

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

**RECEIVED**

APR 16 2019

SC Court of Appeals

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Appellate Case No. 2018-000889

Case No. 2017-CP-40-03697

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

v.

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

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**RECORD ON APPEAL**

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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Amanda Leigh Huskins and Jay  
R. Huskins,

Plaintiffs,

v.

Mungo Homes, LLC,

Defendant.

IN THE CIRCUIT COURT  
FOR THE FIFTH JUDICIAL  
CIRCUIT

CASE NO. 2017-CP-40-03697

**ORDER**

**INTRODUCTION**

This matter comes before the Court upon Mungo Homes' Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on November 8, 2017 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, and arguments of counsel and issues the following Order to **GRANT** the Defendant's Motion to Dismiss and Compel Arbitration.

**FACTS**

The Huskins are residential buyers who executed a Purchase Agreement with Mungo Homes, a national builder on June 29, 2015: Compl. ¶ 1. The Purchase Agreement was for the sale of a tract of land, the construction of a dwelling, and any improvements constructed on the property. Pl.'s Exh. 1. The Purchase Agreement categorizes the transaction as a "Building Job." *Id.* A Building Job gave the purchasers [the Huskins], an opportunity to inspect any Addendums added to the Purchase Agreement for improvements on the property. *Id.* The Purchase Agreement includes an Addendum where the Huskins requested the placement of the driveway on the right side of the property. *Id.* The improvements specified in the Purchase Agreement

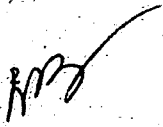
*HB*

Addendum began in August 21, 2015. *Id.* The Addendum includes a Development Rider explaining that factors such as weather and local municipalities may cause delays during the construction and completion of the home. *Id.* Mungo Homes obtained a permit from Richland County classifying the improvement as "residential new construction" for a "single family residence." *Id.* In addition, a Certificate of Occupancy was issued for the property on January 19, 2016. *Id.*

There are two provisions in the Purchase Agreement that are of importance in this lawsuit. First, is the "Limited Warranty" provision, located on page two of the Purchase Agreement. In this provision, Mungo Homes disclaims the implied warranty of habitability, suitability for residential purposes, merchantability, or fitness for particular purpose. *Id.* Mungo Homes also disclaims liability for consequential, or punitive damages. *Id.* A third-party corporation is responsible for any warranties or damages claims. *Id.*

Second, is the "Arbitration and Claims" provision, which is located at the top of page three of the Purchase Agreement. This provision subjects any claims or disputes arising out of, or relating to the Purchase Agreement to arbitration. *Id.* The provision sets a ninety-day period in which a party can demand arbitration after a claim or dispute arises. *Id.* The Arbitration and Claims Provision states:

"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 party's arbitrator. *Each and every demand for arbitration shall be made within 90 days after the claim, dispute or other matter in question has arisen . . . or else any claim, dispute or other matter*



in question not asserted within said time periods shall be deemed waived and forever barred." *Id.*

The Huskins filed a Complaint on June 14, 2017 alleging four causes of action for (1) breach of contract; (2) unjust enrichment; (3) declaratory relief; and (4) violation of the South Carolina Unfair Trade Practices Act. Compl. ¶ 23, 27, 32; 34. Mungo Homes filed a Motion to Dismiss and Compel Arbitration on July 20, 2017. Def. Mot. to Dismiss at 1.

The Huskins put forth three main arguments. First, they argue that the Purchase Agreement involves the sale of a new home. Pl.'s Mem. in Opp'n at 4. Under South Carolina law, the sale of a new home involves *intrastate* commerce; it does not involve interstate commerce. *Id.* The Federal Arbitration Act does not govern this transaction because interstate commerce is not involved. *Id.* Rather, the South Carolina Uniform Arbitration Act applies to this transaction. *Id.* at 5. Second, they argue the "Arbitration and Claims" provision is unconscionable because they had no meaningful choice to negotiate the terms of the arbitration provision and the provision truncates the statute of limitations for when the Huskins may bring a claim arising out of, or related to the Purchase Agreement. Pl.'s Mot. in Opp'n at 7-8. This violates public policy. *Id.* Third, the Huskins argue South Carolina precedent requires the court to analyze the "Limited Warranty" and "Arbitration and Claims" provisions *together* to determine whether the arbitration provision is unconscionable. *Id.*

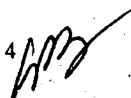
The Defendants argue that the Purchase Agreement involves the sale of property and the construction of a dwelling, or improvements to a dwelling. Def. Mot. to Dismiss at 2. The transaction involved the construction of real estate, which necessarily involves *interstate* commerce according to South Carolina law. *Id.* at 3. The Federal Arbitration Act governs agreements that involve interstate commerce. *Id.* Arbitration of claims subject to the Federal Arbitration Act require the court to analyze the validity of the arbitration provision in isolation

from the remainder of the underlying agreement. Def. Reply Mot. at 3. Mungo Homes argues the "Arbitration and Claims" provision is not unconscionable because the Huskins received an opportunity to review and make changes to the Purchase Agreement and Addendum. Def. Reply Mot. at 4. Further, the "Arbitration and Claims" provision merely sets a time frame for when either party may demand arbitration; it does not shorten the statute of limitations to file a claim arising out of the Purchase Agreement. *Id.* at 5.

#### **I. INTERSTATE COMMERCE: COMMERCE-IN-FACT TEST**

The Federal Arbitration Act Section 2 provides that a controversy or claim subject to arbitration arising out of a contract *involving commerce* is valid, irrevocable, and enforceable except upon grounds for revocation of any contract that exists at law or in equity. 9 U.S.C. § 2 (1988). South Carolina has a strong policy favoring arbitration. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

Section 2 of the Federal Arbitration Act is generally binding on state claims where parties agree to arbitrate if the underlying transaction involved interstate commerce. South Carolina courts utilize a "commerce-in-fact" test to determine whether a transaction involves interstate commerce and subjects arbitration agreements to federal arbitration. *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 111. Alternatively phrased, the transaction "must turn out, in fact, to have involved interstate commerce." *Id.* The South Carolina Supreme Court instructs the courts to "examine the agreement, the complaint, and the surrounding facts," to determine whether the transaction involved interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (noting South Carolina courts consistently look to the essential character of the contract when applying the Federal Arbitration Act).

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To determine whether interstate commerce is involved, the Court must determine whether the transaction was for the sale of a residential home, or a contract for the development or construction of a home. A contract for the sale of residential real estate does not involve interstate commerce. *Bradley*, 398 S.C. at 457, 730 S.E.2d at 317. South Carolina courts accept that construction projects generally involve interstate travel, purchase of materials, or other activities across state borders. *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 118.

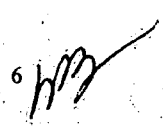
This Court analyzed the agreement, the complaint, and the facts to determine whether the Purchase Agreement involved interstate commerce. Looking to the Purchase Agreement, there is one fact that distinguishes this case from *Bradley* in that the Purchase Agreement in *Bradley* was undisputedly for a "completed dwelling". *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. In this case, the parties contest whether this contract was for a completed home. The language of the Purchase Agreement states the transaction involved improvements to a piece of property and the Purchase Agreement Addendum indicates a driveway was constructed. Pl.'s Exh. 1.

Other language in the Purchase Agreement in this case points to the involvement of construction. For instance, the Development Rider states that factors such as weather or local municipalities, may affect the construction start date or completion of the home. Pl.'s Exh. 1. Also, Richland County issued a permit on the property as "residential new construction" for a "single family residence." *Id.* The Purchase Agreement in *Bradley* checked "N/A" for options such as: "new construction, house plan, options, and color selection." *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. Applying the commerce-in-fact analysis set forth in *Bradley*, the essential character of the Purchase Agreement was for the purchase and improvement of a piece of property, which involved some level of construction, which likely involved interstate commerce.

Although the Purchase Agreement in *Huskins* is distinguishable from the contract in *Bradley*, arbitration is grounded in principles of contract law. Parties are generally free to structure their arbitration agreements as they see fit. *Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). As such, parties are free to enter contracts providing for arbitration under rules established by state law rather than rules established by the Federal Arbitration Act, even if interstate commerce is involved. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 n.2 (2000). The Federal Arbitration Act preempts any state procedural law that completely invalidates the parties' agreement to arbitrate. *Id.* at 343 S.C. at 540, S.E.2d at 364 (invalidating the notice requirement contained in South Carolina's Uniform Arbitration Act because its application would have made the arbitration agreement completely unenforceable).

The "Arbitration and Claims" provision in this case subjects any controversies arising out of the Purchase Agreement to arbitration governed by the South Carolina Uniform Arbitration Act. Pl.'s Exh. 1. Although the Purchase Agreement may have involved interstate commerce, the parties freely agreed that the South Carolina Uniform Arbitration Act would govern. Pl.'s Exh. 1. One of the basic principles of arbitration is to ensure that private agreements to arbitrate are enforced according to their terms. *Volt*, 489 U.S. at 109. It follows that the specific terms of the arbitration provision should be upheld; the South Carolina Uniform Arbitration Act governs this dispute. *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-4 (Ct. App. 2013) (applying the South Carolina Uniform Arbitration Act as agreed upon in the purchase agreement between residential buyer and builder).

## II. UNCONSCIONABILITY

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The South Carolina Uniform Arbitration Act generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement to arbitrate exists in the first place. S.C. CODE ANN. § 15-48-20(a) (2005). If no agreement is found to exist, the court must deny any application to arbitrate. *Id.* To determine whether an agreement to arbitrate is valid, or exists, the trial court should apply ordinary state-law principles that govern the formation of contracts. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22-23 644, S.E.2d 663, 667-68 (2007).

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016); *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. Unconscionability requires courts to focus generally on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. If a court finds that any clause of a contract was unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. CODE ANN. § 36-2-302(1) (2003); *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. A determination of unconscionability requires an evaluation of the facts and circumstances surrounding the particular case. *Id.*

- a. The Huskins lacked meaningful choice to arbitrate their claims because they do not possess business judgment, did not hire counsel, and were not a substantial business concern.**

Whether one party lacks a meaningful choice to enter an arbitration agreement typically speaks to the fundamental fairness of the bargaining process. *Smith*, 417 S.C. at 49, 790 S.E.2d at

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4. "In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Considering the factors set forth in *Simpson*, the Court finds that the Huskins lacked a meaningful choice to arbitrate. First, the Huskins do not have business knowledge and did not hire outside counsel. Pl.'s Mem. in Opp'n at 7. The Huskins are homebuyers that did not enjoy substantially stronger bargaining power against a residential builder than any other average homebuyer. *Smith*, 417 S.C. at 50, 790 S.E.2d at 4-5. The Court in *Simpson* acknowledged that a lack of business judgment leaves the buyer without knowledge of the arbitration agreement's consequences. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Second, The Huskins did not hire independent counsel to discuss the terms of the Purchase Agreement. Pl.'s Mem. in Opp'n at 7; *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. The Huskins, like the buyer in *Simpson*, were customers negotiating with a commercial entity that drafted the contract and held substantially more bargaining power. Compl. ¶ 6-7.; *Simpson* 373 S.C. at 26, 644 S.E.2d at 670.<sup>1</sup>

Further, the Huskins lacked a meaningful choice to arbitrate because they were not a substantial business concern to Mungo Homes. A homebuyer that is a single client to a national builder is not considered a substantial business concern. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. The Huskins executed a Purchase Agreement with Mungo Homes that pertained to one tract of land. Pl.'s Mem. in Opp'n at 7; Compl. ¶ 6-7. The Court finds that the Huskins lacked a

<sup>1</sup> The Huskins purchased a "critically important" item from Mungo Homes like the buyer in *Simpson* who purchased a car from the dealership; a home, like a car, is a modern-day necessity. Compl. ¶ 1; *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670.

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meaningful choice to arbitrate because they did not hire independent counsel, they lacked business knowledge, and they were not a substantial business concern to Mungo Homes.

**b. The arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision because the warranty provision is clearly outside of the arbitration provision.**

When determining the validity of an arbitration provision, courts generally analyze the arbitration provision in isolation from the rest of the contract. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-74 (Ct. App. 2013); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016). The Court will analyze the arbitration provision in conjunction with other provisions of the contract when the arbitration provision cross-references other provisions in the contract. *Smith*, 417 S.C. at 45, 790 S.E.2d at 2.

The Court finds that the "Limited Warranty Provision" exists outside of the "Arbitration and Claims" provision. In *One Belle*, the contract contained a warranty provision that limited the warranty's transferability to a roof manufacturer for shingles it produced and contained an arbitration provision on a separate page. *One Belle*, 418 S.C. at 59, 791 S.E.2d at 290. The court found the warranty provisions *[were] clearly outside the arbitration agreement* and as such the court would only consider the arbitration agreement in an unconscionability analysis. *One Belle*, 418 S.C. at 64, 791 S.E.2d at 293. In the *Huskins* case, the "Limited Warranty" provision is located on the second page of the Purchase Agreement whereas the "Arbitration and Claims" provision is located at the top of page three, which indicates the "Limited Warranty" provision is outside the arbitration agreement and should not be considered in the unconscionability analysis. *Pl.'s Exh. 1*; *see also Carlson*, 404 S.C. at 260, 743 S.E.2d at 873-74 (determining the unconscionability of an arbitration agreement required the court to analyze the arbitration

provision separate from other provisions in the purchase agreement such as a provision limiting the statute of limitations to bring a claim).

Further, the arbitration provision does not reference the "Limited Warranty" provision contained in the Purchase Agreement. The arbitration provision in *Smith* was intertwined within a complex paragraph titled "Warranties and Dispute Resolution." *Smith*, 417 S.C. at 45, 790 S.E.2d at 2. The "Warranties and Dispute Resolution" paragraph contained numerous subparagraphs which cross-referenced once another. *Id.* To determine whether the arbitration agreement was unconscionable, the Court in *Smith* analyzed the "Warranties and Dispute Resolution" paragraph as a whole because the arbitration provision could not be extracted from the "Warranties and Dispute Resolution" paragraph. *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Unlike the arbitration provision in *Smith*, the arbitration provision in this case is not intertwined with the "Limited Warranty" provision. Pl.'s Exh. 1; *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

This Court, in general, is tasked with whether the *arbitration agreement* is invalid, not whether the *contract as a whole* is invalid. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). The "Limited Warranty" provision is clearly outside of the "Arbitration and Claims" provision as both provisions are located on separate pages and headings of the contract and do not cross reference one another. Pl.'s Exh.1. The Court will not consider the "Limited Warranty" provision to determine the unconscionability of the arbitration provision.

**c. The arbitration agreement is not one sided and oppressive because it does not limit the Huskins' statutory remedies, it is clearly labeled, and it applies mutually to both parties.**

To determine whether an arbitration agreement is one-sided and oppressive the courts look at a variety of factors. An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. An arbitration provision that

stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870.

An arbitration clause that limits statutory remedies is an indicator of a one-sided and oppressive arbitration clause. *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. The arbitration provision in the case at hand sets a time frame of ninety days after any claim or dispute arises in which a party can demand arbitration. Pl.'s Exh. 1. The Huskins filed an action on June 14, 2017 and Mungo Homes filed a Motion to Compel Arbitration on July 20, 2017, within the ninety-day time frame. Compl. ¶ 1; Def. Mot. to Dismiss at 1. The ninety-day time frame to demand arbitration does not limit the Huskins' ability to arbitrate claims for damages, unlike an arbitration provision that limits the buyer's ability to arbitrate any double and treble damages available under the South Carolina Uniform Trade Practices Act. *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666.

An arbitration provision that stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims is an indicator of a one-sided and oppressive arbitration clause. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. In *Simpson*, the arbitration clause subjected all claims or controversies between the dealer and customer to arbitration. *Id.* The arbitration clause included an exception where claims between the dealer against the customer were not stayed pending the outcome of arbitration. *Id.* The Court found the arbitration provision was one-

sided and oppressive because the dealer's judicial remedies superseded the consumer's arbitral remedies. *Id.* The Court envisioned a scenario where the dealer could initiate a claim in court, complete the claim, and sell the contested vehicle prior to an arbitrator's determination of the consumer's rights in the same vehicle. *Simpson*, 373 S.C. at 32, 644 S.E.2d at 672.

In contrast to the unequal stay of one party's claims over another's in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims equally. Pl.'s Exh. 1. The arbitration provision calls for binding arbitration before a panel consisting of three arbitrators: one selected by the Huskins, one selected by Mungo Homes, and one mutually selected by the arbitrator chosen by each party. *Id.* Unlike the arbitration provision in *Simpson*, the arbitration provision in the Huskins' case allows both parties to arbitrate the claims or disputes and includes a process for neutrally selecting the arbitrators. Pl.'s Exh. 1.; *Simpson* 373 S.C. at 31, 644 S.E.2d at 672.

An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum is an indicator of a one-sided and oppressive arbitration provision. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The arbitration clause in *Simpson* claimed that "any and all disputes" including "automobile warranty" and "any consumer protection statute" may be resolved *only* by "binding arbitration" which was unenforceable as a matter of public policy for precluding the buyer from filing claims under the Magnuson Moss Warranty Act. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The "Arbitration and Claims" provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting.<sup>2</sup> It

<sup>2</sup> 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. Pl.'s Exh. 1. This provision is outside the "Arbitration and Claims" provision of the contract and is discussed in detail in Section II of this Order. See Section II(b).

requires that all claims and disputes arising out of the Purchase Agreement are subject to arbitration. Pl.'s Exh. 1.

A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870 (Ct. App. 2013). The arbitration agreement at hand is clearly labeled and underlined at the top of the page. Pl.'s Exh. 1. *But see Simpson*, 373 S.C. at 28, 644 S.E.2d at 670 (finding the arbitration agreement was unconscionable and noting the inconspicuous nature of the location of the arbitration clause as paragraph ten out of sixteen on the page). In *Carlson*, the arbitration provision did not waive any rights or remedies otherwise available by law. *Id.* Similarly, the "Arbitration and Claims" provision in the Huskins' case does not preclude their ability to file warranty claims. Pl.'s Exh. 1. Like the arbitration agreement in *Carlson*, the Huskins' case applies to both parties and allows each party to choose a neutral arbitrator. Pl.'s Exh. 1.; *Carlson*, 404 S.C. at 260, 743 S.E.2d at 873-74.

The "Arbitration and Claims" provision in the Huskins' case is distinguishable from the arbitration provision in *Simpson* because the arbitration provision here does not stay one party's claims over the other party's claims, it does not preclude the Huskins' from filing a warranty claim, and it does not divest the Huskins of a right available by statute. Pl.'s Exh. 1. On the contrary, it is clearly labeled and applies to both parties mutually. *Id.*; *see generally Carlson*, v. *S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). This "Arbitration and Claims" provision is not one-sided and oppressive.

#### CONCLUSION

The arbitration clause under the Purchase Agreement is governed by the South Carolina Uniform Arbitration Act because the parties included a choice-of-law provision. There is a valid

agreement to arbitrate the Huskins' claims because the "Arbitration and Claims" provision is not unconscionable. Although the Huskins' lacked a meaningful choice to negotiate the terms of the arbitration provision, when analyzing the "Arbitration and Claims" provision in isolation from the underlying agreement, the Court finds that the "Arbitration and Claims" provision is not one-sided and oppressive.

For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED.**

**IT IS SO ORDERED.**

Columbia, South Carolina  
March 7, 2018

  
The Honorable DeAndrea Gist Benjamin  
Judge, Court of Common Pleas  
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA  
COUNTY OF Richland  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4003697

Amanda Leigh Huskins et al  
PLAINTIFF(S)

Mungo Homes LLC  
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Plaintiff's Motion to Alter or Amend the Court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration is Denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/16/2018.

Jay R Huskins

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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ELECTRONICALLY FILED - 2018 Apr 16 12:46 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4003697



Richland Common Pleas

**Case Caption:** Amanda Leigh Huskins , plaintiff, et al vs Mungo Homes LLC  
**Case Number:** 2017CP4003697  
**Type:** Order/Electronic Form 4

So Ordered \*

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2018-04-16 12:36:10 page 3 of 3

ELECTRONICALLY FILED - 2018 Apr 16 12:46 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4003697

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Amanda Leigh Huskins and Jay R. Huskins,

Plaintiff(s)

vs.

Mungo Homes, LLC,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017-CP - 40- 03697

Submitted By: Charles H. McDonald

Address: Belser & Belser, P.A., P.O. Box 96, Columbia, SC  
29202

SC Bar #: 11580

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Other:

E-mail: chuck@belserpa.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.  
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.  
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Contracts</b><br><input type="checkbox"/> Constructions (100)<br><input type="checkbox"/> Debt Collection (110)<br><input type="checkbox"/> Employment (120)<br><input type="checkbox"/> General (130)<br><input type="checkbox"/> Breach of Contract (140)<br><input checked="" type="checkbox"/> Other (199) | <b>Torts - Professional Malpractice</b><br><input type="checkbox"/> Dental Malpractice (200)<br><input type="checkbox"/> Legal Malpractice (210)<br><input type="checkbox"/> Medical Malpractice (220)<br>Previous Notice of Intent Case #<br>20 -NJ-<br><input type="checkbox"/> Notice/ File Med Mal (230)<br><input type="checkbox"/> Other (299)                                                     | <b>Torts - Personal Injury</b><br><input type="checkbox"/> Assault/Slander/Libel (300)<br><input type="checkbox"/> Conversion (310)<br><input type="checkbox"/> Motor Vehicle Accident (320)<br><input type="checkbox"/> Premises Liability (330)<br><input type="checkbox"/> Products Liability (340)<br><input type="checkbox"/> Personal Injury (350)<br><input type="checkbox"/> Wrongful Death (360)<br><input type="checkbox"/> Other (399)                                                                                                                                                                                         | <b>Real Property</b><br><input type="checkbox"/> Claim & Delivery (400)<br><input type="checkbox"/> Condemnation (410)<br><input type="checkbox"/> Foreclosure (420)<br><input type="checkbox"/> Mechanic's Lien (430)<br><input type="checkbox"/> Partition (440)<br><input type="checkbox"/> Possession (450)<br><input type="checkbox"/> Building Code Violation (460)<br><input type="checkbox"/> Other (499)                                                                                                                                                  |
| <b>Inmate Petitions</b><br><input type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599)                                                                                                                  | <b>Administrative Law/Relief</b><br><input type="checkbox"/> Reinstatement Drv. License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899) | <b>Judgments/Settlements</b><br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured Settlement/Payment Rights Application (760)<br><input type="checkbox"/> Confession of Judgment (770)<br><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)<br><input type="checkbox"/> Other (799) | <b>Appeals</b><br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Public Service Comm. (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) |
| <b>Special/Complex /Other</b><br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input type="checkbox"/> Other (699)                                                                                                 | <input type="checkbox"/> Pharmaceuticals (630)<br><input type="checkbox"/> Unfair Trade Practices (640)<br><input type="checkbox"/> Out-of State Depositions (650)<br><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)<br><input type="checkbox"/> Sexual Predator (670)                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
- Vehicle damage**

Submitting Party Signature:

Date: June 13, 2017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

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-\_\_\_\_\_

)  
)  
)  
)  
) Plaintiffs.

)  
)  
)  
)  
) vs.

**SUMMONS**

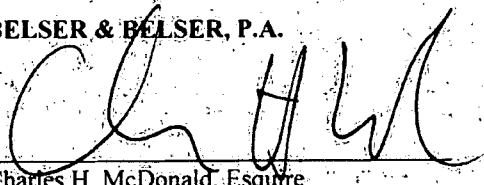
Mungo Homes, LLC,

)  
)  
)  
)  
) Defendant.

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Subscriber at his office, 1901 Main Street, Suite 1550, Columbia, South Carolina, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff herein will apply to the Court for default judgment for the relief demanded in the Complaint.

**BELSER & BELSER, P.A.**

  
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  
June 13, 2017

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-\_\_\_\_\_

Plaintiffs, )

vs. )

Mungo Homes, LLC, )

Defendant. )

**COMPLAINT**  
**(JURY TRIAL DEMANDED)**

2017 JUN 14 PM 4:09

Plaintiffs Amanda Leigh Huskins and Jay R. Huskins, complaining of the Defendant Mungo Homes, LLC ("Mungo") would respectfully show as follows:

**PARTIES AND JURISDICTION**

1. Plaintiffs, who are husband and wife, reside in Richland County, South Carolina, having purchased a new home from Mungo Homes, LLC in the Westcott Ridge subdivision in Richland County in 2016.

2. Mungo is a large residential homebuilder headquartered in Irmo, South Carolina, and is the largest component of the Mungo Homes conglomerate which is one of the largest homebuilding enterprises in the United States.

3. The matters complained of herein arise from Mungo's conduct and actions with respect to the sale of a new home to Plaintiffs.

4. This Court has jurisdiction over the parties and the subject matter of this action.

5. Venue is proper as Mungo is headquartered in Richland County.

## **FACTS**

### **Mungo's Purchase Agreement & Sales Practices**

6. To purchase a new home from Mungo, Plaintiffs were required to execute Mungo's proprietary "Purchase Agreement." A true and correct copy of the Mungo Purchase Agreement executed by Plaintiffs is attached hereto as Exhibit 1.

7. This Purchase Agreement contains a disclaimer of critical warranty rights implied by law in South Carolina and designed to protect the new homebuyer, who the law recognizes is at a significant disadvantage in sophistication and bargaining power with a large volume homebuilder such as Mungo.

8. One of the implied warranties that Mungo requires that its purchasers waive is the implied warranty of habitability which is the most essential warranty that exists with respect to the sale of a new home. The implied warranty of habitability ensures, among other things, that the home purchased by the new homebuyer is free from substantial defects which could render the home unsuitable for habitation.

9. Consistent with its scheme to avoid standing behind its residential homes, Mungo also disclaims and refuses to warrant that its homes are even suitable for a "residential purpose."

10. South Carolina courts have long recognized the importance of guarding and protecting the rights of innocent homebuyers against defective construction placed into the stream of commerce by volume builders such as Mungo.

11. In lieu of the critical and essential implied warranties that Mungo makes its purchasers waive in the Purchase Agreement, Mungo substitutes a dubious and very limited warranty through a third-party warranty company.

12. Through this sophisticated scheme, Mungo does not directly warrant any part of the construction of the new homes it sells to purchasers.

13. The "Limited Warranty" which a purchaser of a Mungo home receives is usually from Quality Builders Warranty. This warranty is indeed limited as it excludes material matters such as building code violations and incomplete construction items.

14. The "Limited Warranty" also requires purchasers of a Mungo home to pay for the first \$500 of repair costs for a defect in the home. This fee is in-artfully called a "deductible" in the Limited Warranty foisted upon Mungo's unsuspecting customers. This "deductible" is not a one-time cost, it applies each time there is something wrong with the home.

15. Mungo does not provide its potential purchasers with a copy of the Limited Warranty until closing. Mungo only offers the opportunity for the purchaser to review a copy at Mungo's office prior to closing if they so desire.

16. Despite requiring its purchasers to give up substantial warranty rights as a condition of purchasing a new home, Mungo provides no reduction in price or separate benefit to the purchaser who is giving up such critical rights.

17. Mungo's warranty scheme in its Purchase Agreement is unfair and deceptive, contrary to South Carolina law, and benefits only Mungo and its affiliates at the expense of homebuyers.

**Waiver of the Implied Warranty of Habitability in South Carolina**

18. In 2006, in *Kirkman v. Parex*, 369 S.C. 477, 632 S.E.2d 854 (2006), the South Carolina Supreme Court ruled that the seller of a new home could not effectively disclaim the implied warranty of habitability unless the disclaimer was "(1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." *Id.* at 485, 632 S.E.2d at 858.

19. Specifically, the South Carolina Supreme Court stated:

We agree with the Supreme Court of Alabama "that the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability." To maintain the protection of purchasers, however, disclaimer can be permitted only if strict conditions are satisfied. We adopt the requirements set forth by the Washington Court of Appeals: the disclaimer must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for.

*Parex*, 369 S.C. at 485, 632 S.E.2d at 858 (internal quotation marks and citations omitted).

20. Mungo and its agents have had actual or constructive knowledge of this ruling since 2006, yet Mungo and its agents continue to operate its improper warranty scheme described above all to the detriment of the purchaser of a Mungo home.

#### **CAUSES OF ACTION**

##### **For a First Cause of Action: Breach of Contract/Breach of Implied Covenant of Good Faith and Fair Dealing**

21. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.

22. Plaintiffs entered into an enforceable and valid contract with Mungo by executing Mungo's form Purchase Agreement in connection with their purchase of a new Mungo home for which Plaintiffs paid valuable consideration.

23. The actions and conduct of Mungo constitute a breach of the duty of good faith and fair dealing implied in every contract, including the Mungo Purchase Agreement.

24. As a direct and proximate result of Mungo's actions, Plaintiffs have suffered actual damages in the form of the fair value of the waiver of the implied warranty of habitability which Mungo intentionally avoided paying the Plaintiffs through its scheme set forth above.

25. Plaintiffs are entitled to judgment against Mungo in such amount as shall be proven at trial together with interest thereon as provided by law.

**For a Second Cause of Action: Unjust Enrichment**

26. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.
27. Mungo has received a significant benefit from the Plaintiffs in the form of a waiver and release of important warranty rights including the warranty of habitability implied in every sale of a new home.
28. Mungo has realized the full benefit of Plaintiffs' waiver and release of these fundamental warranty rights.
29. It would be a gross injustice for Mungo to continue to reap the benefit of this "bargain" with Plaintiffs without paying fair value for Plaintiffs' waiver and release of important warranty rights and specifically the warranty of habitability.
30. Plaintiffs are entitled to recover such fair value from Mungo and seek judgment against Mungo in such amount as the Court finds just and proper under the circumstances.

**For a Third Cause of Action: Declaratory Relief**

31. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.
32. Plaintiffs pray that the Court inquire into the matters set forth above and issue its ruling declaring the relative rights of the parties with respect to the following:
  - a. The validity of the waiver and release of warranty rights contained in the Mungo Purchase Agreement; and
  - b. The validity of Mungo's purported transfer of all remaining warranty obligations to a third party.

**For a Fourth Cause of Action: Violation of South Carolina's Unfair Trade Practice Act**

33. The allegations of Paragraphs 1 through 19 are re-alleged and incorporated herein.

34. Mungo's actions and conduct with respect to its proprietary Purchase Agreement and its "bait and switch" warranty scheme, constitute unfair and deceptive conduct actionable under S.C. Code Ann. § 39-5-20 *et seq.*

35. As Mungo is a volume builder who sells hundreds of homes to purchasers in South Carolina utilizing its proprietary Purchase Agreement, the actions and conduct of Mungo at issue are capable of repetition and affect the public interest.

36. As a direct and proximate result of Mungo's unfair and deceptive trade practices, the Plaintiffs have suffered actual damages in the form of lost compensation for the waiver of critical implied warranty rights and in such further amounts as may be shown at trial.

37. Plaintiffs are entitled to judgment against Mungo in such amounts as shall be proven at trial together with their attorney's fees pursuant to S.C. Code Ann. § 39-5-140. In addition, because Mungo willfully and knowingly used and employed unfair and deceptive acts in its dealings with the Plaintiffs, the Plaintiffs are entitled to an award of treble damages pursuant to S.C. Code Ann. § 39-5-140.

#### **PRAYER FOR RELIEF**

WHEREFORE, having complained of the Defendant Mungo and other entities for which Mungo Homes is legally responsible, Plaintiffs request the following relief:

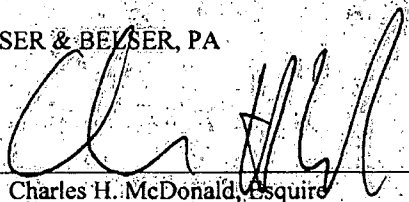
a. Pursuant to the First and Second Causes of Action: (i) an award of actual and compensatory damages for Plaintiffs in the amounts established at trial together with interest thereon as permitted by law; and

b. Pursuant to the Third Cause of Action, a declaration regarding the validity of the waiver and release of certain warranty rights contained in the Mungo Purchase Agreement; and

c. Pursuant to the Fourth Cause of action, an award of actual and compensatory damages for Plaintiffs in the amounts established at trial, attorney's fees, and an award of treble damages pursuant to S.C. Code Ann. § 39-5-140; and

e. For such other relief as the Court may deem appropriate.

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  
June 13, 2017



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.mungohomes.com  
06/29/2015

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

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, Chasin, SC 29035 (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

|                                               |    |            |                              |          |
|-----------------------------------------------|----|------------|------------------------------|----------|
| Total Sales                                   | \$ | 243,625.00 |                              |          |
| Price                                         |    |            |                              |          |
| Earnest Money                                 | \$ | 3,000.00   | Earnest Money Received       | 2,500.00 |
| (All earnest money paid to Mungo Homes, Inc.) |    |            | Additional Earnest Money Due | 500.00   |
|                                               |    |            | 06/22/2015                   |          |

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 Ameri Bank SR 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 deems 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.

EXHIBIT 1

06/29/2015



#### CLOSING

Closing shall be on or before 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-RATOS

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. ~~Seller's~~ 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, ~~Seller's~~ 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 party 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.

06/29/2015



#### 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

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 changes 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 consummation 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.

Witness:

Bill Sanders

By: [Signature] Agent  
PURCHASER

PURCHASER

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: 839 Burnview Lane, Chapin, SC 29036

MUNGO HOMES Community Sales Manager Bill Sanders

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

06/29/2015

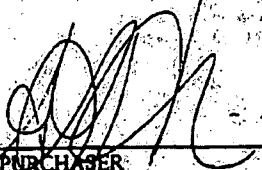


CONTINGENCY ADDENDUM

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.

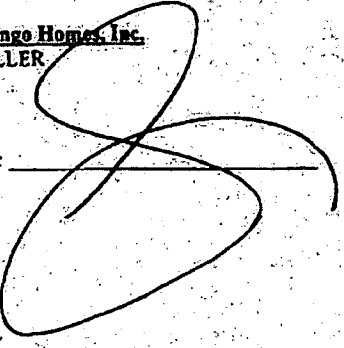
  
\_\_\_\_\_  
PURCHASER

7/3/15  
\_\_\_\_\_  
DATE

\_\_\_\_\_  
PURCHASER

\_\_\_\_\_  
DATE

Mungo Homes, Inc.  
SELLER

BY:   
\_\_\_\_\_

7/3/15  
\_\_\_\_\_  
DATE

06/29/2015

Lot:  
Community:

221  
Westport 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 25<sup>th</sup> and 4<sup>th</sup> 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 affect 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

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Start Date Addendum.doc 2/18/13



## Start Calendar

Lot: 221

Community: Westcott Ridge

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

\_\_\_\_\_

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

m:\munga homes\all things sales\munga contracts forms\structural non structural.doc 1/5/13



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

06/29/2015



Lot  
Community  
Date

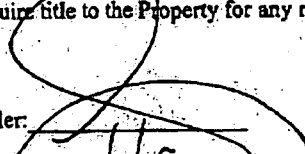
221  
Westcott Ridge  
06/29/2015

**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.

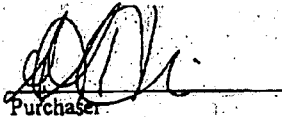
Seller:

By:

  
7/3/15

Purchaser:

Purchaser



06/29/2015



### CLOSING COST ADDENDUM

Job # Westcott Ridge 221  
Purchaser Amanda L. Huskins

Date 06/29/2015  
Address TBD Chapln, 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.

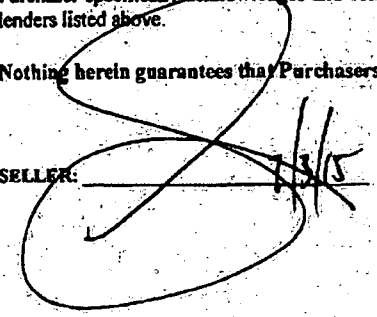
Purchaser will be responsible for all Lender costs associated with "optional" or "elective" programs such as interest rate buy-downs, discount points and other special loan programs. Purchaser shall also be responsible for all other closing costs and pre-paid items including, but not limited to, survey, 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.

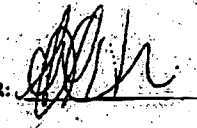
Purchaser understands that Purchaser may not make any change in mortgage company or loan program in the 30 days prior to closing date.

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: 

PURCHASER: 

PURCHASER: \_\_\_\_\_



06/29/2015



LOT: 221

COMMUNITY: Westcott Bidge

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**

STATE OF SOUTH CAROLINA

County of Richland

AMANDA LEIGH HUSKINS  
AND JAY R. HUSKINS,

PLAINTIFFS,

vs.

MUNGO HOMES, LLC.,

DEFENDANT,

COURT OF COMMON PLEAS  
2017-CP-40-03697

TRANSCRIPT OF RECORD

November 8, 2017  
Columbia, South Carolina

BEFORE:

THE HONORABLE DEANDREA GIST BENJAMIN, JUDGE.

APPEARANCES:

CHARLES H. MCDONALD, ESQ.  
Attorney for the Plaintiffs

STEVEN KROPSKI, ESQ.  
Attorney for the Defendant

KAREN AMBROZIAK  
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: All right. This is a motion to dismiss  
2 and compel arbitration.

3 (Off the record).

4 (Pause).

5 This is a motion to dismiss and compel arbitration --

6 MR. KROPSKI: That's correct, Your Honor.

7 THE COURT: -- filed by the defendant.

8 All right. Yes, sir.

9 MR. KROPSKI: Your Honor, we brought the -- the  
10 motion to compel arbitration. That is a lawsuit filed by  
11 the Huskins which were -- are homeowners.

12 They bought a new construction home from Mungo Homes.  
13 The contract was signed June 29th, 2015. A Certificate of  
14 Occupancy was issued January 19th, 2016. In the contract,  
15 there is, as is customary in many new build contracts, a  
16 disclaimer of various warranties.

17 Plaintiffs -- they don't allege that there is  
18 anything wrong with the house. They don't allege there's  
19 damages, construction defects. What they're saying is  
20 they should have gotten consideration for disclaiming  
21 these warranties, a reduced price, some sort of  
22 consideration.

23 So there is nothing wrong with the house. They just  
24 want some money for the disclaimer of the warranties. In  
25 the contract on page three, the purchase agreement, there

1. is a paragraph titled arbitration and claims.

2. It's a very broad arbitration provision, and it says  
3. any claim, any dispute arising out of this contract is  
4. subject to arbitration. Arbitration rules would be  
5. plaintiffs pick an arbitrator; defendants pick an  
6. arbitrator. Then those two arbitrators pick a third they  
7. can agree on. So it's a neutral playing field. Each side  
8. gets an arbitrator, and then a third is an independent.

9. On the front page, there is a notice in capital  
10. letters underlined as is required by the statute that says  
11. this contract is subject to arbitration.

12. Underneath the arbitration provision in the contract,  
13. the plaintiffs initialed the arbitration provision. So by  
14. our count, that's conspicuous. They knew what they were  
15. getting into.

16. Because this was a new construction house, the  
17. Supreme Court has held pretty consistently that when  
18. there's materials and other businesses from outside the  
19. State that involves interstate commerce, and in that  
20. circumstance, the FAA applies.

21. I don't know that it really makes much of a  
22. difference here because we do have the provision on the  
23. front of the contract, the notice, but in any event, under  
24. the FAA, arbitration provisions are looked at separable  
25. from the rest of the contract.

1        So what the court looks at is this arbitration  
2        provision. An agreement to arbitrate, does it encompass  
3        the claims? Well, obviously, this claim is coming out of  
4        the contract, and the arbitration provision would  
5        certainly involve that claim.

6        I believe the plaintiffs argue that there's various  
7        other provisions in this contract that would leave it  
8        unconscionable: Warranty disclaimers, disclaimers of  
9        things like punitive damages and other things.

10       Our position is that these are in different  
11       paragraphs, and the only paragraph the Court looks at in  
12       looking at a motion to compel arbitration is the  
13       arbitration claims paragraph.

14       The courts have said when looking at conscionability  
15       of an arbitration provision what you're looking at is does  
16       it provide for an unbiased arbitration in front of a  
17       neutral arbitration committee or an arbitrator? In this  
18       case, it definitely does. It abides by the rules in the  
19       South Carolina Uniform Arbitration Act. The three  
20       arbitrators, they're neutral.

21       So our position is that this claim needs to be  
22       submitted to arbitration, and the rest of the contract  
23       needs to be interpreted by those arbitrators.

24       THE COURT: All right. Thank you.

25       Yes, sir.

1 MR. MCDONALD: Thank you, Your Honor. May it please  
2 the Court, Chuck McDonald: I'm going to have a little  
3 more to say than that.

4 Your Honor, with me are co-counsel, haven't made a  
5 formal appearance but Mr. Terry Richardson and Biff Sowell  
6 are assisting on this case.

7 Your Honor handed up -- we submitted a memo. I don't  
8 know if the Court has had an opportunity to review it, but  
9 I think it would helpful in resolving this motion if the  
10 Court at some point would be able to read that memo.

11 THE COURT: I have.

12 MR. MCDONALD: Your Honor, this case is about  
13 protecting the rights of a purchaser of a new home, and  
14 that's what the case is about. What's what this motion is  
15 about.

16 For many, many years, the South Carolina courts have  
17 made it clear the policy is to protect the rights of the  
18 purchaser of a new home.

19 As far as back as 1979 with Justice Toal in the  
20 Kennedy vs. Columbia Lumber case, she made clear it's the  
21 policy of South Carolina to protect a new home buyer.  
22 That's what we're asking the court to do here is to deny  
23 this motion.

24 The contract at issue is an adhesion contract. It's  
25 a take-it-or-leave-it contract. It has oppressive terms,

1 and there clearly is no agreement, meaningful agreement,  
2 of the parties to submit disputes to arbitration.

3 I need to give you a little background, Your Honor,  
4 about the purchase agreement. It's important to sort of  
5 understand some things about that to resolve this motion.  
6 It's attached as an exhibit to the complaint and also as  
7 an exhibit to our memo.

8 Your Honor, this is not a construction contract. It  
9 is a contract to purchase real estate, and that is made  
10 clear by the terms of the purchase agreement.

11 The very first paragraph identifies Mungo as the  
12 seller, not the builder, the seller; the Huskins as the  
13 purchaser. It says under the first paragraph: "Property:  
14 Seller agrees to sell and purchaser agrees to buy a  
15 certain tract of land and dwelling with improvements in  
16 Richland County, the proper."

17 It goes on to say in the miscellaneous provisions,  
18 Subsection K, "It is understood that purchaser is buying a  
19 completed dwelling and that seller is not acting as a  
20 contractor or purchaser in the construction of the  
21 dwelling." So it couldn't be more clear that this is not  
22 a new-build contract. That is a contract to buy real  
23 estate, buy a new house.

24 Looking further at the purchase agreement, the  
25 material terms, Your Honor, there is a section: Limited

1 warranty, and under this limited warranty section, there  
2 are broad disclaimers of key warranties.

3 They disclaim the implied warranty of applicability  
4 to say the house is -- we're not warranting the house as  
5 habitable. They disclaim any warranty that the house is  
6 suitable for a residential purpose even though they're  
7 selling a new house. They disclaim all other warranties.

8 They proceed then to limit significantly and severely  
9 any remedies. You can't recover any consequential  
10 punitive damages. You waive all of your rights and  
11 remedies whether based in contract or tort, and  
12 essentially, your only remedy is to go under some  
13 third-party warranty that may provide some relief in  
14 fixing something that's wrong with your house.

15 Going back to what this case is really about is the  
16 waiver of the implied warranty of habitability. Your  
17 Honor, that's a fundamental warranty that springs from the  
18 sale of a new house.

19 In 2006, the our State Supreme Court addressed this  
20 issue head on in the case of Kirkman v. Parex. Justice, I  
21 think, Pleicones issued that opinion, and the issue in  
22 that case was with -- given our strong policy in South  
23 Carolina of protecting the new home buyer, are we even  
24 going to allow as a matter of policy a waiver of the  
25 implied warranty of habitability.

1 The court in Kirkman v. Parex said we will, but only  
2 under strict conditions. The waiver has to be  
3 conspicuous. The waiver has to be known to the buyer, and  
4 there has to be separate consideration given for the  
5 waiver. It has to be separately bargained for.

6 In fact, that case gives the example of a reduction  
7 in the purchase price of the home. So that case makes  
8 clear you don't get this waiver for free, Builder. You  
9 have to give something separate for it, and that's what  
10 this case is about. That doesn't happen.

11 And so the purchaser signs away these rights without  
12 receiving anything in return which is required by, we say,  
13 Kirkman v. Parex. So that's the crux of the case and why  
14 that warranty is so critical, and that's the relief we're  
15 seeking in the case.

16 Now, as a threshold matter, the court needs to  
17 determine what are we -- what are -- under the FAA or  
18 under South Carolina law, the Federal Arbitration Act  
19 would apply if there were interstate commerce involved.

20 Well, there's not, Your Honor. As I pointed out,  
21 this is a -- not a contract to build a house. That is  
22 clear from the plain language of the purchase agreement.  
23 It's a contract to buy real estate in a residence dwelling  
24 point.

25 In 2012, Justice Beatty hit this head on. He

1 addressed this very issue in the case of Bradley vs.  
2 Brentwood Homes.

3 We had the same type of purchase agreement. The  
4 Brentwood Homes was identified as the seller. The  
5 Bradleys were the purchaser. We had the same disclaimer  
6 language in the Brentwood Homes contract that said you  
7 recognize I'm not acting as your builder or contractor.  
8 I'm selling you a home, same thing we have in Mungo's  
9 purchase agreement.

10 Justice Beatty looked at that and analyzed it under  
11 the applicable law and concluded right then that this is  
12 not interstate commerce. It's purely intrastate commerce.

13 So when we're dealing with a purchase contract to buy  
14 a new home and convey real estate as we have here in this  
15 case, the FAA simply doesn't apply. I mean, it couldn't  
16 be clearer.

17 So we're under South Carolina law. There is no  
18 application of Federal Arbitration Act or any cases  
19 arising under it. So what we've got to do is look at what  
20 is the South Carolina law here, and we've already got the  
21 answer.

22 Last year in the summer of 2016, the Supreme Court,  
23 South Carolina Supreme Court, issued its opinion in Smith  
24 v. DR Horton. Your Honor, this -- this case is strikingly  
25 similar to that case. It's almost as if you just change

1 the names. You could substitute the Huskins for the  
2 Smiths and Mungo for DR Horton. It's the same situation,  
3 same analysis.

4 In that case, the Smiths brought a lawsuit against DR  
5 Horton. This is the nation's largest builder. DR Horton  
6 moved for appellate arbitration, and the trial court  
7 denied the motion finding that the arbitration provision  
8 was unconscionable; that the Smiths lacked a meaningful  
9 choice as to the agreement to arbitrate, and the terms  
10 were oppressive and one sided.

11 So the trial court refused to grant that motion and  
12 refused to enforce the arbitration clause, went up to the  
13 Court of Appeals. They affirmed the trial court. DR  
14 Horton petitioned the South Carolina Supreme Court, went  
15 up, and Justice Toal issued an excellent opinion in which  
16 she affirmed the ruling of the trial court and found that  
17 the arbitration provision was unconscionable and  
18 unenforceable. Very, very similar situation, same sort of  
19 criteria in the DR Horton purchase agreement that we have  
20 here with Mungo.

21 In DR Horton, they had severe limitations of remedies  
22 which we have here. They excluded all warranties which we  
23 have here, and so the court, in Smith v. DR Horton  
24 concluded when you have got an individual buyer like the  
25 Smiths dealing with a large national builder like DR

1 Horton, that is per se unequal bargaining power.

2 We have an adhesion contract, a take-it-or-leave-it  
3 contract which is -- the courts have said is suspect on  
4 its face as to whether that's truly a meaningful agreement  
5 to arbitrate. Then -- excuse me, Your Honor. The Court  
6 looks further and says one of the factors is there really  
7 a meaningful choice? Did the buyer really have a choice  
8 to negotiate this arbitration clause, or was it a take it  
9 or leave it situation where if I want the house, I just  
10 have to sign here?

11 In Smith, they found it was an adhesion contract..  
12 They found it was take it or leave it. They found that  
13 the Smiths had no meaningful choice; that it was a  
14 disparity in bargaining power and sophistication because  
15 you had homeowners against a large builder, and they said  
16 no meaningful choice. Then they looked at the second  
17 prong: Are the terms oppressive and one sided?

18 Interestingly, Your Honor, DR Horton made the same  
19 argument as Mungo is making here. Don't look at anything  
20 other than the isolated arbitration provision, and this  
21 Court in Smith said no, we're going to look at other  
22 related provisions.

23 We're going to consider the disclaimer of warranties.  
24 We're going to consider the limitation of remedies as a  
25 whole provision, as part of the analysis of this

1 arbitration agreement. They did that, and they found  
2 these terms are oppressive. They're one sided, and that  
3 renders the arbitration agreement unconscionable.

4 Your Honor, we have the same thing here, there is no  
5 difference. We have the Huskins who were a young couple  
6 dealing with the nation's 37th largest builder, Mungo.  
7 There is no meaningful choice. This is a  
8 take-it-or-leave-it contract as to the arbitration  
9 agreement.

10 They weren't represented by counsel. All of the same  
11 factors that were present in Smith are present here. Same  
12 thing with the terms. All oppressive terms -- and  
13 counsel, it's an interesting statement. It is standard  
14 for these national builders to put these things in there  
15 but it's unconscionable.

16 Just as the court in Smith said we're not going to --  
17 we're not going to uphold those in South Carolina. It's  
18 against our policy of protecting the new home buyer. They  
19 didn't do it in Smith. Your Honor, we submit it shouldn't  
20 be done here. The same terms, the same disclaimer of the  
21 implied warranty of habitability. The same severe  
22 limitations on remedies are present here.

23 So, Your Honor, there was no meaningful choice by the  
24 Huskins as to this arbitration agreement, and considering  
25 as the court did in Smith v. DR Horton, the other relevant

1 provisions which are contained in the limited warranty  
2 paragraph in the Mungo purchase agreement, it renders the  
3 arbitration agreement unenforceable. It's unconscionable.

4 Then finally, Your Honor, if you were only to -- if  
5 you were to accept Mungo's argument and only look at the  
6 paragraph that says arbitration, on its face by itself  
7 that's unconscionable because there's part of this that  
8 Mungo has failed to point out to the court. It's a very  
9 important part. The second part of that paragraph,  
10 arbitration claims, contains an illegal and severely  
11 restrictive time limit on making a claim.

12 It says that if you don't make a demand for  
13 arbitration within 90 days after the claim arose, then  
14 that claim, in quoting the language, shall be deemed  
15 waived and forever barred, 90 days, Your Honor.

16 Well, we know that's not enforceable because that's  
17 in violation of Title 15 chapter 3 section 140 of South  
18 Carolina Code of Laws which says you can't in a contract  
19 curtail the statute of limitations. We know that. I  
20 submit to the court that Mungo knows that or should know  
21 that.

22 It's important to note who doesn't know that, Your  
23 Honor. It's the innocent purchaser. They don't know  
24 that. So why is it in there? Why is it in there?

25 It's in there because it's oppressive. It's one

1 sided. It's unfair and it's unenforceable, and to  
2 suggest -- to the extent there's any suggestion that we  
3 ought to just ignore that, ought to just treat it as if it  
4 didn't exist, that's a little too late for that, Your  
5 Honor. This has been in their contract for years, and  
6 it's in the contract that we're dealing with today.

7 The only purpose of that provision is to unfairly and  
8 improperly limit the time for making a claim. So on its  
9 own, it's -- it's oppressive and one sided, unconscionable  
10 on its -- on its own.

11 And lastly, Your Honor, you can't save it. There may  
12 be an argument -- there's been -- DR Horton made this  
13 argument in Smith. They said, Court, don't throw out the  
14 arbitration provision. It's in the paragraph 14(g). All  
15 of these other provisions are in the other parts of the  
16 contract, just -- just blue pencil those, strike those out  
17 and keep the arbitration clause in there.

18 The court in Smith said no, we can't do that. We  
19 can't blue pencil this. We can't rewrite your contract.  
20 We can't save it. There is no separate severability  
21 provision in the arbitration clause, and there isn't one  
22 here.

23 So, Your Honor, simply put, we stand in the shoes of  
24 the Smiths, and the Supreme Court has spoken. We would  
25 just ask this court to follow that precedent. Deny the

1 this motion and allow the Huskins to proceed in court.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. KROPSKI: Your Honor, I'm sure you imagine I have  
5 a few responses.

6 THE COURT: Yes, sir.

7 MR. KROPSKI: I first want to address the Smith case  
8 which is -- has been referenced by the plaintiff's counsel  
9 quite a bit. That was in 2015. After that, in 2016, the  
10 case Parsons vs. John Wieland Homes which is 418 SC 1  
11 upheld an arbitration provision. The Court of Appeals  
12 relied on Smith. The Supreme Court said you didn't get it  
13 right, okay.

14 What happened in Smith is all of these allegedly  
15 unconscionable provisions were included in the claims and  
16 dispute resolutions section. So the Supreme Court said  
17 we -- we have to look at all of these when looking at the  
18 arbitration provision.

19 What we're looking at here is a very clear one  
20 paragraph arbitration and claims paragraph. All of these  
21 other issues that are discussed by plaintiff's counsel are  
22 in separate paragraphs, clearly delineated paragraphs.  
23 Those are questions for the arbitrator. No one is saying  
24 that they can't make these claims, and no one is saying  
25 that maybe an arbitrator is going to say you are entitled

1 to compensation for these waivers.

2 The situation here is that has to be done in  
3 arbitration. What we're dealing with is a small  
4 paragraph, and that paragraph is very clear. No one is  
5 asserting the statute of limitations here. There is no  
6 statute of limitations issue.

7 Even if you strike out that last part where we have  
8 conflicting viewpoints on what that might mean, whether  
9 it's 90 days to demand arbitration which we did after the  
10 claim was brought, it really doesn't matter.

11 There is no statute of limitations argument  
12 happening. Even if you take out that last sentence, we're  
13 still left with the same arbitration provision that says  
14 you submit disputes under this contract to an arbitrator  
15 or two to three arbitrators in an unbiased forum in front  
16 of unbiased arbitrators. That's what we're dealing with  
17 here.

18 In terms of South Carolina versus interstate  
19 commerce, I do want to address that, as well. This  
20 contract could not be more clear. The front of it has an  
21 X next to building job.

22 The addendum identifies a change negotiated by the  
23 plaintiffs to have the driveway installed on the right  
24 side of the home. There is a start date addendum. There  
25 is a calendar for construction. There is a structural and

1 nonstructural changes sheet. There is a development rider  
2 and a non-owned lot addendum which says we don't even own  
3 this lot yet. We're going to get it, and then we're going  
4 to build your house on it.

5 This is very clearly a construction. This is a new  
6 built home, and to say it was just the sale of a house  
7 would defy logic. Nonetheless, even if that were the case  
8 in the contract, the federal -- the law is very clear,  
9 Nunes vs. Green Tree Financial Corp. -- Corporation which  
10 is 343 SC 531 says even if the parties did not intend for  
11 it to be interstate commerce, if this transaction does  
12 actually hit interstate commerce, then the FAA applies.

13 What we have here, we have an affidavit from Mungo  
14 Homes that says this was obviously a new build. It  
15 included businesses and materials from outside the State  
16 of South Carolina. That brings the FAA into this.

17 The FAA and South Carolina generally have the same  
18 rules concerning an arbitration provision, though. We  
19 look at the paragraph by itself. The paragraph by itself  
20 doesn't have any -- any waivers, any sort of unfair  
21 application in front of an arbitrator that says you submit  
22 your claim to the arbitrators and then you bring all of  
23 your cause of action there.

24 There is nothing that they're going lose by having  
25 this in arbitration. South Carolina says if there is ever

1 a doubt from -- whether it's subject to arbitration or  
2 it's to remain in circuit court, you err on the side of  
3 arbitration. It always goes to arbitration.

4 So the arguments that are being made concerning an  
5 adhesion contract, those are for arbitration. Arguments  
6 concerning the fairness of a warranty waiver, those are  
7 for arbitration. Everything that's claimed in this  
8 complaint is for arbitration, and that's our position.

9 THE COURT: What about the -- you may have addressed  
10 this. In his position regarding the 90 day -- 90 day --  
11 the demand or that contract regarding his 90-day demand,  
12 his argument that -- the argument regarding the -- I guess  
13 it being imposed statute of limitations in -- in a  
14 contract on the 90-day. Each and every demand for  
15 arbitration shall be made within 90 days after the claim  
16 dispute or other matter in question.

17 MR. KROPSKI: Right. And Your Honor, the way I read  
18 that is if we did demand arbitration 90 days after we  
19 filed the lawsuit, I look at that as a waiver of new  
20 demand for arbitration. I don't think we did that.

21 In any event, even if it's read as a -- as an attempt  
22 to limit the statute of limitations, the statute is very  
23 clear that any contractual provision that tries to limit  
24 the statute of limitations is just void ab initio. It's  
25 as if it never happened.

1       We're not making the claim for the statute of  
2 limitations. There is no -- there is no oppression.  
3 There is no prejudice that the Huskins have by this  
4 provision.

5       I will concede to you I think that's ambiguous, but  
6 there's -- in this case, there is no application.  
7 Bringing that up is, I guess, a red herring, but there is  
8 no application. No reasserting the statute of  
9 limitations.

10       Finally, what the Smith court said about severing  
11 provisions in an arbitration, you can sever them, but if  
12 it leaves the whole thing meaningless, then there is no  
13 point in severing.

14       If there is no return in the arbitration agreement,  
15 then it makes no sense. Here, it's the last sentence.  
16 You strike that out, it doesn't make any difference,  
17 whatsoever whether these claims are going forward in  
18 arbitration. It's the exactly same claims. If you strike  
19 out that last sentence, we're in the same position as we  
20 are today.

21       THE COURT: All right. Thank you.

22       MR. MCDONALD: Your Honor, may I briefly respond to  
23 just a few things?

24       THE COURT: Yes.

25       MR. MCDONALD: As to the issue of the FAA, I'm not

1 trying to defy logic. I'm just reading the plain language  
2 of the contract, and it couldn't be more clear.

3 It says it's to buy a completed dwelling, and seller  
4 is not acting as a contractor for purchaser in the  
5 construction of a dwelling. Mungo's words, not mine,  
6 couldn't be more clear.

7 The Brentwood case is right on point. In that case,  
8 Brentwood Homes did the same thing. They filed an  
9 affidavit trying to say oh judge, this is interstate  
10 commerce. The court said no, it's not. So that case is  
11 absolutely on point and clearly leaves no other finding  
12 that the FAA doesn't apply here.

13 THE COURT: Real quick, what about his position  
14 regarding the addendum, the driveway that -- how does that  
15 affect interstate --

16 MR. MCDONALD: It doesn't have any affect because  
17 it's -- this is -- this is a contract to buy real estate  
18 and a house. It is culminated in a closing with a deed  
19 conveyed.

20 It's not like I bought the lot, hired the builder,  
21 hired an architect to build my plans, so none of that  
22 matters. The nature of the transaction is a purchase  
23 agreement to buy real estate, and it's squarely within  
24 Justice Beatty's analysis in the Brentwood Homes case.

25 Your Honor, as to -- as to the issue of the Smith

1 case, first of all it is, in fact, a 2016 case. It is  
2 filed July 6th, 2016, and the Parsons' case cited by  
3 counsel in no way overrules, overturns. I don't even  
4 believe it addresses this. So the Parsons' case was  
5 decided a month or two later, but it in no way overrules,  
6 supersedes Smith v. DR Horton. In fact, it's not even a  
7 case about unconscionability. That's not even the issue  
8 before the court in the Parsons' case, and I would commend  
9 that to Your Honor if you could review it, you'll see  
10 that.

11 It has some small -- the issue of unconscionability  
12 was an additional sustaining ground which the court, the  
13 Supreme Court, dismissed with no analysis.

14 By comparison, we have an extensive analysis in Smith  
15 vs. DR Norton of the exact situation we have here, and the  
16 conclusion in that case is what we believe is the proper  
17 one here. This is an unenforceable arbitration agreement.

18 Lastly, you can't blue pencil, Your Honor. It's an  
19 interesting argument to say now oh, we know this last two  
20 sentences don't really -- it's clear what it means. It  
21 couldn't be more clear. There is no ambiguity.

22 It says if you don't make a claim within 90 days,  
23 that is -- shall be deemed waived and forever barred.

24 It's a door closing mechanism on claims. It's improper  
25 and to come to court now and say oh, it doesn't matter.

1 We can just strike that. Well, why is it in there, and  
2 it's been in there? It's unfair and it's oppressive, and  
3 it's a heck of an argument to come into court now and say  
4 oh well, we can just treat it like it doesn't exist.

5 I have no idea how many people -- I don't know. We  
6 don't know standing here today how many people have been  
7 told you're out of time on the claim. I don't know, but  
8 it's clearly in there. You can't blue pencil it, Your  
9 Honor. That's just not the law for the Court to rewrite  
10 the contract and specifically the arbitration agreement.

11 Lastly, what prejudice will we suffer? Your Honor,  
12 you know, right now this case is in the posture of an  
13 individual case. It may, either this case or other cases  
14 because of the prevailing -- the nature of this contract  
15 and how long it's going to run, there may be a class.  
16 That -- to arbitrate would close a door on that.

17 So while that, you know, the issue here we have a  
18 single case, but that would be -- that would be a  
19 significant prejudice. So I've made all of the arguments  
20 I've got, Your Honor. I think we have certainly -- it is  
21 more articulately put in our brief. I think we're  
22 squarely under Smith vs. DR Horton, and I just ask the  
23 Court to apply that and deny the motion. Thank you.

24 MR. KROPSKI: Your Honor, I apologize for belaboring  
25 on this point.

1 THE COURT: Go ahead.

2 MR. KROPSKI: To respond to a few things. I'll  
3 repeat the case law that I cited. Even if it's not the  
4 intent of the parties to involve interstate commerce, if  
5 it ultimately does involve interstate commerce, then the  
6 FAA applies.

7 I don't think there is any question here that there  
8 might be a miscellaneous statement that this contract is  
9 talking about a new built home. Even if there was in that  
10 provision of the contract, and it was the only provision  
11 in the contract, it did ultimately involve a new built  
12 home. Under the law, that brings in the FAA.

13 Nonetheless -- and they said, I don't think it's that  
14 much of a difference under the FAA or South Carolina law.  
15 We still only look at the arbitration provision. In the  
16 Parsons' case, that's what it's talking about. It says  
17 the Circuit Court improperly looked at other provisions in  
18 the contract to determine that this was unconscionable.

19 They said you can't do that. You can only look at  
20 the arbitration provision. When they looked at the  
21 arbitration provision, they said it has got to go to  
22 arbitration, the left -- the rest of it is left for  
23 arbitration.

24 In doing that, they cite case law. Arbitration  
25 clauses are separable from the contracts in which they are

1 in effect. This is very clearly a separate paragraph.  
2 Finally, in terms of severing what plaintiffs have alleged  
3 is an unconscionable 90-day limit, SC code 36-2-302(1) --

4 THE COURT: One more time.

5 MR. KROPSKI: 36-2-301 allows a court -- expressly  
6 allows a Court to sever any provision that's  
7 unconscionable.

8 As I said, what the court in Smith said was if we do  
9 that, then this provision has no meaning. It's completely  
10 gutted. If we remove this provision which isn't even at  
11 issue in this case, then there is no gutting of the  
12 arbitration provision.

13 Lastly, I don't know what class component might come  
14 with this, but what we're here today on is the Huskins  
15 claim, and the Huskins claim is an individual claim. I  
16 don't think hypothetical class action lawsuits is a reason  
17 to deny a motion to compel arbitration.

18 THE COURT: All right. Thank you.

19 MR. KROPSKI: Thank you.

20 THE COURT: All right. I'll take a look at it and  
21 try to get something to you all as soon as possible.

22 MR. KROPSKI: Thank you, Judge.

23 MR. MCDONALD: Thank you, Your Honor.

24 (Whereupon, the proceedings were concluded.)  
25

COUNTY OF RICHLAND

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 8th day of November, 2017.

June 29, 2018

Karen Ambrozick

Karen Ambroziak, RPR  
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

AMANDA LEIGH HUSKINS AND JAY R. HUSKINS,

CASE NO.: 2017-CP-<sup>90</sup>10-3697

☐ Plaintiff,

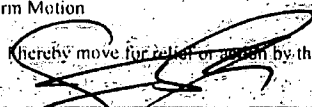
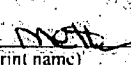
vs.

**MOTION INFORMATION FORM  
AND COVER SHEET**

MUNGO HOMES, LLC.

☒ Defendants.

Check box above indicating submitting party.

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Plaintiffs' Counsel:</b><br>CHARLES H. McDONALD, ESQ.<br>H. FREEMAN BELSER, ESQ.<br>WILLIAM C. DILLARD, JR., ESQ.<br>BELSER & BELSER, P.A.<br>P.O. BOX 96<br>COLUMBIA, SC 29202                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <b>Attorneys for Defendant MUNGO HOMES, LLC</b><br>David W. Overstreet, Esq.<br>State Bar No.: 16965<br>Steven R. Kropski, Esq.<br>State Bar No.: 101441<br>Earhart Overstreet LLC<br>P.O. Box 22528<br>Charleston, SC 29413<br>(843) 972-9400 |
| <input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete SECTIONS II and III)<br><input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                |
| <b>SECTION I: Hearing Information</b><br>Nature of Motion: NOTICE OF MOTION AND MOTION TO DISMISS AND COMPEL ARBITRATION<br>Estimated Time Needed: 15mins. Court Reporter Needed: yes                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                |
| <b>SECTION II: Motion Type</b><br><input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br>Signature of Attorney for Defendants:  Date: 7/10/17                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                |
| <b>SECTION III: Motion Fee</b><br><input checked="" type="checkbox"/> <b>PAID - AMOUNT: \$25.00</b><br><input type="checkbox"/> <b>EXEMPT:</b> <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief<br><input type="checkbox"/> Motion for Stay in Bankruptcy<br><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP)<br><input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions<br>Name of Court Reporter: _____<br><input type="checkbox"/> Other: _____ |                                                                                                                                                                                                                                                |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <b>JUDGE:</b> _____<br><b>CODE:</b> _____ <b>Date:</b> _____                                                                                                                                                                                   |
| <b>CLERK'S VERIFICATION</b><br>Collected by:  (print name)<br><input type="checkbox"/> <b>MOTION FEE COLLECTED:</b> _____<br><input type="checkbox"/> <b>CONTESTED - AMOUNT DUE:</b> _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                |

2017 JUL 20 PM 12:16  
JEANETTE W. McBRIDE  
C.C.P. & C.S.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Amanda Leigh Huskins and Jay R.  
Huskins,

Plaintiffs,

vs.

Mungo Homes, LLC,

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2017-CP-40-03697

) NOTICE OF MOTION AND MOTION TO  
) DISMISS AND COMPEL ARBITRATION

TO: CHARLES H. MCDONALD, ESQUIRE, H. FREEMAN BELSER, ESQUIRE AND  
WILLIAM C. DILLARD, JR., ESQUIRE: ATTORNEYS FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant Mungo Homes, LLC ("Defendants"), by and through their undersigned attorneys, will move as soon as practicable before this Honorable Court to dismiss the Complaint pursuant to Rule 12(b)(6), SCRPC, because Plaintiffs are bound by an arbitration clause requiring them to submit the instant dispute to binding arbitration.

These motions are based upon the pleadings filed in this matter, the Rules of the Court, all state and federal statutes, memoranda of law, any other information this Court accepts or is submitted by Defendant as part of the hearing on this matter.

### ARGUMENT

#### **I. PLAINTIFFS' EXCLUSIVE REMEDY IS THROUGH BINDING ARBITRATION**

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "It is the policy of this state and federal law to favor arbitration[,] and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery*

*Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct.App.2015).

Plaintiffs entered into a contract to purchase a home to be built by the defendant. (Compl. Ex. 1, "the Contract"). The Contract contains an arbitration clause that reads:

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 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.

Furthermore, The first page of the Contract contains the following provision in bold, underlined, capital letters: **THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. UNIFORM ARBITRATION ACT, S.C. CODE 15-48-10 et seq.** (Ex. 1, at 1.)

In their Complaint, Plaintiffs allege that the inclusion of a disclaimer of the implied warranty of habitability in the Contract (1) constitutes a breach of defendants duty of good faith and fair dealing; (2) unjustly enriched defendant; and (4) constitute an unfair trade practice by the defendant. Plaintiffs also seek a declaratory judgment concerning their warranty rights under the contract. Clearly these allegations fall squarely within the Contract's requirement that "any claim, dispute or other matter in question between the parties hereto arising out of this agreement...shall be resolved by final and binding arbitration." (Ex 1, at 3).

Here, to the extent the South Carolina Uniform Arbitration Act controls, the arbitration provision is indisputably valid. S.C. Code §15-48-10 expressly states that:

a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid,

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

S.C. Code §15-48-10 (emphasis added).

That said, the Supreme Court of South Carolina has repeatedly held that a contract providing for construction will inherently touch on interstate commerce for no other reason than it is implausible to suggest that the building materials will be fabricated exclusively in South Carolina. See *Zabinski*, 346 S.C. at 594-95, 553 S.E.2d at 117-18 (utilization of out-of-state materials, contractors and investors implicates interstate commerce); *Episcopal Housing v. Fed. Ins. Co.* 269 S.C. 631, 640, 239 S.E.2d 647, 652 (use of labor, supplies, and materials from out-of-state sources indicates interstate commerce); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App.2002) (finding consultation with out-of-state technicians is an indicator of interstate commerce).

Thus, although the Contract itself identifies the South Carolina Uniform Arbitration Act, the Federal Arbitration Act preempts state law. See *Muñoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001) (holding that although parties may not have contemplated an interstate transaction at the time of contract formation, if their contractual relationship in fact involves interstate commerce, then the FAA nonetheless applies); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277-78, 115 S.Ct. 834 (rejecting the argument that the FAA applies only where the parties contemplated an interstate transaction and finding the FAA applies where an agreement that contains an arbitration provision, on the whole, evidences a transaction that in fact affected interstate commerce); *Zabinski* 346 S.C. at 591, 553

S.E.2d at 115 ("The [United States] Supreme Court utilizes a 'commerce in fact' test to determine if the transaction involves interstate commerce for the FAA to apply.").

As the FAA applies, the FAA requires that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court has construed Section 2 of the FAA as permitting "agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011).

Moreover, according to the United States Supreme Court "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

In the current dispute, the Plaintiffs do not suggest that the arbitration provision is unenforceable<sup>1</sup>. Rather, the Plaintiffs seek to attack a single provision in the Contract dealing with the waiver of the implied warranty of habitability. See, Compl. ¶¶7, 8, 11, 18-20). This is a subject exclusively in the purview of the arbitrator, as it relates to a "dispute or other matter in question between the parties hereto arising out of [the Contract]" (Ex. 1 at 3); See *Cardegna*, 546 U.S. at 445-46, 126 S.Ct. 1204.

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<sup>1</sup> It is unclear *how* the Plaintiff could allege the arbitration agreement is unenforceable. It is separately labeled in bold, underlined and capital letter, and the Plaintiffs initialed immediately below the arbitration provision.

**CONCLUSION**

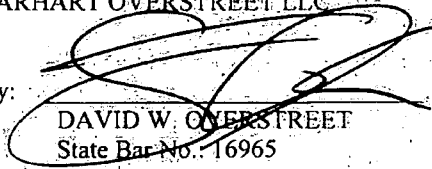
For the reasons stated herein, the Complaint should be dismissed, and the Court should enter an order compelling the parties to arbitrate this dispute.

This 14 day of July, 2017.

Respectfully submitted,

EARHART OVERSTREET LLC

By:

  
DAVID W. OVERSTREET  
State Bar No.: 16965

STEVEN R. KROPSKI  
State Bar No.: 101441

Attorneys for Defendant

P.O. Box 22528  
Charleston, SC 29413  
843-972-9400

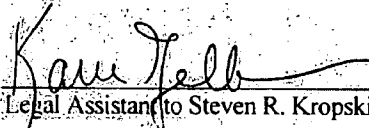
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| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS |
|                                          | ) |                              |
| COUNTY OF RICHLAND                       | ) | CASE NO.: 2017-CP-40-03697   |
|                                          | ) |                              |
| Amanda Leigh Huskins and Jay R. Huskins, | ) |                              |
|                                          | ) |                              |
| Plaintiffs,                              | ) | CERTIFICATE OF SERVICE       |
|                                          | ) |                              |
| vs.                                      | ) |                              |
|                                          | ) |                              |
| Mungo Homes, LLC,                        | ) |                              |
|                                          | ) |                              |

RICHLAND COUNTY  
 FILED  
 2017 JUL 20 PM 12:14  
 JEANETTE W. MCBRIDE  
 C.C.P. & G.S.

I hereby certify that I have this day served a copy of the within *Notice of Motion and Motion to Dismiss and Compel Arbitration* pleading upon all parties to this matter by depositing a true copy of same via electronic mail addressed to counsel of record as follows:

Charles H. McDonald, Esq.  
 H. Freeman Belser, Esq.  
 William C. Dillard, Jr., Esq.  
 Belser & Belser, PA  
 P.O. Box 96  
 Columbia, South Carolina 29202  
 Counsel for Plaintiffs

This 17<sup>th</sup> day of July, 2017.

  
 Legal Assistant to Steven R. Kropski

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2017-CP-40-03697

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT MUNGO HOMES,  
LLC'S MOTION TO DISMISS AND  
COMPEL ARBITRATION**

vs.

Defendant.

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 “37<sup>th</sup> largest builder in the country.”<sup>1</sup> 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. Parox*, 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.

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<sup>1</sup> 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."<sup>2</sup> 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

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<sup>2</sup> 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. Horton<sup>3</sup>, (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 37<sup>th</sup> largest homebuilder with operations throughout the

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<sup>3</sup> 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.<sup>4</sup> 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"

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<sup>4</sup> 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

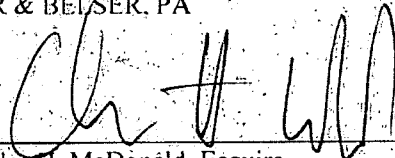
South Carolina public policy to safeguard the applicable statutory limitations period for asserting claims.

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: 

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*Counsel for Plaintiffs*

Columbia, South Carolina  
October 30, 2017

# EXHIBIT A



THIS AGREEMENT IS SUBJECT TO ARBITRATION  
PURSUANT TO S.C. CODE 15-43-10 ET SEQ

PURCHASE AGREEMENT

MUNGO HOMES, INC.  
441 Western Lane  
Irmo, SC 29063  
(803)749-9000  
www.mungohomes.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.

| <u>PRICE</u>                                  |    |            |                              |
|-----------------------------------------------|----|------------|------------------------------|
| Total Sales                                   | \$ | 243,625.00 |                              |
| Price                                         |    |            |                              |
| Earnest Money                                 | \$ | 3,000.00   | Earnest Money Received       |
| (All earnest money paid to Mungo Homes, Inc.) |    |            | 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 Ameri 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 \$ 143,625.00 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 that the price and condition of the Property are acceptable.

EXHIBIT 1

06/29/2015



#### CLOSING

Closing shall be on or before 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-MP, 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. ~~Seller's~~ 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 accept same.

Copy received. ~~Seller's~~ 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 party 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, unfettered 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.

06/29/2015



#### 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 not asserted within said time periods shall be deemed waived and forever barred.

#### NON-RELIANCE ~~X~~ WARRANTY

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.

Witness:

Bill Sanders

By MUNGO HOMES, INC. 7/3/15 Agent

PURCHASER

PURCHASER

Are you working with a Buyer's Agent?

Yes ☐ No ☒

Initial (s): BS

Date: 6/29/15

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 Bill Sanders

06/29/2015

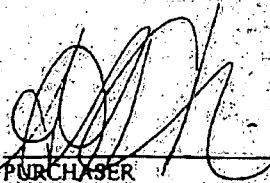


CONTINGENCY ADDENDUM

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.

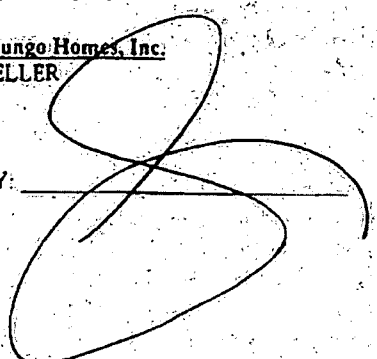
  
PURCHASER

7/3/15  
DATE

PURCHASER

DATE

Mungo Homes, Inc.  
SELLER

BY: 

7/3/15  
DATE

06/29/2015

Lot: 221  
Community: Wascott 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 25<sup>th</sup> and 4<sup>th</sup> 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 affect 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<br>No more structural<br>changes<br><u>7/27/15</u>                     |                                               |     |      |                                 |     |     |
| Week 2 |                                                                                 |                                               |     |      |                                 |     |     |
| Week 3 |                                                                                 |                                               |     |      |                                 |     |     |
| Week 4 | <u>8/17/15</u> Days<br>Selections due and<br>no more non-<br>structural changes |                                               |     |      | Start<br>Date<br><u>8/21/15</u> |     |     |
| Week 5 |                                                                                 | Pre-construction<br>meeting<br><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] 7/3/15  
Mungo Homes

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

6/29/15  
Date

[Signature]  
Purchaser

[Signature]  
Date

[Signature]  
Mungo Homes

7/3/15  
Date

m:\mungo homes\all things sales\mungo contract forms\structural non structural.doc 2/5/13



Lot  
Community  
Date

221  
Westcott Ridge  
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:

Date:

7/3/15

Purchaser

Seller's Authorized Signature

06/29/2015



Lot  
Community  
Date

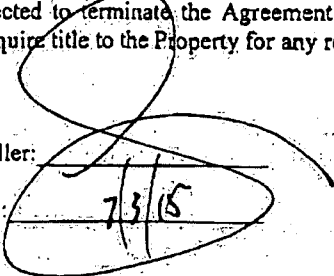
221  
Westcott Ridge  
06/29/2015

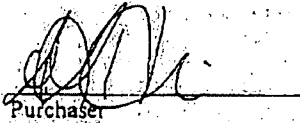
### Non-Owned Lot Addendum

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

06/29/2015



### 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: \_\_\_\_\_

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**

) IN THE COURT OF COMMON PLEAS

CASE NO.: 2017-CP-40-03697

)

;

)

)

REPLY MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS AND COMPEL  
ARBITRATION

2017 NOV -8, AM 8:49  
JEANETTE W MCBRIDE  
C.C.P.O. G.S.  
RICHLAND COUNTY  
FILED  
SOURCES AND

## ARGUMENT

**I. PLAINTIFFS' HOME WAS A NEW BUILD HOME AND IS SUBJECT TO THE FEDERAL ARBITRATION ACT**

<sup>1</sup> It is unclear how Plaintiffs can take this position. The contract was signed on June 29, 2015 by the purchaser. A certificate of occupancy affirming substantial completion of construction was issued on January 19, 2016.

undisputed that the subject home was constructed after entering into the purchase agreement with Mungo Homes, Inc. ("Purchase Agreement"). Indeed, the Purchase Agreement was signed on June 29, 2015. (Exhibit A, "Purchase Agreement"). On January 19<sup>th</sup>, 2016 a Certificate of Occupancy was issued. (Exhibit B, "Permit and Certificate of Occupancy"). Moreover, the plain language of the contract identifies that the Huskins' home was a "Build Job" not a "Field Model." (See, Exhibit A, "Purchase Agreement" pg. 1). Furthermore, the Addendum to the Purchase Agreement contained a contingency stating that "purchasers request driveway to be on the right side." (See, Exhibit A at Addendum). Any argument that the home was not a new construction home is without merit.

As a newly constructed home, the *Brentwood Homes* decision does not apply to the current dispute. Nonetheless, the *Brentwood Homes* court expressly recognized that a new construction home will always affect interstate commerce, and thus be subject to the FAA. In footnote 8, the *Brentwood Homes* Court stated:

We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA. See, e.g., *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (holding that performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Cl.App.2008) (finding contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builders' affidavit swearing the project would involve businesses and supplies from outside of South Carolina).

398 S.C. at fn. 8, 730 S.E.2d at fn 8 (emphasis added).

Here, it is indisputable that the home was a newly constructed residence. Accordingly, the arbitration provision must be interpreted according to the FAA. Therefore, "the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 592, 553 S.E.2d 110 (2001).

## II. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). According to the United States Supreme Court, "[w]e have ... rejected generalized attacks on arbitration that rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.... because so long as the prospective litigant effectively may vindicate his or her [ ] cause of action in the arbitral forum, the statute serves its functions." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 L.Ed.2d 513, 521, 148 L.Ed.2d 373 (2000) (internal quotations and citations omitted). "As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract . . . unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

Contrary to Plaintiffs' contention, it is well established law that enforcement of an arbitration agreement must be viewed on its own, *not* in connection with the other terms of the contract. Moreover, the Federal Arbitration Act ("FAA") permits arbitration agreements to be invalidated only by "generally applicable contract defenses," such as fraud, duress, or unconscionability, but not by defenses that apply solely to arbitration or that derive their meaning

from the fact that an agreement to arbitrate is at issue. *AT&T Mobility, LLC v. Concepcion*, 563 S.C. 333, 339, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011).

Here, neither the arbitration provision nor the Purchase Agreement is unconscionable. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). Specifically relating to arbitration agreements, the South Carolina Supreme Court has instructed that "unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker". *Parsons v. John Weiland Homes and Neighborhoods of the Carolinas*, 481 S.C. 1, 12, 791 S.E.2d 128 (2016).

As evidenced by the addendum to the Purchase Agreement amending the terms of the Purchase Agreement at the request of the Plaintiffs, clearly the Plaintiffs had a meaningful choice concerning the contract terms, and were able to negotiate amendments to the Purchase Agreement. Furthermore, Plaintiffs point to no facts that compelled them to enter into the Purchase Agreement. At no point were the Plaintiffs required to sign the Purchase Agreement, as they were always free to find a different house or contract with a different builder.

Additionally, there was no "element of surprise in the inclusion of the challenged clause," and the arbitration provision was clearly conspicuous. *See generally, Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005). Plaintiffs initialed directly below the arbitration provision. (See, Exhibit A, "Purchase Agreement", pg. 3). Furthermore, the heading "ARBITRATION AND CLAIMS" is in bold, underlined, and capital letters and the front page of the contract states "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO

S.C. CODE §15-48-10 ET SEQ.” See, S.C. Code §15-48-10 (under the SCUAA, an agreement containing the required notice is presumptively valid).

Furthermore, the arbitration agreement unequivocally provides for an unbiased decision by a neutral decision-maker. The subject arbitration provision calls for binding arbitration before a three arbitrator panel; one selected by the Plaintiff, one selected by the Defendant, and one selected mutually by the arbitrator selected by each party. (See, Exhibit A, “Purchase Agreement”, pg. 3).

Similarly unavailing is Plaintiffs’ contention that a general presumption of unequal bargaining power between a new home buyer and a residential builder results in unenforceability of an arbitration provision in the Purchase Agreement. Such a presumption would put the arbitration agreement on unequal footing as it is not a “generally applicable contract defense.” See, *Concepcion*, 563 S.C. at 339, 131 S.Ct. at 1746. Moreover, this argument was expressly rejected by the Supreme Court of South Carolina. *John Weiland Homes*, 481 S.C. at fn 6, 791 S.E.2d 128 (rejecting the dissent’s proposition that the Supreme Court’s judicial notice “that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller” can be applied to arbitration provisions in a contract for construction of a new home).

Finally, Plaintiffs’ assertion that a provision in the arbitration provision requiring a demand for arbitration within ninety (90) days of a claim does not render the arbitration agreement against public policy. As an initial matter, this action was filed on June 14, 2017: (See, Compl.). The Defendant filed this motion to dismiss and compel arbitration on July 20, 2017—well within the ninety (90) requirement. Moreover, this provision does not purport to prescribe an unlawful statute of limitations, rather, it provides a deadline on when arbitration of claims must be demanded.

Furthermore, even if the subject provision did attempt to decrease the statute of limitation, S.C. Code §15-3-140 does not render the entire agreement unenforceable. S.C. Code §15-3-140 states:

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.

S.C. Code §15-3-140. In other words, a contractual provision purporting to shorten the statute of limitations is void *ab initio*. Thus, it is treated as if it was never a provision in the contract. Accordingly, even accepting Plaintiffs' strained interpretation of the arbitration agreement, the arbitration agreement stands and the statutes of limitations set forth in S.C. Code §15-3-20 et seq. apply.

Accordingly, Plaintiffs have failed to identify facts showing that they will not be able to assert their claims in an unbiased arbitration before unbiased arbitrators. Given South Carolina's heavy presumption in favor of arbitrability, this court must decide the current motion in favor of arbitration. See, *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996) (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989))).

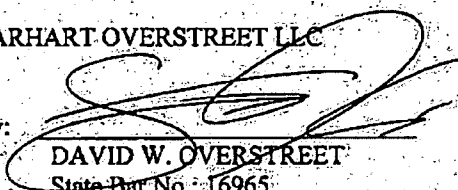
**CONCLUSION**

For the reasons stated herein, the Complaint should be dismissed, and the Court should enter an order compelling the parties to arbitrate this dispute.

This 7 day of November, 2017.

Respectfully submitted,

EARHART OVERSTREET LLC

By: 

DAVID W. OVERSTREET  
State Bar No.: 16965

STEVEN R. KROPSKI  
State Bar No.: 101441

Attorneys for Defendant

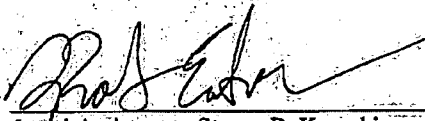
P.O. Box 22528  
Charleston, SC 29413  
843-972-9400

|                                          |   |                              |
|------------------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS |
|                                          | ) |                              |
| COUNTY OF RICHLAND                       | ) | CASE NO.: 2017-CP-40-03697   |
|                                          | ) |                              |
| Amanda Leigh Huskins and Jay R. Huskins, | ) |                              |
|                                          | ) |                              |
| Plaintiffs,                              | ) | CERTIFICATE OF SERVICE       |
|                                          | ) |                              |
| vs.                                      | ) |                              |
|                                          | ) |                              |
| Mungo Homes, LLC,                        | ) |                              |
|                                          | ) |                              |

I hereby certify that I have this day served a copy of the within *Reply Memorandum in Support of Motion to Dismiss and Compel Arbitration* upon all parties to this matter by depositing a true copy of same via United States and electronic mail addressed to counsel of record as follows:

Charles H. McDonald, Esq.  
H. Freeman Belser, Esq.  
William C. Dillard, Jr., Esq.  
Belser & Belser, PA  
P.O. Box 96  
Columbia, South Carolina 29202  
[chuck@belserpa.com](mailto:chuck@belserpa.com)  
Counsel for Plaintiffs

This 7<sup>th</sup> day of November, 2017.

  
Legal Assistant to Steven R. Kropski



THIS AGREEMENT IS SUBJECT TO ARBITRATION  
PURSUANT TO S.C. CODE 15-43-10 ET SEQ.

PURCHASE AGREEMENT

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

THIS PURCHASE AGREEMENT is entered into between Mungo Homes, Inc., a South Carolina corporation ("Seller") and Amanda L. Hoskins ("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. Hoskins.

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, Channing, 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

|                                               |    |            |                              |          |
|-----------------------------------------------|----|------------|------------------------------|----------|
| Total Sales                                   | \$ | 243,625.00 |                              |          |
| Price                                         |    |            |                              |          |
| Earnest Money                                 | \$ | 3,000.00   | Earnest Money Received       | 2,500.00 |
| (All earnest money paid to Mungo Homes, Inc.) |    |            | Additional Earnest Money Due | 500.00   |
|                                               |    |            | 06/22/2015                   |          |

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 deems 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 terms, 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 initials)*





#### CLOSING

Closing shall be on or before 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-MP, 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 additional cost of the change or alteration at the time the request for the Purchase Agreement Change Order is made. ~~Seller's~~ 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. ~~Seller's~~ 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 party 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 unencumbered 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.

06/29/2015



#### 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 ☒ ~~ADAR~~

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 connection 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.

Witness:

Bill Sanders

By: MUNGO HOMES, INC. Agent  
[Signature]  
 PURCHASER  
 PURCHASER

Are you working with a Buyer's Agent? Yes ☐ No ☒  
 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

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

Purchaser's current address is: 839 Burnview Lane, Chapin, SC 29936  
 MUNGO HOMES Community Sales Manager Bill Sanders

06/29/2015

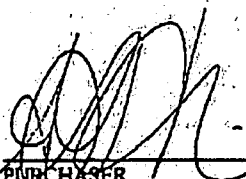


CONTINGENCY ADDENDUM

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.

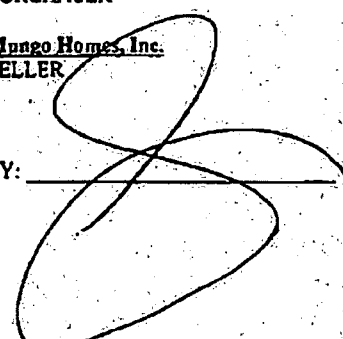
  
PURCHASER

7/3/15  
DATE

PURCHASER

DATE

Mungo Homes, Inc.  
SELLER

BY: 

7/3/15  
DATE

06/29/2015

Lot:

Community:

221

Westcott 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 25<sup>th</sup> and 4<sup>th</sup> 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, sliding 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 Acknowledgment:

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

Purchaser

Date

Purchaser

Date

M:Mungo Homes/All Things Sales/Mungo Contract Forms/Start Date Addendum.doc 2/18/13



# Start Calendar

Lot 221

Community Westcott Ridge

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

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):

- 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

7/27/15  
Date

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

- 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

8/17/15  
Date

  
Purchaser

Date

6/29/15

Purchaser

Date

Mungo Homes

Date

7/3/15

mungo homes/elli things sales/mungo contract forms/structural non structural.doc 2/5/13



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: 7/2/15

Seller's Authorized Signature

06/29/2015



Lot  
Community  
Date

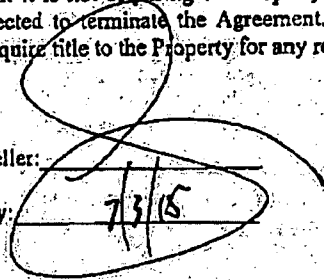
221  
Westcott Ridge  
06/29/2015

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

06/29/2015



### 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: \_\_\_\_\_

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  
6/29/15  
Date

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

Richland  
Development Services  
Progressive • Timely • Professional

# PERMIT CARD

Permit #

**RBD15-01224**

Applicant MUNGO HOMES INC

Address 298 MASSEY CIR CHAPIN, SC 29036

Permit Description RESIDENTIAL NEW CONSTRUCTION

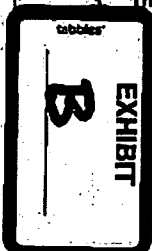
SINGLE FAMILY RES

Date Issued 8/18/2015

**NOTICE TO OWNER OR POSSESSOR**

1. The issuance of this Permit does not relieve the Contractor, Engineer, or Owner from the responsibility to comply with all Codes and Ordinances of Richland County, SC.
2. This Permit may be revoked by the Richland County Officials for non-compliance of Codes and Ordinances of Richland County, SC.
3. The permit or copy thereof shall be kept on site until the project is deemed completed by Richland County, SC.

Richland County  
South Carolina  
2020 Hampton Street  
P.O. Box 192  
Columbia, SC 29201





BUILDING INSPECTIONS

# RESIDENTIAL CERTIFICATE OF OCCUPANCY

Permit #

## RBD15-01224

Site Address 298 MASSEY CIR Owner MUNGO HOMES INC  
CHAPIN, SC 29036 Address 441 WESTERN LANE  
Parcel R02600-09-01 IRMO, SC 29063  
Permit Type RESIDENTIAL NEW CONSTRUCTION  
Permit Sub Type SINGLE FAMILY RES  
Permit Description single family dwelling  
Occupancy Type R-3 RESIDENTIAL - ONE & TWO FAMILY  
Construction Type VB Code Editions 2012  
Automatic Sprinkler NO Req NO Design Occupant Load 0  
CO Issued Date 1/19/2016

**BUILDING OFFICIAL**

**Donny Phipps**

This Certificate issued pursuant to the requirements of the International Codes certifying that at the time of issuance this structure was in compliance with the various ordinances of the County regulating building construction or use.



Richland County, South Carolina  
2020 Hampton Street  
P.O. Box 192  
Columbia, SC 29201  
803-576-2140

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Amanda Leigh Huskins and Jay R.  
Huskins,

Plaintiffs,

vs.

Mungo Homes, LLC,

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2017-CP-40-03697

) AFFIDAVIT OF CHRISTOPHER CONDON

RICHLAND COUNTY  
FILED  
2017 NOV -8 AM 8:49  
JEANETTE W. MCBRIDE  
C.P. & G.S.

PERSONALLY APPEARED BEFORE ME, Christopher Condon, who being duly  
sworn, deposes and says as follows:

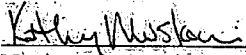
1. I am of sound mind to give this Affidavit.
2. I am employed by Mungo Homes, Inc. in the capacity of Division President.
3. I have personal knowledge of the facts and circumstances of this dispute, including the execution of the Purchase Agreement between the Plaintiffs and Mungo Homes, Inc. and the construction of the Plaintiffs' residence located in Richland County, South Carolina and described as Lot 221 in the Westcott Ridge Community.
4. At the time the Purchase Agreement was executed by the Plaintiffs, June 29, 2015, the Plaintiffs' residence was not erected on the lot.
5. The Plaintiffs' residence was constructed by Mungo Homes, Inc. following execution of the Purchase Agreement.
6. Construction of the Plaintiffs' residence involved businesses and the use of materials and supplies from outside of the State of South Carolina.

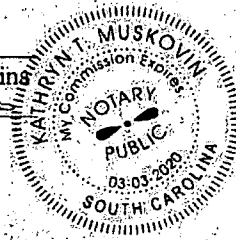
7. A certificate of occupancy for the Plaintiffs' residence was issued by Richland Development Services on January 19, 2016.

FURTHER AFFIANT SAYETH NOT.

  
Christopher Condon

SWORN to before me this 7 day  
Of November, 2017:

  
Notary Public/State of South Carolina  
My Commission Expires: 3.3.2020



|                                          |   |                                    |
|------------------------------------------|---|------------------------------------|
| 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.                                      | ) | <b>PLAINTIFFS' MOTION AND</b>      |
|                                          | ) | <b>MEMORANDUM IN SUPPORT TO</b>    |
| Mungo Homes, LLC,                        | ) | <b>ALTER OR AMEND ORDER</b>        |
| Defendant.                               | ) | <b>GRANTING DEFENDANT'S MOTION</b> |
|                                          | ) | <b>TO DISMISS AND COMPEL</b>       |
|                                          | ) | <b>ARBITRATION</b>                 |

Pursuant to Rules 52(b) and 59(e), SCRCP, 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 Assoc.*, 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.<sup>1</sup> 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

<sup>1</sup> 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.<sup>2</sup> 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

<sup>2</sup> S.C. Code Ann. § 15-3-140: "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

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Counsel for Plaintiffs

Columbia, South Carolina  
March 23, 2018

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND ) CASE NO.: 2017-CP-40-03697

Amanda Leigh Huskins and Jay R.  
Huskins,

Plaintiffs,

vs.

Mungo Homes, LLC,

**DEFENDANT'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S MOTION  
TO ALTER OR AMEND THE ORDER  
DISMISSING THE CASE AND  
COMPELLING ARBITRATION**TO: CHARLES H. MCDONALD, ESQUIRE, H. FREEMAN BELSER, ESQUIRE, AND  
WILLIAM C. DILLARD, JR., ESQUIRE: ATTORNEYS FOR PLAINTIFF

Defendant Mungo Homes, Inc., incorrectly named as Mungo Homes, LLC, hereby submits this memorandum of law in opposition to Plaintiff's motion to reconsider and/or alter or amend this Court's order granting Mungo Homes, Inc.'s motion to dismiss and compel arbitration.

**PRELIMINARY STATEMENT**

By order granted March 7, 2018 and entered March 13, 2018, this Court issued a fourteen page comprehensive and well-reasoned decision compelling the Plaintiffs to submit their lawsuit to arbitration as required by the parties' agreement. ("Order"). The Order addressed in detail each of the parties' positions, and engaged in a thorough discussion of the large body of applicable caselaw related to the enforcement of arbitration agreements. In other words, the Court's order was carefully thought out, and did not fail to fully consider or overlook any arguments, nor did it contain a misapplication of prevailing law as required to support a motion under Rule 59(e), SCRCP. Accordingly, the motion should be denied.

**ARGUMENT**

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." *Pye v. Estate*

of Fox, 369 S.C. 555, 633 S.E.2d 505, 511 (2006) (quoting *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 842 (1992)). A party may request that a trial court reconsider its prior ruling where the party believes the trial court misunderstood, failed to fully consider, or overlooked an argument or issue. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772, 780 (2004).

**I. Paragraph (k) does not alter the Court's decision compelling arbitration**

In their Rule 59(e) motion, Plaintiffs argue that paragraph (k) of the Purchase Agreement controls the interstate vs. intrastate nature of the transaction. This argument is without merit.

While the Court found that the South Carolina Arbitration Act applies *based on the agreement of the parties within the arbitration agreement itself*, the Court expressly held that the overall nature of the transaction between the Huskins and Mungo Homes met the commerce-in-fact test and inherently involved interstate commerce. The Court carefully addressed this exact argument in its discussion of the "completed dwelling" argument by distinguishing the current transaction from the authority cited by Plaintiffs. The Court stated:

Looking to the Purchase Agreement, there is one fact that distinguishes this case from *Bradley* in that the Purchase Agreement in *Bradley* was undisputedly for a "completed dwelling." In this case, the parties contest whether this contract was for a completed home. The language of the Purchase Agreement states the transaction involved improvements to a piece of property and the Purchase Agreement Addendum indicates a driveway was constructed.

Other language in the Purchase Agreement in this case point to the involvement of construction. For instance, the Development Rider states that factors such as weather and local municipalities, may affect the construction start date or completion of the home. Also, Richland County issued a permit on the property as "residential new construction" for a "single family residence." The Purchase Agreement in *Bradley* check "N/A" for options such as "new construction, house plan, options, or color selection.

(Order pg. 5)(internal citations omitted).

Accordingly, the Court should deny Plaintiffs' attempt to insert Paragraph (k) as alleged additional supporting grounds for application of the South Carolina Uniform Arbitration Act, as it is incompatible with controlling Supreme Court authority: *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (explaining the commerce-in-fact test).

**II. The Court correctly determined that the arbitration agreement must be read in isolation from the remainder of the Purchase Agreement**

Plaintiffs, without supporting authority or a legal basis, aver that the clearly delineated and separate arbitration agreement should be disregarded and that the arbitration agreement should not be read in isolation from the remainder of the Purchase Agreement. In doing so, Plaintiffs aver that the Order calls for reading the Limited Warranty section of the Purchase Agreement in isolation. This assertion conflates the Courts holding--that the arbitration agreement must be read in isolation, with a suggestion that each paragraph of a contract must be read in isolation. This argument ignores years of binding jurisprudence concerning the isolated nature of arbitration agreement.

It is hornbook law that arbitration agreements are considered separate agreements from the remainder of a contract, and must be analyzed in isolation of any other contractual provision. *Prima Paint Cor. V. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) ("A party cannot avoid arbitration through rescission of an entire contract when there is no independent challenge to the arbitration clause itself. There must be fraud in the inducement of the arbitration agreement to avoid arbitration of the contract").

Here, the Court's Order notes that it is indisputable the Limited Warranty paragraph is not contained within the Arbitration and Claims paragraph. (Order pg. 10). Thus, it has no impact on the enforceability of the arbitration agreement. Moreover, Plaintiffs' strained contention that the

Limited Warranty is cross-referenced in the arbitration agreement is entirely inconsistent with the unequivocal language of the arbitration agreement<sup>1</sup>. The arbitration agreement *never* cross references any other provision or paragraph in the Purchase Agreement. *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) (“The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous”).

Similarly, to the extent that the Plaintiffs argue that Limited Warranty claims were somehow excluded from the arbitration agreement (Part III of Pl. Mem. in Support of Motion to Alter or Amend), this argument is also without merit.

The arbitration agreement unambiguously covers “any claim, dispute or other matter in question between the parties hereto arising out of this Agreement.” As the Limited Warranty provision (and any questions about its enforceability or a breach thereof) arises out of the Purchase Agreement, it is within the scope of the arbitration agreement.

Moreover, even if there was an ambiguity about the inclusion of Limited Warranty claims within the arbitration agreement, it is well established by the South Carolina Supreme Court that all doubts concerning whether a claim is subject to arbitration must be resolved in favor of arbitration. Our Supreme Court has held:

**A clause which provides for arbitration of all disputes arising out of or relating to the contract is construed broadly.** Courts have held that such broad clauses are capable of an expansive reach. Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not

<sup>1</sup> Defining the *types* of claims subject to arbitration as those “arising out of this Agreement” or “arising out of the deed” is not tantamount to a cross-reference. In any event, the Limited Warranty is never cross-referenced in the arbitration agreement.

limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship.

*Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-214 (2013)(internal citations omitted and emphasis added)

Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers Id.* Moreover, "~~the party resisting arbitration~~ bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

Here, the arbitration agreement is unambiguous and broad, and covers all disputes between the parties, including those related to the Limited Warranty. Accordingly, the Court properly determined that the claims brought by Plaintiffs are subject to arbitration.

### III. The arbitration agreement does not preclude warranty claims

In their Rule 59(e) motion, Plaintiffs additionally suggest that this Court's reference to *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14 (2007) implies that warranty claims are universally excluded from arbitration and must be brought in a court. Neither this Court's Order nor the *Simpson* decision support this proposition.

In *Simpson*, a car dealer required a consumer to arbitrate all claims of the consumer's claims, however, the dealer reserved its own claims against the consumer for prosecution in court. Moreover, the arbitration provision also stated that claims brought by the dealer against the consumer in court had priority over the consumer's claims brought in arbitration. *See id.* Clearly, this arrangement lacks the mutuality required to uphold an arbitration agreement. *Id.* *Simpson* does not suggest that there is a wholesale bar on subjecting warranty claims to arbitration.

Here, both parties must submit all claims to arbitration, and there is no lack of mutuality on the availability of redress. As this Court found:

In contrast to the unequal stay of one party's claims over another's in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims equally.

(Order pg. 12).

Accordingly, the inclusion of warranty claims as those that are to brought in arbitration is not unconscionable, oppressive, or one sided.

**IV. The Court correctly found that the requirements in the arbitration agreement are mutual and the arbitration process is equal and unbiased**

Plaintiffs similarly suggest that use of the word "their" in the arbitration agreement makes the agreement one sided, as it places certain requirements on only the Plaintiffs. More specifically, Plaintiffs point to a provision stating that "arbitration shall be commenced by a written demand for arbitration *to the other party*...each and every demand for arbitration shall be made within ninety days (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 days (30) of written notice of termination."

It is unclear how Plaintiffs read the arbitration provision to be applicable only to the Plaintiffs. The arbitration agreement unambiguously subjects *both* parties to arbitration for all claims, and moreover, the specific provision cited by the Plaintiffs references its application to both parties on more than one occasion. Accordingly, it is indisputable that all requirements of the arbitration provision are mutual, and thus, not one-sided or oppressive. The arbitration agreement simply does not limit any of Plaintiffs' remedies.

Furthermore, Plaintiffs' argument that an arbitration conducted pursuant to the arbitration agreement is inherently one-sided is equally without merit. As the Court set forth in detail in its

order compelling arbitration, the arbitration agreement does not foreclose any claims that could be brought by Plaintiffs, and it sets forth a neutral, unbiased tribunal in which each and every claim can be brought. The arbitration agreement calls for appointment of a three-arbitrator panel; one selected by Plaintiffs, one selected by Mungo, and one mutually agreeable to the arbitrators selected by the respective parties.

It is difficult to conceive of a more neutral and unbiased process. Indeed, the process set forth in the arbitration agreement is identical to the process for appointing arbitrators prescribed within the South Carolina Uniform Arbitration Act. *See*, S.C. Code §15-48-30. Accordingly, the Court correctly determined that the arbitration agreement is not one-sided or oppressive.

#### CONCLUSION

For the reasons stated herein, the Court's March 7, 2018 Order did not misunderstand, fail to fully consider, or overlook any argument or issue. Accordingly, the Court should affirm its decision in its entirety, and deny Plaintiffs' motion to alter and/or amend.

This 9 day of April, 2018.

Respectfully submitted,

EARHART OVERSTREET LLC

By: /s/ Steven R. Kropski

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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

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

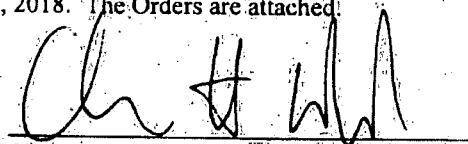
v.

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

NOTICE OF APPEAL

Amanda Leigh Huskins and Jay R. Huskins appeal the orders of the Honorable DeAndrea Gist Benjamin dated March 13, 2108 (*Order Granting Defendant's Motion to Dismiss and Compel Arbitration*) and April 16, 2018 (*Order on Motion to Alter or Amend the Court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration*). Appellants received written notice of entry of the final order on April 16, 2018. The Orders are attached.

May 11, 2018



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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Amanda Leigh Huskins and Jay  
R. Huskins,

Plaintiffs,

v.

Mungo Homes, LLC,

Defendant.

) IN THE CIRCUIT COURT  
) FOR THE FIFTH JUDICIAL  
) CIRCUIT

) CASE NO. 2017-CP-40-03697

) **ORDER**

**INTRODUCTION**

This matter comes before the Court upon Mungo Homes' Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on November 8, 2017 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, and arguments of counsel and issues the following Order to **GRANT** the Defendant's Motion to Dismiss and Compel Arbitration.

**FACTS**

The Huskins are residential buyers who executed a Purchase Agreement with Mungo Homes, a national builder on June 29, 2015. Compl. ¶ 1. The Purchase Agreement was for the sale of a tract of land, the construction of a dwelling, and any improvements constructed on the property. Pl.'s Exh. 1. The Purchase Agreement categorizes the transaction as a "Building Job." *Id.* A Building Job gave the purchasers [the Huskins], an opportunity to inspect any Addendums added to the Purchase Agreement for improvements on the property. *Id.* The Purchase Agreement includes an Addendum where the Huskins requested the placement of the driveway on the right side of the property. *Id.* The improvements specified in the Purchase Agreement

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Addendum began in August 21, 2015. *Id.* The Addendum includes a Development Rider explaining that factors such as weather and local municipalities may cause delays during the construction and completion of the home. *Id.* Mungo Homes obtained a permit from Richland County classifying the improvement as "residential new construction" for a "single family residence." *Id.* In addition, a Certificate of Occupancy was issued for the property on January 19, 2016. *Id.*

There are two provisions in the Purchase Agreement that are of importance in this lawsuit. First, is the "Limited Warranty" provision, located on page two of the Purchase Agreement. In this provision, Mungo Homes disclaims the implied warranty of habitability, suitability for residential purposes, merchantability, or fitness for particular purpose. *Id.* Mungo Homes also disclaims liability for consequential, or punitive damages. *Id.* A third-party corporation is responsible for any warranties or damages claims. *Id.*

Second, is the "Arbitration and Claims" provision, which is located at the top of page three of the Purchase Agreement. This provision subjects any claims or disputes arising out of, or relating to the Purchase Agreement to arbitration. *Id.* The provision sets a ninety-day period in which a party can demand arbitration after a claim or dispute arises. *Id.* The Arbitration and Claims Provision states:

"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 party's arbitrator. *Each, and every demand for arbitration shall be made within 90 days after the claim, dispute or other matter in question has arisen . . . or else any claim, dispute or other matter*

*MP*

in question not asserted within said time periods shall be deemed waived and forever barred." *Id.*

The Huskins filed a Complaint on June 14, 2017 alleging four causes of action for (1) breach of contract; (2) unjust enrichment; (3) declaratory relief; and (4) violation of the South Carolina Unfair Trade Practices Act. Compl. ¶ 23, 27, 32, 34. Mungo Homes filed a Motion to Dismiss and Compel Arbitration on July 20, 2017. Def. Mot. to Dismiss at 1.

The Huskins put forth three main arguments. First, they argue that the Purchase Agreement involves the sale of a new home. Pl.'s Mem. in Opp'n at 4. Under South Carolina law, the sale of a new home involves *intrastate* commerce; it does not involve interstate commerce. *Id.* The Federal Arbitration Act does not govern this transaction because interstate commerce is not involved. *Id.* Rather, the South Carolina Uniform Arbitration Act applies to this transaction. *Id.* at 5. Second, they argue the "Arbitration and Claims" provision is unconscionable because they had no meaningful choice to negotiate the terms of the arbitration provision and the provision truncates the statute of limitations for when the Huskins may bring a claim arising out of, or related to the Purchase Agreement. Pl.'s Mot. in Opp'n at 7-8. This violates public policy. *Id.* Third, the Huskins argue South Carolina precedent requires the court to analyze the "Limited Warranty" and "Arbitration and Claims" provisions *together* to determine whether the arbitration provision is unconscionable. *Id.*

The Defendants argue that the Purchase Agreement involves the sale of property and the construction of a dwelling, or improvements to a dwelling. Def. Mot. to Dismiss at 2. The transaction involved the construction of real estate, which necessarily involves *interstate* commerce according to South Carolina law. *Id.* at 3. The Federal Arbitration Act governs agreements that involve interstate commerce. *Id.* Arbitration of claims subject to the Federal Arbitration Act require the court to analyze the validity of the arbitration provision in isolation

from the remainder of the underlying agreement. Def. Reply Mot. at 3. Mungo Homes argues the "Arbitration and Claims" provision is not unconscionable because the Huskins received an opportunity to review and make changes to the Purchase Agreement and Addendum. Def. Reply Mot. at 4. Further, the "Arbitration and Claims" provision merely sets a time frame for when either party may demand arbitration; it does not shorten the statute of limitations to file a claim arising out of the Purchase Agreement. *Id.* at 5.

I. INTERSTATE COMMERCE: COMMERCE-IN-FACT TEST

The Federal Arbitration Act Section 2 provides that a controversy or claim subject to arbitration arising out of a contract *involving commerce* is valid, irrevocable, and enforceable except upon grounds for revocation of any contract that exists at law or in equity. 9 U.S.C. § 2 (1988). South Carolina has a strong policy favoring arbitration. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

Section 2 of the Federal Arbitration Act is generally binding on state claims where parties agree to arbitrate if the underlying transaction involved interstate commerce. South Carolina courts utilize a "commerce-in-fact" test to determine whether a transaction involves interstate commerce and subjects arbitration agreements to federal arbitration. *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 111. Alternatively phrased, the transaction "must turn out, in fact, to have involved interstate commerce." *Id.* The South Carolina Supreme Court instructs the courts to "examine the agreement, the complaint, and the surrounding facts," to determine whether the transaction involved interstate commerce. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) (noting South Carolina courts consistently look to the essential character of the contract when applying the Federal Arbitration Act).

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To determine whether interstate commerce is involved, the Court must determine whether the transaction was for the sale of a residential home, or a contract for the development or construction of a home. A contract for the sale of residential real estate does not involve interstate commerce. *Bradley*, 398 S.C. at 457, 730 S.E.2d at 317. South Carolina courts accept that construction projects generally involve interstate travel, purchase of materials, or other activities across state borders. *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 118.

This Court analyzed the agreement, the complaint, and the facts to determine whether the Purchase Agreement involved interstate commerce. Looking to the Purchase Agreement, there is one fact that distinguishes this case from *Bradley* in that the Purchase Agreement in *Bradley* was undisputedly for a "completed dwelling". *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. In this case, the parties contest whether this contract was for a completed home. The language of the Purchase Agreement states the transaction involved improvements to a piece of property and the Purchase Agreement Addendum indicates a driveway was constructed. Pl.'s Exh. 1.

Other language in the Purchase Agreement in this case points to the involvement of construction. For instance, the Development Rider states that factors such as weather or local municipalities, may affect the construction start date or completion of the home. Pl.'s Exh. 1. Also, Richland County issued a permit on the property as "residential new construction" for a "single family residence." *Id.* The Purchase Agreement in *Bradley* checked "N/A" for options such as: "new construction, house plan, options, and color selection." *Bradley*, 398 S.C. at 458, 730 S.E.2d at 318. Applying the commerce-in-fact analysis set forth in *Bradley*, the essential character of the Purchase Agreement was for the purchase and improvement of a piece of property, which involved some level of construction, which likely involved interstate commerce.

Although the Purchase Agreement in *Huskins* is distinguishable from the contract in *Bradley*, arbitration is grounded in principles of contract law. Parties are generally free to structure their arbitration agreements as they see fit. *Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). As such, parties are free to enter contracts providing for arbitration under rules established by state law rather than rules established by the Federal Arbitration Act, even if interstate commerce is involved. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 n.2 (2000). The Federal Arbitration Act preempts any state procedural law that completely invalidates the parties' agreement to arbitrate. *Id.* at 343 S.C. at 540, S.E.2d at 364 (invalidating the notice requirement contained in South Carolina's Uniform Arbitration Act because its application would have made the arbitration agreement completely unenforceable).

The "Arbitration and Claims" provision in this case subjects any controversies arising out of the Purchase Agreement to arbitration governed by the South Carolina Uniform Arbitration Act. Pl.'s Exh. 1. Although the Purchase Agreement may have involved interstate commerce, the parties freely agreed that the South Carolina Uniform Arbitration Act would govern. Pl.'s Exh. 1. One of the basic principles of arbitration is to ensure that private agreements to arbitrate are enforced according to their terms. *Volt*, 489 U.S. at 109. It follows that the specific terms of the arbitration provision should be upheld; the South Carolina Uniform Arbitration Act governs this dispute. *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-4 (Ct. App. 2013) (applying the South Carolina Uniform Arbitration Act as agreed upon in the purchase agreement between residential buyer and builder).

## II. UNCONSCIONABILITY

The South Carolina Uniform Arbitration Act generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement to arbitrate exists in the first place. S.C. CODE ANN. § 15-48-20(a) (2005). If no agreement is found to exist, the court must deny any application to arbitrate. *Id.* To determine whether an agreement to arbitrate is valid, or exists, the trial court should apply ordinary state-law principles that govern the formation of contracts. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22-23 644, S.E.2d 663, 667-68 (2007).

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016); *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. Unconscionability requires courts to focus generally on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision maker. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. If a court finds that any clause of a contract was unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. CODE ANN. § 36-2-302(1) (2003); *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. A determination of unconscionability requires an evaluation of the facts and circumstances surrounding the particular case. *Id.*

- a. The Huskins lacked meaningful choice to arbitrate their claims because they do not possess business judgment, did not hire counsel, and were not a substantial business concern.**

Whether one party lacks a meaningful choice to enter an arbitration agreement typically speaks to the fundamental fairness of the bargaining process. *Smith*, 417 S.C. at 49, 790 S.E.2d at

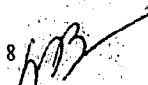
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4. "In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Considering the factors set forth in *Simpson*, the Court finds that the Huskins lacked a meaningful choice to arbitrate. First, the Huskins do not have business knowledge and did not hire outside counsel. Pl.'s Mem. in Opp'n at 7. The Huskins are homebuyers that did not enjoy substantially stronger bargaining power against a residential builder than any other average homebuyer. *Smith*, 417 S.C. at 50, 790 S.E.2d at 4-5. The Court in *Simpson* acknowledged that a lack of business judgment leaves the buyer without knowledge of the arbitration agreement's consequences. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Second, The Huskins did not hire independent counsel to discuss the terms of the Purchase Agreement. Pl.'s Mem. in Opp'n at 7; *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. The Huskins, like the buyer in *Simpson*, were customers negotiating with a commercial entity that drafted the contract and held substantially more bargaining power. Compl. ¶ 6-7; *Simpson* 373 S.C. at 26, 644 S.E.2d at 670.<sup>1</sup>

Further, the Huskins lacked a meaningful choice to arbitrate because they were not a substantial business concern to Mungo Homes. A homebuyer that is a single client to a national builder is not considered a substantial business concern. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5. The Huskins executed a Purchase Agreement with Mungo Homes that pertained to one tract of land. Pl.'s Mem. in Opp'n at 7; Compl. ¶ 6-7. The Court finds that the Huskins lacked a

<sup>1</sup> The Huskins purchased a "critically important" item from Mungo Homes like the buyer in *Simpson* who purchased a car from the dealership; a home, like a car, is a modern-day necessity. Compl. ¶ 1; *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670.

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meaningful choice to arbitrate because they did not hire independent counsel, they lacked business knowledge, and they were not a substantial business concern to Mungo Homes.

- b. The arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision because the warranty provision is clearly outside of the arbitration provision.

When determining the validity of an arbitration provision, courts generally analyze the arbitration provision in isolation from the rest of the contract. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-74 (Ct. App. 2013); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016). The Court will analyze the arbitration provision in conjunction with other provisions of the contract when the arbitration provision cross-references other provisions in the contract. *Smith*, 417 S.C. at 45, 790 S.E.2d at 2.

The Court finds that the "Limited Warranty Provision" exists outside of the "Arbitration and Claims" provision. In *One Belle*, the contract contained a warranty provision that limited the warranty's transferability to a roof manufacturer for shingles it produced and contained an arbitration provision on a separate page. *One Belle*, 418 S.C. at 59, 791 S.E.2d at 290. The court found the warranty provisions [were] clearly outside the arbitration agreement and as such the court would only consider the arbitration agreement in an unconscionability analysis. *One Belle*, 418 S.C. at 64, 791 S.E.2d at 293. In the *Huskins*' case, the "Limited Warranty" provision is located on the second page of the Purchase Agreement whereas the "Arbitration and Claims" provision is located at the top of page three, which indicates the "Limited Warranty" provision is outside the arbitration agreement and should not be considered in the unconscionability analysis Pl.'s Exh. 1.; see also *Carlson*, 404 S.C. at 260, 743 S.E.2d at 873-74 (determining the unconscionability of an arbitration agreement required the court to analyze the arbitration

provision separate from other provisions in the purchase agreement such as a provision limiting the statute of limitations to bring a claim).

Further, the arbitration provision does not reference the "Limited Warranty" provision contained in the Purchase Agreement. The arbitration provision in *Smith* was intertwined within a complex paragraph titled "Warranties and Dispute Resolution." *Smith*, 417 S.C. at 45, 790 S.E.2d at 2. The "Warranties and Dispute Resolution" paragraph contained numerous subparagraphs which cross-referenced once another. *Id.* To determine whether the arbitration agreement was unconscionable, the Court in *Smith* analyzed the "Warranties and Dispute Resolution" paragraph as a whole because the arbitration provision could not be extracted from the "Warranties and Dispute Resolution" paragraph. *Smith*, 417 S.C. at 48, 790 S.E.2d at 4. Unlike the arbitration provision in *Smith*, the arbitration provision in this case is not intertwined with the "Limited Warranty" provision. Pl.'s Exh. 1; *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

This Court, in general, is tasked with whether the *arbitration agreement* is invalid, not whether the *contract as a whole* is invalid. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967). The "Limited Warranty" provision is clearly outside of the "Arbitration and Claims" provision as both provisions are located on separate pages and headings of the contract and do not cross reference one another. Pl.'s Exh. 1. The Court will not consider the "Limited Warranty" provision to determine the unconscionability of the arbitration provision.

**c. The arbitration agreement is not one sided and oppressive because it does not limit the Huskins' statutory remedies, it is clearly labeled, and it applies mutually to both parties.**

To determine whether an arbitration agreement is one-sided and oppressive the courts look at a variety of factors. An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. An arbitration provision that

stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870.

An arbitration clause that limits statutory remedies is an indicator of a one-sided and oppressive arbitration clause. *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. The arbitration provision in the case at hand sets a time frame of ninety days after any claim or dispute arises in which a party can demand arbitration. Pl.'s Exh. 1. The Huskins filed an action on June 14, 2017 and Mungo Homes filed a Motion to Compel Arbitration on July 20, 2017, within the ninety-day time frame. Compl. ¶ 1; Def. Mot. to Dismiss at 1. The ninety-day time frame to demand arbitration does not limit the Huskins' ability to arbitrate claims for damages unlike an arbitration provision that limits the buyer's ability to arbitrate any double and treble damages available under the South Carolina Uniform Trade Practices Act. *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666.

An arbitration provision that stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims is an indicator of a one-sided and oppressive arbitration clause. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. In *Simpson*, the arbitration clause subjected all claims or controversies between the dealer and customer to arbitration. *Id.* The arbitration clause included an exception where claims between the dealer against the customer were not stayed pending the outcome of arbitration. *Id.* The Court found the arbitration provision was one-

sided and oppressive because the dealer's judicial remedies superseded the consumer's arbitral remedies. *Id.* The Court envisioned a scenario where the dealer could initiate a claim in court, complete the claim, and sell the contested vehicle prior to an arbitrator's determination of the consumer's rights in the same vehicle. *Simpson*, 373 S.C. at 32, 644 S.E.2d at 672.

In contrast to the unequal stay of one party's claims over another's in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims equally. Pl.'s Exh. 1. The arbitration provision calls for binding arbitration before a panel consisting of three arbitrators: one selected by the Huskins, one selected by Mungo Homes, and one mutually selected by the arbitrator chosen by each party. *Id.* Unlike the arbitration provision in *Simpson*, the arbitration provision in the Huskins' case allows both parties to arbitrate the claims or disputes and includes a process for neutrally selecting the arbitrators. Pl.'s Exh. 1.; *Simpson* 373 S.C. at 31, 644 S.E.2d at 672.

An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum is an indicator of a one-sided and oppressive arbitration provision. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The arbitration clause in *Simpson* claimed that "any and all disputes" including "automobile warranty" and "any consumer protection statute" may be resolved *only* by "binding arbitration" which was unenforceable as a matter of public policy for precluding the buyer from filing claims under the Magnuson Moss Warranty Act. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The "Arbitration and Claims" provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting.<sup>2</sup> It

<sup>2</sup> 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. Pl.'s Exh. 1. This provision is outside the "Arbitration and Claims" provision of the contract and is discussed in detail in Section II of this Order. See Section II(b).

requires that all claims and disputes arising out of the Purchase Agreement are subject to arbitration. Pl.'s Exh. 1.

A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870 (Ct. App. 2013). The arbitration agreement at hand is clearly labeled and underlined at the top of the page. Pl.'s Exh. 1. *But see Simpson*, 373 S.C. at 28, 644 S.E.2d at 670 (finding the arbitration agreement was unconscionable and noting the inconspicuous nature of the location of the arbitration clause as paragraph ten out of sixteen on the page). In *Carlson*, the arbitration provision did not waive any rights or remedies otherwise available by law. *Id.* Similarly, the "Arbitration and Claims" provision in the Huskins' case does not preclude their ability to file warranty claims. Pl.'s Exh. 1. Like the arbitration agreement in *Carlson*, the Huskins' case applies to both parties and allows each party to choose a neutral arbitrator. Pl.'s Exh. 1.; *Carlson*, 404 S.C. at 260, 743 S.E.2d at 873-74.

The "Arbitration and Claims" provision in the Huskins' case is distinguishable from the arbitration provision in *Simpson* because the arbitration provision here does not stay one party's claims over the other party's claims, it does not preclude the Huskins' from filing a warranty claim, and it does not divest the Huskins of a right available by statute. Pl.'s Exh. 1. On the contrary, it is clearly labeled and applies to both parties mutually. *Id.*; *see generally Carlson, v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). This "Arbitration and Claims" provision is not one-sided and oppressive.

#### CONCLUSION

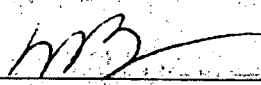
The arbitration clause under the Purchase Agreement is governed by the South Carolina Uniform Arbitration Act because the parties included a choice-of-law provision. There is a valid

agreement to arbitrate the Huskins' claims because the "Arbitration and Claims" provision is not unconscionable. Although the Huskins' lacked a meaningful choice to negotiate the terms of the arbitration provision, when analyzing the "Arbitration and Claims" provision in isolation from the underlying agreement, the Court finds that the "Arbitration and Claims" provision is not one-sided and oppressive.

For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **GRANTED.**

**IT IS SO ORDERED.**

Columbia, South Carolina  
March 7, 2018

  
\_\_\_\_\_  
The Honorable DeAndrea Gist Benjamin  
Judge, Court of Common Pleas  
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA  
 COUNTY OF Richland  
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4003697

Amanda Leigh Huskins et al  
 PLAINTIFF(S)

Mungo Homes LLC  
 DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Plaintiff's Motion to Alter or Amend the Court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration is Denied.

**ORDER INFORMATION**

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/16/2018

Jay R Huskins

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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**Richland Common Pleas**

**Case Caption:** Amanda Leigh Huskins , plaintiff, et al vs Mungo Homes LLC  
**Case Number:** 2017CP4003697  
**Type:** Order/Electronic Form 4

**So Ordered**

**s/DeAndrea Gist Benjamin, #2161**

Electronically signed on 2018-04-18 12:36:10 page 3 of 3

ELECTRONICALLY FILED - 2018 May 21 9:25 AM - RICHLAND - COMMON PLEAS - CASE#2017CP4003697  
ELECTRONICALLY FILED - 2018 Apr 16 12:46 PM - RICHLAND - COMMON PLEAS - CASE#2017CP4003697

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000889

Case No. 2017-CP-40-03697

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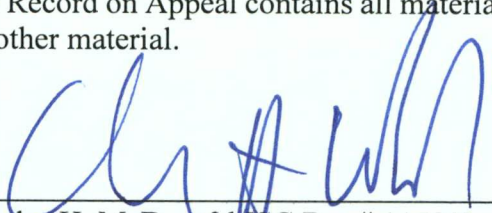
Amanda Leigh Huskins and Jay R. Huskins, ..... Appellants,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

  
\_\_\_\_\_  
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Attorney for Appellant

March 25, 2019