THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-08-02424
Appellate Case No. 2020-000415

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC.....Respondents.

RECORD ON APPEAL, VOLUME I

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Record on Appeal Volume II

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CIVIL CASE NO. 2018-CP-08-02547
Builders Firstsource-Southeast Group, LLC Plaintiff, v. MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC Defendants.	)	**ORDER GRANTING CHARLESTON EXTERIORS, LLC'S AND ECC CONTRACTING, LLC MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimball, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction project known as the "Abbey at Spring Grove" which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the "Abbey") is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas[1]. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the "Underlying Class Action").* The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual / equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

[1] Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law." Rule 56(c), SCRCP; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)).

"Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

A. THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED

South Carolina recognizes the "discovery rule" when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. Burgess v. American Cancer Society, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999)

The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. DISGUISED INDEMNITY CLAIMS

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties ("Non-Indemnity Claims) are each barred by the three-year statute

of limitations, the Court will consider the Defendants' additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the "Stoneledge Defense" which bars claims that are disguised indemnification claims cloaked within separate causes of action.[2] Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");*

C. MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.....

> **ONLY TO THE EXTENT CAUSED.IN WHOLE OR-IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.**

[2] Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)*

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS…..

> **REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE ORIN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.**

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding "anti-indemnity" clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally." Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports "to relieve an indemnitee from the consequences of its own negligence," our case law requires strict construction of the clause. Laurens, 355 S.C. at 111, 584 S.E.2d at 378-79. "Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) see also Murray v. Texas Co., 172 S.C. 399, 402, 174 S.E. 231, 234 (1934)(finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence).*

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master

Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. *As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. Choate v. United States, 233 F. Supp. 463 (D.C. Okla. 1964) First Gen. Servs. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994).* There has been no judgment entered against Builders First Source, so the court must conclude that indemnification for liability incurred by BFS has yet to accrue and is therefore not time barred.

The Court draws a sharp distinction in this case. The relief prayed for in the BFS complaint seeks consequential damages for attorney's fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, "....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action." *See Complaint, Paragraph 33.*

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th 2015 and, therefore, these damages can not be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting, LLC's Motion for Summary Judgment is granted as to the following causes of action only:

a. Negligence
b. Breach of Contract
c. Breach of Warranties

d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this _____ day of _____, 2019, at _____, South Carolina.

_____

Clifton B. Newman

Presiding Judge

Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al

Case Number: 2018CP0802547

Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders Firstsource-Southeast Group, LLC Plaintiff, V MI Windows And Doors, INC.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC, Defendant,	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL CASE NO. 2018-CP-08-02547 **AMENDED ORDER GRANTING CHARLESTON EXTERIORS, LLC'S AND ECC CONTRACTING, LLC'S MOTION FOR SUMMARY JUDGMENT**

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As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. <u>BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS</u>

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States, 233 F. Supp. 463 (D.C. Okla. 1964) First Gen. Servs. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994).* Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp.*, LLC, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

contractual and common law indemnification for and against Liability". *See Complaint, Paragraph 34.*

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney's fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, "....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action." *See Complaint, Paragraph 33; See also Paragraph 34* ("...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney's fees, costs, and other expenses incurred in defending the underlying action... ")

BFS began to incur liability for attorney's costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS's Answer was executed and served more than three years prior to the filing of the present action. Thus BFS's claims for "contractual and common law indemnification against Liability" are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

LLC's Motion for Summary Judgment is granted as to the following causes of action only:

a. Negligence

b. Breach of Contract

c. Breach of Warranties

d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this_____day of_, 2020, at_____, South Carolina.

_____

Clifton B. Newman Presiding Judge

Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al

Case Number: 2018CP0802547

Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders Firstsource-Southeast Group, LLC Plaintiffs, v. MI Windows And Doors, INC.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC, Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT **Civil Action No. 2018-CP-08-02547** **ORDER DENYING RECONSIDERATION**

This matter came before the Court on October 18th, 2019 on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. The matter came before the Court again on January 17, 2020 on the Motion of the Defendants for Reconsideration of the Order Granting Summary Judgment on various claims. An amended Order was issued on February 3, 2020 to which the Defendant seeks reconsideration.

Having fully considered the matter, both Motions for Reconsideration are denied based on the reasons stated in the Order of February 3, 2020.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al

Case Number: 2018CP0802547

Type: Order/Other

So Ordered

s/ Clifton B. Newman, 2127

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No.: 2014-CP-08-2424

PATRICIA DAMICO, JOSHUA and BRETTANY BUETOW, EDWARD and SYLVIA DENGG, JONATHAN and THERESA DOUGLASS, ANTHONY and STACEY RAY, DANNY and ELLEN DAVIS MORROW, & MATTHEW COLLINS, Individually and Derivatively as acting on behalf of the Spring Grove Plantation Homeowners Association

Plaintiffs,

vs.

LENNAR CAROLINAS, L.L.C., SPRING GROVE PLANTATION DEVELOPMENT INC., VOLKMAR CONSULTING SERVICES, L.L.C. & MANALE LANDSCAPING, L.L.C.

Defendants.

COMPLAINT

(Negligence, Negligent Misrepresentation, Breach of Implied Warranty of Habitability, Breach of Implied Warranty of Good and Workmanlike Service, Breach of Plans and Specifications, Breach of Fiduciary Duty, Constructive Trust, and Unfair Trade Practices)

The Plaintiffs, complaining of the Defendants above named, would allege and show unto this Honorable Court as follows:

FACTUAL ALLEGATIONS

1. Plaintiffs are owners of single family homes at The Abbey at Spring Grove Plantation (hereinafter The Abbey), a housing development located on Maywood Drive, Moncks Corner, Berkeley County, South Carolina, and are proceeding on their own behalf and derivatively on behalf of the other homeowners within The Abbey at Spring Grove Plantation.

2. The Defendant, Lennar Carolinas, L.L.C. (hereinafter Lennar), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is the developer and seller of the

neighborhood and the single family homes at The Abbey and has been in control of the Spring Grove Plantation Homeowners Association for said neighborhood.

3. The Defendant, Spring Grove Plantation Development, Inc. (hereinafter SGPD), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; upon information and belief, this Defendant was the initial developer and seller of the neighborhood and the single family homes at The Abbey until selling and turning over control of The Abbey to Lennar.

4. The Defendant, Volkmar Consulting Services, L.L.C. (hereinafter Volkmar), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is an engineering consulting firm that served in the design of The Abbey.

5. The Defendant, Manale Landscaping, L.L.C. (hereinafter Manale), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is a landscaping business that provided landscaping and grading at The Abbey.

6. At the time of the incidents giving rise to the Plaintiffs' Complaints, Defendants Lennar, SGPD, Manale, and Volkmar acted by and through its agents, contractors, and employees for the purpose of carrying on its business and therefore, is liable for the negligent acts of its agents, contractors, and employees under the theory of *respondeat superior*.

7. Defendant Lennar commenced to design, construct, develop, and sell the single family homes in The Abbey to, among others, the Plaintiffs in this action, and are continuing to market and sell units in The Abbey despite the fact that they have been put on notice of the numerous construction and design defects within the subject neighborhood and without

disclosing these defects to the any of the homeowners, including the Plaintiffs as well as new homeowners.

8. The Abbey is a neighborhood development started in 2011 by Defendant SGPD; it was then sold to Defendant Lennar, who then took control over the development of the neighborhood, hired contractors and controlled the homeowners association.

9. By investigation of the subject structures, premises, roads, and property, the homeowners and/or Plaintiffs learned that said subject structures, premises, roads, and property have been deficiently designed and have significant construction defects, particularly the soil grading which was improperly performed and will have to be completely removed and replaced; In addition, the other construction, design and grading deficiencies to the subject structures and property include, but are not limited to, the following:

a. Water accumulation on the property of the Plaintiffs and homeowners;
b. Improper grading of the property of the Plaintiffs and homeowners;
c. Improper installation of drainage pipes; and,
d. Deterioration of the subject structures due to the drainage issues.

10. As a direct and proximate result and consequence of the numerous construction, design, installation, and implementation of the above defects, the Plaintiffs have and will continue to spend substantial sums of money for the repairs and reconstruction of the structures, property, and roads and will be subject to loss of use, enjoyment, and depreciation of value of their property.

11. In addition to the construction, design, and installation defects, Defendant Lennar, in their capacity as head of the Spring Grove Plantation Homeowners Association has:

a. Failed and omitted to act in a fiduciary capacity towards the owners of the property and structures within The Abbey;
b. Negligently maintained the property;
c. Failed to act as competent managers;

d. Acted at all times in their own interests and in contravention of their fiduciary duty towards the homeowners;
e. Covered up and concealed defects and damage from the homeowners; and ,
f. Acted in violation of all fiduciary duty concepts.

12. Due to the actions of the Defendants, as stated above, the Plaintiffs are facing significant damage repairs, deteriorating property, significant and immediate expenses for investigation, destructive testing, and an analysis of construction defects, repairs defects, grading defects, drainage problems, damages, deterioration, and a generally overall dilapidated condition which is the direct and proximate result of defective construction, management, maintenance, and abandonment of generally accepted fiduciary principles on the part of the Defendants.

FOR A FIRST CAUSE OF ACTION
(Negligence – Developers)

13. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

14. The damages and injuries caused to the Plaintiffs, their property, and derivatively on behalf of Spring Grove Plantation Homeowners Association, are the direct and proximate result of the negligence, willfulness, wantonness, carelessness and recklessness of the Defendants SGPD and Lennar in one or more of the following particulars to wit:

a. In their capacity as developers in defectively overseeing the construction of the subject structures;
b. In failing to properly inspect, repair, and maintain the structures;
c. In negligently effecting repairs to the structures, premises, property and roads;
d. In failing and omitting to exercise that degree of care and caution of a reasonably prudent manager of a homeowners association;
e. In failing and omitting to retain proper experts and to effectively inspect and repair the structures, premises, property, and roads; and
f. In placing their interests ahead of the owners thereby breaching their fiduciary duty.

15. As a direct and proximate result of the above stated negligent actions on behalf of Defendants SGPD and Lennar, the Plaintiffs and similarly situated homeowners will have to

spend substantial sums of money for the repairs and reconstruction of their property and structures and will be subject to loss of use, enjoyment, and depreciation of value of property.

FOR A SECOND CAUSE OF ACTION
(Negligence - Contractors)

16. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

17. The construction of the subject structures, premises, property, and roads by Defendants, Lennar and Manale, deviated from the normal standards of good and workmanlike practice in the construction field in the following particulars, to-wit:

a. In failing and omitting to construct the subject structures, premises, property, and roads in conformity with the plans and specifications and construction documents;
b. In failing and omitting to construct the subject structures pursuant to good and workmanlike construction practices;
c. In failing and omitting to properly install drainage solutions to ensure that water intrusion would not occur;
d. In failing and omitting to properly seal the subject structure to prevent water infiltration and intrusion; and
e. By additional improper construction practices, including but not limited to, that outlined above.

18. As a direct, foreseeable, and proximate result of the negligence of Lennar and Manale, the Plaintiffs have suffered damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and to be required over the expected life of the structure; diminution in value of the single family units; and for loss of use.

FOR A THIRD CAUSE OF ACTION
(Negligent Misrepresentation - Developers)

19. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim

20. Defendants SGPD and/or Lennar through advertisements, website advertisements, sales brochures and other marketing literature, and by statements and actions of their agents, made numerous representations to the Plaintiffs, including, but not limited to, the quality of the development and design of the single family homes in The Abbey.

21. The above-described representations made by Defendants SGPD and/or Lennar and their agents to the Plaintiffs were untrue and were negligent misrepresentations of material facts.

22. Defendants SGPD and/or Lennar made the above-described representations in a business or commercial capacity.

23. Defendants SGPD and/or Lennar made the above-described statements at a time when, in the exercise of reasonable and ordinary care, they should have known that they were false, and the Defendants knew or should have known that reasonably foreseeable purchasers of the single family home units would rely on their representations made in their advertising and sales and marketing literature, and by their agents; Defendants SGPD and/or Lennar, therefore, failed to exercise reasonable care or competence in making the above-described statements.

24. The Plaintiffs relied on this false information supplied by Defendants SGPD and/or Lennar when they purchased their property units at The Abbey.

25. Such reliance by the Plaintiffs was reasonable and justifiable based on the knowledge available to them and the circumstances at the time.

26. Defendants SGPD and/or Lennar breached their duties by failing to exercise due care when making these representations.

27. The Plaintiffs reasonably and justifiably relied on Defendants SGPD and/or Lennar's representations to their detriment.

28. As a direct, foreseeable, and proximate result of Defendants SGPD and/or Lennar's negligent misrepresentations, the Plaintiffs have suffered physical damage to their single family home units, premises, and property as well as loss of use and diminution in value.

29. Defendants SGPD and/or Lennar's breach of their duty to exercise due care in making representations about the single family home units, premises, and property constitutes gross negligence, entitling Plaintiffs to recover punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Gross Negligence – Developers)

30. The Plaintiffs repeat and reallege the allegations contained in all of the paragraphs set forth above as if set forth herein verbatim.

31. During all times material to the claims herein, the Defendants', SGPD and Lennar, acts and omissions amounted to gross negligence, recklessness, and a willful and wanton disregard for the safety, well-being, and property of the Plaintiffs. The damages and injuries caused to the Plaintiffs, their property, and derivatively to the Spring Grove Plantation Homeowners Association, are the direct and proximate result of the negligence, willfulness, wantonness, carelessness and recklessness of the Defendants SGPD and Lennar in one or more of the following particulars to wit:

a. In their capacity as developers in defectively overseeing the construction of the subject structures;
b. In failing to properly inspect, repair, and maintain the structures;
c. In negligently effecting repairs to the structures, premises, property and roads;
d. In failing and omitting to exercise that degree of care and caution of a reasonably prudent manager of a homeowners association;
e. In failing and omitting to retain proper experts and to effectively inspect and repair the structures, premises, property, and roads; and

f. In placing their interests ahead of the owners thereby breaching their fiduciary duty.

32. As a direct and proximate result of the above stated grossly negligent actions on behalf of Defendants SGPD and Lennar, the Plaintiffs and similarly situated homeowners will have to spend substantial sums of money for the repairs and reconstruction of their property and structures and will be subject to loss of use, enjoyment, and depreciation of value of property.

33. Plaintiffs are entitled to recover punitive damages from the Defendants SGPD and Lennar in an amount as to be determined by the Court.

FOR A FIFTH CAUSE OF ACTION
(Breach of Implied Warranty of Habitability - Developers and Contractors)

34. The Plaintiffs repeat and reallege the allegations contained in all of the paragraphs set forth above as if set forth herein verbatim.

35. The Defendants impliedly warranted as a matter of law that the subject structures, property, premises, and roads at The Abbey, which they developed and built, were habitable and fit for the intended use.

36. This implied warranty was breached by the Defendants in that the work performed by Lennar was in a manner below ordinary workmanship and the subject structures at The Abbey were neither habitable nor fit for their intended use, causing damage to Plaintiffs.

37. As a direct, foreseeable, and proximate result of the Defendants breach of implied warranty of habitability, the Plaintiffs have suffered physical damage to their single family home units as well as loss of use and diminution in value.

FOR A SIXTH CAUSE OF ACTION
(Breach of Implied Warranty of Good and Workmanlike Service – Developers and Contractors)

38. The Plaintiffs repeat and reallege the allegations contained in all of the paragraphs set forth above as if set forth herein verbatim.

39. In undertaking to complete its construction work on the subject structures at The Abbey, the Defendants Lennar, SGPD, Volkmar and Manale impliedly warranted that all work would be of good quality, free from faults and defects, of good and workmanlike quality, and in conformance with the contract documents and industry standards.

40. The Defendants breached this implied warranty of good and workmanlike service in that the work was performed in a manner below ordinary workmanlike quality, causing damage to the Plaintiffs.

41. As a direct and proximate result of the breach of implied warranty of good and workmanlike service, the Plaintiffs have suffered physical damage to their single family home units as well as loss of use and diminution in value.

FOR A SEVENTH CAUSE OF ACTION
(Negligence – Volkmar)

42. The Plaintiffs repeat and reallege the allegations contained in all of the paragraphs set forth above as if set forth herein verbatim.

43. Volkmar agreed to provide professional architectural and engineering services for the design of The Abbey, specifically including, but not limited to, the issuance of the plans and specifications for construction; these documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards; upon information and belief, Defendant Volkmar agreed to make periodic visits to the project during construction to observe whether the construction was in accordance with the plans and specifications and all applicable building codes.

44. It was foreseeable that the Plaintiffs, as the ultimate purchasers of the homes, property and structures within The Abbey, would be damaged if Volkmar breached the above duties.

45. Volkmar breached its duty of care as follows:

a. By failing to properly design and prepare specifications for The Abbey which were compliant with all applicable building codes and professional standards;
b. Failing to specify its designs were in compliance with applicable building codes for a neighborhood development project in Berkeley County;
c. Failing to design and specify the drainage system of the neighborhood as a whole would adequately prevent water from intruding into the interior of the single family home units;
d. Failing to properly administer, observe, and inspect the construction of The Abbey for compliance with the plans and specifications and applicable building codes; and
e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at The Abbey project.

46. As a result of Volkmar's breach of its standard of care, the Plaintiffs and similarly situated homeowners have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Spring Grove Plantation Homeowners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies, and to implement the remediation plan to their single family homes, property, premises, and structures.

47. Additionally, the Plaintiffs will suffer loss of use and enjoyment of their single family homes, property, premises and structures during the time in which construction repairs are undertaken, and diminution in the value of their property.

48. The Plaintiffs are entitled to a judgment against Volkmar in an amount to be determined at the trial of the case.

FOR AN EIGHTH CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service as to Volkmar)

49. Plaintiffs repeat and reallege the allegations contained in all of the paragraphs set forth above as if set forth herein verbatim.

50. By performing design services for the construction of The Abbey, Volkmar impliedly warranted that its work product would be of good quality, equal to or greater than industry standards.

51. Volkmar breached its duty to provide workmanlike service as follows:

a. By failing to properly design and prepare specifications for The Abbey which were compliant with all applicable building codes and professional standards;
b. Failing to specify its designs were in compliance with applicable building codes for a neighborhood development project in Berkeley County;
c. Failing to design and specify the drainage system of the neighborhood as a whole would adequately prevent water from intruding into the interior of the single family home units;
d. Failing to properly administer, observe, and inspect the construction of The Abbey for compliance with the plans and specifications and applicable building codes; and
e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at The Abbey project.

52. As a direct and proximate cause of the breach of the implied warranty, the Plaintiffs have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Spring Grove Plantation Homeowners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.

53. Additionally, the Plaintiffs will suffer loss of use and enjoyment of their single family homes, property, premises, and structures during the time in which construction repairs are undertaken, and diminution in the value of their property.

54. Plaintiffs are entitled to a judgment against Volkmar, in an amount to be determined at trial, as a result of the breach of its implied warranty.

FOR A NINTH CAUSE OF ACTION
(Breach of Warranty of Plans and Specifications as to Volkmar)

55. Plaintiffs repeat and reallege the allegations contained in all of the paragraphs set forth above as if set forth herein verbatim.

56. Volkmar warranted the sufficiency of the design, plans, and specifications for The Abbey; and, the Plaintiffs, as the ultimate purchasers of their individual homes at The Abbey, were the foreseeable beneficiaries of this implied warranty.

57. By failing to properly design the building and prepare appropriate plans and specifications, Volkmar breached its warranty as follows:

a. By failing to properly design and prepare specifications for The Abbey which were compliant with all applicable building codes and professional standards;
b. Failing to specify its designs were in compliance with applicable building codes for a neighborhood development project in Berkeley County;
c. Failing to design and specify the drainage system of the neighborhood as a whole would adequately prevent water from intruding into the interior of the single family home units;
d. Failing to properly administer, observe, and inspect the construction of The Abbey for compliance with the plans and specifications and applicable building codes; and
e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at The Abbey project.

58. The Plaintiffs have been damaged as a result of Volkmar's breach of its warranty in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Spring Grove Plantation Homeowners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.

59. Additionally, the Plaintiffs will suffer loss of use and enjoyment of their single family homes, property, premises and structures during the time in which construction repairs are undertaken, and diminution in the value of their property.

60. Plaintiffs and members of the class are entitled to a judgment against Volkmar, in an amount to be determined at trial, as a result of the breach of its warranty

FOR A TENTH CAUSE OF ACTION
(Breach of Fiduciary Duty-Developers)

61. The Plaintiffs repeat and reallege the allegations contained in all of the paragraphs as set forth above as if set forth herein verbatim.

62. In their capacity as developers of the condominium project at The Abbey and as head of the Spring Grove Plantation Homeowners Association, the Defendants SGPD and/or Lennar, as a matter of law, undertook a fiduciary duty towards the Plaintiffs and said homeowners association.

63. Defendants SGPD and/or Lennar in their capacity set forth above, breached their duty as fiduciaries towards the Plaintiffs and towards the Spring Grove Plantation Homeowners Association in failing to act in a reasonably prudent manner, and in placing their interests ahead of the interests of those to whom they owed a clear fiduciary duty; rather than acting in the highest possible degree of good faith and fair dealing concerning the Plaintiffs and the Spring Grove Plantation Homeowners Association, Defendants SGPD and/or Lennar acted exactly to the contrary in acting in their own interests at all times, in all aspects of the development, maintenance and sales of the single family units, premises, and property and showed lack of concern of the construction defects and failed to disclose these construction defects to new homeowners.

64. As a direct and proximate result of these breaches of fiduciary duty, the Plaintiffs and the Spring Grove Plantation Homeowners Association have suffered damages in the amount equal to the extraordinary repair, maintenance, and reconstruction costs required and to be required over the expected life of the structure, diminution in value of the condominium units, and loss of use.

FOR AN ELEVENTH CAUSE OF ACTION
(Constructive Trust- Developers)

65. The Plaintiffs repeat and reallege the allegations contained in all of the paragraphs as set forth above as if set forth herein verbatim.

66. The activities of Defendants SGPD and/or Lennar herein in failing to properly manage and maintain the subject Property and in failing to properly manage the Spring Grove Plantation Homeowners Association have placed the Plaintiffs and the homeowners association in a precarious position, requiring an immediate change in management.

67. As a result of Defendants SGPD and/or Lennar's failure to manage properly, their breach of fiduciary duty, and the ongoing lack of management and maintenance, the Plaintiffs and the Spring Grove Plantation Homeowners Association are entitled to this Court's placing a constructive trust over and Receiver in place of the current Defendant Lennar as manager of the Spring Grove Plantation Homeowners Association.

FOR A TWELFTH CAUSE OF ACTION
(Unfair Trade Practices - Developers)

68. The Plaintiffs repeat and reallege the allegations contained in all paragraphs as set forth above as if repeated verbatim herein.

69. The Plaintiffs, Lennar, SGPD, Manale and Volkmar are "persons" within the meaning of S.C. Code Ann. § 39-5-10 (a) (2014).

70. Defendants SGPD and/or Lennar by developing, selling, and marketing the single family home units at The Abbey, were engaged in commerce within the meaning of S.C Code Ann. § 39-5- 10 (b).

71. Defendants SGPD and/or Lennar's actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code Ann. § 39-5-20 (a).

72. Defendants SGPD and/or Lennar's acts are capable of repetition, and, upon information and belief, have been repeated.

73. Defendants SGPD and/or Lennar's conduct affects the public interest of South Carolina.

74. Defendants SGPD and/or Lennar, knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

75. As direct, foreseeable, and proximate result of Defendants SGPD and/or Lennar's unfair and deceptive practices, the Plaintiffs have suffered an ascertainable loss of money and property.

76. The Plaintiffs are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees.

WHEREFORE, the Plaintiffs pray that this Court issues an Order granting judgment for the Plaintiffs against the Defendants, jointly and severally, for the following relief:

a. for actual damages in an amount to be proven at trial;
b. for trebled damages under S.C. Code Ann. §39-5-110;
c. for punitive damages;
d. for prejudgment and postjudgment interest on Plaintiff's damages;
e. for a constructive trust to install new management of receiver to take over and mange the assets of the Spring Grove Plantation Homeowners Association;
f. for attorney's fees and costs; and
g. for such other and further relief as this Court may deem just and proper.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

Respectfully submitted,

Michael J. Jordan
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843-572-0700
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Attorneys for the Plaintiff

October 30, 2014
Goose Creek, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO: 2014-CP-08-02424

Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins.

Plaintiffs,

vs.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc. Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental, and Rick Bryant, individually.

Defendants.

Lennar Carolinas, LLC

Third-Party Plaintiff,

vs.

Super Concrete of SC, Inc. Southern Green, Inc., and TJB Trucking/Leasing, LLC,

Third-Party Defendants.

RULE 23 SOUTH CAROLINA RULES OF CIVIL PROCEDURE CLASS ACTION

FIRST AMENDED COMPLAINT
(Jury Trial Demanded)
(Class Action)
(Construction Defects)
(Verified)

The Plaintiffs, Patricia Damico and Lenna Lucas, as Class Representatives and the above-named Plaintiffs (hereinafter collectively referred to as "Plaintiffs"), individually and as a class of similarly situated owners of homes in a residential community named the Abbey at Spring Grove Plantation complaining of the above-mentioned Defendants, allege and state as follows:

1. Plaintiffs Lenna Lucas and Patricia Damico are citizens and residents of Berkeley County, South Carolina, who at all times relevant hereto live in a residential community known as The Abbey at Spring Grove Plantation, located in Berkeley County, South Carolina. Plaintiffs Lenna Lucas and Patricia Damico further allege and state that they are bringing this action pursuant to Rule 23, SCRCP, as representing a class composed of each and every home owner in The Abbey at Spring Grove Plantation, and that:

a. The class is so numerous that joinder of all members is impracticable;

b. There are questions of law and fact common to the class;

c. The claims of the Plaintiffs, Lenna Lucas and Patricia Damico, are typical of the claims of the class;

d. The Plaintiffs Lenna Lucas and Patricia Damico will fairly and adequately protect the interest of the class; and

e. The amount in controversy exceeds One Hundred Dollars ($100.00) for each member of the class.

2. Plaintiffs Patricia Damico, Lenna Lucas, and other similarly situated home owners, own homes in of The Abbey.

3. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs Patricia Damico and Lenna Lucas bring this action both individually and as a proposed class action against the Defendants on behalf of themselves and

all other similarly situated persons and entities, that own homes within The Abbey (hereinafter referred to collectively as the "Class"). The Class is more particularly defined as follows:

All persons and/or entities that own homes/property within The Abbey.

Excluded from the Class are:

a. Any Judge presiding over this action and members of their families;

b. Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and Defendants' current or former employees investors, members, or officers;

c. Any former owner of a home; and

d. All persons who properly execute and file a timely request for exclusion from the Class.

4. As representatives of the Class defined herein pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure, the Plaintiffs seek to recover monetary damages from the Defendants, for negligence, gross negligence, recklessness, wantonness, willfulness, breach of fiduciary duties, breach of express and implied warranties, with respect to their duties as a developer in the development, marketing, sale of, administration, care, and maintenance and/or repair of The Abbey, as well as their duties to design and construct The Abbey free from defects and in accordance with all applicable building and dwelling codes.

5. *Numerosity:* The Class is composed of in excess of sixty nine (69) persons or entities geographically dispersed throughout the State of South Carolina and other states, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of sixty nine (69) persons or entities.

6. *Typicality:* Plaintiffs Patricia Damico and Lenna Lucas' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in the

design, development, construction, reconstruction, marketing, selling, management and repair of The Abbey.

7. *Adequate Representation*: Plaintiffs Patricia Damico and Lenna Lucas will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including home defect claims and class actions.

8. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since, among other things, individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court systems while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

9. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice vis-à-vis each class member. All Class Members have the same legal right to, and interest in, redress for damages associated with the defective conditions existing within The Abbey.

10. Plaintiffs Patricia Damico, Lenna Lucas, and the Class, who are all members of the Abbey, envision no unusual difficulty in the management of this action as a class action.

11. Each Class Member has an interest of more than $100.00.

12. The amount of money at stake for each Class Member is not sufficient for each member to hire their own counsel, forensic engineers and architects and bring their own action.

13. The individual Plaintiffs are citizens and residents of Berkeley County, South Carolina, who at all times relevant hereto live in a residential community known as The Abbey at Spring Grove Plantation, located in Berkeley County, South Carolina.

14. The Abbey is a section of the residential community, Spring Grove Plantation, located in Berkeley County, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

15. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina or some other state and are authorized to conduct business in this state, and have a principal place of business in Berkeley County or have conducted business in Berkeley County.

16. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

17. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed and constituted in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

18. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

19. This Court has jurisdiction over the parties and subject matter hereto.

20. The construction of The Abbey was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and experienced in performing such construction work as to properly build The Abbey according to the normal standards of good and workmanlike practice in the construction field.

21. Construction defects in The Abbey have recently been discovered. A recent inspection of the subject Homes resulted in the discovery of major problems and deficiencies including but not limited to the following:

a. Lack of proper foundation work;

b. Lack of proper foundation slabs;

c. Structural damage to the homes;

d. Water damage resulting from defects;

e. Improper grading and drainage;

f. Improper roofing; and

g. Improper windows and installation of some.

22. Defendant Lennar Carolinas, LLC (hereinafter referred to as "Lennar") is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant hereto, was authorized to and did conduct business in the State of South Carolina, County of

Berkeley for the purpose of planning, developing, marketing, owning, maintaining, leasing, selling, and constructing the homes in a manner for sale to the public.

23. Upon information and belief, the above-identified Lennar Defendant was, in various capacities, individually and collectively engaged in the planning and developing of the Project, and contracted with various entities for the design of the Project.

24. The Defendant, Spring Grove Plantation Development, Inc. (hereinafter SGPD), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; upon information and belief, this Defendant was the initial owner/developer and seller of the neighborhood.

25. The Defendant, Manale Landscaping, LLC (hereinafter Manale), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is a landscaping business that provided landscaping and grading at The Abbey.

26. The Defendant, Super Concrete of SC, Inc. (hereinafter Super Concrete), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is a concrete contracting business that provided concrete, flatwork, driveways, walkways, and foundation slabs at The Abbey.

27. The Defendant, TJB Trucking/Leasing, LLC (hereinafter TJB), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state; this Defendant is a business that provided grading and pads at The Abbey.

28. The Defendant, Southern Green, Inc. (hereinafter Southern Green), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state; this Defendant is a landscaping business that provided landscaping and grading at The Abbey.

29. The Defendant, Paragon Site Constructors, Inc. (hereinafter Paragon), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; Paragon performed site preparation and/or grading work for the building pads at the lots now known as The Abbey that is the subject of this litigation.

30. The Defendant, Civil Site Environmental, Inc. (hereinafter referred to as "CSE") is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; CSE served as the professional civil engineer and designer for the development of The Abbey neighborhood and provided civil drawings for Phase I and Phase II of the development of the lots now known as The Abbey.

31. The Defendant, Rick Bryant (hereinafter referred to as "Bryant") is a citizen and resident of the County of Berkeley, State of South Carolina; Bryant is a former employee of Spring Grove who undertook certain work and/or provided labor and materials to the project now known as The Abbey neighborhood.

32. At the time of the incidents giving rise to the Plaintiffs' Complaints, Defendants Lennar, SGPD, Manale, Super Concrete, TJB, Southern Green, Paragon, CSE, and Bryant acted by and through its agents, contractors, and employees for the purpose of carrying on its business and

therefore, is liable for the negligent acts of its agents, contractors, and employees under the theory of *respondeat superior*.

33. Defendant Lennar commenced to design, construct, develop, and sell the single family homes in The Abbey to, among others, the Plaintiffs in this action, and marketed and sold units in The Abbey despite the fact that they have been put on notice of numerous construction and design defects within the subject neighborhood and without disclosing those defects to any of the homeowners, including the Plaintiffs as well as new homeowners.

34. The Abbey is a neighborhood development started by Defendant SGPD; it was then sold to Defendant Lennar, who then took control over the development of the neighborhood and hired contractors.

35. By investigation of the subject structures, premises, roads, and property, the homeowners and/or Plaintiffs learned that said subject structures, premises, roads, and property have been deficiently designed and have significant construction defects. Construction was improperly performed and will have to be completely removed and replaced. The design, grading deficiencies, and construction to the subject structures and property include, but are not limited to, the following;

a. Water accumulation on the property of the Plaintiffs and homeowners;

b. Improper grading of the property of the Plaintiffs and homeowners;

c. Improper installation of drainage pipes;

d. Deterioration of the subject structures due to the drainage issues;

e. Improper foundation;

f. Improper flashing; and

g. Water intrusion.

36. As a direct and proximate result and consequence of the numerous construction, design, installation, and implementation of the above defects, the Plaintiffs have and will continue to spend substantial sums of money for the repairs and reconstruction of the structures, property, and roads and will be subject to loss of use, enjoyment, and depreciation of value of their property.

37. Due to the actions of the Defendants, as stated above, the Plaintiffs are facing significant damage repairs, deteriorating property, significant and immediate expenses for investigation, destructive testing, and an analysis of construction defects, repairs defects, grading defects, drainage problems, damages deterioration, and a generally overall dilapidated condition which is the direct and proximate result of defective construction, management, maintenance, and abandonment of generally accepted fiduciary principles and/or duties on the part of the Defendants.

38. In connection with the Project, the Developer Defendants all became and/or acted as subsidiaries, parents, partners, associates, agents, affiliate, co-joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiffs herein for the condition of the Project and the damages set forth herein.

39. The Developer Defendants conducted business in connection with the Project by and through the use and control of subservient entities, and all of these entities in fact manifested no separate interest of their own, and demonstrated an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between any members of that group of corporations, shareholders, officers, agents, partners, employees, and assets.

40. The Defendants listed above including Lennar, SGPD, Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, and Bryant (hereinafter referred to collectively as the "Contractor Defendants") provided labor, materials, goods, and services in connection with the construction of The Abbey at Spring Grove Plantation as contractors, subcontractors, consultants, or independent contractors, or which manufactured, fabricated, and/or otherwise provided construction and building materials, equipment and goods for use in connection with the construction of the Project; and these entities provided labor, materials, goods, and services associated with the original construction of the Project, and the work of each of these Defendants was deficient and defective and resulted in damages to the Plaintiffs as set forth below.

41. All Defendants were instrumental in carrying out duties and actions relating to the construction of the Project, and each of these defendants had independent duties under South Carolina law to perform their duties in a good and workmanlike manner and in accordance with applicable building codes and accepted building practices.

JURISDICTION

42. Personal jurisdiction is vested and exists in the Court of Common Pleas, County of Berkeley, State of South Carolina, and venue is proper in the County of Berkeley, State of South Carolina, by virtue of, among other things, the fact that the property which is the subject matter of the Complaint is located in Berkeley County, South Carolina, and the great majority of the activities relating to the Project and the claims herein occurred in this jurisdiction.

BACKGROUND

43. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

44. Plaintiffs are informed and believe that the Developer Defendants engaged contractors to construct the Project including 69 properties, and related facilities and amenities, collectively known as The Abbey at Spring Grove Plantation, which were thereafter substantially completed, and contained various homes. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project and/or are liable for the actions of the original Developer of the project.

45. The Developer Defendants directed and oversaw those listed as Defendants herein and contractors including the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

46. The Developer Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

47. There would exist a broad element of injustice and fundamental unfairness of the acts of the Developer Defendants, and each of them individually, were not regarded as the acts of one another.

48. The Defendants began the process of constructing the homes by engaging and directing the actions of the various contractors and/or subcontractors named as Defendants herein, and participated in the negligent, deficient, and shoddy workmanship which ignored and/or covered up design and construction defects then in existence and, thereafter, placed the

units into the stream of commerce for sale, which they did sell to the general public and, in particular, to the current owners who are members of the Association.

49. At the time the homes were offered for sale and placed into the stream of commerce by the Developer Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of the Developer Defendants.

50. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

51. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water damage to the buildings and property damage and continue to do so through the date of this filing.

52. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

53. The Plaintiffs suffered damages when the Developer Defendants put these homes into the stream of commerce and continue to be damaged through the date of this filing.

54. The Developer Defendants were engaged in a joint venture, partnership, or other legal or de facto relationship with each other.

55. The Developer Defendants caused, directed, participated in, or acted in willful, reckless, heedless, negligent and grossly negligent disregard of their collective and respective acts and omissions in the planning, development, design, construction, management and sale of the units in the Project, all as more fully described herein.

56. The Developer Defendants represented to the public over the Internet and through various publications and other media that they, by and through their various affiliates, entities, venturers, and agents referenced herein, were qualified, experienced, and would in fact be directing, managing, and otherwise facilitating the construction and selling of the units, and these representations were relied upon by the Plaintiffs.

57. These collective and respective wrongful acts and omissions of the Developer Defendants and such other Defendants as set forth in the causes of action below, represent unfair trade practices and have resulted in substantial deterioration and/or failure of structures and building systems, building deficiencies, actual, incidental, special and consequential damages and loss of use. Remedying the above wrongful acts will result in actual, incidental, consequential, and special damages including loss of use to the Plaintiffs and its members, and entitle Plaintiffs and its members to punitive damages and attorney's fees. Further, these wrongful acts and omissions have directly and proximately caused substantial diminution in value, both pre- and post-repair.

58. The acts and omissions of the Defendants were contrary to the duties they owed, individually and collectively, to the Plaintiffs and actually caused damages to the Plaintiffs including, but not limited to, damages which did not result from the acts and omissions of other

defendants and including, but not limited to, damages other than damages which resulted in physical injury or damage to tangible real and personal property in connection with this Project.

AS A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence and Gross Negligence)

59. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

60. Defendants, and each of them, owed a duty to Plaintiffs to act in a manner compliant with the reasonable standard of care, good faith, and fair dealing recognized under South Carolina law, and Defendants violated this duty to the Plaintiff and were negligent and grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars:

a. In failing to properly design, construct, develop and repair the homes;

b. In failing to comply with the applicable Building Codes of the County of Berkeley and the State of South Carolina;

c. In failing to comply with the applicable Fire and Safety Codes of the County and of Berkeley and the State of South Carolina;

d. In failing to properly supervise the project developer entities and individuals, project architects and engineers, as well as contractors, subcontractors, suppliers and/or agents or employees of any of them in connection with the planning, development, design and construction of the homes offered for sale to the public;

e. In manufacturing, fabricating, preparing for the incorporation into a residential building, reviewing, approving, procuring, and incorporating into the construction of this project such items which were defective, deficient, inferior, inadequate, unsafe, dangerous, inappropriate for the use intended, noncompliant with approved design or design intent, non-compliant with applicable codes and standards in the industry, and otherwise improper for use in the project including, but not limited to, standard systems, grading, HVAC systems, windows, roofs, mechanical systems, plumbing systems, drainage systems, and sewer line systems without appropriate clean-out piping and/or other issues; electrical systems and equipment, interior and exterior drywall and other substrate and sheathing

material, windows, insulation, roofing, waterproofing systems, and other building materials and supplies, finishes, and other items relating to the construction and ultimate use of this residential project;

f. In designing, constructing, marketing, selling, homes and/or property with defective windows;

g. In designing, constructing, marketing, selling, homes and/or properly with inadequate flashing;

h. In designing, constructing, marketing, selling, homes and/or property with inadequate roofs;

i. In designing, constructing, marketing, selling, homes and/or property with inadequate water barriers;

j. In designing, constructing, marketing, selling, homes and/or property without weather proof building envelopes and exteriors;

k. In designing, constructing, marketing, selling, homes and/or property which were defective, deficient, inadequate, unsafe, dangerous, or otherwise non-compliant with codes and standards;

l. In placing defective and inferior construction into the stream of commerce;

m. In placing defective and inferior manufactured systems, equipment, building materials and other products into the stream of commerce;

n. In failing to permit and facilitate a proper evaluation of the condition of the Project prior to and during the process of offering homes and other property for the use and sale to the general public and, further, to obstruct and/or hinder efforts to conduct a proper evaluation of the Project by intended purchasers or users;

o. In misrepresenting the condition of the homes, common elements, garages and other property to prospective and actual purchasers and other users, and in making representations in negligent and/or intentional disregard of whether these representations were false or inaccurate;

p. In failing to undertake sufficient actions to develop a plan for repairs and otherwise failing to make adequate repairs to conditions at the project which were unsafe, dangerous, or otherwise not in compliance with applicable building codes or other authorities or standards of care;

q. In negligently and/or intentionally covering up deficiencies prior to construction of the units and other property for sale or use by the general public;

r. In failing to determine accurate information required, failing to disclose the absence of such information, as well as negligently and/or intentionally providing misleading and inaccurate information regarding the proper level of financial capitalization and reserve funding required for the operations, maintenance, and repairs required by The Abbey for the Project and individual home owners;

s. In failing to act as reasonable persons would in circumstances then and there prevailing and in such other failures as will be shown during discovery and at trial.

61. Said failures above-described, as well as the Defendants' gross negligence, willfulness, and reckless disregard for the rights of Plaintiff and others, have actually and proximately caused damages to Plaintiffs, and the Defendants are liable to the Plaintiffs in an amount of actual, incidental, consequential, special, and punitive damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SECOND CAUSE OF ACTION
(Negligence-Developers)

62. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

63. The damages and injuries caused to the Plaintiffs and their property, are the direct and proximate result of the negligence, willfulness, wantonness, carelessness and recklessness of the Defendants SGPD and Lennar in one or more of the following particulars to wit:

a. In their capacity as developers in defectively overseeing the construction of the subject structures;

b. In failing to properly inspect, repair, and maintain the structures;

c. In negligently effecting repairs to the structures, premises, property and roads;

d. In failing and omitting to exercise that degree of care and caution of a reasonably prudent manager of a homeowners association;

e. In failing and omitting to retain proper experts and to effectively inspect and repair the structures, premises, property, and roads; and

f. In placing their interests ahead of the owners thereby breaching their fiduciary duty.

64. As a direct and proximate result of the above stated negligent actions on behalf of Defendants SGPD and Lennar, the Plaintiffs and similarly situated homeowners will have to spend substantial sums of money for the repairs and reconstruction of their property and structures will be subject to loss of use, enjoyment, and depreciation of value of the property.

AS A THIRD CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Negligent Misrepresentation)

65. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

66. These reports and representations were actually published and presented for information to the general public by these Defendants, and these representations were actually received by, and relied upon by, the prospective and actual purchasers of the townhomes at the Project.

67. At the time of the sale of the homes, Plaintiffs were not aware of the falsity of the representations or the lack of investigation and lack of candor by these Defendants in connection with the reports.

68. Plaintiff subsequently determined that the representations made by these Defendants were false and that these Defendants failed to exercise due care, not only in failing to discover defects in the project, but also in failing to communicate information about the true condition of the Project. As a result of its justifiable reliance on the representations, reports, and other documents presented by these Defendants, Plaintiffs and its members have assumed control over the Project and/or purchased units, and have thereby suffered pecuniary losses in an amount to be determined by the trier of fact.

69. As a direct and proximate result of its justifiable reliance on numerous false representations made by these Defendants in connection with the Project, Plaintiffs have suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION
(Against the Contractor Defendants and the Developer Defendants)
(Breach of Implied Warranty)

70. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

71. The design, construction, development and sale of the units by these Defendants contained as a matter of law implied warranties of good faith and fair dealing, fitness for use merchantability, habitability, and workmanship with respect to construction, which warranties were not effectively disclaimed under South Carolina law.

72. The Developer Defendants and Contractor Defendants through their acts and/or omissions, have breached the aforesaid implied warranties, which directly, actually, and proximately caused and resulted in damage which the Plaintiffs have suffered and continues to suffer in an amount to be determined by the trier of fact.

73. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FIFTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness of Habitability)

74. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

75. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

76. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiffs.

AS A SIXTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness for Particular Purpose)

77. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

78. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

79. At the time of the sale of the subject Residences to the Plaintiffs, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

80. The Defendants, at the time of the sale of the subject Residences to the Plaintiffs, had reason to know that the Plaintiffs were relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

81. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

82. As a result of the Defendants' breach of its implied warranties, Plaintiffs have suffered physical damages.

AS A SEVENTH CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Breach of Implied Warranties as to the Project's Development and Construction)

83. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

84. These Defendants engaged in conduct during the period of development and construction of the Project which gave rise to duties and implied warranties to the public including, but not limited to, tenants, purchasers and other users of the Project, in that by their

conduct these Defendants placed the Project, which constitutes defective, deleterious, and dangerous property, into the stream of commerce.

85. The placement of the Project into the stream of commerce by these Defendants, contained as a matter of law implied warranties of fitness, merchantability, workmanship and habitability, which warranties were not effectively disclaimed pursuant to South Carolina law.

86. As a direct and proximate result of the breaches of the above-described implied warranties by these Defendants, their affiliates, associates, sham entities, and/or joint venturers, whether named or unnamed on any documents transferring interest in the Project, the Plaintiffs has suffered and will continue to suffer damages, injuries and other losses.

87. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A EIGHTH CAUSE OF ACTION
(Individual Liability as to the Developer Defendants)

88. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

89. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN NINTH CAUSE OF ACTION
(Individual Liability as to the Contractor Defendants)

90. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

91. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A TENTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*)

92. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

93. These Defendants' construction and the subsequent offering and sale of the units, along with the issuance of the property condition reports and other representations to tenants, purchasers, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

94. The Defendants, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

a. In failing to properly evaluate the plans and specifications for the Project prior to construction;

b. In failing to conduct a reasonable inquiry into the conditions existing at the Project and marketing the homes, common elements, and other property at the Project to the public for sale and use;

c. In failing to repair the latent defects about which these Defendants were or should have been aware;

d. In failing to carry out duties owed to prospective and actual purchasers and other members of the public in their special relationships of trust and confidence by virtue of their role in the process of offering these units, common elements, and other property for sale and use by the general public, as design, construction, and sellers according to South Carolina law.

e. In attempting to disclaim implied warranties of merchantability and habitability in documents contrary to South Carolina law;

f. In failing to provide any additional consideration for these purported efforts to waive implied warranties of merchantability and habitability;

g. In failing to properly investigate the true conditions of the Project and putting them into the stream of commerce;

h. In making false representations as to the condition of the Project and/or representations as to the condition of the Project in reckless disregard as to the truth of the representations;

l. In failing to analyze relevant data and conditions to determine adequate capital reserves for maintenance and operation of the Project by future owners and users;

95. The conduct of the Defendants as described above was knowing and willful, and Defendants knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

96. Plaintiffs are persons within the meaning of S.C. Code Section 39-5-140(a) and Plaintiffs have suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of these Defendants, in an amount to be determined by the trier of fact.

97. The aforesaid acts of Defendants impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at each and every sale of the units of this Project and, as such, are acts which can, have and will affect the public at large by repetition.

98. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing townhomes by the Defendants and/or rely upon the actions and representations of these Defendants thereby placing members of the public in danger of physical and other injuries.

99. Plaintiffs are entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A ELEVENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Breach of Contract)

100. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

101. These Defendants entered into oral and/or written contractual arrangements with Plaintiffs relating to the representation in a purchase and sale transaction, as well as the purchase of units and other property within the Project, and the right to beneficial use of common elements and amenities to be established, coordinated, and managed by these Defendants, and these Defendants received consideration which was adequate and accepted pursuant to the terms of the Defendants' offer of ownership, goods, and/or services which were accepted by the Plaintiff.

102. Based upon the terms of their contractual agreements, along with the duties which flowed from these Defendants by virtue of the Master Deed and By-laws, real estate agency or other agreements for representation by these Defendants, and the purchase agreements for individual homes and other property interests at the Project, these Defendants owed a contractual obligation to Plaintiffs which required that these Defendants ensure that the Project was safe, habitable, code-compliant, and in a condition consistent with these Defendants' representations prior to turning over control of the Project to the home owners.

103. In breach of these contractual obligations and in breach of the Master Deed, By-laws, and real estate agency and other agreements, these Defendants failed to make a full investigation of conditions at the Project, and failed to disclose the existence of the known defects at the Project, which constitutes a breach of contract and violation of the terms of the Master Deed and By-laws by these Defendants as described above.

104. In addition to and accompanying this breach of these contractual and other obligations, these Defendants made material representations which were false as more fully described in this Complaint which the Plaintiffs relied upon to the Plaintiffs detriment.

105. As a direct and proximate result thereof, Plaintiff have and will continue to suffer, and the actual, incidental, special, and consequential damages and other injuries including, but not limited to, the damages and injuries associated with the acts and omissions which constituted the breach of contract by these Defendants as aforesaid, all in an amount to be determined by the trier of fact.

106. These Defendants are therefore liable to the Plaintiffs for the actual, incidental, special, and consequential damages and other injuries as aforesaid in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN TWELFTH CAUSE OF ACTION
(Against the Developer Defendants)
(Violation of the Residential Property Condition Disclosure Act)

107. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

108. These Defendants were engaged in a joint venture, partnership, or some other form of business venture or association including, but not limited to, the formation of a Limited Liability Company, in connection with the development and construction of The Abbey at Spring Grove Plantation.

109. The Developer Defendants did so place the homes into the stream of commerce for sale to the general public and to the members of The Abbey in particular.

110. At all times relevant to this cause of action the Developer Defendants were "owners" as that term is used within S.C. Code Ann. § 27-50-10 *et seq.*, referred to as the "South Carolina

Residential Property Condition Disclosure Act" (referred to in the remainder of this cause of action as the "Act").

111. The Developer Defendants failed to furnish to the purchasers of the townhome units a written disclosure statement in conformity and compliance with S.C. Code Ann. § 27-50-40.

112. These Defendants failed to inform the sellers of the homes of their obligations under the Act and had reasonable cause to suspect that the information, if any, supplied by the sellers to the individual purchasers was inherently false, incomplete, and misleading.

113. Upon information and belief, notwithstanding the above-described failures of these Defendants, and each of them, knowingly violated and/or failed to perform the duties described in§ 27-50-40.

114. The nature of the defects that were undisclosed in violation of§ 27-50-40, prevented and/or limited any inspection performed by the Plaintiff to uncover or discover the said defects.

115. As a direct and proximate result of these Defendants' violations of their respective and collective duty to furnish written disclosure to the purchasers as required by§ 27-50-10, *et seq.*, the Plaintiff has suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, along with costs, interest, and attorney's fees pursuant to the remedies set forth in the Act, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRTEENTH CAUSE OF ACTION
(Against Developer Defendants)
(Alter Ego Liability and Piercing the Corporate Veil)

116. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

117. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project, and the Developer Defendants combined and joined together through various instrumentalities and alter egos to facilitate to process of building the homes.

118. The Developer Defendants created and controlled numerous and various entities. These Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of these Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities or individuals in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between these Defendants and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

119. These Defendants created entities which were created to perform single purpose functions in order to effectuate the sole will of these Defendants in purchasing, developing, leasing, and/or selling the homes. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, these Defendants actively and directly participated in the development, purchase,

sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

120. These Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of homes, and other activities solely relating to the Project which is the subject of this action.

121. These Defendants directed and oversaw the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

122. There would exist a broad element of injustice and fundamental unfairness if the acts of these Defendants, and each of them individually, were not regarded as the acts of one another.

123. At the time the homes were offered for sale and placed into the stream of commerce by these Defendants, the homes contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of these Defendants.

124. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

125. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

126. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

127. The Plaintiffs suffered damages and injuries when these Defendants put these units into the stream of commerce and continue to be damaged and injured through the date of this filing.

128. As a direct and proximate result thereof, these Defendants are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

129. WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

a. Enter judgment in favor of the Plaintiffs and against all Defendants, jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages;

b. Find that the Defendants have engaged in unfair trade practices and knowingly did so thereby entitling Plaintiffs to treble damages;

c. Award attorneys' fees and costs to the Plaintiffs; and

d. Award such other and further relief as the Court may deem just and proper.

[Signature Page to Follow]

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Attorneys for Plaintiffs

November 23, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

PATRICIA DAMICO AND LENNA LUCAS, individually and on behalf of all others similarly situated, JOSHUA AND BRETTANY BUETOW, EDWARD AND SYLVIA DENGG, JONATHAN AND THERESA DOUGLASS, ANTHONY AND STACEY RAY, DANNY AND ELLEN DAVIS MORROW, CZARA AND CHAD ENGLAND, BRYAN AND CYNTHIA CAMARA, AND MATTHEW COLLINS,

Plaintiffs,

vs.

LENNAR CAROLINAS, LLC, SPRING GROVE PLANTATION DEVELOPMENT, INC., MANALE LANDSCAPING, LLC, SUPER CONCRETE OF SC, INC., SOUTHERN GREEN, INC., TJB TRUCKING/LEASING, LLC, PARAGON SITEWORK CONSTRUCTORS, INC., CIVIL SITE ENVIRONMENTAL, INC., AND RICK BRYANT,

Defendants.

LENNAR CAROLINAS, LLC

Third-Party Plaintiff,

vs.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS CONSULTING, LLC, LAND/SITE SERVICES, INC., MYERS LANDSCAPING, INC., A.C. & A. CONCRETE, INC., KNIGHT'S CONCRETE PRODUCTS, INC., KNIGHT'S REDI-MIX, INC., COASTAL CONCRETE SOUTHEAST,

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-08-02424

LENNAR CAROLINAS, LLC'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT, CROSS-CLAIMS, AND THIRD-PARTY COMPLAINT

LLC, COASTAL CONCRETE SOUTHEAST II, LLC, GUARANTEED FRAMING, LLC, OZZY CONSTRUCTION, LLC, CONSTRUCTION APPLICATORS CHARLESTON, LLC, LA NEW ENTERPRISES, LLC, DÉCOR CORPORATION, DVS, INC., RAUL MARTINEZ MASONRY, LLC, ALPHA OMEGA CONSTRUCTION GROUP, INC., SOUTH CAROLINA EXTERIORS, LLC, BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC, AND LOW COUNTRY RENOVATIONS AND SIDING, LLP,

Third-Party Defendants.

Defendant Lennar Carolinas, LLC ("Lennar") answers the First Amended Complaint of the above-named Plaintiffs, asserts cross-claims against Defendants Spring Grove Plantation Development, Inc. ("Spring Grove"), Manale Landscaping, LLC ("Manale"), Super Concrete of SC, Inc. ("Super Concrete"), Southern Green, Inc. ("Southern Green"), TJB Trucking/Leasing, LLC ("TJB"), Paragon Sitework Constructors, Inc. ("Paragon"), and Civil Site Environmental, Inc. a/k/a CSE ("CSE"), and asserts third-party claims against The Earthworks Group, Inc. ("Earthworks"), Volkmar Consulting Services, LLC ("Volkmar"), Geometrics Consulting, LLC ("Geometrics"), Land/Site Services, Inc. ("Land/Site"), Myers Landscaping, Inc. ("Myers"), A.C. & A. Concrete, Inc. ("A.C. & A."), Knight's Concrete Products, Inc. ("Knight's Concrete"), Knight's Redi-Mix, Inc. ("Knight's Redi-Mix"), Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC (together "Coastal Concrete"), Guaranteed Framing, LLC ("Guaranteed Framing"), Ozzy Construction, LLC ("Ozzy Construction"), Construction Applicators Charleston, LLC ("Construction Applicators"), LA New Enterprises, LLC ("LA New Enterprises"), Décor Corporation ("Décor"), DVS, Inc. ("DVS"), Raul Martinez Masonry, LLC ("Martinez Masonry"), Alpha Omega Construction Group, Inc. ("Alpha Omega"), South Carolina Exteriors, LLC ("Carolina Exteriors"), Builders FirstSource – Southeast Group, LLC

("Builders FirstSource"), and Low Country Renovations and Siding, LLP ("Low Country Renovations"), as follows:

FOR A FIRST DEFENSE

Each and every allegation of the Complaint not hereinafter specifically admitted is denied and strict proof thereof is demanded.

FOR A SECOND DEFENSE

1. Responding to Paragraph 1 of the First Amended Complaint, Lennar is without sufficient information to admit or deny Plaintiffs' allegations as to the citizenship, residency, or living arrangements of Plaintiffs Lenna Lucas or Patricia Damico, and therefore denies the same. Lennar denies the remaining allegations in Paragraph 1 and expressly denies Plaintiffs' allegations regarding the requirements for class certification under Rule 23, SCRCP.

2. Responding to Paragraph 2 of the First Amended Complaint, Lennar craves reference to the public records filed with the Berkeley County Register of Deeds and denies any inconsistent allegations in Paragraph 2. Lennar denies any remaining allegations in Paragraph 2 and expressly denies any allegation that Patricia Damico, Lenna Lucas, and any homeowner in The Abbey are similarly situated.

3. Lennar denies the allegations of Paragraph 3 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

4. Lennar denies the allegations of Paragraph 4 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

5. Lennar denies the allegations of Paragraph 5 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

6. Lennar denies the allegations of Paragraph 6 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

7. Lennar denies the allegations of Paragraph 7 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

8. Lennar denies the allegations of Paragraph 8 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

9. Lennar denies the allegations of Paragraph 9 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

10. Lennar denies the allegations of Paragraph 10 of the First Amended Complaint. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

11. Responding to Paragraph 11 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein and accordingly denies the same. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

12. Responding to Paragraph 12 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein and accordingly denies the same. Lennar expressly denies any allegation that this suit constitutes a class action or that Plaintiffs can satisfy the requirements of Rule 23, SCRCP.

13. Responding to Paragraph 13 of the First Amended Complaint, Lennar is without sufficient information to admit or deny Plaintiffs' allegations as to the citizenship, residency, or living arrangements of Plaintiffs, and therefore denies the same. Lennar craves reference to the public records filed with the Berkeley County Register of Deeds and denies any inconsistent allegations in Paragraph 13.

14. Responding to Paragraph 14 of the First Amended Complaint, Lennar craves reference to the public records filed with the Berkeley County Register of Deeds and denies any inconsistent allegations in Paragraph 14. Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the construction of residences on those lots, and sold the residences. Lennar denies any remaining allegations of Paragraph 14.

15. Responding to Paragraph 15 of the First Amended Complaint, Lennar admits only that it is and was at all relevant times authorized to conduct business in South Carolina and has conducted business in Berkeley County, South Carolina. Lennar denies the remaining allegations of Paragraph 15 concerning Lennar and is without sufficient information to admit or deny the remaining allegations of Paragraph concerning the other Defendants.

16. Lennar denies the allegations of Paragraph 16 of the First Amended Complaint.

17. Responding to Paragraph 17 of the First Amended Complaint, Lennar alleges it undertook to and did comply with any and all applicable duties, laws, regulations, codes, or other

standards. Lennar is without sufficient information to admit or deny the remaining allegations of Paragraph 17.

18. Lennar denies the allegations of Paragraph 18 of the First Amended Complaint.

19. Paragraph 19 of the First Amended Complaint states legal conclusions which require no response from Lennar. To the extent a response is required, Lennar is without sufficient information to admit or deny the allegations therein and accordingly denies the same.

20. Responding to Paragraph 20 of the First Amended Complaint, Lennar admits only that one or more of the defendants participated in the construction of the residences located in The Abbey at Spring Grove Plantation and that Lennar undertook to and did comply with any and all applicable duties, laws, regulations, codes, or other standards. Lennar denies the remaining allegations of Paragraph 20.

21. Lennar denies the allegations of Paragraph 21 of the First Amended Complaint.

22. Responding to Paragraph 22 of the First Amended Complaint, Lennar admits only that it is and was at all relevant times authorized to conduct business in South Carolina and conducted business in Berkeley County, South Carolina. Lennar denies the remaining allegations of Paragraph 22.

23. Responding to Paragraph 23 of the First Amended Complaint, Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the construction of residences on those lots, and sold the residences. Lennar denies any allegations inconsistent therewith and denies the remaining allegations in Paragraph 23.

24. Responding to Paragraph 24 of the First Amended Complaint, Lennar admits upon information and belief that Spring Grove is a corporation organized and existing under the laws of the State of South Carolina, that Spring Grove is authorized to conduct business in South

Carolina, and that Spring Grove's involvement with The Abbey includes, but is not limited to, ownership and development for residential purposes of the property comprising Spring Grove Plantation and The Abbey at Spring Grove Plantation and the sale of residential lots in The Abbey to Lennar.

25. Lennar admits the allegations of Paragraph 25 of the First Amended Complaint upon information and belief.

26. Lennar admits the allegations of Paragraph 26 of the First Amended Complaint upon information and belief.

27. Lennar admits the allegations of Paragraph 27 of the First Amended Complaint upon information and belief.

28. Lennar admits the allegations of Paragraph 28 of the First Amended Complaint upon information and belief.

29. Lennar admits the allegations of Paragraph 29 of the First Amended Complaint upon information and belief.

30. Lennar admits the allegations of Paragraph 30 of the First Amended Complaint upon information and belief.

31. Responding to Paragraph 31 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein and accordingly denies the same.

32. Paragraph 32 of the First Amended Complaint states a legal conclusion and requires no response from Lennar. To the extent a response is required, Lennar denies the allegations of Paragraph 32.

33. Responding to Paragraph 33 of the First Amended Complaint, Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the

construction of residences on those lots, and sold the residences. Lennar denies any remaining allegations of Paragraph 33.

34. Responding to Paragraph 34 of the First Amended Complaint, Lennar admits only that Spring Grove's involvement with The Abbey includes, but is not limited to, ownership and development for residential purposes of the property comprising Spring Grove Plantation and The Abbey at Spring Grove Plantation and the sale of residential lots in The Abbey to Lennar. Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the construction of residences on those lots, and sold the residences. Lennar denies the remaining allegations of Paragraph 34.

35. Lennar denies the allegations of Paragraph 35 of the First Amended Complaint.

36. Lennar denies the allegations of Paragraph 36 of the First Amended Complaint.

37. Lennar denies the allegations of Paragraph 37 of the First Amended Complaint.

38. Responding to Paragraph 38 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 38 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 38 of the First Amended Complaint.

39. Responding to Paragraph 39 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 39 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 39 of the First Amended Complaint.

40. Responding to Paragraph 40 of the First Amended Complaint, Lennar admits only that Spring Grove, Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, and upon information and belief, Bryant provided labor, materials, goods, or services for the construction of the residences located in The Abbey. Lennar denies the remaining allegations of Paragraph 40.

41. Paragraph 41 of the First Amended Complaint states legal conclusions and requires no response from Lennar. To the extent, a response is require, Lennar denies the allegations of Paragraph 41.

42. Paragraph 42 of the First Amended Complaint states legal conclusions and requires no response from Lennar.

43. Responding to Paragraph 43 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

44. Responding to Paragraph 44 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Lennar admits only that Spring Grove's involvement with The Abbey includes, but is not limited to, ownership and development for residential purposes of the property comprising Spring Grove Plantation and The Abbey at Spring Grove Plantation and the sale of residential lots in The Abbey to Lennar. Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the construction of residences on those lots, and sold the residences. Lennar denies any allegations inconsistent therewith and denies the remaining allegations of Paragraph 44.

45. Responding to Paragraph 45 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the terms "Developer

Defendants" and "Contractor Defendants" are unclear and not defined. Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the construction of residences on those lots, and sold the residences. Lennar denies any allegations inconsistent therewith and denies the remaining allegations of Paragraph 45.

46. Responding to Paragraph 46 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 46 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 46 of the First Amended Complaint.

47. Responding to Paragraph 47 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 47 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 47 of the First Amended Complaint.

48. Responding to Paragraph 48 of the First Amended Complaint, Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the construction of residences on those lots, and sold the residences. Lennar denies any allegations inconsistent therewith and denies the remaining allegations of Paragraph 48.

49. Responding to Paragraph 49 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 49 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 49 of the First Amended Complaint.

50. Lennar denies the allegations of Paragraph 50 of the First Amended Complaint.

51. Lennar denies the allegations of Paragraph 51 of the First Amended Complaint.

52. Lennar denies the allegations of Paragraph 52 of the First Amended Complaint.

53. Lennar denies the allegations of Paragraph 53 of the First Amended Complaint.

54. Responding to Paragraph 54 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 54 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 54 of the First Amended Complaint.

55. Responding to Paragraph 55 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 55 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 55 of the First Amended Complaint.

56. Responding to Paragraph 56 of the First Amended Complaint, Lennar is without sufficient information to admit or deny the allegations therein because the term "Developer Defendants" is unclear and not defined. Notwithstanding the foregoing, to the extent Paragraph 56 is intended to make allegations as to it, Lennar denies the allegations of Paragraph 56 of the First Amended Complaint.

57. Lennar denies the allegations of Paragraph 57 of the First Amended Complaint.

58. Lennar denies the allegations of Paragraph 58 of the First Amended Complaint.

IN RESPONSE TO THE FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence and Gross Negligence)

59. Responding to Paragraph 59 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

60. Lennar denies the allegations of Paragraph 60 of the First Amended Complaint including all subparts.

61. Lennar denies the allegations of Paragraph 61 of the First Amended Complaint.

IN RESPONSE TO THE SECOND CAUSE OF ACTION
(Negligence-Developers)

62. Responding to Paragraph 62 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

63. Lennar denies the allegations of Paragraph 63 of the First Amended Complaint including all subparts.

64. Lennar denies the allegations of Paragraph 64 of the First Amended Complaint.

IN RESPONSE TO THE THIRD CAUSE OF ACTION
(Negligent Misrepresentation)

65. Responding to Paragraph 65 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

66. Lennar denies the allegations of Paragraph 66 of the First Amended Complaint.

67. Lennar denies the allegations of Paragraph 67 of the First Amended Complaint.

68. Lennar denies the allegations of Paragraph 68 of the First Amended Complaint.

69. Lennar denies the allegations of Paragraph 69 of the First Amended Complaint.

IN RESPONSE TO THE FOURTH CAUSE OF ACTION
(Breach of Implied Warranty)

70. Responding to Paragraph 70 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

71. Lennar denies the allegations of Paragraph 71 of the First Amended Complaint.

72. Lennar denies the allegations of Paragraph 72 of the First Amended Complaint.

73. Lennar denies the allegations of Paragraph 73 of the First Amended Complaint.

IN RESPONSE TO THE FIFTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness of Habitability)

74. Responding to Paragraph 74 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

75. Lennar denies the allegations of Paragraph 75 of the First Amended Complaint.

76. Lennar denies the allegations of Paragraph 76 of the First Amended Complaint.

IN RESPONSE TO THE SIXTH CAUSE OF ACTION
(Breach of Implied Warranty of Fitness for a Particular Purpose)

77. Responding to Paragraph 77 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

78. Lennar denies the allegations of Paragraph 78 of the First Amended Complaint.

79. Lennar denies the allegations of Paragraph 79 of the First Amended Complaint.

80. Lennar denies the allegations of Paragraph 80 of the First Amended Complaint.

81. Lennar denies the allegations of Paragraph 81 of the First Amended Complaint.

82. Lennar denies the allegations of Paragraph 82 of the First Amended Complaint.

IN RESPONSE TO THE SEVENTH CAUSE OF ACTION
(Breach of Implied Warranties as to the Project's Development and Construction)

83. Responding to Paragraph 83 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

84. Lennar denies the allegations of Paragraph 84 of the First Amended Complaint.

85. Lennar denies the allegations of Paragraph 85 of the First Amended Complaint.

86. Lennar denies the allegations of Paragraph 86 of the First Amended Complaint.

87. Lennar denies the allegations of Paragraph 87 of the First Amended Complaint.

IN RESPONSE TO THE EIGHTH CAUSE OF ACTION
(Individual Liability as to Developer Defendants)

88. Responding to Paragraph 88 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

89. Lennar denies the allegations of Paragraph 89 of the First Amended Complaint.

IN RESPONSE TO THE NINTH CAUSE OF ACTION
(Individual Liability as to the Contractor Defendants)

90. Responding to Paragraph 90 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

91. Lennar denies the allegations of Paragraph 91 of the First Amended Complaint.

IN RESPONSE TO THE TENTH CAUSE OF ACTION
(Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*)

92. Responding to Paragraph 92 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

93. Lennar denies the allegations of Paragraph 93 of the First Amended Complaint.

94. Lennar denies the allegations of Paragraph 94 of the First Amended Complaint including all subparts.

95. Lennar denies the allegations of Paragraph 95 of the First Amended Complaint.

96. Lennar denies the allegations of Paragraph 96 of the First Amended Complaint.

97. Lennar denies the allegations of Paragraph 97 of the First Amended Complaint.

98. Lennar denies the allegations of Paragraph 98 of the First Amended Complaint.

99. Lennar denies the allegations of Paragraph 99 of the First Amended Complaint.

IN RESPONSE TO THE ELEVENTH CAUSE OF ACTION
(Breach of Contract)

100. Responding to Paragraph 100 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

101. Responding to Paragraph 101 of the First Amended Complaint, Lennar craves reference to the cited contractual agreements for their exact terms and denies all allegations inconsistent therewith. Lennar denies the remaining allegations of Paragraph 101.

102. Responding to Paragraph 102 of the First Amended Complaint, Lennar craves reference to the cited contractual agreements for their exact terms and denies all allegations inconsistent therewith. Lennar denies the remaining allegations of Paragraph 102.

103. Lennar denies the allegations of Paragraph 103 of the First Amended Complaint.

104. Lennar denies the allegations of Paragraph 104 of the First Amended Complaint.

105. Lennar denies the allegations of Paragraph 105 of the First Amended Complaint.

106. Lennar denies the allegations of Paragraph 106 of the First Amended Complaint.

IN RESPONSE TO THE TWELFTH CAUSE OF ACTION
(Violation of the Residential Property Disclosure Act)

107. Responding to Paragraph 107 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

108. Lennar denies the allegations of Paragraph 108 of the First Amended Complaint.

109. Responding to Paragraph 109 of the First Amended Complaint, Lennar admits only that it purchased lots in The Abbey at Spring Grove Plantation, contracted with others for the construction of residences on those lots, and sold the residences. Lennar denies any allegations inconsistent therewith and denies the remaining allegations of Paragraph 109.

110. Lennar denies the allegations of Paragraph 110 of the First Amended Complaint.

111. Lennar denies the allegations of Paragraph 111 of the First Amended Complaint.

112. Lennar denies the allegations of Paragraph 112 of the First Amended Complaint.

113. Lennar denies the allegations of Paragraph 113 of the First Amended Complaint.

114. Lennar denies the allegations of Paragraph 114 of the First Amended Complaint.

115. Lennar denies the allegations of Paragraph 115 of the First Amended Complaint.

IN RESPONSE TO THE THIRTEENTH CAUSE OF ACTION
(Alter Ego Liability and Piercing the Corporate Veil)

116. Responding to Paragraph 116 of the First Amended Complaint, Lennar realleges its responses to the preceding paragraphs as if repeated verbatim herein.

117. Lennar denies the allegations of Paragraph 117 of the First Amended Complaint.

118. Lennar denies the allegations of Paragraph 118 of the First Amended Complaint.

119. Lennar denies the allegations of Paragraph 119 of the First Amended Complaint.

120. Lennar denies the allegations of Paragraph 120 of the First Amended Complaint.

121. Lennar denies the allegations of Paragraph 121 of the First Amended Complaint.

122. Lennar denies the allegations of Paragraph 122 of the First Amended Complaint.

123. Lennar denies the allegations of Paragraph 123 of the First Amended Complaint.

124. Lennar denies the allegations of Paragraph 124 of the First Amended Complaint.

125. Lennar denies the allegations of Paragraph 125 of the First Amended Complaint.

126. Lennar denies the allegations of Paragraph 126 of the First Amended Complaint.

127. Lennar denies the allegations of Paragraph 127 of the First Amended Complaint.

128. Lennar denies the allegations of Paragraph 128 of the First Amended Complaint.

129. Lennar denies the allegations and any relief sought in the Wherefore clause, including all subparts.

130. Lennar denies each and every allegation not expressly admitted herein.

FOR A THIRD AND AFFIRMATIVE DEFENSE
(Rule 12(b), SCRCP)

131. Lennar asserts the defenses set forth in Rule 12(b) of the South Carolina Rules of Civil Procedure, including, but not limited to, the defense that Plaintiffs fail to state facts sufficient to constitute causes of action against Lennar.

FOR A FOURTH AND AFFIRMATIVE DEFENSE
(Lack of Standing)

132. Plaintiffs lack standing to make the claims asserted against Lennar in this action.

FOR A FIFTH AND AFFIRMATIVE DEFENSE
(Statute of Limitations)

133. Some or all of the claims asserted against Lennar are barred by the applicable statute of limitations.

FOR A SIXTH AND AFFIRMATIVE DEFENSE
(Comparative Negligence)

134. Plaintiffs' claims, if any, are barred, or should be reduced, by Plaintiffs' own comparative negligence, carelessness, recklessness, willfulness, and wantonness, in among other things, Plaintiffs' failure to maintain their properties and residences.

FOR A SEVENTH AND AFFIRMATIVE DEFENSE
(Intervening Acts or Omissions)

135. Plaintiffs' claims, if any, are the result of acts or omissions of other entities over whom Lennar had no control, barring Plaintiffs' claims against Lennar.

FOR AN EIGHTH AND AFFIRMATIVE DEFENSE
(Laches)

136. Plaintiffs' claims, if any, are barred by the doctrine of laches.

FOR A NINTH AND AFFIRMATIVE DEFENSE
(Acceptance)

137. The final completion and acceptance of the work undertaken by Lennar pursuant to the original contract and all modifications thereto constitute a complete defense to all claims asserted by Plaintiffs.

FOR A TENTH AND AFFIRMATIVE DEFENSE
(Failure to Make Claim Within Warranty Period)

138. Plaintiffs' claims, if any, are barred due to the failure to make a claim against Lennar within the applicable warranty period.

FOR AN ELEVENTH AND AFFIRMATIVE DEFENSE
(Failure to Mitigate)

139. Plaintiffs failed to mitigate their damages and as a result, Plaintiffs' claims, if any, are barred or should be reduced to the extent Plaintiffs could have taken prompt and reasonable action to avoid the damages claimed.

FOR A TWELFTH AND AFFIRMATIVE DEFENSE
(Limitation on Warranties)

140. Lennar contractually limited its warranty obligations to Plaintiffs, excluding liability for many or all of Plaintiffs' claims, barring Plaintiffs' claims, or barring or limiting Plaintiffs' claimed damages, including Plaintiffs' claims for consequential damages or punitive damages, in whole or in part, against Lennar.

141. The failure to Plaintiffs to give notice of or make any claim for alleged deficiencies in workmanship or materials within the warranty period from the date of completion and acceptance by Plaintiffs constitute a complete defense to all of Plaintiffs' claims.

FOR A THIRTEENTH AND AFFIRMATIVE DEFENSE
(Payment or Release)

142. Plaintiffs' claims are barred by payment or release.

FOR A FOURTEENTH AND AFFIRMATIVE DEFENSE
(Waiver or Estoppel)

143. Plaintiffs waived or are estopped from asserting the claims.

FOR A FIFTEENTH AND AFFIRMATIVE DEFENSE
(Conduct of Plaintiffs)

144. If Plaintiffs sustained injuries and damages in the manner alleged, which injuries and damages are all expressly denied by Lennar, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty whether express or implied, or want of due care on the part of Lennar nor of anyone for whose conduct Lennar is in any way responsible, but solely through the fault, neglect, breach, and want of due care of Plaintiffs, all of which will be shown in this action, and for which Plaintiffs can have no recovery against Lennar or alternatively, for which Plaintiffs' recovery should be appropriately reduced.

FOR A SIXTEENTH AND AFFIRMATIVE DEFENSE
(Arbitration)

145. Plaintiffs' claims are barred, or should be stayed, as there exists a valid and enforceable arbitration provision between Plaintiffs and Lennar which encompasses the claims Plaintiffs assert herein.

FOR A SEVENTEENTH AND AFFIRMATIVE DEFENSE
(Rule 23(a), SCRCP)

146. Plaintiffs and Plaintiffs' putative class action claims fail to satisfy the requirements of Rule 23(a) of the South Carolina Rules of Civil Procedure, and this action may not be maintained as a class action.

FOR AN EIGHTEENTH AND AFFIRMATIVE DEFENSE
(Prohibition of Punitive Damages)

147. Plaintiffs' claims for punitive damages are barred by the South Carolina Constitution and the Constitution of the United States because no reasonable and well-defined limits are placed on punitive damages awards, because the award and payment of punitive damages would be a windfall and would advance no legitimate state purpose, and because a punitive damages award would constitute imposition of punishment on Lennar without due process and without adequate notice of substantive rules governing the conduct giving rise to punitive damages.

FOR A NINETEENTH AND AFFIRMATIVE DEFENSE
(Spoliation)

148. Plaintiffs' claims are barred or should be dismissed in whole or in part due to the spoliation of evidence to the extent Plaintiffs destroyed, modified, or otherwise spoiled evidence, including, but not limited to, any repairs of alleged deficiencies without having first given notice to Lennar and without giving Lennar an opportunity to observe the alleged deficiencies.

FOR A TWENTIETH AND AFFIRMATIVE DEFENSE
(Economic Loss Rule)

149. Plaintiffs' claims are barred by the economic loss rule.

FOR A TWENTY-FIRST AND AFFIRMATIVE DEFENSE
(South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act)

150. Plaintiffs' claims are barred and should be stayed or dismissed due to Plaintiffs' failure to comply with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Acts, South Carolina Code § 40-59-810, *et seq.*

FOR A TWENTY-SECOND AND AFFIRMATIVE DEFENSE
(Conditions Precedent)

151. Plaintiffs' claims should be dismissed or stayed as Plaintiffs failed to comply with valid, applicable, and mutually enforceable conditions precedent contained in the applicable purchase and sales agreements, covenants, and property records (to include, but not limited to, the regime documents, master deed and bylaws, deeds, construction and sales contracts, and homeowners association documents) to filing suit, including any and all alternative dispute resolution provisions and provisions related to the number of owners who must agree to file a claim or suit.

FOR A TWENTY-THIRD AND AFFIRMATIVE DEFENSE
(Necessary Parties)

152. Plaintiffs' claims should be dismissed for failure to join necessary, persons, parties, or entities pursuant to Rule 19 of the South Carolina Rules of Civil Procedure.

FOR A TWENTY-FOURTH AND AFFIRMATIVE DEFENSE
(Lack of Impact on Public Interest)

153. Plaintiffs' claim under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*, should be dismissed because the alleged actions of Lennar did not have an impact on the public interest.

FOR A TWENTY-FIFTH AND AFFIRMATIVE DEFENSE
(Statutory Bar on Class Action UTPA Claims)

154. Plaintiffs' claim under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*, should be dismissed because a party cannot pursue a claim under the Act on behalf of a class.

FOR A TWENTY-SIXTH AND AFFIRMATIVE DEFENSE
(Subsequent Purchaser Has No UTPA Claim)

155. Plaintiffs' claim under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*, should be dismissed because a subsequent purchaser of a residence has no claim under the Act against the original builder or seller of the residence.

FOR A TWENTY-SEVENTH AND AFFIRMATIVE DEFENSE
(*Spearin* Doctrine)

156. If Plaintiffs sustained injuries and damages in the manner alleged, which injuries and damages are all expressly denied by Lennar, then the alleged injuries and damages were sustained as the result of defects in the plans and specifications provided by others.

FOR A TWENTY-EIGHTH AND AFFIRMATIVE DEFENSE
(Absence of a "Merchant")

157. Plaintiffs' implied warranty of merchantability and implied warranty of fitness for a particular purpose claims, if any, should be dismissed because Lennar is not a merchant and the Uniform Commercial Code, S.C. Code Ann. § 36-2-101, *et seq.*, accordingly does not apply.

FOR A TWENTY-NINTH AND AFFIRMATIVE DEFENSE
(Absence of a "Good")

158. Plaintiffs' implied warranty of merchantability and implied warranty of fitness for a particular purpose claims, if any, should be dismissed because Lennar did not provide a good and the Uniform Commercial Code, S.C. Code Ann. § 36-2-101, *et seq.*, accordingly does not apply.

FOR A THIRTIETH AND AFFIRMATIVE DEFENSE
(Transfer of New Dwelling)

159. Plaintiffs' claims, if any, under the South Carolina Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10, *et seq.*, should be dismissed because the Act does not apply to the transfer of a dwelling never inhabited.

FOR A THIRTY-FIRST AND AFFIRMATIVE DEFENSE
(Unclean Hands)

160. Plaintiffs' claims, if any, are barred by the doctrine of unclean hands.

FOR A THIRTY-SECOND AND AFFIRMATIVE DEFENSE
(Additional Defenses)

161. Lennar reserves the right to assert and does not waive any addition or further defenses as may be revealed upon any amendments to the pleadings, discovery, or otherwise and reserves the right to amend this Answer to assert any such defenses.

FURTHER ANSWERING AND BY WAY OF CROSS-CLAIMS AND THIRD-PARTY CLAIMS AGAINST THE ABOVE NAMED CO-DEFENDANTS AND THIRD-PARTY DEFENDANTS, LENNAR ALLEGES AS FOLLOWS:

162. Lennar realleges the allegations in the above paragraphs as if repeated verbatim herein.

163. Spring Grove is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

164. Spring Grove entered into an agreement with Lennar for the sale and purchase of the lots in The Abbey.

165. Spring Grove provided the grading, building pads, streets and roads, and storm drainage, retention and detention facilities and other storm drainage systems in The Abbey.

166. Manale is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

167. Manale's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include landscaping and grading.

168. Super Concrete is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

169. Super Concrete's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include grading, foundation slabs and footings, flatwork, formwork, together with all batter boards, forms, reinforcement, and related components.

170. Southern Green is or was a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

171. Southern Green's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include landscaping and grading.

172. TJB is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

173. TJB's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include grading and building pad construction.

174. Paragon is or was a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

175. Paragon's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include grading and building pad construction.

176. CSE is a corporation organized and existing in South Carolina.

177. CSE's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include civil engineering and design services including preparing the grading plans.

178. Earthworks is a corporation organized and existing in South Carolina.

179. Earthworks' work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include architectural or structural engineering and design services including designing, engineering, and preparing the building drawings and plans for the residences.

180. Volkmar is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

181. Volkmar's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include geotechnical engineering services including site exploration, investigation, testing, analysis, and approval, preparing designs and specifications for grading, site preparation, groundwater control, fill, compaction, soils, building pads, footing excavations, footings, and slabs, and observation, investigation, testing, administration, and approval of grading, building pads, and footing excavations.

182. Geometrics is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

183. Geometric's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include geotechnical engineering services including observation, investigation, testing, and approval of building pads and providing designs and specifications for soils, building pads, footing excavations, footings, and slabs.

184. Land/Site is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

185. Land/Site's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include grading and building pad construction.

186. Myers is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

187. Myers' work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include grading.

188. A.C. & A. is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

189. A.C. & A.'s work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include foundation slabs and footings, and formwork, together with all batter boards, forms, reinforcement, and related components.

190. Knight's Concrete is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

191. Knight's Concrete's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include supplying fill dirt.

192. Knight's Redi-Mix is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

193. Knight's Redi-Mix's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include supplying concrete for foundation slabs and flatwork.

194. Coastal Concrete is or was a limited liability company organized in Delaware, authorized to do business in South Carolina, and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

195. Coastal Concrete's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include supplying concrete for foundation slabs and flatwork.

196. Guaranteed Framing is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

197. Guaranteed Framing's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include framing and roofing together with all associated and related waterproofing, flashings, and components.

198. Ozzy Construction is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

199. Ozzy Construction's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include drywall installation and exterior painting and caulking together with all associated and related waterproofing, flashings, and components.

200. Construction Applicators is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

201. Construction Applicators' work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include drywall installation and exterior painting and caulking together with all associated and related waterproofing, flashings, and components.

202. LA New Enterprises is or was a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

203. LA New Enterprises' work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include drywall installation together with all associated and related waterproofing, flashings, and components.

204. Décor is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

205. Décor's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include finish flooring materials and installation of finish floors including all associated and related components.

206. DVS is a corporation organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

207. DVS's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include siding installation together with all associated and related waterproofing, flashings, and components.

208. Martinez Masonry is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

209. Martinez Masonry's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include veneer masonry installation together with all associated and related waterproofing, flashings, and components.

210. Alpha Omega is a corporation organized and existing in North Carolina and conducted business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

211. Alpha Omega's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include roofing together with all associated and related waterproofing, flashings, and components.

212. Carolina Exteriors is a limited liability company organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

213. Carolina Exteriors' work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include roofing together with all associated and related waterproofing, flashings, and components.

214. Builders FirstSource is a limited liability company organized in Delaware, authorized to do business in South Carolina, and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

215. Builders FirstSource's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include supplying the windows and doors and installation of the windows together with all associated and related waterproofing, flashings, and components.

216. Low Country Renovations is a limited liability partnership organized and existing in South Carolina and was authorized to and did conduct business, in whole or in part, at all times relevant hereto in Berkeley County, South Carolina.

217. Low Country Renovations' work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include installation of exterior trim together with all associated and related waterproofing, flashings, and components.

FOR A FIRST CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE AND SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Indemnity)

218. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

219. Plaintiffs sued Lennar claiming damages allegedly caused by improper and defective construction, workmanship, and materials at the residences in The Abbey. Copies of Plaintiffs' pleadings are available from the Berkeley County public index and are incorporated herein by reference.

220. Lennar denied all of Plaintiffs' substantive allegations against it.

221. Plaintiffs allege their residences sustained actual damage by exposure to the defective or deficient work, services, labor, or materials supplied, constructed, or installed by Spring Grove and the subcontractor and supplier defendants and third-party defendants: Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, Land/Site, Myers, A.C. & A., Knight's Concrete, Knight's Redi-Mix, Coastal Concrete, Guaranteed Framing, Ozzy Construction, Construction Applicators, LA New Enterprises, Décor, Alpha Omega, Carolina Exteriors, Builders FirstSource, and Low Country Renovations (collectively "Subcontractor and Supplier Defendants"). Plaintiffs further allege that their residences have sustained property damage caused by continuous exposure to Spring Grove's and Subcontractor and Supplier Defendants' defective and improper materials, installation, and construction that resulted in property damage and not merely negligent construction damaging only the work product itself. In addition, the

alleged negligence, breaches, errors, omissions and wrongful acts of Spring Grove and Subcontractor and Supplier Defendants were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous, and/or injurious events that caused property damage.

222. A special relationship existed between Lennar and Spring Grove and between Lennar and Subcontractor and Supplier Defendants.

223. To the extent, if any, that Lennar is liable to Plaintiffs in this action, such liability would be because the wrongful acts, omissions, negligence, breaches, or representations of Spring Grove or Subcontractor and Supplier Defendants were imputed to Lennar.

224. A right of indemnity exists in favor of Lennar as the relation between Lennar and Spring Grove and the relation between Lennar and Subcontractor and Supplier Defendants is such that in law or equity there is an obligation for Spring Grove and Subcontractor and Supplier Defendants to indemnify Lennar, as Lennar is required to defend itself in this action and exposed to liability due to the alleged wrongful acts, omissions, negligence, breaches, or representations of Spring Grove or Subcontractor and Supplier Defendants.

225. To the extent, if any, that Lennar is held liable to Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of Spring Grove and the Subcontractor and Supplier Defendants which damaged Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

226. To the extent, if any, that the materials, labor, services, or work provided by Spring Grove or the Subcontractor and Supplier Defendants were defective or deficient, such defects and deficiencies would be the result of the breaches of the express and implied contractual obligations and warranties that Spring Grove and the Subcontractor and Supplier

Defendants provided to Lennar, damaging Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

227. In the event Lennar is liable to pay Plaintiffs for defective or deficient materials, labor, work, or services, the principles of equity and the applicable contracts require that Spring Grove and the Subcontractor and Supplier Defendants indemnify and hold harmless Lennar for any sums for which it is held liable to Plaintiffs, any sums it pays Plaintiffs' in settlement of Plaintiffs' claims, and all losses, damages, costs, and attorney's fees.

228. Should it be determined that Lennar does not owe any obligations that were the responsibility of Spring Grove or the Subcontractor and Supplier Defendants Lennar is entitled to be reimbursed for the costs and attorney's fees it incurred defending against claims that were the direct and consequent result of Spring Grove and the Subcontractor and Supplier Defendant's failure to comply with their legal and contractual obligations to Lennar.

FOR A SECOND CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE AND SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Negligence/Gross Negligence)

229. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

230. Spring Grove and Subcontractor and Supplier Defendants provided labor, materials, services, and work for the construction of Plaintiffs' residences.

231. Plaintiffs allege the labor, materials, services, and work provided by Spring Grove and Subcontractor and Supplier Defendants are defective or deficient as a result of negligence, gross negligence, carelessness, or recklessness.

232. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, which Lennar denies, such defects and deficiencies would

be the result of the negligence, gross negligence, carelessness, or recklessness of Spring Grove and Subcontractor and Supplier Defendants.

233. As a direct and proximate result of such negligence, gross negligence, carelessness, and recklessness, Lennar has suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

234. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, Lennar is entitled to judgment collectively or individually against Spring Grove and the Subcontractor Defendants for actual damages including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

235. Plaintiffs' residences have allegedly suffered actual property damage caused by continuous exposure to the improper and negligent construction and faulty work of Subcontractor and Supplier Defendants resulting in property damage which is not the work product of each of the Subcontractor and Supplier Defendants. In addition, the alleged faulty construction, breaches, errors, omissions, and wrongful acts of the Subcontractor and Supplier Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

FOR A THIRD CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE AND SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Breach of Warranties)

236. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

237. Spring Grove and Subcontractor and Supplier Defendants expressly and impliedly warranted to Lennar the labor, material, work, and services provided by them would be performed in a careful, diligent, and workmanlike manner, and that any materials designed, manufactured, supplied, or sold by them for use on the project would be merchantable and fit for their intended or specific purpose.

238. Plaintiffs allege the labor, material, work, and services at their residences are defective, deficient, not merchantable, or not fit for their intended or specific purpose, and not of the highest quality.

239. Plaintiffs allege their residences sustained actual damage by exposure to the defective, deficient, not merchantable, or not fit for the intended or specific purpose work, services, labor, or materials designed, manufactured, supplied, constructed, or installed by Spring Grove and Subcontractor and Supplier. Plaintiffs further allege their residences sustained property damage caused by continuous exposure to Spring Grove's and Subcontractor and Supplier Defendants' defective, deficient, not merchantable, or not fit for the intended or specific purpose work, labor, or materials that resulted in property damage and not merely negligent construction damaging only the work product itself. In addition, the alleged faulty construction, breaches, errors, omissions, and wrongful acts of the Subcontractor and Supplier Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

240. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, Spring Grove and Subcontractor and Supplier Defendants breached their implied and express warranties of merchantability, workmanlike service, and fitness for a particular or intended purpose in the materials supplied to and the construction of The Abbey and Plaintiffs' residences.

241. As a direct and proximate result of such breaches of warranties, Lennar has suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

242. To the extent, if any, that the materials, labor, services, or work for Plaintiffs' residences were defective or deficient, Lennar is entitled to judgment collectively or individually against Spring Grove and the Subcontractor Defendants for actual damages resulting from their breaches of the applicable express and implied warranties including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

FOR A FOURTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SPRING GROVE
(Breach of Contract)

243. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

244. On or about October 22, 2010, Lennar and Spring Grove entered into a contract for the sale of the subdivision lots in The Abbey ("Agreement for the Purchase and Sale of Subdivision Lots").

245. The Agreement for the Purchase and Sale of Subdivision Lots is an enforceable contract between Lennar and Spring Grove supported by mutual consideration.

246. Pursuant to section 6.5 of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to develop the lots in accordance with requirements specified in Exhibit D to the agreement and in compliance with all applicable building codes and regulations.

247. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to:

(a) grade the lots and construct the building pads;

(b) install curbs and gutters;

(c) install streets and roads;

(d) install storm drainage, retention and detention facilities, and other storm drainage structures and systems.

248. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to grade and engineer The Abbey and the lots therein in accordance with all laws, ordinances, and governmental requirements and any engineering and grading plans.

249. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide lots suitable for Lennar to construct single-family residences.

250. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide lots with building pads with fill compacted to 95% of standard proctor.

251. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide lots with building pads with a soil bearing pressure of 2500 PSF or greater.

252. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide a report prepared by a geotechnical engineer indicating the soil comprising the building pad for each lot in The Abbey has sufficient bearing capacity to safely accommodate the type of residential home Lennar intended to build thereon without the need for any additional compaction, displacement, removal or substitution of soil.

253. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide an in-ground storm drainage system to manage storm water.

254. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to engineer and grade the lots such that 2% drainage is established.

255. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide surface drainage such that there would be no standing water on the lots after twenty-fours elapse after a rain event.

256. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide grading and drainage such that storm

water would not flow across more than three lots before being conveyed off the lot or managed through an underground storm drainage system.

257. Pursuant to Exhibit D of the Agreement for the Purchase and Sale of Subdivision Lots, Spring Grove was contractually obligated to provide streets and roads in The Abbey to include the necessary grading and storm sewer structures and system.

258. Plaintiffs allege their lots and The Abbey were improperly, deficiently, or defectively graded.

259. Plaintiffs allege their residences and The Abbey suffers from deficient or defective drainage.

260. Plaintiffs allege that their residences sustained actual damage by exposure to the defective or deficient drainage systems and grading in The Abbey and related work, services, labor, or materials designed, engineered, supplied, constructed, or installed by Spring Grove. Plaintiffs further allege that their residences have sustained property damage caused by continuous exposure to Spring Grove's defective and improper materials, installation, design, engineering, and construction that resulted in property damage and not merely negligent construction damaging only the work product itself. In addition, the alleged negligence, breaches, errors, omissions and wrongful acts of Spring Grove were, and have resulted in, occurrences that were unintended, unforeseen, gratuitous, and/or injurious events that caused property damage.

261. In the event Plaintiffs prevail on any of their claims, Spring Grove materially breached the Agreement for the Purchase and Sale of Subdivision Lots in:

(a) improperly, deficiently, or defectively constructing the building pads;

(b) improperly, deficiently, or defectively compacting the soil comprising the building pads;

(c) failing to provide building pads with sufficient bearing capacity;

(d) failing to provide a report from a geotechnical engineer accurately reflecting the native soils in The Abbey and their characteristics and the implications for construction of residences in The Abbey;

(e) failing to compact, displace, remove, substitute fill for, or otherwise treat or remedy any native soil conditions;

(f) improperly, deficiently, or defectively grading the lots;

(g) improperly, deficiently, or defectively installing curbs and gutters;

(h) improperly, deficiently, or defectively installing streets and roads;

(i) improperly, deficiently, or defectively installing storm drainage, retention and detention facilities and other storm drainage systems;

(j) failing to grade and engineer the lots in accordance with all laws, ordinances, and governmental requirements and any engineering and grading plans;

(k) providing a deficient and defective in-ground storm drainage system;

(l) improperly, deficiently, or defectively grading the lots such that a 2% drainage was not established;

(m) improperly, deficiently, or defectively grading the lots such that water remains standing on the lots more than twenty-four hours after a rain event;

(n) improperly, deficiently, or defectively grading and providing drainage such that water flows across more than three lots;

(o) improperly, deficiently, or defectively grading and providing storm sewer for the streets and roads in The Abbey.

262. Spring Grove failed to cure any such breaches.

263. As a result of the material breaches of Spring Grove, Lennar has suffered direct, incidental, and consequential damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

264. Lennar is entitled to judgment against Spring Grove for Lennar's direct, incidental, and consequential damages resulting from the breaches including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

265. Further, Lennar has been required to expend sums for attorney's fees and costs, all of which were foreseeable to Spring Grove as a result of breaches of the Agreement for the Purchase and Sale of Subdivision Lots.

266. In light of the contractual provisions providing for an award of costs and reasonable attorney's fees, Lennar is entitled to recover the same from Spring Grove.

267. Spring Grove's breaches include breaches of warranties and representations made in regards to the fitness, quality, durability, performance, or use of its products and work.

268. Spring Grove's breaches of warranties and representations in the Agreement for the Purchase and Sale of Subdivision Lots are alleged by Plaintiffs to have caused property damage to their residences.

FOR A FIFTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST SUBCONTRACTOR AND SUPPLIER DEFENDANTS
(Breach of Contract)

269. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

270. Lennar contracted with or was a third-party beneficiary of contracts entered into by Subcontractor and Supplier Defendants.

271. Pursuant to those contracts, Subcontractor and Supplier Defendants were obligated, among other things, to provide labor, materials, and services for the residences in The Abbey and specifically for Plaintiffs' residences.

272. Pursuant to those contracts, Subcontractor and Supplier Defendants agreed to provide work, materials, or services meeting contractually specified standards.

273. To the extent, if any, that the materials, labor, services, or work for the residences constructed in The Abbey were defective or deficient, Subcontractor and Supplier Defendants breached their contracts with Lennar or their contracts for which Lennar was a third-party beneficiary by, among other things, failing to perform their work in a careful, diligent, and workmanlike manner, by failing to provide materials, work, or services that resulted in a quality residence free from defects and otherwise in conformance with all contract documents, and failing to provide materials, work, or services conforming with all appropriate building codes and industry standards.

274. As a result of the breaches of the applicable contracts by Subcontractor and Supplier Defendants, Lennar has suffered direct, incidental, and consequential damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe

Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

275. Further, Lennar has been required to expend sums for attorney's fees and costs, all of which were foreseeable to Subcontractor and Supplier Defendants as a result of breaches of the contracts.

276. Lennar is entitled to judgment against Subcontractor and Supplier Defendants for Lennar's direct, incidental, and consequential damages resulting from the breaches including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

277. Additionally, Lennar's contracts with Subcontractor and Supplier Defendants required that they name Lennar as an additional insured on their commercial general liability ("CGL") policies and thereby provide Lennar with coverage for claims arising out of a Subcontractor or Supplier Defendant's materials, labor, services, or work.

278. To the extent a Subcontractor or Supplier Defendant failed to name Lennar as an additional insured on its CGL policies or otherwise failed to follow the contractual provisions regarding naming Lennar as an additional insured and the Subcontractor or Supplier Defendant's insurance carrier refuses to defend and indemnify Lennar for Plaintiffs' claims, the Subcontractor or Supplier Defendant breached its contract with Lennar, Lennar will have suffered damages as a result of the breach, and Lennar is entitled to recover from the Subcontractor or Supplier Defendant for those damages including, but not limited to, Lennar's attorney's fees, costs, and expenses incurred in defending this action.

279. Subcontractor and Supplier Defendants' breaches include breaches of warranties and representations made in regards to the fitness, quality, durability, performance, or use of its products and work.

280. Spring Grove's breaches of warranties and representations in the Agreement for the Purchase and Sale of Subdivision Lots are alleged by Plaintiffs to have caused property damage to their residences.

FOR A SIXTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST BUILDERS FIRSTSOURCE
(Strict Liability/Products Liability)

281. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

282. Plaintiffs allege the windows installed in their residences are defective or deficient.

283. Builders FirstSource designed, manufactured, supplied, sold, or distributed the windows installed in the residences in The Abbey.

284. Builders FirstSource never warned Lennar of any danger, defect, deficiency, or any other problem inherent in the windows that would cause the problems and damages alleged by Plaintiffs.

285. To the extent, if any, that the windows installed in the residences constructed in The Abbey are defective or deficient and Plaintiffs suffered damages as a result, which Lennar denies, Builders FirstSource sold and delivered a product in a defective condition presenting an unreasonable risk of harming the residences into which they were installed.

286. Builders FirstSource incorporating a defective and unreasonably dangerous product into the residences in The Abbey caused Lennar to suffer direct, incidental, and

consequential damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

FOR A SEVENTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Indemnity)

287. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

288. Lennar entered into contracts with or was a third-beneficiary of contracts entered into with CSE, Earthworks, Volkmar, and Geometrics (collectively the "Design and Engineering Defendants").

289. CSE was responsible for, among other things, preparing the civil engineering plans, drawings, documents, and specifications including preparing grading and drainage plans, drawings, documents, and specifications for The Abbey.

290. Earthworks was responsible for, among other things, preparing the plans, drawings, documents, and specifications for the residences constructed in The Abbey.

291. Volkmar was responsible for providing geotechnical engineering services for construction of residences in The Abbey to include, but not limited to, site exploration, investigation, testing, and analysis of soils in The Abbey, preparing designs and specifications for grading, site preparation, groundwater control, fill, compaction, soils, building pads, footing excavations, footings, and slabs, and observation, investigation, testing, administration, and approval of soils, grading, building pads, and footing excavations for residences in The Abbey.

292. Geometrics was responsible for providing geotechnical engineering services for construction of residences in The Abbey including, but not limited to, observation, investigation, testing, administration, and approval of soils, grading, building pads, and footing excavations for residences in The Abbey.

293. Design and Engineering Defendants provided some or all of those services for the construction of the residences in The Abbey.

294. Plaintiffs sued Lennar alleging damages caused by deficient design, engineering, and construction administration services provided by Design and Engineering Defendants.

295. Lennar denied all of Plaintiffs' substantive allegations against it.

296. Plaintiffs allege their residences sustained actual damage by exposure to the defective or deficient services of Design and Engineering Defendants.

297. A special relationship existed between Lennar and Design and Engineering Defendants.

298. Design and Engineering Defendants owed Lennar a duty to perform and provide their design, engineering, and construction administration services in accordance with their contracts and the applicable rules, regulations, and ethical requirements that relate to architects or engineers practicing in South Carolina and with the appropriate standard of professional care and generally accepted architectural and engineering standards.

299. To the extent, if any, that Lennar is liable to Plaintiffs in this action, such liability would be because the wrongful acts, omissions, negligence, breaches, or representations of Design and Engineering Defendants were imputed to Lennar.

300. A right of indemnity exists in favor of Lennar as the relation between Lennar and Design and Engineering Defendants and the relation between Lennar is such that in law or equity

there is an obligation for Design and Engineering Defendants to indemnify Lennar, as Lennar is required to defend itself in this action and exposed to liability due to the alleged wrongful acts, omissions, negligence, breaches, or representations of Design and Engineering.

301. To the extent, if any, that Lennar is held liable to Plaintiffs in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, or representations of Design and Engineering Defendants which damaged Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

302. To the extent, if any, that the services, engineering, designs, plans, drawings, or specifications provided by Design and Engineering Defendants were improper, defective, deficient, or otherwise not suitable, such defects and deficiencies would be the result of the breaches of the express and implied contractual obligations and warranties that Design and Engineering Defendants provided to Lennar, damaging Lennar as Lennar has been subjected to liability and incurred consequential damages in attorney's fees and costs in defending this action.

303. In the event Lennar is liable to pay Plaintiffs' for any defect, deficiency, or other condition in their residences or any defect, deficiency, or other condition in or on their properties or The Abbey generally, the principles of equity and the applicable contracts require that Design and Engineering Defendants indemnify and hold harmless Lennar for any sums for which it is held liable to Plaintiffs, any sums it pays Plaintiffs' in settlement of Plaintiffs' claims, and all losses, damages, costs, and attorney's fees.

304. Should it be determined that Lennar does not owe any obligations that were the responsibility of Design and Engineering Defendants, Lennar is entitled to be reimbursed for the costs and attorney's fees it incurred defending against claims that were the direct and consequent

result of Design and Engineering Defendants' failures to comply with their legal and contractual obligations to Lennar.

FOR AN EIGHTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Negligence)

305. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

306. Design and Engineering Defendants provided professional design and engineering services for the development of The Abbey and the construction of the residences therein.

307. Plaintiffs allege damages caused by the negligent, grossly negligent, careless, or reckless performance of design, engineering, and construction administration services by Design and Engineering Defendants.

308. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, which Lennar denies, such defects and deficiencies would be the result, in whole or in part, of the negligence, gross negligence, carelessness, or recklessness of Design and Engineering Defendants.

309. To the extent an affidavit is required pursuant to S.C. Code Ann. § 15-36-100, which Lennar does not admit or concede, Lennar states good faith concerns regarding the expiration of any applicable statute of limitations did not permit the timely preparation of an expert affidavit.

310. Design and Engineering Defendants owed Lennar a duty to perform and provide their professional services in accordance with their contracts and the applicable statutes, rules, regulations, and ethical standards applicable to architects and engineers practicing in South Carolina, and in accordance with the applicable industry standards, standard of care, generally

accepted architectural and engineering standards, and any other applicable standard for architects and engineers.

311. As a direct and proximate result of such negligence, gross negligence, carelessness, and recklessness, Lennar suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

312. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Lennar is entitled to judgment collectively or individually against Design and Engineering Defendants for damages including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

313. Plaintiffs' residences have allegedly suffered actual property damage caused by continuous exposure to the improper and negligent work and services of Design and Engineering Defendants resulting in property damage which is not the work product of each of the Design and Engineering Defendants. In addition, the alleged breaches, errors, omissions, and wrongful acts of the Design and Engineering Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

FOR A NINTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Breach of Warranties)

314. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

315. Design and Engineering Defendants expressly or impliedly warranted to Lennar that the work and services performed by them would be performed in a careful, diligent, professional manner and that the designs, plans, drawings, and specifications prepared by them would suit the particular and intended purpose for use in the development and construction of The Abbey and the residences therein.

316. Design and Engineering Defendants owed Lennar an implied duty of workmanlike service to undertake their architectural and engineering tasks with appropriate skill and expertise and in accordance with their contracts and the applicable statutes, rules, regulations, and ethical standards applicable to architects and engineers practicing in South Carolina, and in accordance with the applicable industry standards, standard of care, generally accepted architectural and engineering standards, and any other applicable standard for architects and engineers.

317. Design and Engineering Defendants provided an implied warranty that their architectural or engineering services, designs, drawings, plans, and specifications were sufficient for their intended uses.

318. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Design and Engineering Defendants breached their express and implied warranties.

319. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Lennar is entitled to judgment collectively or individually against Design and Engineering Defendants for damages including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

320. Plaintiffs' residences have allegedly suffered actual property damage caused by continuous exposure to the improper and negligent work and services of Design and Engineering Defendants resulting in property damage which is not the work product of each of the Design and Engineering Defendants. In addition, the alleged breaches, errors, omissions, and wrongful acts of the Design and Engineering Defendants were, and have resulted in, alleged occurrences that were unintended, unforeseen, gratuitous, and injurious events that caused property damage.

FOR A TENTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Breach of Contract)

321. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

322. Lennar contracted with or was a third-party beneficiary of contracts entered into by Design and Engineering Defendants.

323. Pursuant to those contracts, Design and Engineering Defendants were obligated, among other things, to provide work and services for The Abbey generally, the residences constructed in The Abbey, and specifically for Plaintiffs' residences.

324. Pursuant to those contracts, Design and Engineering Defendants agreed to provide work and services meeting contractually specified standards.

325. The terms of the contracts required Design and Engineering Defendants to provide design, engineering, and construction administration services that, among other things, would produce a quality residential development and residences free from defects and otherwise in conformance with all contract documents, building codes, statutes, codes, regulations, industry standards, and any other applicable standard. The contracts further required Design and Engineering Defendants to supervise and direct their work and services using their best skill and attention.

326. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Design and Engineering Defendants breached their contracts with Lennar or their contracts for which Lennar was a third-party beneficiary by, among other things, failing to perform their work in a careful, diligent, and workmanlike manner, by failing to work and services that resulted in a quality residential development and residences free from defects and otherwise in conformance with all contract documents, building codes, statutes, codes, regulations, industry standards, and any other applicable standard.

327. As a result of the breaches of the applicable contracts by Design and Engineering Defendants, Lennar has suffered damages, including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

328. Further, Lennar has been required to expend sums for attorney's fees and costs, all of which were foreseeable to Design and Engineering Defendants as a result of breaches of the contracts.

329. Lennar is entitled to judgment against Design and Engineering Defendants for Lennar's damages resulting from the breaches including, but not limited to, reputational injury, costs and expenses incurred as a result of warranty claims from homeowners, the amount of any monies Lennar is adjudged to owe Plaintiffs or which it pays Plaintiffs in settlement of Plaintiffs' claims, and the cost of investigating and defending this claim.

FOR AN ELEVENTH CROSS-CLAIM OR THIRD-PARTY CLAIM AGAINST DESIGN AND ENGINEERING DEFENDANTS
(Non-Delegable Duty/Vicarious Liability)

330. Lennar realleges the allegations in the previous paragraphs as if restated verbatim herein.

331. Design and Engineering Defendants had a non-delegable duty to provide their services in accordance with the applicable statutes, regulations, rules, and ethical requirements governing the practices of architects and engineers in South Carolina, and in accordance with the appropriate and generally accepted architectural and engineering standards.

332. To the extent, if any, that any defect or deficiency exists in the residences in The Abbey or in or on the lots in The Abbey or The Abbey generally, Design and Engineering Defendants breached their non-delegable duties for the reasons stated herein, directly and proximately causing Lennar damages as described herein.

333. Design and Engineering Defendants are further vicariously liable for any and all errors, omissions, breaches and wrongful acts of any of their consultants and agents, which directly and proximately caused Lennar damages as described herein.

WHEREFORE, Lennar prays that Plaintiffs' claims be dismissed, that Lennar be given judgment against Spring Grove, Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, Earthworks, Volkmar, Geometrics, Land/Site, Myers, A.C. & A., Knight's Concrete, Knight's Redi-Mix, Coastal Concrete, Guaranteed Framing, Ozzy Construction, Construction Applicators, LA New Enterprises, Décor, DVS, Martinez Masonry, Alpha Omega, Carolina Exteriors, Builders FirstSource, and Low Country Renovations, and Lennar demands judgment requiring these Defendants and Third-Party Defendants to indemnify Lennar against any liability which Lennar may suffer in this action, to include Lennar's attorney's fees, costs, and other expenses incurred in defending this action.

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By: _____

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Attorneys for Lennar Carolinas, LLC

November 25, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-

Builders FirstSource-Southeast Group, LLC, Plaintiff, vs. MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC Defendants.	)	SUMMONS

To: MI Windows and Doors, Inc. ECC Contracting, LLC Hurley Services, LLC and Charleston Exteriors, LLC

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the subscriber hereto at his office at 25 Rue Du Bois, Lady's Island, P.O. Box 40, Beaufort, South Carolina, 29901-0040, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

HOWELL, GIBSON & HUGHES, P.A.

By: s/Stephen P. Hughes
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for BuildersFirstSource-
Southeast Group, LLC

Beaufort, South Carolina

December 21, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-08-

Builders FirstSource-Southeast Group, LLC Plaintiff, vs. MI Windows and Doors, Inc, ECC Contracting, LLC, Hurley Services, LLC, Charleston Exteriors, LLC Defendants.	)	COMPLAINT

The Plaintiffs, Builders First Source-Southeast Group, LLC, complaining of the Defendants, MI Windows and Doors, Inc., Hurley Services, LLC, Charleston Exteriors, LLC, and ECC Contracting, LLC, would respectfully allege unto this Honorable Court:

1. That the Plaintiff Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), is informed and believes that MI Windows and Doors, Inc. (hereinafter sometimes "MI"), is a corporation organized under and existing pursuant to the laws of one of the states of the United States, which corporation was, at all times relevant hereto, engaged in the business of designing, engineering, manufacturing, distributing, selling, and/or delivering its products, including windows and doors, for use in

commercial and/or residential construction, including such transactions in Berkeley County, South Carolina, and/or that the said MI Windows anticipated the use of its products in Berkeley County, South Carolina; that BFS would further show that MI Windows' products were used in construction of the subject residences at The Abbey at Spring Grove Plantation, located in Berkley Court, South Carolina.

2. That BFS is informed and believes that ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC are limited liability companies organized under and existing pursuant to the laws of one of the states of the United States, which companies, at all times referenced herein, conducted business, in whole or in part, in Berkeley County, South Carolina. That BFS is further informed and believes that the aforesaid ECC Contracting, LLC (hereinafter sometimes "ECC"), Charleston Exteriors, LLC, and Hurley Services, LLC provided materials and/or services in connection with window and/or door installation, during original construction of the subject residences.

3. That Plaintiffs, Patricia Damico, by, litigation commenced designated by Civil Action Number 2014-CP-08-224, (hereinafter sometimes "the underlying action") in the Court of Common Pleas for Berkeley County, South Carolina, seeking recovery of damages allegedly occasioned by deficiencies in design, development, construction, and/or component materials of the subject residences within The Abbey at Spring Grove Plantation. The specific allegations by the Plaintiffs in the underlying

action are more particularly set forth in that certain Amended Complaint of the Plaintiffs, dated and filed November 23, 2015, and designated in the Court of Common Pleas for Berkeley County, South Carolina by the aforesaid Civil Action Number, the contents of which (subject to the allegations set forth in the Amended Answer and Fourth Party Complaint), as filed therein by Builders FirstSource are hereby fully incorporated by reference.

4. That, Lennar Carolinas, LLC, by its responsive pleadings to the Plaintiffs' Amended Complaint, in the underlying action has also asserted third party claims, including such claims against the Plaintiff herein, BFS.

5. That BFS has thus been subject to suit, as a third party defendant, in the underlying action, by Lennar Carolinas, LLC, seeking recovery of damages alleged within the underlying Amended Complaint of the Plaintiffs. The specific allegations of the Lennar Carolinas, LLC are set forth within that certain Answer to the Amended Complaint, and Third Party Complaint, dated November 25, 2015, and filed on behalf of Lennar Carolinas, LLC in the underlying action in the Court of Common Pleas for Berkeley County, South Carolina, the contents of which (subject to the allegations set forth in the instant Amended Answer and Fourth Party Complaint), are hereby fully incorporated herein by reference.

6. That BFS has denied the material allegations as asserted against it in the Third Party Complaint of Lennar Carolinas, LLC in the underlying action.

FOR A FIRST CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

7. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

8. That Defendant MI Windows and Doors, Inc., was responsible for the development, manufacture, and sale of materials and/or services, including windows and doors, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of the relevant building codes, in connection with original construction of the subject residences at The Abbey At Spring Grove Plantation. In the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action, establishes that windows and/or doors, provided to BFS, for installation at the subject structures, were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event MI has failed properly to execute its duties, which failure has allegedly caused those damages asserted by the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

9. That the subcontract agreements between Builders FirstSource-Southeast Group, LLC, and Defendant, MI Windows and Doors, Inc., provide for contractual indemnification in favor of BFS.

10. The circumstances as set forth herein give rise to a special relationship between Builders FirstSource and MI Windows and Doors.

11. That to the extent, if any, that BFS may be held liable to the Plaintiffs, and/or to Lennar Carolinas, LLC, and/or to others in the underlying action, such liability would be a direct and proximate result of the wrongful acts,

omissions, negligence, and/or representations of MI, which have damages BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys fees and costs in defending against the referenced claims.

12. That BFS is entitled to full contractual and/or common law indemnification from MI Windows and Doors, Inc., for and against any liability which BFS is found to have to the Plaintiffs and/or to Lennar Carolinas, LLC, or to others in the underlying action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of MI, entitling BFS to recover from MI its attorneys fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from MI any sums which Builders FirstSource may be held liable, or may pay in settlement, to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in the underlying action.

FOR A SECOND CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

13. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

14. That to the extent that the allegations in the Plaintiffs' Amended Complaint and/or the Third Party Complaint of Lennar Carolinas, LLC, in the underlying action may be established, then and in that event MI was negligent, careless, and reckless in the design, manufacture, supervision, engineering, inspection, sale and/or supplying of services and/or products outlined above and incorporated in the project.

15. That as a direct and proximate result of such negligence, careless, and reckless, BFS has been damaged in the amount of any monies it is adjudged to owe Plaintiff, the Third Party Plaintiff, or others in the underlying action, or which it pays the Plaintiff, the Third Party Plaintiff, or others in settlement of the Plaintiffs' or other's claims in the underlying action, plus the costs of investigation and defense of such action, including, but not limited to, attorney's fees.

16. Upon information and belief, BFS is entitled to judgment for actual damages against MI in the amount of any monies BFS is adjudged to owe Plaintiff, the Third Party Plaintiff, or others in the underlying action, or which BFS pays Plaintiffs or others in settlement of the Plaintiffs', the Third Party Plaintiff's, or other's claims in the underlying action, as well as fees and costs incurred in investigation, defense, and/or settlement of such claim, including, but not limited to, attorney's fees.

FOR A THIRD CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

17. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

18. That MI, expressly or impliedly warranted that its products used in construction of the subject residences at The Abbey at Spring Grove Plantation would be of the highest quality and in conformance with generally accepted standards of the building components, architecture, and/or construction industries, and that the materials, specifications, instructions, etc. would comply with generally accepted principles in the

industries. MI expressly and/or impliedly warranted that the windows were merchantable, suitable and fit for use in construction the subject residence, and that such materials would be free of defects. To the extent that the allegations of the Complaint or the Third Party Complaint in the underlying action may be established, Defendant, MI, breached its implied and/or express warranties.

19. That as a result of the aforesaid breaches of warranties, BFS has incurred damages in the amount of any monies it is adjudged to owe the Plaintiff or others, or which it pays Plaintiff or others in settlement of the Plaintiff's or other's claims in the underlying action, plus the costs of investigation and the defense of such claim, including attorney's fees.

20. That upon information and belief, BFS is entitled to judgment against MI in the amount of any monies it is adjudged to owe Plaintiffs, the Third Party Plaintiff, or others in the underlying action, or which it pays Plaintiff or others in settlement of the Plaintiff's or other's claims in such action, as well as costs and fees incurred in the investigation, defense, and/or settlement of such claim.

FOR A FOURTH CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

21. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

22. That the Plaintiff, BFS, is informed and believes, that if it is found to be liable to the Plaintiffs, Third-Party Plaintiff, or others in the underlying action, then and in that event MI is a joint tortfeasor and BFS is entitled to

contribution from MI, jointly or severally, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act, Sections 15-38-10, et seq, South Carolina Code of Laws 1976, as amended.

FOR A FIFTH CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

23. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

24. That, upon information and belief, heretofore, BFS entered into an agreement with MI whereby MI agreed, in consideration of payment by BFS, to provide various windows and/or doors to be used in conjunction with construction of the subject residences at The Abbey at Spring Grove Plantation, which materials would be in accordance with relevant plans and specifications, industry standards, code requirements, and otherwise suitable for use in conjunction with the contemplated construction.

25. That BFS paid to MI the consideration required under the aforesaid contract.

26. That in the event that the allegations of the Plaintiffs' Amended Complaint, or the Third Party Complaint in the underlying action, are established, then the materials provided by MI pursuant to the aforesaid contract with BFS were not in accordance with the requirements of said contract, rendering the Fourth Party Defendant, MI, in material breach of its contract with BFS.

27. That as a result of the aforesaid breach and/or breaches of warranty, BFS has incurred damages in the amount of any monies it is adjudged to owe to the Plaintiffs, Third Party Plaintiffs, and/or others in the underlying action, or which it pays to the Plaintiff and/or others in settlement of the claims of Plaintiffs or others in such action, plus the cost of investigation and the cost of defense of such claim, including attorney's fees.

28. That upon information and belief, BFS is entitled to judgment against the Defendant, MI, in the amount of any monies it is adjudged to owe to the Plaintiff and/or others in the underlying action, and/or which it pays to Plaintiff and/or others in settlement of the claims of the Plaintiff and/or others in the underlying action, as well as costs and fees incurred in the investigation, defense, and/or settlement of such claim, including attorneys fees.

FOR A FIRST CUASE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

29. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

30. That the Defendants, ECC Contracting, LLC, Charleston Exteriors, LLC, and Hurley Services, LLC were responsible for provision of materials and/or services in connection with the installation of the windows and doors of the subject structures at The Abbey at Spring Grove Plantation, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the

event that the Plaintiff and/or the Lennar Carolinas, LLC in the underlying action establishes that the materials and/or services provided by the BFS were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC has failed properly to execute its duties, which have allegedly caused the damages alleged by Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

31. That the respective subcontracts between Builders FirstSource-Southeast Group, LLC and (a) ECC Contracting, LLC, (b) Charleston Exteriors, LLC, and (c) Hurley Services, LLC provide for contractual indemnification in favor of BFS.

32. That the circumstances herein give rise to a special relationship between Builders FirstSource and ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC.

33. That to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or to others in the underlying action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC which have damaged BFS, as Builders FirstSource-Southeast Group, LLC, has been subjected to liability and has incurred consequential damages in having to expend

attorneys fees and costs in defending against the claims of Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

34. That BFS is entitled to full contractual and common law indemnification from the ECC Contracting, LLC, for and against any liability which the BFS is found to have to the Plaintiffs, Lennar Carolinas, LLC, and/or to others in the underlying action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorneys fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from the ECC any sums for which BFS may be held liable to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in such action.

FOR A SECOND CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND
HURLEY SERVICES, LLC

35. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

36. That ECC Contracting, Charleston Exteriors, LLC and Hurley Services, LLC made express warranties that materials, services, and/or workmanship provided in conjunction with their services at the subject complex would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.

37. That the respective subcontract agreements between BFS and (a) ECC Contracting, LLC, (b) Charleston Exteriors, LCC, and (c) Hurley Services, LLC include provisions by which ECC, Charleston Exteriors, and Hurley Services expressly undertook to provide materials and services in accordance with the contract documents.

38. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that the materials or services provided by BFS were not in accordance with the requirements of the contract documents, industry standards, or relevant building requirements, then and in that event ECC Contracting, Charleston Exteriors, and Hurley Services has materially breached their express warranties.

39. That BFS is entitled to judgment against ECC Contracting, Charleston Exteriors, and Hurley Services in the amount of any judgment which the Plaintiffs, Lennar Carolinas, LLC, and/or others may obtain against BFS, in the underlying action for breach of any expressed warranties on the part of BFS, plus the BFS's costs for defense, inclusive of attorneys' fees.

FOR A THIRD CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS LLC AND
HURLEY SERVICES, LLC

40. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

41. That ECC Contracting, Charleston Exteriors, and Hurley Services made implied warranties of workmanlike service in connection with their services in construction of the subject complex.

42. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that the services of BFS were deficient, then and in that event ECC Contracting, Charleston Exteriors, and Hurley Services have materially breached their respective implied warranties.

43. That BFS is entitled to judgment against ECC Contracting, Charleston Exteriors, and Hurley Services in the event, and to the extent, that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action may obtain judgment against BFS for breach of implied warranties of workmanlike service.

FOR A FOURTH CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC AND
HURLEY SERVICES, LLC

44. That each and every allegation set forth in the preceding paragraphs thereof is hereby re-alleged and reiterated as fully as if set forth herein.

45. That ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC owed a duty of care in providing services and materials in connection with construction of the subject complex.

46. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that due care was not exercised in the provision of materials and/or services by ECC Contracting, LLC and Charleston Exteriors, LLC and/or Hurley Services, LLC and/or BFS, then and in that event ECC, Charleston Exteriors, and Hurley Services have breached their duties of due care.

47. That in the event that the Plaintiff and/or Lennar Carolinas, LLC obtain judgment against BFS in the underlying action as a direct, foreseeable, and proximate result of the negligence of ECC, Charleston Exteriors, and Hurley Services then and in that event BFS is entitled to judgment against ECC, Charleston Exteriors, and Hurley Services for the amount of any such judgment, plus costs of defense, inclusive of attorneys fees.

FOR A FIFTH CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND
HURLEY SERVICES, LLC

48. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

49. That ECC Contracting, LLC, Charleston Exteriors LLC, and Hurley Services, LLC were contractually responsible for provision of adequate materials and services in connection with their respective undertakings regarding construction of the subject complex.

50. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that the contract of BFS was breached due to improper or adequate materials and/or services provided by the ECC Contracting, Charleston Exteriors and/or Hurley Services, then and in that event ECC, Charleston Exteriors, and/or Hurley Services have materially breached their respective subcontracts, by failing properly and adequately to provide materials and services in connection with construction of the subject complex.

51. That in such an event, BFS is entitled to judgment against ECC Contracting, Charleston Exteriors, LLC and/or Hurley Services, LLC for the amount of any such judgment, plus costs of defense, inclusive of attorneys' fees.

FOR A SIXTH CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC AND
HURLEY SERVICES, LLC

52. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

53. That the Plaintiff, BFS, is informed and believes, that if it is found to be liable to the Plaintiffs, Third-Party Plaintiff, or others in the underlying action, then and in that event ECC Contracting, LLC, Charleston Exteriors, LLC and/or Hurley Services, LLC are a joint tort feasor and BFS is entitled to contribution from ECC Contracting, LLC, Charleston Exteriors, LLC and/or Hurley Services, LLC jointly or severally, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act, Sections 15-38-10, et seq, South Carolina Code of Laws 1976, as amended.

WHEREFORE, Builders FirstSource-Southeast Group, LLC having set forth its Complaint, prays as follows:

a. That this Plaintiff be granted judgment on its claims against MI Windows and Doors, Inc., ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC;

b. That this Plaintiff be granted a jury trial on all matters so triable;

c. That this Plaintiff be granted such other and further relief as this Court may deem just and proper.

HOWELL, GIBSON & HUGHES, P.A.

By:s/Stephen P. Hughes
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders FirstSource-Southeast Group, LLC
Bar No: 2805

Beaufort, South Carolina

December 21, 2018

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO: 2018-CP-08-02547
BUILDERS FIRST SOURCE-SOUTHEAST GROUP, INC. Plaintiff, vs. MI Window & Door, Inc., ECC Contracting, Inc., Charleston Exteriors, LLC and Hurley Services, Inc. Defendants.	)	**DEFENDANT CHARLESTON EXTERIORS, LLC ANSWER TO THE PLAINTIFF'S COMPLAINT** **(Jury Trial Demanded)**

TO: STEPHEN P. HUGHES, ESQUIRE, ATTORNEYS FOR BUILDERS FIRST SOURCE SOUTHEAST GROUP, INC.

1. Now comes the Defendant Charleston Exteriors, LLC ("Defendant" or "this Defendant") answering the Complaint of Builders First Source Southeast Group, Inc. ("BFS") All items not specifically admitted are deemed denied.

2. The allegations contained in Paragraph One are made against Defendant MI Window & Door, Inc. This Defendant does not have personal knowledge requisite to admit or deny these allegations.

3. The allegations contained in Paragraph 2 are made against multiple Defendants and the Defendant is not able to provide personal knowledge as to any of the details against parties other than itself. With regard to allegations made against the Defendant Charleston Exteriors, this defendant would assert that it provided labor only on a small portion of residences which comprise the Abbey at Spring Grove. The Defendant Charleston Exteriors would specifically deny any allegations which suggest that it provided materials at the Project.

4. The allegations contained in paragraph 3, 4, 5, and 6 draw reference to specific legal pleadings which have been filed in Berkeley County South Carolina involving the Abbey at Spring Grove. Regarding the allegations made in this Paragraph, the Defendant Charleston Exteriors would crave reference to the contents of the pleadings and deny any inference is inconsistent with them.

5. The allegations contained in Paragraphs 7, 8, 9, 10, 11 and 12 are being made against a party which is wholly distinct and separate from the Defendant Charleston Exteriors.

6. The allegations contained in paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28 contain allegations made against a defendant that is separate and distinct from Charleston Exteriors and, as such, a response is not required at this time.

7. Paragraph 29 is a reiteration of the previous 28 paragraphs and, therefore, this Defendant need not respond at this time

8. The allegations contained in paragraph 30 are against Charleston Exteriors and two Co-Defendants. Charleston Exteriors is not in possession of personal knowledge as to the allegations made against Hurley Services or ECC Contracting. Charleston Exteriors admits only so much of the allegations made as to admit that it furnished services limited to labor on a very limited number of the subject structures at the Abbey. The Defendant Charleston Exteriors denies all conclusions of law made against its interests and denies any factual assertions which suggest that Charleston Exteriors provided materials which were used in the construction of the subject residences.

9. As to the allegations contained in Paragraph 31, this Defendant craves reference to the specific document referenced and denies all attempts by BFS to paraphrase its contents.

10. The allegations contained in Paragraphs 32, 33, and 34 are denied to the extent they are seeking to assert legal conclusions and establish liability in contract or tort against this Defendant.

11. Paragraph 36 is a reiteration of the previous 28 paragraphs and, therefore, this Defendant need not respond at this time

12. Paragraphs 37, 38, and 39 seeks to make conclusions of law which are supported by references to contracts which have been paraphrased. This Defendant is not required to respond to legal conclusions while responding to the Complaint and, furthermore, craves reference to the specific documents while denying any and all allegations inconsistent with those documents.

13. Paragraph 40 is a reiteration of the previous 39 paragraphs and, therefore, this Defendant need not respond at this time.

14. Paragraphs 41, 42 and 43 seek to establish legal conclusions involving certain alleged implied warranties and the Defendant would assert that it is not required to respond. To the extent a response is required, each Paragraph is denied with strict proof demanded.

15. Paragraph 44 is a reiteration of the previous 43 paragraphs and, therefore, this Defendant need not respond at this time.

16. Paragraphs 44, 45, 46 and 47 seek to draw legal conclusions which Charleston Exteriors need not respond. To the extent a response is required, Charleston Exteriors denies the allegations contained in each Paragraph.

17. Paragraph 48 is a reiteration of the previous 47 paragraphs and, therefore, this Defendant need not respond at this time.

18. The allegations contained in Paragraphs 49, 50, and 51 are made against Charleston Exteriors and two Co-Defendants. Charleston Exteriors is not in possession of personal knowledge as to the allegations made against Hurley Services or ECC Contracting. Charleston Exteriors admits only so much of the allegations made as to admit that it furnished services limited to labor on a very limited number of the subject structures at the Abbey. The Defendant Charleston Exteriors denies all conclusions of law made against its interests and denies any factual assertions which suggest that Charleston Exteriors provided materials which were used in the construction of the subject residences.

19. Paragraph 52 is a reiteration of the previous 51 paragraphs and, therefore, this Defendant need not respond at this time.

20. Paragraph 53 sets forth speculative conclusions of law which do not require a response from this Defendant. To the extent a response is required, the entirety of Paragraph 53 is denied, with strict proof demanded of its contents.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE

(Failure to State a Claim)

21. The Plaintiff's Complaint must be dismissed for failure to state a claim pursuant to SCRCP Rule 12(b)(6).

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE

(Statute of Limitations)

22. The Claims asserted in the Complaint are barred by the three- year statute of limitations as the Plaintiff had notice of the alleged acts and/or omissions which make up the subject matter of this lawsuit before December 21st 2015.

FURTHER ANSWERINT THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Statute of Repose)

23. The claims are barred by the statute of repose.

FURTHER ANSWERINT THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Warranty of Plans/Specs)

24. The claims brought by BFS are barred as they have breached the warranty of plans and specifications as set forth by United States v. Spearin and other precedent.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:
(Failure to Perform)

25. With regard to all warranty and contractual claims, the Defendant would assert that the BFS failed to perform and materially breached its contractual obligations owed to the Defendant and, therefore, is unable to assert these claims.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Acceptance)

26. The claims brought by BFS are barred by the doctrine of acceptance.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Intervening & Superseding Negligence)

27. That if Charleston Exteriors was negligent, which is specifically denied, the injuries and damages sustained by the Plaintiff, if any, were due to and caused by and were the direct and proximate result of the intervening and superseding negligence, carelessness, recklessness, willfulness and wantonness of others.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:
(Defective Product)

28. A portion or the entirety of the claims being made against the Defendant have resulted from the alleged defective window product supplied by MI Window & Door.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:
(Unclean Hands)

29. BFS presents its case despite having unclean hands and such inequitable conduct on the part of BFS constitutes a bar and complete defense to any claim for equitable relief in the form of indemnity or other equitable claims.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:
(Failure to Mitigate Damages)

30. That the Plaintiffs and BFS have failed to take prompt and reasonable action under the circumstances to avoid the occurrence of additional damage to the structure and such failure to mitigate damages constitutes a complete defense as to that portion of damages which could have been otherwise avoided by reasonable and prompt action on the part of the Plaintiffs and BFS.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Notice and Opportunity to Cure)

31. That, to the extent that BFS has failed to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Section 40-59-810 through 40-59-860), this action must be dismissed and/or stayed.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS LLC ALLEGES AND SAYS:

(Severability of Warranty Obligation/Excused by Non-Compliance by BFS)

32. The express warranty claims asserted by BFS must fail due to BFS failure to comply fully with material conditions of its contract with the Defendant.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Comparative Negligence)

33. That the injuries and damages sustained by BFS, if any, were due to and caused by and were the direct and proximate result of the negligence, carelessness, recklessness, willfulness and wantonness of other parties, including the Plaintiff and Co-Defendants, and recovery should be barred or reduced in proportion to that negligence as provided by law and statutes of the State of South Carolina.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Indemnity Not Allowed Between Joint Tortfeasors)

34. The damages complained of by BFS, if any, was due to and caused by and were the direct and proximate result of the negligence, gross negligence, recklessness, willfulness and wantonness of BFS, combining and concurring with the alleged negligence of this Defendant (the existence of which is expressly denied), and therefore BFS is at best a joint tortfeasor, and such constitutes a complete defense to any claim for indemnity.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Unclean Hands)

35. That to the extent that BFS was negligent, grossly negligent, willful, wanton and reckless, resulting in the damages allegedly sustained, BFS comes to Court with unclean hands and such inequitable conduct on the part of BFS constitutes a bar and complete defense to any claim for equitable relief in the form of indemnity.

FURTHER ANSWERING THE THIRD-PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Sole Negligence of Others)

36. Charleston Exteriors would allege that any injury and damage sustained by BFS were due to and caused by the sole and negligent acts or omissions of some person or persons other than Charleston Exteriors, and over whom Charleston Exteriors exercised an authority or control and for that reason, Charleston Exteriors is not liable to BFS in any sum whatsoever.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Expiration of Warranty)

37. Any express warranty allegedly provided by the Defendant has expired.

FURTHER ANSWERING THE THIRD-PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Laches/Waiver/Estoppel)

38. BFS' claims are barred by the doctrines of Laches, Waiver and/or Estoppel.

FURTHER ANSWERING THE THIRD-PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS:

(Economic Loss)

39. That BFS' claims sounding in tort are barred by the Economic Loss Rule.

FURTHER ANSWERING THE THIRD-PARTY COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS

(Spoilation)

40. Upon information and belief, BFS' right to recover damages is barred, in whole or in part, due to Plaintiffs or BFS spoliation of evidence.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO, CHARLESTON EXTERIORS ALLEGES AND SAYS

(Punitive Damages Unconstitutional)

41. The Plaintiff seeks relief including unconstitutional punitive damages which can not be granted as a remedy.

FURTHER ANSWERING THE COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO,
CHARLESTON EXTERIORS ALLEGES AND SAYS:
(Reservation and Non-Waver and Adoption)

42. Charleston Exteriors, LLC specifically reserves any additional defenses, including affirmative defenses, as may be available or revealed to it during the course of its investigation and/or discovery in the case, and as are consistent with the South Carolina Rules of Civil Procedure. Further, Charleston Exteriors hereby adopts by reference all defenses, including affirmative defenses, where relevant and consistent with its position, as alleged by other defendants in this action.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant prays for a trial by jury and that the Plaintiff's Complaint be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

HARPER LITTLE PLLC

s/C. Clay Olson
C. Clay Olson, Esquire
164 Meeting Street Suite 139
Charleston, SC 29401
843-224-6676
clay@harperwhitwell.com

COUNSEL FOR CHARLESTON EXTERIORS, LLC

I hereby certify that I am counsel for the Defendant Charleston Exteriors in the above-captioned matter and that on the 14th day of February 2019, I electronically filed and served a copy of the forgoing Answer on the following person(s) by using the South Carolina electronic filing system:

STEPHEN P. HUGHES

Counsel for Builders First Source Southeast Group

sphughes@hghpa.com

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders FirstSource-Southeast Group, LLC, Plaintiff, vs. MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, Charleston Exteriors, LLC, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2018-CP-08-02547 **ECC CONTRACTING, LLC'S ANSWER TO COMPLAINT**

Defendant, ECC Contracting, LLC ("ECC Contracting"), by and through its undersigned attorneys, hereby answering Plaintiff's Complaint, states as follows:

1. ECC Contracting is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 and, therefore, denies the same and demands strict proof thereof.

2. Answering the allegations of Paragraph 2, ECC Contracting admits that it is a limited liability company organized pursuant to the laws of South Carolina. ECC Contracting denies the remaining allegations of said Paragraph and demands strict proof thereof.

3. ECC Contracting is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 3, 4, 5 and 6, and, therefore, denies the same and demands strict proof thereof.

AS TO THE FIRST CAUSE OF ACTION AGAINST MI WINDOWS AND DOORS, INC.

4. Answering the allegations of Paragraph 7, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

5. The allegations of Paragraphs 8, 9, 10, 11, and 12 set forth a cause of action against

a party other than ECC Contracting and require no response from ECC Contracting. To the extent any response is required, ECC Contracting denies the same and demands strict proof thereof.

AS TO THE SECOND CAUSE OF ACTION AGAINST MI WINDOWS AND DOORS, INC.

6. Answering the allegations of Paragraph 13, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

7. The allegations of Paragraphs 14, 15, and 16 set forth a cause of action against a party other than ECC Contracting and require no response from ECC Contracting. To the extent any response is required, ECC Contracting denies the same and demands strict proof thereof.

AS TO THE THIRD CAUSE OF ACTION AGAINST MI WINDOWS AND DOORS, INC.

8. Answering the allegations of Paragraph 17, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

9. The allegations of Paragraphs 18, 19, and 20 set forth a cause of action against a party other than ECC Contracting and require no response from ECC Contracting. To the extent any response is required, ECC Contracting denies the same and demands strict proof thereof.

AS TO THE FOURTH CAUSE OF ACTION AGAINST MI WINDOWS AND DOORS, INC.

10. Answering the allegations of Paragraph 21, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

11. The allegations of Paragraph 22 set forth a cause of action against a party other than ECC Contracting and require no response from ECC Contracting. To the extent any response is required, ECC Contracting denies the same and demands strict proof thereof.

AS TO THE FIFTH CAUSE OF ACTION AGAINST MI WINDOWS AND DOORS, INC.

12. Answering the allegations of Paragraph 23, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

13. The allegations of Paragraphs 24, 25, 26, 27, and 28 set forth a cause of action against a party other than ECC Contracting and require no response from ECC Contracting. To the extent any response is required, ECC Contracting denies the same and demands strict proof thereof.

AS TO THE FIRST CAUSE OF ACTION AGAINST ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

14. Answering the allegations of Paragraph 29, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

15. ECC Contracting denies the allegations of Paragraphs 30, 31, 32, 33, and 34, and demands strict proof thereof.

AS TO THE SECOND CAUSE OF ACTION AGAINST ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

16. Answering the allegations of Paragraph 35, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

17. ECC Contracting denies the allegations of Paragraphs 36, 37, 38, and 39, and demands strict proof thereof.

AS TO THE THIRD CAUSE OF ACTION AGAINST ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

18. Answering the allegations of Paragraph 40, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

19. ECC Contracting denies the allegations of Paragraphs 41, 42, and 43, and demands

strict proof thereof.

AS TO THE FOURTH CAUSE OF ACTION AGAINST ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

20. Answering the allegations of Paragraph 44, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

21. ECC Contracting denies the allegations of Paragraphs 45, 46, and 47, and demands strict proof thereof.

AS TO THE FIFTH CAUSE OF ACTION AGAINST ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

22. Answering the allegations of Paragraph 48, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

23. ECC Contracting denies the allegations of Paragraphs 49, 50, and 51, and demands strict proof thereof.

AS TO THE SIXTH CAUSE OF ACTION AGAINST ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

24. Answering the allegations of Paragraph 52, ECC Contracting incorporates by reference its previous responses as if repeated herein verbatim.

25. ECC Contracting denies the allegations of Paragraphs 53 and demands strict proof thereof.

26. ECC Contracting denies the relief sought in the WHEREFORE paragraph.

27. ECC Contracting denies any and all allegations not specifically admitted hereinabove.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE

(Lack of Standing)

28. Plaintiff lacks standing to make the claims asserted against ECC Contracting in this action.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Statute of Limitations/Statute of Repose)

29. That all claims asserted against ECC Contracting are barred by the applicable statute of limitations and/or the applicable statute of repose.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Comparative Negligence)

30. Plaintiff's claims, if any, are barred, or should be reduced, by Plaintiff's own comparative negligence and recklessness.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Unclean Hands)

31. That all claims asserted by Plaintiff are barred by the doctrine of unclean hands.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Negligent Acts and Omissions of Others)

32. Plaintiff's claims, if any, are the result of acts and omissions of other entities over whom ECC Contracting had no control, barring Plaintiff's claims against ECC Contracting.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Doctrine of Laches)

33. That all claims are barred by the doctrine of Laches.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Doctrines of Res Judicata/Collateral Estoppel)

34. Plaintiff's claims are barred and/or should be dismissed pursuant to the doctrines of res judicata and/or collateral estoppel.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Acceptance)

35. That the final completion and acceptance of the work undertaken by ECC Contracting pursuant to the original contract and all modifications thereto constitutes a complete defense to all claims asserted by Plaintiff.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Failure to Give Notice/Opportunity to Cure)

36. That Plaintiff failed to give ECC Contracting reasonable notice of the existence of any alleged defects due to faulty workmanship and/or materials and failed to provide ECC Contracting a reasonable opportunity to correct any such alleged defects.

37. That Plaintiff's failure to give ECC Contracting notice of and an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Payment/Release)

38. Plaintiff's Complaint is barred by payment and/or release.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Waiver/Estoppel)

39. Plaintiff has waived and/or are estopped from asserting the claims set forth in their Complaint.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Sole Negligence)

40. If Plaintiff sustained injuries and damages in the manner alleged in the Complaint, which injuries and damages are specifically denied by ECC Contracting, then the alleged injuries and damages were sustained not as the result of any fault, neglect, breach of warranty (express or implied) or want of due care on the part of ECC Contracting nor of anyone for whose conduct ECC Contracting is any way responsible, but solely through the fault, neglect, breach of warranty (express or implied) and want of due care on the part of Plaintiff, all of which will be shown at the trial of this case, and for which Plaintiff can have no recovery against ECC Contracting or, in the alternative, for which Plaintiff's recovery should be appropriately reduced.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Failure to State a Claim)

41. Plaintiff's claims fail to state facts sufficient to constitute causes of action against Defendant.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Comparative Negligence)

42. Plaintiff's claims are barred by their own comparative negligence in failing to provide an adequate design for the structure.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Compliance with Plans and/or Specifications)

43. Defendant alleges that it complied with any plans/and or specifications provided to it with respect to any materials with might have been furnished for the subject project.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Expiration of Warranty/Improper Notice)

44. Defendant alleges that the claims are, upon information and belief, barred as Plaintiff failed to make a claim against this party within the acceptable warranty period, if any.

FURTHER ANSWERING AND AS AN ADDITIONAL AND AFFIRMATIVE DEFENSE (Disclaimer/Limitation of Warranty)

45. Defendant effectively disclaimed or limited all express warranties, if any; and all implied warranties.

RESERVATION AND NON-WAIVER

46. ECC Contracting herby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

BEST HONEYCUTT, P.A.

By: s/L. Dean Best
L. Dean Best
Post Office Box 13466
102 Wappoo Creek Drive, Suite 8 (29412)
Charleston, South Carolina 29422
T: (843) 793-4744
Email: Dean@besthoneycutt.com

and

James H. Elliott, Jr., Esquire
John H. Guerry. Esquire
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Mt. Pleasant, SC 29464
T: (843) 805-6550
jelliott@richardsonplowden.com
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Attorneys for Defendant ECC Contracting, LLC

March 22, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-08-02547

Builders FirstSource-Southeast Group, LLC, Plaintiff, vs. MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC Defendants.	)	MOTION TO STAY AND CONSOLIDATE

TO: ALL COUNSEL OF RECORD:

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through undersigned attorneys, will move before the Presiding Judge of the Ninth Judicial Circuit, at Berkeley, South Carolina, ten (10) days after the service hereof, or as soon thereafter as counsel may be heard, for an Order staying the above referenced case on the following grounds:

That the cause of action in which the claims arose, are the same as those pending in Case Number 2014-CP-08-02424.

That the facts in controversy and witnesses will be identical for each case.

That the only difference between the two cases would be the degree of damages sustained by each Plaintiff, if any.

These cases involve common questions of law and fact.

That the ends of justice and judicial economy will be met by staying and

consolidating the above referenced matter.

This Defendant prays this Honorable Court issue an Order Staying and Consolidating the above referenced matter for trial, pursuant to Rule 42 of the South Carolina Rules of Civil Procedure.

HOWELL, GIBSON & HUGHES, P.A.

By:/s/ *William H. Cox, III*
William H. Cox, III
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders FirstSource-Southeast Group, LLC

Beaufort, South Carolina

August 6, 2019

CERTIFICATE OF SERVICE

I certify that I served the foregoing Motion to Consolidate was served upon all counsel of record, in this proceeding, via electronic mail, and/or via United States Postal Service, with proper postage affixed thereto, to counsels' last known email address and/or mailing address on this 6th day of August, 2019 .

By: /s/ William H. Cox, III
William H. Cox, III

RULE 11 CERTIFICATION

I certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that

____ I have consulted with opposing counsel and have been unable to resolve the matter.

____ Consultation with opposing counsel would serve no useful purpose, or is not required.

__X__ Consultation with opposing counsel could not be timely held

____ I certify that there is no duty of consultation for the attached motion (to dismiss, for summary judgment, for new trial, for judgment NOV, in real estate foreclosures, or with pro se litigants.)

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders Firstsource-Southeast Group, LLC Plaintiff, v. ECC Contracting, LLC; et. al., Defendants,	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL CASE NO. 2018-CP-08-02547 **ECC CONTRACTING, LLC'S MOTION FOR SUMMARY JUDGMENT**

TO: PLAINTIFF AND STEPHEN HUGHES, ATTORNEY FOR PLAINTIFF

You will please take notice that the undersigned, as counsel for the Defendant ECC Contracting, LLC, ("ECC") by and through the undersigned counsel, and moves for an Order Dismissing Plaintiff's claims against ECC pursuant to Rule 12 of the South Carolina Rules of Civil Procedure. The grounds for the Motion are as follows:

1. All of Plaintiff's claims, save contribution, are barred by the applicable Statute of Limitations, SC. Code § 15-3-530 et seq.;
2. Plaintiff's claims for breach of contract, breach of warranty, and negligence are " merely disguised ... claims for equitable indemnity" and fail as a matter of law pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015);
3. Plaintiff's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. *Concord and Cumberland HPR v. Concord and Cumberland, LLC,* 2018 WL 3748616 (S.C. Ct. App. 2018), and
4. In the alternative, Plaintiff's claims are unripe and fail for a lack of standing;

WHEREFORE for the foregoing reasons, ECC respectfully requests this Court enter an Order dismissing, Plaintiff's claims. This Motion will be supported by a Memorandum of Law. First reserves the right to supplement this motion and present additional arguments.

RICHARDSON PLOWDEN & ROBINSON, P.A.

By: s/F. Heyward Grimball
James H. Elliott, Jr., Esq.
F. Heyward Grimball, Esq.
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jelliott@richardsonplowden.com
fhgrimball@richardsonplowden.com

ATTORNEYS FOR ECC CONTRACTING, LLC

August 9, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders Firstsource-Southeast Group, LLC Plaintiff, v. MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CIVIL CASE NO. 2018-CP-08-02547 **CHARLESTON EXTERIORS, LLC'S MOTION FOR SUMMARY JUDGMENT**

TO: BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC AND STEPHEN P. HUGHES, ESQUIRE AND WITT COX, ESQUIRE THEIR ATTORNEYS

YOU WILL PLEASE TAKE NOTICE that the Defendant Charleston Exteriors, LLC by and through its undersigned attorney, hereby moves, pursuant to Rule 56, SCRCP, for summary judgment against Plaintiff Builders FirstSource-Southeast Group, LLC. This motion is made on the grounds that there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law.

The Motion will be supplemented by a memorandum of law and other evidence in the form of affidavits, exhibits, and other admissible evidence.

Specifically, the moving Defendant seeks to show this court that there are no genuine issues of material fact based on the following grounds:

1. The Plaintiff became aware of all potential claims against the moving Defendant prior to December 21st 2015 and, therefore, this matter is barred by the three year statute of limitations.

2. The Plaintiff has asserted claims alleging breach of contract, breach of warranty, and negligence. These claims are "veiled indemnity claims" which are disguised as claims for indemnification and fail pursuant to precedent established in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource- Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015);

3. Plaintiff's claims for contractual indemnity are based on contractual provisions that seek indemnification for Plaintiff's own negligence. The terms of the contract are neither

clear or unequivocal. The Defendant has testified under oath as to the circumstances which surrounded the agreement and those circumstances have served to only further cloud the terms. The Defendant is entitled to summary judgment on this cause of action due to the axiom that "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See also Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018)

4. In the alternative, the Plaintiff lacks standing to assert their challenge, and their claim is not ripe as it posits a hypothetical scenario which has yet to materialize. See James v. Anne's Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010) (recognizing that "[j]usticiability encompasses several doctrines, including ripeness, mootness, and standing," Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 30 n.4, 736 S.E.2d 651, 659 (2012)

WHEREFORE for the foregoing reasons, Charleston Exteriors, LLC, respectfully requests this Court find that it is entitled to Summary Judgment as a matter of law. This Motion will be supported by a Memorandum of Law. Furthermore, Charleston Exteriors, LLC, reserves the right to supplement this motion and present additional arguments.

Respectfully submitted,

s/ C. Clay Olson
C. Clay Olson
Harper Little, PLLC
164 Market Street, Suite 139
Charleston, South Carolina 29401
P: (843) 224-6676
clay@harperwhitwell.com
Attorney for Defendant, Charleston Exteriors, LLC

August 20, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders Firstsource-Southeast Group, LLC Plaintiff, V MI Windows And Doors, INC.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC, Defendant,	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL CASE NO. 2018-CP-08-02547 **ECC CONTRACTING, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TO: PLAINTIFF AND STEPHEN HUGHES, ATTORNEY FOR PLAINTIFF

You will please take notice that the undersigned, as counsel for the Defendant ECC Contracting, LLC, ("ECC") submits the following in support for its Motion for Summary Judgment:

FACTUAL/PROCEDURAL BACKGROUND

This case is a derivative action relating to the construction of a single family residence development known as The Abbey at Spring Grove constructed and developed by Lennar. The main action is *Patricia Damico, et al v. Lennar Carolinas, LLC, et al*, case number 2014-CP-08-2424, filed October 30, 2014. Initially, the case was filed over foundation/lot grading type issues. Lennar moved to compel Arbitration in June of 2015. Plaintiffs subsequently filed amended pleadings asserting claims for the construction of the homes as well. Lennar's Motion to Compel arbitration was denied in September 2016, and their motion to reconsider was denied October 2016. In November 2016, Lennar appealed the lower Court's decision. Lennar has refused to allow discovery to occur during the appeal and has twice gotten orders from the Court of Appeals enforcing the automatic stay of this case.

BFS was served in the *Damico* case on December 3, 2015 by registered mail. Exhibit 1 Affidavit of Service. Their Answer is dated December 15, 2015, and the certificate of service indicates that it served via US mail on December 18, 2015. Exhibit 2. The Clerk of Court filed the Answer on December 21, 2015. They filed the present litigation on December 21, 2018 asserting claims against ECC for Contractual Indemnity, Breach of express and implied warranties, breach of contract, negligence, and contribution; ECC was served on January 10, 2019. ECC is alleged to have installed windows and doors as a subcontractor to BFS. ECC and BFS executed two Master Subcontractor Agreements one dated February 26, 2008, and a second dated July 1, 2015. The Indemnity provision of both contracts, relating to construction defects, is in section 5 on page 6. Exhibit 3.

LEGAL STANDARD

Summary judgment is appropriate if the circuit court finds "there is no genuine issue as to any material fact . . . ." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571 (Ct. App. 2001). Summary judgment should be granted

when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Argument

1. Plaintiff's Claims for Breach of express and implied warranties, breach of contract, and negligence are merely claims for indemnity in disguise.

BFS has only alleged claims as a result of the claims against it in the *Damico* case. Claims conditioned on liability to third parties are considered claims for indemnity "in disguise". *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim"). *See also Holland v. Hucks Pool Co., Inc.*, No. 4:15-cv-00141-RBH, 2016 WL 6157491 (D.S.C. Oct. 24, 2016) ("[The contractor's] breach of contract/warranty crossclaim is not viable as a cause of action separate from its equitable indemnity crossclaim.... [The contractor's] allegations indicate it did not sustain its own damages as a result of any breach of contract or warranty by [the subcontractor].... Accordingly, the Court will grant [the subcontractor's] motion for summary judgment as to [the contractor's] breach of contract/warranty crossclaim...."). Thus, BFS's claims should be dismissed.

2. BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law.

There are two 'master agreements' between BFS and ECC, one from 2008 another from 2015. Given the dates of our client's work, the 2008 contract should govern. However, it is

irrelevant because the relevant indemnity provision is identical in both contracts. There are multiple indemnity provisions in that contract, but only one relates to property damage. That provision states:

> To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant and hold harmless the contractor, the owner, and all of their officers, directors, agents, and employees from and against any and all claims, suits, losses, causes of action, damages, liabilities, fines, penalties, and expenses of any kind whatsoever, including, but not limited to, arbitration or curt costs and attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury or death of any person, or property damage, including loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the subcontractor's performance of the work or other activities of the subcontractor, **but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor** or anyone for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder.

This language is based on the AIA form indemnification language and the key phrase, for our purposes is "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor". The South Carolina Court of Appeals issued an opinion in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC that is directly on point to this case.

That appeal dealt almost exclusively with the interpretation of contractual indemnity provisions. The Court of Appeals noted that the standard for upholding a Contractual Indemnity provision is "clear and unequivocal". In that case in the underlying Circuit Court Opinion, Judge Newman held that:

> In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own

> negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law.

Concord and Cumberland Horizontal Property Regime v Concord & Concord & Cumberland, LLC, No. 2010-CP-10-3026, 2014 WL 12783397, at *3 (S.C.Com.Pl. Oct. 06, 2014)

One of the two indemnity provisions interpreted by the Court was based on the AIA provision we are dealing with (the underlined provisions are identical to the AIA A201 Indemnity Provision):

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that
>
> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor** or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.
>
> (b) [omitted].
>
> Concord & Cumberland at *1–2 (S.C. Ct. App. Aug. 8, 2018)

Further, Judge Newman has ruled that a General Contractor's claims for Contractual Indemnity fail when based on AIA A201. *See Seashore Villas v Ocean Keyes Development et al.* Order Granting Subcontractors Motion for Summary Judgment. Exhibit 4.

Because BFS is ultimately responsible to Lennar for the work performed by ECC, it is impossible for BFS not to be at least partially responsible for any deficient work of ECC. Thus any and all deficiencies in ECC's work are concurrent negligence, which our courts have ruled multiple times is not covered under this indemnity provision.

3. BFS's Claims are barred by the Statute of Limitations

Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 (Ct. App. 2015).

In this case BFS has pled that it is "entitled to full contractual and common law indemnification from against Liability". BFS began to incur liability for attorney's costs and fees – damages it seeks against ECC in this litigation when its Answer was drafted and served. BFS's Answer was executed and served more than three years prior to the filing of the present action. Thus BFS's claims for "contractual and common law indemnification against Liability" are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

4. Plaintiff's claims are unripe and fail for a lack of standing.

ECC withdraws this ground for filing for summary judgment pending the Court's ruling on this motion and BFS' motion to consolidate.

WHEREFORE for the foregoing reasons, ECC respectfully requests this Court enter an Order dismissing, Plaintiff's claims. This Motion will be supported by a Memorandum of Law. First reserves the right to supplement this motion and present additional arguments.

-SIGNATURE ON THE FOLLOWING PAGE-

RICHARDSON PLOWDEN & ROBINSON, P.A.

By: s/F. Heyward Grimball
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F. Heyward Grimball, Esq.
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ATTORNEYS FOR ECC CONTRACTING, LLC

October 9, 2019
Charleston, South Carolina

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-08-02424

PATRICIA DAMICO AND LENNA LUCAS, individually and on behalf of all others similarly situated, JOSHUA AND BRETTANY BUETOW, EDWARD AND SYLVIA DENGG, JONATHAN AND THERESA DOUGLASS, ANTHONY AND STACEY RAY, DANNY AND ELLEN DAVIS MORROW, CZARA AND CHAD ENGLAND, BRYAN AND CYNTHIA CAMARA, AND MATTHEW COLLINS,

Plaintiffs,

vs.

LENNAR CAROLINAS, LLC, SPRING GROVE PLANTATION DEVELOPMENT, INC., MANALE LANDSCAPING, LLC, SUPER CONCRETE OF SC, INC., SOUTHERN GREEN, INC., TJB TRUCKING/LEASING, LLC, PARAGON SITEWORK CONSTRUCTORS, INC., CIVIL SITE ENVIRONMENTAL, INC., AND RICK BRYANT,

Defendants.

LENNAR CAROLINAS, LLC

Third-Party Plaintiff,

vs.

THE EARTHWORKS GROUP, INC., VOLKMAR CONSULTING SERVICES, LLC, GEOMETRICS CONSULTING, LLC, LAND/SITE SERVICES, INC., MYERS LANDSCAPING, INC., A.C. & A. CONCRETE, INC., KNIGHT'S CONCRETE PRODUCTS, INC., KNIGHT'S REDI-MIX, INC., COASTAL CONCRETE SOUTHEAST, LLC, COASTAL CONCRETE SOUTHEAST II, LLC, GUARANTEED FRAMING, LLC, OZZY CONSTRUCTION, LLC, CONSTRUCTION APPLICATORS

AFFIDAVIT OF SERVICE BY MAIL OF BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC

CHARLESTON, LLC, LA NEW ENTERPRISES, LLC, DÉCOR CORPORATION, DVS, INC., RAUL MARTINEZ MASONRY, LLC, ALPHA OMEGA CONSTRUCTION GROUP, INC., SOUTH CAROLINA EXTERIORS, LLC, BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC, AND LOW COUNTRY RENOVATIONS AND SIDING, LLP,

Third-Party Defendants.

PERSONALLY appeared before me, Kelly J. Gouin, who being duly sworn, says:

That on December 1, 2015, the undersigned placed a true copy of **Third-Party Summons and Lennar Carolinas, LLC's Answer to Plaintiffs' First Amended Complaint, Cross-Claims, and Third-Party Complaint** in the United States Mail via Certified Mail with Return Receipt Requested, Receipt # 7015 1660 0000 5071 7976 addressed as follows:

Builders FirstSource – Southeast Group, LLC
CT Corporation System, Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223

That said Summons, Answer to First Amended Complaint, Cross-Claims, and Third-Party Complaint were served on Third-Party Defendant Builders FirstSource – Southeast Group, LLC on December 3, 2015, by being delivered to said defendant. See Certified Mail Confirmation # 7015 1660 0000 5071 7976 attached hereto.

By: Kelly J. Gouin

Kelly J. Gouin
PARKER POE ADAMS & BERNSTEIN LLP

SWORN TO BEFORE ME THIS
7th day of January, 2016.

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: November 15, 2017

Parker Poe

Kelly J. Gouin
Paralegal
Telephone: 843.727.2667
Direct Fax: 843.727.2680
kellygouin@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

December 1, 2015

VIA CERTIFIED MAIL/RETURN RECEIPT/
RESTRICTED DELIVERY/ADDRESSEE ONLY
Builders FirstSource – Southeast Group, LLC
CT Corporation System, Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223

Re: Damico, et al. v. Lennar Carolinas, LLC, et al.
Case No.: 2014-CP-08-02424

T1

Dear Sir/Madam:

In connection with the above-referenced matter, enclosed for service on Builders FirstSource – Southeast Group, LLC, please find the filed Third-Party Summons and Lennar Carolinas, LLC's Answer to Plaintiffs' First Amended Complaint, Cross-Claims, and Third-Party Complaint. You are hereby summoned and required to answer the Third-Party Complaint herein, within thirty (30) days of receipt of this letter.

Please do not hesitate to call me if you have any questions.

Sincerely,

Kelly Gouin
Paralegal to Elliotte Quinn, Esq.

/kjg
Enclosures

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For delivery information, visit our website at www.usps.com®
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Street and Apt. No.
City, State, ZIP
Builders FirstSource–Southeast Group, LLC
CT Corporation System
Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223
Postmark Here
PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

7015 1640 0000 5021 7276

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Builders FirstSource–Southeast Group, LLC
CT Corporation System
Registered Agent
2 Office Park Court, Suite 103
Columbia, SC 29223

9590 9403 0970 5223 1151 56

2. Article Number (Transfer from service label)
7015 1660 0000 5071 7976

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Pam Johnson ☐ Agent ☐ Addressee

B. Received by (Printed Name) Pam Johnson
C. Date of Delivery 12-5-18

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☐ Certified Mail®
■ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

estricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

EXHIBIT 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-

Builders FirstSource-Southeast Group, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	SUMMONS
	)	
MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC	)	
	)	
Defendants.	)	

To: MI Windows and Doors, Inc. ECC Contracting, LLC Hurley Services, LLC and Charleston Exteriors, LLC

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the subscriber hereto at his office at 25 Rue Du Bois, Lady's Island, P.O. Box 40, Beaufort, South Carolina, 29901-0040, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

HOWELL, GIBSON & HUGHES, P.A.

By: s/Stephen P. Hughes
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for BuildersFirstSource-
Southeast Group, LLC

Beaufort, South Carolina

December 21, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-08-

Builders FirstSource-Southeast Group, LLC Plaintiff, vs. MI Windows and Doors, Inc, ECC Contracting, LLC, Hurley Services, LLC, Charleston Exteriors, LLC Defendants.	)	COMPLAINT

The Plaintiffs, Builders First Source-Southeast Group, LLC, complaining of the Defendants, MI Windows and Doors, Inc., Hurley Services, LLC, Charleston Exteriors, LLC, and ECC Contracting, LLC, would respectfully allege unto this Honorable Court:

1. That the Plaintiff Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), is informed and believes that MI Windows and Doors, Inc. (hereinafter sometimes "MI"), is a corporation organized under and existing pursuant to the laws of one of the states of the United States, which corporation was, at all times relevant hereto, engaged in the business of designing, engineering, manufacturing, distributing, selling, and/or delivering its products, including windows and doors, for use in

commercial and/or residential construction, including such transactions in Berkeley County, South Carolina, and/or that the said MI Windows anticipated the use of its products in Berkeley County, South Carolina; that BFS would further show that MI Windows' products were used in construction of the subject residences at The Abbey at Spring Grove Plantation, located in Berkley Court, South Carolina.

2. That BFS is informed and believes that ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC are limited liability companies organized under and existing pursuant to the laws of one of the states of the United States, which companies, at all times referenced herein, conducted business, in whole or in part, in Berkeley County, South Carolina. That BFS is further informed and believes that the aforesaid ECC Contracting, LLC (hereinafter sometimes "ECC"), Charleston Exteriors, LLC, and Hurley Services, LLC provided materials and/or services in connection with window and/or door installation, during original construction of the subject residences.

3. That Plaintiffs, Patricia Damico, by, litigation commenced designated by Civil Action Number 2014-CP-08-224, (hereinafter sometimes "the underlying action") in the Court of Common Pleas for Berkeley County, South Carolina, seeking recovery of damages allegedly occasioned by deficiencies in design, development, construction, and/or component materials of the subject residences within The Abbey at Spring Grove Plantation. The specific allegations by the Plaintiffs in the underlying

action are more particularly set forth in that certain Amended Complaint of the Plaintiffs, dated and filed November 23, 2015, and designated in the Court of Common Pleas for Berkeley County, South Carolina by the aforesaid Civil Action Number, the contents of which (subject to the allegations set forth in the Amended Answer and Fourth Party Complaint), as filed therein by Builders FirstSource are hereby fully incorporated by reference.

4. That, Lennar Carolinas, LLC, by its responsive pleadings to the Plaintiffs' Amended Complaint, in the underlying action has also asserted third party claims, including such claims against the Plaintiff herein, BFS.

5. That BFS has thus been subject to suit, as a third party defendant, in the underlying action, by Lennar Carolinas, LLC, seeking recovery of damages alleged within the underlying Amended Complaint of the Plaintiffs. The specific allegations of the Lennar Carolinas, LLC are set forth within that certain Answer to the Amended Complaint, and Third Party Complaint, dated November 25, 2015, and filed on behalf of Lennar Carolinas, LLC in the underlying action in the Court of Common Pleas for Berkeley County, South Carolina, the contents of which (subject to the allegations set forth in the instant Amended Answer and Fourth Party Complaint), are hereby fully incorporated herein by reference.

6. That BFS has denied the material allegations as asserted against it in the Third Party Complaint of Lennar Carolinas, LLC in the underlying action.

FOR A FIRST CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

7. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

8. That Defendant MI Windows and Doors, Inc., was responsible for the development, manufacture, and sale of materials and/or services, including windows and doors, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of the relevant building codes, in connection with original construction of the subject residences at The Abbey At Spring Grove Plantation. In the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action, establishes that windows and/or doors, provided to BFS, for installation at the subject structures, were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event MI has failed properly to execute its duties, which failure has allegedly caused those damages asserted by the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

9. That the subcontract agreements between Builders FirstSource-Southeast Group, LLC, and Defendant, MI Windows and Doors, Inc., provide for contractual indemnification in favor of BFS.

10. The circumstances as set forth herein give rise to a special relationship between Builders FirstSource and MI Windows and Doors.

11. That to the extent, if any, that BFS may be held liable to the Plaintiffs, and/or to Lennar Carolinas, LLC, and/or to others in the underlying action, such liability would be a direct and proximate result of the wrongful acts,

omissions, negligence, and/or representations of MI, which have damages BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys fees and costs in defending against the referenced claims.

12. That BFS is entitled to full contractual and/or common law indemnification from MI Windows and Doors, Inc., for and against any liability which BFS is found to have to the Plaintiffs and/or to Lennar Carolinas, LLC, or to others in the underlying action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of MI, entitling BFS to recover from MI its attorneys fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from MI any sums which Builders FirstSource may be held liable, or may pay in settlement, to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in the underlying action.

FOR A SECOND CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

13. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

14. That to the extent that the allegations in the Plaintiffs' Amended Complaint and/or the Third Party Complaint of Lennar Carolinas, LLC, in the underlying action may be established, then and in that event MI was negligent, careless, and reckless in the design, manufacture, supervision, engineering, inspection, sale and/or supplying of services and/or products outlined above and incorporated in the project.

15. That as a direct and proximate result of such negligence, careless, and reckless, BFS has been damaged in the amount of any monies it is adjudged to owe Plaintiff, the Third Party Plaintiff, or others in the underlying action, or which it pays the Plaintiff, the Third Party Plaintiff, or others in settlement of the Plaintiffs' or other's claims in the underlying action, plus the costs of investigation and defense of such action, including, but not limited to, attorney's fees.

16. Upon information and belief, BFS is entitled to judgment for actual damages against MI in the amount of any monies BFS is adjudged to owe Plaintiff, the Third Party Plaintiff, or others in the underlying action, or which BFS pays Plaintiffs or others in settlement of the Plaintiffs', the Third Party Plaintiff's, or other's claims in the underlying action, as well as fees and costs incurred in investigation, defense, and/or settlement of such claim, including, but not limited to, attorney's fees.

FOR A THIRD CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

17. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

18. That MI, expressly or impliedly warranted that its products used in construction of the subject residences at The Abbey at Spring Grove Plantation would be of the highest quality and in conformance with generally accepted standards of the building components, architecture, and/or construction industries, and that the materials, specifications, instructions, etc. would comply with generally accepted principles in the

industries. MI expressly and/or impliedly warranted that the windows were merchantable, suitable and fit for use in construction the subject residence, and that such materials would be free of defects. To the extent that the allegations of the Complaint or the Third Party Complaint in the underlying action may be established, Defendant, MI, breached its implied and/or express warranties.

19. That as a result of the aforesaid breaches of warranties, BFS has incurred damages in the amount of any monies it is adjudged to owe the Plaintiff or others, or which it pays Plaintiff or others in settlement of the Plaintiff's or other's claims in the underlying action, plus the costs of investigation and the defense of such claim, including attorney's fees.

20. That upon information and belief, BFS is entitled to judgment against MI in the amount of any monies it is adjudged to owe Plaintiffs, the Third Party Plaintiff, or others in the underlying action, or which it pays Plaintiff or others in settlement of the Plaintiff's or other's claims in such action, as well as costs and fees incurred in the investigation, defense, and/or settlement of such claim.

FOR A FOURTH CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

21. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

22. That the Plaintiff, BFS, is informed and believes, that if it is found to be liable to the Plaintiffs, Third-Party Plaintiff, or others in the underlying action, then and in that event MI is a joint tortfeasor and BFS is entitled to

contribution from MI, jointly or severally, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act, Sections 15-38-10, et seq, South Carolina Code of Laws 1976, as amended.

FOR A FIFTH CAUSE OF ACTION AGAINST
MI WINDOWS AND DOORS, INC.

23. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

24. That, upon information and belief, heretofore, BFS entered into an agreement with MI whereby MI agreed, in consideration of payment by BFS, to provide various windows and/or doors to be used in conjunction with construction of the subject residences at The Abbey at Spring Grove Plantation, which materials would be in accordance with relevant plans and specifications, industry standards, code requirements, and otherwise suitable for use in conjunction with the contemplated construction.

25. That BFS paid to MI the consideration required under the aforesaid contract.

26. That in the event that the allegations of the Plaintiffs' Amended Complaint, or the Third Party Complaint in the underlying action, are established, then the materials provided by MI pursuant to the aforesaid contract with BFS were not in accordance with the requirements of said contract, rendering the Fourth Party Defendant, MI, in material breach of its contract with BFS.

27. That as a result of the aforesaid breach and/or breaches of warranty, BFS has incurred damages in the amount of any monies it is adjudged to owe to the Plaintiffs, Third Party Plaintiffs, and/or others in the underlying action, or which it pays to the Plaintiff and/or others in settlement of the claims of Plaintiffs or others in such action, plus the cost of investigation and the cost of defense of such claim, including attorney's fees.

28. That upon information and belief, BFS is entitled to judgment against the Defendant, MI, in the amount of any monies it is adjudged to owe to the Plaintiff and/or others in the underlying action, and/or which it pays to Plaintiff and/or others in settlement of the claims of the Plaintiff and/or others in the underlying action, as well as costs and fees incurred in the investigation, defense, and/or settlement of such claim, including attorneys fees.

FOR A FIRST CUASE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND HURLEY SERVICES, LLC

29. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

30. That the Defendants, ECC Contracting, LLC, Charleston Exteriors, LLC, and Hurley Services, LLC were responsible for provision of materials and/or services in connection with the installation of the windows and doors of the subject structures at The Abbey at Spring Grove Plantation, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the

event that the Plaintiff and/or the Lennar Carolinas, LLC in the underlying action establishes that the materials and/or services provided by the BFS were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC has failed properly to execute its duties, which have allegedly caused the damages alleged by Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

31. That the respective subcontracts between Builders FirstSource-Southeast Group, LLC and (a) ECC Contracting, LLC, (b) Charleston Exteriors, LLC, and (c) Hurley Services, LLC provide for contractual indemnification in favor of BFS.

32. That the circumstances herein give rise to a special relationship between Builders FirstSource and ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC.

33. That to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or to others in the underlying action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC which have damaged BFS, as Builders FirstSource-Southeast Group, LLC, has been subjected to liability and has incurred consequential damages in having to expend

attorneys fees and costs in defending against the claims of Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

34. That BFS is entitled to full contractual and common law indemnification from the ECC Contracting, LLC, for and against any liability which the BFS is found to have to the Plaintiffs, Lennar Carolinas, LLC, and/or to others in the underlying action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorneys fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from the ECC any sums for which BFS may be held liable to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in such action.

FOR A SECOND CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND
HURLEY SERVICES, LLC

35. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

36. That ECC Contracting, Charleston Exteriors, LLC and Hurley Services, LLC made express warranties that materials, services, and/or workmanship provided in conjunction with their services at the subject complex would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.

37. That the respective subcontract agreements between BFS and (a) ECC Contracting, LLC, (b) Charleston Exteriors, LCC, and (c) Hurley Services, LLC include provisions by which ECC, Charleston Exteriors, and Hurley Services expressly undertook to provide materials and services in accordance with the contract documents.

38. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that the materials or services provided by BFS were not in accordance with the requirements of the contract documents, industry standards, or relevant building requirements, then and in that event ECC Contracting, Charleston Exteriors, and Hurley Services has materially breached their express warranties.

39. That BFS is entitled to judgment against ECC Contracting, Charleston Exteriors, and Hurley Services in the amount of any judgment which the Plaintiffs, Lennar Carolinas, LLC, and/or others may obtain against BFS, in the underlying action for breach of any expressed warranties on the part of BFS, plus the BFS's costs for defense, inclusive of attorneys' fees.

FOR A THIRD CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS LLC AND
HURLEY SERVICES, LLC

40. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

41. That ECC Contracting, Charleston Exteriors, and Hurley Services made implied warranties of workmanlike service in connection with their services in construction of the subject complex.

42. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that the services of BFS were deficient, then and in that event ECC Contracting, Charleston Exteriors, and Hurley Services have materially breached their respective implied warranties.

43. That BFS is entitled to judgment against ECC Contracting, Charleston Exteriors, and Hurley Services in the event, and to the extent, that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action may obtain judgment against BFS for breach of implied warranties of workmanlike service.

FOR A FOURTH CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC AND
HURLEY SERVICES, LLC

44. That each and every allegation set forth in the preceding paragraphs thereof is hereby re-alleged and reiterated as fully as if set forth herein.

45. That ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC owed a duty of care in providing services and materials in connection with construction of the subject complex.

46. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that due care was not exercised in the provision of materials and/or services by ECC Contracting, LLC and Charleston Exteriors, LLC and/or Hurley Services, LLC and/or BFS, then and in that event ECC, Charleston Exteriors, and Hurley Services have breached their duties of due care.

47. That in the event that the Plaintiff and/or Lennar Carolinas, LLC obtain judgment against BFS in the underlying action as a direct, foreseeable, and proximate result of the negligence of ECC, Charleston Exteriors, and Hurley Services then and in that event BFS is entitled to judgment against ECC, Charleston Exteriors, and Hurley Services for the amount of any such judgment, plus costs of defense, inclusive of attorneys fees.

FOR A FIFTH CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC, AND
HURLEY SERVICES, LLC

48. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

49. That ECC Contracting, LLC, Charleston Exteriors LLC, and Hurley Services, LLC were contractually responsible for provision of adequate materials and services in connection with their respective undertakings regarding construction of the subject complex.

50. That in the event that the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action prove that the contract of BFS was breached due to improper or adequate materials and/or services provided by the ECC Contracting, Charleston Exteriors and/or Hurley Services, then and in that event ECC, Charleston Exteriors, and/or Hurley Services have materially breached their respective subcontracts, by failing properly and adequately to provide materials and services in connection with construction of the subject complex.

51. That in such an event, BFS is entitled to judgment against ECC Contracting, Charleston Exteriors, LLC and/or Hurley Services, LLC for the amount of any such judgment, plus costs of defense, inclusive of attorneys' fees.

FOR A SIXTH CAUSE OF ACTION AGAINST
ECC CONTRACTING, LLC, CHARLESTON EXTERIORS, LLC AND
HURLEY SERVICES, LLC

52. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

53. That the Plaintiff, BFS, is informed and believes, that if it is found to be liable to the Plaintiffs, Third-Party Plaintiff, or others in the underlying action, then and in that event ECC Contracting, LLC, Charleston Exteriors, LLC and/or Hurley Services, LLC are a joint tort feasor and BFS is entitled to contribution from ECC Contracting, LLC, Charleston Exteriors, LLC and/or Hurley Services, LLC jointly or severally, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act, Sections 15-38-10, et seq, South Carolina Code of Laws 1976, as amended.

WHEREFORE, Builders FirstSource-Southeast Group, LLC having set forth its Complaint, prays as follows:

a. That this Plaintiff be granted judgment on its claims against MI Windows and Doors, Inc., ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC;

b. That this Plaintiff be granted a jury trial on all matters so triable;

c. That this Plaintiff be granted such other and further relief as this Court may deem just and proper.

HOWELL, GIBSON & HUGHES, P.A.

By:s/Stephen P. Hughes
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders FirstSource-Southeast Group, LLC
Bar No: 2805

Beaufort, South Carolina

December 21, 2018

EXHIBIT 3

Builders FirstSource

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of 1 JULY, 2015 between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, TX 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("Contractor"), and ECC CONTRACTING LLC, address: 201 SPARKLEBERRY LANE - LADSON - SC, telephone: (843)478-8230, fax: (843)821-0301, Contact: ROD ASSIS, e-mail: ECCCONT@YAHOO.COM ("Subcontractor").

SECTION 1. Introduction.

a. Work. This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "Work") from time to time for Contractor on any project (the "Project"). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the "Owner"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the "Contract Documents") and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contract Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. Work Orders. It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, "Work Order") delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s)

Subcontractor

Contractor

are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

e. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.
Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

Subcontractor

Contractor

d. Safety and Environmental.

(1) Compliance with Laws. Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumeration and not limitation, safety, health, and environmental rules and regulations established by or pursuant to federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA"), Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY

Subcontractor

Contractor

WITH THE REGULATIONS.

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other lights required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of $200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.
In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If

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Subcontractor fails to perform under this warranty, the party entitled to performance of Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.

b. **Employer's Liability Insurance** - $1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.

c. **Commercial General Liability** - $1,000,000 per occurrence, $1,000,000 products-completed operations aggregate, $1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.

d. **Business Auto Liability**, including hired and non-owned auto coverage - $500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and alternate employer's endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or Final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance

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provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

SECTION 5. INDEMNITY.
TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY

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OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (1) CAUSED BY OR RESULTS FROM: (A) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (B) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS,

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DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (2) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Certification of Compliance with Equal Employment Opportunity Provisions

If the Project contracted for herein is subject to or becomes subject to 41 CFR 60-741.5(a), then the Subcontractor and Contractor certify that they shall abide by the requirements of 41 CFR 60-741.5(a), such requirements being incorporated by reference herein. This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

If the Project contracted for herein is subject to, or becomes subject to, 41 CFR 60-300.5(a), then the Subcontractor and Contractor certify that they shall abide by the requirements of 41 CFR 60-300.5(a), such requirements being incorporated by reference herein. This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

Subcontractor further certifies that it has read and familiarized itself with the requirements contained in 41 CFR 60-741.5(a) and 41 CFR 60-300.5(a) and shall incorporate the above language into its purchase orders and subcontracts.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH)

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ARISING OUT OF, RESULTING FROM OR RELATED TO SUBCONTRACTOR'S BREACH OF THE OBLIGATIONS SET FORTH IN THIS SECTION 7.

SECTION 8. Default and Damages.

a. Subcontractor's Default. The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

(1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.

(2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.

(3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.

(4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)

(5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.

(6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.

(7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. Damages.

(1) No Damages for Delay. Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) Subcontractor's Liability to Contractor upon Termination. If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to

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Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to perform under this Agreement or other Contract Documents (including, without limitation, the amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

e. Reimbursement for Fines. Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 9. Payment to Subcontractor.

a. Payment by Owner is Condition Precedent. Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("Cost of Work") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

b. Partial Payments. Partial payments ("Partial Payments") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("Employee Time Sheets") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

c. Retainage. Contractor will retain at least ten percent (10%) of each Partial Payment (the "Retainage Amount") or any greater amount Contractor chooses to retain in its sole discretion.

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Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

d. **Grounds for Withholding Payments.** Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. **Final Payment.** Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

(1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;

(2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers), if requested by Contractor;

(3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;

(4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;

(5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and

(6) Contractor has received payment from Owner.

g. **Release of Retainage.** Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue

Subcontractor

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joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

l. INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 10. Miscellaneous.

a. Assignment and Successors. Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

Sub-Contractor

Contractor

h. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

i. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

j. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

k. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

l. **Release.** Subcontractor hereby waives, releases, and forever discharges the Contractor, the Owner, and all of their officers, directors, agents, and employees from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against the Contractor, the Owner, and all of their officers, directors, agents, and employees. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder.

m. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

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Subcontractor

Contractor

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:
ECC CONTRACTING LLC

By: _____

Name: ROD ASSN

Title: OWNER

26-154-8017
Subcontractor Social Security No. or
Federal I.D. No.

BUILDERS FIRSTSOURCE –
SOUTHEAST GROUP, LLC

By: _____

Name: Grant Carson

Title: Senior Attorney

Subcontractor

Contractor

Builders FirstSource

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of Feb. 26, 2008, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 111 Lumber Lane, GooseCreek, SC 29445, telephone: 843-553-5252, fax: 843-797-1710, Contact: Bill Crabtree, e-mail: bill.crabtree@bldr.com ("Contractor"), and ECC CONTRACTING, address: 2505 AUDUBON DR HANAHAN - SC, telephone (843)4788230, fax: 2255397, Contact: ROD ASSIS, e-mail: ECCCOMT@YAHOO.COM ("Subcontractor").

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "Work") from time to time for Contractor on any project (the "Project"). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the "Owner"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the "Contract Documents") and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, "Work Order") delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s) are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

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c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of **Sections 3, 4, and 5** shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in **Section 8**.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section

SECTION 2. Materials and Workmanship.
Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "**Law**") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole

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cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("**Regulations**") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("**MSDS**") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

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(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of $200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

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SECTION 4. Insurance.
At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.

b. **Employer's Liability Insurance** - $1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.

c. **Commercial General Liability** - $1,000,000 per occurrence, $1,000,000 products-completed operations aggregate, $1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.

d. **Business Auto Liability**, including hired and non-owned auto coverage - $500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

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SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION

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OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and

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its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

(1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.

(2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.

(3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.

(4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)

(5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.

(6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.

(7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (**defined in Section 8**) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to perform under this Agreement or other Contract Documents (including, without limitation, the

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amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("**Cost of Work**") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

b. **Partial Payments.** Partial payments ("**Partial Payments**") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("**Employee Time Sheets**") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "**Retainage Amount**") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

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d. Grounds for Withholding Payments. Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. Work Covered by Partial Payments. All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. Final Payment. Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

(1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;

(2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;

(3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;

(4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;

(5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and

(6) Contractor has received payment from Owner.

g. Release of Retainage. Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. Subcontractor's Agreement to Pay. Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

Subcontractor

Contractor

l. INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

Subcontractor

Continental

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

f. **Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

ECC CONTRACTING

By: _____

Name: RODRIGO ASSIS

Title: OWNER

26-1548017

Subcontractor Social Security No. or Federal I.D. No.

BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC

By: _____

Name: Deryl Ward

Title: Associate General Counsel

Subcontractor

Contractor

EXHIBIT 4

STATE OF SOUTH CAROLINA COUNTY OF HORRY SEASHORE VILLAS AT OCEAN KEYES PROPERTY OWNERS ASSOCIATION, INC., Plaintiff, vs. OCEAN KEYES DEVELOPMENT, LLC, KEYE CONSTRUCTION CO., INC., KEYE COMMUNITIES, LLC, RUSSELL P. BALTZER, AIA, PINE BLUFF CONSTRUCTION CO., INC., AFFORDABLE HOME IMPROVEMENTS, INC., CAREFREE EXTERIORS, INC., S.C.S.S., INC., RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a RICHARD FRAMING CONSTRUCTION, RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a RICHARD FRAMING CON., INC., JOSE RODRIGUEZ, COASTAL STUCCO, INC., RE-NEW CONSTRUCTION SERVICES, B&J BUILDERS, INC., HUGO SILVA and HUGO SILVA d/b/a WELLINGTON DA SILVA, Defendants.	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT Civil Action No.: 2015-CP-26-8308 **ORDER GRANTING FINAL SUMMARY JUDGMENT TO DEFENDANTS RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a RICHARD FRAMING CONSTRUCTION, RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a RICHARD FRAMING CON., INC., S.C.S.S., INC., and CAREFREE EXTERIORS, INC. ON CROSSCLAIMS OF OCEAN KEYES DEVELOPMENT, LLC, KEYE CONSTRUCTION CO., INC., KEYE COMMUNITIES, LLC, AND PINE BLUFF CONSTRUCTION CO., INC.**

This matter came before this Honorable Court on January 17, 2019 on the Motions for Summary Judgment filed by Defendants Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Construction, Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Con., Inc. ("Richard Framing"), S.C.S.S., Inc. ("S.C.S.S.") and Carefree Exteriors, Inc. ("Carefree Exteriors") (collectively, "Crossclaim Defendants") on the crossclaims

asserted by Defendants Ocean Keyes Development, LLC ("Ocean Keyes"), Keye Construction Co., Inc. ("Keye Construction"), Keye Communities, LLC ("Keye Communities"), and Pine Bluff Construction Co., Inc. ("Pine Bluff") (collectively, "Keye Defendants"). This Court, having reviewed the motions, the memoranda of law in support, the pleadings, and the deposition testimony and affidavits submitted, and having considered the arguments of the parties and legal authorities submitted, finds the following:

FINDINGS OF FACT

1. This matter involves alleged construction deficiencies asserted by Plaintiff Seashore Villas At Ocean Keyes Property Owners Association, Inc. against the Keye Defendants, Richard Framing, S.C.S.S., Carefree Exteriors, and others at the Seashore Villas At Ocean Keyes condominium project in North Myrtle Beach, South Carolina (the "Project").

2. Keye Defendants served as the developer and/or general contractors for construction of the Project, and Crossclaim Defendants served as subcontractors in various roles.

3. All written contracts with subcontractor Richard Framing were between Ocean Keyes and Richard Framing. (*See e.g.* Hernandez Dep., at p. 40:9-14, and at Ex. 268.)

4. All written contracts with subcontractor S.C.S.S. were between Ocean Keyes and S.C.S.S. (*See e.g.* Hernandez Dep., at p. 40:9-14, and at Ex. 268.)

5. All written contracts with subcontractor Carefree Exteriors were between Ocean Keyes and Carefree Exteriors. (*See e.g.* Hernandez Dep., at p. 40:9-14, and at Ex. 268.)

6. Keye Defendants filed crossclaims against Crossclaim Defendants for (1) "Breach of Contract," (2) "Breach of Express and/or Implied Warranties," and (3) "Equitable Indemnification." (*See* Def. Ocean Keyes Ans. to 2d Am. Compl. & Cross-cl., dated Jan. 20, 2017;

Defs. Keye Construction, Keye Communities, and Pine Bluff Ans. to 2d Am. Compl. & Cross-cl., dated Jan. 20, 2017.)

7. Keye Defendants did not plead a cause of action for contractual indemnification against the Crossclaim Defendants. *See generally* Def. Ocean Keyes Ans. to 2d Am. Compl. & Cross-cl., dated Jan. 20, 2017, at pp.11-13; Defs. Keye Construction, Keye Communities, and Pine Bluff Ans. to 2d Am. Compl. & Cross-cl., dated Jan. 20, 2017, at pp.11-13.)

8. Crossclaim Defendants all filed Motions for Summary Judgment and/or Renewed Motions for Summary Judgment on Keye Defendants' crossclaims.

9. Crossclaim Defendants have all settled with Plaintiff and resolved the first-party claims asserted by Plaintiff against Crossclaim Defendants.

10. None of the Keye Defendants, other than Ocean Keyes, opposed the Motions for Summary Judgment and/or Renewed Motions for Summary Judgment. In that regard, Keye Construction, Keye Communities, and Pine Bluff all failed to both (1) file and serve any written opposition to the Motions for Summary Judgment and/or Renewed Motions for Summary Judgment, and (2) appear at the hearing on the Motions and accordingly assert any opposition at the hearing. With regard to the last point, the only attorney who appeared on the record to present any argument in opposition to the Motions, Rose Beth Smith of Lyles & Associates, explicitly confirmed on the record that she was only representing Ocean Keyes Development, LLC at the hearing.

11. The undisputed facts establish that the Keye Defendants were not wholly without fault but rather share responsibility for damages. Keye Defendants' own expert acknowledges Keye Defendants were negligent in the construction of the Project and thus share in the responsibility. According to the expert retained by the Keye Defendants, the general contractor

"share[s] in the responsibility" in areas where different trades' work comes together. (*See* Henry Dep., at 258:22-259:1.) Furthermore, the Keye Defendants' expert further testified that a general contractor bears some responsibility in vetting subcontractors prior to the subcontractor being hired in order to ensure that the subcontractor "can do what they say they're going to do." (*See id.* at 259:18-23.) Most significantly, the Keye Defendants' expert admitted that a general contractor is "the head of the team of contractors who have performed work on the contract and are in that regard responsible to the owner" and, therefore, "share in responsibility for the work that's performed by others." (*See id.* at 261:12-15, 262:8-10.). The expert also testified that any lack of Tyvek wrap around the building would have been open and obvious to the general contractor. (*See id.* at 245:6-12.) In addition to the Keye Defendants' own expert testimony, Keye Defendants could not produce any testimony from any witness finding that they were wholly without fault.

12. The written contracts between Ocean Keyes and the Crossclaim Defendants did not have attached the AIA Document A201-1997. (*See e.g.* Hernandez Dep., at p. 40:9-14, and at Ex. 268.)

13. Ocean Keyes was unable to provide any record evidence that AIA Document A201-1997 was even given to the subcontractor Crossclaim Defendants. In fact, Ocean Keyes' principal explicitly admitted that he does not know whether the A201-1997 document was ever given to any subcontractors. (*See* Baltzer Dep., at 209:25-210:4, 210:20.)

14. The certificates of occupancy for the following buildings at the Project were as follows:

- Building 16: July 13, 2006
- Building 17: October 10, 2006
- Building 18: October 2, 2006

- Building 19: February 27, 2006
- Building 20: August 28, 2006
- Building 30: February 23, 2006
- Building 31: October 26, 2005
- Building 32: March 28, 2006
- Building 33: October 28, 2005
- Building 34: January 5, 2006
- Building 35: September 30, 2005
- Building 37: August 9, 2005
- Building 39: July 13, 2006
- Building 40: September 2, 2005
- Building 42: July 19, 2005
- Building 44: August 18, 2005

Thus, the dates of substantial completion (as evidenced by the certificates of occupancy) of buildings 16, 17, 18, 19, 20, 30, 31, 32, 33, 34, 35, 37, 39, 40, 42, and 44 were after July 1, 2005 and before February 4, 2008.

In light of the foregoing undisputed record facts, the Court has reached the following conclusions of law and holdings:

CONCLUSIONS OF LAW

15. The Court concludes and holds that Crossclaim Defendants are entitled to summary judgment on Keye Defendants' crossclaims for Breach of Contract and Breach of Express and/or Implied Warranties, because these claims are disguised claims for equitable indemnity. Keye Defendants allege only damages stemming from their potential liability to Plaintiff, and do not

allege and/or have not provided any admissible record evidence that they sustained any separate or independent damages. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim"); *Holland v. Hucks Pool Co., Inc.*, No. 4:15-cv-00141-RBH, 2016 WL 6157491, at *4 (D.S.C. Oct. 24, 2016) ("[The contractor's] breach of contract/warranty crossclaim is not viable as a cause of action separate from its equitable indemnity crossclaim.... [The contractor's] allegations indicate it did not sustain its own damages as a result of any breach of contract or warranty by [the subcontractor].... Accordingly, the Court will grant [the subcontractor's] motion for summary judgment as to [the contractor's] breach of contract/warranty crossclaim...."). Accordingly, this Court concludes Keye Defendants' crossclaims for Breach of Contract and Breach of Express and/or Implied Warranties, are merely disguised claims for equitable indemnity, and thus final summary judgment in favor of the Crossclaim Defendants on the purported causes of action for Breach of Contract and Breach of Express and/or Implied Warranties is appropriate.

16. The Court concludes and holds that Crossclaim Defendants are entitled to summary judgment on Keye Defendants' crossclaims for Equitable Indemnification because the undisputed material facts show that Keye Defendants are at least partially at fault for the damages asserted by Plaintiff. As noted above, the Keye Defendants' expert admitted the general contractor "share[s] in the responsibility" in areas where different trades' work comes together. (*See* Henry Dep., at 258:22-259:1.) Furthermore, the Keye Defendants' expert further testified that the entity or

entities hiring the subcontractors bears some responsibility in vetting subcontractors prior to the subcontractor being hired in order to ensure that the subcontractor "can do what they say they're going to do." (Henry Dep., at 259:18-23.) Most significantly, the Keye Defendants' expert admitted that a general contractor is "the head of the team of contractors who have performed work on the contract and are in that regard responsible to the owner" and, therefore, "share in responsibility for the work that's performed by others." (Henry Dep., at 261:12-15, 262:8-10.) Lastly, counsel for Keye Defendants have not presented any admissible record evidence to contradict the testimony cited by Crossclaim Defendants or to demonstrate that it was completely without fault with respect to Plaintiff's alleged damages. Under South Carolina Rule of Civil Procedure 56, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Thus, there is no issue of material fact that Keye Defendants are at least partially at fault and have unclean hands, precluding an equitable indemnity claim under South Carolina law. *See Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corp.*, 518 S.E.2d 301, 307 (S.C. Ct. App. 1999) ("The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.").

17. The Court concludes and holds that the Keye Defendants have not properly plead and asserted a claim against the Crossclaim Defendants for contractual indemnification as no such cause of action is in the last operative crossclaims from any of the Keye Defendants.

18. Alternatively and further, the Court concludes and holds that even if the Keye Defendants had asserted a crossclaim for contractual indemnification, the Crossclaim Defendants would be and still are entitled to summary judgment on Keye Defendants' crossclaims for Contractual Indemnity because there is no question of material fact that the subcontracts between Ocean Keyes and Crossclaim Defendants did not include any indemnity provisions. Although Keye Defendants orally argued that AIA Document A201-1997 imposed an indemnity obligation, the Court concludes that the AIA Document A201-1997, and specifically its section on indemnification, was not part of any of the contracts between Ocean Keyes and the Crossclaim Defendants. As noted above, the written contracts between Ocean Keyes and the Crossclaim Defendants did not have attached the AIA Document A201-1997. (*See e.g.* Hernandez Dep., at p. 40:9-14, and at Ex. 268.) Further, the indemnification terms of the AIA Document A201-1997 were not summarized in the written contracts. (*See e.g.* Hernandez Dep., at p. 40:9-14, and at Ex. 268.) Finally, there was no record evidence that the Crossclaim Defendants received or were told how to get the copyrighted AIA Document A201-1997. (*See generally* Hernandez Dep., at p. 40:9-14, and at Ex. 268; Baltzer Dep., at 209:25-210:4, 210:20.) As Keye Defendants failed to present admissible record evidence indicating that this Document (any version of it) was actually attached to the written contracts, provided to the Crossclaim Defendants and/or that the Crossclaim Defendants knew of and assented to the terms of AIA Document A201-1997, the AIA Document A201-1997 was not a part of the written contracts. *See Traynham v. Yeargin Enters., Inc.*, 403 S.E.2d 329 (S.C. Ct. App. 1991) (finding contract to be ambiguous as to whether arbitration provision in AIA document was incorporated, despite reference in contract to same, where relevant AIA document was not attached to the contract, no directions were given as to how to access the referenced AIA document, and "no enumeration or description of the conditions" provided in the

AIA document were included in the contract itself); Interpretation of Several Connected Writings—A Writing Expressly Incorporated by Reference, 11 Williston on Contracts § 30:25 (2017) ("[I]n order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms...."). Accordingly, the Court holds that Ocean Keyes' subcontracts with Crossclaim Defendants do not contain an applicable indemnity provision. As such, even if such a claim had been asserted, Keye Defendants' claims for contractual indemnity fail as a matter of law.

19. The Court further holds that even if the AIA Document A201-1997 had been successfully incorporated into the subcontracts between Ocean Keyes and Crossclaim Defendants, such document(s) would not have imposed an indemnity obligation on Crossclaim Defendants under these circumstances. While the AIA Document A201-1997 is not in record evidence, the Court understands from arguments of counsel that the following language is the language contained in at least one sample version of the document. Section 3.18.1 of the AIA Document A201-1997 provides as follows:

> **§ 3.18 INDEMNIFICATION**
> **§ 3.18.1** To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor in accordance with Section 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to **or destruction of tangible property (other than the Work itself)**, but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(Sample AIA Document A201-1997 (emphasis added).) As an initial matter, the language contained within the AIA Document A201-1997 is not sufficiently clear to indemnify a general

contractor for its own concurrent negligence. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166, 173-74 (S.C. Ct. App. 2018). Furthermore, pursuant to the "work itself" exception in the foregoing language, the cited indemnification provision does not cover a claim that challenges the subcontractor's work itself. *See* Philip L. Bruner & Patrick J. O'Connor, Jr., The "work itself" Exception, 3 Bruner & O'Connor Construction Law § 10:53.10 (August 2017); AIA Document Commentary A201-1997 (noting that the above-quoted indemnity provision "does not cover injury or damage to the work itself nor does it cover a claim by the owner that the contractor has failed to construct the building according to contract documents"). Here, the claims for contractual indemnity asserted by Keye Defendants against Crossclaim Defendants consist entirely of claims for indemnity regarding alleged defective construction by Keye Defendants and Crossclaim Defendants and, therefore, would not fall within the ambit of AIA Document A201-1997's indemnity provision, even if the AIA Document had been part of the subcontracts between Ocean Keyes and Crossclaim Defendants. Accordingly, the Court holds that even if Keye Defendants had actually properly asserted a claim for contractual indemnification, and even if the terms of the AIA Document A201-1997 were a part of the written contracts between Keye Defendants and Crossclaim Defendants, there is no genuine issue of material fact that Crossclaim Defendants are entitled to judgement as a matter of law on any such contractual indemnification claim.

20. The Court further holds that because there is no issue of materials fact that no written contracts existed between Keye Construction, Keye Communities, and/or Pine Bluff on the one side and Crossclaim Defendants on the other side, Crossclaim Defendants would further be entitled to summary judgment in their favor on any purported claim of contractual indemnification by Keye Construction, Keye Communities, and Pine Bluff.

21. The Court further concludes and holds that additionally (and alternatively) any and all crossclaims related to Buildings 16, 17, 18, 19, 20, 30, 31, 32, 33, 34, 35, 37, 39, 40, 42, and 44 at the Project are barred by the Statute of Repose contained in South Carolina Code of Laws Section 15-3-640, and thus summary judgment is appropriate on all claims (on all causes of action asserted) regarding Buildings 16, 17, 18, 19, 20, 30, 31, 32, 33, 34, 35, 37, 39, 40, 42, and 44. The Keye Defendants first filed their crossclaims on February 4, 2016. Pursuant to Section 15-3-640, Keye Defendants' claims regarding any building for which the date of substantial completion fell after July 1, 2005, but more than eight (8) years before February 4, 2016 (thus February 4, 2008), are time barred. Therefore, Crossclaim Defendants are further or alternatively entitled to final summary judgment on all crossclaims related to Buildings 16, 17, 18, 19, 20, 30, 31, 32, 33, 34, 35, 37, 39, 40, 42, and 44 at the Project because the dates of substantial completion (as evidenced by the certificates of occupancy) of all of the foregoing buildings were after July 1, 2005 and before February 4, 2008.

22. Finally, the Court further concludes and holds that additionally (and alternatively) because Keye Construction, Keye Communities, and Pine Bluff all failed to offer any opposition to the Motions, for that reason alone Crossclaim Defendants are entitled to final summary judgment in their favor against all crossclaims of Keye Construction, Keye Communities, and Pine Bluff.

23. In sum, the Court concludes and holds that no genuine issue of material fact remains that Crossclaim Defendants are entitled to final summary judgment on all of Keye Defendants' crossclaims.

THEREFORE, it is ORDERED AND ADJUDGED that:

1. The Crossclaim Defendants' Motions for Summary Judgment are GRANTED.

2. Summary Judgment is entered in favor of Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Construction, Richard H. Construction, LLC a/k/a Ricardo Hernandez d/b/a Richard Framing Con., Inc., S.C.S.S., Inc., and Carefree Exteriors, Inc. on all causes of action asserted as crossclaims by Ocean Keyes Development, LLC, Keye Construction Co., Inc., Keye Communities, LLC, and Pine Bluff Construction Co., Inc.

IT IS SO ORDERED:

_____
Clifton Newman
Presiding Judge

This ____ day of _____, 2019.

_____, South Carolina

Horry Common Pleas

Case Caption:	Seashore Villas At Ocean Keyes Property Owners Association I VS Ocean Keyes Development LLC , defendant, et al
Case Number:	2015CP2608308
Type:	Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

TATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CIVIL CASE NO. 2018-CP-08-02547
Builders Firstsource-Southeast Group, LLC Plaintiff, v. MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC Defendants.	)	**CHARLESTON EXTERIORS, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

TO: BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC AND STEPHEN P. HUGHES, ESQUIRE AND WITT COX, ESQUIRE THEIR ATTORNEYS

This matter is currently before the Court on the Defendant Charleston Exteriors, LLC ("Defendant" or "CHS EXT") motion for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. This memorandum will show that the Plaintiff's lawsuit against the Defendant was brought outside the South Carolina three-year statute of limitations and Charleston Exteriors is entitled to judgment as a matter of law. Additionally, the Plaintiff's causes of action for breach of contract, breach of warranties, and negligence are superfluous, and do not exist separately and/or in addition to its claims for indemnification. See Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC, 776 S.E.2d 426 (S.C. Ct. App. 2015) and Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434 (S.C. Ct. App. 2015) Indemnification claims disguised as additional claims have been held as invalid, and the Defendant is, therefore, entitled to judgment as a matter of law as to those causes of action.

Background

The Abbey at Spring Grove (the "Abbey") is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas during 2012 and 2013. To be precise, the Abbey is portion, or phase, of the larger Spring Grove Plantation development.

The Defendant Charleston Exteriors performed window installation pursuant to a subcontract agreement with Plaintiff Builders FirstSource Southeast Group. ("BFS") It has been alleged by BFS that Charleston Exteriors installed windows on approximately 12 to 18 of the residences at the Abbey.

The remaining Defendants in this lawsuit are MI Window and Door ("MI"), the manufacturer of the window units at the Abbey, as well as fellow window installation subcontractors ECC and Hurley Services, LLC. The subcontracting scopes of work for Charleston Exteriors, ECC and Hurley are believed to be quite similar, with each of these defendants installing windows on specific homes within the Abbey.

Statute of Limitations and Timeline

This case is the offspring of a separate lawsuit which is currently pending in Berkeley County. ("Parent Suit") The Parent lawsuit has enjoyed a rather tortured history since being filed on October 23rd, 2014 by certain individual homeowners. The Parent Suit remains pending on appeal. While it is likely a boring read, please consider the history of the Parent Suit as it will show by clear and convincing evidence that Builders First Source became aware of its claims against the Defendant Charleston Exteriors at some point between November 25th, 2015 and December 15th, 2015. Since the lawsuit being considered by this court was filed by Builders First Source on December 21st, 2018, more than three years have passed since Builders First Source learned of its potential action against Charleston Exteriors.

The Plaintiffs in the original Complaint made allegations against Spring Grove Plantation Development, Inc., Lennar Carolinas, and a handful of subcontractors limited to sitework and landscaping duties. *See Patricia Damico, et al. v. Lennar Carolinas, et al. 2014-CP-08-2424.*

On November 23rd, 2015, the Plaintiff amended the original Complaint to include additional allegations.[1] Included in the First Amended Complaint are claims that the windows were defectively manufactured and improperly installed. The First Amended Complaint alleges in Paragraph 20 as follows:

> **"20. Construction defects in The Abbey have recently been discovered. A recent inspection of the subject Homes resulted in the discovery of major problems and deficiencies including but not limited to the following:**

[1] Plaintiff's First Amended Complaint is attached and incorporated as Exhibit "A". The allegations are made against several Defendants including Defendant Lennar Carolinas, LLC.

(g) Improper windows and installation of same."

Paragraph 20(g), First Amended Complaint

The Plaintiff class made further allegations in Paragraph 60 of the First Amended Complaint that the Defendants:

> **".....were negligent and grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars:**
>
> **(f) In designing, constructing, marketing, selling, homes and/or property with defective windows;"**
>
> *(Paragraph 60(f), First Amended Complaint)*

On November 25th, 2015, Lennar Carolinas answered the First Amended Complaint and asserted a Third-Party Complaint against Builders First Source. *See Lennar Carolina's Answer to Plaintiff's First Amended Complaint, Crossclaims, and Third Party Complaint of November 25th 2015.* Charleston Exteriors would show this court that on November 25th 2015, BFS had constructive notice of claims being made against it for negligent installation of windows at the Abbey and such notice began ticking the three year clock on their claims against the subcontractors responsible for the work which has been alleged to be deficient.

The next several paragraphs have been incorporated into this Memorandum of Law for purposes of showing that Lennar put BFS on direct notice that BFS subcontractors were negligent in their installation of the windows at the Abbey. Paragraph 215 of Lennar's Third-Party Complaint identified BFS as one of its subcontractors and product suppliers.

> **"215. Builders First Source's work, services, or materials provided to and for the development and construction of The Abbey and the residences therein include supplying the windows and doors and installation of the windows together with all associated and related waterproofing, flashings, and components."**

In Paragraph 221 of its Third Party Complaint, Lennar states that the Plaintiff's Amended Complaint has claimed, among other things, that there are deficiencies related to the window installation at the Abbey.

> **"221. Plaintiffs allege their residences sustained actual damage by exposure to the defective or deficient work, services, labor, or materials supplied, constructed, or installed by.....Builders FirstSource."** *Paragraph 221, Lennar Carolina's Answer to Plaintiff's First Amended Complaint, Crossclaims, and Third-Party Complaint*

Lennar's Answer and Third-Party Complaint seeks monetary damages from its subcontractor, BFS, for its negligence in providing and installing the windows at the Abbey.

In addition to the indemnity and negligence claims made against BFS, Lennar alleged that BFS breached warranties associated with the installation of windows at the project. *Paragraphs 236-242.* Further, it is alleged by Lennar that Builders First Source breached its contract with Lennar by defectively installing numerous building components, including the windows. *Paragraphs 281-286.*

While the moving party must apologies for going through the tortured details of the Lennar Third-Party Complaint, it should be clear that the pleading put BFS on notice of its potential claims against BFS on or about November 25th 2015. There is no doubt that BFS was on actual notice of its potential claims against Charleston Exteriors as of December 15th, 2015, which was the date it answered the Lennar Third-Party Complaint. *See BFS Answer to Lennar Third-Party Complaint December 15 2015*

Legal Standard

Rule 56(c), SCRCP, "provides the Circuit Court shall grant summary judgment if there is no genuine issue as to any material fact and... the moving party is entitled to judgment as a matter of law." Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 634, 776 S.E.2d 434, 436 (Ct. App. 2015). With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' -- that is, pointing out to the [trial] court -- that there is an absence of evidence to support the nonmoving party's case." Celotex at 325, 106 S. Ct. at 2554, 91 L. Ed. 2d at 275. The moving party need not "support its motion with affidavits or other similar materials negating the opponent's claim." Id. at 323, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274. (Emphasis in original). Once moving party carries its initial burden, opposing party must, under Rule 56(e), "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986) While the evidence and inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Id. at 635, 776 S.E.2d at 436.

Argument

A. BFS's Claims are barred by the Statute of Limitations

South Carolina recognizes the "discovery rule" when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. Burgess v. American Cancer Society, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999)

The pleadings in the underlying case tell a compelling story which is easier to comprehend when the following two dates are considered.

December 21st, 2018

On December 21st 2018, Builders First Source filed this action against the Defendant Charleston Exteriors in Berkeley County, South Carolina. Builders First Source was served with a Third-Party Complaint prior to December 21st 2015, which would be exactly three years prior to the filing of this action. As discussed in detail above, it can not be denied that BFS was on actual notice of its potential claims against BFS on December 15th 2015, the date of its answer. See Answer of BFS.

December 15th, 2015

On December 15th, 2015, BFS drafted and served its Answer to the Lennar Carolinas Third-Party Complaint. A large portion of the claims made by Lennar against BFS were related to the alleged defective installation of materials including windows.

The dates of these two documents are self-proving due to there being portions of the record from this case, as well as the Parent case. By virtue of Lennar putting BFS on notice of its claims regarding window installation, BFS is shown to have been on actual notice more than three years prior to the filing of this lawsuit against Charleston Exteriors. Furthermore, this three year statute of limitations expiration serves to bar BFS causes of action for negligence, breach of contract, and breach of warranties. The only remaining claims made by BFS against Charleston Exteriors are indemnification claims and under the S.C. Contribution amongst Joint Tortfeasors statute.

With regard to indemnification claims, there are two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. See Piper v. Am. Fid. & Cas. Co., 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 330 (Ct. App. 2015).

BFS would have begun to incur liability for attorney's costs and fees – damages it seeks in this litigation- back in November 2015. BFS's Answer was executed and served more than three years prior to the filing of the present action. Thus BFS's claims for "contractual and common law indemnification against Liability" are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

B. Plaintiff's Claims for Breach of Warranties, Breach of Contract, and Negligence are merely "veiled" indemnity claims.

The claims made by BFS in this matter are completely derivative claims from the Parent/ Damico case. The United States District Court for the District of South Carolina has held that a litigant cannot disguise a claim as a negligence claim when in fact it is a claim for indemnity.[2] The two claims must be separate and distinct to both survive through judgment. The South Carolina Court of Appeals adopted the District Court's rationale when it had an opportunity to address similar issues in Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (Stoneledge I) and Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 635-37, 776 S.E.2d 434, 437-38 (Ct. App. 2015), reh'g denied (Sept. 14, 2015) (Stoneledge II) (collectively referred to as the "Stoneledge Appeals").

When a party seeking indemnification makes claims against a would-be indemnitor for damages which are unrelated, or unique, to claims made against the party seeking indemnification, then the party seeking indemnification has an independent breach of contract action against the party. In this case, BFS has no claims against Charleston Exteriors that are separate or unrelated to the Parent case and, therefore, these claims for breach of contract, breach of warranties and negligence are simply a repackaging of the indemnification claims. See

[2] South Carolina National Bank v. Stone, 749 F. Supp. 1419, 1433 (D.S.C. 1990)

Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim"). Thus, BFS's legal causes of action should be barred as veiled indemnity actions.

C. Contractual Indemnity Language Should Be Clear and Unequivocal

The contractual indemnification claim made by Builders First Source has its origin in an October 17, 2012 "Master Subcontractor Agreement" which was presented to Charleston Exteriors, LLC as binding on all projects. In the cumbersome, twelve page agreement, boilerplate indemnification clauses are presented in more than one instance. The indemnification clause which would relate to a case like this one reads as follows:

> **THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR.....AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION..... ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF ORIN ANY-WAYRELATED·TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, *BUT ONLY TO THE EXTENT CAUSED IN WHOLE, OR IN PART* BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR...."**

The South Carolina Court of Appeals recently issued an opinion regarding indemnification clauses in subcontracts in a case which is shockingly analogous to this case. In that case, a prime contractor entered into a subcontractor agreement which contained a complicated indemnification provision.

The general contractor in that case claimed that a subcontractor installed all of the windows and doors pursuant to an agreement with the general. The general contractor alleged it was "entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from" its various subcontractors. The subcontractor argued that it was not contractually bound to indemnify the general contractor due to the general contractor's failure to meet the enhanced

burden placed on indemnitees who seek indemnification for their own negligence. The Court of Appeals agreed. The following is verbatim language which finds that the general contractor / indemnitee (Superior) has not met the enhanced standard and is, therefore, unable to recover from (Muhler) its subcontractor.

> "In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law."
> Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018)

WHEREFORE for the foregoing reasons, Charleston Exteriors, LLC, respectfully requests this Court find that it is entitled to Summary Judgment as a matter of law. This Motion will be supported by a Memorandum of Law. Furthermore, Charleston Exteriors, LLC, reserves the right to supplement this motion and present additional arguments.

Respectfully submitted,

s/ C. Clay Olson
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Attorney for Defendant, Charleston Exteriors, LLC

October 11, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO: 2014-CP-08-02424

Patricia Damico and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins.

Plaintiffs,

vs.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc. Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental, and Rick Bryant, Individually.

Defendants.

Lennar Carolinas, LLC

Third-Party Plaintiff,

vs.

Super Concrete of SC, Inc. Southern Green, Inc., and TJB Trucking/Leasing, LLC,

Third-Party Defendants.

RULE 23 SOUTH CAROLINA RULES OF CIVIL PROCEDURE CLASS ACTION

FIRST AMENDED COMPLAINT
(Jury Trial Demanded)
(Class Action)
(Construction Defects)
(Verified)

TSM

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MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

TCH

The Plaintiffs, Patricia Damico and Lenna Lucas, as Class Representatives and the above-named Plaintiffs (hereinafter collectively referred to as "Plaintiffs"), individually and as a class of similarly situated owners of homes in a residential community named the Abbey at Spring Grove Plantation complaining of the above-mentioned Defendants, allege and state as follows:

1. Plaintiffs Lenna Lucas and Patricia Damico are citizens and residents of Berkeley County, South Carolina, who at all times relevant hereto live in a residential community known as The Abbey at Spring Grove Plantation, located in Berkeley County, South Carolina. Plaintiffs Lenna Lucas and Patricia Damico further allege and state that they are bringing this action pursuant to Rule 23, SCRCP, as representing a class composed of each and every home owner in The Abbey at Spring Grove Plantation, and that:

a. The class is so numerous that joinder of all members is impracticable;

b. There are questions of law and fact common to the class;

c. The claims of the Plaintiffs, Lenna Lucas and Patricia Damico, are typical of the claims of the class;

d. The Plaintiffs Lenna Lucas and Patricia Damico will fairly and adequately protect the interest of the class; and

e. The amount in controversy exceeds One Hundred Dollars ($100.00) for each member of the class.

2. Plaintiffs Patricia Damico, Lenna Lucas, and other similarly situated home owners, own homes in of The Abbey.

3. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiffs Patricia Damico and Lenna Lucas bring this action both individually and as a proposed class action against the Defendants on behalf of themselves and

all other similarly situated persons and entities, that own homes within The Abbey (hereinafter referred to collectively as the "Class"). The Class is more particularly defined as follows:

All persons and/or entities that own homes/property within The Abbey.

Excluded from the Class are:

a. Any Judge presiding over this action and members of their families;

b. Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and Defendants' current or former employees investors, members, or officers;

c. Any former owner of a home; and

d. All persons who properly execute and file a timely request for exclusion from the Class.

4. As representatives of the Class defined herein pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure, the Plaintiffs seek to recover monetary damages from the Defendants, for negligence, gross negligence, recklessness, wantonness, willfulness, breach of fiduciary duties, breach of express and implied warranties, with respect to their duties as a developer in the development, marketing, sale of, administration, care, and maintenance and/or repair of The Abbey, as well as their duties to design and construct The Abbey free from defects and in accordance with all applicable building and dwelling codes.

5. *Numerosity:* The Class is composed of in excess of sixty nine (69) persons or entities geographically dispersed throughout the State of South Carolina and other states, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of sixty nine (69) persons or entities.

6. *Typicality*: Plaintiffs Patricia Damico and Lenna Lucas' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in the

design, development, construction, reconstruction, marketing, selling, management and repair of The Abbey.

7. *Adequate Representation*: Plaintiffs Patricia Damico and Lenna Lucas will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including home defect claims and class actions.

8. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since, among other things, individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court systems while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

9. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice vis-à-vis each class member. All Class Members have the same legal right to, and interest in, redress for damages associated with the defective conditions existing within The Abbey.

10. Plaintiffs Patricia Damico, Lenna Lucas, and the Class, who are all members of the Abbey, envision no unusual difficulty in the management of this action as a class action.

11. Each Class Member has an interest of more than $100.00.

12. The amount of money at stake for each Class Member is not sufficient for each member to hire their own counsel, forensic engineers and architects and bring their own action.

13. The individual Plaintiffs are citizens and residents of Berkeley County, South Carolina, who at all times relevant hereto live in a residential community known as The Abbey at Spring Grove Plantation, located in Berkeley County, South Carolina.

14. The Abbey is a section of the residential community, Spring Grove Plantation, located in Berkeley County, South Carolina and, upon information and belief, was owned, developed, marketed and constructed by the Defendants.

15. The Defendants are, upon information and belief, corporations organized and existing under the laws of the State of South Carolina or some other state and are authorized to conduct business in this state, and have a principal place of business in Berkeley County or have conducted business in Berkeley County.

16. Upon assuming the roles as stated above, the Defendants assumed the duties thereof to develop, construct, and market the property and sell parcels thereof to the general public.

17. Furthermore, in assuming the roles stated above, the Defendants undertook to make certain that this Community was developed and constituted in a workmanlike fashion according to industry standards meeting all applicable codes, guidelines, restrictions, of any and all state, county, and municipal authorities.

18. That pursuant to this marketing scheme, the Defendants extensively advertised to the general public and represented to the general public that *inter alia*, the property and homes built would be of the highest quality, with substantial amenities.

19. This Court has jurisdiction over the parties and subject matter hereto.

20. The construction of The Abbey was performed by one or more of the Defendants. The Defendants represented they were competent, knowledgeable and experienced in performing such construction work as to properly build The Abbey according to the normal standards of good and workmanlike practice in the construction field.

21. Construction defects in The Abbey have recently been discovered. A recent inspection of the subject Homes resulted in the discovery of major problems and deficiencies including but not limited to the following:

a. Lack of proper foundation work;

b. Lack of proper foundation slabs;

c. Structural damage to the homes;

d. Water damage resulting from defects;

e. Improper grading and drainage;

f. Improper roofing; and

g. Improper windows and installation of some.

22. Defendant Lennar Carolinas, LLC (hereinafter referred to as "Lennar") is a corporation organized and existing under the laws of the State of South Carolina and, at all times relevant hereto, was authorized to and did conduct business in the State of South Carolina, County of

Berkeley for the purpose of planning, developing, marketing, owning, maintaining, leasing, selling, and constructing the homes in a manner for sale to the public.

23. Upon information and belief, the above-identified Lennar Defendant was, in various capacities, individually and collectively engaged in the planning and developing of the Project, and contracted with various entities for the design of the Project.

24. The Defendant, Spring Grove Plantation Development, Inc. (hereinafter SGPD), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; upon information and belief, this Defendant was the initial owner/developer and seller of the neighborhood.

25. The Defendant, Manale Landscaping, LLC (hereinafter Manale), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is a landscaping business that provided landscaping and grading at The Abbey.

26. The Defendant, Super Concrete of SC, Inc. (hereinafter Super Concrete), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; this Defendant is a concrete contracting business that provided concrete, flatwork, driveways, walkways, and foundation slabs at The Abbey.

27. The Defendant, TJB Trucking/Leasing, LLC (hereinafter TJB), upon information and belief, is a limited liability company organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state; this Defendant is a business that provided grading and pads at The Abbey.

28. The Defendant, Southern Green, Inc. (hereinafter Southern Green), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this state; this Defendant is a landscaping business that provided landscaping and grading at The Abbey.

29. The Defendant, Paragon Site Constructors, Inc. (hereinafter Paragon), upon information and belief, is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; Paragon performed site preparation and/or grading work for the building pads at the lots now known as The Abbey that is the subject of this litigation.

30. The Defendant, Civil Site Environmental, Inc. (hereinafter referred to as "CSE") is a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State; CSE served as the professional civil engineer and designer for the development of The Abbey neighborhood and provided civil drawings for Phase I and Phase II of the development of the lots now known as The Abbey.

31. The Defendant, Rick Bryant (hereinafter referred to as "Bryant") is a citizen and resident of the County of Berkeley, State of South Carolina; Bryant is a former employee of Spring Grove who undertook certain work and/or provided labor and materials to the project now known as The Abbey neighborhood.

32. At the time of the incidents giving rise to the Plaintiffs' Complaints, Defendants Lennar, SGPD, Manale, Super Concrete, TJB, Southern Green, Paragon, CSE, and Bryant acted by and through its agents, contractors, and employees for the purpose of carrying on its business and

therefore, is liable for the negligent acts of its agents, contractors, and employees under the theory of *respondeat superior*.

33. Defendant Lennar commenced to design, construct, develop, and sell the single family homes in The Abbey to, among others, the Plaintiffs in this action, and marketed and sold units in The Abbey despite the fact that they have been put on notice of numerous construction and design defects within the subject neighborhood and without disclosing those defects to any of the homeowners, including the Plaintiffs as well as new homeowners.

34. The Abbey is a neighborhood development started by Defendant SGPD; it was then sold to Defendant Lennar, who then took control over the development of the neighborhood and hired contractors.

35. By investigation of the subject structures, premises, roads, and property, the homeowners and/or Plaintiffs learned that said subject structures, premises, roads, and property have been deficiently designed and have significant construction defects. Construction was improperly performed and will have to be completely removed and replaced. The design, grading deficiencies, and construction to the subject structures and property include, but are not limited to, the following;

a. Water accumulation on the property of the Plaintiffs and homeowners;

b. Improper grading of the property of the Plaintiffs and homeowners;

c. Improper installation of drainage pipes;

d. Deterioration of the subject structures due to the drainage issues;

e. Improper foundation;

f. Improper flashing; and

g. Water intrusion.

36. As a direct and proximate result and consequence of the numerous construction, design, installation, and implementation of the above defects, the Plaintiffs have and will continue to spend substantial sums of money for the repairs and reconstruction of the structures, property, and roads and will be subject to loss of use, enjoyment, and depreciation of value of their property.

37. Due to the actions of the Defendants, as stated above, the Plaintiffs are facing significant damage repairs, deteriorating property, significant and immediate expenses for investigation, destructive testing, and an analysis of construction defects, repairs defects, grading defects, drainage problems, damages deterioration, and a generally overall dilapidated condition which is the direct and proximate result of defective construction, management, maintenance, and abandonment of generally accepted fiduciary principles and/or duties on the part of the Defendants.

38. In connection with the Project, the Developer Defendants all became and/or acted as subsidiaries, parents, partners, associates, agents, affiliate, co-joint venturers, servants, instrumentalities and/or alter ego entities of each other and are responsible to the Plaintiffs herein for the condition of the Project and the damages set forth herein.

39. The Developer Defendants conducted business in connection with the Project by and through the use and control of subservient entities, and all of these entities in fact manifested no separate interest of their own, and demonstrated an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between any members of that group of corporations, shareholders, officers, agents, partners, employees, and assets.

40. The Defendants listed above including Lennar, SGPD, Manale, Super Concrete, Southern Green, TJB, Paragon, CSE, and Bryant (hereinafter referred to collectively as the "Contractor Defendants") provided labor, materials, goods, and services in connection with the construction of The Abbey at Spring Grove Plantation as contractors, subcontractors, consultants, or independent contractors, or which manufactured, fabricated, and/or otherwise provided construction and building materials, equipment and goods for use in connection with the construction of the Project; and these entities provided labor, materials, goods, and services associated with the original construction of the Project, and the work of each of these Defendants was deficient and defective and resulted in damages to the Plaintiffs as set forth below.

41. All Defendants were instrumental in carrying out duties and actions relating to the construction of the Project, and each of these defendants had independent duties under South Carolina law to perform their duties in a good and workmanlike manner and in accordance with applicable building codes and accepted building practices.

JURISDICTION

42. Personal jurisdiction is vested and exists in the Court of Common Pleas, County of Berkeley, State of South Carolina, and venue is proper in the County of Berkeley, State of South Carolina, by virtue of, among other things, the fact that the property which is the subject matter of the Complaint is located in Berkeley County, South Carolina, and the great majority of the activities relating to the Project and the claims herein occurred in this jurisdiction.

BACKGROUND

43. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

44. Plaintiffs are informed and believe that the Developer Defendants engaged contractors to construct the Project including 69 properties, and related facilities and amenities, collectively known as The Abbey at Spring Grove Plantation, which were thereafter substantially completed, and contained various homes. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project and/or are liable for the actions of the original Developer of the project.

45. The Developer Defendants directed and oversaw those listed as Defendants herein and contractors including the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

46. The Developer Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of units, and other activities solely relating to the Project which is the subject of this action.

47. There would exist a broad element of injustice and fundamental unfairness of the acts of the Developer Defendants, and each of them individually, were not regarded as the acts of one another.

48. The Defendants began the process of constructing the homes by engaging and directing the actions of the various contractors and/or subcontractors named as Defendants herein, and participated in the negligent, deficient, and shoddy workmanship which ignored and/or covered up design and construction defects then in existence and, thereafter, placed the

units into the stream of commerce for sale, which they did sell to the general public and, in particular, to the current owners who are members of the Association.

49. At the time the homes were offered for sale and placed into the stream of commerce by the Developer Defendants, the units contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of the Developer Defendants.

50. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

51. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water damage to the buildings and property damage and continue to do so through the date of this filing.

52. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

53. The Plaintiffs suffered damages when the Developer Defendants put these homes into the stream of commerce and continue to be damaged through the date of this filing.

54. The Developer Defendants were engaged in a joint venture, partnership, or other legal or de facto relationship with each other.

55. The Developer Defendants caused, directed, participated in, or acted in willful, reckless, heedless, negligent and grossly negligent disregard of their collective and respective acts and omissions in the planning, development, design, construction, management and sale of the units in the Project, all as more fully described herein.

56. The Developer Defendants represented to the public over the internet and through various publications and other media that they, by and through their various affiliates, entities, venturers, and agents referenced herein, were qualified, experienced, and would in fact be directing, managing, and otherwise facilitating the construction and selling of the units, and these representations were relied upon by the Plaintiffs.

57. These collective and respective wrongful acts and omissions of the Developer Defendants and such other Defendants as set forth in the causes of action below, represent unfair trade practices and have resulted in substantial deterioration and/or failure of structures and building systems, building deficiencies, actual, incidental, special and consequential damages and loss of use. Remedying the above wrongful acts will result in actual, incidental, consequential, and special damages including loss of use to the Plaintiffs and its members, and entitle Plaintiffs and its members to punitive damages and attorney's fees. Further, these wrongful acts and omissions have directly and proximately caused substantial diminution in value, both pre- and post-repair.

58. The acts and omissions of the Defendants were contrary to the duties they owed, individually and collectively, to the Plaintiffs and actually caused damages to the Plaintiffs including, but not limited to, damages which did not result from the acts and omissions of other

defendants and including, but not limited to, damages other than damages which resulted in physical injury or damage to tangible real and personal property in connection with this Project.

AS A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence and Gross Negligence)

59. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

60. Defendants, and each of them, owed a duty to Plaintiffs to act in a manner compliant with the reasonable standard of care, good faith, and fair dealing recognized under South Carolina law, and Defendants violated this duty to the Plaintiff and were negligent and grossly negligent, careless, reckless, willful and wanton in one or more of the following particulars:

a. In failing to properly design, construct, develop and repair the homes;

b. In failing to comply with the applicable Building Codes of the County of Berkeley and the State of South Carolina;

c. In failing to comply with the applicable Fire and Safety Codes of the County and of Berkeley and the State of South Carolina;

d. In failing to properly supervise the project developer entities and individuals, project architects and engineers, as well as contractors, subcontractors, suppliers and/or agents or employees of any of them in connection with the planning, development, design and construction of the homes offered for sale to the public;

e. In manufacturing, fabricating, preparing for the incorporation into a residential building, reviewing, approving, procuring, and incorporating into the construction of this project such items which were defective, deficient, inferior, inadequate, unsafe, dangerous, inappropriate for the use intended, noncompliant with approved design or design intent, non-compliant with applicable codes and standards in the industry, and otherwise improper for use in the project including, but not limited to, standard systems, grading, HVAC systems, windows, roofs, mechanical systems, plumbing systems, drainage systems, and sewer line systems without appropriate clean-out piping and/or other issues; electrical systems and equipment, interior and exterior drywall and other substrate and sheathing

material, windows, insulation, roofing, waterproofing systems, and other building materials and supplies, finishes, and other items relating to the construction and ultimate use of this residential project;

f. In designing, constructing, marketing, selling, homes and/or property with defective windows;

g. In designing, constructing, marketing, selling, homes and/or properly with inadequate flashing;

h. In designing, constructing, marketing, selling, homes and/or property with inadequate roofs;

i. In designing, constructing, marketing, selling, homes and/or property with inadequate water barriers;

j. In designing, constructing, marketing, selling, homes and/or property without weather proof building envelopes and exteriors;

k. In designing, constructing, marketing, selling, homes and/or property which were defective, deficient, inadequate, unsafe, dangerous, or otherwise non-compliant with codes and standards;

l. In placing defective and inferior construction into the stream of commerce;

m. In placing defective and inferior manufactured systems, equipment, building materials and other products into the stream of commerce;

n. In failing to permit and facilitate a proper evaluation of the condition of the Project prior to and during the process of offering homes and other property for the use and sale to the general public and, further, to obstruct and/or hinder efforts to conduct a proper evaluation of the Project by intended purchasers or users;

o. In misrepresenting the condition of the homes, common elements, garages and other property to prospective and actual purchasers and other users, and in making representations in negligent and/or intentional disregard of whether these representations were false or inaccurate;

p. In failing to undertake sufficient actions to develop a plan for repairs and otherwise failing to make adequate repairs to conditions at the project which were unsafe, dangerous, or otherwise not in compliance with applicable building codes or other authorities or standards of care;

q. In negligently and/or intentionally covering up deficiencies prior to construction of the units and other property for sale or use by the general public;

r. In failing to determine accurate information required, failing to disclose the absence of such information, as well as negligently and/or intentionally providing misleading and inaccurate information regarding the proper level of financial capitalization and reserve funding required for the operations, maintenance, and repairs required by The Abbey for the Project and individual home owners;

s. In failing to act as reasonable persons would in circumstances then and there prevailing and in such other failures as will be shown during discovery and at trial.

61. Said failures above-described, as well as the Defendants' gross negligence, willfulness, and reckless disregard for the rights of Plaintiff and others, have actually and proximately caused damages to Plaintiffs, and the Defendants are liable to the Plaintiffs in an amount of actual, incidental, consequential, special, and punitive damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A SECOND CAUSE OF ACTION
(Negligence-Developers)

62. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

63. The damages and injuries caused to the Plaintiffs and their property, are the direct and proximate result of the negligence, willfulness, wantonness, carelessness and recklessness of the Defendants SGPD and Lennar in one or more of the following particulars to wit:

a. In their capacity as developers in defectively overseeing the construction of the subject structures;

b. In failing to properly inspect, repair, and maintain the structures;

c. In negligently effecting repairs to the structures, premises, property and roads;

d. In failing and omitting to exercise that degree of care and caution of a reasonably prudent manager of a homeowners association;

e. In failing and omitting to retain proper experts and to effectively inspect and repair the structures, premises, property, and roads; and

f. In placing their interests ahead of the owners thereby breaching their fiduciary duty.

64. As a direct and proximate result of the above stated negligent actions on behalf of Defendants SGPD and Lennar, the Plaintiffs and similarly situated homeowners will have to spend substantial sums of money for the repairs and reconstruction of their property and structures will be subject to loss of use, enjoyment, and depreciation of value of the property.

AS A THIRD CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Negligent Misrepresentation)

65. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

66. These reports and representations were actually published and presented for information to the general public by these Defendants, and these representations were actually received by, and relied upon by, the prospective and actual purchasers of the townhomes at the Project.

67. At the time of the sale of the homes, Plaintiffs were not aware of the falsity of the representations or the lack of investigation and lack of candor by these Defendants in connection with the reports.

68. Plaintiff subsequently determined that the representations made by these Defendants were false and that these Defendants failed to exercise due care, not only in failing to discover defects in the project, but also in failing to communicate information about the true condition of the Project. As a result of its justifiable reliance on the representations, reports, and other documents presented by these Defendants, Plaintiffs and its members have assumed control over the Project and/or purchased units, and have thereby suffered pecuniary losses in an amount to be determined by the trier of fact.

69. As a direct and proximate result of its justifiable reliance on numerous false representations made by these Defendants in connection with the Project, Plaintiffs have suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FOURTH CAUSE OF ACTION
(Against the Contractor Defendants and the Developer Defendants)
(Breach of Implied Warranty)

70. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

71. The design, construction, development and sale of the units by these Defendants contained as a matter of law implied warranties of good faith and fair dealing, fitness for use merchantability, habitability, and workmanship with respect to construction, which warranties were not effectively disclaimed under South Carolina law.

72. The Developer Defendants and Contractor Defendants through their acts and/or omissions, have breached the aforesaid implied warranties, which directly, actually, and proximately caused and resulted in damage which the Plaintiffs have suffered and continues to suffer in an amount to be determined by the trier of fact.

73. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A FIFTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness of Habitability)

74. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

75. That the Defendants impliedly warranted as a matter of law that the subject Residences which they built were habitable and fit for their intended uses.

76. That this implied warranty was breached by the Defendants and the work was performed in a manner below ordinary workmanship and the subject Residences were neither habitable nor fit for their intended use causing damage to Plaintiffs.

AS A SIXTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Breach of Implied Warranty of Fitness for Particular Purpose)

77. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

78. The Defendants had the duty to develop, market and construct the subject Residences according to industry standards and in a good and workmanlike manner, and an implied warranty of fitness attached to the sales of these homes.

79. At the time of the sale of the subject Residences to the Plaintiffs, the Defendants had reason to know if any or all parts of the construction of the subject residences were not completed according to industry standards and in a good workmanship manner.

80. The Defendants, at the time of the sale of the subject Residences to the Plaintiffs, had reason to know that the Plaintiffs were relying on the skill and/or judgment of the Defendants to properly construct the homes and adjacent facilities according to industry standards and in a good and workmanlike manner. Plaintiffs, in fact, relied on the Defendants' skill and judgment.

81. The Defendants did not properly construct the subject homes and facilities according to industry standards and in a good and workmanlike manner, causing major defects to Waverly Townhomes.

82. As a result of the Defendants' breach of its implied warranties, Plaintiffs have suffered physical damages.

AS A SEVENTH CAUSE OF ACTION
(Against the Developer Defendants and Contractor Defendants)
(Breach of Implied Warranties as to the Project's Development and Construction)

83. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

84. These Defendants engaged in conduct during the period of development and construction of the Project which gave rise to duties and implied warranties to the public including, but not limited to, tenants, purchasers and other users of the Project, in that by their

conduct these Defendants placed the Project, which constitutes defective, deleterious, and dangerous property, into the stream of commerce.

85. The placement of the Project into the stream of commerce by these Defendants, contained as a matter of law implied warranties of fitness, merchantability, workmanship and habitability, which warranties were not effectively disclaimed pursuant to South Carolina law.

86. As a direct and proximate result of the breaches of the above-described implied warranties by these Defendants, their affiliates, associates, sham entities, and/or joint venturers, whether named or unnamed on any documents transferring interest in the Project, the Plaintiffs has suffered and will continue to suffer damages, injuries and other losses.

87. These Defendants are therefore liable to the Plaintiffs for actual, incidental, special, and consequential damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A EIGHTH CAUSE OF ACTION
(Individual Liability as to the Developer Defendants)

88. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

89. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN NINTH CAUSE OF ACTION
(Individual Liability as to the Contractor Defendants)

90. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

91. As a direct and proximate cause and result of the acts and omissions of these Defendants as aforesaid, Plaintiffs have been damaged, and these Defendants are liable to the Plaintiffs for actual, incidental, consequential, and special damages in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A TENTH CAUSE OF ACTION
(Against the Developer Defendants and the Contractor Defendants)
(Violation of the S.C. Unfair Trade Practices Act, S.C. Code § 39-5-10, *et seq.*)

92. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

93. These Defendants' construction and the subsequent offering and sale of the units, along with the issuance of the property condition reports and other representations to tenants, purchasers, and the public at large, constituted the conduct of trade and commerce within the meaning of S.C. Code Section 39-5-20(a).

94. The Defendants, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 39-5-140(a) and 27-31-430, S.C. Code of Laws as amended:

a. In failing to properly evaluate the plans and specifications for the Project prior to construction;

b. In failing to conduct a reasonable inquiry into the conditions existing at the Project and marketing the homes, common elements, and other property at the Project to the public for sale and use;

c. In failing to repair the latent defects about which these Defendants were or should have been aware;

d. In failing to carry out duties owed to prospective and actual purchasers and other members of the public in their special relationships of trust and confidence by virtue of their role in the process of offering these units, common elements, and other property for sale and use by the general public, as design, construction, and sellers according to South Carolina law.

e. In attempting to disclaim implied warranties of merchantability and habitability in documents contrary to South Carolina law;

f. In failing to provide any additional consideration for these purported efforts to waive implied warranties of merchantability and habitability;

g. In failing to properly investigate the true conditions of the Project and putting them into the stream of commerce;

h. In making false representations as to the condition of the Project and/or representations as to the condition of the Project in reckless disregard as to the truth of the representations;

I. In failing to analyze relevant data and conditions to determine adequate capital reserves for maintenance and operation of the Project by future owners and users;

95. The conduct of the Defendants as described above was knowing and willful, and Defendants knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.

96. Plaintiffs are persons within the meaning of S.C. Code Section 39-5-140(a) and Plaintiffs have suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of these Defendants, in an amount to be determined by the trier of fact.

97. The aforesaid acts of Defendants impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at each and every sale of the units of this Project and, as such, are acts which can, have and will affect the public at large by repetition.

98. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of other consumers who may be injured by purchasing townhomes by the Defendants and/or rely upon the actions and representations of these Defendants thereby placing members of the public in danger of physical and other injuries.

99. Plaintiffs are entitled to be compensated pursuant to S.C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A ELEVENTH CAUSE OF ACTION
(Against the Developer Defendants)
(Breach of Contract)

100. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

101. These Defendants entered into oral and/or written contractual arrangements with Plaintiffs relating to the representation in a purchase and sale transaction, as well as the purchase of units and other property within the Project, and the right to beneficial use of common elements and amenities to be established, coordinated, and managed by these Defendants, and these Defendants received consideration which was adequate and accepted pursuant to the terms of the Defendants' offer of ownership, goods, and/or services which were accepted by the Plaintiff.

102. Based upon the terms of their contractual agreements, along with the duties which flowed from these Defendants by virtue of the Master Deed and By-laws, real estate agency or other agreements for representation by these Defendants, and the purchase agreements for individual homes and other property interests at the Project, these Defendants owed a contractual obligation to Plaintiffs which required that these Defendants ensure that the Project was safe, habitable, code-compliant, and in a condition consistent with these Defendants' representations prior to turning over control of the Project to the home owners.

103. In breach of these contractual obligations and in breach of the Master Deed, By-laws, and real estate agency and other agreements, these Defendants failed to make a full investigation of conditions at the Project, and failed to disclose the existence of the known defects at the Project, which constitutes a breach of contract and violation of the terms of the Master Deed and By-laws by these Defendants as described above.

104. In addition to and accompanying this breach of these contractual and other obligations, these Defendants made material representations which were false as more fully described in this Complaint which the Plaintiffs relied upon to the Plaintiffs detriment.

105. As a direct and proximate result thereof, Plaintiff have and will continue to suffer, and the actual, incidental, special, and consequential damages and other injuries including, but not limited to, the damages and injuries associated with the acts and omissions which constituted the breach of contract by these Defendants as aforesaid, all in an amount to be determined by the trier of fact.

106. These Defendants are therefore liable to the Plaintiffs for the actual, incidental, special, and consequential damages and other injuries as aforesaid in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS AN TWELFTH CAUSE OF ACTION
(Against the Developer Defendants)
(Violation of the Residential Property Condition Disclosure Act)

107. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

108. These Defendants were engaged in a joint venture, partnership, or some other form of business venture or association including, but not limited to, the formation of a Limited Liability Company, in connection with the development and construction of The Abbey at Spring Grove Plantation.

109. The Developer Defendants did so place the homes into the stream of commerce for sale to the general public and to the members of The Abbey in particular.

110. At all times relevant to this cause of action the Developer Defendants were "owners" as that term is used within S.C. Code Ann. § 27-50-10 *et seq.*, referred to as the "South Carolina

Residential Property Condition Disclosure Act" (referred to in the remainder of this cause of action as the "Act").

111. The Developer Defendants failed to furnish to the purchasers of the townhome units a written disclosure statement in conformity and compliance with S.C. Code Ann. § 27-50-40.

112. These Defendants failed to inform the sellers of the homes of their obligations under the Act and had reasonable cause to suspect that the information, if any, supplied by the sellers to the individual purchasers was inherently false, incomplete, and misleading.

113. Upon information and belief, notwithstanding the above-described failures of these Defendants, and each of them, knowingly violated and/or failed to perform the duties described in§ 27-50-40.

114. The nature of the defects that were undisclosed in violation of§ 27-50-40, prevented and/or limited any inspection performed by the Plaintiff to uncover or discover the said defects.

115. As a direct and proximate result of these Defendants' violations of their respective and collective duty to furnish written disclosure to the purchasers as required by§ 27-50-10, *et seq.*, the Plaintiff has suffered, and these Defendants are liable to the Plaintiff for, actual, incidental, consequential, and special damages, along with costs, interest, and attorney's fees pursuant to the remedies set forth in the Act, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

AS A THIRTEENTH CAUSE OF ACTION
(Against Developer Defendants)
(Alter Ego Liability and Piercing the Corporate Veil)

116. The Plaintiffs repeat and reallege their allegations in all of the paragraphs set forth above as if set forth herein verbatim.

117. The Developer Defendants, by and through various instrumentalities and alter-egos and other Defendants were the original developers of the Project, and the Developer Defendants combined and joined together through various instrumentalities and alter egos to facilitate to process of building the homes.

118. The Developer Defendants created and controlled numerous and various entities. These Defendants created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were merely a facade for the operations of these Defendants to achieve their financial goals and to perpetrate the activities more particularly described herein. The subservient entities or individuals in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between these Defendants and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

119. These Defendants created entities which were created to perform single purpose functions in order to effectuate the sole will of these Defendants in purchasing, developing, leasing, and/or selling the homes. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, these Defendants actively and directly participated in the development, purchase,

sale, management, leasing, and/or operations of the Project, and in fact put the same into the stream of commerce.

120. These Defendants created and controlled numerous and various of the Defendant entities for the sole purpose of the planning, development, design, construction, management, purchase, sale of homes, and other activities solely relating to the Project which is the subject of this action.

121. These Defendants directed and oversaw the Contractor Defendants herein who performed insufficient, shoddy, negligent work which failed to comply with applicable building codes and industry standards, all of which has contributed to and resulted in the premature deterioration and/or failure of the structures and building systems in the Project.

122. There would exist a broad element of injustice and fundamental unfairness if the acts of these Defendants, and each of them individually, were not regarded as the acts of one another.

123. At the time the homes were offered for sale and placed into the stream of commerce by these Defendants, the homes contained numerous defects and/or property damage which has been recently and is currently being discovered by Plaintiffs, all as a direct and proximate result of an investigation initiated by Plaintiffs, as a direct and proximate result of defects and deficiencies heretofore hidden and concealed through the acts and omissions of these Defendants.

124. The Developer Defendants and the Contractor Defendants, and each and every other above-captioned Defendant knew or should have known of the existence of the said building defects and deficiencies and property damage, which were latent and unknown to the Plaintiffs.

125. These latent building defects have, unbeknownst to Plaintiffs, regularly resulted in water intrusion into the buildings and property damage and continue to do so through the date of this filing.

126. The latent building defects and property damage have regularly resulted in the deterioration and failure of the structures and building systems, along with the attendant resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

127. The Plaintiffs suffered damages and injuries when these Defendants put these units into the stream of commerce and continue to be damaged and injured through the date of this filing.

128. As a direct and proximate result thereof, these Defendants are liable to the Plaintiffs for actual, incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

129. WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

a. Enter judgment in favor of the Plaintiffs and against all Defendants, jointly and severally, in an amount to be determined for actual, incidental, consequential, special, and punitive damages;

b. Find that the Defendants have engaged in unfair trade practices and knowingly did so thereby entitling Plaintiffs to treble damages;

c. Award attorneys' fees and costs to the Plaintiffs; and

d. Award such other and further relief as the Court may deem just and proper.

[Signature Page to Follow]

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Attorneys for Plaintiffs

November 23 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CIVIL ACTION NO: 2018-CP-08-02547

Builders FirstSource-Southeast Group, LLC,	)	
Plaintiff,	)	MOTION FOR RECONSIDERATION
vs.	)	
MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC	)	
Defendants.	)	

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Builders FirstSource-Southeast Group, LLC, by and through the undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Presiding Judge, Berkeley County Court of Common Pleas, on the tenth (10^{th}) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of December 6, 2019.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

a. The Court, in denying claims seeking contractual indemnity for the Defendants' own negligence, misconstrued relevant law as set forth by the Court of Appeals in the matter of

Concord and Cumberland;

b. The Court improperly determined that the relevant statute of limitations barred the Plaintiff's claims, notwithstanding the absence of any prior judgment in favor of the Plaintiff.

ARGUMENT

A. The Court, in granting summary judgment to the defendants, misconstrued the ruling of the Court of Appeals in *Concord and Cumberland*, which clearly authorized contractual indemnity claims for defendant's own negligence.

As confirmed during oral argument upon the Defendants' motions, the contracts at issue in this case contain indemnity provisions virtually identical to the indemnity provisions considered by the Court of Appeals in the matter of *Concord and Cumberland*, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018). Moreover, the parties to the instant action have agreed that the *Concord and Cumberland* ruling governs the Plaintiff's claims for contractual indemnity in this matter. Appropriate application of the *Concord and Cumberland* standards, to the contractual provisions at issue in the instant proceeding, clearly authorizes pursuit of contractual indemnity for damages caused by the **Defendants' own negligence** (as opposed to damages occasioned by the sole or current negligence of the Plaintiff), and, equally clearly, precludes summary judgement in favor of the Defendants.

This Court's December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence. Nevertheless, pursuant to *Concord and Cumberland*, the

Plaintiff still has valid indemnification claims for Defendants' negligence. See *Concord and Cumberland*, 424 S.C. at 645, where the Honorable Clifton Newman found the subcontract's language did not clearly and unequivocally require Muhler to indemnify Superior for Superior's own negligence and limited indemnification to damages resulting from the work Muhler performed. Thus, the December 6, 2019 Order must be altered and amended accordingly such that the Plaintiff's claims for indemnification are limited to only those damages resulting from the work Defendants' performed. Therefore, the Defendants' motions for summary judgment with respect to the Plaintiff's claims for indemnification for the Defendants' negligence are denied.

B. The South Carolina Supreme Court has made it clear that claims for indemnification do not accrue until a judgment is entered.

The December 6, 2019 Order correctly finds that the *First General Services* ruling governs this matter with respect to the statute of limitations for indemnification claims. The South Carolina Supreme Court has made it clear that claims for indemnification do not accrue until a judgment is entered. See *First General Services* at 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Because no judgement has been entered, the statute of limitations has not even begun, much less expired, on Plaintiff's indemnification claims, and thus the Defendants' motions for summary judgment must be denied. This Court's December 6, 2019 Order, determining that the statute of limitations had expired, notwithstanding the absence of any entry of judgment, is clearly contrary to authoritative Supreme Court ruling, and requires amendment of said order.

More importantly, the December 6, 2019 Order includes an omission of material fact with respect to the Plaintiffs' contractual indemnification claims. This omission of material fact serves as the only basis for the Court's "sharp distinction" from the *First General Services* case, and the sole basis for this courts' finding that the statute of limitations barred Plaintiff's indemnification claims for consequential damages. The December 6, 2019 Order states:

> Specifically, the Complaint against ECC and Charleston Exteriors states that, "...BFS has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolina, LLC in the underlying action." *See Complaint, Paragraph 33.*

December 6, 2019 Order p.7

The Court found that the above cited section from Paragraph 33 distinguishes this case from *First General Services* in that Plaintiff is seeking indemnification for consequential damages which began to accrue more than three years prior to filing the action. As a result, the Court ruled that the consequential damages cannot be recovered.

The December 6, 2019 Order is incorrect because Paragraph 33 of the Plaintiff's Complaint actually includes a qualifying statement to the Plaintiff's indemnification claims and is exactly on point with *First General Services*. As opposed to what the December 6, 2019 Order states, Paragraph 33 actually reads:

> 33. That to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or to others in the underlying action, such liability would be a direct and proximate result of the wrongful acts,

> omissions, negligence, and/or representations of ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC which have damaged BFS, as Builders FirstSource-Southeast Group, LLC, has been subjected to liability and has incurred consequential damages in having to expend attorneys fees and costs in defending against the claims of Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.

Plaintiff's Complaint pp.10, 11

It is critical that the allegation in Paragraph 33 be read in its entirety versus material words being omitted therein. The Plaintiff specifically includes the qualifying language "That to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or to others in the underlying action,..." because that is what the parties agreed to under the contracts and that is what is allowed under the case law in South Carolina. Thus, the Plaintiff's indemnification claims are not distinguishable from those in *First General Services* and the December 6, 2019 Order must be altered and amended accordingly such that the statute of limitations does not bar the Plaintiff's consequential damages.

In brief summary, the December 6, 2019 Order, precluding contractual indemnity claims based upon the **Defendants' negligence,** is contrary to the specific ruling, addressing virtually identical contractual provisions, in the *Concord and Cumberland* matter. The Order also erroneously determined that the plaintiffs' claims were barred by the relevant statute of limitations, notwithstanding the absence of any prior judgment in favor of the Plaintiff. Both of the aforesaid considerations mandate denial of the Defendants' motions for summary judgment.

CONCLUSION

In conclusion, the December 6, 2019 Order must be altered and amended such that the Defendants' motions for summary judgment are denied with respect to Plaintiff's claims for indemnification for Defendants' negligence.

HOWELL, GIBSON & HUGHES, P.A.

By:s/William H.Cox,III
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Attorney for Plaintiff

Beaufort, South Carolina

December 16, 2019

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on 16th day of December, 2019.

By: s/William H. Cox, III
William H. Cox, III

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY Builders Firstsource-Southeast Group, LLC Plaintiff, vs. ECC Contracting, LLC, et al., Defendant,	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CIVIL CASE NO. 2018-CP-08-02547 **ECC CONTRACTING, LLC'S MEMORANDUM IN OPPOSITION TO BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S MOTION TO RECONSIDER**

TO: PLAINTIFF AND STEPHEN HUGHES, ATTORNEY FOR PLAINTIFF

You will please take notice that the undersigned, as counsel for the Defendant ECC Contracting, LLC, ("ECC") submits the following in Opposition to Builders FirstSource-Southeast Group, LLC's Motion to Reconsider:

ARGUMENT

1. **Plaintiff's Motion to Reconsider is merely a restatement of its prior oral arguments to the Court.**

Under SCRCP Rule 59(f), a Rule 59(e) motion may in the discretion of the court be determined on the briefs filed by the parties without oral argument. Hence, the grant or denial of a Motion to Reconsider is within the discretion of the circuit court. Motions to Reconsider are limited in scope and are not to be used to repeat the same arguments previously presented. *Dockins v. Benchmark Commc'n*, 180 F.R.D. 294, 295 (D.S.C. 1998). A Motion to Reconsider cannot be granted where the moving party simply seeks to have the Court rethink its decision. *Id.*

Rule 59(e) Motions are commonly styled as "Motions to Reconsider" as Plaintiffs is in this case. However, the Rule actually provides for a "Motion to Alter or Amend a Judgment". Our Supreme Court has explained that, "our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion." *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 24 (2004). A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. *Id.* A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. *Id.* Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Mem'l Hosp., Inc. v. Hagen*, 313 S.C. 497, 498 (Ct. App. 1994) (citation omitted)).

In this case, Plaintiff has made no assertions that the Court misunderstood or failed to fully consider its arguments. Further there is no assertion that the Court failed to rule upon an issue raise

by the Plaintiff. Indeed, Plaintiff's Memorandum in Support of its Motion is merely a restatement of the oral arguments previously made by counsel. Plaintiff's motion should be denied as it is a mere restatement of its oral arguments.

2. BFS is improperly requesting the Court to re-write contracts ex-post facto.

BFS asserts, as it did at the hearing on this matter, that it should be entitled to pursue its contractual indemnity claims against ECC & Charleston Exteriors for their sole negligence. However, that is not what their contract states or what their complaint seeks. Parties have the right to make their own contracts. *Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 643 (1975); *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 369, (Ct.App.2003). BFS has essentially, conceded that the contract language they drafted and handed to their subcontractors is not enforceable in South Carolina and requests that the Court re-write the contract. They have cited no authority for the requested Judicial Reconstruction of the contracts or their complaint. "Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." *Lowcountry Open Land Tr. v. Charleston S. Univ.*, 376 S.C. 399, 411, (Ct. App. 2008) *See, e.g., Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."). BFS's motion should be denied as it is not the providence of the Court to re-write contracts or complaints on a motion to reconsider.

3. BFS is attempting to pursue indemnification for its concurrent negligence under the guise of sole negligence.

BFS requests the Court save a portion of its Contractual Indemnity claim for damage stemming from the sole negligence of ECC and Charleston Exteriors. This is merely an attempt to pursue claims for indemnification from the concurrent negligence of BFS and its subcontractors under the guise of sole negligence. Given that there are multiple subcontractors and a window manufacturer involved in this litigation it is not possible for ECC's sole negligence to be the but for cause of the claims against BFS. Similarly, it is impossible to say that BFS's legal fees are necessitated because of the sole negligence of ECC. Counsel for BFS may argue that its legal fees could be divided up and allocated on a per subcontractor basis, but that exercise is itself would be indicative of concurrent negligence.

4. BFS's proposed claim for Contractual Indemnity based on the sole negligence of ECC and Charleston Exteriors is merely a claim for Equitable Indemnity.

BFS's request to have this Court reconstruct its Indemnity provision with its subcontractor to create a claim for indemnification for the sole negligence of its subcontractors is unnecessary and

would be duplicative of the claims for Equitable Indemnity that it has already brought. Allowing BFS to pursue duplicative claims of Equitable Indemnity against ECC would be prejudicial to ECC and confusing to the jury.

5. It is impossible for ECC or Charleston Exteriors to be solely at fault for the claims against BFS.

BFS is contractually responsible for the acts and omissions of ECC and its other subcontractors to Lennar. It is not possible for ECC to be solely responsible for the claims against BFS because of the contract between Lennar and BFS. Furthermore, BFS has sued multiple subcontractors as well as the window manufacturer. ECC cannot be solely at fault for the acts and omissions BFS alleges give rise to its claims against the other parties to the case. In particular the claims against the window manufacturer, for which BFS, as the purchaser and supplier of the windows to the jobsite, would also be strictly liable, make it impossible for ECC to be solely at fault for the claims against BFS.

6. BFS's Complaint does not set forth allegations that support the claims it seeks to bring in its motion to reconsider.

The claims BFS seeks to bring with its motion to reconsider are wholly unsupported by its complaint and the contract, which it drafted, with the subcontractors. The word 'sole' is not in BFS' complaint. Instead BFS alleges that it is entitled to "full contractual and common law indemnification". Were the Court to grant BFS' motion large sections of its complaint would need to be re-written. BFS has never moved to amend its complaint. BFS should not be allowed to amend its complaint with a motion to reconsider an order granting it summary judgment.

7. BFS is misconstruing the First General Services case and this Court's order.

BFS asserts that this Court held that held that the First General Services ruling governs this matter with respect to the statute of limitations for indemnifications claims. That is incorrect. This Court's ruling states, "As to indemnity, the statute of limitations **generally** runs from the time judgment is entered against the defendant." ORDER GRANTING SUMMARY JUDGMENT *citing Choate v. United States,* 233 F. Supp. 463 (D.C. Okla. 1964) *First Gen. Servs. v. Miller,* 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). This court then went on to distinguish this case from that case, relying upon, but not citing, the *Piper v. Am. Fid. & Cas. Co.* and *Jones v. Builders Inv. Grp., LLC* cases (discussed below). To the extent, that the Court relied on, but Charleston Exteriors did not cite the *Piper v. Am. Fid. & Cas. Co.* and *Jones v. Builders Inv. Grp., LLC* cases and the distinction between contracts for indemnity against liability and indemnity against loss, ECC suggests that Charleston Exterior's order be amended to clarify that distinction and this Court's holding with the following:

> Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp.*, LLC, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full contractual and common law indemnification from against Liability". BFS began to incur liability for attorney's costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS's Answer was executed and served more than three years prior to the filing of the present action. Thus BFS's claims for "contractual and common law indemnification against Liability" are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

Finally, BFS is misconstruing the *First General Services* case. As was discussed at the Hearing, the *First General Services* case is distinguishable from this case because it deals with Indemnification against loss and, in this case, BFS has contracted for and sued for indemnification against liability. "Section A. Equitable Indemnity. Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *First Gen. Servs. of Charleston, Inc. v. Miller,* 314 S.C. 439, 442 (1994) *citing Winnsboro v. Wiedeman–Singleton,* 303 S.C. 52 at 56 (Ct.App.1990). BFS's motion should be denied.

8. BFS disregards its contracts with its Subcontractors and the plain language of its Complaint.

Counsel for ECC agrees that the proposed order submitted by Charleston Exteriors is a little unclear with regard to the Statute of Limitations. Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for inity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 (Ct. App. 2015).

BFS, in its motion to reconsider, is attempting to wordsmith its way around this fact. They focus, incorrectly, on Paragraph 33 of their operative pleading. They wish for the Court to simply stop reading at Paragraph 33. However, the paragraph that is determinative to the Court's decision is paragraph 34 in which BFS has pled that it is "entitled to full contractual and common law indemnification from against Liability". BFS began to incur liability for attorney's costs and fees – damages it seeks against ECC in this litigation – at the very latest when its Answer was drafted and served. BFS's Answer was executed and served more than three years prior to the filing of the

present action. Thus BFS's claims for "contractual and common law indemnification against Liability" are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

WHEREFORE for the foregoing reasons, ECC respectfully requests this Court enter an Order dismissing, Plaintiff's claims. This Motion will be supported by a Memorandum of Law. First reserves the right to supplement this motion and present additional arguments.

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