THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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

Deborah Denise Harley,

Respondent,

v.

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

Defendants,

Of which D.R. Horton, Inc. is the

Appellant.

AMENDED FINAL BRIEF OF APPELLANT

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October 13, 2025

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2. The circuit court erred by ruling that the arbitration provision is not severable in the absence of explicit severability language and severability is against public policy.

3. The circuit court erred by ruling that the arbitration provision is unenforceable because it lacks mutuality and limits the arbitrator's rights.

4. Recent decisions from both federal and state courts support enforcement of the arbitration provision and provide a useful blueprint for doing so.

INTRODUCTION AND STATEMENT OF THE CASE

On April 21, 2021, Deborah Denise Harley (hereinafter "Plaintiff" or "Harley") entered into a contract to purchase her home at 321 Donnington Court, Aiken, South Carolina (the "Home") from D.R. Horton, Inc. (hereinafter "D.R. Horton"). On July 31, 2023, Harley filed suit against D.R. Horton alleging defective construction of her Home. (R. p. 18 (Compl. ¶ 12).) As part of her purchase, Harley entered into an agreement with D.R. Horton (the "Home Purchase Agreement"). (R. p. 52 (D.R. Horton's Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, Aug. 29, 2024).) The Home Purchase Agreement contains an arbitration clause. (R. p. 57 (Home Purchase Agreement § 15).)

On October 11, 2023, in lieu of filing an Answer, D.R. Horton moved pursuant to the Home Purchase Agreement to stay the action and compel arbitration. (R. p. 27 (D.R. Horton's Mot. Stay & Compel Arbitration, Oct. 11, 2023).) D.R. Horton also sought a stay to allow D.R. Horton time to inspect the alleged defects, pursuant to the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860. By agreement, D.R. Horton conducted its inspection on February 28, 2024, and was given thirty days thereafter to respond to the Complaint. On March 29, 2024, D.R. Horton responded to the Complaint by refiling its Motion to Stay and Compel Arbitration. (R. p. 30 (D.R. Horton Mot. Stay & Compel Arbitration, Mar. 29, 2024).) The lower court heard D.R. Horton's motion to compel arbitration via WebEx on September 4, 2024. (R. p. 300 (Transcript).) On November 27, 2024, the lower court denied D.R. Horton's motion to compel arbitration. (R. p. 1 (Order Denying Mot. Compel Arbitration, Nov. 27, 2024).) D.R. Horton filed a Notice of Appeal on December 19, 2024. (R. p. 286 (Notice of Appeal).) This appeal followed.

STATEMENT OF FACTS

In April 2021, Harley entered into the Home Purchase Agreement with D.R. Horton to purchase the Home, located in Aiken County. As part of the Home Purchase Agreement, Harley and D.R. Horton agreed to arbitrate any and all disputes related to construction of the Home. (R. pp. 57–58 (Home Purchase Agreement § 15).) Harley signed the Home Purchase Agreement and specifically initialed the arbitration provision. (R. pp. 58, 61 (Home Purchase Agreement at 7, 10).)

Harley filed this lawsuit complaining of defects in the construction of her Home and damages related to the same. Harley alleges that certain components of her home, including siding, windows, doors, and the mechanical, electrical, and plumbing systems were not constructed in accordance with applicable building codes and construction industry standards. (R. p. 18 (Compl. ¶¶ 12, 14).) Every cause of action asserted by Harley arises out of the construction of the Home.

Cause of Action	**Basis of Allegation**
Negligence/Gross Negligence	"Defendants breached their duties to Plaintiff Harley . . . [i]n failing to provide adequate exterior claddings, windows, doors, structural components and/or other building components for the Residence . . . [i]n failing to develop the Residence in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices . . . ." (R. pp. 23–24 (Compl. ¶ 53).)
Breach Implied Warranties	"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." (R. p. 25 (Compl. ¶ 59).)
Violation of Unfair Trade Practices	"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 . . . constitute unfair and deceptive

	practices within the meaning of the Act." (R. p. 25 (Compl. ¶ 66).)

Because all of Harley's claims arise out of the construction of the Home, these disputes should be submitted to binding arbitration pursuant to the Home Purchase Agreement.

STANDARD OF REVIEW

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

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

ARGUMENTS

The lower court improperly denied D.R. Horton's motion to compel arbitration based on its erroneous rulings that (1) the arbitration agreement is unconscionable; (3) the arbitration provision is not severable; and (3) the arbitration provision lacks mutuality and improperly limits the arbitrator's rights.

I. The Arbitration Agreement Is Not Unconscionable.

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

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

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

> **Mandatory binding arbitration.** Purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding this agreement and/or the property, including but not limited to any disputes regarding: (a) seller's construction and delivery of the house; (b) seller's performance under any punch list or inspection agreement; and (c) the limited warranty pursuant to section 14 above.
>
> The arbitration shall take place in the county in which the property is located.
>
> The proceeding shall be conducted pursuant to the rules of the American Arbitration Association and, to the extent possible, under rules which provide for an expedited hearing.
>
> The filing fee for the arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as a part of the arbitrator's final order.
>
> The arbitration shall be binding and final, and either party shall have the right to seek judicial enforcement of the arbitration award.
>
> Notwithstanding any other provision herein, any disputes arising under the limited warranty shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures and rules of the limited warranty.

> Notwithstanding the foregoing, seller shall have the right to interplead all or any part of the earnest money into a court of competent jurisdiction as provided for in section 4 herein.

(R. pp. 57–58 (D.R. Horton's Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, § 15 (formatting altered)).)[1]

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

A. The Arbitration Agreement Consists Only of Section 15.

The trial court erred by not limiting its arbitrability review to section 15 of the Home Purchase Agreement. Under the *Prima Paint*[2] doctrine, "the first task of a court is to separate the arbitration provision from the rest of the contract." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). A court can consider only "challenges specifically [to] the validity of the agreement to arbitrate." *Rent-A-Ctr.*, 561 U.S. at 70 (citation omitted). "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* In other words, "a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016). Plaintiff (and the trial court) avoided this limitation by imputing allegedly unconscionable terms from other sections of the contract into the arbitration agreement. (*See, e.g.*, R. pp. 7–9 (Order at 5–7).)

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[1] The arbitration agreement cited in briefing to the trial court contained minor typographical errors and an additional sentence that is not in the parties' arbitration agreement. These errors do not impact the substance of D.R. Horton's argument and have been corrected here. However, the trial court's order relied in part on the extraneous sentence. This is discussed in more detail below. *See infra* Part III.

[2] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

The trial court relied heavily on *Smith* in finding that the arbitration agreement was not limited to section 15. (*See* R. pp. 8–9 (Order at 6–7).) In *Smith*, the South Carolina Supreme Court reviewed a paragraph called "Warranties and Dispute Resolution," with "more than 1,800 words" and "ten separately denominated subparagraphs." 417 S.C. at 53, 60, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting). Subparagraph (g) was specifically identified as "MANDATORY BINDING ARBITRATION" and detailed the parties' obligation to arbitrate their disputes. *Id.* at 57–58, 790 S.E.2d at 9. Notably, the agreement did not contain a severability clause. *Id.* at 50 n.6, 790 S.E.2d at 5 n.6 (majority opinion).

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

The trial court's decision below is based on a similar fiction—that section 15 is so intertwined with other provisions of the Home Purchase Agreement that those provisions combine with section 15 to form the arbitration agreement. (*See* R. pp. 3, 8–9 (Order at 1, 6–7).) In particular, the trial court held that section 15 was intertwined with section 14, which immediately

precedes the arbitration provision and addresses warranties.[3] (R. pp. 8–9 (Order 6–7).) Recent decisions from the South Carolina Supreme Court and South Carolina Court of Appeals have rejected this as an overreach of the law.

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

[3] Curiously, the trial court stated that if the provisions were not so intertwined, "the parties did not come to an agreement on arbitration, invalidating the arbitration provision all together." (R. p. 8 n.7 (Order at 6 n.7).) The parties have not briefed this issue, and the trial court offered no explanation or authority to support this comment. Nonetheless, under South Carolina law, "[t]he familiar requisites to a binding contract are a meeting of the minds of the parties as to all essential and material terms, supported by consideration." *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 877 S.E.2d 486, 489 (Ct. App. 2022), *cert. granted*, 2024 S.C. LEXIS 22 (S.C. Feb. 7, 2024). In the context of an arbitration agreement, this requires "(1) that [the parties] had reasonable notice of an offer to enter into an arbitration agreement, and (2) that [the parties] manifested [their] assent to that agreement." *Marshall v. Georgetown Mem'l Hosp.*, 112 F.4th 211, 218 (4th Cir. 2024). This bar is easily met here, where both Plaintiff and D.R. Horton specifically signed section 15 of the Home Purchase Agreement. (R. pp. 57–58 (Mem. Supp. Mot. Compel Arbitration & Stay Proceedings Ex. 1, § 15).)

arbitration proceeding." *Damico*, 437 S.C. at 610, 879 S.E.2d at 754. Moreover, because the arbitration agreements in both the contract and the related warranty booklet were standalone provisions, in their own sections, "it [was] legally irrelevant that the portions of the contracts outside of the arbitration agreements extensively cross-reference[d] one another and incorporate[d] one another by reference." *Id.* at 610 n.6, 879 S.E.2d at 754 n.6.

This Court acknowledged this standard recently in *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023). *Mart* involved an arbitration provision "in an unnumbered, standalone paragraph." *Id.* at 307, 893 S.E.2d at 361. Other unnumbered paragraphs included a limited warranty that disclaimed all other warranties, as well as liability for consequential and punitive damages. *Id.* at 308, 893 S.E.2d at 362. The buyer "agree[d] to accept [the] limited warranty in lieu of all other rights or remedies, whether base[d] on contract or tort." *Id.* (third alteration in original) (emphasis removed). At closing, the buyer was provided with a warranty application and warranty that contained its own arbitration provision, and which likewise disclaimed all other warranties and precluded recovery of incidental and consequential damages. *Id.* at 309–11, 893 S.E.2d at 363. On appeal, the Court considered whether the trial court erred by incorporating provisions from this separate limited warranty into the parties' sales contract. *Id.* at 312, 893 S.E.2d at 364.

The *Mart* Court looked to the South Carolina Supreme Court's conclusion in *Damico* that "'the circuit court impermissibly considered the terms found in the limited warranty booklet' when analyzing the arbitration provision of the purchase and sales agreement." *Id.* at 315, 893 S.E.2d at 365 (quoting *Damico*, 437 S.C. at 607, 879 S.E.2d at 753). The Court added that "controlling case law [did] not permit [it] to consider the language of the separate limited Warranty or the propriety of the waiver of implied warranties in analyzing the standalone arbitration language of

the Sales Contract." *Id.* at 315, 893 S.E.2d at 365. To demonstrate that the arbitration provision was unconscionable and, therefore, unenforceable, the plaintiff "was required to show that the language *in the arbitration section alone* was unconscionable." *Id.* at 315–16, 893 S.E.2d at 366 (emphasis added). The plaintiff failed to do that because although "[c]hallenged terms [could] be found elsewhere in the Sales Contract and/or the Warranty agreement," the arbitration provision itself "contain[ed] no such . . . term[s]." *Id.* at 315, 893 S.E.2d at 365.

Damico and *Mart* are consistent with the United States Supreme Court's holding in *Rent-A-Center*, where a company sought to enforce a delegation provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of th[e] Agreement." *Rent-A-Ctr.*, 561 U.S. at 66 (citation omitted). Notably, "the underlying contract [was] itself an arbitration agreement" entitled "Mutual Agreement to Arbitrate Claims." *Id.* at 65, 72. The *Rent-A-Center* Court clarified that "[a]pplication of the severability rule [of *Prima Paint*] does not depend on the substance of the remainder of the contract." *Id.* at 72. No matter the underlying contract, when ruling on arbitrability a court can consider only challenges *specifically* to the provision providing for arbitration. *Id.* The *Rent-A-Center* plaintiff's unconscionability arguments—that the agreement "was one-sided" and contained a "fee-splitting arrangement" and "limitations on discovery"—were directed at the arbitration agreement *as a whole*. *Id.* at 73–74. The plaintiff "did not make any arguments *specific to the delegation provision*" or "contest the validity of *the delegation provision in particular*." *Id.* at 74 (emphasis added). *Rent-A-Center* makes clear that this is what the law requires to obtain judicial review.

In this case, the Home Purchase Agreement bears more in common with the separate arbitration provisions in *Damico* and *Mart* than the combined warranty and dispute resolution

paragraph in *Smith*. As in *Rent-A-Center*, here the arbitration clause is a standalone provision located in section 15 of the Home Purchase Agreement, whereas warranties and related disclaimers are in section 14. The trial court erred by concluding that the arbitration provision "incorporates" warranty provisions from elsewhere in the Home Purchase Agreement. (R. p. 3 (Order at 1).) The trial court made much of the fact that section 15 provides for claims under the limited warranty to be resolved according to the terms of that warranty, which is found in section 14. (R. p. 8 (Order at 6).) However, the arbitration provision in *Damico* stated that it applied to "any Dispute," including claims "arising by virtue of any . . . warranties alleged to have been made." 437 S.C. at 605, 879 S.E.2d at 751–52 (ellipsis in original). Nevertheless, as noted above, both this Court and the South Carolina Supreme Court concluded that the arbitration agreement was a standalone provision that must be interpreted on its own—despite its reference to warranties and the existence of an outside limited warranty booklet. *Id.* at 607, 879 S.E.2d at 752–53.

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

Under "federal law, the relevant arbitration provision consists of only that portion of [section 15] in which the parties agree[d] to arbitrate any controversies." *Smith*, 417 S.C. at 62, 790 S.E.2d at 11 (Kittredge, J., dissenting); *see also Prima Paint Corp.*, 388 U.S. at 404 (holding that when ruling on arbitrability, a court "may consider only issues relating to the making and performance of the agreement to arbitrate"). The arbitration provision in both *Damico* and *Mart*

referred to warranty claims; the arbitration provision in *Damico* did so explicitly. Nonetheless, in both cases courts concluded that it was improper to read the terms of the warranty into the arbitration provision. In this case, the relevant arbitration provision consists of the stipulation in section 15 that the "purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding th[e] agreement and/or the property." (R. p. 57 (Mem. Supp. Mot. Compel Arbitration Ex. 1, § 15 (capitalization altered)).) The Court should follow *Damico* and *Mart* and refuse to read extraneous provisions into a standalone, unchallenged arbitration provision. Plaintiff's challenges to those other provisions in the Home Purchase Agreement are "for the arbitrator." *Rent-A-Ctr.*, 561 U.S. at 72.

B. The Arbitration Agreement Contains No Unconscionable Terms.[4]

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also* S.C. Code Ann. § 15-48-10(a). Therefore, "courts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability." *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (citation and internal quotation marks omitted). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle*

[4] As discussed above in Part I.A, any challenge that section 14 of the Home Purchase Agreement is unconscionable should be addressed in arbitration, not by a court, because Plaintiff has not specifically challenged the arbitration agreement. *See Smith*, 417 S.C. at 48, 790 S.E.2d at 4 (majority opinion) ("[I]n conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.").

Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). In short, an agreement is unconscionable if it both reflects "an absence of meaningful choice" *and* contains "oppressive, one-sided terms." *Id.* at 25, 644 S.E.2d at 669.

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

The trial court analyzed the Home Purchase Agreement as an "adhesion contract" and concluded that Plaintiff lacked a meaningful choice in accepting it. (R. p. 7 (Order at 5).) "Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). D.R. Horton disputes that the Home Purchase Agreement was an adhesion contract. Plaintiff was free to purchase a home from another builder, to purchase a pre-existing home from a homeowner, or to purchase no home at all. Moreover, Plaintiff was able to personalize the contract by selecting various options that were offered, some of which came with an additional cost, and for which she separately signed. (R. pp. 62–66 (Home Purchase Agreement Ex. A).) Plaintiff freely assented to D.R. Horton's contractual terms, including arbitration of construction disputes, and there was nothing inherently unfair about this bargaining process.

However, assuming *arguendo* that the trial court was correct, "[a]dhesion contracts . . . are not per se unconscionable." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; *cf. Munoz* at 541 n.5, 542 S.E.2d at 365 n.5 (noting that, under federal law, "[i]nequality of bargaining power alone will not invalidate an arbitration agreement"). As the South Carolina Supreme Court has made clear,

"adhesive contracts are not unconscionable . . . so long as the terms are even-handed." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756 (emphases removed).

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

Here, the arbitration provision in the Home Purchase Agreement is a far cry from provisions that courts have found to be unconscionable. "On the rare occasion when a court has determined that arbitral procedures render an arbitration agreement unenforceable, the one-sided provisions have been so pervasive and extreme that the arbitration provision created a 'sham system unworthy even of the name of arbitration.'" *LaPoint v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, No. 0:08-3553-CMC, 2009 U.S. Dist. LEXIS 146577, at *18–19 (D.S.C. Dec. 1, 2009) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999)). For example, in *Damico*, the court concluded that the arbitration agreement was unconscionable because it gave the homebuilder too much control over the process: only the homebuilder could join contractors and other third parties, and findings would not be binding in other proceedings without mutuality of parties, which the homebuilder had unilateral power to prevent. 437 S.C. at 615–16, 879 S.E.2d at 757. Recently, in *Huskins v. Mungo Homes, LLC*, the

South Carolina Supreme Court declared that a provision in an arbitration agreement purporting to shorten the statute of limitations was "void and illegal as a matter of public policy." 444 S.C. 592, 595, 910 S.E.2d 474, 476 (2024).

In contrast, the arbitration provision in the Home Purchase Agreement easily satisfies the fairness standard discussed above. In relevant part, the arbitration provision (1) binds both D.R. Horton and Plaintiff to arbitrate construction defect disputes; (2) provides for arbitration in Plaintiff's home county; (3) provides for American Arbitration Association ("AAA")[5] rules and an expedited hearing schedule; (4) gives the arbitrator discretion to assess the filing fees and costs against D.R. Horton; and (5) allows any party to seek judicial enforcement of the arbitrator's decision. There is nothing "so oppressive" about these terms such "that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. To the contrary, these are reasonable and customary terms in an arbitration agreement and should be enforced.[6]

II. The Arbitration Agreement Is a Standalone Agreement and Severable from the Rest of the Home Purchase Agreement.

The trial court declined to sever section 15 from the rest of the Home Purchase Agreement and held that doing so would violate public policy. (R. pp. 3, 9–11 (Order at 1, 7–9).) This ruling conflicts with established law. The Court must sever section 15 from the other provisions of the Home Purchase Agreement and enforce its terms as written.

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

[6] Moreover, as discussed in more detail in Part II, because the Home Purchase Agreement contains a severability clause, (R. p. 59 (Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, § 23)), to the extent the Court disagrees, it can sever any provisions it finds unconscionable.

Properly construed, the arbitration provision is limited to the standalone provision in section 15. This provision contains no unconscionable terms and "as a matter of substantive federal arbitration law . . . is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). The arbitration provision is also severable under relevant state law. In short, because severance of *the arbitration provision* is required, severance of *unconscionable terms* is not necessary. However, even if the arbitration agreement itself were not severable from the Home Purchase Agreement, unconscionable terms in the agreement are severable from the rest of the provision. Therefore, there are multiple bases on which this holding of the trial court should be reversed.

The United States Supreme Court addressed a state court's refusal to enforce an arbitration provision on the ground of public policy in *Buckeye Check Cashing*. *Id.* at 446. In that case, the plaintiffs alleged that certain loan agreements violated Florida law and were therefore "criminal on [their] face." *Id.* at 443. The Florida Supreme Court refused to sever and enforce the arbitration provision in the agreements because the contracts were "challenged as unlawful." *Id.* On certiorari to the U.S. Supreme Court, that Court noted that it had "rejected the view that the question of 'severability' was one of state law." *Id.* at 445. The Court made clear that whether an arbitration agreement is enforceable is based on *federal law, not state public policy*. *Id.* at 446. The Court closed its opinion by reiterating that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Like the Florida Supreme Court in *Buckeye Check Cashing*, the trial court in this case refused to sever the arbitration provision from the remainder of the Home Purchase Agreement on public policy grounds. (R. pp. 9–11 (Order at 7–9).) In so doing, the trial court disregarded that federal law preempts state public policy on the issue of an arbitration agreement's enforceability.

See Buckeye Check Cashing, 546 U.S. at 446. The trial court's refusal to enforce the arbitration agreement, based on application of "state severability rules to the arbitration agreement," was an error of law and should be reversed. *Id.*

The arbitration agreement is also severable under state law, which provides an independent basis for enforcing the provision. Under South Carolina law, "[a] severable contract is one . . . susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (citation omitted). On the other hand, a contract should be treated as a single, integrated agreement "when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent." *Id.* (citation omitted). Whether or not a contract is severable "depends primarily upon the intent of the parties." *Id.* (citation omitted).

Here, the evidence suggests that the parties intended to treat section 15 as separate from the rest of the Home Purchase Agreement, including section 14. Plaintiff "separately initialed [section 15] titled 'MANDATORY BINDING ARBITRATION,'" which "indicates the parties themselves viewed these terms as distinct contractual provisions to which they separately consented." *Smith*, 417 S.C. at 61, 790 S.E.2d at 11 (Kittredge, J., dissenting). The Court should give effect to this intention.

Finally, to the extent the Court disagrees that the arbitration provision in section 15 can be severed entirely from section 14, the Home Purchase Agreement contains a severability clause, (R. p. 59 (Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, § 23)), and the Court can sever any provisions it finds unconscionable.

The *Damico* court's refusal to sever the arbitration provision under its review was based, at least in part, on "the *pervasive* presence of oppressive terms in the arbitration provision." 437 S.C. at 622, 879 S.E.2d at 760 (emphasis added); *see also infra* Part III (discussing numerous provisions in *Damico* that the South Carolina Supreme Court found to be unfair). "If, however, only some of an arbitration agreement's provisions are invalid or unenforceable, the severability of the offending provisions—rather than invalidation of the arbitration agreement—would be the appropriate remedy." *Whitman*, 2012 U.S. Dist. LEXIS 176480, at *5. The trial court identified two isolated provisions of section 14 of the Home Purchase Agreement as oppressive terms that render the arbitration agreement unconscionable. (R. p. 8 (Order at 6).) These terms are hardly "pervasive" and can easily be severed from the remainder of the Home Purchase Agreement. The trial court's failure to sever the terms it found to be unconscionable "completely invalidate[d] the parties' agreement to arbitrate," in violation of the FAA, and should be reversed. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001); *cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (noting that "the FAA's pre-emptive effect might extend even to grounds traditionally thought to exist at law or in equity for the revocation of *any* contract" and holding that the FAA preempted a state law that declared class action waivers in consumer contracts to be unconscionable (emphasis added) (citation and internal quotation marks omitted)).

III. The Arbitration Provision Is Fair and Mutuality Is Not Required.

The trial court identified two additional factors that, in its view, rendered the arbitration agreement unconscionable: lack of mutuality of remedies and limits on the arbitrator's authority. (R. pp. 11–12 (Order at 9–10).) Neither provides a basis for refusing to compel arbitration in this case.

The trial court cited a specific sentence of the arbitration provision to show a lack of mutuality—"THE ARBITRATION PROVISIONS OF THIS SUBSECTION (B) SHALL NOT APPLY IN THE EVENT THAT THE DISPUTE RELATES TO A DEFAULT BY THE SELLER." (R. p. 11 (Order at 9).) However, this language is not actually in the Home Purchase Agreement. (*See* R. pp. 57–58 (Mem. Supp. Mot. Compel Arbitration Ex. 1, § 15).) D.R. Horton mistakenly included this language in its briefing to the trial court. (R. p. 34 (Mem. Supp. Mot. Compel Arbitration at 2); *see also supra* note 1.) D.R. Horton uses this opportunity to correct the record.

Nonetheless, even if the Home Purchase Agreement contained such a provision, the trial court's ruling that a "non-mutual arbitration obligation itself, on its face, is unconscionable," (R. p. 12 (Order at 10)), is contrary to established law. The South Carolina Supreme Court has explicitly recognized that "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672.

The court expressed concern about mutuality in *Damico* because the agreement gave the builder sole discretion to join third parties, such as contractors, while also mandating that findings in one proceeding could not be used in another unless there was mutuality of parties. 437 S.C. at 615–16, 879 S.E.2d at 757. This violated the "fundamental principle of law that the plaintiff is the master of his own complaint." *Id.* at 616, 879 S.E.2d at 757. It also "create[d] the possibility of inconsistent factual findings that would preclude [homeowners] from recovery on a purely procedural (rather than a merit) basis." *Id.* at 616, 879 S.E.2d at 757. The builder's control created the possibility of parallel "empty chair" defenses, where an arbitration defendant could blame an absent party, while in court, a litigation defendant could blame the parties that submitted to arbitration. *Id.* As the court noted, "[w]ere the respective fact finders to agree with the defendants'

arguments to that effect, [homeowners] could lose in both forums merely because the fact finder believes the absent defendants to be at fault, and, critically, it is not [the homeowners'] choice that those defendants are absent." *Id.* (emphasis removed). Moreover, because findings would not be binding in other proceedings without mutuality of parties, *which the homebuilder had unilateral power to prevent*, homeowners "could not even use the fact that the arbitrator had found [the builder] was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa." *Id.* It was this "procedural defense to liability" that the court found "wholly unreasonable and oppressive," *id.*, not the fact that some claims were subject to arbitration and others to litigation.

The Home Purchase Agreement contains no such imbalanced provision. As noted above, the arbitration provision requires D.R. Horton *and* homebuyers to arbitrate all construction defect claims and allows any party to seek judicial enforcement of an arbitration decision. (R. p. 57 (Mem. Supp. Mot. Compel Arbitration Ex. 1, § 15).) There is no lack of mutuality in these provisions; even if there were, there are certainly no unconscionable terms like those that concerned the *Damico* Court.

Finally, there is nothing unconscionable about the arbitral procedures the agreement dictates or the limits it places on an arbitrator's authority. In *Hooters*, the court found that the promised arbitration was a "sham" because the company "was responsible for setting up . . . a [neutral] forum by promulgating arbitration rules and procedures," but instead established rules that were "so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding." 173 F.3d at 938, 940. Among the many problems, the company was "not required to file any responsive pleadings or to notice its defenses"; "the employee [had to] provide the company with a list of all fact witnesses with a brief summary of the facts known to each," but the

company had no obligation to reciprocate; the company could expand the scope of arbitration "to any matter," whereas the employee was limited to the issues in the initial claim; the company had the right to record audio or video of the arbitration hearing, but the employee did not; and only the company could "bring suit in court to vacate or modify an arbitral award." *Id.* at 938–39. Moreover, although both parties got to choose one arbitrator, who would then choose a third, "the employee's arbitrator and the third arbitrator [had to] be selected from a list of arbitrators created exclusively by [the company]." *Id.* The court concluded "that the promulgation of so many biased rules—*especially the scheme whereby one party to the proceeding so control[led] the arbitral panel*—breache[d] the contract entered into by the parties." *Id.* at 940 (emphasis added).

The Home Purchase Agreement contains no such egregious provisions. As noted above, it provides for arbitration before the American Arbitration Association, a forum that is "well-known," "consumer friendly," and "affordable." *Whitman*, 2012 U.S. Dist. LEXIS 176480, at *8 (citation omitted). Moreover, the arbitration provision allows for either party to seek judicial enforcement of an arbitration award. (R. p. 57 (Mem. Supp. Mot. Compel Arbitration & Stay Proceedings Ex. 1, § 15).) These provisions are consistent with the goal of "achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

The propriety of any other provisions should be determined by the arbitrator. Even the *Hooters* court recognized that "[g]enerally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance." 173 F.3d at 941. The *Hooters* court undertook the review it did only because the company had a contractual duty to promulgate rules for arbitration and its "material breach of th[at] duty warranting rescission [was] an issue of substantive arbitrability and thus [was] reviewable before arbitration." *Id.* The court made clear that the case was "the exception that proves the rule: *fairness objections should generally be made to the*

arbitrator." *Id.* (emphasis added). There are no such extenuating circumstances present here; therefore, "the rule" applies, and any questions about conscionability or fairness must be resolved in arbitration, not by a court.

IV. Recent Decisions Support Enforcement of the Arbitration Provision

Over the past few months, multiple courts have granted motions to compel arbitration brought by D.R. Horton. The U.S. District Court for the District of South Carolina recently became the first federal court to address the enforceability of the arbitration provision in D.R. Horton's Home Purchase Agreement. *Vriens v. Tip-Top Roofing & Constr., LLC*, No. 2:23-cv-06797-DCN (D.S.C. Sept. 4, 2025), attached hereto as **Exhibit A**. Shortly thereafter, a South Carolina trial court granted D.R. Horton's motion to compel arbitration against homeowner plaintiffs in two cases. *Ban v. D.R. Horton, Inc.*, No. 2025-CP-26-00526 (S.C. Ct. Com. Pl. Sept. 15, 2025), attached hereto as **Exhibit B**; *Prest v. D.R. Horton, Inc.*, No. 2025-CP-26-00484 (S.C. Ct. Com. Pl. Sept. 15, 2025), attached hereto as **Exhibit C**. These courts were faced with the same issues present in this appeal and, after a thorough and thoughtful analysis, found D.R. Horton's arbitration provision to be enforceable. In so doing, they provided a useful blueprint for this Court.

Like Respondent, the plaintiffs in *Vriens* are homeowners who brought construction-defect claims against D.R. Horton. *Vriens*, slip op. at 3–4. The plaintiffs refused to arbitrate pursuant to the terms of the arbitration provision in D.R. Horton's homeowner contracts; therefore, D.R. Horton moved to compel arbitration. *Id.* at 7. The arbitration provision in those contracts is substantially the same as the one in the Home Purchase Agreement. *See id.* at 5.

The plaintiffs objected on similar grounds as Respondent, "raising the defenses of unconscionability and unenforceability as a matter of law and public policy." *Id.* at 14. Specifically, the plaintiffs argued that the arbitration provision had to be viewed in conjunction

with the separate warranty provision and was "an adhesion contract with oppressive terms." *Id.* at 15. They further argued that severance of those oppressive terms would violate public policy. *Id.*

The district court carefully considered and rejected those arguments. The court recognized that its review was limited to the arbitration provision itself and that challenges to the contract as a whole should be addressed to an arbitrator. *Id.* at 14–15. Crucially, the court rejected the plaintiffs' invitation to "intertwine" the arbitration and warranty provisions. *See id.* at 16. Noting that the parties initialed each section separately, the court held that the arbitration agreement was "a standalone provision" that was "separately located from the warranties and related disclaimers" in the homeowner contract. *Id.* at 18.

With its review focused on the arbitration provision, the court found that it was "not unconscionable because [the plaintiffs] did not lack a meaningful choice and were not subject to oppressive terms." *Id.* at 17. As to the plaintiffs' choice, the court noted that they were not forced to buy a home from D.R. Horton. *See id.* at 17–18. As to the provision's terms, they were not "so oppressive . . . such that no fair and honest person would accept them." *Id.* at 18. The court noted that the arbitration provision was binding on both D.R. Horton and the plaintiffs, called for arbitration in the plaintiffs' home county and an expedited schedule, and allowed the arbitrator to assess fees against D.R. Horton. *Id.* The court described those as "reasonable and customary terms" that were the result of "a fair bargaining process." *Id.* Therefore, the court held that the arbitration provision was "not unconscionable and should be enforced." *Id.*

The trial court reached a similar conclusion in *Ban* and *Prest*. As in *Vriens*, the court found that the arbitration agreement was a standalone provision located entirely in section 15 of

the contract and had to be interpreted on its own. *Ban*, slip op. at 12–13.[7] The court noted that the plaintiff separately initialed section 15, which was evidence the parties intended the provision to be severable from the rest of the contract. *Id.* at 13. Therefore, although the arbitration provision *referenced* section 14, with its warranties and disclaimers, the court refused to incorporate those terms into the arbitration agreement. *Id.* at 12–13.

The court then considered whether the arbitration provision was unconscionable, focusing on whether it was drafted so as to achieve an unbiased decision by a neutral decision-maker. *Id.* at 14. Unconscionable arbitration provisions, the court noted, typically give one party excessive control over the arbitral process, to such an extent it is impossible to obtain a fair result. *Id.* at 15. In contrast, the court found that the arbitration provision in D.R. Horton's contract was fair because it bound both the plaintiff and D.R. Horton, provided for proceedings in the plaintiff's home county and before a neutral forum (the AAA), allowed the arbitrator to allocate fees, and allowed either party to seek judicial enforcement of the arbitrator's decision. *Id.* at 15–16. As in *Vriens*, the court described these terms as "reasonable and customary." *Id.* at 16.

The court also found it irrelevant that the contract allowed certain claims to proceed in court while requiring the arbitration of others. *Id.* at 17. The court rejected the plaintiff's argument that this "lack[] [of] mutuality of remedies" rendered the arbitration provision unenforceable. *Id.* Although the law will not enforce an agreement that allows one party's judicial remedies to *supersede* another's arbitral remedies, it does not require complete mutuality. *Id.* at 17–18. Instead, the law requires "even-handedness," *id.* at 18, so that the

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[7] Although D.R. Horton cites only to *Ban*, the *Prest* order is substantively identical.

parties have a fair and neutral forum in which they can resolve their disputes, *id.* at 19–20. The court concluded that the arbitration provision provided just that, and any other challenges to the contract were to be resolved in arbitration. *Id.* at 20.

These recent decisions, from both federal and state courts, provide a roadmap to the proper analysis of the arbitration provision in the Home Purchase Agreement. The decision in *Vriens* is especially pertinent, as it marks the first *federal court* to analyze the arbitration provision, and it does so under *federal law*. *See Limehouse v. Hulsey*, 404 S.C. 93, 108–09, 744 S.E.2d 566, 575 (2013) (noting that South Carolina courts frequently defer to lower federal courts' interpretations of federal law, especially when the decisions reflect a unanimity of opinion among the federal courts); *cf. Biales v. Young*, 315 S.C. 166, 169, 432 S.E.2d 482, 484 (1993) (recognizing that "federal precedent, although not binding, may be applied as guidance in interpretation" of a state statute that is "substantially similar to" a federal law).

CONCLUSION

D.R. Horton asks the Court to reverse the decision of the trial court. The arbitration provision in the Home Purchase Agreement mandates arbitration is a standalone provision, in a single section, with no unconscionable terms. To the extent the Court disagrees, any unconscionable terms can easily be severed from the Home Purchase Agreement. All other challenges to the agreement must be made in arbitration. Therefore, D.R. Horton asks the Court to reverse the decision below and direct the trial court to enter an order granting D.R. Horton's motion to compel arbitration.

[Signature page to follow]

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October 13, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Michael Vriens and Nicolas Bardsley, *individually, and on behalf of others similarly situated*,

Plaintiffs,

vs.

Tip-Top Roofing & Construction, LLC; Pacific Contractors, LLC; Builders FirstSource - Southeast Group, LLC; Carolina Custom Carpentry, LLC; Quad K, LLC; JJL Construction, LLC; CAC Carpentry, LLC; Alpha Construction of SC, LLC; Good Luck Incorporated; South Atlantic Framing, Inc.; SRC Construction, LLC; Jalisco Framing, LLC; Mendoza Construction, LLC; VL Contractor, LLC; 84 Lumber Company, LP; Varanda Contracting Group, Inc.; TOMECH, LLC d/b/a Firm Foundation Costal Carolina's; Valim Construction, LLC; Ram Construction SC, LLC; Gold Star Construction, LLC; ProBuild East, LLC; Archer Exteriors, Inc.; Americo Roofing Concepts, Inc.; Contract Exteriors, LLC; Holy City Exteriors, LLC; SR Construction, LLC; Robert Helms Construction, Inc.; Quick Roofing, LLC; Monarch Company, LLC; Accurate Building Company, LLC; Southend Exteriors, Inc.; Above the Sky Roofing, Inc.; ABC Supply Co. Inc.; SRS Distribution, Inc. f/k/a Superior Distribution; Contract Lumber, Inc.; BMC East, LP; US LBM-Professional Builders Supply a/k/a US LBM Holding, LLC a/k/a US LBM, LLC; SEC Holdings, LLC d/b/a Southend Exteriors and Professional Builders Supply, LLC d/b/a Professional Builders Supply Commercial PRSRE-GVL, LLC; and D.R. Horton, Inc.,

Defendants.

Case No.: 2:23-cv-06797-DCN

ORDER

EXHIBIT A

D.R. Horton, Inc.,

Crossclaim Plaintiff,

vs.

Tip-Top Roofing & Construction, LLC; Pacific Contractors, LLC; Builders FirstSource - Southeast Group, LLC; Carolina Custom Carpentry, LLC; Quad K, LLC; JJL Construction, LLC; CAC Carpentry, LLC; Alpha Construction of SC, LLC; Good Luck Incorporated; South Atlantic Framing, Inc.; SRC Construction, LLC; Jalisco Framing, LLC; Mendoza Construction, LLC; VL Contractor, LLC; 84 Lumber Company, LP; Varanda Contracting Group, Inc.; TOMECH, LLC d/b/a Firm Foundation Costal Carolina's; Valim Construction, LLC; Ram Construction SC, LLC; Gold Star Construction, LLC; ProBuild East, LLC; Archer Exteriors, Inc.; Americo Roofing Concepts, Inc.; Contract Exteriors, LLC; Holy City Exteriors, LLC; SR Construction, LLC; Robert Helms Construction, Inc.; Quick Roofing, LLC; Monarch Company, LLC; Accurate Building Company, LLC; Southend Exteriors, Inc.; Above the Sky Roofing, Inc.; ABC Supply Co. Inc.; SRS Distribution, Inc. f/k/a Superior Distribution; Contract Lumber, Inc.; BMC East, LP; and US LBM-Professional Builders Supply a/k/a US LBM Holding, LLC a/k/a US LBM, LLC,

Crossclaim Defendants.

This matter is before the court on defendant D.R. Horton, Inc.'s ("D.R. Horton") amended motion to compel arbitration and to stay proceedings. ECF No. 215. For the reasons set forth below, the court grants D.R. Horton's motion to compel arbitration and to stay proceedings.

I. BACKGROUND

On July 11, 2022, Michael Vriens ("Vriens") entered into a contract (the "Homeowner Contract") with D.R. Horton for the construction and purchase of a home within Moore's Landing, located at 1261 Ames Way, Mount Pleasant, South Carolina 29466 (the "Home"). ECF No. 1-1, Am. Compl. ¶¶ 1–2. D.R. Horton, a homebuilder company operating in Coastal South Carolina, built the Home.[1] Id. ¶¶ 3–4. Tip-Top Roofing & Construction, LLC ("Tip-Top") and Pacific Contractors, LLC ("Pacific") supplied materials, provided labor, and/or installed roofing components (hereinafter collectively "Roofing") on Vriens' home, acting on D.R. Horton's behalf. Id. ¶ 13. Additional contractors include: Builders FirstSource – Southeast Group, LLC; Carolina Custom Carpentry, LLC; Quad K, LLC; JJL Construction, LLC; CAC Carpentry, LLC; Alpha Construction of SC, LLC; Good Luck Incorporated; South Atlantic Framing, Inc.; SRC Construction, LLC; Jalisco Framing, LLC; Mendoza Construction, LLC; VL Contractor, LLC; 84 Lumber Company, LP; Varanda Contracting Group, Inc.; TOMECH, LLC d/b/a Firm Foundation Costal Carolina's; Valim Construction, LLC; Ram Construction SC, LLC; Gold Star Construction, LLC; ProBuild East, LLC; Archer Exteriors, Inc.; Americo Roofing Concepts, Inc.; Contract Exteriors, LLC; Holy City Exteriors, LLC; SR Construction, LLC; Robert Helms Construction, Inc.; Quick Roofing,

[1] "Coastal South Carolina" is the portion of the following counties that are in a 140 mph or greater wind zone under the International Residential (Building) Code, 2015, 2018, and 2021 editions, as adopted in South Carolina: Beaufort, Colleton, Charleston, Dorchester, Berkeley, Georgetown, and Horry. Am. Compl. ¶ 9.

LLC; Monarch Company, LLC; Accurate Building Company, LLC; Southend Exteriors, Inc.; Above the Sky Roofing, Inc.; ABC Supply Co., Inc.; SRS Distribution, Inc. f/k/a Superior Distribution; Contract Lumber, Inc.; BMC East, LP, US LBM-Professional Builders Supply a/k/a US LBM Holding, LLC a/k/a US LBM, LLC, SEC Holdings, LLC d/b/a Southend Exteriors and Professional Builders Supply, LLC d/b/a Professional Builders Supply Commercial PRSRE-GVL, LLC (collectively, the "Subcontractors"). ECF No. 215 at 4. The Subcontractors each entered into an independent contractor agreement ("ICA") with D.R. Horton to provide certain labor and/or materials. ECF No. 215 at 4. Vriens alleges that D.R. Horton and the Subcontractors deficiently constructed Homes in violation of building codes and industry standards. Am. Compl. ¶¶ 20, 36, 65, 72.

D.R. Horton argues that the Homeowner Contracts and the ICAs generally provide that all disputes shall be subject to alternative dispute resolution, including mediation and arbitration. ECF No. 215 at 4. D.R. Horton maintains that all Homes sold to original purchasers (or "upstream purchasers") include the arbitration clauses. Id. at 3. D.R. Horton argues that such arbitration clauses also compel subsequent purchasers (or "downstream purchasers") to arbitrate. Id. Nicholas Bardsley ("Bardsley") is a purported downstream purchaser of a home built by D.R. Horton. Id. Vriens and Bardsley, individually, and on behalf of others similarly situated, are the "Plaintiffs." Id.

Additionally, D.R. Horton has filed crossclaims, asserting claims against the Subcontractors under the ICAs related to the alleged defective work or materials during the construction of the Homes. Id. at 4.

The full arbitration provision in the Homeowner Contract provides:

> **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 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.

ECF No. 215-2 ¶ 15.

Likewise, the ICAs contains an arbitration provision that applies to the Subcontractors, stating:

> **13.1 DISPUTES**. ALL DISPUTES, WHETHER EXISTING NOW OR ARISING IN THE FUTURE BETWEEN THEM, RELATED IN ANY WAY TO THIS AGREEMENT, TO CONTRACTOR'S WORK, OR TO

> ANY DISPUTE THAT OWNER OR CONTRACTOR SHALL HAVE WITH ANY THIRD PARTY RELATED TO THE WORK ("DISPUTES") SHALL BE SUBJECT TO ALTERNATIVE DISPUTE RESOLUTION. THESE DISPUTES SHALL INCLUDE CLAIMS RELATED TO THE CONSTRUCTION OR SALE OF ANY HOME OR PROPERTY INCORPORATING THE WORK, INCLUDING ANY CLAIMS ASSERTING ANY ALLEGED DEFECTS IN THE WORK OR ANY ALLEGED REPRESENTATIONS AND/OR WARRANTIES, EXPRESS OR IMPLIED, RELATING TO THE PROPERTY AND/OR THE IMPROVEMENTS.
>
> **13.3 ARBITRATION**. IF THE PARTIES ARE UNABLE TO RESOLVE ANY DISPUTE BY AGREEMENT, REGARDLESS OF ANY OTHER CHOICE OF LAW PROVISION IN ANY UNDERLYING CONTRACT OR THIS AGREEMENT, THE DISPUTE SHALL BE SUBMITTED TO BINDING ARBITRATION UNDER THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 ET SEQ. ("FAA"). ALL DEMANDS FOR ARBITRATION SHALL BE MADE BEFORE THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS OR REPOSE, EXCEPT THAT ANY CLAIM BY OWNER SHALL NOT ACCRUE FOR PURPOSES OF ANY TIME LIMITATION FOR CLAIMS UNTIL OWNER HAS DISCOVERED THE CLAIM, OR COULD HAVE DISCOVERED IT BY REASONABLE DILIGENCE. THE AWARD RENDERED BY THE ARBITRATOR(S) SHALL BE FINAL AND BINDING. A PETITION TO CONFIRM, VACATE, MODIFY OR CORRECT AN AWARD MAY BE FILED IN ANY COURT OF COMPETENT JURISDICTION, BUT THE AWARD MAY BE VACATED, MODIFIED OR CORRECTED ONLY AS PERMITTED BY THE FAA.

ECF No. 215-3 at 61.

On November 15, 2023, Vriens, on behalf of himself and the Homeowner Plaintiff Class[2] filed an Amended Summons and Complaint against D.R. Horton and other defendants in the Court of Common Pleas in Charleston County, South Carolina, Case No. 2023-CP-10-05346, (Nov. 15, 2023) (the "State Court Action"), alleging causes

[2] The proposed Plaintiff Class is defined as "[a]ll persons and entities that are owners of residences built by D.R. Horton in Coastal South Carolina which were permitted for construction on or after July 1, 2016." Am. Compl. at ¶ 10.

of action for negligence and gross negligence and breach of implied warranties. See generally, Am. Compl. On December 19, 2023, this case was removed to this court under the Class Action Fairness Act of 2005 ("CAFA"), codified at 28 U.S.C. §§ 1332(d) and 1453. ECF No. 1.

On December 22, 2023, D.R. Horton filed its initial motion to compel arbitration. ECF No. 5. On January 5, 2024, Vriens filed his response in opposition to the motion to compel arbitration. ECF No. 10. On December 18, 2024, D.R. Horton filed its amended motion to compel arbitration and to stay proceedings. ECF No. 215. Vriens filed his response in opposition to the amended motion on December 23, 2024. ECF No. 226. On January 13, 2025, D.R. Horton filed its reply. ECF No. 271. Then, on April 23, 2025, Vriens filed a supplement to his response in opposition to the motion to compel. ECF No. 542. On May 7, 2025, D.R. Horton filed its reply to Vriens' supplement. ECF No. 644. A hearing was held before this court on June 23, 2025. ECF No. 803. As such, this motion is fully briefed and ready for the court's review.

II. STANDARD

Courts recognize that the Federal Arbitration Act ("FAA") creates a strong presumption in favor of arbitration. See 9 U.S.C. §§ 1–14. As the Supreme Court has explained, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985). Arbitration "is a matter of consent, not coercion." E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 294 (2002); see also Arrants v. Buck, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an

underlying agreement between the parties to arbitrate."). Thus, arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010) (internal quotation marks and citations omitted).

The Fourth Circuit has stated that:

> Application of the FAA requires demonstration of four elements: (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the 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 defendant to arbitrate the dispute.

Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 84 (4th Cir. 2016) (quoting Rota-McLarty v. Santander Consumer USA, Inc., 700 F.3d 690, 696 n.6 (4th Cir. 2012)). Although courts must compel arbitration when a party satisfies these four factors, the standard of review and procedural mechanisms to be applied in resolving these four factors are less clear. Gibbs v. Stinson, 421 F. Supp. 3d 267, 299 (E.D. Va. 2019), aff'd sub nom. Gibbs v. Sequoia Cap. Operations, LLC, 966 F.3d 286 (4th Cir. 2020). "Recently, a number of district courts in the Fourth Circuit have determined the burden of proof is 'akin to the burden on summary judgment' because motions to compel arbitration 'often require courts to consider' evidence outside of the pleadings."[3] Gibbs,

[3] Alternatively, courts evaluate a motion to compel arbitration under the standards espoused by § 4 of the FAA, which states in relevant part, that the district court will compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Under this standard, there must be "a judicial conclusion" that there is a validly formed, express agreement to arbitrate. Granite Rock Co., 561 U.S. at 303. As another court in this circuit has noted, "[i]t is unclear what daylight exists, if any, between the two approaches. Both require the party seeking arbitration to offer evidence to satisfy the court that an arbitration agreement actually exists, and both allow the non-moving party to rebut that evidence." Gibbs, 421 F. Supp. 3d at 299 n.51.

421 F. Supp. 3d at 299. (quoting Novic v. Midland Funding, LLC, 271 F. Supp. 3d 778, 782 (D. Md. 2017), rev'd on other grounds sub nom. Novic v. Credit One Bank, Nat'l Ass'n, 757 F. App'x 263 (4th Cir. 2019)); see also Galloway, 819 F.3d at 85 n.3. As such, the party asserting an arbitration agreement has the burden to show the making of the agreement. In re. Mercury Constr. Corp., 656 F.2d 933, 939 (4th Cir. 1981) (en banc), aff'd sub nom, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Whether an arbitration agreement has been formed is an issue of state contract law. Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., 913 F.3d 409, 415 (4th Cir. 2019).

III. DISCUSSION

D.R. Horton argues that this case is subject to mandatory arbitration based on the arbitration provisions in both the Homeowner Contract and the ICAs. ECF Nos. 6 at 2–4; 215 at 12. Plaintiffs argue that the arbitration provisions in the Homeowner Contract and ICAs are unenforceable, and that if they were, that the Homeowner Contracts are subject to the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 et seq. ("SCUAA") and not the FAA. ECF No. 42-1 at 1–2. At the hearing, D.R. Horton and the Subcontractors agreed to arbitration. ECF No. 803. As such, the court grants D.R. Horton's motion to compel arbitration with the Subcontractors.

To determine whether the Homeowner Contract is subject to arbitration, the court will first consider whether the FAA governs. Then, the court will analyze whether any contract defenses raised by Plaintiffs render the arbitration provision in the Homeowner Contract unenforceable. Finally, the court will determine whether the arbitration provision was extinguished pursuant to the merger doctrine.

A. The FAA Governs the Homeowner Contracts

Four factors 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. Galloway, 819 F.3d at 84. The court takes each factor in turn.

1. Dispute Between the Parties

First, there is clearly a dispute between the parties. Plaintiffs entered into the Homeowner Contracts with D.R. Horton. ECF No. 215-2. Plaintiffs now, in connection to the construction of the Homes, allege causes of action for negligence and gross negligence and breach of implied warranties. See generally, Am. Compl.

2. Written Agreement that Includes an Arbitration Provision

Second, the court must determine if there is a written agreement that includes an arbitration provision purporting to cover the dispute. See Galloway, 819 F.3d at 84. "The policy of South Carolina, as well as of the United States, is to favor arbitration of disputes; therefore, there is a strong presumption in favor of the validity of arbitration agreements." Jenkins v. CitiFinancial, Inc., WL 9753133, at *4 (D.S.C. Jan. 16, 2007) (citing O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997)).

The Homeowner Contract provision concerning arbitration states that it covers "any and all disputes which may arise [] regarding this agreement and/or the property." ECF No. 215-2 ¶ 15. The provision specifies that it covers "disputes regarding: (A)

seller's construction and delivery of the home." Id. Further, the provision is initialed separately by the purchaser. Id. As such, the court finds that the Homeowner Contract is a written agreement that includes an arbitration provision purporting to cover the dispute, as this is a dispute regarding the construction of the Home, and thus meets the second element of the FAA.

3. Relationship of the Transaction to Interstate Commerce

Third, the court must determine whether the relationship of the transaction, which is evidenced by the agreement, relates to interstate or foreign commerce. See Galloway, 819 F.3d at 84.

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 that Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 570 S.E.2d 565, 568 (S.C. Ct. App. 2002) (citing Allied-Bruce Terminix Cos., v. Dobson, 513 U.S. 265 (1995)). To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 117 (S.C. 2001).

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, 879 S.E.2d 746, 753 (S.C. 2022); Episcopal Hous. Corp. v. Federal Ins. Co., 239 S.E.2d 647, 652 (S.C. 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").

Plaintiffs argue that "because the essential character of the [Homeowner Contract] was strictly for the purchase of a completed residential dwelling and not the construction" that this dispute is one of an intrastate nature. ECF No. 226-1 at 6 (quoting Bradley v. Brentwood Homes, Inc., 730 S.E.2d 312, 318 (S.C. 2012)). D.R. Horton argues this dispute is one of interstate nature, as the Homeowner Contract was for the construction and sale of a new custom-built home. ECF No. 215 at 12. The court will determine whether the Homeowner Contract is an agreement relating to interstate commerce.

D.R. Horton argues that the Homeowner Contracts clearly cover both the construction and the sale of the Homes. ECF No. 215-1 at 10. It cites to Addendum 8 "Variations in Materials and Components," which contains a list of materials to be used to construct the Home, many of which involve interstate commerce. ECF No. 215-2 at 24. Here, D.R. Horton sourced materials and work from out-of-state manufacturers—Whirlpool Appliances (Michigan), CertainTeed Roof Shingles (Pennsylvania), and Carrier HVAC Equipment (Florida). Furthermore, 84 Lumber (Pennsylvania) supplied

and installed windows and Safe Haven (Missouri) installed security systems. ECF No. 215 at 10.

The court agrees with D.R. Horton that the transaction at issue here was for the construction and sale of the home, affects interstate commerce, and as such falls within the FAA. First, the Homeowner Contracts specifies that it covers "disputes regarding: (A) seller's construction and delivery of the home." ECF No. 215-2 ¶ 15. Next, due to the materials and work sourced from out-of-state entities, interstate commerce is clearly involved in the construction of the new Homes. See Episcopal Hous. Corp., 239 S.E.2d at 652; see also Bernstein v. Pulte Home Co., 2019 WL 8014404, at *1 (D.S.C. Dec. 23, 2019) (granting a motion to compel arbitration and stay proceedings where the agreement involved the construction of new homes, which would involve interstate commerce, and therefore was subject to the FAA) (citing Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)). Plaintiffs have not provided evidence that the materials, equipment, or supplies used to construct the Homes were exclusively sourced from within South Carolina. Thus, the court finds that the transaction for the construction and sale of the Home is evidenced by the Homeowner Contract and relates to interstate commerce, thus meeting the third factor of the FAA analysis. See Galloway, 819 F.3d at 84.

4. Refusal of the Opposing Party to Arbitrate

Fourth, the court must find there is a failure, neglect, or refusal of the opposing party to arbitrate the dispute. Galloway, 819 F.3d at 84. The court finds that this element is clearly met by virtue of the pending matter as Plaintiffs not only contest whether the

FAA applies, but they contest that arbitration provision should be enforced at all. ECF No. 42-1 at 1–2.

Because the four elements of the FAA are satisfied, the court finds that arbitration provision of the Homeowner Contract requires arbitration to be compelled in this matter. The court turns to whether the contract defenses raised by Plaintiffs render the arbitration provision unenforceable

B. No Contract Defenses Render the Provision Unenforceable

Plaintiffs argue that the arbitration provision in the Homeowner Contract is not enforceable, raising the defenses of unconscionability and unenforceability as a matter of law and public policy. ECF No. 542 at 2. In contrast, D.R. Horton argues that the arbitration clause in the Homeowner Contract is enforceable because there are no general contract defenses that would invalidate the agreement to arbitrate. ECF No. 215 at 17.

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 v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 2009 WL 10684895, at *4 (D.S.C. Dec 1, 2009). "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., 892 S.E.2d 112, 115 (S.C. 2023) (quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010)).

"[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." Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 305

(4th Cir. 2001). A party cannot avoid arbitration through rescission of an entire contract when there is no independent challenge to the arbitration clause itself. Carolina Care Plan, Inc. v. United HealthCare Servs., 606 S.E.2d 752, 755 (S.C. 2008).

1. The Arbitration Provision is Not Unconscionable

Plaintiffs argue that the arbitration provision is unconscionable. ECF No. 226-1 at 17. First, they assert that it is is incomplete in scope if considered without the warranties provision. Id. Second, they argue that the arbitration provision is unconscionable because the purchase agreement is an adhesion contract with oppressive terms. Id. Third, they argue that the severance of the oppressive terms would violate South Carolina's public policy. Id.

"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 v. D.R. Horton, Inc., 790 S.E.2d 1, 4 (S.C. 2016) (quoting Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007)). Inequity of bargaining power is not "on its own, sufficient basis to invalidate an arbitration agreement." LaPoint, 2009 WL 10684895 at *11 (citing Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 365 n.5 (S.C. 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, 790 S.E.2d at 4. "Ambiguities in the scope of the arbitration clause must be resolved in favor of arbitration." Volt Info. Scis. Inc. v. Bd. Of Tr. of Leland Stanford Jr. Univ, 489 U.S. 469 (1989).

Plaintiffs specifically argue that "[u]nconscionability must be evaluated under two prongs: (1) lack of meaningful choice; and (2) oppressive terms." ECF No. 226-1 at 17 (quoting Simpson v. MSA of Myrtle Beach Inc., 644 S.E.2d 663, at 668–69 (S.C. 2007). They analogize their situation to that of the plaintiffs in Smith v. D.R. Horton, Inc., 790 S.E.2d 1 at 4–5 (S.C. 2016). Id. They point to the court's finding in Smith that the arbitration provision at issue in that case was "intertwin[ed]" with the "clearly one-sided and oppressive" terms purporting to "disclaim[ ] all other warranties, expressed or implied" and allegedly absolving D.R. Horton of responsibility for "monetary damages of any kind." Id. Plaintiffs argue they had no meaningful choice in accepting the arbitration provision, as it was embedded in a purchase and sale agreement that was offered on a take it or leave it basis by D.R. Horton. ECF No. 226-1 at 19.

The Warranties Provision in the Homeowner Contract provides:

> **14. WARRANTIES AND DISCLAIMER.**
>
> a. **Ten-Year Limited Warranty**. Seller shall provide Buyer with a written, ten-year limited warranty on the House administered by Residential Warranty Corporation ("RWC") which shall be effective as of the Closing Date. The terms and conditions of, and exclusions from, the ten-year limited warranty shall be as set forth in that document published by RWC, entitled "LIMITED WARRANTY, 10 YEAR LIMITED WARRANTY FOR NEW HOMES," and referred to herein as the "Limited Warranty". At Closing, Seller shall deliver to Buyer the actual limited warranty for the House, to be validated by RWC after Closing.
>
> b. **Manufacturers' Warranties**. At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the House.
>
> c. **Disclaimer and Limitation on Seller's Liability.** THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBECTION 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, THE 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.

ECF No. 215-2 ¶ 14.

D.R. Horton argues that the arbitration provision in ¶ 15 of the Homeowner Contract is a standalone provision, and that the warranties and related disclaimers are separately located in ¶ 14. ECF No. 215-1 at 19. D.R. Horton asserts that as a standalone provision, section ¶ 15 should be reviewed as such and is severable from any other language of the Homeowner Contract. Id. D.R. Horton further argues that Plaintiffs had a meaningful choice to enter the Homeowner Contract and were free to purchase a home from another builder, purchase a pre-existing home, or purchase no home at all, and as such they freely chose to assent to D.R. Horton's contractual terms, including arbitration of construction disputes. Id. at 20.

The court finds that the arbitration provision of the Homeowner Contract is not unconscionable because Plaintiffs did not lack a meaningful choice and were not subject to oppressive terms. See Simpson, 644 S.E.2d at 663. Plaintiffs had a meaningful choice

to enter into the Homeowner Contract with D.R. Horton, as they were free to purchase a home from another builder, purchase a pre-existing home, or purchase no home at all. See Smith, 790 S.E.2d at 4. The arbitration provision is binding on both Plaintiffs and D.R. Horton and is not one-sided. See LaPoint, 2009 WL 10684895 at *11. There is nothing so oppressive about the terms in the arbitration provision such that no fair and honest person would accept them. See Smith, 790 S.E.2d at 4. The arbitration provision: (1) binds both D.R. Horton and Plaintiffs to arbitration for construction defect disputes; (2) provides for arbitration in Plaintiffs' 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. ECF No. 215-1 at 20. Further, the arbitration provision in ¶ 15 is a standalone provision, and is separately located from the warranties and related disclaimers in ¶ 14, and they are distinctively separate clauses, as evidenced by the "Initials" sections for the buyer, co-buyer and seller under each paragraph. ECF No 215-2 at 5. Further, at the hearing, D.R. Horton clarified it has changed the provisions in its Homeowner Contract since Smith to be separate arbitration provisions and warranty provisions. ECF No. 803; see Damico, S.E.2d at 754. Thus, the court finds that Plaintiffs and D.R. Horton engaged in a fair bargaining process, the provision has reasonable and customary terms, and as such, is not unconscionable and should be enforced.

2. The Merger Doctrine Does Not Extinguish the Provision

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, 353 S.E.2d 300, 303 (S.C. Ct. App. 1987) (quoting Charleston & Western Carolina Ry. Co. v. Joyce, 99 S.E.2d 187, 193 (S.C. 1957)). The intent of the merger doctrine is not to extinguish agreements outside of these areas such as arbitration of future disputes, which everyone knows are bound to arise. Instead, agreements that are not intended to be merged in a deed are not merged into the deed. Hughes v. Greenville Country Club, 322 S.E.2d 827, 828 (S.C. Ct. App. 1984).

Plaintiffs argue the arbitration provision is extinguished under the merger doctrine. ECF No. 42-1 at 1-2. Plaintiffs argue that the arbitration provision in the Homeowner Contract merged out of existence once the deed was executed, as the arbitration clause is not in the deed. ECF No. 226 at 6. Plaintiffs argue that ¶ 15 of the Homeowner Contract, does not contain such "express" language providing that it will survive closing. ECF No. 226-1 at 24. D.R. Horton argues that the merger doctrine does not apply to the arbitration provision, and that even if it did, there are exceptions to its application in this instance. ECF No. 215 at 10, 24.

D.R. Horton argues that numerous courts have observed the merger doctrine applies only to issues of title, possession, quantity, or emblements of the property and therefore does not apply to the arbitration provision at issue in this matter. ECF No. 215-1 at 15. It argues South Carolina courts follow the same logic as to when the merger doctrine applies, and South Carolina courts have applied the merger doctrine in cases involving possession and title. See Epworth Children's Home v. Beasley, 616 S.E.2d 710 (S.C. 2005) (applying the merger doctrine in a case involving a trust and possession);

Hughes, 322 S.E.2d at 827 (applying the merger doctrine in a case involving possession and use conditions).

D.R. Horton further argues that the Homeowner Contracts contain a number of provisions that evidence the parties' intent not to merge the terms of the Homeowner Contracts with the deed. Id. at 16. It argues that a merger would mean that D.R. Horton's obligation to provide the Plaintiffs a ten-year warranty would also be merged out of existence, which the parties could not have intended. Id. It argues that, accordingly, the terms of the agreement clearly indicate that the parties did not intend for the arbitration provision to be superseded by the deed. Id.

The court finds the merger doctrine does not apply to the Homeowner Contract. Analyzing the intent of the parties, the court finds the language of the arbitration provision in ¶ 15 evidence it was not intended to merge, as it specifically references "any and all disputes which may arise." See Hughes, 322 S.E.2d at 828. Beyond that, the Homeowner Contracts contain a number of provisions that evidence the parties' intent not to merge the terms of the Homeowner Contracts with the deed, such as the warranties provision or post-closing remedies provision. See Carlson v. S.C. State Plastering, LLC, 743 S.E.2d 868, 872–75 (S.C. Ct. App. 2013) (concluding that the arbitration provision was not waived, was not unconscionable, did not merge with deed, and the claims fell within the scope of said provision) As such, the merger doctrine does not preclude enforcement of the arbitration provision.

In sum, finding that the FAA governs the Homeowner Contracts and no contract defenses preclude enforcement, the court finds that the arbitration provision is enforceable.

IV. CONCLUSION

For the foregoing reasons the court **GRANTS** D.R. Horton's motion to compel arbitration and stay proceedings as to the "upstream purchasers." Further, the court **GRANTS** arbitration as to D.R. Horton's crossclaim to compel arbitration with the Subcontractors. The court **ORDERS** D.R. Horton and plaintiffs to brief whether the "downstream purchasers" are also bound to arbitration and whether Plaintiffs may proceed as a Class in arbitration.

AND IT IS SO ORDERED.

David C. Norton
United States District Judge

September 4, 2025
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY Andrew M. Ban, Plaintiffs, vs. D.R. Horton, Inc., Defendant.	)	IN THE COURT OF COMMON PLEAS 2025-CP-26-00526 **ORDER**
D.R. Horton, Inc., Third-Party Plaintiff, vs. Jalisco Framing, LLC; US LBM Holdings, LLC d/b/a Professional Builders Supply - Southend Exteriors; RJM Plumbing, Inc.; Dean Custom Air, LLC; Quality Electric of the Coastal Carolinas, LLC; and 84 Lumber Company, Third-Party Defendants.	)	

On August 20, 2025, this matter came before the court on Defendant D.R. Horton, Inc.'s ("D.R. Horton" or "Defendant") Motion to Stay Action and Compel Arbitration (the "Motion"). Considering the arguments made at the hearing and the memorandum submitted by the parties, the Motion is GRANTED.

FACTUAL BACKGROUND

On February 27, 2022, Plaintiff Andrew Ban ("Plaintiff") entered into a contract with D.R. Horton (the "Homeowner Contract") for the purchase of a home located at 335 Flowering Branch

EXHIBIT B

Avenue, Little River, South Carolina (the "Home"). The Homeowner Contract contains an arbitration provision. The entirety of the arbitration provision provides as follows:

> **Mandatory binding arbitration.** Purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding this agreement and/or the property, including but not limited to any disputes regarding: (a) seller's construction and delivery of the 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

D.R. Horton's Memorandum in Support, Ex. A ("Ex. A.") ¶ 15 (formatting altered).

Plaintiff filed this lawsuit complaining of defects in the construction of the Home and the damages related to same. Plaintiff alleges certain components, including but not limited to the i-joists, were not constructed in accordance with the building codes and applicable construction and safety standards. Compl. ¶ 8. Plaintiff also alleges certain claims regarding fraud and misrepresentation related to the alleged defects in the Home. Compl. ¶¶ 39-65.

Separately, D.R. Horton contracted with Third-Party Defendants Jalisco Framing, LLC; US LBM Holdings, LLC d/b/a Professional Builders Supply - Southend Exteriors; RJM Plumbing, Inc.; Dean Custom Air, LLC; Quality Electric of the Coastal Carolinas, LLC; and 84 Lumber Company (collectively, "Subcontractors") to perform various work on the Home. D.R. Horton has filed a third-party complaint against Subcontractors related to their work. D.R. Horton entered into Independent Contractor Agreements ("ICAs") with Subcontractors. The ICA arbitration provisions are substantially the same and are as follows:

> 13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements…
>
> 13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"). IN MAKING THIS AGREEMENT, THE PARTIES ARE WAIVING THEIR RIGHTS TO FILE A LAWSUIT, TO HAVE A JURY RESOLVE ANY DISPUTE BETWEEN THEM, AND TO APPEAL THE DECISION OF THE ARBITRATIOR TO A COURT OF LAW. All demands for arbitration shall be made before the expiration of the applicable statute of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.
>
> D.R. Horton's Memorandum in Support, Ex. B ("Ex. B.")

On August 20, 2025, D.R. Horton's Motion was heard. No Subcontractors objected to the Motion.

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. *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 542 S.E.2d 360 (2001). "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.*

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, the FAA "preempt[s] any state law that completely invalidates the parties' agreement to arbitrate." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001).

Moreover, "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." *Id.* at 596, 553 S.E.2d at 118. A court may consider challenges to the arbitration clause itself, but any challenge to the contract as a whole should be resolved only 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.").

DISCUSSION

D.R. Horton argues that this case is subject to arbitration based on the arbitration provisions in both the Homeowner Contract and the ICAs. Plaintiffs argue that the arbitration provision in the Homeowner Contract is unenforceable.

To determine whether the Homeowner Contract is subject to arbitration, the court will first consider whether the FAA governs. Then, the court will analyze whether any contract defenses raised by Plaintiffs render the arbitration provision in the homeowner Contract unenforceable. Finally, the court will determine whether the arbitration provision was extinguished pursuant to the merger doctrine.

I. The Homeowner Contract and ICAs are Governed by the FAA.

Four factors 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.

Bernstein, 2019 WL 8014404, at *6 (citing *Wood*, 429 F.3d at 87).

A. Dispute Between the Parties

First, there is clearly a dispute between the parties. Plaintiff entered into the Homeowner Contract for the construction and sale of the Home. Ex. A. Plaintiff now complains of defects in the construction of the Home and related issues. *See generally*, Compl.

Subcontractors entered into the ICAs with D.R. Horton. Now, a dispute has arisen between Subcontractors and D.R. Horton related to the work performed by Subcontractors.

B. Written Agreement Including Arbitration Provision

Second, the court must determine if there is a written agreement that includes an arbitration provision purporting to cover the dispute. *See Bernstein*, 2019 WL 8014404, at *6. The Homeowner Contract covers disputes over alleged construction defects. The Homeowner Contract states that it covers "any and all disputes which may arise . . . regarding this agreement and/or the property." The provision specifically covers "disputes regarding: (A) seller's construction and delivery of the home." *Id.*

The ICAs' arbitration provision states: "all disputes . . . related to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work . . . ." Ex. B., ¶ 13.1. As such, the court finds that the Homeowner Contract

and the ICAs contain written agreements that include arbitration provisions purporting to cover the disputes.

C. Transactions Involve Interstate Commerce

Third, the court must determine whether transactions involve interstate commerce. The FAA applies to any written agreement to arbitrate in a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Courts have interpreted "the words 'involving commerce' [as] the functional equivalent of 'affecting commerce,' which typically indicates Congress' intent to exercise its commerce power in full." *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 115. Congress' authority in this area is incredibly broad, as "case law firmly establishes Congress' power to regulate [even] purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Therefore, a dispute is subject to the FAA where there is a written agreement to arbitrate that encompasses it and the transaction at issue relates to or affects foreign or interstate commerce. *See, e.g.*, *Bernstein*, 2019 U.S. Dist. LEXIS 227884, at *6 (describing when a party can compel arbitration under the FAA).

The South Carolina Supreme Court has repeatedly held that an agreement for the construction of a new home built to a party's specifications "manifestly involve[s] interstate commerce." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022). A party could not construct a new home "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina." *Episcopal Housing. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977).

In support of its argument, D.R. Horton cites to the Homeowner Contract. Specifically, Exhibit C of the Homeowner Contract, "Stages of Construction," contemplates the construction of

the Home. As another example, Addendum 8 of the Homeowner Contract, "Variations in Materials and Components," contains a list of materials to be used to construct the Home, many of which involve interstate commerce. *See*, e.g., Ex. A; *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."). Additionally, the ICA clearly covers the construction of new homes, including the Home.

The court agrees with D.R. Horton that the transaction at issue here was for the construction and sale of the home, affected interstate commerce, and falls within the FAA.

D. Refusal of the Opposing Party to Arbitrate

Fourth, the court must find that there is a failure, neglect or refusal of the opposing party to arbitrate the dispute. D.R. Horton has requested that Plaintiff and Subcontractors arbitrate this matter, but Plaintiff has opposed D.R. Horton's attempts to arbitrate and Subcontractors have either not yet appeared in this action or not agreed to arbitrate. The court finds this element is met.

II. The Arbitration Provisions are Enforceable.

Plaintiffs argue that the arbitration provision in the Homeowner Contract is not enforceable, raising the defense of unconscionability. In contrast, D.R. Horton argues that the arbitration clause is enforceable because there are no general contract defenses that would invalidate it.

a. No Contract Defenses Render the Arbitration Provisions Unenforceable.

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)).

Under the *Prima Paint* doctrine, "the first task of a court is to separate the arbitration provision from the rest of the contract." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). A court can consider only "challenges specifically [to] the validity of the agreement to arbitrate." *Rent-A-Ctr.*, 561 U.S. at 70 (citation omitted). "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* In other words, "a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016).

Plaintiff argues that the arbitration provision is unconscionable due to its connection with the warranties provision and that it is an adhesion contract.

In *Smith*, the South Carolina Supreme Court reviewed a paragraph called "Warranties and Dispute Resolution," with "more than 1,800 words" and "ten separately denominated subparagraphs." 417 S.C. at 53, 60, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting). Subparagraph (g) was specifically identified as "MANDATORY BINDING ARBITRATION" and detailed the parties' obligation to arbitrate their disputes. *Id.* at 57–58, 790 S.E.2d at 9. Notably, the agreement did not contain a severability clause. *Id.* at 50 n.6, 790 S.E.2d at 5 n.6 (majority opinion). The parties, and the justices, in *Smith* disagreed as to whether the ten subparagraphs should be read together as the "arbitration agreement," or only the specifically labeled arbitration subparagraph (g). *Id* at 48, 790 S.E.2d at 4. The majority concluded that "[t]he subparagraphs . . . contain[ed] numerous cross-references to one another" and therefore were "intertwin[ed] . . . so as to constitute

a single provision." *Id.* In a 3–2 decision, the Court held that warranty disclaimers and damages limitations in various subparagraphs rendered the arbitration agreement unenforceable. *Id.* at 50, 790 S.E.2d at 5. Justice Kittredge filed a lengthy dissent, in which he noted that the plaintiffs "[did] not contend the specific agreement to arbitrate was unconscionable," and criticized the majority for relying on "the fiction that the arbitration provision [was] the entirety of Paragraph 14." *Id.* at 53, 59, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting).

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

The court of appeals acknowledged this standard in *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023). *Mart* involved an arbitration provision "in an unnumbered, standalone paragraph." *Id.* at 307, 893 S.E.2d at 361. Other unnumbered paragraphs included a limited warranty that disclaimed all other warranties, as well as liability for consequential and punitive damages. *Id.* at 308, 893 S.E.2d at 362. The buyer "agree[d] to accept [the] limited warranty in lieu of all other rights or remedies, whether base[d] on contract or tort." *Id.* (third alteration in original) (emphasis removed). At closing, the buyer was provided with a warranty application and warranty that contained its own arbitration provision, and which likewise disclaimed all other warranties and precluded recovery of incidental and consequential damages. *Id.* at 309–11, 893 S.E.2d at 363. On appeal, the court of appeals considered whether the trial court erred by incorporating provisions from this separate limited warranty into the parties' sales contract. *Id.* at 312, 893 S.E.2d at 364.

The *Mart* court looked to the South Carolina Supreme Court's conclusion in *Damico* that "'the circuit court impermissibly considered the terms found in the limited warranty booklet' when analyzing the arbitration provision of the purchase and sales agreement." *Id.* at 315, 893 S.E.2d at 365 (quoting *Damico*, 437 S.C. at 607, 879 S.E.2d at 753). The court added that "controlling case law [did] not permit [it] to consider the language of the separate limited Warranty or the propriety of the waiver of implied warranties in analyzing the standalone arbitration language of the Sales Contract." *Id.* at 315, 893 S.E.2d at 365. To demonstrate that the arbitration provision was unconscionable and, therefore, unenforceable, the plaintiff "was required to show that the language *in the arbitration section alone* was unconscionable." *Id.* at 315–16, 893 S.E.2d at 366 (emphasis added). The plaintiff failed to do that because although "[c]hallenged terms [could] be found

elsewhere in the Sales Contract and/or the Warranty agreement," the arbitration provision itself "contain[ed] no such . . . term[s]." *Id.* at 315, 893 S.E.2d at 365.

Damico and *Mart* are consistent with the United States Supreme Court's holding in *Rent-A-Center*, where a company sought to enforce a delegation provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of th[e] Agreement." *Rent-A-Ctr.*, 561 U.S. at 66 (citation omitted). Notably, "the underlying contract [was] itself an arbitration agreement" entitled "Mutual Agreement to Arbitrate Claims." *Id.* at 65, 72. The *Rent-A-Center* Court clarified that "[a]pplication of the severability rule [of *Prima Paint*] does not depend on the substance of the remainder of the contract." *Id.* at 72. No matter the underlying contract, when ruling on arbitrability a court can consider only challenges *specifically* to the provision providing for arbitration. *Id.* The *Rent-A-Center* plaintiff's unconscionability arguments—that the agreement "was one-sided" and contained a "fee-splitting arrangement" and "limitations on discovery"—were directed at the arbitration agreement *as a whole*. *Id.* at 73–74. The plaintiff "did not make any arguments *specific to the delegation provision*" or "contest the validity of *the delegation provision in particular*." *Id.* at 74 (emphasis added). *Rent-A-Center* makes clear that this is what the law requires.

In this case, the Homeowner Contract bears more in common with the separate arbitration provisions in *Damico* and *Mart* than the combined warranty and dispute resolution paragraph in *Smith*. As in *Rent-A-Center*, here the arbitration clause is a standalone provision located in section 15 of the Homeowner Contract, whereas warranties and related disclaimers are in section 14. Plaintiffs may argue that section 15 "incorporates" the warranty and disclaimer provisions of section 14. However, the arbitration provision in *Damico* stated that it applied to "any Dispute," including claims "arising by virtue of any . . . warranties alleged to have been made." 437 S.C. at

605, 879 S.E.2d at 751–52 (ellipsis in original). The arbitration provision must be interpreted on its own, despite any reference to warranties. *Id.* at 607, 879 S.E.2d at 752–53.

In this case, the relevant arbitration provision consists of the stipulation in section 15 of the Homeowner Contracts that the "purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding th[e] agreement and/or the property." (*E.g.*, Ex. 1 § 15 (capitalization altered).) Following *Damico* and *Mart,* Plaintiff's challenges to extraneous provisions outside of the standalone, unchallenged arbitration provision cannot be considered. Instead, Plaintiff's challenges to those other provisions in the Homeowner Contract are "for the arbitrator." *Rent-A-Ctr.*, 561 U.S at 72.

Here, the evidence suggests that the parties intended to treat section 15 as separate from the rest of the Homeowner Contract. Plaintiff "separately initialed [section 15] titled 'MANDATORY BINDING ARBITRATION,'" which "indicates the parties themselves viewed these terms as distinct contractual provisions to which they separately consented." *Smith*, 417 S.C. at 61, 790 S.E.2d at 11 (Kittredge, J., dissenting). In short, the arbitration provision is not combined with the warranty provision such that the two cannot be separated easily. Accordingly, section 15 is a standalone provision.

b. The Arbitration Provisions Are Not Unconscionable.

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also* S.C. Code Ann. § 15-48-10(a). Therefore, "courts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability." *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d

286, 291 (Ct. App. 2016) (citation and internal quotation marks omitted). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *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 touchstone of the analysis begins with the presence or absence of meaningful choice. *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. This requires courts to "consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant." *Id.* at 613, 879 S.E.2d at 755.

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

36, 644 S.E.2d at 674. Rather, courts should examine arbitration clauses for conscionability on a "case-by-case" basis. *Id.*

Here, the arbitration provision in the Homeowner Contract is not similar to those that courts have found to be unconscionable. "On the rare occasion when a court has determined that arbitral procedures render an arbitration agreement unenforceable, the one-sided provisions have been so pervasive and extreme that the arbitration provision created a 'sham system unworthy even of the name of arbitration.'" *LaPoint*, 2009 U.S. Dist. LEXIS 146577, at *18–19 (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999)). For example, in *Damico*, the court concluded that the arbitration agreement was unconscionable because it gave the homebuilder too much control over the *process* of arbitration: findings would not be binding in other proceedings without mutuality of parties, which the homebuilder had unilateral power to prevent because only the homebuilder could join contractors and other third parties. 437 S.C. at 615–16, 879 S.E.2d at 757. Recently, in *Huskins v. Mungo Homes, LLC*, the South Carolina Supreme Court declared that a provision in an arbitration agreement purporting to shorten the statute of limitations was "void and illegal as a matter of public policy." 444 S.C. 592, 595, 910 S.E.2d 474, 476 (2024), *reh'g denied*, 2025 S.C. LEXIS 17 (Jan. 16, 2025).

In contrast, the arbitration provision in the Homeowner Contract satisfies the fairness standard. In relevant part, the arbitration provision (1) binds both D.R. Horton and Plaintiff to arbitrate construction defect disputes; (2) provides for arbitration in Plaintiff's home county; (3) provides for American Arbitration Association ("AAA")[1] rules and an expedited hearing schedule;

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

(4) gives the arbitrator discretion to assess the filing fees and costs against D.R. Horton; and (5) allows any party to seek judicial enforcement of the arbitrator's decision. There is nothing "so oppressive" about these terms such "that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. To the contrary, these are reasonable and customary terms in an arbitration agreement and should be enforced.[2]

The questions as to the ICAs are the same: (1) whether Subcontractors 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.

First, Subcontractors had a meaningful choice to enter the ICAs. Subcontractors were free to decline to enter into a business relationship with D.R. Horton. Subcontractors freely chose to assent to D.R. Horton's contractual terms, including the arbitration provision. Subcontractors also had the opportunity to negotiate terms. There is nothing unfair about this bargaining process. Arbitration is binding on all parties to the contract and is not 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. To start, the Subcontractors are sophisticated parties who entered into these ICAs with D.R. Horton, under which they have performed hundreds of thousands of dollars of work for D.R. Horton. The arbitration provisions bind both D.R. Horton and Subcontractors to arbitrate disputes and do not contain any oppressive terms. There is nothing about the terms such that no fair and honest person would accept them. All of the Subcontractors involved in this matter,

[2] Moreover, because the Home Purchase Agreement contains a severability clause (*E.g.*, Ex. 1, § 23), to the extent the court disagrees, it can sever any provisions it finds unconscionable.

along with many others, agreed to these terms. These are reasonable and customary terms and should be enforced.

Plaintiff argues that the arbitration agreement lacks mutuality of remedies and limits the arbitrator's authority. Neither provides a basis for denying D.R. Horton's motion. Any limitation of liability is in separate provisions, not in the arbitration agreement. Therefore, Plaintiff's challenge should be addressed to an arbitrator.

In addition, the provisions that allow certain actions to proceed in court have no bearing on this case. One deals solely with earnest money and how it will be treated in the transaction. (*See, e.g.*, Ex. 1, § 4.) The other addresses what happens if D.R. Horton does not complete construction of the Home. (*See, e.g.*, *id.* § 16(f).) Neither is relevant to the present dispute.

The South Carolina Supreme Court has recognized that "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672; *see also Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (stating that "the doctrine of mutuality of remedy does not apply" to an arbitration agreement because the agreement "does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined" (emphasis altered)).

The Court expressed concern about mutuality in *Damico* because the agreement gave the builder sole discretion to join third parties, such as contractors, while also mandating that findings in one proceeding could not be used in another unless there was mutuality of parties. 437 S.C. at 615–16, 879 S.E.2d at 757. The *Damico* court found that this violated the "fundamental principle of law that the plaintiff is the master of his own complaint." *Id.* at 616, 879 S.E.2d at 757. The *Damico* court also noted that it "create[d] the possibility of inconsistent factual findings that would preclude [homeowners] from recovery on a purely procedural (rather than a merit) basis." *Id.* at

616, 879 S.E.2d at 757. The Court was concerned that builder's ability to control the proceedings created the possibility of parallel "empty chair" defenses, where an arbitration defendant could blame an absent party, while in court, a litigation defendant could blame the parties that submitted to arbitration. *Id.* Moreover, the Court observed that because findings would not be binding in other proceedings without mutuality of parties, *which the homebuilder had unilateral power to prevent*, homeowners "could not even use the fact that the arbitrator had found [the builder] was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa." *Id.* It was this "procedural defense to liability" that the Court found "wholly unreasonable and oppressive." *Id.*

Similarly, in *Simpson*, the agreement allowed one party—car dealers—to "bring a judicial proceeding that completely disregard[ed] any pending consumer claims that require[d] arbitration." 373 S.C. at 31, 644 S.E.2d at 672

As now-Chief Justice Kittredge noted in *Damico*, the yardstick of whether an agreement is unconscionable is even-handedness. 437 S.C. at 614, 879 S.E.2d 756. The agreement in that case failed to meet that standard by creating a "procedural defense to liability" that was "wholly unreasonable and oppressive." *Id.* at 616, 879 S.E.2d at 757. Similarly, in *Simpson*, the agreement at issue effectively elevated "the dealer's judicial remedies" above "the consumer's arbitral remedies," creating a process that was "one-sided and oppressive and d[id] not promote a neutral and unbiased arbitral forum." 373 S.C. at 32, 644 S.E.2d at 672. The arbitration provision in this case contains no such terms.

As noted above, the arbitration provision in the Homeowner Contract requires D.R. Horton *and* homebuyers to arbitrate all construction defect claims and allows any party to seek judicial

enforcement of an arbitration decision. (*E.g.*, Ex. 2, § 15.) There is no lack of mutuality in these provisions; even if there were, there is no unconscionability.

There is also nothing unconscionable about the arbitral procedures the agreement dictates or the limits it places on an arbitrator's authority. In *Hooters*, the court found that the promised employment arbitration was a "sham" because the company "was responsible for setting up . . . a [neutral] forum by promulgating arbitration rules and procedures," but instead established rules that were "so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding." 173 F.3d at 938, 940. Among the rules' many problems, the company was "not required to file any responsive pleadings or to notice its defenses"; "the employee [had to] provide the company with a list of all fact witnesses with a brief summary of the facts known to each," but the company had no obligation to reciprocate; the company could expand the scope of arbitration "to any matter," whereas the employee was limited to the issues in the initial claim; the company had the right to record audio or video of the arbitration hearing, but the employee did not; and only the company could "bring suit in court to vacate or modify an arbitral award." *Id.* at 938–39. Moreover, two of the three arbitrators that would resolve any dispute had to be picked from a list *created by the company*. *See id.* The court concluded "that the promulgation of so many biased rules—*especially the scheme whereby one party to the proceeding so control[led] the arbitral panel*—breache[d] the contract entered into by the parties." *Id.* at 940 (emphasis added).

The Homeowner Contract contains no similar provisions. It provides for arbitration before the AAA, a forum that is "well-known," "consumer friendly," and "affordable." *Whitman*, 2012 U.S. Dist. LEXIS 176480, at *8 (citation omitted). Moreover, the arbitration provision allows for either party to seek judicial enforcement of an arbitration award. (*E.g.*, Ex. 3, § 15.) These

provisions are consistent with the goal of "achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

The propriety of any other provisions should be determined by the arbitrator, as even the court in *Hooters* recognized that "[g]enerally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance." 173 F.3d at 941. The court emphasized that the case was "the exception that proves the rule: *fairness objections should generally be made to the arbitrator*." *Id.* (emphasis added). Any questions about the conscionability or fairness of the Homeowner Contract must be resolved in arbitration.

Therefore, the court finds that the arbitration clause is enforceable because there are no general contract defenses that would invalidate it.

III. The Arbitration Provision Did Not Merge with the Deed.

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, 311, 353 S.E.2d 300, 303 (Ct. App. 1987) (quoting *Charleston & Western Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187, 193 (1957)).

Plaintiff argues that the arbitration provision merged out of existence when the deed was executed, as the arbitration clause is not in the deed and the provision does not contain express language providing that it will survive closing. D.R. Horton argues that the merger doctrine does not apply to the arbitration provision, and, that even if it did, exceptions to the merger doctrine apply.

The court finds the language of the arbitration provision evidences the parties did not intend to merge, as it specifically references "any and all disputes." The contract also includes a number

of provisions that evidence the parties' intent not the merge the terms of the contract with the deed, such as the warranty provision. As such, the courts finds that the merger doctrine does not apply to the Homeowner Contract.

CONCLUSION

Finding that the FAA governs and no contract defenses preclude enforcement, the court finds the arbitration provisions in the ICAs and Homeowner Contract enforceable. Accordingly, the court GRANTS D.R. Horton's Motion to Stay Action and Compel Arbitration.

AND IT IS SO ORDERED.

[Judge's Electronic Signature Page Follows]

Horry Common Pleas

Case Caption: Andrew M Ban , plaintiff, et al VS DR Horton Inc , defendant, et al

Case Number: 2025CP2600526

Type: Order/Other

15th Circuit Resident Judge

s/ B. Alex Hyman

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS
Sam Charles Prest, III and Kristina Sarah Prest, Plaintiffs, vs. D.R. Horton, Inc., Defendant.	2025-CP-26-00484 **ORDER**
D.R. Horton, Inc., Third-Party Plaintiff, vs. 84 Lumber Company LP; RJM Plumbing, Inc.; Dean Custom Air, LLC; Quality Electric of the Coastal Carolinas, LLC; and US LBM, LLC d/b/a Southend Exteriors; Third-Party Defendants.	

On August 20, 2025, this matter came before the court on Defendant D.R. Horton, Inc.'s ("D.R. Horton" or "Defendant") Motion to Stay Action and Compel Arbitration (the "Motion"). Considering the arguments made at the hearing and the memorandum submitted by the parties, the Motion is GRANTED.

FACTUAL BACKGROUND

On May 25, 2022, Plaintiffs Sam Charles Prest, III and Kristina Prest ("Plaintiff") entered into a contract with D.R. Horton (the "Homeowner Contract") for the purchase of a home located at 859 Flowering Branch Avenue, Little River, South Carolina (the "Home"). The Homeowner Contract contains an arbitration provision. The entirety of the arbitration provision provides as follows:

EXHIBIT C

> **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

D.R. Horton's Memorandum in Support, Ex. A ("Ex. A.") ¶ 15 (formatting altered).

Plaintiff filed this lawsuit complaining of defects in the construction of the Home and the damages related to same. Plaintiff alleges certain components, including but not limited to the i-joists, were not constructed in accordance with the building codes and applicable construction and safety standards. Compl. ¶ 8. P

Separately, D.R. Horton contracted with Third-Party Defendants 84 Lumber Company LP; RJM Plumbing, Inc.; Dean Custom Air, LLC; Quality Electric of the Coastal Carolinas, LLC; and US LBM, LLC d/b/a Southend Exteriors (collectively, "Subcontractors") to perform various work

on the Home. D.R. Horton has filed a third-party complaint against Subcontractors related to their work. D.R. Horton entered into Independent Contractor Agreements ("ICAs") with Subcontractors. The ICA arbitration provisions are substantially the same and are as follows:

> 13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements…
>
> 13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"). IN MAKING THIS AGREEMENT, THE PARTIES ARE WAIVING THEIR RIGHTS TO FILE A LAWSUIT, TO HAVE A JURY RESOLVE ANY DISPUTE BETWEEN THEM, AND TO APPEAL THE DECISION OF THE ARBITRATIOR TO A COURT OF LAW. All demands for arbitration shall be made before the expiration of the applicable statute of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.
>
> D.R. Horton's Memorandum in Support, Ex. B ("Ex. B.")

On August 20, 2025, D.R. Horton's Motion was heard. No Subcontractors objected to the Motion.

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. *Munoz v. Green Tree Fin. Corp*., 343 S.C. 531, 542 S.E.2d 360 (2001). "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.*

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, the FAA "preempt[s] any state law that completely invalidates the parties' agreement to arbitrate." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001).

Moreover, "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." *Id.* at 596, 553 S.E.2d at 118. A court may consider challenges to the arbitration clause itself, but any challenge to the contract as a whole should be resolved only 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.").

DISCUSSION

D.R. Horton argues that this case is subject to arbitration based on the arbitration provisions in both the Homeowner Contract and the ICAs. Plaintiffs argue that the arbitration provision in the Homeowner Contract is unenforceable.

To determine whether the Homeowner Contract is subject to arbitration, the court will first consider whether the FAA governs. Then, the court will analyze whether any contract defenses raised by Plaintiffs render the arbitration provision in the homeowner Contract unenforceable. Finally, the court will determine whether the arbitration provision was extinguished pursuant to the merger doctrine.

I. The Homeowner Contract and ICAs are Governed by the FAA.

Four factors 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.

Bernstein, 2019 WL 8014404, at *6 (citing *Wood*, 429 F.3d at 87).

A. Dispute Between the Parties

First, there is clearly a dispute between the parties. Plaintiff entered into the Homeowner Contract for the construction and sale of the Home. Ex. A. Plaintiff now complains of defects in the construction of the Home and related issues. *See generally*, Compl.

Subcontractors entered into the ICAs with D.R. Horton. Now, a dispute has arisen between Subcontractors and D.R. Horton related to the work performed by Subcontractors.

B. Written Agreement Including Arbitration Provision

Second, the court must determine if there is a written agreement that includes an arbitration provision purporting to cover the dispute. *See Bernstein*, 2019 WL 8014404, at *6. The Homeowner Contract covers disputes over alleged construction defects. The Homeowner Contract states that it covers "any and all disputes which may arise . . . regarding this agreement and/or the property." The provision specifically covers "disputes regarding: (A) seller's construction and delivery of the home." *Id.*

The ICAs' arbitration provision states: "all disputes . . . related to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work . . . ." Ex. B., ¶ 13.1. As such, the court finds that the Homeowner Contract and the ICAs contain written agreements that include arbitration provisions purporting to cover the disputes.

C. Transactions Involve Interstate Commerce

Third, the court must determine whether transactions involve interstate commerce. The FAA applies to any written agreement to arbitrate in a "contract evidencing a transaction involving

commerce." 9 U.S.C. § 2. Courts have interpreted "the words 'involving commerce' [as] the functional equivalent of 'affecting commerce,' which typically indicates Congress' intent to exercise its commerce power in full." *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 115. Congress' authority in this area is incredibly broad, as "case law firmly establishes Congress' power to regulate [even] purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Therefore, a dispute is subject to the FAA where there is a written agreement to arbitrate that encompasses it and the transaction at issue relates to or affects foreign or interstate commerce. *See, e.g.*, *Bernstein*, 2019 U.S. Dist. LEXIS 227884, at *6 (describing when a party can compel arbitration under the FAA).

The South Carolina Supreme Court has repeatedly held that an agreement for the construction of a new home built to a party's specifications "manifestly involve[s] interstate commerce." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022). A party could not construct a new home "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina." *Episcopal Housing. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977).

In support of its argument, D.R. Horton cites to the Homeowner Contract. Specifically, Exhibit C of the Homeowner Contract, "Stages of Construction," contemplates the construction of the Home. As another example, Addendum 8 of the Homeowner Contract, "Variations in Materials and Components," contains a list of materials to be used to construct the Home, many of which involve interstate commerce. *See*, e.g., Ex. A; *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."). Additionally, the ICA clearly covers the construction of new homes, including the Home.

The court agrees with D.R. Horton that the transaction at issue here was for the construction and sale of the home, affected interstate commerce, and falls within the FAA.

D. Refusal of the Opposing Party to Arbitrate

Fourth, the court must find that there is a failure, neglect or refusal of the opposing party to arbitrate the dispute. D.R. Horton has requested that Plaintiff and Subcontractors arbitrate this matter, but Plaintiff has opposed D.R. Horton's attempts to arbitrate and Subcontractors have either not yet appeared in this action or not agreed to arbitrate. The court finds this element is met.

II. The Arbitration Provisions are Enforceable.

Plaintiffs argue that the arbitration provision in the Homeowner Contract is not enforceable, raising the defense of unconscionability. In contrast, D.R. Horton argues that the arbitration clause is enforceable because there are no general contract defenses that would invalidate it.

a. No Contract Defenses Render the Arbitration Provisions Unenforceable.

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)).

Under the *Prima Paint* doctrine, "the first task of a court is to separate the arbitration provision from the rest of the contract." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874,

876 (Ct. App. 2020). A court can consider only "challenges specifically [to] the validity of the agreement to arbitrate." *Rent-A-Ctr.*, 561 U.S. at 70 (citation omitted). "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* In other words, "a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016).

Plaintiff argues that the arbitration provision is unconscionable due to its connection with the warranties provision and that it is an adhesion contract.

In *Smith*, the South Carolina Supreme Court reviewed a paragraph called "Warranties and Dispute Resolution," with "more than 1,800 words" and "ten separately denominated subparagraphs." 417 S.C. at 53, 60, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting). Subparagraph (g) was specifically identified as "MANDATORY BINDING ARBITRATION" and detailed the parties' obligation to arbitrate their disputes. *Id.* at 57–58, 790 S.E.2d at 9. Notably, the agreement did not contain a severability clause. *Id.* at 50 n.6, 790 S.E.2d at 5 n.6 (majority opinion). The parties, and the justices, in *Smith* disagreed as to whether the ten subparagraphs should be read together as the "arbitration agreement," or only the specifically labeled arbitration subparagraph (g). *Id* at 48, 790 S.E.2d at 4. The majority concluded that "[t]he subparagraphs . . . contain[ed] numerous cross-references to one another" and therefore were "intertwin[ed] . . . so as to constitute a single provision." *Id.* In a 3–2 decision, the Court held that warranty disclaimers and damages limitations in various subparagraphs rendered the arbitration agreement unenforceable. *Id.* at 50, 790 S.E.2d at 5. Justice Kittredge filed a lengthy dissent, in which he noted that the plaintiffs "[did] not contend the specific agreement to arbitrate was unconscionable," and criticized the majority

for relying on "the fiction that the arbitration provision [was] the entirety of Paragraph 14." *Id.* at 53, 59, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting).

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

The court of appeals acknowledged this standard in *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023). *Mart* involved an arbitration provision "in an unnumbered, standalone paragraph." *Id.* at 307, 893 S.E.2d at 361. Other unnumbered paragraphs included a limited warranty that disclaimed all other warranties, as well as liability for

consequential and punitive damages. *Id.* at 308, 893 S.E.2d at 362. The buyer "agree[d] to accept [the] limited warranty in lieu of all other rights or remedies, whether base[d] on contract or tort." *Id.* (third alteration in original) (emphasis removed). At closing, the buyer was provided with a warranty application and warranty that contained its own arbitration provision, and which likewise disclaimed all other warranties and precluded recovery of incidental and consequential damages. *Id.* at 309–11, 893 S.E.2d at 363. On appeal, the court of appeals considered whether the trial court erred by incorporating provisions from this separate limited warranty into the parties' sales contract. *Id.* at 312, 893 S.E.2d at 364.

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

Damico and *Mart* are consistent with the United States Supreme Court's holding in *Rent-A-Center*, where a company sought to enforce a delegation provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability,

enforceability or formation of th[e] Agreement." *Rent-A-Ctr.*, 561 U.S. at 66 (citation omitted). Notably, "the underlying contract [was] itself an arbitration agreement" entitled "Mutual Agreement to Arbitrate Claims." *Id.* at 65, 72. The *Rent-A-Center* Court clarified that "[a]pplication of the severability rule [of *Prima Paint*] does not depend on the substance of the remainder of the contract." *Id.* at 72. No matter the underlying contract, when ruling on arbitrability a court can consider only challenges *specifically* to the provision providing for arbitration. *Id.* The *Rent-A-Center* plaintiff's unconscionability arguments—that the agreement "was one-sided" and contained a "fee-splitting arrangement" and "limitations on discovery"—were directed at the arbitration agreement *as a whole*. *Id.* at 73–74. The plaintiff "did not make any arguments *specific to the delegation provision*" or "contest the validity of *the delegation provision in particular*." *Id.* at 74 (emphasis added). *Rent-A-Center* makes clear that this is what the law requires.

In this case, the Homeowner Contract bears more in common with the separate arbitration provisions in *Damico* and *Mart* than the combined warranty and dispute resolution paragraph in *Smith*. As in *Rent-A-Center*, here the arbitration clause is a standalone provision located in section 15 of the Homeowner Contract, whereas warranties and related disclaimers are in section 14. Plaintiffs may argue that section 15 "incorporates" the warranty and disclaimer provisions of section 14. However, the arbitration provision in *Damico* stated that it applied to "any Dispute," including claims "arising by virtue of any . . . warranties alleged to have been made." 437 S.C. at 605, 879 S.E.2d at 751–52 (ellipsis in original). The arbitration provision must be interpreted on its own, despite any reference to warranties. *Id.* at 607, 879 S.E.2d at 752–53.

In this case, the relevant arbitration provision consists of the stipulation in section 15 of the Homeowner Contracts that the "purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding th[e] agreement and/or the property." (*E.g.*, Ex.

1 § 15 (capitalization altered).) Following *Damico* and *Mart*, Plaintiff's challenges to extraneous provisions outside of the standalone, unchallenged arbitration provision cannot be considered. Instead, Plaintiff's challenges to those other provisions in the Homeowner Contract are "for the arbitrator." *Rent-A-Ctr.*, 561 U.S at 72.

Here, the evidence suggests that the parties intended to treat section 15 as separate from the rest of the Homeowner Contract. Plaintiff "separately initialed [section 15] titled 'MANDATORY BINDING ARBITRATION,'" which "indicates the parties themselves viewed these terms as distinct contractual provisions to which they separately consented." *Smith*, 417 S.C. at 61, 790 S.E.2d at 11 (Kittredge, J., dissenting). In short, the arbitration provision is not combined with the warranty provision such that the two cannot be separated easily. Accordingly, section 15 is a standalone provision.

b. The Arbitration Provisions Are Not Unconscionable.

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also* S.C. Code Ann. § 15-48-10(a). Therefore, "courts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability." *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (citation and internal quotation marks omitted). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *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 touchstone of the analysis begins with the presence or absence of meaningful choice. *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. This requires courts to "consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant." *Id.* at 613, 879 S.E.2d at 755.

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

Here, the arbitration provision in the Homeowner Contract is not similar to those that courts have found to be unconscionable. "On the rare occasion when a court has determined that arbitral procedures render an arbitration agreement unenforceable, the one-sided provisions have been so pervasive and extreme that the arbitration provision created a 'sham system unworthy even of the name of arbitration.'" *LaPoint*, 2009 U.S. Dist. LEXIS 146577, at *18–19 (quoting *Hooters of*

Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999)). For example, in *Damico*, the court concluded that the arbitration agreement was unconscionable because it gave the homebuilder too much control over the *process* of arbitration: findings would not be binding in other proceedings without mutuality of parties, which the homebuilder had unilateral power to prevent because only the homebuilder could join contractors and other third parties. 437 S.C. at 615–16, 879 S.E.2d at 757. Recently, in *Huskins v. Mungo Homes, LLC*, the South Carolina Supreme Court declared that a provision in an arbitration agreement purporting to shorten the statute of limitations was "void and illegal as a matter of public policy." 444 S.C. 592, 595, 910 S.E.2d 474, 476 (2024), *reh'g denied*, 2025 S.C. LEXIS 17 (Jan. 16, 2025).

In contrast, the arbitration provision in the Homeowner Contract satisfies the fairness standard. In relevant part, the arbitration provision (1) binds both D.R. Horton and Plaintiff to arbitrate construction defect disputes; (2) provides for arbitration in Plaintiff's home county; (3) provides for American Arbitration Association ("AAA")[1] rules and an expedited hearing schedule; (4) gives the arbitrator discretion to assess the filing fees and costs against D.R. Horton; and (5) allows any party to seek judicial enforcement of the arbitrator's decision. There is nothing "so oppressive" about these terms such "that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. To the contrary, these are reasonable and customary terms in an arbitration agreement and should be enforced.[2]

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

[2] Moreover, because the Home Purchase Agreement contains a severability clause (*E.g.*, Ex. 1, § 23), to the extent the court disagrees, it can sever any provisions it finds unconscionable.

The questions as to the ICAs are the same: (1) whether Subcontractors 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.

First, Subcontractors had a meaningful choice to enter the ICAs. Subcontractors were free to decline to enter into a business relationship with D.R. Horton. Subcontractors freely chose to assent to D.R. Horton's contractual terms, including the arbitration provision. Subcontractors also had the opportunity to negotiate terms. There is nothing unfair about this bargaining process. Arbitration is binding on all parties to the contract and is not 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. To start, the Subcontractors are sophisticated parties who entered into these ICAs with D.R. Horton, under which they have performed hundreds of thousands of dollars of work for D.R. Horton. The arbitration provisions bind both D.R. Horton and Subcontractors to arbitrate disputes and do not contain any oppressive terms. There is nothing about the terms such that no fair and honest person would accept them. All of the Subcontractors involved in this matter, along with many others, agreed to these terms. These are reasonable and customary terms and should be enforced.

Plaintiff argues that the arbitration agreement lacks mutuality of remedies and limits the arbitrator's authority. Neither provides a basis for denying D.R. Horton's motion. Any limitation of liability is in separate provisions, not in the arbitration agreement. Therefore, Plaintiff's challenge should be addressed to an arbitrator.

In addition, the provisions that allow certain actions to proceed in court have no bearing on

this case. One deals solely with earnest money and how it will be treated in the transaction. (*See, e.g.*, Ex. 1, § 4.) The other addresses what happens if D.R. Horton does not complete construction of the Home. (*See, e.g.*, *id.* § 16(f).) Neither is relevant to the present dispute.

The South Carolina Supreme Court has recognized that "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672; *see also Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (stating that "the doctrine of mutuality of remedy does not apply" to an arbitration agreement because the agreement "does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined" (emphasis altered)).

The Court expressed concern about mutuality in *Damico* because the agreement gave the builder sole discretion to join third parties, such as contractors, while also mandating that findings in one proceeding could not be used in another unless there was mutuality of parties. 437 S.C. at 615–16, 879 S.E.2d at 757. The *Damico* court found that this violated the "fundamental principle of law that the plaintiff is the master of his own complaint." *Id.* at 616, 879 S.E.2d at 757. The *Damico* court also noted that it "create[d] the possibility of inconsistent factual findings that would preclude [homeowners] from recovery on a purely procedural (rather than a merit) basis." *Id.* at 616, 879 S.E.2d at 757. The Court was concerned that builder's ability to control the proceedings created the possibility of parallel "empty chair" defenses, where an arbitration defendant could blame an absent party, while in court, a litigation defendant could blame the parties that submitted to arbitration. *Id.* Moreover, the Court observed that because findings would not be binding in other proceedings without mutuality of parties, *which the homebuilder had unilateral power to prevent*, homeowners "could not even use the fact that the arbitrator had found [the builder] was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa."

Id. It was this "procedural defense to liability" that the Court found "wholly unreasonable and oppressive." *Id.*

Similarly, in *Simpson*, the agreement allowed one party—car dealers—to "bring a judicial proceeding that completely disregard[ed] any pending consumer claims that require[d] arbitration." 373 S.C. at 31, 644 S.E.2d at 672

As now-Chief Justice Kittredge noted in *Damico*, the yardstick of whether an agreement is unconscionable is even-handedness. 437 S.C. at 614, 879 S.E.2d 756. The agreement in that case failed to meet that standard by creating a "procedural defense to liability" that was "wholly unreasonable and oppressive." *Id.* at 616, 879 S.E.2d at 757. Similarly, in *Simpson*, the agreement at issue effectively elevated "the dealer's judicial remedies" above "the consumer's arbitral remedies," creating a process that was "one-sided and oppressive and d[id] not promote a neutral and unbiased arbitral forum." 373 S.C. at 32, 644 S.E.2d at 672. The arbitration provision in this case contains no such terms.

As noted above, the arbitration provision in the Homeowner Contract requires D.R. Horton *and* homebuyers to arbitrate all construction defect claims and allows any party to seek judicial enforcement of an arbitration decision. (*E.g.*, Ex. 2, § 15.) There is no lack of mutuality in these provisions; even if there were, there is no unconscionability.

There is also nothing unconscionable about the arbitral procedures the agreement dictates or the limits it places on an arbitrator's authority. In *Hooters*, the court found that the promised employment arbitration was a "sham" because the company "was responsible for setting up . . . a [neutral] forum by promulgating arbitration rules and procedures," but instead established rules that were "so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding." 173 F.3d at 938, 940. Among the rules' many problems, the company was "not

required to file any responsive pleadings or to notice its defenses"; "the employee [had to] provide the company with a list of all fact witnesses with a brief summary of the facts known to each," but the company had no obligation to reciprocate; the company could expand the scope of arbitration "to any matter," whereas the employee was limited to the issues in the initial claim; the company had the right to record audio or video of the arbitration hearing, but the employee did not; and only the company could "bring suit in court to vacate or modify an arbitral award." *Id.* at 938–39. Moreover, two of the three arbitrators that would resolve any dispute had to be picked from a list *created by the company*. *See id.* The court concluded "that the promulgation of so many biased rules—*especially the scheme whereby one party to the proceeding so control[led] the arbitral panel*—breache[d] the contract entered into by the parties." *Id.* at 940 (emphasis added).

The Homeowner Contract contains no similar provisions. It provides for arbitration before the AAA, a forum that is "well-known," "consumer friendly," and "affordable." *Whitman*, 2012 U.S. Dist. LEXIS 176480, at *8 (citation omitted). Moreover, the arbitration provision allows for either party to seek judicial enforcement of an arbitration award. (*E.g.*, Ex. 3, § 15.) These provisions are consistent with the goal of "achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

The propriety of any other provisions should be determined by the arbitrator, as even the court in *Hooters* recognized that "[g]enerally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance." 173 F.3d at 941. The court emphasized that the case was "the exception that proves the rule: *fairness objections should generally be made to the arbitrator*." *Id.* (emphasis added). Any questions about the conscionability or fairness of the Homeowner Contract must be resolved in arbitration.

Therefore, the court finds that the arbitration clause is enforceable because there are no general contract defenses that would invalidate it.

III. The Arbitration Provision Did Not Merge with the Deed.

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, 311, 353 S.E.2d 300, 303 (Ct. App. 1987) (quoting *Charleston & Western Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 99 S.E.2d 187, 193 (1957)).

Plaintiff argues that the arbitration provision merged out of existence when the deed was executed, as the arbitration clause is not in the deed and the provision does not contain express language providing that it will survive closing. D.R. Horton argues that the merger doctrine does not apply to the arbitration provision, and, that even if it did, exceptions to the merger doctrine apply.

The court finds the language of the arbitration provision evidences the parties did not intend to merge, as it specifically references "any and all disputes." The contract also includes a number of provisions that evidence the parties' intent not the merge the terms of the contract with the deed, such as the warranty provision. As such, the courts finds that the merger doctrine does not apply to the Homeowner Contract.

CONCLUSION

Finding that the FAA governs and no contract defenses preclude enforcement, the court finds the arbitration provisions in the ICAs and Homeowner Contract enforceable. Accordingly, the court GRANTS D.R. Horton's Motion to Stay Action and Compel Arbitration.

AND IT IS SO ORDERED.

[Judge's Electronic Signature Page Follows]

Horry Common Pleas

Case Caption: Sam Charles Prest III , plaintiff, et al VS DR Horton Inc , defendant, et al

Case Number: 2025CP2600484

Type: Order/Other

15th Circuit Resident Judge

s/ B. Alex Hyman

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable Patrick C. Fant

Circuit Court Case No. 2023-CP-02-01719
Appellate Case No. 2024-002137

Deborah Denise Harley,

Respondent,

v.

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

Defendants,

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

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Amended Final Brief of Appellant complies with Rule 211(b), SCACR, as modified by Court of Appeals' September 22, 2025 Order regarding Appellant's Motion to Amend, and the Supreme Court's April 15, 2014 Order regarding personal identifiers.

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