No. 24-

IN THE

Supreme Court of the United States

MUNGO HOMES, LLC,

Petitioner,

v.

AMANDA LEIGH HUSKINS AND JAY R. HUSKINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Carolina Supreme Court erred in applying a severability rule that disfavors arbitration and by creating a state-specific public policy defense to arbitration that conflicts with the FAA, such that enforcement of arbitration agreements in the State now turns on whether enforcement is sought in state or federal court.

PARTIES TO THE PROCEEDING

Petitioner is Mungo Homes, LLC.

Respondents are Amanda Leigh Huskins and Jay R. Huskins.

RULE 29.6 DISCLOSURE

Petitioner Mungo Homes, LLC is not a publicly held company. No publicly held company owns ten percent or more of Mungo Homes, LLC.

RELATED PROCEEDINGS

Amanda Leigh Huskins and Jay R. Huskins v. Mungo Homes, LLC, Case No. 2017-CP-40-03697, Richland County Court of Common Pleas, Judgment entered March 13, 2018.

Amanda Leigh Huskins and Jay R. Huskins v. Mungo Homes, LLC, Court of Appeals of South Carolina, Appellate Case No. 2018-000889, Judgment entered June 1, 2022, refiled with a substitute opinion on February 15, 2023.

Amanda Leigh Huskins and Jay R. Huskins v. Mungo Homes, LLC, South Carolina Supreme Court, Appellate Case No. 2023-000452, Judgment entered December 11, 2024.

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INTRODUCTION

This petition presents the Court with a State's highest appellate court that continues to demonstrate the precise form of judicial hostility towards enforcing arbitration agreements that Congress designed the Federal Arbitration Act ("FAA") to avoid, creating a situation where choice of state or federal jurisdiction within the State will determine enforcement of arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Here, the South Carolina Supreme Court invalidated an arbitration clause, indisputably agreed to by the parties to a real estate contract, in its entirety due to an ancillary provision in the same paragraph that purported to shorten the limitations period in which to bring a claim, in violation of a state statute. In direct violation of 9 U.S.C. § 2 and this Court's jurisprudence, the South Carolina Supreme Court struck the entire arbitration agreement, holding that South Carolina's public policy "protect[ed] home buyers from unscrupulous and overreaching terms" and that clauses including such terms were unenforceable and not severable from the rest of the contract. Appendix ("App.") 7a.

This decision directly conflicts with federal law and this Court's binding precedent holding that "an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Indeed, as this Court has explained, "[§ 2 of the FAA] does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion* at 334. The Supremacy Clause likewise mandates that state law must give way to federal law. *See Perry v. Thomas*, 482 U.S. 483, 491 (1987).

Yet despite this Court's long binding precedent, the South Carolina Supreme Court has continuously ignored the FAA and invalidated arbitration agreements under the guise of State "public policy;" "public policy" that conflicts with Congress' policy goals in enacting the FAA and which has been disproportionately applied to refuse enforcement of arbitration agreements. *See e.g. Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016).

Without this Court's intervention, State high courts will continue to ignore the FAA and the decisions of this Court that should be binding upon those State courts. In the case at bar, the South Carolina Supreme Court has demonstrated this to be true. The South Carolina Supreme Court has continued to strike down arbitration agreements under the assertion that they were not enforceable under "generally applicable contract defenses." *See Concepcion* at 339 (noting that § 2's "savings clause" applies to "generally applicable contract defenses"); *but see Id.* at 341-42 (explaining that the FAA may preempt generally applicable contract defenses "that would have a disproportionate impact on arbitration"); *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 581 U.S. 246, 251-52 (2017) (stating that the FAA "also displaces any rule that covertly accomplishes the same objective [discriminating against arbitration] by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements[]"). For instance, a defense such as lack of a severability clause—a defense which has not been applied to the enforcement of any other type of contract in South Carolina.

While the South Carolina Supreme Court's application of its inconsistent severability rules disproportionately impacts valid arbitration agreements, *see Concepcion* at 342, its refusal to recognize the FAA is even more glaring as the Court failed to even mention the FAA in its opinion in the current matter, despite the case unquestionably concerning a contract that involves interstate commerce. *See* App. 1a-8a; *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (acknowledging that a transaction involving a multistate company and materials that came from outside the state involved interstate commerce); *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 791 S.E.2d 128 (2016) (recognizing the applicability of the FAA to a real estate contract involving a newly-built home). In doing so, it deliberately disregarded this Court's directive that "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of the Act. Consequently, the judges of every State must follow it[]"). *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015) (citing U.S. Const., Art. VI, cl. 2).

To further demonstrate the South Carolina Supreme Court's increasing indifference to the FAA and its hostility toward arbitration agreements, the South Carolina Supreme Court has, in the last five years, incorrectly declared that there is no federal policy favoring arbitration. *See Palmetto Constr. Grp. LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("There is no . . . public policy– federal or state– 'favoring' arbitration"). Indeed, after disposition of the case at bar, the South Carolina Supreme Court once again reaffirmed this misstatement of federal law. *See Lampo v. Amedisys Holdings, LLC et al.*, Op. No. 28265 (S.C. Sup.

Ct. filed March 5, 2025) (Howard Adv. Sh. No. 10. at 20) ("[f]irst, [the respondent]—like many parties and some of our courts—continues to argue there is a federal and state 'policy favoring arbitration.' We remind our litigants and lower courts that we dispensed with this incorrect notion almost four years ago[]"). These statements directly conflict with this Court's admonition that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985) (noting the "emphatic federal policy in favor of arbitral dispute resolution").[1]

By refusing to enforce valid arbitration agreements on the basis of a state public policy that contradicts federal

1. These statements also conflict with years of South Carolina precedent which properly acknowledged the federal policy recognized time and time again by this Court and further demonstrate a recent movement by the South Carolina Supreme Court to thwart the FAA and impose their own limitation on the ability of parties to contract to arbitrate. *See e.g. Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7, 791 S.E.2d 128, 131 (2016) ("[t]he policy of the United States and of South Carolina is to favor arbitration of disputes[]"); (*Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 669 (2007) (certiorari denied by *MSA of Myrtle Beach, Inc. v. Simpson*, 552 U.S. 990 (2007)) ("[t]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor the arbitration of disputes"); *Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) ("[w]e must address questions of arbitrability with a healthy regard for the federal policy favoring arbitration").

law, the South Carolina Supreme Court has directly run afoul of the FAA and this Court's interpretation thereof.

Finally, the South Carolina Supreme Court's opinion has created a conflict between the federal courts and the state courts in South Carolina. *See e.g. Dhruva v. Curiositystream, Inc.*, 131 F.4th 146, reported at 2025 U.S. App. LEXIS 5502, at *9 (4th Cir. 2025) (quoting *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 581 U.S. 246, 248 (2017) (alteration in original)) ("[t]he Supreme Court has held, over and over, that the Federal Arbitration Act forbids state law contract rules that 'single[] out arbitration agreements for disfavored treatment'—no matter how modest such rules may seem or how noble their motivations may be.")

On the same day that the South Carolina Supreme Court issued its opinion in the current matter, the United States District Court for the District of South Carolina considered a near-identical issue—whether a provision in an arbitration clause that purports to reduce the statute of limitations could be severed from the arbitration agreement, despite the contract's lack of a severability clause. The federal court concluded that the arbitration agreement was enforceable because, to the extent that the reduced limitations period conflicted with a South Carolina statute against such provisions, the provision was therefore void, and inapplicable to the agreement to arbitrate. *See Fitzgerald v. Faucette*, C/A No. 9:24-cv-00908-BHH, 2024 U.S. Dist. LEXIS 225125 at *3 (D.S.C. Dec. 11, 2024).

These conflicting rulings have created a disjointed and untenable situation in South Carolina in which a party may

enforce its contractual arbitration agreement in federal court, but not in state court. This Court has cautioned against interpretations of the FAA that "would encourage and reward forum shopping[,]" which is precisely the situation that the South Carolina Supreme Court has created. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

Because the South Carolina Supreme Court's holding overtly disregards this Court's jurisprudence regarding the FAA, thus creating a conflict between state and federal courts within the same state—a problem that can repeat throughout the Country—review by this Court is warranted and necessary.

OPINIONS BELOW

The order of the Richland County, South Carolina Court of Common Pleas is unreported but reprinted at App. 28a-45a. The opinion of the South Carolina Court of Appeals is available at 439 S.C. 356 and 887 S.E.2d. 534 and reprinted at App. 9a-27a. The opinion of the South Carolina Supreme Court is reported at 444 S.C. 592 and 910 S.E.2d 474 and reprinted at App 1a-8a. The order of the South Carolina Supreme Court denying Petitioner's petition for rehearing is unreported but reprinted at App. 46a.

JURISDICTION

The South Carolina Supreme Court issued its opinion on December 11, 2024. Petitioner timely petitioned for rehearing, which the South Carolina Supreme Court denied on January 16, 2025. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1257(a).

PERTINENT STATUTES AND RULES

The Supremacy Clause of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 2 of the FAA provides in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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.

STATEMENT OF THE CASE

A. The Contract

On June 29, 2015, Respondents entered into an agreement to purchase a new construction home from Petitioner in Richland County, South Carolina. (R. pp. 28-30) At the top of the first page of the contract, entitled

"Purchase Agreement," and written in all underlined capital letters reads: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 et seq." (R. p. 28).

The contract contains fifteen distinct paragraphs, separated by unique headings and written in bold, underlined capital letters reading: (1) **PROPERTY;** (2) **IMPROVEMENTS;** (3) **PRICE;** (4) **FINANCING CONTINGENCY AND TERMINATION;** (5) **CLOSING;** (6) **CLOSING COSTS AND PRO-RATIONS;** (7) **CHANGE ORDERS;** (8) **RESTRICTIVE COVENANTS;** (9)**HOMEOWNERS ASSOCIATION;** (10) **LIMITED WARRANTY;** (11) **TERMITE PROTECTION;** (12) **DEFAULT AND TERMINATION;** (13) **ARBITRATION AND CLAIMS**; (14) **NON-RELIANCE;** and (15) **MISCELLANEOUS**. (R. pp. 28-30).

At issue here is the enforceability of the thirteenth paragraph of the contract labeled "Arbitration and Claims[.]" This paragraph reads:

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be

> commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of the termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

(R. p. 30). Respondents initialed directly below this paragraph. (R. p. 30).

B. Proceedings Below

On June 14, 2017, Respondents filed a lawsuit alleging four causes of action; (1) breach of contract, (2) unjust enrichment, (3) declaratory relief, and (4) violation of the South Carolina Unfair Trade Practices Act. (R. pp. 21-27). Respondents' four causes of action each arise out of allegations that the contract disclaims certain implied warranties, substituting in its place a limited warranty from a third-party company. Respondents allege the disclaimer of implied warranties provides "no reduction in price or separate benefit to the purchaser." (R. p. 25). Respondents seek a declaration that the waiver of implied warranties in the contract is unenforceable and an award of the "fair value of the waiver of the implied warranty of habitability." (R. pp. 24-26).

After initiating the lawsuit, Petitioner moved for an order enforcing the arbitration agreement as all four causes of action arise directly out of the contract on the grounds that, *inter alia*, Section 2 of the FAA controls this arbitration agreement. App. 57a-59a. The Circuit Court heard arguments on November 8, 2017. (R. pp. 39-64.). By order filed on March 13, 2018, the Circuit Court granted Petitioner's motion. App. 28a-45a. The Circuit Court determined that the FAA "preempts any state procedural law that completely invalidates the parties' agreement to arbitrate." App. 35a. The Circuit Court also determined that the arbitration agreement should be analyzed in isolation from the remainder of the contract, noting that the arbitration agreement is separately labeled, located on a different page from the challenged "Limited Warranty" paragraph, and does not cross-reference other paragraphs of the contract. App. 38a-40a. The Circuit Court then determined that the arbitration agreement was not one-sided or oppressive and was thus enforceable. App. 40a-44a.

Following the Circuit Court's denial of their motion to reconsider, Respondents appealed the Circuit Court's order. The South Carolina Court of Appeals, in its initial opinion, affirmed, as modified, the Circuit Court's order compelling arbitration finding that the final two sentences of the arbitration provision were an unconscionable attempt to reduce the statute of limitation pursuant to S.C. Code Ann. § 15-3-140, which provides:

> No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any

> cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

App. 48a.

However, the South Carolina Court of Appeals held that severing the final two sentences pursuant to S.C. Code Ann. §§ 15-3-140 and 36-2-302[2] did not leave a

2. This statute permits a court, in relevant part, to refuse to enforce all or part of a contract that it finds unconscionable at the time it was made, or to limit the application of any unconscionable clause in order to avoid an unconscionable result. *See* S.C. Code Ann. § 36-2-302(1). Although contained within South Carolina's adopted version of the Uniform Commercial Code, it has been regularly applied by the South Carolina Supreme Court in the context of a contract for the purchase of a newly built home. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 618, 879 S.E.2d 746, 758 (2022); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). While not relied on by the South Carolina Supreme Court in this case, the South Carolina Supreme Court has interpreted this statute sparingly; each time, it is refused to enforce an arbitration agreement. *See Damico*, *supra*; *D.R. Horton*, *supra*; *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010) (vacated and remanded by this Court in *Sonic Auto, Inc. v. Watts*, 563 U.S. 971 (2011) in light of this Court's holding in *Concepcion*); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 36, 373 S.E.2d 663, 674 (2007). Because the South Carolina Supreme Court's application of this statute is "unique" and "restricted" to the field of arbitration, it further warrants review of the South Carolina Supreme Court's negative treatment

fragmented and unenforceable arbitration provision and therefore affirmed the Circuit Court's order compelling arbitration. App. 25a-26a.

After the South Carolina Court of Appeals filed its initial opinion, Respondents petitioned for rehearing. During the pendency of the petition for rehearing, the South Carolina Supreme Court issued its decision in *Damico*, 437 S.C. 596, 879 S.E.2d 746. The South Carolina Court of Appeals then issued a refiled opinion on February 15, 2023 directly addressing the differences between *Damico* and the current matter, and again affirmed as modified the Circuit Court's order compelling arbitration. *Id.* App. 20a-21a.

The South Carolina Supreme Court granted Respondents' petition for a writ of certiorari on February 7, 2024. Petitioner argued, *inter alia*, that refusing to sever the allegedly unconscionable provision in the arbitration clause would place arbitration agreements on unequal footing with all other contracts in South Carolina, in violation of the FAA and this Court's decision in *Concepcion*. App. 51a-54a. An oral argument was held before the South Carolina Supreme Court on October 29, 2024. The South Carolina Supreme Court issued its opinion on December 11, 2024. App. 1a-8a. Petitioner timely moved for a Petition for Rehearing, which the South Carolina Supreme Court denied on January 16, 2025. App. 46a.

This Petition for a Writ of Certiorari followed.

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of arbitration clauses. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 55 (2015).

REASONS FOR GRANTING THE PETITION

I. Certiorari is warranted due to South Carolina's escalating hostility towards enforcing arbitration agreements which violates federal law and this Court's binding interpretation of the FAA.

The FAA mandates that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . 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; App. 47a. This Court has recognized that the "preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate[.]" *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The FAA's substantive rule is applicable to state courts as well. *See Southland* at 15-16. And likewise, "nothing in the Act indicat[es] that the broad principle of enforceability is subject to any additional limitations under state law." *Id.* at 11. Thus, state courts must apply the FAA, "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hospital* at 24.

Despite these clear commands, the South Carolina Supreme Court has abdicated its responsibility to enforce arbitration agreements according to their terms. In *Smith v. D.R. Horton, Inc.*, the South Carolina Supreme Court misapplied this Court's ruling in *Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), to hold that an otherwise valid arbitration agreement in a paragraph

entitled "Warranties and Dispute Resolution" could not be viewed in isolation from a provision in that paragraph that purported to disclaim implied warranty claims and prohibit liability for monetary damages. *See D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1. The paragraph at issue consisted of subparagraphs (a) through (j). *Id.* at 45, 790 S.E.2d at 2. The majority of the subparagraphs expressly disclaimed warranties and liability arising out of the contract. *Id.* Two subparagraphs contained arbitration clauses: one requiring arbitration of claims arising out of the construction of the home, and another for disputes relating to warranties in the contract. *Id.*

The South Carolina Supreme Court noted, as it must, that *Prima Paint* requires a party to assert a contractual defense to the arbitration agreement itself, rather than the contract as a whole. *Id.* at 48, 790 S.E.2d at 4. Relying on the fact that the contract at issue lacked a severability clause, the South Carolina Supreme Court improperly refused to sever the arbitration clauses from the entire paragraph, including all subparts, and held that the entire paragraph was unconscionable. *Id.* at 50, n. 6, 790 S.E.2d at 5, n. 6. Its ruling therefore improperly defined the arbitration agreement too broadly in order to find it unconscionable. This was a not-so-subtle attempt to superficially comply with this Court's mandate while also striking down an arbitration clause it was bound to uphold. Stretching the definition of "arbitration agreement" beyond its conceivable limits until it encompasses an unrelated, unconscionable term elsewhere in the contract is the exact sort of "'device . . . 'declaring arbitration against public policy" that this Court warned against in *Concepcion*. *See Concepcion* at 342. It also disregards this Court's mandate that Section 2 applies to the "specific

'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

As now Chief Justice of the South Carolina Supreme Court Kittredge noted in a strong dissent, "the majority . . . circumvent[ed] the application of these legal principals by expanding the relevant scope of the contractual language at issue to include matters beyond the arbitration provision." *D.R. Horton* at 53, 790 S.E.2d at 6 (Kittredge, J. dissenting). This dissent also correctly recognized that the South Carolina Supreme Court's opinion conflicted with this Court's interpretation of the FAA, explaining that "even if state law justified the majority's finding that the entirety of paragraph fourteen constitutes the relevant arbitration provision (which it does not), such a finding would in any event be in conflict with, and therefore preempted by, federal substantive law[.]" *Id.* 62 at 790 S.E.2d at 11 (Kittredge, J. dissenting).

Subsequently, in *Damico v. Lennar Carolinas, LLC*, the South Carolina Supreme Court considered another unconscionability challenge to an arbitration agreement in the context of a new home purchase contract. *See Damico*, 437 S.C. 596, 879 S.E.2d 746. The arbitration agreement at issue contained a provision which stated "'[Lennar] may, at its sole election, include [Lennar's] contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration' and 'that the mediation and arbitration will be limited to the parties specified herein.'" *Damico* at 606, 879 S.E.2d at 752. The arbitration agreement at issue also contained a severability clause which stated: "[t]he waiver or invalidity of any portion of this Section

shall not affect the validity or enforceability of the remaining portions of this Section." *Id.* at 618, n. 10, 879 S.E.2d at 758, n. 10. After finding that the provision in the arbitration agreement which purported to allow only the homebuilder to decide whether to add its subcontractors to the arbitration proceeding was unconscionable, the South Carolina Supreme Court declined to sever that provision because "it would be the opposite of excising an 'ancillary logistical concern.' Rather, we would be materially rewriting the contract by controlling who will—or will not—participate in arbitration. Blue-pencilling is, of course, within the Court's discretion. Here, we decline to enforce a material term of the contract and enforce the remaining, fragmented agreement." *Id.* at 619-20, 879 S.E.2d at 760.

After declining to view the arbitration agreement in isolation from the remainder of the contract, the South Carolina Supreme Court then turned to state public policy which conflicts with Congress' goals for the FAA. The South Carolina Supreme Court continued:

> [T]he fact that the arbitration agreement contained within the purchase and sale agreement involves construction and sale of a new home is relevant to our analysis of this consumer transaction . . . Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically concerned that honoring the severability clause here creates an incentive for [respondent] and other home

> builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer.

Id. at 621-22, 879 S.E.2d at 760.

This statement demonstrates the South Carolina Supreme Court's dedication to improperly applying conflicting South Carolina public policy to arbitration agreements governed by the FAA, particularly public policy protecting homebuyers purchasing a newly-built home. Moreover, the South Carolina Supreme Court refused to sever the unconscionable provisions under the cover of state law from the otherwise valid agreement to arbitrate in violation of Section 2 of the FAA.

The case at bar presents a more pressing case for this Court to consider than even the *Damico* case, as this case demonstrates a more direct defiance of this Court's precedent on the enforcement of arbitration agreements. Here, unlike in *Damico*, the unenforceable term—which purported to reduce the limitations period in which a claim could be brought—had no bearing on to the agreement to arbitrate itself, nor did it require Respondents to give up any rights in selecting which claims could be brought in arbitration. Likewise, nothing would have prohibited an arbitrator from finding that the statute-shortening provision was void as a matter of law, and thus unenforceable. *See Rent-a-Center* at 86 (explaining that general challenges to a contract would go to the arbitrator). By contrast, the arbitration agreement in *Damico* only permitted the homebuilder to choose which parties participated in the arbitration,

purportedly in violation of the "fundamental principle of law that the plaintiff is the master of his own complaint and is the sole decider of whom to sue for his injuries." *Damico* at 616, 879 S.E.2d at 757 (citing *Myles v. U.S.*, 416 F.3d 551, 552 (7th Cir. 2005)). No such concern exists here, as the unenforceable term purporting to shorten the statutory limitations period did not affect the arbitration proceeding itself. Accordingly, finding the arbitration agreement here unenforceable did not require the court to "blue-pencil" the remainder of the arbitration clause, as was the South Carolina Supreme Court's supposed concern in *Damico*. *See Id.* at 619-20, 879 S.E.2d at 760. Indeed, this is precisely what the South Carolina Court of Appeals below held:

> As we stated, we find the final two sentences of the Arbitration Clause shortening the statutory limitations period were unconscionable. Nevertheless, we conclude sections 15-3-540 and 36-2-302(1) operate to sever this portion of the Arbitration Clause. Here, as in *D.R. Horton*, the Arbitration Clause did not contain a severability clause. On the other hand, unlike *D.R. Horton*, **the offending provision is distinct and constitutes the final two sentences of the Arbitration Clause**. Thus, notwithstanding its lack of a severability clause, **it is possible for this court to simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement**.

App. 26a (emphasis added).[3] These opinions demonstrate that, regardless of the terms of the specific agreement to arbitrate, and regardless of whether or not the parties' contract contains a severability clause, the South Carolina Supreme Court openly opposes arbitration agreements.

The preceding cases demonstrate South Carolina's fervent hostility to enforcing arbitration agreements and have resulted in an increasingly restrictive progeny that has effectively limited the ability of parties to arbitrate disputes arising out of contracts involving interstate commerce. The rules articulated in those cases as well as the case at bar present the exact form of "'devices and formulas' declaring arbitration against public policy" that this Court warned against in *Concepcion*. *See Concepcion* at 342, (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (CA2 1959)).

II. Federal Courts in South Carolina have properly disregarded the South Carolina Supreme Court's invalid statements of law, such that enforcement of arbitration agreements in South Carolina now largely turns on the forum in which enforcement is sought.

The South Carolina Supreme Court's hostility towards arbitration reached a fever pitch in 2021, when the Court declared, despite decades of this Court's instruction, that **there is no federal policy favoring arbitration**:

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3. This holding also respects this Court's command to give "due regard . . . to the federal policy favoring arbitration, and [resolving] ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration," *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 475-76 (1989).

> Neither the Supreme Court nor this Court, however, meant to give the law of arbitration such a special status that it would supplant state procedural law. Rather, these statements must be read in the context in which the Courts made them: overruling a longstanding, policy-based rule that arbitration agreements are unenforceable. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* . . . the Supreme Court explained, "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." . . . *see also Dean Witter Reynolds* . . . ("The [Federal Arbitration] Act, after all, does not mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements."). Therefore, when considered in the proper context, our statements that the law "favors" arbitration mean simply that courts must respect and enforce a provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy –federal or state– "favoring" arbitration.

See Palmetto Constr. Grp. LLC, 432 S.C. 633, 639, 856 S.E.2d 150, 153.

After the South Carolina Supreme Court dropped all pretense of following federal law, courts in South Carolina are now bound by its pronouncement that there

is no federal policy favoring arbitration. Conspicuously, no federal court in South Carolina has cited *Palmetto Constr. Grp.* or echoed the South Carolina Supreme Court's improper pronouncement, nor has a federal court followed the interpretation of the FAA espoused in *Palmetto Constr. Grp.*[4]

To illustrate the conflict between state and federal application of the FAA that the South Carolina Supreme Court has created, on the same day that the Court's decision in this case came down, the United States District Court for the District of South Carolina in *Fitzgerald v. Faucette* considered a near-identical issue to the issue at bar: the enforceability of an arbitration provision that contains a provision purporting to shorten the applicable limitations period, in contravention of S.C. Code Ann. § 15-3-140. *Fitzgerald v. Faucette*, *supra*. In that case, the plaintiff argued that the arbitration agreement

4. *See generally Turner v. Dillards, Inc.*, C/A No. 3:24-3005-SAL-PJG, 2024 U.S. Dist. LEXIS 238525 (D.S.C. Dec. 30, 2024) (report and recommendation adopted by *Taylor v. Dillards, Inc.*, C/A No. 3:24-3005-SAL, 2025 U.S. Dist. LEXIS 12898 (D.S.C. Jan. 24, 2025); *Whatley v. T-Mobile, USA*, C/A No. 2:23-cv-01339-RMG-MGB, 2024 U.S. Dist. LEXIS 83754, at *5 (D.S.C. May 8, 2024) (quoting *Levin v. Alms and Assocs., Inc.*, 634 F.3d 260, 266 (4th Cir. 2011) (noting that "[t]he Supreme Court has consistently encouraged a 'healthy regard for the federal policy favoring arbitration'"); *Browne v. Larlee Constr., LLC*, C/A No. 1:19-02862-MGL, 2022 U.S. Dist. LEXIS 53190, at *7-8 (Mar. 24, 2022) (quoting *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (explaining that "[t]he Fourth Circuit Court of Appeals recognized the FAA's strong federal policy favoring arbitration agreements [and that a] 'district court . . . has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview[]'").

in the contract at issue (an employee handbook) was unconscionable because it purported to shorten the applicable limitations period from the statutory three years to six months. *Fitzgerald*, C/A No. 9:24-cv-00908-BHH-MGB, 2024 U.S. Dist. LEXIS 225994, at *13-14 (D.S.C. Apr. 23, 2024), report and recommendation adopted and specifically incorporated with the exception of recommending dismissal without prejudice by *Fitzgerald v. Faucette*, C/A No. 9:24-cv-00908-BHH, 2024 U.S. Dist. LEXIS 225125 (D.S.C. Dec. 11, 2024).[5] The Court properly held that because the shortened statutory period is void under South Carolina law, it is not applicable to the arbitration provision. *Fitzgerald*, 2024 U.S. Dist. LEXIS 225125 at *3. This is precisely the result that a Court properly applying the FAA to an arbitration agreement should reach.

The Fourth Circuit has also previously considered a case involving the enforceability of arbitration agreements involving, in relevant part, an agreement to shorten the statutory limitations period, despite the contract being governed by South Carolina law. *See In re Cotton Yard Antitrust Litig.*, 505 F.3d 274, 287 n. 9 (4th Cir. 2007). The

5. Admittedly, the provision at issue in that case differs from this case in that it stated: "[t]he six-month statute of limitations period will not apply in California or any state or jurisdiction where a statute or binding court decision prohibits a shorter contractual statute of limitations." *Fitzgerald v. Faucette*, C/A No. 9:24-cv-00908-BHH-MGB, 2024 U.S. Dist. LEXIS 225994, at *13 (D.S.C. Apr. 23, 2024), report and recommendation adopted and specifically incorporated with the exception of recommending dismissal without prejudice by *Fitzgerald v. Faucette*, C/A No. 9:24-cv-00908-BHH, 2024 U.S. Dist. LEXIS 225125 (D.S.C. Dec. 11, 2024). This term was not material to the parties' decision to agree to arbitrate any dispute.

Court noted that "[i]f the South Carolina statute [against contractual shortening of the statute of limitations] applies . . . then the shortened limitation period could not be applied to the South Carolina plaintiffs and thus would not impair their ability to vindicate their statutory rights." *Id.* The Court, in dicta, further explained:

> Also implicit in the plaintiffs' argument and the decision of the district court is the assumption that if the plaintiffs' claims are untimely under the terms of the arbitration agreements, then the plaintiffs necessarily cannot effectively vindicate their statutory rights in the arbitral forum. As noted above, the relevant question is whether the arbitration agreement provides the plaintiff with an "adequate and accessible substitute forum." . . . We have recognized the possibility that very high arbitration costs could render the arbitral forum inaccessible to a given plaintiff . . . but it seems quite a different matter to allow a plaintiff's failure to commence an action within the reasonable contractually established limitations period to render an otherwise adequate and appropriate forum suddenly inadequate or inaccessible . . . **To do so would be to give plaintiffs a backdoor escape for the effects of their agreement to arbitrate and would be inconsistent with the strong federal policy favoring arbitration**. *See Moses H. Cone*, 460 U.S. at 24.

Id. at 290 (emphasis added).

These federal decisions applicable in South Carolina strongly suggest that a federal court would enforce an identical arbitration agreement to the one that the South Carolina Supreme Court refused to enforce below.

To further demonstrate the disconnect between state and federal law in South Carolina, the South Carolina Supreme Court recently doubled down on its view that there is no federal policy favoring arbitration, opining in dicta:

> There are a few other issues raised by the parties or addressed by the court of appeals that we feel we should also address, though they are not important to our decision here. **First, [respondent] – like many parties and some of our courts – continues to argue that there is a federal and state "policy favoring arbitration." We remind our litigants and lower courts that we dispensed with this incorrect notion almost four years ago.** *See Palmetto Constr. Grp. v. Restoration Specialists* . . . The court of appeals *in this case* needed no such reminder . . . In other cases, however, our court of appeals has continued to recite this incorrect notion . . . An arbitration contract is like any other contract; if it exists, it will be enforced according to its terms. *See Morgan v. Sundance, Inc.* . . . (unanimously rebuking the Eighth Circuit for creating "arbitration-specific variants of federal procedural rules" based upon the incorrect notion of a "policy favoring arbitration" and stating, "The federal policy is about treating

> arbitration contracts like all others, not about fostering arbitration").

Lampo, Op. No. 28265 (Howard Adv. Sh. No. 10. at 20) (emphasis added).

Thus, South Carolina courts are now between a rock and a hard place: they must choose between following this Court's binding precedent regarding the FAA or the South Carolina Supreme Court's incorrect interpretation of the same. Additionally, enforcement of arbitration agreements in South Carolina now largely turns on whether enforcement is sought in state or federal court. This disjointed situation is precisely what Congress sought in part to rectify by enacting the FAA. *See Southland* at 15 ("[w]e are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted[]").

III. The South Carolina Supreme Court's opinion below violates § 2 of the FAA and this Court's jurisprudence.

Here, the South Carolina Supreme Court disregarded the FAA's mandate entirely. Despite unquestionably facing a contract involving commerce,[6] the South Carolina

6. While it did not analyze this point of law here, as the Circuit Court did, the South Carolina Supreme Court has recognized the application of the FAA to new home construction contracts. *See Parsons* at 9-10, 791 S.E.2d at 132-33; *see also generally D.R. Horton* at 52, 790 at 5-6 (Kittredge, J. dissenting) (observing that a new home construction contract involves interstate commerce).

Supreme Court's opinion is devoid of any mention of the FAA or this Court's binding precedent, despite the issue being raised in Petitioner's brief. App. 51a-54a. In disregarding federal policy favoring arbitration, the South Carolina Supreme Court struck the entire arbitration clause on the basis of State "public policy," holding:

> We conclude Mungo's manipulative skirting of South Carolina public policy goes to the core of the arbitration agreement . . . The contract was for a consumer purchase of a new home, which brings into play public policy concerns *Damico* eloquently addressed. We have been steadfast in protecting home buyers from unscrupulous and overreaching terms, and applying severance here would erode that laudable public policy.

App. 6a.

In claiming to protect home buyers from "unscrupulous and overreaching terms" while refusing to uphold a valid arbitration agreement, the South Carolina Supreme Court demonstrated the precise form of judicial hostility towards arbitration that Congress sought to preempt in enacting the FAA. *See Concepcion*, at 339.[7] As this Court has noted,

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7. As further support for its position that the arbitration agreement here violated South Carolina public policy, the South Carolina Supreme Court referenced a law review article finding that "market efficiency can be enhanced when courts refuse to replace overreaching contractual terms when the drafter is the sophisticated party, the terms deliberately and egregiously exceed well-established rules, and the drafter is a 'repeat transactor.'" App. 8a (citing Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 Stan L. Rev. 869, 901-04 (2011)). This Court, however, has

"nothing in the Act indicat[es] that the broad principle of enforceability is subject to any additional limitations under state law." *Southland* at 11.

Moreover, the South Carolina Supreme Court improperly applied state contract law regarding severability of the unenforceable term from the arbitration agreement. The Court stated:

> As in *Damico*, we decline to salvage the arbitration agreement by severing out the statute of limitations clause. This is an adhesion contract, meaning it is highly doubtful the parties truly intended for severance to apply. *Damico*, 437 S.C. at 624, 879 S.E.2d at 761 . . . Mungo insisted upon an adhesion contract so its terms could not be varied and would stick. Mungo is stuck with its choice. Were we to hold otherwise, parties who impose standard form adhesion contracts on weaker parties would have no downside to throwing in blatantly illegal terms betting they will go unchallenged or, at worst, that courts would throw them out and enforce the rest . . . We therefore decline to sever the void clause purporting to limit

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recognized that Congress' purpose in enacting the FAA was to enforce arbitration agreements, even if enforcement leads to inefficient results. *See generally Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985) ("the [FAA] requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even when the result would be the possibly inefficient maintenance of separate proceedings in different forums[]"); *see also generally Concepcion* at 360 (Breyer, J. dissenting).

> the statute of limitations. We hold the entire arbitration agreement section of the contract is unenforceable.

App. 7a-8a.

Prima Paint and its progeny, however, instruct state courts to view the arbitration agreement in isolation from the rest of the contract, and not consider challenges to the contract that do not relate to the "making and performance of the agreement to arbitrate."[8] *Prima Paint* at 403. Likewise, "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce." *Rent-A-Center* at 72. These authoritative statements of the law foreclose state courts from applying state severability doctrines that conflict with the FAA's severability rule.

In an effort to force the square peg of state severability doctrine into the round hole of substantive federal law, the South Carolina Supreme Court determined that the unenforceable term was "material" to the arbitration agreement, explaining:

> In our view, the clause shortening the statute of limitations was material because it could determine the outcome of many disputes by

8. The South Carolina Supreme Court, while voicing its criticism of *Prima Paint*, has previously acknowledged that it "must apply the *Prima Paint* doctrine in cases governed by the FAA." *Sanders v. Savannah Hwy. Co.*, 440 S.C. 377, 384-85, 892 S.E.2d 112, 116 (2023).

> calling time on any claim not raised within ninety days. The clause was no mere 'ancillary logistical concern' of the arbitration agreement; it was a brash push to accomplish through arbitration something our statutory law forbids. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 619-20, 879 S.E.2d 746, 759 (2022). If we lifted out the clause, the legal statute of limitations period (which in most cases allows claims to be filed within three years of their reasonable discovery) would drop in. This would rewrite the arbitration agreement to expand the statute of limitations by orders of magnitude. The whole point of an arbitration provision is to provide an alternative way to resolve disputes in a fair and efficient manner. Yet Mungo designed its arbitration provision not to streamline the resolution of disputes but to reduce their number. One sure way to reduce the number of disputes is to shrink the time in which they may ordinarily be brought under applicable law. We conclude Mungo's manipulative skirting of South Carolina public policy goes to the core of the arbitration agreement and weighs against severance.

App. 6a.[9]

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9. The South Carolina Supreme Court's statement that a valid arbitration agreement containing an unenforceable provision was a "brash push to accomplish through arbitration something our statutory law forbids" echoes the California Supreme Court's statement that "[a]greements to arbitrate may not be used to harbor terms conditions and practices that undermine public policy" that this Court rejected in *Concepcion*. *See Discover*

Even assuming, *arguendo*, that the South Carolina Supreme Court properly determined that the unenforceable term was "material" to the contract, it still does not follow that the term would go to the enforceability of the arbitration agreement itself.[10] *Prima Paint* and its progeny required the Court to view the arbitration agreement in *isolation from the rest of the contract*. Indeed, "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce." *Rent-A-Center* at 72. As in *D.R. Horton*, *supra*, the South Carolina Supreme Court improperly

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Bank v. Super. Ct., 36 Cal. 4th 148, 166, 113 P. 3d 1100, 1112 (2005) (internal quotation marks omitted).

10. In support of declining to sever the unenforceable term, the South Carolina Supreme Court cited to the Fourth Circuit's decision in *Dillon v. BMO Harris Bank, N.A.* for the proposition that "[w]hen a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract." App. 6a (quoting *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 337 (4th Cir. 2017)). In that case, the Fourth Circuit considered an arbitration agreement in which the defendant sought to enforce a choice of law provision in the contract applying tribal law that would exclude consumer protections present in state and federal law. *Dillon* at 334-35. The Court found that the choice of law provision was unenforceable, and declined to sever it from the arbitration agreement because, in part, the "choice of law provisions were essential to the purpose of the arbitration agreement." *Id.* at 335-36. The case at bar is distinguishable from *Dillon* because the arbitration agreement at issue here did not require Respondents to submit to an arbitration that limited the claims they would be allowed to bring under state or federal law. Thus, enforcement of the arbitration agreement at issue is in line with Congress' goals for the FAA.

broadened the "specific written provision" here to include a term completely independent of the specific agreement to arbitrate, and in doing so, improperly relied on state contract law on severability in refusing to sever the term from the otherwise valid arbitration agreement. Respondents here never challenged the specific agreement to arbitrate itself, only, as relevant here, the unrelated terms regarding the statutory limitations period, and therefore the FAA mandated that South Carolina courts enforce the parties' agreement.

In addition to failing to give "due regard . . . to the federal policy favoring arbitration, and [resolving] ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration," *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 475-76 (1989),[11] the South Carolina Supreme Court also disregarded this Court's requirement that "the basis of challenge . . . be directed specifically to the agreement to arbitrate before the court will intervene[])." *Rent-A-Center* at 71. Nothing in the above-quoted language demonstrates that the provision shortening the statute of limitations speaks to the *agreement to arbitrate* itself. *See Id.* By relying on its finding that a term distinct from the agreement to arbitrate was "material" to the arbitration agreement in order to refuse to enforce the arbitration agreement, the South Carolina Supreme Court blatantly disregarded this Court's interpretation of the severability rule contained in Section 2 of the FAA.

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11. The South Carolina Supreme Court's decision essentially flips this the policy underlying this command on its head. Rather than resolving ambiguities in favor of arbitration, the South Carolina Supreme Court is broadening the scope of the arbitration clause until it can find a plausible justification for refusing to enforce the parties' arbitration agreement.

Furthermore, nothing in the record on appeal suggested that the parties did not agree to arbitrate their claims, nor is there anything to suggest that the parties' arbitration agreement was contingent on the unenforceable provision being upheld. As Justice Thomas noted in his concurring Opinion in *Concepcion*, "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made." *Concepcion* at 357 (Thomas, J. concurring). Nevertheless, even if the South Carolina Supreme Court was correct in finding that the unenforceable term was a material term of the arbitration agreement under South Carolina law, it still violated § 2 of the FAA because nothing in that provision affected the parties' agreement to arbitrate. *Rent-A-Center* at 71.

Finally, the South Carolina Supreme Court's opinion places arbitration agreements on uneven footing with other contracts in South Carolina. As in most states, a South Carolina court will only find a contract to be unconscionable if the court finds "a lack of meaningful choice *coupled with* unreasonably oppressive terms." *Damico* at 614, 879 S.E.2d at 756 (emphasis in original). As the South Carolina Supreme Court has explained "*adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." *Id.* (emphasis in original). South Carolina follows the Fourth Circuit's rule that "[i]n analyzing claims of unconscionability in the context of arbitration agreements . . . focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668-669 (2007)

(citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).[12] Additionally, this Court has "noted the impermissibility of applying a contract defense . . . 'in a fashion that disfavors arbitration.'" *Kindred Nursing Ctrs.* at 255 (quoting *Concepcion* at 341).

In the arbitration agreement here, however, there were no under-handed or unfair provisions in the specific agreement to arbitrate. Likewise, the South Carolina Supreme Court did not find that the specific agreement to arbitrate was unconscionable, nor could it reasonably have done so. The arbitration agreement at issue unequivocally provides for an unbiased decision by neutral arbitrators (one of whom is to be selected by Respondents). (R. p. 30). Nor does the arbitration agreement limit the remedies available at law. (R. p. 30). This distinguishes the arbitration agreement here from arbitration agreements

12. In *Hooters*, the Fourth Circuit declined to enforce an arbitration agreement which purported to "creat[e] a sham system unworthy even of the name of arbitration[.]" *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999). The Court cautioned " . . . our decision [should not] be misunderstood as permitting a full-scale assault on the fairness of proceedings before the matter is submitted to arbitration." *Id.* at 941. As the Fourth Circuit later reiterated, "[t]he egregiously unfair arbitration rules in *Hooters*, however, provide only a limited departure from the general rule that arbitrators decide questions of fairness regarding arbitration proceedings. Arbitration is not inherently unconscionable[.]" *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 306 (4th Cir. 2001) (internal citations omitted). These decisions instruct federal courts in South Carolina to refrain from the same hostility towards arbitration that the South Carolina Supreme Court has now mandated for state courts.

in prior South Carolina cases which have held arbitration clauses to be substantively unconscionable.[13]

As a practical matter, applying the South Carolina Supreme Court's rule announced in *Mungo* to other contractual provisions in a manner that places them on equal footing with arbitration agreements can only lead to absurd results; results which further demonstrate that arbitration agreements are being singled out for disfavored treatment. Assume, as an example, that a clause purporting to shorten the statutory limitations period was contained in the paragraph entitled "Jurisdiction" which set forth the governing law for the agreement, rather than contained under the "Arbitration" paragraph. Assume further that the contract contained no severability clause. Under the rule espoused in *Mungo*, a South Carolina court would not be able to sever this "material" term from the contract, and thus must invalidate the parties' agreement for their contract to be governed by a certain law.[14] This is an

13. *See e.g. Simpson*, *supra* (finding an arbitration clause unconscionable where the clause prohibited an award of treble damages on a cause of action where the applicable statute mandated treble damages); *D.R. Horton*, *supra* (finding an arbitration clause unconscionable where the clause permitted only the homebuilder to select whether its subcontractors would participate in the arbitration).

14. It is also not clear why the South Carolina Supreme Court's "brash push" analysis would not equally apply if the parties placed the unenforceable term elsewhere in the contract. App. 6a. Accordingly, there is nothing unique about an arbitration clause that would make the unenforceable term 'material' to it, but not another provision of the contract. Therefore, under the South Carolina Supreme Court's analysis, placement of the unenforceable term elsewhere in the contract would still require the whole paragraph it is contained in to be invalidated if there is no severability clause.

absurd result that could not have reasonably been intended by the parties, even in the absence of a severability clause. However, any other holding would violate this Court's command to place arbitration agreements on equal footing with other contracts. *See Concepcion* at 339. While South Carolina courts have not yet had the opportunity to apply the *Mungo* rule, we do not foresee any situation where it will be applied other than to invalidate an otherwise valid arbitration agreement. As with the California Court of Appeals' opinion at issue in *DIRECTV*, "nothing in the [South Carolina Supreme Court's] reasoning suggest[ed] that a [South Carolina] court would reach the same interpretation . . . in any context other than arbitration. *DIRECTV* at 56.

Because these state-law rules "stand as an obstacle to the accomplishment of the FAA's objectives[,]" *Concepcion* at 342, § 2 of the FAA, preempts them and the South Carolina Supreme Court's opinion should be reversed.

CONCLUSION

For the reasons described herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA, FILED DECEMBER 11, 2024

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2023-000452

AMANDA LEIGH HUSKINS AND JAY R. HUSKINS,

Petitioners,

v.

MUNGO HOMES, LLC,

Respondent.

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 28245
Heard October 29, 2024 – Filed December 11, 2024

REVERSED AND REMANDED

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

JUSTICE HILL: When Petitioners Amanda Leigh Huskins and Jay R. Huskins decided to buy a house from Respondent Mungo Homes (Mungo), Mungo presented them with its standard contract. The contract had an arbitration section that included this sentence:

Appendix A

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

It is undisputed this clause shortened the statute of limitations for any claim to the ninety-day period. This, as Mungo concedes, ran afoul of S.C. Code Ann. § 15-3-140 (2005), which forbids and renders void contract clauses attempting to shorten the legal statute of limitations.

The Huskins later brought this suit against Mungo alleging various claims related to the sale. Mungo asked the circuit court to dismiss the Huskins' complaint and compel arbitration. The Huskins countered that the arbitration clause was unconscionable and unenforceable. The circuit court disagreed and granted the motion to compel arbitration. The Huskins appealed. The court of appeals held the clause of the arbitration provision limiting the statute of limitations was unconscionable and unenforceable but ruled the clause could be severed from the rest of the arbitration agreement. The court of appeals therefore affirmed the order compelling arbitration. *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2023). We granted certiorari and now reverse.

I.

As the court of appeals noted, the contract does not include a severability clause or any hint that the parties intended for the arbitration agreement to stand if any part

of it fell. We have held the absence of a severability clause may prevent a court from severing a contract. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6 (2016). In general, whether an agreement can be modified so its remaining provisions survive depends upon what the parties intended. South Carolina law does not allow courts to rewrite contracts; subject to a few exceptions, courts will enforce agreements according to their terms. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). This is true even when the parties include a severability term. When they do not add such a term, we are reluctant to force one upon them. This is in keeping with the law's faith in the liberty of contract. But devotion to that principle can work a cost to other interests. It can exact a needless forfeiture or cause unjust enrichment, tossing out the essence of a bargained for exchange over a trivial technicality. 2 E. Allan Farnsworth, *Contracts* § 5-09 (4th ed 2004).

The court of appeals held the clause limiting the statute of limitations was both unconscionable and unenforceable. We believe the better view is that the clause is unenforceable because it is void and illegal as a matter of public policy. *See White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371-72, 601 S.E.2d 342, 345 (2004) (contracts violating public policy expressed in statutory law are unenforceable). Because it is unenforceable, we need not decide whether it is also unconscionable. The only question we are left with is whether we should sever the illegal term and let the remainder of the arbitration agreement stand.

For centuries, the law has stricken illegal parts from contracts and upheld the legal parts, as long as the central

purpose of the parties' agreement did not depend upon the illegal part. An early English case held that "if some of the covenants . . . are against law, and some good and lawful . . . [then] the covenants or conditions which are against law are void *ab initio*, and the others stand good." *Pigot's Case*, 77 ER 1177, 1179 (1614); *id.* at 1179, n. (c) (observing that "the statute is like a tyrant, when he comes he makes all void: but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest . . . [t]he general principal is, that if any clause, &.c. void by the statute or by the common law, be mixed up with good matter which is entirely independent of it, the good part stands, the rest is void").

This view was transported to America, s*ee United States v. Bradley*, 35 U.S. 343, 360-63, 9 L. Ed. 448 (1836), and is embodied in the Restatement (Second) of Contracts § 184 (1981). *See also* 8 *Williston on Contracts* § 19:70 (4th ed May 2024 Update).

We have followed this main current and interpreted contracts as severable if consistent with the parties' intent. *Packard & Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905); *Scruggs v. Quality Elec. Servs., Inc.*, 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984).

The Restatement takes the further view that if only part of a contract term is unenforceable on grounds of public policy, a court may enforce the rest of the term as long as 1) "the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange" and 2) the party seeking to enforce the

term "obtained it in good faith and in accordance with reasonable standards of fair dealing." Restatement (Second) of Contracts § 184. The severability analysis is the same regardless of whether a clause is unenforceable due to legislation, unconscionability, or some other public policy. *See* Restatement (Second) of Contracts § 178 comment a. The comments to § 184 emphasize that "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable." *Id.* at comment b.

Determining the intent of contracting parties can be a factual question, but here there is no question of fact left to be determined for three reasons. First, there is no severability clause. Second, there is a merger clause in the contract that declares the contract "embodies the entire agreement" and that it can only "be amended or modified" by a writing executed by both the Huskins and Mungo. Third, Mungo has conceded, as it must, that this is an adhesion contract. This means Mungo presented the contract as a "take it or leave it" proposition. Mungo wrote the contract and deemed its terms nonnegotiable. Huskins could not even edit it. This forceful proof of Mungo's intent that the contract not be tinkered with convinces us that we should not rewrite it now.

In our view, the clause shortening the statute of limitations was material because it could determine the outcome of many disputes by calling time on any claim not raised within ninety days. The clause was no

mere "ancillary logistical concern" of the arbitration agreement; it was a brash push to accomplish through arbitration something our statutory law forbids. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 619-20, 879 S.E.2d 746, 759 (2022). If we lifted out the clause, the legal statute of limitations period (which in most cases allows claims to be filed within three years of their reasonable discovery) would drop in. This would rewrite the arbitration agreement to expand the statute of limitations by several orders of magnitude. The whole point of an arbitration provision is to provide an alternative way to resolve disputes in a fair and efficient manner. Yet Mungo designed its arbitration provision not to streamline the resolution of disputes but to reduce their number. One sure way to reduce the number of disputes is to shrink the time in which they may ordinarily be brought under applicable law. We conclude Mungo's manipulative skirting of South Carolina public policy goes to the core of the arbitration agreement and weighs heavily against severance. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 35 n.9, 644 S.E.2d 663, 674 n.9 (2007) (discussing severability); *see Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 337 (4th Cir. 2017) ("[W]hen a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract." (citing Restatement (Second) of Contracts § 184 comment. b)); Farnsworth, *supra*, at § 5-10; *Williston on Contracts* § 19:70.

As in *Damico*, we decline to salvage the arbitration agreement by severing out the statute of limitations clause.

This is an adhesion contract, meaning it is highly doubtful the parties truly intended for severance to apply. *Damico*, 437 S.C. at 624, 879 S.E.2d at 761. The contract was for a consumer purchase of a new home, which brings into play public policy concerns *Damico* eloquently addressed. We have been steadfast in protecting home buyers from unscrupuolous and overreaching terms, and applying severance here would erode that laudable public policy. *See id.* at 624, 879 S.E.2d at 761-62 (holding unconscionable terms in arbitration agreement would not be severed despite presence of severability clause in contract, stating: "[b]ecause this is a contract of adhesion, and because the transaction involves new home construction, we decline to sever the unconscionable provisions for public policy reasons").

Mungo insisted upon an adhesion contract so its terms could not be varied and would stick. Mungo is stuck with its choice. Were we to hold otherwise, parties who impose standard form adhesion contracts on weaker parties would have no downside to throwing in blatantly illegal terms betting they will go unchallenged or, at worst, that courts will throw them out and enforce the rest. *See id.* at 622, 879 S.E.2d at 760 ("We are specifically concerned that honoring the severability clause here creates an incentive for . . . home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer."); *see also McKee v. AT & T Corp.*, 164 Wn.2d 372, 191 P.3d 845, 861 (Wash. 2008) ("Permitting severability . . . in the face of a contract that is permeated with unconscionability only encourages

those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions."); Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 Stan. L. Rev. 869, 901-04 (2011) (explaining how market efficiency can be enhanced when courts refuse to replace overreaching contractual terms when the drafter is the sophisticated party, the terms deliberately and egregiously exceed well-established rules, and the drafter is a "repeat transactor").

We therefore decline to sever the void clause purporting to shorten the statute of limitations. We hold the entire arbitration agreement section of the contract is unenforceable. The decision of the court of appeals compelling arbitration is reversed. The remainder of the parties' contract is unaffected by our ruling, and the case is remanded to the circuit court.

REVERSED AND REMANDED.

KITTREDGE, C.J., FEW, JAMES and VERDIN, JJ., concur.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE STATE OF SOUTH CAROLINA, FILED JUNE 1, 2022, AND REFILED FEBRUARY 15, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appellate Case No. 2018-000889

AMANDA LEIGH HUSKINS AND JAY R. HUSKINS,

Appellants,

v.

MUNGO HOMES, LLC,

Respondent.

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5916
Heard May 5, 2021 – Filed June 1, 2022
Withdrawn, Substituted, and Refiled February 15, 2023

AFFIRMED AS MODIFIED

LOCKEMY, A.J.: Amanda Leigh Huskins and Jay R. Huskins (collectively, the Huskinses) appeal the circuit court's order granting Mungo Homes, LLC's (Mungo's) motion to dismiss and compel arbitration. The Huskinses argue the circuit court erred in (1) finding the limitations

period contained in the arbitration provision was not one-sided, oppressive, and unconscionable; (2) finding the arbitration provision applied mutually to Mungo and the Huskinses; (3) failing to consider the one-sided and oppressive terms of a limited warranty provision in determining whether the arbitration agreement was unconscionable; and (4) granting the motion to dismiss the Huskinses' claims involving the limited warranty provision even though it concluded the arbitration provision did not include claims arising under the limited warranty provision. We affirm the circuit court's order as modified.

FACTS AND PROCEDURAL HISTORY

The Huskinses entered into a purchase agreement (the Purchase Agreement) with Mungo in June 2015 for the purchase of a new home in the Westcott Ridge subdivision in Irmo. The Purchase Agreement consisted of three pages. The top of the first page provided: "*THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ.*"[1] The second page included a paragraph with the heading "*LIMITED WARRANTY*" (the Limited Warranty provision), which stated the following:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the

1. *See* S.C. Code Ann. § 15-48-10 to -240 (2005) (establishing the South Carolina Uniform Arbitration Act (the UAA)).

offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.

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

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

The next page contains a paragraph with the heading "*ARBITRATION AND CLAIMS*" and states,

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties [sic] selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of

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

In July 2017, the Huskinses filed an action against Mungo alleging the Purchase Agreement violated South Carolina law by disclaiming certain implied warranties without providing a reduction in sales price or other benefit to the purchaser for relinquishing such rights. The Huskinses alleged causes of action for (1) breach of contract and the implied covenant of good faith and fair dealing, (2) unjust enrichment, (3) violation of the South Carolina Unfair Trade Practices Act (SCUTPA),[2] and (4) declaratory relief regarding the validity of the waiver and release of warranty rights and the validity of Mungo's purported transfer of all remaining warranty obligations to a third party. They did not allege any problems with the home.

Mungo filed a motion to dismiss and compel arbitration, arguing the Huskinses' claims were subject to arbitration pursuant to the Arbitration and Claims provision (the Arbitration Clause) contained in the Purchase Agreement. The Huskinses filed a memorandum opposing the motion, arguing the Arbitration Clause was unconscionable and unenforceable. They asserted the court should consider the Purchase Agreement's limitations on warranties as part of the agreement to arbitrate and thus find the

2. S.C. Code Ann. § 39-5-10 to -730 (1976 & Supp. 2021).

Arbitration Clause was unconscionable. In addition, the Huskinses argued a provision contained in the Arbitration Clause that limited the time to bring a claim to thirty or ninety days was unconscionable, could not be severed, and rendered the entire Arbitration Clause unenforceable.

After hearing the motion, the circuit court issued an order granting the motion to dismiss and compelling arbitration. The circuit court found that although the Huskinses lacked a meaningful choice, the terms of the Arbitration Clause were not one-sided and oppressive, and the Arbitration Clause was therefore not unconscionable. In considering whether the terms were one-sided and oppressive, the circuit court found that (1) the Limited Warranty provision must be read in isolation from the Arbitration Clause, and (2) the terms in the Arbitration Clause pertaining to the ninety-day time limit were not one-sided and oppressive because they did not waive any rights or remedies otherwise available by law. The Huskinses filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court summarily denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding the provision limiting the time in which to bring a claim was not one-sided, oppressive, and unconscionable?

2. Did the circuit court err in failing to consider the Limited Warranty provision as part of the Arbitration Clause and thus failing to find the Arbitration Clause unconscionable?

3. Did the circuit court err by granting Mungo's motion to dismiss the Huskinses' action when it involved claims falling under the Limited Warranty provision?

STANDARD OF REVIEW

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Id.*

"Arbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citation omitted).

LAW AND ANALYSIS

I. APPEALABILITY

As an initial matter, Mungo maintains the circuit court's order is not immediately appealable. The Huskinses argue that under *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), the order was immediately appealable because it granted Mungo's Rule 12(b)(6), SCRCP, motion to dismiss. We agree.

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Our supreme court has held our state procedural rules—rather than the Federal Arbitration Act (FAA)—govern appealability of arbitration orders.[3] *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding that "because South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, [wa]s applicable, the court's order compelling arbitration [wa]s not immediately appealable"). Ordinarily, an order granting a motion to compel arbitration is not immediately appealable. *See* § 15-48-200(a) (providing that "[a]n appeal may be taken from: (1) An order denying an application to compel arbitration . . . ; (2) An order granting an application to stay arbitration . . . ; (3) An order confirming or denying confirmation of an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of th[e UAA]"). However, the "[d]ismissal of an action pursuant to Rule 12(b)(6) is appealable." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

In *Widener*, this court held an order dismissing the action without prejudice and ordering arbitration was immediately appealable, reasoning that "[b]y dismissing

3. *See* 9 U.S.C. § 16(a)(3) (providing that under the FAA, an appeal may be taken from "a final decision with respect to an arbitration"); *see also Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (holding "when a district court compels arbitration in a proceeding in which there are no other issues before the court, that order is final . . . because the court has disposed of the whole case on the merits").

[the] action, the [circuit] court finally determined the rights of the parties[, and] therefore, [this court had] jurisdiction pursuant to section 14-3-330 of the South Carolina Code [(2017)]." 381 S.C. at 524, 674 S.E.2d at 173-74; *see also* § 14-3-330(2) (providing the appellate courts have jurisdiction in an appeal from "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, . . . or (c) strikes out . . . any pleading in any action"). The appellant in *Widener* argued the dismissal of the action prejudiced him because the statute of limitations would bar him from bringing any future action after the conclusion of the arbitration proceedings. *Id.* at 525, 674 S.E.2d at 174. This court did not decide the merits of the case but reversed and remanded the matter to the trial court to vacate the dismissal and enter an order staying the action "pending the outcome of the arbitration proceedings." *Id.* In contrast, the court in *Toler's Cove*—which did not involve a Rule 12(b)(6) dismissal—found the order compelling arbitration was not immediately appealable but addressed the merits of the appeal "because [the] issues [we]re capable of repetition and need[ed] to be addressed." 355 S.C. at 611, 586 S.E.2d at 584-85.

Here, as in *Widener*, the Huskinses appeal an order dismissing the case, which is an appealable order. *See Williams*, 347 S.C. at 233, 553 S.E.2d at 500 (stating an order dismissing an action pursuant to Rule 12(b)(6) is immediately appealable). In dismissing the Huskinses' claims, the circuit court addressed only the issue of the enforceability of the Arbitration Clause. Unlike the

appellant in *Widener*, the Huskinses do not argue the dismissal prejudiced them; rather, they ask this court to address the merits of the circuit court's decision as to the enforceability of the Arbitration Clause and reverse the order compelling arbitration. We find the order granting the motion to dismiss and compelling arbitration is appealable, and we address the merits because the issue is capable of repetition. *See Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584-85 (finding an order compelling arbitration was not immediately appealable but reviewing the issues on the merits because they were "capable of repetition and need[ed] to be addressed").

II. ENFORCEABILITY OF ARBITRATION AGREEMENT

The Huskinses argue the Arbitration Clause was unenforceable because it included unconscionable terms that cannot be severed, including the Limited Warranty provision and a "limitation of claims" provision. We address each of these arguments in turn.

A. Limited Warranty Provision

The Huskinses challenge the validity of the Limited Warranty provision and assert it must be read together with the Arbitration Clause because it encompassed warranty claims and the provisions cross-referenced one another and were thus substantively intertwined. We disagree.

"Arbitration clauses are separable from the contracts in which they are imbedded." *Hous. Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338, 588 S.E.2d

617, 622 (Ct. App. 2003) (quoting *Jackson Mills Inc. v. BT Cap. Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994)). "[T]he issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." *Id.* (alteration in original) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision."[4] *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (quoting *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (noting the "*Prima Paint* doctrine" required that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

In *D.R. Horton*, instead of considering the arbitration agreement separately from the entire contract, our supreme court considered the warranty provisions

4. Although the circuit court determined the UAA governed the parties' dispute, the application of the UAA as opposed to the FAA does not affect our analysis. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole."); *Simpson*, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1 (noting that "even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause").

and the arbitration provisions of the contract together and construed "the entirety of paragraph 14, entitled 'Warranties and Dispute Resolution,' as the arbitration agreement." 417 S.C. at 48, 790 S.E.2d at 4. The court stated,

> As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

Id. The Arbitration Clause in this case differs from that in *D.R. Horton*. Although *D.R. Horton* also involved a home purchase agreement, there, Paragraph 14 of the agreement was titled "Warranties *and Dispute Resolution*" and consisted of subparagraphs 14(a) through 14(j). *Id.* at 45, 790 S.E.2d at 2 (emphasis added). Two of the subparagraphs stated the parties agreed to arbitrate any disputes related to the warranties contained in the purchase agreement and any claims arising out of the construction of the home. *Id.* In most of the remaining subparagraphs of Paragraph 14, D.R. Horton expressly disclaimed all warranties except for a ten-year structural warranty, and subparagraph 14(i) stipulated D.R. Horton was not "liable for monetary damages of any kind." *Id.* Here, however, the Limited Warranty provision is a completely separate provision in the Purchase Agreement and contains no reference to arbitration or the Arbitration

Clause. Further, the Arbitration Clause contains no cross references to the Limited Warranty provision. Because the two provisions were completely separate and did not cross-reference one another, this court need not construe them together to determine the scope of the warranties or how different disputes were to be handled. This case is therefore distinguishable from *D.R. Horton*, and the circuit court did not err in reviewing the Arbitration Clause in isolation from the remainder of the Purchase Agreement, including the Limited Warranty provision.

B. Limitation of Claims Provision

The Huskinses argue the Arbitration Clause was unenforceable because it required a demand for arbitration to be filed within ninety days of the date the claim, dispute, or other matter arose, or within thirty days if the claim, dispute, or other matter arose from either party's termination of the Purchase Agreement or such claims would be forever barred. They assert this "limitation of claims" provision restricted the statutory limitations period from three years to ninety days and was not severable from the Arbitration Clause. The Huskinses additionally contend that, as a practical matter, this provision applied only to purchasers and such "lack of mutuality" further demonstrated the "one-sided and oppressive nature" of the arbitration clause. We agree this provision abbreviates the statute of limitations period and is one-sided and oppressive. Nevertheless, we find the arbitration clause is enforceable because the unconscionable provision is severable.

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"Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *see also Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), ("[W]hen considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration."), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021. "[A] contract may be invalid—and courts may properly refuse to enforce it—when it is unconscionable. A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability." *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

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1. Unconscionability

a. Absence of Meaningful Choice

We conclude the evidence showed the absence of a meaningful choice on the part of the Huskinses. *See id.* at 25, 644 S.E.2d at 669 ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989))); *id.* ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue."). The Huskinses were average purchasers of residential real estate, were not represented by independent counsel, and were not a substantial business concern to Mungo such that they possessed more bargaining power than any other average homebuyer would. Therefore, evidence supports the circuit court's finding that the Huskinses lacked a meaningful choice in entering the agreement to arbitrate.

b. Oppressive and One-Sided Terms

Next, we conclude the evidence does not support the circuit court's finding that the terms contained in the limitation of claims provision were not one-sided and oppressive.

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South Carolina provides for a three-year statute of limitations in an "action upon a contract, obligation, or liability, express or implied." S.C. Code Ann. § 15-3-530(1) (2005). Section 15-3-140 of the South Carolina Code (2005) provides:

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

The final two sentences of the Arbitration Clause effectively shorten the statutory period to ninety days and provide an even shorter period of thirty days when the "claim, dispute[,] or matter in question" arises from either party's termination of the Purchase Agreement. Even though this provision purports to apply equally to both parties, as a practical matter, it would disproportionately affect the homebuyer's ability to bring a claim. Further, it is not "geared towards achieving an unbiased decision by a neutral decision-maker." *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. We conclude this provision violates sections 15-3-140 and 15-3-530 and is therefore unconscionable and unenforceable. *See id.* at 29-30, 644 S.E.2d at 671 ("The general rule is that courts will not enforce a contract [that]

is violative of public policy, statutory law, or provisions of the Constitution."). We next consider whether this provision is severable or renders the entire Arbitration Clause unenforceable.

2. Severability

Although the Arbitration Clause contains no severability clause, section 36-2-302(1) allows this court to effectively sever the unconscionable provision.[5] *See* S.C. Code Ann. § 36-2-302(1) (2003) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); *see also Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result."); *see also Doe*, 430 S.C. at 615, 846 S.E.2d at 880 ("Courts have discretion though to decide whether a[n arbitration clause] is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive."); *cf. D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d

5. Although title 36 concerns commercial goods and sales, we note our supreme court recently cited section 36-2-302 for the proposition that unconscionable provisions could be severed in a residential home agreement context. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

at 5 n.6 (declining to consider "whether the unconscionable provisions [we]re severable" when the agreement lacked a severability clause and because "doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions").

As we stated, we find the final two sentences of the Arbitration Clause shortening the statutory limitations period were unconscionable. Nevertheless, we conclude sections 15-3-540 and 36-2-302(1) operate to sever this portion of the Arbitration Clause. Here, as in *D.R. Horton*, the Arbitration Clause did not contain a severability clause. On the other hand, unlike *D.R. Horton*, the offending provision is distinct and constitutes the final two sentences of the Arbitration Clause. Thus, notwithstanding the lack of a severability clause, it is possible for this court to simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement. Based on the foregoing, we sever the final two sentences from the remainder of the Arbitration Clause and we affirm the circuit court's order compelling arbitration as modified.[6]

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6. During the pendency of this case's petition for rehearing, our supreme court issued *Lennar*, 437 S.C. 596, 879 S.E.2d 746. The Huskinses contend *Lennar* controls this case. We respectfully disagree. The Huskinses claim that here, as there, the agreement with the developer had multiple provisions that were one-sided and unreasonable. We are constrained to look only at the arbitration clause because, as we noted earlier, the warranty provisions are separate from the arbitration clause. Section 15-3-140 was not at issue in *Lennar*, and that statute essentially instructs us to ignore the developer's attempt to shorten the limitations period.

III. DISMISSAL OF WARRANTY CLAIMS

Finally, we find the Huskinses' contention that the circuit court erred in dismissing claims related to the Limited Warranty provision when it found the Limited Warranty "f[ell] outside" of the Arbitration Clause is without merit. The circuit court did not find such claims fell outside of the scope of the Arbitration Clause. Rather, in considering the enforceability of the Arbitration Clause, the circuit court concluded the Limited Warranty provision was separable and that the Arbitration Clause did not specifically limit the Huskinses' ability to bring a warranty action in a judicial setting. The circuit court additionally concluded the Arbitration Clause provided that all claims and disputes arising out of the Purchase Agreement were subject to arbitration. Thus, we conclude this argument is without merit.

CONCLUSION

For the foregoing reasons, we find the order dismissing the Huskinses' complaint and compelling arbitration was immediately appealable. We affirm, as modified, the order dismissing the complaint and compelling arbitration.

AFFIRMED AS MODIFIED.

MCDONALD and HEWITT, JJ., concur.

When we do that, we believe we are left with a valid arbitration clause, not a broken and unenforceable one. There are no other one-sided and unreasonable terms in the arbitration clause, as there were in *Lennar*.

APPENDIX C — ORDER OF THE STATE OF SOUTH CAROLINA, CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT, COUNTY OF RICHLAND, FILED MARCH 13, 2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL
CIRCUIT

CASE NO. 2017-CP-40-03697

AMANDA LEIGH HUSKINS
AND JAY R. HUSKINS,

Plaintiffs,

v.

MUNGO HOMES, LLC,

Defendant.

Filed March 13, 2018

ORDER

INTRODUCTION

This matter comes before the Court upon Mungo Homes' Motion to Dismiss and Compel Arbitration. Judge DeAndrea Gist Benjamin heard arguments of counsel

on November 8, 2017 at the Court of Common Pleas for Richland County, South Carolina. This Court reviewed the pleadings, memoranda, and arguments of counsel and issues the following Order to **GRANT** the Defendant's Motion to Dismiss and Compel Arbitration.

FACTS

The Huskins are residential buyers who executed a Purchase Agreement with Mungo Homes, a national builder on June 29, 2015. Compl. ¶ 1. The Purchase Agreement was for the sale of a tract of land, the construction of a dwelling, and any improvements constructed on the property. Pl.'s Exh. 1. The Purchase Agreement categorizes the transaction as a "Building Job." *Id.* A Building Job gave the purchasers [the Huskins], an opportunity to inspect any Addendums added to the Purchase Agreement for improvements on the property. *Id.* The Purchase Agreement includes an Addendum where the Huskins requested the placement of the driveway on the right side of the property. *Id.* The improvements specified in the Purchase Agreement Addendum began in August 21, 2015. *Id.* The Addendum includes a Development Rider explaining that factors such as weather and local municipalities may cause delays during the construction and completion of the home. *Id.* Mungo Homes obtained a permit from Richland County classifying the improvement as "residential new construction" for a "single family residence." *Id.* In addition, a Certificate of Occupancy was issued for the property on January 19, 2016. *Id.*

There are two provisions in the Purchase Agreement that are of importance in this lawsuit. First, is the

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

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

> "Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction, or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for

> arbitration and designating the demanding party's arbitrator. Each and every demand for arbitration shall be made within 90 days after the claim, dispute or other mater in question has arisen . . . or else any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred." *Id.*

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

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

Third, the Huskins argue South Carolina precedent requires the court to analyze the "Limited Warranty" and "Arbitration and Claims" provisions *together* to determine whether the arbitration provision is unconscionable. *Id.*

The Defendants argue that the Purchase Agreement involves the sale of property and the construction of a dwelling, or improvements to a dwelling. Def. Mot. to Dismiss at 2. The transaction involved the construction of real estate, which necessarily involves interstate commerce according to South Carolina law. *Id*. at 3. The Federal Arbitration Act governs agreements that involve interstate commerce. *Id.* Arbitration of claims subject to the Federal Arbitration Act require the court to analyze the validity of the arbitration provision in isolation from the remainder of the underlying agreement. Def. Reply Mot. at 3. Mungo Homes argues the "Arbitration and Claims" provision is not unconscionable because the Huskins received an opportunity to review and make changes to the Purchase Agreement and Addendum. Def. Reply Mot. at 4. Further, the "Arbitration and Claims" provision merely sets a time frame for when either party may demand arbitration; it does not shorten the statute of limitations to file a claim arising out of the Purchase Agreement. *Id.* at 5.

I. INTERSTATE COMMERCE: COMMERCE-IN-FACT TEST

The Federal Arbitration Act Section 2 provides that a controversy or claim subject to arbitration arising out of a contract *involving commerce* is valid, irrevocable, and

enforceable except upon grounds for revocation of any contract that exists at law or in equity. 9 U.S.C. § 2 (1988). South Carolina has a strong policy favoring arbitration. *Zabinski v. Bright Acres Assoc.,* 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

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

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

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

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

Although the Purchase Agreement in Huskins is distinguishable from the contract in *Bradley,* arbitration

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

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

Appendix C

II. UNCONSCIONABILITY

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

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

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

Whether one party lacks a meaningful choice to enter an arbitration agreement typically speaks to the fundamental fairness of the bargaining process. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4. "In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia,* the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern." *Simpson,* 373 S.C. at 25, 644 S.E.2d at 669.

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

at 27, 644 S.E.2d at 670. The Huskins, like the buyer in *Simpson*, were customers negotiating with a commercial entity that drafted the contract and held substantially more bargaining power. Compl. ¶ 6-7.; *Simpson* 373 S.C. at 26, 644 S.E.2d at 670.[1]

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

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

When determining the validity of an arbitration provision, courts generally analyze the arbitration provision in isolation from the rest of the contract. *Carlson v.* S. C. *State Plastering, LLC,* 404 S.C. 250, 260, 743 S.E.2d 868, 873-74 (Ct. App. 2013); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.,*

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

418 S.C. 51, 56-58, 791 S.E.2d 286, 289-290 (Ct. App. 2016). The Court will analyze the arbitration provision in conjunction with other provisions of the contract when the arbitration provision cross-references other provisions in the contract. *Smith,* 417 S.C. at 45, 790 S.E.2d at 2.

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

Further, the arbitration provision does not reference the "Limited Warranty" provision contained in the Purchase Agreement. The arbitration provision in *Smith* was intertwined within a complex paragraph titled

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

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

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

To determine whether an arbitration agreement is one-sided and oppressive the courts look at a variety

of factors. An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness. *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. An arbitration provision that stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 31,644 S.E.2d at 672. An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness. *Simpson,* 373 S.C. at 33, 644 S.E.2d at 673. A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson,* 404 S.C. at 254, 743 S.E.2d at 870.

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

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An arbitration provision that stays one party's claims pending the outcome of arbitration, but does not stay the other party's claims is an indicator of a one-sided and oppressive arbitration clause. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. In *Simpson*, the arbitration clause subjected all claims or controversies between the dealer and customer to arbitration. *Id.* The arbitration clause included an exception where claims between the dealer against the customer were not stayed pending the outcome of arbitration. *Id.* The Court found the arbitration provision was one-sided and oppressive because the dealer's judicial remedies superseded the consumer's arbitral remedies. *Id.* The Court envisioned a scenario where the dealer could initiate a claim in court, complete the claim, and sell the contested vehicle prior to an arbitrator's determination of the consumer's rights in the same vehicle. *Simpson,* 373 S.C. at 32, 644 S.E.2d at 672.

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

Appendix C

An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum is an indicator of a one-sided and oppressive arbitration provision. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The arbitration clause in *Simpson* claimed that "any and all disputes" including "automobile warranty" and "any consumer protection statute" may be resolved only by "binding arbitration" which was unenforceable as a matter of public policy for precluding the buyer from filing claims under the Magnuson Moss Warranty Act. *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673. The "Arbitration and Claims" provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting.[2] It requires that all claims and disputes arising out of the Purchase Agreement are subject to arbitration. Pl.'s Exh. 1.

A clearly identified, mutual arbitration provision that does not limit remedies available by law indicates a non-oppressive or one-sided arbitration agreement. *Carlson,* 404 S.C. at 254, 743 S.E.2d at 870 (Ct. App. 2013). The arbitration agreement at hand is clearly labeled and underlined at the top of the page. Pl.'s Exh. 1. *But see Simpson,* 373 S.C. at 28, 644 S.E.2d at 670 (finding the arbitration agreement was unconscionable and noting the inconspicuous nature of the location of the arbitration

2. The Purchase Agreement contains a separate "Limited Warranty" provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages. Pl.'s Exh. 1. This provision is outside the "Arbitration and Claims" provision of the contract and is discussed in detail in Section II of this Oder. *See* Section II(b).

clause as paragraph ten out of sixteen on the page). In *Carlson,* the arbitration provision did not waive any rights or remedies otherwise available by law. *Id.* Similarly, the "Arbitration and Claims" provision in the Huskins' case does not preclude their ability to file warranty claims. Pl.'s Exh. 1. Like the arbitration agreement in *Carlson,* the Huskins' case applies to both parties and allows each party to choose a neutral arbitrator. Pl.'s Exh. 1.; *Carlson,* 404 S.C. at 260, 743 S.E.2d at 873-74.

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

CONCLUSION

The arbitration clause under the Purchase Agreement is governed by the South Carolina Uniform Arbitration Act because the parties included a choice-of-law provision. There is a valid agreement to arbitrate the Huskins' claims because the "Arbitration and Claims" provision is not unconscionable. Although the Huskins' lacked a meaningful choice to negotiate the

terms of the arbitration provision, when analyzing the "Arbitration and Claims" provision in isolation from the underlying agreement, the Court finds that the "Arbitration and Claims" provision is not onesided and oppressive.

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

IT IS SO ORDERED.

Columbia, South Carolina
March 7, 2018

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

APPENDIX D — ORDER OF THE SUPREME COURT OF SOUTH CAROLINA, DATED JANUARY 16, 2025

THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2023-000452

AMANDA LEIGH HUSKINS
AND JAY R. HUSKINS,

Petitioners,

v.

MUNGO HOMES, LLC,

Respondent.

Dated January 16, 2025

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

/s/ John W. Kittredge C.J.
/s/ John Cannon Few J.
/s/ [Illegible] J.
/s/ George James J.
/s/ Letitia H. Verdin J.

APPENDIX E — RELEVANT STATUTORY PROVISIONS

9 U.S.C. § 2

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

28 U.S.C. § 1257(a)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Appendix E

U.S. Const. art. VI cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

S.C. Code Ann. § 15-3-140

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

S.C. Code Ann. § 15-3-530

> Within three years:
>
> (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520;

(2) an action upon a liability created by statute other than a penalty or forfeiture;

(3) an action for trespass upon or damage to real property;

(4) an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property;

(5) an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in Section 15-3-545;

(6) an action under Sections 15-51-10 to 15-51-60 for death by wrongful act, the period to begin to run upon the death of the person on account of whose death the action is brought;

(7) any action for relief on the ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery, the cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(8) an action on any policy of insurance, either fire or life, whereby any person or property, resident or situate in this State, may be or may have been insured, or for or on account of any loss arising under the policy, any clause,

condition, or limitation contained in the policy to the contrary notwithstanding; and

(9) an action against directors or stockholders of a monied corporation or a banking association to recover a penalty or forfeiture imposed or to enforce a liability created by law, the cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created, unless otherwise provided in the law under which the corporation is organized.

APPENDIX F — BRIEF EXCERPTS OF THE SUPREME COURT FOR THE STATE OF SOUTH CAROLINA, FILED APRIL 8, 2024

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2023-000452
Circuit Court Case No.: 2017-CP-40-03697

AMANDA LEIGH HUSKINS AND
JAY R. HUSKINS,

Appellants,

v.

MUNGO HOMES, LLC,

Respondent.

RESPONDENT'S FINAL BRIEF

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Attorney for Respondent

Appendix F

* * *

II. Declining to sever the final two sentences of the Arbitration Agreement pursuant to S.C. Code § 15-3-140 would result in arbitration agreements being placed on uneven footing with other contracts in South Carolina, which directly violates the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011)

In its decision, the Court of Appeals held that S.C. Code §15-3-140 instructs that any attempt to reduce the statute of limitations by contract must be ignored, and is in practice, severed from any agreement in South Carolina by statute.

* * *

Petitioner argues that despite this statute, any such provision can still serve to deem an entire agreement unconscionable. Petitioners' argument, however, would render S.C. Code §15-3-140 unnecessary and inapplicable in any circumstance.

Indeed, if the Legislature intended for a provision attempting to reduce the statute of limitations to render an entire agreement rescinded as unconscionable, the Legislature would have stated as much. The Legislature did not do so. Moreover, if an attempt to reduce the statute of limitations in a contract invalidated the contract in its entirety, there would be no need for the statute, as no

enforceable contract would exist on which a party could sue.

Rather, consistent with the Court of Appeals decision, S.C. Code §15-3-140 instructs that an attempt to reduce the statute of limitations should be disregarded and the remainder of the contract shall be enforced according to its terms. To arrive at any other conclusion would contradict the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011) (holding that a State's law cannot place arbitration agreements on unequal grounds with all other contracts in the State); *see also Parsons*, 418 S.C. at 9-10, 791 S.E.2d at 132 (recognizing the applicability of *Concepcion* to new home build contracts in South Carolina)[3].

Petitioners, however, seek to create a carve out to S.C. Code §15-3-140 solely applicable to arbitration agreements in a new build home contracts. Such a result would inherently put arbitration agreements on unequal grounds with other contracts in South Carolina, impermissibly rejecting *Concepcion*, and abrogating *Parsons*. *See Parsons*, 418 S.C. at fn. 6, 791 S.E. 2d at fn. 6 (clarifying

3. While Petitioners' initially disputed that this matter falls within the Federal Arbitration Act, there is no question that a contract to build and purchase a new home involves interstate commerce. *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (2013); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("[O]ur appellate courts have consistently recognized that contracts for construction are governed by the FAA[]").

that a presumption of unequal bargaining power in new home construction contracts is not applicable to arbitration agreements, as an arbitration agreement is separate and distinct from a new home construction contract and has no connection to the actual sale, purchase or build of a home.).

* * * *

APPENDIX G — BRIEF EXCERPT OF THE SOUTH CAROLINA COURT OF APPEALS, RICHMOND COUNTY, COURT OF COMMON PLEAS, FILED APRIL 17, 2019

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHMOND COUNTY
COURT OF COMMON PLEAS

DeAndrea Gist Benjamin, Circuit Court Judge

Case No.: 2017-CP-40-3697
Appellate Case No.: 2018-000889

AMANDA LEIGH HUSKINS AND
JAY R. HUSKINS,

Appellants,

v.

MUNGO HOMES, LLC,

Respondents.

FINAL BRIEF OF MUNGO HOMES, LLC

Appendix G

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* * *

Appellants further contend that a "general presumption of unequal bargaining power between a new home buyer and a residential builder" results in an unenforceable Arbitration Agreement. However, this argument is again unsupported by legal authority and simply misstates the law. Such a presumption is contrary to South Carolina law as it would put the Arbitration Agreement on unequal footing with any other contract clause. A "presumption of unequal bargaining power" is not a "generally applicable contract defense." See, *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct., 1740, 1746 (2011).

* * * *

APPENDIX H — TRIAL COURT MOTION EXCERPTS OF THE STATE OF SOUTH CAROLINA FOR THE COURT OF COMMON PLEAS, RICHLAND COUNTY, FILED JULY 20, 2017

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

CASE NO.: 2017-CP-40-03697

AMANDA LEIGH HUSKINS AND
JAY R. HUSKINS,

Plaintiffs,

v.

MUNGO HOMES, LLC,

Filed July 20, 2017

NOTICE OF MOTION AND MOTION TO DISMISS AND COMPEL ARBITRATION

* * *

That said, the Supreme Court of South Carolina has repeatedly held that a contract providing for construction will inherently touch on interstate commerce for no other reason than it is implausible to suggest that the building materials will be fabricated exclusively in South Carolina. *See Zabinski*, 346 S.C. at 594-95, 553 S.E.2d at 117-18

(utilization of out-of-state materials, contractors and investors implicates interstate commerce); *Episcopal Housing v. Fed. Ins. Co.* 269 S.C. 631, 640, 239 S.E.2d 647, 652 (use of labor, supplies, and materials from out-of-state sources indicates interstate commerce); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App.2002) (finding consultation with out-of-state technicians is an indicator of interstate commerce).

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

As the FAA applies, the FAA requires that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Appendix H

The United States Supreme Court has construed Section 2 of the FAA as permitting "agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011).

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

* * * *