

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No.: 2017-CP-40-03697
Appellate Case No. 2018-000889

RECEIVED

DEC 27 2018

SC Court of Appeals

Amanda Leigh Huskins and Jay R. Huskins.....Appellants,

v.

Mungo Homes, LLC,.....Respondent.

**RESPONDENT'S REPLY TO APPELLANTS' RETURN
TO RESPONDENT'S MOTION TO DISMISS APPEAL**

Respondent moved to dismiss this appeal on grounds that the four issues identified by Appellants in their initial brief are not immediately appealable, as they only challenge the Circuit Court's decision holding that all of Appellants' claims are subject to arbitration.

In Appellants' return to this motion, Appellants contend that the Circuit Court's order is immediately appealable pursuant to *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009). However, the *Widener* Court did not allow the appellant to immediately appeal the circuit court's decision compelling arbitration. In *Widener*, the Court remanded the case with instructions to stay the civil action while the parties proceeded with arbitration.

Here, however, Appellants' appeal did not raise this argument at any point until their return to the current motion to dismiss. Each of Appellants' four issues on appeal rests solely on their challenge to (1) the Circuit Court's decision enforcing the arbitration agreement, and (2) the Circuit Court's decision holding that their claims under the "Limited Warranty" paragraph of the contract fell within the arbitration agreement. (See, Appellants' Initial Brief at pg. 1, Statement of Issues on Appeal). Thus, each of Appellants' issues on appeal is not immediately appealable, and the appeal should be dismissed.

At no point during the proceedings before the trial court or in their initial brief did the Appellants argue that dismissal of the case, rather than a stay of the case, was improper. (See, Exhibit A, Pl. Mem. In Opp. To Motion to Compel Arbitration; Exhibit B, Pl. Motion to Alter or Amend Judgment; and Appellants' Initial Brief). Accordingly, to the extent that the Appellants now aver that the Circuit Court erred in dismissing the subject lawsuit, that portion of the Circuit Court's order was not appealed from and is not preserved for appellate court review.

A. Appellants did not raise the current issue before the Circuit Court

It is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965). Furthermore, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002).

Here, at no point prior to their return to this motion to dismiss did the Appellants aver that dismissal of the subject lawsuit, as opposed to a stay of the litigation, was improper. In their memorandum in opposition to Respondent's motion to compel arbitration, the Appellants exclusively challenged the enforceability of the arbitration agreement between the parties. (See, Exhibit A). Likewise, in Appellants' motion to alter or amend the Circuit Court's order, the Appellants averred only that the Circuit Court erred in finding the arbitration agreement enforceable and erred in finding the "Limited Warranty" claims fell within the arbitration agreement. Thus, the Appellants did not, at any point before the Circuit Court, allege that a stay of the subject lawsuit, rather than dismissal, was the proper result.

As a result, the current issue is not preserved for appellate review, and the Appellants failed to identify or preserve any issue that is immediately appealable. *See, Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Appellate courts will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

B. Appellants failed to raise the current issue in their initial brief

It is well settled under South Carolina law that where an alleged error by the Circuit Court is not specifically raised in an appellant's brief, that issue is not properly before the appellate court. *Amick v. Hagler*, 286 S.C. 481, 486, 344 S.E.2d 525, 528 (Ct. App. 1985). The failure of an appellant to raise a question by way of an exception constitutes a waiver. *Bentrim v. Bentrim*, 282 S.C. 333, 335, 318 S.E.2d 131, 133 (Ct. App. 1984). A provision of an order neither excepted to nor raised in the brief is not properly before the court on appeal. *Shipman v. DuPre*, 222 S.C. 475,

483, 73 S.E.2d 716, 719-20 (1952); *see also*, *Elder v. Parker*, 286 S.C. 228, at fn. 1, 332 S.E.2d 563 (Ct. App. 1985)(“At oral argument [appellant] contended this case is controlled by our holding in [a previously decided case]. As this point was raised neither at trial, in [appellant’s] exceptions, nor in his brief, it is not properly before us.”).

Specifically, the South Carolina Supreme Court has advised that “no point will be considered which is not set forth in the statement of issues on appeal.” *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing Rule 208(b)(1)(B), SCACR). “It is error for an appellate court to consider issues not raised to it.” *Id.* (citing *State v. Bray*, 342 S.C. 23, 535 S.E.2d 636 (2000)).

Here, Appellants’ initial brief contains four issues on appeal. The first three issues on appeal allege that the Circuit Court erred by finding that the arbitration agreement was enforceable and not unconscionable or one-sided and oppressive. (See, App. Initial Brief at pg. 1, Statement of Issues on Appeal). The final issue on appeal challenges the Circuit Court’s finding that the Appellants’ “Limited Warranty” claims were subject to arbitration pursuant to the arbitration agreement. (*Id.*).

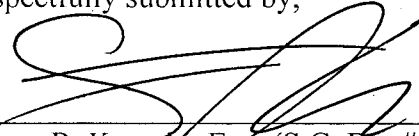
As is clear from the Appellants’ arguments before the Circuit Court, and in their brief on appeal, the current issue was not raised before the trial court, nor presented in their appellate brief. Appellants cannot raise new issues on appeal via a response to this motion to dismiss. *See, Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (“[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.”); *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App.1993).

Accordingly, the current issue is not properly before this Court and was not preserved for appellate review. Similarly, the four issues on appeal presented by Appellants are not immediately appealable. S.C. Code Ann. §15-48-2000(a). Therefore, this appeal should be dismissed.

WHEREFORE, Respondent respectfully request an order dismissing this appeal.

This 12th day of November 2018.

Respectfully submitted by,



Steven R. Kropski, Esq. (S.C. Bar # 101441)
David W. Overstreet, Esq. (S.C. Bar# 16965)
Earhart Overstreet LLC
P.O. Box 22528
Charleston, South Carolina 29413
(843) 972-9404

Attorneys for Mungo Homes, LLC

THE STATE OF SOUTH CAROLINA
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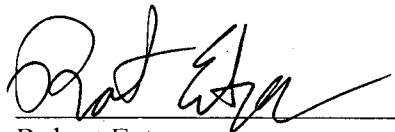
Mungo Homes, LLC,.....Respondent.

Respondent.

PROOF OF SERVICE

I, Robert Eaton, an employee of Earhart Overstreet LLC, attorney for Respondent Mungo Homes, LLC certify that I served a copy of the attached *Respondent's Reply to Appellants' Return to Respondent's Motion to Dismiss* by depositing a copy of it in the United States Postal Service, postage prepaid, on November 12, 2018, addressed to Appellant Amanda Leigh Huskins and Jay R. Huskins' attorneys of record, Beth B. Richardson of Robinson Gray Stepp & Laffite, LLC at P.O. Box 11449 Columbia, South Carolina 29211; Terry E. Richardson, Jr., Matthew J. Nickles, and Brady R. Thomas of Richardson, Patrick, Westbrook, and Brickman, LLC at P.O. Box 1368 Barnwell, SC 29812 and Charles H. McDonald at Belser & Belser, P.A. at P.O. Box 96 Columbia, SC 29202

November 12, 2018



Robert Eaton

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Amanda Leigh Huskins and Jay R.) Civil Action No. 2017-CP-40-03697
Huskins,)
)
Plaintiffs,)

vs.)

Mungo Homes, LLC,)
)
Defendant.)

**PLAINTIFFS' MOTION AND
MEMORANDUM IN SUPPORT TO
ALTER OR AMEND ORDER
GRANTING DEFENDANT'S MOTION
TO DISMISS AND COMPEL
ARBITRATION**

Pursuant to Rules 52(b) and 59(e), SCRPC, Plaintiffs Amanda Leigh Huskins and Jay R. Huskins ("the Huskins") hereby move to alter or amend the order of court granting Defendant Mungo Homes, LLC's ("Mungo") Motion to Dismiss and Compel Arbitration. Specifically, the Order should be altered or amended to deny Mungo's motion to dismiss and compel arbitration and strike the offending arbitration provision in its entirety to retain jurisdiction over this important matter on the following grounds set forth below.

STANDARD OF REVIEW

In South Carolina, "[a] party may wish to file [a motion to reconsider] when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S. Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphases in original).



ARGUMENT

I. **The Court correctly concluded that the South Carolina Uniform Arbitration Act governs the arbitrability of this Purchase Agreement because the parties' "Arbitration and Claims" provision provides for the same, but the Court should amend its Order to find the following facts supported its conclusion, too.**

- Similar to the "Arbitration and Claims" provision itself, the first page of the Purchase Agreement also provides in all caps and underline: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ." This fact was not found by the Court and is additional evidence of the parties' agreement to arbitrate under the South Carolina Uniform Arbitration Act.
- In addition, paragraph (k) of the MISCELLANEOUS section of the Mungo Purchase Agreement provides:

It is understood that Purchaser is buying a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon its completion.

[Complaint, Ex. 1]

The Court did not refer to this paragraph to support further its conclusion that the parties agreed to arbitrate under the South Carolina Uniform Arbitration Act. As the court noted, the South Carolina Supreme Court in *Zabinski v. Bright Acres Asoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) ruled that a contract for the sale of residential real estate does not involve interstate commerce. And a year later, the South Carolina Supreme Court further solidified this principle, ruling that a purchase agreement for the sale of a "completed dwelling" also did not involve interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). It is no coincidence then that

paragraph (k) of the Miscellaneous section of the Purchases Agreement incorporates the *Bradley* Court's meaningful phrase, "completed dwelling," to make clear the parties agreed by contract that the Purchase Agreement was for the sale of a "completed dwelling," not a contract for construction of the same.¹ Stated another way, no matter what the other circumstances-in-fact may be in and surrounding the Purchase Agreement, by use of the words "completed dwelling" in paragraph (k) of the Miscellaneous provision, the parties agreed by contract that the Purchase Agreement involved only intrastate commerce under *Bradley* and was subject to the South Carolina Uniform Arbitration Act.

II. While the Court correctly concluded that the Huskins lacked meaningful choice to arbitrate their claims for the reasons stated in the Order, the Court erred in finding that the "Arbitration and Claims" paragraph was not oppressive and one-sided.

A. As an initial matter, the Court erred in determining that the "Limited Warranty" should be analyzed in isolation.

The Court concluded that the "Limited Warranty" claim should be analyzed in isolation because the "Limited Warranty" provision and the "Arbitration and Claims" provision are set apart by different headings in the Purchase Agreement, and the "Arbitration and Claims" provision does not specifically reference the "Limited Warranty" provision. (Order at 10.) The Court's analysis elevates form over substance, on the one hand, and fails to apply the plain language of the contractual provisions, on the other hand.

In construing a written contract, if the language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d

¹ In fact, paragraph (k) in the Miscellaneous section of Mungo's Purchase Agreement is, with minor exception, the exact same language contained in the purchase agreement at issue in *Bradley v. Brentwood Homes* upon which that court relied in finding the transaction involved only intrastate commerce. *See id.*, 398 S.C. at 450, 730 S.E.2d at 313, FN 3.

705, 706 (1993). At the outset, as to the “headings” in the Purchase Agreement, the Court should not give undue weight to manipulative contract drafting by Mungo’s lawyers and their use of mere labels and “headings” in an adhesion contract at the expense of much less sophisticated purchasers in the residential home context. The Court must apply the plain language of the “Arbitration and Claims” provision itself. The “Arbitration and Claims” provision in the Purchase Agreement is expansive and broad in scope, and plainly includes warranty claims. The “Arbitration and Claims” provision states in pertinent part: “Any claim, dispute or other matter . . . between the parties . . . arising out of this Agreement, related to this Agreement or breach thereof, including without limitation, disputes related to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration.” The “Arbitration and Claims” provision makes no exception for warranty claims of any kind, and applies to any claim, dispute, or other matter, and need only arise out of or relate to the Purchase Agreement or breach thereof. By way of example, an implied warranty of habitability claim under the Huskins’ Purchase Agreement certainly would constitute a “dispute[] relating to the Property” as referenced in the “Arbitration and Claims” provision. “Property” being defined as “that certain tract of land, together with the dwelling” on the first page of the Purchase Agreement. An implied warranty of habitability claim would also constitute a “dispute[] relating to the Property . . . or condition . . . thereof” as referenced in the “Arbitration and Claims” provision.

In addition, the “Limited Warranty” and “Arbitration and Claim” provisions cross-reference one another. The “Limited Warranty” provision states: “This limited warranty will be incorporated in the deed delivered at closing.” The “Arbitration and Claims” provision applies to “disputes relating to . . . the deed to be delivered” pursuant to the Purchase Agreement. Stated

another way, the “Limited Warranty” provision is explicitly merged into the deed delivered at closing, and claims, disputes or other matters related to the Deed are specifically referred to in and included as subject to the mandatory and binding arbitration provided under the “Arbitration and Claims” provision.

Finally, although the contract language is plain and should be enforced as substantively provided above, to the extent that there is any ambiguity as to the scope of the arbitration agreement and its inclusion of all warranty claims under the “Limited Warranty” provision, the Court must construe any doubts and ambiguities against the drafter. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). “This rule applies with particular force in cases involving a contract of adhesion.” *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27 (2003). Mungo, moreover, did not make any representation to the Court, either in its written briefs or at the hearing on its motion, much less submit any evidence that warranty claims under the Purchase Agreement would not be subject to mandatory arbitration under the “Arbitration and Claims” provision. Because the Court is obligated to apply the plain language of the arbitration provision at issue and also construe any ambiguity or provision susceptible to more than one interpretation against its drafter, the “Arbitration and Claims” provision cannot be extracted or isolated from the “Limited Warranty” provision in the Purchase Agreement. The two provisions are in substance intertwined.

- B. Second, when elevating substance over form and construing the “Limited Warranty” provision and the “Arbitration and Claims” provision in harmony with one another, the Court should amend and alter its prior determination that the “Arbitration and Claims” provision does not prevent purchasers from bringing warranty claims in a judicial forum and recognize that the “Arbitration and Claims” provision in fact does so, indicating one-sidedness and oppressiveness.**

As discussed above, the plain language of the “Arbitration and Claims” provision is sweeping, and subjects all claims, disputes, or matters arising out of or relating to the Purchase

Agreement, Property or condition thereof, or deed, among other matters, to mandatory arbitration. The “Arbitration and Claims” provision, moreover, includes no exception for warranty or warranty-related claims, disputes or other matters. As the Court noted in its Order, “[a]n arbitration agreement that limits the consumer’s ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness.” (Order at 11.) Such a limitation is unenforceable as a matter of public policy as it precludes buyers from filing claims under the Magnuson Moss Warranty Act. (Order at 12.)

Because all warranty or warranty-related claims are subject to mandatory arbitration, this court must reverse its determination that the “Arbitration and Claims” provision does not prevent purchasers from bring warranty claims in a judicial forum and find that the “Arbitration and Claims” provision in fact does so, indicating one-sidedness and oppressiveness.

C. Third, when elevating substance over form, the Court should amend and alter its prior determination that the “Arbitration and Claims” provision does not one-sidedly and oppressively limit purchasers’ remedies at law.

As established above, under the “Arbitration and Claims” provision, any warranty claim, dispute or other matter arising out of or related to the Property or Condition thereof is subject to mandatory arbitration under the “Arbitration and Claims” provision. The “Limited Warranty” provision, therefore, cannot be read in isolation from the “Arbitration and Claims” provision, and the two provisions must be read in harmony with one another. Together, the “Arbitration and Claims” and “Limited Warranty” provisions prohibit any purchaser with any kind of warranty claim, dispute, or other matter from recovering damages, consequential or punitive. These damages would otherwise be recoverable in warranty matters by law. This limitation on remedies is just like the terms found to be one-sided and oppressive in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016), wherein D.R. Horton expressly disclaimed all warranties,

including the warranty of habitability, as well as completely absolved itself from ever paying any money damages. Indeed, this Court acknowledged in its Order that an arbitration provision which limits remedies otherwise available by law indicates a one-sided and oppressive arbitration agreement. (Order at 10 (“An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness.”).)

Pursuant to the reasoning above, the Huskins respectfully request that the Court amend and alter its Order to reflect that the “Arbitration and Claims” provision in this case limits purchasers’ remedies at law and is therefore oppressive and one-sided.

- D. Fourth, the Court failed to apply the plain language of the “Arbitration and Claims” provision and erred when it concluded that the ninety-day time frame to demand arbitration does not circumscribe the Huskins’ ability to assert claims related to the Property or Purchase Agreement within the longer time frame allowed by South Carolina law and therefore was not one-sided or oppressive.**

The Court mistakenly concluded that the ninety-day “limitations period” set forth in the “Arbitration and Claims” provision relates to how long Mungo has to move to dismiss a judicial action and compel arbitration. (Order at 11.). As discussed above, the first sentence of this provision defines the expansive scope of any claims, disputes, or other matters to which the mandatory and binding arbitration “shall” apply and the circumstances in which the mandatory and binding arbitration shall take place. Then, the “Arbitration and Claims” provision outlines how the party with the claims, disputes, or other matters in need of resolution subject to mandatory and binding arbitration shall “commence[]” arbitration, noting that such process must be by written demand, specifying the issues and designating an arbitrator. Most importantly, the “Arbitration and Claims” provision then states in pertinent part:

Each and every demand shall be made *within ninety (90) days after the claim, dispute or other matter in question has arisen*, except for any claim, dispute or matter in question arising from either party’s termination of this Agreement which

shall be made within thirty (30) days of the written notice of termination. *Any claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred.*

(emphasis added). Pursuant to the language quoted above, the “Arbitration and Claims” provision circumscribes the time frame in which a party with claims, disputes, or other matters falling within the scope of the mandatory and binding arbitration provision can demand resolution. Depending on the circumstances, those claims, disputes, or other matters must be demanded for resolution through arbitration within 90 or 30 days of the date upon which those claims, disputes, or other issues arise, or such claims will be lost forever. The last sentence of the paragraph leaves no room for any other interpretation, noting “[a]ny claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred.” In other words, the clause operates as a 90 or 30-day limitations period for an aggrieved party to bring a claim once that claim has arisen.

Contrary to the Court’s finding, this language has nothing to do with the time in which Mungo has to move to dismiss this judicial action and seek to compel arbitration. Mungo is not “commenc[ing]” any arbitration against the Huskins by moving to dismiss this action and compel arbitration. Mungo seeks only to foreclose this judicial forum to the Huskins and require the Huskins, not Mungo, to “commence” **their claims** in mandatory and binding arbitration under the “Arbitration and Claims” provision. It is irrelevant how long it took Mungo to file a motion to compel arbitration. The ninety-day and thirty-day limitations period in Mungo’s arbitration clause relates solely to the party asserting a claim, which, in this case, is the Huskins. Accordingly, the arbitration provision, by its plain language, seeks to bar any claim asserted more than 90 days after the claim arose. The Court should not lose sight of the context in which Mungo seeks to impose this severe time limitation on asserting a claim—the purchase of a new home which, for most, is

the largest financial investment of their lives. Viewed in this light, the severe limitation of the right to assert a claim for relief is oppressive in the extreme.

Moreover, the “Arbitration and Claims” provision violates South Carolina law because it drastically shortens (from three years to 90 or, in some instances, 30 days) the time in which a party is allowed to bring a claim, dispute, or other matter under the contract. *See* S.C. Code Ann. § 15-3-140.² The Court should recognize that Mungo, a sophisticated entity and one of the nation’s largest sellers of new homes, either knows or certainly should know that it cannot legally shorten the applicable statute of limitations in South Carolina. Nevertheless, Mungo includes such a provision in its standard-form Purchase Agreement presented to its numerous customers. Mungo circumscribes the purchasing party’s rights despite (or perhaps because of) the average purchaser’s relative lack of sophistication. Because Mungo’s arbitration provision violates South Carolina public policy to safeguard the applicable statutory limitations period for asserting claims as set forth in § 15-3-140, it is not only one-sided and oppressive but unenforceable as a matter of state contract law. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 29-31, 644 S.E.2d 663, 671 (2007).

The Court sets a dangerous precedent by approving Mungo’s one-sided and oppressive arbitration provision and not striking the provision in its entirety. By upholding Mungo’s 30- and 90-day limitations period, the Court sends a clear message to the business community that such restrictive limitations periods in arbitration clauses – although illegal – may nevertheless be included in standard-form contracts without fear that such arbitration provisions will be stricken

² S.C. Code Ann. § 13-4-140: “No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.”

or not enforced. Businesses are thus incentivized to include such illegal and restrictive limitations periods in their standard-form contracts, and thereby mislead unwary consumers into believing that their claims are barred and cannot be pursued because those claims have passed the restrictive limitations period included in their contracts. Instead of creating this harmful precedent, the Court should rule (a) South Carolina's public policy set forth in S.C. Code § 15-3-140 makes Mungo's 30- and 90-day limitations period illegal and unenforceable; (b) Mungo should not be allowed to violate South Carolina law without consequence; and (iii) Mungo's arbitration provision must therefore be stricken in its entirety because to hold otherwise would only incentivize businesses to include illegal and overly-restrictive limitations provisions in all their arbitration clauses to the detriment of South Carolina's citizens.

E. Fifth, Mungo's Arbitration Clause is one-sided and oppressive because it applies exclusively to claims asserted by the Purchaser after the sale of the home is closed.

The Court mistakenly construes Mungo's arbitration provision as applying mutually to Mungo and its purchasers. However, any belief that Mungo would assert a claim and demand arbitration against a Purchaser is illusory, particularly with respect to any claims after the closing of the sale of a residential home to a purchaser. Because Mungo requires full payment for the home at closing, Mungo would have no reason to assert a claim against an individual home buyer after the closing. The time limitations in the arbitration clause thus have no real application to any rights of Mungo and are clearly a one-sided and oppressive provision designed to deprive the individual home buyer of a reasonable time to pursue claims against Mungo.

In sum, Mungo's unlawful circumscription of the time allowed by South Carolina law for purchasers to assert claims related to the Property or Purchase Agreement is sufficient to strike down the "Arbitration and Claims" provision alone. Certainly, however, the cumulative effect of

all the one-sided and oppressive terms in the “Arbitration and Claims” provision taken together is sufficient to declare the provision unconscionable and unenforceable. The “Arbitration and Claims” provision in the Purchase Agreement is one-sided and oppressive on many grounds. It prevents purchasers from bringing warranty claims in a judicial forum. It prevents purchasers from obtaining any money damages otherwise available at law for violations of warranty laws. It circumscribes purchasers’ otherwise lawful assertion of claims related to the Property or Purchase Agreement within the longer time frame allowed by South Carolina law. And, for all practical applications, it does not apply mutually to the parties to the Purchase Agreement. As the Court stated in *Simpson*, “[W]e find the arbitration clause in the adhesion contract . . . wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause.” *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674 (emphasis added).

III. Even if the Court did not alter or amend its conclusion that the “Limited Warranty” provision must be read in isolation from the “Arbitration and Claims” provision, the Court erred in granting Mungo’s Motion to Dismiss, as according to the Court’s analysis, the Huskins’ claims would fall under the “Limited Warranty” provision, outside the “Arbitration and Claims” provision, and therefore appropriately asserted in this judicial forum.

While counsel for the Huskins disagrees with the Court’s determination that the “Limited Warranty” and “Arbitration and Claims” provisions should be read in isolation for the reasons noted above, pursuant to the court’s analysis, the Court determined that “[t]he ‘Arbitration and Claims’ provision in the Huskins’ case does not specifically limit the Huskins’ ability to bring a warranty action in a judicial setting.” (Order at 12.) The Court noted: “The Purchase Agreement contains a separate “Limited Warranty” provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages.” (Order at 12 n. 2.)

The Huskins' Complaint asserts claims related to Mungo's inconspicuous and unlawful disclaimer of the implied warranty of habitability in the "Limited Warranty" provision. Specifically, the Huskins assert breach of contract (the covenant of good faith and fair dealing), unjust enrichment, and request declaratory relief all relating to Mungo's disclaimer of the implied warranty of habitability, without separate and adequate consideration, in the "Limited Warranty" provision. (*See* Complaint.) According to the Court's Order, claims pursuant to the "Limited Warranty" provision fall outside the "Arbitration and Claims" provision and therefore should be allowed to proceed in Circuit Court. Accordingly, at a minimum, the Huskins' claims related to breach of the "Limited Warranty" provision, particularly the covenant of good faith and fair dealing; unjust enrichment by the unlawful disclaimer of the implied warranty of habitability without separate and adequate consideration for the same; and finally, for declaratory relief regarding the legality of the "Limited Warranty" provision under such circumstances should not be dismissed and should proceed in this forum. The Huskins respectfully request, therefore, that the Court deny Mungo's motion to dismiss because the claims asserted in the Complaint are related to the disclaimer of the implied warranty of habitability found in the "Limited Warranty" provision and therefore fall outside the "Arbitration and Claims" provision. The Huskins' claims brought pursuant to the limited warranty provision are appropriately before this judicial forum.

CONCLUSION

For the reasons set forth above, counsel for the Huskins respectfully request that this Court alter and amend its Order entered on March 13, 2018, granting Mungo's Motion to Dismiss and Compel Arbitration. Specifically, the Huskins ask that the Court deny Mungo's Motion to Dismiss and Compel Arbitration, strike the offending unconscionable arbitration provision in its entirety, and retain jurisdiction over this important matter for all the reasons outlined above. Or, without

waiving any right to appeal the Court's decision granting Mungo's Motion to Dismiss and Compel Arbitration for reasons related to the unconscionability of the "Arbitration and Claims" provision, the Huskins ask that the Court retain jurisdiction over this case because the claims involve matters which fall under the "Limited Warranty" provision, which are outside the scope of the "Arbitration and Claims" provision in the Purchase Agreement.

BELSER & BELSER, P.A.

s/ Charles H. McDonald

Charles H. McDonald [SC Bar # 11580]

H. Freeman Belser [SC Bar # 72403]

William C. Dillard, Jr. [SC Bar # 78986]

Post Office Box 96

Columbia, SC 29202

(803) 929-0096

Email: chuck@belsarpa.com

freeman@belsarpa.com

will@belsarpa.com

Counsel for Plaintiffs

Columbia, South Carolina
March 23, 2018

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Amanda Leigh Huskins and Jay R. Huskins,)	Civil Action No. 2017-CP-40-03697
)	
Plaintiffs,)	
)	
vs.)	
)	
Mungo Homes, LLC,)	PLAINTIFFS' OPPOSITION TO
)	DEFENDANT MUNGO HOMES,
)	LLC'S MOTION TO DISMISS AND
Defendant.)	COMPEL ARBITRATION
)	
)	

Plaintiffs Amanda Leigh Huskins and Jay R. Huskins (“the Huskins”) respectfully submit this response to Defendant Mungo Homes, LLC’s (“Mungo” or “Mungo Homes”) Motion to Dismiss and Compel Arbitration pursuant to Rule 12(b)(6), SCRCP.

The present motion concerns Mungo Homes’ effort to avoid this Court’s jurisdiction and instead send this case to arbitration pursuant to its flawed and unfair “Purchase Agreement” that it requires all its homebuyers, such as the Huskins, to sign on a take-it-or-leave-it basis. In its motion, Mungo Homes argues that the Federal Arbitration Act (“FAA”) requires this Court to dismiss the Huskins’ complaint and send the current dispute to arbitration. However, as set forth below, Mungo Homes is wrong. First, the FAA does not apply to the present dispute – rather, the Court should apply the South Carolina Uniform Arbitration Act (“SCUAA”) and South Carolina contract law. Second, South Carolina law provides that Mungo Homes’ arbitration provision is unconscionable and therefore unenforceable. Accordingly, the Court should deny Defendant’s motion, strike the offending arbitration provision in its entirety, and retain jurisdiction over this important matter.



INTRODUCTION AND NATURE OF THE ACTION

Mungo Homes builds and sells new homes in South Carolina and advertises itself as the “37th largest builder in the country.”¹ In June 2015, Mungo Homes sold a new home to the Huskins located in Richland County, South Carolina. In Mungo Home’s proprietary “Purchase Agreement,” Mungo Homes forced the Huskins to waive, without consideration, fundamental warranty rights including the implied warranty of habitability. The Huskins now bring this action, asking the Court to declare as a matter of law that Mungo Homes cannot waive the implied warranty of habitability, without adequate consideration, in the Mungo Homes Purchase Agreement and to determine that Mungo Homes’ business practice gives rise to a right of recovery against Mungo Homes for the fair value of this waiver.

Under well-established law, the “warranty of habitability” is implied in the sale of all new homes in South Carolina. Recognizing the importance of this implied warranty, and the relative sophistication of homebuilders such as Mungo vis-à-vis a new home buyer, the South Carolina Supreme Court has recognized that the warranty of habitability cannot be waived or disclaimed unless the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. *See Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). Nevertheless, in contravention to this long-standing precedent, Mungo operates its business uniformly to require all new home buyers, including the Huskins, to waive the warranty of habitability *without* providing these homebuyers any compensation or separate consideration for such waiver as is required by South Carolina law.

¹ *See* Mungo Homes About Page, *available at* <http://www.mungo.com/about/> (last visited October 20, 2017).

MUNGO'S PURCHASE AGREEMENT

Mungo requires purchasers of its homes to execute Mungo's proprietary "Purchase Agreement."² This Purchase Agreement contains a disclaimer of fundamental warranty rights implied by law in South Carolina in connection with the sale of a new home. One of the implied warranties that Mungo requires that its purchasers waive is the implied warranty of habitability. In lieu of the implied warranties, Mungo instead substitutes a limited warranty through a third-party warranty company. Through this scheme, Mungo does not directly warrant any part of the new homes it sells to purchasers. The Limited Warranty is provided by Quality Builders Warranty.

In addition to the broad disclaimer of warranty rights, Mungo's Purchase Agreement contains other significant limitations on the rights and remedies afforded to the buyer of a Mungo home. For instance, Mungo Homes declares that its customers can *never* sue it for money damages for *any* reason. Further, Mungo Homes demands that all claims related to its homes must be sent to arbitration. Moreover, all demands for arbitration must be made *within 90 days* of when the claim arises or else the customer is forever barred from bringing that claim against Mungo.

ARGUMENT

The Court should deny Defendant's motion because the arbitration agreement contained in its Purchase Agreement is unconscionable and unenforceable. As an initial matter, in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), the Court held that a contract for the sale of a new home involves solely intrastate commerce. As such, the SCUAA and South Carolina law applies here – not the FAA as Defendant contends. Second, under South Carolina law, and as stated in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), the arbitration

² A copy of the Purchase Agreement between Mungo Homes and the Huskins is attached as Exhibit A.

provision at issue is unenforceable because the Huskins had no meaningful choice and its terms are oppressive and one-sided.

I. South Carolina law, not the FAA, applies to the present case because the sale of a completed home is solely “intrastate” commerce.

The Court should reject Defendant’s argument that the FAA applies here because our Supreme Court has held that the purchase of a completed residential home is solely “intrastate” commerce. In *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), a builder moved to compel arbitration against a buyer under a purchase agreement for a home it sold in Myrtle Beach. In that case, the Supreme Court faced the issue whether the purchase of a completed residence involved “interstate commerce” such that the FAA applied, or rather involved “intrastate commerce” such that the FAA was inapplicable and state law applied. After reviewing law from other jurisdictions, the Court held the FAA was inapplicable because the agreement was for the “purchase of a completed residential dwelling and not the construction” and “these types of transactions have historically been deemed to involve intrastate commerce.” *Id.* at 459, 730 S.E.2d at 318. Thus, the Court applied state law rather than the FAA when construing the arbitration provision at issue.

The Court’s holding in *Brentwood Homes* applies perfectly here. Just like the agreement at issue in *Brentwood Homes*, the Mungo Homes’ Purchase Agreement is specifically for the purchase and sale of a completed home located in South Carolina, not its construction—an entirely intrastate activity. The Mungo Purchase Agreement provides: “It is understood that Purchaser [Plaintiffs] is buying a completed dwelling and that Seller [Mungo Homes] is not acting as a contractor for Purchaser [Plaintiffs] in the construction of a dwelling.” (Ex. A, Purchase Agreement, Section Miscellaneous ¶ k.) Under these circumstances, the purchase and sale of the new home situated in South Carolina under the Mungo Homes Purchase Agreement is

unquestionably *intrastate* commerce. Any arbitration provision in the Mungo Homes' Purchase Agreement must therefore be construed under the SCUAA. Contrary to Mungo Home's assertion in its Motion to Compel arbitration, the FAA is inapplicable to the Court's analysis and the validity of Mungo Homes' Purchase Agreement is governed entirely by South Carolina law.

The cases Defendant cites in support of applying the FAA are inapplicable here because they do not involve the purchase of a completed residential home, but rather concern the construction, development, and design of buildings. For instance, *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 586, 553 S.E.2d 110, 113 (2001), involved a partnership agreement for the development and construction of apartments on Hilton Head. Similarly, *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 633, 239 S.E.2d 647, 648 (1977), involved a contract for the construction of an apartment building in Columbia. Finally, *Blanton v. Stathos*, 351 S.C. 534, 537, 570 S.E.2d 565, 567 (Ct. App. 2002), involved an agreement to provide design, drawing, and architectural services for the construction of a restaurant in Seneca, South Carolina. In contrast to the cases Defendant cites, the present agreement is expressly *not* for construction, but rather for purchase of a completed dwelling. As such, *Brentwood Homes* is controlling here and the Defendant's cases are inapplicable.

II. The arbitration provision in Mungo Homes' Purchase Agreement is unconscionable because [1] the Huskins had no meaningful choice and [2] the contract contains oppressive and one-sided terms.

Under South Carolina law, the arbitration provision in Mungo Homes' Purchase Agreement is unconscionable and therefore unenforceable. The factors set forth in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), along with the Court's recent holding in *Smith v. D.R. Horton*, show that the Huskins had no meaningful choice and that the terms of the Purchase Agreement are so one-sided and oppressive as to be unenforceable by this

Court. Finally, because the Purchase Agreement lacks any “severability” clause, the Court should strike the offending clause in its entirety.

To determine whether an arbitration provision is enforceable under South Carolina law, courts must consider whether, independent from the contract in its entirety, the arbitration provision is unconscionable. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (finding adhesive arbitration clause unconscionable). When an arbitration clause is connected to other provisions of a contract, however, such as other warranties and remedies, those contractual provisions must be read together. *See Smith*, 417 S.C. at 48-49, 790 S.E.2d at 4 (holding that “all the subparagraphs of paragraph 14 [entitled Warranties and Dispute Resolution] must be read as a whole to understand the scope of the warranties and how different disputes are to be handled”).

“In South Carolina, unconscionability is defined as (1) the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with (2) terms that are so oppressive 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 (S.C. 2007). Courts have considered the following factors regarding whether a party had a “meaningful choice”: “[i] the nature of the injuries suffered by the plaintiff; [ii] whether the plaintiff is a substantial business concern; [iii] the relative disparity in the parties’ bargaining power; [iv] the parties’ relative sophistication; [v] whether there is an element of surprise in the inclusion of the challenged clause; and [vi] the conspicuousness of the clause,” and whether the product at issue is a “necessity.” *Id.* at 25, 644 S.E.2d at 669; *see also Smith*, 417 S.C. at 49, 790 S.E.2d at 4. To decide whether terms are “oppressive,” courts consider, for example, whether terms are one-sided and whether there are limitations placed on a consumer’s remedies. *Simpson*, 373 S.C. at 28-33, 644 S.E.2d at 670-73. Moreover, if the arbitration clause at issue has no severability provision, courts must refuse to

enforce the entire clause rather than just striking the offending terms within the clause. *See Smith*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6.

a. The Huskins had no meaningful choice in signing the arbitration provision.

The Court's recent decision in *Smith* shows that the Huskins lacked any "meaningful choice" in the transaction at issue. As in the present case, *Smith* involved whether an arbitration provision contained within an agreement for the purchase of a new home from a sophisticated homebuilder – D.R. Horton – was enforceable under South Carolina law. In that case, the Court considered the factors stated in *Simpson* and held that the Smiths lacked any meaningful choice in entering into the arbitration agreement with D.R. Horton. Specifically, the Court recognized (1) the agreement was an adhesive "take-it-or-leave-it contract, (2) that the Smiths were in an unequal bargaining position as against the seller D.R. Horton³, (3) that no evidence existed that the Smiths were represented by independent counsel, and (4) that the Smiths were merely the purchaser of one home and thus not a substantial business concern of D.R. Horton which constructed hundreds of homes in multiple states.

The Court's holding in *Smith* applies to the facts here. Indeed, the Huskins stand in exactly the same position against Mungo Homes as did the Smiths against D.R. Horton. Like in *Smith*, the Huskins (1) were given an adhesive contract, (2) were in an unequal bargaining position vis-à-vis Mungo Homes, (3) there is no evidence here that the Huskins had independent counsel (they did not) and (4) the Huskins were merely the purchasers of a single home and thus not a major business concern of the nation's 37th largest homebuilder with operations throughout the

³ The Court took judicial notice of this fact because it had already decided that the purchaser of a new home is in an unequal bargaining position against the seller/builder as stated in *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989).

Southeast.⁴ This Court should therefore follow *Smith* and hold that the Huskins lacked any meaningful choice in this transaction.

b. The terms of the Purchase Agreement's arbitration provision are oppressive.

Similarly, this Court should follow *Smith* and conclude that the terms of the arbitration provision of the Purchase Agreement at issue are oppressive. First, as did the Court in *Smith*, this Court should consider the limitations of remedies provisions of the Purchase Agreement when construing the arbitration provision. However, even if the Court focuses solely on the paragraph labeled "Arbitration and Claims," the terms therein are so one-sided and oppressive that the Court should still hold it unconscionable.

i. The Court should consider the limitations on remedies together with the arbitration provision and declare the arbitration provision one-sided and oppressive.

As an initial matter, this Court should follow *Smith* and conclude that it should consider the Purchase Agreement's limitations on warranties and remedies when construing the arbitration provision at issue. Because the limitations in Mungo's Purchase Agreement mirror those the Court found oppressive in *Smith*, this Court should strike the arbitration provision here. Finally, the court of appeals' decision in *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016), is inapplicable to the present case and should not affect this Court's analysis.

In *Smith*, D.R. Horton argued that the Court should consider only those terms of its agreement located in subparagraph 14(g) titled "MANDATORY BINDING ARBITRATION"

⁴ Moreover, a home is certainly a "necessity" of modern life, a factor which also shows the Huskins lacked meaningful choice. See *Simpson*, 373 S.C. at 26-27, 644 S.E.2d at 669-70 (describing an automobile as a necessity in modern society)

when determining whether the arbitration provision was unconscionable and must ignore the provisions of subparagraphs 14(c) and 14(i) that contained D.R. Horton's limitation of remedies, including waiver of the warranty of habitability and preclusion of all money damages against it. The Court disagreed with D.R. Horton. It held that D.R. Horton's arbitration provision and the limitation provisions must be read together in order "to understand the scope of warranties and how different disputes are to be handled." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

Similarly, here, the Court should read the "Arbitration and Claims" paragraph of the Purchase Agreement in conjunction with the limitation on remedies provisions contained under separate paragraphs "as a whole." *See Smith*, 417 S.C. at 48-49, 790 S.E.2d at 4 (holding that "all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled.") For example, as in *Smith*, Mungo Homes expressly disclaims all warranties, including the warranty of habitability, as well as completely absolves itself from ever paying any money damages to the Huskins. The fact that these severe limits on the Huskins' rights are contained in subsections outside the paragraph specifically titled "Arbitration" is irrelevant – this Court must read the paragraphs together in order to understand exactly what claims are subject to being arbitrated and what potential remedies would be available in that arbitration. Only if these provision are read together can the Court "understand the scope of warranties and how different disputes are to be handled." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Thus, as in *Smith*, the Court should consider the limitations on remedies foisted upon the Huskins when determining whether Mungo Homes' arbitration provision is unconscionable.

Considering the limitations on remedies in Mungo Home's Purchase Agreement, the Court should clearly decide that the arbitration provision at issue is unconscionable. As noted above, D.R. Horton in *Smith* disclaimed all warranties on the home, including the implied warranty of

habitability, and also declared that it “shall not be liable for monetary damages of any kind.” *Id.* at 45, 790 S.E.2d at 2. The *Smith* Court held that these terms were one-sided and oppressive and therefore agreed with the trial court that the arbitration provision was unconscionable. *Id.* at 50, 790 S.E.2d at 5. Similarly, here, Mungo Homes has expressly disclaimed all warranties, including the warranty of habitability. Furthermore, Mungo Homes also has disclaimed any liability for money damages, stating “Seller shall in no event be liable for consequential or punitive damages of any kind” and that its customers have waived all “rights or remedies, whether based in contract or tort.” Thus, Mungo Homes’ agreement mirrors that of D.R. Horton’s in *Smith*. Accordingly, the Court should follow *Smith* and hold that the terms of the arbitration agreement here are oppressive and one-sided.

Finally, the court of appeals’ decision in *One Belle Hall* does not apply here because that case applied the FAA and because the agreement at issue there contained a severability clause, while the contract in *Smith* and Mungo’s Purchase Agreement do not. In *One Belle Hall*, the issue was whether an arbitration provision contained within a warranty issued by a manufacturer of roof shingles was enforceable. Among other provisions, the agreement there contained a “legal remedies” section that waived certain warranty rights. Importantly however, that section also included a severability clause that stated the waivers would not be applied in states that disallowed such waivers. In reaching its decision on the enforceability of arbitration, the court first found the FAA applied, and then held that the purchaser had no meaningful choice in the transaction. The court then analyzed the “legal remedies” section to determine whether the terms were oppressive. In so doing, the court of appeals distinguished *Smith* because the agreement at issue contained a severability clause while the agreement in *Smith* did not. *One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293 (“Moreover, unlike the arbitration agreement in [*Smith v. D.R. Horton*], the legal

remedies paragraph contains a severability clause.”). Because the severability clause could allow the arbitrator to ignore the waivers, the court of appeals found the limitations were not oppressive. *Id.*

Accordingly, the present case is like *Smith* and not like *One Belle Hall*. As in *Smith*, Mungo’s Purchase Agreement does not contain a severability clause which might revoke the extreme limits placed on the Huskins’ rights. Thus, the court of appeals’ analysis in *One Belle Hall* is inapplicable and this Court should instead follow the Court’s reasoning in *Smith*.

ii. The terms of the paragraph titled “Arbitration and Claims” are oppressive and one-sided

Even if the Court looks to only the terms in the paragraph titled “Arbitration and Claims” it should find its terms oppressive and one-sided. The Purchase Agreement’s arbitration clause contains the following severe, and unlawful, time limitation for asserting a claim against Mungo Homes:

Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen . . . Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

(Ex. A, Purchase Agreement Section Arbitration and Claims.) The time in which the Huskins have under state law to assert the claims at issue here, however, is three years. *See* S.C. Code Ann. § 15-3-530. And South Carolina law provides: “No clause, provision or agreement in any contract . . . whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought with a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action” *See* S.C. Code Ann. § 15-3-140. The term in the Mungo Homes’ arbitration clause, purporting to limit the time the Huskins have to bring their claims against Mungo Homes from three years to 90 days violates

South Carolina public policy to safeguard the applicable statutory limitations period for asserting claims.

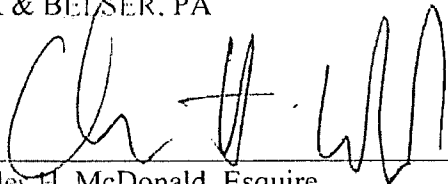
In addition, because Mungo Homes requires full payment for the home at closing, Mungo Homes would have little to no reason to assert a claim against an individual home buyer after the closing. The time limitations in the arbitration clause thus have no real application to any rights of Mungo Homes and are clearly a one-sided provision to deprive the individual home buyer a reasonable time to pursue claims against Mungo Homes. In contrast, Plaintiffs' claims, which relate to the Purchase Agreement's unlawful waiver of the implied warranty of habitability without separate and adequate consideration, arose upon the Huskins' execution of the Purchase Agreement. Yet, the Purchase Agreement drafted by Mungo Homes, a sophisticated commercial enterprise with ready access to its own legal counsel, includes no information that, in signing the Purchase Agreement, the Huskins were entitled to separate and adequate consideration regarding the waiver of the implied warranty of habitability. Under the terms of the Purchase Agreement's 90-day limit on claims, moreover, the Huskins claims would now be barred. These one-sided, oppressive, and unseverable terms within an arbitration clause presents this court with a classic example of arbitration clauses which South Carolina courts have held unconscionable and refused to enforce in the past. *See Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (finding adhesive arbitration clause which also contained unseverable and one-sided limitation on a consumer's statutory remedies unconscionable and unenforceable).

CONCLUSION

Based on the reasoning and authorities set forth above, Mungo's arbitration agreement is unconscionable and unenforceable. Accordingly, Mungo's Motion to Dismiss and Compel Arbitration must be denied.

BELSER & BELSER, PA

By: _____


✓ Charles H. McDonald, Esquire
H. Freeman Belser, Esquire
William C. Dillard, Jr., Esquire
P.O. Box 96
Columbia, SC 29202
Telephone: (803) 929-0096
Facsimile: (803) 929-0196

Counsel for Plaintiffs

Columbia, South Carolina
October 30, 2017

EXHIBIT A



THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ

PURCHASE AGREEMENT

MUNGO HOMES, INC. 441 Western Lane Irmo, SC 29063 (803)749-9000 www.mungo.com 06/29/2015

THIS PURCHASE AGREEMENT is entered into between Mungo Homes, Inc., a South Carolina corporation ("Seller") and Amanda L. Huskins ("Purchaser", whether one or more), Purchaser's phone numbers (Home) (706) 566-7655 (Work), (Mobile), (Email) ahuskins@aflac.com. Title (Deed) to be in Amanda L. Huskins.

PROPERTY

Seller agrees to sell and Purchaser agrees to buy, on the terms and conditions contained herein, that certain tract of land, together with the dwelling and improvements constructed or to be constructed thereon (the "Property"), situated in Richland County, and described as Lot 221 in the Westcott Ridge Community, also known as TBD, Chanin, SC 29036 (Property Address).

IMPROVEMENTS

(Check either Field Model or Building Job)

- () FIELD MODEL The improvements on the Property are under construction in accordance with Plan VICTOR, Elevation B, and any Change Orders issued prior to or with this Agreement. Purchaser's selection items, if any, shall be shown on the attached Customer Selection Sheet. Any changes must be accepted by the Seller by written Change Order. To the extent any improvements are constructed as of the date hereof, Purchaser has inspected the improvements and is buying based upon this inspection and not in reliance upon any model, plans or other material.
(X) BUILDING JOB The improvements shall be constructed on the Property substantially in accordance with Plan VICTOR, Elevation B, and the Start Sheet Addendum and Customer Selection Addendum, attached hereto, plus any written Change Orders accepted by the Seller. Said plans and addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller.

Said plans and Addenda shall supersede any models, advertising materials or other representations. Said plans shall be available for inspection by the Purchaser during reasonable business hours, but shall remain the exclusive property of the Seller. Seller reserves the right to substitute materials of similar pattern, design and quality.

PRICE

Table with 4 columns: Item, Price, Description, Amount. Total Sales \$ 243,625.00; Earnest Money \$ 3,000.00; Earnest Money Received 2,500.00; Additional Earnest Money Due 06/22/2015 500.00.

FINANCING CONTINGENCY AND TERMINATION

Is this Purchase Agreement contingent upon the Purchaser obtaining a mortgage loan? Yes X No

Is this home to be owner occupied? Yes X No If not owner occupied, then a minimum of \$ earnest money is required.

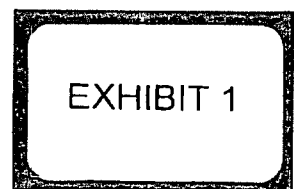
Purchaser will apply for said loan to Ameris Bank SB within five (5) business days. Purchaser to pay all fees or costs required by the lender in connection with the loan application or its processing and will promptly supply all documents or other information required by the Lender.

If Purchaser does not obtain loan approval by 07/29/2015, (loan approval may be conditioned upon an appraisal of at least the Purchase Price) Purchaser may, within seven (7) days thereafter, terminate this Agreement by written notice to the Seller, and Seller shall within thirty (30) days thereafter return the Earnest Money to the Purchaser, after the return of Earnest Money neither party shall have any liability to the other. If Purchaser fails to give Seller such notice of termination within the time specified, this financing or loan contingency shall be deemed waived and of no further effect, except in the event loan approval was conditioned upon an appraisal and the property fails to appraise for at least the Purchase Price. Seller, at its sole option, may extend the time for loan approval and closing for such period or periods as Seller in its sole discretion elects in order to allow the Purchaser to obtain financing. Purchaser consents to any such extension and agrees to be fully bound by this Agreement during any such extension(s). If Purchaser obtains loan approval and refuses to close or fails timely and in good faith to apply for said loan, then Purchaser shall be deemed to be in default entitling Seller to the remedies provided herein. "Good faith" application for said loan shall include, but not be limited to, applying for a loan with the usual and customary term, interest rate and down payment prevailing at the time of application. This contingency will be satisfied by Purchaser obtaining loan approval from any lender.

Nothing herein shall be construed as any representation or warranty by the Seller that the Property meets the requirements for any type of loan or of any lender.

If this transaction is contingent upon the Purchaser obtaining a loan insured by the Federal Housing Administration ("FHA") or guaranteed by the Department of Veterans' Affairs ("VA"), then it is expressly understood that, notwithstanding any other provisions of this Agreement, the Purchaser shall not be obligated to complete the purchase of the Property herein described or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Seller has delivered to the Purchaser a written statement issued by the FHA or VA setting forth the appraised value of the Property, excluding closing cost, for mortgage insurance or guaranty purposes of not less than \$ 243,625.00 which statement the Seller hereby agrees to deliver to the Purchaser promptly after such appraised value is made available to the Seller. The Purchaser shall, however, have the privilege and option of proceeding with the consummation of this Agreement without regard to the amount of the appraised valuation made by the FHA or VA. The appraised valuation is arrived at to determine the maximum mortgage the FHA or VA will insure or guaranty. Neither the FHA nor VA warrants the value or the condition of the Property. The Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.

Handwritten signature/initials



06/29/2015



CLOSING

Closing shall be on or before or 90 days from pre-construction meeting, subject to such extensions as provided herein. If closing is extended Seller will notify the Purchaser of the extended closing date at least ten (10) days prior thereto, unless the reason for the delay arises within ten (10) days of closing in which case Seller shall provide notice which is reasonable under the circumstances. Closing to be extended, at Seller's sole option, for any delays beyond Seller's control including, but not limited to acts of God, inclement weather, labor disputes, difficulty in obtaining labor or materials, difficulty or delays in obtaining or the issuance of governmental permits or approvals, or inclement weather.

Issuance of a certificate of occupancy by any governmental authority, or final inspection and approval by the Federal Housing Administration, the Veteran's Administration or mortgage lender shall constitute certification of completion of the improvements in substantial conformity with the terms hereof.

At closing, Purchaser shall pay to Seller in cash the total purchase price and all other sums payable to Seller hereunder. No portion of the purchase price may be withheld from Seller, or deposited in escrow for any reason. Seller will deliver possession of the Property to Purchaser at closing.

Upon payment in full, Seller will deliver to Purchaser a Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property subject to the lien for current taxes; reservations, conditions, right-of-way and easements of record; and matters to which this Agreement is subject.

If closing is delayed through no fault of Seller, Seller may at its option charge Purchaser an extension fee equal to one-thirtieth of one percent (1/30%) of purchase price per day.

CLOSING COSTS AND PRO-RATIONS

TAXES and ASSESSMENTS shall be pro-rated between the Seller and Purchaser as of the date of closing. DEED preparation shall be paid by Seller.

PREPAID ITEMS (e.g. interim interest, insurance premiums, and tax and insurance escrows) shall be paid by the Purchaser.

MORTGAGE INSURANCE: First year PMI, FHA-MIP, or VA Funding Fee shall be paid by the Purchaser.

ALL OTHER CLOSING COSTS, including DEED STAMPS and or TRANSFER TAXES, shall be paid by Purchaser, except that if the Closing Cost Addendum is attached, Seller shall pay the costs provided therein.

CHANGE ORDERS

No alterations, changes or additions shall be made in the construction of the improvements provided herein, nor shall any extra work be performed or materials be provided or added by the Purchaser unless approved by the Seller, in its sole discretion, in a written Purchase Agreement Change Order, signed by both parties. Except as provided herein, Purchaser shall pay a \$250 Change Order fee, plus the added cost of the change or alteration at the time the request for the Purchase Agreement Change Order is made. *[Signature]* Purchaser's Initials

RESTRICTIVE COVENANTS

The Property is subject to restrictive covenants and to the jurisdiction of a homeowners' association which charges annual assessments. The Purchaser acknowledges that the documents pertaining to such restrictions or associations have been made available to him (her) and that he (she) has read, understands and accepts same.

Copy received. *[Signature]* Purchaser's Initials

HOMEOWNERS' ASSOCIATIONS

The Association Board of Directors set dues amounts annually. The annual dues are currently \$ 450/year, plus \$150.00, one time contribution fee, paid at closing. Any structure, including fences and outbuildings must be approved by the Architectural Control Board prior to construction. Any provision for these structures in this Agreement does not constitute approval by the Architectural Control Board. It is the purchaser's responsibility to obtain this approval.

LIMITED WARRANTY

The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.

THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

TERMITE PROTECTION

Seller will furnish the Purchaser with a one (1) year termite protection bond effective at time of treatment. Seller shall have no liability for damages caused by termites or other wood boring insects beyond the furnishing of this bond. Renewals of the bond shall be at Purchaser's expense. In the event the bond is not renewed, Seller shall not be liable for any damages, including water damage, which could have been discovered and minimized by periodic termite inspections.

DEFAULT AND TERMINATION

If this Agreement is not performed by Purchaser in accordance with its terms, it may be terminated by Seller, by written notice to Purchaser, and upon such termination Seller may retain all amounts paid by Purchaser hereunder as liquidated damages, after which neither part shall have any liability to the other. Such damages are not a penalty, but represent actual damages which Seller will sustain upon a default by Purchaser, which damages will be substantial but not capable of precise determination. In such event, Purchaser will not assert any claim against Seller seeking the return of any portion of the payments made under this Agreement or any reduction in the amount of such liquidated damages.

If this Agreement is not performed by Seller in accordance with its terms, Seller being in default and Purchaser not being in default hereunder, Purchaser may terminate this Agreement by giving prompt written notice thereof to Seller. Seller, upon receipt of such notice of termination, shall within thirty (30) days return to Purchaser all sums heretofore paid by Purchaser to Seller hereunder and pay \$250 to Purchaser, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. After said payment neither party shall have any liability to the other. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Agreement) shall in any case be collectible, enforceable or available to Purchaser.

Notwithstanding the foregoing, Seller, in its sole discretion, without being in default, may terminate this Agreement by written notice to the Purchaser and the payment to the Purchaser of a sum equal to one percent (1%) of the Purchase Price of the Property. Upon the tender of said payment, whether accepted or not, neither party shall have any liability to the other.

Upon either party giving a written notice of termination as provided herein, the Seller shall be entitled to offer for sale and sell the Property to any other person unaffiliated by any claim of the Purchaser. The parties specifically agree that after any notice of termination is given by either party to the other any claims shall be limited solely to the payment of the sums provided herein and no other claim shall be asserted against the either party or the Property.

[Handwritten signature]



ARBITRATION AND CLAIMS

Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

~~NON-RELIANCE X~~ JAN

Purchaser hereby represents to Seller that Purchaser has not relied and is not relying upon any warranties, promises, guarantees or representations made by Seller, any agent of Seller, or anyone else acting or claiming to act on behalf of Seller with respect to the purchase by Purchaser of the Property or the other matters set forth herein unless specifically reduced to writing and made a part of this Agreement.

MISCELLANEOUS

a. This Agreement will be binding and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns; provided that Purchaser shall not assign or transfer this Agreement or any of Purchaser's rights hereunder, and any prohibited assignment shall be null and void and Seller may at Seller's option, immediately terminate this Agreement.

b. In the event of a total destruction of the dwelling by fire, windstorm, hail, earthquake, explosion or other casualty prior to the closing, Purchaser or Seller may terminate this Agreement if the dwelling cannot be restored prior to the Completion Date.

c. This Agreement embodies the entire Agreement between Seller and Purchaser with respect to the Property. No amendment or modification of this Agreement (including contracts for charges in construction of "extras") shall be valid unless contained in writing executed by both parties.

d. Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations.

e. All notices and demands to be given or served pursuant to the terms of this Agreement shall be given by certified or registered mail, return receipt requested, addressed to the parties at their respective addresses set forth herein and will be deemed delivered and received three (3) days after deposit into the United States mail with sufficient postage.

f. If two or more persons are named as Purchaser herein, any one of them is authorized to act as agent for, with the right to bind, the other(s) in all matters of every kind or nature with respect to this Agreement.

g. Purchaser is prohibited from recording this Agreement or any memorandum hereof and upon attempted recordation this Agreement shall at Seller's option, become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

h. Seller agrees to disclose to Purchaser in writing prior to or at closing or post conspicuously on the Property, the type, thickness and R-value of all insulation installed or to be installed in the dwelling.

i. PURCHASER REALIZES AND ACKNOWLEDGES THAT ENTRY UPON THE PROJECT OR THE PROPERTY DURING CONSTRUCTION CAN BE DANGEROUS AND THAT HAZARDS MAY EXIST WHICH ARE NOT OBSERVABLE. PURCHASER'S ENTRY SHALL BE SOLELY AT HIS OWN RISK. PURCHASER DOES HEREBY WAIVE ANY AND ALL CLAIMS AGAINST SELLER FOR INJURY OR LOSS TO PERSON OR PROPERTY ARISING OUT OF OR IN CONNECTION WITH SUCH ENTRY BY PURCHASER OR ANY OTHER PERSON ACCOMPANYING HIM OR ENTERING AT HIS DIRECTION OR PERMISSION.

j. The provisions of this Agreement shall survive closing and not merge in the deed.

k. It is understood that Purchaser is buying a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon its completion.

l. Each lot is unique in size, shape and various characteristics. Purchaser understands and agrees that the size of the lot, the exact location of sidewalks and driveways (if any) and the drainage patterns of the lot will differ from the model home plans, drawings or renderings that Purchaser may have examined.

m. Land adjacent to or surrounding the Property which is not owned by Seller is not within Seller's control. Seller will not be liable to Purchaser for any use or condition of adjacent or surrounding land for commercial, industrial, institutional, multi-family or non-residential purposes.

n. PURCHASER HEREBY RELEASES AND RELINQUISHES ALL CLAIMS AGAINST SELLER FOR DAMAGES TO PROPERTY OR PERSONAL INJURY ARISING AFTER THE DATE OF THIS AGREEMENT RELATING TO ANY OF THE FOLLOWING:

(1) environmental or ecological conditions or events such as weather conditions, atmospheric conditions, terrestrial conditions, acts of God or other natural or man-made conditions or occurrences, occurring beyond the reasonable control of Seller.

(2) consequential damages or expenses resulting from a termination of this Agreement or to delays in closing, such as lodging, storage, moving, meals or travel expenses.

(3) any claims for repairs or modifications to the Property except as specifically covered by Seller's limited home warranty. This waiver will be binding upon Purchaser and the heirs, successors, assigns, guests and invitees of Purchaser. Purchaser acknowledges that Seller shall be entitled to rely upon this waiver as a complete defense against any claim asserted by Purchaser or anyone claiming through Purchaser. The deed conveying the Property to Purchaser may contain a reference to this waiver.

IN WITNESS whereof the parties have set their hands and seals and PURCHASER CERTIFIES THAT THIS AGREEMENT HAS BEEN FULLY READ AND UNDERSTOOD.

Witnesses:

Lill Sanders

By: MUNGO HOMES, INC. 7/29/15, Agent
[Signature]
PURCHASER
PURCHASER

Initial(s): [Signature] Date: 6/29/15

Are you working with a Buyer's Agent? Yes ___ No X
If yes, please fill out information below:
Buyer's Agent Name Office Address ___
Agency Name
Office Phone # Cell Phone # Fax#
Agency Code ___ Agent Code ___ Agent's E-Mail Address ___

Purchaser's current address is: 832 Burnview Lane, Chapin, SC 29036
MUNGO HOMES Community Sales Manager Lill Sanders




CONTINGENCY ADDENDUM

PURCHASER Amanda L. Huskins
LOT 221 COMMUNITY Westcott Ridge DATE 06/29/2015

PURCHASER UNDERSTANDS AND AGREES THAT THIS CONTRACT IS CONTINGENT UPON:

Purchasers request driveway to be on the right side.

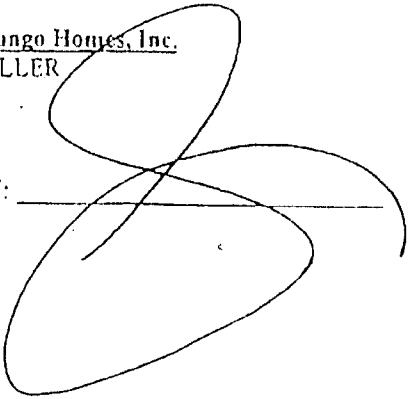

PURCHASER

7/3/15
DATE

PURCHASER

DATE

Mungo Homes, Inc.
SELLER

BY: 

7/3/15
DATE

Lot: 221
Community: Westcot Ridge



START DATE ADDENDUM

The requested Start Date is 8/21/15 and will be confirmed after both parties ratify the Purchase Agreement. Actual construction will begin after your Pre-construction Meeting. The Pre-construction Meeting is typically scheduled for the week following your Start Date.

Purchaser Responsibilities:

1. Meet with the Design Consultant and have your *Color Selections* completed on or before 8/17/15 (4 days before the Start Date), or you must move to the next available Start Date.
2. Make loan application within five (5) days of your *Purchase Agreement*.
3. Be current on all earnest money commitments prior to your Start Date.
4. Be available to attend a Pre-construction Meeting the week following your Start Date.

Changes:

1. Any change (addition/modification/deletion) that requires modifications to the construction drawings must be ratified by both parties prior to 25 days before your chosen Start Date, or you must move to the next available Start Date.
 - a. If the changes are ratified more than 25 days before your Start Date, no Change Order Fees will apply.
 - b. Examples of changes that require plan modifications include but are not limited to the following: foundations, garages, screen porches, bonus rooms, floor plan options, vaulted ceilings, tray ceilings, bath tub or shower options, bay windows, fireplaces, changes to vanities, adding or deleting doors, brick or stone options, windows, laundry sink, dormers or extra concrete patios or driveways.
2. In the twenty-one (21) days between the 25th and 4th days prior to your Start Date, it is possible to change the items enumerated in 1.b. above, but a Preparation Fee will be charged along with the cost of the change itself.
 - a. Changing your choice of floor plan, elevation, home site or any of the other options listed in 1.b. above within this 21 day window will cost \$500 to help offset the expense of re-permitting, surveying and drafting.
 - b. This will require you to move to the next available Start Date.
 - c. The \$500 fee will not be added to the purchase agreement amount, but will be collected by check or debit card prior to initiating the change. The \$500 will be non-refundable.
3. Changes that do not effect the construction drawings are permitted up to 4 days before the Start Date.
 - a. If the changes are ratified more than 4 days before your Start Date, no Change Order Fees will apply.
 - b. Examples of changes that do not require plan modifications include but are not limited to the following: garage door openers, finished garages, upgraded roof shingles, trim options, railings, designer paint schemes, cabinets, flooring, fireplace surrounds, closet shelving, landscaping, irrigation, plumbing fixtures, mirrors, shower doors, siding, security, vacuums, appliances, blinds, hose bibs, decks, home theater and audio, structured wiring, lighting packages, door hardware, countertops, electrical options or fences.
 - c. Notwithstanding the above, all color selections must be made in the design appointment with the Design Consultant. Any changes permitted after that design appointment will include a \$250 Change Order Fee, plus the cost of the change itself.
4. 4 days before the Start Date is when all changes must be complete. After this date, no changes are permitted without prior approval from Mungo Homes, and may not be permitted.
 - a. If a change is permitted, any *Purchase Agreement Change Order* after this date will include a \$250 Change Order Fee, plus the cost of the change itself.
 - b. The \$250 fee will not be added to the purchase agreement amount, but will be collected by check or debit card prior to initiating the change. The \$250 will be non-refundable.
5. Although the changes are possible as described above, the process works best when all options are included in the initial *Purchase Agreement*.

Purchaser's Acknowledgement:

I have read the above addendum, understand and agree the content therein.

Purchaser

Date

Purchaser

Date



Start Calendar

Lot: 221

Community: Westcott Ridge

	Mon	Tue	Wed	Thur	Fri	Sat	Sun
Week 1	-25 Days No more structural changes <u>7/27/15</u>						
Week 2							
Week 3							
Week 4	<u>8/17/15</u> Days Selections due and no more non- structural changes				Start Date <u>8/21/15</u>		
Week 5		Pre-construction meeting <u>8/25/17</u>					

THE THREE (3) CUT OFF DATES LISTED ABOVE FOR STRUCTURAL CHANGES, SELECTIONS AND NON-STRUCTURAL CHANGES ARE THE DATES THAT THE APPLICABLE PAPERWORK MUST BE RECEIVED, EXECUTED AND PROCESSED BY MUNGO HOMES.

Purchaser: [Signature]

Date: 6/29/15

Purchaser: _____

Date: _____

[Signature]
Mungo Homes 7/3/15

Lot #: 221

Community: Westcott Ridge



STRUCTURAL AND/OR NON-STRUCTURAL CHANGES

Examples of changes that require plan modifications include but are not limited to the following (structural changes):

7/27/15
Date

- Garages
- Screen porches
- Bonus rooms
- Floor plan options
- Vaulted ceilings
- Tray ceilings
- Bath tub or shower options
- Bay windows
- Fireplaces
- Changes to vanities
- Adding or deleting doors
- Brick or stone options
- Windows
- Laundry sink
- Additional concrete
- Dormers

Examples of changes that do not require plan modifications include but are not limited to the following (non-structural changes):

8/17/15
Date

- Garage door openers
- Finished garages
- Upgraded roof shingles
- Trim options
- Railings
- Designer paint schemes
- Cabinets
- Flooring
- Fireplace surrounds
- Closet shelving
- Landscaping
- Irrigation
- Plumbing fixtures
- Mirrors
- Shower doors
- Siding
- Security
- Vacuums
- Appliances
- Blinds
- Hose bibs
- Decks
- Home theater and audio
- Structured wiring
- Lighting
- Door hardware
- Countertops
- Electrical options
- Fences

[Signature] _____
Purchaser Date 6/29/15

Purchaser Date

[Signature] _____
Mungo Homes Date 7/3/15



Lot 221
Community Westcott Ridge
Date 06/29/2015

Development Rider

441 Western Lane, Irmo, SC 29063
(803) 749-9000
www.mungo.com

When developing the infrastructure of a community, there are a number of factors that are directly impacted by weather and local municipalities. As a developer, The Mungo Company has a very good idea about the time frame required to complete the construction, inspection and approval process for the community roads and utilities. However, since every project is unique, there are sometimes unexpected delays in the construction process. These may be as a result of:

- Unusually bad weather
- Extensive underground rock
- Municipal approval process
- DHEC approval process
- Utility company's installation of power
- Utility company's installation of water
- Utility company's installation of gas (if applicable)
- Cold weather effects on concrete or paving


Some weather problems and external delays are common, so we factor some time in our schedule to account for these. It is possible however, that Mungo Homes will not be able to begin construction or complete your home when we expect to, due to unusual conditions beyond our control or the control of the developer.

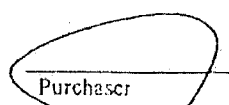
Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration.

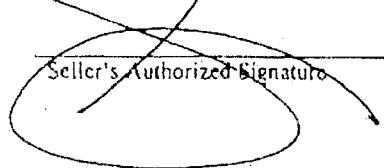
By reading and signing this document, you acknowledge the possibility of delays to the construction start or completion of your home.

In all cases, your satisfaction is our top priority, and you will be kept informed of any changes in our schedule that affect the construction of your home.

Mungo Homes Community
Sales Manager _____

Date: 6/29/15  _____
Purchaser

Date: _____  _____
Purchaser

Date: 7/3/15  _____
Seller's Authorized Signature



Lot
Community
Date

221
Westcott Ridge
06/29/2015


Non-Owned Lot Addendum

Seller is in the process of acquiring the Property upon which the dwelling and other improvements are to be constructed and sold to the Purchaser pursuant to the terms and conditions of the Purchase Agreement to which this Addendum is attached. Seller anticipates acquiring the Property; however, cannot warrant or guarantee that it will be able to do so. Therefore, Purchaser agrees that if Seller does not acquire the Property for any reason, Purchaser may elect to substitute other property which the Seller has available for sale, recognizing that such substitution may require adjustments to price, time and other provisions of the Agreement, or terminate the Agreement and receive a refund of any Earnest Money paid to the Seller. Such election must be made within ten (10) days after Seller notifies Purchaser that it is not acquiring the Property. If Purchaser fails to elect within said time, Purchaser shall be deemed to have elected to terminate the Agreement. Seller shall have no other liability of any nature whatsoever for its failure to acquire title to the Property for any reason.

Seller: _____

By: _____

7/3/15


Purchaser

Purchaser



CLOSING COST ADDENDUM

Job # Westcott Ridge 221
Purchaser Amanda L. Huskins

Date 06/29/2015
Address TBD Chapin, SC 29036

Seller has established Marketing Agreements with Ameris Bank, BB&T, and Starkey Mortgage. Under the terms of these Marketing Agreements these lenders are promoted on Seller's website and permitted to display promotional materials in Seller's sales centers. These lenders offer a broad range of loan programs including, but not limited to, programs which provide for the elimination and/or deferral of closing costs into their loan program. Please contact one or more of these lenders to learn more about the financing options available to you.

"Closing Costs" are fees or charges associated with loan origination, appraisal, processing, closing, underwriting, credit report, tax service, flood certification, lender's title insurance, attorney and recording.

Purchaser will not be responsible for deed stamps, transfer taxes and intangible taxes when (1) the closing is handled by attorney selected by Seller AND (2) one of the lenders listed above are used or Purchaser does not require financing (i.e. cash closing). Purchaser may be required and agrees to execute a waiver of conflict or similar document by the closing attorney selected by the Seller.

Purchaser will be responsible for all Lender costs associated with "optional" or "elective" programs such as interest rate buy-downs, discount points and other special loan programs. Purchaser shall also be responsible for all other closing costs and pre-paid items including, but not limited to, survey, attorney's courier charges to send the loan package to the Lender, owner's title insurance, hazard insurance, per diem interest on Purchaser's loan, Lender-required escrows, and homeowners' association dues and charges.

Purchaser understands that Purchaser may not make any change in mortgage company or loan program in the 30 days prior to closing date.

Seller is not responsible for any rate increase or cost incurred due to loan lock extension or expiration. Purchaser acknowledges that the purchase price is based on closing by the date agreed to in the Purchase Agreement. Should Purchaser fail to close on that date, Seller will be entitled to and the Purchaser agrees to pay carrying costs at the rate defined in the Purchase Agreement from that date until the day of the actual closing. This amount will be charged on a monthly basis and prorated daily. Seller will require that this amount be paid in advance.

Purchaser specifically acknowledges and consents to Seller providing a copy of Purchase Agreement, attachments and addendums to lenders listed above.

Nothing herein guarantees that Purchasers will qualify for any specific financing.

SELLER: _____

13/15
PURCHASER: _____

PURCHASER: _____



06/29/2015



LOT: 221

COMMUNITY: Westcott Ridge

ADDRESS: TBD

PURCHASER (S) Jay + Amanda Huskins

HOMEOWNER'S RESPONSIBILITY

- Complete the *Customer Selection Sheet* completed at least 21 days before your Start Date.
- Make appointment with a mortgage company immediately upon receipt of accepted contract.
- Meet with Project Manager for Pre-construction meeting. (Project Manager will call to schedule).
- Two weeks prior to closing make arrangements for homeowner's insurance. Notify closing attorney's office with information. Also, verify closing date & time with Closing Coordinator at Mungo Homes.
- Put utilities (electricity, gas, water & sewer) in your name. Will be changed from Mungo Homes at closing.
- Day before closing, obtain amount of funds needed to close from Closing Attorney. If funds are less than \$4000, a cashier's check will be accepted. If funds exceed \$4000, arrange for wire transfer of funds to closing attorney's office. Funds must be deposited into attorney's account and available for disbursement from the attorney's account to complete closing, and release reimbursements, checks to agents, and keys to customer.
- David Ross is our preferred closing attorney. He can be reached for your final closing figures 48 hours prior to closing.

HOMEOWNER'S MANUAL ACCEPTANCE

Your signature below acknowledges receipt of your MUNGO HOMES HOMEOWNER'S MANUAL. It also indicates that you have reviewed this information with your Community Sales Manager.

You are discouraged from making any large purchases such as a new car, boat, motorcycle, etc., between the time of signing the sales agreement and closing of the home. Large purchases can affect your credit report and ultimately the ability to purchase your new home.

ACCEPTANCE OF HOMEOWNER'S RESPONSIBILITY AND HOMEOWNER MANUAL:

[Signature]
Purchaser

6/29/15
Date

[Signature]
Purchaser
[Signature]
Community Sales Manager

6/29/15
Date

PLEASE REMEMBER TO BRING YOUR HOMEOWNER MANUAL TO ALL MEETINGS CONCERNING YOUR NEW HOME



Earhart Overstreet
ATTORNEYS AT LAW

Main: 843.972.9400
www.earhartoverstreet.com

PO Box 22528, Charleston, SC 29413

Steve@earhartoverstreet.com
Direct: 843.972.9404

November 12, 2018

VIA U.S. MAIL

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: Amanda Leigh Huskins and Jay R. Huskins v. Mungo Homes, LLC.
Appellate Case No.: 2018-000889
EO File No.: 110-0137

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Respondent's Reply to Appellants' return to Respondent's Motion to Dismiss Appeal. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

STEVEN R. KROPSKI

SRK/rle
Enclosures

cc: Beth B. Richardson, Esquire
Terry E. Richardson, Jr., Esquire
Matthew J. Nickles, Esquire
Brady R. Thomas, Esquire
Charles H. McDonald, Esquire

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Jenny Abbott Kitchings, Clerk
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