

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2018-001598
Civil Action No. 2018-CP-40-00873

RECEIVED
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SC Court of Appeals

Jonathan Mart, on behalf of himself and others similarly situated, ... Respondent,

v.

Great Southern Homes, Inc., ... Appellant.

RECORD ON APPEAL

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

FORM 4

JUDGMENT IN A CIVIL CASE

ROA 002

CASE NO. 2018CP4000873

Jonathan Mart
PLAINTIFF(S)

Great Southern Homes Inc
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:

This matter is under advisement.

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 06/15/2018.

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.



Richland Common Pleas

Case Caption: Jonathan Mart vs Great Southern Homes Inc

Case Number: 2018CP4000873

Type: Order/Electronic Form 4

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2018-06-15 13:30:37 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Jonathan Mart, on behalf of himself and others similarly situated,	)	Civil Action No. 2018-CP-40-00873
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING GREAT
	)	SOUTHERN HOMES, INC.'S MOTION
	)	TO DISMISS AND COMPEL
Great Southern Homes, Inc.,	)	ARBITRATION
	)	
Defendant.	)	

INTRODUCTION

This matter comes before the Court upon Defendant Great Southern Homes, Inc.'s Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on June 13, 2018 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, exhibits, affidavits, and arguments of counsel and issues the following Order to **DENY** the Defendant's Motion to Dismiss and Compel Arbitration.

FACTS

Jonathan Mart is a purchaser of a home from Great Southern Homes, a large builder and seller of new homes in South Carolina. On February 12, 2018, Mart instituted this action, on behalf of himself and others similarly situated, seeking monetary and declaratory relief based upon certain warranty waivers contained in Great Southern Homes' "Contract For Sale." In his Complaint, Mart asks (1) the Court to declare as a matter of law that Great Southern cannot waive the implied warranty of habitability without paying its customers such as Mart adequate consideration for such waiver, and (2) a jury to determine that Mart and all others similarly situated

may recover the fair value of the waiver. In response to the Complaint, Great Southern filed the present motion to compel arbitration of the issues raised in the Complaint.

In July 2015, Mart executed Great Southern's proprietary Contract For Sale for the purchase of a new home to be built by Great Southern in Kershaw County. The Contract For Sale 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 Great Southern requires that its purchasers waive is the implied warranty of habitability.

In lieu of these implied warranties, Great Southern's Contract For Sale substitutes an "Express Limited Warranty," under which Great Southern warrants certain express obligations and other express warranty obligations are transferred to a third-party. Particularly, the Express Limited Warranty is an insurance backed warranty administered by StrucSure Home Warranty, LLC. Under this Express Limited Warranty, Great Southern is the "Warrantor" for Years 1 and 2 with respect to defined warranty items and a third-party company, the "Insurer," is the Warrantor for Years 1 through 10 for "major structural defects." StrucSure is the Administrator of the warranty with no direct responsibility to a homeowner for resolution of warranty issues. Aff. Jonathan Mart, Exh. A, Section 1, Section 17).

Both the Contract For Sale and the Express Limited Warranty contain arbitration provisions. For reference throughout this Order, the Contract For Sale's arbitration clause states in full:

Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et. seq.

Compl., Exh. 1. The Express Limited Warranty's arbitration clause also states in relevant part:

The parties to the Express Limited Warranty intend and agree that any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to the Express Limited Warranty . . . or the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing, shall be settled by arbitration in a manner consistent with this arbitration agreement.

Aff. Jonathan Mart, Exh. A at pg. 22 (emphasis added). There is no provision in the Contract For Sale or the Express Limited Warranty, such as a merger clause, specifying which of these conflicting provisions take precedent over the other.

Plaintiff Mart argues the Contract For Sale and the Express Limited Warranty have broad and sweeping arbitration provisions that apply to all claims related to the Contract For Sale or breach thereof, including the claims set forth in Mart's Complaint. Mart argues that material differences exist between the Contract For Sale's arbitration provision and the Express Limited Warranty's arbitration provision which demonstrates that Mart and Great Southern had no "meeting of the minds" on the agreement to arbitrate. With no meeting of the minds there is no agreement to arbitrate. Great Southern argues there is no conflict between the Contract For Sale's and Express Limited Warranty's arbitration provisions because the arbitration clause in the Contract For Sale applies to Mart's claims rather than the arbitration provision in the Express Limited Warranty.

For the reasons set forth below, the Court finds the arbitration provisions in the Contract For Sale and the Express Limited Warranty are both applicable to the claims set forth in Mart's Complaint and directly and materially conflict with one another. Accordingly, Mart and Great Southern did not mutually assent to an agreement to arbitrate, and this court cannot compel arbitration in this matter.

APPLICABLE LAW

Whether a valid arbitration agreement exists is a matter for judicial determination. *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010); *see Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (finding a “gateway matter” to arbitrability is the existence of an agreement to arbitrate). Neither the FAA nor the South Carolina Uniform Arbitration Act require parties to arbitrate when they have not agreed to do so. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”). Instead, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *Weckesser v. Knight Enters. LLC*, 228 F. Supp. 3d 561, 564 (D.S.C. 2017) (“Whether the parties agreed to arbitrate a particular dispute is a question of state law governing contract formation.”). “When the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved against the drafter. *Id.* at 565. While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the existence of a valid arbitration agreement. *Id.*”

“South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). Where material terms of a contract are inconsistent and conflicting, there is no meeting of the minds. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) (acknowledging where arbitration agreements provided for conflicting and inconsistent material terms, it would be unenforceable for lack of mutual assent thereto). The designation of a specific arbitral forum is a material term of an arbitration agreement. *Grant v.*

Magnolia Manor–Greenwood, Inc., 383 S.C. 125, 128-32, 678 S.E.2d 435, 437-39 (2009) (finding specification of the named arbitrator a material term of the agreement and that where this material term was rendered ineffective, arbitration was no longer required).

Other courts who have addressed the effect of conflicting arbitration agreements also considered material the following aspects of conflicting applicable arbitration agreements. *Ragab v. Howard*, 841 F.3d 1134, 1138 (10th Cir. 2016) (holding conflicting details in the multiple arbitration provisions regarding “(1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys’ fees indicate that there was no meeting of the minds with respect to arbitration”); see *NAACP of Camden East v. Foulke Management Corp.*, 421 N.J. Super. 404, 424-25 (N.J. Appellate Div. 2011) (finding “the arbitration provisions. . . too plagued with confusing terms and inconsistencies [related to nature and locale, time limits, and costs for arbitration] to put a reasonable consumer on fair notice of their intended meaning” and therefore “unenforceable for lack of mutual assent”); *In re Willis*, 579 B.R. 381, 390-95 (S.D. Miss. 2017) (finding under Mississippi law parties did not agree to arbitrate where two arbitration agreements applied to same claims but provided for inconsistent terms regarding (1) the number of arbitrators, (2) how the arbitrator(s) will be selected, (3) the notice required to arbitrate, (4) the location of the arbitration, (5) who pays the costs of the arbitration, (6) who would be entitled to attorneys’ fees and on what showing, and (7) when arbitration proceedings need not be initiated).

I. The arbitration clauses in the Contract For Sale and Express Limited Warranty are broad and sweeping and both cover the claims asserted by Mart against Great Southern in this action.

The plain language of the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are broad and sweeping and apply unambiguously to any claims related to the Contract For Sale, including the claims set forth in Mart’s Complaint. *Compare* Compl., Exh. 1 (providing

for arbitration of “[a]ny dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof”), with Aff. Jonathan Mart, Exh. A at pg. 22 (providing for arbitration of “any and all claims, disputes and controversies by or between the Homeowner, the Builder, arising out of . . . the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing”). See also *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (2016).

Great Southern argues that even if the two provisions broadly apply to the type of claims set forth in the Complaint, Great Southern is only a party to the Contract For Sale and the Express Limited Warranty’s arbitration provision is irrelevant to the court’s determination of the arbitrability of this dispute. However, the Contract For Sale to which Great Southern admits it is a party, expressly incorporates the Express Limited Warranty into its terms. The Contract For Sale references the Express Limited Warranty and provides that “[t]he [Express] Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or implied” by law. Compl. Exh. 1 at Limited Warranty. The Contract For Sale further clarifies that Great Southern is the source and supplier of the Express Limited Warranty, stating “[Great Southern] shall furnish [Mart] with a limited warranty issued by a warranty company approved by the SC Real Estate Commission.” *Id.* The Express Limited Warranty also confirms that Great Southern provides the Express Limited Warranty to Mart. See Aff. Jonathan Mart, Exh. A, Section 1 (“Your builder . . . sold You a home that includes the Express Limited Warranty protection.”).

Even if the court considered the Contract For Sale and Express Limited Warranty as separate agreements, moreover, Great Southern is a party to the Express Limited Warranty and the Contract For Sale and Express Limited Warranty must be construed together. While StrucSure

may issue and administer the Express Limited Warranty in the technical, administrative sense, Great Southern is the *provider, supplier, and source* of the Express Limited Warranty. Admittedly, Great Southern knew and understood the terms of the Express Limited Warranty and that its terms expressly made Great Southern, the Builder, a party thereto as a Warrantor of certain workmanship issues related to the home. *Id.* (stating “[t]he Builder is the Warrantor in years (1) for Workmanship/Materials and years (1) and (2) for Delivery Portions of Systems.”). Pursuant to the Express Limited Warranty, Great Southern, the Builder and Warrantor, agreed to be bound by its terms. *Id.* (stating the Express Limited Warranty is binding on [Great Southern] and [Mart]). Both the Contract For Sale’s and the Express Limited Warranty’s arbitration provisions therefore apply to Mart’s claims.

II. Material terms in the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are inconsistent and therefore Great Southern and Mart had no meeting of the minds on an agreement to arbitrate the claims set forth in the Complaint.

The Contract For Sale’s and Express Limited Warranty’s arbitration provisions conflict in several material respects, including, but not necessarily limited to (1) the law governing and the forum for arbitration; (2) the selection and number of arbitrators to determine the matter; (3) post-award rights and remedies; and (4) the arbitral costs and fees. Under these circumstances, there can be no agreement to arbitrate between Mart and Great Southern.

a. The Contract For Sale’s and Express Limited Warranty’s arbitration provisions provide for conflicting governing law and forums.

Under the Contract For Sale, arbitration will be conducted pursuant to the South Carolina Uniform Arbitration Act (“SCUAA”) and rules thereunder. Compl., Exh. 1 at Arbitration. The Express Limited Warranty on the other hand requires using an independent arbitration service such as Construction Dispute Resolution Services and the procedures by that independent arbitration

service and the Federal Arbitration Act. Aff. Jonathan Mart, Exh. A, Section 15. The SCUAA, moreover, provides parties certain additional rights as to the conduct of the arbitration hearing and pre-hearing discovery that are not found in the Federal Arbitration Act. *Compare* S.C. Code Ann. §§15-48-50-80, *with* 9 U.S.C.A. §§1-16. Therefore, the two arbitration provisions' governing law and forums explicitly differ in substance, where the SCUAA provides the parties more procedural and pre-hearing discovery rights than those rights provided under the FAA, all of which could substantially affect the outcome of the proceeding.

b. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for a conflicting number of arbitrators and process for selecting the same.

The Contract For Sale requires proceeding with three arbitrators with each party appointing an arbitrator and those two arbitrators appointing a third arbitrator. Compl., Exh. 1 at Arbitration. The Express Limited Warranty contemplates utilizing only a single arbitrator and further states that in the event of a conflict between the rules of the independent arbitration service and the Federal Arbitration Act as to arbitrator selection, the Federal Arbitration Act would control under which the judge appoints a single arbitrator. *See* 9 U.S.C.A. § 5; Aff. Jonathan Mart, Exh. A, Section 15.

c. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting post-award remedies.

The Express Limited Warranty states that "[i]f the Homeowner disagrees with the Arbitrator's decision, s/he has the right to appeal it." Aff. Jonathan Mart, Exh. A, Section 16. The Contract for Sale, following the South Carolina Uniform Arbitration Act, does not provide such unlimited, broad right to appeal the merits of an award on any ground. *See* S.C. Code Ann. §§ 15-48-120-200 (providing limited grounds and specific procedures upon which a court can review

and vacate or modify an arbitration award).

d. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting provisions related to arbitration costs and arbitrator fees.

Under the Contract for Sale, the SCUAA allows arbitrators to determine allocation for costs and fees in the award. Compl. Exh. 1 at Arbitration. However, under the Express Limited Warranty, the Homeowner bears the initial burden of all arbitration costs. Aff. Jonathan Mart, Exh. A, Section 15.

With no merger clause in either the Contract For Sale or Express Limited Warranty, there is no method to determine which of these conflicting arbitration provisions control and govern the procedure for arbitrating the claims Mart asserts against Great Southern. No South Carolina court, moreover, has specifically ruled upon arbitration provisions between the same parties and applicable to the same claims which contain expressly conflicting arbitration terms. Yet, several South Carolina courts have acknowledged in dicta that that such circumstance precludes any meeting of the minds on the issue. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83-84, 749 S.E.2d 139, 147-48 (Ct. App. 2013) (finding that two arbitration provisions in separate contracts were not inconsistent and conflicting to make agreements unenforceable). The Court finds that the conflicting arbitration provisions present here evidence a lack of mutual assent to arbitration and, therefore, there is no valid arbitration agreement for this Court to enforce in this case.

III. The HUD regulations governing warranty plans such as the Express Limited Warranty are not relevant to the Court's analysis in ruling on the Motion to Dismiss and Compel Arbitration.

Great Southern argues HUD regulations governing VA loans, such as that obtained by Mart, mandate that home warranty plans such as the Express Limited Warranty provide for

arbitration. Great Southern further contends that this Court cannot declare that arbitration provision contained in the Express Limited Warranty invalid because the arbitration provision is provided for by federal mandate. For the reasons explained below, the Court does not find its ruling in this matter in contravention of any federal mandate provided in the HUD regulations cited by Great Southern.

First, as Great Southern stressed to the Court at the hearing on this motion, Mart's claims do not relate to the certain defined claims involving workmanship and material defects to which the HUD regulations direct its mandatory provision of arbitration. *See* 24 C.F.R. §203.200-209. Mart's claims relate to Great Southern's breach of the covenant of good faith and fair dealing or unjust enrichment of itself in extracting a waiver of the implied warranty of habitability without separate consideration to its homebuyers in the Contract For Sale. Nothing in the HUD regulations require Great Southern to include the broad and sweeping arbitration clause found in the Express Limited Warranty, which applies to Mart's claims in this instance. *See id.* Great Southern's decision to use this Express Limited Warranty with such a broad and sweeping arbitration clause that covers matters outside of the terms of the warranty itself is a contractual decision of its own making—not any HUD requirement. The HUD regulations therefore have no application to the court's consideration of the parties' agreement to arbitrate the claims asserted in this case.

Further, *Daugherty v. Pulte Homes of Greater Kansas City*, relied on by Great Southern to encourage the court's grant of its motion to compel is inapplicable to this case. No. 09-2523-KHV, 2010 WL 4963041 (D. Kan. June 11, 2018). In this case, *Daugherty* did not involve the issue of conflicting arbitration clauses within the purchase agreement and the builder's limited warranty which covered the same scope of claims. *See id.* South Carolina law is clear that an arbitration provision in a home warranty plan can apply to claims arising under the purchase agreement. *See*

Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (S.C. 2016).

Therefore, because the conflict in the arbitration clauses was caused by Great Southern's drafting of its Contract For Sale and by its election to utilize the StrucSure Express Limited Warranty as a purchaser's sole and exclusive remedy for contract matters, such conflicts should be resolved in favor of purchasers such as Mart. *See Weckesser v. Knight Enterprises S.E., LLC*, 228 F.Supp.3d 561, 565 (D.S.C. 2017).

CONCLUSION

The arbitration clauses contained in the Contract For Sale and the Express Limited Warranty both cover claims arising out of or relating to the Contract For Sale. Furthermore, these arbitration clauses are in conflict in numerous material respects. Accordingly, the Court finds that there was no mutual assent between Mart and Great Southern as to any arbitration procedure; and, therefore, there was no meeting of the minds as to an agreement to arbitrate as to claims arising out of or related to the Contract For Sale. For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

IT IS SO ORDERED.

Columbia, South Carolina
_____, 2018

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



Richland Common Pleas

Case Caption: Jonathan Mart vs Great Southern Homes Inc

Case Number: 2018CP4000873

Type: Order/Other

So Ordered

s/DeAndrea Gist Benjamin, #2161

Electronically signed on 2018-07-26 10:29:14 page 12 of 12

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Jonathan Mart, on behalf of himself and others similarly situated

Plaintiffs

vs.

Great Southern Homes, Inc.

Defendant(s)

Submitted By: Charles H. McDonald

Address: McDonald Law, LLC

P.O. Box 96

Columbia SC 29202

ROA 017
IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2018-CP - 40- 00873

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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 cases that are NOT E-Filed. 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. This form is NOT required to be filed in E-Filed Cases.

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)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20____-NI-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☒ Other (499) _____
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Incapacitated Adult Settlement (790) ☐ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680) ☐ Interpleader (690)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature: Charles H. McDonald

Date: 2/12/18

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

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

Pursuant to the ADR Rules, 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 210th 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.
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

COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
)Jonathan Mart, on behalf of himself and
others similarly situated,

Plaintiffs,

v.

Great Southern Homes, Inc.,

Defendant.

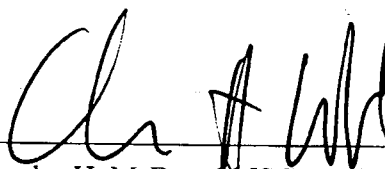
Case No.: 2018-CP-40-

SUMMONS

2018 FEB 12 PM 12:30
CLERK OF COURT
C.D.R. & O.S.

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribers at Post Office Box 96, Columbia, South Carolina 29202, within thirty (30) days of the date of service, exclusive of such day. In the event you fail to answer within the stated time, judgment by default will be rendered against you for the relief demanded in the Complaint.



Charles H. McDonald [SC Bar # 11580]

MCDONALD LAW, LLC

Post Office Box 96

Columbia, SC 29202

(803) 929-0096

Email: chuck@belserpa.com

Counsel for Plaintiffs

February 12, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Jonathan Mart, on behalf of himself	)	Civil Action No. 2018-CP-40-_____
and others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>CLASS ACTION COMPLAINT</u>
	)	<u>(JURY TRIAL DEMANDED)</u>
Great Southern Homes, Inc.,	)	
	)	
Defendant.	)	
	)	
	)	

Plaintiff Jonathan Mart, on behalf of himself and all others similarly situated, complaining of the Defendant Great Southern Homes, Inc. ("Great Southern") would respectfully show as follows:

INTRODUCTION & NATURE OF THE ACTION

Defendant Great Southern is a builder and seller of new homes in the state of South Carolina and advertises itself on its website as the "nation's 62nd largest builder" as well as the "3rd fastest-growing private builder in the nation."¹ 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 Great Southern vis-à-vis the new home buyer, our Supreme Court ruled that the warranty of habitability can be waived or disclaimed only if the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. Nevertheless, and in contravention to this long-standing precedent,

¹ See Great Southern Homes News Page available at <http://www.greatsouthernhomes.com/news/> (last visited January 22, 2018).

Defendant Great Southern unlawfully and uniformly requires all new home buyers, including Plaintiffs, to waive the warranty of habitability *without* providing the homebuyers any compensation for such waiver as required by South Carolina law.

This is a proposed class action under Rule 23, SCRPC, seeking money damages and declaratory relief, to redress Defendant Great Southern's uniform and improper practice of requiring purchasers of its new homes in South Carolina to waive the valuable warranty of habitability without providing to purchasers any compensation for such waiver.

PARTIES AND JURISDICTION

1. Plaintiff resides in Kershaw County, South Carolina, having purchased a new home from Great Southern in the Longview North subdivision in Kershaw County in 2015.
2. Great Southern is a large residential homebuilder headquartered in Irmo, South Carolina, and is one of the largest homebuilding enterprises in the United States.
3. The matters complained of herein arise from Great Southern's unlawful and uniform waiver of the implied warranty of habitability contained in Great Southern's Contract for Sale of new homes in South Carolina to purchasers of unequal sophistication and bargaining power.
4. This Court has jurisdiction over the parties and the subject matter of this action.
5. Venue is proper in this forum as Great Southern is headquartered in Richland County.

THE CLASS MEMBERS

6. The members of the putative class include all persons, excluding Great Southern's agents or principals, who have purchased a new home located in South Carolina from Great

Southern using a Contract for Sale or materially similar Sales Contract as attached as **Exhibit 1** and more particularly described in the paragraphs below.

7. As part of the sale of the new home by Great Southern, all class members were uniformly required to waive and forego valuable warranty rights without compensation to which they were entitled.

8. All class members have been harmed by the unjust conduct of Great Southern and its agents.

FACTS

Great Southern's Contract for Sale & Sales Practices

9. Great Southern requires purchasers of its homes to execute Great Southern's "Contract for Sale."

10. This Contract for Sale 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 Great Southern.

11. One of the implied warranties that Great Southern requires its purchasers to waive is the implied warranty of habitability—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.²

² Although not the subject of this action, consistent with its scheme to avoid standing behind its residential homes, Great Southern also disclaims and refuses to warrant that its homes are even suitable for "residential purposes." (See Exhibit 1 ¶ **LIMITED WARRANTY**)

12. 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 Great Southern.

13. In lieu of the critical and essential implied warranties that Great Southern makes all of its purchasers waive in the Contract for Sale, Great Southern substitutes a dubious limited warranty through a third-party warranty company.

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

15. Upon information and belief, the "Limited Warranty" received by a purchaser of a Great Southern home is usually from StrucSure Home Warranty, LLC. This warranty is exceptionally limited, excluding material matters such as building code violations and incomplete construction items.

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

17. In certain material respects, Great Southern's Contract for Sale is unlawful, unfair, and benefits only Great Southern and its affiliates at the expense of homebuyers.

Waiver of the Implied Warranty of Habitability in South Carolina

18. A seller of a new home cannot disclaim the implied warranty of habitability unless the disclaimer was "(1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." *Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006).

19. The South Carolina Supreme Court has specifically 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. Great Southern and its agents have had actual or constructive knowledge of this ruling since 2006, yet Great Southern and its agents continue to operate the improper warranty scheme described above all to the detriment of the purchaser of a Great Southern 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 20 are re-alleged and incorporated herein.

22. Plaintiff entered into an enforceable and valid contract with Great Southern by executing Great Southern’s “Contract for Sale” in connection with the purchase of a new Great Southern home for which Plaintiff paid valuable consideration.

23. The actions and conduct of Great Southern constitute a breach of the duty of good faith and fair dealing implied in every contract, including the Great Southern Contract for Sale.

24. As a direct and proximate result of Great Southern’s actions, Plaintiff has suffered actual damages in the form of the fair value of the waiver of the implied warranty of habitability which Great Southern intentionally avoided paying the Plaintiff through its scheme set forth above.

25. Plaintiff is entitled to judgment against Great Southern 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 25 are re-alleged and incorporated herein.
27. Great Southern has received a significant benefit from the Plaintiff 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. Great Southern has realized the full benefit of Plaintiff's waiver and release of these fundamental warranty rights.
29. It would be a gross injustice for Great Southern to continue to reap the benefit of this "bargain" with the Plaintiff without paying fair value for the Plaintiff's waiver and release of important warranty rights and specifically the warranty of habitability.
30. Plaintiff is entitled to recover such fair value from Great Southern and seeks judgment against Great Southern 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 30 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 of implied warranty of habitability without separate consideration contained in Great Southern's Contract for Sale; and
 - b. The validity of Great Southern's purported transfer of all remaining warranty obligations to a third party.

CLASS ACTION ALLEGATIONS

33. The allegations of Paragraphs 1 through 32 are re-alleged and incorporated herein.

34. Pursuant to Rule 23, SCRCR, the Plaintiff Class for whom Plaintiffs seek to represent includes: "All persons, excluding Great Southern's agents or principals, who have purchased a new home located in South Carolina from Great Southern using the 'Contract for Sale' or materially similar purchase agreement."

35. Upon information and belief, the size of the class is so numerous that joinder of all members of the Plaintiff Class is impractical.

36. Plaintiff does not have any interests antagonistic to or in conflict with the interests of the Plaintiff Class.

37. Counsel for Plaintiff are experienced in complex civil litigation, well versed in the issues presented in this matter, and have extensive experience in handling class actions in both state and federal court.

38. There are questions of law and fact common to Plaintiff and all members of the Plaintiff Class that predominate over any individual questions of law and/or fact, including the validity of the purported waivers of fundamental warranty rights in Great Southern's Contract for Sale and the consideration to which Plaintiff and all members of the Plaintiff Class are entitled for such waivers.

39. The claims of Plaintiff are typical of the claims of all members of the Plaintiff Class in that the same or materially similar proprietary Contract for Sale were used in each new home sales transaction involving members of the Plaintiff Class.

40. Class treatment of the matters at issue in this case is superior to the alternatives, if any, for the fair and efficient adjudication of such issues because such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum

simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that would be involved in numerous individual actions.

41. The amount in controversy exceeds one hundred dollars for each member of the class.

42. Upon information and belief, the members of the Plaintiff Class are readily ascertainable from Great Southern or other third party's business records.

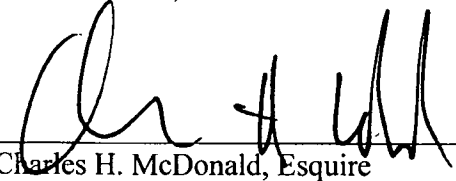
43. Plaintiff is not aware of any difficulty in the management of this action that would preclude it from being maintained as a class action.

PRAYER FOR RELIEF

WHEREFORE, having complained of Defendant Great Southern and other entities for which Great Southern is legally responsible, Plaintiff requests the following relief:

- a. An order: (i) certifying a Plaintiff Class pursuant to Rule 23, SCRPC; (ii) appointing Plaintiff as representative of the Plaintiff Class; and (iii) appointing the undersigned as counsel for the Plaintiff Class;
- b. Pursuant to the First and Second Causes of Action: (i) an award of actual and compensatory damages for Plaintiff and each proposed class member in the amounts established at trial together with interest thereon as permitted by law; and
- c. Pursuant to the Third Cause of Action, a declaration regarding the validity of the waiver and release of certain warranty rights contained in the Great Southern Homes Contract for Sale; and
- d. Attorney's fees if permitted by law along with all taxable costs of this action as may be allowed by this Court; and
- e. For such other relief as the Court may deem appropriate.

McDONALD LAW, LLC

By: 

Charles H. McDonald, Esquire
P.O. Box 96
Columbia, SC 29202
Telephone: (803) 929-0096
chuck@belserpa.com

and

Terry E. Richardson, Jr., Esquire
Matthew A. Nickles, Esquire
Brady R. Thomas, Esquire
Richardson, Patrick, Westbrook & Brickman,
LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812
Telephone: 803.541.7850

and

Thornwell F. Sowell, Esquire
Beth B. Richardson, Esquire
Sowell Gray Robinson Stepp & Laffitte, LLC
1310 Gadsden Street
P.O. Box 11449
Columbia, SC 29211
Telephone (803) 929-1400

Counsel for Plaintiffs

Columbia, South Carolina
February 12, 2018

EXHIBIT 1

Home Sale Information Sheet**New Home Info****Build Job?** ☒ Yes ☐ No

Neighborhood: Longview North

Lot #: 34

Plan: Beaujolais B

Address: 2 Casey Dr., Elgin, SC 29045

Customer Contact Info

Homeowner: Jonathan Mart

Phone (Cell): [REDACTED]

Phone (W): [REDACTED]

Address: Driftwood Ave, Elgin, SC 29045

Email: [REDACTED]

Closing Info

Date: December 18, 2015

Attorney: Hanson Law Firm

Buyer Agent Info

Company: ReMax Midlands Realty

Agent: Elaine Cassidy

Cell: [REDACTED]

Email: [REDACTED]

Commission: 3% + 1% Bonus

Is this a RELO? **YES** or **No** (circle one)

Selling Agent must sign:

*Elaine Cassidy***Mortgage Info**

Institution: Ameris

Agent: Alicia Blevins

Phone: 803-637-7661

Email: Alicia.blevins@amerisbank.com

Type/Plans: VA

Special Island**Contract Info**

Sales Price: [REDACTED]

No Closing Costs paid with Outside Attorney

Deposits:

1.) \$1000 for Earnest Money

Listing agent Info

Contract Date: 7-18-15

Company: R&J Camden

Agent: Philip Reames

Co-Agent: Jackie B. Montgomery

Floater: [REDACTED]

After Receipt of Ratified Contract (usually 1-2 business days) please call:

For Walk Through Date: Please contact

closings@greatsouthernhomes.com

Once Walk Through date & time has been established, Call: Hanson Law Firm at 803-788-8446

Office (803-750-0203-FAX) to set up official closing date. Address: 6166 St. Andrews Rd., Suite 101 Columbia, SC 29212

THIS INFORMATION SHEET IS NOT A LEGAL DOCUMENT - THIS PAGE FOR INTERNAL USE ONLY

CONTRACT SUBJECT TO ARBITRATION (S.C. CODE 15-48-10) version 040215**CONTRACT FOR SALE**

This Contract for Sale is entered into between **GREAT SOUTHERN HOMES, INC.**, a South Carolina corporation, hereinafter referred to as "Seller", and Jonathan Mart hereinafter referred to as "Purchaser", whether one or more. Purchaser's phone numbers: (Home) _____ (Work) _____ (Mobile) _____ (Email) _____

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, hereinafter referred to as the "property", situated in Kershaw County, and described as Lot 34 in the Longview North Subdivision, also known as 2 Casey Dr, Elgin, SC 29045 (Property Address).

STRUCTURES:

() **SPEC MODEL.** The structures on the property are constructed, except for the items, if any, included within the allowances set forth below. Purchaser has conducted a site visit, is purchasing the property based upon this site visit and is not relying upon any model or plans and specifications, MLS/internet pictures or listing information, or any other sales collateral information.

(X) **BUILDING JOB.** The structures shall be constructed on the property in substantial conformance with those certain plans and specifications, as attached. Said plans and specifications shall supersede any models, advertising materials or other representations. Where Seller is unable to obtain exact specified materials through Seller's usual supply sources Seller reserves the right to substitute materials of similar pattern, design, and quality or as otherwise necessary.

PRICE: Total Sales Price \$
This offer is accompanied by an earnest money deposit of \$ 1,000 by Purchaser's Check # 2560. Purchaser and Seller authorize Russell & Jeffcoat, as escrow agent, to hold and disburse the earnest money according to the terms of this agreement. Buyer agrees to and understands that earnest money may be deposited in an interest-bearing escrow account and that he has the right to ownership of any interest accrued. Buyer, through this written agreement, relinquishes ownership of the accrued interest to Escrow Agent, as consideration for the expenses incurred in maintaining the account. At the consummation of this sale, the earnest money deposit shall be credited to the Purchaser. The Parties hereto understand that, under all circumstances, including default, the escrow agent will not disburse the earnest money deposit to either party until both parties have executed an agreement authorizing the disbursement or until a court of competent jurisdiction has directed a disbursement.

FINANCING: This contract is contingent upon the Purchaser obtaining mortgage financing. Purchaser shall apply within Five (5) business days for a mortgage loan through a financial institution (Bank). If Purchaser chooses to use Seller's preferred lender, Regions Bank, Wells Fargo Bank, Ameris Bank, or NBSC/Synovus and Seller's preferred attorneys, The Hanson Law Firm, P.A., then, Seller will agree to pay for deed stamps, and Regions Bank, Wells Fargo Bank, or Ameris Bank will pay or waive all other closing costs, attorney fees, and title charges except prepaid items for all types of loans, except State Housing Loans. For these closing costs to be paid, the transaction must be financed with Regions Bank, Wells Fargo Bank, Ameris Bank or NBSC/Synovus and closed at the Hanson Law Office. If a borrower is using FHA/VA or Rural Housing Mortgage, any funding fee and/or FHA MIP will be financed or paid by the buyers.

If Purchaser does not use Seller's preferred lender AND preferred attorney, Hanson Law Firm, then Purchaser shall be solely responsible for paying all other fees, including deed stamps, or costs required by the lender in connection with the loan application process and will promptly supply all documents or other information required by the Lender. Purchaser Initials
If Purchaser does not obtain loan approval and furnish Seller with a copy of a loan commitment within 10 days of the effective date of this contract or such later date as the Seller, in its sole discretion may designate, then, this contract may be terminated at seller's discretion and any earnest money shall be returned to the Purchaser. 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 contract during any such extension(s). Seller may also, at its option, require purchaser to consult with one or more mortgage lender(s) or broker(s) of Seller's choosing during this extension period. If Purchaser obtains loan approval and refuses to close or fails to apply for said loan, then, Purchaser shall be deemed to be in default entitling Seller to the remedies provided herein. 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. Unless provided by addendum attached hereto, Purchaser specifically warrants that this contract is in no way contingent upon sale, rental, settlement or other disposition of any other property owned by Purchaser. Purchaser gives permission to financial institution (Bank) to disclose any allowable pertinent information concerning Purchaser's loan to any attorney representing Purchaser or Seller and to the Purchaser's and Seller's Broker.

CLOSING AND PRO-RATIONS: Closing shall be on or before December 18, 2015, subject to such extensions as provided herein. Closing shall take place at either of the offices of Seller's preferred closing attorney, The Hanson Law Firm, P.A., 6156 St. Andrews Road, Suite 101, Columbia, South Carolina 29212, or 425 Summit Terrace Court, Building 1, Columbia, South Carolina 29229 or at such other place as the parties herein may deem appropriate. Closing can be extended at Seller's sole option for delays beyond Seller's control including, but not limited to acts of God, inclement weather, labor disputes, or difficulty in obtaining labor or materials. Contract price is subject to increase caused by items that are beyond the control of the builder such as any increase in the cost of labor, materials or any other item not within the control of the builder. Said potential increase shall only be for the actual increased cost of labor or materials and shall not include overhead or profit. The builder is to provide reasonable proof to the buyer regarding any increases to the contract price and the parties must sign an addendum to the contract incorporating any changes thereto prior to continued construction pursuant to the increased cost(s).

At closing, Purchaser shall pay to Seller the balance of the 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. Taxes and assessments shall be pro-rated between the Seller and Purchaser as of the date of closing. 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 county taxes, reservations, conditions, right-of-way and easements of record and matters to which this Contract is subject. If closing is delayed through no fault of Seller, Seller may at its option charge Purchaser a contract extension fee equal to interest then being charged or would be charged to the Seller by its lenders on the total purchase price (less all sums on deposit) during such delay.

CHANGES: 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 or its duly authorized agent in a written *Change Order*. Purchaser shall pay a \$250.00 Change Order fee, plus the added cost of the change or alteration at the time the request for the *Change Order* is made.

RESTRICTIVE COVENANTS: The Property may be subject to restrictive covenants and to the jurisdiction of a homeowners' association that charges annual assessments. The Purchaser acknowledges the documents pertaining to such restrictions or associations have been made available to him/her and that he/she has read, understand and accept same. Purchaser initials SM

HOMEOWNER'S ASSOCIATIONS: The Association Board of Directors set association dues amounts annually. The annual dues are currently \$ 225.00 at time of contract. These dues are subject to change. Purchaser shall pay at closing the pro-rated amount of the association dues for the balance of the current year. Prior to construction, the Architectural Control Board must approve any structure, including fences and outbuildings. Any provision for these structures in this contract does not constitute approval by the Architectural Control Board. It is the purchaser's responsibility to obtain this approval. Purchaser initials SM

LIMITED WARRANTY: The Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller. This limited warranty shall warrant workmanship for One (1) year and warrant the structure itself for Ten (10) years from date of closing. Said limited warranty shall be incorporated in the deed delivered at closing. Purchaser acknowledges that said limited warranty is not a maintenance agreement. FOR QUALITY ASSURANCE PURPOSES WARRANTY VISITS MAY BE VIDEO W/AUDIO TAPED.

This Limited Warranty issued to the Purchaser shall be 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, road, 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.

The issuance of a certificate of completion or occupancy, or final inspection approval by any governmental entity shall constitute certification of completion of the improvements in substantial conformity with the terms of this contract and shall also constitute a final determination, binding on the Parties hereto, that the property and improvements are in full compliance with all applicable laws, regulations and building codes.

TERMITE PROTECTION: Termite protection treatment was performed by Seller during the construction phase. Seller will furnish the Purchaser with a one (1) year termite protection bond effective as of date 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 bonds shall be solely at Purchaser's option and 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.

RADON NOTICE: Throughout the United States, a small percentage of homes experience elevated levels of radon, methane or other naturally occurring gases, which rise up and escape from the soil. Seller has performed no investigation or analysis and, thus, hereby makes no representations as to the existence or non-existence of radon or any other gases on said property. Further, Seller makes no warranty and shall have no liability in connection with the existence or non-existence of radon or any other gases.

RISK OF LOSS: In the event of a partial destruction of the dwelling by fire, windstorm, hail, earthquake, explosion or other casualty prior to the closing, the parties may elect to continue or to terminate this contract if the dwelling cannot be restored prior to the completion date.

DEFAULT: If Purchaser fails to perform as required by the terms of this Contract, at Seller's sole discretion, this contract may terminate. Upon such termination by Seller, Purchaser agrees to the following remedies: (1) Purchaser agrees to pay to Seller the entire earnest money deposit and option monies as liquidated damages, and it is agreed that this amount shall not be construed as a penalty because Seller's actual damages are difficult to ascertain; Or (2) Purchaser agrees to pay Seller's cost of enforcement of this contract.

If Seller fails to perform as required by this Contract's terms, for whatever reason, Seller shall pay to Purchaser, as liquidated damages, and not as a penalty, the amount of the earnest money deposit Purchaser paid at the outset of this Contract, less Seller's expense, whereupon both parties shall thereafter be relieved of further liability hereunder. Seller's liability for any claim hereunder shall be limited to the payment or return of the earnest money deposit.

ARBITRATION: Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10, et. Seq.

NON-RELIANCE: Purchaser hereby represents to Seller that Purchaser has not relied and is not relying upon 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 of the property or to the other matters set forth herein unless specifically reduced to writing and made a part of this Contract.

DISCLAIMER BY BROKERS/AGENTS: The Purchaser acknowledges that the Listing and Selling Broker(s) and their Agent(s): (1) Give no guaranty or warranty of any kind, express or implied, as to the physical condition of the House; (2) Give no warranty, express or implied, as to the habitability or workmanlike service of the House and any implied warranty hereby disclaimed; (3) Give no guaranty or warranty concerning (a) any certification or inspection concerning the condition of the House, and (b) the accuracy of the published square footage of the property; (4) Purchaser acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Purchaser regarding (a) projected income or economic benefit for Purchaser from rentals; (b) rental arrangements or (c) other economic benefits to the Purchaser.

REAL ESTATE COMMISSIONS: This contract has been executed in cooperation with

Elaine Cassidy of ReMax Midlands Realty
Telephone No. (cell) 803-243-9373 a licensed salesperson/broker, as **BUYER'S AGENT**. When showing **BUYER** the Property and assisting **BUYER** in the purchase of a home, the on-site sales representative, independent licensed salesperson, represents the interest of the **BUILDER** only. The **BUILDER'S** sales representative must work to obtain for the **BUILDER** the best price and terms possible and will disclose to the

BUILDER any information obtained from the **BUYER** or any other source which is material to the transaction.
**PLEASE BE ADVISED THAT THE PUBLISHED COMMISSION SPLIT IS PAID ON THE GROSS SALES PRICE
 LESS THE AMOUNT OF CLOSING COSTS PAID BY THE SELLER**

MISCELLANEOUS:

a. This Contract is binding on and for the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns; provided that Purchaser shall not assign or transfer this Contract 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 Contract.

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

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

d. All notices and demands to be given or served pursuant to terms of this Contract 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.

e. 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 Contract.

f. Purchaser acknowledges that they may be contacted by seller's associated trade partners including but not limited to preferred lender(s) and attorney by the information provided herein.

g. Purchaser acknowledges that entry upon the project/property during construction can be dangerous, as hazards may exist. Purchaser's entry shall be solely at his/her own risk. Purchaser hereby waives any and all claims against Seller for injury or loss to person or property arising out of or in the connection with entry by Purchaser or any other person accompanying him or entering at his direction or permission.

h. The provisions of this contract shall survive closing and not merge in the deed.

i. 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 obtain no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion.

j. 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.

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

l. The Parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the internet, and the signature, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

m. The Purchaser and Seller agree that the Listing and Selling Broker and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. The Purchaser and Seller agree that no course of action may be brought against the Listing and Selling Broker and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry. The Purchaser agrees that the Purchaser has the sole responsibility to obtain any such sex offender information and that said sex offender information may be obtained from the local sheriff's department or other appropriate law enforcement officials.

n. Purchaser hereby releases and relinquishes all claims against Seller for damages to property or personal injury arising after the date of this contract relating to any of the following:

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

(ii.) Any claims for repairs 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, guest and invitees of Purchaser. The deed conveying the Property to Purchase may contain a reference to this waiver.

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OTHER PROVISIONS, ETC:

Lot Premium \$3000
Gas Fireplace with white mantle and hearth \$2800
Screened Porch \$8000
Storm Door \$400
(1) extra cable drop \$150
(16) 2" faux wooden blinds \$1200
Hardwoods in foyer, dining, kitchen, hallway, and pantry \$3640. Foyer and Dining at no cost.
6' wood privacy fence @ \$20/ln ft (439 ln ft). Pin to pin. \$8780
(1) walk thru gate and (1) double gate \$600

Contingent upon closing Buyer's property which is
currently under contract

Purchaser certifies that he/she has fully read and understands this contract.

IN WITNESS whereof the parties hereto have set their hands and seals this 18th day of July
in the year 2015

WITNESSES:

Wagon Step

SELLER - GREAT SOUTHERN HOMES, INC.

BY: [Signature]

ITS: VP of Operations

Address: 90 North Royal Tower Drive, Irmo SC 29063

WITNESSES:

Elaine Cassady

PURCHASER(s):

[Signature]

Address: 96 Driftwood Ave

Elgin, SC 29045

LISTING AGENT/BROKER:

Philip Reames R&J

Jacquie E. Montgomery R&J

SELLING AGENT/BROKER:

Elaine Cassady ReMax Midlands

Great Southern Homes

AGENCY POLICY

Policy Statement

Great Southern Homes strictly adheres to the agency laws as set forth by the South Carolina Real Estate Commission and the ethics guidelines prescribed by the National Association of Realtors. Each Great Southern Homes' agent is tasked with explaining Real Estate Agency to all Customers.

DEFINITIONS

- **Agency:** A relationship in which a seller or buyer delegates to a real estate company the right to act for and represent his or her interest in a real estate transaction.
- **Client:** A person who establishes an agency relationship and agrees to be represented by an agent in a real estate transaction.
- **Customer:** A person who seeks to purchase real estate but who has not established an agency relationship and is not represented by an agent.

Great Southern Homes represents the seller. If the buyer does not have an agency relationship and is not represented by an agent then the buyer is a customer.

Acknowledgement

Upon visiting the community, as evidence by my signature below I acknowledge receiving, reading and understanding the South Carolina Real Estate Commission's Agency Disclosure Form.

7/18/15
Date

[Signature]
[Seller or Buyer]

Date

[Signature]
[Seller or Buyer]

7/18/15
Date

Elaine Cassidy
[Licensee]

Certification

As evidenced by my signature below I certify that I have not entered into an Agency Agreement/Contract with any other real estate company, other than listed below:

7/18/15
Date

[Signature]
[Seller or Buyer]

Date

[Signature]
[Seller or Buyer]

7/18/15
Date

Elaine Cassidy
[Licensee]

Yes, I do have representation. Elaine Cassidy ReMax Midlands Realty
[Agent] [Agency]

Selling agent signature:

Elaine Cassidy

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WARRANTY SERVICE ACKNOWLEDGEMENT (Rev 080125)

Great Southern Homes (GSH) provides a limited warranty on the original installation of the materials and workmanship (as defined by the SC Residential Construction Standards) of your home for the first year of occupancy from the date of closing. Routine home maintenance (i.e. changing air filters, caulking), normal wear & tear (carpet wear), resident use-misuse-negligence (i.e. water leaks from shower curtains, improper use of toilets & garbage disposals, clogged and/or overflowing toilets, sinks and sewage lines), vandalism (i.e. broken windows & doors) and acts of God are NOT covered by the GSH warranty. Likewise, any property that is used for rental purposes, the buyer acknowledges this warranty is NOT a maintenance agreement and only claims that meet the requirements as outlined in the 1-year materials & workmanship and 10-year structural limited warranty agreement will be covered.

WARRANTY PROCEDURES

All claims that require attention must be submitted in writing to the attention of the Great Southern Homes Warranty Department. You may fax the request to: (803) 699-4735 or Email a request to: warranty@greatsouthernhomes.com or mail to: Great Southern Homes: 425 Summit Terrace CL Building 2 Columbia, SC 29223

A GSH representative will contact you within 7-10 business days after we receive your request to schedule an appointment. All warranty inspections and repair work will be scheduled between 8:00 AM and 3:30 PM Monday through Friday. We will not schedule work on weekends or after 3:30 PM on the weekdays. All work will be scheduled as soon as possible after the completion of the inspection. You must make your home accessible and have an adult (at least 18 years of age) present at the time any interior work is performed at your home. We will not accept keys from homeowners nor be in your home at any time without an adult present. If a claim is determined to be covered by the warranty, GSH will repair the defect as determined by the SC Residential Construction Standards. You are responsible to remove or repair any improvements you added after the construction of your home such as wallpaper, custom paints, fences, and sprinklers. Note: for service on appliances, electrical, heating & air conditioning or plumbing you will need to contact the subcontractor or manufacturer directly. The phone numbers for these subcontractors are on a decal located inside a cabinet door under the kitchen sink. If you do not have this list of phone numbers please notify our warranty department by email to warranty@gshomes.gs and we will provide this information to you.

EMERGENCY SERVICE

A list of telephone numbers for the electrician, plumber and heating contractors is located inside a lower cabinet in your kitchen. Please call these subcontractors directly for any emergency repairs. Listed below are conditions that are considered to be emergency situations:

Heating and air conditioning systems - Loss of heat due to a malfunction of the furnace when the outside temperature is 40 degrees or below. Air conditioning malfunctions are treated as routine service and not an emergency.

Electrical systems - Circuit breaker to gas furnace or heat pump keeps kicking off.

Plumbing systems - Plumbing leaks that require the water to be shut off at the main valve or all toilets are not functional. No water supply caused by an interruption of service by the Water Company is outside subcontractor & GSH control.

TREE SERVICE, LANDSCAPE & EROSION CONTROL

GSH DOES NOT GUARANTEE THE CONTINUAL GROWTH OR LIFE OF ANY TREE, SHRUB OR GRASS. Prior to your closing all proper grading and landscaping will be completed, and it will become the responsibility of the homeowner to maintain all landscaping and grading. GSH will not replace or remove any landscaping or trees unless it is specifically stated on your pre-closing Condition Form or on your conditional sales contract. THERE ARE NO EXCEPTIONS. Any erosion of the property becomes the responsibility of the homeowner upon closing. Sprinkler systems are not covered under warranty and require maintenance by the homeowner on a regular basis.

SEALANTS

Items related to thermal expansion and contraction of building materials including nail pops and natural hairline cracks require ongoing homeowner maintenance and are not covered under the materials and workmanship warranty. For example, all caulking throughout the home must be maintained by the homeowner.

EXTREME WEATHER CONDITIONS

Your home was designed to be free of leaks under normal conditions. For example, high velocity wind-driven rain can cause damages that are not the result of normal conditions. Damages as a result of these conditions may be covered by your homeowner's Insurance Policy and are not the responsibility of GSH. You should also take necessary precautions whenever a freeze warning is in effect. This can include covering outside hose bibs, keeping cabinet doors open beneath the kitchen sink so warm air can circulate around water pipes, etc.

I acknowledge that I have read the above information and agree to the policies stated in these sections.

Homeowner: _____

Address: 2 Casey Dr, Elgin, SC 29045

Date of closing: 12/16/15

(material & workmanship warranty expires 1 yr. from closing date)

[Handwritten signature]

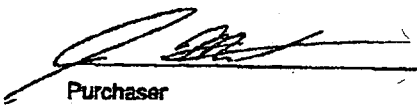
GREAT

Southern
HOMES
Hardwood's Care Waiver

STATE OF SOUTH CAROLINA

Agreement made this day of July 18, 2015 between Jonathan Mart
(Purchaser) and Great Southern Homes (Seller) pertaining to Contract of Sale
dated July 18, 2015 for property located at 2 Casey Dr. Elgin

Products covered with a moisture warranty, such as but not limited to engineered hardwood flooring, will resist damage from normal household food and beverage substances, provided the spill is removed promptly. Topical spills allowed to remain on the floor for any considerable time will damage the floor and void the warranty coverage. Plumbing accidents, leaking appliances (icemakers, dishwashers, clothes washers ect) are not topical spills and are not covered by this warranty.


Purchaser

Purchaser



1 STATE OF SOUTH CAROLINA.

2 -----x

3 Jonathan Mart, on behalf of himself and

4 others similarly situated

5 Plaintiff,

6 Case No.

7 against- 2018-CP-40-00873

8 Great Southern Homes, Inc.

9 Defendant.

10 -----x

11 June 13, 2018

12 Columbia, S.C.

13

14 B E F O R E:

15 HONORABLE DEANDREA GIST BENJAMIN

16

17 A P P E A R A N C E S:

18 HATTIE E. BOYCE, Esquire

19 Attorney for the Plaintiff

20

21 DAVIDA MATHIS, Esquire

22 Attorney for the Defendant

23

24 Aileen Butler

25 Official Court Reporter

1 THE COURT: This is case number 2018-CP-40-873,
2 Jonathan Mart versus Great Southern Homes. This is a
3 motion to dismiss and to compel. Filed by the
4 defendant.

5 MR. POWELL: Yes.

6 THE COURT: Yes, sir.

7 MR. POWELL: Warren Powell for the defendant,
8 Your Honor. I am here with my partner, Henry Wall,
9 and our associate, Ann Allison.

10 Your Honor, we move to dismiss and to compel
11 arbitration in accordance with the parties' contract.
12 Permit me a few introductory remarks.

13 First of all, I am proud to be here today
14 representing Great Southern Homes in this case and
15 this pride does not just emanate from the payment of
16 a fee.

17 There's an important difference in this lawsuit
18 then most of the lawsuits you've heard along these
19 lines. The difference between this one and the
20 others is that in this suit the plaintiff sues his
21 builder for breach of a contract seeking the
22 following; a declaratory judgement as to whether the
23 waiver of warranty of habitability is valid and
24 payment of the value. Payment of a fee of some sort
25 for the value of waiver. So, we weren't paid

1 anything for the waiver and waiver is no good unless
2 you pay the fee. So we want the fee. We want to be
3 paid.

4 The plaintiff sues for breach of contract. The
5 plaintiff could have but did not assert a claim for
6 damages resulting from defective construction,
7 defective materials, defective design of the house,
8 and in fact seeks nothing based upon their being
9 anything wrong with the homes that my client builds.
10 The plaintiff could have done that. The plaintiff
11 sued for breach of contract but does not assert any
12 of those damages. Could have done that but did not.

13 In fact, I'm informed that Great Southern Homes
14 has never been sued for breach of contract for
15 warranty of habitability. It has never been even
16 accused of such, of building a home that is not
17 habitable or somehow unsafe. It has never been sued
18 for building a crummy house even in this lawsuit. In
19 an odd way, the complaint is complimentary of my
20 client because the complaint does not allege that my
21 client did anything wrong. Doesn't seek damages in
22 any way for anything wrong with the house. Had this
23 been true, had there been anything wrong with the
24 house I'm sure Mr. McDonald would have asserted that
25 in his complaint.

1 Our motion, we seek an order dismissing the suit
2 and ordering the parties to take their dispute to
3 arbitration just as the parties' contract provides.
4 The plaintiff argues the following; the structure.
5 It was an expressed limited warranty that was
6 acquired through the purchase. The expressed limited
7 warranty issued by Structure Home Warranty LLC of
8 Denver, Colorado. They argue that this was made part
9 of the contract, of the parties' contract of sale.
10 It's an entirely different document. The structure,
11 expressed limited warranty had its own arbitration
12 provision in it which provided for different terms
13 than the arbitration provision in the parties'
14 contract.

15 Therefore, the plaintiff argues, there was no
16 meeting of the minds as to arbitration and therefore
17 arbitration is out all together.

18 The plaintiff argues also, number two, that the
19 parties arbitration clause is violative of South
20 Carolina section 15-48-10 and it's unconscionable and
21 therefore not enforceable.

22 Third, that Great Southern Homes can not have the
23 plaintiff waive the warranty of habitability without
24 consideration. And number four, the plaintiff should
25 be paid the value of the waiver.

1 Now, as to arbitration, as to the issue of
2 arbitration which is what we are here today to talk
3 about, Your Honor, there can be -- most of those can
4 be rejected or discarded by one simple application of
5 how the Courts, how the appellant courts tell us to
6 view the matter, and that is, the court severs the
7 arbitration agreement. The court is not given the
8 enormous task of trying to interpret the entire
9 contract and determine whether there is any
10 unconscionable provisions in it, whether they are
11 valid or not valid. The courts look to the
12 arbitration agreement itself and I happen to know,
13 Your Honor, that you're familiar with this routine. So
14 I will not try to bore you with a lot of the details
15 that you more than likely already know. But that
16 simple -- simple factoid, legal fact will deal with
17 most of the argument in this motion.

18 The Great Southern's and Mr. Mart's contract for
19 sale does not incorporate and does not include the
20 structure warranty issued by this Colorado company
21 for at least six reasons. And Your Honor, I had the
22 court reporter hand you up a couple of notebooks and
23 your clerk has one. I provided Mr. McDonald his.
24 And I'm actually working through the one entitled
25 exhibits.

1 One contains the motion memoranda and the other
2 one just exhibits. And I provided this. There's
3 nothing new in it but, I think to assist the court,
4 we put this together to assist the court and counsel.

5 First, the first reason it is not incorporated
6 into the same contract. To do so would be against
7 public policy. The plaintiff argues that because the
8 structure expressed limited warranty contains
9 arbitration provision and the parties contract of
10 sale contains arbitration provision with conflicting
11 terms. There was no meeting of the minds as between
12 the parties. Therefore, arbitration -- so the
13 plaintiff would argue, is out the window.

14 Your Honor, under tab-B of the exhibit notebook
15 is the parties contract. And on the third page on --
16 I'm not going to not read through it now because I
17 will be doing it later. But the third page is the
18 arbitration agreement between the parties and if you
19 notice on the first page at the top is the contract,
20 subject arbitration, with the code section in bold
21 and all caps and in bold letters, just the way the
22 statute requires.

23 I'll just point out at this time the arbitration
24 agreement nowhere incorporates the structure or
25 limited warranty into its provisions. It is

1 mentioned in another place in the contract but the
2 arbitration agreement says nothing about that. So,
3 the second document that would be useful to examine
4 at this time, Your Honor, would be under tab K, which
5 is Mr. Mart's affidavit and underneath Mr. Mart's
6 affidavit is the structure home warranty. And I want
7 to point out something on page 22. Page 22 of the
8 structure home warranty under tab K, it clearly
9 indicates under section 15, the parties to this
10 expressed limited warranty intend and agree, et
11 cetera, et cetera. No where is my client, no where
12 is the builder a party to this expressed limited
13 warranty. They are a warrantor as I will explain
14 later. But they're not a party to this agreement.
15 They have certain commitments they have to live up to
16 which they have done it.

17 On the next page I want to point this out; this
18 will help clear up, put the structure limited
19 warranty and those like it in perspective. On page 23
20 in the highlighted section there just above section
21 16. It states, note, for homes with FHA and VA
22 financing only. Then it states for homes with
23 original FHA or VA financing only and notwithstanding
24 anything written above, you -- that is the person
25 receiving the warranty -- that would be Mr. Mart in

1 this case, may elect judicial resolution of any
2 dispute as an alternative to the arbitration
3 provision set forth in this expressed limited
4 warranty.

5 So, in the structure limited warranty that was
6 issued here, it provides that for VA and FHA loans
7 that they, if they so choose, they are entitled to go
8 to Court. They're entitled to bring a suit. They're
9 not bound by the warranty provision in the contract.
10 And one might wonder why that's in there and I will
11 explain that.

12 Under tab F, in the exhibit's notebook, Your
13 Honor, you will see, code of federal regulation 24
14 CFR, 203.204. And this is the requirements and
15 limitations of a plan. That is, if afore warranties
16 which cover the homes that are guaranteed, financed
17 and guaranteed by FHA or VA they have to comply with
18 this HUD regulation here. And under subsection G you
19 will see, in the event of any dispute regarding a
20 homeowner complaint or structural claim, the
21 plaintiffs must, unless prohibited by applicable
22 law -- plans must, unless prohibited by applicable
23 law, provide for binding arbitration, proceedings
24 arranged through a national recognized dispute
25 settlement organization. The sharing of arbitration

1 charges shall be determined by the plan. A plan must
2 contain pre-arbitration conciliation provisions at no
3 cost to the homeowner, and provision for judicial
4 resolution of disputes.

5 But arbitration -- and this is important language
6 -- but arbitration, which must be available to a
7 homeowner during the entire term of the coverage.
8 contract, must be an assured recourse for a
9 dissatisfied owner. After all of this, under the
10 definition section, under that same tab F; there is a
11 definition section which they define terms in here
12 and HUD says assured ten-year protection plan or plan
13 means an agreement between a homeowner and a plan
14 issuer. That's between Colorado company that issued
15 the warranty and the homeowner. Not the builder.
16 We're not a party to it. We are -- we do have
17 certain duties as warrantor. We're not a party to
18 the contract. And in no place in the contract does
19 it incorporate the terms of this assured warranty.

20 Now, the reason that the warranty reads as it
21 does, is it's heavily regulated by HUD because
22 there's so many FHA and VA loans, particularly around
23 here where Fort Jackson and Shaw Air Force Base and
24 so on, that a builder has to conform and the
25 warranties to being sold, must conform to these

1 provisions in the federal regulations. And that's
2 why this one includes the possibility of suit if the
3 homeowner so desire, because HUD says so in order to
4 comply. But it also says, in all circumstances the
5 homeowner must have arbitration available to them
6 because it's cheaper. Thought to be cheaper.
7 Thought to be quicker. They don't want to discard
8 that. To incorporate this contract with the
9 builder's contract -- many builder's contracts read
10 similar to this one -- would violate the HUD
11 regulation because then if you claim that the
12 arbitration provisions are out you're taking away the
13 right to arbitrate from the homeowner which is
14 mandated by HUD.

15 Your Honor, we have looked for a case
16 interpreting this provision, interpreting this code
17 of federal regulation that we're talking about here
18 and in all of the United States everything we can
19 find -- before I get there I want to point out under
20 tab G is the mortgage Mr. Mart took to buy the house.
21 It is a VA loan. Also under tab G is a letter from
22 the bank indicating that the program it's under is
23 Veteran's Administration. So that brings all of this
24 into play. Under Mr. Mart's purchase he is -- his
25 mortgage and all, are underneath or under the HUD's

1 requirements and so as a matter of public policy it
2 is favored, arbitration is favored by the State of
3 South Carolina, by the federal government through the
4 FAA, and in this case by the federal government
5 through HUD.

6 The plaintiff's interpretation that these
7 contracts are merged can not be correct. As I said,
8 it would defeat not only public policy, but this
9 clear directive of HUD.

10 Now we have -- okay, that's the first reason.
11 Their interpretation would violent public policy
12 under HUD provisions.

13 Second, the structure, expressed limited warranty
14 is offered by an entirely different entity than Great
15 Southern Homes Inc. The subject code federal
16 regulations I have read to you has been interpreted
17 in only one case in the United States. And that we
18 have put under tab H, Your Honor. Been one decision
19 and it was from the United States District Court for
20 the District of Kansas. And, Your Honor, this was a
21 case in which it is permitted. My client didn't
22 choose this route. It's permitted that in this case
23 the builder was also the warrantor. Was also the
24 warrantor. The builder himself issued the expressed
25 limited warranty and apparently went through the

1 regulatory process to be able to do that. And the
2 plaintiff in this case argued that because the --
3 same thing the plaintiff is arguing here, because the
4 expressed -- because there was an arbitration
5 provision which allowed him suit in the expressed
6 limited warranty, which it had to be to comply with
7 HUD. That the arbitration should be out. Should be
8 out the window. That conflicted with the purchase
9 agreement.

10 The Court in this case, and as I say it's the
11 only one we could find that interpreted this
12 provision. The Court on pages 17 and 18 deals with
13 this in the highlighted section.

14 The Court says plaintiff's relied on HUD
15 regulation which provides as follows. And then they
16 quote the HUD regulation which I just read to you a
17 few minutes ago. And then the Court says, the
18 plaintiffs ignore that this regulation applies to the
19 ten-year home protection plan such as Pulte's
20 ten-year limited warranty. The insured ten-year
21 protection plan or plan means agreement between the
22 homeowner and plan issuer, which among other things
23 contains warranties regarding construction, and
24 structural integrity as well. The plaintiffs offer
25 no rational for applying this regulation to the

1 party's-purchase agreement. Based on the unambiguous
2 language of the purchase agreement plaintiff's claim
3 for breach of that agreement must be arbitrated.

4 The Court therefore sustains the defendant's
5 Motion to Compel arbitration on the plaintiff's claim
6 for breach of the purchase agreement and dismiss that
7 claim without prejudice.

8 So, the only case we could find in the country,
9 they make it -- the Judge there made it clear these
10 are two different agreements even though it was the
11 same builder. It was expressed limited warranty and
12 then there was the purchase agreement. Two different
13 contracts. One doesn't incorporate each other.
14 Separate agreements. And Your Honor, we respectfully
15 submit this Court should do likewise.

16 Third, the party's contract of sale did not
17 invoke the expressed limited warranty issued by the
18 Structured Home Warranty, LLC. The application was
19 signed -- that was done through an application signed
20 by Mr. Mart and that is under tab -- notebook tab I.
21 And you see their the application is dated December
22 the 18, 2015, and upon payment which was made the
23 warranty came into existence. So nothing in our
24 contract that breathed life into this expressed
25 warranty.

1 In the -- in the -- in this case the warranty was
2 not -- in the case we were talking about before, the
3 Darby case in Kansas, the warranty wasn't even
4 provided by an independent company, separate company
5 but the Court nevertheless recognized the fact that
6 the builder was wearing two hats because there were
7 two different agreements and still arbitration in the
8 purchase agreement was enforced.

9 Number four, the expressed limited warranty, as
10 to that, as I said previously, Great Southern did not
11 sign it and is not under the definitions of HUD, is
12 not a party to it.

13 Number five, the parties contract of sale and the
14 application for expressed limited warranty were not
15 signed at the same time. The plaintiff would urge
16 the Court when you have multiple documents signed at
17 the same sitting and the documents refer to each
18 other or have some relationship that they should be
19 interpreted together. Here, however, the contract
20 was signed -- that's on tab B -- signed on July the
21 18th, 2015, and the application for warranty was
22 December the 18th, 2015.

23 Number six, as a practical matter, Your Honor,
24 because of the HUD mandate, Great Southern Homes had
25 no opportunity or power to effect the language in the

1 expressed limited warranty. If they had wanted to
2 they could not have done that. They had no say so at
3 all about what the language in that warranty
4 provides.

5 Let me just observe here, just to bring it out,
6 that the builder is identified as a warrantor for two
7 years in that warranty, in the expressed limited
8 warranty. And it's true the plaintiff could have
9 sued, could have sued the builder. Could have sued
10 my client under -- if there was something wrong with
11 the house, had a claim, could have brought a suit
12 against him under the expressed limited warranty.
13 Under that warranty. What was covered the first two
14 years, something wrong with the house. Something,
15 you know, went wrong. Could have sued him because
16 that is what HUD mandates. But they didn't. In fact
17 nothing is alleged here is anything wrong with the
18 place.

19 So, under the expressed limited warranty, just as
20 the Kansas Federal Court explained, matters under the
21 purchase agreement they must be arbitrated. And in
22 the parties contract for sale the arbitration
23 provision severed from the rest of the contract and
24 determined whether it's valid.

25 The plaintiff offers case law in its memo in

1 support -- in opposition, as trying to argue that the
2 two contracts were merged somehow. Well, none are
3 applicable here and I am not going to take the time.
4 I'm not going to go through it. I'm not going to take
5 the time to go through those cases. Suffice it to
6 say one of cases the parties had signed six
7 agreements. Here we have one agreement. Another
8 case dealt with a party that the homeowners didn't
9 speak English. I think they were Spanish. Came from
10 Cuba. So, those have no application hear.

11 I will address, my remarks to page four and five
12 of our memo in reply that we filed, Your Honor.

13 Next we get to federal arbitration act.
14 Plaintiff claims that the act is not applicable
15 because this contract for sale did not involve
16 interstate commerce citing the 2012 opinion of
17 Bradley v. Brentwood Homes holding that the sale of
18 completed house does not involve interstate commerce.
19 It's the sale of real estate only. Those are not our
20 facts as I will demonstrate through the filings.

21 Here in order for Great Southern Homes to perform
22 its contract it had to build a house for Mr. Mart.
23 Bradley clearly indicated, Supreme Court although it
24 said sale of completed home without interstate
25 commerce involved. Doesn't involve interstate

1 commerce. If the home is completed at the time of
2 the contract, that would be so. They're just agreeing
3 to buy and sell real estate. Doesn't involve
4 interstate commerce. Here that's not the fact.
5 Under tab B in the exhibit number you will see on the
6 first page of the contract under section entitled
7 near the top, structures, and there are two options.
8 One is a spec model and the other is a building job.
9 As you can see building job is X'd in. So right on
10 the very first page of the contract it indicates that
11 this was a building job and it was not a spec model.
12 In the sequence, the time element of this will make
13 this clear.

14 Under tab C and D, Your Honor, are affidavits and
15 by the way, I didn't do it earlier, but here with me
16 today in the courtroom is the president of Great
17 Southern Homes, Mr. Mike Satterfield and vice
18 president, Shelton Twine. Mr. Twine provided us an
19 affidavit under tab C.

20 Tab C provides the timeline on the second page of
21 Mr. Twine's affidavit says that the contract for the
22 construction of Mr. Mart's home was signed on or
23 about July 18, 2015. The construction of this home
24 began on or about August 26th of 2015 and was
25 substantially completed by December the 10th, 2015.

1 So, at the time of the contract construction had
2 not even started on this house. And since the
3 contract preceded construction it necessarily
4 involved interstate commerce according to the case
5 that the plaintiff cites, Bradley.

6 So, in addition to that, and so there's no
7 question about this, under -- just under Mr. Twine's
8 affidavit I provided the Court three purchase orders.
9 And the first purchase order is dated after the
10 contract, August 13, 2015. And if you notice it has
11 the buyer's name on it, on the purchase order. It
12 says buyer, Jonathan Mart house, Two Casey Drive,
13 Easley. That's his address. And on it it is from
14 the purchase from 84 Lumber, 84 Pennsylvania and it's
15 for the sum of -- and this was for the propose of
16 framing and other similar matter in the sum of
17 \$29,781 and some change. The next purchase order is
18 August 13th same day, shipped to Two Casey Drive.
19 Same address. And this is from Stock Building
20 Company, Columbia. It give a P.O. box, Atlanta,
21 Georgia for the sum of \$2,788 and some change. Third
22 one from the same company, the same date, for \$3,400
23 and it is for flooring also. So we have clearly
24 there isn't any doubt there was interstate commerce
25 involved and that the contract required my client to

1 build a house. As it says, building job. And just
2 to get it out of the way, under tab J, Your Honor, in
3 the exhibits notebook is a certificate of occupancy
4 and it's not dated until December the 10th, 2015. So
5 we're from July to December, between the two. So
6 under this circumstance there's no question that they
7 were dealing -- this contract falls under the FAA.

8 Mr. Mart's affidavit under tab K says that he
9 understood that he was contracting to receive a new
10 home. Not that Great Southern Home would be
11 constructing a home for him. Well, that's hard to
12 swallow. The first page of the contract is X'd in
13 building job. Is beyond belief that Mr. Mart had not
14 viewed where his home was to be located prior to
15 signing the contract. It's a vacate lot on July 18th
16 of 2015 the date they signed the contract. So, it's
17 a little hard to stomach that he didn't understand
18 they were going to be building a house on at the time
19 of the contract.

20 For purposes of the Federal Arbitration Act, the
21 plaintiffs now claimed understanding of what he
22 thought the contract was is of no moment. Under
23 Nunoz verses Greentree case, all of the parties may
24 not have contemplated an interstate transaction at
25 the time of the contract that's just not the point.

1 The Court said, the Court uses and in-fact test. Was
2 interstate commerce employed in fact in the
3 performance of the contract. If so, then the FAA
4 applies. The plaintiff points to subparagraph I,
5 miscellaneous section of the contract, which provides
6 that boilerplate printed language, and it implies
7 there it states that the plaintiff is buying a
8 completed house. We have attached authority and cite
9 authority in our memo, Broderick and Aetna Insurance
10 provisions standard law that in a printed contract if
11 there is customized entries, whether typed or
12 handwritten, that takes precedent that will prevail
13 over the printed boilerplate language of the contract
14 and that's what we have here. Specifically, building
15 job is X'd in. Made certain --the buyer made certain
16 requests concerning construction of the home.

17 So, it's not in conflict there, the customized
18 part of the contract is -- is -- takes precedent.
19 So, in Bradley, Your Honor, is not whether the
20 purchase was for a completed house, but whether under
21 the contract the seller slash builder was required to
22 construct a house in order to fulfill his obligation
23 under that contract. Here that is indeed what we
24 have and that's discussed on page eight of our reply
25 memorandum in further depth which I would not find

1 useful at this time. It cites other cases and so on.

2 I want to mention that -- want to reiterate that
3 in matters concerning much of this there's preemption
4 in federal law. Federal is control. There is
5 substantive federal law concerning severability of
6 the contract, of the arbitration provision in the
7 contract from the remainder. So, I don't want to to
8 drop that.

9 Okay. Third, plaintiff argues that the
10 arbitration agreement is not -- that it is
11 unconscionable. Not enforceable. The arbitration --
12 as I said -- agreement must be viewed on its own,
13 separate and apart from the remainder of the party's
14 contract. It does not mean that any issues remaining
15 in the contract go away. All this means is that the
16 issues is to be decided by the arbitrator.

17 Under tab B -- under tab B is the contract. And
18 at this time I will take just a moment to read the
19 arbitration provision. It is entitled -- this is on
20 the third page of the contract. It is entitled in
21 caps and in bold, bold arbitration. Any dispute
22 between the parties hereto arising out of this
23 contract related to the contract or the breach
24 thereof, including without limitation, disputes
25 relating to the property, improvements or the

1 condition, construction or sale thereof, and the deed
2 to be delivered pursuant thereto, shall be resolved
3 by final and binding arbitration before three
4 arbitrators. One selected by each party, who shall
5 -- one selected by each party who shall mutually
6 select the third arbitrator pursuant to the South
7 Carolina Uniformed Arbitration Act. And I know also
8 for a fact Your Honor is familiar with that. I will
9 point out though, that there are not included in this
10 arbitration provision some provisions which some
11 people may find offensive. For example, a short
12 period of time to make a claim. No sort of short
13 statute of limitations or anything of that is
14 imposed. It is equal on behalf of each party. Each
15 party select an arbitrator and those two select the
16 third and then they go to arbitration and get the
17 matter resolved.

18 Now here in South Carolina, the focus is on
19 whether or not -- whether or not the arbitration
20 clause is calculated to produce a fair and impartial
21 result. Our Supreme Court has said that's what the
22 court is going to do. The arbitration clause if it
23 is designed to produce a fair and impartial result
24 and not anything horrible in it then it should be
25 enforced. This arbitration provision, this contract

1 clause, is about as plain Jane as you can get. It
2 doesn't make anything one sided one way or the other.
3 Either party can demand arbitration. It tells you
4 follow the act. The language is suppose to be on the
5 first page of the contract. It is. So, it's not --
6 the arbitration itself is not unconscionable. It is
7 clear. It is calculated to produce a fair result.
8 The court's tell us that the arbitration provision it
9 should be invalidated only by an generally applicable
10 contract; fraud, duress or unconscionability. And
11 the -- and again, in the Buckeye'd decision from the
12 United States Supreme Court they again recite, made
13 no question, made no -- cleared up any possible
14 question that the arbitration provision needs to be
15 severed from the remainder of the contract.

16 Unconscionability focusses on whether one party
17 had no choice in the matter on equal bargaining
18 provision and the contract arbitration terms were so
19 oppressive that no reasonable person would accept.
20 Whether Mr. Mart had a choice or not, you know, we
21 can debate that for a long time. The argument goes
22 that housing is a necessity, and I agree with that.
23 A single family home, however, is not a necessity.
24 And new home is even less so. But that being aside,
25 look at the party's contract arbitration provision

1 and it is fair. Calculated toward a fair decision.
2 And as aside, as I say the courts in the Parsons
3 versus the John Wieland homes case, our Supreme
4 Court says unconscionability requires the courts to
5 focus whether on whether arbitration clause is geared
6 to achieving an unbiased decision by a neutral
7 decision maker. And that's what I will submitted to
8 Your Honor has been achieved here.

9 Now, yesterday, Mr. McDonald was good enough to
10 send me several cases; three more cases that he may
11 refer to and presumably these cases are calculated to
12 demonstrate -- I believe he's provided Your Honor
13 with those three cases. I believe.

14 MR. MCDONALD: Yes.

15 MR. POWELL: And as to the first one, this is
16 United States District Court case from the Southern
17 District of Mississippi. I'm not going to be/
18 spending a lot of time on them. None of these cases
19 apply to our facts. In this case it was two
20 different arbitrations agreements signed by both
21 parties and that's not the case in this situation.
22 That's not our facts. So that's not the applicable.

23 The second, the second case is Judge Gergel's
24 case and it is Weckesser versus Knight Enterprises
25 and that involves this. It was two agreements

1 executed together, which is not our case as an aside.
2 But the arbitration contract was not signed by the
3 same parties as it is here. That's what Judge Gergel
4 was facing and he did not enforce the arbitration,
5 obviously, didn't enforce the arbitration agreement
6 because it wasn't signed by both parties.

7 The third case is Supreme Court case and this is
8 Parson versus John Weiland homes that I just cited to
9 you earlier. And the plaintiff wants to say here
10 that the warranty provision in the expressed limited
11 warranty should be incorporated into the party's
12 contract in this case. And here they say that this,
13 the South Carolina Supreme Court incorporated the
14 warranty -- or the arbitration provision in the
15 warranty booklet. Contained in the warranty booklet.
16 But the difference is, in this case, in the Parson
17 versus John Wieland homes case, the warrant booklet
18 was prepared by the same party that signed the
19 contract. That's not the situation we have here. So
20 none of these cases really apply to our facts.

21 I am sure that if I have any I will do my best,
22 Your Honor, if I have any concluding remarks after
23 McDonald's presentation I will do my best to keep it
24 short.

25 THE COURT: All right, thank you.

1 MR. MCDONALD: Thank you, Your Honor. May it
2 please the Court. John McDonald for the plaintiff
3 Jonathan Mart.

4 With me today is co-counsel Beth Richardson and
5 Dan Haltawinger. (Phonetics)

6 Your Honor, I would like to have Jonathan Mart
7 here today. He's a fine young man but he works for
8 Norfolk Southern railroad and he's literally off
9 working for the railroad. But he's very interested
10 in this case and it's a very important case to him.

11 Your Honor, this case is not a construction
12 defect case. It's not. It's not about the quality
13 of construction of the home. Those are uniquely
14 individual issues. This case is brought by Jonathan
15 Mart individually on behalf of all purchasers of
16 Great Southern Homes not regarding the quality of
17 construction, but regarding the business practices of
18 Great Southern Homes and how they, in their take it
19 or leave proprietary contract of sale, require things
20 from purchasers that we don't believe the law
21 permits. At least not the way they go about it.

22 Your Honor, I will point out one thing that
23 counsel was pointing about his client never being
24 sued, I don't know how often they have been sued but
25 once I heard that I checked the records of Richland

1 County as of June 11th of this week there was a law
2 suit against Great Southern alleging breach of the
3 implied warranty of habitability. So I don't know
4 how many others there are but I know there has been
5 one filed at least this week in checking the records
6 in Richland County. But that's -- moving on to this
7 case.

8 Your Honor, the policy -- and Mr. Powell set
9 forth what the theories in the complaint are so I
10 won't go into those because we are here on the issue
11 of arbitration. But the one guiding principle that
12 the court needs to be aware of, when we are dealing
13 with the sale of a new home our courts have jealously
14 guarded the rights of the new home buyer, and that
15 policy has been in place at least from Kennedy versus
16 Columbia in the 80's through Kirkman v. Parex in
17 2002, Smith versus D.R. Horton in 2016. And Your
18 Honor, if I may, I am no substitute for Justice Toal,
19 former Justice Toal, so I'd like to quote her from
20 her dissent in Parsons v. John Wieland Homes which we
21 provided a copy to the Court. Justice Toal wrote
22 South Carolina Courts have historically been inclined
23 to expand general contract and tort principles to
24 protect innocent homebuyers. Cases involving
25 residential construction, general contract and tort

1 principles occasionally give way to the State's dual
2 policies of protecting the homebuyer and making it
3 easier for that buyer to pursue claims against the
4 builder or seller. And she concludes by saying that
5 South Carolina's long policy of protecting innocent
6 homebuyers extends to arbitration agreements and that
7 this Court and all Courts should analyze whether we
8 have an agreement to arbitrate under state law
9 contract principles. And that's the issue with that
10 background, Your Honor, and that gloss, and that
11 guiding principle.

12 The Court, in this case the real issue is do we
13 have an agreement to arbitrate and that does not
14 evoke the federal arbitration act.

15 The cases are clear. The cases we cited, the
16 United States Supreme Court case of AT&T versus
17 Concepcion all make clear that when we're talking
18 about do we have an agreement to arbitrate that is a
19 uniquely state law matter of contract. And that's
20 what we have here. We don't have a meeting of the
21 minds on how to arbitrate. We have two conflicting
22 agreements that can't be reconciled.

23 Your Honor, if I may demonstrate how that's the
24 case. Before the Court is the contract of sale from
25 Great Southern Homes and I put it in my notebook and

1 got a tab, a red tab what I handed to the Court, a
2 tab arbitration clause. This contract -- again, it's
3 typical of many of these large builder contracts
4 where they sell to hundreds if not thousands of
5 people. It's a take it or leave it. You sign it if
6 you want the house.

7 In this contract it's a limited warranty
8 provision that expressly says what you get. What
9 warranty you get. And I'm going to come back to this
10 because it's important to understand this. But what
11 the purchaser gets, per Great Southern's term, is an
12 expressed limited warranty from a party of their
13 choosing. Now it's important to understand the
14 plaintiff and the purchasers of a Great Southern
15 Homes they don't pick the structure-home warranty.
16 That's Great Southern's choice. Great Southern, as
17 counsel pointed out, some builders choose to be their
18 own plan. Some builders choose to get another plan.
19 But that is not the choice of the purchaser. That is
20 the condition of the purchase of the home. And
21 that's the only warranty there is.

22 This says, in lieu of all other warranties you
23 get this expressed limited warranty. That's the plan
24 language of the contract of sale. It goes on to say
25 purchaser agrees to accept said limited warranty in

1 lieu of all other rights or remedies whether based on
2 contract or tort.

3 So Great Southern can't have it both ways, Your
4 Honor. They want to disclaim all warranty liability.
5 They want to substitute this expressed limited
6 warranty which is our only remedy and now they come
7 before the court to try and differentiate and
8 distance themselves from the very warranty they
9 provide with the sale of a home. They can not do
10 that. It is part and parcel of the sale and purchase
11 of the home. When it becomes operative or when we
12 apply for it is irrelevant because this is our only
13 warranty and it can't become operative until we take
14 possession of the home. Until we live in it. Until
15 the purchaser lives in it. So that's an important
16 fact to understand. They can't pretend they're a
17 stranger or somehow not a party. This is the
18 warranty. This is it. This is what we get.

19 It goes on, Your Honor, in the contract of sale
20 to have a broad arbitration class. And counsel read
21 it to the Court so I won't do that again. But it is
22 as they acknowledge a broad arbitration clause that
23 includes all claims arising out or related to the
24 contract of sale. But what counsel did not point out
25 to the Court is -- and I'm referring now to the

1 structure warranty which is exhibits of Jonathan
2 Mart's affidavit. It has got a tab in the document I
3 handed, Your Honor, beginning with section one.

4 Again, this is the only warranty covering a home
5 a purchaser buys from Great Southern Homes and to
6 suggest somehow that Great Southern is not a party to
7 it really strains credibility, Your Honor.

8 Let's go through if I may just point out the
9 ways. In fact, Great Southern is much more a part of
10 this warranty than structure. They're just the
11 administrator, paper-pushers. As Mr. Powell points
12 out Great Southern is warrantor. They are the
13 warrantor for the first couple of years. It points
14 out in the very first section, your builder is a
15 member of the structure home warranty program and
16 sold you a home that includes expressed limited
17 warranty protection. They're a member of the program
18 and to suggest somehow they have limited involvement
19 or role in this just flies in the face of plain
20 language, Your Honor. It goes on to say, in section
21 one, this warranty is an insurance back expressed
22 limited warranty provided to you by your builder. By
23 your builder. Not by structure. By your builder.
24 It goes on in subsection 8 to identify the builder as
25 the warrantor. It goes on in section 15 to say this

1 expressed limited warranty is binding on the builder
2 and you.

3 So, Your Honor, how they can suggest somehow they
4 are not a party to this, that it's not binding upon
5 them, is just totally contrary to the plain language
6 of the document.

7 Your Honor, the structure warranty in section 15
8 also contains an arbitration clause, and what I need
9 to point out to the Court that Great Southern does
10 not want to point out to the Court is the breath and
11 scope of the arbitration clause in the expressed
12 warranty. And in the brief, Your Honor, I tabbed a
13 page where I set forth the two clauses in our brief.
14 If Your Honor would care to examine side by side.
15 But it's clear that in the contract of sale that's a
16 very broad arbitration clause that applies to the
17 purchaser and the seller. It's clear. When you look
18 at the arbitration clause in the structure limited
19 warranty it's equally clear that it's very broad and
20 applies to the purchaser and the builder. It
21 actually says it right there in the language; the
22 parties to this expressed limited warranty tend and
23 agree that all claims, disputes and controversies by
24 and between the homeowner; which is Mart in this
25 case, the builder; which is Great Southern, or any

1 combination, arising out of related to this expressed
2 limited warranty.

3 Now, if it stopped there, if they stopped there
4 counsel may have a point. But it doesn't stop there,
5 Your Honor. It goes on. And it includes any and all
6 claims regarding the sale of the subject home by the
7 builder, including without limitation any claim of
8 breach of contract, negligent or intentional
9 misrepresentation or nondisclosure in the inducement,
10 execution or performance of any contract, any
11 contract, including this arbitration agreement or
12 breach of the alleged duty of good faith and fair
13 dealing, shall settled by binding arbitration in a
14 matter consistent with this agreement. So it
15 couldn't be more broad. It goes beyond the limited
16 warranty terms and it expressly includes the claims
17 related to the sale's contract. It's clear, the
18 claims we assert in this case.

19 In fact, one of the causes of action that we
20 assert is the breach of the implied covenant of good
21 faith and fair dealing. Which is right there as part
22 of that arbitration clause.

23 So, Your Honor, we have -- the only warranty we
24 have which arises from the contract of sale, there
25 are two different arbitration clauses. What do we do

1 that? This is know South Carolina case that any of
2 us have been able to find on this issue. But again,
3 it's important to remember in the Weckesser case,
4 Weckesser v. Knight Enterprises that's offered to
5 show the court the standard. When we're talking
6 about, do we have an arbitration agreement, we don't
7 get into the FAA or the Unformed Arbitration Act
8 favoring arbitration. That's for later. That's once
9 the Court finds there's an arbitration agreement,
10 then those presumptions arise. They do not arise at
11 this point at this stage. And not only that as the
12 Weckesser case points out, any ambiguities relating
13 to the arbitration agreements are to be construed
14 against the drafter, which in this case is Great
15 Southern Homes. The purchasers have no role in
16 drafting. Again, Great Southern, they could have
17 taken steps in their contract of sale to make clear
18 the scope of that arbitration clause. They didn't.
19 They made it as broad as it could be. Likewise, they
20 could have done their own plan as other builders have
21 done or chosen another plan that didn't have such a
22 broad arbitration clause. But they chose the
23 structured plan which has, as I pointed out, an
24 extremely broad arbitration clause covering the
25 parties and the issues.

1 So, Your Honor, to point out, to bring this home,
2 if the only arbitration clause was that found in the
3 expressed limited warranty you can rest assure we
4 would be here arguing that that clause applied and
5 covered the claims and we have to arbitrate. I feel
6 confident of that.

7 So, I think it's clear that they both covered the
8 parties and the claims that are at issued in this
9 case. So the question is can they be reconciled and
10 they can't, Your Honor. When you look at these two
11 clauses, and I will point out some of the material
12 differences that just can not be reconciled.

13 They have a different governing law and procedure
14 on how to arbitrate. The contract of sale says you
15 are going to go under South Carolina Uniform
16 Arbitration Act. The expressed limited warranty says
17 you going use a private dispute resolution service
18 and the FAA applies and trumps anything inconsistent
19 with it. So you have a difference there on what law
20 governs, the procedures for the arbitration. You
21 have a different process for selecting arbitrators
22 and the number of arbitrators. The contract of sale
23 says you are going to have a three-person panel with
24 each party appointing an arbitrator and those two
25 appointing a third. The expressed limited warranty

1 provisions are you're going to have a single
2 arbitrator and you either agree on that, or the Court
3 appoints the arbitrator.

4 The agreements are different in the rights of
5 appeal. You have under the contract of sale you have
6 a limited scope of review under the Unformed
7 Arbitration Act. Very limited appeal rights. Under
8 the expressed limited warranty you have very broad
9 appeal rights of the merits of the case. If the
10 homeowner doesn't like the arbitration award the
11 homeowner can appeal. So you have very different
12 rights of review from an arbitration award.

13 You have different provisions regarding the local
14 of the arbitration. Contract of sale doesn't specify
15 where the arbitration will take place. The expressed
16 limited warranty says it will take place at the home
17 or near the home.

18 You have different provisions on payment of the
19 arbitration costs and the arbitrator's fees. The
20 contract of sale says the Uniform Arbitration Act
21 governs which would allow the arbitrator to determine
22 that, who bears the cost. The expressed limited
23 warranty says the homeowner bears all the initial
24 costs.

25 So, Your Honor, we have significant material

1 differences in arbitration procedures and processes
2 in the two agreements that cover the same parties and
3 the same claims. They can not be reconciled.

4 So, you know, what's interesting, Your Honor, is
5 every case that we cite and those were provided to
6 the court to address this issue -- every Court has
7 said this is a matter of first impression. It was
8 for New Jersey. It was for Colorado. It was for
9 Mississippi in the Emory Woods case in bankruptcy
10 court. In every instance each Court built on the
11 ruling of the other. The first Court to rule that it
12 was Indolacy (phonetics) of Camden in New Jersey
13 finding conflicting clauses are unenforceable. Then
14 that was relied upon by the Suito v Highlander
15 Automotive in Florida. Conversely, then following
16 the 10th Circuit, the Federal 10th Circuit, Greyhand
17 verses Howard relied on those cases to find
18 conflicting causes are unenforceable as a matter of
19 state contract law. And then to bring it on home the
20 Emory Willis case does an excellent job for
21 synthesizing all those cases, agreeing with all those
22 rulings and in Mississippi we would do the same
23 thing. Under our state contract law if two
24 arbitration clauses conflict and can't be reconciled,
25 there's no meeting of the minds, no mutual consent,

1 no enforceable agreement.

2 In fact, Your Honor, I would commend the Willis
3 case to the Court because it lists the very issues
4 that we have here as material differences;
5 arbitration procedure is different, number of
6 arbitrators different, location, fee shifting. All
7 of those things that the Willis Court found as
8 conflicting material provisions and they're all, or
9 virtually all present here.

10 Your Honor, so we don't have to look to an
11 unpublished case from the District Court in Kansas as
12 Great Southern would have the Court do about whether
13 or not an arbitration in the warranty -- arbitration
14 in the warranty can govern claims outside the
15 warranty which is what the agreement, the structure
16 agreement purports. It covers claims far beyond the
17 warranty. And that was the issue in front of South
18 Carolina Supreme Court in Parsons v. John Weiland
19 homes. Can and arbitration provision in a builder's
20 limited warranty apply to claims outside the limited
21 warranty, which is exactly what we have here.

22 The claims asserted here are not construction
23 defect claims. They are claims based on the contract
24 and the practices of the waivers extracted in the
25 contract of sale. So in that case, Parsons v. John

1 Weiland homes, Justice Pleicones wrote the opinion,
2 said yes, the scope of that clause is broad enough
3 and as counsel has pointed out we treat these
4 arbitration agreements separately and differently and
5 so they said, following the policy of broadly
6 interpreting the scope of the clause that warranty's
7 arbitration provision applies to claims outside the
8 warranty. So to the extent there's suggestion here
9 that it doesn't, the Court need look no further than
10 the Parsons' case which clearly holds that it does.

11 Your Honor, the HUD regulation is a red herring.
12 We aren't challenging the HUD regulation. We don't
13 assert the HUD regulation. We don't rely on the HUD
14 regulation. In fact, the case cited it didn't have
15 conflicting arbitration provisions. They were not
16 conflicting and that wasn't the issue before the
17 Court. So, very different scenario hear. That case
18 has no application. Particularly in light of the
19 clear ruling of South Carolina Supreme Court in
20 Parsons.

21 So Your Honor, wrapping it up. That is the issue
22 really. Do we have agreement to arbitrate and
23 because we don't the Court need not go any further.
24 So, I'm not going in the interest of time, and I know
25 Your Honor is familiar with the issues. We've raised

1 all the issues in our brief addressing the scenario
2 that Great Southern advances that the only applicable
3 arbitration provision is one in the contract of sale.
4 I would just refer, we'll stand on matters in our
5 brief. I will not take the Court's time up with
6 those issues because we believe that it's clear that
7 we have a conflicting set of arbitrations classes
8 that govern the same parties and the same claims and
9 can't be reconciled that's the end of the inquiry.
10 There is no meeting of the minds. There is no
11 agreement to arbitrate.

12 Your Honor, I would say this, there has been a --
13 we think that's end of the inquiry. If the Court
14 were inclined, goes to the issue whether we have an
15 agreement to arbitrate to consider matters factual --
16 alleged factual matters submitted through affidavits,
17 we -- I'm compelled to move to strike the
18 supplemental affidavit, supplemental affidavit of
19 Shelton Twine because it is not appropriate, Your
20 Honor. It is full of opinion. It is full of
21 speculation. It touches on no relevant issues. So I
22 don't believe it should be considered and I would ask
23 the Court to strike that affidavit and not consider
24 it. But I would say this, if the Court were to
25 disagree and find that there are material issues in

1 that supplemental affidavit then my request would be
2 that we stay a ruling and we be allowed to conduct
3 some limited discovery because we have been
4 prejudiced. I can't address the issues that he
5 raises in their on a motion to dismiss stage without
6 having any discovery. So I would just say I don't
7 think it's necessary, but in fairness to the
8 plaintiffs we would ask if the Court determines that
9 the issues in that affidavit are material to its
10 ruling, we need the opportunity to have a more
11 complete record because we're prejudiced by a late
12 submission of affidavit of a party we have no rights
13 to conduct discovery on. But again, we don't need to
14 to go there I don't think. We clearly, as matter of
15 law, it is clear we have conflicting arbitration
16 provisions covering the same parties, covering the
17 same claims. It can't be reconciled. No agreement
18 to arbitrate. The motion to should be denied.

19 Thank you.

20 THE COURT: Let me ask you just one question.
21 Your position on the FAA argument, is that we don't
22 even get there because there is not an agreement to
23 arbitrate?

24 MR. MCDONALD: That's correct, Your Honor. Yeah.
25 As I cited the AT&T Mobility versus Concepcion case

1 563 U.S.333, the FAA does not require arbitration
2 provision to be enforced if the provisions defective
3 for reasons other than public policy or
4 unconscionability. And other cases are replete with
5 these references. When we're talking do we have an
6 agreement to arbitrate we're not dealing with FAA.
7 So, it just doesn't apply to the initial analysis of
8 do we have agreement to arbitrate. That is purely a
9 state contract law issue.

10 THE COURT: Thank you.

11 MR. POWELL: I will be brief.

12 THE COURT: Yes, sir.

13 MR. POWELL: Your Honor, I would partially agree
14 with Mr. McDonald's statement, whether there's an
15 arbitration agreement, that's right. That is
16 interpreted in terms of traditional contract
17 principles. Was there an agreement. What was the
18 agreement and so on. However, in interpreting
19 unconscionability and determining whether it is
20 unconscionability or not you look to federal law does
21 take a hand at that table because in that situation
22 you sever the arbitration agreement from the
23 remainder of the contract. There can be some
24 unenforceable or unconscionable provisions in the
25 remainder of the contract that doesn't -- the fact

1 that it goes to arbitration doesn't mean that those
2 go away. They have a full right. The plaintiff has
3 a full right to voice that, to try to advance that,
4 to say that the waiver is invalid or whatever they
5 want to say. It just doesn't fool the arbitrator.

6 Your Honor, Mr. McDonald --

7 THE COURT: Let me ask you one question.

8 MR. POWELL: Yes. Yes, ma'am.

9 THE COURT: In his argument, and that's probably
10 where you're going. His argument that the -- looking
11 for the page in here -- regarding the limited
12 warranty --

13 MR. POWELL: Yes, ma'am.

14 THE COURT: -- under this contract.

15 MR. POWELL: Yes, ma'am.

16 THE COURT: And that the limited warranty is
17 offered exclusively I guess, or I think his argument
18 is that the purchaser had to accept the limited
19 warranty provided by the seller. Is that correct?

20 MR. POWELL: Yes, ma'am, that's mandated by HUD.
21 HUD says when you -- in the CFR that I provided the
22 Court, it provides in there that the seller must
23 provide these. The seller has to pay for it. So if
24 we did anything else it would be in violation of that
25 federal regulation.

1 THE COURT: All right. And so his position is
2 that the two contract, because of that provision in
3 the original contract that I guess that it's
4 incorporated?

5 MR. POWELL: That's what they are trying to say.
6 And as the Kansas court said, Your Honor, that no,
7 they're two separate contracts. They're two separate
8 agreements. One deals with limited warranty. With
9 the provisions under the limited warranty.

10 I would point out in this case, Your Honor, this
11 lawsuit as Mr. McDonald admits to has nothing do with
12 any of the warranties here. They're not claiming
13 that there was something wrong with the house. Mr.
14 Mart never made any claim under the structure
15 warranty at all. All of this is being created to
16 avoid arbitration. They don't want to arbitrate. So
17 what they do is they try and create this conflict.

18 None of the cases he cited dealt with a situation
19 in which you had a limited warranty provided was not
20 signed by the -- provided by an independent
21 company -- not signed by the builder. Sure, the
22 builder has responsibilities to the homeowner and
23 under the law and under HUD they got to act within
24 the first two years. They have got to respond to any
25 claims made. None were made here. None were made.

1 Very few -- very few structure warranty claims
2 have ever been made by this builder . As to what
3 happened Monday morning, you know, the affidavits
4 from my client preceded Monday morning. So, I don't
5 know about any recent suit. I'm not aware of that.
6 But prior, to our knowledge, there never had been a
7 case where they have been sued for breach of warranty
8 of habitability. No one ever suggested that because
9 they keep a vigorous warranty program enforced.

10 Now, Mr. McDonald says that it all comes down to
11 John Weiland case and that that's exactly what we
12 have here. Well, as I said before, I respectfully
13 disagree. The John Weiland case could be as far from
14 this case as you can imagine.

15 To begin with the first thing I would point out
16 that is that arbitration was compelled in that case.
17 Okay. And that shows you the breath and how
18 significant the Court looks to enforce arbitration
19 because as I am sure Your Honor knows, United States
20 Supreme Court has corrected the paper of our Supreme
21 Court a time or two and has told when they went too
22 far in denying arbitration. Here, they compel
23 arbitration even though the warranty was in a
24 separate booklet. But the difference between that
25 case and the one we have here is that in the Parsons

1 versus Weiland homes it was the builder that provided
2 the booklet and wrote the booklet. The builder
3 itself. So they're saying, look, we're not going to
4 let the other party out of arbitration just because
5 they didn't sign the arbitration clause. We're not
6 going to let them out of that. That's what was
7 involved in the Parson's case. And the Court was all
8 over the place. I mean, you know, the Chief Justice
9 -- Justice Pleicones wrote the majority opinion.
10 There were two concurring, one dissenting opinion.
11 But that case it doesn't have anything to do with us.
12 We just were not a party to it. As I said, we have
13 responsibility. And as the Kansas Federal Judge
14 observed, you have a warranty agreement and you have
15 a contract for sale agreement. They're two different
16 things. And if they wanted to sue us under the
17 warranty agreement they could have done that. What
18 they're trying to do is to say because you got this
19 responsibility by the builder under the warranty
20 agreement then that should negate the arbitration
21 provision in the contract for sale. And Judge, there
22 isn't any case that he has offered that did that,
23 that just because under a warranty similar to this
24 one where it was imposed or incorporated into the
25 other.

1 The final thing I'm going to say about it, judge,
2 if that were true, if Mr. McDonald was correct about
3 that then it would directly violate, and he's
4 throwing the baby out with the bath water. He's
5 saying no arbitration. Okay, that would be the
6 result of the Court's ruling. There would be no
7 arbitration here because you got one contract that
8 says one thing, another contract that says another,
9 and there's no arbitration and that conflicts with
10 the federal mandate where the homeowner can not be --
11 they can sue if they want too but the language I read
12 to you right out the code of federal regulations says
13 they must be provided the remedy of arbitration. So
14 that's why it can not be correct. And as I say, its
15 -- you know, much academic in this case because there
16 was no accusation unlike just about every other case
17 we've seen, there was no accusation in this case that
18 there was anything wrong with the house.

19 Your Honor, I stand ready to answer any questions
20 you might have.

21 THE COURT: All right. Mr. McDonald, what is the
22 plaintiffs alleged injury?

23 MR. MCDONALD: Pardon, Your Honor?

24 THE COURT: What is the plaintiff's alleged
25 injury?

1 MR. MCDONALD: Your Honor, we rely on the case of
2 Kirkman v Parex that says when you recognizes the
3 fundamental importance of the implied warranty of
4 habitability in the sale of new home and that
5 warranty has to be expressly bargained for and the
6 builder has to give something to the buyer for
7 waiving that very important warranty and that doesn't
8 happen here. So we have our momentary injuries, we
9 believe we're entitled to recovery of the fair value
10 of that waiver. It has a value in that it confers a
11 benefit to Great Southern and we're entitled to be
12 paid for that. And further, we are seeking
13 declaratory relief as to whether these -- that
14 warranty waiver is effective or whether that warranty,
15 in fact goes away.

16 Your Honor, if I may address briefly. Very
17 briefly some points made by counsel just now. The
18 HUD things, it's a good sound bite. It's a red
19 herring for several reasons. HUD doesn't regulate
20 the builder's warranties. So Great Southern Homes
21 was absolutely free to say we will warrant the
22 habitability of the home, we'll warrant the fitness
23 of the home. We'll warrant everything. And in
24 addition to that, we will give you this plan because
25 the VA loans require some additional plan. They

1 don't do that. They say, we don't warrant anything
2 and the only warranty you get is this. And it's
3 important also to realize as I pointed out, we're not
4 here on defect claims. We're here on claims related
5 to the contract. And if they have somehow violated
6 HUD, well then they've done that and that's their
7 problem. But they can't use matters that they
8 created. The suggestion somehow the plaintiffs have
9 created this is nonsense. These documents are
10 uniquely Great Southern's. The purchaser has no
11 control over it and so to suggest if it's a conflict
12 it's of their creation and that should not work to
13 this benefit.

14 Thank you. Any other questions I'm happy to
15 answer.

16 THE COURT: All right.

17 MR. POWELL: Your Honor, I just simply add, since
18 I'm suppose to talk last I feel like I need to
19 respond to that.

20 Your Honor, the co-defendant regulations speak
21 for itself. If you're going to have an expressed
22 limited warranty apply to -- Chuck's correct, that it
23 doesn't apply to all cases. But it applies to VA or
24 FHA loans and that's what we have here. That's what
25 the plaintiff had. And that section specifically

1 addresses, if you're going to write an expressed
2 warranty for a property, a loan guaranteed by the FHA
3 or VA you got to comply with that section. So that
4 is absolutely true.

5 Now it may not apply to somebody who
6 conventional financing or some other type, but it
7 applies to them. And so that's what we got in this
8 case. So, we had zero impute in writing that code
9 federal regulation and it is relevant because that is
10 what mandates the language. Much of the language in
11 the agreement particularly operative part.

12 Thank you for your time, Your Honor.

13 THE COURT: All right.

14 MR. MCDONALD: Your Honor, the last thing. We
15 don't need to even go there because the ruling of
16 this Court could be that the claims asserted they are
17 under the warranty. They arise out of the contract.
18 So we don't even need to go there. We don't need to
19 offend HUD.

20 We can find for these claims asserted by this
21 plan on behalf of myself and the class. They are
22 unrelated to that. They are governed by conflicting
23 procedures. Now, I said all I have to say. Thank
24 you, Your Honor.

25 THE COURT: All right. So what I am going to do

1 is obviously I am going to take this under advisement
2 and I think I have another one under advisement.

3 MR. MCDONALD: No, ma'am we're done with that
4 one.

5 THE COURT: Well, I have another one. I get one
6 every week that of have these motions to dismiss and
7 compel. What I will do is if you all would like to
8 provide proposed orders I'll take a look at that and
9 then I'll take a look at this along with the other
10 research and I will try and get something back to you
11 some time soon.

12 MR. POWELL: Thank you for your attention.

13 MR. MCDONALD: Thank you, Your Honor.

14 THE COURT: Thank you all.

15

16 (END OF TRANSCRIPT)

17

18

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C E R T I F I C A T E

I, the undersigned Aileen Butler, Official Court Reporter
for the 16TH Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate, and
complete transcript of record of all the proceedings in the
captioned case, in the Circuit Court for Columbia County, South
Carolina, on the 13th day of June, 2018.

I do further certify that I am neither of kin, counsel, nor
interest to any party hereto.

October 25, 2018

Aileen Butler

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CIVIL ACTION NO. 2018-CP-40-00873
Jonathan Mart, on behalf of himself and	)	
others similarly situated,	)	
	)	
Plaintiff,	)	NOTICE OF MOTION TO DISMISS AND
	)	TO COMPEL ARBITRATION
v.	)	
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

TO: CHARLES H. McDONALD, ESQUIRE, TERRY E. RICHARDSON, JR., ESQUIRE,
THORNWELL F. SOWELL, ESQUIRE AND BETH B. RICHARDSON, ESQUIRE,
ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Defendant Great Southern Homes, Inc. ("Defendant"), by and through its undersigned counsel, will move ten (10) days after this notice or as soon as practicable before this Honorable Court to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6), SCRCP, because the Plaintiff is bound by an arbitration clause requiring him to submit the issues presented or implied in Plaintiff's Complaint to binding arbitration.

This motion is based upon the pleadings, the Rules of Civil Procedure, all applicable state and federal statutes, any memoranda submitted, and additional matter presented by Defendant at the hearing before this Honorable Court.

ARGUMENT**I. PLAINTIFF'S EXCLUSIVE REMEDY IS THROUGH BINDING ARBITRATION.**

South Carolina courts have adopted the policy of favoring arbitration to the point that, "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)). Should the Plaintiff resist arbitration he has the burden of proving that the claims asserted in this action are unsuitable for arbitration. *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776, S.E.2d 91, 94 (Ct.App. 2015).

Plaintiff entered into a contract to purchase a home to be built by Defendant. (Complaint, with Exhibits, attached as Exhibit 1, "the Contract"). The Contract contains an arbitration clause that reads:

ARBITRATION: Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, *et Seq.*

Furthermore, the first page of the Contract contains the following provision in bold, underlined, capital letters: "**CONTRACT SUBJECT TO ARBITRATION (S.C. CODE 15-48-10) version040215**" (Exhibit 1).

In his Complaint, Plaintiff alleges that the inclusion of language disclaiming the implied warranty of habitability in the Contract (1) constitutes a breach of contract and breach of

Defendant's duty of good faith and fair dealing; and, (2) unjustly enriched Defendant. Plaintiff also seeks a declaratory judgment concerning his warranty rights under the Contract. Clearly, the allegations fall squarely within the Contract's requirement that "any dispute between the parties arising out of this contract . . . shall be resolved by final and binding arbitration." (Exhibit 1, ARBITRATION Paragraph).

Here, to the extent the South Carolina Uniform Arbitration Act controls, the arbitration provision is valid under South Carolina law. S.C. Code Ann. § 15-48-10 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 Ann. § 15-48-10.

Further, 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 not realistic to suggest that the building materials will be made exclusively in South Carolina. See *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594-95, 553 S.E.2d 110, 117-18 (2001), (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 (1977) (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 Munoz 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, 841 (1995) (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, 339, 131 S. Ct. 1740, 1746 (2011).

The Fourth Circuit has held that to compel arbitration under the FAA, a party must show:

- (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (citing *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002)). If a party resists arbitration, the resisting party

bears the burden of proving the claims are unsuitable for arbitration. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

The Federal Act applies to arbitration agreements in contracts “evidencing a transaction involving [interstate] commerce,” 9 U.S.C. § 2, but does not require proof by affidavit or other specific evidence of the nexus to interstate commerce. Where, as here, the party seeking arbitration alleges that the transaction is within the scope of the Act, and the party opposing application of the Act does not come forward with evidence to rebut jurisdiction under the federal statute, we do not read into the Act a requirement of further proof by the party invoking the federal law.

Maxum Founds, Inc. v. Salus Corp., 779 F.2d 974, 978 n.4; see also *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 (4th Cir. 2012).

Moreover, according to the United States Supreme Court, “unless the challenge is to the arbitration clause itself, the issues 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, 1209 (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 this action the Plaintiff does not suggest that the arbitration provision is unenforceable. Rather, the Plaintiff attacks a single provision in the Contract dealing with the waiver of the implied warranty of habitability. See Complaint Paragraphs 3, 10, 11, 18, 19, 24 and 28. This is a subject exclusively in the purview of the arbitrator, as it relates to a “dispute between the parties hereto arising out of this contract” (Exhibit 1, ARBITRATION Paragraph); see *Cardegna*, 546 U.S. at 445-46, 126 S. Ct. at 1209.

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.

Respectfully submitted,

BRUNER POWELL WALL & MULLINS, LLC

s/Warren C. Powell, Jr.

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Attorneys for Defendant

Columbia, South Carolina
April 16, 2018

Exhibit 1

Complaint with Exhibits
2018-CP-40-00873

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Jonathan Mart, on behalf of himself and others similarly situated

Plaintiffs

vs.

Great Southern Homes, Inc.

Defendant(s)

Submitted By: Charles H. McDonald
Address: McDonald Law, LLC
P.O. Box 96
Columbia SC 29202

ROA 098
IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2018-CP - 40- 00813

SC Bar #: 11580
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Other:
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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 cases that are NOT E-Filed. 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. This form is NOT required to be filed in E-Filed Cases.

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)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Previous Notice of Intent Case # 20 - NI - ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☒ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Incapacitated Adult Settlement (790) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680) ☐ Interpleader (690)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of-State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670) ☐ Other (799)		

Submitting Party Signature:

Date: 2/12/18 ROA 098

SCCA 1234 102/2018

ELECTRONICALLY FILED - 2018 Apr 16 4:24 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4000873

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Jonathan Mart, on behalf of himself and
others similarly situated,

Plaintiffs,

v.

Great Southern Homes, Inc.,

Defendant.

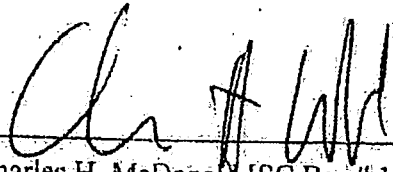
IN THE COURT OF COMMON PLEAS

Case No.: 2018-CP-40-

SUMMONS

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer on the subscribers at Post Office Box 96, Columbia, South Carolina 29202, within thirty (30) days of the date of service, exclusive of such day. In the event you fail to answer within the stated time, judgment by default will be rendered against you for the relief demanded in the Complaint.


 Charles H. McDonald [SC Bar # 11580]
 MCDONALD LAW, LLC
 Post Office Box 96
 Columbia, SC 29202
 (803) 929-0096
 Email: chuck@belserpa.com

Counsel for Plaintiffs

February 12, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Jonathan Mart, on behalf of himself and others similarly situated,	)	Civil Action No. 2018-CP-40-_____
	)	
Plaintiffs,	)	
vs.	)	<u>CLASS ACTION COMPLAINT</u>
Great Southern Homes, Inc.,	)	(JURY TRIAL DEMANDED)
	)	
Defendant.	)	
	)	

Plaintiff Jonathan Mart, on behalf of himself and all others similarly situated, complaining of the Defendant Great Southern Homes, Inc. ("Great Southern") would respectfully show as follows:

INTRODUCTION & NATURE OF THE ACTION

Defendant Great Southern is a builder and seller of new homes in the state of South Carolina and advertises itself on its website as the "nation's 62nd largest builder" as well as the "3rd fastest-growing private builder in the nation."¹ 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 Great Southern vis-à-vis the new home buyer, our Supreme Court ruled that the warranty of habitability can be waived or disclaimed only if the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. Nevertheless, and in contravention to this long-standing precedent,

¹ See Great Southern Homes News Page available at <http://www.greatsouthernhomes.com/news/> (last visited January 22, 2018).

Defendant Great Southern unlawfully and uniformly requires all new home buyers, including Plaintiffs, to waive the warranty of habitability *without* providing the homebuyers any compensation for such waiver as required by South Carolina law.

This is a proposed class action under Rule 23, SCRPC, seeking money damages and declaratory relief, to redress Defendant Great Southern's uniform and improper practice of requiring purchasers of its new homes in South Carolina to waive the valuable warranty of habitability without providing to purchasers any compensation for such waiver.

PARTIES AND JURISDICTION

1. Plaintiff resides in Kershaw County, South Carolina, having purchased a new home from Great Southern in the Longview North subdivision in Kershaw County in 2015.
2. Great Southern is a large residential homebuilder headquartered in Irmo, South Carolina, and is one of the largest homebuilding enterprises in the United States.
3. The matters complained of herein arise from Great Southern's unlawful and uniform waiver of the implied warranty of habitability contained in Great Southern's Contract for Sale of new homes in South Carolina to purchasers of unequal sophistication and bargaining power.
4. This Court has jurisdiction over the parties and the subject matter of this action.
5. Venue is proper in this forum as Great Southern is headquartered in Richland County.

THE CLASS MEMBERS

6. The members of the putative class include all persons, excluding Great Southern's agents or principals, who have purchased a new home located in South Carolina from Great

Southern using a Contract for Sale or materially similar Sales Contract as attached as Exhibit 1 and more particularly described in the paragraphs below.

7. As part of the sale of the new home by Great Southern, all class members were uniformly required to waive and forego valuable warranty rights without compensation to which they were entitled.

8. All class members have been harmed by the unjust conduct of Great Southern and its agents.

FACTS

Great Southern's Contract for Sale & Sales Practices

9. Great Southern requires purchasers of its homes to execute Great Southern's "Contract for Sale."

10. This Contract for Sale 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 Great Southern.

11. One of the implied warranties that Great Southern requires its purchasers to waive is the implied warranty of habitability—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.²

² Although not the subject of this action, consistent with its scheme to avoid standing behind its residential homes, Great Southern also disclaims and refuses to warrant that its homes are even suitable for "residential purposes." (See Exhibit 1 ¶ LIMITED WARRANTY).

12. 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 Great Southern.

13. In lieu of the critical and essential implied warranties that Great Southern makes all of its purchasers waive in the Contract for Sale, Great Southern substitutes a dubious limited warranty through a third-party warranty company.

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

15. Upon information and belief, the "Limited Warranty" received by a purchaser of a Great Southern home is usually from StrucSure Home Warranty, LLC. This warranty is exceptionally limited, excluding material matters such as building code violations and incomplete construction items.

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

17. In certain material respects, Great Southern's Contract for Sale is unlawful, unfair, and benefits only Great Southern and its affiliates at the expense of homebuyers.

Waiver of the Implied Warranty of Habitability in South Carolina

18. A seller of a new home cannot disclaim the implied warranty of habitability unless the disclaimer was "(1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." *Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006).

19. The South Carolina Supreme Court has specifically 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. Great Southern and its agents have had actual or constructive knowledge of this ruling since 2006, yet Great Southern and its agents continue to operate the improper warranty scheme described above all to the detriment of the purchaser of a Great Southern 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 20 are re-alleged and incorporated herein.
22. Plaintiff entered into an enforceable and valid contract with Great Southern by executing Great Southern's "Contract for Sale" in connection with the purchase of a new Great Southern home for which Plaintiff paid valuable consideration.
23. The actions and conduct of Great Southern constitute a breach of the duty of good faith and fair dealing implied in every contract, including the Great Southern Contract for Sale.
24. As a direct and proximate result of Great Southern's actions, Plaintiff has suffered actual damages in the form of the fair value of the waiver of the implied warranty of habitability which Great Southern intentionally avoided paying the Plaintiff through its scheme set forth above.
25. Plaintiff is entitled to judgment against Great Southern 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 25 are re-alleged and incorporated herein.
27. Great Southern has received a significant benefit from the Plaintiff 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. Great Southern has realized the full benefit of Plaintiff's waiver and release of these fundamental warranty rights.
29. It would be a gross injustice for Great Southern to continue to reap the benefit of this "bargain" with the Plaintiff without paying fair value for the Plaintiff's waiver and release of important warranty rights and specifically the warranty of habitability.
30. Plaintiff is entitled to recover such fair value from Great Southern and seeks judgment against Great Southern 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 30 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 of implied warranty of habitability without separate consideration contained in Great Southern's Contract for Sale; and
 - b. The validity of Great Southern's purported transfer of all remaining warranty obligations to a third party.

CLASS ACTION ALLEGATIONS

33. The allegations of Paragraphs 1 through 32 are re-alleged and incorporated herein.

34. Pursuant to Rule 23, SCRCP, the Plaintiff Class for whom Plaintiffs seek to represent includes: "All persons, excluding Great Southern's agents or principals, who have purchased a new home located in South Carolina from Great Southern using the 'Contract for Sale' or materially similar purchase agreement."

35. Upon information and belief, the size of the class is so numerous that joinder of all members of the Plaintiff Class is impractical.

36. Plaintiff does not have any interests antagonistic to or in conflict with the interests of the Plaintiff Class.

37. Counsel for Plaintiff are experienced in complex civil litigation, well versed in the issues presented in this matter, and have extensive experience in handling class actions in both state and federal court.

38. There are questions of law and fact common to Plaintiff and all members of the Plaintiff Class that predominate over any individual questions of law and/or fact, including the validity of the purported waivers of fundamental warranty rights in Great Southern's Contract for Sale and the consideration to which Plaintiff and all members of the Plaintiff Class are entitled for such waivers.

39. The claims of Plaintiff are typical of the claims of all members of the Plaintiff Class in that the same or materially similar proprietary Contract for Sale were used in each new home sales transaction involving members of the Plaintiff Class.

40. Class treatment of the matters at issue in this case is superior to the alternatives, if any, for the fair and efficient adjudication of such issues because such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum

simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that would be involved in numerous individual actions.

41. The amount in controversy exceeds one hundred dollars for each member of the class.

42. Upon information and belief, the members of the Plaintiff Class are readily ascertainable from Great Southern or other third party's business records.

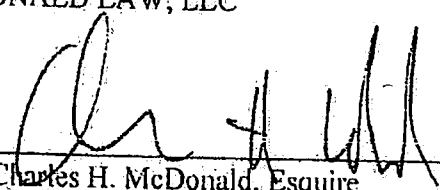
43. Plaintiff is not aware of any difficulty in the management of this action that would preclude it from being maintained as a class action.

PRAYER FOR RELIEF

WHEREFORE, having complained of Defendant Great Southern and other entities for which Great Southern is legally responsible, Plaintiff requests the following relief:

- a. An order: (i) certifying a Plaintiff Class pursuant to Rule 23, SCRCP; (ii) appointing Plaintiff as representative of the Plaintiff Class; and (iii) appointing the undersigned as counsel for the Plaintiff Class;
- b. Pursuant to the First and Second Causes of Action: (i) an award of actual and compensatory damages for Plaintiff and each proposed class member in the amounts established at trial together with interest thereon as permitted by law; and
- c. Pursuant to the Third Cause of Action, a declaration regarding the validity of the waiver and release of certain warranty rights contained in the Great Southern Homes Contract for Sale; and
- d. Attorney's fees if permitted by law along with all taxable costs of this action as may be allowed by this Court; and
- e. For such other relief as the Court may deem appropriate.

McDONALD LAW, LLC

By: 

Charles H. McDonald, Esquire
P.O. Box 96
Columbia, SC 29202
Telephone: (803) 929-0096
chuck@belserpa.com

and

Terry E. Richardson, Jr., Esquire
Matthew A. Nickles, Esquire
Brady R. Thomas, Esquire
Richardson, Patrick, Westbrook & Brickman,
LLC
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812
Telephone: 803.541.7850

and

Thornwell F. Sowell, Esquire
Beth B. Richardson, Esquire
Sowell Gray Robinson Stepp & Laffitte, LLC
1310 Gadsden Street
P.O. Box 11449
Columbia, SC 29211
Telephone (803) 929-1400

Counsel for Plaintiffs

Columbia, South Carolina
February 12, 2018

EXHIBIT 1

Home Sale Information SheetNew Home Info

Neighborhood: Longview North
 Lot #: 34
 Plan: Beaujolais B
 Address: 2 Casey Dr., Elgin, SC 29045

Build Job? ☒ Yes ☐ NoCustomer Contact Info

Homeowner: Jonathan Mart
 Phone (Cell): [REDACTED]
 Phone (W): [REDACTED]
 Address: 9 Driftwood Ave, Elgin, SC 29045

Email: [REDACTED]

Closing Info

Date: December 18, 2018
 Attorney: Hanson Law Firm

Buyer Agent Info

Company: ReMax Midlands Realty
 Agent: Elaine Casady
 Cell: [REDACTED]
 Email: [REDACTED]
 Commission: 3% + 1% Bonus
 Is this a RELO? ☒ YES or ☐ No (circle one)

Selling Agent must sign:

*Elaine Casady*Mortgage Info

Institution: Ameria
 Agent: Alicia Blavins
 Phone: 803-637-7001
 Email: Alicia.blavins@ameriabank.com
 Type/Plans: VA

** Special Island **Contract Info

Sales Price: [REDACTED]
 No Closing Costs paid with Outside Attorney
 Deposits:

1.) \$1000 for Earnest Money

Listing agent Info

Contract Date: 7-18-16
 Company: R&J Camden
 Agent: Philip Reames
 Co-Agent: Jackie B. Montgomery
 Floater: [REDACTED]

After Receipt of Ratified Contract (usually 1-2 business days) please call:

For Walk Through Date: Please contact closings@greatsouthernhomes.com
 Once Walk Through date & time has been established, Call: Hanson Law Firm at 803-798-9446-
 Office (803-760-0203-FAX) to set up official closing date. Address: 6163 St. Andrews Rd., Suite
 101 Columbia, SC 29212
THIS INFORMATION SHEET IS NOT A LEGAL DOCUMENT - THIS PAGE FOR INTERNAL USE ONLY

CONTRACT SUBJECT TO ARBITRATION (S.C. CODE 15-48-10) version 040215**CONTRACT FOR SALE**

This Contract for Sale is entered into between **GREAT SOUTHERN HOMES, INC.**, a South Carolina corporation, hereinafter referred to as "Seller", and Jonathan Mart hereinafter referred to as "Purchaser", whether one or more. Purchaser's phone numbers: (Home) _____ (Work) _____ (Mobile) _____ (Email) _____

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, hereinafter referred to as the "property", situated in Kershaw County, and described as Lot 34 in the Longview North Subdivision, also known as 2 Casey Dr. Elgin, SC 29045 (Property Address).

STRUCTURES:

() **SPEC MODEL** The structures on the property are constructed, except for the items, if any, included within the allowances set forth below. Purchaser has conducted a site visit, is purchasing the property based upon this site visit and is not relying upon any model or plans and specifications, MLS/Internet pictures or listing information, or any other sales collateral information.

(X) **BUILDING JOB** The structures shall be constructed on the property in substantial conformance with those certain plans and specifications, as attached. Said plans and specifications shall supersede any models, advertising materials or other representations. Where Seller is unable to obtain exact specified materials through Seller's usual supply sources Seller reserves the right to substitute materials of similar pattern, design, and quality or as otherwise necessary.

PRICE:

Total Sales Price \$

This offer is accompanied by an earnest money deposit of \$ 1,000 by Purchaser's Check # 2560. Purchaser and Seller authorize Russell & Jeffcoat as escrow agent, to hold and disburse the earnest money according to the terms of this agreement. Buyer agrees to and understands that earnest money may be deposited in an interest-bearing escrow account and that he has the right to ownership of any interest accrued. Buyer, through this written agreement, relinquishes ownership of the accrued interest to Escrow Agent as consideration for the expenses incurred in maintaining the account. At the consummation of this sale, the earnest money deposit shall be credited to the Purchaser. The Parties hereto understand that, under all circumstances, including default, the escrow agent will not disburse the earnest money deposit to either party until both parties have executed an agreement authorizing the disbursement or until a court of competent jurisdiction has directed a disbursement.

FINANCING: This contract is contingent upon the Purchaser obtaining mortgage financing. Purchaser shall apply within Five (5) business days for a mortgage loan through a financial institution (Bank). If Purchaser chooses to use Seller's preferred lender, Regions Bank, Wells Fargo Bank, Ameris Bank, or NBSC/Synovus and Seller's preferred attorneys, The Hanson Law Firm, P.A., then, Seller will agree to pay for deed stamps, and title charges except prepaid items for all types of loans, except State Housing Loans. For these closing costs to be paid, the transaction must be financed with Regions Bank, Wells Fargo Bank, Ameris Bank or NBSC/Synovus and closed at the Hanson Law Office. If a borrower is using FHA/VA or Rural Housing Mortgage, any funding fee and/or FHA MIP will be financed or paid by the buyers.

If Purchaser does not use Seller's preferred lender AND preferred attorney, Hanson Law Firm, then Purchaser shall be solely responsible for paying all other fees, including deed stamps, or costs required by the lender in connection with the loan application process and will promptly supply all documents or other information required by the Lender. Purchaser Initials:

If Purchaser does not obtain loan approval and furnish Seller with a copy of a loan commitment within 10 days of the effective date of this contract or such later date as the Seller, in its sole discretion may designate, then, this contract may be terminated at seller's discretion and any earnest money shall be returned to the Purchaser. 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 contract during any such extension(s). Seller may also, at its option, require purchase to consult with one or more mortgage lender(s) or broker(s) of Seller's choosing during this extension period. If Purchaser obtains loan approval and refuses to close or fails to apply for said loan, then, Purchaser shall be deemed to be in default entitling Seller to the remedies provided herein. 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. Unless provided by addendum attached hereto, Purchaser specifically warrants that this contract is in no way contingent upon sale, rental, settlement or other disposition of any other property owned by Purchaser. Purchaser gives permission to financial institution (Bank) to disclose any allowable pertinent information concerning Purchaser's loan to any attorney representing Purchaser or Seller and to the Purchaser's and Seller's Broker.

CLOSING AND PRO-RATIONS: Closing shall be on or before December 18, 2015, subject to such extensions as provided herein. Closing shall take place at either of the offices of Seller's preferred closing attorney, The Hanson Law Firm, P.A., 6156 St. Andrews Road, Suite 101, Columbia, South Carolina 29212, or 425 Summit Terrace Court, Building 1, Columbia, South Carolina 29228 or at such other place as the parties herein may deem appropriate. Closing can be extended at Seller's sole option for delays beyond Seller's control including, but not limited to acts of God, inclement weather, labor disputes, or difficulty in obtaining labor or materials. Contract price is subject to increase caused by items that are beyond the control of the builder such as any increase in the cost of labor, materials or any other item not within the control of the builder. Said potential increase shall only be for the actual increased cost of labor or materials and shall not include overhead or profit. The builder is to provide reasonable proof to the buyer regarding any increases to the contract price and the parties must sign an addendum to the contract incorporating any changes thereto prior to continued construction pursuant to the increased cost(s).

At closing, Purchaser shall pay to Seller the balance of the 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. Taxes and assessments shall be pro-rated between the Seller and Purchaser as of the date of closing. 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 county taxes, reservations, conditions, right-of-way and easements of record and matters to which this Contract is subject. If closing is delayed through no fault of Seller, Seller may at its option charge Purchaser a contract extension fee equal to interest then being charged or would be charged to the Seller by its lenders on the total purchase price (less all sums on deposit) during such delay.

CHANGES: 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 or its duly authorized agent in a written *Change Order*. Purchaser shall pay a \$250.00 Change Order fee, plus the added cost of the change or alteration at the time the request for the *Change Order* is made.

RESTRICTIVE COVENANTS: The Property may be subject to restrictive covenants and to the jurisdiction of a homeowners' association that charges annual assessments. The Purchaser acknowledges the documents pertaining to such restrictions or associations have been made available to him/her and that he/she has read, understand and accept same. Purchaser Initials: SM

HOMEOWNER'S ASSOCIATIONS: The Association Board of Directors set association dues amounts annually. The annual dues are currently \$ 225.00 at time of contract. These dues are subject to change. Purchaser shall pay at closing the pro-rated amount of the association dues for the balance of the current year. Prior to construction, the Architectural Control Board must approve any structure, including fences and outbuildings. Any provision for these structures in this contract does not constitute approval by the Architectural Control Board. It is the purchaser's responsibility to obtain this approval. Purchaser Initials: SM

LIMITED WARRANTY: The Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller. This limited warranty shall warrant workmanship for One (1) year and warrant the structure itself for Ten (10) years from date of closing. Said limited warranty shall be incorporated in the deed delivered at closing. Purchaser acknowledges that said limited warranty is not a maintenance agreement. FOR QUALITY ASSURANCE PURPOSES WARRANTY VISITS MAY BE VIDEO W/AUDIO TAPED.

This Limited Warranty issued to the Purchaser shall be 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 law, thereof, nor on subdivision improvements, including but not limited to, streets, road, 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.

The issuance of a certificate of completion or occupancy, or final inspection approval by any governmental entity shall constitute certification of completion of the improvements in substantial conformity with the terms of this contract and shall also constitute a final determination, binding on the Parties hereto, that the property and improvements are in full compliance with all applicable laws, regulations and building codes.

TERMITE PROTECTION: Termite protection treatment was performed by Seller during the construction phase. Seller will furnish the Purchaser with a one (1) year termite protection bond effective as of date 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 bonds shall be solely at Purchaser's option and 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.

RADON NOTICE: Throughout the United States, a small percentage of homes experience elevated levels of radon, methane or other naturally occurring gases, which rise up and escape from the soil. Seller has performed no investigation or analysis and, true, hereby makes no representations as to the existence or non-existence of radon or any other gases on said property. Further, Seller makes no warranty and shall have no liability in connection with the existence or non-existence of radon or any other gases.

RISK OF LOSS: In the event of a partial destruction of the dwelling by fire, windstorm, hail, earthquake, explosion or other casualty prior to the closing, the parties may elect to continue or to terminate this contract if the dwelling cannot be restored prior to the completion date.

DEFAULT: If Purchaser fails to perform as required by the terms of this Contract, at Seller's sole discretion, this contract may terminate. Upon such termination by Seller, Purchaser agrees to the following remedies: (1) Purchaser agrees to pay to Seller the entire earnest money deposit and option monies as liquidated damages, and it is agreed that this amount shall not be construed as a penalty because Seller's actual damages are difficult to ascertain; Or (2) Purchaser agrees to pay Seller's cost of enforcement of this contract.

If Seller fails to perform as required by this Contract's terms, for whatever reason, Seller shall pay to Purchaser, as liquidated damages, and not as a penalty, the amount of the earnest money deposit Purchaser paid at the outset of this Contract, less Seller's expense, whereupon both parties shall thereafter be relieved of further liability hereunder. Seller's liability for any claim hereunder shall be limited to the payment or return of the earnest money deposit.

ARBITRATION: Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10, et. Seq.

NON-RELIANCE: Purchaser hereby represents to Seller that Purchaser has not relied and is not relying upon 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 of the property or to the other matters set forth herein unless specifically reduced to writing and made a part of this Contract.

DISCLAIMER BY BROKERS/AGENTS: The Purchaser acknowledges that the Listing and Selling Broker(s) and their Agent(s): (1) Give no guaranty or warranty of any kind, express or implied, as to the physical condition of the House; (2) Give no warranty, express or implied, as to the habitability or workmanlike service of the House and any implied warranty hereby disclaimed; (3) Give no guaranty or warranty concerning (a) any certification or inspection concerning the condition of the House, and (b) the accuracy of the published square footage of the property; (4) Purchaser acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Purchaser regarding (a) projected income or economic benefit for Purchaser from rentals; (b) rental arrangements or (c) other economic benefits to the Purchaser.

REAL ESTATE COMMISSIONS: This contract has been executed in cooperation with

Elaine Cassady of Re/Max Midlands Realty
Telephone No. (cell) 803-243-9373 a licensed salesperson/broker, as BUYER'S AGENT. When showing BUYER the Property and assisting BUYER in the purchase of a home, the on-site sales representative, independent licensed salesperson, represents the interest of the BUILDER only. The BUILDER's sales representative must work to obtain for the BUILDER the best price and terms possible and will disclose to the

BUILDER any information obtained from the BUYER or any other source which is material to the transaction.
PLEASE BE ADVISED THAT THE PUBLISHED COMMISSION SPLIT IS PAID ON THE GROSS SALES PRICE
LESS THE AMOUNT OF CLOSING COSTS PAID BY THE SELLER

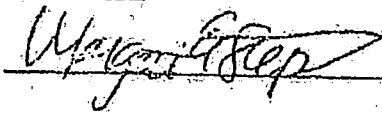
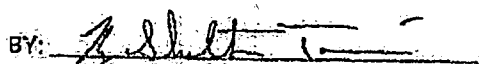
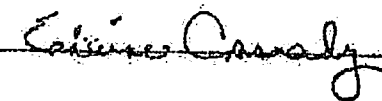
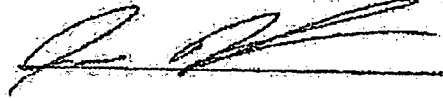
MISCELLANEOUS:

- a. This Contract is binding on and for the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns; provided that Purchaser shall not assign or transfer this Contract 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 Contract.
- b. This Contract embodies the entire Agreement between Seller and Purchaser with respect to the property. No amendment or modification of this Contract (including Contracts for charges in construction "extras") shall be valid unless contained in a writing executed by both parties.
- c. Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations.
- d. All notices and demands to be given or served pursuant to terms of this Contract 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.
- e. 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 Contract.
- f. Purchaser acknowledges that they may be contacted by seller's associated trade partners including but not limited to preferred lender(s) and attorney by the information provided herein.
- g. Purchaser acknowledges that entry upon the project/property during construction can be dangerous, as hazards may exist. Purchaser's entry shall be solely at his/her own risk. Purchaser hereby waives any and all claims against Seller for injury or loss to person or property arising out of or in the connection with entry by Purchaser or any other person accompanying him or entering at his direction or permission.
- h. The provisions of this contract shall survive closing and not merge in the deed.
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 obtain no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion.
- i. 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.
- j. Land adjacent to or surrounding the Property that is not owned by Seller is not within Seller's control. Seller will not be liable to Purchaser for any use or condition adjacent or surrounding land for commercial, industrial, institutional, multi-family or non-residential purposes.
- k. The Parties agree that if either, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the internet, and the signature, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.
- l. The Purchaser and Seller agree that the Listing and Selling Broker and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. The Purchaser and Seller agree that no course of action may be brought against the Listing and Selling Broker and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry. The Purchaser agrees that the Purchaser has the sole responsibility to obtain any such sex offender information and that such sex offender information may be obtained from the local sheriff's department or other appropriate law enforcement officials.
- m. Purchaser hereby releases and relinquishes all claims against Seller for damages to property or personal injury arising after the date of this contract resulting to any of the following:
 - (i) Consequential damages or expenses resulting from a termination of this Contract or to delays in closing, such as lodging, storage, moving, meals, or travel expenses.
 - (ii) Any claims for repairs 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, guest and invitees of Purchaser. The deed conveying the Property to Purchaser may contain a reference to this waiver.

OTHER PROVISIONS, ETC:Lot Premium \$3000Gas Fireplace with white mantle and hearth \$2800Screened Porch \$8000Storm Door \$400(1) extra cable drop \$150(16) 2" faux wooden blinds \$1200Hardwoods in foyer, dining, kitchen, hallway, and pantry \$3640. Foyer and Dining at no cost.6' wood privacy fence @ \$20/ln ft (439 ln ft). PIn to pin. \$8780(1) walk thru gate and (1) double gate \$800Contingent upon closing Buyer's property which is
currently under contract

Purchaser certifies that he/she has fully read and understands this contract.

IN WITNESS whereof the parties hereto have set their hands and seals this 18th day of July
in the year 2015

WITNESSES:SELLER - GREAT SOUTHERN HOMES, INC.BY: ITS: VP of OperationsAddress: 90 North Royal Tower Drive, Irmo SC 29063WITNESSES:PURCHASER(s):Address: 96 W Driftwood AveElgin, SC 29045LISTING AGENT/BROKER:Philip Reames R&JJackie E. Montgomerie R&JSELLING AGENT/BROKER:Elaine Cassady ReMax Midlands

Great Southern HomesAGENCY POLICYPolicy Statement

Great Southern Homes strictly adheres to the agency laws as set forth by the South Carolina Real Estate Commission and the ethics guidelines prescribed by the National Association of Realtors. Each Great Southern Homes agent is tasked with explaining Real Estate Agency to all Customers.

DEFINITIONS

- Agency: A relationship in which a seller or buyer delegates to a real estate company the right to act for and represent his or her interest in a real estate transaction.
- Client: A person who establishes an agency relationship and agrees to be represented by an agent in a real estate transaction.
- Customer: A person who seeks to purchase real estate but who has not established an agency relationship and is not represented by an agent.

Great Southern Homes represents the seller. If the buyer does not have an agency relationship and is not represented by an agent then the buyer is a customer.

Acknowledgement

Upon visiting the community, as evidence by my signature below I acknowledge receiving, reading and understanding the South Carolina Real Estate Commission's Agency Disclosure Form.

7/18/15
Date

[Signature]
[Seller or Buyer]

Date

[Signature]
[Seller or Buyer]

7/18/15
Date

Elaine Cassidy
[Licensee]

Certification

As evidenced by my signature below I certify that I have not entered into an Agency Agreement/Contract with any other real estate company, other than listed below:

7/18/15
Date

[Signature]
[Seller or Buyer]

Date

[Signature]
[Seller or Buyer]

7/18/15
Date

Elaine Cassidy
[Licensee]

Yes, I do have representation.

Elaine Cassidy
[Agent]

ReMax Midlands Realty
[Agency]

Selling agent signature:

Elaine Cassidy

WARRANTY SERVICE ACKNOWLEDGEMENT (Rev 080125)

Great Southern Homes (GSH) provides a limited warranty on the original installation of the materials and workmanship (as defined by the SC Residential Construction Standards) of your home for the first year of occupancy from the date of closing. Routine home maintenance (i.e. changing air filters, caulking), normal wear & tear (carpet wear), resident use-abuse-negligence (i.e. water leaks from shower curtains, improper use of toilets & garbage disposals, clogged and/or overflowing toilets, sinks and sewage lines), vandalism (i.e. broken windows & doors), and acts of God are NOT covered by the GSH warranty. Likewise, any property that is used for rental purposes, the buyer acknowledges this warranty is NOT a maintenance agreement and only claims that meet the requirements as outlined in the 1-year materials & workmanship and 10-year structural limited warranty agreement will be covered.

WARRANTY PROCEDURES

All claims that require attention must be submitted in writing to the attention of the Great Southern Homes Warranty Department. You may fax the request to: (803) 694-4736 or Email a request to: warranty@greatsouthernhomes.com or mail to: Great Southern Homes, 426 Summit Terrace CL, Building 2, Columbia, SC 29223

A GSH representative will contact you within 7-10 business days after we receive your request to schedule an appointment. All warranty inspections and repair work will be scheduled between 8:00 AM and 5:30 PM Monday through Friday. We will not schedule work on weekends or after 5:30 PM on the weekdays. All work will be scheduled as soon as possible after the completion of the inspection. You must make your home accessible and have an adult (at least 18 years of age) present at the time any interior work is performed at your home. We will not accept keys from homeowners nor be in your home at any time without an adult present. If a claim is determined to be covered by the warranty, GSH will repair the defect as determined by the SC Residential Construction Standards. You are responsible to remove or repair any improvements you added after the construction of your home such as wallpaper, custom paints, fences, and sprinklers. Note: for service on appliances, electrical, heating & air conditioning or plumbing you will need to contact the subcontractor or manufacturer directly. The phone numbers for these subcontractors are on a decal located inside a cabinet door under the kitchen sink. If you do not have this list of phone numbers please notify our warranty department by email to warranty@gshhomes.org and we will provide this information to you.

EMERGENCY SERVICE

A list of telephone numbers for the electrician, plumber and heating contractors is located inside a lower cabinet in your kitchen. Please call these contractors directly for any emergency repairs. Listed below are conditions that are considered to be emergency situations:

Heating and air conditioning systems - Loss of heat due to a malfunction of the furnace when the outside temperature is 40 degrees or below. Air conditioning malfunctions are treated as routine service and not an emergency.
Electrical systems - Circuit breaker to gas furnace or heat pump trips kicking off.
Plumbing systems - Plumbing leaks that require the water to be shut off at the main valve or all toilets are not functional. No water supply caused by an interruption of service by the Water Company is outside subcontractor & GSH control.

TREE SERVICE, LANDSCAPE & EROSION CONTROL

GSH DOES NOT GUARANTEE THE CONTINUAL GROWTH OR LIFE OF ANY TREE, SHRUB OR GRASS. Prior to your closing all proper grading and landscaping will be completed, and it will become the responsibility of the homeowner to maintain all landscaping and grading. GSH will not replace or remove any landscaping or trees unless it is specifically stated on your pre-closing Certificate of Completion or on your conditional sales contract. THERE ARE NO EXCEPTIONS. Any erosion of the property becomes the responsibility of the homeowner upon closing. Sprinkler systems are not covered under warranty and require maintenance by the homeowner on a regular basis.

SEALANTS

Leaks caused by thermal expansion and contraction of building materials including nail pops and natural hairline cracks require ongoing homeowner maintenance and are not covered under the materials and workmanship warranty. For example, all caulking throughout the home must be maintained by the homeowner.

EXTREME WEATHER CONDITIONS

Your home was designed to be free of leaks under normal conditions. For example, high velocity wind-driven rain can cause damages that are not the result of normal conditions. Damages as a result of these conditions may be covered by your homeowner's insurance policy and are not the responsibility of GSH. You should also take necessary precautions whenever a freeze warning is issued. This can include covering outside hose bibs, keeping cabinet doors open beneath the kitchen sink so warm air circulate around water pipes, etc.

I acknowledge that I have read the above information and agree to the policies stated in these sections.

Homeowner: _____

Address: 2 Casey Dr, Egin, SC 29045

Date of closing: 12/15/17

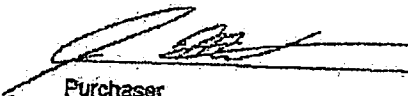
(materials & workmanship warranty expires 1 yr. from closing date)

GREAT
Southern
HOMES
Hardwood's Care Waiver

STATE OF SOUTH CAROLINA

Agreement made this day of July 18, 2015, between Jonathan Mart
(Purchaser) and Great Southern Homes (Seller) pertaining to Contract of Sale
dated July 18, 2015 for property located at 2 Casey Dr, Elgin

"Products covered with a moisture warranty, such as but not limited to engineered hardwood flooring, will resist damage from normal household food and beverage substances, provided the spill is removed promptly. Topical spills allowed to remain on the floor for any considerable time will damage the floor and void the warranty coverage. Plumbing accidents, leaking appliances (icemakers, dishwashers, clothes washers ect) are not topical spills and are not covered by this warranty."


Purchaser

Purchaser



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Jonathan Mart, on behalf of himself and	)	CIVIL ACTION NO. 2018-CP-40-00873
others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	AFFIDAVIT OF SHELTON TWINE
v.	)	
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

Personally, appeared before me, Shelton Twine, after being duly sworn, deposes and states as follows:

1. I am over the age of 21 years and am familiar with the contract and related matters concerning the construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart because I am the records custodian and Vice President of Operations of Great Southern Homes, Inc.
2. The construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart required the purchase of numerous materials and supplies shipped to South Carolina from other states, the following business records kept by Great Southern in the normal course of business to serve only as an example of materials and supplies from foreign states used in the construction of the home.:
 - a. Framing Turnkey, 84 Lumber (vendor), 1019 Route 519, Eighty Four, PA 15330: sum \$29,781.00 (Exhibit 1).
 - b. Flooring, carpet and vinyl, Stock Building Supply, PO Box 404934, Atlanta, GA 30384-4934 Sum \$2,788.75. (Exhibit 1)

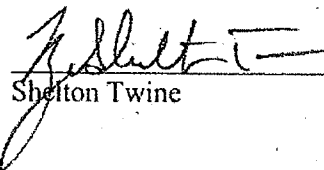
c. Hardwood flooring, Stock Building Supply, PO Box 404934-4934; Sum
\$3,412.75(Exhibit 1)

3. The above materials described in the invoices in paragraph 2 were used to construct the plaintiff's home.

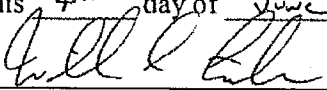
4. The contract for the construction of Mr. Mart's home was signed on or about July 18, 2015. Construction of this home began on or about August 26, 2015 and was substantially completed by December 10, 2015.

5. Since the contract with Mr. Mart was entered prior to commencement of construction, Great Southern Homes was required to construct the home in order to perform its obligations under the contract with Mr. Mart.

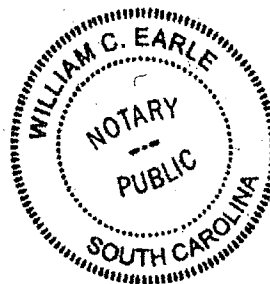
6. I know the facts stated herein to be true of my own knowledge, except as to those matters stated on information and belief and as to those matters I believe them to be true.

 Affiant
Shelton Twine

Sworn and Subscribed to and before me
This 4th day of June 2018

 (L.S.)
Signature

William C. Earle
Print



Notary Public for South Carolina
My Commission Expires July 19, 2022
(SEAL)

***** WORK ORDER HISTORY RE-PRINT *****

ROA 121

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

WORK ORDER: 00109202 (REPRINT)
VENDOR NUMBER: 110841
DATE: 08/13/2015

VENDOR:
84 Lumber
1019 Route 519
Elghty Four, PA 15330
PHONE: 803-359-4484

PERMIT NUMBER:
022936

BUYER:
Mart, Jonathan
HOUSE ADDRESS:
2 Casey Drive
Elgin, SC 29045



DEVELOPMENT
002 LN Longview North

HOUSE MODEL/ELEVATION
00000034 (BEA/B) Beaujolais / Beaujolais Elevation B

BLOCK / LOT ORIENTATION
/ 34 Garage Left

Cost Code	Opt Code	Qty	Description	Amount
266-03			Framing TurnKey - Framing Material & Labor Turn	28,781.00
	70009	1	Screen Porch - Size Per Plan	
266-51			Framing TurnKey - Optional Material & Labor	1,000.00
TOTAL				29,781.00
STYLE / COLOR SELECTIONS				
Window Color: White				

This WO must accompany invoice in order to receive payment.

Authorization:
Great Southern Homes

Work Performed
84 Lumber

Work Accepted:
Superintendent

Date:

Date:

Date:

Tue, May 29 2018 09:41 AM (Eastern Standard Time)

ROA 121

Page 1 of 1

ELECTRONICALLY FILED - 2018 Jun 04 11:20 AM - RICHMOND - COMMON PLEAS - CASE#2018CP4000673

***** PURCHASE ORDER HISTORY RE-PRINT *****

ROA 122

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER: 062495
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(BEA/B) Beaujolais

BLOCK / LOT

/ 34

ORIENTATION

Garage Left

PO Note: Flooring-Flooring-Flooring-Flooring-Carpet & Vinyl Material/Labor

House Number	Cost Code	Option	Description	Amount
LN/00000034	413-01		Flooring - Carpet & Vinyl Material/Labor	3,645.80
LN/00000034	413-51	55049	Flooring - Hardwood in Dining Room	-195.50
LN/00000034	413-53	55046	Flooring - Hardwood in Foyer-	-320.30
LN/00000034	413-53	55071	Flooring - Hardwood in Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	-341.20

Product Code	Description	U/M	Quantity	Price	Extension
12100	Carpet Step Labor - Per Step		14.00	1.786	25.00
12101	Top Card w/ 6# Pad		245.00	8.50	2,082.50
58100	Underlayment - 1/4" x 4' x 8' - Draw #1		9.00	30.00	270.00
58101	Vin Flooring - (Sq Yd) - Draw # 1		47.00	8.75	411.25
STYLE / COLOR SELECTIONS					
Floor Carpet: Mohawk Kuhlman Crossing Rosewood 739					
Floor Vinyl:					
Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)					
Subtotal:					2,788.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					2,788.75

IMPORTANT: Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

Superintendent:

Tue, May 29 2018 09:43 AM (Eastern Standard Time)

ROA 122

Page 1 of 1

ELECTRONICALLY FILED - 2018 Jun 04 11:20 AM - RICHARD COMMONPLEAS - CASE#2018CP4000673

***** PURCHASE ORDER HISTORY RE-PRINT *****

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER: 062496
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(BEA/B) Beaujolais

BLOCK / LOT

/ 34

ORIENTATION

Garage Left

PO Note: Hardwood-Hardwood-Hardwood-Option- Hwd In Foyer and Closet Option-HWD in Kitchen

House Number	Cost Code	Option	Description	Amount
LN/00000034	425-51	55046	Flooring - Hardwood In Foyer-	1,251.40
LN/00000034	425-51	55049	Flooring - Hardwood in Dining Room	1,027.00
LN/00000034	425-51	55071	Flooring - Hardwood in Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	1,134.35

Product Code	Description	U/M	Quantity	Price	Extension
30105	Hardwood Floor - Oak Quarter Round (LnFt) Draw 1		185.00	1.40	259.00
30106	Hardwood Floor- Oak Transitions (LnFt) Draw 1		48.00	0.00	0.00
30112	Hardwood Floor - 5" Square Glue Down (SqFt) Draw 1		725.00	4.35	3,153.75
STYLE / COLOR SELECTIONS:					
Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)					
Subtotal:					3,412.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					3,412.75

IMPORTANT:

Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

Superintendent

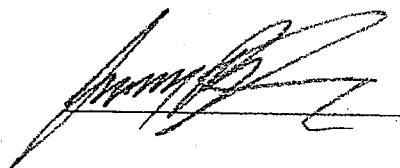
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Jonathan Mart, on behalf of himself and others similarly situated,	)	CIVIL ACTION NO. 2018-CP-40-00873
	)	
Plaintiffs,	)	
	)	AFFIDAVIT OF JEREMY PYLE
v.	)	
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

Personally, appeared before me, Jeremy Pyle, after being duly sworn, deposes and states as follows:

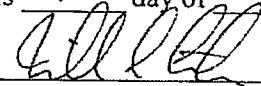
1. I am over the age of 21 years and am familiar with the construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart because I was the company Construction Manager and supervised the construction of this home.
2. The construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart required the purchase of numerous materials and supplies shipped to South Carolina from other states, the following purchase orders serve only as an example:
 - a. Framing Turnkey, 84 Lumber (vendor), 1019 Route 519, Eighty Four, PA 15330; sum \$29,781.00 (Exhibit 1).
 - b. Flooring, carpet and vinyl, Stock Building Supply, PO Box 404934, Atlanta, GA 30384-4934 Sum \$2,788.75. (Exhibit 1)
 - c. Hardwood flooring, Stock Building Supply, PO Box 40494, Atlanta, Ga. 30384-4934; Sum \$3,412.75 (Exhibit 1)

3. The above materials described in the invoices listed in paragraph 2 were used to construct the Mr. Mart's home..

4. I know the facts stated herein to be true of my own knowledge, except as to those matters stated on information and belief and as to those matters I believe them to be true.

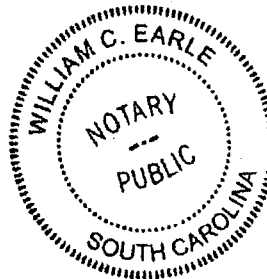
 , Affiant

Sworn and Subscribed to and before me
This 4th day of June 2018

 (L.S.)
Signature

William C. Earle
Print

Notary Public for South Carolina
My Commission Expires July 19, 2022
(SEAL)



***** WORK ORDER HISTORY RE-PRINT *****

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

WORK ORDER: 00109202 (REPRINT)
VENDOR NUMBER: 110841
DATE: 08/13/2015

VENDOR:
84 Lumber
1019 Route 519
Elghty Four, PA 15330
PHONE: 803-359-4484

PERMIT NUMBER:
022936

BUYER:
Mart, Jonathan

HOUSE ADDRESS:
2 Casey Drive
Elgin, SC 29045



DEVELOPMENT

002 LN Longview North

HOUSE
00000034

MODEL/ELEVATION
(BEA/B) Beaujolais / Beaujolais Elevation B

BLOCK / LOT
/ 34

ORIENTATION
Garage Left

Cost Code	Opt Code	Qty	Description	Amount
266-03			Framing TurnKey - Framing Material & Labor Turn	28,781.00
	70009	1	Screen Porch - Size Per Plan	
266-51			Framing TurnKey - Optional Material & Labor	1,000.00
TOTAL				29,781.00
STYLE / COLOR SELECTIONS				
Window Color: White				

This WO must accompany invoice in order to receive payment!!

Authorization

Great Southern Homes

Work Performed

84 Lumber

Work Accepted

Superintendent

Date: _____

Date: _____

Date: _____

Tue, May 29 2018 09:41 AM (Eastern Standard Time)

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER: 062495
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(BEA/B) Beaujolais

BLOCK / LOT

/ 34

ORIENTATION

Garage Left

PO Note: Flooring-Flooring-Flooring-Flooring-Carpet & Vinyl Material/Labor

House Number	Cost Code	Option	Description	Amount
LN/00000034	413-01		Flooring - Carpet & Vinyl Material/Labor	3,645.86
LN/00000034	413-51	55049	Flooring - Hardwood in Dining Room	-195.50
LN/00000034	413-53	55046	Flooring - Hardwood in Foyer-	-320.36
LN/00000034	413-53	55071	Flooring - Hardwood in Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	-341.25

Product Code	Description	U/M	Quantity	Price	Extension
12100	Carpet Step Labor - Per Step		14.00	1.786	25.00
12101	Top Card w/ 6# Pad		245.00	8.50	2,082.50
58100	Underlayment - 1/4" x 4' x 8' - Draw #1		9.00	30.00	270.00
58101	Vin Flooring - (Sq Yd) - Draw # 1		47.00	8.75	411.25
STYLE / COLOR SELECTIONS					
Floor Carpet: Mohawk: Kuhlarn Crossing Rosewood 739					
Floor Vinyl:					
Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)					
Subtotal:					2,788.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					2,788.75

IMPORTANT: Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

Superintendent:

***** PURCHASE ORDER HISTORY RE-PRINT *****

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER: 062496
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(BEA/B) Beaujolais

BLOCK / LOT

/34

ORIENTATION

Garage Left

PO Note: Hardwood-Hardwood-Hardwood-Option- Hwd in Foyer and Closet. Option-HWD in Kitchen

House Number	Cost Code	Option	Description	Amount
LN/00000034	425-51	55046	Flooring - Hardwood in Foyer-	1,251.40
LN/00000034	425-51	55049	Flooring - Hardwood in Dining Room	1,027.00
LN/00000034	425-51	55071	Flooring - Hardwood in Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	1,134.35

Product Code	Description	U/M	Quantity	Price	Extension
30105	Hardwood Floor - Oak Quarter Round (LnFt) Draw 1		185.00	1.40	259.00
30106	Hardwood Floor- Oak Transitions (LnFt) Draw 1		48.00	0.00	0.00
30112	Hardwood Floor - 5" Square Glue Down (SqFt) Draw 1		725.00	4.35	3,153.75
STYLE / COLOR SELECTIONS					
Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)					
Subtotal:					3,412.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					3,412.75

IMPORTANT:

Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

Superintendent

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Jonathan Mart, on behalf of himself and
others similarly situated,

Plaintiff,

v.

Great Southern Homes, Inc,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action No. 2018-CP-40-00873**DEFENDANT'S
MEMORANDUM IN SUPPORT OF
NOTICE OF MOTION TO DISMISS AND
TO COMPEL ARBITRATION****I. INTRODUCTION**

Plaintiff Jonathan Mart entered suit on behalf of himself and purportedly on behalf of others similarly situated against Defendant, Great Southern Homes, Inc., asserting causes of action for breach of contract/breach of implied covenant of good faith and fair dealing, unjust enrichment, and declaratory relief, said action filed on February 12, 2018. Defendant Great Southern Homes, Inc. filed its Notice of Motion to Dismiss and Compel Arbitration on April 16, 2018. Defendant's motion is based upon the reality that this action should be dismissed and parties Mart and Great Southern Homes, Inc. should resolve their differences through binding arbitration as agreed in their contract.

Defendant Great Southern Homes, Inc. offers this Memorandum of Law in support of its Motion to Dismiss and Compel Arbitration, or alternatively, to stay the action, pursuant to the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, and the South Carolina Uniform Arbitration Act, S.C. Code Ann. §15-48-10, *et seq.*

111 (Memorandum in Support of Motion to Dismiss and
Compel Arbitration)

II. THE PARTIES' CONTRACT AND AGREEMENT TO ARBITRATE

The Parties' July 18, 2015 Contract, Exhibit 1 to Plaintiff's Complaint, provides that Defendant Great Southern Homes, Inc. will construct Plaintiff's home on Lot 34 in the Longview North subdivision, also known as 2 Casey Dr., Elgin SC 29045. For convenience of the Court a true and accurate copy of the agreement is attached hereto as Exhibit 1.

ARBITRATION: Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, *et seq.* (Emphasis added).

In addition, the first page of the contract contains the following provision in bold, underlined, capital letters: "**CONTRACT SUBJECT TO ARBITRATION (S.C. Code §15-48-10) Version 040215**" (Exhibit 1).

In plain unambiguous language the Parties' Agreement is directed to all disputes related to the contract, the breach thereof, or concerning the construction of the Property and Defendant's performance of same. All claims asserted by Plaintiff Mart must be resolved through binding arbitration under this provision of the Parties' contract.

III. LAW

Claims asserted by Plaintiff must be resolved through binding arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, (the "FAA"). It is equally enforceable under the South Carolina Uniform Arbitration Act, S.C. Code Ann. §15-48-10, *et seq.* (the "SCUAA"). Both the Federal and State Acts are discussed as follows:

A. The FAA

It is settled and widely recognized that agreements to arbitrate under the FAA are favored. Although the contract itself identifies the Federal Arbitration Act preempts state law. Thus, although the Contract itself identifies the South Carolina Uniform Arbitration Act, the Federal Arbitration Act preempts state law. See *Munoz 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, 841 (1995) (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.”).

Respectfully, in order for the Court to conclude that the Parties’ contractual relationship in fact involved interstate commerce it need look only to the following sources:

1. The Complaint, Exhibit 1:

Page 1 of the Contract, Exhibit 1 to the Complaint and Exhibit 1 to this Memorandum, indicates that, “The structure shall be constructed on the property in substantial conformance with those certain plans and specifications...”

2. Affidavits of Shelton Twine and Jeremy Pyle, with exhibits:

These affidavits filed June 4, 2018 (Exhibit 2 to this Memorandum) provide three purchase orders for materials and supplies used in the construction of Plaintiff’s home, as

310 (Memorandum in Support of Motion to Dismiss and
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follows: August 13, 2015 work order showing the purchase of framing and other materials from 84 Lumber in the sum of \$29,781, located at 1019 Route 519, Eighty Four, PA 15330; purchase order history reprint dated August 13, 2015 for flooring from Stock Building Supply, PO Box 404934, Atlanta GA 30384-4934 in the sum of \$2,788.75; and Purchase Order 062496 of August 13, 2015 from Stock Building Supply, PO Box 404934, Atlanta GA 30384-4934 for additional flooring for the sum of \$3,412.75.

Inasmuch as the Parties' Contract necessarily and factually involved interstate commerce the FAA applies and, that being so, the arbitration agreement, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." 9 USC §2. The United States Supreme Court has construed §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, 339, 131 S. Ct. 1740, 1746 (2011).

The Fourth Circuit has held that to compel arbitration under the FAA, a party must show:

- (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (citing *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500-01 (4th Cir. 2002)). If a party resists arbitration, the resisting party bears the burden of proving the claims are unsuitable for arbitration. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

The Federal Act applies to arbitration agreements in contracts "evidencing a transaction involving [interstate] commerce," 9 U.S.C. § 2, but does not require proof by affidavit or other specific evidence of the nexus to

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interstate commerce. Where, as here, the party seeking arbitration alleges that the transaction is within the scope of the Act, and the party opposing application of the Act does not come forward with evidence to rebut jurisdiction under the federal statute, we do not read into the Act a requirement of further proof by the party invoking the federal law.

Maxum Founds, Inc. v. Salus Corp., 779 F.2d 974, 978 n.4; *see also Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 (4th Cir. 2012).

Moreover, according to the United States Supreme Court, "unless the challenge is to the arbitration clause itself, the issues 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, 1209 (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 this action Plaintiff does not suggest that the Arbitration Provision is unenforceable. Rather, the Plaintiff attacks a single provision in the Contract dealing with the waiver of the implied warranty of habitability. *See* Complaint Paragraphs 3, 10, 11, 18, 19, 24 and 28. This is a subject exclusively in the purview of the arbitrator, as it relates to a "dispute between the parties hereto arising out of this contract" (Exhibit 1, ARBITRATION Paragraph); *see Cardegna*, 546 U.S. at 445-46, 126 S. Ct. at 1209.

B. The SCUAA

Arbitration is also mandated as to Plaintiffs' claims pursuant to the SCUAA. As is true with federal policy, South Carolina public policy strongly favors the arbitration of disputes. (*Eanders v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) quoting *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir.) 1996)). Should the plaintiff resist arbitration it is his burden in proving that the claims asserted in his action.

are unsuitable for arbitration. *Hall v. Greentree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

The Parties' Agreement to Arbitrate contained in their Contract, Exhibit 1 herein, and as discussed above simply provides, "Any dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof ... shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, *et seq.*" Exhibit 1 also demonstrates that on page 1 of the Contract in bold and all cap letters that, **"CONTRACT SUBJECT TO ARBITRATION (S.C. Code 15-48-10)"**.

The South Carolina Uniform Arbitration Act., S.C. Code Ann. §15-48-10 states:

... 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.

In addition, 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 not realistic to suggest that the building materials will be made exclusively in South Carolina. See *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 594-95, 553 S.E.2d 110, 117-18 (2001), (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 (1977) (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).

IV. THE PARTIES' CONTRACT IS NOT UNCONSCIONABLE

Unconscionability of a contract has been described 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 (2016); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, at 68 (2007). Unconscionability mandates the court to focus on whether the arbitration contract 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 the court finds that any clause of the 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 void any unconscionable result. S.C. Code Ann. §36-2-302(1) (2003); *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 648. A determination of unconscionability requires an evaluation of the facts and circumstances surrounding the particular case. *Id.*

A. Plaintiff Mart did not lack meaningful choice to arbitrate any claim he may wish to assert and was not required to use counsel suggested by Great Southern.

An examination of the Parties' Contract, Exhibit 1, demonstrates that Plaintiff Mart initialed each page of the Contract. In addition, Plaintiff Mart was free to use any attorney he chose. If, however, Mart made the decision to use the seller's preferred lender, Regions Bank, Wells Fargo Bank, Amorous Bank, or NBSC/Synovus and the suggested attorneys, then Great Southern would pay for deed stamps and the lenders would pay or waive all other closing costs, attorney fees and title charges except prepaid items for all types of loans except state housing loans.

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This provision appearing on page 1 of the parties' contract was initialed by Plaintiff Mart. In short, Mart made the deliberate decision to use one of the lenders specified and the closing attorney recommended.

B. Because the warranty provision is outside of the arbitration provision the arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision.

Courts generally analyze the arbitration provision in isolation from the remainder of the Contract when determining the validity of the arbitration provision. *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. Association, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016). In *One Belle*, 418 S.C. at 64, 791 S.E.2d at 293 the Court found the warranty provision clearly outside of the arbitration agreement and as such the court would only consider the arbitration agreement in an unconscionability analysis. In this case, the "Limited Warranty" provision is separate from the arbitration agreement and should not be considered in the unconscionability analysis. The "Limited Warranty" provision is located on the second page of the Contract while the Arbitration Agreement is located on the third page of the contract.

The Arbitration Provision on page 3 does not reference in any way the "Limited Warranty" provision contained in the purchase agreement on the second page. 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. This paragraph contained numerous subparagraphs which cross-referenced one 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 of Dispute Resolution".

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. Exhibit 1; *Smith*, 417 S.C. at 48, 790 S.E.2d at 4.

Respectfully, this Court has the task to determine 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).

C. The Arbitration Agreement in this case is not one-sided and oppressive because it does not limit Mart's statutory remedies, it is clearly labeled, and it applies mutually to both parties.

To ascertain the status of a contract as one-sided and oppressive courts look at a number of other 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 arbitration agreement. *Carlson*, 404 S.C. at 254, 743 S.E.2d at 870.

The arbitration provision in this case does not set any timeframe after any claim or dispute would arise during which a party must demand arbitration. In addition, the arbitration provision in this case does not limit the purchaser's ability to arbitrate any double and triple damages which might be available under the South Carolina Uniform Trade Practices Act. See, *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666.

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In *Simpson*, the arbitration clause subjected all claims or controversies between the dealer and customer to arbitration. The arbitration clause included an exception for when claims between the dealer and the customer were not stayed pending the outcome of arbitration. The Court found the arbitration provision was one-sided and oppressive because the dealer's judicial remedies superseded the consumer's arbitral remedies. 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, Exhibit 1. The arbitration provision calls for binding arbitration before a panel consisting of three arbitrators: One selected by the purchaser, one selected by Great Southern, and one mutually selected by the arbitrator chosen by each party (Exhibit 1). Unlike the arbitration provision in *Simpson*, the arbitration provision in this case allows both parties to arbitrate their claims or disputes and includes a process for neutrally selecting the arbitrators. (Exhibit 1; *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672.) The defendant, respectfully, would urge the Court to find that the arbitration provision in this case is not one-sided or oppressive and, therefore, not unconscionable.

Respectfully submitted,

BRUNER POWELL WALL & MULLINS, LLC

s/Warren C. Powell, Jr.

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Attorneys for Defendant

Columbia, South Carolina
June 6, 2018

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Compel Arbitration)

CONTRACT FOR SALE

This Contract for Sale is entered into between **GREAT SOUTHERN HOMES, INC.**, a South Carolina corporation, hereinafter referred to as "Seller", and Jonathan Mart hereinafter referred to as "Purchaser", whether one or more. Purchaser's phone numbers: (Home) _____ (Work) _____ (Mobile) 803-669-2568 (Email) jonathan_mart87@hotmail.com

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, hereinafter referred to as the "property", situated in Kershaw County, and described as Lot 34 in the Longview North Subdivision, also known as 2 Casey Dr, Elgin, SC 29045 (Property Address).

STRUCTURES:

() **SPEC MODEL** The structures on the property are constructed, except for the items, if any, included within the allowances set forth below. Purchaser has conducted a site visit, is purchasing the property based upon this site visit and is not relying upon any model or plans and specifications, MLS/internet pictures or listing information, or any other sales collateral information.

(X) **BUILDING JOB.** The structures shall be constructed on the property in substantial conformance with those certain plans and specifications, as attached. Said plans and specifications shall supersede any models, advertising materials or other representations. Where Seller is unable to obtain exact specified materials through Seller's usual supply sources Seller reserves the right to substitute materials of similar pattern, design, and quality or as otherwise necessary.

PRICE: Total Sales Price \$ 223,470

This offer is accompanied by an earnest money deposit of \$ 1,000 by Purchaser's Check # 2560. Purchaser and Seller authorize Russell & Jeffcoat, as escrow agent, to hold and disburse the earnest money according to the terms of this agreement. Buyer agrees to and understands that earnest money may be deposited in an interest-bearing escrow account and that he has the right to ownership of any interest accrued. Buyer, through this written agreement, relinquishes ownership of the accrued interest to Escrow Agent, as consideration for the expenses incurred in maintaining the account. At the consummation of this sale, the earnest money deposit shall be credited to the Purchaser. The Parties hereto understand that, under all circumstances, including default, the escrow agent will not disburse the earnest money deposit to either party until both parties have executed an agreement authorizing the disbursement or until a court of competent jurisdiction has directed a disbursement.

FINANCING: This contract is contingent upon the Purchaser obtaining mortgage financing. Purchaser shall apply within Five (5) business days for a mortgage loan through a financial institution (Bank). If Purchaser chooses to use Seller's preferred lender, **Regions Bank, Wells Fargo Bank, Ameris Bank, or NBSC/Synovus** and Seller's preferred attorneys, **The Hanson Law Firm, P.A.**, then, Seller will agree to pay for deed stamps, and Regions Bank, Wells Fargo Bank, or Ameris Bank will pay or waive all other closing costs, attorney fees, and title charges except prepaid items for all types of loans, except State Housing Loans. For these closing costs to be paid, the transaction must be financed with Regions Bank, Wells Fargo Bank, Ameris Bank or NBSC/Synovus and closed at the Hanson Law Office. If a borrower is using FHA/VA or Rural Housing Mortgage, any funding fee and/or FHA MIP will be financed or paid by the buyers.

If Purchaser does not use Seller's preferred lender AND preferred attorney, **Hanson Law Firm**, then Purchaser shall be solely responsible for paying all other fees, including deed stamps, or costs required by the lender in connection with the loan application process and will promptly supply all documents or other information required by the Lender. Purchaser Initials JM

If Purchaser does not obtain loan approval and furnish Seller with a copy of a loan commitment within 10 days of the effective date of this contract or such later date as the Seller, in its sole discretion may designate, then, this contract may be terminated at seller's discretion and any earnest money shall be returned to the Purchaser. 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 contract during any such extension(s). Seller may also, at its option, require purchaser to consult with one or more mortgage lender(s) or broker(s) of Seller's choosing during this extension period. If Purchaser obtains loan approval and refuses to close or fails to apply for said loan, then, Purchaser shall be deemed to be in default entitling Seller to the remedies provided herein. Nothing herein shall be construed as

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any representation or warranty by the Seller that the property meets the requirements for any type of loan or of any lender. Unless provided by addendum attached hereto, Purchaser specifically warrants that this contract is in no way contingent upon sale, rental, settlement or other disposition of any other property owned by Purchaser. Purchaser gives permission to financial institution (Bank) to disclose any allowable pertinent information concerning Purchaser's loan to any attorney representing Purchaser or Seller and to the Purchaser's and Seller's Broker.

CLOSING AND PRO-RATIONS: Closing shall be on or before December 18, 2015, subject to such extensions as provided herein. Closing shall take place at either of the offices of Seller's preferred closing attorney, The Hanson Law Firm, P.A., 6156 St. Andrews Road, Suite 101, Columbia, South Carolina 29212, or 425 Summit Terrace Court, Building 1, Columbia, South Carolina 29229 or at such other place as the parties herein may deem appropriate. Closing can be extended at Seller's sole option for delays beyond Seller's control including, but not limited to acts of God, inclement weather, labor disputes, or difficulty in obtaining labor or materials. Contract price is subject to increase caused by items that are beyond the control of the builder such as any increase in the cost of labor, materials or any other item not within the control of the builder. Said potential increase shall only be for the actual increased cost of labor or materials and shall not include overhead or profit. The builder is to provide reasonable proof to the buyer regarding any increases to the contract price and the parties must sign an addendum to the contract incorporating any changes thereto prior to continued construction pursuant to the increased cost(s).

At closing, Purchaser shall pay to Seller the balance of the 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. Taxes and assessments shall be pro-rated between the Seller and Purchaser as of the date of closing. 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 county taxes, reservations, conditions, right-of-way and easements of record and matters to which this Contract is subject. If closing is delayed through no fault of Seller, Seller may at its option charge Purchaser a contract extension fee equal to interest then being charged or would be charged to the Seller by its lenders on the total purchase price (less all sums on deposit) during such delay.

CHANGES: 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 or its duly authorized agent in a written *Change Order*. Purchaser shall pay a \$250.00 *Change Order* fee, plus the added cost of the change or alteration at the time the request for the *Change Order* is made.

RESTRICTIVE COVENANTS: The Property may be subject to restrictive covenants and to the jurisdiction of a homeowners' association that charges annual assessments. The Purchaser acknowledges the documents pertaining to such restrictions or associations have been made available to him/her and that he/she has read, understand and accept same. Purchaser Initials SM

HOMEOWNER'S ASSOCIATIONS: The Association Board of Directors set association dues amounts annually. The annual dues are currently \$ 225.00 at time of contract. These dues are subject to change. Purchaser shall pay at closing the pro-rated amount of the association dues for the balance of the current year. Prior to construction, the Architectural Control Board must approve any structure, including fences and outbuildings. Any provision for these structures in this contract does not constitute approval by the Architectural Control Board. It is the purchaser's responsibility to obtain this approval. Purchaser Initials SM

LIMITED WARRANTY: The Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller. This limited warranty shall warrant workmanship for One (1) year and warrant the structure itself for Ten (10) years from date of closing. Said limited warranty shall be incorporated in the deed delivered at closing. Purchaser acknowledges that said limited warranty is not a maintenance agreement. FOR QUALITY ASSURANCE PURPOSES WARRANTY VISITS MAY BE VIDEO W/AUDIO TAPED.

This Limited Warranty issued to the Purchaser shall be 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, road, 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.

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The issuance of a certificate of completion or occupancy, or final inspection approval by any governmental entity shall constitute certification of completion of the improvements in substantial conformity with the terms of this contract and shall also constitute a final determination, binding on the Parties hereto, that the property and improvements are in full compliance with all applicable laws, regulations and building codes.

TERMITE PROTECTION: Termite protection treatment was performed by Seller during the construction phase. Seller will furnish the Purchaser with a one (1) year termite protection bond effective as of date 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 bonds shall be solely at Purchaser's option and 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.

RADON NOTICE: Throughout the United States, a small percentage of homes experience elevated levels of radon, methane or other naturally occurring gases, which rise up and escape from the soil. Seller has performed no investigation or analysis and, thus, hereby makes no representations as to the existence or non-existence of radon or any other gases on said property. Further, Seller makes no warranty and shall have no liability in connection with the existence or non-existence of radon or any other gases.

RISK OF LOSS: In the event of a partial destruction of the dwelling by fire, windstorm, hail, earthquake, explosion or other casualty prior to the closing, the parties may elect to continue or to terminate this contract if the dwelling cannot be restored prior to the completion date.

DEFAULT: If Purchaser fails to perform as required by the terms of this Contract, at Seller's sole discretion, this contract may terminate. Upon such termination by Seller, Purchaser agrees to the following remedies: (1) Purchaser agrees to pay to Seller the entire earnest money deposit and option monies as liquidated damages, and it is agreed that this amount shall not be construed as a penalty because Seller's actual damages are difficult to ascertain; Or (2) Purchaser agrees to pay Seller's cost of enforcement of this contract.

If Seller fails to perform as required by this Contract's terms, for whatever reason, Seller shall pay to Purchaser, as liquidated damages, and not as a penalty, the amount of the earnest money deposit Purchaser paid at the outset of this Contract, less Seller's expense, whereupon both parties shall thereafter be relieved of further liability hereunder. Seller's liability for any default hereunder shall be limited to the payment or return of the earnest money deposit.

ARBITRATION: Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10, et. Seq.

NON-RELIANCE: Purchaser hereby represents to Seller that Purchaser has not relied and is not relying upon 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 of the property or to the other matters set forth herein unless specifically reduced to writing and made a part of this Contract.

DISCLAIMER BY BROKERS/AGENTS: The Purchaser acknowledges that the Listing and Selling Broker(s) and their Agent(s): (1) Give no guaranty or warranty of any kind, express or implied, as to the physical condition of the House; (2) Give no warranty, express or implied, as to the habitability or workmanlike service of the House and any implied warranty hereby disclaimed; (3) Give no guaranty or warranty concerning (a) any certification or inspection concerning the condition of the House, and (b) the accuracy of the published square footage of the property; (4) Purchaser acknowledges that Seller and Seller's Agents have not made any oral or written commitments to Purchaser regarding (a) projected income or economic benefit for Purchaser from rentals; (b) rental arrangements or (c) other economic benefits to the Purchaser.

REAL ESTATE COMMISSIONS: This contract has been executed in cooperation with

Elaine Cassady of ReMax Midlands Realty

Telephone No. (cell) 803-243-9373 a licensed, salesperson/broker, as **BUYER'S AGENT**. When showing **BUYER** the Property and assisting **BUYER** in the purchase of a home, the on-site sales representative, independent licensed salesperson, represents the interest of the **BUILDER** only. The **BUILDER'S** sales representative must work to obtain for the **BUILDER** the best price and terms possible and will disclose to the

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BUILDER any information obtained from the BUYER or any other source which is material to the transaction.
PLEASE BE ADVISED THAT THE PUBLISHED COMMISSION SPLIT IS PAID ON THE GROSS SALES PRICE
LESS THE AMOUNT OF CLOSING COSTS PAID BY THE SELLER

MISCELLANEOUS:

- a. This Contract is binding on and for the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns; provided that Purchaser shall not assign or transfer this Contract 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 Contract.
- b. This Contract embodies the entire Agreement between Seller and Purchaser with respect to the property. No amendment or modification of this Contract (including Contracts for charges in construction "extras") shall be valid unless contained in a writing executed by both parties.
- c. Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations.
- d. All notices and demands to be given or served pursuant to terms of this Contract 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.
- e. 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 Contract.
- f. Purchaser acknowledges that they may be contacted by seller's associated trade partners including but not limited to preferred lender(s) and attorney by the information provided herein.
- g. Purchaser acknowledges that entry upon the project/property during construction can be dangerous, as hazards may exist. Purchaser's entry shall be solely at his/her own risk. Purchaser hereby waives any and all claims against Seller for injury or loss to person or property arising out of or in the connection with entry by Purchaser or any other person accompanying him or entering at his direction or permission.
- h. The provisions of this contract shall survive closing and not merge in the deed.
- i. 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 obtain no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion.
- j. 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.
- k. Land adjacent to or surrounding the Property that is not owned by Seller is not within Seller's control. Seller will not be liable to Purchaser for any use or condition adjacent or surrounding land for commercial, industrial, institutional, multi-family or non-residential purposes.
- l. The Parties agree that the offer, any counteroffer and/or acceptance of any offer or counteroffer may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the internet, and the signature, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.
- m. The Purchaser and Seller agree that the Listing and Selling Broker and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry. The Purchaser and Seller agree that no course of action may be brought against the Listing and Selling Broker and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry. The Purchaser agrees that the Purchaser has the sole responsibility to obtain any such sex offender information and that said sex offender information may be obtained from the local sheriff's department or other appropriate law enforcement officials.
- n. Purchaser hereby releases and relinquishes all claims against Seller for damages to property or personal injury arising after the date of this contract relating to any of the following:
- (i.) Consequential damages or expenses resulting from a termination of this Contract or to delays in closing, such as lodging, storage, meals, or travel expenses.
- (ii.) Any claims for repairs 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, guest and invitees of Purchaser. The deed conveying the Property to Purchase may contain a reference to this waiver.

ELECTRONICALLY FILED - 2018 Jun 06 4:07 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4000873

OTHER PROVISIONS, ETC:

ROA 143

Lot Premium \$3000
Gas Fireplace with white mantle and hearth \$2800
Screened Porch \$8000
Storm Door \$400
(1) extra cable drop \$150
(16) 2" faux wooden blinds \$1200
Hardwoods in foyer, dining, kitchen, hallway, and pantry \$3640. Foyer and Dining at no cost.
6' wood privacy fence @ \$20/ln ft (439 ln ft). Pin to pin. \$8780
(1) walk thru gate and (1) double gate \$600

Contingent upon closing Buyer's property which is
currently under contract.

Purchaser certifies that he/she has fully read and understands this contract.

IN WITNESS whereof the parties hereto have set their hands and seals this 18th day of July
in the year 2015

WITNESSES:

Margaret G. Steg

SELLER -- GREAT SOUTHERN HOMES, INC.

BY: [Signature]

ITS: VP of Operations

Address: 90 North Royal Tower Drive, Irmo SC 29063

WITNESSES:

Elaine Cassady

PURCHASER(s):

[Signature]

Address: 96 Driftwood Ave

Elgin, SC 29045

LISTING AGENT/BROKER:

Philip Reames R&J

Jackie B. Montgomery R&J

SELLING AGENT/BROKER:

Elaine Cassady ReMax Midlands

ROA 143

Home Sale Information Sheet**New Home Info**Build Job? ☒ Yes ☐ No

Neighborhood: Longview North

Lot #: 34

Plan: Beaujolais B

Address: 2 Casey Dr., Elgin, SC 29045

Customer Contact Info

Homeowner: Jonathan Mart

Phone (Cell): 803-669-2588

Phone (W):

Address: 96 Driftwood Ave, Elgin, SC 29045

Email: Jonathan_mart87@hotmail.com

Closing Info

Date: December 18, 2015

Attorney: Hanson Law Firm

Buyer Agent Info

Company: ReMax Midlands Realty

Agent: Elaine Cassidy

Cell: 803-243-9373

Email: elainere1@hotmail.com

Commission: 3% + 1% Bonus

Is this a RELO? ☒ YES or ☐ No (circle one)

Selling Agent must sign:

*Elaine Cassidy***Mortgage Info**

Institution: Ameris

Agent: Alicia Blevins

Phone: 803-537-7661

Email: Alicia.blevins@amerisbank.com

Type/Plans: VA

** Special Island ****Contract Info**

Sales Price: \$223,470

No Closing Costs paid with Outside Attorney

Deposits:

1.) \$1000 for Earnest Money**Listing agent Info**

Contract Date: 7-18-15

Company: R&J Camden

Agent: Philip Reames

Co-Agent: Jackie B. Montgomery

Floater:

After Receipt of Ratified Contract (usually 1-2 business days) please call:

For Walk Through Date: Please contact

closings@greatsouthernhomes.com

Once Walk Through date & time has been established, Call: Hanson Law Firm at 803-798-9446.

Office (803-750-0203-FAX) to set up official closing date. Address: 6156 St. Andrews Rd., Suite 101 Columbia, SC 29212

THIS INFORMATION SHEET IS NOT A LEGAL DOCUMENT - THIS PAGE FOR INTERNAL USE ONLY

ROA 145

ROA 145

NAVY  **FEDERAL**
Credit Union

PO Box 3000
Merrifield, VA 22119-3000
navyfederal.org

68-7497
7560

Cashier's Check

Serial No.	Account No.	Date	Amount
0 [REDACTED]	000000 [REDACTED]	07/17/15	\$*****1.000.00

Pay to the Order of: RUSSELL & JEFFCOAT

REMITTER: JONATHAN J MART

[Signature]
Authorized Signature

© 2014 Navy Federal NCU C36 (6-14)

Great Southern Homes**AGENCY POLICY****Policy Statement**

Great Southern Homes strictly adheres to the agency laws as set forth by the South Carolina Real Estate Commission and the ethics guidelines prescribed by the National Association of Realtors. Each Great Southern Homes' agent is tasked with explaining Real Estate Agency to all Customers.

DEFINITIONS

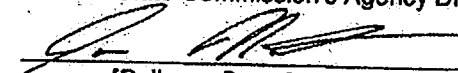
- **Agency:** A relationship in which a seller or buyer delegates to a real estate company the right to act for and represent his or her interest in a real estate transaction.
- **Client:** A person who establishes an agency relationship and agrees to be represented by an agent in a real estate transaction.
- **Customer:** A person who seeks to purchase real estate but who has not established an agency relationship and is not represented by an agent.

Great Southern Homes represents the seller. If the buyer does not have an agency relationship and is not represented by an agent then the buyer is a customer.

Acknowledgement

Upon visiting the community, as evidence by my signature below I acknowledge receiving, reading and understanding the South Carolina Real Estate Commission's Agency Disclosure Form.

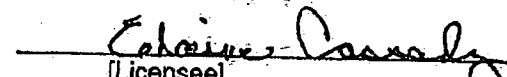
7/18/15
Date


[Seller or Buyer]

Date

[Seller or Buyer]

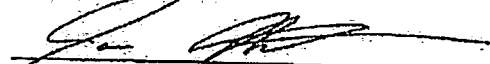
7/18/15
Date


[Licensee]

Certification

As evidenced by my signature below I certify that I have not entered into an Agency Agreement/Contract with any other real estate company, other than listed below.

7/18/15
Date


[Seller or Buyer]

Date

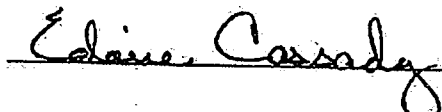
[Seller or Buyer]

7/18/15
Date


[Licensee]

Yes, I do have representation. Elaine Cassidy ReMax Midlands Realty
[Agent] [Agency]

Selling agent signature:



WARRANTY SERVICE ACKNOWLEDGEMENT (Rev 080125)

Great Southern Homes (GSH) provides a limited warranty on the original installation of the materials and workmanship (as defined by the SC Residential Construction Standards) of your home for the first year of occupancy from the date of closing. Routine home maintenance (i.e. changing air filters, caulking), normal wear & tear (carpet wear), resident use-misuse-negligence (i.e. water leaks from shower curtains, improper use of toilets & garbage disposals, clogged and/or overflowing toilets, sinks and sewage lines), vandalism (i.e. broken windows & doors) and acts of God are NOT covered by the GSH warranty. Likewise, any property that is used for rental purposes, the buyer acknowledges this warranty is NOT a maintenance agreement and only claims that meet the requirements as outlined in the 1-year materials & workmanship and 10-year structural limited warranty agreement will be covered.

WARRANTY PROCEDURES

All claims that require attention must be submitted in writing to the attention of the Great Southern Homes Warranty Department. You may fax the request to: (803) 699-4735 or Email a request to: warranty@greatsouthernhomes.com or mail to: Great Southern Homes: 425 Summit Terrace Ct. Building 2 Columbia, SC 29229

A GSH representative will contact you within 7-10 business days after we receive your request to schedule an appointment. All warranty inspections and repair work will be scheduled between 8:00 AM and 3:30 PM Monday through Friday. We will not schedule work on weekends or after 3:30 PM on the weekdays. All work will be scheduled as soon as possible after the completion of the inspection. You must make your home accessible and have an adult (at least 18 years of age) present at the time any interior work is performed at your home. We will not accept keys from homeowners nor be in your home at any time without an adult present. If a claim is determined to be covered by the warranty, GSH will repair the defect as determined by the SC Residential Construction Standards. You are responsible to remove or repair any improvements you added after the construction of your home such as wallpaper, custom paints, fences, and sprinklers. **Note:** for service on appliances, electrical, heating & air conditioning or plumbing you will need to contact the subcontractor or manufacturer directly. The phone numbers for these subcontractors are on a decal located inside a cabinet door under the kitchen sink. If you do not have this list of phone numbers please notify our warranty department by email to warranty@gshomes.gs and we will provide this information to you.

EMERGENCY SERVICE

A list of telephone numbers for the electrician, plumber and heating contractors is located inside a lower cabinet in your kitchen. Please call these subcontractors directly for any emergency repairs. Listed below are conditions that are considered to be emergency situations:

Heating and air conditioning systems – Loss of heat due to a malfunction of the furnace when the outside temperature is 40 degrees or below. Air conditioning malfunctions are treated as routine service and not an emergency.

Electrical systems – Circuit breaker to gas furnace or heat pump keeps kicking off.

Plumbing systems – Plumbing leaks that require the water to be shut off at the main valve or all toilets are not functional. No water supply caused by an interruption of service by the Water Company is outside subcontractor & GSH control.

TREE SERVICE, LANDSCAPE & EROSION CONTROL

GSH DOES NOT GUARANTEE THE CONTINUAL GROWTH OR LIFE OF ANY TREE, SHRUB OR GRASS. Prior to your closing all proper grading and landscaping will be completed, and it will become the responsibility of the homeowner to maintain all landscaping and grading. GSH will not replace or remove any landscaping or trees unless it is specifically stated on your pre-closing Orientation Form or on your conditional sales contract. **THERE ARE NO EXCEPTIONS.** Any erosion of the property becomes the responsibility of the homeowner upon closing. Sprinkler systems are not covered under warranty and require maintenance by the homeowner on a regular basis.

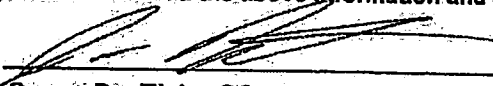
SEALANTS

Items related to thermal expansion and contraction of building materials including nail pops and natural hairline cracks require ongoing homeowner maintenance and are not covered under the materials and workmanship warranty. For example, all caulking throughout the home must be maintained by the homeowner.

EXTREME WEATHER CONDITIONS

Your home was designed to be free of leaks under normal conditions. For example, high velocity wind-driven rain can cause damages that are not the result of normal conditions. Damages as a result of these conditions may be covered by your Homeowner's Insurance Policy and are not the responsibility of GSH. You should also take necessary precautions whenever a freeze warning is in effect. This can include covering outside hose bibs, keeping cabinet doors open beneath the kitchen sink so warm air can circulate around water pipes, etc.

I acknowledge that I have read the above information and agree to the policies stated in these sections.

Homeowner: 

Address: 2 Casey Dr, Elgin, SC 29045

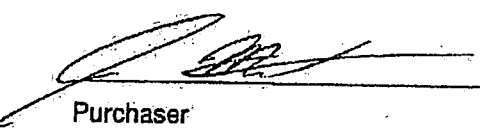
Date of closing: 12/18/15 (material & workmanship warranty expires 1 yr. from closing date)

GREAT
Southern
HOMES
Hardwoods Care Waiver

STATE OF SOUTH CAROLINA

Agreement made this day of July 18, 2015 between Jonathan Mart
(Purchaser) and Great Southern Homes (Seller) pertaining to Contract of Sale
dated July 18, 2015 for property located at 2 Casey Dr, Elgin

Products covered with a moisture warranty, such as but not limited to engineered hardwood flooring, will resist damage from normal household food and beverage substances, provided the spill is removed promptly. Topical spills allowed to remain on the floor for any considerable time will damage the floor and void the warranty coverage. Plumbing accidents, leaking appliances (icemakers, dishwashers, clothes washers ect) are not topical spills and are not covered by this warranty.


Purchaser

Purchaser



I understand I will be contacted, by phone and/or email, by a representative from RFP Technologies. The purpose of this communication will be to coordinate the setup and activation of the automation system in my new home.

I understand this activation process is included with the purchase of the home and will be completed by RFP Technologies at no additional charge. This appointment will take place after closing, and once internet services have been installed.


Signature of Owner

7/18/15

Date

Signature of Owner

Date

RFP Technologies, LLC
P.O Box 5545
Concord, NC 28027-1509
Office 704-631-3981
www.rfptech.biz



Community: LN
Lot # 34
Address: 2 Casey Dr

Plan: Beaujolais B
Name: Jonathan Mart
Date 7/18/15

Color Selections

Exterior Brick N/A
 Brick Mortar (Grey or Buff) N/A
 Shingles Black
 Hardi Plank Color N/A
 Ext Vinyl Spanish Olive
 Ext Vinyl Accent N/A
 Ext Vinyl Batten N/A
 Ext Vinyl shake N/A
 Stone Oak Island
 Shutters Black
 Carpet 739 Rosewood
 Kitchen Cabinets Espresso
 Cabinet Knobs ONLY - Brushed Nickel
 Granite counters New Venetian Gold
 Tile Backsplash N/A
 Vinyl Floor Mohave Stone 02121 Adobe
 Tile flooring N/A
 Hardwood Flooring ~~English Leather~~ *Walnut*
 Appliances Stainless
 Mirror Surround 7210
 Door Hardware/Int Lights
 Brushed Nickel

Shower Door Clear

Metal color white

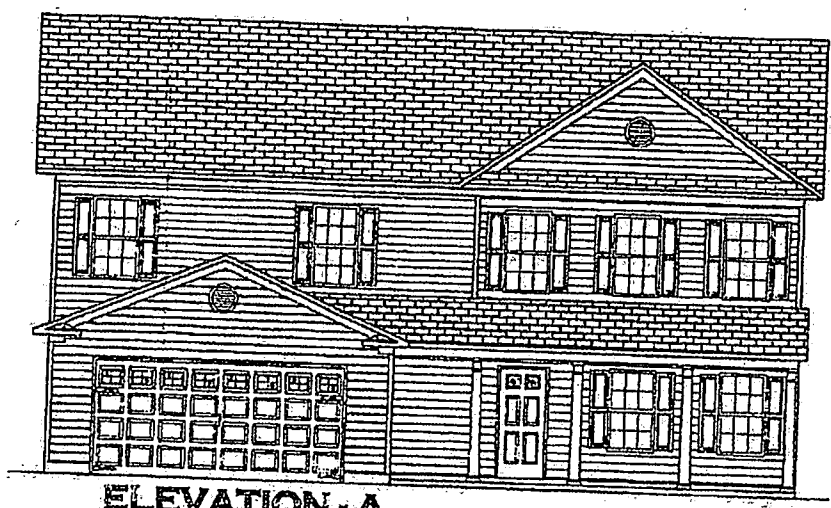
(House Trim/Window/Garage color...fiberglass columns can be either but aluminum columns must be white no matter what. Upgrade to fiberglass columns in communities that do aluminum standard is 175 per column)

***Purchaser acknowledges that stone, brick, granite, carpet, hardwoods ect may vary slightly from samples and other homes due to variations in dye lots or because it is a natural material.





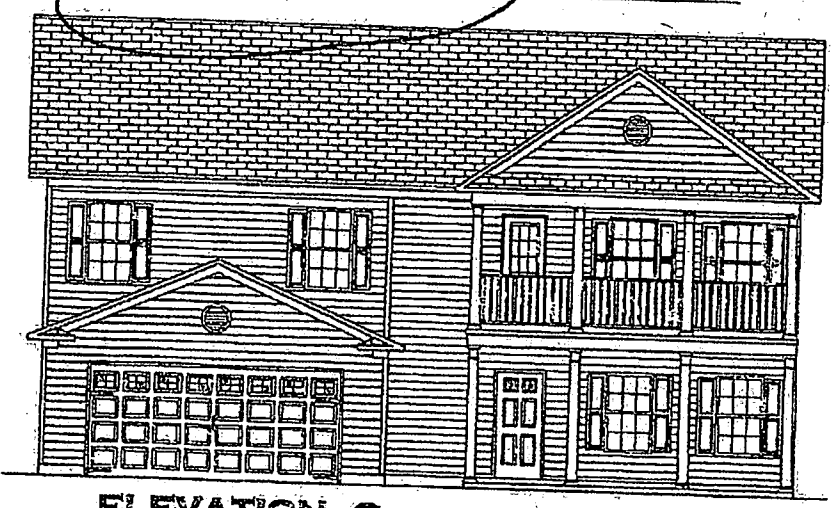
THIS PLAN SHOWN AS TO
BE A PART OF THE RECORD
AND NOT BE A PART OF THE
RECORD AND NOT BE A PART
OF THE RECORD AND NOT BE
A PART OF THE RECORD



ELEVATION - A



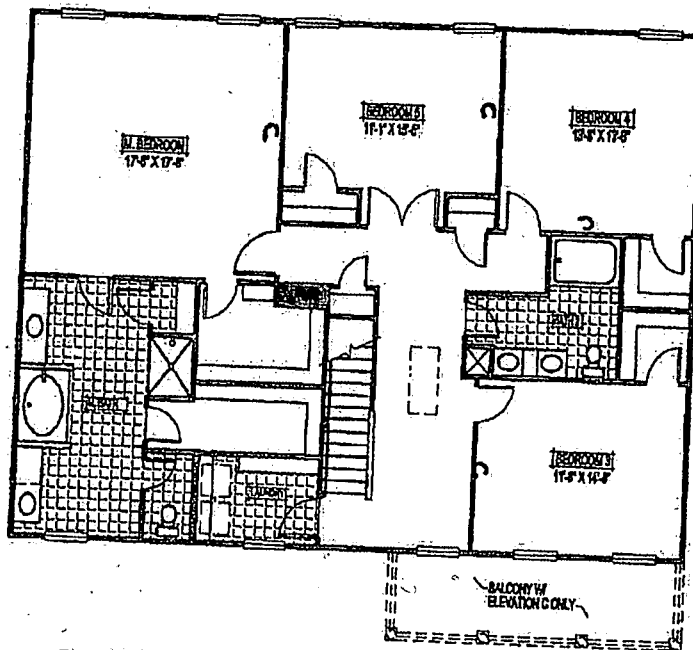
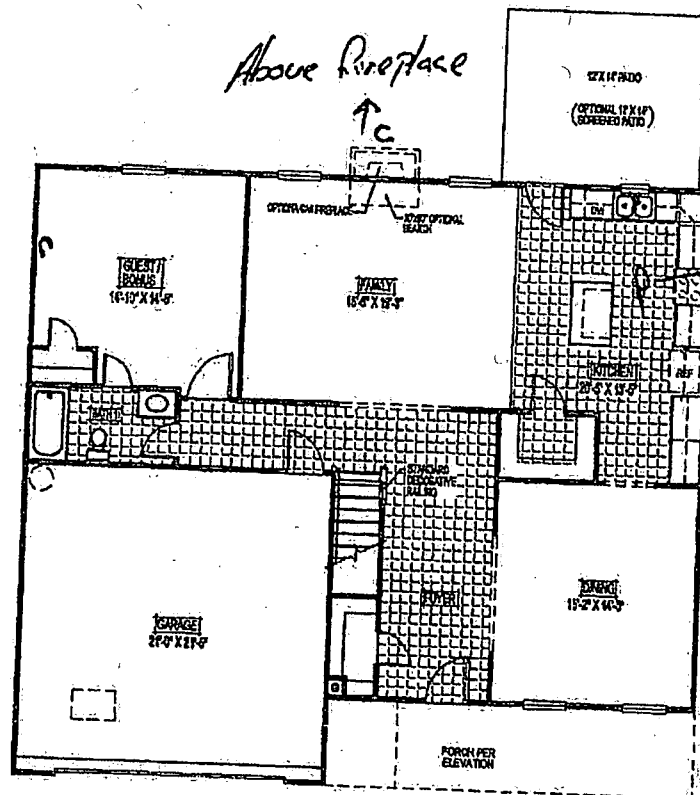
ELEVATION - B



ELEVATION - C

THE BEAUJOLAIS
3,124 SQUARE FEET

SUBDIVISION:	DATE: 07/24/13
NOTE: ALL ROOM SIZES ARE APPROXIMATE	
COPYRIGHT (C) 2005	

**UPPER FLOOR PLAN****LOWER FLOOR PLAN**

THE BEAUJOLAIS
3,124 SQUARE FEET

SUBDIVISION: JC

DATE: 07/24/13

NOTE: ALL ROOM SIZES ARE APPROXIMATE

COPYRIGHT © 2008

ROA 152



Longview

Standard Features

GreenSmart Home Energy & Automation Features

- ❖ R50 Blown Attic Insulation
- ❖ Radiant Barrier Roof Sheathing
- ❖ Thermal Envelope Air Sealing
- ❖ Advanced Framing Techniques
- ❖ Rinnai Tankless Gas Hot Water Heater (per Neighborhood)
- ❖ Energy Efficient 14 Seer Gas HVAC
- ❖ Programmable Thermostat
- ❖ Low VOC Sherwin Williams Paint & Mohawk Carpet
- ❖ High Performance Low E Tilt Out Windows
- ❖ CFL Bulbs in 50% of Light Fixtures
- ❖ Moen Water Sense Shower Heads & Sink Faucets
- ❖ Kenmore Energy Star Appliances (dishwasher, microwave & smooth top range)
- ❖ Stylish Insulated Front Door (per plan)
- ❖ Insulated Exterior Doors (per plan)
- ❖ HERS Energy Testing & Third Party Rating
- ❖ Honeywell Tuxedo Touch Home Automation System
- ❖ CHIP Certified High Performance Home by the Green Building Council of Greater Columbia
- ❖ Audio Docking Station w/ Speakers, Music Port & USB charging ports

Architectural Features

- ❖ Crown Moulding in Dining Room (per plan)
- ❖ Chair Rail in Dining Room (per plan)
- ❖ Oak Newel Post with Metal Balusters (per plan)
- ❖ Oak Handrail
- ❖ Full Picture Framed Windows Downstairs

Kitchen

- ❖ Designer Maple Staggered Height Cabinets with Crown Moulding
- ❖ Designer Hardware
- ❖ Granite Countertops
- ❖ Kenmore Energy Star Dishwasher, Microwave and Smooth Top Range (stainless)
- ❖ Moen Faucet with Sprayer

Owners Suite

- ❖ Maple Comfort Height Vanity
- ❖ Granite Vanity Top
- ❖ Moen Single Lever Sink Faucet(s)
- ❖ Low Maintenance Fiberglass Garden Tub/Shower (per plan)
- ❖ Clear Shower Glass Door (on separate showers)
- ❖ Framed Mirror
- ❖ Paper Holder (Mason)

Secondary Baths

- ❖ Maple Vanity Cabinets
- ❖ Granite Vanity Tops
- ❖ Moen Single Lever Sink Faucets
- ❖ Pedestal Sink in Half Bath (per plan)
- ❖ Framed Mirrors
- ❖ Paper Holders (Mason)

Interior Features

- ❖ Recessed Lighting (per plan)
- ❖ Up to Six (6) Cable and/or Phone Outlets
- ❖ Nickel Lighting, Locks & Hinges
- ❖ Ceiling Fan with Light Kit in Family Room & Master
- ❖ All Secondary Bedrooms Pre-Wired for Ceiling Fans

Flooring

- ❖ Designer Vinyl in Kitchen, Bathrooms & Laundry Area
- ❖ Mohawk carpet or Hardwood in Living Spaces (per plan)

Exterior Features

- ❖ Lifetime Architectural Shingles
- ❖ Lifetime roof pipe vents
- ❖ Brick or Stone Accents (per elevation)
- ❖ Painted Double Car Garage
- ❖ LiftMaster Garage Door Opener with Two (2) Remotes
- ❖ Carriage Garage Door(s) with Carriage Hardware
- ❖ Low Maintenance Revere Vinyl Siding
- ❖ Low Maintenance Aluminum Fascia & Vinyl Soffit
- ❖ Flood Light Pre-Wire to Attic Junction Box
- ❖ Outdoor Living Space - Patio or Deck (per plan)
- ❖ Landscape Package per community
 - Sodded Yard with Automatic Irrigation System up to 20 FT past rear corner of home.
- ❖ Bora-Care Termite Control

1-2-10 Home Warranty from StrucSure Warranty Group

- ❖ 1 Year Warranty on Workmanship
- ❖ 2 Year Limited Warranty on Plumbing, Electrical & HVAC
- ❖ 10 Year Structural Warranty
- ❖ 2 Year Energy Guarantee

Prices, plans, and standard features are subject to change without notice.

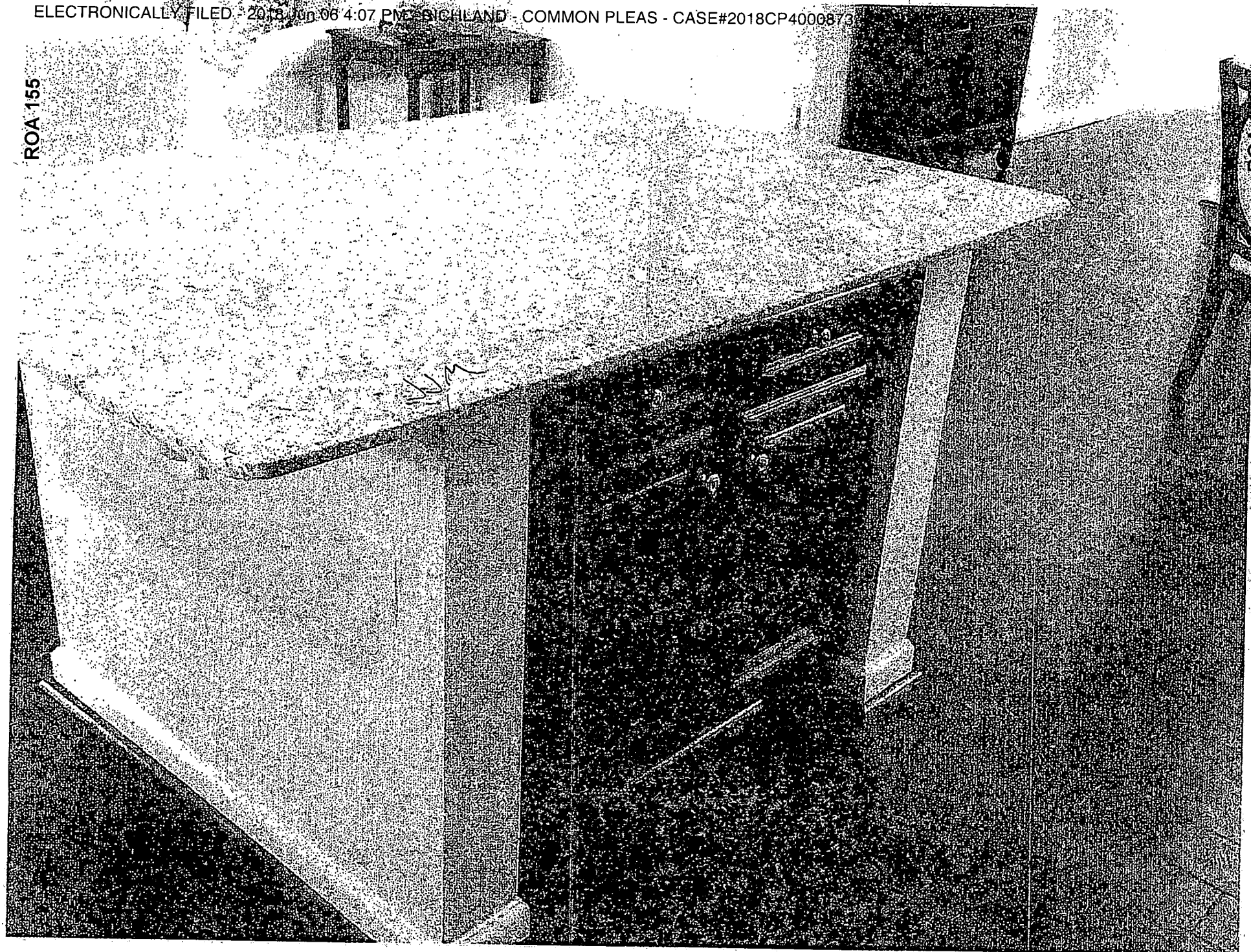
4/27/2015

ROA 153



WM 40

ROA 155



ROA 155

Community: LN
Lot # 34
Address: 2 Casey Dr

Plan: Beaujolais B
Name: Jonathan Mart
Date 7/18/15

Color Selections

Exterior Brick N/A
 Brick Mortar (Grey or Buff) N/A
 Shingles Black
 Hardi Plank Color N/A
 Ext Vinyl Spanish Olive
 Ext Vinyl Accent N/A
 Ext Vinyl Batten N/A
 Ext Vinyl shake N/A
 Stone Oak Island
 Shutters Black
 Carpet 739 Rosewood
 Kitchen Cabinets Espresso
 Cabinet Knobs ONLY - **Brushed Nickel**
 Granite counters New Venetian Gold
 Tile Backsplash N/A
 Vinyl Floor Mohave Stone 02121 Adobe
 Tile flooring N/A
 Hardwood Flooring ~~English Leather~~ *Walnut*
 Appliances Stainless
 Mirror Surround 7210
 Door Hardware/Int Lights
 Brushed Nickel
 Shower Door Clear

Metal color white

(House Trim/Window/Garage color... fiberglass columns can be either but aluminum columns must be white no matter what. Upgrade to fiberglass columns in communities that do aluminum standard is 175 per column)

***Purchaser acknowledges that stone, brick, granite, carpet, hardwoods ect may vary slightly from samples and other homes due to variations in dye lots or because it is a natural material.



ROA 157

701 West Main Street
Lexington, SC 29072
803-566-7441

July 14, 2015

Jonathan Mart
9 Driftwood Ave
Elgin, SC 29045

Re: Pre-Qualification for Purchase

Dear Jonathan,

Thank you for choosing Ameris Bank. We are pleased to inform you that your mortgage loan has been pre-qualified with the following terms and conditions. If there are any changes to the Terms and Conditions listed below your loan will have to be re-submitted to our Underwriting Department for review:

Terms:

Program: VA
Property: Lot 34 Casey Dr

Conditions:

- 1) Credit verification letter showing Navy Federal Credit Union vehicle – paid in full
- 2) Sale of current home located at 9 Driftwood Ave
- 3) Acceptable sales contract to include all applicable addendums when property is located
- 4) Acceptable appraisal and title commitment to be ordered by Ameris Bank
- 5) Acceptable homeowners insurance

Again, thank you for giving Ameris Bank the privilege of financing your home. We look forward to serving your needs.

Sincerely,

Alicia M. Blivins

Senior Mortgage Banker
NMLS#365405
803-567-7661

50

ELECTRONICALLY FILED - 2018 Jun 06 4:07 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4000873

ROA 157

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Jonathan Mart, on behalf of himself and	)	CIVIL ACTION NO. 2018-CP-40-00873
others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	AFFIDAVIT OF SHELTON TWINE
v.	)	
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

Personally, appeared before me, Shelton Twine, after being duly sworn, deposes and states as follows:

1. I am over the age of 21 years and am familiar with the contract and related matters concerning the construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart because I am the records custodian and Vice President of Operations of Great Southern Homes, Inc.
2. The construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart required the purchase of numerous materials and supplies shipped to South Carolina from other states, the following business records kept by Great Southern in the normal course of business to serve only as an example of materials and supplies from foreign states used in the construction of the home.:
 - a. Framing Turnkey, 84 Lumber (vendor), 1019 Route 519, Eighty Four, PA 15330; sum \$29,781.00 (Exhibit 1).
 - b. Flooring, carpet and vinyl, Stock Building Supply, PO Box 404934, Atlanta, GA 30384-4934 Sum \$2,788.75. (Exhibit 1)

Exhibit 2

c. Hardwood flooring, Stock Building Supply, PO Box 404934-4934; Sum \$3,412.75(Exhibit 1)

3. The above materials described in the invoices in paragraph 2 were used to construct the plaintiff's home.

4. The contract for the construction of Mr. Mart's home was signed on or about July 18, 2015. Construction of this home began on or about August 26, 2015 and was substantially completed by December 10, 2015.

5. Since the contract with Mr. Mart was entered prior to commencement of construction. Great Southern Homes was required to construct the home in order to perform its obligations under the contract with Mr. Mart.

6. I know the facts stated herein to be true of my own knowledge, except as to those matters stated on information and belief and as to those matters I believe them to be true.

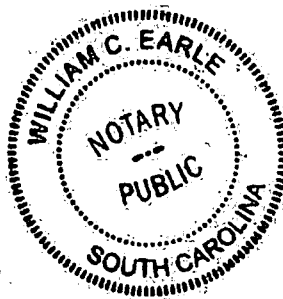
Shelton Twine Affiant

Sworn and Subscribed to and before me
This 4th day of June 2018

William C. Earle (L.S.)
Signature

William C. Earle
Print

Notary Public for South Carolina
My Commission Expires July 19, 2022
(SEAL)



***** WORK ORDER HISTORY RE-PRINT *****

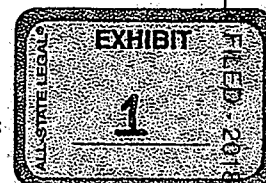
Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

WORK ORDER: 00109202 (REPRINT)
VENDOR NUMBER: 110841
DATE: 08/13/2015

VENDOR:
84 Lumber
1019 Route 519
Elghty Four, PA 15330
PHONE: 803-359-4484

PERMIT NUMBER:
022936

BUYER:
Mart, Jonathan
HOUSE ADDRESS:
2 Casey Drive
Elgin, SC 29045



DEVELOPMENT
002 LN Longview North

HOUSE MODEL/ELEVATION
00000034 (BEA/B) Beaujolais / Beaujolais Elevation B

BLOCK / LOT ORIENTATION
/ 34 Garage Left

Cost Code	Opt Code	Qty	Description	Amount
266-03			Framing TurnKey - Framing Material & Labor Turn	
	70009	1	Screen Porch - Size Per Plan	28,781.00
266-51			Framing TurnKey - Optional Material & Labor	1,000.00
TOTAL				29,781.00
STYLE / COLOR SELECTIONS				
Window Color: White				

This WO must accompany invoice in order to receive payment!!

Authorization
Great Southern Homes

Work Performed
84 Lumber

Work Accepted
Superintendent

Date: _____

Date: _____

Date: _____

Tue, May 29 2018 09:41 AM (Eastern Standard Time)

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER HISTORY RE-PRINT *****

PURCHASE ORDER: 062495
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(BEA/B) Beaujolais

BLOCK / LOT

/ 34

ORIENTATION

Garage Left

PO Note: Flooring-Flooring-Flooring-Flooring-Carpet & Vinyl Material/Labor

House Number	Cost Code	Option	Description	Amount
LN/00000034	413-01		Flooring - Carpet & Vinyl Material/Labor	3,645.88
LN/00000034	413-51	55049	Flooring - Hardwood in Dining Room	-195.50
LN/00000034	413-53	55046	Flooring - Hardwood in Foyer	-320.20
LN/00000034	413-53	55071	Flooring - Hardwood in Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	-341.20

Product Code	Description	U/M	Quantity	Price	Extension
12100	Carpet Step Labor - Per Step		14.00	1.786	25.00
12101	Top Card w/ 6# Pad		245.00	8.50	2,082.50
58100	Underlayment - 1/4" x 4' x 8' - Draw #1		9.00	30.00	270.00
58101	Vin Flooring - (Sq Yd) - Draw # 1		47.00	8.75	411.25
STYLE / COLOR SELECTIONS					
Floor Carpet: Mohawk Kuhlman Crossing Rosewood 739					
Floor Vinyl:					
Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)					
Subtotal:					2,788.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					2,788.75

IMPORTANT:

Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

Superintendent

***** PURCHASE ORDER HISTORY RE-PRINT *****

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER: 062496
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(B&A/B) Beaujolais

BLOCK / LOT

/ 34

ORIENTATION

Garage Left

PO Note: Hardwood-Hardwood-Hardwood-Option- Hwd In Foyer and Closet Option-HWD In Kitchen

House Number	Cost Code	Option	Description	Amount
LN/00000034	425-51	55046	Flooring - Hardwood In Foyer-	
LN/00000034	425-51	55049	Flooring - Hardwood In Dining Room	1,251.40
LN/00000034	425-51	55071	Flooring - Hardwood in Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	1,027.00
				1,134.35

Product Code	Description	U/M	Quantity	Price	Extension
30105	Hardwood Floor - Oak Quarter Round (LnFt) Draw 1		185.00	1.40	259.00
30106	Hardwood Floor- Oak Transitions (LnFt) Draw 1		48.00	0.00	0.00
30112	Hardwood Floor - 5" Square Glue Down (SqFt) Draw 1		725.00	4.35	3,153.75
STYLE / COLOR SELECTIONS					
	Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)				
Subtotal:					3,412.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					3,412.75

IMPORTANT:

Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

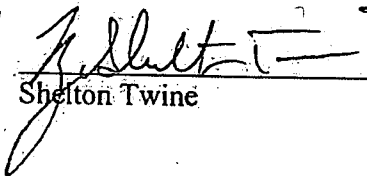
Superintendent

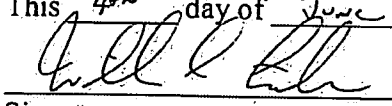
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Jonathan Mart, on behalf of himself and	)	CIVIL ACTION NO: 2018-CP-40-00873
others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	AFFIDAVIT OF SHELTON TWINE
v.	)	
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

Personally, appeared before me, Shelton Twine, after being duly sworn, deposes and states as follows:

1. I am over the age of 21 years and am familiar with the contract and related matters concerning the construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart because I am the records custodian and Vice President of Operations of Great Southern Homes, Inc.
2. The construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart required the purchase of numerous materials and supplies shipped to South Carolina from other states, the following business records kept by Great Southern in the normal course of business to serve only as an example of materials and supplies from foreign states used in the construction of the home.:
 - a. Framing Turnkey, 84 Lumber (vendor), 1019 Route 519, Eighty Four, PA 15330: sum \$29,781.00 (Exhibit 1).
 - b. Flooring, carpet and vinyl, Stock Building Supply, PO Box 404934, Atlanta, GA 30384-4934 Sum \$2,788.75. (Exhibit 1)

- c. Hardwood flooring, Stock Building Supply, PO Box 404934-4934, Sum
\$3,412.75(Exhibit 1)
3. The above materials described in the invoices in paragraph 2 were used to construct the plaintiff's home.
4. The contract for the construction of Mr. Mart's home was signed on or about July 18, 2015. Construction of this home began on or about August 26, 2015 and was substantially completed by December 10, 2015.
5. Since the contract with Mr. Mart was entered prior to commencement of construction. Great Southern Homes was required to construct the home in order to perform its obligations under the contract with Mr. Mart.
6. I know the facts stated herein to be true of my own knowledge, except as to those matters stated on information and belief and as to those matters I believe them to be true.

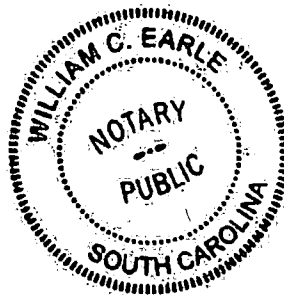
 Affiant
Shelton Twine

Sworn and Subscribed to and before me
This 4th day of June 2018
 (L.S.)

Signature

William C. Earle
Print

Notary Public for South Carolina
My Commission Expires July 19, 2022
(SEAL)



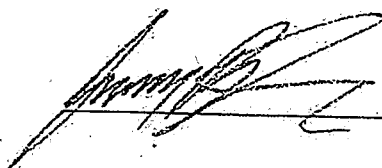
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
Jonathan Mart, on behalf of himself and others similarly situated,	)	CIVIL ACTION NO. 2018-CP-40-00873
	)	
Plaintiffs,	)	
	)	AFFIDAVIT OF JEREMY PYLE
v.	)	
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

Personally, appeared before me, Jeremy Pyle, after being duly sworn, deposes and states
as follows:

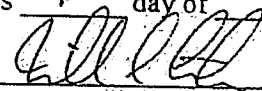
1. I am over the age of 21 years and am familiar with the construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart because I was the company Construction Manager and supervised the construction of this home.
2. The construction of 2 Casey Drive, Elgin, SC 29045 for Jonathan Mart required the purchase of numerous materials and supplies shipped to South Carolina from other states, the following purchase orders serve only as an example:
 - a. Framing Turnkey, 84 Lumber (vendor), 1019 Route 519, Eighty Four, PA 15330: sum \$29,781.00 (Exhibit 1).
 - b. Flooring, carpet and vinyl, Stock Building Supply, PO Box 404934, Atlanta, GA 30384-4934 Sum \$2,788.75. (Exhibit 1)
 - c. Hardwood flooring, Stock Building Supply, PO Box 40494, Atlanta, Ga. 30384-4934; Sum \$3,412.75 (Exhibit 1)

3. The above materials described in the invoices listed in paragraph 2 were used to construct the Mr. Mart's home..

4. I know the facts stated herein to be true of my own knowledge, except as to those matters stated on information and belief and as to those matters I believe them to be true.

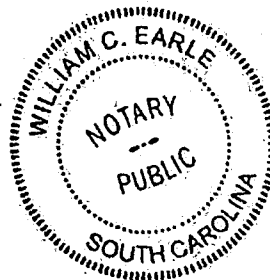
 Affiant

Sworn and Subscribed to and before me
This 4th day of June 2018

 (L.S.)
Signature

William C. Earle
Print

Notary Public for South Carolina
My Commission Expires July 19, 2022
(SEAL)



***** WORK ORDER HISTORY RE-PRINT *****

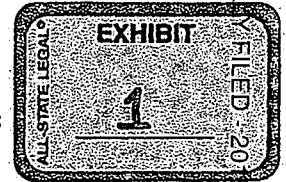
Great Southern Homes
80 N. Royal Tower
Irmó, SC 29063

WORK ORDER: 00109202 (REPRINT)
VENDOR NUMBER: 110841
DATE: 08/13/2015

VENDOR:
84 Lumber
1019 Route 519
Eighty Four, PA 15330
PHONE: 803-359-4484

PERMIT NUMBER:
022936

BUYER:
Mart, Jonathan
HOUSE ADDRESS:
2 Casey Drive
Elgin, SC 29045



ELECTRONICAL FILED - 2018 JUN 06 4:07 PM HIGHLAND - COMMON PLEAS - CASE#2018CP4000873

DEVELOPMENT
002 LN Longview North

HOUSE MODEL/ELEVATION
00000034 (BEA/B) Beaujolais / Beaujolais Elevation B

BLOCK / LOT ORIENTATION
/ 34 Garage Left

Cost Code	Opt Code	Qty	Description	Amount		
266-03	70009	1	Framing TurnKey - Framing Material & Labor-Turn	28,781.00		
			Screen Porch - Size Per Plan			
266-51			Framing TurnKey - Optional Material & Labor	1,000.00		
			TOTAL	29,781.00		
STYLE / COLOR SELECTIONS						
			Window Color: White			

This WO must accompany invoice in order to receive payment!

07 PM HIGHLAND - COMMON PLEAS - CASE#2018CP4000873

This WO must accompany invoice in order to receive payment!!

Authorization

Great Southern Homes

Work Performed

84 Lumber

Work Accepted

Superintendent

Date:

Date:

Date:

Tue, May 29 2018 09:41 AM (Eastern Standard Time)

***** PURCHASE ORDER HISTORY RE-PRINT *****

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER: 062495
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(BEA/B) Beaujolais

BLOCK / LOT

/ 34

ORIENTATION

Garage Left

PO Note: Flooring-Flooring-Flooring-Flooring-Carpet & Vinyl Material/Labor

House Number	Cost Code	Option	Description	Amount
LN/00000034	413-01		Flooring - Carpet & Vinyl Material/Labor	3,645.86
LN/00000034	413-51	55049	Flooring - Hardwood In Dining Room	-195.50
LN/00000034	413-53	55046	Flooring - Hardwood In Foyer	-320.36
LN/00000034	413-53	55071	Flooring - Hardwood In Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	-341.25

Product Code	Description	U/M	Quantity	Price	Extension
12100	Carpet Step Labor - Per Step		14.00	1.786	25.00
12101	Top Card w/ 6# Pad		245.00	8.50	2,082.50
58100	Underlayment - 1/4" x 4" x 8" - Draw #1		9.00	30.00	270.00
58101	Vin Flooring - (Sq Yd) - Draw # 1		47.00	8.75	411.25
STYLE / COLOR SELECTIONS					
Floor Carpet: Mohawk Kuhlarn Crossing Rosewood 739					
Floor Vinyl:					
Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)					
Subtotal:					2,788.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					2,788.75

IMPORTANT:

Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

Superintendent

Tue, May 29 2018 09:43 AM (Eastern Standard Time)

***** PURCHASE ORDER HISTORY RE-PRINT *****

Great Southern Homes
90 N. Royal Tower
Irmo, SC 29063

PURCHASE ORDER: 062496
VENDOR NUMBER: 300422
DATE ISSUED: 08-13-2015
DATE REQUESTED:

VENDOR:

Stock Building Supply
Coleman-Columbia 6523
PO Box 404934
Atlanta, GA 30384-4934
PHONE: 843-640-7307

SHIP TO:
2 Casey Drive
Elgin, SC 29045

SHIP VIA:

DEVELOPMENT

002 LN Longview North

MODEL/ELEVATION

(BEA/B) Beaujolais

BLOCK / LOT

/ 34

ORIENTATION

Garage Left

PO Note: Hardwood-Hardwood-Hardwood-Option- Hwd In Foyer and Closet Option-HWD in Kitchen

House Number	Cost Code	Option	Description	Amount
LN/00000034	425-51	55046	Flooring - Hardwood In Foyer-	1,251.40
LN/00000034	425-51	55049	Flooring - Hardwood In Dining Room	1,027.00
LN/00000034	425-51	55071	Flooring - Hardwood in Kitchen (CUSTOMER MUST SIGN DISCLAIMER WAIVING RIGHTS FOR ANY WARRANTY CLAIMS DUE TO WATER)	1,134.35

Product Code	Description	U/M	Quantity	Price	Extension
30105	Hardwood Floor - Oak Quarter Round (LnFt) Draw 1		185.00	1.40	259.00
30106	Hardwood Floor- Oak Transilions (LnFt) Draw 1		48.00	0.00	0.00
30112	Hardwood Floor - 5" Square Glue Down (SqFt) Draw 1		725.00	4.35	3,153.75
STYLE / COLOR SELECTIONS					
Floor Hardwood: Blue Ridge Mountain Plank- Birch Walnut (BR-WA)					
Subtotal:					3,412.75
Sales Tax: @ 8.00 %					0.00
Grand Total:					3,412.75

IMPORTANT:

Our order number must appear on all invoices, packages, etc. Please notify us immediately if you are unable to ship the complete order by the requested date above. DO NOT SHIP UNTIL NOTIFIED BY PHONE. Superintendent will call to verify request date. This PO must accompany your invoice in order to receive payment!!

Authorized & Accepted by:

Project Manager

Approved for Payment by:

Superintendent

Wed, May 30 2018 02:13 PM (Eastern Standard Time)

ROA 169 Page 1 of 1

ELECTRONICALLY FILED - 2018 Jun 06 4:07 PM - RICHLAND - COMMON PLEAS - CASE#2018CP40000873

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Jonathan Mart, on behalf of himself and others similarly situated,	)	Civil Action No. 2018-CP-40-00873
	)	
Plaintiff,	)	
	)	OPPOSITION TO GREAT SOUTHERN
vs.	)	HOMES, INC.'S MOTION TO
	)	DISMISS AND COMPEL
Great Southern Homes, Inc.,	)	ARBITRATION
	)	
Defendant.	)	

Plaintiff Jonathan Mart ("Mart") respectfully submits this response to Defendant Great Southern Homes, Inc.'s ("Great Southern") Motion to Dismiss and Compel Arbitration pursuant to Rule 12(b)(6), SCRCP.

Great Southern cannot avoid this Court's jurisdiction pursuant to its flawed and unfair "Contract For Sale" that requires all its homebuyers, such as Mart, to sign on a take-it-or-leave-it basis. In its motion, Great Southern argues that the Federal Arbitration Act ("FAA") requires this Court to dismiss Mart's complaint and send the current dispute to arbitration. However, as set forth below, Great Southern is wrong for at least two reasons. First, there was no "meeting of the minds" as to arbitration because Great Southern's "Contract For Sale" contains conflicting and irreconcilable arbitration clauses. Therefore, there is no enforceable agreement to arbitrate. Second, as to the clause titled "Arbitration" that Great Southern seeks to enforce here, that provision is unenforceable under South Carolina law because it violates S.C. Code § 15-48-10(a) and is unconscionable. Accordingly, the Court should deny Defendant's motion and retain jurisdiction over this important matter.

INTRODUCTION AND NATURE OF THE ACTION

Great Southern is a builder and seller of new homes in South Carolina and advertises itself on its website as the “nation’s 62nd largest builder” as well as the “3rd fastest-growing private builder in the nation.”¹ In July 2015, Great Southern sold a new home to Mart located in Kershaw County, South Carolina. In Great Southern’s proprietary “Contract For Sale,” Great Southern forced Mart to waive, without consideration, fundamental warranty rights including the implied warranty of habitability. Mart now brings this action, on behalf of himself and others similarly situated, asking the Court to (1) declare as a matter of law that Great Southern cannot waive the implied warranty of habitability without paying its customers adequate consideration for such waiver, and (2) determine that Great Southern’s business practice gives its customers a right of recovery against Great Southern 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 Great Southern vis-à-vis a new home buyer, the South Carolina Supreme Court has recognized that the warranty of habitability cannot be waived or disclaimed unless the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. *See Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). Nevertheless, in contravention to this long-standing precedent, Great Southern operates its business uniformly to require all new home buyers, including Mart, to waive the warranty of habitability *without* providing these homebuyers any compensation or separate consideration for such waiver as is required by South Carolina law.

¹ See Great Southern Homes News Page available at <http://www.greatsouthernhomes.com/news/> (last visited January 22, 2018).

GREAT SOUTHERN'S CONTRACT FOR SALE

Great Southern requires purchasers of its homes to execute Great Southern's proprietary "Contract For Sale."² This Contract For Sale is an adhesion contract because the purchaser of a Great Southern Home has no ability to negotiate its standard terms and it is offered on a take-it-or-leave-it basis. Great Southern's Contract For Sale 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 Great Southern requires that its purchasers waive is the implied warranty of habitability. In lieu of the implied warranties, Great Southern instead substitutes an "Express Limited Warranty" under which Great Southern has certain defined warranty responsibilities and other warranty obligations are transferred to a third-party warranty company. This Express Limited Warranty is not a separate contract because it is a part of the Contract For Sale and is the operative document that sets forth the warranty obligations of Great Southern.³ Great Southern utilizes the StrucSure Home Warranty as the Express Limited Warranty provided to its purchasers under the Contract For Sale.⁴ In addition to the broad disclaimer of warranty rights, Great Southern's Contract For Sale and the Express Limited Warranty contain other significant limitations on the rights and remedies afforded to the buyer of a Great Southern home.

² A copy of the Contract For Sale between Great Southern Homes and Mart is attached as Exhibit 1 to Plaintiff's Complaint.

³ The Contract For Sale states that "[t]he Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the offices of the Seller." [Complaint, Ex. 1 at "Limited Warranty"]. The Limited Warranty is not signed by either the Seller or Purchaser, nor does it bear any other indicia of being a separate and distinct contract between Seller and Purchaser.

⁴ A copy of the StrucSure Home Warranty is attached to the Affidavit of Jonathan Mart as Exhibit A.

For instance, Great Southern declares that its customers can *never* sue it for money damages for *any* reason.

Further, Great Southern purports to require that any claim that one of its purchasers may have against it arising out of or related to the Contract For Sale be resolved through arbitration.

The Contract For Sale contains a broad arbitration clause which reads as follows:

Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et. seq.

[Complaint, Ex. 1]

In addition to this arbitration clause, the Express Limited Warranty also contains a separate, and equally broad, arbitration clause which reads in relevant part as follows:

The parties to the Express Limited Warranty intend and agree that any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to the Express Limited Warranty . . . or the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing, shall be settled by arbitration in a manner consistent with this arbitration agreement.

[Affidavit of Jonathan Mart; Ex. A at p. 22]

The procedure specified in the Express Limited Warranty for arbitration differs in a number of material respects from the arbitration provision set forth in the Contract For Sale. There is no provision in the Contract For Sale or the Express Limited Warranty, such as a merger clause, which specifies which of these conflicting provisions take precedence.

ARGUMENT

The Court should deny Defendant's motion to compel arbitration for at least two reasons. First, in order for the Court to enforce an arbitration agreement, there must be an agreement to arbitrate. Because the Contract For Sale contains two separate arbitration agreements with irreconcilable differences, there was no meeting of the minds as to a procedure to arbitrate disputes. Therefore, no agreement to arbitrate exists between Great Southern and Mart. Second, even if the arbitration clause in the Contract For Sale, which Great Southern seeks to enforce here, constituted the only arbitration clause between the parties, the Court should deny Great Southern's motion because the arbitration clause is unenforceable. That arbitration clause is unenforceable because it lacks the requirements set forth in S.C. Code § 15-48-10(a) and because it is unconscionable.

I. Without a meeting of the minds as to a procedure to resolve disputes through arbitration, there is no arbitration agreement that this Court can enforce.

Whether a valid arbitration agreement exists is a matter for judicial determination. *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010); *see Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007) (finding a "gateway matter" to arbitrability is the existence of an agreement to arbitrate). In making this determination, trial courts consider "general contract defenses" to ensure that a meeting of the minds to arbitrate existed, and that such an agreement was not the result of "fraud, duress, [or] unconscionability." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001); *see also NAACP of Camden East v. Foulke Management Corp.*, 421 N.J. Super. 404, 424-25 (N.J. Appellate Div. 2011) (finding that an agreement to arbitrate must be the result of a 'meeting of the minds' and that "clarity and internal consistency of a contract's arbitration provisions are important factors in determining whether a party reasonably understood those provisions and agreed to be bound by them.")

In this instance, Great Southern's Contract For Sale contains two conflicting arbitration agreements that cannot be reconciled. A comparison of the two clauses demonstrates the lack of clarity on how to proceed with arbitration.

a. The two arbitration clauses govern the same claims and disputes.

Both arbitration clauses are very broad in nature and cover the same scope of claims and disputes. They are both designed to cover virtually any claim or dispute that might arise between a purchaser and Great Southern. For example, both arbitration clauses cover claims for breach of contract and issues relating to the sale of the home which are the very claims asserted by Mart in the Complaint.

b. The two arbitration clauses have conflicting provisions as to the selection of any arbitrator(s) and as to the governing procedures for arbitration.

The arbitration clause in the Contract For Sale requires proceeding with three arbitrators with each party appointing an arbitrator and those two arbitrators appointing a third arbitrator. The arbitration procedure is that set forth in the South Carolina Uniform Arbitration Act. [Complaint, Ex. 1 at "Arbitration".] However, the arbitration clause in the Express Limited Warranty requires using an independent arbitration service such as Construction Dispute Resolution Services. The arbitration procedure shall be that specified by the independent arbitration service and the Federal Arbitration Act. [Mart Aff.; Ex. A at p. 22.] The method of selecting an arbitrator under the clause in the Express Limited Warranty is not specified, but in the absence of any provision in the rules of the independent arbitration service as to arbitrator selection, it would follow the Federal Arbitration Act under which the judge appoints a single arbitrator. *See* 9 U.S.C.A. § 5.

c. The two arbitration provisions differ in post-award remedies.

The Express Limited Warranty states that "[i]f the Homeowner disagrees with the Arbitrator's decision, s/he has the right to appeal it." [Mart Aff.; Ex. A at p. 23.] The Contract

For Sale does not provide such unlimited, broad right to appeal the merits of an award on any grounds nor does the South Carolina Uniform Arbitration Act. *See* S.C. Code Ann. §§ 15-48-120-200 (providing limited grounds and specific procedures upon which a court can review and vacate or modify an arbitration award).

The above comparison demonstrates that the two arbitration clauses cannot be reconciled or construed in harmony with each other. There is simply no way to determine which of these conflicting arbitration provisions would control and govern the procedure for arbitrating the claims Mart asserts against Great Southern.

South Carolina's appellate courts have not addressed this specific situation where a contract contains conflicting arbitration provisions. *Cf. York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83-84, 749 S.E.2d 139, 147-48 (Ct. App. 2013) (finding that two arbitration provisions in separate contracts were not inconsistent and conflicting to make agreements unenforceable). However, when faced with conflicting arbitration agreements such as those present here, other jurisdictions have found that this lack of clarity resulted in no "meeting of the minds" as to an agreement to arbitrate and refused to enforce the conflicting agreements. *See Ragab v. Howard*, 841 F.3d 1134, 1137-39 (10th Cir. 2016) (holding conflicting arbitration provisions indicated that there was no meeting of the minds with respect to arbitration); *see also Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1155-57 (Fla. 2014) (affirming trial court's finding that no valid agreement to arbitrate existed when provisions regarding selection of arbitrators and governing law or procedure were in conflict); *NAACP of Camden Cnty. East v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 437-38 (N.J. Super. Ct. App. Div. 2011) (holding that "the cumulative effect of the many inconsistencies and unclear passages in the arbitration terms within the [contract documents] compel us to declare them unenforceable for lack of mutual assent."). This Court should follow

this well-reasoned line of cases and likewise find that Great Southern's conflicting arbitration provisions evidence a lack of mutual assent to arbitration and, therefore, there is no valid arbitration agreement for this Court to enforce.

II. The arbitration clause in the Contract For Sale, which is the one that Great Southern seeks to enforce, is not enforceable because it does not meet the specific requirements of the South Carolina Uniform Arbitration Act.

A. The arbitration clause in Great Southern's Contract For Sale is governed by the South Carolina Uniform Arbitration Act (SCUAA), as contracts for sale of completed residential homes in South Carolina involve "solely" intrastate commerce and the arbitration clause itself states that any arbitration is subject to the SCUAA.

In this instance, the Contract For Sale does not involve interstate commerce so the SCUAA governs here. The South Carolina 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 Home Purchase Agreement for a new home it sold in Myrtle Beach. In that case, the Supreme Court faced the issue whether the purchase of the residence involved "interstate commerce" such that the FAA applied, or rather involved "intrastate commerce" such that the FAA was inapplicable and state law applied. The Court focused on the language of the Purchase Agreement that stated "Bradley agreed to purchase a completed dwelling wherein Brentwood Homes acted as a seller of the completed dwelling rather than as a contractor for the construction of the dwelling." *Id.* 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 equally here. Just like the agreement at issue in *Brentwood Homes*, the Great Southern Homes' Contract For Sale is explicitly for the purchase and sale of a completed home located in South Carolina, not its construction—an entirely intrastate activity. Specifically, the contract at issue in *Brentwood Homes* provided:

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 the completion of the dwelling

Id. at 450, 730 S.E.2d at 313, n.3 (emphasis added). Likewise, the Great Southern Contract For Sale 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 obtain no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion.

(Complaint, Ex. 1, Contract For Sale, Section Miscellaneous ¶ i). The contracts are the same. Both contracts contain the 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.⁵ As in *Brentwood Homes*, this case involves only intrastate commerce.

Finally, Great Southern's use of goods from other states to build the Mart home does not affect the intrastate nature of this transaction. For instance, in *Brentwood Homes*, the builder

⁵ This is a critical distinction. The *Brentwood Homes* case made clear that a contract for construction involves interstate commerce, while a contract for sale of a completed home (such as in this case) is solely *intrastate* commerce. *Id.* at 458, 730 S.E.2d at 318 (“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”).

submitted the affidavit of its vice-president, Edward Terry, who swore that the company used “materials and suppliers from outside of the State of South Carolina” to build the plaintiff’s home. *Id.* at 452, 730 S.E.2d at 314. Nevertheless, the Court held Terry’s affidavit was irrelevant because the “Purchase Agreement specifically provides that Bradley agreed to purchase a completed dwelling rather than contract for the construction of a dwelling. . . . Therefore, we find Terry’s affidavit is inapposite as his attestation that out-of-state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing on the purchase of the completed dwelling.” *Id.* at 450, 730 S.E.2d at 318.

Similarly, in the present case, Great Southern has submitted two affidavits of its employees stating that Great Southern used supplies from other states to construct the Mart residence. (*See* Aff. of Shelton Twine; Aff. of Jeremy Pyle). However, as in *Brentwood Homes*, these affidavits are irrelevant. Like in *Brentwood Homes*, the contract at issue here is explicitly for the sale of a completed dwelling and explicitly not a contract for the construction of a dwelling. Thus, these affidavits regarding use of foreign goods are inapposite. In sum, the Court should follow *Brentwood Homes* and find that the SCUAA applies here.

In addition, to the extent any arbitration clause applies, the parties clearly agreed that the South Carolina Uniform Arbitration Act would govern the Contract For Sale at issue here. Private agreements to arbitrate should be enforced according to their terms. *Volt Info. Sci., Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989). Thus, arbitration agreements should be enforced according to their terms. The Contract For Sale states more than once that the arbitration agreement Great Southern seeks to enforce is governed by the SCUAA. As noted above, the Contract For Sale arbitration provision states:

Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, **pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et. seq.**

[Exhibit 1, Complaint (emphasis added)]. Furthermore, there is a page of the Contract for Sale that states at the top in bold, underline, all caps: “THIS AGREEMENT IS SUBJECT TO ARBITRATION (S.C. CODE 15-48-10 et seq.).” Therefore, as agreed to by the parties, to the extent that the arbitration provision in the Contract for Sale can be enforced, it must be governed by the SCUAA. *See Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873-74 (Ct. App. 2013) (applying the SCUAA as agreed upon by residential purchaser and seller).

B. Great Southern’s Contract For Sale does not comply with the specific requirements of the South Carolina Uniform Arbitration Act, and therefore cannot be enforced.

The first page of the contract between Mart and Great Southern is captioned “Home Sale Information Sheet.” [Complaint, Ex. 1; Mart Aff. at ¶ 5.] There is no statement on this page that meets the requirement of the South Carolina Uniform Arbitration Act. It fails to state on this first page that the Contract For Sale is subject to arbitration pursuant to the South Carolina Uniform Arbitration Act. Section 15–48–10(a) of the Act provides as follows:

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.

§ 15–48–10(a) (2005) (emphasis added). The Supreme Court has held that the terms of this section are “clear” and “the court must apply those terms according to their literal meaning.” *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996); *see also*

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (“The notice provision must be typed ... on the first page of the contract. No other variation is acceptable.”). The “first page” of a contract is the page preceding all other pages. See *Richland Horizontal Prop. Regime Homeowners Assoc. v. Sky Green Holdings, Inc.*, 392 S.C. 194 (Ct. App. 2011). Therefore, because the first page of Mart’s contract with Great Southern does not contain the required notice of arbitration, the contract does not comply with section 15-48-10(a), and is not subject to arbitration. See *id.* (refusing to enforce arbitration agreement based on finding that cover page of Master Deed constituted first page of contract even when contract stated second page would be deemed the first page of the Master Deed for all legal purposes).

III. Assuming, *arguendo*, that the arbitration clause in the Contract For Sale was the only arbitration clause and somehow was enforceable despite not complying with the statutory requirements in section 15-48-10(a) discussed above, the arbitration agreement is also unconscionable and unenforceable because Mart had [1] no meaningful choice and [2] the contract contains oppressive and one-sided terms.⁶

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 v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). 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 v. D.R. Horton*, 417 S.C. 42, 48-49, 790 S.E.2d 1, 4 (2016) (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”).

⁶ Mart does not concede that the arbitration clause in the Express Limited Warranty would be enforceable if it were the only arbitration clause that existed in the parties’ contract documents. While Great Southern does not seek to enforce the arbitration clause in the Express Limited Warranty, it would be unenforceable as a standalone provision for similar reasons as the arbitration clause in the Contract For Sale.

“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 24, 644 S.E.2d at 668. 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 25-27, 644 S.E.2d at 669-670; *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 28-30, 644 S.E.2d at 670-71. 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. Mart had no meaningful choice in agreeing to the arbitration provision.

The Court’s recent decision in *Smith* shows that the Mart 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) the Smiths were in an unequal bargaining

position as against the seller D.R. Horton,⁷ (3) no evidence existed the Smiths were represented by independent counsel, and (4) 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, Mart stands in exactly the same position against Great Southern as did the Smiths against D.R. Horton. Like in *Smith*, Mart (1) was given an adhesive contract, (2) was in an unequal bargaining position vis-à-vis Great Southern, (3) there is no evidence Mart had independent counsel (he did not) and (4) Mart was merely the purchaser of a single home and thus not a major business concern of the nation's 62d largest homebuilder with operations throughout South Carolina.⁸ This Court should therefore follow *Smith* and hold that Mart lacked any meaningful choice in this transaction.

b. The terms of the Contract For Sale's arbitration provision are oppressive.

Similarly, this Court should follow *Smith* and conclude that the terms of the arbitration provision of Great Southern's Contract For Sale are oppressive. First, as did the Court in *Smith*, this Court should consider the limitations of remedies provisions of the Contract For Sale when construing the arbitration provision.

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

⁷ The Court actually 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).

⁸ Moreover, a home is certainly a "necessity" of modern life, a factor that also shows Mart 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)

As an initial matter, based on the plain language of the contract provisions as well as prior precedent set forth in *Smith v. D.R. Horton* and *Simpson v. MSA of Myrtle Beach, Inc.*, this Court should consider the Contract For Sale's limitations on warranties and remedies when construing the arbitration provision at issue.

In *Smith v. D.R. Horton*, D.R. Horton argued that the Court should consider only those terms of its agreement located in subparagraph 14(g) titled "MANDATORY BINDING ARBITRATION" 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*, 17 S.C. at 48, 790 S.E.2d at 4.

By way of further example, the arbitration clause at issue in *Simpson v. MSA of Myrtle Beach, Inc.* was expansive and contained far more than just an arbitration clause. It contained a forum selection clause as well as clauses limiting warranty claims and the arbitrator's authority to award punitive or treble damages. *See Simpson*, 373 S.C. at 19-21. The Court took those clauses into consideration in its analysis of whether the terms of the arbitration agreement were one-sided and oppressive. *See id.* In fact, the Court in *Simpson* rejected the argument that offending provisions within the arbitration clause should simply be severed such that the agreement to arbitrate would still be enforced. *See id.* The Court stated: "[W]e find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on

the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause.” *See id.* (emphasis added).

Moreover, an examination of the relevant provisions in Great Southern’s Contract For Sale show that the “Limited Warranty” and “Arbitration” provisions cross-reference one another and are intertwined. The “Limited Warranty” provision states: “Said limited warranty shall be incorporated in the deed delivered at closing.” The “Arbitration” provision applies to “disputes relating to . . . the deed to be delivered” pursuant to the Contract For Sale. 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” provision.

Based on the above authorities and the plain language of the Contract For Sale, the Court should read the Arbitration paragraph of the Contract For Sale in conjunction with the limitation on remedies provisions contained under separate paragraphs of the agreement. For example, as in *Smith*, Great Southern expressly disclaims all warranties, including the warranty of habitability, as well as completely absolves itself from ever paying any money damages to Mart. [See Complaint, Ex. 1 at “Limited Warranty” and “Miscellaneous” ¶ (n).] These paragraphs must be read together to understand exactly what claims are subject to being arbitrated and what potential remedies would be available in that arbitration. Only if these provisions are read together can the Court “understand the scope of warranties and how different disputes are to be handled.” *Smith*, 17 S.C. at 48, 790 S.E.2d at 4. Thus, as in *Smith* and *Simpson*, the Court should consider the limitations on warranty rights and remedies foisted upon Mart in evaluating the unconscionability of Great Southern’s arbitration provision.

The arbitration provision that Great Southern seeks to enforce, moreover, 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, Great Southern has expressly disclaimed all warranties, including the warranty of habitability. Furthermore, Great Southern 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 baser on [sic] contract or tort.” [Complaint, Ex. 1 at “Limited Warranty”.] Thus, Great Southern’s agreement mirrors that of D.R. Horton’s agreement in *Smith*. Accordingly, the Court should follow *Smith* and hold that the terms of the arbitration agreement here are oppressive and one-sided.

ii. The arbitration provision and limitations on damages should be struck in their entirety

Finally, assuming that the arbitration provision in the Contract For Sale was the only operative arbitration clause in the contract documents, the proper action by the Court would be to strike the arbitration provision and the intertwined limitations on recoverable damages in their entirety. In *Smith*, the Court held: “[b]ecause the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties’ contract rather than enforcing their stated intentions.” *Smith*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 (citing *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673). That reasoning applies equally here. As in *Smith*,

the Great Southern Homes Contract For Sale contains no severability clause. Accordingly, the Court must strike the clause in its entirety along with the limitations on recoverable damages referenced above.

CONCLUSION

Because there was no mutual assent between Mart and Great Southern as to any arbitration procedure, there is no arbitration agreement that can be enforced. Furthermore, even if the arbitration clause in Great Southern's Contract For Sale was not in conflict with the arbitration provision in the Express Limited Warranty, it is unenforceable under South Carolina law as it does not comply with section 15-48-10(a) and is unconscionable for the reasons stated above. Accordingly, Great Southern's Motion to Dismiss and Compel Arbitration should be denied.

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Columbia, South Carolina
June 6, 2018

EXHIBIT A

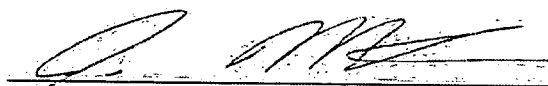
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	Civil Action No.: 2018-CP-40-00873
Jonathan Mart, on behalf of himself	)	
and others similarly situated,	)	
	)	
	)	AFFIDAVIT OF JONATHAN MART
Plaintiff,	)	
vs.	)	
	)	
Great Southern Homes, Inc.,	)	
	)	
Defendant.	)	

The Affiant, Jonathan Mart, having been duly sworn, does hereby state under oath and under penalty of perjury the following:

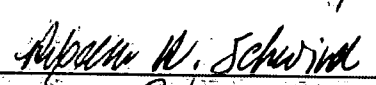
1. I am over the age of 18 years and I am of sound mind and competent to attest to the matters herein.
2. I am the Plaintiff in this action and the matters attested to herein are based on my personal knowledge.
3. On July 18, 2015, I entered into a purchase contract with Great Southern Homes to buy a new home located in Kershaw County located in the Longview North subdivision with the street address of 2 Casey Drive, Elgin, S.C. 29045. Therefore, I closed on the sale of the home and I am the current owner and reside in this home with my family.
4. The document attached to the Complaint as Exhibit 1 is a true and correct copy of the contract that I entered with Great Southern Homes to purchase the above property.

5. The document captioned "Home Sale Information Sheet" was the first page of the contract presented to me for signing at the time I entered the purchase contract to buy my home from Great Southern Homes. Moreover, this document was the first page of the contract documents provided to me as my copy of the executed contract with Great Southern Homes. I understood this document to be the first page of the contract documents.
6. The document attached hereto as Exhibit A is a true and correct copy of the Express Limited Warranty that I was provided by Great Southern Homes upon closing on the purchase of the sale of my home.
7. It was my understanding that the transaction that I entered with Great Southern Homes was for the purchase of a newly constructed home. It was not my understanding that I was contracting with Great Southern Homes to build a home for me.

FURTHER AFFIANT SAYETH NOT.


Jonathan Mart

SWORN TO and subscribed before me
this 25th day of May, 2018.


Print Name: Rebecca H. Schwinn (SEAL)
Notary Public for South Carolina
My Commission Expires: 3/16/2027



STRUCSURE

HOME WARRANTY

Express Limited Warranty Coverage Booklet for:

One-Year Workmanship/Materials
Two-Year Delivery Portion of Systems
10-Year Major Structural Defects

- RESIDENTIAL -



StrucSure Home Warranty, LLC

6825 East Tennessee Avenue, Suite #410 | Denver, CO 80224

1.877.806.8777 (toll-free) | 303.806.8688 (office) | 303.806.9897 (fax)

www.strucsure.com

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SECTION 1: OVERVIEW OF THE STRUCSURE HOME WARRANTY EXPRESS LIMITED WARRANTY

Congratulations Homebuyer(s)! Your Builder is a member of the StrucSure Home Warranty program and sold You a Home that Includes Express Limited Warranty protection. StrucSure Home Warranty is the warranty Administrator.

This warranty booklet defines standards for the various components of a Home, the time period covered by this Express Limited Warranty, coverages and Exclusions, Homeowner responsibilities, and how to request warranty service and/or file a claim. Please read this warranty coverage booklet in its entirety so that You may fully understand the terms and conditions.

Please note that Your warranty will not go into effect until the signed Home Enrollment Application (HEA) and warranty payment have been received and processed by StrucSure Home Warranty. After the warranty goes into effect, StrucSure Home Warranty will mail You a Certificate of Warranty Coverage for Your records (note that this can take up to three months). If You have questions, please contact our customer service department at 1.877.806.8777.

- (1) This warranty is an insurance-backed, Express Limited Warranty provided to You by Your Builder. This warranty coverage booklet embodies the entire extent of the Express Limited Warranty.
- (2) This Express Limited Warranty is not a maintenance agreement, service contract, or an insurance policy.
- (3) In this Express Limited Warranty, reference to a person includes entities and vice versa. Use of the singular includes the plural. Use of one gender includes the other gender. Words that are capitalized are defined in the Definitions section at the back of the booklet.
- (4) Under this Express Limited Warranty, the coverage periods for residential construction are as follows:
 - (a) One (1) year for Workmanship/Materials,
 - (b) Two (2) years for Delivery Portion of Systems (plumbing, electrical, heating, and air-conditioning delivery systems),
 - and*
 - (c) Ten (10) years for major structural components of the Home.

**Please reference the schematic at the back of this booklet to understand each of these different home components.*

- (5) Warranted Defects and/or Deficiencies must occur within the Warranty Term or the item(s) are not covered.
- (6) The warranty cannot go into effect until the signed Home Enrollment Application (HEA) has been accepted by SHW.
- (7) Coverage is limited to those items selected on the Home Enrollment Application (HEA), if applicable.
- (8) Please note that the Warrantor changes depending on the type of Defect and/or Deficiency that occurs, the timeframe in which the Defect and/or Deficiency occurs, and if the Builder is unable to perform warranty obligations. The Warrantor is the Builder in years one (1) for Workmanship/Materials and years one (1) and two (2) for Delivery Portions of Systems. If the Builder is unable to perform one (1) and two (2) year warranty obligations, the Insurer becomes the Warrantor and performs Builder warranty obligations. For Major Structural Defects, the Warrantor is the Insurer for the complete warranty period (years one (1) through ten (10)).
- (9) Neither repairs, payments, nor any other action or inaction of the parties will extend the warranty period.
- (10) This Express Limited Warranty is separate and apart from any contracts between You and Your Builder, including any sales agreements. It cannot be altered, affected or amended in any manner by any other agreement except only through a formal written agreement signed the Builder, the Insurer, the Administrator, and You.
- (11) Any agreements, understandings, promises, negotiations, representations, or obligations implied by law, custom, practice, or other source that are not documented in this warranty, including representations about this warranty, are not covered by this warranty.
- (12) This Express Limited Warranty provides coverage only in excess of coverage provided by other warranties or insurances, whether collectible or not. This limited warranty does not take the place of the Builder's general liability insurance or Your Homeowner's Insurance.
- (13) The Warrantor provides no warranties which extend beyond this document. All other warranties, express or implied, including, but not limited to, all implied warranties of fitness, merchantability, or habitability are disclaimed and excluded to the extent allowed by law. The warranties established herein supersede all implied warranties.
- (14) This warranty does not cover special, incidental, indirect, or Consequential Damages and does not reimburse parties for their attorney's fees or costs.
- (15) This Express Limited Warranty is binding on the Builder and You and Your heirs, executors, Administrators, successors and assigns. An assignment or transfer of benefits, rights or sums payable under this warranty is prohibited except as expressly allowed in this Express Limited Warranty.
- (16) If any term, condition, or provision of this warranty is found to be void or a violation of law or public policy by a court of competent jurisdiction, it shall be deemed modified to the extent necessary so that it is no longer void or in violation of law or

public policy. Any binding decisions that determine a part of the warranty is void, or in violation of law or public policy, will not serve to invalidate the enforceability of any other term, condition or provision of this warranty.

- (17) If performance under this Express Limited Warranty is delayed by an event beyond a parties control, such performance will be excused until the delaying effects of the event are remedied. Such events include, but are not limited to, concealed or unknown conditions such as soil conditions, unavoidable accidents or circumstances, encountering hazardous materials, damage caused by a utility company, acts of God or nature, acts of the common enemy, fire, war, riot civil commotion or sovereign conduct, material shortages or unusual material delivery delays, abnormal adverse weather conditions not reasonably anticipated, labor disputes, acts of terrorism, government action, and/or acts or omissions by You or a person or entity not a party to this Express Limited Warranty. Such delay shall operate to extend the time period for performance, but shall not act to extend the term(s) of warranty coverage(s).
- (18) If an element or component of a Home is not described particularly in this booklet, the element or component shall be constructed in accordance with any written agreement. If there is no agreement, the element or component shall be constructed in accordance with the usual and customary residential construction practices, or practices for similar Improvements in the geographic region shall govern and the element or component shall perform for the purpose for which it is intended for the period of the applicable warranty. All construction shall comply with applicable Codes.
- (19) When an inconsistency exists between the Code, manufacturer's Instructions, and specifications, the standard required by the United States Department of Housing and Urban Development for Federal Housing Administration or Veterans Administration programs, and/or ANSI/ASHRAE Standard (62.2-2003), the most restrictive requirement shall apply.
- (20) Violations of local or national building codes, residential codes, standards or ordinances, or federal regulations are not the responsibility of the Insurer. The obligation of the Insurer under this limited warranty is solely to resolve Warranted Defects and/or Deficiencies.
- (21) This warranty shall be interpreted and enforced in accordance with the laws of the state in which the Home is located. Please note that individual state laws may provide additional limitations, Exclusions, and/or coverage.
- (22) This Express Limited Warranty is subject to change as required by various regulating bodies.
- (23) All Manufactured Products shall be installed by the Builder in accordance with the manufacturer's instructions and specifications. The Builder shall use only new Manufactured Products and parts unless otherwise agreed in writing by the parties. If the Builder does not install a Manufactured Product in accordance with the manufacturer's specifications or use newly-manufactured parts as required, the Builder shall take such action as is necessary to bring the variance within the standard. The Builder will assign to the Homeowner, without recourse, the manufacturer's warranty for all Manufactured Products that are covered by a manufacturer's warranty. Any rights that inure to the Homeowner provided under a manufacturer's warranty are the obligation of the manufacturer. The Builder does not assume any of the obligations of the manufacturer resulting from a manufacturer's warranty.
- (24) This Express Limited Warranty is fully transferable along with Your rights and obligations to subsequent owners during the Warranty Term. There is no limit to the number of transfers during the Warranty Term or any cost as a result of such transfer(s).
- (25) All notices required under this Express Limited Warranty must be in writing, sent certified mail, return receipt requested.

SECTION 2: LIMIT OF LIABILITY

- (1) Subject to the provisions of this warranty, the Builder's or Insurer's (as applicable) total aggregate limit of financial liability under this warranty shall not exceed the original sales price of the Home, as shown on the Home Enrollment Application (HEA). The Builder's or Insurer's (as applicable) obligations under this warranty are limited to its obligations that are explained in this warranty booklet.
- (2) The aggregate obligation of the Builder or Insurer (as applicable) for all claims under this warranty is equal to the sales price of the Home listed on the Home Enrollment Application (HEA). This means that every time Your Builder or the Insurer (as applicable) pays for costs of determining the existence and/or extent of a covered Defect and/or Deficiency, pays for a repair, or pays a claim, those aggregate payments are deducted from the sales price of the Home listed on the HEA (the warranty limit). Once that total equals the sales price of the Home on the Home Enrollment Application (HEA), there is no further warranty coverage. If the payment is made for the repair of a Common Element of a Condominium, the payment shall be deducted pro-rata from the sales price listed on the Home Enrollment Application (HEA) for each unit in the building.
- (3) If at any time during the Warranty Term, the limit of liability has been reached, regardless of whether costs were incurred singularly or aggregately, the entire warranty is automatically and permanently terminated. Any rights You may have under this warranty are then automatically terminated.
- (4) The Insurer may, where appropriate, make payment for any claim for \$10,000 or more jointly to You and Your Mortgagee as Your interests may appear. The Mortgagee is bound by the claim resolution reached with You.

SECTION 3: MULTI-DWELLING UNIT COVERAGE

- (1) Subject to all provisions of this warranty, this coverage applies only to multi-dwelling unit buildings such as condominiums, townhouses, and duplexes. In addition to the Exclusions section of this warranty, clubhouses, recreational facilities, exterior structures, exterior walkways, decks, balconies, arches, or any non-residential structure(s) that are a part of the multi-dwelling unit building (whether attached or not) are not covered by this warranty. Equipment, items, or systems that are owned by the condominium association or designated as a condominium common area are not covered. All other provisions of this warranty apply to this coverage, except as noted below.
- (2) The Common Elements of the multi-dwelling unit buildings are only covered by this warranty if all units are enrolled in the Workmanship/Materials, Delivery Portion of Systems, and 10-year Major Structural Defects warranty program. Common element Defects and/or Deficiencies must be reported within the applicable Warranty Term. Coverage will not be provided for Common Element exterior stairways and landings, unless they are constructed entirely of metal or concrete (or in any combination of these two materials).
- (3) If Your Home is an individual residence located within a multi-dwelling unit building and You have Workmanship/Materials, Delivery Portion of Systems, and 10-year Major Structural Defect coverage, the coverage applies only to the components of the unit that You individually own. Coverage is the same as stated elsewhere within this warranty, except as noted in this coverage section.
- (4) The Insurer's liability for warranty performance shall be limited to only those units of a multi-dwelling unit building which have been warranted by StrucSure Home Warranty, LLC. The limit of liability shall be pro-rated based upon the number of warranted units under this warranty.
- (5) Should a request for warranty performance involve Common Elements of a multi-dwelling unit building, then the owners of each unit affected and in need of warranty performance shall be responsible for the processing fee of \$250.00 per unit in the building or \$5,000 per building (whichever is less). *This fee is required for each Request for Warranty Performance Form and Notice of Major Structural Defect Claim Form submitted to the Administrator (StrucSure Home Warranty, LLC).*
- (6) Should notification of a structural claim involve Common Elements of a condominium, then an authorized representative of the condominium association must make the request.

SECTION 4: HOMEOWNER DUTIES & RESPONSIBILITIES

You have duties and responsibilities under the law and under this warranty. This warranty is expressly conditioned on Your full performance of duties (express or implied) relating to residential construction and the warranty. These duties include, but are not limited to:

- (1) You have a duty to ensure that any plans, specifications, or other information supplied to the Builder are accurate and suitable for the construction of the project and to provide all information relating to the project that is not known or reasonably discoverable by the Builder.
- (2) You have a duty to work toward the mutual goal of achieving a successful project, to not cause any unreasonable delay in the start of the project, to not delay, hinder, or interfere with the performance of other parties, to not act arbitrarily with respect to requests for extensions of time, to perform all of the contractual obligations in good faith, and to not take any action that would prevent the Warrantor from pursuing Your rights and remedies against other parties responsible for Your loss.
- (3) You have a duty to make reasonable efforts to minimize or avoid losses.
 - (a) Upon observation of a circumstance that You cannot control and may cause damage to the Home or a Home component and/or may make the house uninhabitable, You shall take immediate and reasonable action to prevent it.
 - (b) You agree that only those repairs necessary to make the house habitable or mitigate further damage shall be performed. You agree that any and all repairs performed beyond such measures will not be covered by the warranty. Any unauthorized repairs made by you or someone under your direction, other than those permitted in this paragraph, will not be reimbursed or compensated.
- (4) You are responsible for the proper maintenance of Your new Home. Regular preventative maintenance is necessary to prolong the life of the Home. Your obligation is to care for Your Home in such a way as to prevent or minimize damage to it. You should be aware that all new Homes go through a period of settlement and movement. During this period, Your Home may experience some minor material shrinkage, cracking, and other events which are normal and customary.
- (5) Maintenance of the Home and the lot on which the Home is located is essential to the proper functioning of the Home, and You are responsible for that maintenance. You are responsible for maintenance items described in this section and those maintenance items identified separately in this warranty booklet. Additionally, You are responsible for ongoing maintenance responsibilities that affect the performance of the Home but that may not be expressly stated in this booklet. Such ongoing maintenance responsibilities include, but are not limited to:
 - (a) Periodic repainting and resealing of finished surfaces as necessary,
 - (b) Caulking for the life of the Home,

- (c) Regular maintenance of mechanical systems,
 - (d) Regular replacement of HVAC filters
 - (e) Cleaning and proper preservation of grading around the Home and drainage systems to allow for the proper drainage of water away from the Home, and
 - (f) Other standard and customary maintenance repairs.
- (6) You shall properly maintain each component of the Home including proper cleaning, care, and upkeep of the Home. You shall use Home components for the purposes for which they are intended and shall not damage, misuse, or abuse Home components.
 - (7) You shall use and perform periodic maintenance on all Manufactured Products according to the manufacturer's instructions and specifications. The misuse, abuse, neglect or other failure to follow manufacturer's specifications with regard to Manufactured Products may void the manufacturer's warranty.
 - (8) You shall take measures to prevent landscaping materials or plants from contacting the exterior surface of the Home and from interfering with the proper drainage of water away from the foundation. You should not improperly alter the proper drainage pattern or grade of the soil within ten (10) feet of the foundation so that it negatively impacts the Home's performance or fails to comply with the Residential Code.
 - (9) You shall take action to prevent Excessive moisture accumulation by properly using ventilation equipment, preventing Excessive temperature fluctuation, and taking any other action reasonably necessary to avoid Excessive moisture, dampness, humidity, or condensation in the Home that may lead to damage due to Excessive moisture or dryness.

SECTION 5: EMERGENCY PROCEDURES

An emergency is a condition that if not immediately repaired may cause damage to the Home or a Home component, may cause danger to the Home's occupants, and/or may make the house uninhabitable.

- (1) If You have a One-Year Workmanship/Materials and/or Two-Year Delivery Portion of Systems warranty coverage emergency, You must contact Your Builder and the Administrator (StrucSure Home Warranty) at 1.877.806.8777 in order to receive authorization for any emergency repairs. If You are unable to contact Your Builder and the Administrator for emergency authorization, You must make minimal repairs until authorization for more extensive repairs has been approved by Your Builder and the Administrator. You must take action in order that further damage can be mitigated, and You must report the emergency to the Builder and the Administrator on the next business day.
- (2) If You have a Ten-Year Structural Defect warranty coverage emergency, You must contact the Administrator (StrucSure Home warranty) at 1.877.806.8777 in order to receive authorization for any emergency repairs. If You are unable to contact the Administrator for emergency authorization, You must make minimal repairs until authorization for more extensive repairs has been approved by the Administrator. You must take action in order that further damage can be mitigated and You must report the emergency to the Administrator on the next business day.

SECTION 6: EXCLUSIONS

This warranty does not provide coverage for damage resulting from or made worse by any of the items listed in this section. This warranty also does not cover any of the following item(s), cause(s), or condition(s), regardless of whether any of them acted alone, in sequence, or in concurrence with any other item(s), cause(s), or condition(s) to create the loss or damage.

- (1) The Builder's failure to finish any or all construction of the Home including, but not limited to, walkthrough or punch list items on or before the Effective Date of Warranty, or damages arising from such failure. Failure of the Builder to complete construction, or to construct the Home in compliance with the original plans and specifications, or to perform any washing or cleaning of any kind. *Note: an incomplete item is not considered a Warranted Defect; however, the Builder may be obligated to complete such items under separate agreements.*
- (2) Any condition, Defect, or Deficiency You were aware of prior to the Effective Date of Warranty, whether appearing on a "walk through" or "punch" list or not.
- (3) Any request for warranty performance submitted after unreasonable delay or after the expiration of the applicable Warranty Term.
- (4) Any changes, modifications, additions, or Improvements made to the Home after the Effective Date of Warranty.
- (5) Homeowner delay in reporting a known construction Defect or Deficiency or failing to take reasonable action necessary to prevent further damage to the Home. Failure of the Homeowner to minimize or prevent loss or damage in a timely manner.
- (6) Any warranted Defects or Deficiencies You repair prior to receiving written authorization from the Builder and Administrator unless it is an emergency. Please reference the Emergency Procedures section in this warranty booklet for more information.

- (7) Any loss, damage, Deficiency, cost, or expense which is caused, in whole or in part, by any peril or occurrence which is covered by Homeowner's insurance, from another warranty or insurance policy, or for which compensation is provided by state legislation and/or public funds.
- (8) Failure of the Homeowner to comply with the Homeowner's responsibilities and perform routine maintenance on the Home as set forth under the Homeowner Responsibilities section in this warranty booklet.
- (9) Any dampness or condensation due to Your failure to maintain guttering, caulking, flashing, or adequate ventilation.
- (10) You or Your condominium, townhouse, or other association's failure to perform routine maintenance on the Home, common areas, Common Elements, or Your or the association's grounds.
- (11) While the Home is being used primarily for nonresidential purposes.
- (12) Systems or Items that service commercial space even though they may also service covered residential unit(s).
- (13) Use for which the Home or the component of the Home was not designed.
- (14) Use that exceeds the normal design loads prescribed by the Code or the engineer of record.
- (15) Violations of local or national building codes, Residential Codes, standards, or ordinances.
- (16) Normal wear and tear or deterioration to any component of the Home. This includes, but is not limited to, the deterioration of concrete surfaces caused by salt, chemicals, implements, or any other any factors.
- (17) The negligence, improper maintenance, misuse, abuse, failure to follow manufacturer's recommendations, failure to take reasonable action to mitigate damage, failure to take reasonable action to maintain the residence, or other action or inaction of anyone other than the Builder or persons providing work or material at the direction of the Builder.
- (18) The negligence, abuse, misuse, improper operation or maintenance of the Home, a Home component, its systems, or a Manufactured Product.
- (19) Any modification or addition to the Home or the property under or around the Home made by You after the Effective Date of Warranty. Modification or repair to the Home performed by anyone other than Your Builder or persons providing work or materials at the direction of the Builder after the Effective Date of Warranty.
- (20) Changes to the grading or drainage surrounding the Home made by anyone other than Your Builder or persons providing work at the direction of the Builder. This includes, but is not limited to, soil erosion or runoff caused by Your failure to maintain the Builder-established grades, changes in the grading caused by erosion, or changes in the level of the underground water table, drainage structures, devices or swales, stabilized soil, sodded, seeded or landscaped areas.
- (21) Alterations to the grade of the soil that are not in compliance with the Code or applicable governmental regulations.
- (22) Sound transmission and sound proofing unless these components were part of the Home's construction.
- (23) Glass breakage unless the condition is the result of construction activities.
- (24) Unless Builder installed, wiring (to and between) communication devices, from the source of power, whether connected to the Home or not. Such devices shall include, but may not be limited to, television cable, telephone systems, intercom systems, computer(s), and security systems. Sources of power shall include, but may not be limited to, service entrance conductors, switches, outlets, receptacles and junction boxes.
- (25) Swimming pools (whether located inside or outside the Home), recreational facilities, garage slabs, and driveways, boundary and or retaining walls, bulkheads, fences, landscaping, sod, seeding, shrubs, trees and plantings, subsurface drainage systems (other than footer drains), lawn sprinkler systems, off-site Improvements including streets, sidewalks, adjacent property and the like, or any other Improvements not part of the Home itself.
- (26) Decks, balconies, patios, porches, porch roofs, porticos, and any other elements constructed separately from foundation walls or other structural elements of the Home such as, but not limited to, chimneys and concrete floors of basements and attached garages.
- (27) Patios, porches, and stoops which are not a load-bearing and structurally attached integral component of the Home. Decks and balconies not bolted to or cantilevered from the main structure of the Home.
- (28) Detached garages, carports or outbuildings (except those which contain plumbing, electrical, heating, cooling, or ventilation systems serving the Home, and then only to the extent where Deficiencies would affect these systems).
- (29) Structural slab foundation systems that may have experienced movement but are within design performance criteria.
- (30) Acts of God or nature, war, nuclear hazards, contamination accidents, explosion, riot, civil commotion, terrorism, vandalism, malicious mischief, theft, burglary, power failure or shortage, electrical surge, Excessive or inadequate voltage, artificially-generated electrical currents, electrical wiring that is not to Code, blasting, steam or water escape, condensation, mud or mud slides, sinkholes, Extreme Weather Conditions, drought, windstorm, hail, lightning, ice, snow, blizzard, hurricane, tornado, tsunami, flood, earthquake, land shock waves or tremors occurring before, during, or after volcanic eruption or by any other external cause (whether sudden or gradual), mine subsidence, faults, fissures, crevices, falling trees or other objects, or accidents involving aircraft, vehicles, or boats.

- (31) Damage resulting directly or indirectly from Excessive or inadequate water pressure, flood, surface water, waves, tidal water, overflow of a body of water, (whether wind driven or not), wetlands, springs, or aquifers. Water which backs up from sewers or drains, water below the surface of the ground (including water which exerts pressure on, seeps, or leaks under or through a Home, building, sidewalk, driveway, foundation, swimming pool, or other structure). Change in the underground water table that exerts pressure on, seeps, or leaks under the Home, sidewalk, driveway, foundation or other structure or causes subsidence or sinkholes.
- (32) Any loss or damage caused by buried debris, underground springs, mineshafts, uncontrolled fill, or other anomalies.
- (33) Erosion or accretion of soils unless such loss or damage is a direct result of a construction Defect.
- (34) The quality and potability of water unless caused by a construction Defect.
- (35) Damage to or Deficiency in water supply systems, sewage disposal systems, septic systems, leach fields, sewer systems, and drains.
- (36) Defects, Deficiencies, or destruction caused by micro-organisms, plants, fungus, decay, wet rot, dry rot, soft rot, or any other kind of rotting, mold, mildew, termites, insects, vermin, rodents, birds, wild or domestic animals, corrosion, rust, radon, radiation, formaldehyde, asbestos, any solid, liquid, or gaseous pollutant, contaminant, toxin, irritant, or carcinogenic substance, whether organic or inorganic, or an electromagnetic field or emission. This Exclusion includes any claim of health risks or inhabitability as a result of Volatile Organic Compounds (VOC'S) or any of the foregoing items.
- (37) Damage to real property which is not a part of Your Home, bodily damage, personal injury, or Consequential Damages and expenses. Consequential damages is defined as all damages or costs for which a remedy is not expressly provided for in this warranty which includes, but is not limited to:
- (a) Costs of shelter, transportation, food, moving, storage, or other incidental expenses including those related to relocation during any work performed under this warranty;
 - (b) Kenneling of animals, veterinary expenses, pet daycare;
 - (c) Loss of use, loss of wages, inconvenience, annoyance, and diminution in value of the Home;
 - (d) Any and all consequential loss or damage to personal property and damage to property which You do not own;
 - (e) Physical or mental pain and suffering and emotional distress;
 - (f) Medical or hospital expenses;
 - (g) Lost profits or wages.
- (38) Loss, damage, or injury to land, person, animals, personal property, Improvements, and structures other than items in the Home as identified in this Express Limited Warranty.
- (39) Manufactured Products which are covered by a manufacturer's warranty including, but not limited to, appliances, fixtures, and items of equipment (including attachments and appurtenances). This warranty does not cover systems Deficiencies that are caused by a failure of any Manufactured Product or failure to comply with manufacturer's warranty requirements. This includes air conditioning units, attic fans, boilers, burglar alarms, carbon monoxide detectors, ceiling fans, central vacuum systems, door bell systems, dishwashers, dryers, electronic air cleaners, exhaust fans, fire alarms, freezers, furnaces, garage door openers, garbage disposals, gas and electric meters, heat exchangers, heat pumps, humidifiers, intercoms, interior sprinkler systems, microwave ovens, oil tanks, outside lights or motion lights not attached to the Home, ranges and range hoods, refrigerators, sewage pumps, smoke detectors, solar collectors, space heaters, sump pumps, thermostats, trash compactors, washers, water pumps, water softeners, water heaters, whirlpool bathtubs, whole house fans, and similar items/appliances.
- (40) Any Exclusions set forth under any Performance Standards and/or Construction Quality Standards in this warranty booklet.
- (41) Fire, smoke, or water damage unless such loss or damage is a direct result of a construction Defect.
- (42) Diminished value of the Home.
- (43) Fraudulently enrolled Homes.
- (44) Collusion with any other party with the intention to defraud the Builder and/or Insurer.
- (45) Acts of omission by You, Your agents, employees, licensees, or invitees.

SECTION 7: WORKMANSHIP/MATERIALS & DELIVERY PORTION OF SYSTEMS COVERAGE

For one (1) year from the Effective Date of Warranty, Your Builder warrants that Your Home will be free from Deficiencies in Workmanship and Materials as defined in the Performance Standards in Section 8. For two (2) years from the Effective Date of Warranty, Your Builder warrants that Your Home will be free from Deficiencies in the Delivery Portion of Systems (electrical, plumbing, and mechanical distribution systems) to the extent stated in the Performance Standards in Section 9.

SECTION 8: PERFORMANCE STANDARDS FOR HOME COMPONENTS UNDER THE ONE-YEAR WORKMANSHIP/ MATERIALS WARRANTY

This section describes the Performance Standards for the various Workmanship and Materials elements or components of a Home as described. The Builder or Insurer (as applicable) will repair or replace those elements or components of a Home that do not meet these standards during the applicable warranty period.

1) SITE WORK

1.1 GRADING

OBSERVATION: Settling of the final grade ground around the foundation over utility trenches or other filled areas on the property where excavation and backfill have taken place that affect drainage away from Home.

DEFICIENCY: Settling of the final grade around foundations walls, utility trenches or other filled areas which exceeds a depth of six (6) inches from finished grade established by the Builder is a Deficiency.

BUILDER CORRECTION: If the Builder has provided final grading, the Builder shall fill settled areas affecting proper drainage one time only during the first-year warranty period. The Builder is then responsible for removal and resetting of shrubs and other landscaping (installed by the Builder) affected by replacement of the fill.

1.2 DRAINAGE

OBSERVATION: Inadequate surface drainage affecting the drainage in the immediate area surrounding the Home causing areas/pools of standing water.

DEFICIENCY: The Builder is responsible for establishing grades and swales in accordance with the local Building Code that will provide proper drainage away from the Home. Site drainage under this warranty is limited to grades/swales within ten (10) feet of the foundation. Standing or ponding water within such area(s) which remain for a period longer than 24 hours after a rain storm is a Deficiency. Where swales are draining from adjoining properties, or where a sump pump discharges a period of 48 hours, is acceptable for the water to dissipate. The possibility of standing water after an unusually heavy rainfall should be anticipated and is not to be considered a Deficiency. No grading determination shall be made while there is frost or snow or when the ground is saturated. The Builder is not responsible for any changes to the grading made by any other party. Standing or pooling water on the property which does not directly affect the immediate area(s) surrounding the foundation of the Home, or which does affect the area but is caused by unusual grade conditions, retention of treed areas, sodding, planting, or any other work done by any party other than the Builder is not covered.

BUILDER CORRECTION: The Builder is responsible for initially establishing the proper grades, swales and drainage away from Home in conformance with the local Residential Code. Subject to the Exclusions, the Builder shall correct improper drainage to meet the criteria set forth above one time only during the first-year warranty period.

OBSERVATION: Grassed or landscaped areas which are disturbed or damaged due to work on the property as a result of work performed by the Builder in conjunction with the correction of a Deficiency.

DEFICIENCY: Landscaped areas, which are disturbed during repair work, are a Deficiency.

BUILDER CORRECTION: The Builder shall restore grades, sod, seeded and landscaped areas to their pre-damaged condition.

2) CONCRETE

2.1 CASTS-IN-PLACE CONCRETE

OBSERVATION: Basement or foundation wall cracks (other than expansion or control joints).

DEFICIENCY: Non-structural cracks are not unusual in concrete foundation walls. Cracks greater than 1/8 inch in width are a Deficiency.

BUILDER CORRECTION: The Builder shall repair non-structural cracks in excess of 1/8 inch by surface patching. Such repairs should be made toward the end of the first-year of the warranty coverage, in order to allow for the normal stabilizing of Home during settling.

OBSERVATION: Cracking of basement floor.

DEFICIENCY: Minor cracks in concrete basement floors are common. Cracks exceeding 1/4 inch in width or 1/4 inch in vertical displacement are Deficiencies.

BUILDER CORRECTION: The Builder shall repair cracks exceeding the maximum tolerance described above by surface patching or other methods, as required.

OBSERVATION: Cracking of attached garage floor slab or cracks in attached patio slab.

DEFICIENCY: Cracking of garage floor or patio slabs is not a Deficiency, since such items and damage are excluded from coverage under this warranty.

BUILDER CORRECTION: None required.

OBSERVATION: Cracks in concrete slab-on-grade floors, with Builder-installed finish flooring attached.

DEFICIENCY: Cracks that rupture or significantly impair the appearance or performance of the finished flooring material are Deficiencies.

BUILDER CORRECTION: The Builder shall repair cracks as required, so as not to be apparent when the finish flooring material is in place. The Builder shall repair or replace the finish flooring as required in order to meet this standard.

OBSERVATION: Uneven concrete floor slabs.

DEFICIENCY: Except for basement floors or flooring surface(s), which have been designed for specific drainage purposes, concrete floors in rooms finished by the Builder for habitability shall not have pits, depressions or areas of unevenness exceeding 1/4 inch in 32 inches.

BUILDER CORRECTION: The Builder shall repair or replace as necessary to meet the criteria noted above. Where applicable, surface skim coating is an acceptable method of repair. The Builder shall re-install or replace any finish flooring material as necessary.

OBSERVATION: Pitting or scaling of interior concrete work.

DEFICIENCY: Interior concrete surfaces that disintegrate to the extent that the aggregate is exposed and loosened under normal conditions of weathering and use are Deficiencies. This Deficiency does not apply to garage slabs or exterior concrete surfaces.

BUILDER CORRECTION: The Builder shall take whatever corrective action is necessary to repair or replace Defective concrete surfaces.

OBSERVATION: Excessive powdering or chalking of interior concrete surfaces.

DEFICIENCY: Excessive powdering or chalking of interior concrete surfaces are a Deficiency, but should not be mistaken for normal surface dust that may accumulate over a period of time after the Home is occupied.

BUILDER CORRECTION: The Builder shall take corrective action necessary to treat, repair or resurface Defective areas.

OBSERVATION: Cracking, settling or heaving of stoops and steps.

DEFICIENCY: Stoops, decks, porches, steps, etc. are excluded from coverage by this warranty.

BUILDER CORRECTION: None required.

2.2 CONSTRUCTION AND CONTROL JOINTS

OBSERVATION: Separation or movement of concrete slabs within the structure at construction and control joints.

DEFICIENCY: None. Concrete slabs within the structure are designed to move at construction control joints and are not Deficiencies.

BUILDER CORRECTION: None required.

3) MASONRY

3.1 UNIT MASONRY (BRICK, BLOCK AND STONE)

OBSERVATION: Cracks in non load-bearing or non load-supporting walls.

DEFICIENCY: Small shrinkage cracks running through masonry and mortar joints are not unusual. However, cracks in excess of 1/8 inch in width are Deficiencies.

BUILDER CORRECTION: The Builder shall repair non-structural shrinkage cracks in excess of 1/8 inch by pointing or patching. The repairs shall be made near the end of the first-year warranty period.

OBSERVATION: Cracks in bearing or supporting masonry walls.

DEFICIENCY: Vertical or diagonal cracks, which do not affect the structural ability of masonry bearing walls, are not unusual. Cracks in excess of 1/8 inch in width are Deficiencies.

BUILDER CORRECTION: The Builder shall repair shrinkage cracks in excess of 1/8 inch by pointing or patching.

OBSERVATION: Horizontal cracks in basement and foundation walls.

DEFICIENCY: Horizontal cracks in the joints of masonry walls are not common, but may occur. Cracks 1/4 inch or more in width are Deficiencies.

BUILDER CORRECTION: The Builder shall repair cracks between 1/8 and 3/16 inch in width by pointing and patching. Cracks exceeding 3/16 inch, shall be investigated by the Builder to determine the cause. The Builder shall take the necessary steps to remove the cause, and make subsequent repairs by pointing, patching, and reinforcement, or replacement of the Defective masonry courses, if necessary.

OBSERVATION: Cracks in the masonry/brick stone wall(s) or veneer(s) above grade.

DEFICIENCY: Small cracks are common in mortar joints of masonry construction. Cracks 1/8 inch or greater in width are Deficiencies.

BUILDER CORRECTION: The Builder shall repair cracks and voids exceeding 1/8 inch by surface pointing. These repairs should be made toward the end of the first-year of warranty coverage. The Builder is not responsible for color variations between existing and new mortar; however, an attempt should be made to match as closely as possible.

OBSERVATION: Separation of brick or masonry edging from concrete slab or step.

DEFICIENCY: It is common for joints between concrete and masonry to crack, due to the dissimilarity of the materials. However, cracks in excess of 1/4 inch are a Deficiency.

BUILDER CORRECTION: The Builder shall grout the crack(s) thoroughly and reset loose masonry where necessary. If replacement of masonry material is necessary, the Builder should attempt to match the exiting material as closely as possible.

OBSERVATION: Cracking or scaling of stucco and cement plaster.

DEFICIENCY: Hairline cracks in stucco or cement plaster are common, particularly when applied directly to masonry backing. Cracks greater than 1/8 inch in width, or scaling of the finished surface(s), are Deficiencies.

BUILDER CORRECTION: The Builder shall scrape out cracks and scaled areas and fill with cement plaster or stucco to match finish and color as closely as possible.

4) CARPENTRY

4.1 ROUGH CARPENTRY

OBSERVATION: Floors squeak as a result of loose or improperly installed sub-flooring.

DEFICIENCY: A floor squeak that is noticeable, loud and objectionable is a Deficiency. However, a completely squeak-proof floor is not assured by the Builder or this warranty.

BUILDER CORRECTION: The Builder shall correct the problem if the cause is due to faulty installation by re-securing any loose sub-flooring material (through any reasonable repair method) without removing the finished floor surface. Where the underside of the sub-flooring material is inaccessible to repair without necessitating the removal of the finished flooring, the corrective work may be attempted from the finished floor side. Nailing through a carpeted surface and countersinking the nail(s) is an acceptable method of repair.

OBSERVATION: Uneven wood-framed floors.

DEFICIENCY: Floors which are more than 1/4 inch out of level within any 32-inch measurement when measured parallel to the floor joists are a Deficiency. Floor slope within any one room that exceeds 1/240 of the room width or length is a Deficiency (e.g., 10'0" wide room not to exceed 1/2 inch out of level).

BUILDER CORRECTION: The Builder shall correct or repair to meet the tolerances of the above criteria.

OBSERVATION: Bowed stud walls or ceilings.

DEFICIENCY: All interior and exterior wood-framed walls or ceilings have slight variations in the finished surfaces. However, bowing should not be visible to the extent that it significantly detracts from the finished surface. Walls or ceilings that are bowed more than a 1/2 inch within a 36-inch horizontal or vertical measurement are Deficiencies.

BUILDER CORRECTION: Exterior and interior wood-framed walls or ceilings bowed in excess of the allowable standard shall be corrected by the Builder to meet the tolerance of the above criteria.

OBSERVATION: Wood-framed walls out of plumb.

DEFICIENCY: All wood-framed walls that are out of plumb more than one inch in an 8-foot vertical measurement.

BUILDER CORRECTION: The Builder shall take necessary repairs to meet the tolerance noted above.

OBSERVATION: Warping, checking or splitting of wood framing which materially affects its intended purpose.

DEFICIENCY: Minor warping, checking, or splitting of wood is common as the wood dries out and is not considered a Deficiency. However, if a condition exists which materially affects the structural integrity of the individual framing member or any Builder-applied surface material attached thereto, then that condition is a Deficiency.

BUILDER CORRECTION: Where a problem exists and the surface material is affected, the Builder shall repair, replace or stiffen the frame member as necessary.

OBSERVATION: Exterior sheathing and sub-flooring which delaminates or swells.

DEFICIENCY: Sheathing and sub-flooring delaminating or swelling on the side that the finish material has been applied is a Deficiency.

BUILDER CORRECTION: The Builder shall repair or replace sub-flooring or sheathing as required. Replacement of the finish materials, when necessary, shall be done to match the existing finish as closely as possible.

OBSERVATION: Wood frame walls out of square.

DEFICIENCY: The diagonal of a triangle with sides of 12-feet and 16-feet along the edges of the floor shall be 20-feet plus or minus 1/2 inch.

BUILDER CORRECTION: The Builder shall make necessary modifications to any floor as necessary.

4.2 FINISH CARPENTRY

OBSERVATION: Unsatisfactory quality of finished exterior trim and Workmanship/Materials.

DEFICIENCY: Joints between exterior trim elements, and siding or masonry that are in excess of 3/8 inch are Deficiencies. In all cases, the exterior trim abutting masonry siding shall be capable of performing its function to exclude the elements.

BUILDER CORRECTION: The Builder shall repair open joints and touch-up finish coating where required (matching existing as closely as possible). The Builder shall caulk open joints between dissimilar materials.

OBSERVATION: Unsatisfactory quality of finished interior trim and Workmanship/Materials.

DEFICIENCY: Joints between moldings and adjacent surfaces, which exceed 1/8 inch in width, are deficient.

BUILDER CORRECTION: The Builder shall repair Defective joints and touch-up finish coating where required (matching existing as closely as possible). Caulking is acceptable.

OBSERVATION: Surface Defects in finished woodwork and millwork such as checks, splits and hammer marks.

DEFICIENCY: Finished woodwork and millwork is to be smooth and without surface marks. Finished surfaces that do not meet what is reasonably expected within the residential construction industry are Deficiencies.

BUILDER CORRECTION: The Builder shall correct repairable Defects. Sanding, filing, or puttying is acceptable to return the surface to its original condition. The Builder shall replace material that is not repairable and will refinish and restore to match surrounding surfaces as closely as possible.

OBSERVATION: Exposed nail heads in woodwork.

DEFICIENCY: Material used to fill nail holes has a tendency to dry and shrink after a period of time, and is not considered a Deficiency. Nail holes in finished, painted woodwork that have not been filled are Deficiencies. Nail holes do not have to be filled where the surface finish is not conducive or so designed to have nail holes filled because of the product.

BUILDER CORRECTION: The Builder shall fill nail holes where required and if necessary, touch-up paint, stain, or varnish to match as closely as possible.

5) THERMAL AND MOISTURE PROTECTION

5.1 WATERPROOFING

OBSERVATION: Leaks in basement or in foundation/crawlspace.

DEFICIENCY: Leaks resulting in actual trickling of water through the walls or seeping through the floor are Deficiencies. However, leaks resulting from improper landscaping installed by the Homeowner or failure of Homeowner to maintain proper grades that have been established by the Builder are not a Deficiency and are subject to Exclusions. Dampness in basement and foundation walls or in concrete basement and crawlspace floors is often common to new construction and is not a Deficiency.

BUILDER CORRECTION: The Builder will take the appropriate actions(s) required to correct basement and crawlspace leaks, except where the cause is determined to be the result of Homeowner negligence. Where the Builder has installed a sump pit in the affected area but a sump pump was not installed or contracted for by the Homeowner, no action is required until the Homeowner attempts to correct the condition by installing a properly sized pump. Thereafter, should the condition continue to exist, the Builder will take action necessary to correct the problem.

5.2 INSULATION

OBSERVATION: Insufficient insulation.

DEFICIENCY: Insulation that is not installed around all habitable areas in accordance with established local industry standards is a Deficiency.

BUILDER CORRECTION: The Builder shall install insulation of sufficient thickness and characteristics to meet the local industry standards. In the event of a dispute regarding the insulation, the cost for investigating the sufficiency of insulation and restoring areas to prior condition shall be borne by the Homeowner, if it is discovered that the standard had been met by the Builder.

OBSERVATION: Sound transmission between rooms, floor levels, adjoining condominium units in a building, or from the street into the Home.

DEFICIENCY: None. No coverage.

BUILDER CORRECTION: None. No coverage is provided for soundproofing.

5.3 LOUVERS AND VENTS

OBSERVATION: The attic or crawlspace is insufficiently ventilated.

DEFICIENCY: Attic and crawlspace areas that are not ventilated as required by the locally applicable Residential Code are a Deficiency. Ventilation will also be considered deficient if damage occurs to framing members or insulation as a result of excessive moisture accumulation. The Builder is not responsible for any action taken by the Homeowner which interferes with proper ventilation.

BUILDER CORRECTION: The Builder shall install properly-sized louvers, vents, or use other locally acceptable methods in order to correct the Deficiency.

OBSERVATION: Leaks due to snow or wind driven rain through louvers and vents.

DEFICIENCY: Improperly installed louvers and vents that permit penetration of the elements under normal conditions are Deficiencies. Properly installed louvers or vents may at times allow penetration of rain or snow under strong wind conditions, and are not Deficiencies.

BUILDER CORRECTION: The Builder shall take necessary steps to eliminate penetration of rain or snow under normal conditions if it is determined the installation was improper.

5.4 EXTERIOR SIDING

OBSERVATION: Delaminating, splitting, or deterioration of exterior siding.

DEFICIENCY: Exterior siding that delaminates, splits or deteriorates is a Deficiency.

BUILDER CORRECTION: The Builder shall repair or replace only the damaged siding. A reasonable attempt should be made to match the replaced or repaired siding as closely as possible to the original existing siding; however, the Homeowner should be aware that the new finish may not exactly match the original surface finish, and the Builder is not responsible for such variation. The Builder is not responsible for action taken by the Homeowner whom accelerates or causes damage to the siding, such as repeated use of sprinklers, which continually wets the siding.

OBSERVATION: Loose or fallen siding.

DEFICIENCY: Any improperly installed exterior siding, which loosens, falls off, or separates from the framing of the structure, is a Deficiency.

BUILDER CORRECTION: The Builder shall properly re-secure or spot replace deficient siding if necessary, in order and make it secure. If replacement is required, the Builder shall replace only the affected area, and attempt to match as closely as reasonably practicable.

OBSERVATION: Siding is bowed.

DEFICIENCY: Bows exceeding 1/2 inch in 32-inches are Deficiencies.

BUILDER CORRECTION: The Builder shall repair bowed siding to meet the standard. If replacement of siding is required, the Builder shall match original material as closely as possible; however, the Homeowner should be aware that the new finish may not exactly match the original surface finish, and the Builder is not responsible for such variation.

OBSERVATION: Nails have stained siding.

DEFICIENCY: Nail stains exceeding 1/2 inch in length and visible from a distance of twenty (20) feet are Deficiencies.

BUILDER CORRECTION: The Builder shall either remove stains or paint or stain the affected area. The Builder shall match the color and finish as closely as possible; however, the Homeowner should be aware that the new finish may not exactly match the original surface finish, and the Builder is not responsible for such variation. Where paint or stain touch up affects the majority of the wall surface, the whole area shall be refinished.

5.5 ROOFING

OBSERVATION: Roof or flashing leaks.

DEFICIENCY: Roof or flashing leaks under normal weather conditions are Deficiencies; however, when the cause of the leak is determined to result from severe weather conditions such as ice or snow build-up, high winds or wind-driven rain, such leaks are not Deficiencies.

BUILDER CORRECTION: The Builder shall correct any roof or flashing leaks that are verified to have occurred under normal weather conditions.

OBSERVATION: Lifted, curled or torn roof shingles.

DEFICIENCY: Roof shingles which lift or curl during the first-year of warranty coverage or tear loose during normal weather conditions are Deficiencies; however, accidental loss or damage from acts of nature such as, but not limited to fire, explosion, smoke, water escape, windstorms, hurricane, tornado, hail, lightning, falling trees, aircraft, vehicles, flood and earthquake is not a Deficiency.

BUILDER CORRECTION: The Builder shall repair or replace lifted, curled or torn shingles.

OBSERVATION: Standing water on built-up roofs.

DEFICIENCY: A properly pitched built-up roof should allow for the drainage of water, except for minor ponding. Dead flat roofs will retain a certain amount of water; however, excessive ponding of water that causes leaking of the built-up roof is a Deficiency.

BUILDER CORRECTION: The Builder shall repair all leaks due to or caused by standing water.

5.6 SEALANTS

OBSERVATION: Water or air leaks in exterior walls due to inadequate caulking.

DEFICIENCY: Joints and cracks in exterior wall surfaces and around openings which are not properly caulked to exclude the entry of water or excessive drafts are Deficiencies.

BUILDER CORRECTION: The Builder shall repair and or caulk joints or cracks in exterior wall surfaces as required, correcting the Deficiency one time during the first-year of warranty coverage. The Homeowner is responsible for maintaining the caulking once the condition is corrected.

5.7 SHEET METAL

OBSERVATION: Gutters and downspouts leak.

DEFICIENCY: Gutters and downspouts which leak are a Deficiency. Gutters that are improperly pitched to drain water are Deficiencies; however, standing water in gutters is acceptable if it does not exceed one (1) inch in depth. The Homeowner is responsible for maintenance and keeping the gutters/downspouts/extensions/drains free from leaves and debris to prevent overflow.

BUILDER CORRECTION: Repair leaks, and if necessary, properly re-pitch gutters to drain adequately.

6) DOORS AND WINDOWS

6.1 INTERIOR AND EXTERIOR DOORS

OBSERVATION: Warping of interior or exterior doors.

DEFICIENCY: Interior and exterior doors that warp to the extent that the warping prevents normal operation, closing or fit are deficient. The maximum allowable warping of an interior door is 1/4 inch when measured from top to bottom, either vertically or diagonally.

BUILDER CORRECTION: The Builder will repair or replace as may be required. New doors should be refinished to match the original as closely as possible.

OBSERVATION: Door panels shrink and expose bare wood.

DEFICIENCY: Door panels will shrink due to the nature of the material. Exposing of the bare wood at the edges is not a Deficiency.

BUILDER CORRECTION: None required.

OBSERVATION: Door panels split.

DEFICIENCY: Door panels that have split to the extent that light is visible through the door are Deficiencies.

BUILDER CORRECTION: If light is visible, the Builder shall fill the crack and re-finish the panel to match as closely as possible. The Builder will make corrections one time only during the first-year of warranty coverage. If the panel cannot be repaired to conceal the crack, the panel or the door itself shall be replaced and finished to match the original as closely as possible.

OBSERVATION: Bottom of door(s) rubs on Builder-installed wall-to-wall carpeted surface(s).

DEFICIENCY: The bottom(s) of doors that rub or drag on the carpet are Deficiencies. However, when the carpet selected by the Homeowner has excessively high pile, the Homeowner is responsible for any additional door undercutting.

BUILDER CORRECTION: The Builder shall undercut doors as required.

OBSERVATION: Excessive opening at the bottoms of interior doors.

DEFICIENCY: Passage doors from room to room that have openings between the bottom of the door and the Builder-installed finished flooring material in excess of 1 1/2 inch, are a Deficiency. Closet doors having an opening in excess of 2 inches are a Deficiency.

BUILDER CORRECTION: The Builder shall make necessary adjustments or replace the door to meet the required tolerance.

OBSERVATION: Door binds against either the jamb or head of frame or does not lock.

DEFICIENCY: Passage doors that do not open and close freely without binding against the doorframe are Deficiencies. Doors that do not lock as intended are a Deficiency.

BUILDER CORRECTION: The Builder shall adjust door(s) and keeper(s) to operate freely and meet the standard.

6.2 GARAGE DOORS (ATTACHED GARAGE)

OBSERVATION: Garage door fails to operate or fit properly.

DEFICIENCY: Garage doors that do not operate and fit the door opening within the manufacturer's installation tolerances are Deficiencies. Some infiltration of the elements can be expected under heavy weather conditions and is not considered a Deficiency.

BUILDER CORRECTION: The Builder shall take necessary adjustments to meet the manufacturer's installation tolerances. No adjustment is required when the cause is determined to result from anyone other than the Builder's or Builder's subcontractors' installation of an electric door opener.

6.3 WOOD, PLASTIC AND METAL WINDOWS

OBSERVATION: Malfunction of windows.

DEFICIENCY: Windows that do not operate in conformance with manufacturer's design standards are deficient.

BUILDER CORRECTION: The Builder shall consult with the manufacturer when necessary and make required adjustments so that the windows operate in accordance with the standard.

OBSERVATION: Double hung windows do not stay in place when open.

DEFICIENCY: Double hung windows are permitted to move within a two inch tolerance, up or down when put in an open position. Any excessive movement exceeding the tolerance is a Deficiency.

BUILDER CORRECTION: The Builder shall adjust sash balances one time only during the first-year of warranty coverage. Where possible, the Builders shall instruct the Homeowner on the method of adjustment for future use.

OBSERVATION: Condensation or frost on window frames or glass panes.

DEFICIENCY: None. Window glass and frames will collect condensation on the frame and glass surface when humidity and temperature differences are present. Condensation is usually the result of temperature/humidity conditions in the Home.

BUILDER CORRECTION: None required.

6.4 HARDWARE

OBSERVATION: Hardware that does not work properly, fails to lock, or perform its intended purpose.

DEFICIENCY: Any Builder-installed hardware on doors and windows that do not operate properly are a Deficiency.

BUILDER CORRECTION: The Builder shall adjust, repair, or replace hardware as required.

6.5 STORM DOORS, WINDOWS AND SCREENS

OBSERVATION: Storm doors, storm windows or screens do not operate or fit properly.

DEFICIENCY: Installed storm doors, windows and screens when installed do not operate or fit properly to provide the protection for which they are intended, are considered Deficiencies. Missing screens are not a Deficiency.

BUILDER CORRECTION: The Builder shall make necessary adjustments to ensure proper fit and operation. The Builder shall replace the storm doors, storm windows or screens when adjustment(s) cannot be made.

6.6 WEATHERSTRIPPING AND SEALS

OBSERVATION: Drafts around doors and windows.

DEFICIENCY: Weather stripping is required on all doors leading directly from a habitable area to the exterior (outside) of the Home. Some infiltration is normally noticeable around doors and windows, especially during high winds. Excessive infiltration resulting from openings in poorly fitted doors and windows or poorly fitted weather stripping is a Deficiency.

BUILDER CORRECTION: The Builder shall adjust or correct poorly-fitted windows or doors or poorly-fitted weather stripping.

6.7 GLASS AND GLAZING

OBSERVATION: Clouding and condensation on inside surfaces of insulated glass.

DEFICIENCY: Insulated glass, which clouds up or has condensation on the inside surfaces of the glass, is a Deficiency.

BUILDER CORRECTION: The Builder shall replace glass in accordance with window and glass manufacturer's requirements.

7) FINISHES**7.1 LATH AND PLASTER**

OBSERVATION: Cracks in plaster wall or ceiling surfaces.

DEFICIENCY: Noticeable cracks in plastered wall and ceiling surfaces of more than 1/8 inch are Deficiencies. However, hairline cracks are not uncommon and are not a Deficiency.

BUILDER CORRECTION: The Builder shall repair cracks that are greater than 1/8 inch in width and touch up paint to match as closely as possible one time only during the first-year of warranty coverage. Such conditions should be reported toward the end of the first year of warranty coverage to allow for normal movement of the Home.

7.2 GYPSUM WALLBOARD

OBSERVATION: Drywall cracks over door/window frames or archways, blisters in tape, excess compound in joints, exposed corner beads, nail pops, or trowel marks.

DEFICIENCY: Slight Defects, such as occasional nail pops, seam lines and cracks are common to gypsum wallboard installation. Blisters in tape, cracks over door and window frames and over archways, excess compound in joints, trowel marks, excessive nail popping and exposed corner bead are Deficiencies. Nail pops are a Deficiency only when there are signs of spackling compound cracking or falling away. Depressions or slight mounds at nail heads are not considered Deficiencies.

BUILDER CORRECTION: The Builder shall correct such Defects to the acceptable tolerance and repaint areas to match as closely as possible one time only during the first-year of warranty coverage. Such conditions should be corrected toward the end of the first-year of warranty coverage to allow for normal settlement of the Home.

7.3 HARD SURFACE FLOORING (FLAGSTONE, MARBLE, QUARRY/CERAMIC TILE, ETC.)

OBSERVATION: Flooring cracks or becomes loose.

DEFICIENCY: Ceramic tile, flagstone, or similar hard-surfaced sanitary flooring that cracks or becomes loose is a Deficiency. Sub-flooring and wallboard are required to be sufficiently secure, rigid, and suitable enough to receive the finish. Cracking and loosening of flooring caused by Homeowner negligence is not a Deficiency. The Builder is not responsible for slight color and pattern variation or discontinued patterns of the manufacturer. The Builder is not required to replace the entire finish when the replacement material consists of less than 25 percent of the finished area.

BUILDER CORRECTION: The Builder shall replace, reset, or correct the cracked or loose finish material.

OBSERVATION: Cracks appear in grouting of ceramic tile joints or at junctions with other building components such as, but not limited to, a bathtub, shower, or a countertop.

DEFICIENCY: Cracks in grouting of ceramic tile joints are Deficiencies. Re-grouting of these cracks is a maintenance responsibility of the Homeowner after the Builder has re-grouted once. Open cracks or loose grouting where the wall surface abuts the flashing lip at a tub, shower basin or countertop are considered Homeowner maintenance and any resultant damage to other finish surfaces due to leaks, etc. are not considered Deficiencies.

BUILDER CORRECTION: The Builder shall repair grouting as necessary one time only during the first year of warranty coverage.

7.4 RESILIENT FLOORING

OBSERVATION: Nail pops appear on the surface of resilient flooring.

DEFICIENCY: Readily apparent nail pops are a Deficiency.

BUILDER CORRECTION: The Builder shall correct nail pops that have caused damage to the flooring material by repairing, or if necessary, replacing damaged floor coverings in the affected area. The Builder is not responsible for discontinued patterns or color variations.

OBSERVATION: Depressions or ridges appear in the resilient flooring due to sub-floor irregularities.

DEFICIENCY: Readily apparent depressions or ridges exceeding 1/8 inch are a Deficiency. The ridge (or depression) measurement is taken with the gap at one end of a six-inch straightedge when the straightedge is centered directly over the depression or ridge, and while the opposite three-inch length of the straightedge is held tightly to the floor.

BUILDER CORRECTION: The Builder shall take required action to bring the Deficiency within acceptable tolerances so as to be not readily visible. The Builder is not responsible for discontinued patterns or color variations in the floor covering. The Builder is also not responsible for Homeowner neglect or abuse, or installations performed by others.

OBSERVATION: Resilient flooring or base loses adhesion.

DEFICIENCY: Resilient flooring or base that lifts, bubbles, or becomes unglued is a Deficiency.

BUILDER CORRECTION: The Builder shall repair or replace resilient flooring or base as required. The Builder is not responsible for discontinued patterns or color variations.

OBSERVATION: Seams or shrinkage gaps show at resilient flooring joints.

DEFICIENCY: Gaps in excess of 1/8 inch in width in resilient floor covering joints are a Deficiency. Where dissimilar materials abut, a gap in excess of 3/16 inch is Deficiency.

BUILDER CORRECTION: Builder shall take required action to correct the causes of the Deficiency. The Builder is not responsible for discontinued patterns or color variations of floor covering.

7.5 FINISHED WOOD FLOORING

OBSERVATION: Knot pops, open joints or cracks in finished wood flooring.

DEFICIENCY: Knot pops, open joints or cracks in floor boards of finished wood flooring which exceed the manufacturer's performance specifications.

BUILDER CORRECTION: The Builder shall repair by filling and refinishing to match the wood surface as closely as possible. For non-repairable Deficiencies, the Builder shall replace and finish the affected area to match the remaining flooring as closely as possible.

7.6 PAINTING

OBSERVATION: Knot and wood stains appear through paint on exterior.

DEFICIENCY: Excessive knot and wood stains that bleed through the paint are considered a Deficiency.

BUILDER CORRECTION: The Builder shall seal the immediately affected areas where excessive bleeding of knots and stains appear and touch-up paint to match as closely as possible.

OBSERVATION: Exterior paint or stain peels or deteriorates.

DEFICIENCY: Exterior paints or stains that peel or deteriorate during the first-year of ownership are Deficiencies. However, fading is normal and often subject to the orientation of painted surfaces to the climactic conditions that may prevail in the area. Fading is not a Deficiency.

BUILDER CORRECTION: The Builder shall properly prepare and refinish affected areas, matching color as closely as possible. Where finished repairs affect the majority of the surface areas, the whole area should be refinished. The warranty on the newly repainted surfaces will not extend beyond the original warranty period. The Builder is not responsible for fading.

OBSERVATION: Painting required as corollary repair because of other work.

DEFICIENCY: Where repairs required by this warranty are made to a painted surface, that surface shall be repainted and refinished to match surrounding areas as closely as possible.

BUILDER CORRECTION: The Builder shall repaint (and when necessary, refinish) only the immediately affected area to meet this standard.

OBSERVATION: Deterioration of varnish or lacquer finishes.

DEFICIENCY: Natural finish on interior woodwork that deteriorates during the first-year of the warranty coverage is a Deficiency. Varnish type finishes on exterior building components could deteriorate rapidly and are not considered a Deficiency.

BUILDER CORRECTION: The Builder shall refinish areas of natural finished interior woodwork, matching color as closely as possible.

OBSERVATION: Interior paint coverage.

DEFICIENCY: Interior paint not applied in a manner sufficient to visually cover wall, ceiling or trim surfaces is a Deficiency.

BUILDER CORRECTION: Builder shall repaint wall, ceiling or trim surfaces where inadequate paint has been applied. Where a fifty (50) percent or greater portion of the surface is affected, the entire surface shall be repainted from break line to break line.

OBSERVATION: Paint splatters or paint smears on finish surfaces.

DEFICIENCY: Paint stains on porous surfaces that are excessive and which cannot be removed by normal cleaning methods detract from the finish and are considered Deficiencies. Minor paint splatter or smear that can be easily removed from impervious surfaces is considered Homeowner maintenance and are not Deficiencies.

BUILDER CORRECTION: The Builder shall remove paint stains without affecting the finish of the material or replace the damaged surface if stain cannot be removed.

OBSERVATION: Mildew or fungus develops on painted or factory-finished surfaces.

DEFICIENCY: None. Mildew or fungus that forms on painted or factory-finished surfaces that is subject to various exposures such as, but not limited to, ocean, lake, riverfront, and heavily wooded areas or mountains is not a Deficiency.

BUILDER CORRECTION: None required.

7.7 WALL COVERING

OBSERVATION: Peeling of wall covering installed by Builder.

DEFICIENCY: Peeling of wall covering is a Deficiency, unless it is due to the Homeowner's abuse or negligence.

BUILDER CORRECTION: The Builder shall repair or replace defective wall covering.

OBSERVATION: Mismatching in wall covering pattern.

DEFICIENCY: Mismatching wall covering patterns over a large area that severely detracts from its intended purpose due to poor Workmanship/Materials is a Deficiency.

BUILDER CORRECTION: The Builder shall remove mismatched wall covering and replace them. The Builder is not responsible for discontinued patterns or variations in color.

OBSERVATION: Lumps, ridges, or nail pops in the wallboard which appear after the Homeowner has wall covering installed by others.

DEFICIENCY: None. The Homeowner shall insure that the surface to receive wall covering is suitable and assumes full responsibility should lumps, ridges and nail pops occur at a later date.

BUILDER CORRECTION: None required.

7.8 CARPETING

OBSERVATION: Seams in carpet.

DEFICIENCY: Seams in carpeting that separate due to improper installation are Deficiencies.

BUILDER CORRECTION: The Builder shall correct the seams to eliminate the separation.

OBSERVATION: Carpeting comes loose or excessive stretching occurs.

DEFICIENCY: Wall-to-wall carpeting that comes loose is a Deficiency; however, stretching that may occur in the carpeting is subject to the quality and surface over which it is laid, and is not a Deficiency.

BUILDER CORRECTION: The Builder shall re-secure loose carpeting one time during the first year of warranty coverage.

EXCLUDED: Carpet and carpeting materials are not covered by this warranty; however, the removal, re-setting, or re-stretching of carpet for the purpose of complying with the provisions of the Workmanship/Materials Coverage section of this warranty, or incidental to covered Major Structural Defects is covered.

8) SPECIALTIES

8.1 FIREPLACES

OBSERVATION: Fireplace on chimney does not draw properly causing smoke to enter the Home.

DEFICIENCY: A properly-designed and constructed fireplace or chimney is to function as intended. It is normal to expect that high winds can cause temporary negative draft situations. Similarly, negative draft situations can also be caused by obstructions such as large branches of trees too close to the chimney. In addition, the physical location of the fireplace or its relationship to adjoining walls and roof may cause negative draft conditions. In some cases, it may be necessary to open a window slightly to create an effective draft. Since negative draft conditions could be temporary, it is necessary for the Homeowner to substantiate the problem to the Builder by constructing a fire so the condition can be observed.

BUILDER CORRECTION: When it is determined that the malfunction is based upon improper performance of the fireplace, the Builder shall make the necessary steps to correct the problem. When it is determined that the fireplace is properly designed and constructed, but continues to malfunction due to natural causes beyond the Builder's control, the Builder is not responsible.

OBSERVATION: Chimney separation from the structure to which it is attached.

DEFICIENCY: Newly-built fireplaces will often incur a slight amount of separation. A separation which exceeds 1/2 inch from the main structure in any ten-foot vertical measurement is a Deficiency.

BUILDER CORRECTION: The Builder shall make correction(s) to meet rise tolerance. Caulking or grouting is acceptable, up to a 1/2 inch of displacement.

9) EQUIPMENT

9.1 KITCHEN CABINETS AND VANITIES

OBSERVATION: Kitchen or vanity cabinet doors or drawers malfunction.

DEFICIENCY: Cabinet doors, drawers and other operating parts that do not function as designed are Deficiencies.

BUILDER CORRECTION: The Builder shall repair or replace operating parts.

OBSERVATION: Surface cracks and de-laminating in high-pressure laminate cabinet countertops.

DEFICIENCY: Countertops fabricated with high-pressure laminate coverings that delaminate or have surface cracks or joints exceeding 1/16 inch between sheets are considered Deficiencies.

BUILDER CORRECTION: The Builder shall repair or replace the laminated surface covering having cracks or joints exceeding the allowable widths.

OBSERVATION: Warping of kitchen or vanity cabinet doors and drawer fronts.

DEFICIENCY: Warping that exceeds 1/4 inch as measured from the face of the cabinet frame to the furthestmost point of warping on the drawer or door front in a closed position is a Deficiency.

BUILDER CORRECTION: The Builder shall correct or replace doors or drawer fronts as required.

OBSERVATION: Gaps between cabinets, ceiling and walls.

DEFICIENCY: Countertops, splashboards, base and wall cabinets are to be securely mounted. Gaps in excess of 1/4 inch between wall or ceiling surfaces are a Deficiency.

BUILDER CORRECTION: The Builder shall make necessary adjustments of cabinets and counter tops or close gaps by means of molding suitable to match the cabinet or counter top finish as closely as possible or by other reasonable means.

10) MECHANICAL SYSTEMS**10.1 PLUMBING**

OBSERVATION: Faucet or valve leak.

DEFICIENCY: A valve or faucet leak due to Workmanship/Materials is a Deficiency and is covered only during the first year of the warranty; however, leaks caused by worn or Defective washers or seals are a Homeowner maintenance item and are not considered a Deficiency.

BUILDER CORRECTION: The Builder shall repair or replace the leaking faucet or valve.

OBSERVATION: Defective plumbing fixtures, appliances or trim fittings.

DEFICIENCY: Fixtures, appliances, or fittings are to be judged according to the manufacture's standards regarding use and operation and are covered only during the first year of the warranty.

BUILDER CORRECTION: The Builder shall replace or repair any fixture or fitting which is outside of acceptable standards as defined by the manufacturer.

10.2 WATER SUPPLY

OBSERVATION: Staining of plumbing fixtures due to high iron content in the water supply.

DEFICIENCY: High iron content in the water supply system will cause staining of plumbing fixtures and is not considered a Deficiency.

BUILDER CORRECTION: None required. Maintenance and treatment of the water is the Homeowner's responsibility.

OBSERVATION: Noisy water pipes.

DEFICIENCY: Some noise can be expected from the water pipe system due to the flow of water; however, the pipes should not omit a pounding noise "water hammer" in the supply system. Such sound is a Deficiency and is covered only during the first year of the warranty. Common noises due to water flow and pipe expansion are not considered Deficiencies.

BUILDER CORRECTION: The Builder shall correct to eliminate "water hammer."

11) HEATING, AIR CONDITIONING, AND DUCTWORK**11.1 HEATING**

OBSERVATION: Inadequate heat.

DEFICIENCY: A heating system that fails to produce an inside temperature of at least 70 degrees Fahrenheit when measured at the center of the room at a height of five feet above the floor under local outdoor winter design conditions is a Deficiency. However, there may be periods when the outdoor temperature falls below the design temperature, thereby lowering the temperature in the Home. The physical orientation of the Home and location of each room will also create a temperature differential particularly when the heating system is controlled by a single thermostat serving one or more floor levels. The Homeowner is responsible for balancing and maintaining vents, returns and dampers as necessary.

BUILDER CORRECTION: The Builder shall correct the heating system in order to meet the winter design tolerance noted above during the first year of warranty coverage.

11.2 AIR CONDITIONING

Please note that the costs of parts and/or labor may be the responsibility of the Builder depending on the Manufacturer's product agreement.

OBSERVATION: Inadequate cooling.

DEFICIENCY: A Builder-installed air conditioning system that fails to maintain a temperature of 78 degrees Fahrenheit when measured in the center of each room at height of five feet about the floor, under local outdoor summer design conditions is a Deficiency. **NOTE FOR AIR CONDITIONING:** There may be periods when the outdoor temperature rises above the design temperature, thereby raising the temperature in the Home. The physical orientation of the Home and location of each room will also create a temperature differential particularly when the air conditioning system is controlled by a single thermostat serving one or more floor levels. The Homeowner is responsible for balancing and maintaining vents, returns and dampers as necessary.

BUILDER CORRECTION: The Builder shall correct the cooling system in order to meet the summer design tolerance noted above during the first year of warranty coverage.

OBSERVATION: Condensation lines clog up.

DEFICIENCY: Condensation lines will clog under normal conditions.

BUILDER CORRECTION: The Builder is responsible only for providing clean and unobstructed lines at the time of the Effective Date of Warranty. Continued proper operation of drain lines is a Homeowner maintenance responsibility.

OBSERVATION: Improper mechanical operation of the evaporative cooling system.

DEFICIENCY: Equipment that does not function properly at temperature standards set is a Deficiency.

BUILDER CORRECTION: The Builder shall correct and adjust so that blower and water system operate as designed during the first year of warranty coverage.

11.3 DUCTWORK

OBSERVATION: Ductwork and heating piping not insulated in a non-insulated area.

DEFICIENCY: Non-insulated ductwork and heating pipes that are installed within non-insulated areas such as crawlspaces, garages or attics is a Deficiency. Basements are not "insulated areas" and no insulation is required unless otherwise required by local Residential Codes.

BUILDER CORRECTION: The Builder shall install the required insulation.

OBSERVATION: Ductwork noisy.

DEFICIENCY: Noise in the ductwork may occur for a brief period when heating or cooling begins to function and is not considered a Deficiency; however, noise emanating from ductwork which occurs for prolonged periods of time during its normal operation is a Deficiency.

BUILDER CORRECTION: The Builder shall make necessary steps to eliminate noise in the ductwork.

12) ELECTRICAL SYSTEM**12.1 SWITCHES AND RECPTACLES**

OBSERVATION: Fuses blow or circuit breakers kick out.

DEFICIENCY: Fuses and circuit breakers that deactivate under normal usage when reset or replaced are Deficiencies during the first year of warranty coverage.

BUILDER CORRECTION: The Builder shall check wiring and replace the wiring or breaker if it does not perform adequately or is Defective.

OBSERVATION: Drafts from electrical outlets.

DEFICIENCY: The electrical junction box on exterior walls may produce a slight airflow whereby the cold air can be drawn through the outlet into a room. This problem is normal in new Home construction and is not considered a Deficiency.

BUILDER CORRECTION: None required.

OBSERVATION: Malfunction of electrical outlets, switches or fixtures.

DEFICIENCY: Electrical outlets, switches or fixtures that do not operate as intended are considered Deficiencies only during the first year of the warranty coverage.

BUILDER CORRECTION: The Builder shall repair or replace Defective outlets, switches or fixtures as necessary.

12.2 SERVICE AND DISTRIBUTION

OBSERVATION: Ground fault Interrupter trips frequently.

DEFICIENCY: Ground fault interrupters are sensitive safety devices installed into the electrical system to provide protection against electrical shock. These devices are sensitive and can be tripped very easily. Ground fault outlets that do not operate as intended are considered Deficiencies.

BUILDER CORRECTION: The Builder shall replace the device (if Defective) during the first year of the warranty.

**SECTION 9: PERFORMANCE STANDARDS FOR ELECTRICAL, PLUMBING, AND MECHANICAL
DISTRIBUTION SYSTEMS UNDER THE TWO-YEAR DELIVERY PORTION OF SYSTEMS WARRANTY:**

This section describes the Performance Standards for the various Delivery Portion of Systems in a Home as described below. The Builder or Insurer (as applicable) will repair or replace those elements or components of a Home that do not meet these standards during the applicable warranty period.

1) MECHANICAL SYSTEMS**1.1 WATER SUPPLY SYSTEM**

OBSERVATION: Water supply system fails to deliver water or pressure is low.

DEFICIENCY: Builder installed on-site service connections to municipal water main or private water supply that fail to deliver water are deficient. Low water pressure is defined as follows: The cold water system supply pressure at any one single fixture is drastically reduced when the cold water supply at any one other single fixture is in simultaneous use. Water supply systems that fail this standard are deficient.

BUILDER CORRECTION: The Builder shall repair as required if failure to supply water is the result of a Deficiency in workmanship or materials. The Builder is not responsible for conditions that disrupt or eliminate the sources of water supply that are beyond his control.

1.2 SEPTIC TANK SYSTEM

OBSERVATION: Septic system(s) fail(s) to operate properly..

DEFICIENCY: A septic system that is not capable of properly handling the normal flow of household effluent is a Deficiency; however, it is possible that due to freezing, soil saturation, changes its ground water table, or excessive use of plumbing or appliances, an overflow can occur, and such conditions are user Deficiency. Periodic pumping of the septic tank is considered Homeowner maintenance and a normal need for pumping is not a Deficiency. This includes, but is not limited to:

- (a) Excessive use of water such as overuse of a washing machine or dishwasher, including their simultaneous use,
- (b) Connection of sump pump, roof drains or backwash from water conditioner to the system,
- (c) Placing of non-biodegradable items in the system,
- (d) Addition of any harsh chemicals, greases, cleaning agents, or excessive amount(s) of bleaches or drain cleaners,
- (e) Use of a food waste disposal not supplied by Builder,
- (f) Placement of impervious surfaces over the disposal area,
- (g) Allowing vehicles to drive or park over the disposal areas, and
- (h) Failure to periodically pump out the septic tank when required.

BUILDER CORRECTION: The Builder shall take corrective action as required if it is determined that the malfunction is due to Defect in workmanship, materials or installation. The Builder is not responsible for malfunctions that occur through negligence, abuse, or malfunctions that occur due to acts of nature such as freezing, soil saturation, changes in the ground water table, or excessive use.

1.3 PLUMBING

OBSERVATION: Plumbing pipes freeze and burst.

DEFICIENCY: Drain, waste, vent, and water supply pipes shall be adequately protected to prevent freezing during normally anticipated cold weather conditions in accordance with the applicable Building Code; however, the Homeowner is responsible for maintaining suitable temperature in the Home to prevent pipes from freezing and bursting. Homes which are occupied only periodically, or where there will be no occupancy for an extended period of time, must be properly winterized to ensure that a reasonable temperature is maintained. Leaks occurring due to the Homeowner's neglect are not a Deficiency and are not the Builder's responsibility.

BUILDER CORRECTION: The Builder shall correct plumbing conditions that do not meet the applicable Residential Code.

OBSERVATION: Leakage from any piping.

DEFICIENCY: Leaks in drain, waste, vent and water supply piping are Deficiencies. Condensation on piping does not constitute leakage, and is not a Deficiency, except where pipe insulation is required by the local Building Code.

BUILDER CORRECTION: Builder shall make necessary repairs to eliminate leakage.

OBSERVATION: Stopped up sanitary sewers, fixtures and sanitary drains.

DEFICIENCY: Sanitary sewer, fixtures and sanitary drains that do not operate or drain properly are a Deficiency; however, sewers, fixtures and drains that become clogged as a result of the Homeowner's negligence, abuse, or misuse are not Deficiencies.

BUILDER CORRECTION: Where Defective construction is shown to be the cause, the Builder shall make necessary repairs. The Builders responsibility for Defective sewer lines extends only to the limit of the property line upon which Home is constructed.

1.4 HEATING AND AIR CONDITIONING

Please note that the costs of parts and/or labor may be the responsibility of the Builder depending on the Manufacturer's product agreement.

OBSERVATION: Refrigerant line leak.

DEFICIENCY: Builder-installed refrigerant lines that develop leaks during normal operations are a Deficiency.

BUILDER CORRECTION: The Builder shall repair leaking lines and recharge the unit as required.

OBSERVATION: Ductwork separates or becomes unattached.

DEFICIENCY: Ductwork that separates or that is not securely attached is Deficiency.

BUILDER CORRECTION: The Builder shall re-secure and re-attach separated or unattached ductwork.

2) ELECTRICAL

2.1 ELECTRICAL CONDUCTORS

OBSERVATION: Failure of the wiring to carry its designated circuit load to switches and receptacles.

DEFICIENCY: Wiring that is not capable of carrying the designated load during normal residential use to switches, receptacles or equipment is a Deficiency.

BUILDER CORRECTION: The Builder shall check wiring and replace wiring if it fails to carry the designed load.

SECTION 10: HOW TO REQUEST WARRANTY PERFORMANCE FOR A WORKMANSHIP/MATERIALS AND/OR DELIVERY PORTION OF SYSTEMS DEFECT OR DEFICIENCY:

If You believe Your Home has a Defect and/or Deficiency covered under this warranty, You must notify the Warrantor (Builder) upon discovery of the Defect and/or Deficiency in writing as provided below. *Notice cannot be Initiated with a phone call.* Your written request for warranty performance must be received before the expiration of the applicable warranty period (one (1) year for Workmanship/Materials and two (2) years for Delivery Portion of Systems (electrical, plumbing, and mechanical distribution systems)).

- (1) **Notice to Warrantor (Builder) for One-Year Workmanship/Materials and/or Two-Year Delivery Portion of Systems Issue:**
 - (a) If a Warranted Defect and/or Deficiency occurs, You must notify the Warrantor (Builder) in writing. *Notice cannot be Initiated with a phone call.*
 - (b) Your request for warranty performance to the Warrantor (Builder) does not constitute notice to the Administrator (StrucSure Home Warranty, LLC) or the Insurer (Golden Insurance Company) and does not extend the Warranty Term.
 - (c) The Warrantor (Builder) will investigate and respond to Your request within thirty (30) days of receipt to determine whether the Defects and/or Deficiencies described are covered under this Express Limited Warranty. You must provide the Warrantor (Builder) a reasonable opportunity to inspect your home during normal business hours if the Warrantor (Builder) requests such an opportunity.
 - (d) The Warrantor (Builder) will advise You in writing as to whether Your Defect and/or Deficiency is covered by this Express Limited Warranty. If it is, the Warrantor (Builder) will perform repair work, replace, or make payment as described in this Express Limited Warranty. If You added Improvements which were not part of the Warrantor's (Builder's) original construction work, You are responsible for removal and/or repair of these items. Warranty repairs will be made during normal business hours.
 - (e) If the Warrantor (Builder) does not respond to Your request for warranty performance within thirty (30) days, please complete the Request for Warranty Performance Form at the back of this booklet and send it to the Administrator: StrucSure Home Warranty, LLC, Attn: Warranty Service Division, 6825 East Tennessee Avenue, Suite #410, Denver, CO 80224.
 - (f) The written notice should be sent certified mail, return receipt requested.
 - (g) Such notice must be received no later than sixty (60) days after the expiration of the applicable warranty period or the request will be rejected. *Note that the first thirty (30) days is time for the Builder to respond to Your initial notification, and the second thirty (30) days is time for You to notify the Administrator (StrucSure Home Warranty, LLC) of the Builder's lack of response.*
 - (h) Once Your written notice has been received, the Administrator (StrucSure Home Warranty, LLC) will process Your request for warranty performance in accordance with the provisions of this warranty. The Administrator (StrucSure Home Warranty, LLC) will investigate to determine whether the Defects described in the complaint are covered under this Express Limited Warranty and will respond to Your claim within thirty (30) days. You must provide the Administrator (StrucSure Home Warranty, LLC) and the Insurer (Golden Insurance Company) a reasonable opportunity to inspect Your Home during normal business hours.
 - (i) Should the Builder default on their warranty obligation under the Workmanship/Materials warranty during year one (1) and/or Delivery Portion of Systems warranty during years one (1) and two (2), the Insurer (Golden Insurance Company) becomes the Warrantor.
 - (j) There is a \$250.00 processing fee made payable by You to the Insurer (Golden Insurance Company). *This fee is required for each Request for warranty Performance Form submitted to the Administrator (StrucSure Home Warranty, LLC). Note: If You are the original owner with the original FHA/VA or USDA financing still in effect, a \$250.00 fee will be collected following the acceptance of Your claim and determination of the amount of loss.*
 - (k) You have an obligation to cooperate with the Builder, Administrator (StrucSure Home Warranty, LLC) and the Insurer (Golden Insurance Company) concerning the arbitration, inspection, investigation, repair, and claim settlement. Your failure to cooperate may jeopardize Your warranty coverage.

SECTION 11: MAJOR STRUCTURAL DEFECT COVERAGE

This section describes coverage for the various major structural components of a Home as described. The Insurer will repair or replace those elements or components of a Home that meet the conditions defined below during the applicable warranty period.

Major Structural Defects are warranted for a Ten-Year Warranty Term from the Effective Date of Warranty.

- (1) A Major Structural Defect is defined as actual physical damage to one or more of the below-designated load-bearing elements of the Home caused by failure of such load-bearing elements which affect(s) their load-bearing function(s) to the extent that the Home becomes unsafe, unsanitary, or otherwise unlivable. This definition is identical as defined in the regulations of the Department of Housing and Urban Development (HUD) in effect at the time of this Express Limited Warranty.

- (2) This is coverage for catastrophic failure of load-bearing elements of Your Home.
- (3) The following are the designated load-bearing elements of the Home that are covered by this warranty and qualify for Major Structural Defect Coverage:
- (a) Load-bearing foundation systems and footings,
 - (b) Load-bearing floor framing systems,
 - (c) Load-bearing walls and partitions,
 - (d) Load-bearing roof framing systems,
 - (e) Load-bearing beams,
 - (f) Load-bearing headers,
 - (g) Load-bearing girders,
 - (h) Load-bearing lintels (other than those supporting veneers),
 - (i) Load-bearing columns (other than a column that is designed to be cosmetic), and
 - (j) Load-bearing masonry arches (other than a masonry arch that is designed to be cosmetic).
- (4) The following are some examples of non-load bearing elements of the Home, and **DO NOT** qualify for Major Structural Defect Coverage:
- (a) Non load-bearing partitions and walls,
 - (b) Wall tile or paper, etc.,
 - (c) Plaster, laths, or drywall,
 - (d) Flooring and sub-flooring materials,
 - (e) Brick, stucco, stone, or veneer,
 - (f) Any type of exterior siding,
 - (g) Roof shingles, tiles, sheathing, and tar paper,
 - (h) Heating, cooling, ventilating, plumbing, electrical, and mechanical systems,
 - (i) Appliances, fixtures, or items of equipment,
 - (j) Doors, trim, cabinets, hardware, insulation, paint, and stains, and/or
 - (k) Basement and other interior floating, ground-supported concrete slabs.
- (5) Subject to all provisions of this warranty, the repair of a Major Structural Defect is limited to:
- (a) The repair of damage to the designated load-bearing element(s) which is necessary to restore its load-bearing ability.
 - (b) The repair of the non-load bearing portions, items, or systems of the Home, damaged by the Major Structural Defect, which make the Home unsafe, unsanitary, or otherwise unlivable.
 - (c) The repair, removal, and replacement of only those surfaces, finishes, and coverings, (original with the Home) damaged by the Major Structural Defect.
 - (d) Repair or replacement is NOT intended to restore the Home to a like-new condition.
- (6) All decisions concerning the repair of a Major Structural Defect, including, but not limited to, development and choice of a repair design (or "plan"), method of repair, execution of repairs, replacement of covered Defective items, as well as all matters pertaining to the repair or replacement of all covered damage, belong to the sole discretion of the Insurer.

SECTION 12: HOW TO REPORT A MAJOR STRUCTURAL DEFECT CLAIM

If You believe Your Home has a Major Structural Defect (MSD) covered under this warranty, You must notify the Administrator upon discovery of the Defect in writing as provided below. **Notice cannot be initiated with a phone call.** Your written request for warranty performance must be received before the expiration of the applicable warranty period (ten (10) years for Major Structural Defects).

- (1) Notice to Administrator (StrucSure Home Warranty, LLC) for Major Structural Defects during Years One (1) through Ten (10).

- (a) If a Warranted Defect occurs during years one (1) through ten (10), You must notify the Administrator (StrucSure Home Warranty, LLC) in writing. Please complete the Notice of Major Structural Defect Claim Form at the back of this booklet and send it to StrucSure Home Warranty, LLC, Attn: Warranty Service Division, 6825 East Tennessee Avenue, Suite #410, Denver, CO 80224. **Notice cannot be initiated with a phone call.**

- (b) There is a \$250.00 processing fee made payable by You to the Insurer (Golden Insurance Company). *This fee is required for each Notice of Major Structural Defect Claim Form submitted to the Administrator (StrucSure Home Warranty, LLC). Note: If You are the original owner with the original FHA/VA or USDA financing still in effect, a \$250.00 fee will be collected following the acceptance of Your claim and determination of the amount of loss.*
- (c) The written notice should be sent certified mail, return receipt requested.
- (d) Such notice must be received before the expiration of the applicable warranty period.
- (e) Your request for warranty performance must describe the condition of the warranted Major Structural Defect in detail.
- (f) Once Your written notice has been received, the Administrator (StrucSure Home Warranty, LLC) will process Your request for warranty performance in accordance with the provisions of this warranty.
- (g) The Administrator (StrucSure Home Warranty, LLC) will investigate to determine whether the Defects described in the complaint are covered under this Express Limited Warranty and will respond to Your claim within thirty (30) days. You must provide the Administrator (StrucSure Home Warranty, LLC) and the Insurer (Golden Insurance Company) a reasonable opportunity to inspect Your Home during normal business hours.
- (h) You have an obligation to cooperate with the Administrator (StrucSure Home Warranty, LLC) and the Insurer (Golden Insurance Company) concerning the arbitration, inspection, investigation, repair, and claim settlement. Your failure to cooperate may jeopardize Your warranty coverage.

SECTION 13: CONDITIONS OF WARRANTY PERFORMANCE

- (1) Actions taken to repair Defects and/or Deficiencies will not extend the periods of coverage provided in the Warranty Term(s).
- (2) If a request for warranty performance during years one (1) for Workmanship/Materials and years one (1) and two (2) for Delivery Portion of Systems qualifies for coverage, the Warrantor (Builder or Insurer, as applicable) has the right to choose to repair, replace, or pay the reasonable cost of repair or replacement of any items which do not meet Performance Standards and are not excluded from coverage.
- (3) If a Major Structural Defect claim qualifies for coverage in years one (1) through ten (10), the Insurer has the right to choose to repair, replace, or pay the reasonable cost of repair or replacement of any covered Major Structural Defect. If the Insurer elects to make a cash settlement for the reasonable cost of a Warranted Defect, the settlement must be in writing. The Homeowner shall have up to 45 days upon the receipt of settlement agreement to respond.
- (4) Any events which cause a delay in the performance of the warranty obligations of the Builder, the Administrator, and/or the Insurer, and which are beyond the control of the Builder, the Administrator, and/or the Insurer, shall excuse the Builder, the Administrator, and/or the Insurer from performing until the effects causing the delay are remedied.
- (5) The right to repair or replace is solely that of the Builder or the Insurer (as applicable), and the decision to make payment in lieu of implementing the covered repairs is solely that of the Builder or the Insurer (as applicable). Replacement does not mean an obligation to purchase Your Home in the event of a claim nor under any other circumstance.
- (6) If the Warrantor (Builder or Insurer, as applicable) repairs, replaces, or pays You the reasonable cost to repair or replace a Warranted Item, the Warrantor (Builder or Insurer, as applicable) shall be subrogated to all Your rights of recovery against any person or entity. If requested to do so, You must sign and deliver to the Builder, Administrator, and the Insurer a full and unconditional release, in recordable form, of all legal obligations and rights to recovery (including subrogation rights) with respect to the Warranted Defects and/or Deficiencies, and any condition arising from the warranted items. This must occur prior to payment for the reasonable cost of repair or replacement, or once the repair or replacement has been made. You must execute and deliver any and all instruments and documents, and take any and all other actions necessary to secure such rights including, but not limited to, assignment of proceeds of any other insurance or other warranties to the Insurer. You shall do nothing to prejudice these rights of subrogation.
- (7) The Warrantor (Builder or Insurer, as applicable) is not responsible for exact color, texture or finish matches when replacing or repairing materials, repainting areas, or when items or materials have been discontinued. Surfaces altered incident to any repair will be finished or touched up to match the surrounding area as closely as practical. In connection with the repair of finish or surface material, such as paint, wallpaper, flooring or a hard surface, the Warrantor (Builder or Insurer, as applicable) will match the standard and grade as closely as reasonably possible. The Warrantor (Builder or Insurer, as applicable) will attempt to match the finish, but will not be responsible for discontinued patterns or materials, color variations, or shade variations. When the surface finish material must be replaced and the original material has been discontinued, the Warrantor (Builder or Insurer, as applicable) is responsible for installing replacement material substantially similar in appearance to the original material.

SECTION 14: MEDIATION AND INSPECTION

Within thirty (30) days following the Administrator's receipt of appropriate notice of request for warranty performance, the Administrator may review and mediate Your request by communicating with You, Your Builder, and/or the Insurer and any other individuals or entities who the Administrator believes possess pertinent information.

If, after thirty (30) days, the Administrator has not been able to successfully mediate Your request, or at any earlier time when the Administrator believes that You and Your Builder and/or Insurer are at an impasse, then the Administrator will notify You that Your request has become an Unresolved Warranty Issue and that You may proceed to arbitration.

At any time following the receipt of appropriate notice of Your request for warranty performance, the Administrator may schedule an inspection of the item(s). You must provide the Insurer reasonable access during normal business hours for any such inspection. The Administrator, at its discretion, may schedule a subsequent inspection to determine compliance.

When a request for warranty performance is filed and the Defect and/or Deficiency cannot be observed under normal conditions, it is Your responsibility to substantiate that the need for warranty performance exists including any costs involved.

You have an obligation to cooperate with the mediation, inspection, and investigation of Your warranty request. Your warranty file may be closed should You fail to cooperate or respond to requests within thirty (30) days.

SECTION 15: ARBITRATION

The parties to this Express Limited Warranty intend and agree that any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to this Express Limited Warranty, any alleged Defect and/or Deficiency in or to the subject Home or the real property on which the subject Home is situated; or the sale of the subject Home by the Builder, including, without limitation, any claim of breach of contract, negligent or intentional misrepresentation, or nondisclosure in the Inducement, execution, or performance of any contract, including this arbitration agreement, or breach of any alleged duty of good faith and fair dealing, shall be settled by binding arbitration in a manner consistent with this arbitration agreement. Agreeing to arbitration means You are waiving Your right to a trial by a Judge and/or a jury.

You must begin the arbitration process by giving the Administrator written notice of Your request for arbitration of an Unresolved Warranty Issue. After the Administrator's receipt of Your notice of request for arbitration, any Unresolved Warranty Issue that You have with the Warrantor (Builder or Insurer, as applicable) or Administrator shall be submitted to an independent arbitration service mutually agreed upon by You, the Administrator, and the Warrantor (Builder or Insurer, as applicable). If You, the Administrator, and the Warrantor (Builder or Insurer, as applicable) cannot agree on an independent arbitration service, then both parties agree to use Construction Dispute Resolution Services (CDRS) for the arbitration. This binding arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 et seq., as amended (FAA), and any rules of the independent arbitration service employed by the parties to the arbitration. Should any conflict exist between the FAA and the rules of the independent arbitration service selected, the FAA shall control.

You understand that should You submit a request for arbitration, You will be required to pay all arbitration fees to the independent arbitration service prior to the issue being presented to the Arbitrator. You and the Warrantor (Builder or Insurer, as applicable) agree that the Arbitrator shall have the power to award the cost of any/all arbitration fees to any party or to split these fees among the parties to the arbitration.

Since this Express Limited Warranty requires mandatory binding arbitration of Unresolved Warranty Issues, if any party hereto commences litigation in violation of this Express Limited Warranty, such party shall reimburse the other parties named in the litigation for their costs and expenses, including reasonable attorney fees, incurred in responding to and/or requesting dismissal or stay of such litigation. The parties to this Express Limited Warranty intend that no party to any arbitration hereunder may make a claim for punitive damages as part of the arbitration proceeding and that the Arbitrator shall not have the authority to award punitive damages to any party hereto.

This arbitration agreement shall inure to the benefit of, and be enforceable by, the Builder's subcontractors, agents, vendors, suppliers, design professionals, Insurers, and any other person alleged to be responsible for any Defects and/or Deficiencies in or to the subject Home or the real property on which the subject Home is situated. Any party shall be entitled to recover reasonable attorney's fees and costs incurred in enforcing this arbitration agreement. The decision of the Arbitrator shall be final and binding and may be entered as a judgment in any State or Federal court of competent jurisdiction.

This arbitration agreement shall be deemed to be a self-executing arbitration agreement. Any disputes concerning the interpretation or the enforceability of this arbitration agreement, including, without limitation, its revocability or voidability for any cause, the scope of arbitration issues, and any defense based upon waiver, estoppel or laches, shall be decided by the Arbitrator.

The initiation of or participation by any party in any judicial proceeding concerning this arbitration agreement or any matter arbitrable hereunder shall not be deemed a waiver of the right to enforce this arbitration agreement, and, notwithstanding any applicable rule of law to the contrary, shall not be asserted or accepted as a reason for delay, refusal to participate in, or refusal to enforce this arbitration agreement.

The arbitration hearing shall take place at or near the residence covered by the Express Limited Warranty unless both You and the Warrantor (Builder or Insurer, as applicable) mutually agree to hold the arbitration at a different location.

The Warrantor (Builder or Insurer, as applicable) or Administrator shall have the right, in advance of the arbitration proceeding, to re-inspect any Home which is the subject of the arbitration proceeding if the request for arbitration was made more than sixty (60) days following the last claim decision of the Warrantor (Builder or Insurer, as applicable) or Administrator concerning such Home. No arbitration proceeding shall involve more than one single-family detached dwelling or more than one multi-dwelling unit building.

The parties expressly agree that this Express Limited Warranty and this arbitration agreement touch and concern interstate commerce and are governed by the provisions of the FAA and the rules of the Independent arbitration service selected by the parties to the arbitration to the exclusion of any contrary or inconsistent state or local laws, ordinances, or judicial rules.

If any provision of this arbitration agreement shall be determined by the Arbitrator or by any court to be unenforceable or waived, the remaining provisions shall be deemed to be severable and enforceable according to their terms. The duty to arbitrate hereunder survives the termination of this Express Limited Warranty.

Note: For Homes With FHA/VA Financing Only:

For Homes with the original FHA or VA financing only, and notwithstanding anything written above, You may elect judicial resolution of any disputes as an alternative to the Arbitration provision set forth in this Express Limited Warranty.

SECTION 16: ENFORCEMENT OF ARBITRATION AWARD

The Arbitrator will determine the amount of time all awards must be completed within. Deadlines may be extended depending on special circumstances (for example, inclement weather). In such circumstances, the Builder or Insurer (as applicable) will complete such repairs or replacement as soon as possible without incurring overtime or weekend expenses.

If the Homeowner disagrees with the Arbitrator's decision, s/he has the right to appeal it.

- (1) If the Independent Arbitrator makes an award in favor of the Homeowner concerning a dispute under this warranty's Workmanship/Materials and/or Delivery Portion of Systems Coverage, then the Builder will receive notice of the award and either: a) complete the repair(s) awarded, or b) complete a full payment for the cost of the repair(s) to the Homeowner. In the event that the Builder defaults on its warranty obligations under this compliance paragraph, then the Insurer will assume this responsibility.
- (2) If the independent Arbitrator makes an award in favor of the Homeowner concerning a dispute under this warranty's Major Structural Defect Coverage, then the arbitrating parties will receive notice of the award and the Insurer will either: a) complete the repair(s) awarded, or b) complete a full payment for the cost of the repair(s) to the Homeowner. The Independent Arbitrator may grant an extension of time if complicated or time-consuming engineering investigation/design development is involved in order to make the structural repairs.
- (3) Under no circumstance will any independent Arbitrator be allowed to create, establish, or fix a monetary sum as an award to any arbitrating party unless this is expressly agreed to by all of the arbitrating parties and the Builder or Insurer (as applicable). The refusal of the Builder or Insurer (as applicable) to agree to a monetary award does not invalidate any provision stated.
- (4) Within twenty (20) calendar days immediately following the expiration of the applicable compliance period, the prevailing party may request a compliance inspection by contacting the Builder or Insurer (as applicable) in writing. Any cost associated with a compliance inspection must be pre-paid by the requesting party.

SECTION 17: DEFINITIONS

Administrator: StrucSure Home Warranty, LLC is the Administrator of the StrucSure Home Warranty Program, and performs certain warranty-related functions as described in this warranty coverage booklet.

Arbitrator: The person selected to determine and enforce arbitration awards in the event of an Unresolved Warranty Issue. If You and the Administrator cannot agree on an independent arbitration service, then both parties agree to use Construction Dispute Resolution Services (CDRS) for the arbitration.

Builder: The person, corporation, partnership or other entity which is a member of the StrucSure Home Warranty Program and is listed on the StrucSure Home Warranty Home Enrollment Application (HEA). The Builder is the Warrantor in years one (1) for Workmanship/Materials and years one (1) and two (2) for Delivery Portions of Systems.

Certificate of Warranty Coverage: A certificate that the Administrator sends to the Homeowner upon project completion, homeowner acceptance, and receipt of the warranty fees. The certificate includes the Home Enrollment Application (HEA) number and the Effective Date of Warranty. Warranty coverage is not in effect until the Certificate of warranty Coverage has been issued.

Common Element: Any portion of the structure in which attached enrolled units are located.

Consequential Damages: All damages or costs for which a remedy is not expressly provided for in this warranty which includes but is not limited to costs of shelter, transportation, food, moving, storage or other incidental expenses, including those related to relocation during any work performed under this warranty; kenneling of animals, veterinary expenses, pet daycare; loss of use, loss of wages, inconvenience, annoyance, or diminution in value of the Home; any and all consequential loss or damage to personal

property, and damage to property which You do not own; physical or mental pain and suffering and emotional distress; medical or hospital expenses; or lost profits and/or wages.

Construction Quality Standard: The standard(s) to which a Home or an element or component of a Home constructed as a part of new Home construction or a material improvement or interior renovation must perform. Construction Quality Standards are set forth in this warranty booklet.

Date of Homeowner Acceptance: The date indicated on the Home Enrollment Application (HEA) whereby the Homeowner agrees that the Home is complete and there are no outstanding Defects and/or Deficiencies.

Defect/Deficiency: A condition of any item warranted by this Express Limited Warranty which exceeds the allowable tolerances or does not meet the Construction Quality Standards or Performance Standards. Failure to complete construction of the Home or any portion thereof, in whole or in part, is not considered a Defect or Deficiency.

Delivery Portion of Systems: The electrical, plumbing, and mechanical distribution systems in Your Home.

Effective Date of Warranty: The date of closing, first title transfer, first date of occupancy, or the date the Certificate of Occupancy was issued. The Effective Date of Warranty will be indicated on the Certificate of Warranty Coverage.

Express Limited Warranty: The Express Limited Warranty described by the terms and provisions contained within this warranty coverage booklet.

Excessive: A quantity, amount, or degree that exceeds that which is normal, usual, or reasonable under the circumstance.

Exclusion: Items, conditions, or situations not warranted or not covered under this warranty.

Extreme Weather Condition(s): Severe or unseasonal weather or weather phenomena that are at the extremes of the historical distribution. Weather conditions in excess of or outside of the scope of the design criteria stated or assumed for the circumstance or locale in the Residential Code.

Golden Insurance Company (GIC): A Risk Retention Group which, subject to the terms contained in this warranty booklet, provides insured warranty coverage for this warranty product.

Home: The single-family dwelling as identified on the Home Enrollment Application (HEA). The Home may be a single-family detached dwelling; condominium; apartment; townhouse; duplex; manufactured Home or modular Home.

Homeowner: The person(s) listed as the homeowner(s) on the original Homeowner Enrollment Application (HEA), and who must hold legal title to the Home; or, any subsequent homeowner who holds legal title to the Home.

Homeowner Responsibility: An action required by the Homeowner for proper maintenance or care of the Home or the element or component of the Home concerned. A Homeowner's failure to substantially comply with stated Homeowner responsibility creates an Exclusion to the warranty for the Construction Quality Standard or Performance Standard.

Improvement(s): Any labor, materials, or other work supplied by the Builder or its independent contractors or suppliers in performance of the contract documents or other written agreements including but not limited to design plans or specifications.

Insurer: Golden Insurance Company, A Risk Retention Group (GIC). If coverage is provided and the Builder is unable to perform one (1) and two (2) year warranty obligations, the Insurer becomes the Warrantor and performs Builder warranty obligations. The Insurer is the Warrantor the entire coverage term (years one (1) through ten (10)) for Major Structural Components.

Major Structural Defect (MSD): Please refer to the Major Structural Defect Coverage section in this warranty booklet for the definition of a Major Structural Defect.

Manufactured Product: A component of the Home that was manufactured away from the site of the Home and that was installed in the Home without significant modifications to the product as manufactured. Manufactured Products which are covered by a manufacturer's warranty include, but not limited to, appliances, fixtures, and items of equipment (including attachments and appurtenances). This warranty does not cover systems/Deficiencies that are caused by a failure of any Manufactured Product or failure to comply with manufacturer's warranty requirements. This includes air conditioning units, attic fans, boilers, burglar alarms, carbon monoxide detectors, ceiling fans, central vacuum systems, door bell systems, dishwashers, dryers, electronic air cleaners, exhaust fans, fire alarms, freezers, furnaces, garage door openers, garbage disposals, gas and electric meters, heat exchangers, heat pumps, humidifiers, intercoms, interior sprinkler systems, microwave ovens, oil tanks, outside lights or motion lights not attached to the Home, ranges and range hoods, refrigerators, sewage pumps, smoke detectors, solar collectors, space heaters, sump pumps, thermostats, trash compactors, washers, water pumps, water softeners, water heaters, whirlpool bathtubs, whole house fans and similar items/appliances. For purposes of this booklet, a Manufactured Product includes any component of a Home for which the manufacturer provides a warranty, provided that the manufacturer permits transfer of the warranty to the Homeowner.

Performance Standard: The standard(s) to which a Home or an element or component of a Home constructed as a part of new Home construction, a material improvement, or interior renovation must perform. Performance Standards are set forth in this warranty booklet.

Residential Code: The requirements specified in the text of the Residential Code officially adopted by the state, city, county (or parish) in which Your Home is located.

StrucSure Home Warranty (SHW): The Administrator of this Express Limited Warranty. SHW is neither the Warrantor nor the Insurer.

Unresolved Warranty Issue: A request for performance under the warranty that has not been met by the Builder and/or his subcontractors.

Warranted Defect/Warranted Deficiencies: A condition of a warranted item that, according to the Construction Quality Standards and Performance Standards described in this Express Limited Warranty, requires action by the Warrantor (Builder or Insurer, as applicable). Failure to complete construction of the Home or any portion of the Home in whole or in part is not considered a Warranted Defect.

Warrantor: The Builder in years one (1) for Workmanship/Materials and years one (1) and two (2) for Delivery Portions of Systems. If coverage is provided and the Builder is unable to perform one (1) and two (2) year warranty obligations, the Insurer becomes the Warrantor and performs Builder warranty obligations. The Insurer (GIC) is the Warrantor the entire coverage term (years one (1) through ten (10)) for Major Structural Defects.

Warranty Term: The period during which a Warranted Defect and/or Deficiency must first occur in order to be covered, and is that period which begins on the Effective Date of Warranty as defined above and ends one (1), two (2), or ten (10) years thereafter, depending on the covered item.

Workmanship/Materials: The standard and quality of a Builder's work or the skills used in construction. Materials are the items used for construction.

You/Your: You/Your means the person(s) listed as the Homeowner(s) on the original Home Enrollment Application (HEA), and who must hold legal title to the Home; or, any subsequent Homeowner(s) who holds legal title to the Home.



WARRANTY PROGRAM OVERVIEW

StrucSure Home Warranty, LLC provides third-party, insurance-backed home warranties to builders and homeowners across the United States. Below is a description of our new home warranty programs and what they cover. If you have further questions, please call 1.877.806.8777 or visit www.strucsure.com.



▶ 1-2 & 10 YEAR WARRANTY

This multi-part warranty program includes the following:

- The one-year warranty is a builder surety and backs the builder's warranty on workmanship and materials. Covered components of a home that do not meet established Performance Standards during the first year will be repaired, replaced, or paid for under our warranty in the event the builder is unwilling or unable to do so.
- The two-year warranty is a builder surety and backs the builder's warranty for the delivery portion of systems. Covered components of a home that do not meet established Performance Standards during the first two years will be repaired, replaced, or paid for under our warranty in the event the builder is unwilling or unable to do so.
- The 10-year structural warranty is a direct warranty that begins on the day of your home's closing and lasts for 10 years. As a direct warranty, we are the responsible party for major structural defects. If a major structural defect occurs within the first 10 years, it will be repaired, replaced, or paid for under our warranty.

ONE-YEAR WORKMANSHIP / MATERIALS*

This warranty provides coverage on workmanship and materials for one year from the date of closing on the following:

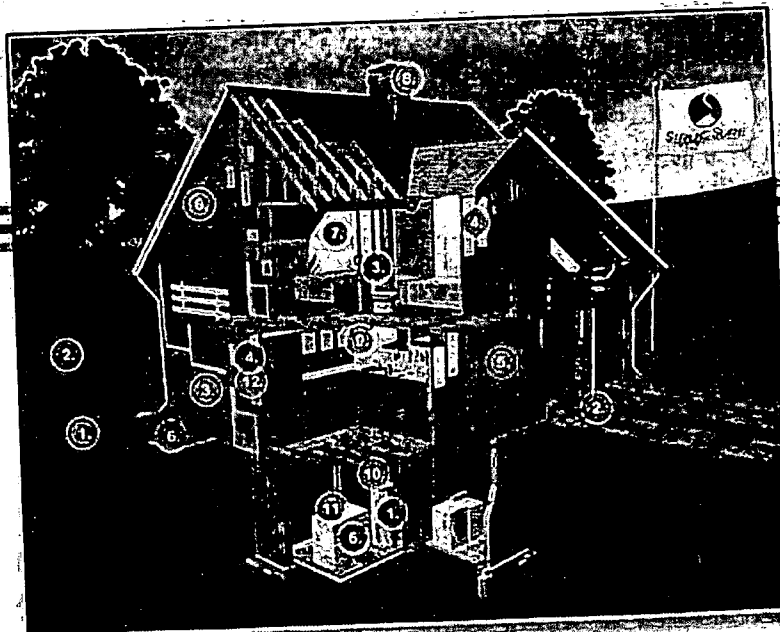
1. pre work	7. finishes
2. concrete	8. specialties (e.g., fireplaces)
3. masonry	9. equipment (e.g., cabinets)
4. carpentry	10. mechanical systems (e.g., plumbing)
5. doors & windows	11. heating, air conditioning, & ductwork
6. siding & roofing	12. electrical systems

TWO-YEAR DELIVERY PORTION OF SYSTEMS*

This warranty provides coverage on the delivery portion of systems (electrical, plumbing, and mechanical distribution systems) for two years from the date of closing on the following:

1. water supply system	4. electrical
2. septic tank system	5. heating
3. plumbing	6. air conditioning

*Please reference our Warranty Coverage Booklet for specific terms, conditions, and exclusions.



NAHB

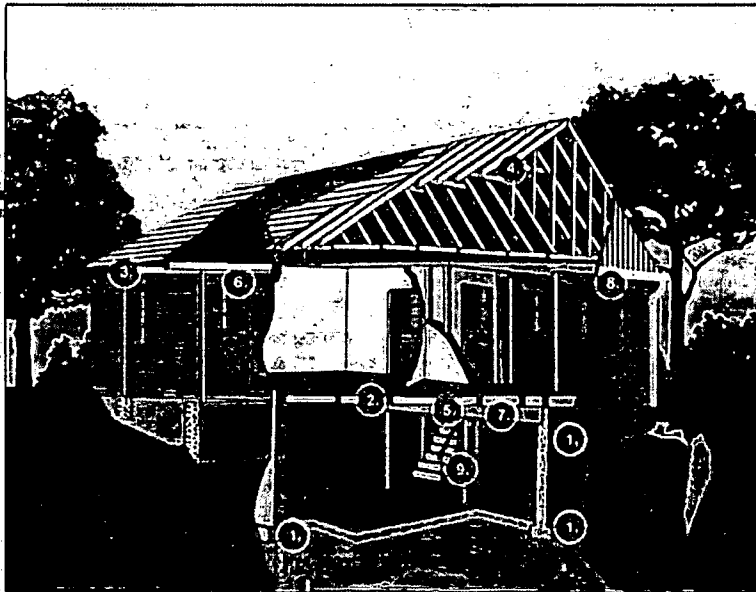
2018-2019 National Association of Home Builders
Builder's Choice Award
2018-2019 National Association of Home Builders
Builder's Choice Award



TEN-YEAR MAJOR STRUCTURAL DEFECTS*

This warranty provides coverage for any major structural defects that occur within the 10-year warranty term. Coverage begins on the day of your home's closing and covers the following home components:

1. load-bearing foundation systems, footings, and piers
2. load-bearing floor framing systems
3. load-bearing walls and partitions
4. load-bearing roof framing systems
5. load-bearing beams
6. load-bearing headers
7. load-bearing girders
8. load-bearing intels (other than those supporting veneers)
9. load-bearing columns (other than those designed to be cosmetic)
10. load-bearing masonry arches (other than those designed to be cosmetic)



WHY CHOOSE STRUCSURE HOME WARRANTY?

More than just a warranty company, StrucSure Home Warranty goes the extra mile to meet the needs of our clients. For nearly 15 years, we've worked hard to provide builders with risk management products that not only protect their bottom line, but add to it by building buyer confidence and giving homebuyers peace-of-mind. We offer stellar service, competitive rates, and the best coverage available in the industry.

LEAVE THE RISK TO US!

If you are interested in learning more about who we are, why builders choose us and stay with us, and why homeowners appreciate us, we invite you to visit www.strucsure.com or call 1-877-306-2777

COMPETITIVE PRICING | FOCUS ON CUSTOMER EXPERIENCE | WE PAY CLAIMS! | PRO-BUILDER MANAGEMENT TEAM
 INSURANCE-BACKED COVERAGE | FHA APPROVED & HUD ACCEPTED | EASY ONLINE MEMBERSHIP & HOME ENROLLMENT
 IMMEDIATE STRUCTURAL COVERAGE | TRANSFERABLE WARRANTY | MANDATORY THIRD-PARTY ARBITRATION
 FREE MARKETING SUPPORT & SALES TRAINING | DISCOUNTED INSURANCE PRODUCTS FOR WARRANTY CLIENTS





6825 East Tennessee Avenue, Suite #410 | Denver, CO 80224
 1.877.806.8777 (toll-free) | 303.806.8688 (office) | 303.806.9897 (fax) | www.strucsure.com

NOTICE OF MAJOR STRUCTURAL DEFECT CLAIM FORM

Please read the SHW Express Limited Warranty Coverage Booklet before completing this form. This form must be completed in its entirety and submitted along with a copy of the Home Enrollment Application (HEA). This form must be received by StrucSure Home Warranty prior to the expiration of the applicable warranty period. A warranty service fee may be required. Please contact a Claims Representative at 1.877.806.8777 for more details.

Name _____
 Claim Address _____ Street _____ City _____ State _____ Zip _____
 Home Phone () _____ Business Phone () _____ Cell Phone () _____
 Email Address _____
 Effective Date of Warranty _____ Month _____ Day _____ Year _____ Home Enrollment Application No. _____ SHW HEA # _____

Please note that the warranty provides Limited Major Structural Defect Coverage, which is subject to Exclusions and conditions. You are encouraged to review and understand the Major Structural Defect Coverage provisions of the Express Limited Warranty Coverage Booklet.

1. Have You read the definition of a Major Structural Defect in the Express Limited Warranty Coverage Booklet? ☐ Yes ☐ No
2. Have You read the Exclusions in the Express Limited Warranty Coverage Booklet? ☐ Yes ☐ No
3. Do You feel Your Home is unlivable because it is unsafe? ☐ Yes ☐ No
4. Do You feel Your Home is unlivable because it is unsanitary? ☐ Yes ☐ No
5. Do You feel that Your Home is unlivable for some other reason? ☐ Yes ☐ No

Please describe the nature of the Defect as accurately and specifically as possible (if necessary, attach a separate sheet of paper):

Date Defect was first observed _____ Date first reported to Builder in writing _____
 Month Day Year Month Day Year

If Your Home still has the original FHA financing in effect, You are required to provide the following information:

FHA Case Number _____
 Name of Mortgage Company _____
 Address of Mortgage Company _____

Attach copies of any relevant correspondence between You and Your Builder involving this matter.

 Homeowner signature Date

 Homeowner signature Date

It is unlawful to knowingly provide false, incomplete, or misleading facts or information to any warranty company for the purpose of defrauding or attempting to defraud the company. Penalties may include imprisonment, fines, denial of coverage, and civil damages. Violators will be prosecuted to the full extent of the law. This form is not confirmation of warranty coverage. Warranty coverage is confirmed by a separate written confirmation.



STRUCSURE
HOME WARRANTY

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**REQUEST FOR WARRANTY PERFORMANCE FORM
(WORKMANSHIP/MATERIALS AND/OR DELIVERY PORTION OF SYSTEMS)**

Please read the SHW Express Limited Warranty Coverage Booklet before completing this form. If Your previous written attempts to resolve the warranted Defect and/or Deficiency with Your Builder have failed, complete this form and send it to Your Builder and StrucSure Home Warranty, Attn: Warranty Service Division. This form must be received by Your Builder and StrucSure Home Warranty prior to the expiration of the applicable warranty period. A warranty service fee may be required. Please contact a Claims Representative at 1.877.806.8777 for more details.

Name _____

Claim Address:

Street	City	State	Zip

Home Phone () _____ Business Phone () _____ Cell Phone () _____

Email Address: _____

Effective Date of Warranty _____ Home Enrollment Application No. _____
 Month Day Year SHW HEA # _____

Please describe the nature of the Defect and/or Deficiency as accurately and specifically as possible (if necessary, attach a separate sheet of paper):

Date Defect/Deficiency was first observed _____

Month	Day	Year

Date Defect/Deficiency was first reported in writing to the Builder: _____

Month	Day	Year

If Your Home still has the original FHA financing in effect, You are required to provide the following information:

FHA Case Number _____

Name of Mortgage Company _____

Address of Mortgage Company _____

Attach copies of any relevant correspondence between You and Your Builder involving this matter, correspondence that indicates the Builder has failed to perform its obligations as set forth under this warranty, and attach a copy of the Home Enrollment Application (HEA).

Homeowner Signature

Date _____

Homeowner Signature _____

Date _____

It is unlawful to knowingly provide false, incomplete, or misleading facts or information to any insurance company for the purpose of defrauding or attempting to defraud the company. Penalties may include imprisonment, fines, denial of coverage, and civil damages. Violators will be prosecuted to the full extent of the law. This form is not confirmation of warranty coverage. Warranty coverage is confirmed by a separate written confirmation.

ROA 222



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HOME WARRANTY

StrucSure Home Warranty, LLC

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www.strucsure.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CIVIL ACTION NO. 2018-CP-40-00873
Jonathan Mart, on behalf of himself and	)	
others similarly situated,	)	
	)	
Plaintiff,	)	SUPPLEMENTAL AFFIDAVIT OF
	)	SHELTON TWINE
v.	)	
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

PERSONALLY appeared before me after being duly sworn deposes and states as follows:

1 I am Shelton Twine and my position with Great Southern Homes, Inc. is Vice President of Operations. I have been employed by Great Southern Homes for eight years and know the facts and circumstances set forth in this affidavit to be true except for those that are asserted on information and belief and, as to those, believe them to be true.

2. No claim has ever been made against Great Southern Homes, Inc., either orally, by way of letter or through a law suit, that Great Southern Homes, Inc. had breached the implied warranty of habitability of any home it had constructed.

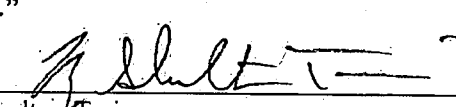
3. Great Southern Homes, Inc. has never used or attempted to use any purported waiver contained in its contract in order to avoid or attempt to avoid or deflect any complaint made by a purchaser of a Great Southern Homes, Inc. built residence.

4. Great Southern Homes, Inc. maintains a vigorous customer complaint department (Warranty Department), and funds which other companies may devote to advertising. Great Southern Homes, Inc. devotes to its Warranty Department in order to address issues concerning purchased homes. It is my belief that this program is a material reason Great Southern Homes,

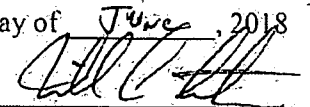
Inc. has not been sued by a purchaser of a residence built by the company for breaching any warranty of habitability or any other similar warranty, even in this current law suit.

5. The StrucSure Home Warranty referenced in Great Southern's contract is between StrucSure Home Warranty, LLC and the home purchaser. When Great Southern Homes, Inc. sells a home such a sale includes an express limited warranty protection issued by StrucSure Home Warranty, LLC for the benefit of the purchaser. Great Southern Homes, Inc. is not a party to this warranty and the terms and conditions of the warranty are not incorporated into the contract between Great Southern Homes, Inc. and the home purchaser. Due in large part to the quality of the homes built by Great Southern Homes, Inc. and its aggressive Warranty Department very few claims have ever been made to StrucSure Home Warranty, LLC for relief.

6. The contract between the parties consists of a document entitled "Contract for Sale" shown on the first page of the parties' contract. This page also contains the appropriate statutory language concerning arbitration. The first page of the Plaintiff's Exhibit 1 to the Complaint is merely a Home Sale Information Sheet which is NOT part of the contract as is shown at the bottom of the sheet which reads, "THIS INFORMATION SHEET IS NOT A LEGAL DOCUMENT. THIS PAGE FOR INTERNAL USE ONLY."

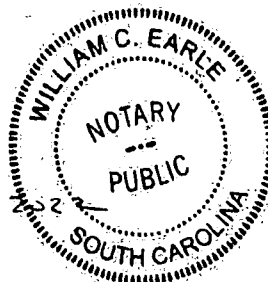

Shelton Twine

SWORN to before me this 8th
day of June, 2018


Notary Public for South Carolina

William C. Earle
Printed Name of Notary

My Commission Expires: July 19, 2022



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CIVIL ACTION NO. 2018-CP-40-00873
Jonathan Mart, on behalf of himself and	)	
others similarly situated,	)	
	)	
Plaintiff,	)	DEFENDANT'S REPLY
	)	MEMORANDUM IN SUPPORT OF
v.	)	MOTION TO DISMISS AND COMPEL
	)	ARBITRATION
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	

TO: CHARLES H. McDONALD, ESQUIRE, TERRY E. RICHARDSON, JR., ESQUIRE, THORNWELL F. SOWELL, ESQUIRE AND BETH B. RICHARDSON, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Plaintiff, argues that (1) the Express Limited Warranty issued by StrucSure Home Warranty, LLC of Denver, Colorado is made a part of the Parties' Contract for Sale; and (2) the Federal Arbitration Act does not apply because Plaintiff's subject residence was either not a new built home or the contract did not require construction of same; and (3) the arbitration provision contained in the Parties' Contract for Sale is unconscionable and unenforceable. All of these arguments are either factually and/or legally flawed.

I. The Express Limited Warranty issued StrucSure Home Warranty, LLC was not incorporated into the Parties' Contract for Sale for the following 6 reasons:

First, express limited warranties covering FHA or VA loans for home mortgages must be approved by HUD and the requirements for such are contained in the Code of Federal Regulations. (See: 24 CFR 203.204 and Definitions, Exhibit 1) Plaintiff's loan was a VA loan (Exhibit 2, Mart mortgage and PUD Rider) This regulation states in material part:

1 | 10 (Defendant's Reply Memo to Motion to Dismiss)

In the event of any dispute regarding a homeowner complaint or structural defect claim, Plans must, unless prohibited by applicable law, provide for binding arbitration proceedings arranged through a nationally recognized dispute settlement organization. The sharing of arbitration charges shall be as determined by the Plan. A Plan must contain pre-arbitration conciliation provisions at no cost to the homeowner, and provision for judicial resolution of disputes, but arbitration, which must be available to a homeowner during the entire term of the coverage contract, must be an assured recourse for a dissatisfied homeowner.

The subject StrucSure Express Limited Warranty, approved by HUD, contains compliant language in the arbitration provision, as follows:

For homes with the original FHA or VA financing only, and notwithstanding any written above, you may elect judicial resolution of any disputes as an alternative to the Arbitration Provision set forth in this Express Limited Warranty.

The drafting of the StrucSure Express Limited Warranty by StrucSure Home Warranty, LLC of Denver Co. was, therefore, the result of federal mandate, Great Southern Homes, Inc. having no influence or power to alter StrucSure's Express Limited Warranty arbitration provision. Further, the merging or incorporation of the warranty agreement and the Parties' Contract for Sale did not take place nor could it have taken place as such would run afoul of the federal mandate governing such warranty plans.

Plaintiff argues that because the Express Limited Warranty contains an arbitration provision which is at variance with the arbitration provision contained in the purchase agreement of July 18, 2015 that there was no meeting of the minds between the parties or that in some other way the arbitration agreement contained in the purchase should be declared unenforceable. After diligent search the defendant has located only one case in the United States which fits this parameter. In *Daugherty v. Poultry Homes of Greater Kansas City*, Case No. 09-2523-KHV, filed in the U.S. District Court for the District of Kansas, the federal judge was presented with similar

issues (Exhibit 3, December 1, 2010 Order of The Honorable Katherine H. Vratil, Presiding Judge, U.S. District Court, District of Kansas, Case No. 09-2523-KHV). In this lawsuit homeowners Daugherty argued that because they purchased their home under the VA Home Loan Guarantee Program, the binding arbitration provision does not apply. The plaintiffs relied on a HUD regulation which provided that the homeowner would be entitled to arbitration through a nationally recognized dispute settlement organization. According to the HUD regulation the Plan must contain pre-arbitration conciliation provisions at no cost to the homeowner, and provision for judicial resolution of disputes ...” The regulation cited by the homeowner in this case is the same as Defendant’s Exhibit 1 to this Memorandum in Reply. The Court at page 17-18 of its Order stated:

Plaintiffs ignore that this regulation applies to 10-year home protection plans such as Pulte’s 10-year limited warranty. (See, 24 CFR §203.200 (“insured 10-year protection plan or Plan) means agreement between homeowner and plan issuer which, among other things, contains warranties regarding construction and structural integrity of dwelling). Plaintiffs offer no rational for applying this regulation to the purchase agreement. Based on the unambiguous language of the purchase agreement, Plaintiff’s claim for breach of that agreement must be arbitrated. The court therefore sustains Defendants’ motion to compel arbitration on Plaintiffs’ claim for breach of the purchase agreement and dismiss that claim without prejudice.

The District Court goes on to allow the homeowner Plaintiffs to sue, if they so chose, the express limited warranty company but dismissed the claim against the builder and issued its order compelling arbitration as to the purchase agreement. The facts are very similar to the facts presented to the court here.

Second, the Express Limited Warranty is offered by an entirely different entity than Defendant and the plaintiff does not contend such. StrucSure Home Warranty, LLC is neither an agent, subsidiary nor sister corporation of Defendant. In addition, neither Defendant nor its

employees own any interest in the warranty company and exercise no control with respect to its operation.

Third, the Parties' Contract for Sale did not make the StrucSure Home Warranty issued by StrucSure Home Warranty, LLC operative, rather, the Express Limited Warranty was made operative by virtue of the application by Plaintiff and payment of the fee as shown by the letter from the warranty company and Plaintiff's signed application dated December 18, 2015, attached as Exhibit 4.

Fourth, Plaintiff's application for the Express Limited Warranty and the Parties' Contract for Sale were not signed contemporaneously by Plaintiff. The Contract was signed on July 18, 2015 while Plaintiff's application for the Express Limited Warranty was signed December 18, 2015. This sequence is inconsistent with cases holding multiple documents signed at the same time should be interpreted as one.

Fifth, the examination of the Express Limited Warranty attached as an exhibit to Plaintiff's Memorandum in Opposition shows that Great Southern Homes, Inc. is not a party to same. In addition, there is no incorporation clause contained in the Contract for Sale making the warranty a part of the sales contract.

Sixth, the Express Limited Warranty issued by StrucSure Home Warranty, LLC is of no moment. As far as Defendant is aware Plaintiff has never made any claim under the StrucSure Home Warranty.

Because the Express Limited Warranty is not a part of the Parties' Contract for Sale there exists but one Arbitration Agreement between them as shown by the July 18, 2015 Contract. The authorities cited by Plaintiff for the proposition which would have the Court merge the warranty agreement into the Parties' Contract for Sale are not entirely as represented. For example, in 4|10 (Defendant's Reply Memo to Motion to Dismiss)

RAGAB v. Howard, 841 F.3d 1134 (10th Cir. 2016) the court clearly recited that in that case, "The parties had six agreements ..." 841 F.3d at 1136. In this case the parties had only one agreement. In *York v. DodgeLand of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) the Court of Appeals affirmed the trial court's order dismissing the appellant's suit and compelling arbitration, notwithstanding any multi document details. In *Basulto v. Hileah Auto*, 141 SO.3d 1145 (FLA 2014), also cited by Plaintiff the Florida Supreme Court cited "pertinent facts" which included statements that the buyers allege that while at the automobile dealership, the dealer had the buyer sign the contract in blank, with the representation that the agreed upon numbers would be filled in. The buyers also allege that when the dealership completed the sales contract, it allowed them a lower trade-in allowance than the amount agreed upon. Further, the court observes that the plaintiffs immigrated from Cuba in December 1997 and were only able to communicate in Spanish. All of the documents pertaining to that civil action between the buyers and the dealership were drafted in English. The court is silent as to whether any of the documents involved were drafted between the plaintiffs and any party other than the auto dealership. 141 So.3d at 1148-1149. The facts of this case are hardly applicable here.

II. The Parties' Contract required Defendant to construct a new home for Plaintiff and, that being so, the Parties' Contract affected interstate commerce and is therefore subject to the Federal Arbitration Act

Plaintiff contends that the Parties' Contract for Sale does not involve interstate commerce because, among other reasons, the Agreement was for the "Purchase of a completed residential dwelling and not the construction". Plaintiff cites *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012). *Bradley* is inapplicable to this case because the parties' contract in *Bradley* did not require the builder/seller to build a home for the purchaser. The *Brentwood Homes*

5110 (Defendant's Reply Memo to Motion to Dismiss)

court made it clear that the new construction of a home will always affect interstate commerce making the contract between the parties to such an agreement subject to the FAA.

The Parties in this case, however, clearly indicate on page one of the Contract under the heading **STRUCTURES** that this was a **BUILDING JOB**. Further, the Affidavit (filed June 4, 2018) of Shelton Twine, Defendant's records custodian and Vice President of Operations, indicates that the Contract for the construction of Mr. Mart's home was signed on or about July 18, 2015. Construction of this home began on or about August 26, 2015 and was not substantially completed until on or about December 10, 2015. The Certificate of Occupancy issued by the Kershaw County, South Carolina Planning and Zoning Department was not issued until December 10, 2015. (Exhibit 5)

Without question the Parties Contract required Great Southern Homes, Inc. to build a residence for Plaintiff. Plaintiff states in his Affidavit that it was his understanding that the transaction he entered with Great Southern Homes, Inc. was for the purchase of a newly constructed home and it was not his understanding that he was contracting with Great Southern Homes, Inc. to build a home for him. This is difficult to accept inasmuch as the Contract Mr. Mart signed on July 18, 2015 indicated the property location as Lot 34 in Longview North subdivision. At that time Lot 34 was a vacant lot. In addition, the first page of Mr. Mart's Contract for Sale also indicates that it was a "**BUILDING JOB**".

For purposes of the application of the FAA, the plaintiff's "understanding" now as to what he contracted for in July 2015 is not material. The United States Supreme Court looks to the reality of the transaction. See, *Munoz v. GreenTree 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

6 | 10 (Defendant's Reply Memo to Motion to Dismiss)

commerce, then the FAA nonetheless applies); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277-78, 115 S. Ct. 834, 841 (1995) (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.”).

Plaintiff argues that the boilerplate Paragraph (i) in the ‘Miscellaneous’ section of the Parties’ Agreement is dispositive as to whether the contract called for construction of Plaintiff’s home. Plaintiff ignores the customized entry on the first page of the Contract for Sale which indicates that this was a **“BUILDING JOB.”** The customized entries in a contract control over boilerplate verbiage. (See, *Broderick Wood Products Co. v. United States*, 195 F.2d 433, 438 (10th Cir. 1952; *Aetna Insurance Co. v. Labor*, 855 D. 192, 179 N.W.2d 271, 273 (1970).) In any event, the U.S. Supreme Court instructs the courts to employ a “commerce in fact” test regardless of any stated intent contained in the contract. Interstate commerce was implicated “in fact” in the construction of this home. (See Affidavits of Twine and Pyle as to the timeline of the contract and construction of the home as well as purchase orders for materials used in the construction from Pennsylvania and Georgia.)

The Affidavits of Mr. Twine and Jeremy Pyle, Construction Supervisor for the construction of Mr. Mart’s home, show via the exhibits attached to the affidavits through post contract purchases \$29,781 worth of framing was purchased and shipped from 84 Lumber, 1019 Rt. 519, Eighty Four, Pennsylvania 15330 and purchases for flooring from Stock Building Company, PO Box 404934, Atlanta, Georgia 30384 as shown in two purchase orders for the sums of \$2,788.75

7|10 (Defendant’s Reply Memo to Motion to Dismiss)

and \$3,412.75 and that all of the materials in these purchase orders were used in the construction of Mr. Mart's home. The timeline, purchase orders, Certificate of Occupancy, affidavits of Twine and Pyle and the contract itself all indicate that Great Southern was required to construct a home for Mart in order to fulfill its obligations under the Parties' Contract for Sale.

Finally, the gravamen of *Bradley* is not whether the purchase was for a completed home but, rather, under the contract was the seller/builder required to construct same after the contract was signed and, if so, interstate commerce is implicated invoking the application of the Federal Arbitration Act.

Defendant reiterates its position set forth in its motion that while it is true that the Parties are allowed to select state law for the Rules under which the arbitration will be conducted the arbitration agreements which fall within the purview of the Federal Arbitration Act must still be enforced in a way which is consistent with substantive provisions of the FAA. Under the FAA an arbitration agreement in a transaction involving interstate commerce "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.

III. The Arbitration Agreement entered by Plaintiff and Great Southern Homes is NOT UNCONSCIONABLE:

It is fundamental that enforcement of an arbitration agreement such as this one before the court must be viewed on its own and not in connection with the other terms of the contract. The Federal Arbitration Act ("FAA") allows 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.Ct. 333, 339, 131 Sup. Ct. 1740, 8|10 (Defendant's Reply Memo to Motion to Dismiss)

1746, 179 L.Ed.2d 742 (2011). The U.S. Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 Sup. Ct. 1801 (1967) made clear that “[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.” Also see *Greentree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 191 Sup. Ct. 513, 521 (2000). The U.S. Supreme Court removed all doubt about this question in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) in which it stated, “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 issues of the contract’s validity is considered by the arbitrator in the first instance.”

In the case before the Court neither the arbitration clause involved nor the purchase agreement as a whole is unconscionable. Our Supreme Court has defined unconscionability 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 Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). Our Supreme Court in *Parsons v. John Weiland Homes and Neighborhoods of the Carolinas*, 481 S.C. 1, 12, 791 S.E.2d 128 (2016) instructs that, “unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”

Plaintiff offers no fact or circumstance which compelled him to enter into the GSH purchase agreement. While it is true that suitable living accommodations are a necessity the purchase of a single-family house is not and the purchase of a new residence even less so. In

addition, there was no element of surprise in the inclusion of the complained of clause and the arbitration provision was in compliance with the statute and was clearly conspicuous.

In terms of the arbitration agreement itself it can hardly be contested that it provides for an unbiased decision by a neutral decision-maker. This binding arbitration provision spells out that the arbitration will be conducted before a three-arbitrator panel, one selected by the plaintiff, one selected by the defendant, and one selected mutually by the arbitrators selected by each party. (See Parties' Contract for Sale dated July 18, 2015, p. 3)

CONCLUSION

For the reasons offered in its Motion, Memorandum in Support and this Memorandum in Reply, Defendant prays this Honorable Court grants its Motion to Dismiss and Compel binding arbitration between the parties.

Respectfully submitted,

BRUNER POWELL WALL & MULLINS, LLC

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Attorneys for Defendant

Columbia, South Carolina
June 11, 2018

Exhibit 1

Cornell Law School

Legal Information Institute [LII]

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CFR › Title 24 › Subtitle B › Chapter II › Subchapter B › Part 203 › Subpart A › Section 203.204

24 CFR 203.204 - Requirements and limitations of a plan.

§ 203.204 Requirements and limitations of a plan.

In addition to complying with the criteria set out in § 203.202 and § 203.205, for a Plan to be acceptable to HUD, it must meet the following requirements:

- (a) A Plan must assure timely resolution of homeowners' complaints or claims covered under § 203.205. Warranties set forth in a Plan must comply with section 2301(a)(1)-(13) of the Magnuson-Mass Warranty-Federal Trade Commission Improvement Act (15 U.S.C. 2301- 2312) along with the requirements and criteria set out in this section.
- (b) The entire cost to the homeowner for Plan coverage must be prepaid by the builder, or the Plan issuer must give irrevocable coverage, at the time of settlement. In the case of optional coverage beyond the coverage required under § 203.205, the cost for the optional coverage may be paid by either the builder or the homeowner.
- (c) Unexpired Plan coverage must be automatically transferred, without additional cost, to subsequent homeowners.
- (d) Issued Plan coverage must be noncancellable by a Plan issuer or by its insurance backer(s).
- (e) Exclusions from Plan coverage must not defeat coverage objectives stated in § 203.202 and § 203.205 and must permit normal homeowner use of the covered property, including normal maintenance and emergency property protection measures.
- (f) Unless prohibited by applicable law, Plans must, at a minimum, stipulate that all homeowner complaints covered by a Plan, including those regarding construction deficiencies and structural defects claims, will be settled in the amount of their actual cost to correct or for the original sales price of the property, whichever is the lesser, subject to a deductible not to exceed a total of \$250 for all claims filed by a homeowner during the first two years of coverage and not to exceed a maximum of \$250 per claim during the third through the tenth year of coverage.
 - (1) In the case of claims filed by a condominium association, the deductible is limited to \$250.00 per claim for each affected unit in the structure, not to exceed a maximum of \$5,000.00 where the claim relates to the same event that affected several units. Recurrent claims for structural defects occasioned by a common cause shall be subject to the payment of no more than one deductible. In addition, a Plan covering a condominium must provide the condominium association with an additional warranty that allows for claims by homeowners involving the common elements of the building.
 - (2) A homeowner shall be liable for a deductible only if a builder defaults on warranty performance and the Plan issuer has to make the covered corrections. When the builder performs corrections under the builder's warranty, no deductible that may be included in the Plan is applicable.
- (g) In the event of any dispute regarding a homeowner complaint or structural defect claim, Plans must, unless prohibited by applicable law, provide for binding arbitration proceedings arranged through a nationally recognized dispute settlement organization. The sharing of arbitration charges shall be as

determined by the Plan. A Plan must contain pre-arbitration conciliation provisions at no cost to the homeowner, and provision for judicial resolution of disputes, but arbitration, which must be available to a homeowner during the entire term of the coverage contract, must be an assured recourse for a dissatisfied homeowner.

(h) Where a State has a home protection act or other statutes or regulations that require its approval of Plans, a Plan issuer must demonstrate such approval to HUD as an additional prerequisite to HUD acceptance.

(i) A Plan issuer must provide homeowners an executed coverage contract clearly describing -

- (1) The identity of the property covered;
- (2) The time at which coverage begins;
- (3) The maximum amount of Plan liability;
- (4) Noncancellability of the coverage contract by the Plan or its insurance backers;
- (5) No-cost transferability of unexpired coverage to successors in title;
- (6) The property coverage provided;
- (7) Any exclusions from coverage;
- (8) Performance standards for resolving homeowner complaints and claims (if standards for complaint and claim adjustment are promulgated as part of a Plan);
- (9) Dispute settlement procedures;
- (10) The names, addresses, and telephone numbers of the Plan issuer and its insurance backers; and
- (11) When, to whom, under what conditions, and to what address homeowners should submit any construction deficiency complaints or structural defects claims.

(j) Plans will not be required to warrant that a covered property complies with:

- (1) Original dwelling plans and specifications;
- (2) Applicable building codes; or
- (3) Specific terms of a homeowner's contract to purchase a property.

[55 FR 41021, Oct. 5, 1990, as amended at 61 FR 36264, July 9, 1996]

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§ 203.200 Definitions.

As used in § 203.201 through § 203.209, the following terms shall have the meaning indicated:

Coverage contract means a warranty certificate, insurance policy, or other document of similar purpose (including any endorsements), delivered to the homeowner at the time of closing or settlement which is issued by a State, a builder, a warranty company, or an insurance company and which defines the terms and conditions under which a Plan will provide warranty coverage of the covered property.

Construction deficiencies are defects (not of a structural nature) in a dwelling covered by an insured ten-year protection plan that are attributable to poor workmanship or to the use of inferior materials which result in the impaired functioning of the dwelling or some part thereof. Defects resulting from homeowner abuse or from normal wear and tear are not considered construction deficiencies.

Insurance backing (or *insurance backer*) means the direct insurance or reinsurance of potential Plan obligations by one or more insurance companies.

Insured ten-year protection plan or *Plan* means an agreement between a homeowner and a Plan issuer which, among other things, contains warranties regarding the construction and structural integrity of the homeowner's one- to four-family dwelling covered by an FHA-insured mortgage. A Plan issuer may be a State, an insurance company, a warranty company, a Risk Retention Group as defined in 15 U.S.C. 3901a(4)(A)-(H) (Supp. IV 1986), a builder, or by any other HUD-approved entity with the required insurance backing. A Plan must specify in its coverage contract the obligations and duties of the Plan issuer to the homeowner (or to the homeowner's successor in interest) with respect to the warranties covering the dwelling.

Plumbing means all components of piped on-site gas, fluid, or fluid-based systems that are not separately covered by manufacturers' warranties, and includes any on-site water supply or sewage disposal systems.

State includes the several States, Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, American Samoa, and the Virgin Islands.

Structural defect is actual physical damage to the designated load-bearing portions of a home caused by failure of such load-bearing portions that affects their load-bearing functions to the extent that the home becomes unsafe, unsanitary, or otherwise unlivable. Load-bearing components for the purpose of defining structural defects are defined as follows: Footing and

foundation systems; beams; girders; lintels; columns; load-bearing walls and partitions; roof framing systems; and floor systems, including basement slabs in homes constructed in designated areas (see § 203.207) containing expansive or collapsible soils. Damage to the following nonload-bearing portions of the home is not considered a structural defect: Roofing; drywall and plaster; exterior siding; brick, stone, or stucco veneer; floor covering material; wall tile and other wall coverings; nonload-bearing walls and partitions; concrete floors in attached garages; electrical; plumbing, heating, cooling and ventilation systems; appliances, fixtures and items of equipment; paint; doors and windows; trim, cabinets, hardware, and insulation. Repair of a structural defect is limited to:

(1) The repair of damage to designated load-bearing portions of the home which is necessary to restore their load-bearing ability;

(2) The repair of designated non-load-bearing portions, items or systems of the home, damaged by the structural defect, which make the home unsafe, unsanitary or otherwise unlivable (such as the repair of inoperable windows, doors and the restoration of functionality of damaged electrical, plumbing, heating, cooling, and ventilating systems); and

(3) The repair and cosmetic correction of only those surfaces, finishes and coverings, original with the home, damaged by the structural defect, or which require removal and replacement attendant to repair of the structural defect, or to repair other damage directly attributable to the structural defect. It is the intent of this section to ensure the repair of a covered home to a condition approximately the condition just prior to the defect, not to a like new condition. It does not require refinishing of all interior or exterior surfaces if only one or two surfaces are damaged. It does not cover personal property items, not a part of the structure, which are damaged by the defect or as a result of the defect. It excludes damage covered by a homeowner's casualty insurance policy.

Warranty company is an insurance company or other entity that provides insurance backing for an insured ten-year protection plan which, if the Plan issuer fails to meet its obligations to a covered homeowner, will assume the obligations and perform in accordance with the Plan's coverage contract with the homeowner.

§ 203.201 Scope.

Effective August 6, 1991, the provisions and requirements set forth in § 203.202 through § 203.209 apply to one- to four-family dwellings covered by HUD mortgage insurance (including family units in a condominium where the units are insured under subpart A of part 234 of this chapter).

§ 203.202 Plan acceptability and acceptance renewal criteria - general.

(a) For a Plan to be acceptable to HUD, it must assure that:

(1) If a builder, for any reason, fails to correct structural defects or construction deficiencies in a property covered by an insured 10-year protection Plan during the term of any warranty offered by the builder on the property, the Plan issuer will effect the corrections in accordance with the terms of the Plan; and

(2) If a Plan issuer, for any reason, fails to effect correction of these deficiencies or defects, or otherwise fails to honor the terms of its coverage, its insurance backer or, if the Plan issuer is an insurance company, the insurance company itself, will effect the corrections or otherwise honor the terms of the Plan.

(b) In evaluating applications for renewal of Plan acceptance, HUD will take into consideration such reliable evidence, as is made available to the Department, of a Plan issuer's failure to fulfill its obligations. Where HUD has credible evidence of a Plan issuer's failure to correct covered homeowner problems, or there are justifiable homeowner complaints about untimely problem resolution by a Plan issuer, HUD will consider this as cause for termination of a Plan's acceptance and as grounds for initiation of sanctions against a Plan issuer or insurance backer, in accordance with 2 CFR part 2424. If HUD proposes to terminate a Plan's acceptance, the issuer of the Plan will be advised of the reason therefore, and the procedural safeguards of 2 CFR part 2424 will apply.

(c) Unless renewed, Plan acceptance by HUD expires automatically on the second anniversary date of acceptance. The Plan issuer must apply for acceptance renewal at least two months, but no more than three months, in advance of expiration to avoid automatic acceptance termination. Prior acceptance of a Plan will be continued beyond the date of automatic acceptance termination only by a written notification to the Plan issuer and only if the delay is caused by a lack of timely HUD processing of a renewal application. HUD will not extend the expiration date of a prior Plan acceptance if the Plan issuer has negligently provided incomplete information with its renewal application.

(d) After a Plan has been accepted by HUD, there shall be no change in, or modification to, its provisions, or in its insurance backers or insurance contract(s), without prior written HUD acceptance of such change or modification, except that changes mandated by other applicable laws may not require HUD's prior approval. A violation of this condition may be cause for termination of a Plan's acceptance, and may be grounds for initiation of

sanctions against the Plan issuer, in accordance with 2 CFR part 2424. Insofar as practicable, HUD will respond to a Plan issuer's request for acceptance of a change within 30 days of receipt of the request. Plan acceptance by HUD will be for a two-year period.

(e) Requests for initial HUD acceptance or renewal of acceptance of a Plan should be made to the Deputy Assistant Secretary for Single Family Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410. Requests must be accompanied by information and documentation evidencing Plan compliance with § 203.204. Acceptability of Plans will be determined by the Deputy Assistant Secretary for Single Family Housing who will notify applicants of his or her determination. If a Plan is rejected, the applicant will be advised of the reason for rejection. The applicant may appeal the rejection to the Assistant Secretary for Housing, at the above address, stating specifically why the Plan should be approved. The Assistant Secretary (whose decision is final) will, within a reasonable time, advise the applicant whether the rejection will be upheld or reversed. Each HUD field office will be advised of Plans determined to be acceptable, or Plans that have been rejected.

(f) Existing Plans will be allowed a grace period of 9 months commencing from November 6, 1990 to make the necessary adjustments to comply with the provisions and requirements of § 203.200 to § 203.209.

(g) Each Plan issuer must submit a written certification addressed to the Deputy Assistant Secretary for Single Family Housing, 451 Seventh Street, SW., Washington, DC 20410, no later than three weeks before the anniversary date of the Plan's acceptance by HUD, that the insurance company backing its Plan is still an insurance carrier approved by the State insurance commission (or the equivalent entity) in each jurisdiction in which the Plan is offered, or is still a Risk Retention Group meeting the criteria of § 203.208 of this part.

(Approved by the Office of Management and Budget under control number 2502-0343)

[55 FR 41021, Oct. 5, 1990, as amended at 72 FR 73495, Dec. 27, 2007]

§ 203.203 Issuance and nature of insured 10-year protection plans.

(a) Plans may be issued:

- (1)** By a builder, warranty company, insurance company, or Risk Retention Group (see 15 U.S.C. 3901a(4)(A)-(H) (Supp. IV 1986); or
- (2)** By a State that guarantees the builder's performance and the State's continuing financial backing throughout the Plan's coverage period.

(b) All Plans must have insurance backing unless backed by the full faith and credit of a State.

(c)

(1) Plans backed by the full faith and credit of a State must be in compliance with § 203.200 through § 203.202, § 203.204 through § 203.206, and § 203.209 to be acceptable to HUD. HUD will evaluate these Plans to ensure their compliance with these sections.

(2) HUD will not accept Plans backed by a State agency or a State insurance guaranty fund unless HUD is assured that the full faith and credit of the State is pledged to satisfy any and all obligations of the State agency or guaranty fund that may arise in connection with its financial backing of a Plan.

(d) The functions of a Plan issuer and an insurance backer may be performed by a single corporate entity.

Exhibit 2

 **COPY**

201500009322 08
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Filed for Record in
KERSHAW COUNTY SC
BILLIE MCLEOD, REGISTER,
12-22-2015 At 12:08:00 pm.
MORTGAGE 31.00
OR Volume 3464 Page 42 - 66

[Space Above This Line For Recording Data]
PARCEL TAX ID#: 307-00-00-034-SKH
VA CASE# 19-19-6-0475024

Loan No. 403287387

MIN 1004031-0403287387-0 MORTGAGE

**NOTICE: THIS LOAN IS NOT ASSUMABLE
WITHOUT THE APPROVAL OF THE DEPARTMENT
OF VETERANS AFFAIRS OR ITS AUTHORIZED
AGENT.**
DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated December 18th, 2015 together with all Riders to this document.
(B) "Borrower" is JONATHAN MART, A MARRIED MAN

Borrower is the mortgagor under this Security Instrument.

(C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

SOUTH CAROLINA -- Single Family -- Fannie Mae/Freddie Mac
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ROA 247

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(D) "Lender" is PLATINUM MORTGAGE, INC.

Lender is a AN ALABAMA CORPORATION
laws of THE STATE OF ALABAMA
103 SPENRYN DR , MADISON, AL 35758

organized and existing under the
Lender's address is

(E) "Note" means the promissory note signed by Borrower and dated December 18th 2015. The Note states that Borrower owes Lender TWO HUNDRED TWENTY THREE THOUSAND FOUR HUNDRED SEVENTY AND NO/100

Dollars (U.S. \$ 223,470.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than January 1st, 2046

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower (check box as applicable):

☐ Adjustable Rate Rider	☐ Condominium Rider	☐ Second Home Rider
☐ Balloon Rider	☐ Biweekly Payment Rider	☐ 1-4 Family Rider
☒ VA Rider	☒ Planned Unit Development Rider	
☐ Other(s) [specify]		

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (12 C.F.R. Part 1024), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property located in the COUNTY

of KERSHAW [Type of Recording Jurisdiction]

SEE EXHIBIT 'A' [Name of Recording Jurisdiction]

which currently has the address of 2 CASEY DR

ELGIN [City], South Carolina 290457001 ("Property Address"):
[Street] [Zip Code]

TO HAVE AND TO HOLD this Property unto MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, forever, together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3041 1/01
MG3041-03 (11/12) (Page 3 of 19)

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts

(including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters,

or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in

connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the

amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until the Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payment using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has -if any- with respect to the Mortgage Insurance under the Homeowner's Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. **Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. **Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. **Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. **Notices.** All Notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a

prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to Section 22 of this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer.

Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that

adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

23. Release. Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

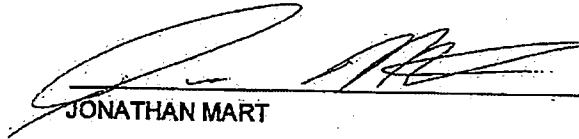
24. **Homestead Waiver.** Borrower waives all rights of homestead exemption in the Property to the extent allowed by Applicable Law.

25. **Waiver of Appraisal Rights.** The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within 30 days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. TO THE EXTENT PERMITTED BY LAW, THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY. This waiver shall not apply so long as the Property is used as a dwelling place as defined in § 12-37-250 of the South Carolina Code of Laws.

26. **Future Advances:** The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to one hundred and fifty percent (150%) of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

[THIS SPACE LEFT INTENTIONALLY BLANK]

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

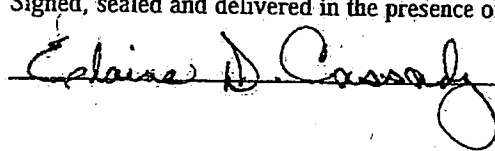

JONATHAN MART 12-18-15 (Seal)
-Borrower

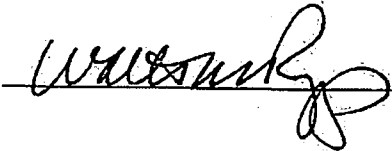
(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

Signed, sealed and delivered in the presence of:





ACKNOWLEDGMENT

STATE OF SOUTH CAROLINA

COUNTY OF Richland

)
) SS
)

I, the undersigned Notary Public do certify that
JONATHAN MART, A MARRIED MAN

personally appeared before me, and having satisfactorily proven to be the person or persons
whose names are subscribed above, have acknowledged the due execution of the within

mortgage

Witness my official seal on this 18th day of December, 2015

Walter M Riggs
Notary Public for:

WALTER M RIGGS
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES
10/24/2024

My Commission expires: 10/24/24

Prepared By:
JASON HALL
PLATINUM MORTGAGE, INC.
103 SPENRYN DR
MADISON, AL 35758

RECORD AND RETURN TO:
PLATINUM MORTGAGE, INC.
103 SPENRYN DR SUITE B
MADISON, AL 35758

NMLSR ID: 263032
NMLSR (L.O.) ID: 269932 (ELIZABETH KOUMAS QUICK)
Loan Originator: GOLDEN GATE MORTGAGE, INC.
Add'l Loan Originator: PLATINUM MORTGAGE, INC./64524
SOUTH CAROLINA - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3041 1/01
G3041-19 (6/15)
(Page 19 of 19)

EXHIBIT A

All that certain piece, parcel, or lot of land, together with any improvements thereon, situate, lying and being in the County of Kershaw, State of South Carolina, and being shown as Lot 34 in Longview Subdivision NORTH on that plat of survey prepared for LONGVIEW SUBDIVISION - NORTH AND WEST by Robert H. Lackey Surveying, Inc. dated January 27, 2015 and revised February 26, 2015 and recorded in the Office of the R/D for Kershaw County in Plat Book C170 at Page 8 on March 4, 2015; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

This being the same property conveyed to Mortgagor herein by deed of Great Southern Homes, Inc. dated December 18, 2015 and recorded in the Office of the R/D for Kershaw County simultaneously herewith.

JSM

PLANNED UNIT DEVELOPMENT RIDER

LOAN# 403287387

VA CASE# 19-19-6-0475024

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 18th day of December, 2015, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to

PLATINUM MORTGAGE, INC., AN ALABAMA CORPORATION

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

2 CASEY DR ELGIN, SC 29045-7001

[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in

Protective covenants, conditions, and restrictions of said developments.

(the "Declaration"). The Property is part of a planned unit development known as

LONGVIEW NORTH

[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts

(including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan.

Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this PUD Rider.


JONATHAN MART 12-8-15 (Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower



701 West Main Street
Lexington, SC 29072
803-566-7441

July 14, 2015

Jonathan Mart
9 Driftwood Ave
Elgin, SC 29045

Re: Pre-Qualification for Purchase

Dear Jonathan,

Thank you for choosing Ameris Bank. We are pleased to inform you that your mortgage loan has been pre-qualified with the following terms and conditions. If there are any changes to the Terms and Conditions listed below your loan will have to be re-submitted to our Underwriting Department for review:

Terms:

Program: VA
Property: Lot 34 Casey Dr

Conditions:

- 1) Credit verification letter showing Navy Federal Credit Union vehicle – paid in full
- 2) Sale of current home located at 9 Driftwood Ave
- 3) Acceptable sales contract to include all applicable addendums when property is located
- 4) Acceptable appraisal and title commitment to be ordered by Ameris Bank
- 5) Acceptable homeowners Insurance

Again, thank you for giving Ameris Bank the privilege of financing your home. We look forward to serving your needs.

Sincerely,

A handwritten signature in cursive script that reads 'Allison M. Blowers'.

Senior Mortgage Banker
NMLS#365405
803-567-7661

Handwritten initials, possibly 'JB', in a stylized cursive script.

ELECTRONICALLY FILED - 2018 JUN 14 2:27 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4000873

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN DAUGHERTY and
CYNTHIA DAUGHERTY,

Plaintiffs,

v.

PULTE HOMES OF GREATER
KANSAS CITY,

Defendant.

CIVIL ACTION

No. 09-2523-KHV

MEMORANDUM AND ORDER

John and Cynthia Daugherty filed suit against Pulte Homes of Greater Kansas City for breach of warranty and contract related to the purchase of a home in Lenexa, Kansas. This matter is before the Court on Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51) and Defendant Pulte Homes Of Greater Kansas City, Inc.'s Motion To Compel Arbitration As To Those Claims Arising Under The Parties' Purchase Agreement And Not Governed By The Terms And Conditions Of The Limited Warranty (Doc. #53), both filed August 13, 2010. For reasons stated below, the Court sustains defendant's motion for summary judgment in part, sustains defendant's motion to compel arbitration as to claims under the Purchase Agreement and remands the remaining state law claim for breach of the Limited Warranty to state court.

Legal Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c);

accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Liberty Lobby, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial as to those dispositive matters for which it carries the burden of proof. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. Applied Genetics, 912 F.2d at 1241.

"[W]e must view the record in a light most favorable to the parties opposing the motion for summary judgment." Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. Liberty Lobby, 477 U.S. at 250-51. In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52.

Factual Background

I. Compliance With Rules Governing Summary Judgment

Plaintiffs have attempted to controvert many of defendant's facts, but nearly all of plaintiffs' responses are insufficient for one or more of the following reasons:¹

1. Many of plaintiffs' responses do not explain specifically what portion of defendant's statement of fact is disputed. Plaintiffs repeatedly state that they "Deny. Admit." or "Admit. Deny," see Response To ¶¶ 9-12, 17-26, 28-29, 32-34, 36, 42-45, 47-49, 51-60, without attempting to explain what portion of defendant's statement of fact that they admit and what portion that they deny.² Under Rule 56.1(e) of the Local Rules and basic principles of persuasion, a responding party has a duty to fairly meet the substance of the matter asserted.
2. Plaintiffs repeatedly refer to multi-page exhibits and cross reference lengthy

¹ The Court also notes that plaintiffs' entire factual response is single spaced in violation of local rules. See D. Kan. Rule 5.1(a) (documents must be double-spaced).

² For example, paragraph 34 of defendant's statement of facts states as follows: "Pursuant to the Warranty of Completion of Construction, '[t]he FHA Commissioner or the Secretary of Veterans' Affairs reserves the right to make a final determination as whether a defect exists and whether the builder must remedy the defect.' (Doc. 18-4, Exh. H)." In response, plaintiffs state as follows:

Deny. Admit. Sad realization for the Plaintiffs. Two veteran homeowners purchased a home that was presented to them as constructed in accordance with 2003 International Residential Code, from a reputable builder, the Defendant, who issued a HUD Form 92541, a Warranty of Completion of Construction, and a 10-year warranty to induce the Veterans Administration to approve the Plaintiffs [sic] loan. And four (4) years later, despite filing numerous construction complaints with the Veterans Administration, the home is as defective today as it was constructed and unrepaired because the Defendant will not simply fix the home because they know the Veterans Administration cannot force the Defendant to repair it. Reference Plaintiffs' previous responses given in paragraphs 12, 32, and 33 above. The Plaintiffs admit these languages [sic] appears in the said document. Reference Plaintiffs' Exhibit M and B.

Plaintiffs' Opposition In Response To Defendant's Motion For Summary Judgment And Memorandum In Support (Doc. #62) filed September 7, 2010 at 23.

responses without any pinpoint cites.³ Under Rule 56.1(b) of the Local Rules, all references in factual statements shall be with particularity to those portions of record which non-movant relies. Plaintiff's broad references provide little aid to the Court or opposing counsel. See United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); Boldridge v. Tyson Foods, Inc., No. 05-4055-SAC, 2007 WL 1299197, at *2 (D. Kan. May 2, 2007) (duty of parties contesting motion for summary judgment to direct court to places in record where evidence exists to support their positions).

3. In response to many of defendant's statements of fact, plaintiffs include lengthy portions of legal argument with no references to the factual record or legal authorities.⁴ Legal argument belongs in the argument section of a brief.

³ For example, paragraph 56 of defendant's statement of facts states as follows: "Plaintiffs testified that they refused to allow Pulte to make repairs because they believed that the method of making such repairs should be governed by their judgment or the judgment of their agents, rather than the judgment of Pulte or Pulte's engineers. (See Exh. C, John Daugherty Depo., 34:23 to 37:1; Exh. E, Cynthia Daugherty Depo., 38:25 to 40:16)." Plaintiffs' response to this fact is "Deny. Admit. See Plaintiffs' response to paragraphs 12, 18, 51, 52, 53, 54, and 55 above." Unfortunately, plaintiffs' response to the referenced paragraphs is some 24 pages of single spaced text and provides little insight as to what is possibly relevant to plaintiffs' response to paragraph 56. See also Response To ¶ 10 (referring to plaintiffs' entire depositions without pinpoint cites; setting forth more than eight pages of e-mails between plaintiffs and Pulte without attempting to relate the e-mails to defendant's statement of fact); Response to ¶¶ 2, 9, 33, 34, 41 (referring generally to plaintiffs' Exhibit M which consists of some 116 pages of closing documents).

⁴ For example, paragraph 25 of defendant's statement of fact states that "[t]he March 23, 2007 Buy Back Letter does not request warranty service; rather it demands that Pulte 'buy back' the Residence. (Exh. G, March 23, 2007 Letter to William J. Pulte, at 1 (Deposition Exhibit No. 8))." In response, plaintiffs state as follows:

Deny. Admit. Any consumer, purchasing anything, from a roll of toilet paper to a home, that when [sic] the product, services, or goods does not meet the customer's satisfaction will first seek to remedy the problem by requesting repurchase or in some cases an exchange of goods. It is a normal, widely acceptable, practice that many companies utilize in order to keep their customers happy and hopefully returning for future purchases, simply because they treated their customers with respect and dignity. Their fulfillment of the customer's expectation demonstrates pride and integrity by honoring the request. The act of requesting that the Defendant to [sic] repurchase the home should not or ever be construed as something the judicial system has interpret [sic] in the past as wrong or illegal, it was simply a request that was denied by the Defendant. It is what it is. Period.

(continued...)

4. Plaintiffs have attached numerous exhibits with no affidavit or deposition testimony to authenticate the exhibits. Under D. Kan. Rule 56.1(d), “[a]ll facts on which a motion or opposition is based must be presented by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories, and responses to requests for admission.” No provision in the Federal Rules of Civil Procedure or the Local Rules for the District of Kansas allows a party to simply attach a document as an exhibit with no supporting affidavit, deposition testimony, or other relevant evidence authenticating the document.

In light of the numerous deficiencies in plaintiffs’ response to defendant’s factual statement, the Court ordinarily would strike nearly all of plaintiffs’ factual response for failure to comply with D. Kan. Rule 56.1.⁵ Because defendant’s motion for summary judgment has been pending for some

⁴(...continued)

The same letter cited was also sent on or about March 23, 2007 from the Plaintiff, Cynthia C. Daugherty to Mr. Richard J. Dugas, Jr. CEO of Pulte Homes, Reference Plaintiffs’ Exhibit V, includes the following quote: “We have owned this home of 218 days (August 18th, 2006–March 23rd, 2007), of which 168 days have circumvented around Pulte Homes. It is safe to say that our entire period of ownership has focused on repairs versus enjoyment. No homeowner should be saddled with a defective home that is evident of incompetence, carelessness, and poor craftsmanship and is beyond any reasonable score of warrantable repair.”

The Plaintiffs’ [sic], since receiving the refusal from the Defendant, have consistently requested remedy [sic] from the Defendant, who has repeatedly refused to acknowledge their responsibilities. It has been their refusal to issue a Work Proposal that is reflective of their intent to stand behind their promised “Nation’s Best Warranty”. Plaintiffs admit they sent both letters to Mr. William J. Pulte and Mr. Richard J. Dugas on March 23, 2007.

Plaintiffs’ Opposition (Doc. #62) at 21:

⁵ The Court has no desire to make “technical minefields” of summary judgment proceedings, but neither can it countenance laxness in the proper and timely presentation of proof. Orsi v. Kirkwood, 999 F.2d 86, 92 (4th Cir. 1993). In some circumstances, the Court has ordered the plaintiff to re-file a response in compliance with the rules, ordered defendant to file another reply and ordered plaintiff to reimburse defendant for attorney fees to file the additional reply. Effective December 1, 2010, under Rule 56 of the Federal Rules of Civil Procedure, if a party fails to properly

(continued...)

three months and litigants should not succumb to summary judgment merely because their counsel fails to comply with the technical requirements involved in defending such a motion, however, the Court will attempt to properly set forth the facts in a light most favorable to plaintiffs and to search the record to determine whether genuine issues of material fact preclude the entry of summary judgment for defendant.⁶

II. Statement Of Facts

The following material facts are uncontroverted, deemed admitted or, where controverted, viewed in the light most favorable to the non-movants, John and Cynthia Daugherty.

On January 8, 2006, under a Purchase Agreement, Pulte Homes of Greater Kansas City, Inc. ("Pulte") agreed to design and construct a home at 8712 Quill Street in Lenexa, Kansas. See Purchase Agreement, attached as Exhibit B to Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51) filed August 13, 2010. On August 18, 2006, the Daughertys and Pulte closed on the purchase agreement and plaintiffs took possession of the home. In part, plaintiffs financed the purchase by a Veterans' Administration ("VA") loan. Plaintiffs still reside in the home. The home is not and has never been unsafe or uninhabitable.

⁵(...continued)

support or address an assertion of fact, the Court has discretion to (1) give a party an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion; (3) grant summary judgment if the motion and supporting materials show that the movant is entitled to it; or (4) issue any other appropriate order. Fed. R. Civ. P. 56(e).

⁶ Even if a non-movant does not respond at all, the Court must determine whether the movant is entitled to summary judgment on the merits. See Fed. R. Civ. P. 56(e)(3) (effective December 1, 2010); see also former Fed. R. Civ. P. 56(e)(2) (must determine whether summary judgment is appropriate).

A. Purchase Agreement

Under the Purchase Agreement, Pulte warranted the home against defects in workmanship and materials subject to and limited by the Limited Warranty. See Purchase Agreement ¶ 7; see also Limited Warranty, attached as Exhibit F to Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51). The Purchase Agreement provides that "any controversy, claim or dispute arising out of construction or design issues (other than claims under the Limited Warranty)" shall be mediated and, if mediation fails, arbitrated. See Purchase Agreement ¶ 17.⁷

B. Limited Warranty

Plaintiffs received a copy of the Limited Warranty when they executed the Purchase Agreement and again at closing. At the time of closing, plaintiffs understood how to request customer service from Pulte.

The Limited Warranty defines "Covered Defects" as "defects in material and workmanship that are either part of the structure or are elements of the home" at the date of closing. Limited

⁷ Paragraph 17 in its entirety states as follows:

ARBITRATION: Any controversy, claim or dispute arising out of or relating to this Agreement or Your purchase of the Home (other than claims under the Limited Warranty) shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") and the Federal Arbitration Act (Title 9 of the United States Code), and judgment rendered by the arbitrator(s) may be confirmed, entered and enforced in any court having jurisdiction. As a condition precedent to arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of the AAA, or such other mediation service selected by [Pulte]. Claims under the Limited Warranty will be arbitrated in accordance with the arbitration provision set forth in the Limited Warranty.

Purchase Agreement ¶ 17.

Warranty at 6. The Limited Warranty states that Covered Defects are governed by one of four coverage periods.⁸ The Limited Warranty provides that to preserve a claim under the warranty, the homeowner must submit written notice of a claim to Pulte and the Plan Administrator "by certified mail, return receipt requested." Limited Warranty at 9. Plaintiffs testified that except for a single letter sent to William J. Pulte dated March 23, 2007 (the "March 23, 2007 Buy Back Letter"), they did not provide any notice to Pulte via certified mail, return receipt requested. In the March 23, 2007 Buy Back Letter, plaintiffs did not request warranty service; rather, they demanded that Pulte "buy back" the house.

⁸ In particular, the Limited Warranty states as follows:

ONE YEAR COVERAGE: THE BUILDER warrants the construction of the home will conform to the tolerances for materials and workmanship, as defined in the Performance Standards, for a period of one year after the closing date.

TWO YEAR COVERAGE: THE BUILDER warrants the workability of the plumbing, electrical, heating, ventilating, air conditioning and other mechanical systems, as defined in the Performance Standards, for a period of two years after the closing date.

FIVE YEAR COVERAGE: THE BUILDER warrants against various types of water infiltration and internal leaks, as specifically defined in the Performance Standards, for a period of five years after the closing date.

TEN YEAR COVERAGE: THE BUILDER warrants the construction of the home will conform to the tolerances set forth in the below Performance Standards for Structural Elements for a period of ten years after the closing date, subject to the limitations set forth below. Structural Elements are footings, bearing walls, beams, girders, trusses, rafters, bearing columns, lintels, posts, structural fasteners, subfloors and roof sheathing. A Structural Element will not be deemed defective, and no action will be required of THE BUILDER, unless there is actual physical damage that diminishes the ability of the Structural Element to perform its load-bearing function such that the home is unsafe.

Limited Warranty at 6.

Pursuant to the Limited Warranty, the parties agreed that any failure by plaintiffs to allow Pulte reasonable access to the home during normal working hours for making repairs would relieve Pulte from its obligations under the Limited Warranty.⁹ In addition, the Limited Warranty provides that Pulte "reserves the right to use its judgment in determining the most appropriate method of repairing warranty defects." Limited Warranty at 7.

The Limited Warranty contains a jury trial waiver provision, which is set off in its own paragraph and entitled, "WAIVER OF JURY TRIAL":

WAIVER OF JURY TRIAL: To the extent the laws of your state preclude an agreement that requires the parties to submit to binding arbitration, or to the extent a court of competent jurisdiction finds that any claim between THE BUILDER and THE HOMEOWNER is not subject to binding arbitration pursuant to the provisions of this LIMITED WARRANTY, then THE BUILDER and THE HOMEOWNER knowingly waive trial by jury in any action, proceeding or counterclaim brought by either of them in connection with this agreement regardless of the claim(s) made or damages sought. This waiver of jury trial will extend to any third party named in any proceedings by THE BUILDER or THE HOMEOWNER.

Limited Warranty at 10.

⁹ The Limited Warranty states as follows:

The benefits included in this LIMITED WARRANTY are only available when service is requested according to the procedures established by THE BUILDER and included in your warranty material. In addition, THE HOMEOWNER's failure to reasonably provide access to the home during normal working hours for making repairs will relieve THE BUILDER from its obligations under this warranty. THE BUILDER's aggregate total liability shall not exceed the original contract price of the home.

Limited Warranty at 7.

C. Warranty of Completion of Construction

At some point, plaintiffs received a copy of a "Warranty of Completion of Construction."¹⁰

See Exhibit H to Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51). The stated purpose of the Warranty of Completion of Construction is to induce the FHA and/or the VA to guarantee and/or insure mortgages to veterans. The Warranty of Completion of Construction provides as follows:

[T]his warranty shall apply only to such instances of substantial nonconformity as to which the Purchaser(s)/Owners or his/her (their) successors or transferees shall have given written notice to the Warrantor at any time or times within one year from the date of original conveyance of title to such Purchaser(s)/Owner(s) or the date of initial occupancy, whichever first occurs

Id. Pursuant to the Warranty of Completion of Construction, "[t]he FHA Commissioner or the Secretary of Veterans' Affairs reserves the right to make a final determination as whether a defect exists and whether the builder must remedy the defect." Id.

As part of the financing and/or closing documents on their home, plaintiffs signed a document from the Veterans Administration entitled, "Home Loan Guaranty Benefits." The Home Loan Guaranty Benefits document states as follows: "If you have a home built, VA cannot compel the builder to correct construction defects although the VA does have the authority to suspend a builder from further participation in the home loan program." Exhibit Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51).

The Department of Veterans Affairs website instructs veterans with complaints about a newly constructed home that was inspected by VA (or HUD/FHA) as follows:

If the new home was inspected by a fee compliance inspector assigned by VA or

¹⁰ The copy which plaintiffs have provided is not signed by plaintiffs or Pulte.

HUD during construction, VA has complaint processing procedures that are used to attempt to get the builder to correct construction defects which the VA determines are the builder's responsibility. A complaint must be registered with VA within the first year of ownership. Ultimately, VA does not have the authority to force a builder to make corrections to a property. Also, some problems about which a veteran complains may be determined by VA to be within minimum standards of acceptable building practice. In such cases, VA will not look to the builder for correction. However, when builders refuse to correct items which VA determines are their responsibility to correct, VA will take administrative sanctions against them and refuse to do further business with them. In the end, some veterans may still need to pursue legal action against the builder.

Exhibit K to Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51).

D. Efforts To Identify Items To Repair

After plaintiffs raised numerous complaints with Pulte and shortly before Pulte's three-month scheduled follow-up inspection, Pulte informed plaintiffs that it remained committed to honoring the warranty. See E-mail Dated November 13, 2006 From Josh Wallace (General Manager of Customer Relations at Pulte) To Cynthia Daugherty, Exhibit J to Plaintiffs' Supplemental Exhibits (Doc. #64) at 23. Pulte suggested the following procedure to address any defects:

Step #1:

- Visually inspect the items you submitted via email to ensure we (Pulte) fully understand the scope of work necessary per the terms outlined in the Pulte warranty.
- Conduct 3-month service review and identify any warrantable items not on the current list.
- Have a plumbing professional cap the pipe in the basement.

Step #2:

- Pulte Homes to draft a document identifying action(s) to be taken on these warrantable items. We will review the document with you to ensure proper expectations and alignment. Document will be signed and dated by all parties prior to proceeding with work.

Step #3:

- Schedule trade professionals to complete agreed upon items and perform

engineering inspections.

- Pulte to schedule a professional engineer to visually inspect foundation cracks and position of isolation rings. Engineer to provide professional recommendations as to the necessary repairs and the re-establishment of isolation rings under the monoposts.
- Pulte to schedule elevation readings to be performed on the basement concrete slab. These results to be provided to the professional engineer to assist in drafting recommendations.

Step #4:

- Discuss engineering recommendations with you and appropriate action(s) to be taken per the Pulte warranty.
- Pulte Homes to draft a document identifying these actions. We will review the document with you to ensure proper expectations and alignment. Document will be signed and dated by all parties prior to proceeding with work.

Step #5:

- Schedule trade professionals to complete agreed upon items from Step #4.

Id.

During the three-month inspection procedure, the Daughertys claimed that the house had “defects” that Pulte was required to repair pursuant to the Limited Warranty. Pulte investigated these complaints and on February 22, 2007, Pulte gave plaintiffs a work proposal (February 2007 Work Proposal). See Exhibit L to Defendant Pulte’s Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51). The proposal stated that it was “an outline of the suggested repairs and the estimated timeframe needed to conduct the repairs,” but that “these actions may, or may not, be all inclusive and the timeframe listed could change because of unforeseen circumstances.” Id. The proposal stated that it addressed (1) pier pad / footing locations, (2) hairline cracks in foundation walls and hole in foundation wall, (3) basement stair framing detail and (4) engineered floor joist deflection. In addition, the proposal noted that after the repairs were completed, Pulte would (1) repair the cosmetic finishes within the home that had been affected by

the pier pad repairs, (2) complete repairs as outlined in the Service Request #KC17170, dated November 17, 2006, which included 38 numbered tasks such as drywall repair, caulking, adjusting various doors, replacing window screen and painting and (3) weather permitting, complete repairs to the exterior and landscaping of the home that had been affected by the pier pad repairs along with the items noted in the Service Request #KC17196, dated November 17, 2006 which related to settlement of soil in front of the house, poor drainage and standing water in the yard. Id.

Plaintiffs did not permit Pulte to make any of the repairs set forth in the February 2007 Work Proposal. Plaintiffs refused to let Pulte conduct any of the repairs set forth in the February 2007 Work Proposal because they did not want Pulte to attempt to correct the pier pads. See Cynthia Daugherty Depo. at 71-72 (told Pulte that she did not want pier pad situation corrected but wanted floor fixed and lot graded, but Pulte said take it all or nothing); id. at 71 (gave Pulte copy of Hudson report which recommended that pier pads not be corrected because of risk of further damage); see also id. at 38-40 (refused to allow repairs because engineer hired by plaintiffs only able to monitor work, engineer had no right to stop work if he thought it was unsafe). On March 23, 2007, in response to Pulte's February 2007 Work Proposal, plaintiffs demanded that Pulte buy back the house and pay damages in a total cost to Pulte of \$390,808.32. See Exhibit G to Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51).

On August 15, 2007, Cynthia Daugherty met with John Connelly of Pulte. Ms. Daugherty told Connelly that she wanted Pulte to buy back her home. See Cynthia Daugherty Depo. at 40-41. When Connelly stated that Pulte would not buy back the home, plaintiff asked him and another Pulte representative to leave. See id. at 41. Later on August 15, 2007, by e-mail, Ms. Daugherty again asked Pulte for an all-inclusive work proposal/statement of work. In response, Pulte demanded that

before giving plaintiffs a revised work proposal/statement of work, plaintiffs must agree to let Pulte do all the remedies suggested in the work proposal.

Plaintiffs allege three different claims for breach of contract: breach of the Warranty of Completion of Construction, breach of the Purchase Agreement and breach of the Limited Warranty. See Pretrial Order (Doc. #55) at 11-12. Under each theory, plaintiffs seek repairs to their home at an approximate cost of \$252,900.00. See Pretrial Order (Doc. #55) at 21.

Analysis

I. Breach Of Warranty Of Completion Of Construction

Plaintiffs allege that Pulte breached a Warranty of Completion of Construction, HUD Form 92544. See Pretrial Order (Doc. #55) at 11-12. Pulte argues that consistent with this Court's prior ruling, plaintiffs cannot assert a private cause of action for breach of the Warranty of Completion of Construction. On Pulte's motion, the Court dismissed Count IV of plaintiffs' amended complaint which included their claim for breach of the Warranty of Completion of Construction. See Memorandum And Order (Doc. #32) at 5; First Amended Complaint For Damages (Doc. #18) ¶ 53 ("Pulte breached the Warranty of Completion of Construction filed with the VA"). Plaintiffs do not cite any statutory authority for such a claim or attempt to explain how their claim survives this Court's ruling on defendant's motion to dismiss.¹¹ See California v. Sierra Club, 451 U.S. 287, 297 (1981) (federal judiciary will not engraft remedy on statute, no matter how

¹¹ Plaintiffs here do not assert that the Warranty of Completion of Construction constitutes a contract or part of the bargain between plaintiffs and Pulte. Indeed, the document is unsigned by plaintiffs and Pulte, and plaintiffs have presented no evidence to suggest that the parties ever signed such a document. Here, the VA issued a loan guaranty because Pulte issued a separate 10-year Limited Warranty. See Correspondence From VA To Cynthia Daugherty, Exhibit K to Plaintiffs' Supplemental Exhibits (Doc. #64) at 1, 4-6. As the VA informed plaintiffs in 2007, they must file complaints about alleged defects under that Limited Warranty. See id.

salutary, that Congress did not intend to provide). Plaintiffs argue that under the warranty which they attempt to enforce, defendant must repair all defects reported to the Veterans Administration. See Plaintiffs' Opposition (Doc. #62) at 23. Plaintiffs concede, however, that under the warranty they attempt to enforce, the VA "cannot force the Defendant to repair" the home. Id.¹² Because plaintiffs have not shown that they can enforce an unsigned Warranty of Completion of Construction against Pulte, the Court sustains defendant's motion for summary judgment on this claim.¹³

II. Breach Of Purchase Agreement

Plaintiffs allege that Pulte breached the Purchase Agreement by (1) misrepresenting the manner in which the home was constructed at the time of closing and (2) not fully disclosing the unstable soil conditions on the lot and that expansive soil was used as backfill around the foundation walls. Pretrial Order (Doc. #55) at 9. Pulte argues that to the extent that plaintiffs can maintain a claim for breach of the Purchase Agreement apart from their claim for breach of the Limited

¹² The stated purpose of the Warranty of Completion of Construction is to induce the FHA and/or the VA to guarantee and/or insure mortgages to veterans. Pursuant to the Warranty of Completion of Construction, "[t]he FHA Commissioner or the Secretary of Veterans' Affairs reserves the right to make a final determination as whether a defect exists and whether the builder must remedy the defect." Exhibit H to Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51); see Department of Veterans Affairs website, "Post-Loan Frequently Asked Questions," attached as Exhibit K to Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51) (VA ultimately not authorized to force builder to correct property; if builders refuse to correct items, VA will take administrative sanctions against them and refuse to do further business with them).

¹³ In response to defendant's statement of facts, plaintiffs apparently assert that HUD Form 92541, entitled "Builder's Certification of Plans, Specifications, & Site," creates an enforceable warranty which a homeowner can enforce against a builder. See Plaintiffs' Opposition (Doc. #62) at 23-25. The pretrial order does not include a claim for breach of such a warranty. See Pretrial Order (Doc. #55) at 11-12. In addition, plaintiffs do not assert that Pulte breached any warranty other than the 10-year Limited Warranty and the Warranty of Completion of Construction. See Cynthia Daugherty Depo. at 69. The Court therefore need not address plaintiffs' argument included in their response to defendant's statement of facts.

Warranty, the claim under the Purchase Agreement must be arbitrated. See Defendant Pulte Homes Of Greater Kansas City, Inc.'s Motion To Compel Arbitration As To Those Claims Arising Under The Parties' Purchase Agreement And Not Governed By The Terms And Conditions Of The Limited Warranty (Doc. #53) filed August 13, 2010.¹⁴

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, ensures that contractual agreements to arbitrate disputes are "valid, irrevocable, and enforceable." 9 U.S.C. § 2; *see Hill*, 603 F.3d at 770-71. Federal policy favors arbitration agreements and requires that the Court rigorously enforce them. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). On a motion to compel arbitration under the FAA, the Court applies a strong presumption in favor of arbitration. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995) (FAA evinces strong federal policy in favor of arbitration); *see Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (court should resolve any doubts concerning scope of arbitrable

¹⁴ Plaintiffs question the timing of Pulte's motion, but do not contend that Pulte waived the right to raise the issue. See Plaintiffs' Opposition To Pulte Homes Of Greater Kansas City, Inc.'s Motion To Compel Arbitration As To Those Claims Arising Under The Parties' Purchase Agreement And Not Governed By The Terms And Conditions Of The Limited Warranty (Doc. #60) filed September 7, 2010 at 1 ("This suggestion of arbitration on behalf of the Defendant is a surprise as to the timing of the arbitration request. The Plaintiffs have expended an exorbitant effort in their summary judgment response."). Even if plaintiffs had specifically raised the issue, the record does not support a waiver. Due to strong state and federal policies favoring arbitration, a party asserting a waiver of arbitration has a heavy burden of proof. *See Peterson v. Shearson/Am. Express, Inc.*, 849 F.2d 464, 466 (10th Cir. 1988). A waiver of arbitration rights requires an unequivocal demonstration of intent to waive. *Robinson v. Food Serv. of Belton, Inc.*, 415 F. Supp.2d 1221, 1224-25 (D. Kan. 2005). Pulte did not raise the issue of arbitration until the deadline for filing dispositive motions, but based on the uncertainty that plaintiffs even had a plausible claim for breach of the Purchase Agreement (separate and apart from their claim for breach of the Limited Warranty), Pulte's delay was reasonable and does not appear to be an attempt to manipulate the judicial process. *See Hill v. Ricoh Ams. Corp.*, 603 F.3d 766, 773 (10th Cir. 2010) (important consideration in assessing waiver is whether party now seeking arbitration is improperly manipulating judicial process); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994) (waiver depends on facts of particular case).

issues in favor of arbitration). Where the parties dispute whether a valid and enforceable arbitration agreement exists, however, this presumption of arbitrability disappears. Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 779 (10th Cir. 1998).

In seeking to compel arbitration, defendant bears the initial burden to present evidence sufficient to demonstrate an enforceable agreement to arbitrate. SmartText Corp. v. Interland, Inc., 296 F. Supp.2d 1257, 1263 (D. Kan. 2003). Defendant has satisfied its burden as the Purchase Agreement clearly includes an arbitration clause which states that the parties will arbitrate any controversy, claim or dispute which arises out of or relating to the agreement.¹⁵ Plaintiffs concede that they signed the Purchase Agreement. Plaintiffs argue, however, that because they purchased their home under the VA Home Loan Guaranty Program, the binding arbitration provision does not apply. Plaintiffs rely on a HUD regulation which provides as follows:

In the event of any dispute regarding a homeowner complaint or structural defect claim, Plans must, unless prohibited by applicable law, provide for binding arbitration proceedings arranged through a nationally recognized dispute settlement organization. The sharing of arbitration charges shall be as determined by the Plan. A Plan must contain pre-arbitration conciliation provisions at no cost to the

¹⁵ In its entirety, the arbitration clause states as follows:

ARBITRATION: Any controversy, claim or dispute arising out of or relating to this Agreement or Your purchase of the Home (other than claims under the Limited Warranty) shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA") and the Federal Arbitration Act (Title 9 of the United States Code), and judgment rendered by the arbitrator(s) may be confirmed, entered and enforced in any court having jurisdiction. As a condition precedent to arbitration, the dispute shall first be mediated in accordance with the Construction Industry Mediation Rules of the AAA, or such other mediation service selected by [Pulte]. Claims under the Limited Warranty will be arbitrated in accordance with the arbitration provision set forth in the Limited Warranty.

Purchase Agreement ¶ 17.

homeowner, and provision for judicial resolution of disputes, but arbitration, which must be available to a homeowner during the entire term of the coverage contract, must be an assured recourse for a dissatisfied homeowner.

24 C.F.R. § 203.204(g). Plaintiffs ignore that this regulation applies to 10-year home protection plans such as Pulte's 10-year Limited Warranty. See 24 C.F.R. § 203.200 ("Insured ten-year protection plan or Plan" means agreement between homeowner and Plan issuer which, among other things, contains warranties regarding construction and structural integrity of dwelling).¹⁶ Plaintiffs offer no rationale for applying this regulation to the Purchase Agreement. Based on the unambiguous language of the Purchase Agreement, plaintiffs' claim for breach of that agreement must be arbitrated. The Court therefore sustains defendant's motion to compel arbitration on plaintiffs' claim for breach of the Purchase Agreement and dismisses that claim without prejudice.¹⁷

III. Jurisdiction Over Remaining Claim

Pulte originally removed this action from state court based on plaintiffs' claim under the Real

¹⁶ The Limited Warranty includes an addendum which provides for judicial resolution of disputes in addition to the binding arbitration procedure. The Limited Warranty states as follows:

The HOMEOWNER of a home with original FHA/VA financing is not required to submit disputes related to or arising out of this LIMITED WARRANTY to the Binding Arbitration procedure available here, however, if THE HOMEOWNER elects to pursue the dispute to a final resolution, including judicial resolution of disputes, such election shall bar THE HOMEOWNER from pursuing the same dispute against this LIMITED WARRANTY through the Binding Arbitration procedure provided herein.

Limited Warranty at 45-46.

¹⁷ Based on the record, the Court cannot ascertain how apart from the Limited Warranty, plaintiffs allege that Pulte breached the Purchase Agreement. See John Daugherty Depo. at 13-14 (Pulte breached Purchase Agreement because they did not fix anything; essentially admitting that claim for breach of Purchase Agreement based solely on failure to make repairs under Limited Warranty). Even so, to the extent such a claim is plausible, it must be arbitrated under the Purchase Agreement.

Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq. See Notice Of Removal (Doc. #1) at 2. Plaintiffs have not included this claim in the pretrial order. See Pretrial Order (Doc. #55) at 22. The pretrial order notes that federal law governs plaintiffs' claim for breach of the Warranty of Completion of Construction, see id. at 3, but the Court has sustained Pulte's motion for summary judgment on that claim. Plaintiffs' remaining claim is a state law claim for breach of the Limited Warranty.¹⁸

Under 28 U.S.C. § 1367(c)(3), a district court has discretion to decline to exercise supplemental jurisdiction once it has dismissed the claims over which it had original jurisdiction. Lancaster v. Indep. Sch. Dist. No. 5, 149 F.3d 1228, 1236 (10th Cir. 1998). If the court dismisses all federal claims before trial, it will generally decline to exercise jurisdiction over the remaining state law claims. Thatcher Enters. v. Cache County Corp., 902 F.2d 1472, 1478 (10th Cir. 1990). At this relatively late stage of pretrial proceedings, the Court occasionally exercises jurisdiction over remaining state law claims. In this case, however, plaintiffs have one remaining claim (breach of the Limited Warranty). As to that claim, plaintiffs have not addressed the rules of contract interpretation or how they apply to the facts of this case. Furthermore, defendant does not address the effect of plaintiffs' refusal to let it conduct one particular repair while simultaneously asking it to conduct all other repairs.¹⁹ Neither Kansas law nor the Limited Warranty provide an obvious

¹⁸ Above, the Court addressed plaintiffs' state law claim for breach of the Purchase Agreement because Pulte sought to enforce the parties' arbitration agreement under the Federal Arbitration Act.

¹⁹ Pulte characterizes plaintiffs' conduct as a blanket refusal of all repairs and a demand that Pulte buy back the home. The record does not reflect that plaintiffs refused to let Pulte conduct all repairs. See Cynthia Daugherty Depo. at 71-72 (told Pulte that she did not want pier pad situation corrected but wanted floor fixed and lot graded, but Pulte said take it all or nothing). At (continued...)

answer. Because undecided questions of state law dispose of the only remaining claim in this non-diversity case, and in the interest of comity and federalism, the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claim for breach of the Limited Warranty. See id. (notions of comity and federalism demand that state court try its own lawsuits, absent compelling reasons to contrary).

IT IS THEREFORE ORDERED that Defendant Pulte's Motion For Summary Judgment And Memorandum Of Law In Support (Doc. #51) filed August 13, 2010 be and hereby is **SUSTAINED in part**. The Court sustains defendant's motion for summary judgment as to plaintiffs' claim for breach of the Warranty of Completion of Construction.

IT IS FURTHER ORDERED that Defendant Pulte Homes Of Greater Kansas City, Inc.'s Motion To Compel Arbitration As To Those Claims Arising Under The Parties' Purchase Agreement And Not Governed By The Terms And Conditions Of The Limited Warranty (Doc. #53) filed August 13, 2010 be and hereby is **SUSTAINED**. The Court dismisses without prejudice plaintiffs' claim for breach of the Purchase Agreement.

IT IS FURTHER ORDERED that all remaining motions (Doc. ##52, 65, 80 and 82) be and hereby are **OVERRULED without prejudice**.

IT IS FURTHER ORDERED that the Court declines to exercise supplemental jurisdiction over plaintiffs' state law claim for breach of the Limited Warranty. The Court dismisses without prejudice plaintiffs' state law claim for breach of the Limited Warranty.

¹⁹(...continued)

times, plaintiffs asked or even insisted that Pulte buy back the home, but Pulte cites no provision in the warranty which provides that such requests by themselves void the warranty.

Dated this 1st day of December, 2010 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

Exhibit 4



December 17, 2015

Jennifer Shealy
Hanson Law Firm
6156 ST. Andrews Rd, Suite 101
Columbia, SC 29212
jshealy@hansonlawfirm.net; emilylewis@greatsouthernhomes.com

Builder: Great Southern Homes
Builder's SHW No.: 24382
Home Enrollment No.: 168255

This letter is to confirm that the underwriting requirements have been met for enrollment into the StrucSure Home Warranty Program, and the intent to warrant 2 Casey Dr, Elgin, South Carolina 29045. The warranty is a 10 year structural warranty which meets HUD criteria, and initiates the day of closing provided the signed warranty document and enrollment fee are received.

If you have any questions or concerns, please feel free to contact our office at 303.806.8688 or 1.877.806.8777.

Sincerely,

StrucSure Home Warranty

1.877.806.8777 (toll-free) • 303.806.8688 (office) • 303.806.9897 (fax)
6825 E. Tennessee Ave., Suite #410 • Denver, CO 80224

www.strucsure.com



STRUCSURE
HOME WARRANTY

ROA 295



HOME ENROLLMENT APPLICATION

PLEASE PRINT OR TYPE

1. **HOMEBUYER & PROPERTY INFORMATION**

NAME(S): Jonathan Mart

ADDRESS: 2 Casey Dr CITY: Elgin

STATE: South Carolina ZIP: 29045 PHONE:

COUNTY: Kershaw LOT/BLOCK #: 34 / n/a SUBDIVISION: Longview North

2. **BUILDER & WARRANTY INFORMATION**

MEMBER NAME: Great Southern Homes MEMBER NUMBER: 24382

3. EFFECTIVE DATE OF CLOSING: 12-18-15 (MM/DD/YYYY) HEA NUMBER: 168255

4. RATE FORMULA FOR ONE-YEAR WORKMANSHIP; TWO-YEAR SYSTEMS; AND TEN-YEAR STRUCTURAL COVERAGE:

\$ 223,470.00 / 1000 = x \$ 95.00 = \$ 95.00

Sales Price Rate Warranty Fee

5. RATE FORMULA FOR TEN-YEAR STRUCTURAL COVERAGE:

\$ / 1000 = x \$ = \$

Sales Price Rate Warranty Fee

6. Loan Type (check one; if applicable): ☐ FHA ☒ VA ☐ FmHA ☐ Cash ☐ Conventional

7. Type of Home: ☒ Single Family ☐ Condominium ☐ Townhome ☐ Manufactured ☐ Duplex

If multi-family dwelling, please provide total number of units in building:

ANY MODIFICATIONS, ALTERATIONS, REPRODUCTIONS, OR REVISIONS MADE TO THIS DOCUMENT WITHOUT THE EXPRESS WRITTEN CONSENT OF STRUCSURE WILL VOID ANY COVERAGE.

By signing this application, home purchaser(s) acknowledges this Warranty is an EXPRESS LIMITED WARRANTY and that StrucSure Home Warranty (SHW), its employees, agents, affiliates, and successors, shall have no liability whatsoever, by implication or otherwise, for loss or damage which is not EXPRESSLY covered by the Warranty documents. By signing this document, the Home Purchaser(s) acknowledges he/she has received a copy of this Application; agrees to download online or request by mail the Warranty Coverage Booklet and Certificate of Warranty Coverage; and agrees to resolve any claims, disputes, and controversies with the Builder, the Administrator, and/or the Insurer through binding arbitration and not litigation. The warranty fee, along with the signed copy of this application, must be received by StrucSure Home Warranty within 15 business days of closing or the warranty may be void. The Warranty is void if closing has not occurred within 90 days of SHW's Issuance Date. This warranty does not cover consequential damages or manufacturer's defects of any kind except where this exclusion is not permitted by law. By providing an email below, home purchaser(s) consent to receive important warranty updates and other communications electronically.

STRUCSURE HOME WARRANTY ISSUANCE DATE: 12/17/2015

Home Purchaser Signature: [Signature] 12 / 18 / 15 jonathan_mart87@hotmail.com
Month Day Year Email Address

Home Purchaser Signature: _____ / / _____
Month Day Year Email Address

STRUCSURE HOME WARRANTY, LLC | 6825 E. TENNESSEE AVE., #410 | DENVER, CO 80224-1628

1.877.806.8777 (TOLL-FREE) | 303.806.8688 (PHONE) | 303.806.9897 (FAX)

THIS DOCUMENT DOES NOT CONFIRM WARRANTY COVERAGE. CONFIRMATION OF COVERAGE WILL BE AVAILABLE UPON RECEIPT AND ACCEPTANCE OF THE HOME ENROLLMENT APPLICATION AND WARRANTY PAYMENT BY STRUCSURE HOME WARRANTY.

ROA 295

ELECTRONICALLY FILED - 2018 Jun 11 4:27 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4000873

Exhibit 5

Certificate of Occupancy

KERSHAW COUNTY, SOUTH CAROLINA
PLANNING AND ZONING DEPARTMENT



This Certificate issued pursuant to the requirements of the International Building 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. For the following:

Description/Comments: Residential

Use/Occupancy: Single Family Dwelling

Building Permit Number: 022936

Edition of Code: 2012 IRC

Type Construction: V

Sprinkler System: NA

Required: NA

Design Occupant Load: NA

Owner of Building: Great Southern Homes Address: 90 N. Royal Tower Drive, Irmo, SC 29063

Building Address: 2 Casey Drive, Elgin, SC 29045 Tax Map Number: 307-00-00-034 SKH


Building Official

12-10-15
Date

POST IN A CONSPICUOUS PLACE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	CIVIL ACTION NO. 2018-CP-40-00873
Jonathan Mart, on behalf of himself and	)	
others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
Great Southern Homes, Inc,	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

This case came before this Court on Defendant's Motion to Dismiss and Compel Arbitration on June 13, 2018 in the Court of Common Pleas for Richland County, South Carolina. Plaintiff entered suit on February 12, 2018 asserting claims for breach of contract/breach of implied warranty of good faith and fair dealing, unjust enrichment, and declaratory relief. Defendant Great Southern Homes, Inc. filed its Notice of Motion and Motion to Compel Arbitration on April 16, 2018. At the hearing on Defendant's motion the plaintiff was represented by his attorney, Chuck McDonald, Esquire and the defendant was represented by Warren C. Powell, Jr., both of the Richland County Bar. This Court has reviewed the pleadings, memoranda and exhibits and has considered arguments of counsel and issues the following Order to **GRANT** the defendant's motion to dismiss and compel arbitration.

I. FACTS

Plaintiff signed the Contract for Sale with Defendant on July 18, 2015 (Exhibit 1 to Plaintiff's Complaint) which provided that Defendant Great Southern Homes, Inc. would build

Plaintiff's home on Lot 34 in the Longview North subdivision, also known as 2 Cayce Dr., Elgin SC 29045. The parties' Contract for Sale contains the following arbitration clause:

ARBITRATION: Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, *et Seq.*

In addition, the first page of the parties' contract contains the following provision in bold, underlined, capital letters: "**CONTRACT SUBJECT TO ARBITRATION (S.C. Code §15-48-10) Version 040215**".

The parties Contract for Sale categorizes the transaction as a "building job." The construction of Plaintiff's home required over \$35,000 in materials from companies located outside of the state of South Carolina were used. (Pyle and Twine Affidavits) Construction of Plaintiff's home began on or about August 26, 2015 and was substantially completed by December 10, 2015. The Certificate of Occupancy for Plaintiff's home was issued on December 10, 2015. The parties' Contract for Sale contained boilerplate language on the page preceding the signature pages in subparagraph (i) in the Miscellaneous section of the document that the plaintiff was not contracting with Great Southern Homes to build a home for him. However, the parties' Contract for Sale on the first page contains a hand or type written "X" next to the option, "Building Job". The Home Sale Information Sheet also has an "x" next to designation, "Building Job." In addition, the Contract for Sale indicated that the plaintiff would later be provided a Limited Warranty approved by the South Carolina Real Estate Commission and that a copy of same would be available for inspection at the buyer's option, the same being provided purportedly in lieu of all

other warranties. The arbitration clause in the Contract for Sale is separate and apart from the warranty provision of the document.

Following the parties' July 18, 2015 Contract for Sale the plaintiff on December 18, 2015 signed the Home Enrollment Application (Exhibit 4 to Defendant's Reply Memorandum) to apply for the issuance of the StrucSure Home Warranty with the insurer/warrantor identified as the Golden Insurance Company. This express limited warranty also provides for binding arbitration although under its terms the plaintiff could have entered suit (StrucSure Limited Warranty, Section 15, Exhibit A to Plaintiff's Opposition Memo) in lieu of binding arbitration because his loan was guaranteed by the Veterans Administration. (Plaintiff's December 18, 2015 Mortgage, Exhibit 2 to Defendant's Reply Memorandum) The arbitration clause in the warranty does not contain the same terms as the one found in the parties' Contract for Sale.

The defendant in an effort to avoid arbitration advances three arguments. First, that the StrucSure Home Warranty issued by StrucSure Home Warranty, LLC of Denver, Colorado issued at some point after December 18, 2015 was made a part of the parties' July 18, 2015 Contract for Sale, and because the arbitration clause in the two documents differed there was no meeting of the minds; second, the Federal Arbitration Act does not apply because Plaintiff's residence was either not a new built home or the contract did not require construction of same; third, the arbitration provision contained in the Parties' Contract for Sale is unconscionable and unenforceable.

StrucSure Home Warranty:

A close examination of the StrucSure Home Warranty is necessary in order to identify its provisions and purpose in order for the Court to make an informed decision concerning the defendant's incorporation argument. A fair representation of the contents of the StrucSure Home Warranty are described in brevity as follows:

Section 1: Overview ...

(4) Under this Express Limited Warranty, the coverage periods for residential construction are as follows:

(a) One (1) year for Workmanship/Materials,

(b) Two (2) years for Delivery Portion of Systems (plumbing, electrical, heating, and air-conditioning delivery systems), and

(c) Ten (10) years for major structural components of the home. (StrucSure Home Warranty, Section 1, (4)).

(8) Please note that the Warrantor changes depending on the type of Defect and/or Deficiency that occurs, the timeframe in which the Defect and/or Deficiency occurs, and if the Builder is unable to perform warranty obligations. The Warrantor is the builder in years one (1) for Workmanship/Materials and years one (1) and two (2) for Delivery Portions of Systems. If the builder is unable to perform one (1) and two (2) year warranty obligations, the Insurer becomes the Warrantor and performs Builder warranty obligations. For Major Structural Defects, the Warrantor is the Insurer for the complete warranty period (years one (1) through ten (10)). (StrucSure Home Warranty, Section 1, (8));

(10) **"This Express Limited Warranty is separate and apart from any contracts between You and Your Builder, including any sales agreement.** It cannot be altered, affected or amended in any manner by any other agreement except only through a formal written agreement signed by the Builder, the Insurer, the Administrator, and You." (StrucSure Home Warranty, Section 1 (10)) (Emphasis supplied)

(20) ... The obligation of the Insurer under this limited warranty is solely to resolve Warranted Defects and/or Deficiencies;

(24) This Express Limited Warranty is fully transferable along with Your rights and obligations to subsequent owners during the Warranty Term. There is no limit to the number of transfers during the Warranty Term or any cost as a result of such transfer(s);

Section 6: Exclusions: This section lists the exclusions such as:

(1) The Builder's failure to finish any or all construction of the home including, but not limited to, walkthrough or punch list items ...

(4) Any changes, modifications, additions after the date of the warranty.

Section 7: - Workmanship/Materials and Delivery Portion of Systems Coverage: Describes the warranty covering the systems, one year for deficiencies in workmanship and materials as defined in the Performance Standards and two years for Deficiencies in the Delivery Portion of Systems (electrical, plumbing, and mechanical distribution systems) to the extent stated in the Performance Standards. (StrucSure Home Warranty, Section 7);

Section 8: Performance Standards for Home Components under the One-Year Workmanship/Materials Warranty:

1) Site Work

1.1 Grading:

Observation: Setting of the final grade ground around the foundation over utility trenches or other filled areas on the property where excavation and backfill have taken place that affect drainage away from home.

Deficiency: Settling of the final grade around foundations (sic) walls, utility trenches or other filled areas which exceeds a depth of six (6) inches from finished grade established by the Builder is a Deficiency.

Builder Correction: If the Builder has provided final grading, the Builder shall fill settled areas affecting proper drainage one time only during the first-year warranty period. The Builder is then responsible for removal and resetting of shrubs and other landscaping (installed by the Builder) affected by replacement of the fill. Surface draining shall be diverted to a storm sewer conveyance or other approved point of collection that does not create a hazard. Lots shall be graded to drain surface water away from foundation walls. The grade shall fall a minimum of six inches within the first 10 feet. Where lot lines, walls, slopes or other physical barriers prohibit six inches of fall within 10 feet, drains or swales shall be constructed to ensure drainage away from the structure. Impervious surfaces within 10 feet of the building foundation shall be sloped a minimum of two percent away from the building.

1.2 Drainage: section describes observation, deficiency, and builder correction, similar comment as above.

2) Concrete

2.1 Casts-in-Place Concrete: section describes observation, deficiency and builder correction, similar comments as above.

2.2 Construction and Control Joints: section describes observation, deficiency and builder correction, similar comments as above.

3) Masonry

3.1 Unit Masonry (brick, block and stone): section describes observation, deficiency and builder correction, similar comments as above.

4) Carpentry

4.1 Rough Carpentry: section describes observation, deficiency and builder correction, similar comments as above.

4.2 Finish Carpentry: section describes observation, deficiency and builder correction, similar comments as above.

5) Thermal and Moisture Protection

5.1 Waterproofing: section describes observation, deficiency and builder correction, similar comments as above.

5.2 Insulation: section describes observation, deficiency and builder correction, similar comments as above.

5.3 Louvers and Vents: builder describes observation, deficiency and builder correction, similar comments as above.

5.4 Exterior Siding: section describes observation, deficiency and builder correction, similar comments as above.

5.5 Roofing: section describes observation, deficiency and builder correction, similar comments as above.

5.6 Sealants: section describes observation, deficiency and builder correction, similar comments as above.

5.7 Sheet Metal: section describes observation, deficiency and builder correction, similar comments as above.

6) Doors and Windows

6.1 Interior and Exterior Doors: section describes observation, deficiency and builder correction, similar comments as above.

6.2 Garage Doors (Attached Garage): section describes observation, deficiency & builder correction, similar comments as above.

6.3 Wood, Plastic and Metal Windows: section describes observation, deficiency & builder correction, similar comments as above.

6.4 Hardware: section describes observation, deficiency & builder correction, similar comments as above.

6.5 Storm Doors, Windows and Screens: section describes observation, deficiency & builder correction, similar comments as above.

6.6 Weather-stripping and Seals: section describes observation, deficiency & builder correction, similar comments as above.

6.7 Glass and Glazing: section describes observation, deficiency & builder correction, similar comments as above.

7) Finishes

7.1 Lath and Plaster: section describes observation, deficiency and builder correction, similar comments as above.

7.2 Gypsum Wallboard: section describes observation, deficiency and builder correction, similar comments as above.

7.3 Hard Surface Flooring (Flagstone, Marble, Quarry/Ceramic Tile, Etc.): section describes observation, deficiency and builder correction, similar comments as above.

7.4 Resistant Flooring: section describes observation, deficiency and builder correction, similar comments as above.

7.5 Finished Wood Flooring: section describes observation, deficiency and builder correction, similar comments as above.

7.6 Painting: section describes observation, deficiency and builder correction, similar comments as above.

7.7 Wall Covering: section describes observation, deficiency and builder correction, similar comments as above.

7.8 Carpeting: section describes observation, deficiency and builder correction, similar comments as above.

8) Specialties

8.1 Fireplaces: section describes observation, deficiency and builder correction, similar comments as above.

9) Equipment

9.1 Kitchen Cabinets and Vanities: section describes observation, deficiency and builder correction, similar comments as above.

10) Mechanical Systems

10.1 Plumbing: section describes observation, deficiency and builder correction, similar comments as above.

10.2 Water Supply: section describes observation, deficiency and builder correction, similar comments as above.

11) Heating, Air-Conditioning and Ductwork

11.1 Heating: section describes observation, deficiency and builder correction, similar comments as above.

11.2 Air-Conditioning: section describes observation, deficiency and builder correction, similar comments as above.

11.3 Ductwork: section describes observation, deficiency and builder correction, similar comments as above.

12) Electrical System

12.1 Switches and Receptacles: section describes observation, deficiency and builder correction, similar comments as above.

12.2 Service and Distribution: section describes observation, deficiency and builder correction, similar comments as above.

Section 9: Performance Standards for Electrical, Plumbing, and Mechanical Distribution Systems under the Two-Year Delivery Portion of Systems Warranty:

1) Mechanical Systems

1.1 Water Supply System: section describes observation, deficiency and builder correction, similar comments as above.

1.2 Septic Tank System: section describes observation, deficiency and builder correction, similar comments as above.

1.3 Plumbing: section describes observation, deficiency and builder correction, similar comments as above.

1.4 Heating and Air-Conditioning: section describes observation, deficiency and builder correction, similar comments as above.

2) Electrical

2.1 Electrical Conductors: section describes observation, deficiency and builder correction, similar comments as above.

Section 10: How to Request a Warranty Performance for a Workmanship/Materials And/or Delivery Portion of Systems Defect or Deficiency: section describes procedure.

Section 11: Major Structural Defect Coverage: section describes coverage of warranty

Section 12: How to Report a Major Structural Defect Claim: section describes procedure

Section 15: Arbitration

The StrucSure Home Warranty provides for arbitration under the Federal Arbitration Act and provides other details concerning arbitration.

In addition, at the end of the section on page 23 it provides that, **“Note: For Homes with FHA/VA Financing Only: For Homes with the original FHA or VA financing only, and notwithstanding anything written above, You may elect judicial resolution of any disputes as an alternative to the Arbitration provision set forth in this Express Limited Warranty.”** (Emphasis added)

II. DISCUSSION AND FINDINGS

South Carolina courts have adopted the policy of favoring arbitration to the point that, “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)). Should the Plaintiff resist arbitration he has the burden of proving that the claims asserted in this action are unsuitable for arbitration. *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776, S.E.2d 91, 94 (Ct. App. 2015). Further, the burden of proof and persuasion as to a particular matter or

issue is on the party raising that matter or issue, and, as in this case, “it is generally true that the plaintiff in an action bears the burden of proving jurisdiction when the defendant challenges it. *Eldridge v. City of Greenwood*, 331 S.C. 398, 410; 503 S.E.2d 191, 197 (Ct. App. 1998).

A. Alleged no meeting of the minds due to incorporation of Contract for Sale and StrucSure Home Warranty

“Where the agreement in question is a written contract, the parties’ intention must be gathered from the contents of the entire agreement and not from any particular clause thereof.” *Barnacle Broad, Inc. v. Baker Broad, Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93; 594 S.E.2d 485, 493 (Ct. app. 2004).

The purpose of all rules of construction is to ascertain the intention of the parties to the contract. The subject matter of the contract and the purpose of its exception are material to the ascertainment of the intention of the parties and the meaning of the terms they use. ... All contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results. *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 at 442 (1962).

A warranty is in affect a contract. *Roundtree Villas Asso. v. 4701 Kings Corp.*, 282 SC 415, 423; 321 S.E.2d 46, 51 (1984). The subject matter of the StrucSure Home Warranty, as appears in its various provisions, taken as a whole is to provide the homeowner an insured limited warranty and after a claim is made on the warranty to address any defects or deficiencies discovered in sections of the home, including any major structural defects. The purpose of the parties’ Contract for Sale is to transfer to Plaintiff an equitable interest in the property, specify the terms of sale including price, the home to be constructed, closing date, and other such matters. Both documents provide for arbitration although the rules governing each differ. In addition, the arbitration provision in the StrucSure Home Warranty provides for the option of judicial resolution

at the option of homeowners closing with FHA or VA mortgages such as the plaintiff did in this case.

Plaintiff's argument that there was no meeting of the minds between the parties is based upon the premise that, "This Express Limited Warranty is a separate contract because it is a **part** of the Contract for Sale and is the operative document that sets forth the warranty obligations of Great Southern." (Plaintiff's Memo in Opposition, p. 3) This is a difficult proposition to accept when the parties' Contract for Sale does not incorporate the Express Limited Warranty and declares no incorporation with any other document when it specifically states in Section I:

(10) **"This Express Limited Warranty is separate and apart from any contracts between You and Your Builder, including any sales agreement.** It cannot be altered, affected or amended in any manner by any other agreement except only through a formal written agreement signed by the Builder, the Insurer, the Administrator, and You." (StrucSure Home Warranty, Section I (10))

Further, the subject matter of the Contract for Sale and the Express Limited Warranty are fundamentally different, the former is directed to the sale terms, closing date and sets forth binding arbitration, while the latter is directed to claims for any defects or deficiency and provides for arbitration which (as to this plaintiff) is optional.

The general law concerning the incorporation of documents is well illustrated by the following from American Jurisprudence 2d, Contracts:

Where a written contract refers to another instrument and makes the terms and conditions of such other instrument a part of it, the two will be construed together as the agreement of the parties. In order for an instrument to be incorporated into and become part of a contract, the instrument must actually be incorporated; it is not enough for the contract to merely mention the instrument, and the referring language in the contract must demonstrate the parties intended to incorporate all or part of the referenced instrument. Additionally, a reference in a contract to another instrument will incorporate the other instrument only to the extent indicated and for the specific purpose indicated

17A Am.Jur2d Contracts §381.

The suggestion that arbitration may be defeated because the arbitration provision in the Contract for Sale varies in terms from the StrucSure Home Warranty arbitration provision is misplaced. The Court could and where possible should strive to implement the parties' intent as to both instruments. That is not necessary or possible here as the plaintiff never made a claim under the StrucSure Home Warranty so that document never came into play. Moreover, under facts such as the plaintiff presents there never would be any conflict between the two arbitration provisions and such a circumstance was evident at the time of closing from merely reading the documents.

If a homeowner in Plaintiff's position (VA loan) discovered a defect or deficiency in their home they could file a claim with StrucSure Home Warranty, LLC of Denver Colorado and at his option, either enter arbitration or file suit. In this case, however, the plaintiff fully admits he does not assert that anything was deficient or defective about his home and has never filed a claim with the warranty company. Therefore, the StrucSure Warranty itself never came into play. The reality that in order to invoke the provisions of the warranty a claim would need to be made was evident at the outset from a reading of the StrucSure Home Warranty. (StrucSure Home Warranty, Sections 10, 11 and 12) That being so, the plaintiff should not be permitted to avoid the Parties' Contract for Sale's arbitration provision when he has asserted no defect or deficiency in his home. As a result, Mart never filed any claim under the express warranty, the wording of which he seeks to use to support the proposition that the parties never agreed to arbitrate. The plaintiff would have the court accept the proposition that because the parties' executed Contract for Sale arbitration provision varied from the arbitration provision in a warranty issued by a third party, which never came into play in this case because the plaintiff asserts no material defects or deficiencies in his

home, that the parties never agreed to arbitrate at all. This would lead to a result bordering on the absurd which *Bruce v. Blalock, Id.* instructs trial courts to avoid.

The Court also looks to the severity of Plaintiff's damages sought as well as the type of injuries and damages. In this case the plaintiff made clear through counsel that he does not seek damages based upon any claimed defect or deficiency in the construction of his home, loss of use, or that his home is worth less than it would have been because the defendant did something it should not have done or failed to do something it should have done. The damages Plaintiff seeks for breach of contract and related claims are for economic damages in the strictest sense. Specifically, Plaintiff seeks payment for the value of his purported waiver. Such alleged damages do not trigger a potential claim under the plaintiff's StrucSure Home Warranty. Again, this conclusion was evident at the time of the Contract for Sale and the StrucSure Home Warranty merely by a review of its terms.

In South Carolina there is a strong presumption in favor of arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Even if the parties had signed two contracts, only the first containing an arbitration provision, there is authority in this state holding under such a circumstance the arbitration provision would be enforced. *Housing Authority of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328; 588 S.E.2d 617 at 620 (Ct. App. 2003).

The language in the arbitration provision of the StrucSure Limited Warranty that the VA/FHA buyer be allowed the option of judicial resolution instead of arbitration is mandated by 24 CFR 203.204 and Definitions thereto. Defendant points out that only one case in the US judicial system has been located which dealt with these circumstances. *Daugherty v. Poultry Homes of Greater Kansas City*, Case No. 09-2523-KHV, litigated in the U.S. District Court for the District

of Kansas, was an unpublished decision and is not relied upon as precedent here but offered only to illustrate the court's analysis and the relationship of the homeowner and builder with respect to the warranty. The Kansas District Court was presented with similar issues as the case at bar: (December 1, 2010, Order of The Honorable Katherine H. Vsatil, Presiding Judge, U.S. District Court, District of Kansas). In that case homeowners Daugherty argued that because they purchased their home under the VA Home Loan Guarantee Program, the binding arbitration provision in this purchase agreement does not apply. The plaintiffs relied on a HUD regulation which provided that the homeowner would be entitled to arbitration through a nationally recognized dispute settlement organization. According to the HUD regulation the Plan must contain pre-arbitration conciliation provisions at no cost to the homeowner, and provision for judicial resolution of disputes. The regulation cited by the homeowner in this federal case is the same as the one governing the StrucSure Home Warranty in this case. The Court at page 17-18 of its Order stated:

Plaintiffs ignore that this regulation applies to 10-year home protection plans such as Pulte's 10-year limited warranty. (See, 24 CFR §203.200 ("insured 10-year protection plan or Plan) means agreement between homeowner and plan issuer which, among other things, contains warranties regarding construction and structural integrity of dwelling). Plaintiffs offer no rationale for applying this regulation to the purchase agreement. Based on the unambiguous language of the purchase agreement, Plaintiff's claim for breach of that agreement must be arbitrated. The court therefore sustains Defendants' motion to compel arbitration on Plaintiffs' claim for breach of the purchase agreement and dismiss that claim without prejudice.

The District Court goes on to allow the homeowner Plaintiffs to sue, if they so chose, under the express limited warranty but dismissed the claim against the builder and issued its order compelling arbitration as to the purchase agreement. The facts are very similar to the facts presented to the court here. Although not controlling, this reasoning is persuasive.

Further, the Express Limited Warranty is offered by an entirely different entity than Defendant, and the plaintiff does not contend otherwise. StrucSure Home Warranty, LLC is neither an agent, subsidiary nor sister corporation of Defendant. In addition, neither Defendant nor its employees own any interest in the warranty company and exercise no control with respect to its operation.

The Parties' Contract for Sale did not make the StrucSure Home Warranty issued by StrucSure Home Warranty, LLC operative, rather, this warranty was made operative by virtue of the application by Plaintiff and payment of the fee as shown by the letter from the warranty company and Plaintiff's signed application dated December 18, 2015.

Plaintiff's application for the Express Limited Warranty and the Parties' Contract for Sale were not signed contemporaneously by Plaintiff. The Contract was signed on July 18, 2015 while Plaintiff's application for the Express Limited Warranty was signed December 18, 2015. The examination of the Express Limited Warranty attached as an exhibit to Plaintiff's Memorandum in Opposition shows that Great Southern Homes, Inc. is not a party to same. In addition, there is no incorporation clause contained in the Contract for Sale making the warranty a part of the sales contract.

For the foregoing reasons this Court finds that the parties' Contract for Sale did not incorporate the StrucSure Home Warranty, that those two documents served different purposes and contained different subject matter, one from the other. Further, each document is capable of being enforced so as to achieve the intent of the parties depending upon which document is put into play.

B. Application of the Federal Arbitration Act

Plaintiff contends that the Parties' Contract for Sale does not involve interstate commerce because, among other reasons, the Agreement was for the "Purchase of a completed residential dwelling and not the construction". Plaintiff cites *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012). *Bradley* is inapplicable to this case because the parties' contract in *Bradley* did not require the builder/seller to build a home for the purchaser. The *Brentwood Homes* court made it clear that the new construction of a home will always affect interstate commerce making the contract between the parties to such an agreement subject to the FAA.

The Parties in this case, however, clearly indicate on page one of the Contract under the heading **STRUCTURES** that this was a "**BUILDING JOB.**" Further, the Affidavit (filed June 4, 2018) of Shelton Twine, Defendant's records custodian and Vice President of Operations, indicates that the Contract for the construction of Mr. Mart's home was signed on or about July 18, 2015. Construction of this home began on or about August 26, 2015 and was not substantially completed until on or about December 10, 2015. The Certificate of Occupancy issued by the Kershaw County, South Carolina Planning and Zoning Department was not issued until December 10, 2015.

The Parties' Contract required Great Southern Homes, Inc. to build a residence for Plaintiff. Plaintiff states in his Affidavit that it was his understanding that the transaction he entered with Great Southern Homes, Inc. was for the purchase of a newly constructed home and it was not his understanding that he was contracting with Great Southern Homes, Inc. to build a home for him. This is difficult to accept inasmuch as the Contract Mr. Mart signed on July 18, 2015 indicated the property location as Lot 34 in Longview North subdivision. At that time Lot

34 was a vacant lot. In addition, the first page of Mr. Mart's Contract for Sale also indicates that it was a "**BUILDING JOB**".

For purposes of the application of the FAA, the plaintiff's "understanding" now as to what he contracted for in July 2015 is not material. The United States Supreme Court looks to the reality of the transaction. See, *Munoz v. GreenTree 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, 841 (1995) (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.").

Plaintiff argues that the boilerplate Paragraph (i) in the 'Miscellaneous' section of the Parties' Agreement is dispositive as to whether the contract called for construction of Plaintiff's home. Plaintiff ignores the customized entry on the first page of the Contract for Sale which indicates that this was a "**BUILDING JOB**." The customized entries in a contract control over printed boilerplate text. (See, *Broderick Wood Products Co. v. United States*, 195 F.2d 433, 438 (10th Cir. 1952; *Aetna Insurance Co. v. Labor*, 855 D. 192, 179 N.W.2d 271, 273 (1970).) In any event, the U.S. Supreme Court instructs the courts to employ a "commerce in fact" test regardless of any stated intent contained in the contract. Interstate commerce was implicated "in fact" in the construction of this home. (See Affidavits of Twine and Pyle as to the timeline of the contract and

construction of the home as well as purchase orders for materials used in the construction from Pennsylvania and Georgia amount to almost \$36,000.) The timeline, purchase orders, Certificate of Occupancy, affidavits of Twine and Pyle and the contract itself all indicate that Great Southern was required to construct a home for Mart in order to fulfill its obligations under the Parties' Contract for Sale. Finally, the essential issue is not whether the purchase was for a completed home but, rather, under the contract was the seller/builder required to construct same after the contract was signed and, if so, interstate commerce is implicated invoking the application of the Federal Arbitration Act.

While it is true that the Parties are allowed to select state law for the Rules under which the arbitration will be conducted, the arbitration agreements which fall within the purview of the Federal Arbitration Act must still be enforced in a way which is consistent with substantive provisions of the FAA. Under the FAA, an arbitration agreement in a transaction involving interstate commerce "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. For the foregoing reasons this Court finds that the Federal Arbitration Act applies to the Parties' transaction but that they also elected to conduct the arbitration under South Carolina law under the Parties' Contract for Sale arbitration provision and the South Carolina Arbitration Act.

C. The Arbitration Agreement entered by Plaintiff and Great Southern Homes is NOT UNCONSCIONABLE:

Enforcement of an arbitration agreement such as this one before the court must be viewed on its own and not in connection with the other terms of the contract. The Federal Arbitration Act ("FAA") allows 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 Sup. Ct. 1740, 1746, 179 L.Ed.2d 742 (2011). The U.S. Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 Sup. Ct. 1801 (1967) instructed that “[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.” Also see *Greentree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 191 Sup. Ct. 513, 521 (2000). The U.S. Supreme Court removed all doubt about this question in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) in which it stated, “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 issues of the contract’s validity is considered by the arbitrator in the first instance.”

Our Supreme Court has defined unconscionability 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 Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). Our Supreme Court in *Parsons v. John Weiland Homes and Neighborhoods of the Carolinas*, 481 S.C. 1, 12, 791 S.E.2d 128 (2016) instructs that, “unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.”

Meaningful Choice:

Plaintiff offers no fact or circumstance which compelled him to enter into the GSH purchase agreement. While it is true that suitable living accommodations are a necessity, the purchase of a single-family house is not and the purchase of a new residence even less so. In addition, there was no element of surprise in the inclusion of the complained of arbitration clause and this provision was in compliance with the statute and was clearly conspicuous. Nevertheless, from all appearances Plaintiff was in an unequal bargaining position with a commercial entity and was a single customer with no known sophistication in such commercial matters. Therefore, the Court finds that Plaintiff lacked a meaningful choice to arbitrate.

The arbitration agreement itself provides for an unbiased decision by a neutral decision-maker. This binding arbitration provision spells out that the arbitration will be conducted before a three-arbitrator panel, one selected by the plaintiff, one selected by the defendant, and one selected mutually by the arbitrators selected by each party. (*See Parties' Contract for Sale dated July 18, 2015, p. 3*) This arbitration provision does not require either party to serve their demand for arbitration within any specified period for time, imposes no restriction on the amount or type of damages which can be recoverable, allows either party to initiate arbitration and imposes no stay on either party's claims during the process. The Court finds, therefore, that it is fair, equitable, and applies equally to both parties geared towards achieving an unbiased decision by a neutral decision-maker.

ORDER

THEREFORE, THIS COURT ORDERS, ADJUDGES AND DECREES THAT:

1. Defendant's motion to dismiss is granted; and

2. Defendant's motion to compel arbitration is granted and that the arbitration be conducted as set out in the arbitration clause contained in the Parties' July 18, 2015 Contract for Sale and as set forth in the South Carolina Uniform Arbitration Act. §15-48-10, *et Seq.*, S.C. Code of Laws.

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

Columbia, South Carolina
July ____, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Jonathan Mart, on behalf of himself and others similarly situated,	)	Civil Action No. 2018-CP-40-00873
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING GREAT
	)	SOUTHERN HOMES, INC.'S MOTION
Great Southern Homes, Inc.,	)	TO DISMISS AND COMPEL
	)	ARBITRATION
Defendant.	)	

INTRODUCTION

This matter comes before the Court upon Defendant Great Southern Homes, Inc.'s Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel on June 13, 2018 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, exhibits, affidavits, and arguments of counsel and issues the following Order to **DENY** the Defendants Motion to Dismiss and Compel Arbitration.

FACTS

Jonathan Mart is a purchaser of a home from Great Southern Homes, a large builder and seller of new homes in South Carolina. On February 12, 2018, Mart instituted this action, on behalf of himself and others similarly situated, seeking monetary and declaratory relief based upon certain warranty waivers contained in Great Southern Homes' "Contract For Sale." In his Complaint, Mart asks (1) the Court to declare as a matter of law that Great Southern cannot waive the implied warranty of habitability without paying its customers such as Mart adequate consideration for such waiver, and (2) a jury to determine that Mart and all others similarly situated may recover the fair value of the waiver to which Great Southern unjustly enriched itself or extracted in breach of the covenant of good faith and fair dealing in contract. In response to the

Complaint, Great Southern filed the present motion to compel arbitration of the issues raised in the Complaint.

In July 2015, Mart executed Great Southern's proprietary Contract For Sale for the purchase of a new home to be built by Great Southern in Kershaw County. Great Southern's Contract For Sale is in the nature of an adhesion contract because the purchaser of a Great Southern Home has no ability to negotiate its standard terms and, therefore, lacks any meaningful choice as to the terms and conditions of sale. The Contract For Sale 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 Great Southern requires that its purchasers waive is the implied warranty of habitability.

In lieu of these implied warranties, Great Southern's Contract For Sale substitutes an "Express Limited Warranty," under which Great Southern warrants certain express obligations and other express warranty obligations are transferred to a third-party. Particularly, the Express Limited Warranty is an insurance backed warranty administered by StrucSure Home Warranty, LLC. Under this Express Limited Warranty, Great Southern is the "Warrantor" for Years 1 and 2 with respect to defined warranty items and a third-party company, the "Insurer," is the Warrantor for Years 1 through 10 for "major structural defects." StrucSure is the Administrator of the warranty with no direct responsibility to a homeowner for resolution of warranty issues. (Affidavit of Jonathan Mart; Ex. A, Section 1 at p.1 and Section 17 at p. 23.)

Both the Contract For Sale and the Express Limited Warranty have arbitration provisions.

For reference throughout this Order, the Contract For Sale's arbitration clause states in full:

Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et. seq.

(Complaint, Ex. 1.) The Express Limited Warranty's arbitration clause also states in relevant part:

The parties to the Express Limited Warranty intend and agree that **any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to the Express Limited Warranty . . . or the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing,** shall be settled by arbitration in a manner consistent with this arbitration agreement.

(Affidavit of Jonathan Mart; Ex. A at 22 (emphasis added).) There is no provision in the Contract For Sale or the Express Limited Warranty, such as a merger clause, specifying which of these conflicting provisions take precedence over the other.

Plaintiff Mart argues the Contract For Sale and the Express Limited Warranty have broad and sweeping arbitration provisions that apply to all claims related to the Contract For Sale or breach thereof, including the claims set forth in Mart's Complaint. While the arbitration provisions in the Contract For Sale and the Express Limited Warranty both apply to the type of claims set forth in the Complaint, Mart argues that material differences between the two arbitration provisions' processes for arbitration itself demonstrate that Mart and Great Southern had no "meeting of the minds" on the agreement to arbitrate and therefore there is no agreement to arbitrate. Great Southern argues there is no conflict between the Contract For Sale's and Express Limited Warranty's arbitration provisions because the arbitration clause in the Contract For Sale applies to Mart's claims rather than the arbitration provision in the Express Limited Warranty.

For the reasons set forth below, the Court finds the arbitration provisions in the Contract For Sale and the Express Limited Warranty are both applicable to the claims set forth in Mart's Complaint and in direct and material conflict with one another. Accordingly, Mart and Great

Southern did not mutually assent to an agreement to arbitrate, and this court cannot compel arbitration in this matter.

APPLICABLE LAW

Whether a valid arbitration agreement exists is a matter for judicial determination. Partain v. Upstate Auto Grp., 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010); see Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (finding a “gateway matter” to arbitrability is the existence of an agreement to arbitrate). Neither the FAA nor the South Carolina Uniform Arbitration Act require parties to arbitrate when they have not agreed to do so. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”). Instead, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. Weckesser v. Knight Enters. S.E., LLC, 228 F. Supp. 3d 561, 564 (D.S.C. 2017), aff’d, No. 17-1247, 2018 WL 2972665 (4th Cir. June 12, 2018) (“Whether the parties agreed to arbitrate a particular dispute is a question of state law governing contract formation.”) (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); THI of S.C. at Columbia, LLC v. Wiggins, No. CA 3:11-888-CMC, 2011 WL 4089435, at *5 (D.S.C. Sept. 13, 2011) (citing Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir.2005) (and noting that, even when the FAA governs, state law controls whether a dispute is arbitrable which are issues of contract formation). “When the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved *against the drafter* . . . While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the *existence* of a valid arbitration agreement.” Weckesser, 228 F. Supp. 3d at 565 (emphasis in original and internal citations omitted); cf. also Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d

1069, 1073–74 (5th Cir. 2002) (stating the “federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties.” (internal quotation marks omitted)).

“South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original); *see also Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987) (“It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms.”). And where material terms of a contract are inconsistent and conflicting, there is no meeting of the minds. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) (acknowledging where arbitration agreements provided for conflicting and inconsistent material terms, it would be unenforceable for lack of mutual assent thereto). The designation of a specific arbitral forum is a material term of an arbitration agreement. *Grant v. Magnolia Manor–Greenwood, Inc.*, 383 S.C. 125, 128-32, 678 S.E.2d 435, 437-39 (2009) (finding specification of the named arbitrator a material term of the agreement and that where this material term was rendered ineffective, arbitration was no longer required).

Other courts who have addressed the effect of conflicting arbitration agreements also considered material the following aspects of conflicting applicable arbitration agreements. *Ragab v. Howard*, 841 F.3d 1134, 1138 (10th Cir. 2016) (holding conflicting details regarding “(1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys’ fees and on what showing” in the multiple arbitration provisions indicate that there was no meeting of the minds with respect to arbitration”); *NAACP*

of Camden East v. Foulke Management Corp., 421 N.J. Super. 404, 424-25 (N.J. Appellate Div. 2011) (finding “the arbitration provisions . . . too plagued with confusing terms and inconsistencies [related to nature and locale, time limits, and costs for arbitration] to put a reasonable consumer on fair notice of their intended meaning” and therefore “unenforceable for lack of mutual assent”); *In re Willis*, 579 B.R. 381, 390-95 (S.D. Miss. 2017) (finding under Mississippi law parties did not agree to arbitrate where two arbitration agreements applied to same claims but provided for inconsistent terms regarding (1) the number of arbitrators, (2) how the arbitrator(s) will be selected, (3) the notice required to arbitrate, (4) the location of the arbitration, (5) who pays the costs of the arbitration, (6) who would be entitled to attorneys’ fees and on what showing, and (7) when arbitration proceedings need not be initiated).

I. The arbitration clauses in the Contract For Sale and Express Limited Warranty are broad and sweeping and both cover the claims asserted by Mart against Great Southern in this action.

The plain language of the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are broad and sweeping and apply unambiguously to any claims related to the Contract For Sale, including the claims set forth in Mart’s Complaint. *Cf.* (Complaint, Ex. 1 (providing for arbitration of “[a]ny dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof”)), *with* (Mart Aff.; Ex. A at 22 (providing for arbitration of “any and all claims, disputes and controversies by or between the Homeowner, the Builder, arising out of . . . the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing”)). *See also Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (S.C. 2016) (holding that scope of arbitration clause in warranty for new home purchase was not limited to claims covered by warranty, even though clause was located in warranty, and

thus scope of clause was broad enough to encompass homeowners' claims for breach of purchase agreement.)

Great Southern argues that even if the two provisions broadly apply to the type of claims set forth in the Complaint, Great Southern is only a party to the Contract For Sale and the Express Limited Warranty's arbitration provision is therefore irrelevant to the court's determination of the arbitrability of this dispute. The Contract For Sale to which Great Southern admits it is a party, however, expressly incorporates the Express Limited Warranty into its terms. The Contract For Sale references the Express Limited Warranty, and provides that "[t]he [Express] Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or implied" by law in Great Southern's sale of a new home to Mart. (Compl. Ex. 1, Limited Warranty section.) The Contract For Sale further clarifies that Great Southern is the source and supplier of the Express Limited Warranty. "*Seller [Great Southern] shall furnish Purchaser with a limited warranty issued by a warranty company approved by the SC Real Estate Commission.*" (Compl. Ex. 1, Contract For Sale, Limited Warranty section (emphasis added); *see also id.* at "Warranty Service Acknowledgement ("*Great Southern homes provides a limited warranty . . . for the first year of occupancy from the date of closing.*") (emphasis added); *id.* at "Miscellaneous" section (n)(ii) ("*Purchaser hereby refuses and relinquishes . . . [a]ny claims for repairs to the Property except as specifically covered by Seller's limited home warranty.*" (emphasis added).)) The Express Limited Warranty also confirms that Great Southern provides the Express Limited Warranty to Mart. (Mart Aff.; Ex. A, Section 1 at 1 ("*Your builder . . . sold You a home that includes the Express Limited Warranty protection.*")

Even if the court considered the Contract For Sale and Express Limited Warranty as separate agreements, moreover, Great Southern is a party to the Express Limited Warranty and the

Contract For Sale and Express Limited Warranty must be construed together. While StrucSure may issue and administer the Express Limited Warranty in the technical, administrative sense, Great Southern is the *provider, supplier, and source* of the Express Limited Warranty. Admittedly, Great Southern knew and understood the terms of the Express Limited Warranty, and that its terms expressly made Great Southern, the Builder, a party thereto as a Warrantor of certain workmanship issues related to the home. (*Id.* section 1(8) at 1 (“The Builder is the Warrantor in years (1) for Workmanship/Materials and years (1) and (2) for Delivery Portions of Systems.”)); *see also id.* (“Your builder is a member of the StrucSure home warranty program”) And pursuant to the Express Limited Warranty, Great Southern, the Builder and Warrantor, agreed to be bound by its terms. (*Id.* at 1(15) at 1 (stating the Express Limited Warranty is “binding on the Builder [Great Southern] and You [Mart].”)) Where agreements are negotiated and executed by the same parties during the same transaction for the same purpose (here, providing for the terms applicable to the sale of a new home) they must be construed together under South Carolina law. *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20, 24 (1977) (holding “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together”). Both the Contract For Sale’s and the Express Limited Warranty’s arbitration provisions therefore apply to Mart’s claims.

II. Material terms in the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are inconsistent and therefore Great Southern and Mart had no meeting of the minds on an agreement to arbitrate the claims set forth in the Complaint.

The Contract For Sale’s and Express Limited Warranty’s arbitration provisions conflict in several material respects, including, but not necessarily limited to (1) the law governing and the forum for arbitration; (2) the selection and number of arbitrators to determine the matter; (3) post-

award rights and remedies; and (4) the arbitral costs and fees. Under these circumstances, there can be no agreement to arbitrate between Mart and Great Southern.

a. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting governing law and forums.

Under the Contract For Sale, arbitration will be conducted pursuant to the South Carolina Uniform Arbitration Act ("SCUAA") and rules thereunder. (Complaint, Ex. 1 at "Arbitration".) The Express Limited Warranty on the other hand requires using an independent arbitration service such as Construction Dispute Resolution Services and the procedures by that independent arbitration service and the Federal Arbitration Act. (Mart Aff.; Ex. A, Section 15 at p. 22.) The SCUAA, moreover, provides parties certain additional rights as to the conduct of the arbitration hearing and pre-hearing discovery that are not found in the Federal Arbitration Act. *Cf.* S.C. Code Ann. §§15-48-50-80, *with* 9 U.S.C.A. §§1-16. Therefore, the two arbitration provisions' governing law and forums explicitly differ in substance, where the SCUAA provides the parties more procedural and pre-hearing discovery rights than those rights provided under the FAA, all of which could substantially affect the outcome of the proceeding.

b. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for a conflicting number of arbitrators and process for selecting the same.

The Contract For Sale requires proceeding with three arbitrators with each party appointing an arbitrator and those two arbitrators appointing a third arbitrator. (Complaint, Ex. 1 at "Arbitration".) The Express Limited Warranty contemplates utilizing only a single arbitrator and further states that in the event of a conflict between the rules of the independent arbitration service and the Federal Arbitration Act as to arbitrator selection, the Federal Arbitration Act would control

under which the judge appoints a single arbitrator. *See* 9 U.S.C.A. § 5. (Mart Aff.; Ex. A, Section 15 at p. 22.)

c. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting post-award remedies.

The Express Limited Warranty states that “[i]f the Homeowner disagrees with the Arbitrator’s decision, s/he has the right to appeal it.” (Mart Aff.; Ex. A, Section 16 at p. 23.) The Contract for Sale, following the South Carolina Uniform Arbitration Act, does not provide such unlimited, broad right to appeal the merits of an award on any ground. *See* S.C. Code Ann. §§ 15-48-120-200 (providing limited grounds and specific procedures upon which a court can review and vacate or modify an arbitration award).

d. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting provisions related to arbitration costs and arbitrator fees.

Under the Contract for Sale, the South Carolina Uniform Arbitration Act allows arbitrators to determine allocation for costs and fees in the award. (Complaint, Ex. 1 at “Arbitration.”) However, under the Express Limited Warranty, the Homeowner bears the initial burden of all arbitration costs. (Mart Aff.; Ex. A, Section 15 at p. 22.)

With no merger clause in either the Contract For Sale or Express Limited Warranty, there is no method to determine which of these conflicting arbitration provisions control and govern the procedure for arbitrating the claims Mart asserts against Great Southern. No South Carolina court, moreover, has specifically ruled upon arbitration provisions between the same parties and applicable to the same claims which contain expressly conflicting arbitration terms. Yet, several South Carolina courts have acknowledged, albeit in dicta, that that such circumstance precludes any meeting of the minds on the issue. *Cf. York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83-

84, 749 S.E.2d 139, 147-48 (Ct. App. 2013) (finding that two arbitration provisions in separate contracts were not inconsistent and conflicting to make agreements unenforceable). As noted above, other jurisdictions faced with conflicting arbitration agreements similar to the conflicting arbitration agreements present here, ruled the parties failed to mutually assent to any agreement to arbitrate. *See In re Willis*, 579 B.R. 381 (Bankr. S.D. Miss. 2017) (denying motion to compel arbitration when conflicting arbitration provisions indicate there was no meeting of the minds with respect to arbitration); *see also Ragab v. Howard*, 841 F.3d 1134, 1137-39 (10th Cir. 2016) (affirming on appeal the same); *Basulto v. Hialeah Automotive*, 141 So. 3d 1145, 1155-57 (Fla. 2014) (affirming on appeal the same); *NAACP of Camden Cnty. East v. Foulke Mgmt. Corp.*, 421 N.J. Super. 404, 437-38 (2011) (holding that “the cumulative effect of the many inconsistencies and unclear passages in the arbitration terms within the [contract documents] compel us to declare them unenforceable for lack of mutual assent.”). The Court concurs with the holdings of the courts in other jurisdictions and likewise finds that the conflicting arbitration provisions present here evidence a lack of mutual assent to arbitration and, therefore, there is no valid arbitration agreement for this Court to enforce in this case.

III. The HUD regulations governing warranty plans such as the Express Limited Warranty are not relevant to the Court’s analysis in ruling on the Motion to Dismiss and Compel Arbitration.

Great Southern argues HUD regulations governing VA loans, such as that obtained by Mart, mandate that home warranty plans such as the Express Limited Warranty provide for arbitration. Because the arbitration provision is provided for by federal mandate in the Express Limited Warranty, Great Southern further contends this Court cannot declare that arbitration provision invalid. For the reasons explained below, the Court does not find its ruling in this matter in contravention of any federal mandate provided in the HUD regulations cited by Great Southern.

First, as Great Southern stressed to the Court at the hearing on this motion, Mart's claims do not relate to the certain defined claims involving workmanship and material defects to which the HUD regulations direct its mandatory provision of arbitration. *See* 24 C.F.R. §203.200-209. Mart's claims relate to Great Southern's breach of the covenant of good faith and fair dealing or unjust enrichment of itself in extracting a waiver of the implied warranty of habitability without separate consideration to its homebuyers in the Contract For Sale. Nothing in the HUD regulations, moreover, require Great Southern to include the broad and sweeping arbitration clause found in the Express Limited Warranty, which applies to Mart's claims in this instance. *See id.* Great Southern's decision to use this Express Limited Warranty with such a broad and sweeping arbitration clause that covers matters outside of the terms of the warranty itself is a contractual decision of its own making—not any HUD requirement. The HUD regulations therefore have no application to the court's consideration of the parties' agreement to arbitrate the claims asserted in this case.

Notably too, HUD's regulations require that warranties include not only an arbitration provision but also an "opt out" provision allowing judicial resolution of warranty claims. HUD regulations therefore wanted to assure that veterans have the contractual right to choose either an arbitral or judicial forum to resolve warranty claims. Thus, to the extent the HUD regulations have any import to this matter, this court cannot grant Great Southern's Motion to Compel, as such order would contravene the dictate of the HUD regulations giving the choice of judicial or arbitral forums to veterans, not homebuilders or warrantors. And here, it appears obviously that Mart has chosen the judicial forum.

For the reasons provided above, moreover, *Daugherty v. Pulte Homes of Greater Kansas City*, Case No. 09-2523-KHV, relied on by Great Southern to encourage the court's grant of its

motion to compel is inapplicable to this case. Unlike this case, *Daugherty* did not involve the issue of conflicting arbitration clauses within the purchase agreement and the builder's limited warranty which covered the same scope of claims. *See id.*

South Carolina law is clear that an arbitration provision in a home warranty plan can apply to claims arising under the purchase agreement. *See Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (S.C. 2016) (holding that scope of arbitration clause in warranty for new home purchase was not limited to claims covered by warranty, even though clause was located in warranty, and thus scope of clause was broad enough to encompass homeowners' claims for breach of purchase agreement). As was the case in *Parsons*, the arbitration clause in the Express Limited Warranty is broad in scope and expressly encompasses claims relating to breach of the parties' purchase agreement. It is with respect to the claims by Mart arising out of Great Southern's Contract For Sale, that an irreconcilable conflict exists as to which arbitration clause governs such claims and the Court's ruling in this matter is limited to such claims.

Lastly, the Court notes that other such HUD regulated home warranty plans are available for a builder to use including plans issued by the builder itself. *See* 24 C.F.R. § 203.203(a)(1). However, Great Southern was the party that elected to have the StrucSure Express Limited Warranty serve as the sole and exclusive remedy for a purchaser of one of its homes. *See Weckesser*, 228 F. Supp. 3d at 565 ("When the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved *against the drafter* . . ."). The Court is also mindful that the purchaser of a new home, such as Mart, often has no ability to negotiate or bargain for any other warranty with respect to the sale of the home. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989). Therefore, because the conflict in

the arbitration clauses was caused by Great Southern's drafting of its Contract For Sale and by its election to utilize the StrucSure Express Limited Warranty as a purchaser's sole and exclusive remedy for contract matters, such conflicts should be resolved in favor of purchasers such as Mart. *See Weckesser v. Knight Enterprises S.E., LLC*, 228 F.Supp.3d 561, 565 (D.S.C. 2017).

CONCLUSION

The arbitration clauses contained in the Contract For Sale and the Express Limited Warranty both cover claims arising out of or relating to the Contract For Sale. Furthermore, these arbitration clauses are in conflict in numerous material respects. Accordingly, the Court finds that there was no mutual assent between Mart and Great Southern as to any arbitration procedure; and, therefore, there was no meeting of the minds as to an agreement to arbitrate as to claims arising out of or related to the Contract For Sale. For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

IT IS SO ORDERED.

Columbia, South Carolina
_____, 2018

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

BRUNER, POWELL, WALL & MULLINS, LLC

ROA 333

WARREN C. POWELL, JR., P.A.*
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August 31, 2018

VIA HAND DELIVERY

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

*Re: Jonathan Mart, on behalf of himself and others similarly situated v. Great Southern Homes, Inc.
Civil Action No. 2018-CP-40-00873
Our File No. 9-3007.1*

Dear Ms. Kitchings:

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Pursuant to SCACR 203, enclosed please find for filing the following: **AUG 31 2018**

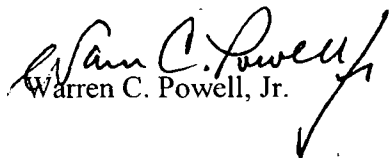
SC Court of Appeals

1. Notice of appeal;
2. Proof of service;
3. A copy of the Order of the Honorable DeAndrea Gist Benjamin, filed July 26, 2018 which is the subject of our appeal;
4. A copy of our letter to the court reporter, Eileen Butler, requesting the hearing transcript; and
5. Our firm's check in the amount of \$100.00 to cover the filing fee.

Please clock in our copies and return them with our courier.

With my kindest regards, I am,

Sincerely,


Warren C. Powell, Jr.

WCPjr/ljf

cc: Charles H. McDonald, Esquire

ROA 333

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. 2018-CP-40-00873

RECEIVED
AUG 31 2018
SC Court of Appeals

Johnathan Mart, on behalf of himself and others similarly situated, ... Respondent,

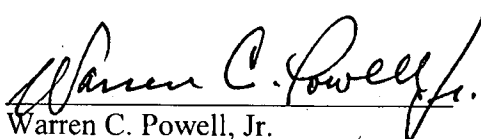
v.

Great Southern Homes, Inc., ... Appellant,

NOTICE OF APPEAL

Great Southern Homes, Inc. appeals the order of the Honorable DeAndrea Gist Benjamin dated July 26, 2018. Appellant received written notice of entry of this order on July 26, 2018.

August 21, 2018


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AUG 31 2018

SC Court of Appeals

INTRODUCTION

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may recover the fair value of the waiver. In response to the Complaint, Great Southern filed the present motion to compel arbitration of the issues raised in the Complaint.

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In lieu of these implied warranties, Great Southern's Contract For Sale substitutes an "Express Limited Warranty," under which Great Southern warrants certain express obligations and other express warranty obligations are transferred to a third-party. Particularly, the Express Limited Warranty is an insurance backed warranty administered by StrucSure Home Warranty, LLC. Under this Express Limited Warranty, Great Southern is the "Warrantor" for Years 1 and 2 with respect to defined warranty items and a third-party company, the "Insurer," is the Warrantor for Years 1 through 10 for "major structural defects." StrucSure is the Administrator of the warranty with no direct responsibility to a homeowner for resolution of warranty issues. Aff. Jonathan Mart, Exh. A, Section 1, Section 17).

Both the Contract For Sale and the Express Limited Warranty contain arbitration provisions. For reference throughout this Order, the Contract For Sale's arbitration clause states in full:

Any dispute between the parties hereto arising out of this contract, related to the contract 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 arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et. seq.

Compl., Exh. 1. The Express Limited Warranty's arbitration clause also states in relevant part:

The parties to the Express Limited Warranty intend and agree that any and all claims, disputes and controversies by or between the Homeowner, the Builder, the Administrator, and/or the Insurer, or any combination of the foregoing, arising out of or related to the Express Limited Warranty . . . or the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing, shall be settled by arbitration in a manner consistent with this arbitration agreement.

Aff. Jonathan Mart, Exh. A at pg. 22 (emphasis added). There is no provision in the Contract For Sale or the Express Limited Warranty, such as a merger clause, specifying which of these conflicting provisions take precedent over the other.

Plaintiff Mart argues the Contract For Sale and the Express Limited Warranty have broad and sweeping arbitration provisions that apply to all claims related to the Contract For Sale or breach thereof, including the claims set forth in Mart's Complaint. Mart argues that material differences exist between the Contract For Sale's arbitration provision and the Express Limited Warranty's arbitration provision which demonstrates that Mart and Great Southern had no "meeting of the minds" on the agreement to arbitrate. With no meeting of the minds there is no agreement to arbitrate. Great Southern argues there is no conflict between the Contract For Sale's and Express Limited Warranty's arbitration provisions because the arbitration clause in the Contract For Sale applies to Mart's claims rather than the arbitration provision in the Express Limited Warranty.

For the reasons set forth below, the Court finds the arbitration provisions in the Contract For Sale and the Express Limited Warranty are both applicable to the claims set forth in Mart's Complaint and directly and materially conflict with one another. Accordingly, Mart and Great Southern did not mutually assent to an agreement to arbitrate, and this court cannot compel arbitration in this matter.

APPLICABLE LAW

Whether a valid arbitration agreement exists is a matter for judicial determination. *Partain v. Upstate Auto Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010); see *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (finding a “gateway matter” to arbitrability is the existence of an agreement to arbitrate). Neither the FAA nor the South Carolina Uniform Arbitration Act require parties to arbitrate when they have not agreed to do so. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so.”). Instead, state contract law determines whether parties entered into a valid agreement to arbitrate a set of claims. *Weckesser v. Knight Enters. LLC*, 228 F. Supp. 3d 561, 564 (D.S.C. 2017) (“Whether the parties agreed to arbitrate a particular dispute is a question of state law governing contract formation.”). “When the parties dispute whether a valid arbitration agreement exists, any ambiguities must be resolved against the drafter. *Id.* at 565. While there is a presumption in favor of arbitration, this presumption disappears when the parties dispute the existence of a valid arbitration agreement. *Id.*”

“South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). Where material terms of a contract are inconsistent and conflicting, there is no meeting of the minds. See *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) (acknowledging where arbitration agreements provided for conflicting and inconsistent material terms, it would be unenforceable for lack of mutual assent thereto). The designation of a specific arbitral forum is a material term of an arbitration agreement. *Grant v.*

Magnolia Manor–Greenwood, Inc., 383 S.C. 125, 128-32, 678 S.E.2d 435, 437-39 (2009) (finding specification of the named arbitrator a material term of the agreement and that where this material term was rendered ineffective, arbitration was no longer required).

Other courts who have addressed the effect of conflicting arbitration agreements also considered material the following aspects of conflicting applicable arbitration agreements. *Ragab v. Howard*, 841 F.3d 1134, 1138 (10th Cir. 2016) (holding conflicting details in the multiple arbitration provisions regarding “(1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys’ fees indicate that there was no meeting of the minds with respect to arbitration”); see *NAACP of Camden East v. Foulke Management Corp.*, 421 N.J. Super. 404, 424-25 (N.J. Appellate Div. 2011) (finding “the arbitration provisions, . . . too plagued with confusing terms and inconsistencies [related to nature and locale, time limits, and costs for arbitration] to put a reasonable consumer on fair notice of their intended meaning” and therefore “unenforceable for lack of mutual assent”); *In re Willis*, 579 B.R. 381, 390-95 (S.D. Miss. 2017) (finding under Mississippi law parties did not agree to arbitrate where two arbitration agreements applied to same claims but provided for inconsistent terms regarding (1) the number of arbitrators, (2) how the arbitrator(s) will be selected, (3) the notice required to arbitrate, (4) the location of the arbitration, (5) who pays the costs of the arbitration, (6) who would be entitled to attorneys’ fees and on what showing, and (7) when arbitration proceedings need not be initiated).

I. The arbitration clauses in the Contract For Sale and Express Limited Warranty are broad and sweeping and both cover the claims asserted by Mart against Great Southern in this action.

The plain language of the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are broad and sweeping and apply unambiguously to any claims related to the Contract For Sale, including the claims set forth in Mart’s Complaint. *Compare* Compl., Exh. 1 (providing

for arbitration of “[a]ny dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof”), with Aff. Jonathan Mart, Exh. A at pg. 22 (providing for arbitration of “any and all claims, disputes and controversies by or between the Homeowner, the Builder, arising out of . . . the sale of the subject home by the Builder, including without limitation, any claim of breach of contract . . . or breach of any alleged duty of good faith and fair dealing”). See also *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (2016).

Great Southern argues that even if the two provisions broadly apply to the type of claims set forth in the Complaint, Great Southern is only a party to the Contract For Sale and the Express Limited Warranty’s arbitration provision is irrelevant to the court’s determination of the arbitrability of this dispute. However, the Contract For Sale to which Great Southern admits it is a party, expressly incorporates the Express Limited Warranty into its terms. The Contract For Sale references the Express Limited Warranty and provides that “[t]he [Express] Limited Warranty issued to the Purchaser shall be in lieu of all other warranties, express or implied” by law. Compl. Exh. 1 at Limited Warranty. The Contract For Sale further clarifies that Great Southern is the source and supplier of the Express Limited Warranty, stating “[Great Southern] shall furnish [Mart] with a limited warranty issued by a warranty company approved by the SC Real Estate Commission.” *Id.* The Express Limited Warranty also confirms that Great Southern provides the Express Limited Warranty to Mart. See Aff. Jonathan Mart, Exh. A, Section 1 (“Your builder . . . sold You a home that includes the Express Limited Warranty protection.”).

Even if the court considered the Contract For Sale and Express Limited Warranty as separate agreements, moreover, Great Southern is a party to the Express Limited Warranty and the Contract For Sale and Express Limited Warranty must be construed together. While StrucSure

may issue and administer the Express Limited Warranty in the technical, administrative sense, Great Southern is the *provider, supplier, and source* of the Express Limited Warranty. Admittedly, Great Southern knew and understood the terms of the Express Limited Warranty and that its terms expressly made Great Southern, the Builder, a party thereto as a Warrantor of certain workmanship issues related to the home. *Id.* (stating “[t]he Builder is the Warrantor in years (1) for Workmanship/Materials and years (1) and (2) for Delivery Portions of Systems.”). Pursuant to the Express Limited Warranty, Great Southern, the Builder and Warrantor, agreed to be bound by its terms. *Id.* (stating the Express Limited Warranty is binding on [Great Southern] and [Mart]). Both the Contract For Sale’s and the Express Limited Warranty’s arbitration provisions therefore apply to Mart’s claims.

II. Material terms in the Contract For Sale’s and Express Limited Warranty’s arbitration provisions are inconsistent and therefore Great Southern and Mart had no meeting of the minds on an agreement to arbitrate the claims set forth in the Complaint.

The Contract For Sale’s and Express Limited Warranty’s arbitration provisions conflict in several material respects, including, but not necessarily limited to (1) the law governing and the forum for arbitration; (2) the selection and number of arbitrators to determine the matter; (3) post-award rights and remedies; and (4) the arbitral costs and fees. Under these circumstances, there can be no agreement to arbitrate between Mart and Great Southern.

a. The Contract For Sale’s and Express Limited Warranty’s arbitration provisions provide for conflicting governing law and forums.

Under the Contract For Sale, arbitration will be conducted pursuant to the South Carolina Uniform Arbitration Act (“SCUAA”) and rules thereunder. Compl., Exh. 1 at Arbitration. The Express Limited Warranty on the other hand requires using an independent arbitration service such as Construction Dispute Resolution Services and the procedures by that independent arbitration

service and the Federal Arbitration Act. Aff. Jonathan Mart, Exh. A, Section 15. The SCUAA, moreover, provides parties certain additional rights as to the conduct of the arbitration hearing and pre-hearing discovery that are not found in the Federal Arbitration Act. *Compare* S.C. Code Ann. §§15-48-50-80, with 9 U.S.C.A. §§1-16. Therefore, the two arbitration provisions' governing law and forums explicitly differ in substance, where the SCUAA provides the parties more procedural and pre-hearing discovery rights than those rights provided under the FAA, all of which could substantially affect the outcome of the proceeding.

- b. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for a conflicting number of arbitrators and process for selecting the same.**

The Contract For Sale requires proceeding with three arbitrators with each party appointing an arbitrator and those two arbitrators appointing a third arbitrator. Compl., Exh. 1 at Arbitration. The Express Limited Warranty contemplates utilizing only a single arbitrator and further states that in the event of a conflict between the rules of the independent arbitration service and the Federal Arbitration Act as to arbitrator selection, the Federal Arbitration Act would control under which the judge appoints a single arbitrator. *See* 9 U.S.C.A. § 5; Aff. Jonathan Mart, Exh. A, Section 15.

- c. The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting post-award remedies.**

The Express Limited Warranty states that "[i]f the Homeowner disagrees with the Arbitrator's decision, s/he has the right to appeal it." Aff. Jonathan Mart, Exh. A, Section 16. The Contract for Sale, following the South Carolina Uniform Arbitration Act, does not provide such unlimited, broad right to appeal the merits of an award on any ground. *See* S.C. Code Ann. §§ 15-48-120-200 (providing limited grounds and specific procedures upon which a court can review

and vacate or modify an arbitration award).

- d. **The Contract For Sale's and Express Limited Warranty's arbitration provisions provide for conflicting provisions related to arbitration costs and arbitrator fees.**

Under the Contract for Sale, the SCUAA allows arbitrators to determine allocation for costs and fees in the award. Compl. Exh. 1 at Arbitration. However, under the Express Limited Warranty, the Homeowner bears the initial burden of all arbitration costs. Aff. Jonathan Mart, Exh. A, Section 15.

With no merger clause in either the Contract For Sale or Express Limited Warranty, there is no method to determine which of these conflicting arbitration provisions control and govern the procedure for arbitrating the claims Mart asserts against Great Southern. No South Carolina court, moreover, has specifically ruled upon arbitration provisions between the same parties and applicable to the same claims which contain expressly conflicting arbitration terms. Yet, several South Carolina courts have acknowledged in dicta that that such circumstance precludes any meeting of the minds on the issue. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83-84, 749 S.E.2d 139, 147-48 (Ct. App. 2013) (finding that two arbitration provisions in separate contracts were not inconsistent and conflicting to make agreements unenforceable). The Court finds that the conflicting arbitration provisions present here evidence a lack of mutual assent to arbitration and, therefore, there is no valid arbitration agreement for this Court to enforce in this case.

- III. **The HUD regulations governing warranty plans such as the Express Limited Warranty are not relevant to the Court's analysis in ruling on the Motion to Dismiss and Compel Arbitration.**

Great Southern argues HUD regulations governing VA loans, such as that obtained by Mart, mandate that home warranty plans such as the Express Limited Warranty provide for

arbitration. Great Southern further contends that this Court cannot declare that arbitration provision contained in the Express Limited Warranty invalid because the arbitration provision is provided for by federal mandate. For the reasons explained below, the Court does not find its ruling in this matter in contravention of any federal mandate provided in the HUD regulations cited by Great Southern.

First, as Great Southern stressed to the Court at the hearing on this motion, Mart's claims do not relate to the certain defined claims involving workmanship and material defects to which the HUD regulations direct its mandatory provision of arbitration. *See* 24 C.F.R. §203.200-209. Mart's claims relate to Great Southern's breach of the covenant of good faith and fair dealing or unjust enrichment of itself in extracting a waiver of the implied warranty of habitability without separate consideration to its homebuyers in the Contract For Sale. Nothing in the HUD regulations require Great Southern to include the broad and sweeping arbitration clause found in the Express Limited Warranty, which applies to Mart's claims in this instance. *See id.* Great Southern's decision to use this Express Limited Warranty with such a broad and sweeping arbitration clause that covers matters outside of the terms of the warranty itself is a contractual decision of its own making—not any HUD requirement. The HUD regulations therefore have no application to the court's consideration of the parties' agreement to arbitrate the claims asserted in this case.

Further, *Daugherty v. Pulte Homes of Greater Kansas City*, relied on by Great Southern to encourage the court's grant of its motion to compel is inapplicable to this case. No. 09-2523-KHV, 2010 WL 4963041 (D. Kan. June 11, 2018). In this case, *Daugherty* did not involve the issue of conflicting arbitration clauses within the purchase agreement and the builder's limited warranty which covered the same scope of claims. *See id.* South Carolina law is clear that an arbitration provision in a home warranty plan can apply to claims arising under the purchase agreement. *See*

Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 7-9, 791 S.E.2d 128, 131-32 (S.C. 2016).

Therefore, because the conflict in the arbitration clauses was caused by Great Southern's drafting of its Contract For Sale and by its election to utilize the StrucSure Express Limited Warranty as a purchaser's sole and exclusive remedy for contract matters, such conflicts should be resolved in favor of purchasers such as Mart. *See Weckesser v. Knight Enterprises S.E., LLC*, 228 F.Supp.3d 561, 565 (D.S.C. 2017).

CONCLUSION

The arbitration clauses contained in the Contract For Sale and the Express Limited Warranty both cover claims arising out of or relating to the Contract For Sale. Furthermore, these arbitration clauses are in conflict in numerous material respects. Accordingly, the Court finds that there was no mutual assent between Mart and Great Southern as to any arbitration procedure; and, therefore, there was no meeting of the minds as to an agreement to arbitrate as to claims arising out of or related to the Contract For Sale. For the reasons stated above, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

IT IS SO ORDERED.

Columbia, South Carolina
_____, 2018

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



Richland Common Pleas

Case Caption: Jonathan Mart vs Great Southern Homes Inc

Case Number: 2018CP4000873

Type: Order/Other

So Ordered

s/DeAndrea Gist Benjamin, #2161

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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. 2018-CP-40-00873

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SC Court of Appeals

Johnathan Mart, on behalf of himself and others similarly situated, ... Respondent,

v.

Great Southern Homes, Inc., ... Appellant,

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 21, 2018, addressed to Respondent's attorney of record, Charles H. McDonald.

August 21, 2018

Warren C. Powell, Jr.

s/Warren C. Powell, Jr.

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CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material, pursuant to Rule 210, SCACR.



Chelsea J. Clark, Esquire

May 22^d, 2019
Columbia, South Carolina

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