STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Steven Domenic Abatiello and Ashley Nicole Abatiello, Plaintiffs, vs. D.R. Horton, Inc. Defendant.	)	CASE NO. 2025-CP-32-00293 **ORDER DENYING D.R. HORTON, INC.'S MOTION TO COMPEL ARBITRATION OF PLAINTIFFS' CLAIMS**
D.R. Horton, Inc., Third-Party Plaintiff, vs. M & L General Construction, Inc.; 84 Lumber Company LP; Piedmont Plumbers of Columbia S.C., LLC; Long Heating & Air Conditioning, Inc.; Full House Capital f/k/a L&M Electric, Inc.; ASC Services & Supply, Inc.; New Beginning Masonry, LLC; Southern Expert Roofing Company, LLC; and Builder Services Group, Inc. d/b/a Parkfield Gale Insulation; Third-Party Defendants.	)	

This matter came before the Court on Defendant D.R. Horton, Inc.'s March 28, 2025, Motion to Stay Action and Discovery and Compel Arbitration as to the claims brought against it by Plaintiffs, Steven Domenic Abatiello and Ashley Nicole Abatiello ("Plaintiffs"). Both D.R. Horton and Plaintiffs submitted written briefs, and the Court held an argument on this Motion on May 15, 2025. As explained in greater detail below, D.R. Horton's Motion to Stay Action and Discovery and to Compel Arbitration as to Plaintiffs is **DENIED**.

FINDINGS OF FACTS & CONCLUSIONS OF LAW

Plaintiffs' home at issue in this suit was constructed by D.R. Horton. Plaintiffs signed their "Home Purchase Contract" with D.R. Horton in March 2022. Plaintiffs closed on their home on May 18, 2022.

On January 23, 2025, Plaintiffs filed their Complaint generally alleging that their home was constructed in a defective and unworkmanlike fashion. Moreover, Plaintiffs allege negligence/gross negligence; breach of express and implied warranties; breach of contract; violations of South Carolina's Unfair Trade Practices Act; fraud and misrepresentation; constructive fraud; and breach of contract accompanied by fraud.

On March 27, 2025, D.R. Horton filed its Answer and Third-Party Complaint. That same day, it also filed its Motion to Stay Action and Discovery and Compel Arbitration—a motion opposed by Plaintiffs.[1]

D.R. Horton's Motion to Compel Arbitration relies on a clause in the Home Purchase Contract signed by the Plaintiffs and D.R. Horton in March 2022. More specifically, Paragraph 15 of the Home Purchase Agreement provides:

> **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

[1] On May 29, 2025, the Court entered its Form 4 Order granting D.R. Horton, Inc.'s Motion to Compel Arbitration as it pertains to its objecting subcontractor and Third-Party Defendant M & L General Construction, Inc. on separate grounds.

> 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.

Additionally, the first page of the Home Purchase Agreement provides the following,

> **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).**[2]

Plaintiffs do not deny that they signed the Home Purchase Agreement. Instead, they assert that the arbitration provision relied on by D.R. Horton is unconscionable and thus unenforceable. As support, Plaintiffs heavily rely on the South Carolina Supreme Court's decision in *Smith v. D.R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016).

In *Smith*, the arbitration agreement relied on by D.R. Horton was contained in a "subparagraph" of paragraph 14 styled "Warranties and Dispute Resolution." 417 S.C. at 45, 790 S.E.2d at 1. On appeal, D.R. Horton argued that "the arbitration agreement was contained exclusively in subparagraph 14(g)" and it was improper to "consider any of the remaining subparagraphs of paragraph 14—such as subparagraph 14(i)'s damages limitation—in determining

[2] Emphasis Original. And as D.R. Horton concedes, the correct citation to the South Carolina Uniform Arbitration Act is S.C. Code Ann. 15-48-10, et seq.

whether the arbitration agreement is unconscionable" under the United States Supreme Court's holding *in Prima Paint Corp. v. Flood & Conklin Manufacturing Co*. 388 U.S. 395, 406, 87 S.Ct. 1801 (1967). *Id.* at 46, 790 S.E.2d at 3. More specifically, subparagraph 14(i) of the contract in *Smith* contained language "attempt[ing] to disclaim implied warranty claims and prohibit *any* monetary damages," and these terms that were "clearly one-sided and oppressive." *Id.* at 48, 790 S.E.2d at 4.

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

After interpreting the agreement in *Smith* in this fashion, the South Carolina Supreme Court concluded that in the context of a transaction between a new homebuyer and D.R. Horton, "the Smiths lacked a meaningful choice in their ability to negotiate" and the "clearly one-sided and oppressive" terms of subparagraph 14(i) made the arbitration provision "unconscionable and thus unenforceable." *Smith*, 417 S.C. at 50, 790 S.E.2d at 5.

To be sure, paragraph 14(c) of the Home Purchase Agreement here maintains similar language "attempt[ing] to disclaim implied warranty claims and prohibit *any* monetary damages," and these terms are "clearly one-sided and oppressive." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Specifically:

> **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.[3]

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

c. Disclaimer and Limitation on Seller's Liability. THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14a ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABIITY OR FITNESS FOR A PARTICULAR PURPOSE. IN ADDITION, SELLER MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER REGARDING THE PAST, PRESENT OR FUTURE CONDITION OR USE OF ANY LANDS OR AREAS SURROUNDING THE PROPERTY OR IN THE VICINITY OF THE PROPERTY. **AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY OR OBLIGATION TO PURCHASER OF ANY NATURE WHATSOEVER** EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 9(d) ABOVE AND IN SELLER'S DEED TO PURCHASER. EXCEPT AS OTHERWISE PROVIDED IN THE LIMITED WARRANTY, **SELLER SHALL NOT BE LIABLE FOR ANY REASON, UNDER ANY CIRCUMSTANCES, TO PURCHASER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL, OR INDIRECT DAMAGES.**

(emphasis added).

While acknowledging *Smith's* authority, D.R. Horton asserts that the Home Purchase Agreement should be construed differently. This is because, according to D.R. Horton, "the arbitration clause is a standalone provision found at Section 15" of the Home Purchase Agreement. And the "[w]arranties and related disclaimers are separately located in section 14."

[3] A copy of the "Limited Warranty" was not presented to the Court.

D.R. Horton finds some support for its contention under the Supreme Court's ruling in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022). D.R. Horton asserts that the Home Purchase Agreement here is closer to the one analyzed in *Damico* than *Smith*. According to D.R Horton, in the Home Purchase Agreement here, like in *Damico*, "there is a distinct section of the purchase and sale agreement that sets forth the entirety of the arbitration agreement" that "deals solely with the scope of arbitration and the requisite formalities accompanying an arbitration proceeding." *Damico*, 437 S.C. at 610, 879 S.E.2d at 754.

But even separated into separate paragraphs, vice subparagraphs, the arbitration and warranty provisions of the Home Purchase Agreement still "contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. And, even in their somewhat revised form, both paragraphs "must be read [together] to understand the scope of the warranties and how different disputes are to be handled." *Id.* This is "dissimilar" to the arbitration provision the Supreme Court considered in *Damico*, that contained "nothing that refer[red] to the limited warranty . . . or incorporate[d] it by reference." *Damico*, 437 S.C. at 610, 879 S.E.2d at 754.

In sum, while D.R. Horton argues that paragraph 15 of the Home Purchase Agreement stands alone, that it repeatedly incorporates terms defined and limited by paragraph 14—including multiple express references to the Limited Warranty—defeats that formal separation. Just as in *Smith*, these provisions are functionally interwoven, not severable, and must be read together.

Moreover, in *Damico*, the Supreme Court noted that "mutuality is a paramount consideration when assessing the substantive unconscionability of a term." *Damico*, 437 S.C. at 615, 879 S.E.2d at 757 (citing 17A Am. Jur. 2d *Contracts* § 272) (cleaned up). "[T]he more substantively oppressive the

contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* (quoting 17A Am. Jur. 2d *Contracts* § 272).

In *Damico*, Lennar's form arbitration provision lacked mutuality where it dictated that Lennar had the sole right to determine the parties joined to any arbitration and further required joinder of those parties to find them at fault. 437 S.C. at 616, 879 S.E.2d at 757. This restraint unconscionably limited the available arguments a claimant could make about liability. *Id*.

Lack of mutuality is also present in the Home Purchase Agreement here. The Court concludes the terms of the putative arbitration agreement in the Home Purchase Agreement "disclaim implied warranty claims and prohibit *any* monetary damages" and "the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton." *Smith* at 50, 790 S.E.2d at 5 (emphasis original). But "[t]his is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation." *Id.* This Court cannot find any reason to distinguish the arbitration agreement here from nearly identical language the Supreme Court has already rejected as unconscionable.

In considering whether an arbitration agreement is unconscionable, this Court must not just consider the "oppressive nature of the terms found in the arbitration agreement" but also the lack of "meaningful choice in agreeing to arbitrate" and the *Smith*, 417 S.C. at 49, n. 5, 790 S.E.2d at 4, n. 5.

Here, the Court concludes the arbitration provision was set forth in a "standard form contract" drafted by D.R. Horton that was "offered on a take-it or leave-it basis." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). These sort of adhesion contracts "are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Damico*, 437 S.C. at 620, 879 S.E.2d at 759–60 (2022) (quoting *Simpson*, 373 S.C. at

26, 644 S.E.2d at 669). This is especially true when a "contract involves the purchase of a new home" because of South Carolina's "deeply-rooted and long-standing policy of protecting new home buyers." *Id.* at 621, 879 S.E.2d at 760. Indeed, the Supreme Court has "taken judicial cognizance of the fact that the modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Smith*, 417 S.C. at 50, 790 S.E.2d at 4. Here, there is no reason to suggest that Plaintiff was exceptional in this regard. Among other things, she possessed no experience in real estate, construction or the legal industries and was not represented by counsel at the time she signed the Home Purchase Agreement. This is in direct contrast to D.R. Horton, "America's Largest Homebuilder," that is active in at least 37 different states. In other words, the Home Purchase Agreement bears all hallmarks of a classic adhesion contract: it is standardized, offered without negotiation, and drafted exclusively by the party with superior knowledge, sophistication, and bargaining leverage.

But even having concluded that "both prongs" of unconscionability are satisfied here, that does not end the Court's analysis because this Court must also determine whether the unconscionable provisions of the arbitration provision can be severed from the rest of the agreement. "If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result." *Damico*, 437 S.C. at 618, 879 S.E.2d at 758 (citing S.C. Code Ann. § 36-2-302(1)). But it is "the general principle in this State is that it is not the function of the court to rewrite contracts for parties." *Simpson*, 373 S.C. at 34, 644 S.E.2d 663.

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

be "the Court rewriting the parties' contract rather than enforcing their stated intentions." *Id.* (citing *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673) (declining to enforce the entirety of an arbitration provision even where the broader contract for the sale of an automobile contained a specific severability clause when the arbitration provision was "unconscionable" "unenforceable" and "oppressive and one-sided"). *Smith*'s conclusion that the absence of a severability clause in an arbitration agreement compels a court to respect the parties' agreement is enough.

But furthering this holding and "recognizing South Carolina's deeply-rooted and long-standing policy of protecting new home buyers," *Damico*, 437 S.C. at 604, 879 S.E.2d at 751, the South Carolina Supreme Court has recognized the special qualities of a consumer contract "involv[ing] the purchase of a new home." *Id.* at 623, 879 S.E.2d at 761. In recent decisions implementing this "long-standing policy" the Court has repeatedly declined to sever unconscionable provisions of contracts for the purchase of a new home and instead continued its "extensive history of expanding its common law on contracts so as to protect new homebuyers." *Id.* at 624, 879 S.E.2d at 761.

Likewise, with unanimity in *Damico*, even when a severability clause was contained *in an arbitration provision*, the Supreme Court declined to sever these unconscionable provisions contained within a "unconscionable, adhesive home construction contract" "as a matter of public policy." *Damico*, 437 S.C. at 622, 879 S.E.2d at 760. "Honoring [a] severability clause" in those circumstances (much like here) "creates an incentive for . . . home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer." *Damico*, 437 S.C. at 622, 879 S.E.2d at 760. "Because most homebuyers simply comply with their arbitration agreements rather than challenging

them in court . . . the law should provide a strong incentive for homebuilders not to overreach.*" Id.* at 623, 879 S.E.2d at 761 (internal substitutions omitted) (emphasis added).

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

The logic of *Simpson, Smith, Damico,* and *Huskins* apply with at least equal force here. "[D.R. Horton] insisted upon an adhesion contract so its terms could not be varied and would stick. [D.R. Horton] is stuck with that choice." *Huskins*, 444 S.C. at 598, 910 S.E.2d at 478.

As such, even if the putative arbitration agreement contemplated severance of unconscionable terms, South Carolina's long-standing protection of home buyers from unscrupulous and overreaching terms, especially in contracts of adhesion, lends further support to Plaintiff's position.

In sum, to enforce this arbitration clause would be to endorse the very imbalance our Supreme Court has condemned: an overreaching builder dictating procedure, forum, and remedy against an unsophisticated buyer stripped of any meaningful recourse. As such, D.R. Horton, Inc.'s Motion to Stay Action and Discovery and Compel Arbitration is **DENIED**.

AND IT IS SO ORDERED.

Lexington Common Pleas

Case Caption: Steven Domenic Abatiello , plaintiff, et al VS D.R. Horton, Inc.

Case Number: 2025CP3200293

Type: Order/Other

So Ordered

Patrick C. Fant, III