THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-001345

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Petitioner.

REPLY TO PETITION FOR REHEARING

August 2, 2016

W. Kyle Dillard, Esq.
(SC Bar No. 69408)
Matthew K. Johnson, Esq.
(SC Bar No. 12284)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street
PO Box 2757
Greenville, SC 29602
(864) 271-1300 (telephone)
(864) 235-8806 (facsimile)
kyle.dillard@ogletreedeakins.com
matthew.johnson@ogletreedeakins.com

ATTORNEYS FOR PETITIONER,
D.R. HORTON, INC.

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CERTIFICATE OF COUNSEL

Counsel for Petitioner D.R. Horton. Inc,., certifies that the Return upon which this Reply is based was received by e-mail on July 28, 2016 and that this Reply has been timely filed pursuant to Rule 240(f), SCACR.

ARGUMENT IN REPLY

D.R. Horton seeks rehearing pursuant to Rule 221(a), SCACR, which requires identification of points this Court "overlooked or misapprehended." Contrary to the Smiths' assertion, D.R. Horton has not "abandoned" any other arguments it has raised on appeal. (Respondents' Return, p. 1, fn. 1.). Rather, as required, D.R. Horton's arguments in its *Petition for Rehearing* were limited exclusively to those this Court overlooked or misapprehended. This does not mean D.R. Horton intends to "abandon" any prior arguments or avenues for further appeal of the issues raised in this case.

The two issues this Court most clearly and obviously overlooked or misapprehended are those addressed in the *Petition for Rehearing*—(1) application of the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), as it applied to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and other binding federal precedent to this Court's unconscionability analysis and (2) the lack of evidence of an adhesion contract and its impact upon a proper analysis of meaningful choice under *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2006).

I. This Court overlooked or misapprehended D.R. Horton's arguments concerning the FAA, *Prima Paint*, and other binding

federal precedent and their impact on its unconscionability analysis.

The Smiths suggest this Court properly analyzed the arbitration provision under the *FAA* and *Prima Paint* by considering all of Section 14 rather than solely ¶ 14(g), which was separately titled, in bold font, "MANDATORY BINDING ARBITRATION" provision, and was separately initialed and acknowledged by the Smiths. As D.R. Horton has argued throughout, and as the dissent here notes, this is not the case, or at least this Court has cited no legal argument or precedent to support its interpretation and analysis of Section 14 as a whole rather than ¶ 14(g) in isolation. But equally important is the fact that, while this interpretation lacks support in the Court's opinion or is simply incorrect, for purposes of the *Petition for Rehearing* this Court misapprehended or overlooked a significant argument bearing upon this issue.

The majority opinion ignores the "clear federal directive in support of arbitration." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002). It either ignored or overlooked the importance of the FAA and related controlling case law, which suggest a different interpretation and analysis of the arbitration provision that would favor arbitration. This Court, like those below, has never addressed whether the FAA applies, or the impact of related federal precedent, including with respect to the appropriate analysis and interpretation of, as the Smiths have described it, "paragraph 14 vs. subparagraph 14(g)."

The conflation of Section 14 as a whole with the separate and distinct arbitration provision at ¶ 14(g) violates *Prima Paint* and other federal precedent. *Cf.*, A *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) ("[A]n arbitration provision is severable from the remainder of the contract."); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (internal quotation marks omitted)(arbitration provision consists solely of the "specific written provision to settle by arbitration a controversy"); and *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (the scope of a court's analysis of arbitrability is "highly circumscribed" and must relate "specifically to the arbitration clause.").

A rehearing is appropriate so that this Court can consider several of D.R. Horton's prior arguments, whether the FAA applies and the significance of the FAA and related cases in a proper *Prima Paint* analysis. In other words, whether the application of the FAA and related precedent require reconsideration of the "paragraph 14 vs. subparagraph 14(g)" issue, particularly in light of stated public policy favoring arbitration, which is not evident in this case.

II. This Court overlooked or misapprehended D.R. Horton's argument that there is no evidence of an adhesion contract in performing an appropriate analysis of meaningful choice.

D.R. Horton further argues that a determination of unconscionability must begin with whether a contract of adhesion is present. *Petition for Rehearing*, pp. 12–14; *see also, Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388,

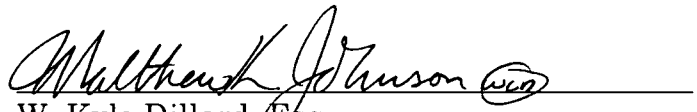
395, 498 S.E.2d 898, 901–02 (Ct. App. 1998). This has not been denied by the Smiths or this Court. Even so, despite D.R. Horton's argument, this Court has overlooked or misapprehended this issue, and its impact on whether a lack of meaningful choice resulting in unconscionability exists. *See, Smith v. D.R. Horton, Inc.*, Op. No. 27645, at fn. 2 (S.C. Sup. Ct. filed July 6, 2016).

The Smiths' *Return* cites several purported reasons this Court should find the purchase agreement to be an adhesion contract. D.R. Horton has refuted these arguments previously. *Petition for Rehearing*, p. 10; *Brief of Petitioner* p. 27–29. Nevertheless, even assuming the Smiths' arguments are valid, they have never been addressed by this Court. This Court should therefore take this opportunity to grant this *Petition for Rehearing* to address this issue and argument, which have been overlooked or misapprehended. Whether or not an adhesion contract is present is significant to the overall analysis of whether an absence of meaningful choice exists that, if combined with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them, would render an arbitration provision unconscionable. *See, Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668–669; *Herron v. Century BMW*, 387 S.C. 525, 532, 693 S.E.2d 394, 398 (2010).

CONCLUSION

For the foregoing reasons, it is clear that the Court overlooked or misapprehended important issues and arguments and, therefore, the Court should grant Petitioner D.R. Horton, Inc.'s *Petition for Rehearing*.

Respectfully submitted,



W. Kyle Dillard, Esq.
(SC Bar No. 69408)
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(SC Bar No. 12284)
OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C.
300 North Main Street
PO Box 2757
Greenville, SC 29602
(864) 271-1300 (telephone)
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kyle.dillard@ogletreedeakins.com
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PROOF OF SERVICE

I certify that I have served the *Reply to Petition for Rehearing* of Appellant D.R. Horton, Inc., on Respondents Gregory W. Smith and Stephanie Smith by sending to their attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses:

Phillip W. Segui, Jr., Esq.
Segui Law Firm, PC
864 Lowcountry Blvd.
Suite A
Mt. Pleasant, SC 29464

John T. Chakeris, Esq.
231 Calhoun Street
P.O. Box 397
Charleston, SC 29402

Michael A. Timbes, Esq.
Thurmond, Kirchner & Timbes, P.A.
15 Mid-Atlantic Wharf
Suite 101
Charleston, SC 29401

August 2, 2016

Matthew K. Johnson (MKJ)
Matthew K. Johnson
S.C. Bar No. 12284