [prior] agreement[s] between the parties is inadmissible to vary or contradict the terms of the deed.

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<sup>6</sup> Notable, Harley does not assert any express warranty claims and, therefore, cannot be compelled to arbitrate under the express warranty.

*Charleston & Western*, 231 S.C. at 505, 99 S.E.2d at 193 (citations and quotations omitted); *Wilson*, 281 S.C. at 364, 315 S.E.2d at 133 (“A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract. . .”) (citations and quotations omitted).<sup>7</sup>

## 2. **The Arbitration Provision in Harley’s Purchase Contract Was Extinguished by the Deed**

In 2005, 2011, 2021, and 2023, four South Carolina Circuit Courts refused to enforce the arbitration provision in D.R. Horton’s purchase agreement because they found that the provisions in the purchase contract were extinguished by the deed:

Plaintiff asserts that because the only arbitration requirement is found in the contract of sale, and not the Deed. . .under the Doctrine of Merger, the arbitration clause contained in the contract is null and void.

South Carolina Law, like the general rule in other states, is clear that when there is a contract of sale and a subsequent deed, the subsequent deed becomes the contract. Accordingly, the Doctrine of Merger essentially means that if the language relied upon (in this case the Arbitration Clause) does not exist in the latter contract (the Deed), it is extinguished.

*Smith v. D.R. Horton*, Case No. 2010-CP-18-641 (S.C. Com. Pl.) (Judge Dickson Apr. 12, 2011 Order Denying Horton’s Arbitration Motion) (Dorchester County) (Exhibit 7) (emphasis added);<sup>8</sup> *see also Upchurch v. D.R. Horton*, 2005 WL 5621497, at \*3 (S.C. Com. Pl.) (Judge Barber Sept. 28, 2005 Order Denying Horton’s Arbitration Motion) (Richland County) (Exhibit 8) (refusing to enforce arbitration because the “arbitration clause did not survive closing”); *Zitek v. D.R. Horton*,

<sup>7</sup> *See also Yawkey v. Lowndes*, 150 S.C. 493, 148 S.E. 554, 562–563 (1929) (“[w]hatever may have been the plaintiff’s desires, as disclosed in his telegrams, it is certain that all the negotiations were merged in the deed”); *St. Philip’s Church v. Zion Presbyterian Church*, 23 S.C. 297, 315 (1885) (“The deed was absolute on its face and in its terms. No such conditions as those appearing in the lease were incorporated in the deed”).

<sup>8</sup> *Smith* was appealed and the Supreme Court ultimately affirmed the lower court’s declination of arbitration based on unconscionability grounds. Neither the Court of Appeals nor the Supreme Court addressed merger. *Smith* is discussed in further detail in Section B (2).



Case No. 2019-CP-04-01942 (S.C. Com. Pl.) (Judge Maddox Jan. 27, 2021 Order Denying Horton’s Arbitration Motion and Granting Class Certification) (Anderson County) (Exhibit 3) (refusing to enforce arbitration provision because it was “extinguished and unenforceable under the Merger Doctrine”); *Baddorf, et al. v. D.R. Horton*, Case No. 2022-CP-23-03974) (S.C. Com. Pl.) (Judge Gravely April 25, 2023 Order Denying D.R. Horton’s Arbitration Motion) (Greenville County) (Exhibit 4) (finding that, like the three cases above, “the deeds in this case were executed after the execution of the Purchase Agreements which contain the subject Arbitration Provision. . . The Arbitration Provision at Paragraph 15 of the Purchase Agreements – even if it had any validity – is therefore extinguished and unenforceable under the Merger Doctrine”).

Like *Smith*, *Upchurch*, *Zitek*, and *Baddorf*, Harley’s deed was executed **after** Harley’s purchase contract. (Exhibit 1) (Harley contract executed on April 21, 2021); (Exhibit 2) (Harley deed executed on October 1, 2021); *see also Wilson*, 281 S.C. at 364, 315 S.E.2d at 133 (“A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract. . .”). The antecedent Paragraph 15 of Harley’s purchase agreement – even if it had any validity – is therefore extinguished and unenforceable under the Merger Doctrine.

### 3. **D.R. Horton Cannot Satisfy the Contrary Intent Exception Because Paragraph 15 Was Not Intended to Survive Closing**

The “contrary intent” exception to the Merger Doctrine provides that agreements that are not intended to be merged in a deed, are not merged into the deed. *Hughes v. Greenville Country Club*, 283 S.C. 448, 451, 322 S.E.2d 827, 828 (Ct. App. 1984). Under this exception, “the party denying merger has the burden of proving *by clear and convincing evidence* that merger was not intended.” *Id.* (emphasis added.) In effect, this means that D.R. Horton must prove, by clear and convincing evidence, that the parties intended for Paragraph 15 to survive closing. D.R. Horton cannot meet this burden, which is established by the purchase agreement itself.

Paragraph 15 of the purchase agreement, itself, does not contain language evidencing an intent that the arbitration obligation “survives” closing or applies “after closing.” (Exhibit 1, p. 6). Nor do the purchase agreements have a general survival clause that purports to apply to all terms in the agreement. (Exhibit 1). However, directly bearing on D.R. Horton’s argument, in the purchase agreements, D.R. Horton included express “survival” language in select, individual provisions, which expressly evidences D.R. Horton’s intent that those provisions were to survive. For example:

- In Paragraph 9(b) about purchaser’s indemnity obligations for inspections, D.R. Horton wrote: “Purchaser’s indemnity of [D.R. Horton] pursuant to this Section shall survive Closing. . .”
- In Paragraph 10 about brokerage fees and commissions, D.R. Horton wrote: “[T]he provisions of this Section shall survive Closing. . .”
- In Paragraph 21 about walk-through inspections, D.R. Horton wrote: “[D.R. Horton’s] obligation to [correct Punch List items agreed upon prior to closing] shall survive closing.”

(Exhibit 1) (emphasis added).

D.R. Horton drafted the purchase agreements and clearly knew and understood how to memorialize its intent that certain provisions of the purchase agreement were to survive closing. The arbitration provision was not one of those provisions, which actually evidences D.R. Horton’s intent that the arbitration requirement *not survive* closing.

**a. Carlson’s Application of the Contrary Intent Exception is Clearly Distinguishable**

Further, the absence of survival language in the arbitration provision clearly distinguishes this case from the Court of Appeals’ decision in *Carlson v. S.C. State Plastering*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013), which D.R. Horton cites and relies upon with respect to the survivability issue. In *Carlson*, unlike here, the purchase contract contained a survival clause that

expressly indicated that the terms of contract “shall not be merged into or waived by the instruments at Closing.” *Id.* at 254, 743 S.E.2d at 870-71 (emphasis added). The *Carlson* court exclusively relied on this language in finding that the parties “did not intend for the [contract’s] arbitration clause to be merged into the deed at closing.” *Id.* Harley’s purchase contract and Paragraph 15 do not contain this language, so the opposite result is required as found by both the *Zitek* and *Baddorf* Courts. (Exs. 3, 4).

**b. D.R. Horton’s Post Closing Warranties Do Not Evidence Clear Intent**

D.R. Horton next argues that the purchase contract’s references to the “ten-year limited warranty” and “manufacturer warranties” it is supposed to provide to homeowners at closing is somehow evidence that the parties did not intend for merger. (D.R. Horton Memorandum in Support of Motion to Compel Arbitration and Stay Proceedings at p. 12-14) These post-closing warranties, copies of which D.R. Horton failed to provide this Court, have their own, distinct arbitration provisions. The plain language of Paragraph 15 proves this point:

. . .Any disputes arising under the limited warranty **shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures of that warranty program.**

(Exhibit 1) (emphasis added).

This is clear and convincing evidence that D.R. Horton, as the drafter of the purchase contract, intended for these warranties’ arbitration terms to control post-closing disputes and not Paragraph 15. D.R Horton cannot prove otherwise. *Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct.App.1984) (“[T]he party denying merger has the burden of proving by clear and convincing evidence that merger was not intended.”).

**4. D.R. Horton Cannot Satisfy the Part Performance Exception Because D.R. Horton Has Purportedly Performed All “Unperformed Obligations”**

The second exception relied upon by D.R. Horton is the part performance exception, which essentially provides that unperformed contractual obligations do not merge with deeds until they are performed. *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993) citing 26A C.J.S. Deeds § 9.<sup>9</sup> As the Court in *Zitek* and *Baddorf*, this exception also does not apply because D.R. Horton has no “unperformed obligations.” 26A C.J.S. Deeds § 223 (1956) (“An exception. . .to the merger rule occurs if the contract contains provisions that delivery of the deed does not fulfill. As to those provisions, the contract is not merged in the deed, and the contract remains in force until the contract has been fully performed.”) (emphasis added).

D.R. Horton defines its unperformed obligations in Paragraph 14(c) of the purchase agreement. According to this paragraph, D.R. Horton has no post-closing obligations “except as provided in”: (1) Section 14 (i.e., the Warranties); (2) Section 21 (i.e., Punch List Repairs based on Walkthroughs); and (3) homeowners’ deeds.<sup>10</sup> However, there are no D.R. Horton post-closing

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<sup>9</sup> *New Prospect* is the only South Carolina appellate decision that mentions this exception and it does so in a cursory manner. *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993) citing 26 C.J.S. Deeds § 91 (1956).

<sup>10</sup> As noted above, Harley’s purchase agreement indicates that D.R. Horton’s other rights and obligations end at “Closing.”

obligations expressly incorporated into homeowners' deeds;<sup>11</sup> and D.R. Horton contends that it performed both its Warranty and Punch List obligations. As such, Harley's "contract[s] has been fully performed." Exhibit 3) (finding that the part performance exception did not apply because Zitek's purchase contract "ha[d] been fully performed") *citing* 26A C.J.S. Deeds § 223.

This Court should find that neither of these exceptions apply here; the arbitration provision merged with, and was extinguished by, the deed; and therefore, the arbitration provision is independently unenforceable under the Merger Doctrine.

**a. The Circuit Court's Order in *Tyler* is Not a Final Order and is Not Applicable Here.**<sup>12</sup>

D.R. Horton relies on an Order in *Tyler v. D.R. Horton, Inc.*, Case No. 2022-CP-08-02548 (S.C. Com. Pl.) (Judge Goodstein March 4, 2024, Order) (Berkeley County). The circuit court's order in *Tyler* (1) is not a final order and is subject to appeal; (2) made no specific findings relative to unconscionability or severability; and (3) made no specific findings relative to violating South Carolina public policy.

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<sup>11</sup> While the implied warranty of habitability survives deeds, this does negate the Merger Doctrine's applicability to pre-deed warranty disclaimers (or arbitration provisions). As explained by the 4th Circuit in *Tower South*:

The South Carolina Supreme Court did not abandon the merger doctrine in *Rutledge* and *Lane*. It simply held that the implied warranty of fitness survives delivery of the deed in the sale of a new building. As the same court explained more recently: "We recognized that a builder-vendor of a new house gives his purchaser an implied warranty of fitness in *Rutledge*. . . The result of this holding was to establish this implied warranty as an independent covenant which survives delivery of the deed. To this extent, *Rutledge* abrogated the doctrine of merger by deed." *Kennedy*. . . The implied warranty survives the merger doctrine to protect innocent purchasers and to prevent builders from placing defective and inferior construction into the stream of commerce. . . These reasons do not apply to disclaimers of implied warranties, which sellers use to limit liability. Unlike the implied warranty, which arises automatically by operation of law, a waiver of an implied warranty is an affirmative contractual provision. If the deed does not include the waiver of the implied warranty, a court should assume that the parties modified their agreement as to the seller's liability, and it should nullify the waiver provision under the merger doctrine.

*Tower South POA v. Summey Building Systems, Inc.*, 47 F.3d 1165 (Unpublished) (emphasis added).

<sup>12</sup> *Tyler v. D.R. Horton, Inc.*, Case No. 2022-CP-08-02548 (S.C. Com. Pl.) (Judge Goodstein March 4, 2024, Order) (Berkeley County).

Further, Plaintiff's counsel in this case and in that case believe the *Tyler* Order, which addressed only the Merger Doctrine, will be reversed on appeal because the Order's sole ruling – that the “contrary intent exception” to the Merger Doctrine applies here – is incorrect and construes many inferences in the drafter's favor, instead of Plaintiff's favor.<sup>13</sup>

### **CONCLUSION**

In sum, this Court should deny D.R. Horton's Arbitration Motion, and in doing so, the Court should find that the arbitration provision in Harley's purchase contract is unenforceable for four, distinct reasons:

1. The arbitration provision is unconscionable because the purchase agreement is an adhesion contract and its arbitration provision contains similar references to the same oppressive terms that “intertwine” these related provisions;
2. The arbitration provision is unconscionable because it lacks mutuality and improperly limits the arbitrator's ability to reach an unbiased decision;
3. The arbitration provision, and its severance from other provisions, violates South Carolina public policy; and
4. The arbitration provision is extinguished under the Merger Doctrine because the purchase contract was intended to, and did, merge with the deed.

***(Signature Page to Follow)***

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<sup>13</sup> Plaintiff's Motion for Reconsideration as to this Order as well as the Supporting Memorandum is incorporated fully herein by reference and attached as Exhibit 9.

LYLES & ASSOCIATES, LLC

*s/ Joseph Winterstein*

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**Counsel for Plaintiff**

Mount Pleasant, South Carolina  
September 3, 2024

# Exhibit 1



Abbey at Trolley Run St 60

28

466390028


  
**HOME PURCHASE AGREEMENT**

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

In consideration of the reciprocal covenants stated herein, **D.R. Horton Inc.** ("Seller") and **Deborah Denise Harley** (collectively "Purchaser") agree as follows:

**1. CONVEYANCE.** Seller shall sell to Purchaser and Purchaser shall purchase from Seller all that certain parcel or tract of land located in **AIKEN** County, SC, with a street address of **321 DONNINGTON COURT, AIKEN, SC 29801**, more particularly described as Lot: **28**, in **Abbey at Trolley Run St 60** Subdivision (the "Lot"), together with all improvements thereon and all appurtenances thereto collectively referred to as the "Property."

**2. PURCHASE PRICE AND METHOD OF PAYMENT.** Subject to adjustment as may be provided herein, the Purchase Price for the Property shall be **Two Hundred Seventy Thousand Nine Hundred Thirty and 00/100 Dollars (\$270,930.00)** to be paid in cash as provided herein. The terms of the subsection (a or b) checked below shall also apply.

☐ **a. No Financing Contingency.**

Purchaser shall pay to Seller the Purchase Price in cash at Closing (See Section 16 below). Within five (5) business days of the Effective Date, Purchaser shall provide documentation to Seller that will verify to Seller's reasonable satisfaction that Purchaser has the available funds necessary to purchase the Property according to the terms of this Agreement. If Purchaser does not provide such documentation to Seller within that time period, then Seller may at its option terminate this Agreement by providing written notice to Purchaser of termination, in which event Seller shall retain the Earnest Money (see Section 4 below) and neither party shall have any further obligation or liability to the other hereunder.

☒ **b. Financing Contingency**

(1) Purchaser shall use its best efforts to obtain a loan in the principal amount of no more than **100%** of the Purchase Price, reduced to the next lowest hundred dollars, (the "Loan") to be secured by a first priority mortgage on the Property. The proceeds of the Loan, together with the balance of the Purchase Price, shall be paid to Seller by Purchaser in cash or other immediately available funds at Closing.

(2) Purchaser shall apply for the Loan within three (3) business days after the Effective Date. **Failure by Purchaser to apply for the Loan within that time-period or to pursue approval of the Loan diligently thereafter shall constitute a material breach of this Agreement by Purchaser.** Within seven (7) days after the Effective Date, Purchaser shall provide Seller with written evidence from Purchaser's lender confirming that Purchaser has been prequalified for the Loan (the "Prequalification Letter"). Within twenty-one (21) days of the Effective Date, Purchaser shall provide Seller with a letter from Purchaser's lender confirming that the Loan has been conditionally approved (the "Conditional Approval Letter"). Within thirty (30) days after the Effective Date, Purchaser shall provide Seller with a letter from Purchaser's lender confirming that the Loan has been fully and finally approved, with no conditions or contingencies (the "Final Approval Letter"). If Purchaser fails to provide the Prequalification Letter, the Conditional Approval Letter or the Final Approval Letter to Seller by the respective deadlines stated above, then Seller, at Seller's option, may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money shall be refunded to Purchaser if Purchaser is not in breach of this Agreement, and thereafter neither party shall have any further liability or obligation to the other hereunder.

(3) Purchaser acknowledges that there are many different loan programs available from many different lenders. If the loan approval obtained by Purchaser contains any contingencies, Seller may require the satisfaction of those contingencies within the time period specified for obtaining the Final Approval Letter and terminate this Agreement if those contingencies are not waived or satisfied within that time; in which event, the Earnest Money shall be refunded to Purchaser, and neither party shall thereafter have any further liability or obligation to the other hereunder.

(4) Purchaser acknowledges that there are many different loan programs available from many different lenders. Purchaser understands and acknowledges that certain loan/credit approvals are only valid for up to one hundred twenty (120) days. Purchaser shall update loan/credit approval documentation as needed in order to maintain current loan approval up until the date of closing. Purchaser agrees to execute all papers and perform all other actions necessary to obtain the Loan and to accept the Loan if approved by lender. Purchaser shall, in addition to the payment of principal and interest upon the Loan, pay at Closing such amounts as may be required by the lender to establish or maintain an escrow for insurance, property taxes or private mortgage insurance.

**(5) FOR FHA/VA LOANS ONLY:**

(i) **FHA Amendatory Clause.** If Purchaser applies for and obtains a commitment for an FHA-insured loan, then, notwithstanding any other provisions of this Agreement, Purchaser shall not be obligated to complete the purchase of the Property or to incur any penalty, by forfeiture of earnest money or any other deposit, or otherwise, unless Purchaser has been given, in accordance with HUD/FHA requirements, a written statement by the Federal Housing Commissioner or a Direct Endorsement lender setting forth the appraised value of the Property of not less than \$270,930.00. Purchaser shall have the privilege and option of proceeding with consummation of the Agreement without regard to the amount of the appraised valuation. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure. HUD does not warrant the value or condition of the Property. Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.

(ii) **Escape Clause for VA Loans:** It is expressly agreed that, if Purchaser applies for and obtains a commitment for a VA-guaranteed mortgage loan, then, notwithstanding any other provisions of the Agreement, Purchaser shall not incur any penalty by forfeiture of earnest money or any other deposit, or otherwise, nor shall Purchaser be obligated to complete the purchase of the Property if the Purchase Price or cost exceeds the reasonable value of the Property established by the Department of Veterans Affairs. Purchaser shall, however, have the privilege and option of proceeding with the consummation of the Agreement without regard to the amount of the reasonable value established by the Department of Veterans Affairs (Authority: 38 U.S.C. 501, 3703(c)(1)).

(iii) **Additional Funding:** Purchaser agrees that, should Purchaser elect to complete the purchase of the Property at an amount in excess of the appraised value, Purchaser shall pay such excess amount in cash from a source Purchaser agrees to disclose to the FHA or VA (as applicable) and that Purchaser represents will not be from borrowed funds, except as approved by the FHA or VA (as applicable).

**3. FINANCIAL INFORMATION.** Purchaser acknowledges that Purchaser's financial situation may affect Purchaser's ability to obtain a loan and/or purchase this Property. Purchaser further acknowledges that it is important for the Seller to know Purchaser's financial situation and Purchaser's ability to obtain financing. Purchaser hereby grants permission for the Seller to contact any mortgage company or financial institution to which Purchaser may apply for a loan and to discuss Purchaser's financial situation and prospects of obtaining a loan. Purchaser hereby authorizes any mortgage company or financial institution from which Purchaser may seek a loan to discuss Purchaser's financial status with the Seller and to provide the Seller with any documentation or information regarding said financial status, including but not limited to Purchaser's credit score. **Purchaser hereby authorizes and directs the settlement agent conducting the Closing to disclose to Seller the type of mortgage loan obtained by Purchaser (e.g., FHA, VA, USDA, Conventional) to purchase the Property.**

**4. DEPOSITS.**

**a. Earnest Money.** The parties acknowledge that, as of the Effective Date, Purchaser has deposited with Seller earnest money in the amount shown below (the "Initial Deposit"). Purchaser shall deliver to Seller additional deposits of earnest money in the amounts shown below by the due dates shown below (the "Additional Deposits"). The Initial Deposit and any Additional Deposits are hereinafter referred to as the "Earnest Money," both individually and collectively. Upon execution of this Agreement by Seller, the Earnest Money shall be deposited in a separate account and held in trust until closing or other disposition in accordance with this Agreement. Failure by Purchaser to pay any Additional Deposit by the applicable due date shall constitute a material breach of this Agreement by Purchaser. The schedule of Earnest Money deposits is as follows:

| Earnest Deposits |                              |                     |                     |                       |                          |
|------------------|------------------------------|---------------------|---------------------|-----------------------|--------------------------|
| <u>Due Date</u>  | <u>Collection Date</u>       | <u>Payment Type</u> | <u>Check Number</u> | <u>Deposit Amount</u> | <u>Collection Amount</u> |
| 04/21/2021       |                              |                     |                     | \$2,000.00            | \$2,000.00               |
|                  | 04/21/2021                   | Online Payment      |                     |                       | \$2,000.00               |
|                  | Note: Online Payment via web |                     |                     |                       |                          |
| Total            |                              |                     |                     | \$2,000.00            | \$2,000.00               |

**b. Disbursement.** The Earnest Money shall be retained by Seller except as otherwise expressly stated in the Agreement. At Closing, the Earnest Money shall be credited to Purchaser against the Purchase Price; otherwise, the Earnest Money shall be disbursed as provided herein. If any dispute arises between Purchaser and Seller as to the final disposition of all or part of the Earnest Money, Seller may, but shall not be required to, interplead all or any disputed part of the Earnest Money into a court of competent jurisdiction. If Seller interpleads the Earnest Money into a court, Seller shall be entitled to recover the costs of such interpleader, including reasonable attorney's fees incurred in connection with the interpleader, from the Earnest Money.

**c. Deposits of VA Borrowers.**

- i. **Purchaser Notice Regarding Mortgage Loan.** Purchaser hereby represents that it [SELECT ONE] ☐ DOES ☒ DOES NOT intend to apply for and obtain a mortgage loan guaranteed by the U.S. Department of Veterans Affairs (a "VA Loan") to purchase the Property. **IF PURCHASER DOES NOT CURRENTLY INTEND TO OBTAIN A VA LOAN, BUT LATER DECIDES TO OBTAIN A VA LOAN, PURCHASER SHALL PROMPTLY NOTIFY SELLER IN WRITING.**
- ii. **Trust Account; Disbursement.** Notwithstanding any other provision of this Agreement, if Purchaser obtains a VA Loan, then the Earnest Money, Option Money (hereinafter defined), and all other sums deposited by Purchaser pursuant to this Agreement (collectively, the "Deposits") shall be deposited in a trust account that is safeguarded from the claims of creditors of Seller until the Deposits are (A) disbursed at Closing or (B) otherwise applied or disbursed in accordance with the terms of this Agreement.

**5. SURVEY.** At Closing Seller shall provide Purchaser, at no cost to Purchaser, with a plat of survey of the Property performed by an independent, licensed surveyor, showing all structures and other improvements located on the Property as of the date of the survey (the "Survey"). Seller makes no warranty or representation whatsoever regarding the quality, accuracy or reliability of the Survey. Seller makes no warranty or representation whatsoever regarding the quality, accuracy or reliability of any survey of the Property obtained for the benefit Purchaser pursuant to this subsection, and Purchaser shall look solely to the surveyor for same.

**6. WARRANTY OF TITLE.** Seller shall convey insurable fee simple title in and to the Property to Purchaser at Closing by special or limited warranty deed (the "Deed"), subject to: (a) zoning ordinances affecting the Property; (b) utility, drainage and other easements, deed restrictions or other conditions or restrictions of record upon which do not prevent use or enjoyment of the Lot or the House constructed thereon; (c) subdivision covenants, conditions and restrictions; (d) all matters shown on the final plat for the subdivision where the Property is located; (e) all prior conveyances of all rights, titles and interests to all oil, gas, water, petroleum, natural gas, coal, lignite and other minerals and hydrocarbons, and all geothermal energy and resources, located in whole or in part on, in or under the Lot and/or that may be produced or extracted from the Lot; and (f) any matters that would be shown or revealed by a current survey of the Lot. As used in this Agreement, "insurable fee simple title" shall mean title which a title insurance company licensed to do business in South Carolina will insure at its regular rates, subject only to its standard exceptions and those exceptions listed in subsections (a) through (e) above.

**7. TITLE EXAMINATION.** Purchaser shall have until ten (10) days prior to the Closing Date (as defined in Section 16 below) to examine title to the Property and to furnish Seller with a written statement of any exceptions to insurable title. If Purchaser does not serve Seller with notice of exception to insurable title prior to that date, Purchaser shall have waived any objection to title to the Property as it existed as of the Effective Date. If Purchaser does serve such notice on Seller prior to that date, the notice shall specify and itemize the exceptions to insurable title. If Seller does not remove any exceptions to insurable title within a reasonable time, Purchaser shall have the right to terminate this Agreement and to receive a refund of the Earnest Money and Option Money (as defined in Exhibit A

attached hereto), if any, paid to Seller. Under no circumstances shall Seller be obligated or required to remove or cure any exception to title to the Property that is a permissible exception to insurable title as defined in Section 6 above.

**8. DESTRUCTION.** If the home built on the Lot (the "House") is either totally destroyed or substantially damaged (as determined by Seller in its sole discretion) before Closing, either party may terminate this Agreement by written notice to the other within ten (10) days after the date of such destruction. From and after the Closing (see Section 16 below), all risk of loss to the Property shall be upon Purchaser.

## 9. INSPECTION.

**a. Procedure.** Prior to Closing, Seller shall have the right to deny access to the Lot to any person at any time, as Seller determines in its sole discretion. However, Purchaser or a professional home inspector contracted by Purchaser shall have the right to enter upon the Property at reasonable times during normal business hours solely for the purpose of inspecting, examining, testing and surveying the Property, solely at Purchaser's expense, provided that any such inspection must meet the following requirements and conditions (collectively, "Inspections"):

(1) Inspections by Purchaser:

(a) All Inspections by Purchaser must be scheduled through Seller's sales agent for the Subdivision. These Inspections must be scheduled at least seven (7) days in advance, must be in accordance with Seller's production schedule and must take place during the following timeframe: Monday through Friday, 11 a.m. to 6:00 p.m.

(b) Seller or its appointed representative shall have the right to accompany Purchaser during the Inspections.

(2) Inspections by an independent professional home inspector:

(a) All Inspections by a professional home inspector must be scheduled through Seller's sales agent for the Subdivision. These Inspections must be scheduled at least seven (7) days in advance, must be in accordance with Seller's production schedule, and must take place during the following timeframe: Monday through Friday, 11 a.m. to 6:00 p.m. IF AN INSPECTOR DOES NOT HAVE AN APPOINTMENT ONE WEEK PRIOR TO THE PROPOSED INSPECTION, THE INSPECTOR WILL NOT BE ALLOWED TO PERFORM THE INSPECTION AND WILL BE INSTRUCTED TO RESCHEDULE. SELLER WILL NOT DELAY CONSTRUCTION OR CLOSING TO ACCOMMODATE INSPECTION APPOINTMENTS.

(b) Seller or its appointed representative shall have the right to accompany the home inspector during the Inspection.

(c) The home inspector must be licensed to do business in the State of South Carolina and must furnish to Seller a copy of the inspector's State License Certificate prior to conducting any Inspections. The home inspector must be a member of the American Society of Home Inspectors or the South Carolina Association of Home Inspectors and shall furnish to Seller, no later than 48 hours prior to any Inspection, written evidence of such membership. The home inspector must be certified by the Council of American Building Officials on the One and Two Family Dwelling Code (International Residential Code), 2000 edition, with South Carolina Amendments, and shall furnish to Seller evidence of such certification prior to any Inspection.

(d) Prior to each Inspection, the home inspector must furnish Seller with proof that the home inspector has: (i) worker's compensation insurance in accordance with applicable law, (ii) an errors and omissions insurance policy with a limit of no less than Three Hundred Thousand Dollars (\$300,000) and otherwise in accordance with applicable law and the guidelines of the Limited Warranty provided pursuant to Section 14(a) below, and (iii) a General Liability Insurance Policy in the amount of at least One Million Dollars (\$1,000,000) naming Seller as an additional insured.

(3) **Failure by Purchaser to follow the procedures set forth in this subsection shall constitute a material breach of this Agreement.** Unauthorized entry onto the Lot or unauthorized activities upon the Lot by Purchaser, its agents or contractors shall constitute a material breach of this Agreement by Purchaser. Purchaser specifically acknowledges that Purchaser may not, under any circumstances, install or construct any equipment, fixtures, structures or other improvements upon the Lot, or modify any of the existing equipment, fixtures, structures or other improvements, at any time and any such unauthorized activities shall constitute a material breach of the Agreement by Purchaser. Purchaser shall not interrupt or otherwise interfere with sales or construction within the Subdivision. Upon completion of any Inspection, Purchaser shall restore

the Property to its condition prior to the Inspection.

(4) THE CLOSING SHALL NOT BE DELAYED DUE TO PURCHASER'S FAILURE TO SCHEDULE AND CONDUCT ALL INSPECTIONS SUFFICIENTLY IN ADVANCE OF CLOSING TO ALLOW SELLER TO ADDRESS ISSUES, IF ANY, IDENTIFIED BY THE INSPECTIONS.

**b. Purchaser's Indemnity.** Purchaser assumes all responsibility for the acts of Purchaser, Purchaser's agents, contractors or representatives in exercising Purchaser's rights under this Section, and shall indemnify and hold Seller harmless, to the extent permitted by applicable law, from any loss or expense Seller may suffer as a result of any claim or damage which arises directly or indirectly out of Purchaser's exercise of its rights under this Section. Notwithstanding any other provision herein, Purchaser's indemnity of Seller pursuant to this Section shall survive Closing and the termination of this Agreement for any reason.

**c. Inspection Results.** In the event any inspection by Purchaser or its agents or contractors reveals a purported defect in the Property, Purchaser shall provide Seller with written notice of the claim of defect. If a professional home inspection was performed, the home inspector must prepare a report (including references to any applicable code sections). Purchaser shall deliver to Seller a true and complete copy of any report produced by the home inspector within forty-eight (48) hours of receipt of such report by Purchaser. If Seller determines that Purchaser's claim of defect is valid, Seller shall correct or repair the defect. If Seller determines the claim of defect is not valid, Seller shall notify the Purchaser of that determination within thirty (30) days of receipt of the written notice of claim of defect. Notwithstanding any other provision herein, Seller shall not be required to correct or repair any defect in construction that does not constitute a violation of: (1) the building code of the governing jurisdiction in which the Property is located, or (2) the building guidelines and standards of the provider of the Limited Warranty pursuant to Section 14(a) below. The issuance of a certificate of occupancy, temporary certificate of occupancy, or final inspection certificate for the Property by the applicable governing authority shall be conclusive evidence of compliance with applicable building codes and other applicable regulations and shall constitute substantial completion of the House.

**d. Walkthrough; Punch List:** After substantial completion of the House but prior to Closing, Seller and Purchaser will meet at the Property to conduct a walkthrough inspection and orientation, in accordance with Seller's standard practices (the "Initial Walkthrough"). At the conclusion of the Initial Walkthrough, Purchaser and Seller shall prepare and sign a written list of items on the Property that the parties agree should be corrected, repaired or replaced (hereinafter, the "Punch List"). No items may be added to the Punch List after the Initial Walkthrough. Seller shall thereafter correct, repair or replace the items listed on the Punch List. Under no circumstances shall Seller be required to correct, repair or replace any items on or of the Property that are not listed on the Punch List signed by Seller. Within a reasonable amount of time after the Initial Walkthrough but prior to Closing, Seller and Purchaser shall meet at the Property to conduct a second walkthrough inspection (the "Final Walkthrough") in order to confirm which items on the Punch List have been corrected, repaired or replaced. At the conclusion of the Final Walkthrough, the parties will prepare and sign an updated Punch List reflecting the current status of each item thereon. Seller's obligation to correct, repair or replace any items that are listed on the Punch List shall survive Closing. UNDER NO CIRCUMSTANCES SHALL CLOSING BE DELAYED DUE TO SELLER'S FAILURE TO COMMENCE OR COMPLETE CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST. UNDER NO CIRCUMSTANCES SHALL FUNDS BE ESCROWED AT CLOSING TO COVER THE COST OF CORRECTION, REPAIR OR REPLACEMENT OF ANY ITEMS ON A PUNCH LIST. If Purchaser appoints a third party to conduct the Initial Walkthrough on Purchaser's behalf, such appointee must also conduct the Final Walkthrough on behalf of Purchaser.

**10. REAL ESTATE BROKER AND COMMISSION.** SELLER'S SALES AGENTS ARE LICENSED REAL ESTATE AGENTS IN SOUTH CAROLINA. **D.R. Horton Realty of Georgia, Inc., (Firm# 66418; MLS# CPRF01)** an affiliate of Seller, is the listing broker and will be paid a commission by Seller upon Closing (as hereinafter defined). Purchaser acknowledges that Seller's sales agents represent Seller only and do not represent Purchaser or have any duty to Purchaser. Purchaser represents to Seller that Purchaser has not employed any real estate broker, agent or finder in connection with this Agreement, other than **Jeanette Clark**, an agent of **Good Sense Realty** and (collectively, "Co-Broker"). Purchaser 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, other than the Co-Broker named above. Notwithstanding any other provision herein, the provisions of this Section shall survive Closing or termination of this Agreement for any reason. Purchaser acknowledges receipt of a copy of the disclosure titled "Agency Relationships in Real Estate" Disclosure.

**11. NO RELIANCE.** Purchaser acknowledges that it has not relied upon the advice or representations, if any, of Seller or Seller's salespersons or other agents with regard to the legal and tax consequences of this Agreement or the terms and conditions of any proposed financing of the purchase of the Property. Purchaser acknowledges that if such matters are of concern to Purchaser, Purchaser must



obtain independent, professional advice regarding them.

**12. WOOD INFESTATION REPORT.** At the time of Closing, Seller shall provide Purchaser with a letter or a soil treatment report from a pest-control company licensed in South Carolina certifying that the Lot has been treated within one (1) year of the date of Closing for subterranean termite infestation. If required by Purchaser's lender, Purchaser may obtain at Seller's expense a South Carolina Wood Infestation Report performed by a pest-inspection company licensed in South Carolina.

**13. HAZARDOUS SUBSTANCES.** Purchaser acknowledges that Seller makes no representation or warranty with respect to the presence or absence of toxic waste, radon, hazardous materials or other undesirable substances on the Property. SELLER HEREBY DISCLAIMS ANY LIABILITY OR RESPONSIBILITY FOR THE PRESENCE OF ANY SUCH SUBSTANCES IN, ON, UNDER OR ABOUT THE PROPERTY.

#### 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.

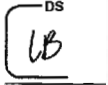
**b. Manufacturers' Warranties.** At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the House.

**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, MERCHANTABILITY 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.

Initials DS  
DDH DS  
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Buyer Seller

**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. 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.

Initials    
Buyer Seller

**16. CLOSING.** The following shall constitute the "Closing": (a) receipt by the settlement agent of all funds necessary to close the transaction, (b) receipt by the settlement agent of the fully executed Deed for immediate recording in the office of the clerk of court register of deeds, as applicable, (c) execution of the Closing Disclosure by Purchaser, Seller and the settlement agent, and (d) payment to Seller of the net proceeds of sale due to Seller. The date on which the Closing Disclosure is executed by all parties is referred to hereinafter as the "Closing Date." Closing shall not be complete until Seller has received full payment of the Purchase Price. Keys to and possession of the Property will not be delivered to Purchaser until the Closing is complete. Closing shall be scheduled and conducted as follows:

**a. Closing Date.** Seller shall give Purchaser notice of the final date and time of Closing (the "Closing Date") at least three (3) business days prior to Closing. PURCHASER'S FAILURE TO CLOSE BY THE CLOSING DATE SET BY SELLER SHALL CONSTITUTE A MATERIAL BREACH, ENTITLING SELLER TO TERMINATE THIS AGREEMENT AND RETAIN THE EARNEST MONEY AND ANY OPTION MONEY. Seller shall exercise good faith and due diligence in completing construction of the House; however, SUBJECT ONLY TO THE PROVISIONS OF THIS SUBSECTION, SELLER SHALL HAVE SOLE DISCRETION IN DETERMINING THE CLOSING DATE. After the Closing Date has been set by Seller, the parties may agree in writing to extend the Closing Date at any time. Subject only to the provisions of Section 27 below, Closing shall occur no later than the date which is two (2) years after the date that Purchaser signs this Agreement.

**b. Purchaser Failure to Close.** PURCHASER'S FAILURE TO CLOSE BY THE CLOSING DATE SET BY SELLER SHALL CONSTITUTE A MATERIAL BREACH, ENTITLING SELLER TO TERMINATE THIS AGREEMENT AND RETAIN THE EARNEST MONEY AND ANY OPTION MONEY. If Purchaser fails to close as required by the terms of this Agreement, Seller shall have the right, in Seller's sole discretion, to either: (1) terminate this Agreement due to Purchaser's default or (2) extend the Closing Date. Seller's election to extend the Closing Date pursuant to this subsection b. shall not be construed as a waiver of Purchaser's default.

**c. Exchange at Closing.** At Closing, Seller shall deliver to Purchaser the Deed for the Property, a certificate of occupancy for the house located on the Property issued by the applicable governmental authority, and, if applicable, a certificate of final approval by the FHA or VA. At Closing, Purchaser shall pay to Seller the Purchase Price in full.

**d. Place of Closing.** The Closing shall take place at the office of the closing attorney selected by Purchaser in South Carolina, or at such other place as the parties may agree in advance. The Purchaser hereby selects & ASSOCIATES, MCDONNELL, MCDONNELL AND ASSOCIATES, 3720 Executive Center Drive, MARTINEZ, GA to handle the Closing of the transaction contemplated in this Agreement.

**e. Closing Costs.** Seller shall pay the cost of the Termite Certification. Except as may be prohibited by FHA or VA regulations, Purchaser shall pay for all other costs related to the Closing, including but not limited to cost of any title search, all recording fees, deed and transfer tax (deed stamps) imposed by the State of South Carolina upon the recording of the Deed, the costs for preparation of the Deed, any capital contribution, initial assessment or transfer fee charged by the Association, and any costs and expenses associated with Purchaser's financing of Purchaser's acquisition of the Property.

**f. Prorations.** All real property taxes for the current year, homeowner association dues and assessments for the current assessment period (but not homeowner association capital assessments due at or after the Closing) and hazard insurances premiums (if applicable), shall be prorated as of the Closing Date, using the most accurate information available on the Closing Date.

**17. UTILITIES AND PERSONAL PROPERTY.** Purchaser shall transfer all utilities into Purchaser's name within twenty-four (24) hours after Closing (excluding weekends and holidays). Purchaser shall not move any personal property onto the Property prior to Closing.

**18. DEFAULT; REMEDIES.** The remedies specified below shall be the sole and exclusive remedies available to the parties in the event of breach of this Agreement, and shall be to the exclusion of all other remedies at law or in equity.

**a. Purchaser's Default.** If Purchaser defaults on any of its obligations hereunder prior to Closing, Seller's sole and

exclusive remedy shall be to terminate this Agreement by written notice to Purchaser; whereupon, Seller shall retain all Earnest Money and Option Money (if any) paid by Purchaser to Seller as liquidated damages. Thereafter, neither party shall have any further liability or obligation to the other hereunder.

**b. Seller's Default.** If Seller defaults on any of its obligations hereunder prior to Closing, Purchaser's sole and exclusive remedy shall be either: (a) to terminate this Agreement by written notice to Seller, whereupon Purchaser shall be entitled to recover all Earnest Money and Option Money (if any) paid to Seller, or (b) to seek specific performance of this Agreement by serving written notice of default on Seller and by instituting mandatory binding arbitration of Purchaser's claim of default and demand for specific performance in accordance with Section 15 above. Notwithstanding the foregoing, subject to the provisions of Section 27 below and provided that Seller has not terminated this Agreement as a result of breach by Purchaser, if Seller is obligated by this Agreement to build a single-family residence on the Lot and Seller fails to complete construction of the residence within two (2) years of the date Purchaser signs this Agreement, then Purchaser may pursue whatever remedies it may have against Seller at law or in equity.

**19. TIME/DATE.** The Effective Date of this Agreement shall be the date of signing of this Agreement by Seller. **Time is of the essence** as to the occurrence of all events, the satisfaction of all conditions and the performance of all obligations hereunder.

**20. RESTRICTIVE COVENANTS; HOMEOWNERS ASSOCIATION.** Purchaser acknowledges receipt of a copy of that certain declaration of covenants, conditions and restrictions for **Abbey at Trolley Run St 60** Subdivision, together with all amendments thereto (collectively, the "Declaration"). Purchaser acknowledges that the Property is subject to the Declaration and that, upon purchase of the Property, Purchaser shall personally be subject to all the provisions of the Declaration, including but not limited to provisions requiring membership in and payment of assessments to any homeowners association for the Subdivision (the "Association"). Purchaser further acknowledges that the current regular assessment due to the Association is estimated to be **595** annually. Purchaser acknowledges that, in addition to the regular assessment, Purchaser shall be required to pay an initial fee or assessment to the Association at Closing in the amount of and a Processing Transfer Fee of **TBD**. **PURCHASER FURTHER ACKNOWLEDGES THAT THE DECLARATION MAY BE AMENDED FROM TIME TO TIME AS PROVIDED THEREIN, AND THAT THE AMOUNTS TO BE PAID BY PURCHASER TO THE ASSOCIATION MAY CHANGE AT ANY TIME.**

**21. SUCCESSORS AND ASSIGNS; INTERPRETATION.** This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their heirs, successors, administrators, executors and assigns. Purchaser shall not have the right to assign Purchaser's interest in this Agreement. As required by context herein, the singular shall include the plural, and the neuter shall include the masculine and the feminine.

**22. ENTIRE AGREEMENT; AMENDMENT.** This document contains the sole and entire agreement between the parties hereto with regard to the Property. All prior discussions have been merged into this Agreement. No representation, statement, promise or inducement shall be binding upon either party hereto unless specifically stated in this Agreement. This Agreement may not be modified except by a writing signed by both parties.

**23. SEVERABILITY.** If any provision of this Agreement shall be declared invalid or unenforceable by laws applicable thereto, or unenforceable as to certain parties, then the performance of such provision shall be excused by the parties hereto and the remaining provisions of this Agreement shall remain in full force and effect.

**24. NO-WAIVER.** Any failure or delay of Purchaser or Seller to enforce any term of this Agreement shall not constitute a waiver of such term, it being explicitly agreed that such a waiver must be specifically stated in a writing delivered to the other party in compliance with Section 28 below. Any such waiver by Purchaser or Seller shall not be deemed to be a waiver of any other breach or of a subsequent breach of the same or any other term.

## **25. ADDENDA AND EXHIBITS.**

**a. Addenda.** The following Addenda are attached hereto and incorporated herein:

- ☒ Addendum 1, Builder's Referral Incentives and Contributions Addendum
- ☒ Addendum 2, Construction Addendum and Disclosures
- ☐ Addendum 3, Current Residence Contingency
- ☒ Addendum 4, Co-Broker Commission Addendum
- ☐ Addendum 5, Alternative Incentive Addendum
- ☐ Addendum 6, Special Stipulations



- ☐ Addendum 7, Model House  
☒ Addendum 8, Variations in Materials and Components  
☒ Smart Home Disclosure Addendum  
☐ Community-Specific Addenda

- b. **Exhibits.** The following Exhibits are attached hereto and incorporated herein:  
 (1) Exhibit A, Home Features and Options

**26. NOTICE.** Except when specifically provided otherwise herein, any notices required to be given hereunder must be in writing. Notice shall be deemed delivered upon receipt or refusal if deposited in the United States Mail, Certified Mail, Return Receipt Requested, postage prepaid, properly addressed to the party to be served. Notice shall also be deemed given if delivered to the address for service of notice shown below by Federal Express, UPS or other nationally recognized overnight carrier service, with no signature or receipt required. Notice to Purchaser also shall be deemed given if delivered to the email address for service of notice shown under Purchaser's signature. Each party warrants that its correct mailing address for service of notice is shown below. Purchaser warrants that its correct telephone number and email address are shown below. A party may change its address for service of notice by giving the other party written notice of the change of address.

**27. EXCUSED DELAYS.** Notwithstanding any other provision herein, if Seller is delayed in performing any of its obligations hereunder or meeting any specified completion dates by labor disputes, fire, delays in deliveries, adverse weather conditions, unanticipated damage to or destruction of the Property, governmental controls or moratoria, acts of God or any other causes beyond Seller's reasonable control, then the time-period specified herein for performance of such obligation and/or meeting such completion date shall be extended a sufficient number of working days to enable and allow Seller to perform and/or complete the obligation.

**28. OFFER.** This instrument shall be regarded as an offer by the first party to sign until fully executed by both parties, at which time it shall become binding on both parties.

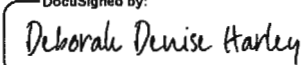
**29. ELECTRONIC SIGNATURES AND TRANSMISSIONS.** This Agreement may be executed by electronic means via DocuSign. Such signatures shall be deemed to constitute originals for all purposes hereunder. In addition, if either party transmits executed documents in electronic format via facsimile or email, then the other party may rely upon such documents as if they were executed originals.

**WHEN SIGNED BY BOTH PARTIES, THIS DOCUMENT WILL BECOME A BINDING CONTRACT IMPOSING LEGALLY ENFORCEABLE OBLIGATIONS UPON YOU. SELLER'S SALES REPRESENTATIVE DOES NOT HAVE AUTHORITY TO EXECUTE THIS CONTRACT ON BEHALF OF SELLER OR OTHERWISE BIND SELLER. IF YOU DO NOT FULLY UNDERSTAND THIS DOCUMENT OR IF YOU DO NOT FEEL IT MEETS YOUR NEEDS, YOU SHOULD CONSULT A SOUTH CAROLINA REAL ESTATE ATTORNEY BEFORE SIGNING IT.**

(Signatures on the Following Page)

IN WITNESS WHEREOF, the parties hereto have executed this Home Purchase Agreement on the dates indicated below.

**PURCHASER:**

DocuSigned by:  
  
CF2869BE10AC436...

**Buyer: Deborah Denise Harley** 4/21/2021  
Date

Purchaser's Current Mailing Address:

2917 Running Creek Lane

Augusta, GA 30907

US

Purchaser's Home Phone:

Mobile Phone: (478) 718-5858

Work Phone:

Purchaser's Email: [deborahdharley@yahoo.com](mailto:deborahdharley@yahoo.com)

Co-Buyer's Current Mailing Address:

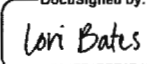
Co-Buyer's Home Phone:

Mobile Phone:

Work Phone:

Co-Buyer's Email:

**SELLER:****D.R. Horton Inc.**

DocuSigned by:  
  
1E047717EF6745C...

**Lori Bates** 4/23/2021  
Date

Officer, D.R. Horton

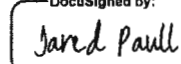
Seller's Address:

1371 Dogwood Dr. SW

Conyers, GA 30012

*For Internal Purposes Only:*

Seller's Sales Representative:

DocuSigned by:  
  
8252B1E2643741E...

**Sales Rep: Jared Paull** 4/21/2021  
Date

[JWPaull@drhorton.com](mailto:JWPaull@drhorton.com)

(803) 800-4476

Sales Rep License Number: **54110**

ELECTRONICALLY FILED - 2024 Sep 03 3:20 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719



466390028

## EXHIBIT A HOUSE FEATURES AND OPTIONS

Community: **Abbey at Trolley Run St 60**Lot: **28**Plan/Elevation: **DENTON Express**Address: **321 DONNINGTON COURT, AIKEN, SC 29801**

1. **OPTIONS SELECTIONS.** Purchaser has selected the features, options and upgrades listed below (collectively, the "Options") to be included in the House. Seller will include the Options in the House at the prices indicated below. In the event Seller omits the installation of any Option in the House, Seller's responsibility for such omission shall be limited to a refund of the applicable price or allowance stated below. Any such omission shall not invalidate this Agreement, constitute a breach of its terms or give rise to any claim for damages against Seller.

The Options are as follows:

### Selected Options

| AP – Appliances                                                  |        |            |             |           |        |            |            |
|------------------------------------------------------------------|--------|------------|-------------|-----------|--------|------------|------------|
| Option #                                                         | Rev. # | Rev. Date  | User        |           | Qty.   | Unit Price | Ext. Price |
| APWPPFG1                                                         | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 0.00    | \$ 0.00    |
| Color:                                                           |        |            |             | Location: |        |            |            |
| WHIRLPOOL PLAT FREE STANDING RANGE GAS APPLIANCE PKG (STAINLESS) |        |            |             |           |        |            |            |
|                                                                  |        |            |             |           |        | Sub-Total  | \$ 0.00    |

| AR – Area Cost         |        |            |             |           |        |            |            |
|------------------------|--------|------------|-------------|-----------|--------|------------|------------|
| Option #               | Rev. # | Rev. Date  | User        |           | Qty.   | Unit Price | Ext. Price |
| AR466390               | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 0.00    | \$ 0.00    |
| Color:                 |        |            |             | Location: |        |            |            |
| TROLLY RUN STATION 60' |        |            |             |           |        |            |            |
|                        |        |            |             |           |        | Sub-Total  | \$ 0.00    |

| CA – Cabinets                                                                                                        |        |            |             |                  |        |                  |                |
|----------------------------------------------------------------------------------------------------------------------|--------|------------|-------------|------------------|--------|------------------|----------------|
| Option #                                                                                                             | Rev. # | Rev. Date  | User        |                  | Qty.   | Unit Price       | Ext. Price     |
| CA000105                                                                                                             | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00          | \$ 0.00        |
| <b>Color:</b>                                                                                                        |        |            |             | <b>Location:</b> |        |                  |                |
| EXPRESS/DRH-E CABINET UPGRADE PACKAGE                                                                                |        |            |             |                  |        |                  |                |
| UPGRADE FROM 30" TO 36" MAIN UPPER CABINETS WITH STAGGERED 24" CABINET OVER RANGE AND 18" CABINET OVER REFRIGERATOR. |        |            |             |                  |        |                  |                |
| CA000110                                                                                                             | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00          | \$ 0.00        |
| <b>Color:</b>                                                                                                        |        |            |             | <b>Location:</b> |        |                  |                |
| EXPRESS KITCHEN CABINET CROWN MOLD                                                                                   |        |            |             |                  |        |                  |                |
|                                                                                                                      |        |            |             |                  |        | <b>Sub-Total</b> | <b>\$ 0.00</b> |

| CT – Countertops                                        |        |            |             |        |            |            |   |
|---------------------------------------------------------|--------|------------|-------------|--------|------------|------------|---|
| Option #                                                | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
| CT000370                                                | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| Color: COLOR DRIVEN BY INTERIOR PKG                     |        |            | Location:   |        |            |            |   |
| NATURAL STONE COUNTERTOP IN KITCHEN W/CONTINUOUS BARTOP |        |            |             |        |            |            |   |

Sub-Total \$ 0.00

| EL – Electrical                                                       |        |            |             |           |        |            |            |   |
|-----------------------------------------------------------------------|--------|------------|-------------|-----------|--------|------------|------------|---|
| Option #                                                              | Rev. # | Rev. Date  | User        |           | Qty.   | Unit Price | Ext. Price |   |
| EL000101                                                              | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 215.00  | \$ 215.00  | P |
| Color:                                                                |        |            |             | Location: |        |            |            |   |
| CEILING FAN (FAMILY ROOM)                                             |        |            |             |           |        |            |            |   |
| EL000102                                                              | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 215.00  | \$ 215.00  | P |
| Color:                                                                |        |            |             | Location: |        |            |            |   |
| CEILING FAN (MASTER BEDROOM)                                          |        |            |             |           |        |            |            |   |
| EL000215                                                              | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| Color:                                                                |        |            |             | Location: |        |            |            |   |
| KITCHEN LIGHTING PACKAGE (LED-DISC LIGHTS)                            |        |            |             |           |        |            |            |   |
| EL000260                                                              | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| Color:                                                                |        |            |             | Location: |        |            |            |   |
| PREWIRE GARBAGE DISPOSAL (DO NOT REMOVE WHEN ADDING GARBAGE DISPOSAL) |        |            |             |           |        |            |            |   |
| EL0DEAKO                                                              | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| Color:                                                                |        |            |             | Location: |        |            |            |   |
| DEAKO LIGHT SWITCHES                                                  |        |            |             |           |        |            |            |   |

Sub-Total \$ 430.00

| EV – Elevations |        |            |             |           |        |            |            |
|-----------------|--------|------------|-------------|-----------|--------|------------|------------|
| Option #        | Rev. # | Rev. Date  | User        |           | Qty.   | Unit Price | Ext. Price |
| EV017000        | 0      | 04/21/2021 | Jared Paull |           | 1.0000 | \$ 0.00    | \$ 0.00    |
| Color:          |        |            |             | Location: |        |            |            |
| VINYL Elevation |        |            |             |           |        |            |            |

Sub-Total \$ 0.00

| EX – Exterior                                                                                                                                                                                                                                                                                          |        |            |             |                  |        |            |            |   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|------------|-------------|------------------|--------|------------|------------|---|
| Option #                                                                                                                                                                                                                                                                                               | Rev. # | Rev. Date  | User        |                  | Qty.   | Unit Price | Ext. Price |   |
| COLORAAU                                                                                                                                                                                                                                                                                               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b> SHUTTER STYLE PER ELEVATION                                                                                                                                                                                                                                                              |        |            |             | <b>Location:</b> |        |            |            |   |
| Express Aurora Package (Black Gutters)                                                                                                                                                                                                                                                                 |        |            |             |                  |        |            |            |   |
| Vinyl Siding: White Vinyl Shake: White Vinyl Board and Batten: White Paint: Scheme 420 (Siding 7004/Accent 7004) Primary Brick: Capers Island Brick Quions: not applicable Stone: Sawgrass Mortar: Magnolia Buff Roof: Black Shutters: Black Windows: White Soffit Fascia Garage: White Gutters: Black |        |            |             |                  |        |            |            |   |
| EX000290                                                                                                                                                                                                                                                                                               | 0      | 04/21/2021 | Jared Paull |                  | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b>                                                                                                                                                                                                                                                                                          |        |            |             | <b>Location:</b> |        |            |            |   |
| GUTTERS ON ALL SIDES                                                                                                                                                                                                                                                                                   |        |            |             |                  |        |            |            |   |

Sub-Total \$ 0.00

| FL – Flooring |        |            |             |        |            |            |   |
|---------------|--------|------------|-------------|--------|------------|------------|---|
| Option #      | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
| FL001950      | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |

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**Color:** COLOR DRIVEN BY INTERIOR PKG  
**Location:**  
MOHAWK LAMINATE FLOORING 1ST FLOOR (EXCLUDES BEDROOMS)

**Sub-Total** \$ 0.00

**FP – Fireplace**

| Option #                                                          | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
|-------------------------------------------------------------------|--------|------------|-------------|--------|------------|------------|---|
| FP000140                                                          | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>DIRECT VENT FIREPLACE FIBER CEMENT (FAMILY ROOM) |        |            |             |        |            |            |   |
| <b>Location:</b>                                                  |        |            |             |        |            |            |   |

**Sub-Total** \$ 0.00

**GA – Garage**

| Option #                                                                  | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
|---------------------------------------------------------------------------|--------|------------|-------------|--------|------------|------------|---|
| GA000110                                                                  | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>CARRIAGE DOORS WITH DECORATIVE HINGES - FRONT ENTRY ONLY |        |            |             |        |            |            |   |
| <b>Location:</b>                                                          |        |            |             |        |            |            |   |

**Sub-Total** \$ 0.00

**IO – Interior Options**

| Option #                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|------------|-------------|--------|------------|------------|---|
| COLOREW4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>EXPRESS WHITE - INTERIOR PKG                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |        |            |             |        |            |            |   |
| <b>Location:</b><br>INTERIOR PAINT: SW7029 AGREEABLE GRAY (PAINTERS EDGE), CABINETS: WHITE PAINT, GRANITE KITCHEN (IF APPLICABLE): WHITE FANTASY, BACKSPLASH (IF APPLICABLE): GRAY SUBWAY, LAMINATE COUNTERTOP: PEARL SOAPSTONE MARBLE BATH COUNTERTOP (IF APPLICABLE): SOLID WHITE GEL, CARPET: TEMPLE STONE 728, ENGINEERED FLOORING (IF APPLICABLE): MILLSTONE CHESNUT DRW33, HARDWOODS (IF APPLICABLE): GRAPHITE BIRCH DRW18, BATH/LAUNDRY VINYL FLOORING: 591 SILVER SCREEN, BATH TILE (IF APPLICABLE): CA22 CANDIDO |        |            |             |        |            |            |   |
| IN000570                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>BLINDS THROUGHOUT HOUSE (SLAB)                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |        |            |             |        |            |            |   |
| <b>Location:</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |        |            |             |        |            |            |   |

**Sub-Total** \$ 0.00

**LS – Landscape**

| Option #                                                                                                                                                                                                                                                                    | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|------------|-------------|--------|------------|------------|---|
| LS000170                                                                                                                                                                                                                                                                    | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>UPGRADE TO SILVER LANDSCAPE PACKAGE                                                                                                                                                                                                                        |        |            |             |        |            |            |   |
| <b>Location:</b><br>16 - 3 GALLON PLANTS: 9 - TALL 2 DIFFERENT VARIETIES 7 - SHORT 2 DIFFERENT VARIETIES 2 - 2" HARDWOOD TREES OAK OR MAPLE: 3 GALLON TALL - ANISE, CIEYERA, LIQUSTRUM 3 GALLON SHORT - CARISSA, RUBY COROPETALUMS, INDIAN HAWTHORNE ONE 6' X 12' KIDNEY SH |        |            |             |        |            |            |   |

**Sub-Total** \$ 0.00

**PL – Plumbing**

| Option #                          | Rev. # | Rev. Date  | User        | Qty.   | Unit Price | Ext. Price |   |
|-----------------------------------|--------|------------|-------------|--------|------------|------------|---|
| PL000345                          | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>GARBAGE DISPOSAL |        |            |             |        |            |            |   |
| <b>Location:</b>                  |        |            |             |        |            |            |   |
| PL000350                          | 0      | 04/21/2021 | Jared Paull | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b>                     |        |            |             |        |            |            |   |
| <b>Location:</b>                  |        |            |             |        |            |            |   |

## GAS FOR HEATING AND COOKING

|                                                       |   |            |             |           |        |         |         |   |
|-------------------------------------------------------|---|------------|-------------|-----------|--------|---------|---------|---|
| PL000480                                              | 0 | 04/21/2021 | Jared Paull | Location: | 1.0000 | \$ 0.00 | \$ 0.00 | P |
| <b>Color:</b><br>SHOWER DOOR - FIBERGLASS SHOWER UNIT |   |            |             |           |        |         |         |   |
| PL000490                                              | 0 | 04/21/2021 | Jared Paull | Location: | 1.0000 | \$ 0.00 | \$ 0.00 | P |
| <b>Color:</b><br>TANKLESS WATER HEATER                |   |            |             |           |        |         |         |   |

Sub-Total \$ 0.00

## SW – Structured Wiring

| Option #                                                | Rev. # | Rev. Date  | User        |           | Qty.   | Unit Price | Ext. Price |   |
|---------------------------------------------------------|--------|------------|-------------|-----------|--------|------------|------------|---|
| SWHOMCON                                                | 0      | 04/21/2021 | Jared Paull | Location: | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>HOME IS CONNECTED (SMART HOME PACKAGE) |        |            |             |           |        |            |            |   |

Sub-Total \$ 0.00

## TR – TR

| Option #                      | Rev. # | Rev. Date  | User        |           | Qty.   | Unit Price | Ext. Price |   |
|-------------------------------|--------|------------|-------------|-----------|--------|------------|------------|---|
| TR003300                      | 0      | 04/21/2021 | Jared Paull | Location: | 1.0000 | \$ 0.00    | \$ 0.00    | P |
| <b>Color:</b><br>EXPRESS TRIM |        |            |             |           |        |            |            |   |

Sub-Total \$ 0.00

Total: \$ 430.00

(No color selections found.)

Base Home Price: \$267,500.00  
Options Total: \$ 430.00  
Options Incentives: \$ 0.00  
Lot Premium: \$3,000.00  
**Total Home Price: \$270,930.00**

**2. OPTION MONEY.** The parties hereby acknowledge that Purchaser has paid to Seller \$ 0.00 towards the cost of the Options, and Purchaser shall make additional payments towards the cost of the Options in the amounts shown in the table below by the due dates shown in the table below. Such payments towards the cost of the Options, and any and all future payments made by Purchaser for options in advance of Closing, are collectively referred to in this Agreement as "Option Money."

(No option deposits found.)

Option Money paid to Seller shall not be held in escrow and shall be nonrefundable to Purchaser, except in the event of material breach of this Agreement by Seller or as otherwise provided in this Agreement. Upon Closing, all Option Money previously paid to Seller shall be credited to Purchaser against the Purchase Price. Any change to the Options shall be subject to additional charges, as set forth in Addendum 2 to the Agreement.

## PURCHASER:

DocuSigned by:

Deborah Denise Harley

CF2889BE10AC438...

4/21/2021

Buyer: Deborah Denise Harley

Date

## SELLER:

D.R. Horton Inc.

DocuSigned by:

Lori Bates

1E047717EF6745C...

4/23/2021

Lori Bates

Date

Officer, D.R. Horton

For Internal Purposes Only:

Bayer(s): Deborah Denise Harley, Community: Abbey at Trolley Run St 60, Plat: 28//1A, Address: 321 DONNINGTON COURT, Sales Rep: Jared Paull

Job: **466390028**  
Printed: 4/21/2021

DocuSigned by:

  
8252B1E2643741E...

4/21/2021

**Sales Rep: Jared Paull**

**Date**

ELECTRONICALLY FILED - 2024 Sep 03 3:20 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719



Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
 Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Pauli** / Internal #  
 Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

**Project: Abbey at Trolley Run**  
**St 60**  
**Lot: 28**  
**466390028**

## ADDENDUM 2 CONSTRUCTION ADDENDUM & DISCLOSURES

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between **Deborah Denise Harley** as Purchaser and **D.R. Horton Inc.**, as Seller, regarding that parcel of land located in **AIKEN** County, **SC**, briefly described as Lot **28**, in **Abbey at Trolley Run St 60** and referred to in the Agreement as the "Lot." All terms defined in the main text of the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree as follows:

**1. CONSTRUCTION OF HOUSE.** Prior to Closing, Seller shall construct or complete construction of a single-family ☒ detached ☐ townhouse residence (the "House") on the Lot. Seller shall not be required to commence construction of the House unless and until: (a) the Loan has been approved by Purchaser's lender to Seller's satisfaction (if the Agreement contains a Financing Contingency); (b) Purchaser has paid all amounts then due to Purchaser's lender (if any) and to Seller; and (c) all contingencies to Purchaser's performance hereunder have been satisfied or removed to Seller's satisfaction. Seller's obligation to construct the House shall be contingent on Seller's ability: (a) to place the House on the Lot without obtaining variances from any set-backs or other dimensional requirements, and (b) to construct the House on the Lot without incurring abnormal costs for foundation, slab or structural support walls. If Seller determines that either of these contingencies cannot be satisfied to Seller's satisfaction, then Seller may terminate this Agreement upon written notice to Purchaser, in which event the Earnest Money and Option Money (if any) shall be refunded to Purchaser.

**2. HOUSE PLAN.** Seller shall construct the House according to the **DENTON Express** Plan, Elevation **A1**, including those features and options listed on Exhibit A to the Agreement, ☒ on a slab / ☐ over a basement (the "Base Plan"). Purchaser hereby acknowledges and agrees as follows:

- a. Seller shall determine the placement and orientation of the House on the Lot in Seller's sole discretion.
- b. The House shall be handmade and unique, and that although the House shall be based on the Base Plan, variations from the Base Plan will occur. Seller shall not be responsible for such variations from the Base Plan or changes to the Base Plan standard features made prior to Closing. Standard features of the Base Plan are subject to change without notice or obligation.
- c. Brochures, collateral, drawings, renderings and other marketing materials, models and displays used by Seller's sales agents are for general illustrative purposes only, and are not to be relied upon as representations of actual locations, dimensions, specifications, features or finished products.
- d. Seller may locate the heating, wiring and electrical system, hot water heater, all plumbing lines, and gas and electric meters at Seller's sole discretion.
- e. Seller may substitute materials or items to be used in the construction of the House with materials or items of equal or comparable value, in Seller's reasonable discretion.
- f. Seller may remove or retain any trees and other vegetation currently existing on the Property if, in Seller's sole discretion, Seller determines that such removal or retention is necessary or desirable in connection with the development of the Property or the Subdivision.
- g. Seller may use a helicopter during the development and construction phases of the Subdivision. From time to time, there may be helicopter flyovers and/or landings in the Subdivision. Once construction is completed, said flyovers and landings by Seller will cease.
- h. Subject only to the provisions of 9.c and 14 of this Agreement, Closing shall constitute acceptance of the House by Purchaser **AS BUILT**, and Purchaser hereby waives any right to object to any variation in construction from the Base Plan after Closing.

**3. HEATING AND AIR CONDITIONING.** The House shall be adequately and efficiently heated and air-conditioned with equipment having at least the minimum specifications for the House as established by applicable building and construction codes. Purchaser acknowledges that the performance and methods and practices of operating heating and cooling systems can be directly affected by the orientation and location of a room or Home in relation to the sun. Seller shall, therefore, have no obligation other than to install a heating and cooling system at the Property which has been sized and designed based on industry standards for the type and size of House to be



constructed and which functions in accordance with industry standards. No representations are made that the systems in the Property including, by way of example only, heating and air conditioning and electrical systems will operate or perform at a level or standard greater than the minimum specifications of the manufacturer. The clothes dryer shall vent to the outside.

**4. INSULATION.** The type, thickness and R-value of the insulation to be installed in the House, where construction reasonably permits as determined in the sole discretion of Seller, shall be as follows: (a) exterior walls are insulated with batt insulation to a thickness of 3.5 inches or per code, whichever is greater, which will yield an R-value meeting or exceeding applicable building code; (b) ceilings below attic areas are insulated with blown insulation to a thickness of 12 inches or per code, whichever is greater, which will yield an R-value meeting or exceeding applicable building code; (c) vaulted ceilings are insulated with batt insulation to a thickness of 3.5 inches or per code, whichever is greater, which will yield an R-value meeting or exceeding applicable building code; (d) floor overhangs are insulated with batt insulation to a thickness of 3.5 inches or per code, whichever is greater, which will yield an R-value meeting or exceeding building code; (e) notwithstanding the foregoing, Purchaser acknowledges that insulation may be of lesser thickness and R-value than indicated in certain areas based upon normal construction variances in insulation thickness and openings in walls and where the design of the Home does not permit greater thickness. Purchaser further acknowledges that the information above as to R-values is based on the representation of the manufacturer or installer of the insulation and Seller does not warrant the accuracy of such representations. Seller reserves the right to substitute the type, thickness and R-value of the insulation installed in the Home as long as the R-value of the insulation installed in a substantial portion of the Home is not substantially changed.

**5. ALARM SYSTEM OR PREWIRING.** Only the item checked below is part of this Agreement:

- ☐ A. An alarm system shall be or has been INSTALLED on the main floor of the House; however it shall be Purchaser's responsibility to activate the alarm system and secure monitoring for the alarm system. Seller shall not be responsible for any changes made to the alarm system by Purchaser or by any alarm-servicing or monitoring company other than the contractor engaged by Seller to install the system.
- ☐ B. An alarm system shall be or has been PREWIRED on the main floor of the House; however it shall be Purchaser's responsibility to install an alarm system, activate the alarm system, and secure monitoring for the alarm system. Seller shall not be responsible for any changes made to the alarm system prewiring by Purchaser or by anyone other than the contractor engaged by Seller to install the system. Purchaser understands and acknowledge there may be additional costs associated with installation, activation, and/or monitoring of an alarm system. Any additional costs associated with the installation, activation, and/or monitoring of an alarm system are the Purchaser's sole responsibility and are not part of this Agreement.
- ☒ C. The House shall not be prewired for a security system, nor will an alarm system be installed.

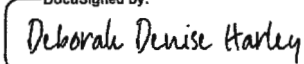
**6. CHANGES.** After the execution of this Agreement, Seller may (but shall not be obligated to) permit Purchaser to change the options to be included House. Seller may withhold approval of any change in its sole discretion. In order to change an option in the House, Purchaser shall pay to Seller a Change Fee in the amount of Five Hundred and 00/100 Dollars (\$500.00) for each such change at the time the request is approved by Seller. Any Change Fee paid shall be nonrefundable and shall not be credited against the Purchase Price. Any changes shall not be effective unless evidenced by a written amendment to this Agreement. At the time of execution of that amendment, Seller may, in its sole discretion, require Purchaser to pay additional Option Money in the amount of the total increase in the Purchase Price resulting from the change. Any Option Money paid to Seller at any time shall not be held in escrow, and shall be nonrefundable to Purchaser except in the event of: (1) breach of this Agreement by Seller, or (2) termination of this Agreement by Seller pursuant to Section 2 above. At Closing, all Option Money previously paid to Seller shall be credited to Purchaser against the Purchase Price. Purchaser acknowledges that any changes may affect the timing of completion of the House. Purchaser acknowledges that the cost of options and upgrades may not result in a commensurate increase in the value of the Property.

**7. COMPLETION.** Subject to the contingencies stated herein, Seller shall complete construction of the House prior to Closing. Seller shall construct the House according to all applicable governmental codes and regulations. Construction of the House shall be deemed complete when a certificate of occupancy is issued for the House by the applicable governmental authority. Seller shall deliver the completed House to Purchaser at Closing in "broom-clean" condition, ready to occupy. The House and Lot shall be free of all trash and debris.

**8. PURCHASER'S INQUIRIES.** Purchaser shall direct all inquiries and questions to Seller's on-site associate. The on-site associate will provide Purchaser with timely responses; however, the associate does not and shall not have authority to change the terms of this Agreement in any manner. This Agreement may be changed or modified only by a written amendment duly executed by both Purchaser and Seller. Purchaser acknowledges that Seller's sales associates, superintendents, closing staff, warranty staff and other employees do not have authority to modify this Agreement. Only an authorized corporate officer of Seller may modify this Agreement on Seller's behalf.

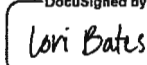
IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATES SHOWN BELOW.

**PURCHASER:**

DocuSigned by:  
  
CF2869BE10AC436...  
Buyer: Deborah Denise Harley  
4/21/2021  
Date

**SELLER:**

**D.R. Horton Inc.**

DocuSigned by:  
  
1E047717EF6745C...  
4/23/2021

Lori Bates  
Date

Officer, D.R. Horton

For Internal Purposes Only

Seller's Sales Representative:

DocuSigned by:  
  
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4/21/2021

Sales Rep: Jared Paull  
Date

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Abbey at Trolley Run St 60

466390028

## ADDENDUM 8

### VARIATIONS IN MATERIALS AND COMPONENTS

This Addendum is attached to and made a part of that Home Purchase Agreement (the "Agreement") between Deborah Denise Harley as Purchaser, and **D.R. Horton Inc.**, as Seller, regarding that parcel of land located in **AIKEN** County, SC, briefly described as Lot **28**, Block/Phase, **Abbey at Trolley Run St 60** subdivision, and referred to in the Agreement as the "Lot." All terms defined in the Agreement shall have the same meanings when used in this Addendum. Purchaser and Seller further agree and acknowledge as follows:

1. Many materials, both natural and man-made, used in the construction of homes contain variations and inconsistencies. Such variations and inconsistencies are beyond Seller's control, and Seller shall not be responsible or liable for them. Some of the materials and components which may exhibit variations and inconsistencies are detailed in the sections below.

2. CONCRETE. Purchaser understands and acknowledges that when adding additional concrete to the existing concrete pad, the two pads may not match in color. Also, there may be visible seam between the two pads.

3. INTERIOR PAINT. Seller installs a level 4 drywall/Gypsum Board finish in its homes. White or light color flat paint is recommended for this type of finish and is a standard feature in Seller's homes. Colored, gloss or semi-gloss paint are not recommended as they may magnify joint or patch photographing in critical lighting areas.

4. OUTLET LOCATIONS. Purchaser understands that any cable, phone and/or data outlet locations that are not specifically designated at the initial time of selections will be placed by the construction supervisor, and will not be moved.

5. WOOD.

a. Purchaser understands that wood of the same species will vary in color, mineral streaking, texture, pitch pockets, and grain uniformity, depending on when, where and how the tree grew and the fact that different wood products come from different manufacturers. These characteristics may occur on adjacent cabinets, between pair of doors and/or drawers, with the same cabinet panels, between flooring, stair treads and railings and between flooring and cabinets/vanities. It is these differences, caused by nature, that create the warmth and individuality of fine woods. Darker finishes tend to hide some of these natural characteristics while lighter finishes tend to accentuate the differences. Because of this, the variations in color and contrast may be different than in a display or in a smaller sample.

b. Seller shall not be responsible under any circumstances for damage or wear to hardwood flooring caused in whole or in part by moisture. Please refer to the Limited Warranty administered by Residential Warranty Corporation for terms, conditions, and exclusions pertaining to flooring.

6. STUCCO. The final appearance of your home may be impacted by sunlight angles, shadows from architectural details, application and texturing techniques, environmental surrounding and color lot to color lot variations.

7. BRICK/STONE. Brick and stone products are composed of earthen materials and go through many processes before firing and consequently each run or lot of brick/stone will vary. Photographs, samples and even completed homes are only a representation of the color and each run or lot and even installation can vary from home to home. An exact replication of total color or percentages as displayed by samples or model homes cannot be guaranteed.

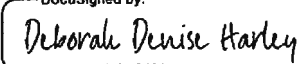
Buyer(s): Deborah Denise Harley, Community: Abbey at Trolley Run St 60, Plat: 28//1A, Address: 321 DONNINGTON COURT, Sales Rep: Jared Paull

Job: 466390028  
Printed: 4/21/2021

8. GRANITE/CERAMIC/MARBLE. The materials used in counter tops, fireplace surrounds/hearths, wall and floor tile contain color variations and “veining”, natural blemishes, and grain. Accordingly, consistency *cannot be guaranteed*.

9. In the event of any conflict between the provisions of this Addendum and the provisions of the Agreement, the Agreement shall control. In the event of any conflict between the provisions of this Addendum and the provisions of the Limited Warranty, the Limited Warranty shall control.

IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND UNDERSTOOD THIS ADDENDUM, HEREBY EXECUTE THIS ADDENDUM AS OF THE DATES SHOWN BELOW.

|                                                                                                                                                                                                            |                                      |                                                                                                                                                                                                                                                                         |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Purchaser:</b><br><div>DocuSigned by:<br/><br/>CF2869BE10AC436...</div> <div><b>Buyer:</b> Deborah Denise Harley</div> | <div><u>4/21/2021</u><br/>Date</div> | <b>Seller:</b><br><b>D.R. Horton Inc.</b><br><div>DocuSigned by:<br/><br/>1E047717EF6745C...</div> <div><b>4/23/2021</b><br/>Date</div> <div>Lori Bates<br/>Officer, D.R. Horton</div> |
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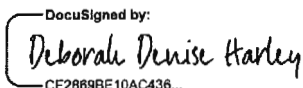
Buyer(s): Deborah Denise Harley, Community: Abbey at Trolley Run St 60, Plat: 28//1A, Address: 321 DONNINGTON COURT, Sales Rep: Jared Paull

Job: 466390028  
Printed: 4/21/2021Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**Project: **Abbey at Trolley Run St 60**  
Lot: **28**  
**466390028****FHA REAL ESTATE CERTIFICATION**

This certification is attached to and made part of that certain Home Purchase Agreement (the "Agreement") by and between **D.R. Horton Inc.**, as Seller, and **Deborah Denise Harley**, as Purchaser, for the purchase and sale of Lot **28**, Block/Phase, **Abbey at Trolley Run St 60** Subdivision in **AIKEN, SC**. Capitalized terms not otherwise defined herein shall have the same meanings as ascribed to them in the Agreement.

**Purchaser, Seller, and Co-Broker hereby certify that (1) the terms and conditions of the Agreement are true to the best of their knowledge and belief, and (2) any other agreement entered into by any of these parties in connection with this real estate transaction is part of, or attached to, the Agreement.**

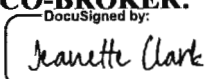
**PURCHASER:**

DocuSigned by:  
  
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\_\_\_\_\_  
**Buyer: Deborah Denise Harley**      4/21/2021  
Date

**SELLER:**

**D.R. Horton Inc.**  
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\_\_\_\_\_  
**Lori Bates**      4/23/2021  
Date  
**Officer, D.R. Horton**

**CO-BROKER:**

DocuSigned by:  
  
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\_\_\_\_\_  
**Broker Agent: Jeanette Clark**      4/21/2021  
Date

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Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60 / Lot: 28**  
 Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
 Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run**  
**St 60**  
**Lot: 28**  
**466390028**



**ADDENDUM 4**  
**CO-BROKER COMMISSION ADDENDUM**

Seller: **D.R. Horton Inc.**  
 Purchaser(s): **Deborah Denise Harley**  
 Property: **321 DONNINGTON COURT, AIKEN, SC 29801**  
**Lot 28, Abbey at Trolley Run St 60 Subdivision**  
 Co-Broker Real Estate Agency: **Good Sense Realty**  
 Agency Address: **3514 Wrightsboro Rd, Augusta, GA 30909, US**  
 Agency License Number:  
 Co-Broker Agent: **Jeanette Clark**  
 Co-Broker Agent License No. **49253**  
 (706) 294-7844      jjclark@goodsense.biz

This Co-Broker Addendum ("Addendum") is being provided pursuant to the Home Purchase Agreement ("Agreement") by and between Seller and Purchaser for the purchase and sale of the above-referenced Property. Capitalized terms not otherwise defined herein shall have the same means as ascribed to them in the Agreement. If any term or condition of this Addendum conflicts with any term or condition of the Agreement, the terms and conditions of this Addendum shall prevail.

- 1. Commission.** Purchaser hereby identifies and designates the above named Sales Agent, Real Estate Broker and Real Estate Agency, collectively, as "Co-Broker," as provided in Section 10 of the Agreement. Subject to the terms and provisions of the Agreement and this Addendum, and provided that Closing actually occurs, Co-Broker will receive a real estate sales commission at Closing determined as 3.00% multiplied by (b) the "Sale Price of Property" shown on the Closing Disclosure (or "Contract sales price" shown on Line 401 of HUD-1 Settlement Statement) at Closing (the "Base Commission"). For the purposes of this Addendum, the term "Commission" is intended to include the Base Commission and all other commissions, incentives, and bonuses, if any, to be received by Co-Broker in connection with the purchase and sale of the Property pursuant to the Agreement. No commission of any kind shall be earned or due unless and until Closing occurs. The Commission shall be subject to limitations, if any, on total broker commission imposed by Purchaser's lender. The Commission shall be paid at Closing and must be shown on the closing disclosure or settlement statement.
- 2. Bonus Commission.** The subsection checked below shall apply:

☒ No bonus commission shall be due or paid.

**OR**

☐ If Closing occurs on or before , then, at Closing, the Co-Broker shall be paid an additional, bonus commission in the amount specified in the sub-subsection checked below:

☐ \$0.00

**AND / OR**

☐ Relocation fee reimbursement up to \$ \_\_\_\_\_

Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
 Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
 Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

**Project: Abbey at Trolley Run**  
**St 60**  
**Lot: 28**  
**466390028**

The applicable **D.R. Horton Club Elite** bonus amount pursuant to the **D.R. Horton Club Elite** rules published by the Seller as of the Closing Date shall be paid if eligible.

3. **Real Estate Certification.** Co-Broker hereby certifies as follows:

- a. The terms, conditions, representations and warranties contained in the Agreement are true, to the best of my knowledge and belief; and
- b. Any other agreement entered into by any parties in connection with the subject real estate transaction is part of, or attached to, the Agreement.

4. **Warranty of Authority.** The undersigned Sales Agent (or other person signing on behalf of Co-Broker) represents and warrants that he or she has the requisite authority to bind Co-Broker, including the above-named Real Estate Broker and Real Estate Agency as to all matters addressed in this Addendum and to modify any existing commission agreement with respect to the Agreement and under which Co-Broker may be entitled to receive a commission.

**CO-BROKER:**

DocuSigned by:

*Jeanette Clark*  
 B54CAB0DC5CB444...

**Broker Agent: Jeanette Clark**

4/21/2021  
 Date

**Agent License Number:** 49253  
 (706) 294-7844  
 jjclark@goodsense.biz

**SELLER:**

**D.R. Horton Inc.**

DocuSigned by:

*Lori Bates*  
 1E047717EF8745C...

**Lori Bates**

**Officer, D.R. Horton**

4/23/2021  
 Date

For Internal Purposes Only:

**SELLER SALES REP:**

*Jared Paull*  
 8252B1E2643741E...

**Sales Rep: Jared Paull**

(803) 800-4476  
 JWPau11@drhorton.com

4/21/2021  
 Date

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Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60 / Lot: 28**  
 Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
 Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run St 60**  
 Lot: **28**  
 466390028

**D·R·HORTON** DHI  
Listed  
NYSE  
*America's Builder*  
**CO-BROKER CERTIFICATION**

Seller: **D.R. Horton Inc.**

Purchaser(s): **Deborah Denise Harley**

Property: **321 DONNINGTON COURT, AIKEN, SC 29801**  
 Lot **28**, Abbey at Trolley Run St 60 Subdivision

Co-Broker Real Estate Agency: **Good Sense Realty**

Co-Broker Agent: **Jeanette Clark**

Co-Broker Agent License No. **49253**

This Co-Broker Certification (this "Certification") is being provided pursuant to the Home Purchase Agreement ("Agreement") by and between Seller and Purchaser in connection with the purchase and sale of the above-referenced Property. Capitalized terms not otherwise defined herein shall have the same means as ascribed to them in the Agreement. If any term or condition of this Addendum conflicts with any term or condition of the Agreement, the terms and conditions of this Addendum shall prevail. As used herein, "Co-Broker" shall refer collectively to the above named Co-Broker Sales Agent, Co-Broker Broker-In-Charge/Qualifying Broker, and Co-Broker Real Estate Agency.

1. Certification.

- a. Co-Broker hereby acknowledges and certifies that it **WILL NOT** pay to Purchaser all or any part of the Commission (as defined in Addendum 4) at Closing. Co-Broker acknowledges and agrees that no payment by Co-Broker of any portion of the Commission will be made directly to, or indirectly on behalf of, Purchaser or any other interested and/or related party, and that no part of the Commission will be used to pay Purchaser costs associated with the purchase and sale of the Property.
- b. Co-Broker certifies that it **HAS NOT** and **WILL NOT** give, pay, or provide any payment or other benefit directly or indirectly (as part of Closing or outside of Closing) to Purchaser or to any other interested and/or related party, or pay any of Purchaser's costs or liabilities to any third party, for the purpose of inducing Purchaser to close on the sale of the Property. Any such inducement payment or benefit and any shared commission are collectively referred to hereinafter as "Inducements" or, in the singular, an "Inducement."
- c. In the event Co-Broker decides at a later date to pay or give any type of Inducement, Co-Broker agrees to execute an amendment to the Agreement to disclose the terms of such Inducement in order to create transparency with regard to how such Inducement applies to the purchase and sale of the above-referenced Property.
- d. Co-Broker acknowledges that Seller is relying on this Certification as verification of whether any payment of any portion of the Commission to Purchaser is to be made.

2. Warranty of Authority. The undersigned Sales Agent (or other person signing on behalf of Co-Broker) represents and warrants that he or she has the requisite authority to bind Co-Broker, including the above-named Real Estate Broker and Real Estate Agency as to all matters addressed in this Addendum and to modify any existing commission agreement with respect to the Agreement and under which Co-Broker may be entitled to receive a commission.

**CO-BROKER:**

DocuSigned by:

*Jeanette Clark*

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4/21/2021

Broker Agent: Jeanette Clark

Date

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Buyer: **Deborah Denise Harley** / Community: **Abbey at Trolley Run St 60** / Lot: **28**  
Address: **321 DONNINGTON COURT** / Project#: **466390000** / Sales Agent: **Jared Paull** / Internal #  
Lender: **DHI MORTGAGE** / Lender Agent: **RITZ, MIKE**

Project: **Abbey at Trolley Run**  
**St 60**  
Lot: **28**  
**466390028**

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Abbey at Trolley Run St 60

466390028

**ADDENDUM 1****BUILDER'S REFERRAL BRICA INCENTIVES AND CONTRIBUTIONS ADDENDUM**

This **ADDENDUM** is attached to and made a part of that Home Purchase Agreement between **D.R. Horton Inc.**, as Seller, and **Deborah Denise Harley** as Purchaser (the "Purchase Agreement"), regarding that parcel of real estate located in **AIKEN** County, **SC**, briefly described as Lot **28**, in **Abbey at Trolley Run St 60** subdivision, and referred to in the Purchase Agreement as the "Lot." All terms defined in the main text of the Purchase Agreement shall have the same meanings when used in this Addendum. This Addendum together with the Purchase Agreement, constitutes the sole and entire agreement between Seller and Purchaser with regard to any incentives, allowances, adjustments, credits, discounts, rebates or other contributions of any kind or amount (collectively, the "Referral Incentives and Contributions") made, or to be made, by Seller to Purchaser in connection with Seller's referral of Purchaser to **SELLER'S PREFERRED MORTGAGE LENDER(S) DESCRIBED BELOW ("PREFERRED LENDER")**, and there are no agreements regarding such Referral Incentives and Contributions, whether written or unwritten, expressed or implied, between the parties except as set forth in this Addendum. In the event of any conflict between the terms and provisions of this Addendum and the terms and provisions of the main text of the Purchase Agreement, the terms and provisions of this Addendum shall control. Purchaser acknowledges receipt of that document entitled "Notice of Seller's Business Affiliations" (the "Affiliation Notice"), and Purchaser confirms its understanding that Seller has an affiliation with **DHI MORTGAGE COMPANY, LTD. ("DHI MORTGAGE")** and that Purchaser is not required to use this affiliated company or any Preferred Lender (described below) as a condition of Purchaser's purchase of the Property or Purchaser's access to settlement services in connection with the purchase of the Property. The parties state, acknowledge and agree as follows:

1. Seller shall provide for the benefit of Purchaser the Referral Incentives and Contributions listed in Section 2 below, provided that Purchaser chooses to use **PREFERRED LENDER** to finance the purchase of the Property and provided that each and all of the following occur:

- a. Purchaser applies to **PREFERRED LENDER** for a mortgage loan to finance the purchase of the Property within the timeframe required under Section 2(b) of this Purchase Agreement;
- b. Purchaser's loan application is approved by **PREFERRED LENDER**, and **PREFERRED LENDER** actually funds the loan and finances the purchase of the Property;
- c. Purchaser closes on the purchase of the Property on or before the final date and time for Closing set by Seller pursuant to subsection 16a of the Purchase Agreement; and
- d. Purchaser uses the closing attorney recommended by Seller to act as settlement agent and close the purchase of the Property.

2. Provided that all the conditions set forth in Section 1 above are satisfied and met in a timely manner, Purchaser shall be entitled to a contribution from Seller towards Purchaser's closing costs in an amount up to **\$5000**. This contribution, up to the applicable limit, shall be applied against closing costs actually charged to Purchaser, in the following order (as applicable): Origination Charge, Origination Fee, Upfront Unfinanced Mortgage Insurance (if applicable).

If any of the maximum amount of contribution remains unapplied after payment of all of the above listed closing costs, then the remainder shall be applied against other usual and customary closing costs actually charged to Purchaser by other settlement service providers. Notwithstanding the foregoing: (i) any contribution by Seller to Purchaser's closing costs shall be subject to Purchaser's loan program and any lender guidelines or restrictions, (ii) no portion of the maximum amount of contribution may be applied as a credit to, or in partial payment of, the Purchase Price of the Property or disbursed to Purchaser, and (iii) any unapplied portion of the maximum amount of contribution shall be forfeited by Purchaser.

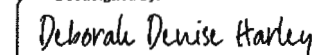
3. **Preferred Lender.** The Preferred Lender relating to this Builder's Referral Incentive and Contributions Addendum is **DHI Mortgage**. More information regarding **DHI Mortgage** is available at: [www.dhimortgage.com](http://www.dhimortgage.com).

Purchaser's decision to use any lender other than PREFERRED LENDER will not affect any concessions, incentives or discounts offered by Seller for the purchase of the Property *other than* the closing cost contribution and builder options allowance (if any) described Sections 2 and 3 above.

**IN WITNESS WHEREOF, THE UNDERSIGNED, HAVING READ AND REVIEWED THIS ADDENDUM, HAVE SIGNED THIS ADDENDUM ON THE DATE SHOWN BELOW.**

**Purchaser:**

DocuSigned by:



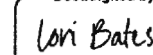
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**Buyer:** Deborah Denise Harley4/21/2021

Date

**Seller:****D.R. Horton Inc.**

DocuSigned by:



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Lori Bates

Officer, D.R. Horton

4/23/2021

Date

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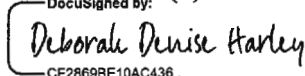
**D.R. HORTON**  
*America's Builder*  
**GENERAL INCENTIVE ADDENDUM**

This General Incentive Addendum ("Addendum") is attached to and made a part of that Home Purchase Agreement between D.R. Horton Inc., as Seller, and **Deborah Denise Harley**, as Purchaser, of even date herewith (the "Agreement"), regarding that parcel of real estate located in **AIKEN** County, SC, briefly described as Lot **0028, Abbey at Trolley Run St 60** Subdivision, and, together with all improvements thereon and rights and privileges appurtenant thereto, referred to in the Agreement as the "Property." Seller and Purchaser also agree as follows:

1. This Addendum, together with the Agreement and all addenda and amendments thereto, constitutes the entire agreement between Seller and Purchaser with regard to any cost incentives, allowances, adjustments, credits, discounts, rebates, or other builder concessions of any kind or amount (collectively, "**Incentives**") made, or to be made, by Seller in connection with the sale of the Property to Purchaser under the Agreement, and there are no agreements regarding such Incentives, whether written or unwritten, expressed or implied, between the parties except as set forth in this Addendum and the Agreement. This Addendum replaces and supersedes any previous General Incentive Addendum that details incentives granted to Purchaser for purchase of the Property.
2. Seller has offered in conjunction with Purchaser's use of a preferred lender an incentive as outlined in the Builders Referral Incentive Concessions Addendum (BRICA). In the event Purchaser applies for a loan with a preferred lender identified on the BRICA, **but is denied by said preferred lender**, Seller hereby offers the following incentives to Purchaser upon successful close of this transaction if Purchaser utilizes one of the following alternative lenders to fund the purchase of the Property: New American Funding, Southeast Mortgage, or Homebridge Mortgage.
  - a. **Options Incentive.** Purchaser shall be entitled to an incentive in the amount of up to N/A, which amount may be applied by Purchaser as a credit to the costs owed to the Seller for any optional features, material upgrades, landscaping improvements, or decorator items selected by Purchaser and included in the Purchase Price of the Property as set forth in the Agreement and as permitted by Seller pursuant to Addendum 2. No portion of this amount may be disbursed to Purchaser in cash or applied towards the base purchase price of the House.
  - b. **Finance Incentive.** Purchaser shall be entitled to an incentive in the amount of up to **\$1,000.00**, which amount is to be applied towards Purchaser's payment of the closing costs incurred and payable by Purchaser at Closing. Such incentive shall be applied first to the following fees to the extent applicable and in the following order: Origination Charge, Origination Fee, and Upfront Unfinanced Mortgage Insurance (if applicable). If not fully utilized, any remaining finance incentive may be applied towards other usual and customary closing costs charged to Purchaser by other settlement service providers and towards the payment of HOA dues and prepaid taxes and insurance as allowable by the Purchaser's lender. No portion of this amount may be applied as a credit to, or in partial payment of, the Purchase Price of the Property or disbursed to the Purchaser. Any unused amount of the incentive described in this Section 2(b) **may not** be applied or added to the Options Incentive described in Section 2(a) above.
3. Purchaser acknowledges that there are other lenders available to Purchaser and that Purchaser is free to use any lender it chooses to finance the purchase of the Property. However, Purchaser also acknowledges that Purchaser shall not be entitled to the contribution against closing costs described in Section 2 above unless all of the conditions listed and stated in Section 2 above are fully met and satisfied.

THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ THIS GENERAL INCENTIVE AND CONCESSIONS ADDENDUM TO THE AGREEMENT AND AGREE TO THE TERMS, CONDITIONS AND LIMITATIONS CONTAINED HEREIN.

**PURCHASER(S):**

DocuSigned by:  
  
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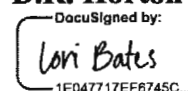
**Buyer:** Deborah Denise Harley

**4/21/2021**

**Date**

**SELLER:**

**D.R. Horton Inc.**

DocuSigned by:  
  
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**Lori Bates**

**Officer, D.R. Horton**

**4/23/2021**

**Date**

NOTICE OF SELLER’S BUSINESS AFFILIATIONS

To: Deborah Denise Harley  
[Homebuyer(s)]

PROPERTY: 321 DONNINGTON  
COURT, AIKEN, SC  
29801

FROM: D.R. Horton Inc.  
[Seller]

DATE: April 21, 2021

This is to give you notice that the above referenced seller has a business relationship with:

|                                                                            |                                                                                        |                                                                                                                                                    |
|----------------------------------------------------------------------------|----------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>DHI MORTGAGE COMPANY, LTD.</b><br>207 Pitcarin Way<br>Augusta, GA 30909 | <b>D.R. HORTON INSURANCE AGENCY, INC.</b><br>1341 Horton Circle<br>Arlington, TX 76011 | <b>TRAVIS COUNTY TITLE COMPANY, DBA<br/>DHI TITLE AGENCY/DHI TITLE OF<br/>GEORGIA, INC.</b><br>10700 Pecan Park Blvd. Ste #130<br>Austin, TX 78750 |
|----------------------------------------------------------------------------|----------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|

The nature of this business relationship is that these companies are corporate affiliates, each being 100% wholly owned by, or by subsidiary of, the same parent corporation. Because of this relationship, this referral may provide seller a financial or other benefit.

Set forth below is the estimated charge or range of charges by each company for settlement services listed. You are NOT required to use these companies as a condition of your purchase of the property from seller or as a condition of your application for, or settlement of, a mortgage loan on the property in connection with your purchase. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

| DHI MORTGAGE COMPANY, LTD. |                                                                                            | TRAVIS COUNTY TITLE COMPANY            |                         |
|----------------------------|--------------------------------------------------------------------------------------------|----------------------------------------|-------------------------|
| Service                    | Charge                                                                                     | Service                                | Charge or Range         |
| Loan Origination Charge:   | 0% of Loan Amount<br>plus \$1,000.00                                                       | Simultaneous Lender’s Title Insurance: | \$150.00 - \$250.00     |
|                            | An additional 2% of the Loan Amount may apply for certain Affordable Housing Loan Programs | Owners Title insurance:                | \$1,355.00 - \$1,470.00 |

Travis County Title Company charge estimates are based on an average home price of \$300,000. Title insurance rates are set by the state. Adjustments to Sales Price, Loan Amount and Lender requirements will impact the cost of your title insurance. Mortgage fees may vary depending upon whether the loan is originated or brokered by DHI Mortgage Company, Ltd.

Note: If you apply with DHI Mortgage Company, Ltd., a Loan Estimate of all settlement charges will be provided to you by DHI Mortgage Company, Ltd. at or within three business days after loan application.

You may be entitled to additional builder discounts/credits paid by the seller to purchase multiple settlement services as set forth in the Builder’s Incentive and Concessions Addendum to your purchase contract.

**D. R. HORTON INSURANCE AGENCY, INC.**

D.R. HORTON INSURANCE AGENCY, INC. is a licensed insurance agent that offers policies of property insurance as agent for one or more insurance companies qualified to transact insurance business in the State of Georgia. You will be provided a separate proposal or quote of the terms and conditions of any policy of insurance offered by D.R. HORTON INSURANCE AGENCY, INC. in which you express an interest. For comparison purposes, the cost for a hazard insurance policy for a home valued at \$300,000 with commonly selected coverage items and deductibles would range between: \$200 and \$3,985 per annum. The specific premium depends on various factors, including but not limited to, the value of the home, the location of the home, deductibles selected, and the amount of coverage selected. The quote will set out the estimated premium and other charges, or range of charges, by D.R. HORTON INSURANCE AGENCY, INC. for its insurance products or services.

**ACKNOWLEDGMENT:**  
I/We have read this disclosure form and understand that caller is referring me/us to purchase the above described settlement

Buyer: Deborah Denise Harley / Subdivision: Abbey at Trolley Run St 60 / Lot: 28 / Address: 321 DONNINGTON COURT / Project#: 466390000 / Printed by: Jared Paull / Date: 04/21/2021

Project: **Abbey at Trolley Run**

Residential Lot/Unit No.: **28**

### INTEREST RATE ADDENDUM

**BUYER:**

Deborah Denise Harley  
«BUYER-HOME-ADDRESS1»  
Augusta, GA 30907

**SELLER:**

D.R. Horton Inc.  
1371 Dogwood Drive SW  
Conyers, GA 30012

**ESCROW COMPANY:**

MCDONNELL AND ASSOCIATES  
& ASSOCIATES, MCDONNELL  
3720 Executive Center Drive Suite A  
MARTINEZ, GA 30907  
(866) 931-8793

**DATE:** April 21, 2021

This Interest Rate Addendum ("**Addendum**") is attached to and forms a part of the Purchase Agreement and Escrow Instructions ("**Purchase Agreement**"), executed between Buyer and Seller for the Property described in the Purchase Agreement. Any capitalized terms not otherwise defined herein shall have the meanings as set forth in the Purchase Agreement. If there is a conflict between the Purchase Agreement and the terms and provisions of this Addendum, the terms and provisions of this Addendum shall control.

**1. INTEREST RATE INCENTIVE PROMOTION THROUGH DHI MORTGAGE (THE "PROMOTION"):** This Promotion is offered by Seller through DHI Mortgage. Seller is NOT a lender, but has obtained commitment from DHI Mortgage to provide Seller's eligible customers with pre-purchased interest rates. The availability of the Promotion to Buyer is subject to the satisfaction of each of the following conditions: (i) Buyer chooses to use DHI Mortgage to finance the purchase of the Property; (ii) Buyer applies to DHI Mortgage for a mortgage loan to finance the purchase of the Property within the timeframe provided under the Purchase Agreement; (iii) Buyer's loan application is approved by DHI Mortgage and DHI Mortgage actually funds the loan and finances the purchase of the Property; (iv) at the time Buyer locks in an interest rate with DHI Mortgage, the pre-purchased interest rate available to Buyer is below the interest rate otherwise available to Buyer through DHI Mortgage; and (v) Buyer closes on the purchase of the Property on or before the Closing Date established pursuant to the terms of the Purchase Agreement.

**2. ADDITIONAL ACKNOWLEDGEMENTS AND LIMITATIONS.** In addition, Buyer acknowledges and understands that: (i) Promotion funds are limited and the interest rate may change or not be available to Buyer at the time a mortgage loan commitment is issued if funds are exhausted; (ii) this is not an offer of any specific interest rate or a commitment to make a loan and only DHI Mortgage (not Seller) can offer a specific interest rate or issue a loan commitment under this Promotion; (iii) the interest rate offered by DHI Mortgage for the Promotion may be adjusted depending on Buyer's credit profile, loan to value ratio, certain property characteristics and/or Buyer's intention to occupy the Property as a primary residence; (iv) the Promotion may require the Buyer to pay discount points to receive the interest rate offered under the Promotion; and (v) Seller's cost associated with obtaining this Promotion rate will be considered an interested party contribution and may result in the Buyer being required to bring additional funds to closing.

**3. FINANCING QUESTIONS.** Buyer is to contact their DHI Mortgage loan originator for financing questions and/or details regarding this Promotion and other requirements and restrictions associated with financing.

**4. COUNTERPARTS.** This Addendum may be executed in counterparts, each of which when taken together, will constitute one fully executed original.

This Addendum has been made and executed as of the date set forth above, but will not be valid until executed by Seller's authorized officer of the company.

DocuSigned by:

*Deborah Denise Harley*

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4/21/2021

Date

**Buyer: Deborah Denise Harley**

**D.R. Horton Inc.**

DocuSigned by:

*Lori Bates*

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Page 152 of 320

4/23/2021

ELECTRONICALLY FILED - 2024 Sep 03 3:20 PM - AIKEN - COMMON PLEAS - CASE# 2023 CP0201719

Buyer: Deborah Denise Harley / Subdivision: Abbey at Trolley Run St 60 / Lot: 28 / Address: 321 DONNINGTON COURT / Project#: 466390000 / Printed  
by: Jared Paull / Date: 04/21/2021

Project: Abbey at Trolley Run  
St 60  
Residential Lot/Unit No.: 28

ELECTRONICALLY FILED - 2024 Sep 03 3:20 PM - AIKEN - COMMON PLEAS - CASE#2023CP0201719



## D.R. Horton Smart Home Disclosure

Congratulations on your new D.R. Horton Smart Home! Your new home is equipped with technology that includes some or all of the following Internet-connected devices: a programmable thermostat; a door lock; a light switch; a touchscreen smart home control device; home security devices such as door and window contacts and motion detectors; a video doorbell; a garage door opener; and a smart speaker (collectively, "**Smart Home Technology**"), all of which are integrated by an automation platform hosted by Alarm.com. Other Smart Home Technology features may be offered for an additional charge. See your D.R. Horton sales representative for complete details on the Smart Home Technology included in your home.

The video doorbell and the smart speaker will be installed by a third party ("**Installer**") after closing. Installation of the touchscreen smart home control device also may occur after closing. At that time, the Installer will activate certain components of the Smart Home Technology, provide training to you on how to use the Smart Home Technology, and provide information to you regarding additional services or products available for purchase.

The Alarm.com home automation-only application (the "**App**") is included at no charge to you for 36 months following the close of escrow on your home. Thereafter, the App may be purchased directly from the Installer for a monthly fee or, if you have contracted with the Installer for security monitoring services, the App is included with such security-monitoring services.

In order to install and activate the Smart Home Technology and to provide you with training on how to use the Smart Home Technology and information regarding additional services or products available for purchase, D.R. Horton will provide your contact information to the Installer so the Installer can get in touch with you via telephone, email or U.S. mail to schedule an appointment. For the Smart Home Technology to work, you must obtain and pay for your own Internet service, and you may need to purchase compatible devices and maintain accounts with third parties for the services. The Installer will discuss these requirements with you prior to the appointment to ensure the installation and activation goes smoothly. D.R. Horton may receive a referral fee from the Installer if you purchase additional services or products from the Installer.

**IMPORTANT INSTALLATION DEADLINE:** You have 120 days from the date you close escrow on your home (the "**Deadline**") to schedule an appointment with the Installer. If you schedule an appointment with the Installer after the Deadline, you will be required to pay the Installer's then-current labor and equipment costs to install and activate certain components of the Smart Home Technology and to train you on how to use the Smart Home Technology.

**PRIVACY DISCLOSURE:** In connection with your purchase of a home from D.R. Horton, we will collect certain personal information from you. To learn more about the categories of personal information we collect, and how we may use or share that personal information, please view our Privacy Policy on our website at [www.drhorton.com](http://www.drhorton.com), as it may change from time to time.

**COLLECTION OF INFORMATION BY DEVICES:** The Smart Home Technology may collect information about you and your use of the device. This information is collected, used and analyzed by the third-party providers of the devices and the Alarm.com automation platform. Use of such information is governed by the terms, conditions, policies and practices of such third-party providers only. D.R. Horton recommends that you carefully review your agreements with, and other terms and conditions published by, these third-party providers, as well as additional information about the Smart Home Technology by visiting [www.drhorton.com/smart-home](http://www.drhorton.com/smart-home). D.R. Horton does not collect any information from these devices about you or your use of the devices.



I acknowledge and agree that D.R. Horton does not make any representations or warranties that any or all of the Smart Home Technology is secure, will meet any of my needs or will provide any level of physical or cyber security for my home or otherwise – even if the Smart Home Technology is working as intended.

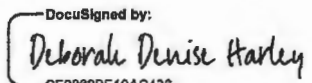
Cell Phone #: (478) 718-5858 Work Phone #: Home Phone #:

Email Address (primary): deborahdharley@yahoo.com Email Address (secondary):

My New Home – Address /Direct Mail: 321 DONNINGTON COURT, AIKEN, SC 29801  
Community/Subdivision Name: Abbey at Trolley Run St 60

Projected Closing Date: 06/30/2021

**BUYER(S):**

DocuSigned by:  
  
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4/21/2021  
**Buyer:** Deborah Denise Harley **Date**

# Exhibit 2

**AIKEN COUNTY ASSESSOR**

**Tax Map:**  
**086-00-42-007**  
**Date: 10/01/2021**

Prepared by McDonnell & Associates, P.A.  
After recording return to:  
P.O. Box 12245  
Columbia, SC 29211  
M&A File No.: SC-21494981

STATE OF SOUTH CAROLINA               )  
                                                           )  
COUNTY OF AIKEN                          )      **SPECIAL WARRANTY DEED**

**KNOW ALL MEN BY THESE PRESENTS**, that **D.R. HORTON, INC.** , hereinafter referred to whether singular or plural as "Grantor" in the State aforesaid, for and in consideration of the sum of **TWO HUNDRED SEVENTY THOUSAND NINE HUNDRED THIRTY DOLLARS AND NO CENTS (\$270,930.00)**, the receipt and sufficiency of which is here acknowledged, has granted, bargained, sold and released, and by these presents does hereby grant, bargain, sell and release subject to the easements, restrictions, reservations and conditions contained herein, unto **DEBORAH DENISE HARLEY**, referred to hereinafter whether singular or plural as "Grantee," the following described property:

SEE ATTACHED EXHIBIT "A"

Grantees' Address: 321 Donnington Court, Aiken, SC 29801

This conveyance is made subject to taxes and assessments for the year 2021 and all subsequent years, and to all easements, covenants, restrictions and conditions of record and otherwise affecting the property, including but not limited to rights-of-way indicated by instruments and plats of record, all other matters shown on plats of record, and to all applicable zoning and other land use regulations or restrictions of any political subdivision in which the subject is situate.

TOGETHER with all and singular, subject to the easements, restrictions, reservations and conditions contained herein, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, Grantee's heirs and assigns forever.

AND Grantor does hereby promise, for Grantor and Grantor's successors, assigns, and representatives, that title to the property described herein is the same quality of title which was received by Grantor from the prior title holder and Grantor binds Grantor and Grantor's heirs, successors and assigns to warrant and forever defend all and singular the premises unto the Grantee, Grantee's heirs, successors and assigns, against the Grantor and Grantor's successors, assigns, and representatives only.

|                              |              |
|------------------------------|--------------|
| AIKEN COUNTY, SC             |              |
| 2021029183                   | DEED         |
| RECORDING FEES               | \$15.00      |
| STATE TAX                    | \$704.60     |
| COUNTY TAX                   | \$298.10     |
| PRESENTED & RECORDED         |              |
| 09-27-2021                   | 09:00 AM     |
| JUDITH WARNER                |              |
| REGISTER OF MESNE CONVEYANCE |              |
| AIKEN, COUNTY SC             |              |
| By: QUINLAN RATES            |              |
| BK:RB 4964                   | PG:1661-1665 |

WITNESS the Hand and Seal of the Grantor this 23 day of September 2021.

Signed, Sealed and Delivered  
in the presence of

Grantor:  
D.R. Horton, Inc.

Witness #1 ERIC BROWN

By: [Signature]

Witness #2 (NOTARY) ANGIE SHIELDS

Its: Gina White, Assistant Secretary



STATE OF GEORGIA  
COUNTY OF ROCKDALE

ACKNOWLEDGEMENT

The foregoing instrument was acknowledged before me this 09/23/2021 (date) by  
Gina White Assistant Secretary

(name of officer or agent, title of officer or agent) of  
DR HORTON, INC

(name of corporation acknowledging) a  
DELEWARE (state or place of incorporation) corporation, on behalf of the

corporation). Further, I have verified that pursuant to SC Code Section 26-1-120(E), "The subscribing witness identified above who witnessed the principal sign the instrument or witnessed the principal acknowledge his/her signature on the instrument is not a party to or beneficiary of the transaction."

Notary Public of the State of GEORGIA

My Commission expires: 10/04/2022  
(Place Notary Seal Below)



Page 2 of 5

Book 4964 Page 1662

**RECEIVED****Aug 11 2025****SC Court of Appeals**

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**EXHIBIT "A"**

All that certain piece, parcel or lot of land, situate, lying and being in the County of Aiken, State of South Carolina, being shown and designated as Lot 28 on a plat of the Abbey - Phase 1A of Trolley Run Station recorded in the Office of the RMC for the Aiken County, South Carolina in Plat Book PL 62, at Page 633. Reference is made to said plat, which is incorporated herein for a more complete and accurate description as to the metes, bounds and location of said property.

For Informational Purposes Only:

Being the same property conveyed to D.R. Horton, Inc. by deed of Sage Mill Residential, Ltd. dated February 27, 2021 and recorded March 5, 2021 in Book 4912 at Page 561 in the Land Records of Aiken County, South Carolina.

TMS: 086-00-42-007

Property Address: 466390028, Lot 28 Abbey at Trolley Run St 60, 321 Donnington Court, Aiken, SC 29801

STATE OF SOUTH CAROLINA )  
COUNTY OF AIKEN ) AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY, appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at 466390028, Lot 28 Abbey at Trolley Run St 60, 321 Donnington Court, Aiken, SC 29801, bearing County Tax Map Number 086-00-42-007, 086-00-19-001 (parent), was transferred by D.R. Horton, Inc. to Deborah Denise Harley on 9-23-2021.
3. Check one of the following: The deed is
  - (a) X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
  - (b) \_\_\_\_\_ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
  - (c) \_\_\_\_\_ exempt from the deed recording fee because (See Information section of affidavit):

(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty?

Check Yes \_\_\_\_\_ or No \_\_\_\_\_

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit.):

- (a) The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$270,930.00
- (b) The fee is computed on the fair market value of the realty which is \_\_\_\_\_.
- (c) The fee is computed on the fair market value of the realty as established for property tax purposes which is \_\_\_\_\_.

5. Check Yes \_\_\_\_\_ or No \_\_\_\_\_ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. (This includes, pursuant to Code Section 12-59-140(E)(6), any lien or encumbrance on realty in possession of a forfeited land commission which may subsequently be waived or reduced after the transfer under a signed contract or agreement between the lien holder and the buyer existing before the transfer.) If "Yes," the amount of the outstanding balance of this lien or encumbrance is: \_\_\_\_\_.

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here: \$270,930.00
- (b) Place the amount listed in item 5 above here: \_\_\_\_\_ (If no amount is listed, place zero here.)
- (c) Subtract Line 6(b) from Line 6(a) and place result here: \$270,930.00

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: \$1002.70

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: [Check the correct title]: \_\_\_\_\_ Seller \_\_\_\_\_ Buyer X Closing Attorney.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

[Signature]  
Responsible Person Connected with the Transaction  
SWORN to and subscribed before me this

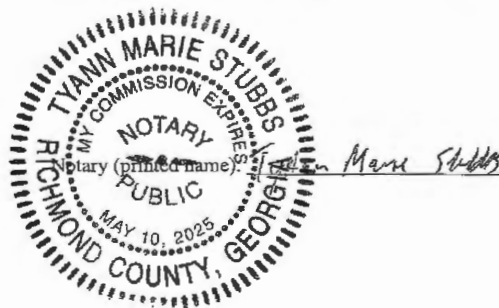
[Signature]  
Print or Type Name Here  
[AFFIX NOTARY SEAL IN BLANK SPACE BELOW]

23 day of September 20 21

Notary Public for Georgia

My Commission Expires: May 10, 2025

Notary (L.S.): [Signature]



**INFORMATION**

Except as provided in this paragraph, the term "value" means "the consideration paid or to be paid in money or money's worth for the realty." Consideration paid or to be paid in money's worth includes, but is not limited to, other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. (This includes, pursuant to Code Section 12-59-140(E)(6), any lien or encumbrance on realty in possession of a forfeited land commission which may subsequently be waived or reduced after the transfer under a signed contract or agreement between the lien holder and the buyer existing before the transfer.) Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

**Exempted from the fee are deeds:**

- (1) transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars;
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts;
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States;
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty;
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39;
- (7) that constitutes a contract for the sale of timber to be cut;
- (8) transferring realty to a corporation, a partnership, or a trust as a stockholder, partner, or trust beneficiary of the entity or so as to become a stockholder, partner, or trust beneficiary of the entity as long as no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in the stock or interest held by the grantor. However, except for transfers from one family trust to another family trust without consideration or transfers from a trust established for the benefit of a religious organization to the religious organization, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee, even if the realty is transferred to another corporation, a partnership, or trust;
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any the above. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A);
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation;
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership;
- (12) that constitutes a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quitclaim deed;
- (13) transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed pursuant to foreclosure proceeding;
- (14) transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty;
- (15) transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act.

# Exhibit 3



|                                                   |   |                                   |
|---------------------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                           | ) | IN THE COURT OF COMMON PLEAS      |
|                                                   | ) | FOR THE TENTH JUDICIAL CIRCUIT    |
| COUNTY OF ANDERSON                                | ) | CASE NO.: 2019-CP-04-1942         |
|                                                   | ) |                                   |
| Natalie Zitek, individually, and on behalf of all | ) |                                   |
| others similarly situated,                        | ) |                                   |
|                                                   | ) |                                   |
| Plaintiff,                                        | ) | <b>ORDER GRANTING PLAINTIFF'S</b> |
|                                                   | ) | <b>MOTION FOR CLASS</b>           |
| v.                                                | ) | <b>CERTIFICATION AND DENYING</b>  |
|                                                   | ) | <b>DEFENDANT'S MOTION TO</b>      |
| D.R. Horton, Inc.; Jane Doe #1-10; and John       | ) | <b>COMPEL ARBITRATION</b>         |
| Doe #1-50,                                        | ) |                                   |
|                                                   | ) |                                   |
| Defendants.                                       | ) |                                   |

This matter came before the Court on December 9, 2020 on Plaintiff's Motion for Class Certification and Defendant's Motion to Compel Arbitration.<sup>1</sup> Having reviewed the parties' submissions, heard oral arguments, and conducted a rigorous Rule 23 analysis under the South Carolina Rules of Civil Procedure, this Court finds that:

1. All five Rule 23 class certification requirements are met here;
2. This case is well-suited for class certification because multiple claims that center on Horton's conduct can be resolved in a single action that poses no unusual manageability problems;
3. Horton's arbitration provision is unenforceable because it was extinguished pursuant to the Doctrine of Merger; and,
4. Horton's arbitration provision is unenforceable because it is unconscionable.

Accordingly, the Court **GRANTS** Zitek's Class Certification Motion and certifies the class as proposed; and, the Court **DENIES** Horton's Arbitration Motion.

### **BACKGROUND**

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<sup>1</sup> At the December 9<sup>th</sup> hearing, Justin Lucey and Dabny Lynn with the Lucey Law Firm appeared on behalf of Plaintiff. Tom Dudley and Brian Aughtry with the Kenison, Dudley, & Crawford Law Firm appeared on behalf of Defendant.

This is a proposed class action that involves 234 single-family homes built and sold by Defendant, D.R. Horton, Inc. (“Horton”), in the Rose Hill subdivision located in Easley, South Carolina. These homes were completed between 2012 and 2017. Plaintiff, Natalie Zitek (“Zitek”), owns one of these homes. Zitek maintains that her home and all other Horton-built homes in Rose Hill contain common defects and damages such as leaky windows and patio doors; insufficiently supported brick that is cracking along walls; loosely embedded stone that is separating away from walls; and, insufficiently supported slab foundations that are cracking in many places. Zitek’s expert, Dr. Rhett Whitlock (“Dr. Whitlock”), catalogued all 234 homes and performed detailed inspections at 1/3<sup>rd</sup> of these homes.<sup>2</sup> According to Dr. Whitlock, all 234 homes share common construction, a common construction problem (*i.e.*, failing exterior envelopes), and common repairs for this problem that can be commonly priced from home to home. As such, Zitek argues class certification is appropriate and seeks certification of the following class:

Any persons or entities that own a home developed/built by D.R. Horton within the Rose Hill neighborhood in Easley, South Carolina.<sup>3</sup>

Horton argues that class certification is inappropriate, and separately, argues that the 174 or so proposed class members who contracted directly with Horton should be compelled to arbitrate their claims based on the arbitration provision in Horton’s purchase agreement. Zitek argues that this arbitration provision is unenforceable for two independent reasons: (1) it no longer exists under the Doctrine of Merger; and, (2) it is unconscionable under *Smith v. D.R. Horton*, 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013), *aff’d*, 417 S.C. 42, 790 S.E.2d 1 (2016).

### **PROCEDURAL HISTORY**

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<sup>2</sup> Dr. Whitlock tested the windows and masonry at several of these inspected homes. Whitlock Aff., para. 22.

<sup>3</sup>The class excludes any home owned by D.R. Horton and/or their affiliates; any home owned by the Judge, any Rose Hill home developed by persons other than D.R. Horton; any former Rose Hill homeowner; any current Rose Hill homeowner who previously released D.R. Horton; and, all persons who properly and timely opt out of the Class.

On September 25, 2019, Zitek filed this proposed class action to recover damages owed to her and other Rose Hill homeowners due to defects existing in their homes. Zitek's Complaint asserts the following claims against Horton: negligence/gross negligence, breach of implied warranties, and unfair trade practices.<sup>4</sup> On February 28, 2020, Horton filed a Motion to Stay for Compliance with the Right to Cure Act (the "Act"). On March 30, 2020, Zitek responded with a Class Certification Motion. In support of her Motion, Zitek filed several supporting exhibits, supporting Affidavits of Dr. Whitlock, Zitek, and Class Counsel, and pictures of the same or similar window defects and damages in a multitude of the homes.

Both parties' Motions were scheduled to be heard on May 29, 2020.<sup>5</sup> On May 27, 2020, Horton filed its Opposing Memo to Class Certification and an Affidavit from a Horton Manager, Shawn Kruglewicz ("Kruglewicz"). Horton also filed a separate Motion to Compel Arbitration. On May 28, 2020, Zitek filed Dr. Whitlock's Reply Affidavit to Kruglewicz's Affidavit.

At the May 29<sup>th</sup> hearing, the Court took the Motions under advisement and encouraged the parties to reach an agreement on representative (class action) compliance with the Act. The parties agreed on a compliance plan that this Court enrolled on July 20, 2020. Under this plan, the Parties temporarily withdrew their Motions and Horton inspected and offered to cure 48 homes.<sup>6</sup> This process ended on October 18, 2020. The next day, Horton re-filed its Arbitration Motion; and, on October 20, 2020, Zitek re-filed her Class Certification Motion.<sup>7</sup>

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<sup>4</sup> Plaintiff represented that if the class were certified that John and Jane Does would not be added and that SCUPTA claims would not apply to the class.

<sup>5</sup> On May 19, 2020, Horton moved to Continue Zitek's Class Certification Motion, but Horton's Motion was denied.

<sup>6</sup> These homes included 25 Lucey Law Firm clients which were randomly selected and 22 or so other homeowners which were selected by Horton.

<sup>7</sup> On November 13, 2020, and after Horton received Zitek's discovery requests, Horton filed a Rule 26 Motion seeking to halt discovery given its pending Arbitration Motion.

Prior to the hearing of these Motions on December 9, 2020,<sup>8</sup> Zitek filed two memoranda and additional materials supporting her Motion including: (1) Dr. Whitlock's Supplemental Affidavit regarding additional engineering inspections and over 100 photos showing a half dozen common defects and damages; (2) Horton's offers to cure also showing common conditions; and, (3) a chart challenging Horton's points opposing certification. Zitek also filed two memoranda and materials opposing Horton's Arbitration Motion including (1) Horton's One Year Warranty and (2) Zitek's Affidavit discussing her lack of bargaining power. Horton supplemented its Memo Opposing Class Certification with one expert Affidavit; and, in support of its Arbitration Motion, Horton filed a memorandum and an Affidavit of Horton Manager, Philip Deleskamp.

## **ANALYSIS**

### **I. This Action Meets Rule 23's Class Certification Requirements**

This Court finds that Zitek has met all Rule 23 requirements and class certification is an appropriate vehicle for the fair and effective adjudication of this matter. *See* Rule 23, SCRCP.<sup>9</sup>

#### **A. Numerosity – Rule 23(a)(1)**

The Court finds that the proposed class, which Horton admits consists of 234 or more members who own 234 houses, is so numerous that the joinder of all members is impractical. Rule 23(a)(1), SCRCP;<sup>10</sup> *Kruglewicz Aff.*, para. 8 (Horton agreeing that there are 234 Horton-built homes in Rose Hill); *Mixson Aff.*, paras. 3-6 (“[T]he putative class is in excess of 234 members”).

The Court also finds that a class action is the appropriate procedure to efficiently litigate the claims of these homeowners. Many of these homeowners may not have the ability to bring their

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<sup>8</sup> This hearing was originally scheduled for November 30, 2020, then for December 2, 2020, but it was moved to December 9, 2020 to ensure that the parties had enough time to make their respective arguments.

<sup>9</sup> *See also Salmonsens v. CGD*, 377 S.C. 442, 455, 661 S.E.2d 81, 88 (2008) (South Carolina favors class actions).

<sup>10</sup> *See also Newberg on Class Actions* § 3:12 (“[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.”).

own claim because of a lack of time, expertise, or financial resources required. Even if each of these homeowners had the resources to proceed individually, this Court would be overrun with claims.

**B. Commonality – Rule 23(a)(2)**

The Court finds that there are common legal and factual questions that bind the proposed class together such as whether Horton’s construction practices damaged class members. Rule 23(a)(2), SCRCP;<sup>11</sup> Compl, para. 37 (alleging common questions of law and fact). Zitek also submitted evidence supporting the commonality of the claims at issue. *See, e.g.*, Whitlock Aff., para. 20 (opining that all 234 homes contain many of the same components and have experienced the same weather conditions); Whitlock Aff., paras. 27-32 (opining that defects and damages observed are typical and consistent and affect all 234 Rose Hill Homes); Whitlock Aff., para. 34 (opining that all-inclusive unit costs for the repair of these common defects are typical and consistent); Whitlock Reply Aff., para. 4-8 (opining that these defects can be classified singularly as defective exterior building envelopes); Whitlock Supp. Aff., Exs. B-G (over 100 photos showing six common defects Whitlock documented throughout these homes’ envelopes); *see also* Kruglewicz Aff., para. 18 (Horton admitting it hired subcontractors to perform nearly identical scopes of work); Offers to Cure (showing Horton observed sealant failure at windows in 96% of the homes it inspected and damaged patio doors in 52% of these homes).

**C. Typicality – Rule 23(a)(3)**

This Court finds that Zitek’s claims are typical of the claims of the proposed class. Rule 23(a)(3), SCRCP; Compl., para. 38. Zitek’s claims arise out of a common pattern of alleged wrongdoing by Horton, and the same legal and factual theories, *e.g.*, building code violations, are

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<sup>11</sup> *See Napier, et al v. Adiz, et al*, Case No. 2016-CP-02-263 (S.C. Com. Pl.) (Judge Bucker Jan. 12, 2018 Order Granting Class Cert., p. 12) (“Napier Order”) (Aiken County); *Marcum, et al v. Adiz, et al*, Case No. 2012-CP-02-3191 (S.C. Com. Pl.) (Judge Early Apr. 21, 2014 Order Granting Class Cert., pp. 10-11) (“Marcum Order”) (Aiken County). (Compl, paras. 29-31); *see also McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) (not every issue must be common to all class members; and even a single common issue will satisfy Rule 23).

asserted on behalf of all class members. Zitek has also presented evidence that further support these points.

**D. Adequacy – Rule 23(a)(4)**

The Court finds that Zitek and Zitek’s Counsel will fairly and adequately represent the class. Rule 23(a)(4), SCRCF.<sup>12</sup> Zitek voluntarily accepted her role as class representative and there is nothing to suggest that she has competing interests. Zitek Aff., paras. 10-13. No material conflict exists between Zitek (an owner of a Horton-built home) and the class members she seeks to represent (also owners of Horton-built homes). Horton’s argument that her upscale residence should disqualify her is inadequately supported and misplaced. Zitek also retained the Lucey Law Firm to prosecute her and the proposed class’ claims. Zitek Aff., paras. 10-13. The Lucey Law Firm is highly experienced in construction and class action litigation. Lucey Aff., paras. 1-16. The firm is reputed to have three of the four largest negotiated, residential construction recoveries in South Carolina, and the largest construction verdicts; and, Mr. Lucey has been qualified and appointed as class counsel in many cases. *Id.*

**E. Amount in Controversy – Rule 23(a)(5)**

This Court finds that the proposed class meets the \$100 amount in controversy requirement. Rule 23(a)(5), SCRCF. Dr. Whitlock opined that the cost to repair each of these homes is more than \$100 and Horton’s offers to cure implicitly confirm this. Whitlock Aff., p. 5, n. 1; *see also* Offers to Cure.

**II. Horton’s Opposition to Class Certification is Overruled**

Horton’s opposition primarily focuses on two grounds – commonality and typicality. Horton offers rhetorical arguments that “potential” differences in size, price, model type, etc. “may” require

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<sup>12</sup> *See also Newberg on Class Actions* § 3:50 (The class representative (1) should not have any significant antagonistic or conflicting interests to class members; and (2) should vigorously prosecute the interests of the class through qualified counsel).

individualized inquiries. However, Horton offers no evidence showing how any of these purported differences impact the common and typical defect at issue – failing exterior envelopes (consisting of failing siding systems and failing fenestrations).

Moreover, Horton’s offers to cure show that there are at least two common and typical conditions relating to these homes’ envelopes – which Horton agreed to commonly repair. (Offers to Cure). Horton concedes these common conditions in its Opposing Memo.<sup>13</sup> These concessions negate Horton’s expert’s opinion that individualized repairs “may” be required and that “there was not one issue that was common and present at all of the homes”. Moore Aff., paras. 23, 25.

This Court will not deny class certification based on speculation rather than facts. Zitek and Dr. Whitlock provided extensive evidence supporting all five Rule 23 requirements. Horton has had months to challenge this evidence or otherwise refute Dr. Whitlock’s opinions but failed to do so. Notably, Plaintiffs have shown that person(s) knowledgeable about the construction of these homes are still employed by Horton and could have submitted less speculative affidavits – but did not.

### **III. Arbitration is Unenforceable Under the Doctrine of Merger**

This Court finds that the arbitration provision in Horton’s purchase agreement is unenforceable under the Doctrine of Merger because this provision merged with homeowner deeds.

[Under] [t]he doctrine of merger. . . The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.

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<sup>13</sup> Horton Opposing Memo, p. 17 (“Additionally, the expert affidavit (“Moore Affidavit”) prepared by Larry Steven Moore (“Moore”) with Applied Building Sciences, Inc., attached hereto as Exhibit A, indicates that there are no defects or issues common to every single home inspected. To the contrary, the only potential defect that might be common to most or all of the homes is a failure of an adhesive sealant around some of the windows of the homes. Although several of the homes have similar issues, like those arising from doors, whether it be framing or weatherproofing issues, these issues are not common to all the homes. Most, if not all, of the alleged defects would best be characterized as common to some, or maybe even half, of the homes. However, these alleged defects are certainly not common to all the homes in Rose Hill.”) (emphasis added).

*Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 132-33 (Ct. App. 1984) quoting *Charleston & Western Carolina Railway Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957) (emphasis added). In other words, once parties execute a deed:

. . . [T]he 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. . .

*Charleston & Western*, 231 S.C. at 505, 99 S.E.2d at 193; *Wilson*, 281 S.C. at 364, 315 S.E.2d at 133 (“A deed executed [after a] contract for the sale of land supersedes that contract. . .”).

In 2005 and 2011, two South Carolina Circuit Courts refused to enforce the arbitration provision in Horton purchase agreements because they found that the provision was extinguished by the deed.<sup>14</sup> Like these cases, Zitek’s deed was executed after Zitek’s purchase agreement. Zitek Purchase Agreement, p. 8 (Zitek purchase agreement executed on February 17, 2013); Zitek Deed, p. 2 (Zitek deed executed on July 25, 2013). Paragraph 15 of Zitek’s purchase agreement<sup>15</sup> – even if it had any validity – is therefore extinguished and unenforceable under the Merger Doctrine.

#### **IV. The Two Merger Doctrine Exceptions Do Not Apply**

Horton argues two exceptions to the Merger Doctrine that this Court finds do not apply here.

##### **A. Contrary Intent Exception**

First, the Court finds the “contrary intent” exception to the Merger Doctrine does not apply because Horton has not clearly shown that Paragraph 15 was intended to survive closing. Under this exception, “the party denying merger has the burden of proving by clear and convincing evidence that merger was not intended.” *Hughes v. Greenville Country Club*, 283 S.C. 448, 451,

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<sup>14</sup> *Smith v. D.R. Horton*, Case No. 2010-CP-18-641 (S.C. Com. Pl.) (Judge Dickson Apr. 12, 2011 Order Denying Horton’s Arbitration Motion) (Dorchester County); *Upchurch v. D.R. Horton*, 2005 WL 5621497, at \*3 (S.C. Com. Plea) (Judge Barber Sept. 28, 2005 Order Denying Horton’s Arbitration Motion) (Richland County).

<sup>15</sup> Horton’s express arbitration provision is in Paragraph 15 of its purchase agreement. As discussed herein, this Court finds that Paragraph 15 does not stand alone; rather, it is intertwined with Paragraph 14. However, even assuming Paragraph 15 did stand alone, it is nevertheless unenforceable under the Doctrine of Merger.



322 S.E.2d 827, 828 (Ct. App. 1984). Horton has not met this burden. This is supported by the following facts:

- Zitek’s purchase agreement does not contain a general survival clause;
- Paragraph 15, itself, does not state that it “survives closing” or applies “after closing”;<sup>16</sup>
- Horton included survival sentences in other provisions like Paragraphs 9(b), 10, and 21;
- Paragraph 14(c) indicates that “after closing” Horton has no liability or obligation to Zitek “except as provided in. . .[her] deed”;
- Horton provided Zitek two, separate post-closing Warranties that have their own arbitration provisions that conflict with Paragraph 15;<sup>17</sup> and
- Horton did not include Paragraph 15 in Zitek’s deed or anything else given to her at closing.

**B. Part Performance Exception**

Second, the Court finds that the “part performance” exception to the Merger Doctrine does not apply because Horton has no unperformed obligations. This exception provides that unperformed contractual obligations do not merge with deeds until they are performed. *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993). “As to those provisions, the contract is not merged in the deed, and the contract remains in force until the contract has been fully performed.” 26A C.J.S. Deeds § 223 (1956) (emphasis added).

Horton defines its unperformed obligations in Paragraph 14(c) of the purchase agreement. According to this Paragraph, Horton has no post-closing obligations “except as provided in”: (1) Section 14 (*i.e.*, the Written Warranties); (2) Section 21 (*i.e.*, Punch List Repairs); and (3) the homeowners’ deeds.<sup>18</sup> There are no Horton post-closing obligations expressly incorporated into

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<sup>16</sup> These facts distinguish this case from *Carlson v. S.C. State Plastering*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). There, the purchase agreement had a survival clause and the arbitration provision stated that it applied “after closing”.

<sup>17</sup> To be clear, there was a total of three different arbitration provisions, and Horton does not seek to compel either of the other two arbitration provisions which were contained in the two written warranties.

<sup>18</sup> Zitek’s purchase agreement indicates that Horton’s other rights and obligations end at “Closing”. *See, e.g.*, Zitek Purchase Agreement Paras. 5, 6, 8, 9, 12, 14(a), 16, 18.

Zitek's deed;<sup>19</sup> and, Horton's post-closing Warranty obligations are set forth in separate documents. As such, Zitek's purchase "contract has been fully performed". 26A C.J.S. Deeds § 223, *supra*. Moreover, again, the Written Warranties have their own arbitration provisions, and the Punch List provision has its own survival clause.

**V. Arbitration is Also Unenforceable Because the Arbitration Provision is Unconscionable**

This Court also finds that arbitration is unenforceable because Zitek's purchase agreement is an adhesion contract and its arbitration provision contains oppressive terms that are not severable. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 ("[U]nconscionability is. . .the absence of meaningful choice. . .due to one-sided contract provisions, together with [oppressive] terms. . .").

**A. Absence of Meaningful Choice/Adhesion Contract**

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

- The agreement is a boilerplate contract that Horton offered to Zitek on a take-it-or-leave-it basis. Zitek Aff., paras. 5, 7;
- Zitek has no experience in real estate, construction or the law and was not represented by her own attorney at the time she signed the agreement. Zitek Aff., paras. 2, 8;
- Zitek is an unsophisticated purchaser whereas Horton is a sophisticated developer that has constructed nearly 800,000 homes in the United States. *Id.*; *see also* Horton Website; and,
- Similar Horton contracts have previously been found to be adhesion contracts by South Carolina courts.

**B. Oppressive Terms**

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<sup>19</sup> Implied warranties may survive deeds, but this does negate the Merger Doctrine's applicability to pre-deed warranty disclaimers (or arbitration clauses) as explained by the 4<sup>th</sup> Circuit in *Tower South POA v. Summey Building Systems, Inc.*, 47 F.3d 1165 (1995) (unpublished).

Second, this 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. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4.<sup>20</sup> The only pertinent differences between *Smith* and here is that Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and (2) its disclaimers from Paragraph 14(i) to Paragraph 14(c). However, the relocation of these provisions does not negate *Smith's* applicability. A comparison of *Smith's* paragraphs to *Zitek's* paragraphs shows that they contain the same cross-references.<sup>21</sup>

More importantly, Paragraph 15, unlike *Smith's* Paragraph 14(g), contains a broad reference to Section 14 – it states that disputes regarding Horton's warranty "pursuant to Section 14 above" shall be arbitrated. Thus, Paragraph 15 – does not stand alone – it references "Section 14 above" which includes oppressive terms.

### **C. Severability**

The Court further finds that Paragraph 15 is not severable from Paragraph 14. This is supported by the fact that neither Paragraph 14 nor 15 (nor the body of *Zitek's* purchase agreement) contain a severability clause. *Zitek Purchase Agreement*. This is also supported by the law:

We conclude the arbitration clause. . .should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for "monetary damages of any kind. . ."

*Smith*, 403 S.C. at 16, 742 S.E.2d at 41 (emphasis added).

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<sup>20</sup> See also *Mirmow v. Great Southern Homes, Inc.*, 2019 WL 7611604, \*2 (S.C. Com. Pl.) (Judge Kessley Dec. 9, 2019 Order Denying Arb. Motion) (Lexington County) (finding the arbitration agreement in limited warranty unconscionable under *Smith* based on "related" warranty and liability disclaimers).

<sup>21</sup> See Pl. Memo. Opposing Arb., p. 13 (charts showing similarities between *Smith's* and *Zitek's* paragraphs).

Horton's argument that Paragraph 15 is a separable provision is the same argument considered and rejected by the *Smith* Court. *Smith* is good law; this case involves essentially the same contracts, paragraphs, cross-references and oppressive terms; and therefore, *Smith* controls.

**VI. Even if the Arbitration Provision Survived, It Would Only Apply to A Subclass of Original Purchasers, Not the Subclass of Downstream Purchasers**

Even if the arbitration provision survived, it would only apply to the subclass of homeowners that purchased their homes directly from Horton ("Original Homeowners"). Horton does not have contracts with downstream homeowners, those that purchased their homes from other homeowners. The absence of a contractual agreement to arbitrate downstream claims is fatal to the Motion to Compel Arbitration against this subclass.<sup>22</sup> Therefore, had there been an arbitration agreement that survived closing, it is only the subclass of Original Homeowners (estimated by Plaintiff to be the owners of approximately one hundred and sixty-five homes) which would have been sent by this Court to arbitration.

**CONCLUSION**

Having found that all Rule 23 requirements are satisfied here, this Court **GRANTS** Zitek's Class Certification Motion and certifies the following class:

Any persons or entities that own a home developed/built by D.R. Horton within the Rose Hill neighborhood in Easley, South Carolina.

The class excludes any home owned by D.R. Horton and/or their affiliates; any home owned by the Judge, any Rose Hill home developed by persons other than D.R. Horton; any former Rose Hill homeowner; any current Rose Hill homeowner who previously released D.R. Horton; and, all persons who properly execute and file a timely request for exclusion from the Class.

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<sup>22</sup> It appears that Horton does not contest the inapplicability of its arbitration provision to downstream purchasers.

This class shall consist of two subclasses, the first being original owners, and the second being downstream owners, so that should Horton appeal the denial of the Motion to Compel, the downstream subclass may continue to prosecute their claims during the pendency of the appeal.

Natalie Zitek is hereby appointed as Class Representative. Justin Lucey, Dabny Lynn, and Sohayla Townes of the Lucey Law Firm are hereby appointed as Class Counsel. The filed Notice Plan, Notice, and Opt-Out Form are approved for use by Class Counsel as detailed in the documents.

Having found that the arbitration provision in Horton's purchase agreement is unenforceable, this Court **DENIES** Horton's Motion to Compel Arbitration.<sup>23</sup>

AND IT IS SO ORDERED!

Anderson, South Carolina  
\_\_\_\_\_, 2021

\_\_\_\_\_  
The Honorable Cordell Maddox  
Presiding Judge for the 10<sup>th</sup> Circuit

<sup>23</sup>Since this Court finds arbitration is unenforceable, it need not address whether the South Carolina Uniform Arbitration Act ("SCUAA") or Federal Arbitration Act ("FAA"), or both, would apply. However, the purchase contracts set forth that the SCUAA applies and the Court sees no reason to disturb that provision.



Anderson Common Pleas

**Case Caption:** Natalie Zitek VS D.R. Horton, Inc. , defendant, et al

**Case Number:** 2019CP0401942

**Type:** Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

Electronically signed on 2021-01-27 11:29:22 page 14 of 14

# Exhibit 4

|                                             |   |                                  |
|---------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                     | ) | IN THE COURT OF COMMON PLEAS     |
|                                             | ) | FOR THE THIRTEENTH JUDICIAL      |
| COUNTY OF GREENVILLE                        | ) | CIRCUIT                          |
|                                             | ) | CASE NO.: 2022-CP-23-03974       |
|                                             | ) |                                  |
| Robert Baddorf, Barbara Briggs and Jo Anne  | ) |                                  |
| Gregory, individually, and on behalf of all | ) |                                  |
| others similarly situated,                  | ) |                                  |
|                                             | ) | <b>ORDER DENYING DEFENDANT’S</b> |
| Plaintiffs,                                 | ) | <b>MOTION TO COMEPL</b>          |
|                                             | ) | <b>ARBITRATION</b>               |
| v.                                          | ) |                                  |
|                                             | ) |                                  |
| D.R. Horton, Inc.,                          | ) |                                  |
|                                             | ) |                                  |
|                                             | ) |                                  |
| Defendant.                                  | ) |                                  |

This matter came before the Court on March 21, 2023, by way of Defendant D.R. Horton, Inc.’s Notice of Motion to Stay Action and Compel Arbitration (“Arbitration Motion”).<sup>1</sup> Having reviewed the parties’ submissions and hearing oral arguments, this Court finds that:

1. D.R. Horton’s (hereinafter “DRH”) arbitration provision is unenforceable because it was extinguished pursuant to the Doctrine of Merger;
2. DRH’s arbitration provision is unenforceable because it is unconscionable; and
3. DRH’s arbitration provision is unenforceable because it violates South Carolina public policy,

### **PROCEDURAL BACKGROUND**

Eagles Glen is a subdivision located in Greenville County that contains 128 homes built by Defendant DRH. Plaintiffs are the owners of homes in Eagles Glen and bring these claims individually and on behalf of others similarly situated. Plaintiffs allege that the common defects to

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<sup>1</sup> At the March 21<sup>st</sup> hearing, Robert Lyles and Danny Winterstein with Lyles & Associates, LLC appeared on behalf of Plaintiffs. Kim Wooten with Kenison, Dudley & Crawford Law Firm appeared on behalf of Defendant.



their homes include insufficient drainage, inadequate grading, improper sloping, and flooding and erosion.

Plaintiffs' Complaint was filed on July 28, 2022, and asserts the following causes of action against DRH: negligence/gross negligence, breach of implied warranties, and unfair trade practices. DRH filed a Notice of Appearance and the Answer and Third-Party Complaint of Defendant D.R. Horton, Inc. on October 10, 2022, asserting claims against Southern States Resources, LLC ("Southern States") and Raby Construction Company, LLC ("Raby"). DRH subsequently filed its Amended Answer and Third-Party Complaint of Defendant D.R. Horton, Inc. on November 10, 2022, asserting additional claims against Bold Mountain Corp d/b/a Kodiak Construction GBR, LLC ("Kodiak").

On December 23, 2022, DRH filed Defendant D.R. Horton, Inc.'s Notice of Motion and Motion to stay Action and Compel Arbitration. With leave of Court, DRH filed its Second Amended Answer and Third-Party Complaint of Defendant D.R. Horton, Inc. on March 9, 2023. Plaintiffs' Memorandum Opposing Defendant D.R. Horton's Motion to Stay and Compel Arbitration was filed on March 16, 2023 ("Pl's Op."). On March 17, 2023, DRH filed its Memorandum In Support of Motion to Compel Arbitration. Finally, on March 20, 2023, Plaintiffs' Supplemental Memorandum Opposing Defendant D.R. Horton's Motion to Stay and Compel Arbitration was filed. The matter was heard at the Greenville County Courthouse on March 21, 2023, where counsel for DRH and Plaintiffs appeared and made arguments. I have considered those arguments together with all of the written submissions of the parties.

#### **THE ARBITRATION AGREEMENT AT ISSUE**

Plaintiff Baddorf executed the purchase agreement for his home on January 28, 2019 ("Baddorf Purchase Agreement"), (Pl's Op, Ex. A, p. 7). Plaintiff Briggs executed a purchase

agreement with DRH on August 2, 2018 (“Briggs Purchase Agreement,” Pl’s Op., Ex. B p. 7). (The Baddorf Purchase Agreement and the Briggs Purchase Agreement may be collectively referred to as the “Purchase Agreements.”) The Purchase Agreements contain the following “Arbitration Provision”:

**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 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 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 THAT WARRANTY PROGRAM. NOT WITHSTANDING 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 IN SECTION 4 HEREIN. NOTWITHSTANDING THE FOREGOING, THE ARBITRATION PROVISIONS OF THE 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.

(Pl’s Op. Ex. A) (emphasis added).

**I. The Arbitration Provision is Unenforceable Under the Doctrine of Merger.**

This Court finds that the Arbitration Provision in the Purchase Agreements is unenforceable under the “Merger Doctrine” because this provision merged with homeowner deeds.

[Under][t]he doctrine of merger. . . The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed [Citations omitted].

*Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 132-33 (Ct. App. 1984) (emphasis added). In other words, once parties execute a deed:

. . . [T]he 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 evidence of [prior] agreement[s] between the parties is inadmissible to vary or contradict the terms of the deed.

*Charleston & Western Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 505, 99 S.E.2d 187, 193 (1957) (citing 55 Am Jur. 756). “A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract. . .”. *Wilson*, 315 S.E.2d at 133 (citing *Charleston & Western*, 99 S.E.2d at 193)(additional citations omitted).

Though not binding authority, I note that in 2005, 2011, and 2021 three South Carolina Circuit Courts refused to enforce the same or similar arbitration provisions in DRH purchase agreements because those courts found that the arbitration provisions were extinguished by subsequently executed deeds.<sup>2</sup> Like those cases, the deeds in this case were executed after the execution of the Purchase Agreements which contain the subject Arbitration Provision. The Baddorf Purchase Agreement was executed on January 28, 2019. (Pl’s Op, Ex. A). Baddorf’s deed was executed on March 1, 2019. (Pl’s Op. Ex. C). The Briggs Purchase Agreement was

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<sup>2</sup> *Smith v. D.R. Horton*, Case No. 2010-CP-18-641 (S.C. Com. Pl.) (Judge Dickson Apr. 12, 2011 Order Denying DRH’s Arbitration Motion) (Dorchester County); *Upchurch v. D.R. Horton*, 2005 WL 5621497, at \*3 (S.C. Com. Plea) (Judge Barber Sept. 28, 2005 Order Denying DRH’s Arbitration Motion) (Richland County); *Zitek v. D.R. Horton*, Case No. 2019-CP-04-01942 (S.C. Com. Pl.) (Judge Maddox Jan. 27, 2021) (Anderson County)) (Pl’s Op. Exs. E-G)

executed on August 2, 2018. (Pl's Op., Ex. B). Briggs' deed was executed on August 16, 2018. (Pl's Op., Ex. D). The Arbitration Provision at Paragraph 15 of the Purchase Agreements – even if it had any validity – is therefore extinguished and unenforceable under the Merger Doctrine.

## **II. Merger Doctrine Exceptions Do Not Apply.**

DRH argues two exceptions to the Merger Doctrine that this Court finds do not apply here.

### **A. The Contrary Intent Exception Does Not Apply.**

First, the Court finds the “Contrary Intent” exception to the Merger Doctrine does not apply. Under this exception, “the party denying merger has the burden of proving by clear and convincing evidence that merger was not intended.” *Hughes v. Greenville Country Club*, 283 S.C. 448, 451, 322 S.E.2d 827, 828 (Ct. App. 1984). DRH has not met this burden. This is supported by the following facts:

- The Purchase Agreements do not contain a general survival clause; and
- The Arbitration Provision itself, does not state that it “survives closing” or applies “after closing.”<sup>3</sup>

Despite the absence of survival language, DRH argues that the language of the Arbitration Provision evidences intent that the arbitration obligation survives the closing. However, I find that the language of the DRH's Purchase Agreements actually suggests otherwise. Specifically, DRH included express survival language in other provisions of the Purchase Agreements, such as in Paragraphs 9(b), 10, and 21, but did not include that language in the Arbitration Provision at Paragraph 15. This implies the contrary intent, specifically that when drafting the Purchase Agreements, DRH elected not to make the Arbitration Provision survive the closing.

Considering all of the arguments and the provisions of the Purchase Agreements, DRH has not

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<sup>3</sup> These facts distinguish this case from *Carlson v. S.C. State Plastering*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). There, the purchase agreement had a survival clause and the arbitration provision stated that it applied “after closing.”

established that the Contrary Intent exception to the Merger Doctrine applies.

**B. The Part Performance Exception Does Not Apply.**

Second, the Court finds that the “Part Performance” exception to the Merger Doctrine does not apply because DRH has no unperformed obligations. This exception provides that unperformed contractual obligations do not merge with deeds until they are performed. *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993). “As to those provisions, the contract is not merged in the deed, and the contract remains in force until the contract has been fully performed.” 26A C.J.S. Deeds § 223 (1956) (emphasis added).

DRH defines its unperformed obligations in Paragraph 14(c) of the Purchase Agreements. According to this paragraph, DRH has no post-closing obligations “except as provided in” the following: (1) Section 14 (*i.e.*, the Written Warranties); (2) Section 21 (*i.e.*, Punch List Repairs); and (3) the homeowners’ deeds.<sup>4</sup> There are no other DRH post-closing obligations expressly incorporated into Plaintiffs’ deeds.<sup>5</sup> As such, Plaintiffs’ purchase “contract has been fully performed.” 26A C.J.S. Deeds § 223, *supra*. Moreover, again, the Written Warranties have their own arbitration provisions, and the Punch List provision has its own survival clause.

**III. The Arbitration Provision Is Unenforceable Because It Is Unconscionable.**

This Court also finds that the Arbitration Provision is unenforceable because the Purchase Agreements are adhesion contracts, and their arbitration provisions contain oppressive and

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<sup>4</sup> The Purchase Agreements indicate that DRH’s other rights and obligations end at “Closing.” *See, e.g.*, Baddorf Purchase Agreement Paras. 5, 6, 8, 9, 12, 14(a), 16, 18. (Pl’s Op. Ex. A).

<sup>5</sup> Implied warranties may survive deeds, but this does negate the Merger Doctrine’s applicability to pre-deed warranty disclaimers (or arbitration clauses) as explained by the 4<sup>th</sup> Circuit in *Tower South POA v. Summey Building Systems, Inc.*, 47 F.3d 1165 (1995) (unpublished).

unconscionable terms that are not severable. In *Smith v. D.R. Horton*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016), the South Carolina Supreme Court recognized:

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them (citations omitted).

**A. Plaintiffs Lacked A Meaningful Choice.**

First, this Court finds that the Purchase Agreements are adhesion contracts and Plaintiffs lacked a meaningful choice in their ability to negotiate arbitration. This is supported by the following facts:

- The Purchase Agreements are boilerplate contracts that DRH offered to Plaintiffs on a take-it-or-leave-it basis;
- Plaintiffs are unsophisticated purchasers whereas DRH is a sophisticated developer that has constructed nearly 800,000 homes in the United States. *See* DRH Website (Pl’s Op. Ex. H); and,
- Similar DRH contracts have previously been found to be adhesion contracts by South Carolina courts<sup>6</sup>.

**B. The Arbitration Provision Contains Oppressive Terms.**

Second, this Court finds the Arbitration Agreements in the Purchase Agreements contain oppressive terms that disclaim all implied warranties and waive DRH’s liability “for monetary damages of any kind”. In *Smith*, our Supreme Court held that a number of provisions of DRH’s contract in that matter were unconscionable. *Id.* In that case, some of those unconscionable provisions related to limitations of warranties, waiver, and damages, were contained in the same paragraph as the arbitration provision. Thus, the *Smith* court held that the arbitration provision was “intertwined” with unconscionable provisions, which rendered it unenforceable. *Id.*

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<sup>6</sup> Pl’s Op. Ex. F, G.

In the Purchase Agreements at issue in this case, DRH has numerically separated the Arbitration Provision (Paragraph 15) from the provisions for warranty, waiver, and damages (Paragraph 14). However, many of these provisions are identical to those the *Smith* court held were unconscionable. 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.

**C. The Arbitration Provision Is Not Severable.**

To avoid a similar result as *Smith*, DRH asks the Court to “sever” any unconscionable provisions from the arbitration provision. This argument is rejected.

First, neither Paragraph 14 nor 15 of the Purchase Agreements contain a severability clause.

Severability was also rejected by the Court of Appeals in *Smith*, which was affirmed:

We conclude the arbitration clause. . .should not be severed from the numerous unconscionable provisions and particularly Horton’s attempt to waive any seller liability for “monetary damages of any kind. . .”

*Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 18, 742 S.E.2d 37, 41 (Ct. App. 2013), *affd.* 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (emphasis added). DRH’s argument that Paragraph 15 is a severable provision is the same argument considered and rejected by the *Smith* Court. *Id.*, generally. *Smith* involves essentially the same contracts, paragraphs, cross-references and oppressive terms; and therefore, *Smith* controls.

Further, since *Smith*, the Supreme Court has decided, *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022), *petition for cert. filed*, No. 22-804 (Feb. 24, 2023). In that case, the Supreme Court considered whether a large residential developer/homebuilder’s purchase agreement arbitration provision was enforceable, and directly addressed the issue of

whether an arbitration agreement could be, and should be, severed from other, unconscionable provisions of that contract. In refusing to sever the arbitration agreement from unconscionable contract terms, the Supreme Court has made it clear that:

adhesion contracts are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties.” *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted); *see also* 17A Am. Jur. 2d Contracts § 274; 17 C.J.S. Contracts § “In particular, when a contract of adhesion is at issue, **“there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.”**” *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Similarly, given the adhesive nature of the contract here, we find it “considerably doubtful” any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) [Purchasers] had no hand in drafting or negotiating any of the language of the arbitration agreement. *See Doe*, 430 S.C. at 615, 846 S.E.2d at 880 (explaining that when exercising its discretion to sever portions of the agreement, a court must be guided by the parties’ intent).

*Damico*, 437 S.C. at 620-621, 844 S.E.2d at 760.

The Supreme Court refused to “rescue” the drafter/homebuilder from the consequences of its unconscionable drafting, noting that “[Seller] furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause. We refuse to reward such misconduct, particularly in a home construction setting” *Id.* at 624, 762.

In denying that relief, the Supreme Court also took the extraordinary step of concluding that public policy mandated its decision. In doing so, the Supreme Court found that the contract at issue was a consumer transaction, involving the sale of a new home, which, the Supreme Court noted, is a transaction with a long history of protection in South Carolina.

South Carolina has a **deeply-rooted and long-standing policy of protecting new home buyers**. *Kennedy[ v. Columbia Lumber & Mfg. Co.]*, 299 S.C. [335,] 341-44, 384 S.E.2d [730], 734-36 [(1989)] (rejecting a result in which “a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions”; and explaining that in the past, when the Court is confronted



with a new scenario "not properly disposed of by our present set of rules," it "[o]nce more[] respond[s] by expanding our rules to provide the innocent buyer with protection" (citing *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976)). As we stated over thirty years ago, it is **"intolerable to allow builders to place defective and inferior construction into the stream of commerce."** *Id.* at 344, 384 S.E.2d at 736 [citations omitted]. 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.**

*Damico*, 437 S.C. at 621, 879 S.E.2d at 760. The same is true here.

The *Damico* Court further held;

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" 17A Am. Jur. 2d *Contracts* § 238 (Supp. 2021) (citation omitted).

437 S.C. at 622, 844 S.E.2d at 761.

For all of the forgoing reasons, this Court refuses to sever the arbitration provision from the unconscionable terms with which it is intertwined, making it unenforceable.

#### **IV. Waiver Argument.**

In their Memorandum Opposing DRH's Motion to Compel Arbitration, the Plaintiffs argue that DRH had waived its right to compel arbitration which was not really addressed at the hearing. Since the Court has denied DRH's Motion based on other grounds as set forth above, it is not necessary to consider the additional ground of waiver and the Court makes no findings as to this issue.

### **CONCLUSION**

Having found that the arbitration provision in DRH's purchase agreement is unenforceable, this Court **DENIES** DRH's Motion to Compel Arbitration.

AND IT IS SO ORDERED!

*E-signature of Judge Gravely to Follow*



## Greenville Common Pleas

**Case Caption:** Robert Baddorf , plaintiff, et al vs. D R Horton Inc , defendant, et al

**Case Number:** 2022CP2303974

**Type:** Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2023-04-25 15:51:36 page 12 of 12

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# Exhibit 5



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**D.R. HORTON AMERICA'S BUILDER**

Home for every stage in  
life.®



01:25

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# Giving you more

We're committed to giving you more ways to find your home. We'll work together to guide your entire homebuying journey from start to finish.

LEARN MORE

## RESOURCES

Tools for homebuyers and homeowners.

CHECK OUT TOOLS

## HOME IS CONNECTED

Check out what's behind the door of America's Smart Home.

LEARN MORE

## PARTNER WITH US

We love working with real estate agents.

LEARN MORE

## SELL YOUR HOME

Learn more about our partnership with Zillow Offers.

LEARN MORE





# We want to hear your story

Because of you and so many others, we can call ourselves America's Builder. We want to share your homebuying journey from start to finish.

**SHARE YOUR STORY**

**D.R. HORTON**

# An Industry Standard Since 1978

You want the best for your family. So do we. That's why D.R. Horton has been giving America's homeowners quality, value and peace of mind since 1978.

**D·R·HORTON**  
*America's Builder*

## THE TIMELINE

### 1978

D.R. Horton broke ground on our first home in Fort Worth.

### 1992

The company completes its initial public offering of stock.

### 2002

D.R. Horton becomes the nation's largest homebuilder by volume.

## VALUE

Your home says a lot about what you value in life. It's a refuge for you to relax, entertain, learn, grow, or just be. Which is why we build your home using only the finest materials, latest designs, and the kind of warranty that can only come from America's Builder.

## TRUST

When you're making the biggest investment of your life, you need to know that you can count on your builder. You're not just a customer. You're family. And we'll take care of you like family.

## TRADITION

You're buying more than just a house. You're investing in a place to call home as you grow through life's stages, and one day retire. Which is why since 1978, D.R. Horton has stood by its promise to deliver you top-quality homes at affordable prices. Or, what we like to call, the American Dream.



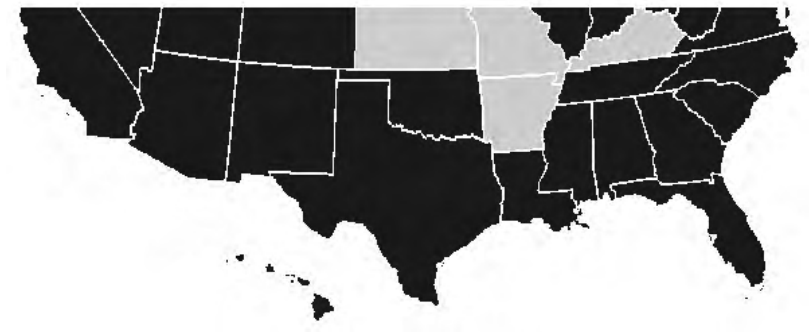
< 61,164  
HOMES CLOSED LAST  
YEAR (TTM ENDED 6/30/20)



|       |       |           |
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| VALUE | TRUST | TRADITION |

SELECT A STATE TO BEGIN YOUR SEARCH





03:21

## OUR STORY

# We Are America's Builder

It's one of the greatest opportunities we have as Americans. It's that special place where our memories are made – that place we call home. Since 1978, we've been delivering the American dream. We believe in a vision of homeownership for everyone, a home for every stage in life.

## COMMITMENT TO EXCELLENCE

In 1978, D.R. Horton broke ground on our first home in Fort Worth, Texas. Since that day, the company has defined its success not by bricks and mortar, but by the satisfaction of the families that make our houses their homes. Our foundation is a single, guiding principle: a value-first dedication to the individual needs of each and every one of our nation's homebuyers.

From first-time homebuyers to empty nesters, our family of brands provides a home for every stage in life. Our highly-trained, market experts are where you want to live, from New Jersey to Hawaii, providing unique, personalized services tailored to your individual needs. But the real value comes from the quality construction we put into every home, and the peace of mind that comes with a premium-backed warranty from America's Number One Homebuilder.

What else should you consider as you select a new home? We believe the financial strength of the builder is an important consideration. Below are a few items for your consideration in determining our ability to be there for you, both during the construction process and after you close on your home.

- We've delivered more than 770,000 homes to our nation's customers since our company's inception.

- Since 2002, more homebuyers have chosen D.R. Horton than any other national builder.
- We operate in 44 of homebuilding's top 50 markets in the U.S., and rank among the top 5 in 36 of these.
- Our team of operating experts are spread across the nation in 29 states and 88 markets.

Above all, our customer-driven principles have allowed us to work closely with each individual market to gain insight into the needs and wants from those who matter most: you.

## **BUILDING THE FUTURE**

We've come a long way, and while more people choose our family of brands over any other builder in the country, we never forget the most important thing of all – the families that choose us for their place to call home.

So continue to live out those dreams, America, and know we'll be here for you every step of the way.

D.R. Horton. **We are America's Builder.**



## HOMEBUYING GUIDE

Let us  
help you  
get  
started

At D.R. Horton, we understand the value and pride in owning a quality home.

**SINCE 1978, D.R. HORTON  
HAS HELPED MORE THAN  
770,000 OF OUR NATION'S**

# HOMEBUYERS ACHIEVE THE AMERICAN DREAM.

We also understand it can be overwhelming at times. There are several aspects of the homebuying process, which is why we've provided a step-by-step guide to serve as a reference to simplify the process and help you to reap the benefits of homeownership for years to come.

The following is a list of steps to consider when buying a new home:

## DETERMINE HOMEOWNERSHIP COSTS

Homeownership is a big purchase and a lifestyle change. Before you begin looking at homes, it's critical to know your finances. We recommend using our handy mortgage calculator to help determine your financial feasibility.

## GET MORTGAGE PRE- APPROVAL

Next, it's time to begin the process of mortgage pre-approval. Our lending affiliates can help offer a positive home mortgage experience and provide you a good faith estimate that includes a list of anticipated costs you can expect to pay as part of your home loan and closing costs.

## SEARCH FOR A NEW HOME

Location is a key aspect of owning a home. Our sales specialists are located inside the community in order to better serve your needs. Just click the magnifying glass at the very top of the page to search for an up-to-date map and see what communities are available in your market.

## **VISIT MODEL HOMES AND COMMUNITIES**

Once you've narrowed down your search to a few communities, it's time to pay an in-person visit. Schedule a visit right from the listing on this site, or use the address provided to drop by one of our locations during listed business hours.

## **SIGN A SALES CONTRACT**

So, you've decided on your new home. Next, it's time to sign on the dotted line. Our experienced sales agents are glad to assist you and can walk you through the entire purchasing process by answering any of your questions.

## **CLOSE ON YOUR HOME**

Even though you are close to the home stretch, you can't pass "Go" until you've closed on your home. This might even include fundamentals such as closing costs, which can account for up to three to six percent of your home purchase. Luckily, working with one of our reputable lenders can provide you with this information early in the homebuying process.



## MOVE INTO YOUR HOME

Don't forget to save for the move itself. It's a good idea to call around and request quotes from moving companies. Consider calling one of our referral moving companies who are a fantastic resource and can help ease some of the anxieties of moving. Once you have a good idea on the size and layout of your new home, it's a great time to determine what goes where.

Contact us to start your journey today!

## WARRANTY & SERVICE REQUESTS

# Help when you need it.

**Submit a warranty request**

---

**Warranty guides**

---

## Submit a warranty request

Move into your new home with peace of mind. We are proud to offer a robust home warranty with each new D.R. Horton home. Should you have a concern with your home or would like to schedule a service appointment, submitting a request is simple.

First, enter your home's zip code, then select your complete address from the list that is displayed. For faster results, begin typing your street address to reduce the number of addresses listed. If you don't see your address listed, select "Address Not Listed" and we'll ask a few additional questions to try to get your request into the right hands.

Warranty response times may be impacted by COVID-19 protocols. Learn more about our COVID-19 policy **here**.

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# Home Information

Zip Code: \*

Select Address: \*

Find and Select your House Address \*

☐ Address Not Listed

SUBMIT

**DOCUMENTS & GUIDES**

# Help when you need it.

**Submit a warranty request**

**Warranty guides**

---

## **RWC 10-Year Limited Warranty**

Learn what is covered by your home's warranty and how to submit a warranty claim with Residential Warranty Company, LLC ("RWC") for major structural defects. Exclusions are also noted as well as addenda for specific states. Click below to read or print a copy of the warranty.

**RWC GUIDE**

# THE LIMITED WARRANTY

10 YEAR WRITTEN WARRANTY FOR NEW HOMES



This Limited Warranty does not cover consequential or incidental damages. The Warrantor's total aggregate liability of this Limited Warranty is limited to the Final Sales Price listed on the Application For Warranty form.

The Builder makes no housing merchant implied warranty or any other warranties, express or implied, in connection with the attached sales contract or the warranted Home, and all such warranties are excluded, except as expressly provided in this Limited Warranty. There are no warranties which extend beyond the face of this Limited Warranty.

Some states do not allow the exclusion or limitation of incidental or consequential damages by the Builder so all of the limitations or exclusions of this Limited Warranty may not apply to you.

## Warranty Confirmation

Your validated Warranty consists of your Application for Warranty, the Limited Warranty book, and your Warranty Confirmation. You can confirm your warranty has been validated by RWC, and obtain your Warranty Confirmation, AFTER 60 days from your closing at [confirm.rwcwarranty.com](http://confirm.rwcwarranty.com). If you do not have access to the Internet, please contact RWC to obtain your Limited Warranty book and Warranty Confirmation.

For your Limited Warranty to be in effect, you should receive the following documentation:  
Limited Warranty #319 • Application For Warranty form #316 (Refer to I.B.3. for applicability) • Warranty Confirmation

Insurer: Western Pacific Mutual Insurance Company, A Risk Retention Group

# RESIDENTIAL WARRANTY COMPANY, LLC

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Dear Home Buyer,

Congratulations on the purchase of your new Home. This is probably one of the largest, most important investments you've ever made and we wish you many years of enjoyment. You've chosen a Home built by a leading Builder which includes the RWC Limited Warranty, assurance that your investment is well protected. This book explains the Limited Warranty in its entirety, and we encourage you to take time to READ IT CAREFULLY.

This Limited Warranty provides you with protection in accordance with this warranty book for ten full years of Home ownership. During the first two years, your Builder is responsible for specified warranty obligations. In the unlikely event your Builder is unable or unwilling to perform, the Warranty is provided subject to the conditions, terms and exclusions listed. For the remaining eight years, your Warranty applies to Major Structural Defects as defined in this book.

This is not a warranty service contract, but a written ten year limited warranty which your Builder has elected to provide with your Home.

Take time now to read this book. Familiarize yourself with the Warranty and its limitations. Contact your Builder regarding specific construction standards and how they apply to your Home.

Again, congratulations and enjoy your new Home!

Very truly yours,  
Residential Warranty Company, LLC

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Residential Warranty Company, LLC  
5300 Derry Street, Harrisburg, PA 17111  
717-561-4480

## A. Introduction

To help you better understand your Limited Warranty, refer to the following list of definitions which apply in this book.

## B. Definitions

### 1. Administrator

Residential Warranty Company, LLC (RWC) is the Administrator of this Limited Warranty. RWC is neither Warrantor nor Insurer.

### 2. Appliances and Items of Equipment, including Attachments and Appurtenances

Water heaters, pumps, stoves, refrigerators, compactors, garbage disposals, ranges, dishwashers, washers and dryers, bathtubs, sinks, commodes, faucets, light fixtures, switches, outlets, thermostats, furnaces and oil tanks, humidifiers, oil purifiers, air conditioning materials, in-house sprinkler systems and similar items.

### 3. Application For Warranty

The form signed at closing by you, the Purchaser, and your Builder which identifies the location, the Effective Date Of Warranty and the Final Sales Price of the enrolled Home. If the Builder is participating in the RWC electronic enrollment process, the Application for Warranty form is eliminated. This information will be included on your Warranty Confirmation.

### 4. Arbitrator

The person appointed by the independent arbitration service to resolve an Unresolved Warranty Issue.

### 5. Builder

The person, corporation, partnership or other entity which participates in the RWC Limited Warranty Program and has obtained this Limited Warranty for you.

### 6. Consequential Damages

All consequential damages including, but not limited to, damage to the Home that is caused by a warranted Defect but is not itself a warranted Defect and costs of shelter, transportation, food, moving, storage or other incidental expenses related to relocation during repairs.

### 7. Cooling, Ventilating and Heating Systems

All ductwork, refrigerant lines, steam and water pipes, registers, convectors and dampers.

### 8. Defect

A condition of any item warranted by this Limited Warranty which exceeds the allowable tolerance specified in this Limited Warranty. Failure to complete construction of the Home or any portion of the Home, in whole or in part, is not considered a Defect.

### 9. Effective Date Of Warranty

The date coverage begins as specified on the Application for Warranty form or on your Warranty Confirmation if your Builder is participating in the electronic enrollment process.

### 10. Electrical Systems

All wiring, electrical boxes and connections up to the house side of the meter base.



### 11. Home

The single family dwelling, identified on the Application For Warranty form, which may be a townhome, condominium or duplex.

### 12. Insurer

Western Pacific Mutual Insurance Company, a Risk Retention Group (WPMIC), located at 9265 Madras Ct, Littleton, CO 80130, phone: 303-263-0311. *(Refer to Section IV. for instructions on requesting warranty performance.)*

### 13. Limited Warranty

The terms and conditions contained in this book including any applicable addenda.

## SECTION I.



## DEFINITIONS

### SECTION I.

#### 14. Major Structural Defects (MSD)

All of the following conditions must be met to constitute a Major Structural Defect:

- actual physical damage to one or more of the following specified load-bearing components of the Home;
- causing the failure of the specific major structural components; and
- which affects its load-bearing function to the degree that it materially affects the physical safety of the occupants of the Home.

Load-bearing components of the Home deemed to have MSD potential:

- roof framing members (rafters and trusses);
- floor framing members (joists and trusses);
- bearing walls;
- columns;
- lintels (other than lintels supporting veneers);
- girders;
- load-bearing beams; and
- foundation systems and footings.

Examples of non-load-bearing elements deemed not to have Major Structural Defect potential:

- non-load-bearing partitions and walls;
- wall tile or paper, etc.;
- plaster, laths or drywall;
- flooring and subflooring material;
- brick, stucco, stone, veneer, or exterior wall sheathing;
- any type of exterior siding;
- roof shingles, sheathing and tar paper;
- Heating, Cooling, Ventilating, Plumbing, Electrical and mechanical systems;
- Appliances, fixtures or Items of Equipment
- doors, windows, trim, cabinets, hardware, insulation, paint and stains; and
- drainage Systems located within or outside the Home.

#### 15. Owner

See Purchaser.

#### 16. Plumbing Systems

All pipes located within the Home and their fittings, including gas supply lines and vent pipes.

#### 17. Purchaser

You. The Purchaser includes the first buyer of the warranted Home and any and all subsequent Owners who take title within the warranty period.

#### 18. Residence

See Home.

#### 19. Sewage Disposal System (Private or Public)

This system includes, but is not limited to, all waste, drainage, sewer pipes and lines, cleanouts, tanks, pumps, drainfields and seepage pits, outside and beyond the exterior wall of the Home.

#### 20. Structurally Attached

An integral part of the Home being structurally supported by footings, block walls or reinforced concrete and connected to the foundation of the Home.

#### 21. Unresolved Warranty Issue

All requests for warranty performance, demands, disputes, controversies and differences that may arise between the parties to this Limited Warranty that cannot be resolved among the parties. An Unresolved Warranty Issue may be a disagreement regarding:

- the coverages in this Limited Warranty;
- an action performed or to be performed by any party pursuant to this Limited Warranty;
- the cost to repair or replace any item covered by this Limited Warranty.

#### 22. Warrantor

Your Builder in Years 1 and 2; the Insurer in Years 3 through 10 and in Years 1 and 2 if your Builder defaults.

#### 23. Warranty Confirmation

The document you obtain by going to [confirm.rwcwarranty.com](http://confirm.rwcwarranty.com) (or by contacting RWC if you do not have access to the Internet). It includes your Validation Number, Effective Date of Warranty, Term of Coverage, and any applicable Addenda.

#### 24. Water Supply System (Private or Public)

This system includes, but is not limited to, all supply and distribution pipes, fittings, valves, pumps and wells, outside the exterior wall of the Home, which supply water to the Home.



SECTION II.

## A. Introduction to the Limited Warranty

1. This book provides specific details, conditions and limitations of the Limited Warranty including procedures for requesting warranty performance and for binding arbitration, in accordance with the procedures of the Federal Arbitration Act. Additional information may be received by calling RWC at 717-561-4480. Read this document in its entirety to understand the protection it affords, the exclusions applicable to it, the Warranty Standards which determine its interpretations and operation and your responsibilities.
2. This is NOT an insurance policy, a maintenance agreement or a service contract. It is an explanation of what you, the Purchaser, can expect from this Limited Warranty.
3. Appliances and Equipment included in the Home are not warranted under this Limited Warranty, but may be covered by separate warranties provided by the manufacturer or supplier. These warranties are passed on to you by your Builder at closing and are separate from this Limited Warranty.
4. You are responsible for maintenance of your new Home. General and preventative maintenance are required to prolong the life of your new Home.
5. This Limited Warranty is **automatically transferred** to subsequent Owners during the ten-year term of this Limited Warranty, except in the case of a foreclosure that voids the warranty as provided in Section II.A.6.
6. This Limited Warranty becomes void and all obligations on the part of Warrantor cease as of the date an Owner vacates the Home due to foreclosure proceedings.
7. This Limited Warranty is subject to changes required by various regulating bodies and some local agencies as indicated in the Addenda Section V of the Limited Warranty book. Notations throughout indicate where the Addenda apply.

## B. The Limited Warranty

1. **Actions taken to cure Defects will NOT extend the periods of specified coverages in this Limited Warranty.**
2. Only warranted elements which are specifically designated in the Warranty Standards are covered by this Limited Warranty.

3. The Warrantor has the choice to repair, replace or pay the reasonable cost to repair or replace warranted items which do not meet Warranty Standards and are not excluded in the Limited Warranty.
4. If a warranted MSD occurs during the appropriate coverage period, and is reported as required in **Section IV.**, the Warrantor will repair, replace or pay you the reasonable cost to repair or replace the warranted MSD, limited to actions necessary to restore the MSD to its load-bearing capacity.



## C. Warranty Coverage

1. **ONE YEAR COVERAGE:** Your Builder warrants that for a period of one (1) year after the Effective Date Of Warranty, warranted items will function and operate as presented in the Warranty Standards of Year 1, **Section III.A.** Coverage is ONLY available where specific Standards and Actions are represented in this Limited Warranty.
2. **TWO YEAR COVERAGE:** Your Builder warrants that for a period of two (2) years from the Effective Date Of Warranty, specified portions of the Heating, Cooling, Ventilating, Electrical and Plumbing Systems, as defined in this Limited Warranty, will function and operate as presented in the Warranty Standards of Years 1 and 2 only, **Section III.B.**<sup>‡</sup>
3. **TEN YEAR COVERAGE:** Major Structural Defects (MSD) are warranted for ten (10) years from the Effective Date Of Warranty. Your Builder is the Warrantor during Years 1 and 2 of this Limited Warranty and the Insurer is the Warrantor in Years 3 through 10.
4. **CONDOMINIUM COVERAGE:** This Limited Warranty shall only apply to warranted common elements. Warranted common elements are those portions of the defined Electrical, Heating, Ventilating, Cooling, Plumbing and structural Systems

## THE LIMITED WARRANTY

### SECTION II.

which serve two (2) or more residential units, and are contained wholly within a residential structure. Warranty coverage for common elements shall be for the same periods and to the same extent as similar or comparable items in individual residential units. Examples of common elements which are covered by this Limited Warranty are hallways, meeting rooms and other spaces wholly within the residential structure designated for the use of two (2) or more units. Examples of common elements which are not covered under this Limited Warranty are club houses, recreational buildings and facilities, exterior structures, exterior walkways, decks, balconies, arches or any other non-residential structure which is part of the condominium.



#### D. Conditions

1. This Limited Warranty provides coverage only in excess of coverage provided by other warranties or insurance, whether collectible or not.
2. This Limited Warranty is binding on the Builder and you and your heirs, executors, administrators, successors and assigns.
3. This Limited Warranty shall be interpreted and enforced in accordance with the laws of the state in which the Home is located.
4. This Limited Warranty is separate and apart from your contract and/or other sales agreements with your Builder. It cannot be affected, altered or amended in any way by any other agreement which you may have.
5. This Limited Warranty cannot be modified, altered or amended in any way except by a formal written instrument signed by you, your Builder and the Administrator.
6. If any provision of this Limited Warranty is determined by a court of competent jurisdiction to be unenforceable, that determination will not affect the validity of the remaining provisions.
7. All notices required under this Limited Warranty must be in writing and sent by email or certified mail, return receipt requested. If you send your written notice by email, your written notice must be sent to [warranty.resolution@rwcwarranty.com](mailto:warranty.resolution@rwcwarranty.com). The written notice will not be considered received without a valid confirmation of receipt number. If you do not receive a confirmation of receipt number within 48 hours of emailing your written notice, contact RWC by calling 717-561-4480 and request to speak with the Warranty Resolution Department's Customer Service. If sending your written notice by certified mail, return receipt requested, it must be postage prepaid, to the recipient's address shown on the Application for Warranty form, or to whatever address the recipient may designate in writing.
8. If actions by the Warrantor on any obligations under this Limited Warranty are delayed by an event beyond its control, such performance will be excused until the delaying effects of the event are remedied. Such events include, but are not limited to, acts of God, acts of the common enemy, war, riot, civil commotion or sovereign conduct, or acts or omissions by you or any other person not a party of this Limited Warranty.
9. If your Builder fails to complete any part of the Home that is reasonably foreseeable to cause damage to the Home, then it is your responsibility to complete such parts of the Home to avoid the damage. If you fail to complete the work, then any resulting damage is not covered under this Limited Warranty. The warranty period for any item completed after the Effective Date of Warranty shall be deemed to have commenced on the Effective Date of Warranty.
10. Costs incurred for unauthorized repairs to warranted items are not reimbursable. Written authorization prior to incurring expenses must be obtained from the Administrator.

## THE LIMITED WARRANTY

11. Whenever appropriate, the use of one gender includes all genders and the use of the singular includes the plural.



12. Under this Limited Warranty, the Warrantor is not responsible for exact color, texture or finish matches in situations where materials are replaced or repaired, or for areas repainted or when original materials are discontinued.
13. Your Builder must assign to you all manufacturers' warranties on products included in the Final Sales Price of your Home. Neither the Insurer nor the Administrator shall be liable for your Builder's failure to do so.
14. You are responsible for establishing a written, final walk-through inspection list of items in need of service prior to occupancy or closing, whichever is first. This list must be signed and dated by you and your Builder. Keep a copy for your records.

### E. Exclusions

**The following are NOT covered under this Limited Warranty:**

1. Loss or damage:
  - a. to land.
  - b. to the Home, persons or property directly or indirectly caused by insects, birds, vermin, rodents, or wild or domestic animals.
  - c. which arises while the Home is used primarily for non-residential purposes.
  - d. which is covered by any other insurance or for which compensation is granted by legislation.
  - e. resulting directly or indirectly from flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these (whether or not driven by wind), water which backs up from sewers or drains, changes in the water table

which were not reasonably foreseeable, water below the surface of the ground (including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool, or other structure), wetlands, springs or aquifers.

- f. from normal deterioration or wear and tear.
- g. caused by material or work supplied by anyone other than your Builder or its employees, agents or subcontractors.
- h. from your or the condominium association's failure to perform routine maintenance on the Home, common areas, common elements or your or the condominium association's grounds.
- i. after Year 1, to, resulting from, or made worse by all components of structurally attached decks, balconies, patios, porches, stoops, porch roofs and porticos.
- j. after Year 1, to, resulting from, or made worse by elements of the Home which are constructed separate from foundation walls or other structural elements of the Home such as, but not limited to, chimneys and concrete floors of basements and attached garages.
- k. to wiring, to and between communication devices from the source of power, whether or not connected to the interior wiring system of the Home. Such devices shall include, but not be limited to, telephone systems, television cable systems, intercom systems, computer systems and security systems. Sources of power shall include, but not be limited to, service entrance conductors, switches, outlets, receptacles and junction boxes.
- l. to, or caused by, recreational facilities; driveways; walkways; patios, porches and stoops not structurally attached; decks and balconies which are not bolted to or cantilevered from the main structure of the Home; boundary and/or retaining walls; bulkheads; fences; landscaping, sodding, seeding, shrubs, trees and plantings; subsurface drainage systems (other than footer drains); lawn sprinkler systems; off-site improvements, including streets, sidewalks, adjacent property and the like; or any other improvements not part of the Home itself.

## SECTION II.

## THE LIMITED WARRANTY

### SECTION II.

- m. caused by any item listed as an additional exclusion on the Application for Warranty form.
2. Loss or damage resulting from, or made worse by:
  - a. changes in the grading of the property surrounding the Home by anyone except your Builder or its employees, agents or subcontractors.
  - b. changes in grading caused by erosion.
  - c. modifications or additions to the Home, or property under or around the Home, made after the Effective Date Of Warranty (other than changes made in order to meet the obligations of this Limited Warranty).
  - d. intrusion of water into crawl spaces.
  - e. the weight and/or performance of any type of waterbed or any other furnishing which exceeds the load-bearing design of the Home.
  - f. the presence or consequence of unacceptable levels of radon, formaldehyde, carcinogenic substances or other pollutants and contaminants; or the presence of hazardous or toxic materials resulting in uninhabitability or health risk within the Home.
  - g. acts or omissions by you, your agents, employees, licensees, invitees; accidents, riots, civil commotion, nuclear hazards, acts of God or nature, fire, explosion, blasting, smoke, drought, water escape, windstorms, tropical storms, hurricanes, hail, lightning, ice, snow, falling trees, aircraft, vehicles, flood, mud slides, sinkholes, mine subsidence, faults, crevices, earthquake, land shock waves or tremors occurring before, during or after a volcanic eruption, or manmade events such as war, terrorism or vandalism.
  - h. your failure to perform routine maintenance.
  - i. your failure to minimize or prevent such loss or damage in a timely manner.
  - j. defects in, but not limited to: recreational facilities; driveways; walkways; patios, porches and stoops not structurally attached; decks and balconies which are not bolted to or cantilevered from the main structure of the Home; boundary and/or retaining walls; bulkheads; fences; landscaping, sodding, seeding, shrubs, trees and plantings; sub-surface drainage systems (other than footer drains); lawn sprinkler systems; off-site improvements, including streets, sidewalks, adjacent property and the like; or any other improvements not part of the Home itself.
  - k. defects in detached garages or outbuildings (except those which contain Plumbing, Electrical, Heating, Cooling or Ventilating Systems serving the Home, and then only to the extent where Defects would affect these systems). A detached garage is one which is constructed on its own foundation, separate and apart from the foundation of the Home. A breezeway, fence, utility line or similar union shall not cause a garage or outbuilding to be considered attached.
  - l. negligent maintenance or operation of the Home and its systems by anyone other than your Builder or its agents, employees or subcontractors.
  - m. any portion of a Water Supply System, private or public, including volume and pressure of water flow.
  - n. quality and potability of water.
  - o. any portion of a Sewage Disposal System, private or public, including design.
  - p. dampness, condensation or heat build-up caused by your failure to maintain proper ventilation.



## THE LIMITED WARRANTY

### SECTION II.

3. Failure of your Builder to complete construction of the Home or any part of the Home on or before the Effective Date Of Warranty or damages arising from such failure. An incomplete item is not considered a Defect, although your Builder may be obligated to complete such items under separate agreements between you and your Builder.
4. Any deficiency which does not result in actual physical damage or loss to the Home.
5. Any Consequential Damages.
6. Personal property damage or bodily injury.
7. Violation of applicable Building Codes or ordinances unless such violation results in a Defect which is otherwise covered under this Limited Warranty. Under such circumstances, the obligation of the Warrantor under this Limited Warranty shall only be to repair the defective warranted portion of the Home, but not to restore or bring the Home to conform to code.
8. Any request for warranty performance submitted to the Administrator after an unreasonable delay or later than 30 days after the expiration of the applicable warranty period.
9. Warranted Defects that you repair without prior written authorization of the Administrator.
10. Any damage to or resulting from the use, construction, placement, equipment, components, maintenance, etc., whether inside or outside the Home, of the following: swimming pools, elevators, or solar panels.
11. The removal and/or replacement of items specifically excluded from coverage under this Limited Warranty, such as landscaping or personal property, and items not originally installed by your Builder, such as wallpaper, where removal and replacement are required to execute a repair.
12. Any Defect consisting of, caused by, contributed to, or aggravated by moisture, wet or dry rot, mold, mildew, fungus or rust, regardless of the originating cause of any moisture or water penetration that leads to the Defect.
13. Sound transmission and sound proofing between rooms or floor levels.
14. Appliances and Equipment included in the Home are not warranted under this Limited Warranty, but may be covered by separate warranties provided by the manufacturer or supplier. These warranties are passed on to you by your Builder at closing and are separate from this Limited Warranty. Damage

caused by improper maintenance or operation, negligence, or improper service of these items by you or your agent will not be covered under this Limited Warranty. †

15. Modifications or additions to the Home, or property under or around the Home, made after the Effective Date of Warranty (other than changes made in order to meet the obligations of this Limited Warranty).



### F. Limitation of Liability

1. The Warrantor's liability and obligations are limited to the repair, replacement or the payment of the reasonable cost of repair or replacement of warranted items not to exceed an aggregate equal to the Final Sales Price of the Home as listed on the Application for Warranty form or in the absence of an Application for Warranty form, as otherwise provided to the Administrator by the Builder. The choice to repair, replace or make payment is the Warrantor's.
2. All other warranties, express or implied, including, but not limited to, all implied warranties of fitness, merchantability or habitability, are disclaimed and excluded to the extent allowed by law.

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply. †

**A. YEAR 1 STANDARDS ONLY****1. FOUNDATIONS**

| OBSERVATION                                                                                                     | ACTION REQUIRED                                                                               | COMMENTS                                                                                                                                                                                                                                                               |
|-----------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>BASEMENT</b>                                                                                                 |                                                                                               |                                                                                                                                                                                                                                                                        |
| <b>1.1</b> Cracks appear in control joints.                                                                     | No action required.                                                                           | The expansion/contraction joint is placed to control cracking. This is not a deficiency.                                                                                                                                                                               |
| <b>1.2</b> Uneven concrete floors in finished areas of a basement.                                              | Builder will correct those areas in which Defect exceeds 3/8 in. within a 32 in. measurement. | In rooms not initially finished as living areas or where a floor or a portion of a floor surface has been designed for specific drainage purposes, a slope which exceeds 3/8 in. within a 32 in. measurement is not a deficiency.                                      |
| <b>1.3</b> Cracks in poured concrete foundation walls.                                                          | Builder will correct any crack which exceeds 1/4 in. in width.                                | Shrinkage cracks are common and should be expected. Surface patching and epoxy injections are examples of acceptable repair methods.                                                                                                                                   |
| <b>1.4</b> Cracks in block or veneer wall.                                                                      | Builder will correct cracks which exceed 1/4 in. in width.                                    | Some cracks are common through masonry and mortar joints. Cracks 1/4 in. or less are considered routine Owner maintenance.                                                                                                                                             |
| <b>1.5</b> Leaks resulting in actual flow or trickling of water through wall or floor, causing an accumulation. | Builder will correct.                                                                         | A one-time occurrence may not indicate a Defect. Owner must maintain proper grading around the Home and maintain any surface water control systems installed by Builder. Dampness and condensation are normal conditions and are not covered by this Limited Warranty. |
| <b>1.6</b> Disintegration of the concrete floor surface.                                                        | Builder will correct disintegrated surfaces caused by improper placement of concrete.         | Disintegration caused by erosion due to salt, chemicals, implements used and other factors beyond Builder's control is not a warranted deficiency.                                                                                                                     |
| <b>1.7</b> Cracks in concrete floor which rupture or significantly impair performance of floor covering.        | Builder will correct so Defect is not readily noticeable when floor covering is in place.     | Minor impressions in floor covering are not considered significant imperfections.                                                                                                                                                                                      |
| <b>1.8</b> Cracks in concrete floor of unfinished area (no floor covering) or in areas not designed for living. | Builder will correct cracks which exceed 1/4 in. in width or vertical displacement.           | Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.                                                                                                                                   |
| <b>1.9</b> Condensation on walls, joists, support columns and other components of basement area.                | No action required.                                                                           | Maintaining adequate ventilation and moisture control is considered Owner maintenance.                                                                                                                                                                                 |

**SECTION  
III.**

## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### 1. FOUNDATIONS

| OBSERVATION                                                                                                      | ACTION REQUIRED                                                                           | COMMENTS                                                                                                                                                                                                                    |
|------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>CRAWL SPACE</b>                                                                                               |                                                                                           |                                                                                                                                                                                                                             |
| <b>1.10</b> Cracks in poured concrete foundation walls.                                                          | Builder will correct any crack which exceeds 1/4 in. in width.                            | Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks of 1/4 in. or less are common and should be expected.                                                                     |
| <b>1.11</b> Cracks in block or veneer wall.                                                                      | Builder will correct cracks greater than 1/4 in. in width.                                | Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks of 1/4 in. or less are common and should be expected.                                                                     |
| <b>1.12</b> Inadequate ventilation.                                                                              | Builder will install properly sized louvers or vents.                                     | Maintaining adequate ventilation and moisture control, including seasonal adjustment of vent openings, is considered Owner maintenance.                                                                                     |
| <b>1.13</b> Condensation on walls, joists, support columns and other components of the crawl space area.         | No action required.                                                                       | Maintaining adequate ventilation and moisture control, including seasonal adjustment of vent openings, is considered Owner maintenance.                                                                                     |
| <b>SLAB ON GRADE</b>                                                                                             |                                                                                           |                                                                                                                                                                                                                             |
| <b>1.14</b> Cracks appear at control joints.                                                                     | No action required.                                                                       | Expansion/contraction joint is placed to control cracking. This is not a deficiency.                                                                                                                                        |
| <b>1.15</b> Uneven concrete floors in finished areas.                                                            | Builder will correct areas in which Defect exceeds 3/8 in. within a 32 in. measurement.   | In rooms not initially finished as living areas or where a floor or a portion of a floor surface has been designed for specific drainage purposes, a slope which exceeds 3/8 in. within a 32 in. measurement is acceptable. |
| <b>1.16</b> Disintegration of concrete floor surface.                                                            | Builder will correct disintegrated surfaces caused by improper placement of concrete.     | Disintegration caused by erosion due to salt, chemicals, implements used and other factors beyond Builder's control is not a warranted deficiency.                                                                          |
| <b>1.17</b> Crack in concrete floor which ruptures or significantly impairs performance of floor covering.       | Builder will correct so Defect is not readily noticeable when floor covering is in place. | Minor impressions in floor covering are not considered significant imperfections.                                                                                                                                           |
| <b>1.18</b> Cracks in attached garage slab.                                                                      | Builder will correct cracks which exceed 1/4 in. in width or vertical displacement.       | Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.                                                                                        |
| <b>1.19</b> Cracks in concrete floor of unfinished area (no floor covering) or in areas not designed for living. | Builder will correct cracks which exceed 1/4 in. in width or vertical displacement.       | Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.                                                                                        |
| <b>1.20</b> Cracks in visible face of foundation.                                                                | Builder will correct cracks in excess of 1/4 in. in width.                                | Surface patching and epoxy injections are examples of acceptable repair methods. Shrinkage cracks are common and should be expected.                                                                                        |

## SECTION III.



## WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

## 2. FRAMING

## OBSERVATION

## ACTION REQUIRED

## COMMENTS

## CEILING

2.1 Uneven ceiling.

Builder will correct if unevenness exceeds 1/4 in. within a 32 in. measurement.

Some minor framing imperfections should be expected.

## FLOOR

2.2 High and low areas.

Builder will correct if high or low areas exceed 1/4 in. within a 32 in. measurement.

Some minor framing imperfections should be expected.

2.3 Floor squeaks.

Builder will correct if caused by a defective joist or improperly installed subfloor. Builder will take corrective action to reduce squeaking to the extent possible within reasonable repair capability without removing floor or ceiling finishes.

A large area of floor squeaks which is noticeable, loud and objectionable is a Defect. A squeak-proof floor cannot be guaranteed. Lumber shrinkage as well as temperature and humidity changes may cause squeaks.

## ROOF

2.4 Split or warped rafters or trusses.

No action required.

Some splitting and warping is normal and is caused by high temperature effects on lumber.

## WALL

2.5 Bow or bulge.

Builder will correct if bow or bulge exceeds 1/2 in. within 32 in. horizontal or vertical measurement.

Minor framing imperfections should be expected.

2.6 Out-of-plumb.

Builder will correct where out-of-plumb condition exceeds 3/4 in. within 8 ft. vertical measurement.

Minor framing imperfections should be expected.

2.7 Wall is out-of-square.

No action required.

A wall out-of-square is not a Defect.

SECTION  
III.



**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**3. EXTERIOR**

| OBSERVATION                                                                               | ACTION REQUIRED                                                                                        | COMMENTS                                                                                                                                                                                                           |
|-------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>STRUCTURALLY ATTACHED WOOD OR COMPOSITE DECKS</b>                                      |                                                                                                        |                                                                                                                                                                                                                    |
| <b>3.1</b> Wood twisting, warping or splitting.                                           | Builder will correct only if due to improper installation.                                             | Twisting, warping or splitting of wood deck material is normal due to exposure to the elements. Owner maintenance is required.                                                                                     |
| <b>3.2</b> Settlement.                                                                    | Builder will correct slope of deck which exceeds a ratio of 2 in. in a 10 ft. measurement.             | Some slope is often provided to allow for water drainage.                                                                                                                                                          |
| <b>3.3</b> Loose railing or post.                                                         | Builder will correct if due to improper installation.                                                  | Owner maintenance is required.                                                                                                                                                                                     |
| <b>DOORS</b>                                                                              |                                                                                                        |                                                                                                                                                                                                                    |
| <b>3.4</b> Binds, sticks or does not latch.                                               | Builder will correct if caused by faulty workmanship or materials.                                     | Seasonal changes may cause doors to expand and contract, and are usually temporary conditions.                                                                                                                     |
| <b>3.5</b> Wood door panel shrinks.                                                       | No action required.                                                                                    | Panels will shrink and expand and may expose unfinished surfaces.                                                                                                                                                  |
| <b>3.6</b> Warping.                                                                       | Builder will correct warping which exceeds 1/4 in., measured vertically, horizontally or diagonally.   | Seasonal changes may cause doors to expand and contract, and are usually temporary conditions.                                                                                                                     |
| <b>3.7</b> Split in panel.                                                                | Builder will correct if split allows the entrance of elements.                                         | Splits which do not allow the entrance of elements are considered normal. Owner maintenance is required.                                                                                                           |
| <b>3.8</b> Separation between door and weather-stripping.                                 | Builder will correct if daylight is visible or if entrance of elements occurs under normal conditions. | Even with properly installed weather-stripping, some movement of the door, when closed, may be expected. Owner maintenance is required for minor alterations to adjustable thresholds and other parts of the door. |
| <b>3.9</b> Screen mesh is torn or damaged.                                                | Builder will correct only if damage is documented prior to occupancy.                                  | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                                                                                  |
| <b>3.10</b> Overhead garage door fails to operate or allows rain or snow to leak through. | Builder will correct garage doors which do not fit or operate properly.                                | Some entrance of elements can be expected and is not considered a deficiency. If Owner installs a garage door opener, Builder is not responsible for operation of door.                                            |

**SECTION III.**

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**3. EXTERIOR**

| OBSERVATION                                                                                                                                                                                 | ACTION REQUIRED                                                                                                              | COMMENTS                                                                                                                                                                                                                                                                                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>ROOFING</b>                                                                                                                                                                              |                                                                                                                              |                                                                                                                                                                                                                                                                                         |
| <b>3.11</b> Roof and roof flashing leaks.                                                                                                                                                   | Builder will correct active and current leaks that occur under normal conditions.                                            | No action is required if leak is due to snow or ice buildup, high winds or driving rains. Prevention of snow or ice buildup is the Owner's responsibility. Substantiation of an active and current leak is the Owner's responsibility.                                                  |
| <b>3.12</b> Lifted, torn, curled, or cupped shingles.                                                                                                                                       | No action required.                                                                                                          | Owner maintenance is required. Cupping in excess of 1/2 in. should be reported to the manufacturer.                                                                                                                                                                                     |
| <b>3.13</b> Shingles that have blown off.                                                                                                                                                   | Builder will correct affected area if due to poor installation.                                                              | Shingles shall not blow off in winds less than the manufacturer's specifications.                                                                                                                                                                                                       |
| <b>3.14</b> Inadequate ventilation.                                                                                                                                                         | Builder will provide adequate ventilation.                                                                                   | Moisture accumulation in attics which are not adequately vented is a deficiency. Owner is responsible to keep vents clear of obstructions to promote air flow.                                                                                                                          |
| <b>3.15</b> Water stays in gutters.                                                                                                                                                         | Builder will correct to limit standing water depth at 1 in.                                                                  | Owner is responsible for keeping gutters and downspouts clean.                                                                                                                                                                                                                          |
| <b>3.16</b> Gutter or downspout leaks.                                                                                                                                                      | Builder will correct leaks at connections.                                                                                   | Owner is responsible for keeping gutters and downspouts clean. Gutters may overflow during heavy rains.                                                                                                                                                                                 |
| <b>SITE WORK</b>                                                                                                                                                                            |                                                                                                                              |                                                                                                                                                                                                                                                                                         |
| <b>3.17</b> Standing water within 10 ft. of the foundation.                                                                                                                                 | Builder will correct water which stands for more than 24 hours, or more than 48 hours in swales.                             | Standing water beyond the 10 ft. perimeter of the foundation is not covered by this Limited Warranty. Owner is responsible for establishing and maintaining adequate ground cover.                                                                                                      |
| <b>3.18</b> Settling of ground around foundation walls, utility trenches or other filled areas on property where there has been excavation and backfill which affected foundation drainage. | If final grading was performed by Builder, he will replace fill in excessively settled areas only once.                      | If settlement does not exceed 6 in., it is Owner's responsibility to fill affected areas. The party responsible for establishing the final grade shall provide for positive drainage away from foundation. Owner is responsible for establishing and maintaining adequate ground cover. |
| <b>STRUCTURALLY ATTACHED STOOP, PORCH &amp; PATIO</b>                                                                                                                                       |                                                                                                                              |                                                                                                                                                                                                                                                                                         |
| <b>3.19</b> Settlement, heaving or movement.                                                                                                                                                | Builder will correct if movement exceeds 1 in. from the Home for stoops, porches and patios which are structurally attached. | Stoops, porches and patios which are poured separately and simply abut the house are not covered by this Limited Warranty.                                                                                                                                                              |
| <b>3.20</b> Concrete splatters on adjacent surfaces.                                                                                                                                        | Builder will correct only if damage is documented prior to occupancy.                                                        | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                                                                                                                                                       |

**SECTION  
III.**

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**3. EXTERIOR****SECTION  
III.**

| OBSERVATION                                                                                                                                                                  | ACTION REQUIRED                                                                                                              | COMMENTS                                                                                                                                                                                                                                       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| WALL COVERING                                                                                                                                                                |                                                                                                                              |                                                                                                                                                                                                                                                |
| <b>3.21</b> Entrance of elements through separations of wood, hardboard or fiber cement siding or trim joints, or separation between trim and surfaces of masonry or siding. | Builder will correct entrance of elements or separations exceeding 3/8 in. by caulking or other methods.                     | Any separations 3/8 in. or less are considered routine Owner maintenance.                                                                                                                                                                      |
| <b>3.22</b> Cracks in stucco or similar synthetic based finishes.                                                                                                            | Builder will correct cracks which exceed 1/8 in. in width.                                                                   | Caulking and touch-up painting are examples of acceptable repair methods. Builder is not responsible for exact color, texture or finish matches. Hairline cracks are common.                                                                   |
| <b>3.23</b> Siding materials become detached from the Home.                                                                                                                  | Builder will correct affected area if due to improper workmanship or materials.                                              | Separated, loose or delaminated siding can be due to improper maintenance and is not considered a Defect.                                                                                                                                      |
| <b>3.24</b> Aluminum or vinyl siding is bowed or wavy.                                                                                                                       | Builder is responsible only if installed improperly and waves or bowing exceed 1/2 in. within a 32 in. measurement.          | Check your manufacturer's warranty on this product for coverage regarding dents, holes, wind specifications, etc.                                                                                                                              |
| <b>3.25</b> Paint or stain peels or deteriorates.                                                                                                                            | Builder will correct. If 75% of a particular wall is affected, entire wall will be corrected.                                | Some fading is normal due to weathering. Mildew and fungus on exterior surfaces are caused by climatic conditions and are considered routine maintenance. Varnish or lacquer deteriorates quickly and is not covered by this Limited Warranty. |
| <b>3.26</b> Paint splatters and smears on other surfaces.                                                                                                                    | Builder will correct only if damage is documented prior to occupancy.                                                        | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                                                                                                              |
| <b>3.27</b> Faulty application of paint on wall and trim surfaces.                                                                                                           | Builder will correct affected area. If greater than 75% of wall or trim piece is affected, entire surface will be corrected. | Some minor imperfections such as over-spray, brushmarks, etc., are common and should be expected.                                                                                                                                              |
| <b>3.28</b> Knot holes bleed through paint or stain.                                                                                                                         | Builder will correct affected areas where excessive bleeding of knots appear.                                                | Knot holes will be apparent depending on the quality of material used.                                                                                                                                                                         |
| <b>3.29</b> Vent or louver leaks.                                                                                                                                            | Builder will correct if caused by improper installation.                                                                     | Properly installed louvers or vents may at times allow rain or snow to enter under strong wind conditions and is not a deficiency.                                                                                                             |
| <b>3.30</b> Cracks in masonry, veneer, stone, etc.                                                                                                                           | Builder will correct cracks which exceed 1/4 in. in width.                                                                   | Some cracks are common through masonry and mortar joints. Cracks 1/4 in. or less are considered routine Owner maintenance.                                                                                                                     |

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**3. EXTERIOR**

| OBSERVATION                                                   | ACTION REQUIRED                                                       | COMMENTS                                                                                                                                                                                                                                                                                                                                                                                                          |
|---------------------------------------------------------------|-----------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>WINDOWS</b>                                                |                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>3.31</b> Condensation or frost on interior window surface. | No action required.                                                   | Condensation is relative to the quality and type of windows. Temperature differences in high levels of humidity along with individual living habits will cause condensation.                                                                                                                                                                                                                                      |
| <b>3.32</b> Clouding or condensation between panes of glass.  | Builder will correct only if damage is documented prior to occupancy. | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                                                                                                                                                                                                                                                                                 |
| <b>3.33</b> Glass breakage.                                   | Builder will correct only if damage is documented prior to occupancy. | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                                                                                                                                                                                                                                                                                 |
| <b>3.34</b> Excessive drafts and leaks.                       | Builder will correct poorly fitted windows.                           | Relative to the quality and type of windows, drafts are sometimes noticeable around windows, especially during high winds. It may be necessary for the Owner to have storm windows installed to provide a satisfactory solution in high wind areas. All caulking materials expand and contract due to temperature variation and dissimilar materials. Maintenance of weather-stripping is Owner's responsibility. |
| <b>3.35</b> Difficult to open, close or lock.                 | Builder will correct.                                                 | Windows should open, close and lock with reasonable pressure.                                                                                                                                                                                                                                                                                                                                                     |

**4. INTERIOR**

|                                             |                                                                                                                                                               |                                                                                                |
|---------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------|
| <b>DOORS</b>                                |                                                                                                                                                               |                                                                                                |
| <b>4.1</b> Latch is loose or rattles.       | No action required.                                                                                                                                           | Some minor movement should be expected.                                                        |
| <b>4.2</b> Binds, sticks or does not latch. | Builder will correct if due to faulty workmanship and materials.                                                                                              | Seasonal changes may cause doors to expand and contract, and are usually temporary conditions. |
| <b>4.3</b> Warping.                         | Builder will correct warping which exceeds 1/4 in., measured vertically, horizontally or diagonally.                                                          | Seasonal changes may cause doors to expand and contract, and are usually temporary conditions. |
| <b>4.4</b> Excessive opening at bottom.     | Builder will correct gaps in excess of 1-1/2 in. between bottom of passage door and finished floor or 2 in. between bottom of closet door and finished floor. | Gaps under doors are intended for air flow.                                                    |
| <b>4.5</b> Rubs on carpet.                  | Builder will correct.                                                                                                                                         | Builder is not responsible if Owner installs carpet.                                           |

**SECTION III.**

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**4. INTERIOR****SECTION  
III.**

| OBSERVATION                                                                                                                    | ACTION REQUIRED                                                                                                                                                                                                                                                                                                                                          | COMMENTS                                                                                                                                                                              |
|--------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| WALLS, CEILINGS, SURFACES, FINISHES & TRIMS                                                                                    |                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                       |
| <b>4.6</b> Cracks and separations in drywall, lath or plaster; nail pops.                                                      | Builder will correct cracks in excess of 1/8 in. in width. Builder will correct nail pops which have broken finished surface. Repair cracks and/or nail pops and touch up paint to match as close as possible, one time only. Such conditions should be reported near the end of Year 1 of the warranty period to allow for normal movement of the Home. | Minor seam separations and cracks, and other slight imperfections, are common and should be expected. Minor depressions and slight mounds at nail heads are not Defects.              |
| <b>4.7</b> Peeling of wallpaper.                                                                                               | Builder will correct if not due to Owner neglect or abuses.                                                                                                                                                                                                                                                                                              | Builder is not responsible for wallpaper installed by Purchaser. Owner is responsible for maintaining adequate ventilation in areas of high humidity, such as kitchens and bathrooms. |
| <b>4.8</b> Separated seams in wallpaper.                                                                                       | Builder will correct if wall surface is readily visible.                                                                                                                                                                                                                                                                                                 | Minor imperfections can be expected.                                                                                                                                                  |
| <b>4.9</b> Lumps, ridges and nail pops in wallboard which appear after Owner has wall covering installed by himself or others. | No action required.                                                                                                                                                                                                                                                                                                                                      | Owner should insure that surface to be covered is suitable for installation of wall covering.                                                                                         |
| <b>4.10</b> Surface deficiencies in finished woodwork.                                                                         | Builder will correct readily apparent splits, cracks, hammer marks and exposed nail heads, only if documented prior to occupancy.                                                                                                                                                                                                                        | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                                                     |
| <b>4.11</b> Gaps between trim and adjacent surfaces, and gaps at trim joints.                                                  | Builder will correct gaps in excess of 1/8 in. at trim joints and 1/4 in. between trim and adjacent surfaces.                                                                                                                                                                                                                                            | Some separation due to lumber shrinkage is normal and should be expected.                                                                                                             |
| <b>4.12</b> Cracks in ceramic grout joints.                                                                                    | Builder will correct cracks in excess of 1/8 in. one time only.                                                                                                                                                                                                                                                                                          | Cracking of grout joints is common and is considered routine Owner maintenance unless excessive.                                                                                      |
| <b>4.13</b> Ceramic tile cracks or becomes loose.                                                                              | Builder will correct only if documented prior to occupancy.                                                                                                                                                                                                                                                                                              | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                                                     |
| <b>4.14</b> Cracking or deterioration of caulking.                                                                             | No action required.                                                                                                                                                                                                                                                                                                                                      | All interior caulking shrinks and deteriorates. Owner maintenance is required.                                                                                                        |

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**4. INTERIOR**

| OBSERVATION                                                                       | ACTION REQUIRED                                                                                                                                                                                                                                                           | COMMENTS                                                                                                                                                     |
|-----------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>WALLS, CEILINGS, SURFACES, FINISHES &amp; TRIMS</b>                            |                                                                                                                                                                                                                                                                           |                                                                                                                                                              |
| <b>4.15</b> Wall or trim surfaces visible through paint.                          | Builder will correct affected area. If greater than 75% of wall, trim piece, or ceiling is affected, entire surface will be corrected. The surface being painted shall not show through new paint when viewed from a distance of 6 feet under normal lighting conditions. | Some minor imperfections such as overspray, brushmarks, etc., are common and should be expected.                                                             |
| <b>FLOOR COVERING</b>                                                             |                                                                                                                                                                                                                                                                           |                                                                                                                                                              |
| <b>4.16</b> Resilient flooring comes loose at edge.                               | Builder will correct.                                                                                                                                                                                                                                                     | Owner maintenance is required.                                                                                                                               |
| <b>4.17</b> Gaps at seams of resilient flooring.                                  | Builder will correct gaps of similar materials in excess of 1/8 in., and 3/16 in. where dissimilar materials abut.                                                                                                                                                        | Minor gaps should be expected.                                                                                                                               |
| <b>4.18</b> Fastener pops through resilient flooring.                             | Builder will correct affected area where fastener has broken through floor covering.                                                                                                                                                                                      | Sharp objects such as high heels, table and chair legs, can cause similar problems, and are not covered by this Limited Warranty.                            |
| <b>4.19</b> Depressions or ridges in resilient flooring at seams of sub-flooring. | Builder will correct depressions or ridges which exceed 1/8 in. in height or depth.                                                                                                                                                                                       | This is determined by placing a 6 in. straight edge over ridge or depression, with 3 in. on either side, and measuring height or depth at sub-flooring seam. |
| <b>4.20</b> Cuts and gouges in any floor covering.                                | Builder will correct only if documented prior to occupancy.                                                                                                                                                                                                               | Owner is responsible for establishing a pre-closing walk-through inspection list.                                                                            |
| <b>4.21</b> Hollow sounding marble or tile.                                       | No action required.                                                                                                                                                                                                                                                       | Hollow sounding marble or tile is not a deficiency of construction and is not covered under this warranty.                                                   |
| <b>4.22</b> Fades, stains or discolors.                                           | Builder will correct stains or spots only if documented prior to occupancy.                                                                                                                                                                                               | Fading is not a deficiency. Owner is responsible for establishing a pre-closing walk-through inspection list.                                                |
| <b>4.23</b> Premature wearing of carpet.                                          | No action required.                                                                                                                                                                                                                                                       | Excessive wear in high-traffic areas such as entryways and hallways is normal. Wearability is directly related to quality of carpet.                         |
| <b>4.24</b> Visible gaps at carpet seams.                                         | Builder will correct gaps.                                                                                                                                                                                                                                                | Seams will be apparent. Owner maintenance is required.                                                                                                       |
| <b>4.25</b> Carpet becomes loose or buckles.                                      | Builder will correct one time only.                                                                                                                                                                                                                                       | Some stretching is normal. Owner should exercise care in moving furniture.                                                                                   |

**SECTION III.**

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**5. MECHANICAL****SECTION  
III.**

| OBSERVATION                                           | ACTION REQUIRED                                                                                                                                                                                                                                                                                                                                                                                                                                                          | COMMENTS                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>ELECTRICAL</b>                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>5.1</b> Circuit breakers trip excessively.         | Builder will correct if tripping occurs under normal usage.                                                                                                                                                                                                                                                                                                                                                                                                              | Ground Fault Circuit Interrupters (GFCI) are intended to trip as a safety factor. Tripping that occurs under abnormal use is not covered by this Limited Warranty.                                                                                                                                                                                                                                                                                                |
| <b>5.2</b> Outlets, switches or fixtures malfunction. | Builder will correct if caused by defective workmanship or materials.                                                                                                                                                                                                                                                                                                                                                                                                    | Owner should exercise routine care and maintenance. Replacement of light bulbs is Owner's responsibility.                                                                                                                                                                                                                                                                                                                                                         |
| <b>HEATING &amp; COOLING</b>                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>5.3</b> Condensation lines clog under normal use.  | No action required.                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Condensation lines will clog under normal conditions. Continued operation of drain line requires Owner maintenance.                                                                                                                                                                                                                                                                                                                                               |
| <b>5.4</b> Noisy ductwork.                            | Builder will correct oil canning noise if caused by improper installation.                                                                                                                                                                                                                                                                                                                                                                                               | When metal heats and cools, ticking and cracking may occur and are not covered by this Limited Warranty.                                                                                                                                                                                                                                                                                                                                                          |
| <b>5.5</b> Insufficient heating.                      | Builder will correct if Heating System cannot maintain a 70 degree Fahrenheit temperature, under normal operating and weather conditions. Temperature shall be measured at a point 5 ft. above center of floor in affected area. All rooms may vary in temperature by as much as 4 degrees.                                                                                                                                                                              | Orientation of the Home, location of rooms and location of vents will also provide a temperature differential. There may be periods when outdoor temperature falls below design temperature thereby lowering temperature in the Home. Certain aspects of the Home including, but not limited to, expansive stairways, open foyers, sunrooms or cathedral ceilings may cause abnormal variation from these Standards and are not covered by this Limited Warranty. |
| <b>5.6</b> Insufficient cooling.                      | Builder will correct if Cooling System cannot maintain a 78 degree Fahrenheit temperature, under normal operating and weather conditions. Temperature shall be measured at a point 5 ft. above center of the floor in the affected room. On excessively hot days, where outside temperature exceeds 95 degrees Fahrenheit, a difference of 17 degrees from outside temperature will be difficult to maintain. All rooms may vary in temperature by as much as 4 degrees. | Orientation of the Home, location of rooms and location of vents will also provide a temperature differential. There may be periods when outdoor temperature rises above design temperature thereby raising temperature in the Home. Certain aspects of the Home including, but not limited to, expansive stairways, open foyers, sunrooms or cathedral ceilings may cause abnormal variation from these Standards and are not covered by this Limited Warranty.  |
| <b>5.7</b> Refrigerant line leaks.                    | Builder will correct.                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Owner maintenance is required on the system.                                                                                                                                                                                                                                                                                                                                                                                                                      |

**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**5. MECHANICAL**

| OBSERVATION                                                           | ACTION REQUIRED                                                          | COMMENTS                                                                                                                                                                       |
|-----------------------------------------------------------------------|--------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>PLUMBING</b>                                                       |                                                                          |                                                                                                                                                                                |
| <b>5.8</b> Pipe freezes and bursts.                                   | Builder will correct if due to faulty workmanship or materials.          | Proper winterization of pipes is considered routine maintenance and Owner should maintain suitable temperatures inside the Home.                                               |
| <b>5.9</b> Noisy water pipe.                                          | Builder will correct hammering noise if caused by improper installation. | Some noise can be expected due to flow of water and pipe expansion. This is not a Defect.                                                                                      |
| <b>5.10</b> Plumbing fixtures and trim fittings leak or malfunction.  | Builder will correct if due to faulty workmanship and materials.         | Owner maintenance is required. Scratches, tarnishing or marring must be noted on a pre-closing walk-through inspection list.                                                   |
| <b>5.11</b> Damaged or defective plumbing fixtures and trim fittings. | Builder will correct only if documented prior to occupancy.              | Owner is responsible for establishing a pre-closing walk-through inspection list. Defective trim fittings and plumbing fixtures are covered under the manufacturer's warranty. |

**6. SPECIALTIES**

|                                                                                |                                                                              |                                                                                   |
|--------------------------------------------------------------------------------|------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| <b>BATHROOM &amp; KITCHEN</b>                                                  |                                                                              |                                                                                   |
| <b>6.1</b> Cabinet separates from wall or ceiling.                             | Builder will correct separation in excess of 1/4 in.                         | Some separation is normal. Caulking is an acceptable method of repair.            |
| <b>6.2</b> Crack in door panel.                                                | Builder will correct only if documented prior to occupancy.                  | Owner is responsible for establishing a pre-closing walk-through inspection list. |
| <b>6.3</b> Warping of cabinet door or drawer front.                            | Builder will correct if warp exceeds 3/8 in. as measured from cabinet frame. | Seasonal changes may cause warping and may be a temporary condition.              |
| <b>6.4</b> Doors or drawers do not operate.                                    | Builder will correct.                                                        | Owner maintenance is required.                                                    |
| <b>6.5</b> Chips, cracks, scratches on countertop, cabinet fixture or fitting. | Builder will correct only if documented prior to occupancy.                  | Owner is responsible for establishing a pre-closing walk-through inspection list. |
| <b>6.6</b> Delamination of countertop or cabinet.                              | Builder will correct only if documented prior to occupancy.                  | Owner is responsible for establishing a pre-closing walk-through inspection list. |
| <b>6.7</b> Cracks or chips in fixture.                                         | Builder will correct only if documented prior to occupancy.                  | Owner is responsible for establishing a pre-closing walk-through inspection list. |

**SECTION  
III.**



**WARRANTY STANDARDS • A. YEAR 1 COVERAGE ONLY**

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

**6. SPECIALTIES**

| OBSERVATION                                                                      | ACTION REQUIRED                                                                  | COMMENTS                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------------------------------------------------------------------------|----------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>CHIMNEY &amp; FIREPLACE</b>                                                   |                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>6.8</b> Exterior and interior masonry veneer cracks.                          | Builder will correct cracks in excess of 1/4 in. in width.                       | Some cracks are common in masonry and mortar joints. Cracks 1/4 in. in width or less are considered Owner maintenance.                                                                                                                                                                                                                                                                                                                                                             |
| <b>6.9</b> Firebox color is changed; accumulation of residue in chimney or flue. | No action required.                                                              | Owner maintenance is required.                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>6.10</b> Chimney separates from the Home.                                     | Builder will correct separation in excess of 1/2 in. within 10 ft.               | Newly built chimneys will often incur slight amounts of separation.                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>6.11</b> Smoke in living area.                                                | Builder will correct if caused by improper construction or inadequate clearance. | Temporary negative draft situations can be caused by high winds; obstructions such as tree branches too close to the chimney; the geographic location of the fireplace; or its relationship to adjoining walls and roof. In some cases, it may be necessary to open a window to create an effective draft. Since negative draft conditions could be temporary, it is necessary that Owner substantiate problem to Builder by constructing a fire so the condition can be observed. |
| <b>6.12</b> Water infiltration into firebox from flue.                           | No action required.                                                              | A certain amount of rainwater can be expected under certain conditions.                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>6.13</b> Firebrick or mortar joint cracks.                                    | No action required.                                                              | Intense heat may cause cracking.                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| <b>INSULATION</b>                                                                |                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>6.14</b> Air infiltration around electrical receptacles.                      | No action required.                                                              | Air flow around electrical boxes is normal and is not a deficiency.                                                                                                                                                                                                                                                                                                                                                                                                                |

**SECTION III.**

## WARRANTY STANDARDS • B. YEARS 1 & 2 COVERAGE ONLY C. TEN YEAR MSD COVERAGE ONLY

The following Warranty Standards are applicable only to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

### B. SYSTEMS - YEARS 1 & 2

| OBSERVATION                                      | ACTION REQUIRED                                                                       | COMMENTS                                                                                                                                       |
|--------------------------------------------------|---------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>ELECTRICAL</b>                                |                                                                                       |                                                                                                                                                |
| <b>B.1</b> Wiring fails to carry specified load. | Builder will correct if failure is due to improper installation or materials.         | Switches, outlets and fixtures are applicable to <b>Year 1 Coverage Only</b> .                                                                 |
| <b>HEATING AND COOLING</b>                       |                                                                                       |                                                                                                                                                |
| <b>B.2</b> Ductwork separates.                   | Builder will correct.                                                                 | Owner maintenance is required.                                                                                                                 |
| <b>PLUMBING</b>                                  |                                                                                       |                                                                                                                                                |
| <b>B.3</b> Pipe leaks.                           | Builder will correct.                                                                 | Condensation on pipes does not constitute leakage. Faulty faucets, valves, joints and fittings are applicable to <b>Year 1 Coverage Only</b> . |
| <b>B.4</b> Water supply stops.                   | Builder will correct if due to faulty workmanship or materials inside the Home.       | Drought or causes other than faulty workmanship and materials will not be covered under this Limited Warranty.                                 |
| <b>B.5</b> Clogged drain or sewer.               | Builder will correct clog within structure caused by faulty workmanship or materials. | Clogs and stoppages beyond the exterior wall are not covered by this Limited Warranty. Routine Owner maintenance and proper use is required.   |

### C. TEN YEAR MSD COVERAGE

|                                       |                                                                                                                                             |                                                                                                                                                                                                 |
|---------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>MAJOR STRUCTURAL DEFECTS</b>       |                                                                                                                                             |                                                                                                                                                                                                 |
| <b>C.1.</b> Major Structural Defects. | The criteria for establishing the existence of a Major Structural Defect is set forth in Section I.B.14 of this Limited Warranty Agreement. | The Warrantor will correct Major Structural Defects, limited to such actions as are necessary to restore the load-bearing capability of the component(s) affected by a Major Structural Defect. |

## SECTION III.

## REQUESTING WARRANTY PERFORMANCE

### A. Notice to Warrantor in Years 1 & 2

1. If a Defect occurs in Years 1 and 2, you must notify your Builder in writing. Your request for warranty performance should clearly describe the Defect(s) in reasonable detail.
2. Request for warranty performance to your Builder does not constitute notice to the Administrator, and it will not extend applicable coverage periods.
3. If a request for warranty performance to your Builder does not result in satisfactory action within a reasonable time, written notice must be given to RWC, Administrator, at warranty.resolution@rwcwarranty.com or forwarded by certified mail, return receipt requested to 5300 Derry Street, Harrisburg, Pennsylvania 17111, Attn: Warranty Resolution Department. This notice should describe each item in reasonable detail.
4. *Please note that a written request for warranty performance must be emailed no later than thirty (30) days after the expiration of the applicable warranty period or sent to RWC by certified mail, return receipt requested and postmarked no later than thirty (30) days after the expiration of the applicable warranty period. For example, if the item is one which is warranted by your Builder during your second year of coverage, a request for warranty performance must be emailed or mailed to RWC and postmarked no later than thirty (30) days after the end of the second year to be valid.*
5. You must provide the Warrantor with reasonable weekday access during normal business hours in order to perform its obligations. Failure by you to provide such access to the Warrantor may relieve the Warrantor of its obligations under this Limited Warranty.
6. If your Builder does not fulfill its obligations under this Limited Warranty, the Administrator will process the request for warranty performance as described in the Limited Warranty and subject to the provisions of **IV.F**.

### B. Notice to Warrantor in Years 3–10

If a Defect related to a warranted MSD occurs in Years 3 through 10 of this Limited Warranty, you must notify the Administrator to review the item within a reasonable time after the situation arises. All such notices must be presented in writing to RWC, Administrator, at warranty.resolution@rwcwarranty.com or forwarded by certified mail, return receipt requested to RWC, Ad-

ministrator, 5300 Derry Street, Harrisburg, Pennsylvania 17111, Attn: Warranty Resolution Department. Any such notice should describe the condition of the MSD in reasonable detail. Requests for warranty performance emailed or postmarked more than thirty (30) days after the expiration of the term of this Limited Warranty will not be honored.

### C. Purchaser's Obligations

1. **Your notice to the Administrator must contain the following information:**
  - a. Validation # and Effective Date Of Warranty;
  - b. Your Builder's name and address;
  - c. Your name, address, email address and phone number (including home, cell and work numbers);
  - d. Reasonably specific description of the warranty item(s) to be reviewed;
  - e. A copy of any written notice to your Builder;
  - f. Photograph(s) may be required; and
  - g. A copy of each and every report you have obtained from any inspector or engineer.
2. You have an obligation to cooperate with the Administrator's mediation, inspection and investigation of your warranty request. From time to time, the Administrator may request information from you regarding an alleged Defect. Failure by you or your appointed representative to respond with the requested information within thirty (30) days of the date of the Administrator's request can result in the closing of your warranty file.

### D. Mediation and Inspection

Within thirty (30) days following the Administrator's receipt of proper notice of request for warranty performance, the Administrator may review and mediate your request by communicating with you, your Builder and any other individuals or entities who the Administrator believes possess relevant information. If, after thirty (30) days, the Administrator has not been able to successfully mediate your request, or at any earlier time when the Administrator believes that your Builder and you are at an impasse, then the Administrator will notify you that your request has become an Unresolved Warranty Issue. At any time following the receipt of proper notice of your request for warranty performance, the Administrator may schedule an inspection of the item. You must provide the Administrator reasonable access for any such inspection as discussed in **Section IV.A.5**. The Administrator, at its discretion,

## SECTION IV.

## REQUESTING WARRANTY PERFORMANCE

may schedule a subsequent inspection to determine Builder compliance.

**When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions, it is your responsibility to substantiate that the need for warranty performance exists including any cost involved. If properly substantiated, you will be reimbursed by the Warrantor.**

SECTION  
IV.**E. Arbitration**

**You begin the arbitration process by giving the Administrator written notice of your request for arbitration of an Unresolved Warranty Issue.** The written notice of your request for arbitration must be received by the Administrator no later than thirty (30) days following the expiration of the ten year warranty period. However, if you receive notification of an Unresolved Warranty Issue from the Administrator following the expiration of the ten year warranty period, then this period is extended and written notice of your request for arbitration must be received by the Administrator no later than thirty (30) days from the date of your receipt of notification of the Unresolved Warranty Issue. Within twenty (20) days after the Administrator's receipt of your notice of request for arbitration, any Unresolved Warranty Issue that you have with the Warrantor shall be submitted to an independent



arbitration service experienced in arbitrating residential construction matters upon which you and the Administrator agree. This **binding** arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et. seq.* If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service. After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or to split it among the parties to the arbitration. The arbitration shall be conducted in accordance with this Limited Warranty and the arbitration rules and regulations to the extent that they are not in conflict with the Federal Arbitration Act.

Within one (1) year after an arbitration award, either party may apply to the U.S. District Court where the Home is situated to confirm the award. The Administrator's receipt of a written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision. The decision of the Arbitrator shall be final and binding upon all parties.<sup>†</sup>

Since this Limited Warranty provides for mandatory binding arbitration of Unresolved Warranty Issues, if any party commences litigation in violation of this Limited Warranty, such party shall reimburse the other parties to the litigation for their costs and expenses, including attorney fees, incurred in seeking dismissal of such litigation.

In Years 1 & 2, the Builder shall have sixty (60) days from the date the Administrator sends the Arbitrator's award to the Builder to comply with the Arbitrator's decision. In Years 3-10, the Warrantor shall have sixty (60) days from the date the Administrator receives the Arbitrator's award to comply with the Arbitrator's decision. Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period with the exception of any repair that would reasonably take more than sixty (60) days to complete, including, but not limited to, repair delayed or prolonged by inclement weather. The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses.

You may request a compliance arbitration within twenty (20) days after the sixty-day compliance period has expired by giving the Administrator written notice of your request. You must pay the fees for the compliance arbitration prior to the matter being submitted to the arbitration service.

**F. Conditions of Warranty Performance**

1. You must provide the Warrantor and/or Administrator with reasonable weekday access during normal business hours to inspect the condition of your Home and/or to perform their obligations.
2. When your request for warranty performance is determined to be a warranted issue, the Warrantor reserves the right to repair or replace the warranted item, or to pay you the reasonable cost of repair or replacement.
3. In Years 1 and 2, if your Builder defaults in its warranty obligations, the Administrator will process the request for warranty performance provided you pay a warranty service

## REQUESTING WARRANTY PERFORMANCE

- fee of \$250 for each request prior to repair or replacement.\*♦
4. In Years 3 through 10 you must pay the Administrator a warranty service fee of \$500 for each request.\*♦
  5. If the Administrator elects to award you cash rather than repair or replace a warranted item, the warranty service fee will be subtracted from the cash payment.
  6. If the Warrantor pays the reasonable cost of repairing a warranted item, the payment shall be made to you and to any mortgagee or mortgagee's successor as each of your interests may appear; provided that the mortgagee has notified the Administrator in writing of its security interest in the Home prior to such payment. Warrantor shall not have any obligation to make payment jointly to the Purchaser and mortgagee where the mortgagee has not notified your Builder or the Administrator in writing of its security interest in the Home prior to such payment. Any mortgagee shall be completely bound by any mediation or arbitration relating to a request for warranty performance between you and the Warrantor.
  7. Prior to payment for the reasonable cost of repair or replacement of warranted items, you must sign and deliver to the Builder or the Administrator, as applicable, a full and unconditional release, in recordable form, of all legal obligations with respect to the warranted Defects and any conditions arising from the warranted items.
  8. Upon completion of repair or replacement of a warranted Defect, you must sign and deliver to the Builder or the Administrator, as applicable, a full and unconditional release, in recordable form, of all legal obligations with respect to the Defect and any conditions arising from the situation. The repaired or replaced warranted item will continue to be warranted by this Limited Warranty for the remainder of the applicable period of coverage.
  9. If the Warrantor repairs, replaces or pays you the reasonable cost to repair or replace a warranted item, the Warrantor shall be subrogated to all your rights of recovery against any person or entity. You must execute and deliver any and all instruments and papers and take any and all other actions necessary to secure such rights, including, but not limited to, assignment of proceeds of any insurance or other warranties to the Warrantor. You shall do nothing to prejudice these rights of subrogation.
  10. Any Warrantor obligation is conditioned upon your proper maintenance of the Home, common elements and grounds to prevent damage due to neglect, abnormal use or improper maintenance.
- 
11. **Condominium Procedures:**
    - a. In the case of common elements of a condominium, at all times, owner(s) of each unit affected by the common elements in need of warranty performance shall each be responsible to pay the warranty service fee (\$250 in Years 1 and 2, \$500 in Years 3 through 10) for each request for warranty performance.\*
    - b. If a request for warranty performance under this Limited Warranty involves a common element in a condominium, the request may be made only by an authorized representative of the condominium association. If the Builder retains a voting interest in the association of more than 50%, the request may be made by unit owners representing 10% of the voting interests in the association.
    - c. If a request for warranty performance under this Limited Warranty involves a common element affecting multiple units, and all affected units are not warranted by the RWC Warranty Program, the Insurer's liability shall be limited to only those units warranted by the RWC Warranty. The limit of liability shall be prorated based upon the number of units warranted by this Limited Warranty.

### SECTION IV.

\*Homeowners in Maryland, refer to Maryland Addendum, Section V.D.

\*Homeowners in Newark, Delaware, refer to Newark, Delaware, Addendum, Section V.D.

## ADDENDA

### A. Newark, Delaware, Addendum

The warranty service fee as described in **Sections IV.F.3., IV.F.4. and IV.F.11.a** will be waived for homes built in the city of Newark, Delaware.

### B. State of New York Addendum

Except as expressly provided in this Addendum, the warranties and rights listed herein are in addition to, and are not exclusive of, any warranties or rights listed in this Limited Warranty.

1. **Appliances and Items of Equipment** — Subject to other terms and conditions listed in this Limited Warranty, the exclusion concerning deficiencies in Appliances and Items of Equipment described in **Section II.E.14.** of this Limited Warranty shall not apply during the first two (2) years of the warranty term wherever (i) such Appliances and Items of Equipment are components of the Cooling, Ventilating, Heating, Electrical or Plumbing Systems; and (ii) the deficiencies in such fixtures, Appliances or Items of Equipment are the result of defective installation by your Builder.
2. **Standards — Section III.** — If the statutes of the State of New York provide greater coverage than the provisions of this Limited Warranty, those provisions shall modify the warranty to allow for the greater coverage.
3. **Alternative Dispute Resolution** — When making a request for warranty performance pursuant to **Section IV.E.** of this Limited Warranty, you have no obligation to submit to binding arbitration, nor do you have to pay any fee or charge for participation in non-binding arbitration or any mediation process concerning your request. However, any Unresolved Warranty Issues must be submitted to arbitration before a legal proceeding may be commenced. Further, if an Owner resorts to litigation, the rights and obligations imposed by **Section IV.E.** shall apply to such litigation.

### C. State of Indiana Addendum

The warranties and rights listed above are in addition to, and are not exclusive of, any warranties listed in this book.

Notwithstanding anything contained in the attached printed form of the RWC Limited Warranty, this Limited Warranty shall include the following protection per **Section II.C.**, and is amended to read as follows:

1. **Two Year Coverage** — Commencing on the Effective Date of this Limited Warranty as specified on the Application For Warranty form, and subject to the terms and conditions listed herein, your Builder warrants that for a period of two (2) years your Home will be free from Defects due to nonconformity with the Warranty Standards set forth in **Section III.** of this Limited Warranty. With respect to fixtures, Appliances and Items of Equipment, the Warranty is for one (1) year or the manufacturer's written warranty, whichever is less.
2. **Years 3 and 4 Coverage Only** — During the third and fourth year following the Effective Date Of Warranty as specified on the Application For Warranty form, and subject to the terms and conditions listed in this Limited Warranty, your Warrantor warrants that your Home will be free from Defects due to nonconformity with the Warranty Standards set forth in **Section III. A. 3.11-3.16.**

### D. Maryland Addendum

You should contact the Administrator personally to verify the existence of your Warranty. Further, you should report any Warranty problems, which are not promptly resolved by your Builder, to the Administrator.

1. **Section IV.F.3. and IV.F.4.** are not applicable for the state of Maryland.

SECTION  
V.



**RESIDENTIAL WARRANTY COMPANY, LLC**

# Exhibit 6



STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

DIANNE MIRMOW,

Plaintiff,

v.

GREAT SOUTHERN HOMES, INC. and  
UNDER PAR GROUP, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2019-CP-32-02577

**ORDER DENYING GREAT SOUTHERN  
HOMES, INC.'S MOTION TO DISMISS  
IN LIEU OF ANSWER OR COMPEL  
ARBITRATION**

This matter came before the Court on November 19, 2019 at 11:00 a.m. on the Motion of Defendant, Great Southern Homes, Inc. ("Great Southern"), to Dismiss in Lieu of Answer or Compel Arbitration. The Plaintiff, Dianne Mirmow, was represented by F. Elliott Quinn IV of The Steinberg Law Firm, LLP of Charleston. Great Southern was represented by Drew Hamilton Butler of Richardson Plowden & Robinson, PA of Charleston. The motion is denied.

**FACTUAL SUMMARY AND PROCEDURAL BACKGROUND**

This action is a construction defect suit arising from the defendants' construction of Plaintiff's home. Plaintiff filed suit on June 25, 2019, asserting claims of negligence, breach of implied warranties, and unfair trade practices against Great Southern and Under Par Group, LLC. Plaintiff alleges the defendants graded the lot on which her home was constructed so as to create a slope at the rear of the lot without a retaining wall or other structure to support the slope. Plaintiff further alleges the defendants constructed the slope improperly and constructed her home too close to that slope. Plaintiff alleges

the slope is now failing resulting in a loss of support for her home, cracking, and other damage to her home.

After service of the Summons and Complaint, Great Southern filed the instant motion to dismiss or compel arbitration under Rule 12(b)(1), SCRCP, and the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10, *et. seq.* (“SCUAA”). At issue is whether the parties are bound by an enforceable arbitration agreement that would require a stay of this action pending the outcome of said arbitration proceedings.<sup>1</sup> Plaintiff asserted the arbitration agreement is unconscionable and fails to comply with the notice requirements of the SCUAA. Plaintiff asserted the arbitration agreement is unenforceable for either or both of those reasons.

### **STANDARD OF REVIEW**

The question of the arbitrability of a claim is an issue for judicial determination. *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). South Carolina courts are to apply a presumption that a claim falls within the scope of an arbitration agreement, but that presumption in favor of arbitration does not extend to whether a valid arbitration agreement exists. *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019).

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<sup>1</sup> Great Southern filed the Motion as a motion to dismiss or in the alternative to stay the action, but Great Southern conceded at the hearing on the Motion that a dismissal is not available as a result of moving to compel arbitration. When a party seeks to compel arbitration of an action, a court may stay the action pending the outcome of the arbitration proceedings but may not dismiss the action. See *Widener v. Fort Mill Ford*, 381 S.C. 522, 525, 674 S.E.2d 172, 174 (Ct. App. 2009).

## **ANALYSIS**

### **I. Unconscionability**

The SCUAA requires an arbitration agreement to comply with generally applicable law regarding the enforceability of contracts. S.C. Code Ann. § 15-48-10. In accordance with such generally applicable contract law, “a party may seek revocation of the contract under such grounds as exist at law or in equity, including fraud, duress, and unconscionability.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Under South Carolina law, an agreement is unconscionable where a party lacked a meaningful choice in entering into the agreement and the agreement contains oppressive, one-sided terms. *Id.* at 24–25, 644 S.E.2d at 668–69. This Court finds the arbitration agreement at issue is unconscionable and therefore unenforceable because of a lack of a meaningful choice and oppressive, one-sided terms.

#### **A. Lack of a Meaningful Choice**

When determining whether a party lacked a meaningful choice in entering into an agreement, courts must take into consideration “the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, the relative disparity of the parties’ bargaining power, the parties’ relative sophistication, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause.” *Id.* at 25, 644 S.E.2d at 669–70. Additional factors to be considered are whether the agreement is an adhesion contract and whether the agreement is for a consumer “necessity.” *Id.* at 26–27, 644 S.E.2d at 669–70. Adhesion contracts are reviewed with “considerable skepticism,” raise “considerable doubt that any true agreement ever existed

to submit disputes to arbitration,” and weigh in favor of finding a lack of meaningful choice. *Id.*

Here, the evidence presented by the parties causes the Court to conclude Great Southern’s arbitration agreement was an adhesion contract. An adhesion contract is “a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). A review of the agreement indicates it was a form contract created by Great Southern as shown by Great Southern’s company name typed into the agreement whereas blanks spaces were left for Plaintiff’s name to be handwritten into the agreement and for the details of the lot and purchase price to be handwritten into the agreement. Furthermore, as set forth in the Affidavit of Plaintiff Dianne Mirmow, she avers she was presented the agreement on a take-it-or-leave-it basis with no opportunity to negotiate or modify the agreement’s terms. Great Southern argues that Plaintiff was able to negotiate the agreement’s terms and in support, points to the handwritten terms on the agreement as to the purchase price for the home, the purchase being contingent on Plaintiff selling her residence at that time, and a few upgrades and selections for the home to be purchased. The Court finds these handwritten terms do not provide any indication that Plaintiff was able to negotiate the agreement’s terms such that the agreement would not be an adhesion contract. Rather, the handwritten terms evidence minor additions to the agreement, not negotiations of Great Southern’s standard terms.

Great Southern’s agreement is also a contract for a necessity—a home. In the *Simpson* decision, the South Carolina Supreme Court found that an automobile is

“critically important in modern day society” and a contract to purchase an automobile is a contract for a necessity. If an automobile is a necessity in modern society, then shelter—a home—is also a necessity.

The injuries Plaintiff alleges she suffered are, if proven, substantial. She alleges she is in danger of losing her monetary investment in her home as well as the physical structure of and shelter provided by her home.

The evidence presented indicates Plaintiff entered into the agreement not as a substantial business concern, but as an ordinary consumer in an unequal bargaining position with Great Southern. Because the agreement was for the purchase of a home, there is a presumption that Plaintiff was in an unequal bargaining position in relation to Great Southern. *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) (stating the Supreme Court has “taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller”); *see also Smith v. D. R. Horton*, 417 S.C. 42, 50, 790 S.E.2d 1, 4–5 (2016) (applying the *Kennedy* presumption of unequal bargaining power to find a home purchaser lacked a meaningful choice in entering into an arbitration agreement). Great Southern did not present evidence to overcome the presumption of unequal bargaining position applicable here. Moreover, Plaintiff presented evidence that she purchased the home as an individual and that she is an educator without relevant sophistication in law, engineering, or homebuilding. Plaintiff presented evidence that she was one purchaser of a home from Great Southern among many purchasers of homes from Great Southern, and therefore, that she was not a substantial business concern to

Great Southern. Plaintiff also presented evidence resulting in the conclusion that Great Southern is a substantial business concern with significant bargaining power and sophistication in homebuilding and home sales. For all of these reasons, the Court concludes Plaintiff was not a substantial business concern and there was a wide disparity in the parties' bargaining power and relative sophistication.

The arbitration language here was inconspicuous. The arbitration language was on the third page of the agreement and was indistinguishable from the other terms on that page. The arbitration language was not in bold, underlined, or capitalized, as opposed to other terms which were in bold, underlined, or capitalized. The arbitration language did not require initialing or any other form of acknowledgement by the home purchaser, as opposed other terms which required the home purchaser's initials. Additionally, the related limited warranty terms and waiver of liability terms are inconspicuous. Other than bolding of limited portions of those terms, those terms are not made conspicuous to a home purchaser. Those terms are not underlined, are not capitalized, and did not require initialing or any other acknowledgment by the purchaser. The waiver of liability provision is on the fifth page of the agreement at the bottom of a section entitled "Miscellaneous."

In conclusion, Great Southern's agreement was an adhesion contract for the purchase of a necessity, and Great Southern was a large, corporate homebuilder who presented the relatively unsophisticated Plaintiff with a contract with inconspicuous arbitration, warranty waiver, and limitation of liability terms buried in the agreement. Considering each of the factors relevant to whether a party lacked a meaningful choice in entering into an arbitration agreement, the Court finds ample evidence supporting a

conclusion that Plaintiff lacked a meaningful choice in entering into Great Southern's arbitration agreement.

### **B. Oppressive, One-Sided Terms**

In addition to a lack of meaningful choice, the agreement contains terms that are oppressive and one sided. The arbitration agreement at issue here contains warranty disclaimers and limitations on liability that are substantially identical to those found to be oppressive and one-sided in the Supreme Court's decision in *Smith v. D. R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016). In *Smith*, the Supreme Court held that an arbitration agreement which contained a disclaimer of implied warranties and a limitation of liability provision barring monetary damages was oppressive and one-sided, and that those terms combined with a lack of a meaningful choice, rendered the arbitration agreement unconscionable. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. In addition to being unconscionable because it contains essentially the same terms as those found oppressive and one-sided in the *Smith* decision, Great Southern's arbitration agreement also contains additional oppressive, one-sided terms beyond those considered in the *Smith* decision.

Like the waiver of implied warranties found oppressive and one-sided in the *Smith* decision, Great Southern's agreement contains the following disclaimer of implied warranties:

This Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or implied, any warranty of habitability, suitability for residential purposes, merchantability, or fitness for a particular purpose is hereby excluded and disclaimed.

Like the limitations on liability and bar on monetary damages found oppressive and one-sided in the *Smith* decision, Great Southern's agreement attempts to limit Great Southern's obligations and liability to the terms of the limited warranty and to bar any monetary damages against Great Southern, providing:

- "Purchaser agrees to accept said limited liability in lieu of all other rights or remedies, whether based on contract or tort."
- "Purchaser hereby releases and relinquishes all claims against Seller for damages to property or personal injury arising after the date of this contract relating to any of the following: . . . Any claims for repairs to the Property except as specifically covered by Seller's limited home warranty."

As found oppressive and one-sided in the *Smith* decision, the limitation on liability and bar on monetary damages terms in Great Southern's agreement would result in Plaintiff having no monetary damages remedy and no other remedy for damages from the improper construction of her home other than any repairs provided by Great Southern under its limited warranty, even where any repairs provided by Great Southern are inadequate.

While these provisions alone are sufficient to render the agreement oppressive and one-sided, the agreement goes further by including additional oppressive and one-sided terms. While Great Southern's agreement attempts to limit Plaintiff's remedy and Great Southern's obligations and liability to the terms of a limited warranty, Plaintiff presented evidence establishing that Great Southern did not provide her with a copy of that limited warranty prior to or at the time she signed the agreement. Plaintiff not having received the limited warranty prior to or when she signed the agreement is established by her affidavit wherein she stated she did not receive a copy of the warranty at any time



prior to when she closed on the home, she was not informed of the limitation of Great Southern's liability to the terms of the limited warranty prior to this action, and was not informed of any option to request a copy of the limited warranty prior to closing. Additionally, Plaintiff not having received the limited warranty before signing the agreement is established by language in the agreement which provides: "The Seller shall furnish the Purchaser at closing with a limited warranty . . . . A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller." Great Southern did not present any evidence to the contrary. Therefore, Great Southern attempted to force Plaintiff to agree to limit Great Southern's obligations and liability for improper construction to the terms of a limited warranty that Great Southern did not provide to Plaintiff. The Court finds that a term limiting a purchaser's rights to a limited warranty that the purchaser has not had the opportunity to read is an oppressive, one-sided term.

In addition to the limitation of liability provisions already discussed, Great Southern's agreement also attempts to limit its liability through a term providing that the issuance of a certificate of occupancy by the applicable jurisdiction binds the parties as a determination that the construction was performed in compliance with the applicable building codes and other laws. Specifically, the agreement provides:

The issuance of a certificate of completion or occupancy, or final inspection approval by any governmental entity shall constitute certification of completion of the improvements in substantial conformity with the terms of this contract and shall also constitute a final determination, binding on the Parties hereto, that the property and improvements are in full compliance with all applicable laws, regulations and building codes.

The agreement thus provides that an inspection to be conducted after Plaintiff entered into the agreement, by a governmental entity over which Plaintiff had no control, for which no guarantee of notice or the opportunity to be present was given to Plaintiff, and the scope of which Plaintiff was not informed, would result in Plaintiff not being able to assert that any portion of the construction violates the applicable building codes or any other law. The Court finds this term to be an oppressive, one-sided term.

The court finds the terms of the agreement to be one-sided and oppressive, and having found the agreement was the result of a lack of a meaningful choice, the Court accordingly finds the arbitration agreement unconscionable and unenforceable.

## **II. SCUAA's Notice Requirements**

The court rejects the Plaintiff's claim that the notice requirements of the SCUAA were not met. That Act provides: "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code § 15-48-10. The Plaintiff argues that the reference to "pursuant to this chapter," is a reference to the SCUAA, *i.e.*, Chapter 48, Title 15 of the South Carolina Code. Great Southern's arbitration agreement states on the first page "CONTRACT SUBJECT TO ARBITRATION (S.C. CODE 15-48-10)." The court declines to adopt the interpretation that this notice fails to comply with the notice requirements of the SCUAA.

### **CONCLUSION**

In conclusion, this Court denies Great Southern's Motion to Dismiss in Lieu of Answer or Compel Arbitration because the agreement for the reasons stated above.

AND IT IS SO ORDERED.

[Electronic signature follows on separate page.]



## Lexington Common Pleas

**Case Caption:** Dianne Mirmow VS Great Southern Homes Inc , defendant, et al  
**Case Number:** 2019CP3202577  
**Type:** Order/Compel

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2019-12-06 16:33:43 page 12 of 12

# Exhibit 7

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

GREGORY W. SMITH AND STEPHANIE  
SMITH,

Plaintiffs.

vs.

D.R. HORTON, INC., TOM'S VINYL SIDING,  
LLC, LUTZEN CONSTRUCTION COMPANY,  
INC., BOOZER LUMBER COMPANY, ALL  
AMERICAN ROOFING, INC., AND MYERS  
LANDSCAPING, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO: 2010-CP-18-641

**ORDER DENYING DEFENDANT D.R.  
HORTON, INC.'S MOTION TO COMPEL  
ARBITRATION AND TO STAY  
PROCEEDINGS, OR, ALTERNATIVELY,  
TO DISMISS**

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 Clerk of Court  
 DORCHESTER COUNTY

This matter came before the court on September 9, 2010, upon Defendant D.R. Horton, Inc.'s Motion to Compel Arbitration and to Stay Proceedings, or, Alternatively, to Dismiss. Present on behalf of the Plaintiffs was Phillip W. Segui, Jr., Esquire. Present on behalf of Defendant D.R. Horton, Inc. was Michael M. Shetterly, Esquire.

**FACTS**

This case arises out of alleged construction defects to a single-family home in Summerville, South Carolina. Plaintiffs purchased their home from the Defendant D. R. Horton and have alleged a variety of defects with their home including improperly installed siding, windows, structural framing and concrete slab as well as failure to properly install various flashings so as to prevent moisture intrusion into their home which have led to damage to their home. Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable and fail for lack of inclusion in the deed under the Doctrine of Merger.

**ARGUMENT**

In the contract for the purchase of the residence at issue, in addition to the attempts to disclaim various warranties within the body of the contract, there is within the

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 [Signature]

Warranties and Dispute Resolution in Section 14 beginning on page 7 in which it is referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies available to the Plaintiffs.

The recent Supreme Court case of Simpson v. MSA of Myrtle Beach, 373 S.C. 14 (2007), addressed a very similar set of circumstances in which it held that despite application of the Federal Arbitration Act, that the arbitration clause between the parties was unconscionable and unenforceable in its entirety. In addition to analyzing the lack of conspicuousness of the arbitration provisions which were similar to those at issue in the present case, the Court focused on the other provisions of the contract limiting the recovery and claims available under its terms. Specifically, because the provisions of the contract in the Simpson case violated statutory law in that it prevented Simpson from receiving the mandatory statutory remedies to which she may have been entitled in her underlying SCUTPA and Dealers Act claims and that it allowed her to waive statutory remedies which were contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest, the Court found that these provisions were oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, the Court found that these provisions were an unconscionable waiver of statutory rights, and therefore, unenforceable. Although it was argued in the Simpson case that these offending provisions should simply be severed, the Court stated:

In this case, we find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.

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The Contract between the parties in the instant case likewise has oppressive and one-sided provisions which our courts have held cannot be disclaimed. Specifically, in Kirkman v. Parex, Inc. 369 S.C. 477 (2006), the Court held that where an attempted disclaimer of the implied warranty of habitability is not (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for, that such disclaimer is void. The court went further to state that "this standard is to be applied strictly and will be met only in rare circumstances." Given that such circumstances were not met nor even attempted, any attempts to disclaim these implied warranty claims, like in the Simpson case, are unenforceable and unconscionable. Likewise, and perhaps even more stark are the provisions in the Limitations of Liability in sub-section (i) on page 9 in which, in addition to the attempted waiver of various important remedies of the Plaintiffs in violation of the Kirkman requirements, the following is set forth in the last sentence:

SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

Clearly, the provisions that the Court in Simpson found objectionable enough to require striking the entire arbitration clause pale in comparison to the waivers set forth by Defendant D.R. Horton, Inc. in which every reasonably suitable remedy otherwise available at law is waived.

As an additional matter as to whether the Arbitration Clause is enforceable, Plaintiff asserts that because the only arbitration requirement is found in the contract of sale, and not the Deed (attached), under the Doctrine of Merger, the arbitration clause contained in the contract is null and void. South Carolina Law, like the general rule in other states, is clear that when there is a contract of sale and a subsequent deed, the subsequent deed becomes the contract. Accordingly, the Doctrine of Merger essentially means that the



if the language relied upon (in this case the Arbitration Clause) does not exist in the latter contract (the Deed), it is extinguished. As the Court has stated:

"The Doctrine of Merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution delivering and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract and generally the rights of the parties are fixed by their expressions as contained in the deed. (emphasis supplied). Wilson v. Landstrom, 281 SC 260, 315 S.E.2d 130 (S.C. Ct App 1984)."

Lastly, because the Defendant and the Plaintiffs are both residents of South Carolina, the construction at issue occurred in South Carolina, and any out-of-state transactional involvement is merely tangential, Plaintiffs contend that the Federal Arbitration Act does not apply and that the South Carolina Uniform Arbitration Act (§ 15-48-10) applies instead such that, for an additional reason beyond those above, the arbitration provisions in this matter further fail for the lack of conspicuousness as required under the South Carolina Act.

### CONCLUSION

Given that (1) the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions; (2) that the Deed at issue and which controls the relationship between the parties does not contain an arbitration provision; and (3) that the arbitration provisions fail to meet the South Carolina Uniform Arbitration Act, it is proper that Defendant's Motion to Compel Arbitration and to Stay Proceedings, or, Alternatively, to Dismiss is DENIED.

AND IT IS SO ORDERED this 7<sup>th</sup> day of April, 2011 at Orangeburg, South Carolina.



Honorable Edgar Warren Dickson  
Presiding Judge  
First Judicial Circuit

# Exhibit 8

2005 WL 5621497 (S.C.Com.Pl.) (Trial Order)  
Court of Common Pleas of South Carolina,  
Fifth Judicial Circuit.  
Richland County

Robert J. UPCHURCH, Plaintiff,  
v.  
D. R. HORTON, INC., Defendant.

No. 05 CP40 1231.  
September 28, 2005.

### Order

James R. Barber, III, S.C. Circuit Court Judge.

The Complaint in this action states tort causes of action for Trespass to Real Property, Negligent Misrepresentation, and Unfair Trade Practices arising out of the placement of a mound of dirt by the defendant on the rear of property owned by the Plaintiff without his consent or permission.

The placement of this dirt occurred after the sale and closing of property purchased from the defendant. The defendant seeks arbitration of this law suit based on language contained in the closed sales contract. The Plaintiff denies he agreed in the sales contract to arbitrate the tort causes of action contained in the Complaint of this action.

The defendant has refused to participate in discovery, including answering interrogatories, responding to requests to produce or participating in a noticed deposition and has filed a Motion to Quash Discovery. The Plaintiff has filed a Motion to Compel Discovery. The Plaintiff has also filed a Motion to Strike Defenses contained in the Defendant's Answer.

### Arbitration Motion

Arbitrability of a claim is an issue for judicial determination. *A T & T Techs, Inc. v. Communication Workers of America*, 475 U.S. 643, 106 S.Ct. 1415 (1986). The Court looks to see if the parties have consented to arbitrate the dispute because consent to arbitrate a dispute is a matter of contract. A party cannot be required to submit to arbitration a dispute that the party has not agreed to submit. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001).

The only consent to arbitrate is contained in the sales contract for the purchase of the property. The sale was completed prior to the defendant placing dirt on the Plaintiff's property. The first issue is whether there is a contract arbitration clause to consider. Paragraph 15 of the contract to purchase controls the survival of the arbitration agreement. Its plain language states:

“Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled.”

The sales contract was closed, Plaintiff moved into his home and two months later dirt was placed on his property. The arbitration clause did not survive the closing. Plaintiff is not complaining of anything either arising out of the contract or a condition or stipulation not fulfilled at the time of Closing.

For purposes of analysis, this Court will assume the arbitration clause survived the closing and will consider whether the factual allegations underlying the causes of action plead in the Complaint fall within the scope of the arbitration language contained in the sales contract.

The sales contract's arbitration clause contained in subparagraph d of paragraph 14 states in part:

..... The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

The underlying facts of this dispute are not covered by the language contained in (1), (2), (3), or (4) of the above clause.

The defendant's only basis for compelling arbitration is the preamble language of the above quoted paragraph which reads:

"Purchaser and Seller each agree that to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves".

The S.C. Supreme Court has held that "[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained" *Zabinski v Bright Acres Assoc.* 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001). The "significant relationship" test is based on whether the particular tort claim is so interwoven with the contract that it would not stand alone. If the tort and contract claims are interwoven, both are arbitrable. On the other hand, if the tort claim is completely independent of the contract and could be maintained without reference to the contract, the tort claim is not arbitrable. See: *Id.* at 598 n. 4, 553 S.E.2d at 119 n. 4.

The only relationship between the parties is the sales contract prepared by the defendant for the purchase of the home and site which was signed on January 5, 2004. It was closed by George Nickolson, Esquire on June 7, 2004. Plaintiff was given a deed to the property and the single business relationship between the parties was ended as of June 7, 2004.

Approximately two months later, dirt was dumped on Plaintiff's property on August 2, 2004. It is alleged that the dirt was dumped by agents of D.R. Horton, Inc. and additional dumping of dirt and traveling over plaintiff's property with bulldozers has continued as recently as April 27, 2005 and May 2, 2005. Because of this dumping and trespass, a Summons and Complaint was filed and served. The factual underpinning of the Plaintiff's causes of action are not based on the sales contract.

The Complaint's first cause of action alleges the intentional act of dumping dirt on Plaintiff's property without his permission or knowledge. Trespass and conversion of Plaintiff's property is not an act contemplated by the single business transaction between the parties and both the cause of action and damages are completely independent of and do not arise under the sales contract. This is also true of the second and third causes of action.

The negligent failure to disclose the planned dumping of dirt on property sold to Plaintiff involves damages as a result of the sale; if the facts show the dumping was planned prior to June 7, 2004. This cause of action does not arise out of the terms of the contract, but from the actions of D.R. Horton in dumping dirt and trespassing. This cause of action is independent of the contract.

The third cause of action, Unfair Trade Practices, is based on the placement of dirt on plaintiff's property and the resultant loss of use of his property. The cause of action and damages are completely independent of the contract to purchase the home and do not arise under the sales contract.

It is clear that this dispute involves intentional torts after the closing of the sales contract and does not arise out of the contract. A single sales contract transaction does not meet the test of a significant relationship between the trespass and the contract between the parties.

A simple analysis which shows the error of defendant's argument that every dispute between the parties must be sent to arbitration is to reverse the parties' positions and analyze the following facts. Assume the plaintiff had arranged to place several tons of dirt on the front lawn of D. R. Horton's model home to prevent access to the front door and rode a motorcycle over the mound on a regular basis. D.R. Horton, Inc. would not take the position they have to arbitrate this intentional tort. They could file either a Complaint in common pleas to seek an injunction and damages for the intentional tort of trespass or seek criminal charges for the trespass. If this is not a correct analysis of their options, the arbitration clause written by D.R. Horton, Inc. would be unconscionable "as so oppressive that no reasonable person would make them and no fair and honest person would accept them". *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (Sup Ct 1996)

By the same token, the defendant's act of dumping dirt on plaintiff's property without permission, continuing to dump dirt and drive bulldozers over his property, and allowing motorcycles and four-wheelers to "play" on the mound are not acts contemplated in the arbitration clause of the sales contract. Any argument that trespass is contemplated by the specific language of the preamble to the arbitration clause is wrong. Otherwise, the clause would be unconscionable and have to be stricken from the contract. The parties did not consent to have trespass, conversion, assault and battery and other intentional acts covered by the preamble language. D.R. Horton's contract contained examples of what was covered by arbitration and intentional acts were not included in that language. Defendant has not proved the Plaintiff consented to arbitrate the facts alleged in the complaint.

Arbitration cannot be compelled when the underlying facts allege the defendant committed intentional torts that did not arise out of the contract. There is no significant relationship between the underlying facts of the causes of action and the sales contract. The case of *Chasserrau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 611 S.E.2d 305 (Ct.App. 2005) is illustrative. In *Chasserrau* the Plaintiff purchased a pool from the defendant. The sales contract had a broad arbitration clause. The plaintiff did not make the financing payments to the defendant in a timely manner and the defendant in the process of collecting the payments allegedly defamed the Plaintiff and engaged in harassing phone calls. A law suit was brought for the defamation and harassment and the circuit court refused to send the case to arbitration. The Court of Appeals agreed that the claims did not arise out of the contract "any more than would a claim that Darwin and other employees of Global-Sun Pools had gone to Chassereau's workplace and verbally or physically attached her" *Id.* at 611 S.E.2d 309. The court held the claims could be proved independently of the contract and did not have a significant relationship to the governing contract.

### ORDER

The Motion to stay or dismiss this action and force arbitration is denied. The arbitration clause did not survive the closing of the contract. Even assuming that the arbitration clause survived, it is clear the factual basis of the complaint arose after the closing of the Contract and there is no significant relationship to the sales contract.

Plaintiff's problem is with defendant's conduct, not with the contract. The unexpected tortious behavior of the Defendant could not have been foreseen when the sales contract was executed so there could not have been an agreement to arbitrate these facts.

The motion to compel discovery by Plaintiff is granted. The award of attorney fees to Plaintiff's attorney for filing a Motion to Compel is denied. The Plaintiff's Motion to strike from the Answer the first defense, fifth defense and thirteenth defense is granted. The Plaintiff's Motion to strike the other defenses is denied at this time subject to discovery being completed and the ruling on the validity of the seventh, eighth, ninth, and tenth defenses is reserved for the trial judge.

AND IT IS SO ORDERED

<<signature>>

James R. Barber, III

S.C. Circuit Court Judge

September 28, 2005

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# Exhibit 9

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2022-CP-08-02548

Andrew Tyler and Justin Vining, individually  
and on behalf of all others similarly situated,

Plaintiffs,

vs.

D.R. Horton, Inc.; Lowcountry Septic System  
Solutions, LLC; Coastal Soil and Wetland  
Services, LLC; Alternative Septic Services,  
LLC; Mountain Soils, Inc.; Horizon Landscape  
Management, Inc.; BR's Clearing & Grading,  
Inc.; Pleasant Places, Inc.; L. Dean Weaver  
Construction Co., Inc.; MV Engineering  
Consultants, LLC; and John Doe #1-5,

Defendants.

---

Lowcountry Septic System Solutions, LLC and  
Horizon Landscape Management, LLC,

Third-Party Plaintiffs,

vs.

JSR Clearing and Grading, LLC; Charleston  
Tractor Works, LLC; and Trinity Construction,  
LLC,

Third-Party Defendants.

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**PLAINTIFFS' MOTION TO  
RECONSIDER MARCH 4, 2024  
ORDER COMPELLING  
ARBITRATION AND STAYING  
DISCOVERY**

The above-named Plaintiffs move this Court to reconsider its March 4, 2024 Order granting D.R. Horton, Inc.'s ("Horton") Motions to Compel Arbitration and Stay Discovery ("March 4<sup>th</sup> Order") under Rule 59(e), SCRCP.

The compelling reasons as to why this Court should reconsider and amend its March 4<sup>th</sup> Order include:



- The March 4<sup>th</sup> Order impermissibly compels the subclass of downstream purchasers to arbitrate when there was no motion to compel the downstream owners to arbitrate and there is no arbitration agreement between these purchasers and Horton;
- The March 4<sup>th</sup> Order fails to address Plaintiffs' unconscionability argument and the fact that the arbitration agreement here mirrors the arbitration agreement in *Smith v. D.R. Horton*, 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013), *aff'd*, 417 S.C. 42, 49, 790 S.E.2d 1, 4, (2016) which our Supreme Court invalidated (along with three other trial courts considering the same agreement);
- The March 4<sup>th</sup> Order fails to address Plaintiffs' lack of mutuality argument and the plain language of Paragraph 15 which (a) restricts the purchasers' claims to arbitration while at the same time reserving Horton's own right to litigate; and (b) limits the authority of any arbitrator that may decide a "post-closing" dispute by disclaiming Horton's own liability in advance;
- The March 4<sup>th</sup> Order inaccurately characterizes Paragraph 15 "as the arbitration agreement" in its Background Section when the scope of Paragraph 15 cannot be determined without reference to Paragraph 14 and the Order further fails to address Plaintiff's argument that Paragraphs 14 and 15 are intertwined and inseverable from each other according to prevailing South Carolina precedent and public policy; and,
- The March 4<sup>th</sup> Order's sole ruling, that the "contrary intent exception" to the Merger Doctrine applies here, is incorrect, fails to recognize the presence of a survival clause in *Carlson* and the absence of one here, and improperly construes many inferences in the drafter's favor instead of Plaintiffs' favor.

In support of this Motion, Plaintiffs rely upon the Memorandum of Law accompanying the Motion and all exhibits thereto, the discovery exchanged to date by the parties, and such oral argument as the Court may permit.

[SIGNATURE PAGE TO FOLLOW]

JUSTIN O'TOOLE, LUCEY, P.A.

s/ Justin O'Toole Lucey

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*Attorneys for Plaintiffs*

Charleston, SC  
March 14, 2024

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Andrew Tyler and Justin Vining, individually  
and on behalf of all others similarly situated,

Plaintiffs,

VS.

D.R. Horton, Inc.; Lowcountry Septic System Solutions, LLC; Coastal Soil and Wetland Services, LLC; Alternative Septic Services, LLC; Mountain Soils, Inc.; Horizon Landscape Management, Inc.; BR's Clearing & Grading, Inc.; Pleasant Places, Inc.; L. Dean Weaver Construction Co., Inc.; MV Engineering Consultants, LLC; and John Doe #1-5,

Defendants.

Lowcountry Septic System Solutions, LLC and  
Horizon Landscape Management, LLC,

Third-Party Plaintiffs,

VS.

JSR Clearing and Grading, LLC; Charleston Tractor Works, LLC; and Trinity Construction, LLC,

### Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS  
) FOR THE NINTH JUDICIAL CIRCUIT  
) CASE NO.: 2022-CP-08-02548

**PLAINTIFFS' MEMORANDUM  
SUPPORTING THEIR MOTION TO  
RECONSIDER MARCH 4, 2024  
ORDER COMPELLING  
ARBITRATION AND STAYING  
DISCOVERY**

## INTRODUCTION

This Court must reconsider its March 4, 2024 Order Compelling Arbitration and Staying Discovery (“March 4<sup>th</sup> Order” or “Order”) because it does not answer the gateway question that is essential to all arbitrability determinations; it does not address many of Plaintiffs’ well-supported arguments; and, because its sole ruling – that the “contrary intent exception” to the Merger

Doctrine applies here – is incorrect and construes many inferences in the drafter’s favor, instead of Plaintiffs’ favor.

The March 4<sup>th</sup> Order does not address the threshold question that courts must address to compel arbitration – whether Horton’s arbitration agreement is valid. It is hornbook South Carolina law that arbitration cannot be compelled where (1) there is no arbitration agreement or (2) the arbitration agreement is unfair. Here, we have both situations: (1) a subclass of downstream purchasers who cannot be compelled to arbitrate because they have no arbitration agreement with Horton, assert no breach of express warranty claims (and who were not addressed in, or the subject of, Horton’s Motion); and (2) a subclass of original purchasers who cannot be compelled to arbitrate because, as found by our Supreme Court and many other courts, Horton’s arbitration agreement is unconscionable, inseverable, and unenforceable, for multiple reasons. The Court did not address these issues in its March 4<sup>th</sup> Order, instead focusing solely on the interplay between Horton’s arbitration agreement and the Merger Doctrine.

Additionally, the Court’s Merger Doctrine analysis is flawed in many respects:

- The Court overlooked a key distinction between this case and *Carlson*. *Carlson*’s purchase contract contained a survival clause that expressly indicated that the terms of contract “shall *not* be merged into or waived by the instruments at Closing” and “after closing” language that do not exist here;
- The Court discounted the “considerable skepticism” lens under which adhesive contracts such as these must be reviewed; and,
- The Court improperly weighed “evidence of intent” by construing inferences in Horton’s favor as opposed to Plaintiffs’ favor when both Plaintiffs’ capacity as the non-moving party and Horton’s capacity as the drafter dictated otherwise.

In sum, this Court's March 4<sup>th</sup> Order contains many procedural and substantive errors that will have far-reaching negative implications unless rectified by this Court.<sup>1</sup>

### **PERTINENT FACTS THE COURT OVERLOOKED<sup>2</sup>**

#### **A. Downstream Purchasers Are Not Subject to Arbitration**

The Court did not differentiate between the two sets of purchasers here – the downstream purchasers, like Vining, who did not contract directly with Horton; and the original purchasers, like Tyler, who did contract directly with Horton. *Compare* (Ex. A) (Tyler Purchase Contract) *with* (Ex. B) (Vining Purchase Contract). Downstream purchasers plainly were not within the scope of Horton's Motion and plainly are not subject to arbitration agreements to which they were not party. Nor were they availing themselves of the benefits of a predecessor's contract that was restricted to arbitration. The complaint sounds in common law claims, negligence, and implied warranty; no contractual rights or benefits (or warranties) are asserted. All claims brought by this subclass must proceed. The only "arbitration agreement" at issue is the one provided to the original purchaser subclass in their Horton purchase contracts.

#### **B. Horton's Arbitration Agreement is Part of its Adhesive Purchase Contract**

This Court did not acknowledge that Horton, "America's No. #1 Homebuilder", is a sophisticated builder that presented its form contract to these buyers on a "take it or leave it basis": that the contract's format, content, and material terms were all pre-determined, and not subject to

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<sup>1</sup> Horton will be able to immediately appeal an Amended Order issued by this Court that declines to compel arbitration; however, these homeowners may not have that same opportunity should this Court fail to revisit and amend its March 4<sup>th</sup> Order.

<sup>2</sup> Plaintiffs fully incorporate their Memorandum Opposing Horton's Motion to Stay and Compel Arbitration filed on December 7, 2023 ("Opposing Memo") by reference. Plaintiff's Opposing Memo provides the case's background, procedural history, and quotes the language of Horton's arbitration agreement verbatim whereas this Fact Section focuses on factual omissions this Court should correct upon reconsideration.

modification or negotiation. In short, Horton’s contract is one of adhesion, properly subject to heightened scrutiny due to the disparity in bargaining position between Horton and these homeowners. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (citations omitted) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)) (“[C]ourts tend to look upon [adhesion contracts] with ‘considerable skepticism’ because they give rise to ‘considerable doubt that any true agreement ever existed to submit disputes to arbitration.’ In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication”).

**C. Paragraphs 14 and 15 are “Intertwined”**

The Court also overlooked that Paragraph 15 in these homeowners’ purchase contracts does not stand alone – it expressly references “Section 14 above”, which means that Paragraph 14 and Paragraph 15 must be read together to comprise the arbitration agreement in the Tyler contract. (Ex. A, paras. 14-15). Multiple courts, including our Supreme Court, have reached this same conclusion. *Smith*, 417 S.C. at 48, 790 S.E.2d at 4 (“all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.”); *see also* (Zitek Order Denying Arbitration attached as Exhibit C); (Baddorf Order Denying Arbitration attached as Exhibit D). In fact, by Paragraph 15’s express terms, one cannot determine the scope of Paragraph 15 without incorporating Paragraph 14.

#### **D. Paragraphs 14 and 15 Both Contain Unfair Terms**

Properly read together, Paragraphs 14 and 15 seek to eliminate all meaningful avenues of recovery for these homeowners by (1) disclaiming all implied warranties and (2) relieving Horton of all liability for “monetary damages of any kind”. (Ex. A, paras. 14-15). The South Carolina courts cited above have rightly found this language unconscionable and unenforceable. *Id.* Paragraph 15, even considered in isolation, lacks mutuality and improperly limits the authority of any arbiter that may decide this case.

#### **E. Horton’s Arbitration Agreement Does Not Have a Survival Clause**

The March 4<sup>th</sup> Order also failed to address the critical fact that Horton wrote a survivability clause into some provisions of the Tyler contract, while choosing to omit a survivability clause from other provisions, including the arbitration provision. The correct interpretation is obvious: the contract clearly indicates which provisions survive closing, and the arbitration agreement is not among them.

#### **F. Horton’s Only Material Post-Closing Obligations is Governed by a Separate Warranty That Has a Separate Arbitration Provision**

The March 4<sup>th</sup> Order further failed to recognize that the terms in Horton’s purchase contract show that a different arbitration agreement governs post-closing disputes such as this one.

Paragraph 18(b), for example, indicates that Paragraph 15 only applies to pre-closing disputes:

**If [Horton] defaults on any of its obligations hereunder prior to Closing,**  
Purchaser’s sole and exclusive remedy shall be either: (a) to terminate this Agreement by written notice to [Horton]. . .or (b) to seek specific performance of this Agreement. . .by instituting mandatory binding arbitration of Purchaser’s claim of default and demand for specific performance [per Paragraph 15] (§ 18(b)).

Paragraphs 14(a) and 15 indicate that Horton will provide a separate warranty with a separate arbitration “at closing” that will govern “any” post-closing disputes:

**At Closing**, [Horton] shall execute and deliver the Purchaser. . .the RWC Warranty. . .Any disputes arising under [the RWC Warranty]. . .**shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures of that warranty program.** (§§ 14(a), 15).

Paragraph 14(c) then emphasizes that Horton’s “after closing” obligation is limited to this separate warranty and the homeowners’ deeds.

**After Closing**, [Horton] shall have **no liability or obligation** to Purchaser. . .**except as provided** in [the Warranties]. . .**and in [Horton’s] deed to purchaser.** (§ 14(c)).

#### **G. Horton Did Not Move to Compel Arbitration Under This Separate Warranty**

Finally, the March 4<sup>th</sup> Order overlooked the fact that Horton did not move to compel arbitration under these warranties’ arbitration provisions.

This Court should reconsider its March 4<sup>th</sup> Order to amend its factual findings in line with these important points.

### **STANDARD OF REVIEW**

South Carolina courts should reconsider their decisions, pursuant to Rule 59(e), SCRC, when “**the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue**”. *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Because the March 4<sup>th</sup> Order exhibits such shortcomings, the Plaintiffs respectfully ask the Court to reconsider.

### **ARGUMENT**

This Court needs to correct the procedural and substantive errors in its March 4<sup>th</sup> Order by issuing an Amended Order that (1) recognizes that the downstream owners were not within the scope of Horton’s Motion and for good reason, as they are not party to any arbitration agreement, nor do their claims arise out of a predecessor’s arbitration contract; (2) includes a validity analysis of the arbitration provision in Tyler’s purchase contract; (3) recognizes the enormous distinction



between *Carlson*'s contract that contained a general survival clause, and Tyler's which does not; and (4) concludes with a ruling that arbitration cannot be compelled here as to original purchasers because they do not have valid arbitration agreements according to prevailing South Carolina jurisprudence.

**A. This Court Erred in Seeming to Compel Downstream Purchasers Such as Plaintiff Vining to Arbitrate**

The March 4<sup>th</sup> Order inaccurately characterizes Paragraph 15 as the arbitration agreement "for both parties". (Order, p. 2). As noted above, Plaintiff Vining, is a downstream purchaser who has no contract with Horton. Horton acknowledged this fact. (Supporting Memo, p. 1) ("Plaintiff Justin Vining, is a subsequent purchaser **and is not subject to the arbitration agreements made by homeowners who purchased their homes from D.R. Horton.**") (emphasis added). Horton, with no contract between itself and these downstream purchasers, has no arbitration agreement to compel as to these purchasers.

The Court of Appeals' recent decision in *Dixon v. Pattee*, 2023WL8792809, at \*5, 10-11 (Ct. App. 2023) does not change this outcome, contrary to Horton's suggestion otherwise in its proposed arbitration order. (Proposed Order, pp. 1, 19).<sup>3</sup> In *Dixon*, the developer defendant relied on arbitration clauses contained in both purchase contracts and post-closing warranties, the latter of which was allegedly transferred to the Dixons as subsequent purchasers. The Dixons asserted a breach of express warranty claim apparently under the transferred warranty, prompting the court to find that arbitration was warranted, "because [the Dixons] causes of action are dependent upon the [warranties] that require arbitration" *Id.* at \*10.

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<sup>3</sup> Horton apparently attempted to expand the scope of its filed motion in its unfiled proposed order. That is not proper motions practice.

Here, Horton does not rely on its post-closing warranties and Plaintiffs do not assert a breach of express warranty claim: the *Dixon* ruling has no application to the matter at hand. The simple fact is that in no scenario can these downstream purchasers—neither signatories to the purchase contract, nor assertors of a breach of express warranty claims—be compelled to arbitration. This Court erred in suggesting otherwise and must correct its error.

**B. The Court Erred in Failing to Consider Whether the Arbitration Provision Was Unconscionable, Inseverable, and Unenforceable**

The Court’s second error is its failure to address the validity of Tyler’s arbitration agreement. Plaintiffs challenged its validity on three grounds:

- (1) The arbitration agreement is unconscionable under *Smith* because it mirrors the same agreement that our Supreme Court invalidated in that case;
- (2) The arbitration “agreement” lacks mutuality and improperly limits the arbiter’s authority; and,
- (3) The arbitration “agreement” violates South Carolina public policy under *Damico*.

The Court must reconsider its March 4<sup>th</sup> Order to account for these challenges, because the question of whether a valid arbitration agreement exists must, of course, be answered before arbitration can be compelled. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (noting the arbitrability determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement); *see also Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) (“The question of arbitrability of a claim is an issue for the courts.”).

***1. The Arbitration Provision in Tyler’s Purchase Contract Contains the Same Oppressive Terms Already Found Unconscionable by Our Supreme Court and Many Courts***

This Court should reconsider its March 4<sup>th</sup> Order and issue an Amended Order finding 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. *See, e.g., Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (“[U]nconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. . .”).

Here, like *Smith*, there is no evidence that Tyler “enjoyed a substantially stronger bargaining position against Horton than the average homebuyer” or that Tyler “was represented by independent counsel.” *Id.* at 48, 790 S.E.2d at 4. Tyler is an unsophisticated purchaser, whereas Horton is a sophisticated developer that annually constructs nearly 80,000 homes throughout the United States. *Id.*; *see also* (Horton Website attached to Pl. Memo. Opp. Arbitration as Ex. G); *Mirmow v. Great Southern Homes, Inc.*, 2019 WL 7611604, \*2 (S.C. Com. Pl.) (Judge Keesley Dec. 9, 2019 Order Denying Arbitration Motion) (Lexington County) (attached to Pl. Memo. Opp. Arbitration as Ex. H). Thus, Tyler is “not a substantial business concern of Horton” because Tyler does “not comprise a large portion of Horton’s clientele.” *Id.* at 48, 790 S.E.2d at 4. As such, this Court should find Tyler “lacked a meaningful choice in [his] ability to negotiate the arbitration clause.” *Id.*

Also, like *Smith*, Paragraph 15 expressly references Paragraph 14 (which describes the Warranties and includes Horton’s disclaimers of any and all implied warranties and monetary damages of any kind):

**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. . .**

This cross-referencing “intertwines” these paragraphs “so as to constitute a single arbitration provision.” *Id.* at 49, 790 S.E.2d at 4 (emphasis added). As stated by Judge Cordell Maddox when confronted with the same Horton arbitration provision:

[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.

(Ex. C) (Zitek Order) (emphasis added); (Ex. D) (Baddorf Order) (“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).

The only pertinent differences between *Smith* and this case are that, in the matter at hand, Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and (2) its disclaimers and limitations from Paragraph 14(i) to Paragraph 14(c). Horton made these changes, presumably, in a misguided and cynical effort to circumvent *Smith*’s holding, and to avail itself, instead, of *Prima Paint*’s holding. However, the relocation of these provisions does not negate *Smith*’s applicability. The *Smith* court found that *Prima Paint* does not preclude courts from considering provisions that are “referenced by” an express arbitration provision.<sup>4</sup>

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<sup>4</sup> *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 Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967). So long as there is a challenge to the arbitration provision, as is the case here, courts can decide the “arbitrability” issue, and, in doing so, can also consider both the arbitration provision and its affiliated provisions. As Justice Toal aptly explained in the oral arguments for *Smith*, *Prima Paint* “simply says you have to look at the arbitration provision” and “does not stand for the proposition that one can cherry pick out” certain language of a provision one drafted and which includes express references to other provisions.

The below comparison of Smith’s paragraphs to Tyler’s paragraphs shows that the references and disclaimers considered by the *Smith* court are the same as here:

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Tyler's Paragraph 15:</p> <p>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) <b><u>the Limited Warranty pursuant to Section 14 above. . . Any disputes arising under the [RWC] Warranty. . .shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures and rules of that Warranty. . .</u></b></p>                                                      | <p>Smith's Paragraph 14(g):</p> <p>Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) <b><u>Seller's performance under any warranty contained in this Agreement. . .If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty. . .control.</u></b></p> |
| <p>Tyler's Paragraph 14(c):</p> <p>The limited warranty given to purchase by seller pursuant to subsection 14(a) above <b><u>is to the exclusion</u></b> of all other warranties, expressed or implied, and <b><u>Seller hereby disclaims any and all such other warranties</u></b>, express or implied, including but not limited to any warranty of <b><u>habitability</u></b>, merchantability or fitness for a particular purpose. . . <b><u>Seller shall not be liable for any reason under any circumstances to purchaser or anyone claiming through purchaser for monetary damages of any kind</u></b>, including secondary, consequential, punitive, general, special or indirect damages.</p> | <p>Smith's Paragraph 14(i):</p> <p><b><u>Except for</u></b> the RWC Warranty. . .Title Warranties, and. . .any warranties imposed by law, which cannot be disclaimed, Seller makes no other warranty of any kind. <b><u>All other such warranties are hereby disclaimed.</u></b> . .Seller makes no warranty as to merchantability or fitness for a particular purpose, either express or implied. . .<b><u>Seller shall not be liable for monetary damages of any kind</u></b>, including secondary, consequential, punitive, general, special or indirect damages.</p>                                                                                                  |

Analytically, there is no basis for this Court to diverge from *Smith*'s holding: the cases involve materially identical disclaimers, neither positioned "within" the nominal arbitration provision. Respectfully, the Court should amend its Order accordingly.

## 2. *Severing Paragraphs 14 and 15 Would Violate Contract Interpretation Principles and Public Policy*

To sever Paragraph 15 from Paragraph 14 would contravene both established contract interpretation law and recognized public policy principles. In a recent case involving similar subject matter, *Damico v. Lennar Carolinas*, 437 S.C. 596, 619-622, 879 S.E.2d 746, 759-760 (2022), Justice Kittredge summarized the contract interpretation and public policy considerations that apply here:

We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, “agreed upon” parties to the arbitration proceeding. **We decline to blue-pencil that provision. . .**

Blue-pencilling an agreement is, of course, within the Court’s discretion. **Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement.** See *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (“A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” (citation omitted)); cf. *id.* at 579, 762 S.E.2d at 701 (noting even when parties manifest an intent to be bound, an indefinite material term may invalidate the agreement (quoting 1 Corbin on Contracts § 2.8 (Rev. ed. 1993))); *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 478 (Fla. 2011) (“Further, if the [unconscionable] provision were severed, the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other—particularly[ ] when those legal promises are viewed through the eyes of the contracting parties.” (internal quotation marks omitted) (internal citation omitted)). Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.

**There are two additional, important considerations in this case that bear on severability.** The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. **As mentioned above, adhesion contracts “are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties.”** *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted); see also 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9. **In particular, when a contract of adhesion is at issue, “there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.”** *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted).

Similarly, given the adhesive nature of the contract here, we find it “considerably doubtful” any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) (Petitioners) had no hand in drafting or negotiating any of the language of the arbitration agreement. See *Doe*, 430 S.C. at 615, 846 S.E.2d at 880 (explaining that when exercising its discretion to sever portions of the agreement, a court must be guided by the parties’ intent).

**The second additional consideration of which we take note is that this contract involves a consumer transaction.** See *Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (placing emphasis on the need for a case-by-case analysis in cases involving consumer transactions so as to address the unique circumstances inherent in those types of contacts). **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.** *Kennedy*, 299 S.C. at 341–44, 384 S.E.2d at 734–36 (rejecting a result in which “a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions”; and explaining that in the past, when the Court is confronted with a new scenario “not properly disposed of by our present set of rules,” it “[o]nce more[ ] respond[s] by expanding our rules to provide the innocent buyer with protection” (citing *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976))). **As we stated over thirty years ago, it is “intolerable to allow builders to place defective and inferior construction into the stream of commerce.”** *Id.* at 344, 384 S.E.2d at 736 (citing *Rogers v. Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968)). 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. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).

**A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole.** 17A Am. Jur. 2d *Contracts* § 238 (Supp. 2021) (citation omitted). Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); see also 17A Am. Jur. 2d *Contracts* § 238 (2016) (explaining courts may consider, *inter alia*, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

**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.**

Like the national homebuilder in *Damico*, Horton has inserted a severability clause into a separate paragraph at the end of the Tyler contract, in the hope that the court will sever the many unconscionable terms in its one-sided contract that a homeowner has the temerity to contest. This cynical conduct should not be rewarded by South Carolina’s courts. As Justice Kittredge made clear in *Damico*: **“[Seller] furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause.** We refuse to reward such misconduct, particularly in a home construction setting.” *Id.* at 624, 844 S.E.2d at 762 (emphasis added).

This Court should do the same and refuse to rescue Horton from its own overbearing, unfair, and unconscionable contract terms. Horton has continually had similar arbitration provisions struck down by South Carolina courts. In fact, this **same** arbitration and severability provision were struck down by Judge Gravely last year in the *Baddorf* case. (Ex. D) (Baddorf Order).

### **3. *Mart* Does Not Control the Severability Analysis**

Horton tries to explain its intertwined arbitration paragraphs—and its unconscionable terms such as: limitations on the arbiter’s authority, drastic limitations of Horton’s liability, and preclusion of all monetary damages awardable against Horton—in mistaken reliance on our Supreme Court’s recent decision in *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 360 (2023). *Mart* is distinguishable because the trial court ruling involved two separate arbitration



clauses in two separate documents: Mart's purchase contract and Mart's post-closing Limited Warranty. The Court of Appeals 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;
- 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 lacking material terms."**

*Id.* 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.").

The 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 ("The standalone arbitration clause here differs from those found unconscionable in South Carolina cases considering adhesion contracts between sophisticated builders and new homeowners.") (citing *Smith*, 417 S.C. at 50, 790 S.E.2d at 5) (finding arbitration provision unconscionable and unenforceable where relief was left "to the whim of D.R. Horton while simultaneously allowing no monetary [recovery] when, as here, the repairs are simply inadequate.")). The arbitration clause here contains **the same** one-sided

and oppressive terms as the arbitration clause in the *Smith* case and should be rejected by this Court in an Amended Order that finds this clause is unconscionable, inseverable, and unenforceable.

**4. Paragraph 15 in Tyler’s Purchase Contract Lacks Mutuality and Improperly Limits the Arbiter’s Rights**

Furthermore, Paragraph 15 in Tyler’s purchase contract, “standing alone”, is unconscionable for two further reasons.

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

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

(Ex. A). This non-mutual arbitration obligation itself, on its face, is unconscionable. *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*, 39 F.Supp.2d 582 (D.S.C. 1998), *aff’d and remanded*, 173 F.3d 933, 940 (4th Cir. 1999) (finding the analysis must focus on whether the arbitration fosters a level playing field or a stacked deck).

Second, Horton seeks to limit the authority of any arbiter that may decide a “post-closing” dispute by disclaiming its own liability beforehand:

**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. . .**

(Ex. A). This language purports to prevent the arbiter from finding Horton liable for any type of monetary award; if given effect, it would prevent the arbitrator from making a fair, unbiased decision and is therefore invalid and unenforceable. *Damico*, 437 S.C. at 611, 879 S.E.2d at 755 (“In analyzing claims of unconscionability in the context of arbitration agreements. . . courts. . . focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”).

#### ***5. The Court Must Amend its Order to Find That Horton’s Arbitration Agreement is Invalid***

As shown above, this Court erred in compelling arbitration based on arbitration agreement that is invalid in multiple respects. The arbitration agreement, which consists of Paragraphs 14 and 15, is unconscionable under the precepts established by our Supreme Court in *Smith*. The only material difference between Smith’s purchase contract and Tyler’s purchase contract is that Horton inserted a general severability clause; however, this Court cannot utilize this severability clause because it is against public policy in this context, as found by our Supreme Court in *Damico*. Even read in isolation, Paragraph 15 would be unconscionable because it lacks mutuality and is geared toward a biased result. Thus, under any analysis the Court chooses, Tyler’s arbitration agreement is invalid and unenforceable, a result dictated by controlling, South Carolina authority; and this Court erred in failing to find the same in its March 4<sup>th</sup> Order, regardless of any Merger Doctrine impact.

#### **C. *Carlson’s Application of the Contrary Intent Exception is Clearly Distinguishable***

The Court erred in its merger analysis by exclusively relying upon *Carlson v. S.C. State Plastering*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). In *Carlson*, unlike here, the purchase contract contained a survival clause that expressly indicated that the terms of contract “shall

**not be merged into or waived by the instruments at Closing.**” *Id.* at 254, 743 S.E.2d at 870-71 (emphasis added). Failing to account for this key distinction, the March 4<sup>th</sup> Order instead focuses on *Carlson*’s conclusion that “clear and unambiguous terms” in the purchase contract supported a “finding that the parties did not intend for the arbitration to be merged into the deed at closing”. (Order, p. 4).

The basis for the *Carlson* court’s conclusion, however, was **the presence of the express survival clause and non-merger language** referenced above. *Carlson*’s analysis, when read in full, is:

In the instant case, we find the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed. The purchase agreement in the instant case expressly provides, **“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 states that **“[a]fter closing, every controversy or claim arising out of or relating to this Agreement ... shall be settled by binding arbitration.”** Pursuant to the clear and unambiguous terms of the purchase agreement, clear and convincing evidence supports a finding that the parties did not intend for the arbitration clause to be merged into the deed at closing.

*Carlson*, 404 S.C. at 261, 743 S.E.2d at 874 (emphasis added).

Here, Tyler’s purchase contract and Paragraph 15 do **not** contain this language, do not contain an applicable survival clause, and do not contain a non-merger clause, so the opposite result is required as found by both the *Zitek* and *Baddorf* courts. (Exs. C, D); *see also Tower S. Prop. Owners Ass’n v. Summey Bldg. Sys., Inc.*, 47 F.3d 1165 (4<sup>th</sup> Cir. 1995) (“If the deed does not include the waiver of the implied warranty, **a court should assume that the parties modified their agreement as to the seller’s liability, and it should nullify the waiver provision under the merger doctrine.**”) (emphasis added).

**D. This Court Erred in Compelling Arbitration Based Solely on the Contrary Intent Exception to the Merger Doctrine**

The Court's sole arbitration ruling, that the "contrary intent exception" to the "Merger Doctrine"<sup>5</sup> applies here, is incorrect because of these key *Carlson* distinctions and also because the Court's analysis construes many inferences in the drafter's favor, instead of Plaintiffs' favor.

***1. Tyler's Arbitration Agreement Does Not Contain a Survival Clause***

In fact, Horton drafted Tyler's purchase contract and quite clearly understood how to memorialize its intent that certain provisions were to survive closing. Horton specifically inserted separate survival sentences in specific, discrete contract provisions, clear evidence of Horton's intent to preserve only these provisions beyond closing:

- In Paragraph 9(b) about purchaser's indemnity obligations for inspections, Horton wrote: "Purchaser's indemnity of [Horton] pursuant to this Section shall survive Closing. . ."
- In Paragraph 9(d) about walk-through inspections, Horton wrote: "[Horton's] obligation to [correct Punch List items agreed upon prior to closing] shall survive closing."
- In Paragraph 10 about brokerage fees and commissions, Horton wrote: "[T]he provisions of this Section shall survive Closing. . ."

(Ex. A). The arbitration provision was not one of those provisions. The Court should have construed Horton's silence as to the survival of its arbitration agreement in Plaintiffs' favor and found that this silence constituted evidence that the parties did not intend merger.

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<sup>5</sup> The March 4<sup>th</sup> Order appears to confuse the various exceptions to the Merger Doctrine. To be clear, there are three exceptions: (1) the contrary intent exception; (2) the part performance exception; and (3) the collateral rights exception. Under the contrary intent exception, which the Court references in its Order, the Court must consider the totality of the evidence and inferences relating to the parties' intent which, in this case, weighs in favor of Plaintiff – not Horton.

## 2. *Horton's Post Closing Warranties Do Not Evidence Clear Intent*

The Court correctly stated that Tyler's purchase contract refers to the "ten-year limited warranty" and "manufacturer warranties" that Horton is supposed to provide to homeowners; however, these post-closing warranties also show that the parties did not intend for Paragraph 15 to apply to post-closing disputes. This is because these warranties **have their own, distinct arbitration provisions**. The plain language of Paragraph 15 proves this point:

. . .Any disputes arising under the limited warranty **shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures of that warranty program.**

(Ex. A) (emphasis added).

A comparison of Paragraph 15 to these post-closing warranties' arbitration agreements<sup>6</sup> also proves this point. The ten-year limited warranty which Horton "elected to provide" which these homes allegedly provides these homeowners "protection for ten full years of Home ownership". (Ex. E, p. 1).

The warranty also includes the following "condition" making it clear that the warranty is a separate agreement from the homeowners' purchase contracts:

This Limited Warranty is separate and apart from your contract and/or other sales agreements with your Builder. It cannot be affected, altered or amended in any way by any other agreement which you may have.

(Ex. E, p. 4) (emphasis added).

The warranty's arbitration provision goes on to lay out different rules, parameters, and restrictions which supposedly govern the "ten-year warranty period" after a homeowner closes on their home:

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<sup>6</sup> Horton failed to provide copies of these post-closing warranties to this Court, but the ten year, RWC limited warranty that Horton provided to some of these homeowners is attached as Exhibit E for the Court's reference.



*v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (emphasis added) (citations omitted) (“Ambiguous language in a contract, however, should be construed liberally and **interpreted strongly in favor of the non-drafting party**. ‘After all, the drafting party has the greater opportunity to prevent mistakes in meaning. **It is responsible for any ambiguity and should be the one to suffer from its shortcomings**.’”). The Court can easily correct its error by finding that Horton intended its limited warranty to control post-closing disputes as this is what Horton expressly stated in Paragraph 14(c) of its purchase contract:

**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 (*i.e.*, the Warranties which have their own arbitration provisions), IN SECTION 9(d) (*i.e.*, Punch List Repairs based on Walkthroughs); ABOVE AND IN SELLER'S DEED TO PURCHASER (which does not have an arbitration provision).

(Ex. A).

### ***3. Paragraph 16(f) Does Not Evidence Clear Intent***

The March 4<sup>th</sup> Order also misconstrues Paragraph 16(f) in Horton’s favor. Paragraph 16(f) contemplates what should occur *if* the house is *not* complete and the Court inferred that “potential” non-completion equated to non-merger. The Court should have drawn the opposite inference – that this “iffy” language could not clearly evidence intent one way or the other. Of course, the question is academic because all of these homes were completed before these homeowners closed on them<sup>9</sup> and, as explained above, Horton had no post-closing obligations (pursuant to its contract disclaimer) except for those detailed in the (a) separate warranties it provided which include a separate arbitration clause; (b) warranty-related walkthroughs; and (c) the homeowners deeds (which have no arbitration clause).

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<sup>9</sup> See (Ex. F) (Bridges’ certificates of occupancy and records of completed certificate of occupancy inspections).



**4. Horton Did Not Meet its Burden to Show That Paragraph 15 Was Clearly Intended to Survive Closing**

The March 4<sup>th</sup> Order’s ultimate merger error – its finding that the “terms of the [Purchase] Agreement clearly indicate that the parties did not intend for merger”<sup>10</sup> – arises from the Order’s failure to account for the totality of the foregoing evidence – *i.e.*, the lack of survivability clause in Tyler’s Purchase Contract arbitration agreement, the competing arbitration clauses in other warranties, Horton’s clear limitation of its post-closing obligations, Horton’s similar limitation of Paragraph 15’s applicability to only pre-closing disputes, the completion of these homes, and the missing arbitration agreement in these homeowners deeds. These facts weigh in favor of Plaintiffs when considered in their totality. **Further**, the Court failed to appreciate the standards under which adhesion contracts such as these must be reviewed.

Here, Horton did not, and cannot, meet its burden of proving the parties “clearly did not intend for merger”<sup>11</sup> when: (1) this adhesion contract is “subject to considerable skepticism. . . due to the disparity in bargaining positions of the parties”;<sup>12</sup> (2) any ambiguity or doubt as to this adhesive contract’s language must be construed against Horton as the drafter;<sup>13</sup> (3) there is no survival clause, “non-merger”, or “after closing” language like *Carlson* clearly evidencing intent;

<sup>10</sup> (Order, p. 5).

<sup>11</sup> *Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984) (emphasis added) (“[T]he party denying merger has the burden of proving by clear and convincing evidence that merger was not intended.”).

<sup>12</sup> *Damico v. Lennar Carolinas*, 437 S.C. 596, 619-622, 879 S.E.2d 746, 759-760 (2022) (emphasis added) (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007)) (“In particular, when a contract of adhesion is at issue, ‘there arises **considerable doubt** that any true agreement ever existed to submit disputes to arbitration.’”).

<sup>13</sup>*Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) (emphasis added) (“[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.”).

and (4) the six “merger was intended” points made by Plaintiffs in this Opposition outweigh the three “merger was not intended” points cited to by this Court in its March 4<sup>th</sup> Order.

### **CONCLUSION**

This Court should grant Plaintiffs’ Motion to Reconsider so that it can issue an Amended Order that finds (1) downstream purchasers in Bridges cannot be compelled to arbitrate because they never had an arbitration agreement with Horton and do not assert breach of express warranty claims; (2) original purchasers in Bridges cannot be compelled to arbitrate because their arbitration agreements are unconscionable, inseverable, and unenforceable; (3) *Carlson* is clearly distinguishable from this case due to lack of survival language in these original purchasers’ arbitration agreement; and (4) the totality of the evidence shows that Horton intended for the contract’s arbitration agreement to merge with these homeowners’ deeds, or alternatively, Horton cannot clearly show otherwise because of the ambiguities and evidentiary inferences that must be construed in Plaintiffs’ favor.

[SIGNATURE PAGE TO FOLLOW]

JUSTIN O'TOOLE, LUCEY, P.A.

s/ Justin O'Toole Lucey

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM AIKEN COUNTY

Court of Common Pleas  
The Honorable Patrick C. Fant

Case No. 2023-CP-02-01719

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Deborah Denise Harley,

Respondent,

v.

D.R. Horton, Inc. and Plumbing  
Solutions, LLC,

Defendants,

Of Whom D.R. Horton, Inc. is the

Appellant.

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NOTICE OF APPEAL

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D.R. Horton, Inc. (“Appellant”) appeals the Honorable Patrick C. Fant’s Order denying D.R. Horton’s Motion to Stay and Compel Arbitration, attached as **Exhibit 1**. Counsel for the Appellant received notice of entry of the Order on November 27, 2024.

[SIGNATURE ON FOLLOWING PAGE]

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# EXHIBIT 1

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

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

1. D.R. Horton's arbitration provision is unenforceable because it is unconscionable under *Smith* and contains essentially the same intertwined references and incorporates disclaimers of any and all implied warranties and monetary damages of any kind;
2. D.R. Horton's arbitration provision is not severable from other unconscionable terms and enforcing D.R. Horton's general severability clause would violate South Carolina public policy under *Damico*;
3. D.R. Horton's arbitration provision is unenforceable because it lacks mutuality and improperly limits the arbitrator's rights;

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

## PERTINENT FACTS

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

**A. Harley's Purchase Contract and Deed**

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

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

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

(Purchase Contract).

Paragraph 14 describes the Warranties, wrongfully attempts to disclaim all implied warranties,<sup>3</sup> and unconscionably attempts to relieve D.R. Horton of all liability for “monetary damages of any kind”:

#### 14. WARRANTIES AND DISCLAIMER.

- a. **Ten-Year Limited Warranty.** Seller shall provide Buyer with a written, ten-year limited warranty on the House administered by Residential Warranty Corporation (“RWC”) which shall be effective as of the Closing Date. The terms and conditions of, and exclusions from, the ten-year limited warranty shall be as set forth in that document published by RWC, entitled “LIMITED WARRANTY, 10 YEAR LIMITED WARRANTY FOR NEW HOMES,” and referred to herein as the “Limited Warranty”. At Closing, Seller shall deliver to Buyer the documentation necessary for Buyer to obtain the actual Limited Warranty for the House from RWC.
- b. **Manufacturers’ Warranties.** At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the house.
- c. **Disclaimer and Limitation on Seller's Liability.** THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14(a) ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. . . AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR 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

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



OR INDIRECT DAMAGES.

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

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

**B. Procedural Background**

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

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

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

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

### **THE ARBITRATION AGREEMENT AT ISSUE**

#### **I. The Arbitration Provision is Unenforceable Because it is Unconscionable**

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

##### **A. Plaintiff Lacked a Meaningful Choice**

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

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

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

**B. The Arbitration Provision Contains Oppressive Terms**

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

**1. The Arbitration Provision Includes Paragraphs 14 and 15**

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

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

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

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

<sup>7</sup> Otherwise, the parties did not come to an agreement on arbitration, invalidating the arbitration provision all together.

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

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

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

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

We conclude the arbitration clause. . .should not be severed from the numerous unconscionable provisions and particularly Horton’s attempt to waive any seller liability for “monetary damages of any kind. . .”

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

<sup>9</sup> *See* (Pl. Memo. Opposing Arb., p. 9) (charts showing similarities between *Smith* and *Harley*).

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

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

We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon" parties to the arbitration proceeding. We decline to blue-pencil that provision. . .

Blue-pencilling an agreement is, of course, within the Court's discretion. Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement. . . Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.

There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. . .

The second additional consideration of which we take note is that this contract involves a consumer transaction. . . More specifically, this contract involves the purchase of a new home. South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. . . As we stated over thirty years ago, it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce." . . .

Generally, courts will not enforce contracts that violate public policy. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).

A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. . .

Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically

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

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

This Court, like *Smith*, finds that Paragraph 15 is not severable from Paragraph 14 and, like *Damico*, refuses to enforce Horton’s general severability clause to “rescue” D.R. Horton from the consequences of its unconscionable drafting as a matter of public policy. *Id.*<sup>10</sup>

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

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

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

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

---

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

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

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

AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR 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. . .

(Purchase Contract).

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

**CONCLUSION**

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

AND IT IS SO ORDERED!

**Electronic Signature of Judge Fant to Follow**

Aiken, South Carolina

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Aiken Common Pleas

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

So Ordered

Patrick C. Fant, III

Electronically signed on 2024-11-27 10:06:21 page 12 of 12

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STATE OF SOUTH CAROLINA      **TRANSCRIPT OF RECORD**

COUNTY OF AIKEN      CASE NO.:2023-CP-02-01719

**\*\*TRANSCRIPTION OF WEBEX VIDEO\*\***

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September 4, 2024

**BEFORE:**    The Honorable Patrick C. Fant, III

-----  
DEBORAH DENISE HARLEY,

Plaintiff,

vs.

D.R. HORTON, INC., and PLUMBING SOLUTIONS, LLC, of  
whom D.R. HORTON, INC., is the Appellant,

Defendants.  
-----

APPEARANCES:

Robert T. Lyles, Esq.  
Appearing for the Plaintiff.

Kimila L. Wooten, Esq.  
Appearing for the Defendant D.R. Horton.

Recorded by:    WebEx Video Courtroom

Transcriber:    Natalie Dahl, RPR  
SC Official Court Reporter

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## EXHIBITS

(NONE)

### Transcript Legend

|                |                                                                      |
|----------------|----------------------------------------------------------------------|
| Dash (--)      | Indicates an interruption in speech                                  |
| Ellipses (...) | Indicates trailing off in speech                                     |
| Phonetic (ph)  | Indicates a phonetic word                                            |
| (Inaudible)    | Indicates word(s) are not discernable due to audio recording quality |

**P R O C E E D I N G S**

1 THE COURT: Okay. Case No. 2023-CP-02-01719.

2 We are here on Defendant D.R. Horton, Inc., motion  
3 to stay and compel arbitration.

4 Ms. Wooten, I'll hear from you.

5 MS. WOOTEN: Yes, Your Honor. Kim Wooten  
6 here on behalf of D.R. Horton in this case.

7 As Your Honor, may -- or I'm sure you already  
8 do because you've looked at the briefs here, but  
9 this is a one-home construction defect case. And  
10 the one thing that we would ask Your Honor -- I  
11 know you have read the briefs, but we filed our  
12 brief in accordance with what we believe were Your  
13 Honor's preference of 72 hours. We got a brief  
14 yesterday afternoon from the plaintiffs in the  
15 case, and we would just request that if Your Honor  
16 is -- is inclined to grant -- I mean to deny our  
17 motion, that we would be given some additional time  
18 to respond to that since it was not filed within  
19 the preference time.

20 But, anyway, to go forward with the facts of  
21 the case, just briefly, in this case, again, it is  
22 a one-home case that -- in which the plaintiff has  
23 alleged a myriad of defects similar to what the  
24 plaintiffs usually allege in these cases, which is  
25

1 building envelope defects, windows, doors, and et  
2 cetera.

3 In these cases, there has been a progression,  
4 Your Honor, of how these cases have been handled by  
5 the South Carolina courts over the years. First of  
6 all, the FAA applies in this case, the Federal  
7 Arbitration Act applies in this case. The South  
8 Carolina courts many years ago determined that  
9 construction cases are Federal Arbitration Act  
10 cases because they necessarily involve interstate  
11 commerce in some way or another.

12 And so the way that the courts have gone  
13 about addressing that is to say that even if the  
14 South Carolina Arbitration Act is not met, that the  
15 Federal Arbitration Act is going to apply in  
16 construction cases to govern those cases.

17 In this particular case, as we said in our  
18 brief, we have complied with both Acts. Our  
19 contract that we attached to our brief, the  
20 purchase contract that is in question here,  
21 contains the requisite statutory language at the  
22 top of the contract. It is conspicuous in bold and  
23 in capital letters as the statute requires. So  
24 both the South Carolina Act and the Federal  
25 Arbitration Act has been met here.

1           Now, the standard under the Federal  
2 Arbitration Act is that courts must stay a  
3 proceeding if the Court determines that, one, a  
4 valid arbitration provision exists; and, two, that  
5 the claims that are alleged in the case fall under  
6 the (inaudible) of the arbitration clause.

7           Here, we have both, and I'll discuss why the  
8 plaintiff's arguments about our arbitration  
9 provision are incorrect and don't apply in this  
10 case. But, first, I wanted to note both South  
11 Carolina courts and the Federal Arbitration Act  
12 have a heavy presumption in favor of arbitration,  
13 and that any type of arbitration clause, such as we  
14 have in this case -- if the Court will note, our  
15 arbitration clause in this case says that  
16 purchasers and sellers agree to submit all disputes  
17 to arbitration, and the courts have held, as you  
18 can see in the case law in our briefs, that this is  
19 -- means that the arbitration clause will be  
20 construed broadly.

21           So it's always been Federal and South  
22 Carolina policy to favor arbitration, and to find  
23 in favor of arbitration. Somewhere along the way,  
24 there were a few outlier cases that have come along  
25 which have involved construction cases.

1 THE COURT: Merger.

2 MS. WOOTEN: Merger is one, that's right,  
3 Your Honor.

4 But before that, *Smith v. D.R. Horton*, at  
5 that time the warranties and the arbitration clause  
6 were intertwined with one another. And so after  
7 that case, what happened is Horton and all of the  
8 larger builders who had used that type of clause  
9 changed their clauses to separate the arbitration  
10 clause from the warranty clause, which is important  
11 in this particular instance, because when the  
12 arbitration clause is separated and stands alone,  
13 it clearly covers the disputes in this case.

14 The arbitration clause here, also under the  
15 *Smith* case, is not oppressive. It binds both of  
16 the parties. It has a location in the plaintiff's  
17 home county. It provides for expedited hearing  
18 schedule. And AAA rules apply to all parties, and  
19 it also has a provision that allows attorney's fees  
20 against either party, against the builder or  
21 against the plaintiff.

22 So the concerns in *D.R. Horton* -- or *Smith v.*  
23 *D.R. Horton* certainly have been assuaged by the new  
24 arbitration clause that we have in this case. So  
25 after *Smith*, everything went along as it had been

1 before. Normally, what used to happen in these  
2 cases, is that the cases would get filed, and the  
3 parties would talk about it, and we would show them  
4 the arbitration clause, and the parties would just  
5 agree.

6 So, then, the Damico case came along. And in  
7 that case -- that is a case involving Lennar, an  
8 opinion written by Justice Kittredge, where the  
9 builder had a clause that a lot of builders were  
10 using during this time, and that clause provided  
11 that arbitration would be at the sole election of  
12 the builder, and did not require -- or did not give  
13 the opportunity for the homeowner to back out of  
14 arbitration if the builder decided that it wanted  
15 arbitration, and did not allow the homeowner to  
16 contest litigation if the builder decided on that.

17 So when Damico came out, plaintiffs started  
18 making different arguments that, oh, arbitration is  
19 not favored now, and this merger argument came up.  
20 As Your Honor probably has already gathered, there  
21 is no binding precedent with this merger argument.  
22 I think the argument is absurd, myself. I don't  
23 see how an arbitration clause merges into a deed.  
24 You would not expect a deed to have any language in  
25 it about an arbitration clause, and that's why the



1 only appellant court case in the state that has  
2 addressed the merger issue held that there was no  
3 merger.

4 Of course the Court, I'm sure, has looked at  
5 the general law of merger, but the exception that  
6 applies here of language merging into a deed when  
7 you have a home purchase, is that you can't have a  
8 merger if it's clear from the language of the  
9 document that merger was not intended. And in this  
10 case, as we put in our brief, there are a number of  
11 contract provisions that show that the parties here  
12 did not intend for merger to take place.

13 For example, the purchase agreement contains  
14 a 10-year warranty on some of the elements of the  
15 home. It contains a complete one-year warranty on  
16 the home. It also says that if the home doesn't  
17 close within two years, then there is certain  
18 remedies that are available to the parties. So,  
19 clearly, the parties did not intend that the  
20 arbitration clause here was going to be merged into  
21 a deed. They wouldn't have put an arbitration  
22 clause in there that said, you know, all  
23 disputes -- any and all disputes about this  
24 document or this home would be referred to  
25 arbitration.

1           We don't think argument of merger has any  
2 merit, and the only time that any courts have  
3 granted or have denied a motion to compel  
4 arbitration on those grounds were prior to the Mart  
5 (phonetic) case being decided. The Mart case and  
6 the *Dixon v. Pattee* case -- we did not cite Dixon  
7 in this particular brief because Dixon actually has  
8 to do with subsequent purchasers, but both cases  
9 came out well after courts had started buying this  
10 merger argument, and a few circuit courts had ruled  
11 in favor of the merger argument.

12           Mart (inaudible) that a Court must not read  
13 the language of the warranty together with that of  
14 the arbitration clause, must separate the amount.  
15 And then Mart went on to hold that arbitration is  
16 still favored in this case when you -- when you  
17 have a clause that is not intertwined, as Smith  
18 was; that is not a sole opposition clause, as was  
19 the case in *Damico*; and was not -- did not try to  
20 shorten the statute of limitations, as in the  
21 *Huskins* case, then you have to support the  
22 arbitration clause, and the courts are to grant  
23 arbitration.

24           The Mart case provides a lot of guidance in  
25 that regard as to when the Court should and should

1 not grant arbitration. We believe that Mart and  
2 *Dixon v. Pattee* are two cases that are showing that  
3 the Court did not want circuit courts to go  
4 backward in time and now not favor arbitration, and  
5 consider arguments, such as merger, that are simply  
6 nonsensical when you look at the law.

7 So, Your Honor, for those reasons, we would  
8 request that you look at Judge Goodstein's order.  
9 She made her order -- we've attached it -- she made  
10 her order after the Mart and Dixon cases were  
11 decided. She was aware of the Mart case when we  
12 went into the argument. She granted our motion to  
13 stay and compel arbitration, and we believe that  
14 that's going to be what the appellant courts in  
15 this state are going to now support.

16 So we ask humbly that the Court grant our  
17 motion to stay and compel arbitration in this case.  
18 And we also wish to thank the Court and Mr. Lyles  
19 for allowing me to appear virtually today due to my  
20 illness.

21 THE COURT: Thank you. And you have that  
22 attached, I think, the Goodstein in our other case?

23 MS. WOOTEN: Yes, sir.

24 THE COURT: I believe you had previously  
25 attached that.

1           Okay, Mr. Lyles.

2           MR. LYLES:   Good morning, Your Honor.   Good  
3 to see you.

4           THE COURT:   It's nothing but a pleasure to  
5 see both of you.

6           MR. LYLES:   Well, thank you.   We heard your  
7 morning, so....

8           MS. WOOTEN:   We did.

9           THE COURT:   It's continuing.   I'm ready to  
10 get back before I eat lunch.

11           MR. LYLES:   Well, enjoy Aiken.   And I hope  
12 you get to spend a little time at the Willcox while  
13 you are there.

14           THE COURT:   That's not under my subsistence.  
15 I'm not litigating construction defect cases.

16           MR. LYLES:   The only thing I would have to  
17 say is Ron Tate would go there.

18           THE COURT:   Oh, would he?

19           MR. LYLES:   Yes, he would.

20           (laughing)

21           So, Your Honor, I will try to keep this  
22 brief, because I know we have a lengthy memorandum.

23           THE COURT:   Take as much time as you need.

24           MR. LYLES:   Yes, sir.   Thank you.

25           A couple of points I do want to focus on

1 given Ms. Wooten's argument. The first is, as you  
2 know from our brief, that this contract, which is  
3 at issue before you -- you know, this issue has  
4 been decided a couple other times in similar cases,  
5 including in our Eagles Glenn case. And any time  
6 you try to assess the enforceability of an  
7 arbitration agreement, you need to look at the  
8 contract itself. And the contract at issue here is  
9 this contract with Ms. Harley, which  
10 notwithstanding Ms. Wooten's compelling arguments  
11 to the contrary, the hard core reality of this  
12 contract is this: In the *Smith v. D.R. Horton*  
13 case, the provisions of this contract -- a number  
14 of provisions in this contract specifically related  
15 to the warranty provisions were deemed to be  
16 unconscionable.

17 And in the Smith case, as you will recall,  
18 the unconscionable language in the warranty  
19 provisions in that contract were contained within  
20 Paragraph 14, and they were one of several subparts  
21 of Paragraph 14. After the Smith case was decided,  
22 D.R. Horton wanted to avoid the same result, so  
23 what they did is they took the language that  
24 Justice Toal found in the Smith case was  
25 unconscionable, and they didn't change it. They

1 left the unconscionable language in their contract.

2       What they did was simply separated  
3 numerically the unconscionable warranty language of  
4 the contract from the arbitration provision, which  
5 they move to its own -- and I'll put square quotes  
6 around this -- stand-alone Paragraph 15. That, to  
7 me, is remarkable in that D.R. Horton knowingly,  
8 willfully, and intentionally continues to use a  
9 contract that contains language that Justice Toal  
10 found very plainly was unconscionable. Apparently,  
11 their business approach to this is to simply use  
12 the contract, hope that they can somehow insulate  
13 their arbitration provision from it, and for the  
14 people that can't afford to go out and hire lawyers  
15 to fight the unconscionability, they are just stuck  
16 with it. So, to me, that is the beginning premise  
17 of the argument.

18       The problem that D.R. Horton has had in these  
19 other cases, and the problem that they have in the  
20 Harley case, is that even though they numerically  
21 separated the arbitration provision from the  
22 judicially found unconscionable language of its  
23 warranty provision, is that they continue to  
24 intertwine those provisions. Paragraph 15, which  
25 is the arbitration provision continues to reference

1 the unconscionable language of the warranty  
2 provision.

3 And so, for that reason, other courts,  
4 including Judge Maddox and Judge Gravely, have  
5 found, I think properly, that the arbitration  
6 provision in the contract that is at issue in the  
7 case before you today, is part of an unconscionable  
8 contract. Under the Damico case, you can't blue  
9 pencil that language. You can't separate it out.  
10 D.R. Horton just didn't do enough to insulate their  
11 arbitration provision from the known unconscionable  
12 language that they continue to use.

13 And so, I think fundamentally, the  
14 arbitration -- the motion to compel arbitration  
15 needs to be denied because the language is  
16 unconscionable.

17 On the merger issue, which was an emphasis of  
18 Ms. Wooten, you know, the law there is clear. I  
19 mean, when a contract is completed, a deed is  
20 formed, then the terms of the contract merge into  
21 the deed. They are what they are. Absent clear  
22 and convincing evidence that the intention of the  
23 parties was for provisions of the contract to  
24 survive the closing.

25 Now, the argument that Ms. Wooten has made to

1 you is that, well, it just makes sense that this  
2 would merge, otherwise, why would they have had the  
3 arbitration language in there? Clearly, that is  
4 what they wanted to do. It is sort of silly to  
5 think that this language would disappear upon the  
6 closing. The problem with that is that D.R. Horton  
7 is a very sophisticated contracting firm. They  
8 know and understand the concept of merger. That is  
9 why if you look on Page 22 of our brief, you will  
10 see that there are at least three other provisions  
11 of the same contract where D.R. Horton specifically  
12 says that the language of those paragraphs will  
13 survive the closing. They knew how to do this.  
14 They just didn't for the arbitration provision.

15         Notwithstanding how much sense it might make,  
16 or it only makes sense that it wouldn't go away or  
17 be merged into the deed, their own language from  
18 their own contract establishes that that was not  
19 their intent with respect to the arbitration  
20 language.

21         We have -- we have argued in our brief a  
22 couple other points: Lack of mutuality with  
23 respect to this arbitration provision --

24         THE COURT: Violation of public policy.

25         MR. LYLES: And violation of public policy.



1 And, you know, the unconscionability thing is so  
2 important as you think about this contract, and you  
3 read the words of Justice Toal, and you read the  
4 words of Justice Kittredge in the Damico case. The  
5 public policy of South Carolina is to protect  
6 homebuyers, particularly protect homebuyers from  
7 tract homebuilders, just like D.R. Horton.

8 And so, you know, for all of those reasons,  
9 we request and hope that you will deny D.R.  
10 Horton's motion to compel the arbitration in  
11 Ms. Harley's case.

12 THE COURT: Okay.

13 Ms. Wooten, you are muted, and not by me.

14 MS. WOOTEN: Sorry about that. May I just  
15 briefly respond to a couple of those points, and  
16 we'll let you out so you can go back to the fun.

17 First of all, Your Honor, with regard to the  
18 *Smith v. D.R. Horton* case, if the Court will take a  
19 close look at that case, what the actual problem  
20 was with the Court was that the provisions were one  
21 in the same, that they were intertwined into the  
22 same provision. That is why D.R. Horton took them  
23 out and made them into two separate provisions,  
24 because that was Justice Toal's problem; not that  
25 they were somehow otherwise intertwined, but that

1 they were in the same provision, therefore, you  
2 could not separate the arbitration provision out  
3 like you should be able to. That's why they are  
4 now two different provisions, and they definitely  
5 meet the requirements that Justice Toal set forth  
6 in the *Smith v. D.R. Horton* case. That has to do  
7 with the unconscionable part.

8 If you listen to the language of what the  
9 courts are saying in the current cases, in *Mart* and  
10 in *Dixon v. Pattee*, it is clear that the courts are  
11 now saying we want these provisions to be separated  
12 out, and we want these provisions to be enforced.

13 Both cases have to do with homeowners, and  
14 the courts -- while it is important, we understand,  
15 to protect the rights of the homeowners, *D.R.*  
16 *Horton* has done what the courts have asked us to  
17 do, and what the courts have asked big builders to  
18 do, and what the courts have asked all builders to  
19 do.

20 Judge Gravely and Judge Maddox are the only  
21 two judges that have held that the merger argument  
22 would be entertained. And, again, they didn't have  
23 the benefit of reading what the Court said about  
24 separating out the arbitration clauses and about  
25 the intent provisions in *Mart* and *Dixon*. They

1 didn't have the benefit of that.

2 THE COURT: Ms. Wooten.

3 MS. WOOTEN: Yes, sir.

4 THE COURT: I know I'm interrupting you, but  
5 didn't Judge Gravely also focus on  
6 unconscionability?

7 MS. WOOTEN: I believe he did. That has been  
8 a while -- to be honest, that was in the Eagles  
9 Glenn case, so I believe he did focus on --

10 THE COURT: What case is that?

11 MS. WOOTEN: That is the one you have now, et  
12 cetera.

13 THE COURT: I'm messing. Go ahead.

14 MS. WOOTEN: But, anyway....

15 THE COURT: I try to be funny.

16 MS. WOOTEN: And you are (laughing).

17 But the Carlson case, *Carlson v. South*  
18 *Carolina State Plastering*, that is the one that has  
19 to do with merger, and it's identical to the case  
20 we have here, and the Court held no merger.

21 So we, again, would ask that Your Honor grant  
22 our motion to stay and compel, and if you need more  
23 information or would like, we would like the chance  
24 to respond to the brief we got yesterday, if Your  
25 Honor is going to consider it.

1           THE COURT: And, Mr. Lyles, I would allow you  
2 to do the same. I mean, I'm not going to get into  
3 the technicalities.

4           If you feel like -- I mean, if you feel like  
5 you would need to respond, Ms. Wooten, that is  
6 perfectly fine.

7           And, Mr. Lyles, if you feel like you need to  
8 respond.

9           I think I'm going to have enough, but I  
10 totally respect you all.

11          And, Ms. Wooten, you do what you feel led to  
12 do. I don't think I'll be making this decision  
13 today. I can safely represent that to you all.  
14 Hopefully, by the end of the week, okay?

15          MS. WOOTEN: Thank you very much, Your Honor.

16          THE COURT: Anything else?

17          MR. LYLES: Your Honor, if I may? I hate to  
18 do this, but at the risk of Danny Winterstein  
19 getting mad at me for not making an argument, two  
20 brief things in response to Ms. Wooten.

21          The first is it is hard to imagine that  
22 Justice Toal was directing D.R. Horton to continue  
23 to use language that she found to be  
24 unconscionable. So this notion that D.R. Horton is  
25 now behaving and doing what the courts want it to

1 do is just nonsense.

2 Second, with respect to the Mart case, and I  
3 neglected to mention the Mart case earlier, but I  
4 did say to begin that the contract themselves are  
5 what's really important and at issue and, you know,  
6 in the Mart case that there was a different  
7 contract at issue.

8 In fact, in the Mart case, the Court  
9 specifically notes that the contract in Mart was  
10 different than the D.R. Horton contract that had  
11 been at issue, I think, in the Smith case.

12 So those are the only two issues that I would  
13 raise, and I appreciate your time.

14 THE COURT: Okay.

15 MS. WOOTEN: Thank you, Your Honor.

16 THE COURT: I know you want to respond,  
17 but....

18 MS. WOOTEN: It's okay.

19 THE COURT: You all have a great day. Always  
20 good to see you.

21 MR. LYLES: Thank you, Judge. Safe travels.

22 MS. WOOTEN: Thank you.

23 (Whereupon, the Webex video/audio concluded.)  
24  
25

**CERTIFICATE OF TRANSCRIBER**

Case Name: Deborah D. Harley v. D.R. Horton,  
Inc., et. al

Case No.: 2023-CP-02-01719

Date of Hearing: September 4, 2024

\* \* \* \* \*

I, Natalie Dahl, do hereby certify that the  
foregoing transcript is a true and correct record  
of the recorded proceedings; **that said proceedings  
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I do further certify that I am neither of  
kin, counsel, nor have interest to any party  
hereto.

*Natalie Dahl, RPR*

\_\_\_\_\_  
Natalie Dahl, Registered Professional  
Reporter and transcriber for the State of  
South Carolina