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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

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Appellate Case No. 2022-000938

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Denise M. Petersen, individually and as Trustee of the Denise M. Petersen 2005 Revocable Trust Dated November 9, 2005, as Trustee of the 601 Ocean Boulevard Residence Trust Dated November 30, 2012, and as Trustee of the 601 Ocean Boulevard Residence Trust II Dated December 7, 2012, Plaintiffs

v.

DCTCL, L.P., d/b/a Buffington Homes, L.P., Donnix Construction, LLC, Hunt Brothers Construction, Inc., Island Exteriors and Siding, Inc., Plastering Surfaces, LLC, a Unique Design, Inc., Berkeley Heating and Air Conditioning, Inc., Energyone America, LLC, Aqua Blue Pools of Charleston, Inc., Sunnyside Farms, Inc., TAMKO Building Products, LLC, Haddigan Electrical Contractors, LLC and John Doe Contractors 3 through 50, Defendants,

of Which Donnix Construction, LLC, is the Respondent and TAMKO Building Products, LLC is the Appellant

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**RECORD ON APPEAL**

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as TRUSTEE OF THE DENISE M. PETERSEN 2005 REVOCABLE TRUST DATED NOVEMBER 9, 2005, as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST DATED NOVEMBER 30, 2012, and as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST II DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES, L.P., DONNIX CONSTRUCTION, LLC, HUNT BROTHERS CONSTRUCTION, INC., ISLAND EXTERIORS AND SIDING, INC., PLASTERING SURFACES, LLC, A UNIQUE DESIGN, INC., BERKELEY HEATING AND AIR CONDITIONING, INC., ENERGYONE AMERICA, LLC, AQUA BLUE POOLS OF CHARLESTON, INC., SUNNYSIDE FARMS, INC., TAMKO BUILDING PRODUCTS, LLC, HADDIGAN ELECTRICAL CONTRACTORS, LLC and JOHN DOE CONTRACTORS 3 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-10-01973

**ORDER DENYING TAMKO  
BUILDING PRODUCTS, LLC'S  
MOTION TO DISMISS AND COMPEL  
ARBITRATION**

This matter came before me on June 2, 2022, on Tamko Building Products LLC's ("Tamko") Motion to Dismiss and Compel Arbitration. This matter was submitted for consideration with oral argument and filing of briefs by counsel for Tamko, Plaintiff, and Donnix Construction, LLC ("Donnix"). The Court has reviewed arguments, the briefing, and the record herein, is fully informed, and denies Tamko's Motion to Dismiss and Compel Arbitration based upon the following:

### **LEGAL STANDARD OF REVIEW**

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). If one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement exists. If the agreement does not exist, the court must deny any application to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. *Simpson*, 373 S.C. at 25, 644 S.E. 2d at 688 (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

In determining whether the Federal Arbitration Act (the “FAA”) applies, the initial inquiry to be made by the court is whether an arbitration agreement exists between the parties. *The Housing Authority of City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003). Arbitration is a matter of contract and the evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin.*

*Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

### **DISCUSSION**

#### **I. Plaintiff cannot be compelled to arbitration because there is no enforceable contract between Plaintiff and Tamko.**

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (“[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate.”). South Carolina law requires that “in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009).

Here the court finds, Plaintiff and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko’s limited warranty attached as Exhibit A to its’ Memorandum in Support of its’ Motion to Compel Arbitration. Tamko itself admits the limited warranty containing the arbitration clause was only delivered to the Defendant Donnix *after* it completed the purchase of the Tamko product, and Tamko does not contest Plaintiff’s assertion that she never received the limited warranty.<sup>1</sup> Thus, there could be no meeting of the minds

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<sup>1</sup> See Affidavit of Denise Petersen file June 1, 2022.

regarding the arbitration clause, as it was not included in a sales contract or otherwise discussed during the sale of the product.

Counsel for Tamko argued the court should apply the precedent established in *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). However, the arbitration clause at issue in the *One Belle Hall Property Owners Assoc. Inc.* case involved an arbitration clause contained in a bulk sales agreement that was entered into prior to the purchase of and delivery of the product. Here the court finds that Plaintiff was never made aware of limited warranty much less the arbitration clause, and that Donnix, whom actually purchased the underlayment, only became aware of the arbitration clause after the purchase of the product was completed and the underlayment was delivered to Plaintiff's residence. Additionally, the Court of Appeals noted that the HOA, via the developer, utilized the warranty process and availed itself of the limited warranty prior to filing the lawsuit in that case. *See Id.* at 58. In this instance, neither Plaintiff nor Donnix, availed themselves of the limited warranty.<sup>2</sup> The court finds, that unlike the developer and ultimately the HOA in *One Belle Hall Property Owners Assoc. Inc.*, Plaintiff was not given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase of the Tamko underlayment, nor did she attempt to avail herself of the express warranty contained therein.

Further, the court finds Tamko attached an unexecuted limited warranty to its Memorandum in support of its' Motion to assert there has been a meeting of the minds between Plaintiff and Tamko regarding an arbitration agreement. However, the court does not find this is evidence sufficient to establish an enforceable agreement to arbitrate, as the warranty is wholly

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<sup>2</sup> Plaintiff Complaint specifically alleges breach of implied warranties, negligence and/or gross negligence, and strict liability for product defect.

unexecuted, does not specify the applicable Tamko product the warranty pertains to, and it cannot be established the limited warranty Tamko references pertains to the construction of Plaintiffs' residence. *See Nelson v. Tamko Building Prods., Inc.*, 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). Counsel for Tamko argued the arbitration clause need not be signed by Plaintiff or Donnix, citing the *Pearson* precedent. The court finds the *Pearson* precedent holds a non-signatory to a contract containing an arbitration clause can be bound by the contract under a theory of equitable estoppel, *only if* the non-signatory received a direct benefit from the contract. *Pearson*, 400 S.C. 281, 290. Here, however, the court does not need to address the issue of estoppel, as Tamko has failed to establish that a binding agreement to arbitrate exists or that Plaintiff has received a direct benefit from any contract with Tamko.

Lastly, since the Federal Arbitration Act is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko, Donnix, or Plaintiff regarding arbitration.

In view of the foregoing, Tamko's Motion to Dismiss and Compel Arbitration is denied.

**II. Donnix cannot be compelled to arbitration because there is no enforceable arbitration agreement between Donnix and Tamko**

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate."). South Carolina law

requires that “in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009).

Here the court finds, Donnix and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko’s limited warranty attached as Exhibit One to its’ Memorandum in Support of its’ Motion to Compel Arbitration. Tamko itself admits the limited warranty containing the arbitration clause was only delivered to Donnix *after* it completed the purchase of the Tamko product. Thus, there could be no meeting of the minds regarding the arbitration clause, as it was not included in a sales contract or otherwise discussed during the sale of the product.

Counsel for Tamko argued the court should apply the precedent established in *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). However, the arbitration clause at issue in *One Belle Hall Property Owners Assoc. Inc* involved an arbitration clause contained in a bulk sales agreement, that was entered into prior the purchase of and delivery of the product. Here the court finds Donnix only became aware of the arbitration clause after the purchase of the product was completed and the underlayment was delivered to Plaintiff’s residence. The court finds, unlike the developer in *One Belle Hall Property Owners Assoc. Inc.*, Donnix was not given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase of the Tamko underlayment.

Further, the court finds Tamko attached an unauthenticated and unexecuted limited warranty to its Memorandum in support of its’ Motion to assert there has been a meeting of the

minds between Donnix and Tamko regarding an arbitration agreement. However, the court does not find this is evidence sufficient to establish an enforceable agreement to arbitrate, as the warranty is wholly unexecuted, does not specify the applicable Tamko product the warranty pertains to, and it cannot be established the limited warranty Tamko references pertains to the construction of Plaintiffs' residence. *See Nelson v. Tamko Building Prods., Inc.*, 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). Counsel for Tamko argued the arbitration clause need not be signed by Donnix, citing the *Pearson* precedent. The court finds the *Pearson* precedent holds a non-signatory to a contract containing an arbitration clause can be bound by the contract under a theory of equitable estoppel, *only if* the non-signatory received a direct benefit from the contract. *Pearson*, 400 S.C. 281, 290. Here, however, the court does not need to address the issue of estoppel, as Tamko has failed to establish that a binding agreement to arbitrate exists or that Donnix has received a direct benefit from any contract with Tamko.

Lastly, since the FAA is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko and Donnix regarding arbitration.

In view of the foregoing, Tamko's Motion to Dismiss and Compel Arbitration is denied.

AND IT IS SO ORDERED.

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THE HONORABLE BENJAMIN CULBERTSON

\_\_\_\_\_, South Carolina

June \_\_\_\_\_, 2022



Charleston Common Pleas

**Case Caption:** Denise M Petersen , plaintiff, et al VS Dctcl Lp , defendant, et al

**Case Number:** 2021CP1001973

**Type:** Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

CASE NO. 2021CP1001973

Denise M Petersen et al  
PLAINTIFF(S)

Dctcl Lp et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

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

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

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

Hearing: 6/2/2022

Defendant's Motion to Dismiss and Compel Arbitration is DENIED. Order signed 6/9/2022.

Defendant's Motion for Protection to Stay Discovery is DENIED.  
Defendant's Motion to Compel Discovery is WITHDRAWN.

**ORDER INFORMATION**

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/09/2022 .

601 Ocean Boulevard Residence Trust II  
601 Ocean Boulevard Residence Trust  
Dctcl Lp  
John Doe Contractors 2 through 50

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

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

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Charleston Common Pleas

**Case Caption:** Denise M Petersen , plaintiff, et al VS Dctcl Lp , defendant, et al

**Case Number:** 2021CP1001973

**Type:** Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

CASE NO. 2021CP1001973

Denise M Petersen et al  
PLAINTIFF(S)

Dctcl Lp et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

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

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

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

The "Defendant TAMKO Building Products, LLC's Motion to Alter/Amend Order Denying TAMKO's Motion to Dismiss and Compel Arbitration" filed 6/17/2022 is DENIED.

PURSUANT to Rule 59(f), SCRPC, this motion is decided without oral arguments.

**ORDER INFORMATION**

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/29/2022 .

601 Ocean Boulevard Residence Trust II  
601 Ocean Boulevard Residence Trust  
Dctcl Lp  
John Doe Contractors 2 through 50

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

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

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Charleston Common Pleas

**Case Caption:** Denise M Petersen , plaintiff, et al VS Dctcl Lp , defendant, et al

**Case Number:** 2021CP1001973

**Type:** Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

IF YOU ARE IDENTIFIED IN **BOLD** PRINT, YOU ARE HEREBY SUMMONED and required to answer the Plaintiff's Third Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Third Amended Complaint upon the subscriber, T. Happel Scurry, at his office located at 15 Middle Atlantic Wharf, Charleston, South Carolina, 29401, within thirty (30) days after

service hereof, exclusive of the day of such service; and if you fail to answer the Third Amended Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff will apply to the Court for the relief demanded in the Third Amended Complaint and judgment by default will be rendered against you.

All other parties who have been previously named and served in the above-referenced action are hereby summoned and required to answer the Plaintiff's Third Amended Complaint and to serve a copy of your Answer to the Third Amended Complaint upon the subscriber, T. Happel Scurry, at his office located at 15 Middle Atlantic Wharf, Suite 101, Charleston, South Carolina, 29401, **within the time prescribed pursuant to SCRCP 15(a)**; and if you fail to answer the Third Amended Complaint within the time aforesaid, or otherwise appear and defend, the Plaintiff will apply to the Court for the relief demanded in the Third Amended Complaint and judgment by default will be rendered against you.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

By: s/ T. Happel Scurry  
JESSE A. KIRCHNER  
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[happel@tktlawyers.com](mailto:happel@tktlawyers.com)

*Attorneys for Plaintiff*

April 28, 2022  
Charleston, South Carolina.

### THIRD AMENDED COMPLAINT (amendments in bold)

Page 3 of 18

filing *nunc pro tunc*, complaining of the Defendants named herein, and allege unto this Honorable Court by way of a **Third** Amended Complaint, as follows:

### PARTIES AND JURISDICTION

1. Plaintiff Denise Petersen ("Plaintiff") is a citizen and resident of Massachusetts and is the owner (and/or the Trustee of the Owner) of real property and improvements thereon located at 45 Eugenia Avenue in Charleston County, South Carolina (the "Residence").

2. The Residence is located in Charleston County and is the subject of this action.

3. Defendant DCTCL, L.P. d/b/a Buffington Homes, L.P. ("Buffington") is a limited partnership organized and existing pursuant to the laws of South Carolina with its principal place of business in Charleston County.

4. Defendant Donnix Construction, LLC ("Donnix") is a corporation organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as a roof installer.

5. Defendant Hunt Brothers Construction, Inc. ("Hunt") is a corporation organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as a framer.

6. Defendant Island Exteriors and Siding, Inc. ("Island Exteriors") is a corporation organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as a siding installer.

7. Defendant Plastering Surfaces, LLC ("Plastering Surfaces") is a limited

liability company organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as a stucco installer.

8. Defendant A Unique Design, Inc. ("AUD") is a corporation organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as a tile installer.

9. Defendant Berkeley Heating and Air Conditioning, Inc. ("Berkeley") is a corporation organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as an HVAC installer.

10. Defendant EnergyOne America, LLC ("EnergyOne") is a limited liability company organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as an insulation installer.

11. Defendant Aqua Blue Pools of Charleston, Inc. ("Aqua Blue") is a corporation organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as a pool installer.

12. Defendant Sunnyside Farms, Inc. ("Sunnyside") is a corporation organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as a grader.

13. Defendant Tamko Building Products, LLC ("Tamko") is a corporation organized and existing pursuant to the laws of a state other than South Carolina.

14. Defendant Haddigan Electrical Contractors, LLC (“Haddigan”) is a limited liability company organized and existing pursuant to the laws of South Carolina, and, at all times relevant hereto, conducted business in Charleston County, South Carolina as an electrician. Defendant Haddigan is hereby substituted for John Doe Contractor 2, *nunc pro tunc*.

15. Defendant John Doe Contractors 3 through 50 are subcontractors and/or other entities or persons who supplied materials, labor and services for the construction of the Residence, including but not limited to, roofing, framing, house wrap, siding, exterior cladding, windows, flashings, waterproofing and HVAC mechanical system, whose identities are not yet known nor discoverable to Plaintiff but whose identities may be known to one or more of the defendants.

16. This matter arises out of the design, development, construction, marketing and sale of the Residence located in Charleston County.

17. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto, and venue is proper in this forum.

#### FACTUAL ALLEGATIONS

18. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

19. Plaintiff is the owner of the Residence.

20. Upon information and belief, Buffington served as the builder and general contractor for the Residence and obtained the necessary building permits, which allowed the Residence to be constructed. As such, Buffington owed a duty to Plaintiff to construct the Residence free from defects, in a good and workmanlike manner and in accordance

with all applicable building codes and industry standards.

21. Upon information and belief, Donnix, as a subcontractor to Buffington, installed the roof, related flashings and various waterproofing components used in the roofs and decks at the Residence.

22. Upon information and belief, Hunt, as a subcontractor to Buffington, was responsible for framing the Residence, including the sheathing, house wrap, windows and doors and related components at the Residence.

23. Upon information and belief, Island Exteriors, as a subcontractor to Buffington, installed the exterior siding, trim and/or related flashings at the Residence.

24. Upon information and belief, Plastering Surfaces, as a subcontractor to Buffington, installed the stucco exterior and related components at the Residence.

25. Upon information and belief, AUD, as a subcontractor to Buffington, installed the tile on the exterior decks and balconies and interior tile and related components at the Residence.

26. Upon information and belief, Berkeley, as a subcontractor to Buffington, designed and installed the HVAC mechanical system and its and related components at the Residence.

27. Upon information and belief, EnergyOne, as a subcontractor to Buffington, installed the spray foam insulation at the Residence.

28. Upon information and belief, Aqua Blue, as a subcontractor to Buffington, designed and installed the swimming pool at the Residence.

29. Upon information and belief, Sunnyside, as a subcontractor to Buffington,

was responsible for the soil preparation and compacting as well as the finish grade at the Residence.

30. Upon information and belief, Tamko, designed, tested, manufactured, sold and distributed its Tamko TW Metal and Tile Underlayment ("TW") and created and disseminated the installation/application instructions and related literature concerning the proper use of its product. Upon information and belief, Tamko regularly and knowingly sold, supplied, distributed, directed and delivered its TW product to the State of South Carolina and the County of Charleston for use in residential construction, including for use in Plaintiff's Residence.

**31. Upon information and belief, Haddigan, as s subcontractor to Buffington, installed the electrical components at the Residence.**

32. Defendants Donnix, Hunt, Island Exteriors, Plastering Surfaces, AUD, Berkeley, EnergyOne, Aqua Blue, Sunnyside, Tamko, **Haddigan**, and John Doe Contractors **3** – 50 may hereinafter be referred to collectively as "Defendant Subcontractors."

33. Defendant Subcontractors, by undertaking the work and actually performing work on the Residence, owed a duty to Plaintiff to construct the Residence free from defects, in a good and workmanlike manner and in accordance with all applicable building codes and industry standards.

34. Plaintiff, due to recent investigations, has determined that the Residence is extensively damaged, which damage was proximately caused by the Defendants, their agents, servants, employees, and/or subcontractors. As a direct and proximate result of the Defendants' actions, Plaintiff has spent and will continue to expend substantial sums

of money in order to renovate and restore the Residence to make it safe and habitable, and in addition thereto, the Residence has suffered a loss in value and depreciation by virtue of the defects and damages. In addition, Plaintiff will be required to expend substantial sums which include, but are not limited to, the cost of the investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct, and indirect damages all to Plaintiff's damage in an amount to be determined. As a result of the conduct referenced herein, Plaintiff is entitled to punitive damages in an amount to be determined.

35. Notwithstanding that Plaintiff has properly maintained the Residence, the construction defects set forth herein have caused occurrences in the form of leaks, air infiltration, defects, and failures within the building envelope which are not readily apparent to one examining the exterior surface thereof.

36. The latent construction defects have resulted in repeated exposure to the same generally harmful conditions over time and have resulted in consequential damages. Such repeated exposure to the same generally harmful conditions constitutes "occurrences" and compensable damage. Further, the negligence of each Defendant herein has resulted in damage to the work of the other subcontractors and trades, damage to non-defective components of the work, damage to the Residence, Plaintiff's property (real and personal), and Plaintiff's use and enjoyment of the Residence.

FOR A FIRST CAUSE OF ACTION

(Negligence/Gross Negligence as to Buffington and Defendant Subcontractors)

37. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

38. Upon information and belief, Buffington, either with their own employees or

through the use of subcontractors, designed, constructed and sold the Residence.

39. As a licensed general contractor, Buffington owed a duty to Plaintiff to exercise due care in the construction of the Residence and to construct the Residence free from defects and in conformity with all applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner.

40. By agreeing to perform the work and actually performing the work, Buffington undertook a duty to Plaintiff to exercise due care in the construction of the Residence and to construct the Residence free from defects and in conformity with all applicable building and dwelling codes, approved construction plans and specifications, and in a careful, diligent, and workmanlike manner.

41. Buffington and Defendant Subcontractors, their agents, servants, employees, and/or subcontractors were negligent, careless, reckless, willful and wanton in failing to design and/or construct the Residence in accordance with the applicable building and dwelling codes, and in a careful, diligent and workmanlike manner, thereby breaching the above-referenced duty by, but not limited to, the following:

- (a) In failing to construct the Residence so as to make the exterior building envelope water tight and thereby violating the residential building code in effect at the time the work was performed;
- (b) In installing balcony and deck waterproofing in violation of applicable building codes and industry standards of care;
- (c) In failing to install structural framing in accordance with the building code;
- (d) In failing to install the exterior siding and related flashings in accordance with the manufacturer's installation instructions,

applicable building code and industry standards;

- (e) In failing to install the exterior stucco, exterior weeps and control joints and related flashings in accordance with the manufacturer's installation instructions, applicable building code and industry standards;
- (f) In failing to install the windows in accordance with the manufacturer's installation instructions, the applicable building code and industry standards of care;
- (g) In failing to install the exterior doors in accordance with the manufacturer's installation instructions, the applicable building code and industry standards of care;
- (h) In failing to appropriately seal and caulk the exterior doors and windows;
- (i) In failing to install or properly install flashings;
- (j) In installing balcony and deck tile in violation of applicable building code and industry standards of care;
- (k) In installing interior tile in violation of applicable building code and industry standards of care;
- (l) In failing to design and install the HVAC and component parts in accordance with the applicable building code and industry standards of care;
- (m) In failing to properly install insulation within the wall and ceiling cavities in violation of industry standards and the applicable building code;
- (n) In failing to construct the building envelope in a weather-tight manner in violation of the applicable building code and industry standards;
- (o) In failing to design and install the pool and pool tiles in accordance with the applicable building code and industry standards;
- (p) In failing to properly prepare the subgrade to receive the slab which has caused excessive cracking in the concrete slab;
- (q) In designing manufacturing, distributing and holding out for consumption a defective TW roofing underlayment system;

- (r) **In failing to properly install the electrical components in violation of industry standards and the applicable building code.**
- (s) In failing to investigate the subcontractors to determine if they were competent and capable of performing their work in accordance with good construction practices;
- (t) In failing to adequately supervise the work of their subcontractors and/or employees;
- (u) In failing to discover defects in the work performed by their subcontractors and/or employees;
- (v) In failing to properly investigate and correct defective work and resulting damages;
- (w) In failing to construct the Residence in accordance with applicable building codes and industry standards;
- (x) In failing to act as a reasonably prudent developer, contractor and/or subcontractor would act under similar circumstances; and
- (y) In such other failures as will be shown through the discovery and trial of this matter.

42. As a direct, foreseeable and proximate result of the negligence and gross negligence of these Defendants, Plaintiff has suffered significant physical damage to the Residence as well as diminution in its value and loss of use. Plaintiff has further been damaged in that they have spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the structure and to repair it.

43. The violation of applicable building codes constitutes negligence per se.

44. The breach of duty, code violations, and deviations from industry standards on the part of these Defendants constitute gross negligence, entitling Plaintiff to an award of all actual, consequential, and punitive damages.

#### FOR A SECOND CAUSE OF ACTION

(Breach of Implied Warranties as to Buffington and Defendant Subcontractors)

45. Plaintiff hereby incorporates the allegations of the foregoing paragraphs as if fully restated herein.

46. By operation of law, Buffington and Defendant Subcontractors impliedly warranted that their work would be performed using the utmost skill and attention and would be of a good and workmanlike quality free from all defects.

47. Buffington and Defendant Subcontractors have breached the implied warranty of workmanlike service by performing defective work as set forth above.

48. In selling the Residence or otherwise placing the Residence into the stream of commerce, Buffington, by operation of law, impliedly warranted that the house would be habitable and free from all defects.

49. Buffington has breached the implied warranty of habitability by constructing and selling a defective house as set forth above.

50. As a direct, foreseeable and proximate result of the Defendants' breach of warranties, Plaintiff has suffered significant physical damage to the Residence, as well as diminution in its value and loss of use. Plaintiff has further been damaged in that they have spent, and will continue to expend, large sums of money in order to determine the extent of the damage to the structure and to repair it.

51. As a direct and proximate result of these Defendants' breach of their implied warranties, Plaintiff is entitled to a judgment against said Defendants for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION  
(Negligence / Gross Negligence as to Tamko)

52. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

53. Upon information and belief, Tamko designed, manufactured, marketed, distributed, sold and/or otherwise placed into the stream of commerce, certain underlayment products known as "TW" that was installed on the Plaintiff's Residence.

54. Tamko owed Plaintiff a duty to design and manufacture TW to be free of any and all defects that prevent the underlayment from properly performing and satisfying its ordinary, intended and foreseeable uses. Tamko owed Plaintiff a duty of care and Tamko knew or should have known that Plaintiff would be injured and damaged if Tamko acted negligently.

55. Tamko breached its duty of due care and was negligent, careless, willful, wanton and reckless in the following particulars:

- (a) In designing, manufacturing, marketing, distributing, and selling a product that is defective in that it has failed, has caused components installed over the underlayment to fail, and has allowed water and moisture to continuously intrude through the exterior cladding, thereby significantly damaging component parts of the Residence;
- (b) In developing the underlayment in a defective manner;
- (c) In failing to reasonably test the underlayment to determine if it would perform in accordance with applicable building codes and industry standards;
- (d) In failing to promulgate appropriate installation instructions in compliance with applicable building codes and industry standards;
- (e) In failing to appropriately train, instruct and educate the installers of their product;
- (f) In failing to use the requisite degree of care and caution that a reasonably prudent manufacturer would have used in designing and manufacturing the underlayment; and
- (g) In such other failures that will be shown during the discovery of this case and at trial.

56. As a direct, foreseeable and proximate result of Tamko's negligence and

gross negligence, Plaintiff has been damaged in that Plaintiff has suffered significant physical damage to the Residence, including failure of the components installed over the underlayment, water intrusion as well as diminution in its value. Plaintiff has further been damaged in that she has spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

57. Tamko's breach of duty in designing, manufacturing, marketing, distributing and selling the defective exterior trim constitutes gross negligence, entitling Plaintiff to a recovery of actual, consequential, and punitive damages.

FOR A FOURTH CAUSE OF ACTION  
(Products Liability – Strict Liability as to Tamko)

58. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully restated herein.

59. Upon information and belief, Tamko is in the business of designing, manufacturing, marketing, distributing, selling, and/or installing underlayment products, including but not limited to, TW. Tamko marketed the underlayment product as one that would provide a safe and durable barrier from the elements.

60. The TW underlayment installed on the Residence was defectively designed and manufactured in that it prematurely fails and deteriorates and allows water to intrude into the building, resulting in significant damage in the form of rot, severe water intrusion into the Residence and mold contamination to the structure onto which the underlayment was installed.

61. Tamko is in violation of S.C. Code Ann. § 15-73-10 because they designed, manufactured, marketed, distributed, and sold a product that was defective and was in a condition unreasonably dangerous to Plaintiff and her property. Upon information and

belief, the product reached Plaintiff, and was intended to reach Plaintiff, without substantial change in the condition in which it was sold.

62. Plaintiff could not have discovered that TW was defective or harmful through the exercise of reasonable care. The defective nature of TW for use as underlayment is beyond the ordinary knowledge common to the consuming public and this Plaintiff.

63. As a direct, foreseeable, and proximate result of the sale of the defective product by Tamko, Plaintiff has been damaged in that Plaintiff has suffered significant physical damage to the Residence, including water intrusion as well as diminution in its value. Plaintiff has further been damaged in that they have spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

64. Upon information and belief, Tamko is strictly liable for all damages prayed for herein that were proximately caused by their defective product, TW.

FOR A FIFTH CAUSE OF ACTION  
(Products Liability – Breach of Warranty as to Tamko)

65. Plaintiff incorporates the allegations of the foregoing paragraphs as if fully restated herein.

66. Upon information and belief, Tamko designed, manufactured and sold the TW underlayment installed onto the Residence.

67. Tamko impliedly warranted that its product would be merchantable.

68. The TW product was not merchantable and could not pass without objection in the trade at the time of sale.

69. Tamko breached the implied warranty of merchantability codified at S.C.

Code Ann. § 36-2-314 in that, among other things previously described above, the TW product was not merchantable, resulting in failure of components installed over the underlayment, severe moisture intrusion and resulting damage to the Residence.

70. Tamko had reason to know, and in fact intended that the roof was to be used as a component of the Residence's exterior envelope.

71. Tamko, at the time of the sale of the TW, had reason to know that Plaintiff, or those authorized to act on Plaintiff's behalf, were relying on the skill or judgment of Tamko to furnish a product that was appropriate for use as a component of the structure's exterior envelope and weather barrier.

72. Tamko breached the implied warranty of fitness for particular purpose and/or intended use codified at S.C. Code Ann. §36-2-315 by the particulars previously described above.

73. As a direct, foreseeable and proximate result of Tamko's breach of the Warranty of Merchantability and/or Warranty of Fitness for a Particular Purpose and/or Intended Use, the Plaintiff has been damaged in that Plaintiff has suffered significant physical damage to the Residence, including water intrusion as well as diminution in its value. Plaintiff has further been damaged in that she has spent and will continue to expend large sums of money in order to determine the extent of the damage to the structure and to repair it.

WHEREFORE, Plaintiff prays this Honorable Court inquire into the matters set forth herein and award judgment in favor of Plaintiff against Defendants, jointly and severally, as follows:

- (a) For all actual, direct, indirect, special and consequential damages against the Defendants, jointly and severally, in an amount to be shown at trial;

- (b) For punitive damages in an amount to be determined by the trier of fact;
- (c) For pre-judgment and post-judgment interest;
- (d) For all attorneys' fees and costs associated with investigating and prosecuting this action; and
- (e) For all other relief this Honorable Court deems just and proper.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

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*Attorneys for Plaintiff*

April 28, 2022  
Charleston, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as TRUSTEE OF THE DENISE M. PETERSEN 2005 REVOCABLE TRUST DATED NOVEMBER 9, 2005, as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST DATED NOVEMBER 30, 2012, and as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST II DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES, L.P., DONNIX CONSTRUCTION, LLC, HUNT BROTHERS CONSTRUCTION, INC., ISLAND EXTERIORS AND SIDING, INC., PLASTERING SURFACES, LLC, A UNIQUE DESIGN, INC., BERKELEY HEATING AND AIR CONDITIONING, INC., ENERGYONE AMERICA, LLC, AQUA BLUE POOLS OF CHARLESTON, INC., SUNNYSIDE FARMS, INC., TAMKO BUILDING PRODUCTS, LLC, HADDIGAN ELECTRICAL CONTRACTORS, LLC and JOHN DOE CONTRACTORS 3 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-10-01973

**DONNIX CONSTRUCTION, LLC'S  
ANSWER TO PLAINTIFF'S THIRD  
AMENDED COMPLAINT AND  
CROSS-CLAIMS AGAINST TAMKO  
BUILDING PRODUCTS, LLC**

**TO: JESSE KIRCHNER, ESQ. AND T. HAPPEL SCURRY, ESQ., ATTORNEYS FOR PLAINTIFFS**

**ANSWER**

Defendant Donnix Construction Inc. (hereinafter "Defendant") by and through the undersigned counsel, hereby responds to Denise M. Petersen, individually and as Trustee of the Denise M. Petersen 2005 Revocable Trust dated November 9, 2005, as Trustee of the 601 Ocean Boulevard Residence Trust dated November 30, 2012, and as Trustee of the 601 Ocean Boulevard

Residence Trust II dated December 7, 2012's (hereinafter "Plaintiff") Third Amended Complaint filed on April 28, 2022 and asserts the following:

**FOR A FIRST DEFENSE**

1. Defendant denies each and every allegation of Plaintiffs' Third Amended Complaint, which is not hereinafter specifically admitted, qualified or explained, and demands strict proof thereof.

**AS TO THE PARTIES AND JURISDICTION STATEMENT**

2. Defendant admits, upon information and belief, the allegations contained in Paragraph 1 of Plaintiff's Third Amended Complaint and therefore admits the same.

3. Defendant admits, upon information and belief, the allegations contained in Paragraph 2 of Plaintiff's Third Amended Complaint and therefore admits the same.

4. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 3 of Plaintiff's Third Amended Complaint and therefore denies the same.

5. Responding to the allegations contained in Paragraph 4 of Plaintiffs' Third Amended Complaint, Defendant states that Donnix Construction Inc. is a corporation organized under the law of the State of South Carolina. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the remaining allegations contained in Paragraph 4 of Plaintiff's Third Amended Complaint and therefore denies the same.

6. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 5 of Plaintiff's Third Amended Complaint and therefore denies the same.

7. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 6 of Plaintiff's Third Amended Complaint and therefore denies the same.

8. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 7 of Plaintiff's Third Amended Complaint and therefore denies the same.

9. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 8 of Plaintiff's Third Amended Complaint and therefore denies the same.

10. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 9 of Plaintiff's Third Amended Complaint and therefore denies the same.

11. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 10 of Plaintiff's Third Amended Complaint and therefore denies the same.

12. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 11 of Plaintiff's Third Amended Complaint and therefore denies the same.

13. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 12 of Plaintiff's Third Amended Complaint and therefore denies the same.

14. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 13 of Plaintiff's Third Amended Complaint and therefore denies the same.

15. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 14 of Plaintiff's Third Amended Complaint and therefore denies the same.

16. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 15 of Plaintiff's Third Amended Complaint and therefore denies the same.

17. The allegations of Paragraph 16 contain legal conclusions, to which no response is required. To the extent a response is required, Defendant denies the allegations contained in Paragraph 15 and demands strict proof thereof

18. The allegations of Paragraph 17 contain legal conclusions, to which no response is required. To the extent a response is required, Defendant denies the allegations contained in Paragraph 17 and demands strict proof thereof.

#### **AS TO THE FACTUAL ALLEGATIONS**

19. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of their Answer as fully as if repeated verbatim herein.

20. Defendant admits, upon information and belief, the allegations contained in Paragraph 19 of Plaintiff's Third Amended Complaint and therefore admits the same

21. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 20 of Plaintiff's Third Amended Complaint and therefore denies the same.

22. Defendant denies the allegations in Paragraph 21 of the Third Amended Complaint and demands strict proof thereof.

23. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 22 of Plaintiff's Third Amended Complaint and therefore denies the same.

24. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 23 of Plaintiff's Third Amended Complaint and therefore denies the same.

25. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 24 of Plaintiff's Third Amended Complaint and therefore denies the same.

26. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 25 of Plaintiff's Third Amended Complaint and therefore denies the same.

27. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 26 of Plaintiff's Third Amended Complaint and therefore denies the same.

28. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 27 of Plaintiff's Third Amended Complaint and therefore denies the same.

29. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 28 and all its subparts of Plaintiff's Third Amended Complaint and therefore denies the same.

30. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 29 of Plaintiff's Third Amended Complaint and therefore denies the same.

31. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 30 of Plaintiff's Third Amended Complaint and therefore denies the same.

32. Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 31 of Plaintiff's Third Amended Complaint and therefore denies the same

33. The allegations of Paragraph 32 contain party definitions, to which no response is required. To the extent a response is required, Defendant denies the allegations contained in Paragraph 30 and demands strict proof thereof.

34. Defendant denies the allegations in Paragraph 33 of the Third Amended Complaint and demands strict proof thereof.

35. Defendant denies the allegations in Paragraph 34 of the Third Amended Complaint and demands strict proof thereof.

36. Defendant denies the allegations in Paragraph 35 of the Third Amended Complaint and demands strict proof thereof.

37. Defendant denies the allegations in Paragraph 36 of the Third Amended Complaint and demands strict proof thereof.

**AS TO THE FIRST CAUSE OF ACTION**  
**(Negligence/Gross Negligence—As to Buffington and Defendant Subcontractors)**

38. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of their Answer as fully as if repeated verbatim herein.

39. The allegations contained in Paragraph 38 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 38 of Plaintiff's Third Amended Complaint and therefore denies the same.

40. The allegations contained in Paragraph 39 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 39 of Plaintiff's Third Amended Complaint and therefore denies the same.

41. The allegations contained in Paragraph 40 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 40 of Plaintiff's Third Amended Complaint and therefore denies the same.

42. Defendant denies the allegations in Paragraph 41 and all its subparts of the Third Amended Complaint and demands strict proof thereof.

43. Defendant denies the allegations in Paragraph 42 of the Third Amended Complaint and demands strict proof thereof.

44. Defendant denies the allegations in Paragraph 43 of the Third Amended Complaint and demands strict proof thereof.

45. Defendant denies the allegations in Paragraph 44 of the Third Amended Complaint and demands strict proof thereof.

**AS TO THE SECOND CAUSE OF ACTION**  
**(Breach of Implied Warranties – As to Buffington and Defendant Subcontractors)**

46. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of their Answer as fully as if repeated verbatim herein.

47. Defendant denies the allegations in Paragraph 46 of the Third Amended Complaint and demands strict proof thereof.

48. Defendant denies the allegations in Paragraph 47 of the Third Amended Complaint and demands strict proof thereof.

49. Defendant denies the allegations in Paragraph 48 of the Third Amended Complaint and demands strict proof thereof.

50. Defendant denies the allegations in Paragraph 49 of the Third Amended Complaint and demands strict proof thereof.

51. Defendant denies the allegations in Paragraph 50 of the Third Amended Complaint and demands strict proof thereof.

52. Defendant denies the allegations in Paragraph 51 of the Third Amended Complaint and demands strict proof thereof.

**AS TO THE THIRD CAUSE OF ACTION**  
**(Negligence/Gross Negligence as to Tamko)**

53. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of their Answer as fully as if repeated verbatim herein.

54. The allegations contained in Paragraph 53 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the

truthfulness or falsity of the allegations contained in Paragraph 53 of Plaintiff's Third Amended Complaint and therefore denies the same.

55. The allegations contained in Paragraph 54 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 54 of Plaintiff's Third Amended Complaint and therefore denies the same.

56. The allegations contained in Paragraph 55 and all its subparts of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 55 and all its subparts of Plaintiff's Third Amended Complaint and therefore denies the same.

57. The allegations contained in Paragraph 56 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 56 of Plaintiff's Third Amended Complaint and therefore denies the same.

58. The allegations contained in Paragraph 57 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 57 of Plaintiff's Third Amended Complaint and therefore denies the same.

**AS TO THE FOURTH CAUSE OF ACTION**  
**(Products Liability – Strict Liability as to Tamko)**

59. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of their Answer as fully as if repeated verbatim herein.

60. The allegations contained in Paragraph 59 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 59 of Plaintiff's Third Amended Complaint and therefore denies the same.

61. The allegations contained in Paragraph 60 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 60 of Plaintiff's Third Amended Complaint and therefore denies the same.

62. The allegations contained in Paragraph 61 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 61 of Plaintiff's Third Amended Complaint and therefore denies the same.

63. The allegations contained in Paragraph 62 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 62 of Plaintiff's Third Amended Complaint and therefore denies the same.

64. The allegations contained in Paragraph 63 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 63 of Plaintiff's Third Amended Complaint and therefore denies the same.

65. The allegations contained in Paragraph 64 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 64 of Plaintiff's Third Amended Complaint and therefore denies the same.

**AS TO THE FIFTH CAUSE OF ACTION**  
**(Products Liability – Breach of Warranty as to Tamko)**

66. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of their Answer as fully as if repeated verbatim herein.

67. The allegations contained in Paragraph 66 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 66 of Plaintiff's Third Amended Complaint and therefore denies the same.

68. The allegations contained in Paragraph 67 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 67 of Plaintiff's Third Amended Complaint and therefore denies the same.

69. The allegations contained in Paragraph 68 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 68 of Plaintiff's Third Amended Complaint and therefore denies the same.

70. The allegations contained in Paragraph 69 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 69 of Plaintiff's Third Amended Complaint and therefore denies the same.

71. The allegations contained in Paragraph 70 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 70 of Plaintiff's Third Amended Complaint and therefore denies the same.

72. The allegations contained in Paragraph 71 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 71 of Plaintiff's Third Amended Complaint and therefore denies the same.

73. The allegations contained in Paragraph 72 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the

truthfulness or falsity of the allegations contained in Paragraph 72 of Plaintiff's Third Amended Complaint and therefore denies the same.

74. The allegations contained in Paragraph 73 of the Third Amended Complaint are not directed at this Defendant and therefore, no response is required from this Defendant. To the extent a response is required, Defendant is without information sufficient to form a belief as to the truthfulness or falsity of the allegations contained in Paragraph 73 of Plaintiff's Third Amended Complaint and therefore denies the same.

75. Defendant denies the prayers contained in the WHEREFORE Paragraph of Plaintiff's Third Amended Complaint.

76. Each and every allegation not expressly admitted is denied.

**FOR A SECOND DEFENSE**  
**(Failure to Mitigate)**

77. Defendant would respectfully show that Plaintiff has failed to take reasonable steps to mitigate damages.

**FOR A THIRD DEFENSE**  
**(Intervening Acts of a Third Party)**

78. Any alleged injury Plaintiff sustained may have been due to and proximately caused by the sole and intervening negligence, recklessness, willfulness and/or wantonness of some persons or entities other than Defendant, which occurred subsequent to any acts or omissions by Defendant, if any (which is expressly denied), and therefore, the sole and intervening acts of third-parties may be the real and proximate causes of any alleged injuries to Plaintiff, and therefore, Plaintiff may not recover from Defendant.

**FOR A FOURTH DEFENSE**  
**(Failure to State a Claim)**

79. Defendant would respectfully show each and every cause of action set forth in Plaintiff's Third Amended Complaint fails to state a claim upon which relief can be granted and therefore, Plaintiff's Third Amended Complaint should be dismissed.

**FOR A FIFTH DEFENSE**  
**(Punitive Damages Barred)**

80. To the extent Plaintiff claims punitive damages, an award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I § 3 of the South Carolina Constitution in that:

- a. The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantee;
- b. Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. Any award of punitive damages based upon the wealth of Defendant violates due process guarantees;
- d. The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and
- f. Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of Defendant.

81. Further, Plaintiff's claims for punitive damages violate the federal doctrine of separation of powers and Article I, § 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

**FOR A SIXTH DEFENSE**  
**(Causation)**

82. Defendant would respectfully show that no act or omission by Defendant was the cause of any damages to Plaintiff. Any damages alleged by Plaintiff were not due to or caused by Defendant but were due to and caused by the contributing, concurring, intervening or superseding fault, breach of warranty, and/or act or omission of one of more of the above listed Defendants or Plaintiff, over which Defendant had no control.

**FOR AN SEVENTH DEFENSE**  
**(Waiver, Laches, Estoppel)**

83. Defendant would respectfully show that some or all of the claims in Plaintiff's Third Amended Complaint are barred by the doctrines of waiver, estoppel and/or laches.

**FOR AN EIGHTH DEFENSE**  
**(Contribution or Indemnification)**

84. Defendant would respectfully show that another party may be liable, in full or in part, for any damages suffered by Plaintiff.

**FOR A NINTH DEFENSE**  
**(Incorporation by Reference)**

85. Defendant incorporates by reference any and all affirmative defenses asserted or to be asserted by any other Defendants(s) as if they are expressly stated herein.

**FOR A TENTH DEFENSE**  
**(Statute of Limitations/Repose)**

86. Defendant would respectfully show that all or part of Plaintiff's claims may be barred by the applicable statute of limitations and/or statute of repose.

**FOR AN ELEVENTH DEFENSE**  
**(Unclean Hands)**

87. Defendant would respectfully show that Plaintiff's claims are barred in whole, or in part, by the doctrine of unclean hands.

**FOR A TWELFTH DEFENSE**  
**(Standard of Care)**

88. Defendant complied with the applicable standards of care at all times relevant hereto and is thus not liable to Plaintiff.

**FOR A THIRTEENTH DEFENSE**  
**(Comparative Negligence)**

89. Defendant would respectfully show, upon information and belief, that any injuries or damages sustained by Plaintiff were due to Plaintiff's own negligent, careless, reckless and/or grossly negligent acts or omissions, which combined and concurred with any negligence, carelessness, recklessness and gross negligence on the part of Defendant, which are specifically denied, to produce such injuries or damages, if any, and without which such injuries or damages would not have occurred. Such negligent, careless, reckless and/or grossly negligent acts or omissions on the part of Plaintiff were the direct and proximate cause of any injuries or damages sustained by Plaintiff, and Defendant pleads such negligence, carelessness, recklessness and gross negligence on the part of Plaintiff and would ask that this court compare the negligence or other conduct of Plaintiff and Defendant and if it is determined that Plaintiff's negligence, carelessness, recklessness and gross negligence were greater than the negligence, carelessness, recklessness and

gross negligence of Defendant, which is specifically denied, then Plaintiff should be totally barred from recovery and if it is determined that Plaintiff's negligence, carelessness, recklessness and gross negligence is equal to or less than the negligence of Defendant, then the amount of recovery available to Plaintiff should be reduced by the percentage of Plaintiff's own negligence, carelessness, recklessness and gross negligence.

**FOR A FOURTEENTH DEFENSE**  
**(Betterment)**

90. Defendant would respectfully show that Plaintiff is not entitled to recover for repairs which will put them in a better position than they would have been if all contracts/warranties had been properly performed and fulfilled, and their damages, if any, must be reduced by the amount of all betterments made or to be made to the subject residence.

**FOR A FIFTEENTH DEFENSE**  
**(Economic Loss Doctrine)**

91. Defendant would respectfully show that Plaintiff's claims are barred by the Economic Loss Doctrine.

**FOR A SIXTEENTH DEFENSE**  
**(Lack of Notice and Right to Cure)**

92. To the extent Defendant is liable to Plaintiff, which liability is denied, Plaintiff's claims must fail in that Plaintiff failed to give Defendant timely and reasonable notice of any alleged defects and/or timely and reasonable opportunity to correct any alleged defects as required by S.C. Code Ann. §40-59-810, et seq.

**FOR A SEVENTEENTH DEFENSE**  
**(Set Off)**

93. Any recovery by Plaintiff must be set off or reduced, abated, or apportioned to the extent that any other party's actions caused or contributed to damages, if any, or as otherwise provided pursuant to §15-38-50 of the South Carolina Code.

**FOR AN EIGHTEENTH DEFENSE**  
**(Limitation of Warranties)**

94. Defendant would respectfully show that Plaintiff's claims are or may be barred by the limitation of express and implied warranties.

**FOR A NINETEENTH DEFENSE**  
**(Disclaimer of Warranties)**

95. Defendant would respectfully show that Plaintiff's claims are barred, in whole or in part, by the disclaimer of warranties.

**FOR A TWENTIETH DEFENSE**  
**(Expiration of Warranties)**

96. Defendant would respectfully show that Plaintiff's claims are barred, in whole or in part, because to the extent any warranties existed, all such warranties have expired.

**FOR A TWENTY-FIRST DEFENSE**  
**(Applicable Warranty Period)**

97. Defendant would respectfully show that Plaintiff's claims are barred, in whole or in part, because to the extent any warranties existed, Plaintiff failed to file a claim within the applicable warranty period.

**FOR A TWENTY-SECOND DEFENSE**  
**(No Contractual Privity)**

98. Defendant would respectfully show that Plaintiff's claims against Defendant are barred, in whole or in part, because there was no contractual privity between Plaintiff and Defendant.

**FOR A TWENTY-THIRD DEFENSE**  
**(Certificate of Occupancy)**

99. Defendant would respectfully show that the subject residence was designed, constructed and certified for occupancy in conformity with the then applicable and prevailing industry, construction, and governmental standards, regulations, and/or statutory requirements.

**FOR AN TWENTY-FOURTH DEFENSE**  
**(Failure to Join a Necessary Party)**

100. Plaintiff may have failed to join a party(ies) necessary to this litigation as required by Rule 19, SCRCP, and Plaintiff's Third Amended Complaint should be dismissed pursuant to Rule 12(b)(7), SCRCP.

**FOR AN TWENTY-FIFTH DEFENSE**  
**(First Material Breach)**

101. Defendant would respectfully show Plaintiff breached the original contract by and through its failure to perform pursuant to the terms of the contract and as otherwise may be proven at trial and therefore, Plaintiff is responsible for all liability from any subsequent nonperformance and Defendant is discharged of any further obligation to perform.

**FOR A TWENTY-SIXTH DEFENSE**  
**(Spoliation of Evidence)**

102. Defendant would respectfully show that Plaintiff's claims are barred by the doctrine of spoliation of evidence.

**FOR A TWENTY-SEVENTH DEFENSE**  
**(Acceptance)**

103. Defendant would respectfully show that the final completion and acceptance of work undertaken by Defendant pursuant to the original contract, if any, and all modifications thereto, constitutes a complete defense to all claims asserted by Plaintiff.

**FOR A TWENTY-EIGHTH DEFENSE**  
**(Beneficial Use)**

104. Defendant would respectfully show that the damages claimed by Plaintiff must be reduced by the proportionate value of the beneficial use provided by the work or services of Defendant.

**FOR A TWENTY-NINTH DEFENSE**  
**(Use of Life)**

105. Defendant would respectfully show that Plaintiff's claims are barred as to any and all components of the subject residence that has reached or exceeded their useful life expectancy.

**FOR A THIRTIETH DEFENSE**  
**(Proximate Cause)**

106. Defendant would respectfully show that even if it were negligent or breached a contract or warranty, which is specifically denied, the negligence of or breach of contract or warranty by Defendant is not the direct or proximate cause of any injuries or damages alleged by Plaintiff and, therefore, Defendant is not liable for any injuries or damages allegedly sustained by Plaintiff.

**FOR A THIRTY-FIRST DEFENSE**  
**(Accord and Satisfaction)**

107. Defendant would respectfully show that Plaintiff's claims are barred by the defense of accord and satisfaction.

**FOR A THIRTY-SECOND DEFENSE**  
**(Substantial Alteration or Modification)**

108. Defendant would respectfully show that Plaintiff's claims against Defendant are barred because the subject residence has been substantially altered or modified by persons other than Defendant after Defendant completed its work.

**FOR A THIRTY-THIRD DEFENSE**  
**(Compliance with Industry Custom, Practices and Standards)**

109. Defendant would respectfully show that any and all materials, work or services which Defendant provided met all construction industry customs, practices, and standards applicable to the claims asserted in Plaintiffs' Third Amended Complaint, and Defendant exercised that degree of skill and care required of it by law at all times relevant to the matters complained of in Plaintiffs' Third Amended Complaint.

**FOR A THIRTY-FOURTH DEFENSE**  
**(Duties Alleged Beyond the Scope)**

110. Defendant would allege and show that the duties and obligations alleged are not within the scope of services which were provided by Defendant and such duties and obligations lie beyond the scope of services provided and, as such, constitute a complete defense to all claims for negligence.

**FOR A THIRTY-FIFTH DEFENSE**  
**(Conformity with Standard Instructions, Designs, Plans and Specifications)**

111. Defendant would respectfully show that the claims against it are barred by the *Spearin* doctrine and the work and/or services of Defendant met all construction industry customs, practices and standards applicable to Plaintiff's claims and/or conformed to the instructions, designs, plans, and specifications furnished by others, which were implicitly warranted to be complete and code-conforming. Further, the design and materials used in the construction of the

subject residence in question was developed, selected, and approved by Plaintiff and/or other Defendants, thereby relieving Defendant of any liability or responsibility for damages resulting from design deficiency or materials which may not have been suitable for incorporation into the subject residence.

**FOR A THIRTY-SIXTH DEFENSE**  
**(Substantial Compliance and Completion)**

112. Defendant would respectfully show that it substantially performed and complied with all requirements, contractual or otherwise, and standards in a reasonable manner.

**FOR A THIRTY-SEVENTH DEFENSE**  
**(No Indemnity Among Joint Tortfeasors)**

113. Defendant would respectfully show that Plaintiff was negligent, grossly negligent, willful, wanton, and reckless in the particulars set forth in the Plaintiffs' Third Amended Complaint, and the damages sustained by the Plaintiffs, if any, were due to and caused by and were the direct and proximate result of the negligence, gross negligence, recklessness, willfulness, and wantonness of Plaintiff, combining and concurring with the alleged negligence of Defendant (the existence of which is expressly denied), and therefore Plaintiff is at best a joint tortfeasor, and such constitutes a complete defense to any claim for indemnity.

**FOR A THIRTY-EIGHTH DEFENSE**  
**(Recovery Barred)**

114. Defendant would respectfully show that Plaintiff's claim for negligence is nothing more than attempted claim for equitable indemnity for which Plaintiff is not entitled to recover due to their own acts of independent negligence and wrongdoing.

**FOR A THIRTY-NINTH DEFENSE**  
**(Limitation on Punitive Damages)**

115. To the extent Plaintiff seeks punitive damages, Defendant would show that any award of punitive damages is subject to the limitations set forth in South Carolina Code §15-32-530.

**FOR A FORTIETH DEFENSE**  
**(Stoneledge Defense)**

116. Defendant would respectfully show that the causes of action for negligence, breach of contract and breach of express and implied warranties are nothing more than an additional claim for equitable indemnity and should be dismissed upon the reasoning of the South Carolina Court of Appeals following the decision of *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders FirstSource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) and *Stoneledge at Lake Keowee Owner's Association, Inc. v. Clear View Construction, LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015).

**FOR A FORTY-FIRST DEFENSE**  
**(Further Affirmative Defense)**

117. Defendant has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of Plaintiff's allegations. Defendant intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported injury or damage to Plaintiff as alleged in Plaintiff's Third Amended Complaint and gives notice of its intent to assert any further affirmative defense that its information-gathering process may indicate is supported by fact and law. Defendant thus reserves the right to amend this Answer and assert such defenses.

**FURTHER ANSWERING AND BY WAY OF CROSS-CLAIMS AGAINST  
TAMKO BUILDING PRODUCTS, LLC (“CROSS-CLAIM DEFENDANT”) DONNIX  
ALLEGES AS FOLLOWS:**

118. The Defendant repeats and reallege Paragraphs 1–117 above as though repeated herein verbatim.

119. Plaintiffs have filed suit against Defendant alleging damages caused by deficient construction services.

120. Defendant has denied all substantive allegations that were made against it.

121. Upon information and belief, Tamko Building Products, LLC (“Tamko”) contracted with Defendant to furnish all materials and other facilities required to facilitate the construction of the Subject Project, identified in Plaintiffs’ Third Amended Complaint.

122. This court has jurisdiction over the Crossclaims asserted because the claims asserted herein are so related to the claims in the original action within the court’s original jurisdiction that they form part of the same case or controversy.

**AS A FIRST CAUSE OF ACTION AGAINST CROSS-CLAIM DEFENDANT  
(Negligence/Gross Negligence)**

123. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of its Answer and Crossclaims as fully as if repeated verbatim herein.

124. To the extent Plaintiffs prove any negligence on behalf of Defendant, Tamko was negligent, careless and reckless in the design and or supply of the materials outlined above and incorporated into the residence at issue.

125. As a direct and proximate result of such negligence, carelessness and recklessness, Defendant has been damaged in the amount of any monies they are adjudged to owe Plaintiffs, or which they pay Plaintiffs in the settlement of Plaintiffs’ claims, plus the cost of investigating and defending this claim.

126. Upon information and belief, the Defendant is entitled to judgment for actual damages collectively or individually against Tamko in the amount of any monies they are adjudged to owe Plaintiff, or which they pay Plaintiff in the settlement of Plaintiff's claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

**AS A SECOND CAUSE OF ACTION AGAINST CROSS-CLAIM DEFENDANT**  
**(Products Liability - Breach of Warranty)**

127. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of its Answer and Crossclaims as fully as if repeated verbatim herein.

128. Tamko expressly and/or impliedly warranted to Defendant that all that any materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or specific purpose.

129. Crossclaim Defendants breached its implied and/or express warranties of merchantability, workmanlike service and/or fitness for a particular or intended purpose in the construction of the project.

130. As a result of these breaches of warranties, Defendant has incurred damage in the amount of any money they are adjudged to owe Plaintiffs, or which they pay Plaintiffs in the settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

131. Upon information and belief, Defendant is entitled to judgment against Crossclaim Defendants in the amount of any monies they are adjudged to owe Plaintiffs, or which they pay Plaintiffs in the settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, the defense and settlement of this claim.

**AS A THIRD CAUSE OF ACTION AGAINST CROSS-CLAIM DEFENDANT**  
**(Equitable Indemnity)**

132. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of its Answer and Crossclaims as fully as if repeated verbatim herein.

133. The damages alleged by Plaintiffs, if any, were due solely to the actions of Tamko and was not caused by any act or omission on the part of the Defendant. The damages alleged by Plaintiffs were due to the active and/or primary fault of Tamko or its authorized agents, servants or employees and, to the extent liability or damages are imposed against the Defendant, Defendant alleges its liability to Plaintiffs, if there is any at all, is only secondary or passive based on Cross-claim Defendants' conduct in relationship to Plaintiffs, and Plaintiffs' injuries were solely and proximately caused by the active or primary fault of Cross-claim Defendants.

134. Defendant pleads that the common law right of full legal and equitable indemnity exists in their favor against Tamko because Defendant is exposed to liability in this case, if at all, because of the primary wrongful acts and/or omissions of Tamko in which the Defendant did not join; that to the extent Plaintiffs recover against Defendant, Defendant alleges Tamko is, or may be, liable to Defendant for all or part of Plaintiffs' claims against Defendant; and that Tamko must indemnify Defendant for any judgment Plaintiffs obtain in this case, including all attorneys' fees and costs incurred in defending Plaintiffs' claims.

**AS A FOURTH CAUSE OF ACTION AGAINST CROSS-CLAIM DEFENDANT**  
**(Breach of Implied Contract)**

135. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of its Answer and Crossclaims as fully as if repeated verbatim herein.

136. Defendant subcontracted the services of Tamko to provide materials at the Subject Property.

137. Upon information and belief, Tamko was to provide construction materials and for the Residence that, among other things, would produce a quality building free from defects and otherwise in conformance with all contract documents, including all building codes and industry standards. Further, Tamko was to oversee and ensure the quality of its' construction materials.

138. Tamko breached the contract by failing to provide appropriate construction materials to the Residence, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all agreements, and failing to provide materials and services that were in conformity with all appropriate building codes and industry standards.

139. As a result of these breaches of implied contract, Defendant has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in the settlement of Plaintiffs' claims, plus the cost of investigating and defending this action.

**AS A FIFTH CAUSE OF ACTION AGAINST CROSS-CLAIM DEFENDANT**  
**(Contribution)**

140. Defendant re-alleges and fully incorporates by reference all preceding paragraphs of their Answer and Crossclaims as fully as if repeated verbatim herein

141. In the event that the Defendant is found liable to Plaintiffs, which is denied, then any such liability was joint and concurring with the liability of Tamko and Defendant is entitled to contribution, in whole or in part, from said Tamko as provided by law.

WHEREFORE, having fully responded to the allegations of the Plaintiffs' Third Amended Complaint, Defendant respectfully request that the Plaintiff's Third Amended Complaint be dismissed in its entirety, with all costs of this action to be cast upon the Plaintiffs. Further, Defendant prays for relief as follows:

1. For consequential and incidental damages, and any other damages available under the law, in an amount to be proven at trial;
2. For costs and, if allowed under applicable law, attorneys' fees; and
3. For such other relief as the Court may deem just and proper.

Respectfully submitted,

**RESNICK & LOUIS, P.C.**

/s/ Patrick J. McDonald

Patrick J. McDonald, Esq. (SC Bar # 16921)

Jessica W. Stratta, Esq. (SC Bar # 103958)

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*Attorneys for Defendant Donnix Construction Inc.*

May 10, 2022

Charleston, South Carolina

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

DENISE M. PETERSEN, individually and  
 as TRUSTEE OF THE DENISE M.  
 PETERSEN 2005 REVOCABLE TRUST  
 DATED NOVEMBER 9, 2005, as  
 TRUSTEE OF THE 601 OCEAN  
 BOULEVARD RESIDENCE TRUST  
 DATED NOVEMBER 30, 2012, and as  
 TRUSTEE OF THE 601 OCEAN  
 BOULEVARD RESIDENCE TRUST II  
 DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES  
 L.P., DONNIX CONSTRUCTION, LLC,  
 HUNT BROTHERS CONSTRUCTION,  
 INC., ISLAND EXTERIORS AND SIDING,  
 INC., PLASTERING SURFACES, LLC, A  
 UNIQUE DESIGN, INC. BERKELEY  
 HEATING AND AIR CONDITIONING,  
 INC., ENERGYONE AMERICA, LLC,  
 AQUA BLUE POOLS OF CHARLESTON,  
 INC., SUNNYSIDE FARMS, INC.,  
 TAMKO BUILDING PRODUCTS, LLC,  
 and JOHN DOE CONTRACTORS 2  
 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP-10-01973

**Defendant TAMKO Building Products,  
 LLC's Answer and Affirmative Defenses to  
 Plaintiff's Third Amended Complaint**

Defendant, TAMKO Building Products, LLC ("TAMKO"), hereby files this Answer and Affirmative Defenses in response to Plaintiff's Third Amended Complaint.

Each and every allegation in the Third Amended Complaint is expressly denied, except those specifically admitted.

**FOR A FIRST DEFENSE TO ALL CAUSES OF ACTION**

1. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 1, and therefore denies same.
2. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 2, and therefore denies same.
3. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 3, and therefore denies same.
4. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 4, and therefore denies same.
5. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 5, and therefore denies same.
6. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 6, and therefore denies same.
7. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 7, and therefore denies same.
8. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 8, and therefore denies same.
9. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 9, and therefore denies same.
10. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 10, and therefore denies same.
11. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 11, and therefore denies same.

12. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 12, and therefore denies same.

13. Responding to Paragraph 13, TAMKO admits only that it is a limited liability company organized and existing pursuant to the laws of the State of Missouri. TAMKO denies any allegations set forth in Paragraph 13 inconsistent with this limited admission.

14. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 14, and therefore denies same.

15. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 15, and therefore denies same.

16. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 16, and therefore denies same.

17. Paragraph 17 purports to state legal conclusions to which no response is required. However, TAMKO does not contest jurisdiction or venue in this matter.

18. Responding to Paragraph 18, TAMKO repeats and realleges its answers to the allegations of the Third Amended Complaint incorporated herein by reference as fully as if said answers were set forth herein verbatim.

19. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 19, and therefore denies same.

20. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations and legal conclusions in Paragraph 20, and therefore denies same.

21. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 21, and therefore denies same.

22. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 22, and therefore denies same.

23. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 23, and therefore denies same.

24. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 24, and therefore denies same.

25. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 25, and therefore denies same.

26. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 26, and therefore denies same.

27. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 27, and therefore denies same.

28. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 28, and therefore denies same.

29. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 29, and therefore denies same.

30. Answering Paragraph 30, TAMKO admits only that it manufactured and sold TAMKO TW Metal and Tile Underlayment and disseminated installation and application instructions with its product. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 30, and therefore denies same.

31. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 31, and therefore denies same.

32. Responding to Paragraph 32, TAMKO craves reference to the allegations set forth in the Third Amended Complaint and denies any allegations in Paragraph 32 inconsistent therewith.

33. Insofar as the allegations and legal conclusion in Paragraph 33 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 33 as they relate to other defendants.

34. Insofar as the allegations and legal conclusion in Paragraph 34 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 34 as they relate to other defendants.

35. Upon information and belief, TAMKO denies the allegations in Paragraph 35.

36. Insofar as the allegations and legal conclusion in Paragraph 36 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 36 as they relate to other defendants.

37. Responding to Paragraph 37, TAMKO craves reference to the allegations set forth in the Third Amended Complaint and denies any allegations in Paragraph 37 inconsistent therewith.

38. The allegations in Paragraph 38 are not directed at TAMKO, and TAMKO is without sufficient knowledge or information to form a belief as to their truth.

39. The allegations and legal conclusions in Paragraph 39 are not directed at TAMKO, and TAMKO is without sufficient knowledge or information to form a belief as to their truth.

40. The allegations and legal conclusions in Paragraph 40 are not directed at TAMKO, and TAMKO is without sufficient knowledge or information to form a belief as to their truth.

41. Insofar as the allegations in Paragraph 41, and its subparts (a) – (y), are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations in Paragraph 41 as they relate to other defendants.

42. Insofar as the allegations and legal conclusions in Paragraph 42 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 42 as they relate to other defendants.

43. Insofar as the allegations and legal conclusions in Paragraph 43 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 43 as they relate to other defendants.

44. Insofar as the allegations and legal conclusions in Paragraph 44 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 44 as they relate to other defendants.

45. Responding to Paragraph 45, TAMKO craves reference to the allegations set forth in the Third Amended Complaint and denies any allegations in Paragraph 45 inconsistent therewith.

46. Insofar as the allegations and legal conclusions in Paragraph 46 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or

information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 46 as they relate to other defendants.

47. Insofar as the allegations and legal conclusions in Paragraph 47 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 47 as they relate to other defendants.

48. The allegations and legal conclusions in Paragraph 48 are not directed at TAMKO, and TAMKO is without sufficient knowledge or information to form a belief as to their truth.

49. The allegations and legal conclusions in Paragraph 49 are not directed at TAMKO, and TAMKO is without sufficient knowledge or information to form a belief as to their truth.

50. Insofar as the allegations and legal conclusions in Paragraph 50 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 50 as they relate to other defendants.

51. Insofar as the allegations and legal conclusions in Paragraph 51 are directed at TAMKO, TAMKO denies those allegations. TAMKO is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations and legal conclusions in Paragraph 51 as they relate to other defendants.

52. Responding to Paragraph 52, TAMKO craves reference to the allegations set forth in the Third Amended Complaint and denies any allegations in Paragraph 52 inconsistent therewith.

53. TAMKO lacks sufficient knowledge or information to admit that it manufactured, marketed, sold and/or otherwise placed into the stream of commerce underlayment products that

were installed on Plaintiff's Residence, and therefore denies same. Insofar as Paragraph 53 alleges that TAMKO manufactured or supplied all of the underlayment on Plaintiff's Residence, TAMKO is without sufficient knowledge or information to form a belief as to the truth of such allegations.

54. TAMKO denies the allegations and legal conclusions set forth in Paragraph 54.

55. TAMKO denies the allegations and legal conclusions set forth in Paragraph 55, including subparts (a) – (g).

56. TAMKO denies the allegations and legal conclusions set forth in Paragraph 56.

57. TAMKO denies the allegations and legal conclusions set forth in Paragraph 57.

58. Responding to Paragraph 58, TAMKO craves reference to the allegations set forth in the Third Amended Complaint and denies any allegations in Paragraph 58 inconsistent therewith.

59. TAMKO admits the allegations set forth in Paragraph 59.

60. TAMKO lacks sufficient knowledge or information to admit that it manufactured the underlayment that was installed on Plaintiff's Residence, and therefore denies same. Insofar as the allegations and legal conclusions in Paragraph 60 alleges wrongdoing on the part of TAMKO, TAMKO denies those allegations and legal conclusions.

61. TAMKO denies the allegations and legal conclusions set forth in Paragraph 61.

62. TAMKO denies the allegations and legal conclusions set forth in Paragraph 62.

63. TAMKO denies the allegations and legal conclusions set forth in Paragraph 63.

64. TAMKO denies the allegations and legal conclusions set forth in Paragraph 64.

65. Responding to Paragraph 65, TAMKO craves reference to the allegations set forth in the Third Amended Complaint and denies any allegations in Paragraph 65 inconsistent therewith.

66. Responding to Paragraph 66, TAMKO lacks sufficient knowledge or information to admit that it manufactured the underlayment that was installed on Plaintiff's Residence, and therefore denies same.

67. Paragraph 67 purports to state legal conclusions to which no response is required. To the extent a response is required, TAMKO denies same and demands strict proof thereof.

68. TAMKO denies the allegations and legal conclusions set forth in Paragraph 68.

69. TAMKO denies the allegations and legal conclusions set forth in Paragraph 69.

70. TAMKO denies the allegations and legal conclusions set forth in Paragraph 70.

71. TAMKO denies the allegations and legal conclusions set forth in Paragraph 71.

72. TAMKO denies the allegations and legal conclusions set forth in Paragraph 72.

73. TAMKO denies the allegations and legal conclusions set forth in Paragraph 73.

74. Responding to the unnumbered paragraph, beginning with WHEREFORE, and its subparts (a) – (e), TAMKO denies Plaintiff is entitled to the relief requested therein.

#### **FOR A SECOND DEFENSE**

75. The Third Amended Complaint fails to state facts sufficient to constitute a cause of action against TAMKO.

#### **FOR A THIRD DEFENSE**

76. Plaintiff's claims against TAMKO are barred by all applicable statutory and contractual periods of limitation.

#### **FOR A FOURTH DEFENSE**

77. Plaintiff's claims against TAMKO are barred by the equitable doctrine of waiver.

#### **FOR A FIFTH DEFENSE**

78. Plaintiff's claims against TAMKO are barred by the equitable doctrine of laches.

**FOR A SIXTH DEFENSE**

79. Plaintiff's claims against TAMKO are barred by the TAMKO Limited Warranty agreement, which expressly provides for mandatory final and binding arbitration to resolve any and all claims against TAMKO "relating to or arising out of the product . . . whether the action sounds in warranty, contract, statute or any other legal or equitable theory."

**FOR A SEVENTH DEFENSE**

80. Plaintiff's claims against TAMKO are barred because Plaintiff's damages, if they exist at all, were the result of intervening and/or supervening negligent construction, installation, maintenance, and/or repair of Plaintiff's Resident by persons or parties other than TAMKO.

**FOR AN EIGHTH DEFENSE**

81. Plaintiff's claims against TAMKO are barred, or should be reduced, because Plaintiff failed to mitigate the claimed damages.

**FOR A NINTH DEFENSE**

82. The imposition of punitive damages would violate the equal protection, due process, and excessive finds clauses of the United States and South Carolina Constitutions. With respect to Plaintiff's demand for punitive damages, TAMKO specifically incorporates by reference all standards of limitations regarding the determination and enforceability of punitive damage award that arise in the decisions of *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 425 (2001); and *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

**FOR A TENTH DEFENSE**

83. Plaintiff fails to state any basis upon which punitive damages are recoverable against Nexton, and accordingly, Plaintiff's prayer for such damages should be dismissed and/or

stricken from the Complaint as they pertain to Nexton pursuant to Rule 12(b)(6) and/or 12(f) of the South Carolina Rules of Civil Procedure.

**FOR AN ELEVENTH DEFENSE**

84. Plaintiff's negligence, gross negligence, and strict product liability claims against TAMKO are barred by the economic loss rule.

**FOR A TWELFTH DEFENSE**

85. Plaintiff's implied warranty claims are expressly excluded by the terms of the TAMKO Limited Warranty.

**FOR A THIRTEENTH DEFENSE**

86. Plaintiff has suffered no damage as a result of the alleged acts or omissions of TAMKO.

**FOR A FOURTEENTH DEFENSE**

87. TAMKO has not completed its investigation into Plaintiff's allegations. TAMKO intends to act as best it can to inform itself of the pertinent facts and circumstances surrounding the events in question and hereby gives notice of its intent to amend this Answer, if necessary, and to assert any further affirmative defenses that may become appropriate in light of the continuing investigation.

**WHEREFORE**, having fully answered Plaintiff's Third Amended Complaint, TAMKO prays that the Third Amended Complaint be dismissed against it with costs, and for such other and further relief as the Court may deem just and proper.

*[Signature block on the following page.]*

Respectfully submitted,

**WILLIAMS MULLEN**

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Building Products, LLC*

|                                         |   |                                           |
|-----------------------------------------|---|-------------------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS              |
|                                         | ) | FOR THE NINTH JUDICIAL CIRCUIT            |
| COUNTY OF CHARLESTON                    | ) |                                           |
|                                         | ) |                                           |
| DENISE M. PETERSEN, individually and as | ) |                                           |
| TRUSTEE OF THE DENISE M. PETERSEN       | ) |                                           |
| 2005 REVOCABLE TRUST DATED              | ) |                                           |
| NOVEMBER 9, 2005, as TRUSTEE OF THE     | ) |                                           |
| 601 OCEAN BOULEVARD RESIDENCE           | ) |                                           |
| TRUST DATED NOVEMBER 30, 2012, and      | ) |                                           |
| as TRUSTEE OF THE 601 OCEAN             | ) |                                           |
| BOULEVARD RESIDENCE TRUST II            | ) |                                           |
| DATED DECEMBER 7, 2012,                 | ) |                                           |
|                                         | ) |                                           |
| Plaintiffs,                             | ) |                                           |
|                                         | ) |                                           |
| vs.                                     | ) | <b>Defendant TAMKO Building Products,</b> |
|                                         | ) | <b>LLC's Motion to Dismiss and Compel</b> |
|                                         | ) | <b>Arbitration</b>                        |
| DCTCL, L.P. d/b/a BUFFINGTON HOMES      | ) |                                           |
| L.P., DONNIX CONSTRUCTION, LLC,         | ) |                                           |
| HUNT BROTHERS CONSTRUCTION, INC.,       | ) |                                           |
| ISLAND EXTERIORS AND SIDING, INC.,      | ) |                                           |
| PLASTERING SURFACES, LLC, A             | ) |                                           |
| UNIQUE DESIGN, INC. BERKELEY            | ) |                                           |
| HEATING AND AIR CONDITIONING,           | ) |                                           |
| INC., ENERGYONE AMERICA, LLC,           | ) |                                           |
| AQUA BLUE POOLS OF CHARLESTON,          | ) |                                           |
| INC., SUNNYSIDE FARMS, INC., TAMKO      | ) |                                           |
| BUILDING PRODUCTS, LLC, and JOHN        | ) |                                           |
| DOE CONTRACTORS 2 THROUGH 50,           | ) |                                           |
|                                         | ) |                                           |
| Defendants.                             | ) |                                           |

Defendant TAMKO Building Products, LLC ("TAMKO") hereby moves, pursuant to Rule 12, SCRCF, for an order dismissing and compelling arbitration of Plaintiff's claims and Co-Defendant Donnix Constriction, LLC's ("Donnix") crossclaims against TAMKO.

### **Facts**

Plaintiff has sued an array of contractors, subcontractors, and construction materials manufacturers for various alleged defects in the construction of her beach home. *See* 3d. Am.

Compl. Plaintiff has sued roofing subcontractor Donnix based on her belief that the roofing system of the property is defectively installed. *Id.* ¶¶ 4, 21, 41(q), 45-51. Plaintiff has sued TAMKO, a roofing materials manufacturer, under product liability theories of negligence/gross negligence, strict liability, and breach of warranty, based on her belief that Donnix installed defective “TAMKO TW Metal and Tile Underlayment” (the “underlayment”). *Id.* ¶¶ 52-73. Donnix has asserted crossclaims against TAMKO. *See* Donnix Ans. to 3d. Am. Compl. ¶¶ 53-76. TAMKO denies that the underlayment is defective.

The underlayment was sold with a limited warranty that included an express arbitration provision requiring all disputes related to the underlayment be submitted to mandatory binding arbitration. Exh. A, TAMKO Warranty, p. 2. Specifically, the warranty provides:

**MANDATORY BINDING ARBITRATION:**

EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN “ACTION”) BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO’S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT [www.adr.com](http://www.adr.com) OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

Exh. A (Bold and capitals in original).

The Court of Appeals of South Carolina has held that this arbitration provision is enforceable in residential-consumer/subcontractor cases such as this one. *See One Belle Hall Property Owners Association, Inc. v. Trammel Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286

(Ct. App. 2016). Plaintiff's claims and Donnix's crossclaims against TAMKO "relate to" the underlayment, and as such, the arbitration provision applies to these claims. Neither Plaintiff nor Donnix have initiated arbitration in accordance with this provision. TAMKO requests the Court issue an order dismissing Plaintiff's claims and Donnix's crossclaims, and individually compelling these parties to initiate arbitration of their claims.

### **Law**

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *One Belle Hall*, 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App. 2016) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). "Unless the parties have contracted otherwise, the Federal Arbitration Act (FAA) applies in federal or state courts to any arbitration agreement involving interstate commerce." *Id.* at 59-60, 791 S.E.2d at 291 (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). "The FAA provides that a written arbitration provision in a contract involving interstate commerce 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 60, 791 S.E.2d at 291 (citing 9 U.S.C. § 2 (2012)). "General contract principles of state law apply to arbitration clauses governed by the FAA." *Id.* (citing *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364).

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Id.* (quoting *Zabinski*, at 596, 553 S.E.2d at 118)). As the South Carolina Court of Appeals has succinctly explained, state policy is in harmony with this federal goal: "South Carolina favors arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

## Argument

### **I. The FAA Applies Because the Transaction Involved Interstate Commerce**

Absent a contrary agreement, “the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.”<sup>1</sup> *One Belle Hall*, at 59-60, 791 S.E.2d at 291 (citing *Munoz*, at 538, 542 S.E.2d at 363). “[I]nvolving commerce’ is the same as ‘affecting commerce,’ which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent.” *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct.App.2002). There are “three categories of activity that Congress can regulate pursuant to the Commerce Clause, namely: “(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) those activities having a substantial effect on interstate commerce.” *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003) (citing *Selma Med. Ctr., Inc. v. Fontenot*, 824 So. 2d 668, 674 (Ala. 2001)). “To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117.

TAMKO, is a Delaware-based limited liability company, with its principal place of business in Missouri. *See* Exh. B, Affidavit of G. Ross, ¶ 3. TAMKO has several manufacturing facilities across the country, none of which are located in South Carolina. *Id.* ¶ 4. The

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<sup>1</sup> South Carolina has its own Arbitration Act, but insofar as the provisions of that statute would invalidate an arbitration agreement involving interstate commerce, the FAA preempts such provisions. *Blanton v. Stathos*, 351 S.C. 534, 539-40, 570 S.E.2d 565, 567-68 (Ct. App. 2002); *see also Concepcion*, 31 S.Ct. 1740. Thus, although the South Carolina Arbitration Act has certain notice requirements for arbitration provisions, a failure to meet those requirements does not invalidate an arbitration agreement that is governed by the FAA. *Blanton*, at 539-40, 570 S.E.2d at 567-68; *see also Zabinski*, at 590-96, 553 S.E.2d at 115-18.

underlayment at issue is manufactured in Joplin, Missouri. *Id.* ¶ 6. TAMKO sells the underlayment to distributors but not to the general public. *Id.* ¶ 5. Distributors who wish to purchase the underlayment must submit a purchase order to TAMKO's Customer Services Department in Joplin, Missouri. *Id.* ¶ 6. When TAMKO receives an order for the underlayment, the product is packaged in Joplin, Missouri and shipped to the distributor's location. *Id.* Underlayment purchased by distributors in South Carolina are transported across state lines by way of interstate highway. *Id.* Upon delivery of the underlayment, the distributor submits payment for the product to TAMKO's Accounts Receivable Department, which is located in Joplin, Missouri. *Id.*

Upon information and belief, Donnix purchased the underlayment from a distributor in South Carolina and installed the underlayment on a residential property in South Carolina. The sale of the underlayment involved channels and instrumentalities of interstate commerce to transport the product, was an object in interstate commerce, and directly affected interstate commerce. As such, the FAA applies in this case. *Munoz*, 343 S.C. at 538-39, 542 S.E.2d at 363; *Lucey*, 401 S.C. at 134-35, 736 S.E.2d at 280 (surveying South Carolina cases considering the issue of interstate commerce for FAA purposes).

## **II. The Arbitration Agreement is Mutually Binding on the Parties Under South Carolina Contract Law**

Whether there has been an agreement to arbitrate is governed by ordinary principles of state contract law. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy in favor of arbitration." *Id.* 338 S.C. at 37, 524 S.E.2d at 844 (internal citations omitted).

[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of

waiver, delay, or a like defense to arbitrability. *Motion to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.*

*Id.* 338 S.C. at 41-42, 524 S.E.2d at 846 emphasis added).

Because the arbitration clause is a part of a contractual warranty involving a sale of goods, it is governed by South Carolina's Commercial, S.C. Code Ann. §§ 36-2-313 through 318. As it pertains to Plaintiff's claims, § 36-2-318 provides that "[a] seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." The South Carolina Supreme Court has explained that "[t]he plain language of the foregoing section dispenses with the necessity of privity as to any natural person who may be expected to use, consume or be affected by the product, and extends third party beneficiary protection to this class of person[.]" *Gasque v. Eagle Mach. Co., Ltd.*, 270 S.C. 499, 503, 243 S.E.2d 831, 832 (1978). Plaintiff can be "expected" to be "affected" by the underlayment on her roof, and thus, by statute, the TAMKO warranty provides her the possibility of recovery, regardless of whether she directly contracted with TAMKO. Plaintiff's claims seek to avail Plaintiff of the benefits of this statute. Other than the sale of the underlayment, Plaintiff has not alleged any relationship exists between herself and TAMKO from which a legal duty by TAMKO might arise. As such, Plaintiff's claims arise solely from the underlayment's contractual warranty, and thus the legal relationship between Plaintiff and TAMKO is controlled by the language of the warranty.

As to Donnix's crossclaims, Donnix is a party to the contractual warranty because it was the actual purchaser-for-use of the TAMKO underlayment. Other than the sale of the underlayment, Donnix does not allege that it has any relationship with TAMKO from which a

separate legal duty might arise. To this extent, any duty Donnix asserts TAMKO breached, thereby giving rise to liability, necessarily arose out of the sale of the underlayment.

Based on the above, Plaintiff's claims and Donnix's crossclaims against TAMKO are governed by the language of the contractual warranty, which is clear and unambiguous: "*EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER . . . BETWEEN YOU AND TAMKO . . . RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY.*" Exh. A (capitals in original, emphasis added). All claims against TAMKO in this case "relate to" the underlayment at the heart of this provision.

Plaintiffs and Donnix have an avenue for recovery against TAMKO that is exclusive of this lawsuit. As such, their remedies must be sought according to the terms of the warranty. Those terms unambiguously require that all disputes related to the underlayment be addressed through arbitration.

### **Conclusion**

Both South Carolina and the United States favor the enforcement of arbitration agreements. The terms of the agreement at issue are unambiguous and apply to Plaintiff's claims and Donnix's crossclaims against TAMKO. TAMKO respectfully moves for an order dismissing TAMKO from the present action, tolling Plaintiff's and Donnix's statute of limitations for these claims against TAMKO pending the outcome of arbitration<sup>2</sup>, and compelling Plaintiff and Donnix to individually arbitrate their claims against TAMKO.

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<sup>2</sup> *In Widener v. Ford Mill Ford*, a defendant sought to enforce an arbitration agreement by way of a motion to dismiss or stay the trial court's proceedings and to compel arbitration. 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009). The trial court dismissed by the Court of Appeals reversed and remanded for entry of an order staying the action, reasoning that the dismissal had the potential to

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May 11, 2022  
Columbia, SC

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create statute of limitations issues in the even that the arbitration failed to dispose of all the claims. *Id.* However, a more recent Court of Appeals affirmed a trial court's grant of a motion to dismiss and compel arbitration. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013). Because of the breadth of the arbitration clause in the instant case, there is no *Widener*-like potential that the arbitration will not address all of the potential claims, so dismissal is appropriate, but an order tolling the statute of limitations while the arbitration is pending will in any event address the concerns discussed in that case.



## TAMKO WATERPROOFING, FENESTRATION FLASHINGS, UNDERLAYMENTS AND ACCESSORIES FIVE YEAR LIMITED MATERIAL WARRANTY (A LIMITED WARRANTY)

For a complete list of products covered under this  
limited warranty - see reverse side.

**This limited warranty is personal to the original owner and  
is not assignable or transferable under any circumstances**

**THIS LIMITED WARRANTY APPLIES ONLY TO PRODUCTS INSTALLED IN THE UNITED STATES (EXCLUDING HAWAII AND ALASKA) AND CANADA (EXCLUDING QUEBEC AND NEW BRUNSWICK). ALL PRODUCTS INSTALLED IN LOCATIONS WHERE THIS LIMITED WARRANTY DOES NOT APPLY ARE SOLD "AS IS" AND WITHOUT WARRANTY OF ANY KIND, INCLUDING ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

### TERMS AND CONDITIONS

**TAMKO BUILDING PRODUCTS, INC.** ("TAMKO"), warrants to the original consumer purchaser (the "Owner") that, subject to the conditions set forth herein, for a period of five (5) years from the date of purchase (the "Term") for the TAMKO product identified below ("Product"), if manufacturing defects in the Product cause the Product to lose its watertight integrity and leaks result, then subject to the conditions, exclusions and other provisions detailed below, TAMKO, at its sole option, will either (1) refund the original purchase price of the Product; or (2) provide the amount of Product necessary to make repairs. This limited warranty does not cover any cost or expenses associated with removal, excavation, or replacement of concrete or other materials in connection with the testing, repair, removal, or replacement of the Product. **This limited warranty applies to Product applied in strict accordance with, and as part of, TAMKO published application instructions in effect at the time of the application. This Product is sold AS IS and without warranty of any kind when used in any other application.**

### CONDITIONS TO WARRANTY COVERAGE:

This limited warranty is additionally specifically conditioned upon the following matters, each and all of which shall be a precondition to any of TAMKO's obligations hereunder:

- PROOF OF PURCHASE:** Claims under this limited warranty will require proof of purchase by the Owner. TAMKO shall not be responsible for any claims without such proof of purchase.
- NOTIFICATION TO TAMKO:** Within thirty (30) days following discovery of any leaks alleged to result directly from manufacturing defects, the Owner must notify TAMKO of such leaks by certified mail at P.O. Box 1404, Joplin, Missouri 64802.
- COMPLIANCE WITH TAMKO INSTRUCTIONS, RECOMMENDATIONS AND LIMITED WARRANTY:** In no event shall TAMKO be liable under this limited warranty or otherwise unless the Product has been stored, handled, installed and maintained in compliance with TAMKO's application instructions, specifications and recommendations, and unless all of the terms and provisions of this limited warranty have been complied with.
- BUILDING AND STRUCTURE PLANS:** Because TAMKO does not practice engineering or architecture, neither the issuance of this limited warranty nor any review or inspection of the building, structure, plans, specifications or construction by a TAMKO representative shall constitute any warranty or representation by TAMKO with respect to the building, structure, plans, specifications or construction or in any way constitute an extension of the terms and conditions of this limited warranty. **ALL SUCH WARRANTIES AND REPRESENTATIONS ARE EXPRESSLY DISCLAIMED.**
- NONWAIVER:** The Owner agrees that any post application inspection of the Product by TAMKO or its authorized representative shall not constitute a waiver of any terms, conditions, or limitations set forth in this limited warranty, including, but not limited to, the requirement that the Product be installed in full compliance with the terms and conditions set forth in TAMKO's most recent published application instructions, specifications and recommendations. **FURTHER, THE OWNER HEREBY ACKNOWLEDGES THAT IT IS SOLELY THE OWNER'S RESPONSIBILITY TO DETERMINE THAT THE PRODUCT HAS BEEN INSTALLED IN COMPLIANCE WITH (I) ANY CONTRACT SPECIFICATIONS PROVIDED BY THE OWNER TO THE CONTRACTOR AND (II) THE TERMS AND CONDITIONS OF THIS LIMITED WARRANTY.**

### EXCLUSIONS FROM COVERAGE: TAMKO shall not be liable under any circumstances for:

- Damage to any building or structure, either exterior or interior, or any property contained therein or for injuries or damages of any kind whatsoever.
- Leaks or damages resulting from Acts of God including, but not limited to, lightning, flood, wind, earthquake, hurricane, tornado, hail or other violent storm or casualty or impact of objects.
- Leaks or damages resulting from insurrection, war, riot or vandalism, exposure of the Product to ionized radiation or contamination by radioactivity from any nuclear source, or chemical attack on the Product as the result of exposure to chemicals including, but not limited to, aliphatic or aromatic solvents, chlorinated hydrocarbons, turpentine, oils, or organic or inorganic polar materials.
- Inadequate drainage or leaks or damages resulting there from.
- Structural defects or failures in the building(s) or structure(s) to which the Product is applied.
- Building or structural expansion or additions or reductions, settling, shifting, distortion, failure or cracking of foundations or other system components exceeding 1/16" or leaks or damage caused or attributable to traffic, or for damage attributable to alterations.
- Leaks or damage resulting from any additional installation on or through the Product or flashing after the the initial installation that is not consistent with TAMKO application instructions.
- Repairs or alterations to the Product or other system components or leaks or damages resulting there from, after the initial installation unless done in a manner prescribed by TAMKO application instructions.
- Infiltration or condensation of moisture around or under the foundation or other system components.
- Splitting, cracking, blistering, delamination or separation of the Product due to underlying or overlying materials.
- Misuse or abuse of the Product or leaks or damages resulting there from.
- Faulty or improper workmanship or application of the Product or leaks or damages resulting there from.
- Damages to the building or structure, its contents, foundation, or other system components.
- Removal, excavation, or replacement of concrete or other materials in connection with the testing, repair, removal, or replacement of the Product.
- Leaks from any cause other than inherent manufacturing defect in the Product.

### RIGHT OF INSPECTION:

TAMKO shall have a reasonable time after notification of a leak to inspect the Product, and if TAMKO determines there are manufacturing defects covered by this limited warranty, TAMKO shall have ninety (90) days after receipt of notification to either (1) refund the purchase price of the Product or (2) provide the amount of replacement Product necessary to make repairs. TAMKO shall not be liable for any cost of repair other than as specifically set forth herein.

**NO WARRANTY MODIFICATION:**

This limited warranty may not be modified except in a writing signed by TAMKO's President. No representative, employee, agent of TAMKO or any person, other than the President of TAMKO, has any authority to assume for TAMKO any additional or other liability or responsibility in connection with the Product or this limited material warranty.

**NON-TRANSFERABILITY:**

This limited warranty shall accrue and inure only to the benefit of the Owner of the Product and shall not be assigned, sold, or transferred in any manner whatsoever. Except where prohibited by law, any assignment, sale or transfer of this limited warranty or of the building to which the Product is applied shall extinguish all obligations of TAMKO contained herein or hereunder and all implied warranties and conditions including warranties and conditions of merchantability and fitness for a particular purpose.

**MANDATORY BINDING ARBITRATION:**

EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT [www.adr.com](http://www.adr.com) OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P. O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

**LEGAL REMEDIES: EXCEPT WHERE PROHIBITED BY LAW, THE OBLIGATION CONTAINED IN THIS LIMITED WARRANTY IS EXPRESSLY IN LIEU OF ANY AND ALL OTHER OBLIGATIONS GUARANTEES, WARRANTIES AND CONDITIONS EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY OTHER OBLIGATION OR WARRANTY ON THE PART OF TAMKO. IN NO EVENT SHALL TAMKO BE LIABLE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY KIND.** SOME STATES AND PROVINCES DO NOT ALLOW EXCLUSION OR LIMITATION OF IMPLIED WARRANTIES AND CONDITIONS OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU. NO ACTION FOR BREACH OF THIS LIMITED WARRANTY OR ANY OTHER ACTION RELATING TO OR ARISING OUT OF THE PRODUCT, ITS PURCHASE OR THIS TRANSACTION SHALL BE BROUGHT LATER THAN ONE YEAR AFTER ANY CAUSE OF ACTION HAS ACCRUED. IN JURISDICTIONS WHERE STATUTORY CLAIMS OR IMPLIED WARRANTIES AND CONDITIONS CANNOT BE EXCLUDED, ALL SUCH STATUTORY CLAIMS, IMPLIED WARRANTIES AND CONDITIONS AND ALL RIGHTS TO BRING ACTIONS FOR BREACH THEREOF EXPIRE ONE YEAR (OR SUCH LONGER PERIOD OF TIME IF MANDATED BY APPLICABLE LAWS) AFTER THE DATE OF PURCHASE. SOME STATES AND PROVINCES DO NOT ALLOW LIMITATIONS ON HOW LONG IMPLIED WARRANTIES AND CONDITIONS LAST, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. THIS LIMITED WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE AND PROVINCE TO PROVINCE. Invalidity or unenforceability of any provision herein shall not affect the validity or enforceability of any other provision, all of which shall remain in full force and effect.

Material purchased from \_\_\_\_\_

TAMKO product applied:

- ☐ TW 60
- ☐ TW Window & Door Flash
- ☐ TW Moisture Wrap
- ☐ TW Flash-N-Wrap®-25
- ☐ TW Flash-N-Wrap®-40
- ☐ TW Thru-Wall Flashing Membrane
- ☐ TW Metal and Tile Underlayment
- ☐ Moisture Guard Plus®
- ☐ TW Underlayment
- ☐ TWM-1 Mastic
- ☐ TWP-1 Quick Dry Primer\*
- ☐ TWP-2 Water-Based Primer\*

\_\_\_\_\_  
Owner

\_\_\_\_\_  
Contractor's Name

\_\_\_\_\_  
Contractor's Address

\_\_\_\_\_  
City, State and Zip

\_\_\_\_\_  
Date of Application

\*This limited warranty applies to TAMKO's primer products when they are used in conjunction with another TAMKO product listed above.

Retain this limited warranty with the contractor's receipt for future reference.



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as  
 TRUSTEE OF THE DENISE M. PETERSEN  
 2005 REVOCABLE TRUST DATED  
 NOVEMBER 9, 2005, as TRUSTEE OF THE  
 601 OCEAN BOULEVARD RESIDENCE  
 TRUST DATED NOVEMBER 30, 2012, and  
 as TRUSTEE OF THE 601 OCEAN  
 BOULEVARD RESIDENCE TRUST II  
 DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES  
 L.P., DONNIX CONSTRUCTION, LLC,  
 HUNT BROTHERS CONSTRUCTION, INC.,  
 ISLAND EXTERIORS AND SIDING, INC.,  
 PLASTERING SURFACES, LLC, A  
 UNIQUE DESIGN, INC. BERKELEY  
 HEATING AND AIR CONDITIONING,  
 INC., ENERGYONE AMERICA, LLC,  
 AQUA BLUE POOLS OF CHARLESTON,  
 INC., SUNNYSIDE FARMS, INC., TAMKO  
 BUILDING PRODUCTS, LLC, and JOHN  
 DOE CONTRACTORS 2 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

**Affidavit of Gerry Ross**

Personally appeared before me, Gerry Ross, who being duly sworn did state as follows:

1. My name is Gerry Ross. I have been employed by TAMKO Building Products, LLC, ("TAMKO") since 1992. I have over 50 years of experience in the roofing industry. I am currently employed as a Technical Systems Specialist. As a Technical Systems Specialist, my duties include, but are not limited to, inspecting the roofing materials and installation work on residential and

commercial roofing systems as well as evaluating application instructions, technical specifications and testing of residential and commercial roofing systems.

2. I am over the age of 18 and have personal knowledge of and am competent to testify about the matters addressed in this Affidavit. The following information is true and correct, to the best of my knowledge and belief.

3. TAMKO is a limited liability company formed under the laws of Delaware. TAMKO's members reside in various states. TAMKO's principal place of business is located in Joplin, Missouri.

4. TAMKO has no manufacturing facilities, warehouse facilities, or distribution centers in South Carolina.

5. TAMKO products are sold to independent distributors around the country. Distributors then sell the products to roofing contractors. TAMKO does not sell products directly to consumers. Distributors purchase TAMKO products by placing purchase orders with TAMKO's Customer Services Department in Joplin, Missouri. Distributors submit payment for the products to TAMKO's Accounts Receivable Department in Joplin, Missouri.

6. The TAMKO product at issue, TW Metal and Tile Underlayment, is manufactured at a facility in Joplin, Missouri. Distributors who wish to purchase the product must submit a purchase order to TAMKO's Customer Services Department in Joplin, Missouri. When TAMKO receives an order for the underlayment, the product is packaged in Joplin, Missouri and shipped to the distributor's location. Underlayment purchased by distributors for resale in South Carolina are transported across state lines by way of interstate highway. Upon receipt, the distributor submits payment for the product to TAMKO's Accounts Receivable Department, which is also in Joplin, Missouri.

7. As is the case with any TAMKO product sold into South Carolina, the sale of the underlayment at issue necessarily involved both the product and payment crossing state lines, because there are no TAMKO manufacturing facilities, warehouse facilities, or distribution centers in the state.

8. The TAMKO underlayment at issue was sold with a Limited Warranty, the terms of which are available to customers at the time of sale on TAMKO's website and printed on the wrapper of each package of underlayment. *See* Exh. A, TAMKO Limited Warranty. This Limited Warranty expressly provides that:

**MANDATORY BINDING ARBITRATION:**

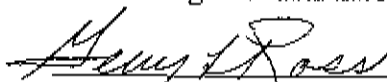
EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT [www.adr.com](http://www.adr.com) OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

*Id.* p. 2 (emphasis in original). The Limited Warranty includes provisions explaining the steps necessary to initiate arbitration.

9. TAMKO does not have records evidencing the direct sale of underlayment in relation to the property at issue in this case, located at 45 Eugenia Ave., Kiawah Island, South Carolina.

10. TAMKO has not received warranty claims related to this property and so has not opened a warranty claim file for this property.

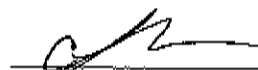
11. On September 14, 2021, Plaintiff filed her Second Amended Complaint in the case of *Petersen v. DCTCL, L.P.*, CA No. 2021-CP-10-1973, in which she asserted claims against TAMKO centered on allegations that the underlayment at issue was defective. On September 24, 2021, Co-Defendant Donnix Construction, LLC, filed its Answer to Plaintiff's Second Amended Complaint and Crossclaims Against TAMKO, in which it asserted several crossclaims against TAMKO centered on allegations that the underlayment at issue was defective. To TAMKO's knowledge, these parties have not initiated arbitration against TAMKO for these claims.

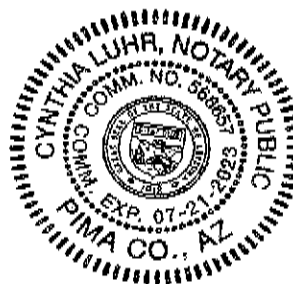


Gerry Ross  
TAMKO Building Products, LLC

SWORN TO BEFORE ME

This 22 days of November, 2021

  
Notary Public for Pima County  
My Commission Expires: 07-21-2023



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as TRUSTEE OF THE DENISE M. PETERSEN 2005 REVOCABLE TRUST DATED NOVEMBER 9, 2005, as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST DATED NOVEMBER 30, 2012, and as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST II DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES, L.P., DONNIX CONSTRUCTION, LLC, HUNT BROTHERS CONSTRUCTION, INC., ISLAND EXTERIORS AND SIDING, INC., PLASTERING SURFACES, LLC, A UNIQUE DESIGN, INC., BERKELEY HEATING AND AIR CONDITIONING, INC., ENERGYONE AMERICA, LLC, AQUA BLUE POOLS OF CHARLESTON, INC., SUNNYSIDE FARMS, INC., TAMKO BUILDING PRODUCTS, LLC, HADDIGAN ELECTRICAL CONTRACTORS, LLC and JOHN DOE CONTRACTORS 3 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-10-01973

**DONNIX CONSTRUCTION, LLC'S  
MEMORANDUM IN OPPOSITION TO  
TAMKO BUILDING PRODUCTS,  
LLC'S MOTION TO DISMISS AND  
COMPEL ARBITRATION**

Defendant Donnix Construction, LLC, (hereinafter "Donnix") respectfully submits this Memorandum in Opposition to Defendant Tamko Building Products LLC's (hereinafter "Tamko") Motion to Dismiss and Compel Arbitration ("Motion to Compel Arbitration").

**FACTS**

This is a construction defect case in which Plaintiffs, Denise M. Petersen, Individually and A Trustee Of The Denise M. Petersen 2005 Revocable Trust Dated November 9, 2005, As Trustee

Of The 601 Ocean Boulevard Residence Trust Dated November 30, 2012, and As Trustee Of The 601 Ocean Boulevard Residence Trust II Dated December 7, 2012, (“Plaintiffs”) allege various defects and deficiencies in relation to the construction of their single-family residence (“the Residence”) located in Charleston County, South Carolina. Plaintiff entered a contract with DCTCL, L.P. d/b/a Buffington Homes, L.P. (“Buffington”) to build her Residence. Donnix acted as a subcontractor for the construction to the Residence. Specifically, Buffington entered a contract with Donnix to install the roof and related flashings and waterproofing. Donnix installed roofing underlayment manufactured by Tamko. Specifically, Donnix installed Tamko TW Metal & Tile Underlayment on Plaintiff’s residence.

Plaintiff alleges the Residence is extensively damaged by construction defects and filed suit against Buffington, Donnix, Tamko, and all other subcontractors involved in the construction of the Residence. These defects include failing underlayment that was manufactured by Tamko. Specifically, the underlayment has melted and is dripping out from under the shingles, forming what looks like stalactites around the perimeter of the roof. Accordingly, Donnix filed a Crossclaim against Tamko asserting causes of action of negligence/gross negligence, strict liability, and breach of warranty. However, Tamko asserts Donnix is bound by an arbitration clause subject to the Federal Arbitration Act, contained within a limited warranty it produced as Exhibit One to its’ Memorandum in Support of its Motion to Compel Arbitration.

### **STANDARD**

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). If one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement exists. If the agreement does not

exist, the court must deny any application to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. *Simpson*, 373 S.C. at 25, 644 S.E. 2d at 688 (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

## **ARGUMENT**

### **I. Donnix Did Not Enter a Contact with Tamko Submitting Claims to Arbitration**

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (“[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate.”). South Carolina law requires that “in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009).

Here, Donnix and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko's limited warranty attached as Exhibit One to its' Memorandum in Support of its' Motion to Compel Arbitration. However, Tamko fails to establish that the limited warranty was part of an enforceable agreement between Donnix, as it is not signed by any parties. Further, the limited warranty does not even specify what Tamko product it applies to. The section on the warranty where the applicable product should have been listed is left blank, further rendering the arbitration clause contained within the limited warranty as unenforceable. There is no ascertainable way to establish the limited warranty Tamko references even pertains to the construction of Plaintiffs' residence.

Moreover, an almost identical motion was filed by Tamko in the 10<sup>th</sup> Circuit, in *Nelson v. Tamko Building Prods., Inc.*, 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). In this case, Tamko filed a Motion to Compel Arbitration of Plaintiffs' claims citing there was a binding arbitration clause in the limited warranty attached to the shingles installed on the residence. *Id.* Here, the court determined Tamko failed to establish that the limited warranty was part of an enforceable agreement between the Plaintiffs and Tamko because it was unauthenticated. Accordingly, Tamko's motion was denied. *Id.* at 4. Similarly in this case, Tamko has merely attached the unauthenticated and unexecuted limited warranty to its Memorandum in support of its' Motion to Compel Arbitration to attempt to assert there has been a meeting of the minds between Donnix and Tamko regarding an arbitration agreement. However, this is not sufficient to prove a meeting of the minds occurred, as the warranty is wholly unexecuted and does not specify the applicable Tamko product the warranty pertains to. Tamko has not submitted evidence

sufficient to establish an enforceable agreement to arbitrate, therefore Donnix cannot be compelled to arbitration.

## **II. The Federal Arbitration Act is Inapplicable Because There is Not a Valid and Enforceable Agreement Between Donnix and Tamko**

The Federal Arbitration Act (the “FAA applies”) when the party seeking arbitration can demonstrate “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.” *Am. Gen. Life & Accident Ins. CO. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005). In determining whether the FAA applies, the initial inquiry to be made by the court is whether an arbitration agreement exists between the parties. *The Housing Authority of City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003). Arbitration is a matter of contract and the evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

As previously discussed, there was no meeting of the minds between Donnix and Tamko regarding the arbitration clause. Since the FAA is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause does not meet the requirements of the FAA and cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko and Donnix regarding arbitration. Accordingly, Tamko’s Motion to Compel Arbitration should be denied as matter of law.

### III. **Donnix Be Compelled to Arbitration Due to Concerns for Expedience or Judicial Economy**

The Court should not simply enforce their own views of judicial economy and efficiency on the parties where there has been no agreement to arbitrate. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (internal citations omitted) (“The FAA, both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and not to substitute its own views of economy and efficiency for those of Congress.”). There must be a valid agreement to arbitrate, even if the outcome results in bifurcated proceedings. *Id.*, 470 U.S. at 221.

South Carolina has held that courts cannot refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 71, 620 S.E.2d 86, 90 (Ct. App. 2005). The inverse of *Dean Witter Reynolds, Inc.* and *Wellman, Inc.* should also be true. If a court cannot deny a motion to compel arbitration where a valid provision exists for reasons of judicial economy, then a court should not be able to require a party to arbitrate claims where no agreement to arbitrate exists. After all, “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). While this may result in litigation and arbitration of “intertwined issues”, “[a]ny inefficiency or risk of inconsistent results is a consequence of the parties’ bargaining.” *Wellman, Inc.* 366 S.C. at 70, 620 S.E.2d at 91. Otherwise, a party could compel anyone into arbitration, despite the absence of a valid arbitration provision, simply by including a party in the suit that is subject to a valid arbitration agreement. *See Id.* at 70–71, 620 S.E.2d at 91.

Here, it is evident Donnix never entered an agreement to submit its’ claims against Tamko to arbitration. Since there is no valid arbitration agreement between Donnix and Tamko, it would

hinder judicial economy to compel Donnix to arbitration. Therefore, Tamko's Motion to Compel Arbitration should be denied as matter of law.

**CONCLUSION**

For the reasons set forth above, Donnix respectfully asks this Court to deny Tamko's Motion to Dismiss and Compel Arbitration.

Respectfully submitted,

**RESNICK & LOUIS, P.C.**

*/s/ Patrick J. McDonald*

Patrick J. McDonald, Esq. (SC Bar # 16921)

Jessica W. Stratta, Esq. (SC Bar # 103958)

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Charleston, South Carolina 29492

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[jstratta@rlattorneys.com](mailto:jstratta@rlattorneys.com)

*Attorneys for Defendant Donnix Construction Inc.*

May 20, 2022

Charleston, South Carolina

Plaintiff, Denise M. Petersen, Individually and A Trustee Of The Denise M. Petersen 2005 Revocable Trust Dated November 9, 2005, As Trustee Of The 601 Ocean Boulevard Residence Trust Dated November 30, 2012, and As Trustee Of The 601 Ocean Boulevard Residence Trust II Dated December 7, 2012, (hereinafter "Plaintiff") respectfully submits this Memorandum in Opposition to Defendant Tamko Building

Products LLC's (hereinafter "Tamko") Motion to Dismiss and Compel Arbitration ("Motion to Compel Arbitration").

### **FACTS**

This is a construction defect case in which Plaintiff alleges various defects and deficiencies in relation to the construction of her single-family residence ("the Residence") located in Charleston County, South Carolina. Plaintiff entered into a contract with DCTCL, L.P. d/b/a Buffington Homes, L.P. ("Buffington") to build her Residence. Donnix Construction, LLC (hereinafter "Donnix") served as a subcontractor to Buffington for certain labor and materials for the construction of the Residence. Specifically, as it relates to this motion, Buffington entered a contract<sup>1</sup> with Donnix to install the roof and related flashings and waterproofing<sup>2</sup>. Donnix installed roofing underlayment manufactured by Tamko. Specifically, Donnix installed Tamko TW Metal & Tile Underlayment on the roof of Plaintiff's Residence as a subcontractor to Buffington.

Plaintiff alleges the Residence is extensively damaged by construction defects and filed suit against Buffington, Donnix, Tamko, and other subcontractors involved in the construction of the Residence. The defects alleged include failing underlayment that was manufactured by Tamko. Specifically, the underlayment has melted and is dripping out from under the shingles, forming what looks like stalactites around the perimeter of the roof and pooling of the substance on shingles and other elements of the Residence. A representative photograph of this condition appears below:

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<sup>1</sup> Donnix was a subcontractor to Buffington and, as such, Plaintiff has no contract or agreement with Donnix.

<sup>2</sup> Plaintiff and Buffington are also pursuing claims against Donnix for improper waterproofing and related components on elevated decks on the Residence. As of the date of this filing, there is no evidence that a Tamko product was utilized in the construction of the elevated decks.



Plaintiff's Complaint alleges negligence/gross negligence, breach of implied (not express) warranties, and strict liability against Tamko. Subsequently, Donnix filed Crossclaims against Tamko asserting causes of action of negligence/gross negligence, strict liability, and breach of warranty. In reply Tamko asserts Plaintiff and Donnix are bound by an arbitration clause subject to the Federal Arbitration Act, contained within a limited warranty it produced as Exhibit A to its' Memorandum in Support of its Motion to Compel Arbitration. Notably, Plaintiff had never seen the limited warranty until it was produced by Tamko as a part of its motion to compel arbitration. Additionally, Plaintiff is not relying upon the limited warranty in prosecuting any of her claims against Tamko.

### **STANDARD**

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). If one party denies the

existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement exists. If the agreement does not exist, the court must deny any application to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. *Simpson*, 373 S.C. at 25, 644 S.E. 2d at 688 (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

### **ARGUMENT**

#### **I. Plaintiff Did Not Enter ANY Agreement With Tamko, Much Less An Agreement To Submit Her Claims to Arbitration**

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (“[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate.”). South Carolina law requires that “in order to have a valid and enforceable contract, there must be a meeting of the minds between the

parties with regard to all essential and material terms of the agreement.” *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009).

Here, Plaintiff and Tamko never entered into any contract at all, much less a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. Plaintiffs, as noted above, are not pursuing a claim for breach of contract or breach of express warranty against Tamko, nevertheless, Tamko seeks to enforce the terms of their limited express warranty containing the alleged arbitration agreement as if a contract exists. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko’s limited warranty attached as Exhibit A to its’ Memorandum in Support of its’ Motion to Compel Arbitration. However, Tamko fails to establish that the limited warranty was part of an enforceable agreement between Tamko and Plaintiff, as it is not signed by any parties. Further, the limited warranty does not even specify what Tamko product it applies to, it mentions “Tamko Waterproofing, Fenestration Flashings, Underlayments and Accessories Five Year Limited Material Warranty...” The section on the warranty where the applicable product should have been listed is left blank, further rendering the arbitration clause contained within the limited warranty as unenforceable. There is no ascertainable way to establish the limited warranty Tamko references even pertains to any materials used in the construction of Plaintiffs’ residence.

Moreover, an almost identical motion was filed by Tamko in the 10<sup>th</sup> Circuit, in *Nelson v. Tamko Building Prods., Inc.*, 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). In this case, Tamko filed a Motion to Compel Arbitration of Plaintiffs’ claims citing there was a binding arbitration clause in the limited warranty

attached to the shingles installed on the residence. *Id.* Here, the court determined Tamko failed to establish that the limited warranty was part of an enforceable agreement between the Plaintiffs and Tamko because it was unauthenticated. Accordingly, Tamko's motion was denied. *Id.* at 4. Similarly in this case, Tamko has merely attached the unauthenticated and unexecuted limited warranty from 2009<sup>3</sup> to its Memorandum in support of its' Motion to Compel Arbitration to attempt to assert there has been a meeting of the minds between Plaintiff and Tamko regarding an arbitration agreement. In an apparent attempt to allege the applicability of the Arbitration clause, Tamko also submitted the affidavit of Gerry Ross (See Exhibit B to Tamko's Memorandum in Support of its' Motion to Compel Arbitration), however, this affidavit only further supports Plaintiff's contention that she is not bound by the terms of the Limited Warranty as it states in part: "Tamko does not sell products directly to consumers..." Further, neither Exhibit A, nor Exhibit B are sufficient to prove a meeting of the minds occurred, as the warranty is wholly unexecuted and does not specify the applicable Tamko product the warranty pertains to. Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, therefore Plaintiff cannot be compelled to arbitration.

**II. The Federal Arbitration Act is Inapplicable Because There is Not a Valid and Enforceable Agreement Between Plaintiff and Tamko**

The Federal Arbitration Act (the "FAA") applies when the party seeking arbitration can demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or

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<sup>3</sup> Importantly, the construction of the Plaintiff's residence took place in 2016 and 2017, with a Certificate of Occupancy being issued September 25, 2017, some 8 years after the unauthenticated and unexecuted limited warranty upon which Tamko relies.

foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.” *Am. Gen. Life & Accident Ins. CO. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005). In determining whether the FAA applies, the initial inquiry to be made by the court is whether an arbitration agreement exists between the parties. *The Housing Authority of City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003). Arbitration is a matter of contract and the evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

As previously discussed, there was no meeting of the minds between Plaintiff and Tamko regarding the arbitration clause. Since the FAA is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause does not meet the requirements of the FAA and cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko and Plaintiff regarding arbitration. Accordingly, Tamko’s Motion to Compel Arbitration should be denied as matter of law.

### **III. Plaintiff Should Not Be Compelled to Arbitration Due to Concerns for Expedience or Judicial Economy**

The Court should not simply enforce its own views of judicial economy and efficiency on the parties where there has been no agreement to arbitrate. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (internal citations omitted) (“The FAA,

both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and not to substitute its own views of economy and efficiency for those of Congress.”). There must be a valid agreement to arbitrate, even if the outcome results in bifurcated proceedings. *Id.*, 470 U.S. at 221.

South Carolina has held that courts cannot refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 71, 620 S.E.2d 86, 90 (Ct. App. 2005). The inverse of *Dean Witter Reynolds, Inc. and Wellman, Inc.* should also be true. If a court cannot deny a motion to compel arbitration where a valid provision exists for reasons of judicial economy, then a court should not be able to require a party to arbitrate claims where no agreement to arbitrate exists. After all, “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). While this may result in litigation and arbitration of “intertwined issues”, “[a]ny inefficiency or risk of inconsistent results is a consequence of the parties’ bargaining.” *Wellman, Inc.* 366 S.C. at 70, 620 S.E.2d at 91. Otherwise, a party could compel anyone into arbitration, despite the absence of a valid arbitration provision, simply by including a party in the suit that is subject to a valid arbitration agreement. See *Id.* at 70–71, 620 S.E.2d at 91.

In the instant matter, Plaintiff has asserted claims against DCTCL, L.P. d/b/a Buffington Homes, L.P., Donnix Construction, LLC, Hunt Brothers Construction, Inc., Island Exteriors and Siding, Inc., Plastering Surfaces, LLC, A Unique Design, Inc., Berkeley Heating and Air Conditioning, Inc., EnergyOne America, LLC, Aqua Blue Pools of Charleston, Inc., Sunnyside Farms, Inc., and Haddigan Electrical Contractors, LLC.

None of Plaintiff's claims against these defendants are subject to arbitration. Additionally, as mentioned above, Plaintiff has asserted claims against Donnix for work that Donnix performed that does not have any connection whatsoever to the roof underlayment manufactured by Tamko. As such, it cannot be credibly claim that judicial economy requires Plaintiff to maintain two actions, one in arbitration and one in litigation, particularly where the Plaintiff's claims against Donnix would be split into two actions.

### **CONCLUSION**

It is evident Plaintiff never entered any agreement with Tamko, much less an agreement to submit her claims against Tamko to arbitration. Since there is no valid arbitration agreement between Plaintiff and Tamko, Plaintiff cannot be compelled to arbitration.

For the reasons set forth above, Plaintiff respectfully asks this Court to deny Tamko's Motion to Dismiss and Compel Arbitration.

Respectfully submitted,

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*Attorneys for Plaintiff*

May 31, 2022  
Charleston, South Carolina.

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

DENISE M. PETERSEN, individually and  
 as TRUSTEE OF THE DENISE M.  
 PETERSEN 2005 REVOCABLE TRUST  
 DATED NOVEMBER 9, 2005, as  
 TRUSTEE OF THE 601 OCEAN  
 BOULEVARD RESIDENCE TRUST  
 DATED NOVEMBER 30, 2012, and as  
 TRUSTEE OF THE 601 OCEAN  
 BOULEVARD RESIDENCE TRUST II  
 DATED DECEMBER 7, 2012,

Plaintiffs, )

vs. )

DCTCL, L.P. d/b/a BUFFINGTON HOMES  
 L.P., DONNIX CONSTRUCTION, LLC,  
 HUNT BROTHERS CONSTRUCTION,  
 INC., ISLAND EXTERIORS AND SIDING,  
 INC., PLASTERING SURFACES, LLC, A  
 UNIQUE DESIGN, INC. BERKELEY  
 HEATING AND AIR CONDITIONING,  
 INC., ENERGYONE AMERICA, LLC,  
 AQUA BLUE POOLS OF CHARLESTON,  
 INC., SUNNYSIDE FARMS, INC.,  
 TAMKO BUILDING PRODUCTS, LLC,  
 and JOHN DOE CONTRACTORS 2  
 THROUGH 50,

Defendants. )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No.: 2021-CP-10-01973

**Defendant TAMKO Building Products,**  
**LLC's Reply in Support of its**  
**Motion to Dismiss and Compel Arbitration**

Defendant, Donnix Construction, LLC ("Donnix"), has failed to raise any valid basis for the denial of TAMKO's Motion to Dismiss and Compel Arbitration.

Donnix has sued TAMKO for breach of an express warranty, but disavows the warranty's arbitration provision, arguing there is no contract because the warranty "is not signed by any parties." *See* Donnix Resp., p. 4. Under South Carolina law, an arbitration provision does not

need to be signed by both parties to be enforceable. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). A party seeking to compel performance or a benefit under a contract is bound to an arbitration clause found in the contract – whether or not the party is a signatory. *Id.* (“the doctrine estops the non-signatory from claiming he is not bound to the arbitration agreement when he receives a ‘direct benefit’ from the contract containing an arbitration clause”).

Here, the warranty, the benefits of which Donnix seeks to selectively enforce, was packaged with the underlayment. In fact, it is packaged with every roll of underlayment manufactured by TAMKO. Donnix accepted the terms of the warranty when it purchased and used the underlayment. If Donnix did not agree to the terms of the warranty, it had the choice not to purchase the underlayment, or to return it. Donnix did neither, and instead used the underlayment. In doing so, Donnix accepted the terms of the warranty – which it now seeks to enforce, at least in part. However, Donnix cannot selectively enforce portions of the warranty, and cannot deny that it accepted the terms of warranty, including the arbitration provision, when it went forward with its purchase and use of the underlayment.

Donnix asserts two other, equally invalid arguments in its Response. First, Donnix claims that the warranty, which TAMKO attached as Exhibit A to its Motion Dismiss and Compel Arbitration, is not “authenticated.” However, the Affidavit of Gerry Ross, attached as Exhibit B to the Motion, authenticates the warranty. *See* Rule 901, SCRE (“Testimony that a matter is what it is claimed to be” is sufficient to authenticate a document). Mr. Ross’s affidavit explains that the underlayment was sold with the Limited Warranty attached as Exhibit A, and quotes the language at issue in the warranty. *See* TAMKO’s Motion to Dismiss, Exh. B, Aff. of Gerry Ross, ¶ 8.

Second, Donnix argues that the warranty “does not specify what Tamko product it applies

to.” Donnix Resp. pp. 3-4. However, the warranty provides in bold capital letters, at the top of the first page: “TAMKO WATERPROOFING, FENESTRATION FLASHINGS, **UNDERLAYMENTS** AND ACCESSORIES FIVE YEAR LIMITED MATERIAL WARRANTY (A LIMITED WARRANTY).” See TAMKO’s Motion to Dismiss, Exh. A, (Emphasis added). Not only that – the warranty accompanied the underlayment at the time of sale, which should be sufficient to inform Donnix that the warranty *actually packaged with the product* applies to *that specific product*.

Donnix ignores completely that the South Carolina Court of Appeals has already held in *One Bell Hall* that the arbitration provision at issue was enforceable against contractors and homeowners in a case with facts paralleling the facts before this Court. *One Belle Hall Property Owners Association, Inc. v. Trammel Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). The Court of Appeals held that the arbitration provision was enforceable, and this Court is bound by that answer. Donnix must be compelled to arbitrate its dispute against TAMKO.

#### **WILLIAMS MULLEN**

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as  
 TRUSTEE OF THE DENISE M. PETERSEN  
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 DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES  
 L.P., DONNIX CONSTRUCTION, LLC,  
 HUNT BROTHERS CONSTRUCTION, INC.,  
 ISLAND EXTERIORS AND SIDING, INC.,  
 PLASTERING SURFACES, LLC, A  
 UNIQUE DESIGN, INC. BERKELEY  
 HEATING AND AIR CONDITIONING,  
 INC., ENERGYONE AMERICA, LLC,  
 AQUA BLUE POOLS OF CHARLESTON,  
 INC., SUNNYSIDE FARMS, INC., TAMKO  
 BUILDING PRODUCTS, LLC, and JOHN  
 DOE CONTRACTORS 2 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT  
 CASE NO.: 2021-CP-10-1973

**Defendant TAMKO Building Products,  
 LLC's Motion to Alter/Amend Order  
 Denying TAMKO's Motion to Dismiss  
 and Compel Arbitration**

Defendant TAMKO Building Products, LLC ("TAMKO"), pursuant to Rules 52(b), 59(e), and 60(b) of the South Carolina Rules of Civil Procedure ("SCRCF"), respectfully requests the Court to reconsider, alter or amend its Order denying TAMKO's Motion to Dismiss and Compel Arbitration, which was entered on June 9, 2022, in the following particulars explained below.

### **Introduction**

On June 9, 2022, the Court adopted a joint proposed Order submitted by Plaintiff Petersen and Co-Defendant Donnix Construction, LLC's ("Donnix") denying TAMKO's Motion to Dismiss and Compel Arbitration (the "Order"). The Order, drafted by Plaintiff's and Donnix's counsel at the Court's direction, contains inaccurate statements of law and fact. Accordingly, TAMKO respectfully requests that the Court reconsider the Order, specifically the determination that (1) no direct contract exists between Donnix and TAMKO and, therefore, the arbitration clause cannot be enforced as to Donnix; and (2) Plaintiff cannot be bound by the arbitration clause because there is no direct contract between Plaintiff and TAMKO. TAMKO incorporates herein the factual background and arguments previously set forth in its Motion to Dismiss and Compel Arbitration, which was filed with this Court on May 11, 2022 (the "Motion"), and its Reply in Support of the Motion, which was filed on May 31, 2022.

### **Standard of Review**

"A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (citations omitted). Indeed, "[t]here is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id.* Furthermore, this Court has the authority and discretion to reconsider an interlocutory order at any time. *See Blyth v. Morris*, 335 S.C. 363, 366, 517 S.E.2d 433, 435 (1999).

Similarly, under Rule 52(b), SCRCF, upon motion of a party, a court may alter or amend a judgment or order for good cause shown, which motion stays the time in which the order or judgment may be appealed. Rule 52(c), SCRCF; see *USAA Property and Cas. Inc. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008). Finally, under Rule 60(b)(1), SCRCF, an order may be altered or amended due to mistake.

### **Argument**

#### **1. The Court erred in failing to recognize that a contract for the sale of goods exists between Donnix and TAMKO.**

The Court is correct that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). However, the Court erred when it determined that no contract for the sale of goods existed between Donnix and TAMKO,<sup>1</sup> despite Donnix clearly alleging that there is such a contract in its Answer to Plaintiff’s Third Amended Complaint and Cross-Claims against TAMKO (“Crossclaim”).

Donnix affirmatively alleges in its Crossclaim that TAMKO “contracted with [Donnix] to furnish all materials and other facilities required to facilitate the construction of the Subject Project, identified in Plaintiffs’ Third Amended Complaint.” (Crossclaim at ¶ 121). Donnix asserted in its Second Cause of Action against TAMKO that TAMKO breached its “implied and/or **express** warranties . . .” in the construction of the project. (*Id.* at ¶ 129) (emphasis added) “It is well settled that parties are judicially bound by their pleadings . . .” *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). “The allegations, statements, or admissions contained in a pleading are **conclusive** as against the pleading and a party cannot subsequently take a position

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<sup>1</sup> “Here the court finds, Donnix and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein.” (Order at p. 6).

contradictory of, or inconsistent with, his pleadings . . .” *Id.* (emphasis added) (citing *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410 (1964)). Thus, the Court cannot ignore the threshold matter “conclusively established” by Donnix’s clear allegation that a contract exists between Donnix and TAMKO.

It is axiomatic that any claim for “[b]reach of warranty is an action affirming [a] contract.” *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002) (citing *Genetti v. Caterpillar*, 261 Neb. 98, 621 N.W.2d 529 (2001)). Without a contract, there can be no claim by Donnix for breach of any warranty (express or implied) associated with the sale of TAMKO’s underlayment that was allegedly installed on the project as Donnix claims. The existence of a contract for the sale of goods is the *sine qua non* of any breach of warranty cause of action (whether express or implied). Thus, Donnix’s claim for breach of express and implied warranty cannot be sustained (nor can it exist for that matter) without a contract between Donnix and TAMKO.

It is important to note as a fundamental principle of contract law in South Carolina that contracts exist, particularly involving the sale of goods, without the necessity of a literal written contract signed by both parties. An express warranty is part of a contract for the sale of goods. *See* S.C. Code Ann. § 36-2-313. An implied warranty under the UCC (S.C. Code Ann. §§ 36-2-314 – 318) arises when there has been a sale of goods, and extends to all foreseeable downstream users of the goods. S.C. Code Ann. § 36-2-318; *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980). Both the implied and express warranties that Plaintiff (implied) and Donnix (express and implied) are suing TAMKO for breaching by selling allegedly defective underlayment are contracts.

Finally, the Court’s finding that “no contract exists” between Donnix and TAMKO is belied by Donnix’s own documents produced in this case that substantiate the existence of a contract. Donnix has produced its purchase order invoices with the distributor of TAMKO’s product, which contain specific item descriptions for the TAMKO underlayment which are at issue in this action. A copy of the purchase order invoices are attached hereto as **Exhibit A**. Each invoice contains an express provision in the Purchase Agreement Terms and Conditions of Sale provided by the distributor that distributor will “assign or transfer to [Donnix] any assignable or transferable manufacturer’s warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied . . .” (Ex. A at pp. 2, 4, and 7). Ultimately, these warranties were transferred to Plaintiff (as the homeowner) via both the subcontract between Donnix and Defendant DCTCL, L.P. d/b/a Buffington Homes L.P. (“Buffington”)<sup>2</sup> and Plaintiff’s contract with Buffington for the construction of her home, which also included Buffington’s assignment to Plaintiff of TAMKO’s express warranty.<sup>3</sup>

Accordingly, the Court erred in accepting opposing counsel’s assertions that a contract for the sale of goods “does not exist” between Donnix and TAMKO, or Plaintiff and TAMKO. That contract for the sale of the underlayment is evinced by the purchase order invoices, as contemplated by Article 2 of the Uniform Commercial Code, and expressly alleged by Donnix in its Crossclaim. (Crossclaim at ¶¶ 121, 129). Therefore, TAMKO requests that the Court reconsider its conclusion as set forth in its Order that no contract exists between TAMKO and these parties. Because such a contract exists between TAMKO and these parties, they are necessarily bound by the arbitration clause set forth therein.

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<sup>2</sup> A copy of the Subcontract is attached hereto as **Exhibit B**.

<sup>3</sup> A copy of the Buffington’s Limited Warranty and Mandatory Mediation and Arbitration agreement provided to Plaintiff is attached hereto as **Exhibit C**.

**2. The Court's Order misstated the facts of the *One Belle Hall* case resulting in the mischaracterization of the arbitration agreement at issue in this case and its enforceability.**

On page four of the Order, the Court explains that the arbitration clause at issue in *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016)<sup>4</sup> was “contained in a bulk sales agreement that was entered into prior to the purchase of and delivery of the product.” This fact was significant in the Court’s determination of whether essentially the same arbitration clause at issue here was enforceable. The Court explained the *One Belle Hall* holding was inapplicable to this matter because “Plaintiff was never made aware of the limited warranty much less the arbitration clause, and that Donnix, whom [sic] actually purchased the underlayment,<sup>5</sup> only became aware of the arbitration clause after the purchase of the product was completed and the underlayment was delivered to Plaintiff’s residence.” (Order at p. 4) (emphasis added). Therefore, the Court concluded that the factual background giving rise to the valid arbitration clause in *One Belle Hall* was not similar to the facts presented in this case and, therefore, inapposite to the Court’s ruling.

However, the facts surrounding the sale of goods in this case (identified as a “sale of mass-produced goods” by the court in *One Belle Hall*) and the transaction between TAMKO and the contractor in the *One Belle Hall* case, are identical. In *One Belle Hall*, (1) a subcontractor purchased the TAMKO roofing product (shingles) from a distributor for installation in residential properties; (2) the roofing product allegedly failed (cracked and prematurely deteriorated); (3) despite having no direct contract with TAMKO for the purchase of the shingles, the property

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<sup>4</sup> Undersigned counsel for TAMKO was also counsel for TAMKO in the *One Belle Hall* litigation, and has the appellate record on hand, which can be provided to the Court if it doubts TAMKO’s assertions.

<sup>5</sup> The Court determined in the Order that Donnix did, in fact, purchase the underlayment at issue; however, it also contradictorily ruled that no contract existed to facilitate such purchase. (Order at p. 4).

owners sued TAMKO in express and implied warranty, because they were third-party beneficiaries under S.C. Code § 36-2-318; and (4) those claims were therefore subject to the arbitration clause. Similarly, here TAMKO supplied its underlayment product to its distributor, in this case ABC Supply Co. Inc., who in turn sold the product to the subcontractor, Donnix, pursuant to a purchaser order and invoice. *See Exhibit A.* There was no written agreement between Donnix and TAMKO that was executed prior to the delivery of the underlayment, just as there was no written agreement between TAMKO and the contractor at issue in *One Belle Hall*. In fact, one of the main issues in *One Belle Hall* was whether the agreement for the sale of mass-produced goods was an “adhesion contract” that bound the homeowner because it was, by its nature, a take it or leave it contract that was not the subject of negotiation. *One Belle Hall*, 418 S.C. at 63, 791 S.E.2d at 293.

As such, the Court’s explanation that the main difference in this case is that the developer and ultimately the homeowner’s association in *One Belle Hall* were “given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase” is factually incorrect. (Order at p. 4) (emphasis in original). Rather, both the contract for the sale of goods in this case and the one in *One Belle Hall* are both valid, adhesion contracts that were not negotiated prior to sale, and have been upheld by the Court of Appeals and our Supreme Court. *One Belle Hall*, 418 S.C. at 63, 791 S.E.2d at 293 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007)). Accordingly, for the same reasons that the same arbitration clause in *One Belle Hall* was enforceable, so is the arbitration agreement in this case, and the Court is bound by that holding.

**3. The Court mistakenly ruled that Plaintiff, as a non-signatory to the contract between Donnix and TAMKO, was not bound by the Arbitration Clause at issue.**

“While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, it does not follow that under the Federal Arbitration Act an obligation to arbitrate attaches only to

one who has personally signed the written arbitration provision.” *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000) (quoting *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960)) (emphasis added) (alterations omitted). Both controlling Federal and State case law is crystal clear that a party can submit to arbitration by means other than personally signing a contract that contains an arbitration clause. *Id.* In South Carolina, the Supreme Court has expressly recognized that a non-signatory to a contract can be compelled to arbitrate under an arbitration clause, if the non-signatory is a direct beneficiary of the contract and seeks the benefit of it. *See Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

The homeowners in the *One Belle Hall* case also argued to the circuit court that they could not be bound by the arbitration clause in the TAMKO shingle warranty, because they were not signatories to the arbitration agreement at issue, had not expressly agreed to it, were not made aware of it until years after the shingles were installed and subsequently cracked and failed, and were not give the opportunity to accept or reject it. Wisely, the circuit court (Judge Nicholson) found this aspect their argument “unpersuasive” and rejected it. *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co.*, Appellate Case No. 2014-002115, Record at 253 (Ct. App. June 1, 2016). Of course, the lawyers for Donnix and Plaintiff who drafted the proposed order that the Court adopted and signed, were not aware of these facts, because they were not involved in that matter. But we were.

“Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.” *International Paper*, 206 F.3d at 416-17.<sup>6</sup> The Fourth Circuit has recognized five theories that

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<sup>6</sup> The U.S. Supreme Court has directed that courts should “apply ordinary state law principles that govern the formation of contracts,” *First options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944,

arise out of common law principles of contract and agency law that could provide the basis for binding nonsignatories, such as Plaintiff in this case, to an arbitration agreement. *Id.* at 417. For our purposes here, the applicable theory would be “equitable estoppel.”

Equitable estoppel “precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Id.* at 417-18 (quotations omitted). “In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause *when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.*” *Id.* at 418 (emphasis added). “Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause when is receives a direct benefit from a contract containing an arbitration clause.” *Wilson*, at 340, 827 S.E.2d at 174 (quoting *Pearson*, at 290, 733 S.E.2d at 601) (internal quotations omitted).

The Fourth Circuit in *International Paper* dealt with a similar fact pattern as is before the Court here, in that the buyer of an industrial saw alleged in its Amended Complaint that the manufacturer failed to honor the warranties in the contract between the manufacturer and the distributor, and sought damages, revocation, and rejection under that contract. *International Paper*, 206 F.3d at 418. Ultimately, the Fourth Circuit held that the buyer’s entire case hinged on its asserted rights under the contract between the manufacturer and distributor (not between the

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and the “federal substantive law of arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Therefore, state law determines the questions concerning the validity or enforceability of contracts, generally, but the Federal Arbitration Act “creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.” *Moses H. Cone*, 460 U.S. at 24. Since the existence of the contract between Donnix and TAMKO has already been established and, therefore, presents no state law question of contract formation or validity, the Court should look to the “federal substantive law of arbitrability” to resolve the remaining question.

manufacturer and the buyer) and, therefore, the buyer could not “seek to enforce those contractual rights and avoid the contract’s requirement that ‘any dispute arising out of’ the contract be arbitrated.” *Id.*

Here, Plaintiff “artfully” seeks to dance around the arbitration clause by only alleging a breach of implied warranty. To be sure, Plaintiff alleges that TAMKO “impliedly warranted that its product would be merchantable.” (Third Am. Compl. at ¶ 66). This implied warranty is a direct benefit arising from the sale of the goods (a “contract” under the UCC) and cannot come from any other source. To suggest that the implied warranty can arise from anywhere other than a contract for the sale of the underlayment gravely misunderstands basic common law contract principles. Plaintiffs claim for breach of the implied warranty (which only exists because of the contract between Donnix and TAMKO) are covered by the Arbitration Clause contained within the contract that created the implied warranty. As such, Plaintiffs are estopped from suing for breach of implied warranty while at the same time disavowing the terms of the express warranty that limits the implied warranty. As the warranty states, the Arbitration Clause covers “every claim, controversy, or dispute of any kind whatsoever . . . relating to or arising out of the [underlayment].”

Plaintiff’s argument that she is not suing TAMKO for breach of the express warranty does not allow her to duck the terms of the express warranty that limits the implied warranty she is suing under. If such were the law in South Carolina, no limitation of implied warranty contained in an express warranty would ever be enforceable. Clearly, this is not the law. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1036-40 (D.S.C. 1993) (applying South Carolina law).

Finally, Plaintiff is signatory to a separate arbitration clause contained in her contract with Buffington (*see* Exhibit C). Because Plaintiff’s claims against Buffington are intertwined with her

claims against TAMKO, as they all center on alleged defects in the construction of her beach home, under the doctrine of “intertwined claims,” Plaintiff is also estopped from denying the enforceability of that arbitration clause by non-signatory TAMKO. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601-02 (quoting *International Paper*, 206 F.3d at 418 n. 6).

### **Conclusion**

TAMKO understands motions to reconsider, made in anticipation of a subsequent appeal, are rarely, if ever, granted. But TAMKO believes it is necessary to alert the Court to errors in fact and law contained in its order to allow for an opportunity to correct these errors before the case goes up on appeal. No disrespect to the Court is intended by this Motion; however, the practical result of the Court’s ruling is that an arbitration clause in an express warranty (which has already been upheld by the Court of Appeals as enforceable) that accompanies the sale of a product used in the construction of a dwelling, can never be enforced against a homeowner. Homeowners never sign warranties that come with the sale of building products such as underlayment, or shingles, or windows, or concrete blocks for that matter – it is simply not how these contracts are created. These terms are never negotiated in the construction industry. This is a “take it or leave it” contract of adhesion that is not unlawful in South Carolina per longstanding and binding case law. If the Court’s order is a correct statement of contract law, TAMKO’s warranty and accompanying arbitration clause would not be worth the paper it is printed on. This is not the law in South Carolina, and this Court should not allow itself to be led into error by the contradictory and misleading arguments made by Plaintiff and Donnix.

**[signature on following page]**

## WILLIAMS MULLEN

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*Attorneys for Defendant TAMKO Building  
Products, LLC*

June 17, 2022  
Columbia, SC

# Exhibit A



REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

IMPORTANT: SELLER MAKES NO WARRANTIES: SEE REVERSE SIDE OR ELECTRONIC ATTACHMENT FOR IMPORTANT TERMS AND CONDITIONS. IF THERE IS NO REVERSE SIDE OR ELECTRONIC ATTACHMENT, SELLER WILL FURNISH THE TERMS AND CONDITIONS UPON REQUEST. This order is subject to the terms and conditions set forth on the reverse side or electronic attachment, and by accepting the below materials, you agree to those terms and conditions.

Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with section 12(A) of the Fair Labor Standards Act of 1938, as amended.

T/D symbols are described on the reverse side or electronic attachment.

Returns must be made in accordance with ABC's Return Policy. A copy of this policy is available upon request.

LATE PAYMENT CHARGE: All accounts past due will be subject to a monthly late payment charge, not to exceed the maximum allowable by state or federal law.

When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call the number provided.

SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAHAN SC 29410 4762

SHIP TO:

45 EUGINA 00000- 0000

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|                     |                                     |          |                  |                  | INVOICE DATE     | SHIP DATE  | PAGE           |
|                     |                                     |          |                  |                  | 08/16/16         | 08/16/16   | 1 of 1         |
| INVOICE NO.         | CUSTOMER ORDER NO.                  | SHIP VIA | MAIN ACCOUNT NO. | CUSTOMER NO.     | TERMS            |            | SALES REP      |
| 52062460            | 45 EUGINA                           | CPU      | 75012900         | 19378400         | END OF MONTH     |            | JS317          |
| ITEM NUMBER         | ITEM DESCRIPTION                    | U/M      | T/D              | QUANTITY SHIPPED | QUANTITY BACKORD | UNIT PRICE | EXTENDED PRICE |
| ABC #054 CHARLESTON | CUSTOMER PICK UP                    |          |                  |                  |                  |            |                |
| 1264300815          | QUALCRAFT SAFETY KIT 50' #00815QC50 | EA       |                  | 1                | 0                | 111.99     | 111.99         |
| 11TKTWMTTL          | TAMKO TW METAL & TILE UNDLAYMNT 2SQ | RL       |                  | 5                | 0                | 75.10      | 375.50         |
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REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

IMPORTANT: SELLER MAKES NO WARRANTIES: SEE REVERSE SIDE OR ELECTRONIC ATTACHMENT FOR IMPORTANT TERMS AND CONDITIONS. IF THERE IS NO REVERSE SIDE OR ELECTRONIC ATTACHMENT, SELLER WILL FURNISH THE TERMS AND CONDITIONS UPON REQUEST. This order is subject to the terms and conditions set forth on the reverse side or electronic attachment, and by accepting the below materials, you agree to those terms and conditions.

Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with section 12(A) of the Fair Labor Standards Act of 1938, as amended.

T/D symbols are described on the reverse side or electronic attachment.

Returns must be made in accordance with ABC's Return Policy. A copy of this policy is available upon request.

LATE PAYMENT CHARGE: All accounts past due will be subject to a monthly late payment charge, not to exceed the maximum allowable by state or federal law.

When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call the number provided.

SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAHAN SC 29410 4762

SHIP TO:

ABSOLUTELY NO PICK UP  
WITHOUT NICK'S 200-0245  
APPROVAL, THIS INCLUDES  
ADD-ONS 00000- 0000

|                     |                         |          |                  |                  |                  |            |                |
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|                     |                         |          |                  |                  | INVOICE DATE     | SHIP DATE  | PAGE           |
|                     |                         |          |                  |                  | 08/16/16         | 08/16/16   | 1 of 1         |
| INVOICE NO.         | CUSTOMER ORDER NO.      | SHIP VIA | MAIN ACCOUNT NO. | CUSTOMER NO.     | TERMS            |            | SALES REP      |
| 52072321            | BROUGHTON/CRESENT       | CPU      | 75012900         | 19378400         | END OF MONTH     |            | JS311          |
| ITEM NUMBER         | ITEM DESCRIPTION        | U/M      | T/D              | QUANTITY SHIPPED | QUANTITY BACKORD | UNIT PRICE | EXTENDED PRICE |
| ABC #054 CHARLESTON | CUSTOMER PICK UP        |          |                  |                  |                  |            |                |
| 4844400055          | STRIP VYCOP PLUS 4"X75' | EA       |                  | 4                | 0                | 24.83      | 99.32          |
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**PURCHASE AGREEMENT TERMS  
AND CONDITIONS OF SALE  
AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC.**

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ELECTRONICALLY FILED - 2022 Jun 17 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001973

1. Any purchase made on credit requires that Buyer have on file with American Builders & Contractors Supply Co., Inc. ("Seller") an approved Credit Application. Buyer further confirms Buyer's consent to Seller's Credit Agreement, the terms and conditions of which have been read by Buyer and are incorporated by reference herein. All accounts past due are subject to a monthly late payment charge, not to exceed the maximum allowed by applicable state and federal law.
2. Seller acknowledges and accepts Buyer's order; however, Seller's acknowledgment and acceptance is expressly conditioned upon Buyer's acceptance of the terms and conditions herein. No terms or conditions other than those stated herein, whether contained in Buyer's purchase order, shipping release, or elsewhere, and no written or oral agreement that purports to vary these terms and conditions is binding upon Seller unless set forth in writing, signed by Seller's authorized representative. All negotiations, proposals and representations are merged herein, and this writing constitutes the complete and exclusive statement of the terms and conditions of this Purchase Agreement between Buyer and Seller. In the event Buyer fails to accept this Purchase Agreement in writing, Buyer's consent to the terms and conditions herein is conclusively presumed, either from Buyer's failure to object within ten days in writing or from Buyer's acceptance or use of the material delivered hereunder. Unless Buyer notifies Seller in writing to the contrary prior to making a purchase, Buyer hereby represents and warrants that any employee or agent action on Buyer's behalf is authorized by Buyer and Seller may rely upon such representation.
3. In any case in which Seller makes delivery, Buyer will pay Seller's customary shipping charges. Delivery will be made at the project site or other place of delivery adjacent to the closest public right of way. Title and risk of loss passes to Buyer upon delivery of the goods. Should Buyer not be present to accept delivery, Buyer authorizes Seller to unload the goods and leave them at the delivery destination. Buyer releases Seller and will indemnify and hold harmless Seller from and against any and all claims demands, actions, causes of action, cost, expenses, and attorneys' fees arising out of or in connection with any and all injury including death, to any person or persons (whether third parties or agents, servants, or employees of Buyer), any and all damages to or loss of any property (whether belonging to Buyer or a third party), and any and all other damages recognized at law or in equity caused in whole or in part by or in any way related to the delivery of goods onto the project site by Seller, whenever such delivery is made in accordance with or pursuant to Buyer's instruction or authorization.
4. Buyer has the right to inspect the goods upon arrival. Buyer's inspection rights expire 24 hours after the arrival of the goods at the delivery destination. A failure to make inspection within that time waives notice of any defect that a reasonable inspection would have revealed. A rejection of the goods by Buyer is not effective unless written notice of rejection is given to Seller within three (3) calendar days of delivery.
5. Without prejudice to any other rights, Seller may suspend further deliveries of any items purchased if Buyer defaults in payment of any amounts due, or whenever Seller may deem itself insecure as to Buyer's performance, until Buyer remedies such default or provides assurance that satisfies Seller in its sole discretion, of Buyer's ability to perform. Seller may cancel any order at any time prior to payment by Buyer.
6. Unless otherwise provided by law, Seller may require Buyer to pay or to reimburse Seller for any tax (except income tax) which now or hereafter is imposed by any taxing authority with respect to the items purchased or the sale, purchase, manufacture, delivery or use thereof.
7. Seller reserves the right to discontinue, without liability hereunder, deliveries of any merchandise, the manufacture, use and/or sale of which in the opinion of Seller would infringe any patent now or hereafter issued, or other intellectual property right under which Seller is not licensed.
8. Where Buyer requires tests or inspection not regularly provided by Seller, Seller may charge Buyer for the actual cost of such test or inspections.
9. Buyer's wrongful nonacceptance of goods, or cancellation or repudiation of an agreement to purchase goods or services entitles Seller to recover, in addition to any incidental damages caused by Buyer's wrongful nonacceptance, cancellation or repudiation, either (i) in the case of goods, the risk of loss of which has passed to Buyer at the time of nonacceptance, cancellation or repudiation, or goods which cannot reasonably be resold by Seller to a third party, or service which have already been performed by Seller, the price of such goods or services; or (ii) in the case of goods for which other buyers exist or services not yet performed, or where an action for the price is not otherwise permitted by law; damages equal to the profit (including reasonable overhead) which Seller would have realized had Buyer fully performed or, at Seller's option, twenty percent (20%) of the contract price as liquidated damages (which constitute a reasonable estimate of Seller's loss and not a penalty), plus, in the case of special orders, Seller's expenses, if any, incurred prior to receipt by Seller of notice of cancellation by Buyer, in connection with providing special services, developing special tooling, purchase special supplies and the like.
10. Seller is not responsible for any delay caused in whole or in part by circumstances beyond Seller's reasonable control, including but not limited to, force majeure, fires or accidents; strikes or other differences with workers; war (whether declared or undeclared), riots or embargoes; delays by carriers; delays in shipment or receipt of materials from suppliers; or any legislative, administrative or executive law, order or requisition of the federal or any state or local government or any subdivision, department, agency, officer or official thereof. Seller is not liable in any event for any damages (whether direct, general, special, incidental, consequential or other) caused by Seller's failure or delay in performance or delivery, if Seller is unable, due to any cause beyond Seller's control, to supply Buyer's total demand for products. Seller may allocate its available supply among Seller's customers, including Seller's branches and affiliates, in any manner Seller deems reasonable.
11. In the case of goods manufactured and sold by Seller with a separate written warranty, that warranty will apply. Otherwise, in the case of goods manufactured and sold by Seller, Seller warrants only that such goods have been manufactured in accordance with Seller's specifications and are free from defects in material and workmanship at the time of sale. For all other goods, upon request, Seller make no warranties, but will assign or transfer to Buyer any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied. **EXCEPT AS EXPRESSLY PROVIDED HEREIN, SELLER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTIES INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THERE IS NO WARRANTY THAT EXTENDS BEYOND THE DESCRIPTION ON THE FACE OF THIS PURCHASE AGREEMENT. BUYER ACKNOWLEDGES THAT BUYER'S PURCHASE DECISION IS BASED UPON BUYER'S DUE DILIGENCE AND INSTRUCTION TO SELLER OF THE GOODS REQUIRED BY BUYER AND NOT BY REASON OF ANY STATEMENT MADE BY OR ON BEHALF OF SELLER AS TO THE MERCHANTABILITY, SPECIFIC ATTRIBUTES OR OTHER INFORMATION REGARDING THE GOODS.** Buyer acknowledges that lumber and other product dimension descriptions are made consistent with industry standards and do not necessarily represent exact or accurate dimensions. For example, lumber commonly called "2x4" is actually 1.5 inches deep by 3.5 inches wide.
12. Buyer's Remedies/Limitation of Liability: (a) Buyer's sole and exclusive remedy and the limit of Seller's liability for goods or services proven to be other than warranted, whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other legal theory, shall be, at Seller's option, (a) replacement of the goods or services, without charge, carriage paid to Buyer's facility; or (b) refund of the purchase price paid in respect of such goods or services, plus commercially reasonable charges in connection with the return or disposition of goods. To effect this sole and exclusive remedy, Buyer must make its claim for breach of warranty within 12 months of the date of shipment of the goods or performance of the services, and any such claim not made within such 12-month period is irrevocably waived.
- (b) Seller's sole liability with respect to the goods and services, for any and all loss or damage to Buyer, or any other loss, damage, expense or claim, resulting from any cause whatsoever (whether based on damaged or defective goods, irrespective of whether such damages or defects are discoverable or latent, or Seller's limited warranty shall fail of its essential purpose, or any other reason), and whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other theory, will not exceed the aggregate purchase price of the particular goods and services with respect to which losses, damages, expenses or costs are claimed. Seller has no liability to any person other than Buyer by virtue of the sale of the goods, provision or services, or any other matters contemplated by this Agreement and Buyer will add Seller as a party protected by Buyer's warranty and limit of liability provisions in Buyer's terms of sale. The limitation of liability set forth in this paragraph shall survive termination or cancellation of this Agreement. For the avoidance of doubt, Seller is not liable for any damages whatsoever whether direct or indirect resulting from any delay in delivery of the goods or failure to deliver the goods in a reasonable time - whether or not such delay or failure is caused by Seller.
- (c) THE FOREGOING IS THE ENTIRE OBLIGATION OF SELLER. SELLER IS NOT LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES TO ANY PERSON, WHETHER BASED UPON BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF CONTRACT OR ANY OTHER THEORY, REGARDLESS OF WHETHER THE REPLACEMENT OR REFUND REMEDY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE OR FOR ANY OTHER REASON WHATSOEVER. Seller shall not be liable for any damages attributable to product abuse, misuse, neglect or any other cause, which is not the fault of Seller.
13. (a) Buyer agrees to indemnify and hold harmless Seller from and against any and all claims, demands, actions, causes of action, costs and expenses arising out of or in connection with, in whole or in part, any act(s) or omission(s), negligent or otherwise, of Buyer, or any of Buyer's agents, servants, employees, subcontractors or customers, including but not limited to: (i) claims of personal injury, including death, to any person or persons (whether third parties or agents, servants or employees of Buyer or Seller); (ii) claims of loss of any property, real or personal (whether belonging to Seller, Buyer or to a third party); and (iii) any and all other damages recognized at law or in equity under any theory whatsoever.
- (b) This indemnity includes, but is not limited to, any reasonable attorney's fees or other reasonable legal fees incurred by Seller and associated with the foregoing.
- (c) This indemnity provision is a material term to the Agreement. Buyer's duty to indemnify is a condition to the sale of any goods from Seller to Buyer. Buyer has read the indemnity provision in its entirety, understands each and every part of the provision and acknowledges that there is no ambiguity concerning Buyer's duty to indemnify.
- (d) In the event that the applicable law prohibits enforcement of this clause as written, then and only then, this clause will be modified to provide the maximum indemnification to Seller, as indemnitee, allowable under that applicable law.
14. Export Sales. Buyer represents and warrants that it has complied and will comply with all applicable laws, rules and regulations pertaining to the export, import and movement of the goods sold hereunder. All drawbacks of duties paid on items used in the manufacture of the goods delivered hereunder will accrue to the Seller, and Buyer agrees to furnish the Seller with all documents and cooperation necessary to obtain payment of such drawbacks.
15. This Agreement shall be governed by and construed according to the laws of the state wherein the Seller branch supplying the goods hereunder is situated. Any action brought upon, or by reason of, this Agreement shall be brought, in Seller's sole discretion, either in a court with jurisdiction over the county in which the Seller branch is located, in a court with jurisdiction over the county in which the project for which the goods are to be used is located, or in a Court or before an arbitration panel where an action between Seller and a third party is pending which concerns the subject matter of this Agreement. Buyer agrees that, in the event any action is brought upon, or due to, this Agreement by either Buyer or Seller, and Seller prevails, Buyer shall pay Seller's reasonable attorney's fees and other costs incurred because of or in connection with such action, in the maximum amount permitted by law.
16. Waiver by Seller of any terms or conditions of this contract or waiver of any breach hereof shall not be construed as a waiver of any other term, condition, or breach. Determination that any provision of this Agreement is illegal or invalid shall not affect the validity or enforceability of the remaining provisions of this Agreement.
17. Returns must be made in accordance with Seller's return policy. A copy of this policy is available upon request.
18. The purchase of goods or services shall not entitle Buyer to use, or otherwise identify Buyer or its business with the name, trademark or other identity of the Seller. Should Buyer violate this provision, Seller reserves all remedies provided for by law or in equity, including, without limitation, injunctive relief. Except with respect to goods manufactured by Seller, Buyer shall indemnify and hold harmless Seller against all loss, damages, costs and expenses awarded against or incurred by Seller in connection with or paid or agreed to be paid, by Seller in settlement of any claim for infringement of any patents, copyright, design, trademark or any other industrial or intellectual property rights of any other person or entity with respect to the goods sold by Seller to Buyer hereunder.
19. T/D symbols printed on the front of any Seller warehouse picking/delivery ticket, invoice, or statement represents the tax and discount status of individual items. The following is a description of each symbol or combination of symbols:
- / = Taxable regardless of the order's tax status
  - \ = Nontaxable regardless of the order's tax status
  - = Non-discountable regardless of the order's terms
  - + = Taxable and non-discountable regardless of the order's tax status and terms
  - +/- = Nontaxable and non-discountable regardless of the order's tax status and terms
- If the item is taxable, and discountable based on the order's tax status and terms, no symbol will print.



REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

IMPORTANT: SELLER MAKES NO WARRANTIES. SEE REVERSE SIDE OR ELECTRONIC ATTACHMENT FOR IMPORTANT TERMS AND CONDITIONS. IF THERE IS NO REVERSE SIDE OR ELECTRONIC ATTACHMENT, SELLER WILL FURNISH THE TERMS AND CONDITIONS UPON REQUEST. This order is subject to the terms and conditions set forth on the reverse side or electronic attachment, and by accepting the below materials, you agree to those terms and conditions.

Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with section 12(A) of the Fair Labor Standards Act of 1938, as amended.

T/D symbols are described on the reverse side or electronic attachment.

Returns must be made in accordance with ABC's Return Policy. A copy of this policy is available upon request.

LATE PAYMENT CHARGE: All accounts past due will be subject to a monthly late payment charge, not to exceed the maximum allowable by state or federal law.

When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call the number provided.

SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAHAN SC 29410 4762

SHIP TO:

ABSOLUTELY NO PICK UP  
WITHOUT NICK'S 200-0245  
APPROVAL, THIS INCLUDES  
ADD-ONS 00000- 0000

| INVOICE DATE | SHIP DATE | PAGE   |
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| 08/11/16     | 08/11/16  | 1 of 1 |

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| ITEM NUMBER             | ITEM DESCRIPTION                         | U/M             | T/D                          | QUANTITY SHIPPED         | QUANTITY BACKORD      | UNIT PRICE | EXTENDED PRICE     |
| ABC #054 CHARLESTON     | CUSTOMER PICK UP                         |                 |                              |                          |                       |            |                    |
| 81BBHR516C              | BB 5" HALF RND COPPER GUT 16OZ 10'       | EA              |                              | 2                        | 0                     | 70.68      | 141.36             |
| 11TKTWMTTL              | TAMKO TW METAL & TILE UNDLAYMNT 2SQ      | RL              |                              | 30                       | 0                     | 75.10      | 2,253.00           |

CHARLESTON COMMON PLEAS - CASE#2021CP1001973

**VISUALIZE the project | CREATE an estimate | PLACE an order**

learn more at: [abcsupply.com/abc-connect](http://abcsupply.com/abc-connect)



SUBTOTAL 2,394.36

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|-----------------|---|---------|---|-----------------|-------------------------------|
| SUBTOTAL AMOUNT | + | FREIGHT | + | SALES TAX SC CH | TOTAL PAYABLE IN U.S. DOLLARS |
| 2,394.36        |   | 0.00    |   | 203.52          | 2,597.88                      |

**PURCHASE AGREEMENT TERMS  
AND CONDITIONS OF SALE  
AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC.**

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7. Seller reserves the right to discontinue, without liability hereunder, deliveries of any merchandise, the manufacture, use and/or sale of which in the opinion of Seller would infringe any patent now or hereafter issued, or other intellectual property right under which Seller is not licensed.
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11. In the case of goods manufactured and sold by Seller with a separate written warranty, that warranty will apply. Otherwise, in the case of goods manufactured and sold by Seller, Seller warrants only that such goods have been manufactured in accordance with Seller's specifications and are free from defects in material and workmanship at the time of sale. For all other goods, upon request, Seller make no warranties, but will assign or transfer to Buyer any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied. **EXCEPT AS EXPRESSLY PROVIDED HEREIN, SELLER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTIES INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THERE IS NO WARRANTY THAT EXTENDS BEYOND THE DESCRIPTION ON THE FACE OF THIS PURCHASE AGREEMENT. BUYER ACKNOWLEDGES THAT BUYER'S PURCHASE DECISION IS BASED UPON BUYER'S DUE DILIGENCE AND INSTRUCTION TO SELLER OF THE GOODS REQUIRED BY BUYER AND NOT BY REASON OF ANY STATEMENT MADE BY OR ON BEHALF OF SELLER AS TO THE MERCHANTABILITY, SPECIFIC ATTRIBUTES OR OTHER INFORMATION REGARDING THE GOODS.** Buyer acknowledges that lumber and other product dimension descriptions are made consistent with industry standards and do not necessarily represent exact or accurate dimensions. For example, lumber commonly called "2x4" is actually 1.5 inches deep by 3.5 inches wide.
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- (b) Seller's sole liability with respect to the goods and services, for any and all loss or damage to Buyer, or any other loss, damage, expense or claim, resulting from any cause whatsoever (whether based on damaged or defective goods, irrespective of whether such damages or defects are discoverable or latent, or Seller's limited warranty shall fail of its essential purpose, or any other reason), and whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other theory, will not exceed the aggregate purchase price of the particular goods and services with respect to which losses, damages, expenses or costs are claimed. Seller has no liability to any person other than Buyer by virtue of the sale of the goods, provision or services, or any other matters contemplated by this Agreement and Buyer will add Seller as a party protected by Buyer's warranty and limit of liability provisions in Buyer's terms of sale. The limitation of liability set forth in this paragraph shall survive termination or cancellation of this Agreement. For the avoidance of doubt, Seller is not liable for any damages whatsoever whether direct or indirect resulting from any delay in delivery of the goods or failure to deliver the goods in a reasonable time - whether or not such delay or failure is caused by Seller.
- (c) THE FOREGOING IS THE ENTIRE OBLIGATION OF SELLER. SELLER IS NOT LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES TO ANY PERSON, WHETHER BASED UPON BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF CONTRACT OR ANY OTHER THEORY, REGARDLESS OF WHETHER THE REPLACEMENT OR REFUND REMEDY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE OR FOR ANY OTHER REASON WHATSOEVER. Seller shall not be liable for any damages attributable to product abuse, misuse, neglect or any other cause, which is not the fault of Seller.
13. (a) Buyer agrees to indemnify and hold harmless Seller from and against any and all claims, demands, actions, causes of action, costs and expenses arising out of or in connection with, in whole or in part, any act(s) or omission(s), negligent or otherwise, of Buyer, or any of Buyer's agents, servants, employees, subcontractors or customers, including but not limited to: (i) claims of personal injury, including death, to any person or persons (whether third parties or agents, servants or employees of Buyer or Seller); (ii) claims of loss of any property, real or personal (whether belonging to Seller, Buyer or to a third party); and (iii) any and all other damages recognized at law or in equity under any theory whatsoever.
- (b) This indemnity includes, but is not limited to, any reasonable attorney's fees or other reasonable legal fees incurred by Seller and associated with the foregoing.
- (c) This indemnity provision is a material term to the Agreement. Buyer's duty to indemnify is a condition to the sale of any goods from Seller to Buyer. Buyer has read the indemnity provision in its entirety, understands each and every part of the provision and acknowledges that there is no ambiguity concerning Buyer's duty to indemnify.
- (d) In the event that the applicable law prohibits enforcement of this clause as written, then and only then, this clause will be modified to provide the maximum indemnification to Seller, as indemnitee, allowable under that applicable law.
14. Export Sales. Buyer represents and warrants that it has complied and will comply with all applicable laws, rules and regulations pertaining to the export, import and movement of the goods sold hereunder. All drawbacks of duties paid on items used in the manufacture of the goods delivered hereunder will accrue to the Seller, and Buyer agrees to furnish the Seller with all documents and cooperation necessary to obtain payment of such drawbacks.
15. This Agreement shall be governed by and construed according to the laws of the state wherein the Seller branch supplying the goods hereunder is situated. Any action brought upon, or by reason of, this Agreement shall be brought, in Seller's sole discretion, either in a court with jurisdiction over the county in which the Seller branch is located, in a court with jurisdiction over the county in which the project for which the goods are to be used is located, or in a Court or before an arbitration panel where an action between Seller and a third party is pending which concerns the subject matter of this Agreement. Buyer agrees that, in the event any action is brought upon, or due to, this Agreement by either Buyer or Seller, and Seller prevails, Buyer shall pay Seller's reasonable attorney's fees and other costs incurred because of or in connection with such action, in the maximum amount permitted by law.
16. Waiver by Seller of any terms or conditions of this contract or waiver of any breach hereof shall not be construed as a waiver of any other term, condition, or breach. Determination that any provision of this Agreement is illegal or invalid shall not affect the validity or enforceability of the remaining provisions of this Agreement.
17. Returns must be made in accordance with Seller's return policy. A copy of this policy is available upon request.
18. The purchase of goods or services shall not entitle Buyer to use, or otherwise identify Buyer or its business with the name, trademark or other identity of the Seller. Should Buyer violate this provision, Seller reserves all remedies provided for by law or in equity, including, without limitation, injunctive relief. Except with respect to goods manufactured by Seller, Buyer shall indemnify and hold harmless Seller against all loss, damages, costs and expenses awarded against or incurred by Seller in connection with or paid or agreed to be paid, by Seller in settlement of any claim for infringement of any patents, copyright, design, trademark or any other industrial or intellectual property rights of any other person or entity with respect to the goods sold by Seller to Buyer hereunder.
19. T/D symbols printed on the front of any Seller warehouse picking/delivery ticket, invoice, or statement represents the tax and discount status of individual items. The following is a description of each symbol or combination of symbols:
  - / = Taxable regardless of the order's tax status
  - \ = Nontaxable regardless of the order's tax status
  - = Non-discountable regardless of the order's terms
  - + = Taxable and non-discountable regardless of the order's tax status and terms
  - +/- = Nontaxable and non-discountable regardless of the order's tax status and terms

If the item is taxable, and discountable based on the order's tax status and terms, no symbol will print.



REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

IMPORTANT: SELLER MAKES NO WARRANTIES: SEE REVERSE SIDE OR ELECTRONIC ATTACHMENT FOR IMPORTANT TERMS AND CONDITIONS. IF THERE IS NO REVERSE SIDE OR ELECTRONIC ATTACHMENT, SELLER WILL FURNISH THE TERMS AND CONDITIONS UPON REQUEST. This order is subject to the terms and conditions set forth on the reverse side or electronic attachment, and by accepting the below materials, you agree to those terms and conditions.

Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with section 12(A) of the Fair Labor Standards Act of 1938, as amended.

T/D symbols are described on the reverse side or electronic attachment.

Returns must be made in accordance with ABC's Return Policy. A copy of this policy is available upon request.

LATE PAYMENT CHARGE: All accounts past due will be subject to a monthly late payment charge, not to exceed the maximum allowable by state or federal law.

When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call the number provided.

SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAHAN SC 29410 4762

SHIP TO:

ABSOLUTELY NO PICK UP  
WITHOUT NICK'S 200-0245  
APPROVAL, THIS INCLUDES  
ADD-ONS 00000- 0000

| INVOICE DATE | SHIP DATE | PAGE   |
|--------------|-----------|--------|
| 08/17/16     | 08/17/16  | 1 of 1 |

|                         |                                     |                 |                              |                          |                       |                     |
|-------------------------|-------------------------------------|-----------------|------------------------------|--------------------------|-----------------------|---------------------|
| INVOICE NO.<br>52102388 | CUSTOMER ORDER NO.<br>EUGENE        | SHIP VIA<br>CPU | MAIN ACCOUNT NO.<br>75012900 | CUSTOMER NO.<br>19378400 | TERMS<br>END OF MONTH | SALES REP<br>JS3172 |
| ITEM NUMBER             | ITEM DESCRIPTION                    | U/M T/D         | QUANTITY SHIPPED             | QUANTITY BACKORD         | UNIT PRICE            | EXTENDED PRICE      |
| ABC #054 CHARLESTON     | CUSTOMER PICK UP                    |                 |                              |                          |                       |                     |
| 11TKTWMTTL              | TAMKO TW METAL & TILE UNDLAYMNT 2SQ | RL              | 6                            | 0                        | 75.10                 | 450.60              |

CHARLESTON COMMON PLEAS - CASE#2021CP1001973

THANKS FOR YOUR HARDWORK!

We will be closed September 5th for Labor Day

★★★★★



SUBTOTAL 450.60

|                 |   |         |   |                 |                               |
|-----------------|---|---------|---|-----------------|-------------------------------|
| SUBTOTAL AMOUNT | + | FREIGHT | + | SALES TAX SC CH | TOTAL PAYABLE IN U.S. DOLLARS |
| 450.60          |   | 0.00    |   | 38.31           | 488.91                        |

**PURCHASE AGREEMENT TERMS  
AND CONDITIONS OF SALE  
AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC.**

125

ELECTRONICALLY FILED - 2022 Jun 17 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001973

1. Any purchase made on credit requires that Buyer have on file with American Builders & Contractors Supply Co., Inc. ("Seller") an approved Credit Application. Buyer further confirms Buyer's consent to Seller's Credit Agreement, the terms and conditions of which have been read by Buyer and are incorporated by reference herein. All accounts past due are subject to a monthly late payment charge, not to exceed the maximum allowed by applicable state and federal law.
2. Seller acknowledges and accepts Buyer's order; however, Seller's acknowledgment and acceptance is expressly conditioned upon Buyer's acceptance of the terms and conditions herein. No terms or conditions other than those stated herein, whether contained in Buyer's purchase order, shipping release, or elsewhere, and no written or oral agreement that purports to vary these terms and conditions is binding upon Seller unless set forth in writing, signed by Seller's authorized representative. All negotiations, proposals and representations are merged herein, and this writing constitutes the complete and exclusive statement of the terms and conditions of this Purchase Agreement between Buyer and Seller. In the event Buyer fails to accept this Purchase Agreement in writing, Buyer's consent to the terms and conditions herein is conclusively presumed, either from Buyer's failure to object within ten days in writing or from Buyer's acceptance or use of the material delivered hereunder. Unless Buyer notifies Seller in writing to the contrary prior to making a purchase, Buyer hereby represents and warrants that any employee or agent action on Buyer's behalf is authorized by Buyer and Seller may rely upon such representation.
3. In any case in which Seller makes delivery, Buyer will pay Seller's customary shipping charges. Delivery will be made at the project site or other place of delivery adjacent to the closest public right of way. Title and risk of loss passes to Buyer upon delivery of the goods. Should Buyer not be present to accept delivery, Buyer authorizes Seller to unload the goods and leave them at the delivery destination. Buyer releases Seller and will indemnify and hold harmless Seller from and against any and all claims demands, actions, causes of action, cost, expenses, and attorneys' fees arising out of or in connection with any and all injury including death, to any person or persons (whether third parties or agents, servants, or employees of Buyer), any and all damages to or loss of any property (whether belonging to Buyer or a third party), and any and all other damages recognized at law or in equity caused in whole or in part by or in any way related to the delivery of goods onto the project site by Seller, whenever such delivery is made in accordance with or pursuant to Buyer's instruction or authorization.
4. Buyer has the right to inspect the goods upon arrival. Buyer's inspection rights expire 24 hours after the arrival of the goods at the delivery destination. A failure to make inspection within that time waives notice of any defect that a reasonable inspection would have revealed. A rejection of the goods by Buyer is not effective unless written notice of rejection is given to Seller within three (3) calendar days of delivery.
5. Without prejudice to any other rights, Seller may suspend further deliveries of any items purchased if Buyer defaults in payment of any amounts due, or whenever Seller may deem itself insecure as to Buyer's performance, until Buyer remedies such default or provides assurance that satisfies Seller in its sole discretion, of Buyer's ability to perform. Seller may cancel any order at any time prior to payment by Buyer.
6. Unless otherwise provided by law, Seller may require Buyer to pay or to reimburse Seller for any tax (except income tax) which now or hereafter is imposed by any taxing authority with respect to the items purchased or the sale, purchase, manufacture, delivery or use thereof.
7. Seller reserves the right to discontinue, without liability hereunder, deliveries of any merchandise, the manufacture, use and/or sale of which in the opinion of Seller would infringe any patent now or hereafter issued, or other intellectual property right under which Seller is not licensed.
8. Where Buyer requires tests or inspection not regularly provided by Seller, Seller may charge Buyer for the actual cost of such test or inspections.
9. Buyer's wrongful nonacceptance of goods, or cancellation or repudiation of an agreement to purchase goods or services entitles Seller to recover, in addition to any incidental damages caused by Buyer's wrongful nonacceptance, cancellation or repudiation, either (i) in the case of goods, the risk of loss of which has passed to Buyer at the time of nonacceptance, cancellation or repudiation, or goods which cannot reasonably be resold by Seller to a third party, or service which have already been performed by Seller, the price of such goods or services; or (ii) in the case of goods for which other buyers exist or services not yet performed, or where an action for the price is not otherwise permitted by law; damages equal to the profit (including reasonable overhead) which Seller would have realized had Buyer fully performed or, at Seller's option, twenty percent (20%) of the contract price as liquidated damages (which constitute a reasonable estimate of Seller's loss and not a penalty), plus, in the case of special orders, Seller's expenses, if any, incurred prior to receipt by Seller of notice of cancellation by Buyer, in connection with providing special services, developing special tooling, purchase special supplies and the like.
10. Seller is not responsible for any delay caused in whole or in part by circumstances beyond Seller's reasonable control, including but not limited to, force majeure, fires or accidents; strikes or other differences with workers; war (whether declared or undeclared), riots or embargoes; delays by carriers; delays in shipment or receipt of materials from suppliers; or any legislative, administrative or executive law, order or requisition of the federal or any state or local government or any subdivision, department, agency, officer or official thereof. Seller is not liable in any event for any damages (whether direct, general, special, incidental, consequential or other) caused by Seller's failure or delay in performance or delivery, if Seller is unable, due to any cause beyond Seller's control, to supply Buyer's total demand for products. Seller may allocate its available supply among Seller's customers, including Seller's branches and affiliates, in any manner Seller deems reasonable.
11. In the case of goods manufactured and sold by Seller with a separate written warranty, that warranty will apply. Otherwise, in the case of goods manufactured and sold by Seller, Seller warrants only that such goods have been manufactured in accordance with Seller's specifications and are free from defects in material and workmanship at the time of sale. For all other goods, upon request, Seller make no warranties, but will assign or transfer to Buyer any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied. **EXCEPT AS EXPRESSLY PROVIDED HEREIN, SELLER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTIES INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THERE IS NO WARRANTY THAT EXTENDS BEYOND THE DESCRIPTION ON THE FACE OF THIS PURCHASE AGREEMENT. BUYER ACKNOWLEDGES THAT BUYER'S PURCHASE DECISION IS BASED UPON BUYER'S DUE DILIGENCE AND INSTRUCTION TO SELLER OF THE GOODS REQUIRED BY BUYER AND NOT BY REASON OF ANY STATEMENT MADE BY OR ON BEHALF OF SELLER AS TO THE MERCHANTABILITY, SPECIFIC ATTRIBUTES OR OTHER INFORMATION REGARDING THE GOODS.** Buyer acknowledges that lumber and other product dimension descriptions are made consistent with industry standards and do not necessarily represent exact or accurate dimensions. For example, lumber commonly called "2x4" is actually 1.5 inches deep by 3.5 inches wide.
12. Buyer's Remedies/Limitation of Liability: (a) Buyer's sole and exclusive remedy and the limit of Seller's liability for goods or services proven to be other than warranted, whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other legal theory, shall be, at Seller's option, (a) replacement of the goods or services, without charge, carriage paid to Buyer's facility; or (b) refund of the purchase price paid in respect of such goods or services, plus commercially reasonable charges in connection with the return or disposition of goods. To effect this sole and exclusive remedy, Buyer must make its claim for breach of warranty within 12 months of the date of shipment of the goods or performance of the services, and any such claim not made within such 12-month period is irrevocably waived.
- (b) Seller's sole liability with respect to the goods and services, for any and all loss or damage to Buyer, or any other loss, damage, expense or claim, resulting from any cause whatsoever (whether based on damaged or defective goods, irrespective of whether such damages or defects are discoverable or latent, or Seller's limited warranty shall fail of its essential purpose, or any other reason), and whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other theory, will not exceed the aggregate purchase price of the particular goods and services with respect to which losses, damages, expenses or costs are claimed. Seller has no liability to any person other than Buyer by virtue of the sale of the goods, provision or services, or any other matters contemplated by this Agreement and Buyer will add Seller as a party protected by Buyer's warranty and limit of liability provisions in Buyer's terms of sale. The limitation of liability set forth in this paragraph shall survive termination or cancellation of this Agreement. For the avoidance of doubt, Seller is not liable for any damages whatsoever whether direct or indirect resulting from any delay in delivery of the goods or failure to deliver the goods in a reasonable time - whether or not such delay or failure is caused by Seller.
- (c) THE FOREGOING IS THE ENTIRE OBLIGATION OF SELLER. SELLER IS NOT LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES TO ANY PERSON, WHETHER BASED UPON BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF CONTRACT OR ANY OTHER THEORY, REGARDLESS OF WHETHER THE REPLACEMENT OR REFUND REMEDY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE OR FOR ANY OTHER REASON WHATSOEVER. Seller shall not be liable for any damages attributable to product abuse, misuse, neglect or any other cause, which is not the fault of Seller.
13. (a) Buyer agrees to indemnify and hold harmless Seller from and against any and all claims, demands, actions, causes of action, costs and expenses arising out of or in connection with, in whole or in part, any act(s) or omission(s), negligent or otherwise, of Buyer, or any of Buyer's agents, servants, employees, subcontractors or customers, including but not limited to: (i) claims of personal injury, including death, to any person or persons (whether third parties or agents, servants or employees of Buyer or Seller); (ii) claims of loss of any property, real or personal (whether belonging to Seller, Buyer or to a third party); and (iii) any and all other damages recognized at law or in equity under any theory whatsoever.
- (b) This indemnity includes, but is not limited to, any reasonable attorney's fees or other reasonable legal fees incurred by Seller and associated with the foregoing.
- (c) This indemnity provision is a material term to the Agreement. Buyer's duty to indemnify is a condition to the sale of any goods from Seller to Buyer. Buyer has read the indemnity provision in its entirety, understands each and every part of the provision and acknowledges that there is no ambiguity concerning Buyer's duty to indemnify.
- (d) In the event that the applicable law prohibits enforcement of this clause as written, then and only then, this clause will be modified to provide the maximum indemnification to Seller, as indemnitee, allowable under that applicable law.
14. Export Sales. Buyer represents and warrants that it has complied and will comply with all applicable laws, rules and regulations pertaining to the export, import and movement of the goods sold hereunder. All drawbacks of duties paid on items used in the manufacture of the goods delivered hereunder will accrue to the Seller, and Buyer agrees to furnish the Seller with all documents and cooperation necessary to obtain payment of such drawbacks.
15. This Agreement shall be governed by and construed according to the laws of the state wherein the Seller branch supplying the goods hereunder is situated. Any action brought upon, or by reason of, this Agreement shall be brought, in Seller's sole discretion, either in a court with jurisdiction over the county in which the Seller branch is located, in a court with jurisdiction over the county in which the project for which the goods are to be used is located, or in a Court or before an arbitration panel where an action between Seller and a third party is pending which concerns the subject matter of this Agreement. Buyer agrees that, in the event any action is brought upon, or due to, this Agreement by either Buyer or Seller, and Seller prevails, Buyer shall pay Seller's reasonable attorney's fees and other costs incurred because of or in connection with such action, in the maximum amount permitted by law.
16. Waiver by Seller of any terms or conditions of this contract or waiver of any breach hereof shall not be construed as a waiver of any other term, condition, or breach. Determination that any provision of this Agreement is illegal or invalid shall not affect the validity or enforceability of the remaining provisions of this Agreement.
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19. T/D symbols printed on the front of any Seller warehouse picking/delivery ticket, invoice, or statement represents the tax and discount status of individual items. The following is a description of each symbol or combination of symbols:
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  - \ = Nontaxable regardless of the order's tax status
  - = Non-discountable regardless of the order's terms
  - + = Taxable and non-discountable regardless of the order's tax status and terms
  - +/- = Nontaxable and non-discountable regardless of the order's tax status and terms
- If the item is taxable, and discountable based on the order's tax status and terms, no symbol will print.

# Exhibit B



License: 95976

**DCTCL, LP dba Buffington Homes LP**  
 3690 Betsy Kerrison Pkwy  
 Suite 2D  
 Johns Island SC 29455  
 843-768-8525

## Subcontract

Subcontract#: 2075

Subcontract Date: 03/09/2016

To: DONNIX Construction, LLC  
 1202 Catbird Ct.  
 Hanahan SC 29410

Project: 170  
 45 Eugenia- Petersen  
 45 Eugenia  
 Kiawah Island SC 29455

You are hereby directed to perform the following work per the plans and specifications provided.

Plans Attached ☐Specifications Attached ☐

Retention Rate: 10.00 %

| Description of Work    | Cost Code | Description       | Amount    |
|------------------------|-----------|-------------------|-----------|
| Roofing (incl permits) | 7100.000  | Roofing           | 56,900.00 |
| Chimney windbreak      | 7150.000  | Chimney Windbreak | 4,600.00  |
| Install mermaid finial | 7150.000  | Chimney Windbreak | 250.00    |
| House flashing         | 7200.000  | House Flashing    | 13,200.00 |
| Waterproofing          | 7300.000  | Waterproofing     | 17,300.00 |
| Gutters                | 7500.000  | Gutters           | 4,320.00  |

### Notes

Labor and material to install roofing, waterproofing, flashing, chimney windbreaks, and gutters for the residence at 45 Eugenia per estimate dated 02-24-16 and subcontract agreement and scope of work. The corner unit lift and slide to be installed by others. Kiawah Building permit number BRES-000902-2015. You are responsible for pulling your permit prior to start. Failure to pull permit will result in hefty fines by the Town of Kiawah Island.

Proof of General Liability and Workman's Compensation Insurance with Buffington Homes named as additional insured, a current contractor's license, and a Kiawah Island Permit must be submitted to the Buffington Homes office before work can begin. No exceptions...you will be asked to leave the jobsite if these items are not received. Any fines resulting from not obtaining a work permit, including ones imposed on Buffington Homes, will be the responsibility of the subcontractor.

Job site is to be cleaned at the end of every workday and trash/construction debris is to be deposited in the dumpster. Violations will result in a \$200 backcharge per incident

Amount of Subcontract

96,570.00

Contractor

Subcontractor

Date

Date

3/9/2016

3/10/16

# Estimate<sup>128</sup>

DONNIX CONSTRUCTION LLC.  
1202 CATBIRD CT.  
HANAHAN, SC. 29410  
(843) 200 - 0245

| Date      | Estimate # |
|-----------|------------|
| 3/10/2016 | 1086 R-2   |

## Name / Address

BUFFINGTON HOMES LLC  
3690 BETSY KERRISON PKY.  
JOHNS ISLAND SC.29455  
\*\*\*\*\*  
45 EUGENIA AVE. ( SHINGLE & COPPER ROOF )

| Rep | Project             |
|-----|---------------------|
| ND  | 45 EUGENIA AVE. ... |

| Description                                                                                                                                                                                                              | Total     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| 1) S.C. RESIDENTIAL BUILDERS COMMISSION (BOND) REG # RBS.52692 EXP. 6/30/2017                                                                                                                                            | 0.00      |
| 2) CHARLESTON COUNTY LICENSE #201050524 EXP. 8/31/2016                                                                                                                                                                   |           |
| 3) KIAWAH LICENSE #1112559 EXP. 12/31/2015                                                                                                                                                                               |           |
| 4) MOUNT PLEASANT LICENSE #20007061 EXP. 06/30/2016                                                                                                                                                                      |           |
| 5) TOWN OF SEABROOK LICENSE # 20110236 EXP. 1/18/2016                                                                                                                                                                    |           |
| 6) LIABILITY INSURANCE #WS100741 \$2 MILLION                                                                                                                                                                             |           |
| 7) WORKERS COMP # WC5-35S-522746-011                                                                                                                                                                                     |           |
| 8) CITY OF HANAHAN # RBS 52692 CITY LIC#. 4504                                                                                                                                                                           |           |
| 9) SULLIVANS ISLAND LIC. #3883 EXP. 12/31/2015                                                                                                                                                                           |           |
| 10) CITY OF I.O.P #9641 EXP. 12/21/2015                                                                                                                                                                                  |           |
| *****                                                                                                                                                                                                                    | 500.00    |
| PERMITS                                                                                                                                                                                                                  |           |
| INSTALL HIGH TEMP METAL AND TILE ICE & WATER SHIELD ON UNDER COPPER ROOFING                                                                                                                                              | 3,900.00  |
| INSTALL 40 YRS ARCH. LANDMARK PRO SHINGLES ( COLOR TO BE DETERMINED ) , FABRICATE AND INSTALL DRIP EDGE, ( COLOR TO BE DETERMINED ) STARTERS, HIP AND RIDGE CAP, ICE AND WATER IN ALL VALLEY'S, RIDGE VENT, PIPE COLLARS | 25,200.00 |
| INSTALL 16 OZ. COPPER STANDING SEAM ROOF SYSTEM W/ ALL FASTENERS ( STAINLESS STEEL ) , ALL HIP VALLEYS WALL FLASHING AND RIDGES TO BE ROLLED, DRIPEDGE, VALLEYS, APPRON, WALL FLASHING AND RADIUS WINDOW                 | 27,300.00 |
| INSTALL 16 OZ. COPPER GUTTER 6" HALF ROUND AND 4" ROUND DOWN SPOUT W/ ALL HANGERS, OUTLETS, OUTSIDE MITERS , ENDCAPS, ELBOWS AND STRAPS .. AROUND BACK UPPER EYEBROW                                                     | 4,320.00  |
| PLEASE FEEL FREE TO CALL NICK DORIA FOR ANY QUESTIONS AT 843-200-0245 THANK YOU                                                                                                                                          |           |
| <b>Total</b>                                                                                                                                                                                                             |           |



# Estimate <sup>130</sup>

DONNIX CONSTRUCTION LLC.  
1202 CATBIRD CT.  
HANAHAN, SC. 29410  
(843) 200 - 0245

| Date      | Estimate # |
|-----------|------------|
| 3/10/2016 | 1086 R-2   |

## Name / Address

BUFFINGTON HOMES LLC  
3690 BETSY KERRISON PKY.  
JOHNS ISLAND SC.29455  
\*\*\*\*\*  
45 EUGENIA AVE. ( SHINGLE & COPPER ROOF )

| Rep | Project             |
|-----|---------------------|
| ND  | 45 EUGENIA AVE. ... |

| Description                                                                        | Total                    |
|------------------------------------------------------------------------------------|--------------------------|
| *****<br>DONNIX CONSTRUCTION WILL HONOR A 5 YEAR WARRANTY ON LABOR<br>*****        | 0.00                     |
| PLEASE FEEL FREE TO CALL NICK DORIA FOR ANY QUESTIONS AT<br>843-200-0245 THANK YOU | <b>Total</b> \$96,570.00 |

## SUBCONTRACT AGREEMENT

THIS SUBCONTRACT, made this 09 day of March, 2016 by and between DCTCL, L.P. dba Buffington Homes, L.P. (hereinafter "**Contractor**", with an office and principal place of business at 3690 Betsy Kerrison Pkwy., Suite 2-D, Johns Island, SC 29455 and DONNIX Construction, LLC (hereinafter "**Subcontractor**") with an office and principal place of business at 1202 Catbird Ct. Hanahan, SC 29410 (hereinafter collectively "Parties").

### Terms and Conditions:

This agreement and its attached Exhibits:

- A. Plans and Specifications
- B. Scope of the work
- C. Draw Request form
- D. Certificate of Insurance

shall govern the relationship of the Parties with respect to all of their joint Work. The following are general terms and conditions which are agreed to between the Parties.

### WITNESSETH:

**WHEREAS**, Contractor and Denise Petersen (hereinafter "**Owner**") have entered into a contract dated \_\_\_\_\_ for the construction of a single family home located at 45 Eugenia Kiawah Island, SC 29455 (hereinafter "**Project**"), according to the plans, drawings and specifications listed in **Exhibit A** attached hereto (hereinafter "**Contract Documents**") which are made a part of this Subcontract insofar as they apply; and

**WHEREAS**, Contractor desires to subcontract certain work specified in the Contract Documents, and Subcontractor desires to perform said work at the prices and upon the terms and conditions hereinafter expressed;

**WHEREAS**, all documents comprising the Contract Documents are available for examination by Subcontractor, and Subcontractor represents that it has read and examined the Contract Documents and fully and completely understands them, or that it has had the full and complete opportunity to do so;

**NOW, THEREFORE**, in consideration of the mutual agreements herein expressed, the Parties contract, covenant and agree as follows:

### 1. Subcontractor's Work

a. Subcontractor shall perform all work and shall furnish all supervision, labor, materials, plant, hoisting, scaffolding, tools, equipment, supplies and all other things necessary for the construction and completion of the work described in Scope of Work attached as **Exhibit B** and work incidental thereto and reasonably inferable therefrom, in strict accordance and full compliance with the terms of this Subcontract, and to the satisfaction of Contractor and Owner (hereinafter "**Work**").

b. All Work is to be performed by employees of the Subcontractor.

c. Subcontractor will warrant all items of work furnished and installed for (1) year, in addition to manufacturer's standard warranties. Subcontract work and all labor will be warrantied for (2) years from completion date. All warranties start on the date a Certificate of Occupancy is issued by the building department. With respect to the Work covered by this Subcontract, and except as expressly modified herein, Subcontractor shall have all rights that Contractor has under the Contract Documents, and Subcontractor shall assume all obligations, risks, and responsibilities that Contractor has assumed towards Owner, and third parties as applicable, in the Contract Documents. Subcontractor shall be bound to Contractor in the same manner and to the same extent that Contractor is bound to Owner or said third parties. In case of a conflict between this Subcontract Agreement and the Contract Documents as incorporated herein, the terms of this Subcontract Agreement shall prevail. To the extent relevant to their respective scopes of work, Subcontractor shall ensure that each of its subcontractors and suppliers are bound to the terms of this Subcontract Agreement and the Contract Documents.

d. All work must meet or exceed, national, state, and local codes and ordinances. Subcontractor shall assume sole responsibility for and shall perform, or cause to be performed, all special inspections and testing required by any applicable building code, regulations, or the Contract Documents relative to the Subcontractor's Scope of Work. To the fullest extent permitted by law, Subcontractor shall be liable to Contractor for all liability, costs, expenses, fines, penalties, and attorney's fees resulting from its failure to perform such duties.

### 2. Payment

a. For performance of the Work, Contractor shall pay Subcontractor the total sum of EXACTLY NINETY-SIX THOUSAND FIVE HUNDRED SEVENTY DOLLARS (\$ 96,570.00), subject to additions and deductions delineated by written change order(s).

b. All payments to Subcontractor shall be subject to a ten percent (10%) **retainage** to be held by Contractor. The retainage shall be released to Subcontractor after all of the Subcontractor's work has been completed to the satisfaction of the Contractor. No retainage will be held for payments for material.

c. No payment by Contractor to Subcontractor shall be made without Subcontractor supplying the proper Certificates of Insurance for General Liability Insurance and Worker's Compensation Insurance as designated in Section 4.

d. No payment by Contractor to Subcontractor shall be made until Subcontractor obtains the proper trade building permits from the Building Department and provides proof of said permit to the Contractor.

e. Requests for partial payment for work performed shall be made on a completed copy of the Subcontractor Draw Request form attached as **Exhibit C**

f. Contractor shall pay Subcontractor for work performed the prior week by 12:00 noon on Friday. In order for payment to be considered, an invoice for work performed during the prior week must be presented to

Contractor by 12:00 noon on the Monday following the week that the work was performed. Final payment of a contract must be submitted within two weeks of completion of the work.

g. Partial payment shall be due Subcontractor for value of the Work completed or in place. However, if Contractor does not receive payment from the Owner for Work performed by Subcontractor without the fault of Subcontractor then within a reasonable time, which is agreed to be no less than ninety (90) days after the date payment was due to Contractor by Owner, Contractor shall pay Subcontractor for Work performed in accordance with the Subcontract. If the Contract Documents allow Contractor partial payments for stored materials, partial payments shall also be due Subcontractor of stored materials for which payment has been made to Contractor by Owner.

h. No partial payment made under this Subcontract shall be considered an acceptance of the Work in whole or in part. All material and Work covered by partial payments shall become the property of Contractor, or, if the Contract Documents so provide, the property of Owner immediately upon approval of payment; however, this provision shall not relieve Subcontractor from its responsibility for all Work as provided in Article 4.

i. Subcontractor shall not apply for payment of any sums because of Work performed by any sub-subcontractor or vendor unless it intends to immediately pay such sums to them. The Subcontractor shall pay any amounts to its sub-contractors or vendors whether for labor performed or materials furnished within thirty (30) days after the Subcontractor receives payment from Contractor which encompasses labor or material furnished by such sub-contractor or vendor. After the first partial payment hereunder, Contractor shall have the right to withhold any subsequent partial payments until Subcontractor submits evidence satisfactory to Contractor that all previous amounts owed in connection with performance of this Subcontract have been paid. In addition to the requirements for payment in the Contract Documents, as requested by Contractor, Subcontractor may be required to furnish with any payment application (a) an affidavit stating that all obligations directly or indirectly related to any payment have been paid, (b) a waiver of lien rights and claim rights under any payment provided by Contractor, for all work performed on and material provided to the Project through the date of said payment application, all in a form acceptable to Contractor, or, (c) certified copies of payrolls of Subcontractor and its subcontractors.

j. Final payment, including any retainage withheld under Paragraph 2.b., shall be made after (i) Subcontractor's Work has been accepted by Owner and Contractor, (ii) execution and delivery of a complete and final release of Contractor, Owner and Contractor's surety, if any, and a waiver of lien rights, or a release of any filed liens, in a form acceptable to Contractor from all persons or entities furnishing labor and/or materials in the performance of the Subcontract, (iii) satisfactory proof of payment of all amounts owed by Subcontractor in connection with this Subcontract has been provided, (iv) written consent of Subcontractor's surety has been received, (v) the Subcontractor's Work is complete, (vi) Subcontractor has provided warranties required by the Contract Documents, (vii) submission of such other documents or instruments as Contractor may reasonably require or which are required by the Contract Documents, (viii) production of proof that the insurance coverage required by this Contract and Exhibit D has been procured and is in force and (ix)

Contractor has been paid in full by Owner for the Subcontractor's Work. Final payment shall constitute a waiver of all claims by Subcontractor arising out of the Work or Subcontract.

k. Subcontractor accepts sole and exclusive liability for all taxes and contributions required of Subcontractor by federal, state or local laws or regulations, including, without limitation, the Federal Social Security Act and the Unemployment Compensation Law or similar laws in any state with respect to the employees of Subcontractor and the performance of the Work.

l. Contractor may withhold from any payment, including final payment, such amount as Contractor deems reasonably necessary to protect itself against any actual or potential liability (including attorney's fees and costs) or damage directly or indirectly relating to the Subcontract arising from, or alleged to arise from, any act or omission by Subcontractor, regardless of whether or not the Owner has actually withheld payment from the Contractor.

### **3. Subcontractor's Liability**

a. Subcontractor hereby assumes the entire responsibility and liability for all Work, supervision, labor, and materials provided hereunder, whether or not erected in place and for all plant, scaffolding, tools, equipment, supplies, and other things provided by Subcontractor until final acceptance of the entirety of the Work by Owner. In the event of any loss, damage or destruction thereof from any cause, Subcontractor shall be liable therefore, and shall repair, rebuild and make good said loss, damage or destruction at Subcontractor's cost, subject only to the extent that any net proceeds are payable under any builder's risk property insurance that may be maintained by Owner or Contractor, if any.

b. Subcontractor shall be liable to Contractor for all costs Contractor incurs as a result of any failure of Subcontractor, or any of its suppliers or subcontractors of any tier, to perform.

c. To the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless the Contractor, Owner and their respective officers, directors, employees and agents ("Indemnified Parties") from and against all claims, damages, demands, losses, expenses, fines, causes of action, suits or other liabilities, (including all costs reasonable attorneys' fees, consequential damages, and punitive damages), arising out of or resulting from, or alleged to arise out of or arise from, the performance of Subcontractor's Work under the Subcontract, whether such claim, damage, demand, loss or expense is attributable to bodily injury, personal injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom; but only to the extent attributable to the negligence of the Subcontractor or any entity for which it is legally responsible and; regardless whether the claim is presented by an employee of Subcontractor. Such indemnity obligation shall not be in derogation or limitation of any other obligation or liability of the Subcontractor or the rights of the Contractor contained in this Subcontract or otherwise. This indemnification shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Subcontractor under any workers' compensation acts, disability benefits acts, or other employee benefits acts. This indemnification shall be in addition to any indemnity liability imposed by the

Contract Documents, and shall survive the completion of the Work or the termination of the Subcontract.

d. All work time restrictions, noise abatement requirements, parking, etc shall be observed. Any fines imposed due to Subcontractor/employees violations shall be the responsibility of the Subcontractor.

e. Subcontractor will staff the job at all times with at least one individual that understands and speaks English.

f. Subcontractor's assumption of liability is independent from, and not limited in any manner by, the Subcontractor's insurance coverage obtained pursuant to Article 4, or otherwise.

#### 4. Subcontractor's Insurance

a. Prior to commencing the Work, Subcontractor shall procure, and thereafter maintain, at its own expense, until final acceptance of the Work or later as required by the terms of the Subcontract, insurance coverage required by the Contract Documents and this Subcontract. At a minimum, the types of insurance and minimum policy limits specified in this agreement shall be maintained in a form and from insurers acceptable to Contractor. All insurers shall have at least an A- (excellent) rating by A.M. Best and be qualified to do business in the jurisdiction where the Project is located.

b. Proof of this insurance shall be provided to the Contractor before the Work commences, as set forth below. To the extent that the Subcontractor subcontracts with any other entity or individual to perform all or part of the Subcontractor's Work, the Subcontractor shall require the other Sub-Subcontractor to furnish evidence of equivalent insurance coverage, in all respects, terms and conditions as set forth herein, prior to the commencement of the Work, be deemed a waiver by the Contractor of Subcontractor's or the Sub-Subcontractor's insurance obligations set forth herein.

c. In the event that the insurance company(ies) issuing the policy (ies) required by this exhibit deny coverage to the Contractor, the Subcontractor or the Sub-Subcontractor will, upon demand by the Contractor, defend and indemnify the Contractor at the Subcontractor's or Sub-Subcontractor's expense.

#### **Commercial General Liability Insurance**

\$1,000,000 Each Occurrence Limit (Bodily Injury and Property Damage)

\$2,000,000 General Aggregate per Project

\$2,000,000 Products & Completed Operations Aggregate

\$1,000,000 Personal and Advertising Injury Limit

#### **Worker's Compensation and Employees' Liability Insurance**

\$100,000 Each Accident

\$100,000 Each Employee for Injury by Disease

\$500,000 Aggregate for Injury by Disease

**The Contractor and Owner, along with their respective officers, agents, employees, shall be named as additional insureds for Ongoing Operations and Products/Completed Operations on the Subcontractor's and any Sub-Subcontractor's Commercial General Liability Policy, which must be primary and noncontributory with respect to the additional insureds. The Subcontractor shall continue to carry Completed Operations Liability Insurance for at least (3) years after either ninety (90) days following Substantial Completion of the Work or final payment to the Contractor on any individual Projects, whichever is later.**

It is expressly understood by the Parties to the Subcontract that it is the intent of the Parties that any insurance obtained by the Contractor is deemed excess, non-contributory and not co-primary in relation to the coverage(s) procured by the Subcontractor, the Sub-Subcontractor or any of their respective consultants, officers, agents, subcontractors, employees, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of the aforementioned may be liable by operation of statute, government regulation or applicable case law.

To the fullest extent permitted by applicable state law, a Waiver of Subrogation Clause shall be added to the General Liability and Workers' Compensation policies in favor of Contractor and Owner, and this clause shall apply to the Contractor's and Owner's officers, agents, and employees, with respect to all Projects during the policy term.

Prior to commencement of Work on any individual Project, Subcontractor shall submit a Certificate of Insurance in favor of Contractor and an Additional Insured Endorsement (in a form acceptable to the Contractor) as required hereunder. The Certificate shall provide for thirty (30) days' notice to Contractor for cancellation or any change in coverage. Copies of insurance policies shall promptly be made available to the Contractor upon request.

#### 5. Time of Performance

a. Subcontractor will commence Work when directed by Contractor and Subcontractor will proceed with the Work in a prompt and diligent manner in accordance with the Project Schedule, which may be amended from time to time by Contractor. **TIME IS OF THE ESSENCE.** Subcontractor shall be entitled to additional compensation for compliance with schedule amendments only to the extent, if any, that Contractor receives reimbursement from the Owner. Conversely, if Subcontractor causes a delay in the Work not related to a properly executed Change Order Subcontractor will be responsible for any penalties due to Owner for delay of the completion date.

b. **Subcontractor shall submit a detailed schedule for performance of the Subcontract upon acceptance of the proposal,** which shall comply with all scheduling requirements of the Contract Documents and with Paragraph 5.a. above. Contractor may, at its sole discretion, direct Subcontractor to make reasonable modifications and revisions in said schedule.

c. Subcontractor will coordinate its Work with the work of Contractor, other subcontractors, and Owners' other builders, if any, so no delays or interference will occur in the completion of any part or the entire Project.

## **6. Changes and Claims**

a. Contractor may, at any time, unilaterally or by agreement with Subcontractor make changes in the Work. Any unilateral order, or agreement, under this Paragraph 6.a. shall be in writing, unless an emergency requires Subcontractor to proceed without a written order. Subcontractor shall immediately perform the Work as changed without delay.

b. Subcontractor shall submit in writing to Contractor, along with substantiating evidence deemed satisfactory by Contractor, any claims for adjustment in the Subcontract Price, schedule or other provisions of the Subcontract claimed by Subcontractor for changes directed by Owner, or for damages for which the Owner is liable, or as a result of deficiencies or discrepancies in the Contract Documents ("Owner Claims") prior to the start of the work, otherwise such claims are waived. Contractor shall process said Owner Claims according to the provisions of the Contract Documents so as to protect the interests of Subcontractor and others including Contractor. Subcontract adjustments shall be made only to the extent that Contractor receives relief from or must grant relief to Owner and then only based on Subcontractor's allocable share of such relief. Subcontractor's allocable share shall be determined by Contractor, after allowance of Contractor's normal overhead, profit and other interest in any recovery, by making a reasonable apportionment, if applicable, among Subcontractor, Contractor and other subcontractors or persons with interests in the adjustment. In no event shall the Contractor become or be liable to the Subcontractor because of any such Owner Claims in excess of the amount actually received by Contractor from Owner because of such claim. It is expressly acknowledged that receipt of payment by Contractor from Owner because of any such Subcontractor's Owner Claims is an express condition precedent to any obligation of Contractor to pay such claims. This paragraph will also cover other equitable adjustments or other relief allowed by the Contract Documents.

c. For changes ordered by Contractor independent of Owner or the Contract Documents, Subcontractor shall be entitled to an equitable adjustment of the Subcontract Price or Project Schedule, or both, to the extent that impact can be substantiated to the Contractor's satisfaction.

d. Pending resolution of any claim, dispute, or other controversy, nothing shall excuse Subcontractor from proceeding with prosecution of the Work.

e. No payments for change orders will be made unless Contractor has issued a signed change order before the work has started.

## **7. Failure to Perform**

a. If, in the opinion of Contractor, Subcontractor shall at any time (1) refuse or fail to provide sufficient properly skilled workmen or materials of the proper quality, (2) fail in any respect to prosecute the Work according to the Project Schedule, (3) stop, delay, or interfere with the

work of Contractor or any other builder or subcontractor, (4) fail to comply with all provisions of this Subcontract or the Contract Documents as incorporated herein, (5) be adjudged a bankrupt, or make a general assignment for the benefit of its creditors, (6) have a receiver appointed, or (7) become insolvent or a debtor in reorganization proceedings, then, after serving three (3) days written notice, unless the condition specified in such notice shall have been eliminated with such three (3) days, the Contractor may at its option (i) without voiding the other provisions of the Subcontract and without notice to the sureties, take such steps as are necessary to overcome the condition, in which case the Subcontractor shall be liable to Contractor for the cost thereof; (ii) terminate for default the Subcontractor's right to proceed under the Subcontract, or (iii) seek specific performance of Subcontractor's obligations hereunder, it being agreed by Subcontractor that specific performance may be necessary to avoid irreparable harm to Contractor and/or Owner.

b. In the event of termination for default, Contractor may, at its option, (1) enter on the premises and take possession, for the purpose of completing the Work, of all materials and equipment of Subcontractor, (2) require Subcontractor to assign to Contractor any or all of its subcontracts or purchase orders involving the Project; or (3) complete the Work either by itself, or through others, by whatever method Contractor may deem expedient. In case of termination for default, Subcontractor shall not be entitled to receive any further payment until the Work shall be fully completed and accepted by Owner.

c. If the Owner terminates any portion of the prime agreement with Contractor which includes the Work, then the Subcontract shall be similarly terminated and Subcontractor shall be entitled to such relief as may be granted to Contractor on Subcontractor's behalf consistent with Articles 1, 7 and 8 of the Subcontract.

d. In the event of termination for default or any other reason, the provisions of this Subcontract concerning the subcontractor's liability, indemnity, and insurance obligations shall remain in full force and effect in conformance with and for the period(s) specified in those provisions.

## **8. Settlement of Disputes**

a. In case of any dispute between Contractor and Subcontractor, due to any Owner Claims, any act or omission of Owner or any entity for which the Owner is responsible, or involving the Contract Documents, Subcontractor agrees, to the same extent that Contractor is bound to Owner, to be bound by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, board or court so authorized in the Contract Documents or by law, whether or not Subcontractor is a party to such proceedings. In case of such dispute, Subcontractor will comply with all provisions of the Contract Documents allowing a reasonable time for Contractor to analyze and forward to Owner any required communications or documentation. Contractor will, at its sole option (1) present to Owner, in Contractor's name, or (2) authorize Subcontractor to present to Owner, in Contractor's name, all of Subcontractor's claims and answer Owner's claims involving Subcontractor's Work, whenever Contractor is permitted to do so by the terms of the Contract Documents. If such dispute is prosecuted or defended by Contractor, Subcontractor agrees to furnish all documents, statements, witnesses, and other information required, and to pay for all costs, including attorneys' fees, incurred in connection therewith. The

Subcontract Price shall be adjusted by Subcontractor's allocable share determined in accordance with Article 7 hereof.

b. With respect to any controversy between Contractor and Subcontractor not involving the Owner, the Contract Documents or an Owner Claim, Contractor shall issue a decision which shall be final and binding unless, within five (5) days of receipt, the Subcontractor files a notification in writing of its intent to litigate the controversy in accordance with this agreement. Notification of any such claim under this agreement must be submitted in writing within ten (10) days of Subcontractor's awareness of the facts underlying the claim. Failure of Subcontractor to submit timely its notice of claim or notice of intent to litigate shall constitute an absolute bar and complete waiver of Subcontractor's right to recover on account of such claim.

c. Subject to Subcontractor's compliance with such notice requirements, either party may request non-binding mediation of non-Owner Claims with a mediator to be agreed upon by the Parties, and shall pursue resolution of their dispute in good faith through such mediation. If the Parties cannot agree upon a mediator, they shall submit the dispute to the American Arbitration Association for non-binding mediation pursuant to its rules. Any such mediation shall take place in the place where the Project is located. Any mediation costs shall be equally borne by the parties.

d. Anything to the contrary in the Contract Documents notwithstanding, any controversy between Contractor and Subcontractor not involving Owner, the Contract Documents, or an Owner Claim and which is not amicably resolved by the Parties will be submitted to arbitration pursuant to the Construction Industry Rules of the American Arbitration Association to be conducted at the place where the Project is located. The prevailing party in arbitration shall be entitled to recover reasonable attorney's fees, costs, and expenses incurred in connection with the litigation.

#### **9. Termination for Convenience**

Contractor shall have the right to terminate this Subcontract, in whole or part, for its own convenience and regardless whether there is a termination of Contractor's contract with Owner, by providing Subcontractor with a written notice of termination, to be effective upon receipt by Subcontractor. If the Subcontract is terminated for convenience, the Subcontractor shall be paid the amount representing costs that are due from the Owner for its Work, as provided in the Contract Documents, after payment therefore by the Owner to Contractor. This remedy shall be exclusive and in no event will Subcontractor be entitled to recovery of any anticipatory profits or damages.

#### **10. Assignment**

a. Subcontractor shall not subcontract any portion of the Work or the Subcontract and shall not assign or transfer this Subcontract, or funds due hereunder, without the prior, written consent of Contractor and Subcontractor's surety.

b. Contractor may assign the Subcontract without prejudice to its rights under the Subcontract or any surety bond issued with respect thereto.

#### **11. Safety**

The Contractor makes no representation with respect to the physical conditions or safety of the Project Site. The Subcontractor shall, at its own expense, preserve and protect from injury its employees engaged in the performance of the Work and all property and persons that may be affected by its operations in performing the Work. The prevention of accidents to workers engaged in the Work and others affected by the Work is the responsibility of the Subcontractor. Subcontractor shall comply with all federal, state, labor and local laws, regulations, and codes concerning safety as shall be applicable to the Work and to the safety standards established by Contractor during the progress of the Work. Subcontractor shall indemnify, defend and hold harmless Contractor, Owner and their respective officers, directors, agents and employees from any costs, expenses or liability (including attorneys' fees, fines or penalties) resulting from failure of Subcontractor to comply with the aforesaid laws, regulations and codes. Violation of safety rules will not be tolerated and is grounds for removal of individual and/or Subcontractor from the job.

#### **12. Clean-up**

Subcontractor shall clean areas used by Subcontractor for its Work on a daily basis. All debris, rubbish, waste material, excess material from Subcontractors Work shall be removed from the Project site, or to a specified location on the Project site as directed by Contractor, and in a manner that will not impede either the progress of the Project or of other trades. Negligence in the cleaning the jobsite each day will result in a back charge of \$200 per day without limitation.

#### **Conduct:**

Smoking and/or other tobacco products are banned within the building structure or its appurtenant structures. Subcontractor shall not consume alcohol or illegal drugs. Subcontractor shall not cause damage to the job. An example would be extension cords over window sills causing tension and subsequent damage to the sill.

It is expected that Subcontractor's be mindful and respect others' work, use appropriate non-profane language; wear clean booties to protect flooring (\$200) fine; as well as taking reasonable steps to protect and prevent damage or disturbance on the job site in all respects.

All Subcontractors must cooperate with Contractor and work concurrently with other Subcontractors.

No Subcontractor shall alter, or operate any mechanical equipment or materials he does not supply to prevent damage to said products.

We Build It As If It Were Our Own.

**14. Governing Law**

This Subcontract shall be governed by and construed in accordance with the laws of the State of South Carolina without regard to conflict of law principles.

**15. Presumption Arising From Authorship**

Both Parties have had the opportunity to review this Subcontract with counsel and negotiate before signing this Subcontract. Therefore, there will be no presumption for or against either of the Parties arising out of the drafting of the Subcontract.

**IN WITNESSETH WHEREOF**, the Parties, by their duly authorized representatives, have hereunto executed this Subcontract, on the day and year first above written.

**Exhibits:**

- A - Plans & Specifications
- B- Scope of the Work
- C- Draw Request form
- D- Certificate of Insurance

**SUBCONTRACTOR:** DONNIX Construction

By: 

Name: Nicola J. Doria

Title: Owner

Date: 3/10/16

**CONTRACTOR:**

By: 

Name: Pamela Hicks

Title: Controller

Date: 3/9/2016

WITNESS: \_\_\_\_\_

## Scope of Work - Roofing & Waterproofing

### Attachment "B"

This document sets forth the scope of work for **THIS PROJECT** designated 45 Eugenia- Petersen and located at 45 Eugenia Kiawah Island, SC 29455.

This document along with all drawings and specifications as provided by the Architect or the Owner, will comprise the entire scope of work for this Division of work to be bid and performed by the Subcontractor.

The provisions of this document are incorporated into all Requests for Proposal, Proposal and Subcontracts related to this project and **no deviations shall be allowed without express written qualification of the bid, proposal or subcontract.**

#### General Requirements Highlights

All work to be performed per the plans and specifications for the described property and made available to subcontractor.

**All work to be performed by employees of this subcontractor, none of this scope of work shall be performed by other subcontractors without the prior approval of Buffington Homes, LP.**

All work must meet national, state, and local codes and ordinances. Any discrepancies between plans and specifications and national, state, and/or local codes and ordinances recognized by subcontractor must be disclosed to Buffington Homes.

All materials and products must be installed per manufacturer's specifications.

All subcontractors must cooperate with Buffington Homes and work concurrently with other subcontractors.

No subcontractor shall alter, turn on or operate any mechanical equipment or materials they do not supply or work with at sites to prevent damage to said products.

**Site Cleaning** – Subcontractor is responsible for cleaning the jobsite at the end of each day with all debris removed to job site dumpster (provided by others). Not cleaning the jobsite at the end of each day will result in a back charge of \$200 per incident without limitation.

**Draw Requests** – All draw requests must be submitted on a completed Buffington Homes' Draw Request Form on Monday by noon in order to be approved for payment by Friday of the same week. This does not guarantee that payment will be made on Friday. Draw requests can only be submitted for work performed the week before the request. Final payment of a contract must be submitted within two weeks of completion of work.

**Change Orders** – No payments for change orders will be made unless a signed change order has been issued to the subcontractor before the work is started.

No alcohol or drugs are permitted on Buffington Homes' jobsites at any time. Any user of alcohol and/or drugs will be asked to leave the job site immediately and will not be allowed back on a Buffington Homes' jobsite at any time. Any Buffington Homes representative has the authority to determine and report if an individual is or has been using alcohol or drugs.

Smoking and/or other tobacco products are not allowed within the building structure or its appurtenant structures.

No radios or "horseplay" on jobsites.

Subcontractors are responsible to pay for any damage caused by the subcontractor or their suppliers to city streets and roads.

Violation of safety rules will not be tolerated and will be grounds for removal of individual and/or subcontractor from jobsite.

All work time restrictions, noise abatement requirements, parking, etc. of the specific area of construction shall be observed. Any fines imposed due to subcontractor employee violations shall be the responsibility of the subcontractor.

Subcontractor will staff the job at all times with at least one individual that understands and speaks English.

Subcontractor will warrant all items of work furnished and installed for (1) one year, in addition to manufacturer's standard warranties and subcontract work and all labor for (2) two years from completion date. All warranties are to start on the date that the Certificate of Occupancy is issued from the building department.

**An estimated time frame for completion of this scope of work must be submitted with proposal or proposal will not be accepted.**

**Requests for retention must be made within two weeks of final payment on contract.  
This scope of work must be signed by subcontractor and returned with proposal or proposal will not be accepted**

### **Roofing & Waterproofing Requirements**

Scope of Work: Subcontractor agrees to furnish all labor, equipment, tools, apparatus, scaffolding, material handling equipment, etc. to construct and complete in a good and workmanlike manner, the scope of which shall include but not be limited to:

1. Before ordering materials, subcontractor responsible for checking with Project Manager for approval of all roofing material, including ridge venting if appropriate.
2. Contractor may elect to pay suppliers directly for material ordered by subcontractor. In this instance, subcontractor will supply contractor with invoice and contact information for supplier so that payment can be made. Subcontractor will assume all responsibility for the material that is ordered. The subcontract agreement will be adjusted to reflect the direct payment to supplier.
3. The Subcontractor is responsible for his ordering instructions. Specification errors excess material on orders or anything which causes a negative dollar impact are to be paid by the subcontractor once he has accepted and approved the material order. Excess which cannot be refunded will become the property of the subcontractor and appropriate deductions will be made to his contract price.
4. Subcontractor is responsible for supplying and installing all roofing materials with proper flashing as specified.
5. Subcontractor responsible for supplying all metal flashing material required for project. This includes, but is not limited to, brick flashing, window and door flashing, door pans, water table flashing, deck flashing, column caps, and chimney cap and stack flashing.

6. Ice and water shield type materials to be installed where necessary as soon as exterior framing has been completed.
7. Deck waterproofing will be adhered according to industry standards and have minimum joints at newel posts. Material is to be run up at least eight (8) inches at newel posts.
8. Use 16 oz. Copper flashing where copper is specified.
9. Provide and install chimney chase covers and caps as required.
10. Install all boots, flanges, and covers for all roof penetrations and coordinate installation with other trades.

Subcontractor Signature



Date

3/10/16

# Exhibit C

### **Buffington Homes, L.P. Limited Warranty**

Pursuant to the guidelines established by the National Association of Home Builders and local statutory code, this warranty is provided for all single family residential construction and renovations performed by Buffington Homes and its service, warranty and renovations division, Buffington Customer Care. Any reference to Buffington Homes in the following Limited Warranty may be to Buffington Homes or Buffington Customer Care. Buffington Homes has a long tradition of standing behind the quality of its work. This warranty contract describes our homeowners' rights and responsibilities regarding work performed by Buffington Homes, excluding normal wear and tear and/or defects caused by the OWNER or its agents.

No steps taken by Buffington Homes to correct defects shall act to extend the warranty period beyond the terms set forth herein. Defects must be reported in writing before the end of the applicable warranty period.

The following sets forth the items that are covered by Buffington Homes for the periods of Two (2) years, (5) Five years and Eight (8) years, as well as specific and general exclusions. These warranty periods commence upon the date of the final walk through ("Warranty Commencement Date"). The warranty covers only those portions of Owner's property or systems constructed, renovated, altered or installed by Buffington Homes, Buffington Customer Care, its subcontractors or agents performing work directly for the companies.

#### **I. WARRANTY PROCEDURE**

If you encounter a construction defect or require customer service, please notify Buffington Customer Care immediately by calling:

843-768-8525

If you wish to fax your request, the fax number is:

843-768-8524

The company makes every attempt to schedule warranty calls as soon as possible, and requires reasonable access to your home to perform all work.

Upon completion of the requested warranty items, you will be asked to sign off on a listing of those items, which have been completed. Should you have any comments regarding the work performed, either with respect to completeness or professionalism, they should be noted at that time. We welcome and value your comments regarding our performance.

Emergency Warranty during the Warranty Period:

In rare situations, immediate action may be necessary to correct an occurrence that is covered by your home warranty such as roof leak, water leaks or other items that prevent you from occupying all or part of your home (hereinafter referred to as "Emergency Warranty"). In such cases you should first take immediate action to prevent personal injury and property damage. Your next action is to notify Buffington Homes @ 843-768-8525. A list of the major subcontractors (i.e. electrical, plumbing and heating/air conditioning) and their telephone numbers have been provided for your assistance in your Homeowners Manual. Please understand that warrantable items that are not defined as emergency warranty will be addressed during the applicable service period. (Hereinafter referred as "Non-Emergency Warranty Items") Non-Emergency Warranty Items work will be conducted Monday thru Friday, during normal working hours.

Responsible Parties:

Buffington Homes provides the overall warranty for the materials, workmanship and products in your home. In many instances, the product manufacturers will provide additional warranties and warranty support for you appliances, mechanical equipment and fixtures installed by Buffington Homes in your home. In all cases, you should report all warranty items to Buffington Homes. In general, homeowner maintenance responsibilities begin on the first day and are vital to maintenance of your home and not voiding the warranty. This Limited Warranty will help you understand what you must do to maintain your new home.

#### **II. WARRANTY COVERAGE**

For Two (2) years from the Warranty Commencement Date, Buffington Homes warrants that the property shall be free from defects in materials and workmanship. The following items, while not considered defects, will be fixed during this period as Buffington Homes offers a superior warranty to our homeowners

Exterior and interior paint repairs due to building movement are covered as described below. It is the Owner's responsibility to provide the original paint, which was stored on site prior to move in. Please make the paint available to the worker on the day of the repair. Repair of special paint finishes (such as faux painting) are not included. Providing Buffington supplied and installed ventilation systems are installed in bathrooms and other excessively humid areas; Buffington Homes warrants the interior wall paint against peeling for a period of two (2) years. If peeling occurs, Buffington Homes will scrape and repaint the immediate area. If Buffington Homes has painted custom colors initially, touch up may be difficult to match after initial application. Buffington Homes will use the original paint formula and application method in an effort to match the paint if repairs are necessary; but can make no guarantee that color, shade or sheen will match existing surfaces.

Buffington Homes warrants the ceramic tile for a period of two (2) years. This warranty includes quality of adhesion and replacement of tiles that crack due to shrinkage and settlement. Please note that only the damaged tiles will be replaced and exact dye-lot matches cannot be guaranteed. Buffington Homes will repair cracks that may develop in ceramic tile grout at the one and two year anniversary. After that point, grout repair will be a homeowner maintenance item. Note that Buffington Homes cannot be responsible for any damage caused by homeowner negligence.

Porcelain fixture glazing is subject to wear. Abrasive cleaners may damage the glass-like finish of porcelain and the finish may become dull and porous. Use only non-abrasive cleaning agents to retain the beauty that can be expected of a porcelain surface.

Certain finishes used on interior and exterior hardware, plumbing fixtures and light fixtures will tarnish over time. This is customary and will not be covered by this limited warranty.

Buffington Homes warrants all mirrors supplied through our construction contract against all defects prior to closing. Any cosmetic discrepancies with mirrors must be reported on the final walkthrough.

Buffington Homes warrants the counter tops and cabinets against improper installation and manufacturer defects for a period of two (2) years. Any cracks, gouges, burns and scratches must be reported during the final walkthrough. NOTE: due to the characteristics of wood, some color and wood grain variation can be expected. Major color differences will be corrected only if noted on the final walkthrough. Due to the size of some counters, seams in the countertops may be necessary. At the two year anniversary, all sinks, tubs, showers and backsplashes will be done if necessary. After two (2) years, any additional work on those items will become a homeowner maintenance item.

Buffington Homes warrants the carpet against separation of seams, manufacturing defects and improper installation for a period of two (2) years.

Buffington Homes warrants the concrete slab floor against abnormal settlement for a period of two (2) years. Expansion and settlement cracks are expected. It is quite normal for concrete slab floors to be slightly irregular. Any cracks that exceed 1/4" will be repaired during the first two (2) years. Buffington Homes does not warrant normal cracks or slight irregularities. Buffington Homes reserves the right to choose the ways, means and materials for making the necessary repairs. This also includes concrete patios, driveways, and walkways. Buffington Homes warrants that no exterior concrete slab will have standing water in excess of 1/4" after a twenty-four (24) hour period.

NOTE: due to mineral content in area soils, color variations and mud stains may appear in exterior concrete. These are normal and are not considered warrantable. Exterior concrete surfaces and garage level areas will be pressure washed time prior to taking possession. Normal shrinkage of concrete will sometimes cause cracks in paved concrete areas. Control joints have been placed at appropriate intervals to help control this cracking. Any cracking that is 1/4" or less is considered normal and will not be repaired.

Please note the gutters may overflow during very heavy rain. It is the homeowner's responsibility to keep gutters and downspouts free of leaves and debris. Also, Buffington Homes does NOT warrant any staining of concrete that occurs from the "bleeding" of copper roofs or gutters.

Buffington Homes warrants the exterior paint on the house against peeling for a two year period. In the event the paint on the exterior does peel, Buffington Homes will scrape the area, remove any loose paint, and prime and repaint that particular board or the immediate area this is involved. We will use the original paint formula and application method in an effort to match the existing wall color. An exact match at any point after possession is not guaranteed. The paint warranty only applies to peeling paint and DOES NOT encompass the natural fading of paint or mildew on a house. Please note, that rendering warranty services during this period does not extend coverage.

Also, while Buffington Homes warrants items as outlined in this Limited Warranty, the company is not responsible for consequential damage attributable to the lack of maintenance or negligence on the part of the homeowner.

NOTE: mildew mold and fungus formation are natural occurrences and are not covered under the limited warranty. It is the responsibility of the homeowner to maintain all painted surfaces.

**MANUFACTURER'S WARRANTY:**

The manufacturer's warranty is utilized in both length and scope for all of the systems noted below:

Appliances

Fixtures

Items of Equipment

Electrical

Plumbing

Heating and Cooling

Ventilating Systems

**MANUFACTURER LITERATURE:**

Please take time to read the literature (warranties, use and care guidelines) provided in your Homeowners Manual. Although much of the information may be familiar to you, some points may differ significantly from your previous home.

We make all reasonable efforts to keep the information in this manual current. However, if any detail in our material conflicts with the manufacturer's recommendations, you should follow the manufacturer's recommendations.

Activate specific manufacturer's warranties by completing and mailing any registration cards included with their products. (Refer to Homeowners' Manual). All manufacturers' warranties begin at the closing date.

**APPLIANCES:**

For warranty service on major kitchen equipment, please call the manufacturer's service number provided on the subcontractor list in your Homeowner's Manual.

**HEATING AND COOLING:**

The authorized manufacturer's subcontractor warrants the installation of your heating and cooling systems. Warranties are as follows:

- A minimum of Two (2) years coverage for labor
- Five (5) years coverage for parts – no labor

However, this clause shall be amended upon the selection of the manufacturer for the system should that system have a longer warranty.

The heating system shall be capable of producing an inside temperature of 70 degrees Fahrenheit as measured in the center of each room at a height of five (5) feet above the floor under local outdoor conditions as specified in the American Society of Heating Refrigerating Air Conditioning Engineers (ASHRAE) handbook. Federal, state or local energy codes shall supersede this standard where such codes have been locally adopted. Reasonable temperature differentials between rooms should be expected.

The cooling system shall be designed to cool your home to at least 65 degrees (during a 95 degree outside temperature) Fahrenheit as measured in the center of each room at a height of Five (5) feet above the floor, under local outdoor summer design conditions as specified in the ASHRAE handbook. In the case of outside temperatures exceeding 95 degrees Fahrenheit a differential of 30 degrees Fahrenheit from the outside temperature could be realized. Federal, state or local energy codes shall supersede this standard where such codes have been locally adopted. Reasonable temperature differentials between rooms should be expected.

Air conditioner condensation lines drain up to five gallons (5) of water daily creating damp areas around the air handler units. This occurrence is normal and is not warranted. Condensation lines will clog eventually under normal use and homeowners must check their lines each month in order to avoid any problems resulting from a line that is blocked.

## HEATERS

Buffington Homes warrants the electric water heaters for a period of one (1) year. The manufacturers' limited warranty covers the first 5 years. Water heater elements and other electrical parts are under warranty for one year for parts and labor. The tank is under warranty for five (5) years on a pro-rated cost basis.

## PLUMBING:

The manufacturer warrants plumbing fixtures and devices for two (2) years. The water and drainage pipes in the plumbing system in your home are under warranty by Buffington Homes for two (2) years. This warranty covers major faults such as water line separation, faulty equipment, and faulty or improper installation. It does not cover frozen pipes or damage caused by them. Any homeowner repairs or alteration of plumbing systems will void the warranty.

Plumbing leaks must be reported to Buffington Homes and the subcontractor immediately. We cannot be responsible for damage due to negligence on the part of the homeowner. The sound of water and waste flowing through drain lines is considered customary and not covered under this warranty.

All hot and cold water lines to each fixture (including the dishwasher) have valves for emergency shut-off. There is also a shut-off valve for the entire house. Please refer to the homeowner's manual for location and ask to see valve and how to operate it during the final walkthrough. All toilets have a flushing capacity of 1.6 gallons, pursuant to the 1992 Energy Policy and Conservation Act. This amount of water should be sufficient; however, "double flushing" may be required in some cases. A stopped-up toilet is not covered by this warranty.

All plumbing faucets, showers and tub valves are equipped with water saving devices installed by the manufacturer, pursuant to the 1992 Energy Policy and Conservation Act. Buffington Homes or its subcontractors are not permitted to tamper with or remove these devices.

## ELECTRICAL:

Buffington Homes warrants your electrical system, including fixtures and items of equipment for a period of two (2) years. Repairs and alterations made to the electrical system by anyone other than the installing subcontractor or one authorized by Buffington Homes will void the warranty.

All circuits in your home are protected by circuit breakers. After any electrical failure, check your circuit breakers first. To re-set the circuit breaker, be certain to flip the switch all the way to the "off" position, and then back to the "on" position. When replacing burned out bulbs, only use the recommend wattage bulb. See the sticker on the bulb socket for this information. Please refer to your Homeowner's Manual for location(s) of the electrical circuit breaker panel(s).

## IV. EIGHT YEAR WARRANTY COVERAGE:

For an Eight-year period, from the date of occupancy, all major structural defects are warranted. Buffington Homes expressly warrants the structure of the improvements to be constructed in a good and workmanlike manner consistent with the standards of quality workmanship, and in accordance with the plans and state and local building codes.

Repair of major structural defects occurring during the term of coverage include:

- The repair of damage to the load bearing portions of the structure that is necessary to restore their load bearing functions.
- The repair of those items of the structure damaged by the major structural defect that made the structure unsafe, unsanitary or unlivable.
- Buffington Homes' total liability is limited to the cost of repair or replacement. Steps taken by Buffington Homes to correct any major structural defect shall not extend the time of this warranty.
- Any attempt to repair a major structural defect by anyone other than Buffington Homes or its agents or subcontractors will void any warranty.

### SPECIFIC CONDITION EXCLUSIONS

The standard for construction defects and Contractor remedies shall be the Residential Construction Performance Guidelines, Second Edition (a copy of which can be reviewed upon request). The following are specifically excluded from this Limited Warranty:

- Normal wear and tear.
- Insect damage – Buffington Homes is not responsible for damage caused by any insects. It is the responsibility of the homeowner to maintain the termite bond yearly.
- Normal shrinkage due to drying out of building components.
- Normal changes in appearance of materials due to environmental exposure.
- Squeaks in hardwood floors. Noises are an inherent characteristic of hardwood floors.
- Frozen pipes, when frozen due to Owner's failure to drain pipes in area vulnerable to freezing, specifically including all hose bib lines.
- Any condition which does not result in actual physical damage to the structure, including but not limited to inhabitability due to health risk from the presence or consequence of unacceptable levels of radon gas, mold, formaldehyde, or other pollutants and contaminants; or the presence of hazardous or toxic onsite materials. Buffington Homes does not test air quality or warrant that indoor air does not contain impurities or contaminants.
- Finally, loss or damage caused by or resulting from abnormal loading on floors by the Homeowner, which exceeds design loads as mandated by the engineered design.

### VI. GENERAL WARRANTY EXCLUSIONS

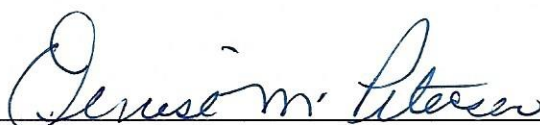
The following warranty exclusions are in addition to those described in the preceding sections:

- Appliances and equipment are "consumer products" as defined by the Magnusson-Moss Act, other than Buffington Homes' own workmanship and materials. Equipment, assemblies, or units purchased by Buffington Homes and included in the contract are sold and installed subject to the manufacturer's guarantees/warranties and not Buffington Homes.
- Buffington Homes assigns the owner all such manufacturers' guarantees and/or warranties.
- Any defect in materials supplied or work performed by anyone other than Buffington Homes, its subcontractors, or agents.
- Any damage caused by or made worse by negligence, improper maintenance or improper operations by anyone other than Buffington Homes, their subcontractors or agents, to include humidifiers, furnaces, security and fire alarms, roofing, gutters, and exterior wall coverings, dryer venting, anything that could promote the growth of mold in the house, etc.
- Any damage, which has not been reported in a timely manner.
- Damage that has not been properly minimized by the Owner.
- Any loss or damage that arises while the house is being used primarily for nonresidential purposes.
- Accidental loss or damage including but not limited to: Fire, Hurricane, Explosion, Smoke, Water leakage, Glass breakage, Windstorm, Hail, Lightning, Earthquake or other Acts of God. The exception would be when such loss or damage is caused by Buffington Homes' failure to comply with accepted industry standards and practices.

Mold disclaimer and waiver of testing. This subject Project does not include mold testing and remediation. CONTRACTOR, any of its agents and employees are held harmless and free from all liability and legal action relating to the current and/or future presence of mold at the subject property, regardless of the legal theory upon which any such claim rests unless such condition is caused by Buffington Homes' or its subcontractor's failure to comply with accepted industry standards and practices. This waiver and release shall be binding on heirs, agents, assignees, successors, and on any other person(s) who might otherwise be entitled to file suit or make a claim.

- Consequential, incidental, or theoretical damages.

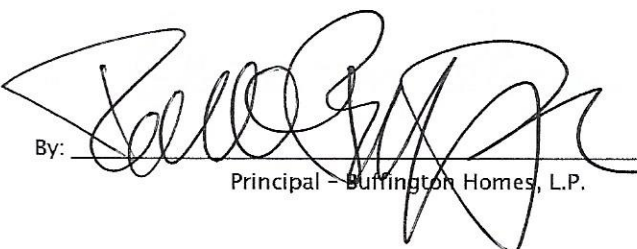
**AGREED AND ACCEPTED BY:**

By:   
OWNER

Date: 7/18/15

By: \_\_\_\_\_  
OWNER

Date: \_\_\_\_\_

By:   
Principal - Buffington Homes, L.P.

Date: 7/18/2015

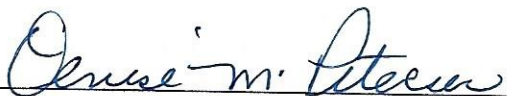
## ACKNOWLEDGMENT OF LIMITED WARRANTY AND DISCLAIMER

\_\_\_\_\_ (Owner's Initials). OWNER UNDERSTANDS AND ACKNOWLEDGES THAT THE CONTRACTOR'S LIMITED WARRANTY IS AN EXPRESS LIMITED WARRANTY AND THAT NO PERSONS OR ENTITIES SHALL HAVE LIABILITY WHATSOEVER, BY IMPLICATION OR OTHERWISE, FOR CLAIMS WHICH ARE NOT EXPRESSLY COVERED BY THE CONTRACTOR'S LIMITED WARRANTY DOCUMENTS. CONTRACTOR SPECIFICALLY DISCLAIMS ANY LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL (SECONDARY) DAMAGE TO ANY PERSON OR PROPERTY RESULTING FROM THE PURCHASE, REPAIR OR USE OF THE HOME OR ANY ITEM COVERED BY THE CONTRACTOR'S LIMITED WARRANTY. EXCEPT AS SPECIFICALLY PROVIDED HEREIN, CONTRACTOR IS NOT RESPONSIBLE FOR ANY LOSS, DAMAGE OR INJURY TO ANY PERSON OR PROPERTY.

\_\_\_\_\_ (Owner's Initials). IMPLIED WARRANTIES ARE EXPRESSLY DISCLAIMED AND DO NOT APPLY, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, SUITABILITY FOR RESIDENTIAL PURPOSES, FITNESS FOR A PARTICULAR PURPOSE, AND HABITABILITY, AND OTHERWISE. NOTWITHSTANDING ANY OTHER PROVISION OF THE CONTRACTOR'S LIMITED WARRANTY, CONTRACTOR SHALL HAVE NO LIABILITY UNDER THE CONTRACTOR'S LIMITED WARRANTY UNLESS HOMEBUYER(S) COMPLIES WITH ALL APPLICABLE NOTICE REQUIREMENTS PROVIDED FOR IN THE CONTRACTOR'S LIMITED WARRANTY. THE MAXIMUM AMOUNT PAYABLE UNDER THE CONTRACTOR'S LIMITED WARRANTY FOR ALL CLAIMS SUBMITTED IS THE ORIGINAL FINAL SALES PRICE OF THE HOME.

\_\_\_\_\_ (Owner's Initials). OWNER AND CONTRACTOR ACKNOWLEDGE AND AGREE THAT THE CONTRACTOR'S LIMITED WARRANTY (AND THE DISCLAIMERS, LIMITATIONS, EXCLUSIONS (INCLUDING THE MOLD DAMAGE EXCLUSION) AND CONDITIONS CONTAINED IN THE CONTRACTOR'S LIMITED WARRANTY AND IN THIS ACKNOWLEDGMENT) WERE SPECIFICALLY BARGAINED FOR AND TAKEN INTO EXPRESS CONSIDERATION IN ARRIVING AT THE CONTRACT PRICE. IF THE CONTRACTOR'S LIMITED WARRANTY HAD BEEN ALTERED FROM WHAT IS EXPRESSLY STATED IN THIS CONTRACT, THE CONTRACT PRICE WOULD HAVE BEEN MODIFIED ACCORDINGLY.

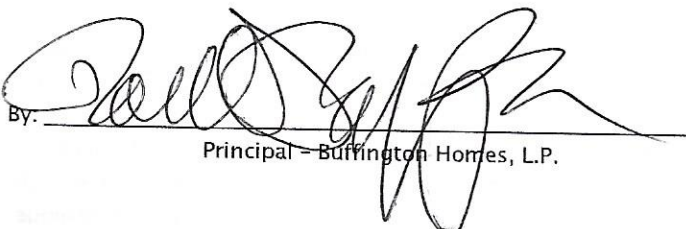
Agreed and Accepted by:

By:   
OWNER

Date: 7/18/15

By: \_\_\_\_\_  
OWNER

Date: \_\_\_\_\_

By:   
Principal - Buffington Homes, L.P.

Date: 7/18/2015

## MANDATORY MEDIATION AND ARBITRATION

The below-referenced provisions relating to mediation and arbitration supersede any conflicting references to mediation or arbitration or litigation or claims in any of the contract documents.

## MANDATORY MEDIATION

Prior to the commencement of arbitration or legal proceedings arising out of any claims, disputes, or other matters in question between the CONTRACTOR and the OWNER arising out of, or relating to this agreement, the project, the work, the contract documents or any breach thereof, the parties agree to participate in a formal non-binding mediation proceeding in an attempt to resolve their differences. The mediator may include any other entities or persons involved in the dispute.

The parties will agree upon a mediator and the mediation will take place within thirty (30) days after notice by one of the parties of the claim or dispute and the demand for mediation. If the parties are unable to agree on a mediator, they will ask the American Arbitration Association (which provides mediators for construction disputes) for the appointment of the mediator. The cost of the mediation and the mediator shall be divided equally among the parties participating in the mediation.

A representative of each party will attend the mediation, and the representative in attendance shall have authority on behalf of the party to resolve the dispute.

Notwithstanding the above, if the statute of limitations or some other deadline is approaching and must be tolled, a party may initiate arbitration or legal proceedings to toll the deadline and protect its interests, but will thereafter participate in mediation above-described as soon as possible.

## MANDATORY ARBITRATION

Subject to the qualification found in the following paragraph, all claims, disputes and other matters in question between the CONTRACTOR and the OWNER arising out of, or relating to this Agreement, the Project, the Work, the Contract Documents or the breach thereof may, at either party's option, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining as modified hereby.

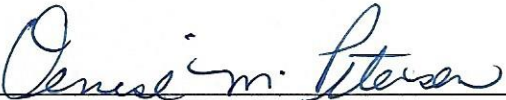
Any arbitration arising out of or relating to this Agreement, the Project, the Work, the Contract Documents, or the breach thereof may include by consolidation, joinder or in any other manner, at either party's option, any other entities or persons whom the parties believe to be substantially involved in a common question of fact or law. However, if either party wishes to include in the dispute by consolidation, joinder or in any other manner any other entity or persons whom either party believes to be substantially involved in a common question of law or fact, and either party is unable to compel such entities or persons to participate in the arbitration for whatever reason (e.g., it has no binding arbitration agreement with such entities or persons), then, at either party's option, either party may declare this arbitration provision null and void and may proceed with the dispute through litigation, at which time the OWNER and CONTRACTOR shall dismiss the arbitration without prejudice (if arbitration has been initiated) and shall proceed with litigation through the courts (subject to the mandatory non-binding mediation provision set forth above).

Either party may elect at the commencement of the arbitration to have the discovery rights and procedures provided by the Federal Rules of Civil Procedure to be available and enforceable within the arbitration proceeding.

The locale for the arbitration shall be Charleston, South Carolina. Any request or demand for arbitration hereunder shall be made before the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

This agreement to arbitrate shall be specifically enforceable by either party under the prevailing arbitration law. Any award rendered by arbitrators shall be final and enforceable by any party to the arbitration, and judgment may be rendered upon it in accordance with applicable law in any court having jurisdiction thereof.

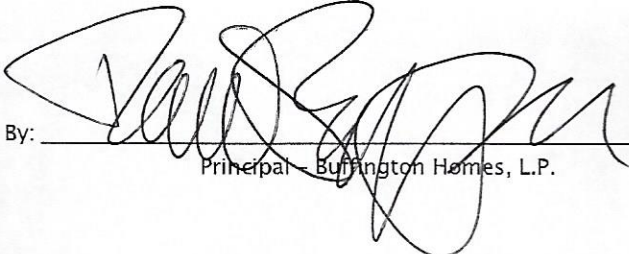
Accepted by:

By:   
OWNER

Date: 7/18/15

By: \_\_\_\_\_  
OWNER

Date: \_\_\_\_\_

By:   
Principal - Burlington Homes, L.P.

Date: 7/18/2015

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**  
**Jul 07 2022**  
**SC Court of Appeals**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Case No. 2021-CP-10-01973

Denise M. Petersen, individually and as  
Trustee of the Denise M. Petersen 2005  
Revocable Trust Dated November 9, 2005,  
as Trustee of the 601 Ocean Boulevard  
Residence Trust Dated November 30, 2012,  
and as Trustee of the 601 Ocean Boulevard  
Residence Trust II Dated December 7, 2012, .....Respondent,

v.

DCTCL, L.P., d/b/a Buffington Homes, L.P.,  
Donnix Construction, LLC, Hunt Brothers  
Construction, Inc., Island Exteriors and  
Siding, Inc., Plastering Surfaces, LLC, a  
Unique Design, Inc., Berkeley Heating and  
Air Conditioning, Inc., Energyone America,  
LLC, Aqua Blue Pools of Charleston, Inc.,  
Sunnyside Farms, Inc., TAMKO Building  
Products, LLC, Haddigan Electrical  
Contractors, LLC and John Doe Contractors  
3 through 50, .....Defendants,

Of Whom

Donnix Construction, LLC, is .....Respondent,

And

TAMKO Building Products, LLC is .....Appellant.

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**NOTICE OF APPEAL**

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TAMKO Building Products, LLC appeals the Order of the Honorable Benjamin H. Culbertson denying TAMKO Building Products, LLC's ("TAMKO") Motion to Dismiss and Compel Arbitration, entered on June 9, 2022, and the corresponding Order denying TAMKO's Motion to Alter/Amend the Order Denying TAMKO's Motion to Dismiss and Compel Arbitration, entered on June 29, 2022. An order denying arbitration is immediately appealable. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34-35, 524 S.E.2d 839, 842 (Ct. App. 1999); *see also* S.C. Code Ann. § 15-48-200(a)(1). Judgment date for this matter is June 29, 2022. Copies of the subject orders are attached hereto.

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July 7, 2022

Columbia, SC

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david@cslaw.com

*Counsel for Sunnyside Farms, Inc.*

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

**Jul 07 2022**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Benjamin Culbertson, Circuit Court Judge

Case No. 2021-CP-10-01973

Denise M. Petersen, individually and as  
Trustee of the Denise M. Petersen 2005  
Revocable Trust Dated November 9, 2005,  
as Trustee of the 601 Ocean Boulevard  
Residence Trust Dated November 30, 2012,  
and as Trustee of the 601 Ocean Boulevard  
Residence Trust II Dated December 7, 2012, .....Respondent,

v.

DCTCL, L.P., d/b/a Buffington Homes, L.P.,  
Donnix Construction, LLC, Hunt Brothers  
Construction, Inc., Island Exteriors and  
Siding, Inc., Plastering Surfaces, LLC, a  
Unique Design, Inc., Berkeley Heating and  
Air Conditioning, Inc., Energyone America,  
LLC, Aqua Blue Pools of Charleston, Inc.,  
Sunnyside Farms, Inc., TAMKO Building  
Products, LLC, Haddigan Electrical  
Contractors, LLC and John Doe Contractors  
3 through 50, .....Defendants,

Of Whom

Donnix Construction, LLC, is .....Respondent,

And

TAMKO Building Products, LLC is .....Appellant.

---

**PROOF OF SERVICE**

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I certify that I have served the Notice of Appeal as the undersigned employee of the law offices of Williams Mullen, attorneys for Appellant, and hereby certify that service of the Notice of Appeal was made on all counsel of record, specified below, by electronically mailing a copy of the same to the following addresses:

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Kim Rothrock  
Legal Administrative Assistant

July 7, 2022

Columbia, South Carolina

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July 7, 2022

**RECEIVED****Jul 07 2022****SC Court of Appeals****VIA U.S. MAIL and E-Mail**

Ms. Jenny Abbott Kitchings, Clerk of Court  
Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211  
[ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

RE: Denise M. Petersen, individually and as Trustee of the Denise M. Petersen 2005 Revocable Trust Dated November 9, 2005, as Trustee of the 601 Ocean Boulevard Residence Trust Dated November 30, 2012, et al. vs DCTCL, L.P., d/b/a Buffington Homes, L.P., Donnix Construction, LLC, et al.

Charleston County Court of Common Pleas Case Number: 2021-CP-10-01973

Dear Ms. Kitchings:

Please find a Notice of Appeal, Proof of Service, and this firm's check in the amount of \$250.00 for the respective filing fee enclosed herein for your review and filing in connection with the above-referenced matter:

Should you have any questions or require additional information, please do not hesitate to contact our office.

Sincerely,



Richard H. Willis

RHW/kmr  
Enclosures: As referenced.  
Cc: All counsel via e-mail only.

STATE OF SOUTH CAROLINA     )  
                                           )  
 COUNTY OF CHARLESTON        )     IN THE COURT OF COMMON PLEAS  
                                           )     NINTH JUDICIAL CIRCUIT  
                                           )     2021-CP-10-01973

DENISE M. PETERSEN, individually     )  
 and as TRUSTEE OF THE DENISE         )  
 M. PETERSEN 2005 REVOCABLE TRUST     )  
 DATED NOVEMBER 9, 2005, as            )  
 TRUSTEE OF THE 601 OCEAN BOULEVARD    )  
 RESIDENCE TRUST DATED                 )  
 NOVEMBER 30, 2012, and as TRUSTEE     )  
 OF THE 601 OCEAN BOULEVARD            )  
 RESIDENCE TRUST II DATED              )  
 DECEMBER 7, 2012,                     )  
                                           )

Plaintiff,     ) Transcript of Record

vs.             )  
                   )  
                   )

DCTCL, L.P. d/b/a BUFFINGTON HOMES, )  
 L.P., DONNIX CONSTRUCTION, LLC,     )  
 HUNT BROTHERS CONSTRUCTION, INC.,    )  
 ISLAND EXTERIORS AND SIDING, INC.,   )  
 PLASTERING SURFACES, LLC, A UNIQUE    )  
 DESIGN, INC., BERKELEY HEATING AND    )  
 AIR CONDITIONING, INC., ENERGYONE   )  
 AMERICA, LLC, AQUA BLUE POOLS OF     )  
 CHARLESTON, INC., SUNNYSIDE FARMS,    )  
 INC., TAMKO BUILDING PRODUCTS, LLC, )  
 HADDIGAN ELECTRICAL CONTRACTORS,     )  
 LLC, and JOHN DOE CONTRACTORS 3       )  
 THROUGH 50,                            )  
                                           )

Defendant.     )  
                   )  
                   )

Charleston, South Carolina  
 June 2, 2022

## B E F O R E:

The Honorable Benjamin H. Culbertson

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

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Mr. Happel Scurry, Esquire

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Mr. Jenkins Wilson, Esquire

Attorney for Defendant, A Unique Design, Inc.

Mr. Adam Ribock, Esquire

Attorney for Defendant, Buffington Homes

Mr. Richard Willis, Esquire

Attorney for Defendant, Tamko Building Products, Inc.

Ms. Katie Walker, Esquire

Attorney for Defendant, Berkeley Heating and Cooling,  
Inc.

Recorded by: WebEx

Transcribed by: Lisa Carter, Court Reporter

## I N D E X

WITNESSESPAGE

(NO WITNESSES INTRODUCED DURING HEARING)

(EXHIBITS INTRODUCED DURING HEARING)

1                   THE COURT:       All right. This is 2021-CP-10-  
2                   01973. Denise M. Petersen and other others versus DCTC LLP  
3                   and others. According to my roster the matter is before the  
4                   court on the motion for protection to stay discovery, a  
5                   motion to compel discovery, and a motion to dismiss and  
6                   compel arbitration. We'll need to go around, everybody will  
7                   need to give their names, the capacity in which they're  
8                   appearing at this hearing and where they are physically  
9                   located.

10                  My name is Judge Ben Culbertson. I'm the circuit judge  
11                  assigned to this term of Common Pleas Non-Jury for  
12                  Charleston County. During this hearing I am physically  
13                  located in Courtroom 3-E of the Charleston County  
14                  Courthouse.

15                  All right. Mr. Kirchner, if you would go next.

16                  MR. KIRCHNER: Yes sir. Thank you, judge. Jesse  
17                  Kirchner I represent the plaintiff, Denise Petersen. For  
18                  this hearing I'm physically located in my office here in  
19                  Charleston on 15 Middle Atlantic Wharf.

20                  THE COURT:       All right. Mr. Ribock?

21                  MR. RIBOCK:     Good morning, judge. My name is Adam  
22                  Ribock. I represent the general contractor, Buffington  
23                  Homes in this matter. I'm located in my office in Columbia,  
24                  South Carolina.

25                  THE COURT:       All right. Mr. Berthelsen?

1 MR. BERTHELSEN: Good morning, Your Honor. I  
2 represent Island Exteriors, one of the subcontracts in this  
3 and co-counsel with Madison Alger and I'm located at this  
4 time in my office in Mount Pleasant, South Carolina in  
5 Charleston County.

6 THE COURT: All right. Mr. Cleveland? I'm sorry,  
7 you're muted.

8 MR. CLEVELAND: I'm sorry, Your Honor. I'm David  
9 Cleveland. I represent the subcontractor Sunnyside Farms.  
10 I'm located in my office in Charleston.

11 THE COURT: All right. Mr. Thrift?

12 MR. THRIFT: Good morning, Your Honor. I'm here on  
13 behalf of Plastering Surfaces today. I am located in my  
14 office downtown Charleston.

15 THE COURT: All right. Mr. Scurry?

16 MR. SCURRY: Good morning, Your Honor. I'm located  
17 in Charleston ---

18 THE COURT: I'm sorry, I can not hear -- you're  
19 breaking up, Mr. Scurry. You're audio isn't working.  
20 (Whereupon, the attorney works on getting his audio  
21 working)

22 THE COURT: I still cannot hear you.

23 MR. KIRCHNER: Judge, Happel is with me. He's here in  
24 our office here in Charleston. He also represents the  
25 plaintiff, but I'll be doing the talking.

1 THE COURT: All right.

2 MR. SCURRY: I apologize, Your Honor, can you hear  
3 me?

4 THE COURT: Mr. Wilson?

5 MR. WILSON: Good morning, Your Honor, Jenkins  
6 Wilson here for A Unique Design. I'm at my house in  
7 Charleston.

8 THE COURT: All right. Ms. Stratta?

9 MS. STRATTA: Good morning, Your Honor. My name is  
10 Jessica Stratta. I represent Donnix Construction, LLC which  
11 is a subcontractor in this case. I'm located at my office  
12 in Charleston, specifically, in Daniel Island, 146  
13 Fairchild Street.

14 THE COURT: Ms. Walker?

15 MS. WALKER: Good morning, Your Honor. I represent  
16 Berkeley Heating and Air and I'm located in my office in  
17 Mount Pleasant, South Carolina.

18 THE COURT: Ms. Alger?

19 MS. ALGER: Good morning, Your Honor. My name is  
20 Madison Alger and co-counsel for Island Exteriors with Mr.  
21 Berthelsen and I'm located at my home on Daniel Island.

22 THE COURT: Okay. Mr Willis?

23 MR. WILLIS: Good morning, Your Honor. I'm with --  
24 this is Richard Willis. I'm with Williams Mullen in  
25 Columbia. I'm in my office here. With me is Derek Tarver,

1       who's an associate on the case. I'll be speaking on behalf  
2       of Tamko who is the manufacturer of the underlayment to the  
3       material on the roof.

4               THE COURT:       Mr. Winograd?

5               MR. WINOGRAD:   Good morning, Your Honor. My name is  
6       Scott Winograd. I represent Energyone America and I'm here  
7       in my office in Mount Pleasant, South Carolina.

8               THE COURT:       All right. Mr. Watkins?

9               MR. WATKINS:    Goo morning, Your Honor. Trey Watkins  
10       here on behalf of Aqua Blue Pools and I'm in my office in  
11       Charleston, South Carolina.

12              THE COURT:       All right. The first, let's see, the  
13       motion filed on November 24, 2021, motion to dismiss and  
14       compel arbitration, whose is that?

15              MS. WILLIS:     That's my motion, Your Honor, on behalf  
16       of  
17       Tamko and we're ready to proceed.

18              THE COURT:       All right. Mr. Willis, let me hear from  
19       you.

20              MR. WILLIS:     So, Your Honor, I represent Tamko.  
21       They're a company out of Joplin, Missouri. They manufacture  
22       a number of different kinds of building materials. They're  
23       sort of a bulk manufacturer of building materials primarily  
24       roofing materials, shingles, underlayment, membranes, and  
25       that sort of thing. This is actually the second time in

1 South Carolina that their arbitration clause has been  
2 subject to adjudication. The One Bell Hall case that we  
3 mentioned in our memorandum of law which went up to the  
4 South Carolina Court of Appeals, is the other one.

5 So this is a little bit of a deja vu issue for us.  
6 This underlayment is basically the, the sort of fabric  
7 material that goes under the shingles and under the copper  
8 roof on Ms. Petersen's house. This is a large and beautiful  
9 house that was built on the front beach of Kiawah and as,  
10 Your Honor, can see from the various people on the call  
11 there were a number of problems associated with it. Tamko  
12 is only interested in issues associated with the roof. And  
13 so when Mr. Scurry joined Tamko as a defendant, we  
14 immediately moved to dismiss on the grounds that there's an  
15 arbitration clause contained in the warranty that is issued  
16 when this product is sold. That warranty accrues to the  
17 benefit of Ms. Peterson the homeowner under the terms of  
18 the warranty and we moved to compel arbitration. There --  
19 the alleged problem with the underlayment is that under  
20 heat and pressure the polymer and the underlayment can come  
21 out of the fabric and drip and there are some photos that  
22 Mr. Scurry has that show that dripping associated with the,  
23 the underlayment. It's primarily under the shingles. Our  
24 understanding from an inspection that occurred I believe  
25 yesterday or two days ago that there, there is no dripping

1 of the underlayment under the copper portion of the roof,  
2 but there is under the shingles.

3 And this is an issue that that Tamko has had with a  
4 couple, with some of the batches of underlayment that it  
5 manufactured. The polymer was changed and it didn't work  
6 and so they went back to the old polymer. And so this  
7 particular underlayment falls, probably falls within that  
8 batch.

9 Your Honor, I want to -- I'll get to the merits of the  
10 motion, but having argued before you before I know you are  
11 as interested in the practicalities of the circumstances as  
12 the, as the legal doctrine. And so let me sort of skip to  
13 the last chapter of the book and talk very briefly about  
14 practicality. As Your Honor is probably aware a motion to  
15 enforce an arbitration, if that motion is granted then the  
16 case goes to arbitration. And in my experience with these  
17 arbitrations involving this particular product, it gets  
18 resolved pretty quickly within three, three to five months  
19 usually by some sort of settled resolution. That doesn't  
20 always happen, but it tends to happen with this product and  
21 that takes Tamko out of the case. And so that's the reason  
22 why we moved for arbitration. It's faster. It's cheaper. I  
23 think it benefits everyone, frankly, as opposed to us  
24 getting involved as one of a dozen defendants in a large  
25 construction case. If, Your Honor, grants that motion we'll

1 go with arbitration in this case, at least, this aspect of  
2 the case will be resolved.

3 If, Your Honor, denies the motion then, as you're  
4 probably aware under the South Carolina Arbitration Act  
5 it's immediately appealable. And there's a recent case  
6 called Huskins versus Mungo Homes out of the South Carolina  
7 Court of Appeals that talks about that appealability issue.  
8 That's what happened in the One Bell Hall case which is the  
9 other case involving similar arbitration clause in a bulk  
10 sales contract and on shingles Tamko manufacturers. And so  
11 I don't know about the other folks on the call, but I  
12 currently have an appeal in front of the South Carolina  
13 Court of Appeals, it's been pending for three years. And so  
14 that's the long solution to the problem and the arbitration  
15 is the short solution to the problem. But either way this  
16 case will either be going to arbitration or will be going  
17 up on an appeal. And I'm not sure that really benefits  
18 anyone other than the lawyers, frankly. So that's the,  
19 that's the practicality of what we're asking the court to  
20 do. And we've had conversations with Mr. Scurry and  
21 conversations with Mr. McDonald. I've tried to persuade  
22 them this is the right thing to do and I have failed at  
23 that. So we are, hence, arguing the motion in front, in  
24 front of you.

25 I want to talk about three things on the merits of the

1 motion, Your Honor. First, I want to briefly go over the  
2 analysis that the Court of Appeals and the Supreme Court  
3 has set down for deciding when to enforce an arbitration  
4 clause as part of a commercial sales transaction. I want to  
5 touch briefly on some of the arguments that the  
6 plaintiff's, Ms. Petersen, represented by Mr. Scurry, made  
7 as to why they shouldn't be required to arbitrate. And as  
8 well as the arguments that Donnix, who is the among other  
9 things at the, at the home the company that installed the  
10 roof, why they should not be required to arbitrate. I'll  
11 talk briefly about that. And then, Your Honor, I want to  
12 explain to the court what we're asking you to do. So those  
13 are sort of the three phases of my argument.

14 As, as the court is aware, the analysis that it must  
15 follow in determining whether to enforce an arbitration  
16 clause is first, is the transaction or the claim associated  
17 with interstate commerce. Clearly here it is, it's, these  
18 shingles were manufactured in Missouri. They were sold  
19 through a distributor in South Carolina to Donnix. So that  
20 box is checked and no one disputes that.

21 The second issue that the court has to decide is  
22 whether or not the claims that are made in the underlying  
23 lawsuit fall within the arbitration clause or are closely  
24 enough related to the arbitration clause that it's fair to  
25 send them to arbitration, and that arbitration clause and

1 the entire warranty, Your Honor, are attached to our brief  
2 as Exhibit A. It's a very broad arbitration clause and it,  
3 basically, requires any claims associated with the  
4 underlayment to be submitted to mandatory binding  
5 arbitration. So we believe clearly the these claims are  
6 covered by the arbitration agreement.

7 And then the third issue, Your Honor, is whether or  
8 not it's, whether or not the arbitration agreement is  
9 conscionable. Whether or not it's fair. Mr. Happel and Mr.  
10 McDonald don't raise that issue. I'm not sure that whether  
11 they think it's fair or not, but anyway, that, that issue  
12 hasn't been, it isn't part of their opposition. But just  
13 for the record the South Carolina Court of Appeals has  
14 already found that this, essentially, identical mandatory  
15 arbitration clause is fair. It's not unconscionable. It's  
16 equitable. And it's not one sided. It's fair to both sides.  
17 So that issue is really not in front of the court.

18 And so if it is involved with interstate commerce, if  
19 it's covered by the arbitration clause and the arbitration  
20 clauses conscionable, we believe, Your Honor, really  
21 doesn't have a choice in the matter, you have to enforce  
22 arbitration. But in every case like this, you get issues  
23 that pop up. Because this arbitration clause is part of the  
24 bulk sale of material that's incorporated into a home.  
25 Frequently, the homeowner doesn't even realize that they

1 have a warranty. And so they -- when we raised the  
2 arbitration clause, the first thing the homeowner says, is  
3 well, I don't have a contract with you. Well, yes you do.  
4 You may not know it, but you do have one and that is the  
5 warranty that accompanies the sale of the product is  
6 transferred to the homeowner under the terms of the  
7 warranty. And, of course, anytime there is a sale of  
8 material under the UCC there is also an implied warranty  
9 that accompanies that sale. And so that's a, that's  
10 contract as well. So there is a contract.

11 THE COURT: Excuse me for interrupting and I hate  
12 interrupt, but the warranty compels arbitration. If a  
13 homeowner doesn't want to enter into that contract, how did  
14 they say, no, I don't agree to that.

15 MR. WILLIS: It's a contract of adhesion, Your  
16 Honor. It's not one that they can disagree with. They can,  
17 the buyer of the installer of the material could decide  
18 well we don't want to install a material that contains a  
19 binding arbitration clause. But, but once that decision is  
20 made then, as as a practical matter the homeowner has no  
21 choice. They've not arbitrated ---

22 THE COURT: But even ---

23 MR. WILLIS: --- they have a claim.

24 THE COURT: But, I mean, in this case you don't  
25 have a homeowner coming and sign and saying I want to get

1 this product to go under my shingles. You probably got a  
2 subcontractor that's buying the product and making the  
3 decision for the homeowner.

4 MR. WILLIS: That's correct, Your Honor. The  
5 homeowner is, is a non-signatory to the arbitration clause  
6 as, as his Donnix as a matter of just practicality. So  
7 this, so this issue involves when an arbitration clause can  
8 be enforced against the non-signatory.

9 THE COURT: I mean, issue been addressed on appeal?

10 MR. WILLIS: Yes, sir, Your Honor. There's a lot of  
11 law on that. The leading case which we cited in our brief  
12 is a case called Pearson versus Hilton Head Hospital. That,  
13 that issue was also sort of behind the scenes in One Bell  
14 Hall case. Mr. Lucey (ph) didn't challenge that issue in  
15 that case. But, essentially, the law is that an arbitration  
16 clause can be enforced against a non-signatory, if that  
17 non-signatory's lawsuit involves claims such as breach of  
18 warranty, breach of implied warranty, even negligence and  
19 strict liability claims or unfair trade practices claims,  
20 because they essentially arise out of the sale of the  
21 product which has been covered by the UCC which is then  
22 covered by both express warranty and the implied warranty.

23 So I'd urge the court to review that Pearson case.  
24 It's a, it's a fairly extensive case and it talks about the  
25 various circumstances under which non-signatories can be

1 compelled to arbitrate. It talks -- a good bit of federal  
2 law involved in that as well, Your Honor. Because as you  
3 know the Federal Arbitration Act preempts state law to the  
4 extent that state law might be inconsistent.

5 So both the plaintiff and Donnix have sued Tamko under  
6 claims of breach of warranty. The plaintiff's claim is  
7 breaching implied warranty. They've avoided the express  
8 warranty possibly because they either didn't know about it  
9 or they don't want to have to arbitrate or they don't like  
10 limitations. Donnix, on the other hand, I think knew about  
11 it when they filed their cross-claim. They allege in their  
12 cross-claim that there is a contract between Donnix and  
13 Tamko. That's in Paragraph 121 of their, of their answer  
14 and a cross-claim. And then they bring in a claim against  
15 Tamko for file, for breach of express warranty and breach  
16 of implied warranty. So that's the reason why there is a  
17 contract and that's the reason why the arbitration clause  
18 should bind the non-signatories.

19 So the issues that the opponents to the motion raise  
20 is, you know, first, as I said there's no contract. Well,  
21 there is, in fact, a contract both implied in law and an  
22 express contract and the express warranty.

23 Then they say, well, we didn't agree to it and we  
24 didn't or we didn't sign it. And, unfortunately, that by  
25 virtue of the sale, they're deemed to have agreed to it and

1       they don't need to sign it. They're non-signatory to the  
2       contract. In a sense, Your Honor, they're a third-party  
3       beneficiaries of the terms and conditions of the warranty.  
4       But the courts tend to address this on a estoppel grounds,  
5       equitable estoppel as opposed to third-party beneficiary,  
6       but they're similar and that Pearson case talks about that.

7               Then they take the position that the warranty is not  
8       authentic. I think that arises from a case that Donnix's  
9       counsel cites called Nelson which comes out of Missouri.  
10      This warranty has been authenticated. It's authenticated by  
11      the, by the affidavit that we submitted along with our  
12      motion. And this warranty is available online and it also  
13      appears on the packaging for each roll of underlayment  
14      that's installed at the site.

15             THE COURT:       Yeah, but I mean, you know, the  
16      homeowner is not going to see that.

17             MR. WILLIS:     No, sir. The homeowner doesn't see  
18      this. This is -- Your Honor, this is no different than any  
19      warranty a homeowner would get with the purchase of a home.  
20      You know, the piping might be warranted. The flooring might  
21      be warranted. Not dissimilar to warranties do you get, you  
22      know, when you buy a car. Your tires are warranted. Your  
23      hoses are warranted. Those are different from the overall  
24      warranty associated with the house. It's so frequently the  
25      homeowner doesn't see it.

1           Other arguments are is the warranty doesn't say what  
2           it applies to. Well, it actually does clearly say what it  
3           applies to in terms of the warranty. It applies to a number  
4           of things including the underlayment and it appears on the  
5           underlayment.

6           I think Donnix raises the issue of the blanks in the  
7           warranty aren't filled in. They don't need to be filled in  
8           for the warranty to be effective. That's just a way for the  
9           installer to inform Tamko that underlayment has been put on  
10          this particular structure and that it doesn't have to be  
11          filled in for the warranty to be effective.

12          THE COURT:       But is there case law that says that or  
13          that's just your position?

14          MR. WILLIS:     Your Honor, it's pretty clear from the  
15          terms of the warranty.

16          THE COURT:       Okay.

17          MR. WILLIS:     It's not a warranty where you have to  
18          fill it out and send in a warranty card. It just companies  
19          the cell of the product. And similarly an implied warranty  
20          would accompany the sale of the product whether it's signed  
21          or not, it's not or filled out, it's just has nothing to do  
22          with the effectiveness of the warranty or the arbitration  
23          clause.

24          And so finally, Your Honor, what we're asking the  
25          court to do pretty clear from our motion is dismiss the

1 case and order arbitration. And if the court does that, my  
2 prediction is that our aspect of this will be resolved  
3 pretty quickly. If the court does not do that then, we'll  
4 be, unfortunately, having to take it up on appeal.

5 THE COURT: All right.

6 MR. WILLIS: Happy to answer -- I'll be happy to  
7 answer any questions that, Your Honor, might have.

8 THE COURT: I'm fine. Thank you.

9 MR. WILLIS: Thank you.

10 THE COURT: All right. Does anybody other than  
11 plaintiff's counsel have an argument in favor or against  
12 arbitration, if so, raise your hand.

13 MS. STRATTA: Your Honor, this is Jessica Stratta. I  
14 represent Donnix and I have arguments against Tamko's  
15 motion.

16 THE COURT: Okay. Let me hear from you.

17 MS. STRATTA: Okay. Thank you, Your Honor. May it  
18 please, the Court?

19 I mentioned I represent Donnix Construction LLC. And  
20 Donnix Construction LLC was hired by the general contractor  
21 to install the roof, flashings and water (inaudible) into  
22 it plaintiff's residence. Now, Donnix never entered into a  
23 contract specifically with Tamko for the underlayment  
24 install at the residence. Donnix placed an order with a  
25 building supplier in which the building suppliers delivered

1 the product to plaintiff's residence. And at that point and  
2 only after the product has been paid for and delivered to  
3 the residence, was this limited warranty continuing the  
4 arbitration clause first visible to Donnix. It was not  
5 discussed specifically between Tamko and Donnix during the  
6 sale that was facilitated by the supplier and the Donnix  
7 never consented to the arbitration clause contained within  
8 this on authenticated limited warranty.

9 THE COURT: And I -- excuse me for interrupting  
10 you, Ms. Stratta, but according to Mr. Willis this Pearson  
11 decision that he references says that doesn't matter.

12 MS. STRATTA: Yes, Your Honor.

13 THE COURT: I haven't read the case so I don't know  
14 what the case says, but, I mean, either it does mean you're  
15 wrong and he's right or else it doesn't say what he's  
16 saying it said so which one is it?

17 MS. STRATTA: Yes, Your Honor. The Pearson case dealt  
18 with an entirely different set of facts than what we have  
19 here. The Pearson case dealt with a former employer who was  
20 terminated and sued his employer for wrongful termination.  
21 The employer filed a motion to compel arbitration based  
22 upon an employment contract with the former employee as the  
23 former employee benefitted from the employment contract  
24 while he was still employed. And the Court ruled that the  
25 former employee in Pearson received a direct benefit from

1 the employment contract. The employee could not, then,  
2 dispute that it did not know about the arbitration clause  
3 within his employment contract. Here there is not even a  
4 contract between Tamko and Donnix. Had there been a  
5 contract between the two of them, maybe the arbitration  
6 clause would be enforceable. But there was no meeting of  
7 the minds which is the first step of even forming a  
8 contract.

9 Now, counsel for Tamko also cites the One Bell Hall  
10 case and here the court did agree that the arbitration  
11 clause within the bulk sale contract for the shingles was  
12 enforceable. Here there's no bulk sales contract between  
13 Tamko and Donnix. There is this blank limited warranty that  
14 was attached to the underlayment where Donnix only became  
15 aware of this arbitration clause after purchasing the  
16 material. The limited warranty is, it references a number  
17 of products. It doesn't specify, specifically, the exact  
18 type of underlayment. It has a line for plaintiff to sign.  
19 It has a line for the contractor to sign. And it has marked  
20 for what specific products that it applies to. There's no  
21 way to even tell that this limited warranty applies to the  
22 material installed at plaintiff's residence. It's not a  
23 bulk sales contract. It is a limited warranty that was  
24 provided to Donnix after the sale was completed.

25 Now, as I'm sure you are aware the Federal Arbitration

1 Act requires that arbitration clauses are governed by the  
2 principle of contracts formation and here there has been no  
3 meeting of the mind between Donnix and Tamko regarding the  
4 arbitration clause. Without the meeting of the mind, the  
5 arbitration clause cannot be enforced against Donnix. So  
6 this is why we are opposing the motions and believe that it  
7 would be inequitable and against judicial economy to force  
8 Donnix to participate in an arbitration, in an arbitration  
9 clause that he did not know about or even consent to until  
10 after the product already purchased.

11 THE COURT: All right. Anyone else other than the  
12 plaintiff, have an argument against arbitration or in favor  
13 of the arbitration, if so, raise your right hand.

14 (Whereupon, no one is raising their hand)

15 THE COURT: All right. Mr. Kirchner, let hear from  
16 you.

17 MR. KIRCHNER: Yes, sir. Thank you, judge. And we  
18 filed a brief with an affidavit as well. So I'll rely on  
19 that for purposes of the record and just try to hit the  
20 highlights here.

21 I think you, your questioning, you picked up on  
22 exactly the primary reason why we oppose the arbitration in  
23 this matter. And if I can read from the Pearson case it  
24 says, "Arbitration is a matter of contract and a party  
25 cannot be required to submit to arbitration any dispute

1       which he has not agreed to so to submit." And so here, the  
2       plaintiff has not agreed to submit any dispute to  
3       arbitration. It has no agreement with Tamko whatsoever much  
4       less an agreement to arbitrate. And I think the distinction  
5       with the Pearson case as Ms. Stratta pointed out was an  
6       employment matter where there was actually an employment  
7       contract. Here there's no contract at all. And in the  
8       Pearson case it talked about the non-signatory being bound  
9       by a contract if it participant under the contract or  
10      received the benefit of the contract. Here ---

11           THE COURT:       Mr. Willis' argument is that there is  
12      an appellate decision out there that says since you're  
13      bringing in a breach of warranty claim that you're governed  
14      by the provisions of the warranty that compel arbitration.

15           MR. KIRCHNER:   And I think he's been incorrect in this  
16      respect. I believe if we had brought a breach of express  
17      warranty or a breach of contract claim, perhaps that  
18      argument might fly, although, I disagree with that, but we  
19      have not, Your Honor. We've brought a negligence claim, a  
20      gross negligence claim, a strict liability claim, and a  
21      breach of implied warranty claim. Not the express warranty  
22      that he's relying on to try to compel us to arbitration.  
23      The warranties that are implied in law such as the warranty  
24      of merchantability, the warranty via fitness for a  
25      particular purpose does have nothing to do with express

1       warranties or contracts. Those are implied in law. And  
2       here, again, I think the distinction in Pearson is there's  
3       a difference between non-signatory and a non-party and the  
4       example I always give is your insurance policy, right. You  
5       are a party to your insurance policy, but you don't sign  
6       it. You're not a signatory to the insurance policy, but you  
7       have your insurance policy, you pay your premium. If  
8       there's a dispute under that insurance policy, you're bound  
9       by its terms. But here, we're not a party to a contract  
10      that we didn't sign. We're not a party at all period. So  
11      we're not only a non-signatory, we're a non party. As Ms.  
12      Stratta pointed out the document that they have, that  
13      they've put in front of the court to purport a legal  
14      requires to arbitrate lists twelve different products, none  
15      of which is checked off. There's a blank for where the  
16      material was purchased from. That's empty. There's a blank  
17      for the owner's name. That's empty. My mind doesn't appear  
18      anywhere on that document. There's a blank for the  
19      contractors name. That's empty. There's a blank for the  
20      contractors address, the city, state, zip. That's empty.  
21      And there's a blank for the date that this product was  
22      applied to my client's home. That's completely empty. And  
23      this document is dated to 2009 some nine years before my  
24      client's home was ever even constructed.

25               So again, judge, my client has no agreement with Tamko

1 as you mentioned. We have a contract with Buffington owes  
2 the builder. And Buffington hired a subcontractor, Donnix  
3 who purchased this material that presumably arrived on site  
4 by delivery person and was installed on my client's home  
5 and there are problems with it. She never, at any  
6 agreement, to arbitrate with anyone. Had no agreement at  
7 all with, with, with Tamko.

8 And again, even the Pearson case stands for the  
9 proposition that in order to compel someone to arbitration  
10 the very first inquiry is whether or not there is a valid  
11 agreement to arbitrate which is a matter of contract law.  
12 And here there's, there's no agreement with Tamko  
13 whatsoever much less an agreement to arbitrate. And with  
14 respect to One Bell Hall let me just clarify the  
15 distinction there too. Ms. Stratta mentioned that there was  
16 all sample agreement in that case which we don't have here.  
17 The other thing in that case, judge, if you read the  
18 opinion, the homeowners association through the developer  
19 actually made a warranty claim. So they have problems with  
20 their shingles, again this doesn't have anything with  
21 shingles, this is the underlayment, it's, essentially,  
22 melting, but they made a warranty claim. Tamko came out,  
23 did an inspection, provided a warranty kit and then two  
24 years later the association sued Tamko and Tamko rely on  
25 the warranty that the homeowners had made a claim under. We

1 have no such similar fact here, judge. We didn't even know  
2 this warranty existed until Tamko filed it as a part of  
3 their motion. No claims ever made under the warranty. But  
4 Ms. Petersen has not tried to avail herself under the  
5 provisions of the warranty at all and, candidly, they're  
6 not a benefit to her. It's very much a restriction on our  
7 rights if you read the actual terms of the warranty.

8 So for those reasons, judge, and the reasons in our  
9 brief, we don't believe we all need to compel to arbitrate  
10 our claims against Tamko.

11 THE COURT: All right. Mr. Willis, anything in  
12 reply?

13 MR. WILLIS: Yes sir, Your Honor. You don't need to  
14 take my word for it as to what Pearson says, just, just  
15 read the case. It makes it very clear that non-signatories  
16 can be bound under these circumstances. In fact, it says  
17 and I quote, "the rule in the Fourth Circuit is that a  
18 broadly in arbitration clause applies to disputes that do  
19 not arise under the governing contract when a significant  
20 relationship exists between the asserted claims and the  
21 contract in which the arbitration clauses contained." So,  
22 obviously, there's a significant relationship between the  
23 warranty that accompanies the sale of the product and the  
24 fact that we're being sued for breach of implied warranty  
25 by the plaintiff and breach of express and implied warranty

1 by Donnix. If their position is that there's no contract,  
2 Your Honor, than their implied warranty claims and their  
3 express warranty claims have to be dismissed. Those are  
4 claims that sound in contract to under the UCC. So when  
5 there's a sale of goods there is a contract created, a  
6 sales contract and that the downstream users of that  
7 product are a party to that contract or are third-party  
8 beneficiaries of that contract and that's under UCC 36-2-  
9 314 through 318. I mean, it's interesting to hear Donnix  
10 say there's no contract when they allege affirmatively in  
11 their counter, in their cross-claim in Paragraph 121, "upon  
12 information and belief Tamko building products contracted  
13 with defendant to furnish all materials and then they sue  
14 for breach of express warranty which is a contract and  
15 breach of implied warranties which is a contract." So, Your  
16 Honor, with all due respect there is a contract here. It's  
17 a sales contract. Ms. Stratta says, well, there's no bulk  
18 sales agreement. Well, that, that's what they, that's what  
19 the courts call the sales contracts. There's not a separate  
20 agreement. When the way it works is when the -- now, these  
21 are all construction lawyers on this call, Your Honor, they  
22 know how it works. But when a subcontractor goes to install  
23 materials he orders materials from a distributor, those  
24 materials are delivered, and they come with a warranty on  
25 the materials. So Donnix knew precisely what materials it

1 had purchased from, from, um, through the distributor from  
2 Tamko and the warranty, itself, is on the role of  
3 underlayment and that appears in our affidavit. It's also  
4 on the website. And this warranty was written in 2009. Now,  
5 there's not a -- the comment that it was dated in 2009,  
6 that just when the warranty was written. There's, there's -  
7 - you don't write a separate warranty for each transaction.  
8 So, Your Honor, there clearly is a contract and if there's  
9 not then, we ought to be dismissed also.

10 The unauthenticated issue just doesn't make any sense.  
11 The document authenticated by the affidavit. It's  
12 authentic. And this is the warranty that's on the  
13 underlayment that was placed in Ms. Petersen's house. And  
14 that for counsel to say, well, we don't know what it  
15 applies to, I mean, by its very terms it applies to the  
16 underlayment as well as other products. As I said it  
17 doesn't need to be filled out. I mean, Tamko doesn't fill  
18 this out, Your Honor. They don't know who that goes to.  
19 They sell through a distributor, the distributor then  
20 supplies it to the worksite. If someone wants to fill out  
21 the blanks in the, in the warranty that's up to Donnix to  
22 do that. The fact that they didn't do it doesn't matter as  
23 to the enforceability of the warranty. The fact that they  
24 don't, that the plaintiff's don't sue an expressed  
25 warranty, but only an implied warranty, also doesn't

1 matter. You can get around limitations in an implied  
2 warranty by not suing on it. And, I guess, Your Honor,  
3 probably the best case that explains that is Judge  
4 Traxler's very lengthy opinion in The Myrtle Beach pipeline  
5 case. I'm happy to supply that to the court, but it  
6 explains how that process works. And I'm ---

7 THE COURT: I mean, that was, that was a trial  
8 court decision. That wasn't appellate decision, was it?

9 MR. WILLIS: It was a, it was appealed to the  
10 Fourth Circuit, Your Honor, and affirm by the Fourth  
11 Circuit.

12 THE COURT: Okay.

13 MR. WILLIS: So I can, I can submit that to you. And  
14 you've probably read that case. I mean, it's a, it's a,  
15 it's a very interesting and long opinion that deals with  
16 limited warranties, expressed warranties when they can be  
17 enforced, when they can't, and the reason of the Economic  
18 Loss Rule Bars Tort Claims like the claims that have been  
19 asserted in this case. I mean, that's really not before,  
20 Your Honor, but it's an interesting case. And I've actually  
21 got it here. I can give you the citation if the court needs  
22 it.

23 THE COURT: No. That's all right. What I'm gonna  
24 do is I'm gonna have to take this under advisement, do some  
25 research myself, read the case y'all've mentioned, check

1 your briefs. I have Mr. Kirchner and Mr. Willis, if both of  
2 y'all would submit proposed orders. Certainly Mr. Willis,  
3 yours that grant the motion. Mr. Kirchner yours that denies  
4 the motion and the basis, while I did my research. And if  
5 you could send this to me, email them to me in Word form so  
6 if I need to make any changes or anything, I can adapt them  
7 as I deem appropriate. But, otherwise, I think I'm just  
8 gonna take the motion under advisement, okay.

9 MR. KIRCHNER: We're glad to do that, Your Honor.

10 MR. WILLIS: Thank you.

11 MR. KIRCHNER: Thank you. Thank you for your  
12 attention.

13 THE COURT: All right. Next, we have motion to  
14 compel discovery, whose motion is that?

15 MR. RIBOCK: Your Honor, this is Adam Ribock. I  
16 represent Buffington Homes. I believe that was my motion to  
17 compel A Unique Designs discovery responses. They have  
18 provided those discovery responses to me and, therefore,  
19 the motion can be withdrawn.

20 THE COURT: All right. Now, we have a motion to  
21 stay discovery, whose is that? Filed on April 6, 2022,  
22 motion for protection to stay discovery. Anybody know  
23 whose that it?

24 MR. WILLIS: Your Honor, I believe that's our  
25 motion. I apologize for not jumping right in. So we were

1 sent standard discovery requests. And because the case law  
2 is pretty strict on voluntary participation in a piece of  
3 litigation waives an arbitration clause, we moved to stay  
4 that discovery until, Your Honor, could decide ---

5 THE COURT: Oh, okay.

6 MR. WILLIS: --- the motion to arbitrate. And if,  
7 Your Honor, denies the motion to arbitrate and we elect not  
8 to appeal it, we'll certainly respond to that discovery.  
9 It's reasonable and we have no objection to it.

10 THE COURT: All right. Let's do this then, Mr.  
11 Willis in your proposed order on the motion to compel  
12 arbitration, you would certainly put that the motion for  
13 protection is granted. Mr. Kirchner, in yours you would put  
14 that the motion for protection for discovery is denied. Am  
15 I ---

16 MR. WILLIS: Thank you, Your Honor.

17 THE COURT: Am I understanding that correctly?

18 MR. KIRCHNER: With respect to that motion, judge, we  
19 have no objection to it while this decision is pending. We  
20 don't expect them to answer our discovery. So we got no  
21 objection to that.

22 THE COURT: All right. All right. We'll handle it  
23 that way, then. All right. Thank y'all very much.

24 (CONCLUSION OF HEARING HELD ON JUNE 2, 2022)

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Ninth Circuit for Charleston County, South Carolina, on the 2nd day of June, 2022.

**That said proceedings are transcribed to the best of my ability from the audio recording and supporting information.**

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

s/ Lisa S. Carter

Lisa Carter

Circuit Court Reporter

July 22, 2022

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as TRUSTEE OF THE DENISE M. PETERSEN 2005 REVOCABLE TRUST DATED NOVEMBER 9, 2005, as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST DATED NOVEMBER 30, 2012, and as TRUSTEE OF THE 601 OCEAN BOULEVARD RESIDENCE TRUST II DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES, L.P., DONNIX CONSTRUCTION, LLC, HUNT BROTHERS CONSTRUCTION, INC., ISLAND EXTERIORS AND SIDING, INC., PLASTERING SURFACES, LLC, A UNIQUE DESIGN, INC., BERKELEY HEATING AND AIR CONDITIONING, INC., ENERGYONE AMERICA, LLC, AQUA BLUE POOLS OF CHARLESTON, INC., SUNNYSIDE FARMS, INC., TAMKO BUILDING PRODUCTS, LLC, HADDIGAN ELECTRICAL CONTRACTORS, LLC and JOHN DOE CONTRACTORS 3 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-10-01973

**ORDER DENYING TAMKO  
BUILDING PRODUCTS, LLC'S  
MOTION TO DISMISS AND COMPEL  
ARBITRATION**

This matter came before me on June 2, 2022, on Tamko Building Products LLC's ("Tamko") Motion to Dismiss and Compel Arbitration. This matter was submitted for consideration with oral argument and filing of briefs by counsel for Tamko, Plaintiff, and Donnix Construction, LLC ("Donnix"). The Court has reviewed arguments, the briefing, and the record herein, is fully informed, and denies Tamko's Motion to Dismiss and Compel Arbitration based upon the following:

### **LEGAL STANDARD OF REVIEW**

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). If one party denies the existence of an arbitration agreement raised by an opposing party, a court must determine whether the agreement exists. If the agreement does not exist, the court must deny any application to arbitrate. *Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

Whether the parties agreed to arbitration is a question of substantive state law. *Simpson*, 373 S.C. at 25, 644 S.E. 2d at 688 (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008).

In determining whether the Federal Arbitration Act (the “FAA”) applies, the initial inquiry to be made by the court is whether an arbitration agreement exists between the parties. *The Housing Authority of City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003). Arbitration is a matter of contract and the evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin.*

*Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

## **DISCUSSION**

### **I. Plaintiff cannot be compelled to arbitration because there is no enforceable contract between Plaintiff and Tamko.**

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (“[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate.”). South Carolina law requires that “in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009).

Here the court finds, Plaintiff and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko’s limited warranty attached as Exhibit A to its’ Memorandum in Support of its’ Motion to Compel Arbitration. Tamko itself admits the limited warranty containing the arbitration clause was only delivered to the Defendant Donnix *after* it completed the purchase of the Tamko product, and Tamko does not contest Plaintiff’s assertion that she never received the limited warranty.<sup>1</sup> Thus, there could be no meeting of the minds

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<sup>1</sup> See Affidavit of Denise Petersen file June 1, 2022.

regarding the arbitration clause, as it was not included in a sales contract or otherwise discussed during the sale of the product.

Counsel for Tamko argued the court should apply the precedent established in *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). However, the arbitration clause at issue in the *One Belle Hall Property Owners Assoc. Inc.* case involved an arbitration clause contained in a bulk sales agreement that was entered into prior to the purchase of and delivery of the product. Here the court finds that Plaintiff was never made aware of limited warranty much less the arbitration clause, and that Donnix, whom actually purchased the underlayment, only became aware of the arbitration clause after the purchase of the product was completed and the underlayment was delivered to Plaintiff's residence. Additionally, the Court of Appeals noted that the HOA, via the developer, utilized the warranty process and availed itself of the limited warranty prior to filing the lawsuit in that case. *See Id.* at 58. In this instance, neither Plaintiff nor Donnix, availed themselves of the limited warranty.<sup>2</sup> The court finds, that unlike the developer and ultimately the HOA in *One Belle Hall Property Owners Assoc. Inc.*, Plaintiff was not given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase of the Tamko underlayment, nor did she attempt to avail herself of the express warranty contained therein.

Further, the court finds Tamko attached an unexecuted limited warranty to its Memorandum in support of its' Motion to assert there has been a meeting of the minds between Plaintiff and Tamko regarding an arbitration agreement. However, the court does not find this is evidence sufficient to establish an enforceable agreement to arbitrate, as the warranty is wholly

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<sup>2</sup> Plaintiff Complaint specifically alleges breach of implied warranties, negligence and/or gross negligence, and strict liability for product defect.

unexecuted, does not specify the applicable Tamko product the warranty pertains to, and it cannot be established the limited warranty Tamko references pertains to the construction of Plaintiffs' residence. *See Nelson v. Tamko Building Prods., Inc.*, 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). Counsel for Tamko argued the arbitration clause need not be signed by Plaintiff or Donnix, citing the *Pearson* precedent. The court finds the *Pearson* precedent holds a non-signatory to a contract containing an arbitration clause can be bound by the contract under a theory of equitable estoppel, *only if* the non-signatory received a direct benefit from the contract. *Pearson*, 400 S.C. 281, 290. Here, however, the court does not need to address the issue of estoppel, as Tamko has failed to establish that a binding agreement to arbitrate exists or that Plaintiff has received a direct benefit from any contract with Tamko.

Lastly, since the Federal Arbitration Act is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko, Donnix, or Plaintiff regarding arbitration.

In view of the foregoing, Tamko's Motion to Dismiss and Compel Arbitration is denied.

## **II. Donnix cannot be compelled to arbitration because there is no enforceable arbitration agreement between Donnix and Tamko**

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012). Courts have held that mutual assent and a meeting of the minds is necessary for an enforceable arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("[A]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate."). South Carolina law

requires that “in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009).

Here the court finds, Donnix and Tamko never entered a contract containing an arbitration provision, ergo there cannot have been any meeting of the minds to give rise to an enforceable agreement to arbitrate the disputes herein. *Pearson*, supra. The only evidence provided by Tamko of the alleged binding arbitration agreement is Tamko’s limited warranty attached as Exhibit One to its’ Memorandum in Support of its’ Motion to Compel Arbitration. Tamko itself admits the limited warranty containing the arbitration clause was only delivered to Donnix *after* it completed the purchase of the Tamko product. Thus, there could be no meeting of the minds regarding the arbitration clause, as it was not included in a sales contract or otherwise discussed during the sale of the product.

Counsel for Tamko argued the court should apply the precedent established in *One Belle Hall Property Owners Assoc. Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). However, the arbitration clause at issue in *One Belle Hall Property Owners Assoc. Inc* involved an arbitration clause contained in a bulk sales agreement, that was entered into prior the purchase of and delivery of the product. Here the court finds Donnix only became aware of the arbitration clause after the purchase of the product was completed and the underlayment was delivered to Plaintiff’s residence. The court finds, unlike the developer in *One Belle Hall Property Owners Assoc. Inc.*, Donnix was not given the opportunity to consent to the terms of the arbitration clause *prior* to the purchase of the Tamko underlayment.

Further, the court finds Tamko attached an unauthenticated and unexecuted limited warranty to its Memorandum in support of its’ Motion to assert there has been a meeting of the

minds between Donnix and Tamko regarding an arbitration agreement. However, the court does not find this is evidence sufficient to establish an enforceable agreement to arbitrate, as the warranty is wholly unexecuted, does not specify the applicable Tamko product the warranty pertains to, and it cannot be established the limited warranty Tamko references pertains to the construction of Plaintiffs' residence. *See Nelson v. Tamko Building Prods., Inc.*, 2015 U.S. Dist. LEXIS 75597, 2015 WL 3649384, (D. Kan. June 11, 2015). Counsel for Tamko argued the arbitration clause need not be signed by Donnix, citing the *Pearson* precedent. The court finds the *Pearson* precedent holds a non-signatory to a contract containing an arbitration clause can be bound by the contract under a theory of equitable estoppel, *only if* the non-signatory received a direct benefit from the contract. *Pearson*, 400 S.C. 281, 290. Here, however, the court does not need to address the issue of estoppel, as Tamko has failed to establish that a binding agreement to arbitrate exists or that Donnix has received a direct benefit from any contract with Tamko.

Lastly, since the FAA is guided by the general principles of contract law and Tamko has not submitted evidence sufficient to establish an enforceable agreement to arbitrate, the arbitration clause cannot be enforced. The issue of interstate commerce does not need to be discussed, as there is no enforceable agreement between Tamko and Donnix regarding arbitration.

In view of the foregoing, Tamko's Motion to Dismiss and Compel Arbitration is denied.

AND IT IS SO ORDERED.

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THE HONORABLE BENJAMIN CULBERTSON

\_\_\_\_\_, South Carolina

June \_\_\_\_\_, 2022

|                                         |   |                                              |
|-----------------------------------------|---|----------------------------------------------|
| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS                 |
|                                         | ) |                                              |
| COUNTY OF CHARLESTON                    | ) | FOR THE NINTH JUDICIAL CIRCUIT               |
|                                         | ) |                                              |
|                                         | ) | Civil Case No. 2021-CP-10-01973              |
| DENISE M. PETERSEN, individually and as | ) |                                              |
| TRUSTEE OF THE DENISE M. PETERSEN       | ) |                                              |
| 2005 REVOCABLE TRUST DATED              | ) |                                              |
| NOVEMBER 9, 2005, as TRUSTEE OF THE     | ) |                                              |
| 601 OCEAN BOULEVARD RESIDENCE           | ) |                                              |
| TRUST DATED NOVEMBER 30, 2012, and      | ) |                                              |
| as TRUSTEE OF THE 601 OCEAN             | ) |                                              |
| BOULEVARD RESIDENCE TRUST II            | ) |                                              |
| DATED DECEMBER 7, 2012,                 | ) |                                              |
|                                         | ) | <b>Order Granting Defendant TAMKO</b>        |
| Plaintiff,                              | ) | <b>Building Products, LLC’s Motion to</b>    |
|                                         | ) | <b>Dismiss and Compel Arbitration</b>        |
| vs.                                     | ) |                                              |
|                                         | ) | <b>AND</b>                                   |
| DCTCL, LP d/b/a BUFFINGTON HOMES,       | ) |                                              |
| LP, DONNIX CONSTRUCTION, LLC,           | ) | <b>Denying as Moot TAMKO Building</b>        |
| HUNT BROTHERS CONSTRUCTION,             | ) | <b>Products, LLC’s Motion for Protection</b> |
| INC., ISLAND EXTERIORS AND SIDING,      | ) | <b>from Discovery</b>                        |
| INC., PLASTERING SURFACES, LLC,         | ) |                                              |
| A UNIQUE DESIGN, INC., BERKELEY         | ) |                                              |
| HEATING AND AIR CONDITIONING,           | ) |                                              |
| INC., ENERGYONE AMERICA, LLC,           | ) |                                              |
| AQUA BLUE POOLS OF CHARLESTON,          | ) |                                              |
| INC., SUNNYSIDE FARMS, INC.,            | ) |                                              |
| TAMKO BUILDING PRODUCTS, LLC, and       | ) |                                              |
| JOHN DOE SUBCONTRACTORS 2               | ) |                                              |
| THROUGH 50                              | ) |                                              |
| Defendants.                             | ) |                                              |
|                                         | ) |                                              |
|                                         | ) |                                              |

This matter comes before the Court on Defendant TAMKO Building Products, LLC’s (“TAMKO”) Motion to Dismiss and Compel Arbitration of Plaintiff’s claims and Co-Defendant Donnix Construction, LLC’s (“Donnix”) crossclaims against TAMKO, and TAMKO’s Motion for Protection from Discovery during pendency of its Motion to Dismiss.

The Court held a hearing on these motions on June 2, 2022. As it pertains to the parties

involved in these motions, the following counsel appeared before the Court: Richard H. Willis and Derek D. Tarver for TAMKO; Jesse A. Kirchner and T. Happel Scurry for Plaintiff; and Jessica W. Stratta for Donnix.

After consideration of the briefs, the parties' arguments, and performing its own review of the law governing the issues before the Court, for the reasons set forth below, the Court hereby **GRANTS** TAMKO's Motion to Dismiss and Compel Arbitration; **ORDERS** that Plaintiff and Donnix submit their claims and crossclaims, respectively, against TAMKO to binding arbitration; and **DENIES** as moot TAMKO's Motion for Protection from Discovery.

### **I. Facts and Procedural History**

This is a construction defect case. Plaintiff has sued various contractors, subcontractors, and construction materials manufacturers for an array of alleged defects in the construction of her beach home. *See* 3d. Am. Compl. Among those Defendants, Plaintiff has sued roofing subcontractor Donnix based on her claim that the roofing system of the property is defectively installed. *Id.* ¶¶ 4, 21, 41(q), 45-51. Plaintiff has sued TAMKO, a roofing materials manufacturer, under product liability theories of negligence/gross negligence, strict liability, and breach of implied warranty, claiming that Donnix purchased and installed defective TAMKO-brand TW Metal and Tile Underlayment ("underlayment") as part of her home's roof system. *Id.* ¶¶ 52-73. Plaintiff claims that the underlayment is "melting" and "dripping out from under the shingles." Pl. Memo in Opp. p. 2.

Donnix has asserted crossclaims against TAMKO for negligence/gross negligence, breach of express and implied warranties, equitable indemnity, breach of implied contract, and contribution. *See* Donnix Ans. to 3d. Am. Compl. ¶¶ 118-141. Donnix's claims against TAMKO are all based on the allegedly defective underlayment. In its crossclaims, Donnix alleges that

“Tamko [] contracted with [Donnix] to furnish all materials . . . required to facilitate the construction of [Plaintiff’s home].” *Id.* ¶ 121. TAMKO seeks to compel arbitration of these claims pursuant to a mandatory binding arbitration clause contained in the TAMKO Limited Warranty that was sold with the underlayment.

By way of background, TAMKO manufactured the underlayment at its facility in Joplin, Missouri. *See* TAMKO Mot. to Dismiss, Exh. B, G. Ross Aff. ¶ 6. A distributor in South Carolina ordered the underlayment from TAMKO through a purchase order. *Id.* TAMKO then shipped the underlayment to the distributor. *Id.* Donnix purchased the underlayment from the distributor in South Carolina. *Id.* Donnix then either transported or had the underlayment delivered to Plaintiff’s home site on Kiawah Island, where Donnix installed the underlayment onto Plaintiff’s home.

It is undisputed that the underlayment was sold with a TAMKO Limited Warranty. TAMKO attached the warranty to its Motion to Dismiss and Compel Arbitration as “Exhibit A,” and authenticated the warranty through the Affidavit of Gerry Ross, attached as “Exhibit B” to the same motion. Mr. Ross explained in his affidavit that this limited warranty was included as part of the sale of the underlayment, and quoted the arbitration clause found in the warranty.<sup>1</sup> *See* TAMKO Mot. to Dismiss, ¶ 8. Neither Plaintiff nor Donnix have presented contrary evidence of any other warranty that TAMKO provided with the underlayment.

The TAMKO Limited Warranty contains the following text in bold capital letters at the top of the first page: “**TAMKO WATERPROOFING, FENESTRATION FLASHINGS, UNDERLAYMENTS AND ACCESSORIES FIVE YEAR LIMITED MATERIAL WARRANTY (A LIMITED WARRANTY).**” *See* TAMKO Mot. to Dismiss, Exh. A. Immediately beneath that, the warranty provides: “For a complete list of products covered under

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<sup>1</sup> Plaintiff and Donnix argue that the TAMKO limited warranty is “not authentic,” and so the Court should not consider it. The Affidavit of Gerry Ross plainly authenticates the TAMKO limited warranty pursuant to Rule 901, SCRCP.

this limited warranty – see reverse side.” *Id.* The reverse side of the warranty provides a list of products covered, such list which includes “TW Metal and Tile Underlayment,” *id.*, which is the underlayment alleged to be at issue in this case.

The second page of the TAMKO Limited Warranty contains an arbitration clause that provides:

**MANDATORY BINDING ARBITRATION:**

EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN “ACTION”) BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO’S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT [www.adr.com](http://www.adr.com) OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

*Id.* (Bold and capitals in original).

TAMKO asserts that this arbitration clause requires Plaintiff and Donnix to arbitrate their claims against TAMKO, because these parties: (1) are third-party beneficiaries of the TAMKO Limited Warranty, and therefore their claims involving the underlayment’s performance are subject to the warranty’s terms and limitations; and (2) seek to obtain the benefit of the warranty under their claims for breach of warranty, and are therefore estopped from denying the enforceability of the arbitration clause.

Conversely, Plaintiff and Donnix contend that the warranty’s arbitration provision is not enforceable against them because they “never entered a contract containing an arbitration

provision . . . .” *See* Donnix Memo. in Opp., p. 4; Pl. Memo. in Opp., p. 5 (“Plaintiff and Tamko never entered into any contract at all, much less a contract containing an arbitration provision. . . .”).<sup>2</sup> In support of this argument, these parties assert there can be no contract because the warranty “is not signed by any parties”; they “did not agree” to the arbitration clause; and they “did not know” about the arbitration provision. *See id.* (and arguments by counsel at the hearing). *Id.* These parties also argue that the TAMKO Limited Warranty is “not authentic,” and that the warranty “does not identify” the product. *See* Donnix Memo. in Opp., p. 4; Pls.’ Memo. in Opp., pp. 5-6.

The Court of Appeals of South Carolina has previously held that this arbitration clause is enforceable in residential-consumer/subcontractor cases such as this one. *See One Belle Hall Property Owners Association, Inc. v. Trammel Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). However, that case analyzed whether the arbitration clause was enforceable if other aspects of the contract were unconscionable. Here, Plaintiffs and Donnix do not argue conscionability. Instead, the issue in this case is: whether a party can be compelled to arbitrate claims subject to an arbitration clause contained in a product warranty, when the party is not in privity with the warrantor, but: (1) is a third-party beneficiary of the warranty, and has sued based on the product’s failure; and/or (2) seeks to recover the benefit of the warranty through litigation. As explained below, the answer to each of these questions is “yes.”

## II. Legal Standard

“The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.” *One Belle Hall*, 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App.

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<sup>2</sup> Plaintiffs’ Memorandum in Opposition is essentially identical to Donnix’s Memorandum in Opposition, and presents no arguments specific to Plaintiff’s position as downstream user/beneficiary of the contract for purchase of the underlayment.

2016) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). “Unless the parties have contracted otherwise, the Federal Arbitration Act (FAA) applies in federal or state courts to any arbitration agreement involving interstate commerce.” *Id.* at 59-60, 791 S.E.2d at 291 (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). “The FAA provides that a written arbitration provision in a contract involving interstate commerce ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’” *Id.* at 60, 791 S.E.2d at 291 (citing 9 U.S.C. § 2 (2012)). “General contract principles of state law apply to arbitration clauses governed by the FAA.” *Id.* (citing *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364).

“The policy of the United States and South Carolina is to favor arbitration of disputes.” *Id.* (quoting *Zabinski*, at 596, 553 S.E.2d at 118)). As the South Carolina Court of Appeals has succinctly explained, state policy is in harmony with this federal goal: “South Carolina favors arbitration.” *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). The Court of Appeals has explained that its statements that the law “favors” arbitration “means simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contract provisions.” *Huskins v. Mungo Homes, LLC*, 2022 WL 1760628 (S.C. Ct. App. June 1, 2022) (quoting *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021)).

### **III. Analysis**

Plaintiff has sued TAMKO for breach of implied warranty, among other claims related to the underlayment’s performance. Donnix has sued TAMKO for breach of express and implied warranties, among other claims related to the underlayment’s performance.

As a threshold matter, a claim for either breach of express or implied warranty requires the

existence of a warranty provided as part of a contract for the sale of goods. *See* S.C. Code Ann. §§ 36-2-313 – 315; *see also Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002). The South Carolina Uniform Commercial Code, which governs product warranty claims, provides that a “contract” refers to the “sale of goods,” and “sale” refers to “passing of title from the seller to the buyer for a price.” S.C. Code Ann. § 36-2-106(1). Under this statute, a seller may create and include an express warranty as part of the sale of a product, and certain implied warranties accompany the sale of a product and accrue to the benefit of foreseeable users, unless otherwise expressly excluded. *See* S.C. Code Ann. § 36-2-313 – 315.

The Affidavit of Gerry Ross states that TAMKO originally sold the underlayment to a distributor in South Carolina, and included the TAMKO Limited Warranty as part of that sale. The TAMKO Limited Warranty is the only warranty TAMKO provided with the underlayment, and sets forth all of TAMKO’s warranties related to the product, including express warranties and disclaimer of any implied warranties. As such, Plaintiff and Donnix’s breach of warranty claims must be based on and flow from the TAMKO Limited Warranty, whether or not they expressly knew about the warranty, and regardless of whether they signed it.

Plaintiff and Donnix are not signatories to the TAMKO Limited Warranty but, under the law, are permitted to seek the benefit of the warranty as third-party beneficiaries. That appears to be their position in this case, as they seek the benefit of the warranty while simultaneously denying their claims are subject to the arbitration clause contained within the warranty, because they “never entered into any contract” with TAMKO. As explained below, even if these parties did not have a contract with TAMKO, their claims are still subject to the arbitration clause for two independent reasons: (1) claims asserted by third-party beneficiaries of a warranty are subject to limitations contained within the warranty, including forum selection clauses and arbitration clauses; and (2)

parties that seek the benefit of a warranty are equitably estopped from denying the enforceability of an arbitration clause within the warranty. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

**a. Plaintiff and Donnix are third-party beneficiaries of the TAMKO Limited Warranty, subject to limitations and terms contained in the warranty.**

Despite being non-signatories to the original “contract” for sale of the underlayment, Plaintiff and Donnix are third-party beneficiaries of the TAMKO Limited Warranty. As third-party beneficiaries, these parties may, and in fact do here, assert claims for breach of that warranty, but such claims are subject to limitations contained within the warranty, including its arbitration clause, unless they are unconscionable or otherwise prohibited by South Carolina law, which neither Plaintiff nor Donnix contend.

South Carolina Code section 36-2-318, titled “Third party beneficiaries of warranties express or implied,” provides: “[a] seller’s warranty whether express or implied extends to any natural person who may be expected to use, consumer or be affected by the goods and whose person or property is damaged by breach of warranty.” S.C. Code Ann. § 36-2-318. A non-signatory to a product warranty may avail itself of the warranty, because the promises within the warranty extend to all foreseeable users or persons affected by the product’s failure, as third-party beneficiaries. *See* S.C. Code Ann. §§ 36-2-318; *Brooks v. GAF Materials Corp.*, 41 F. Supp. 3d 474 (2014). In addition, any exclusions, limitations, and other terms within the warranty also extend to the third-party beneficiaries of the warranty. *See, e.g., Brooks*, at 483 (homeowners were third-party beneficiaries of a contract for purchase of shingles between their contractor and shingle manufacturer, and were therefore bound by the disclaimer in the manufacturer’s limited warranty).

Both state and federal courts have consistently recognized that third-party beneficiaries to

a contract are bound by arbitration clauses found in a contract they seek to enforce. *See, e.g., Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) (“a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.”); *Westbard v. Westwood*, 181 Md. App. 37, 51, 954 A.2d 470, 478 (2008) (“[A] third-party beneficiary who sued for breach of contract to which it was not a signatory [is] bound by the arbitration clause contained therein.”); *Johnson v. Pennsylvania Nat. Ins. Co.*, 527 Pa. 504, 594 A.2d 296 (1991) (holding plaintiff was “bound by the limitations [arbitration provision] contained in the contract she seeks to enforce.”); *Exp parte Dyess*, 709 So.2d 447 (Sup. Ct. Ala. 1997) (a third-party beneficiary “cannot pick and choose the portions of the contract that he wants to apply”); *Benton v. Vanderbilt Univ.*, 137 S.W.3d 614, 619 (Sup. Ct. Tenn. 2004) (third-party beneficiary seeking to enforce rights under a contract is subject to arbitration clause contained within the contract); *Ross Bros. Const. Co. v. Int’l Steel Servs., Inc.*, 283 F.3d 867 (7th Cir. 2002) (same).

Here, Plaintiff and Donnix seek to recover against TAMKO for breach of warranty while simultaneously denying the existence of a contract with TAMKO, in an effort to avoid arbitration. The only warranty TAMKO sold with the underlayment is the TAMKO Limited Warranty, which contains the arbitration clause at issue. Plaintiff and Donnix, as third-party beneficiaries, may theoretically recover against TAMKO for breach of that warranty, but are also subject to the arbitration clause contained therein. A party cannot seek to compel the benefit of a warranty while simultaneously denying the application of other terms within the warranty. *Pearson*, at 290, 733 S.E.2d at 601 (quoting *Int’l Paper Co.*, at 418); *Thompson*, 416 S.C. 43, 784 S.E.2d 679.

Plaintiff and Donnix argue they have no “contract” with TAMKO because they had no “meeting of the minds,” they “did not sign” the warranty, “did not know” about the warranty, or

“fill out” the warranty, and the warranty “did not identify the product.” Even if true, these points are irrelevant to Plaintiff and Donnix’s status as third-party beneficiaries of the TAMKO Limited Warranty. Under the law, the benefits and limitations of a warranty flow to “foreseeable users” and other persons affected by the product. S.C. Code Ann. § 36-2-318. There is no requirement that a third-party negotiate, sign, “fill out,” or even know about a product warranty to be a third-party beneficiary. *See id.* And, as noted above, the TAMKO Limited Warranty identifies the TAMKO TW Metal a& Tile Underlayment as a covered product on the face of the warranty.

Even insofar as Plaintiff and Donnix have asserted causes of action that are not “breach of warranty” claims, under the Federal Arbitration Act (“FAA”), those claims are still subject to the arbitration clause in the TAMKO Limited Warranty. This issue is governed by the FAA, because the underlayment was transported through interstate commerce. *One Belle Hall*, at 59-60, 791 S.E.2d at 291 (citing *Munoz*, at 538, 542 S.E.2d at 363). The South Carolina Court of Appeals has expressly recognized that under the FAA, “a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a ‘significant relationship’ exists between the asserted claims and the contract in which the arbitration clause is contained.” *Pearson*, 400 S.C. 281, 733 S.E.2d 597 (quoting *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)).

The “significant relationship” rule applies in this case. The arbitration clause is broadly worded such that it extends to every “claim, controversy, or dispute of any kind whatsoever . . . relating to or arising out of the product.” Plaintiff and Donnix’s claims clearly have a “significant relationship” with the promises made in the TAMKO Limited Warranty, because they all are based on the underlayment’s failure to perform as warranted. As such, Plaintiff and Donnix, as third-party beneficiaries, are required to arbitrate all of their underlayment-related claims pursuant to the arbitration clause in the TAMKO Limited Warranty.

**b. Plaintiff and Donnix seek to obtain the benefit of the TAMKO Limited Warranty and so are estopped from denying the application of the arbitration clause within the warranty.**

Plaintiffs and Donnix are equitably estopped from asserting that the arbitration clause in the TAMKO Limited Warranty does not extend to their claims, because they have asserted claims that seek to compel performance under the warranty. The South Carolina Court of Appeals has expressly held that a nonsignatory/nonparty to an arbitration agreement “may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.” *Pearson*, at 290, 733 S.E.2d at 601 (quoting *Int’l Paper Co.*, at 418). “To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying the enactment of the Arbitration Act.” *Id.* “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it received a direct benefit from a contract containing an arbitration clause.’” *Id.* This rule applies when, *inter alia*, the nonsignatory “makes a claim . . . integrally related to th[e] contract.” *Id.* at 602, 733 S.E.2d at 291 (citing *Int’l Paper Co.*, at 418). Here, the contract is the TAMKO Limited Warranty.

If Plaintiff and Donnix are correct, that there is no “contract” with TAMKO, and they are not seeking to enforce the terms of the TAMKO Limited Warranty because they are suing TAMKO for “breach of implied warranty,” or are not in privity with TAMKO, these parties are still required to submit their claims to arbitration, because this dispute arises out of and relates to the sale and installation of the underlayment. *Pearson*, 400 S.C. 281, 733 S.E.2d 597 (quoting *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001)). The terms of the sale include the express warranty and the implied warranties under South Carolina law.

Plaintiff and Donnix each assert claims “integrally related to th[e] contract,” because they both seek to recover against TAMKO for breach of warranty, and the only warranty introduced in this case is the TAMKO limited warranty – which contains the arbitration clause at issue. To allow these parties to assert these claims to obtain the benefit of the warranty, while simultaneously avoiding its other terms they find burdensome, would both disregard equity and contravene the purposes underlying the enactment and the Federal Arbitration Act. *See Pearson*, at 280, 733 S.E.2d at 601. Accordingly, these parties are estopped from denying to enforceability of the arbitration clause found within the warranty they have sued on.

### **Conclusion**

For the foregoing reasons, the Court hereby **GRANTS** TAMKO’s Motion to Dismiss and Compel Arbitration, **DENIES AS MOOT** TAMKO’s Motion for Protection from Discovery, and **Orders** the following:

1. Plaintiff’s claims against TAMKO for negligence/gross negligence, strict liability, and breach of implied warranty are dismissed with prejudice;
2. Plaintiff shall submit her claims to binding arbitration with the American Arbitration Association, pursuant to the terms of the TAMKO Limited Warranty;
3. Donnix’s claims against TAMKO for negligence/gross negligence, breach of express and implied warranties, equitable indemnity, breach of implied contract, and contribution are dismissed with prejudice;
4. Donnix shall submit its claims to binding arbitration with the American Arbitration Association, pursuant to the terms of the TAMKO Limited Warranty.

IT IS SO ORDERED

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The Honorable Judge Culbertson  
Circuit Court Judge

\_\_\_\_\_, 2022

\_\_\_\_\_, South Carolina



**TAMKO WATERPROOFING, FENESTRATION FLASHINGS,  
UNDERLAYMENTS AND ACCESSORIES FIVE YEAR  
LIMITED MATERIAL WARRANTY (A LIMITED WARRANTY)**

For a complete list of products covered under this  
limited warranty - see reverse side.

**This limited warranty is personal to the original owner and  
is not assignable or transferable under any circumstances**

**THIS LIMITED WARRANTY APPLIES ONLY TO PRODUCTS INSTALLED IN THE UNITED STATES (EXCLUDING HAWAII AND ALASKA) AND CANADA (EXCLUDING QUEBEC AND NEW BRUNSWICK). ALL PRODUCTS INSTALLED IN LOCATIONS WHERE THIS LIMITED WARRANTY DOES NOT APPLY ARE SOLD "AS IS" AND WITHOUT WARRANTY OF ANY KIND, INCLUDING ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

**TERMS AND CONDITIONS**

**TAMKO BUILDING PRODUCTS, INC.** ("TAMKO"), warrants to the original consumer purchaser (the "Owner") that, subject to the conditions set forth herein, for a period of five (5) years from the date of purchase (the "Term") for the TAMKO product identified below ("Product"), if manufacturing defects in the Product cause the Product to lose its watertight integrity and leaks result, then subject to the conditions, exclusions and other provisions detailed below, TAMKO, at its sole option, will either (1) refund the original purchase price of the Product; or (2) provide the amount of Product necessary to make repairs. This limited warranty does not cover any cost or expenses associated with removal, excavation, or replacement of concrete or other materials in connection with the testing, repair, removal, or replacement of the Product. **This limited warranty applies to Product applied in strict accordance with, and as part of, TAMKO published application instructions in effect at the time of the application. This Product is sold AS IS and without warranty of any kind when used in any other application.**

**CONDITIONS TO WARRANTY COVERAGE:**

This limited warranty is additionally specifically conditioned upon the following matters, each and all of which shall be a precondition to any of TAMKO's obligations hereunder:

1. **PROOF OF PURCHASE:** Claims under this limited warranty will require proof of purchase by the Owner. TAMKO shall not be responsible for any claims without such proof of purchase.
2. **NOTIFICATION TO TAMKO:** Within thirty (30) days following discovery of any leaks alleged to result directly from manufacturing defects, the Owner must notify TAMKO of such leaks by certified mail at P.O. Box 1404, Joplin, Missouri 64802.
3. **COMPLIANCE WITH TAMKO INSTRUCTIONS, RECOMMENDATIONS AND LIMITED WARRANTY:** In no event shall TAMKO be liable under this limited warranty or otherwise unless the Product has been stored, handled, installed and maintained in compliance with TAMKO's application instructions, specifications and recommendations, and unless all of the terms and provisions of this limited warranty have been complied with.
4. **BUILDING AND STRUCTURE PLANS:** Because TAMKO does not practice engineering or architecture, neither the issuance of this limited warranty nor any review or inspection of the building, structure, plans, specifications or construction by a TAMKO representative shall constitute any warranty or representation by TAMKO with respect to the building, structure, plans, specifications or construction or in any way constitute an extension of the terms and conditions of this limited warranty. **ALL SUCH WARRANTIES AND REPRESENTATIONS ARE EXPRESSLY DISCLAIMED.**
5. **NONWAIVER:** The Owner agrees that any post application inspection of the Product by TAMKO or its authorized representative shall not constitute a waiver of any terms, conditions, or limitations set forth in this limited warranty, including, but not limited to, the requirement that the Product be installed in full compliance with the terms and conditions set forth in TAMKO's most recent published application instructions, specifications and recommendations. **FURTHER, THE OWNER HEREBY ACKNOWLEDGES THAT IT IS SOLELY THE OWNER'S RESPONSIBILITY TO DETERMINE THAT THE PRODUCT HAS BEEN INSTALLED IN COMPLIANCE WITH (I) ANY CONTRACT SPECIFICATIONS PROVIDED BY THE OWNER TO THE CONTRACTOR AND (II) THE TERMS AND CONDITIONS OF THIS LIMITED WARRANTY.**

**EXCLUSIONS FROM COVERAGE:** TAMKO shall not be liable under any circumstances for:

1. Damage to any building or structure, either exterior or interior, or any property contained therein of for injuries or damages of any kind whatsoever.
2. Leaks or damages resulting from Acts of God including, but not limited to, lightning, flood, wind, earthquake, hurricane, tornado, hail or other violent storm or casualty or impact of objects.
3. Leaks or damages resulting from insurrection, war, riot or vandalism, exposure of the Product to ionized radiation or contamination by radioactivity from any nuclear source, or chemical attack on the Product as the result of exposure to chemicals including, but not limited to, aliphatic or aromatic solvents, chlorinated hydrocarbons, turpentine, oils, or organic or inorganic polar materials.
4. Inadequate drainage or leaks or damages resulting there from.
5. Structural defects or failures in the building(s) or structure(s) to which the Product is applied.
6. Building or structural expansion or additions or reductions, settling, shifting, distortion, failure or cracking of foundations or other system components exceeding 1/16" or leaks or damage caused or attributable to traffic, or for damage attributable to alterations.
7. Leaks or damage resulting from any additional installation on or through the Product or flashing after the the initial installation that is not consistent with TAMKO application instructions.
8. Repairs or alterations to the Product or other system components or leaks or damages resulting there from, after the initial installation unless done in a manner prescribed by TAMKO application instructions.
9. Infiltration or condensation of moisture around or under the foundation or other system components.
10. Splitting, cracking, blistering, delamination or separation of the Product due to underlying or overlying materials.
11. Misuse or abuse of the Product or leaks or damages resulting there from.
12. Faulty or improper workmanship or application of the Product or leaks or damages resulting there from.
13. Damages to the building or structure, its contents, foundation, or other system components.
14. Removal, excavation, or replacement of concrete or other materials in connection with the testing, repair, removal, or replacement of the Product.
15. Leaks from any cause other than inherent manufacturing defect in the Product.

**RIGHT OF INSPECTION:**

TAMKO shall have a reasonable time after notification of a leak to inspect the Product, and if TAMKO determines there are manufacturing defects covered by this limited warranty, TAMKO shall have ninety (90) days after receipt of notification to either (1) refund the purchase price of the Product or (2) provide the amount of replacement Product necessary to make repairs. TAMKO shall not be liable for any cost of repair other than as specifically set forth herein.

**NO WARRANTY MODIFICATION:**

This limited warranty may not be modified except in a writing signed by TAMKO's President. No representative, employee, agent of TAMKO or any person, other than the President of TAMKO, has any authority to assume for TAMKO any additional or other liability or responsibility in connection with the Product or this limited material warranty.

**NON-TRANSFERABILITY:**

This limited warranty shall accrue and inure only to the benefit of the Owner of the Product and shall not be assigned, sold, or transferred in any manner whatsoever. Except where prohibited by law, any assignment, sale or transfer of this limited warranty or of the building to which the Product is applied shall extinguish all obligations of TAMKO contained herein or hereunder and all implied warranties and conditions including warranties and conditions of merchantability and fitness for a particular purpose.

**MANDATORY BINDING ARBITRATION:**

EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT [www.adr.com](http://www.adr.com) OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P. O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

**LEGAL REMEDIES: EXCEPT WHERE PROHIBITED BY LAW, THE OBLIGATION CONTAINED IN THIS LIMITED WARRANTY IS EXPRESSLY IN LIEU OF ANY AND ALL OTHER OBLIGATIONS GUARANTEES, WARRANTIES AND CONDITIONS EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY OTHER OBLIGATION OR WARRANTY ON THE PART OF TAMKO. IN NO EVENT SHALL TAMKO BE LIABLE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY KIND.** SOME STATES AND PROVINCES DO NOT ALLOW EXCLUSION OR LIMITATION OF IMPLIED WARRANTIES AND CONDITIONS OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU. NO ACTION FOR BREACH OF THIS LIMITED WARRANTY OR ANY OTHER ACTION RELATING TO OR ARISING OUT OF THE PRODUCT, ITS PURCHASE OR THIS TRANSACTION SHALL BE BROUGHT LATER THAN ONE YEAR AFTER ANY CAUSE OF ACTION HAS ACCRUED. IN JURISDICTIONS WHERE STATUTORY CLAIMS OR IMPLIED WARRANTIES AND CONDITIONS CANNOT BE EXCLUDED, ALL SUCH STATUTORY CLAIMS, IMPLIED WARRANTIES AND CONDITIONS AND ALL RIGHTS TO BRING ACTIONS FOR BREACH THEREOF EXPIRE ONE YEAR (OR SUCH LONGER PERIOD OF TIME IF MANDATED BY APPLICABLE LAWS) AFTER THE DATE OF PURCHASE. SOME STATES AND PROVINCES DO NOT ALLOW LIMITATIONS ON HOW LONG IMPLIED WARRANTIES AND CONDITIONS LAST, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. THIS LIMITED WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE AND PROVINCE TO PROVINCE. Invalidity or unenforceability of any provision herein shall not affect the validity or enforceability of any other provision, all of which shall remain in full force and effect.

Material purchased from \_\_\_\_\_

TAMKO product applied:

- ☐ TW 60
- ☐ TW Window & Door Flash
- ☐ TW Moisture Wrap
- ☐ TW Flash-N-Wrap®-25
- ☐ TW Flash-N-Wrap®-40
- ☐ TW Thru-Wall Flashing Membrane
- ☐ TW Metal and Tile Underlayment
- ☐ Moisture Guard Plus®
- ☐ TW Underlayment
- ☐ TWM-1 Mastic
- ☐ TWP-1 Quick Dry Primer\*
- ☐ TWP-2 Water-Based Primer\*

\_\_\_\_\_  
Owner

\_\_\_\_\_  
Contractor's Name

\_\_\_\_\_  
Contractor's Address

\_\_\_\_\_  
City, State and Zip

\_\_\_\_\_  
Date of Application

\*This limited warranty applies to TAMKO's primer products when they are used in conjunction with another TAMKO product listed above.

Retain this limited warranty with the contractor's receipt for future reference.



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

DENISE M. PETERSEN, individually and as  
 TRUSTEE OF THE DENISE M. PETERSEN  
 2005 REVOCABLE TRUST DATED  
 NOVEMBER 9, 2005, as TRUSTEE OF THE  
 601 OCEAN BOULEVARD RESIDENCE  
 TRUST DATED NOVEMBER 30, 2012, and  
 as TRUSTEE OF THE 601 OCEAN  
 BOULEVARD RESIDENCE TRUST II  
 DATED DECEMBER 7, 2012,

Plaintiffs,

vs.

DCTCL, L.P. d/b/a BUFFINGTON HOMES  
 L.P., DONNIX CONSTRUCTION, LLC,  
 HUNT BROTHERS CONSTRUCTION, INC.,  
 ISLAND EXTERIORS AND SIDING, INC.,  
 PLASTERING SURFACES, LLC, A  
 UNIQUE DESIGN, INC. BERKELEY  
 HEATING AND AIR CONDITIONING,  
 INC., ENERGYONE AMERICA, LLC,  
 AQUA BLUE POOLS OF CHARLESTON,  
 INC., SUNNYSIDE FARMS, INC., TAMKO  
 BUILDING PRODUCTS, LLC, and JOHN  
 DOE CONTRACTORS 2 THROUGH 50,

Defendants.

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

**Affidavit of Gerry Ross**

Personally appeared before me, Gerry Ross, who being duly sworn did state as follows:

1. My name is Gerry Ross. I have been employed by TAMKO Building Products, LLC, ("TAMKO") since 1992. I have over 50 years of experience in the roofing industry. I am currently employed as a Technical Systems Specialist. As a Technical Systems Specialist, my duties include, but are not limited to, inspecting the roofing materials and installation work on residential and

commercial roofing systems as well as evaluating application instructions, technical specifications and testing of residential and commercial roofing systems.

2. I am over the age of 18 and have personal knowledge of and am competent to testify about the matters addressed in this Affidavit. The following information is true and correct, to the best of my knowledge and belief.

3. TAMKO is a limited liability company formed under the laws of Delaware. TAMKO's members reside in various states. TAMKO's principal place of business is located in Joplin, Missouri.

4. TAMKO has no manufacturing facilities, warehouse facilities, or distribution centers in South Carolina.

5. TAMKO products are sold to independent distributors around the country. Distributors then sell the products to roofing contractors. TAMKO does not sell products directly to consumers. Distributors purchase TAMKO products by placing purchase orders with TAMKO's Customer Services Department in Joplin, Missouri. Distributors submit payment for the products to TAMKO's Accounts Receivable Department in Joplin, Missouri.

6. The TAMKO product at issue, TW Metal and Tile Underlayment, is manufactured at a facility in Joplin, Missouri. Distributors who wish to purchase the product must submit a purchase order to TAMKO's Customer Services Department in Joplin, Missouri. When TAMKO receives an order for the underlayment, the product is packaged in Joplin, Missouri and shipped to the distributor's location. Underlayment purchased by distributors for resale in South Carolina are transported across state lines by way of interstate highway. Upon receipt, the distributor submits payment for the product to TAMKO's Accounts Receivable Department, which is also in Joplin, Missouri.

7. As is the case with any TAMKO product sold into South Carolina, the sale of the underlayment at issue necessarily involved both the product and payment crossing state lines, because there are no TAMKO manufacturing facilities, warehouse facilities, or distribution centers in the state.

8. The TAMKO underlayment at issue was sold with a Limited Warranty, the terms of which are available to customers at the time of sale on TAMKO's website and printed on the wrapper of each package of underlayment. *See* Exh. A, TAMKO Limited Warranty. This Limited Warranty expressly provides that:

**MANDATORY BINDING ARBITRATION:**

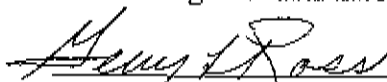
EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT [www.adr.com](http://www.adr.com) OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

*Id.* p. 2 (emphasis in original). The Limited Warranty includes provisions explaining the steps necessary to initiate arbitration.

9. TAMKO does not have records evidencing the direct sale of underlayment in relation to the property at issue in this case, located at 45 Eugenia Ave., Kiawah Island, South Carolina.

10. TAMKO has not received warranty claims related to this property and so has not opened a warranty claim file for this property.

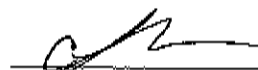
11. On September 14, 2021, Plaintiff filed her Second Amended Complaint in the case of *Petersen v. DCTCL, L.P.*, CA No. 2021-CP-10-1973, in which she asserted claims against TAMKO centered on allegations that the underlayment at issue was defective. On September 24, 2021, Co-Defendant Donnix Construction, LLC, filed its Answer to Plaintiff's Second Amended Complaint and Crossclaims Against TAMKO, in which it asserted several crossclaims against TAMKO centered on allegations that the underlayment at issue was defective. To TAMKO's knowledge, these parties have not initiated arbitration against TAMKO for these claims.

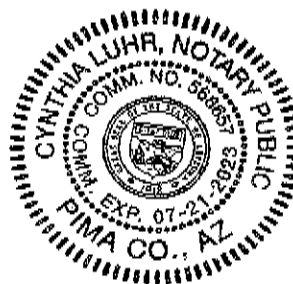


Gerry Ross  
TAMKO Building Products, LLC

SWORN TO BEFORE ME

This 22 days of November, 2021

  
Notary Public for Pima County  
My Commission Expires: 07-21-2023



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
DENISE M. PETERSEN, individually and as )  
TRUSTEE OF THE DENISE M. PETERSEN )  
2005 REVOCABLE TRUST DATED )  
NOVEMBER 9, 2005, as TRUSTEE OF )  
THE 601 OCEAN BOULEVARD )  
RESIDENCE TRUST DATED NOVEMBER )  
30, 2012, and as TRUSTEE OF THE 601 )  
OCEAN BOULEVARD RESIDENCE TRUST )  
II DATED DECEMBER 7, 2012, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DCTCL, L.P. d/b/a BUFFINGTON HOMES, )  
L.P., DONNIX CONSTRUCTION, LLC, )  
HUNT BROTHERS CONSTRUCTION, INC., )  
ISLAND EXTERIORS AND SIDING, INC., )  
PLASTERING SURFACES, LLC, A )  
UNIQUE DESIGN, INC., BERKELEY )  
HEATING AND AIR CONDITIONING, INC., )  
ENERGYONE AMERICA, LLC, AQUA )  
BLUE POOLS OF CHARLESTON, INC., )  
SUNNYSIDE FARMS, INC., TAMKO )  
BUILDING PRODUCTS, LLC, HADDIGAN )  
ELECTRICAL CONTRACTORS, LLC, and )  
JOHN DOE CONTRACTORS 3 THROUGH )  
50, )  
 )  
Defendants. )

PERSONALLY APPEARED BEFORE ME, DENISE M. PETERSEN, who, first  
being duly sworn, deposes and states as follows:

1. I am over the age of eighteen (18) and have personal knowledge of and am competent to testify about the matters addressed in this Affidavit. The following information is true and correct, to the best of my knowledge and belief.

2. I own the residence constructed on 45 Eugenia Avenue on Kiawah Island,

South Carolina.

3. I contracted with DCTCL, L.P. d/b/a Buffington Homes, L.P. to build my residence.

4. Prior to today, I have never seen the document filed by Tamko Building Products, LLC as Exhibit A (attached hereto) to its Motion to Dismiss and Compel Arbitration.

AFFIANT FURTHER SAYETH NOT.

By:   
Denise M. Petersen

**SWORN** to before me this

1<sup>st</sup> day of June, 2022.



  
Notary Public For the State of Massachusetts

My Commission Expires: 03/28/2025



**TAMKO WATERPROOFING, FENESTRATION FLASHINGS,  
UNDERLAYMENTS AND ACCESSORIES FIVE YEAR  
LIMITED MATERIAL WARRANTY (A LIMITED WARRANTY)**

For a complete list of products covered under this  
limited warranty - see reverse side.

**This limited warranty is personal to the original owner and  
is not assignable or transferable under any circumstances**

**THIS LIMITED WARRANTY APPLIES ONLY TO PRODUCTS INSTALLED IN THE UNITED STATES (EXCLUDING HAWAII AND ALASKA) AND CANADA (EXCLUDING QUEBEC AND NEW BRUNSWICK). ALL PRODUCTS INSTALLED IN LOCATIONS WHERE THIS LIMITED WARRANTY DOES NOT APPLY ARE SOLD "AS IS" AND WITHOUT WARRANTY OF ANY KIND, INCLUDING ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

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- 3. COMPLIANCE WITH TAMKO INSTRUCTIONS, RECOMMENDATIONS AND LIMITED WARRANTY:** In no event shall TAMKO be liable under this limited warranty or otherwise unless the Product has been stored, handled, installed and maintained in compliance with TAMKO's application instructions, specifications and recommendations, and unless all of the terms and provisions of this limited warranty have been complied with.
- 4. BUILDING AND STRUCTURE PLANS:** Because TAMKO does not practice engineering or architecture, neither the issuance of this limited warranty nor any review or inspection of the building, structure, plans, specifications or construction by a TAMKO representative shall constitute any warranty or representation by TAMKO with respect to the building, structure, plans, specifications or construction or in any way constitute an extension of the terms and conditions of this limited warranty. **ALL SUCH WARRANTIES AND REPRESENTATIONS ARE EXPRESSLY DISCLAIMED.**
- 5. NONWAIVER:** The Owner agrees that any post application inspection of the Product by TAMKO or its authorized representative shall not constitute a waiver of any terms, conditions, or limitations set forth in this limited warranty, including, but not limited to, the requirement that the Product be installed in full compliance with the terms and conditions set forth in TAMKO's most recent published application instructions, specifications and recommendations. **FURTHER, THE OWNER HEREBY ACKNOWLEDGES THAT IT IS SOLELY THE OWNER'S RESPONSIBILITY TO DETERMINE THAT THE PRODUCT HAS BEEN INSTALLED IN COMPLIANCE WITH (I) ANY CONTRACT SPECIFICATIONS PROVIDED BY THE OWNER TO THE CONTRACTOR AND (II) THE TERMS AND CONDITIONS OF THIS LIMITED WARRANTY.**

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3. Leaks or damages resulting from insurrection, war, riot or vandalism, exposure of the Product to ionized radiation or contamination by radioactivity from any nuclear source, or chemical attack on the Product as the result of exposure to chemicals including, but not limited to, aliphatic or aromatic solvents, chlorinated hydrocarbons, turpentine, oils, or organic or inorganic polar materials.
4. Inadequate drainage or leaks or damages resulting there from.
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6. Building or structural expansion or additions or reductions, settling, shifting, distortion, failure or cracking of foundations or other system components exceeding 1/16" or leaks or damage caused or attributable to traffic, or for damage attributable to alterations.
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9. Infiltration or condensation of moisture around or under the foundation or other system components.
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12. Faulty or improper workmanship or application of the Product or leaks or damages resulting there from.
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14. Removal, excavation, or replacement of concrete or other materials in connection with the testing, repair, removal, or replacement of the Product.
15. Leaks from any cause other than inherent manufacturing defect in the Product.

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TAMKO product applied:

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- ☐ Moisture Guard Plus®
- ☐ TW Underlayment
- ☐ TWM-1 Mastic
- ☐ TWP-1 Quick Dry Primer\*
- ☐ TWP-2 Water-Based Primer\*

Owner

Contractor's Name

Contractor's Address

City, State and Zip

Date of Application

\*This limited warranty applies to TAMKO's primer products when they are used in conjunction with another TAMKO product listed above.

Retain this limited warranty with the contractor's receipt for future reference.



### **Buffington Homes, L.P. Limited Warranty**

Pursuant to the guidelines established by the National Association of Home Builders and local statutory code, this warranty is provided for all single family residential construction and renovations performed by Buffington Homes and its service, warranty and renovations division, Buffington Customer Care. Any reference to Buffington Homes in the following Limited Warranty may be to Buffington Homes or Buffington Customer Care. Buffington Homes has a long tradition of standing behind the quality of its work. This warranty contract describes our homeowners' rights and responsibilities regarding work performed by Buffington Homes, excluding normal wear and tear and/or defects caused by the OWNER or its agents.

No steps taken by Buffington Homes to correct defects shall act to extend the warranty period beyond the terms set forth herein. Defects must be reported in writing before the end of the applicable warranty period.

The following sets forth the items that are covered by Buffington Homes for the periods of Two (2) years, (5) Five years and Eight (8) years, as well as specific and general exclusions. These warranty periods commence upon the date of the final walk through ("Warranty Commencement Date"). The warranty covers only those portions of Owner's property or systems constructed, renovated, altered or installed by Buffington Homes, Buffington Customer Care, its subcontractors or agents performing work directly for the companies.

#### **I. WARRANTY PROCEDURE**

If you encounter a construction defect or require customer service, please notify Buffington Customer Care immediately by calling:

843-768-8525

If you wish to fax your request, the fax number is:

843-768-8524

The company makes every attempt to schedule warranty calls as soon as possible, and requires reasonable access to your home to perform all work.

Upon completion of the requested warranty items, you will be asked to sign off on a listing of those items, which have been completed. Should you have any comments regarding the work performed, either with respect to completeness or professionalism, they should be noted at that time. We welcome and value your comments regarding our performance.

#### **Emergency Warranty during the Warranty Period:**

In rare situations, immediate action may be necessary to correct an occurrence that is covered by your home warranty such as roof leak, water leaks or other items that prevent you from occupying all or part of your home (hereinafter referred to as "Emergency Warranty"). In such cases you should first take immediate action to prevent personal injury and property damage. Your next action is to notify Buffington Homes @ 843-768-8525. A list of the major subcontractors (i.e. electrical, plumbing and heating/air conditioning) and their telephone numbers have been provided for your assistance in your Homeowners Manual. Please understand that warrantable items that are not defined as emergency warranty will be addressed during the applicable service period. (Hereinafter referred as "Non-Emergency Warranty Items") Non-Emergency Warranty Items work will be conducted Monday thru Friday, during normal working hours.

#### **Responsible Parties:**

Buffington Homes provides the overall warranty for the materials, workmanship and products in your home. In many instances, the product manufacturers will provide additional warranties and warranty support for you appliances, mechanical equipment and fixtures installed by Buffington Homes in your home. In all cases, you should report all warranty items to Buffington Homes. In general, homeowner maintenance responsibilities begin on the first day and are vital to maintenance of your home and not voiding the warranty. This Limited Warranty will help you understand what you must do to maintain your new home.

#### **II. WARRANTY COVERAGE**

For Two (2) years from the Warranty Commencement Date, Buffington Homes warrants that the property shall be free from defects in materials and workmanship. The following items, while not considered defects, will be fixed during this period as Buffington Homes offers a superior warranty to our homeowners

Exterior and interior paint repairs due to building movement are covered as described below. It is the Owner's responsibility to provide the paint, which was stored on site prior to move in. Please make the paint available to the worker on the day of the repair. Repair of special paint finishes (such as faux painting) are not included. Providing Buffington supplied and installed ventilation systems are installed in bathrooms and other excessively humid areas; Buffington Homes warrants the interior wall paint against peeling for a period of two (2) years. If peeling occurs, Buffington Homes will scrape and repaint the immediate area. If Buffington Homes has painted custom colors initially, touch up may be difficult to match after initial application. Buffington Homes will use the original paint formula and application method in an effort to match the paint if repairs are necessary; but can make no guarantee that color, shade or sheen will match existing surfaces.

Buffington Homes warrants the ceramic tile for a period of two (2) years. This warranty includes quality of adhesion and replacement of tiles that crack due to shrinkage and settlement. Please note that only the damaged tiles will be replaced and exact dye-lot matches cannot be guaranteed. Buffington Homes will repair cracks that may develop in ceramic tile grout at the one and two year anniversary. After that point, grout repair will be a homeowner maintenance item. Note that Buffington Homes cannot be responsible for any damage caused by homeowner negligence.

Porcelain fixture glazing is subject to wear. Abrasive cleaners may damage the glass-like finish of porcelain and the finish may become dull and porous. Use only non-abrasive cleaning agents to retain the beauty that can be expected of a porcelain surface.

Certain finishes used on interior and exterior hardware, plumbing fixtures and light fixtures will tarnish over time. This is customary and will not be covered by this limited warranty.

Buffington Homes warrants all mirrors supplied through our construction contract against all defects prior to closing. Any cosmetic discrepancies with mirrors must be reported on the final walkthrough.

Buffington Homes warrants the counter tops and cabinets against improper installation and manufacturer defects for a period of two (2) years. Any cracks, gouges, burns and scratches must be reported during the final walkthrough. NOTE: due to the characteristics of wood, some color and wood grain variation can be expected. Major color differences will be corrected only if noted on the final walkthrough. Due to the size of some counters, seams in the countertops may be necessary. At the two year anniversary, all sinks, tubs, showers and backsplashes will be done if necessary. After two (2) years, any additional work on those items will become a homeowner maintenance item.

Buffington Homes warrants the carpet against separation of seams, manufacturing defects and improper installation for a period of two (2) years.

Buffington Homes warrants the concrete slab floor against abnormal settlement for a period of two (2) years. Expansion and settlement cracks are expected. It is quite normal for concrete slab floors to be slightly irregular. Any cracks that exceed 1/4" will be repaired during the first two (2) years. Buffington Homes does not warrant normal cracks or slight irregularities. Buffington Homes reserves the right to choose the ways, means and materials for making the necessary repairs. This also includes concrete patios, driveways, and walkways. Buffington Homes warrants that no exterior concrete slab will have standing water in excess of 1/4" after a twenty-four (24) hour period.

NOTE: due to mineral content in area soils, color variations and mud stains may appear in exterior concrete. These are normal and are not considered warrantable. Exterior concrete surfaces and garage level areas will be pressure washed time prior to taking possession. Normal shrinkage of concrete will sometimes cause cracks in paved concrete areas. Control joints have been placed at appropriate intervals to help control this cracking. Any cracking that is 1/4" or less is considered normal and will not be repaired.

Please note the gutters may overflow during very heavy rain. It is the homeowner's responsibility to keep gutters and downspouts free of leaves and debris. Also, Buffington Homes does NOT warrant any staining of concrete that occurs from the "bleeding" of copper roofs or gutters.

Buffington Homes warrants the exterior paint on the house against peeling for a two year period. In the event the paint on the exterior does peel, Buffington Homes will scrape the area, remove any loose paint, and prime and repaint that particular board or the immediate area this is involved. We will use the original paint formula and application method in an effort to match the existing wall color. An exact match at any point after possession is not guaranteed. The paint warranty only applies to peeling paint and DOES NOT encompass the natural fading of paint or mildew on a house. Please note, that rendering warranty services during this period does not extend coverage.

Also, while Buffington Homes warrants items as outlined in this Limited Warranty, the company is not responsible for consequential damage attributable to the lack of maintenance or negligence on the part of the homeowner.

NOTE: mildew mold and fungus formation are natural occurrences and are not covered under the limited warranty. It is the responsibility of the homeowner to maintain all painted surfaces.

**MANUFACTURER'S WARRANTY:**

The manufacturer's warranty is utilized in both length and scope for all of the systems noted below:

Appliances

Fixtures

Items of Equipment

Electrical

Plumbing

Heating and Cooling

Ventilating Systems

**MANUFACTURER LITERATURE:**

Please take time to read the literature (warranties, use and care guidelines) provided in your Homeowners Manual. Although much of the information may be familiar to you, some points may differ significantly from your previous home.

We make all reasonable efforts to keep the information in this manual current. However, if any detail in our material conflicts with the manufacturer's recommendations, you should follow the manufacturer's recommendations.

Activate specific manufacturer's warranties by completing and mailing any registration cards included with their products. (Refer to Homeowners' Manual). All manufacturers' warranties begin at the closing date.

**APPLIANCES:**

For warranty service on major kitchen equipment, please call the manufacturer's service number provided on the subcontractor list in your Homeowner's Manual.

**HEATING AND COOLING:**

The authorized manufacturer's subcontractor warrants the installation of your heating and cooling systems. Warranties are as follows:

- A minimum of Two (2) years coverage for labor
- Five (5) years coverage for parts – no labor

However, this clause shall be amended upon the selection of the manufacturer for the system should that system have a longer warranty.

The heating system shall be capable of producing an inside temperature of 70 degrees Fahrenheit as measured in the center of each room at a height of five (5) feet above the floor under local outdoor conditions as specified in the American Society of Heating Refrigerating Air Conditioning Engineers (ASHRAE) handbook. Federal, state or local energy codes shall supersede this standard where such codes have been locally adopted. Reasonable temperature differentials between rooms should be expected.

The cooling system shall be designed to cool your home to at least 65 degrees (during a 95 degree outside temperature) Fahrenheit as measured in the center of each room at a height of Five (5) feet above the floor, under local outdoor summer design conditions as specified in the ASHRAE handbook. In the case of outside temperatures exceeding 95 degrees Fahrenheit a differential of 30 degrees Fahrenheit from the outside temperature could be realized. Federal, state or local energy codes shall supersede this standard where such codes have been locally adopted. Reasonable temperature differentials between rooms should be expected.

Air conditioner condensation lines drain up to five gallons (5) of water daily creating damp areas around the air handler units. This occurrence is normal and is not warranted. Condensation lines will clog eventually under normal use and homeowners must check their lines each month in order to avoid any problems resulting from a line that is blocked.

## HEATERS

Buffington Homes warrants the electric water heaters for a period of one (1) year. The manufacturers' limited warranty covers the first 5 years. Water heater elements and other electrical parts are under warranty for one year for parts and labor. The tank is under warranty for five (5) years on a pro-rated cost basis.

## PLUMBING:

The manufacturer warrants plumbing fixtures and devices for two (2) years. The water and drainage pipes in the plumbing system in your home are under warranty by Buffington Homes for two (2) years. This warranty covers major faults such as water line separation, faulty equipment, and faulty or improper installation. It does not cover frozen pipes or damage caused by them. Any homeowner repairs or alteration of plumbing systems will void the warranty.

Plumbing leaks must be reported to Buffington Homes and the subcontractor immediately. We cannot be responsible for damage due to negligence on the part of the homeowner. The sound of water and waste flowing through drain lines is considered customary and not covered under this warranty.

All hot and cold water lines to each fixture (including the dishwasher) have valves for emergency shut-off. There is also a shut-off valve for the entire house. Please refer to the homeowner's manual for location and ask to see valve and how to operate it during the final walkthrough). All toilets have a flushing capacity of 1.6 gallons, pursuant to the 1992 Energy Policy and Conservation Act. This amount of water should be sufficient; however, "double flushing" may be required in some cases. A stopped-up toilet is not covered by this warranty.

All plumbing faucets, showers and tub valves are equipped with water saving devices installed by the manufacturer, pursuant to the 1992 Energy Policy and Conservation Act. Buffington Homes or its subcontractors are not permitted to tamper with or remove these devices.

## ELECTRICAL:

Buffington Homes warrants your electrical system, including fixtures and items of equipment for a period of two (2) years. Repairs and alterations made to the electrical system by anyone other than the installing subcontractor or one authorized by Buffington Homes will void the warranty.

All circuits in your home are protected by circuit breakers. After any electrical failure, check your circuit breakers first. To re-set the circuit breaker, be certain to flip the switch all the way to the "off" position, and then back to the "on" position. When replacing burned out bulbs, only use the recommend wattage bulb. See the sticker on the bulb socket for this information. Please refer to your Homeowner's Manual for location(s) of the electrical circuit breaker panel(s).

## IV. EIGHT YEAR WARRANTY COVERAGE:

For an Eight-year period, from the date of occupancy, all major structural defects are warranted. Buffington Homes expressly warrants the structure of the improvements to be constructed in a good and workmanlike manner consistent with the standards of quality workmanship, and in accordance with the plans and state and local building codes.

Repair of major structural defects occurring during the term of coverage include:

- The repair of damage to the load bearing portions of the structure that is necessary to restore their load bearing functions.
- The repair of those items of the structure damaged by the major structural defect that made the structure unsafe, unsanitary or unlivable.
- Buffington Homes' total liability is limited to the cost of repair or replacement. Steps taken by Buffington Homes to correct any major structural defect shall not extend the time of this warranty.
- Any attempt to repair a major structural defect by anyone other than Buffington Homes or its agents or subcontractors will void any warranty.

### SPECIFIC CONDITION EXCLUSIONS

The standard for construction defects and Contractor remedies shall be the Residential Construction Performance Guidelines, Second Edition (a copy of which can be reviewed upon request). The following are specifically excluded from this Limited Warranty:

- Normal wear and tear.
- Insect damage – Buffington Homes is not responsible for damage caused by any insects. It is the responsibility of the homeowner to maintain the termite bond yearly.
- Normal shrinkage due to drying out of building components.
- Normal changes in appearance of materials due to environmental exposure.
- Squeaks in hardwood floors. Noises are an inherent characteristic of hardwood floors.
- Frozen pipes, when frozen due to Owner's failure to drain pipes in area vulnerable to freezing, specifically including all hose bib lines.
- Any condition which does not result in actual physical damage to the structure, including but not limited to inhabitability due to health risk from the presence or consequence of unacceptable levels of radon gas, mold, formaldehyde, or other pollutants and contaminants; or the presence of hazardous or toxic onsite materials. Buffington Homes does not test air quality or warrant that indoor air does not contain impurities or contaminants.
- Finally, loss or damage caused by or resulting from abnormal loading on floors by the Homeowner, which exceeds design loads as mandated by the engineered design.

### VI. GENERAL WARRANTY EXCLUSIONS

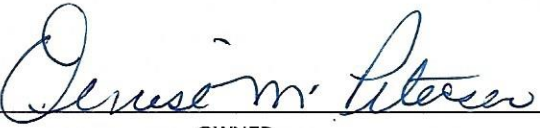
The following warranty exclusions are in addition to those described in the preceding sections:

- Appliances and equipment are "consumer products" as defined by the Magnusson-Moss Act, other than Buffington Homes' own workmanship and materials. Equipment, assemblies, or units purchased by Buffington Homes and included in the contract are sold and installed subject to the manufacturer's guarantees/warranties and not Buffington Homes.
- Buffington Homes assigns the owner all such manufacturers' guarantees and/or warranties.
- Any defect in materials supplied or work performed by anyone other than Buffington Homes, its subcontractors, or agents.
- Any damage caused by or made worse by negligence, improper maintenance or improper operations by anyone other than Buffington Homes, their subcontractors or agents, to include humidifiers, furnaces, security and fire alarms, roofing, gutters, and exterior wall coverings, dryer venting, anything that could promote the growth of mold in the house, etc.
- Any damage, which has not been reported in a timely manner.
- Damage that has not been properly minimized by the Owner.
- Any loss or damage that arises while the house is being used primarily for nonresidential purposes.
- Accidental loss or damage including but not limited to: Fire, Hurricane, Explosion, Smoke, Water leakage, Glass breakage, Windstorm, Hail, Lightning, Earthquake or other Acts of God. The exception would be when such loss or damage is caused by Buffington Homes' failure to comply with accepted industry standards and practices.

Mold disclaimer and waiver of testing. This subject Project does not include mold testing and remediation. CONTRACTOR, any of its agents and employees are held harmless and free from all liability and legal action relating to the current and/or future presence of mold at the subject property, regardless of the legal theory upon which any such claim rests unless such condition is caused by Buffington Homes' or its subcontractor's failure to comply with accepted industry standards and practices. This waiver and release shall be binding on heirs, agents, assignees, successors, and on any other person(s) who might otherwise be entitled to file suit or make a claim.

- Consequential, incidental, or theoretical damages.

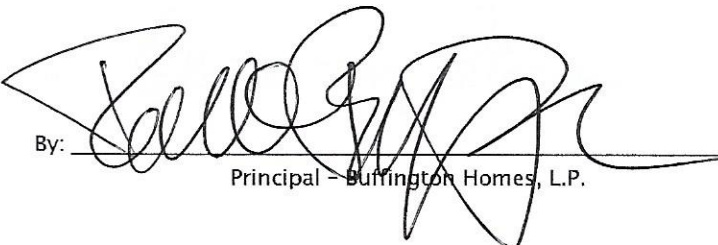
**AGREED AND ACCEPTED BY:**

By:   
OWNER

Date: 7/18/15

By: \_\_\_\_\_  
OWNER

Date: \_\_\_\_\_

By:   
Principal - Buffington Homes, L.P.

Date: 7/18/2015

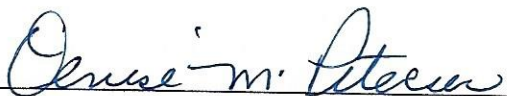
## ACKNOWLEDGMENT OF LIMITED WARRANTY AND DISCLAIMER

\_\_\_\_\_ (Owner's Initials). OWNER UNDERSTANDS AND ACKNOWLEDGES THAT THE CONTRACTOR'S LIMITED WARRANTY IS AN EXPRESS LIMITED WARRANTY AND THAT NO PERSONS OR ENTITIES SHALL HAVE LIABILITY WHATSOEVER, BY IMPLICATION OR OTHERWISE, FOR CLAIMS WHICH ARE NOT EXPRESSLY COVERED BY THE CONTRACTOR'S LIMITED WARRANTY DOCUMENTS. CONTRACTOR SPECIFICALLY DISCLAIMS ANY LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL (SECONDARY) DAMAGE TO ANY PERSON OR PROPERTY RESULTING FROM THE PURCHASE, REPAIR OR USE OF THE HOME OR ANY ITEM COVERED BY THE CONTRACTOR'S LIMITED WARRANTY. EXCEPT AS SPECIFICALLY PROVIDED HEREIN, CONTRACTOR IS NOT RESPONSIBLE FOR ANY LOSS, DAMAGE OR INJURY TO ANY PERSON OR PROPERTY.

\_\_\_\_\_ (Owner's Initials). IMPLIED WARRANTIES ARE EXPRESSLY DISCLAIMED AND DO NOT APPLY, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, SUITABILITY FOR RESIDENTIAL PURPOSES, FITNESS FOR A PARTICULAR PURPOSE, AND HABITABILITY, AND OTHERWISE. NOTWITHSTANDING ANY OTHER PROVISION OF THE CONTRACTOR'S LIMITED WARRANTY, CONTRACTOR SHALL HAVE NO LIABILITY UNDER THE CONTRACTOR'S LIMITED WARRANTY UNLESS HOMEBUYER(S) COMPLIES WITH ALL APPLICABLE NOTICE REQUIREMENTS PROVIDED FOR IN THE CONTRACTOR'S LIMITED WARRANTY. THE MAXIMUM AMOUNT PAYABLE UNDER THE CONTRACTOR'S LIMITED WARRANTY FOR ALL CLAIMS SUBMITTED IS THE ORIGINAL FINAL SALES PRICE OF THE HOME.

\_\_\_\_\_ (Owner's Initials). OWNER AND CONTRACTOR ACKNOWLEDGE AND AGREE THAT THE CONTRACTOR'S LIMITED WARRANTY (AND THE DISCLAIMERS, LIMITATIONS, EXCLUSIONS (INCLUDING THE MOLD DAMAGE EXCLUSION) AND CONDITIONS CONTAINED IN THE CONTRACTOR'S LIMITED WARRANTY AND IN THIS ACKNOWLEDGMENT) WERE SPECIFICALLY BARGAINED FOR AND TAKEN INTO EXPRESS CONSIDERATION IN ARRIVING AT THE CONTRACT PRICE. IF THE CONTRACTOR'S LIMITED WARRANTY HAD BEEN ALTERED FROM WHAT IS EXPRESSLY STATED IN THIS CONTRACT, THE CONTRACT PRICE WOULD HAVE BEEN MODIFIED ACCORDINGLY.

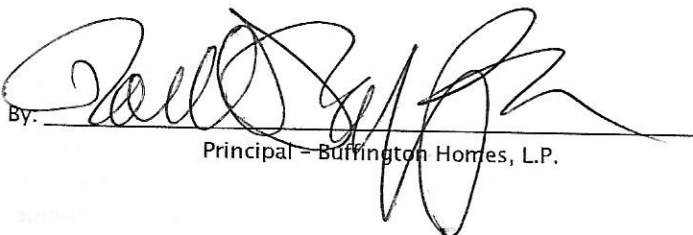
Agreed and Accepted by:

By:   
OWNER

Date: 7/18/15

By: \_\_\_\_\_  
OWNER

Date: \_\_\_\_\_

By:   
Principal - Buffington Homes, L.P.

Date: 7/18/2015

## MANDATORY MEDIATION AND ARBITRATION

The below-referenced provisions relating to mediation and arbitration supersede any conflicting references to mediation or arbitration or litigation or claims in any of the contract documents.

## MANDATORY MEDIATION

Prior to the commencement of arbitration or legal proceedings arising out of any claims, disputes, or other matters in question between the CONTRACTOR and the OWNER arising out of, or relating to this agreement, the project, the work, the contract documents or any breach thereof, the parties agree to participate in a formal non-binding mediation proceeding in an attempt to resolve their differences. The mediator may include any other entities or persons involved in the dispute.

The parties will agree upon a mediator and the mediation will take place within thirty (30) days after notice by one of the parties of the claim or dispute and the demand for mediation. If the parties are unable to agree on a mediator, they will ask the American Arbitration Association (which provides mediators for construction disputes) for the appointment of the mediator. The cost of the mediation and the mediator shall be divided equally among the parties participating in the mediation.

A representative of each party will attend the mediation, and the representative in attendance shall have authority on behalf of the party to resolve the dispute.

Notwithstanding the above, if the statute of limitations or some other deadline is approaching and must be tolled, a party may initiate arbitration or legal proceedings to toll the deadline and protect its interests, but will thereafter participate in mediation above-described as soon as possible.

## MANDATORY ARBITRATION

Subject to the qualification found in the following paragraph, all claims, disputes and other matters in question between the CONTRACTOR and the OWNER arising out of, or relating to this Agreement, the Project, the Work, the Contract Documents or the breach thereof may, at either party's option, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining as modified hereby.

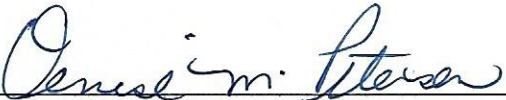
Any arbitration arising out of or relating to this Agreement, the Project, the Work, the Contract Documents, or the breach thereof may include by consolidation, joinder or in any other manner, at either party's option, any other entities or persons whom the parties believe to be substantially involved in a common question of fact or law. However, if either party wishes to include in the dispute by consolidation, joinder or in any other manner any other entity or persons whom either party believes to be substantially involved in a common question of law or fact, and either party is unable to compel such entities or persons to participate in the arbitration for whatever reason (e.g., it has no binding arbitration agreement with such entities or persons), then, at either party's option, either party may declare this arbitration provision null and void and may proceed with the dispute through litigation, at which time the OWNER and CONTRACTOR shall dismiss the arbitration without prejudice (if arbitration has been initiated) and shall proceed with litigation through the courts (subject to the mandatory non-binding mediation provision set forth above).

Either party may elect at the commencement of the arbitration to have the discovery rights and procedures provided by the Federal Rules of Civil Procedure to be available and enforceable within the arbitration proceeding.

The locale for the arbitration shall be Charleston, South Carolina. Any request or demand for arbitration hereunder shall be made before the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

This agreement to arbitrate shall be specifically enforceable by either party under the prevailing arbitration law. Any award rendered by arbitrators shall be final and enforceable by any party to the arbitration, and judgment may be rendered upon it in accordance with applicable law in any court having jurisdiction thereof.

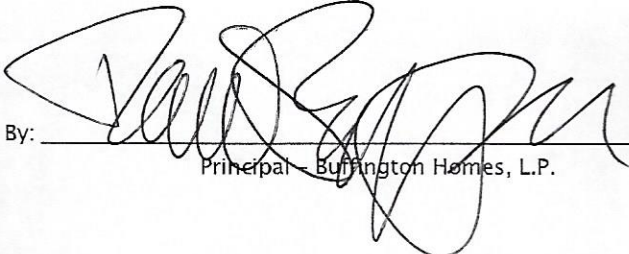
Accepted by:

By:   
OWNER

Date: 7/18/15

By: \_\_\_\_\_  
OWNER

Date: \_\_\_\_\_

By:   
Principal - Burlington Homes, L.P.

Date: 7/18/2015



License: 95976

**DCTCL, LP dba Buffington Homes LP**  
 3690 Betsy Kerrison Pkwy  
 Suite 2D  
 Johns Island SC 29455  
 843-768-8525

## Subcontract

Subcontract#: 2075

Subcontract Date: 03/09/2016

To: DONNIX Construction, LLC  
 1202 Catbird Ct.  
 Hanahan SC 29410

Project: 170  
 45 Eugenia- Petersen  
 45 Eugenia  
 Kiawah Island SC 29455

You are hereby directed to perform the following work per the plans and specifications provided.

Plans Attached ☐Specifications Attached ☐

Retention Rate: 10.00 %

| Description of Work    | Cost Code | Description       | Amount    |
|------------------------|-----------|-------------------|-----------|
| Roofing (incl permits) | 7100.000  | Roofing           | 56,900.00 |
| Chimney windbreak      | 7150.000  | Chimney Windbreak | 4,600.00  |
| Install mermaid finial | 7150.000  | Chimney Windbreak | 250.00    |
| House flashing         | 7200.000  | House Flashing    | 13,200.00 |
| Waterproofing          | 7300.000  | Waterproofing     | 17,300.00 |
| Gutters                | 7500.000  | Gutters           | 4,320.00  |

### Notes

Labor and material to install roofing, waterproofing, flashing, chimney windbreaks, and gutters for the residence at 45 Eugenia per estimate dated 02-24-16 and subcontract agreement and scope of work. The corner unit lift and slide to be installed by others. Kiawah Building permit number BRES-000902-2015. You are responsible for pulling your permit prior to start. Failure to pull permit will result in hefty fines by the Town of Kiawah Island.

Proof of General Liability and Workman's Compensation Insurance with Buffington Homes named as additional insured, a current contractor's license, and a Kiawah Island Permit must be submitted to the Buffington Homes office before work can begin. No exceptions...you will be asked to leave the jobsite if these items are not received. Any fines resulting from not obtaining a work permit, including ones imposed on Buffington Homes, will be the responsibility of the subcontractor.

Job site is to be cleaned at the end of every workday and trash/construction debris is to be deposited in the dumpster. Violations will result in a \$200 backcharge per incident

Amount of Subcontract

96,570.00

Contractor

Subcontractor

Date

Date

3/9/2016

3/10/16

# Estimate <sup>233</sup>

DONNIX CONSTRUCTION LLC.  
1202 CATBIRD CT.  
HANAHAN, SC. 29410  
(843) 200 - 0245

| Date      | Estimate # |
|-----------|------------|
| 3/10/2016 | 1086 R-2   |

## Name / Address

BUFFINGTON HOMES LLC  
3690 BETSY KERRISON PKY.  
JOHNS ISLAND SC.29455  
\*\*\*\*\*  
45 EUGENIA AVE. ( SHINGLE & COPPER ROOF )

| Rep | Project             |
|-----|---------------------|
| ND  | 45 EUGENIA AVE. ... |

| Description                                                                                                                                                                                                              | Total     |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| 1) S.C. RESIDENTIAL BUILDERS COMMISSION (BOND) REG # RBS.52692 EXP. 6/30/2017                                                                                                                                            | 0.00      |
| 2) CHARLESTON COUNTY LICENSE #201050524 EXP. 8/31/2016                                                                                                                                                                   |           |
| 3) KIAWAH LICENSE #1112559 EXP. 12/31/2015                                                                                                                                                                               |           |
| 4) MOUNT PLEASANT LICENSE #20007061 EXP. 06/30/2016                                                                                                                                                                      |           |
| 5) TOWN OF SEABROOK LICENSE # 20110236 EXP. 1/18/2016                                                                                                                                                                    |           |
| 6) LIABILITY INSURANCE #WS100741 \$2 MILLION                                                                                                                                                                             |           |
| 7) WORKERS COMP # WC5-35S-522746-011                                                                                                                                                                                     |           |
| 8) CITY OF HANAHAN # RBS 52692 CITY LIC#. 4504                                                                                                                                                                           |           |
| 9) SULLIVANS ISLAND LIC. #3883 EXP. 12/31/2015                                                                                                                                                                           |           |
| 10) CITY OF I.O.P #9641 EXP. 12/21/2015                                                                                                                                                                                  |           |
| *****                                                                                                                                                                                                                    | 500.00    |
| PERMITS                                                                                                                                                                                                                  |           |
| INSTALL HIGH TEMP METAL AND TILE ICE & WATER SHIELD ON UNDER COPPER ROOFING                                                                                                                                              | 3,900.00  |
| INSTALL 40 YRS ARCH. LANDMARK PRO SHINGLES ( COLOR TO BE DETERMINED ) , FABRICATE AND INSTALL DRIP EDGE, ( COLOR TO BE DETERMINED ) STARTERS, HIP AND RIDGE CAP, ICE AND WATER IN ALL VALLEY'S, RIDGE VENT, PIPE COLLARS | 25,200.00 |
| INSTALL 16 OZ. COPPER STANDING SEAM ROOF SYSTEM W/ ALL FASTENERS ( STAINLESS STEEL ) , ALL HIP VALLEYS WALL FLASHING AND RIDGES TO BE ROLLED, DRIPEDGE, VALLEYS, APPRON, WALL FLASHING AND RADIUS WINDOW                 | 27,300.00 |
| INSTALL 16 OZ. COPPER GUTTER 6" HALF ROUND AND 4" ROUND DOWN SPOUT W/ ALL HANGERS, OUTLETS, OUTSIDE MITERS , ENDCAPS, ELBOWS AND STRAPS .. AROUND BACK UPPER EYEBROW                                                     | 4,320.00  |
| PLEASE FEEL FREE TO CALL NICK DORIA FOR ANY QUESTIONS AT 843-200-0245 THANK YOU                                                                                                                                          |           |
| <b>Total</b>                                                                                                                                                                                                             |           |

ELECTRONICALLY FILED - 2022 Jun 17 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2021CPI001973

234  
**Estimate**

DONNIX CONSTRUCTION LLC.  
1202 CATBIRD CT.  
HANAHAN, SC. 29410  
(843) 200 - 0245

| Date      | Estimate # |
|-----------|------------|
| 3/10/2016 | 1086 R-2   |

**Name / Address**

BUFFINGTON HOMES LLC  
3690 BETSY KERRISON PKY.  
JOHNS ISLAND SC.29455  
\*\*\*\*\*  
45 EUGENIA AVE. ( SHINGLE & COPPER ROOF )

| Rep | Project             |
|-----|---------------------|
| ND  | 45 EUGENIA AVE. ... |

| Description                                                                                                                                                                                                   | Total        |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|
| FABRICATE 16 OZ. COPPER FLASHING W/WINDOW AND DOOR HEADER, WATER TABLE, DOOR PANS TO BE INSTALLED AND SOLDERED BY DONNIX CONSTRUCTION                                                                         | 13,200.00    |
| INSTALL URETHANE WATER PROOFING ON ALL WATER PROOFED DECKS TO INCLUDE: 16 OZ. COPPER FLASHING, PREP DECKS W/ NP1 ON ALL JOINTS, NAIL HOLES, AND KNOTTS, URETHANE BASE COATS TWO ( 2 ) AND TOP COATS ONE ( 1 ) | 17,300.00    |
| CUT RINGLET IN CONCRETE ON FRONT PORCH, INSTALL 16 O.Z. COPPER WALL FLASHING 10 INCH STOCK, URETHANE OVER COPPER AND UP WALL.1 BASE COAT AND 1 TOP COAT                                                       |              |
| CUT RINGLET ON BACK DECK,INSTALL 16 O.Z. COPPER WALL FLASHING 10 INCH STOCK, URETHANE OVER COPPER AND UP WALL. 1 BASE COAT AND 1 TOP COAT                                                                     | 650.00       |
| FABRICATE AND INSTALL ONE ( 1 ) 16 OZ. COPPER CHIMNEY CHASE COVER                                                                                                                                             | 2,650.00     |
| FABRICATE AND INSTALL 16 OZ. COPPER WINDBREAK W/ COPPER SCREEN                                                                                                                                                | 1,300.00     |
| PURCHASE AND INSTALL COPPER FINIALS TWO ( 2 )                                                                                                                                                                 | 250.00       |
| INSTALL ONE ( 1 ) COPPER FINIALS                                                                                                                                                                              | 0.00         |
| NOTE; FELT TO BE INSTALLED BY FRAMERS                                                                                                                                                                         |              |
| *****<br>ANY ITEM OR ITEMS NOT ON THIS ESTIMATE WILL BE CONSIDERED AN EXTRA<br>*****                                                                                                                          | 0.00         |
| *****<br>ALL ROOFING, FLASHING AND WATERPROOFING MATERIAL TO BE SUPPLIED BY DONNIX CONSTRUCTION LLC.<br>*****                                                                                                 | 0.00         |
| *****<br>ESTIMATE'S ARE ONLY GOOD FOR 30 DAYS DUE TO MATERIAL PRICE CHANGES<br>*****                                                                                                                          |              |
| PLEASE FEEL FREE TO CALL NICK DORIA FOR ANY QUESTIONS AT 843-200-0245 THANK YOU                                                                                                                               | <b>Total</b> |

ELECTRONICALLY FILED - 2022 Jun 17 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2021CPI001973

235  
**Estimate**

DONNIX CONSTRUCTION LLC.  
1202 CATBIRD CT.  
HANAHAN, SC. 29410  
(843) 200 - 0245

| Date      | Estimate # |
|-----------|------------|
| 3/10/2016 | 1086 R-2   |

| Name / Address                                                                                                                  |
|---------------------------------------------------------------------------------------------------------------------------------|
| BUFFINGTON HOMES LLC<br>3690 BETSY KERRISON PKY.<br>JOHNS ISLAND SC.29455<br>*****<br>45 EUGENIA AVE. ( SHINGLE & COPPER ROOF ) |

| Rep | Project             |
|-----|---------------------|
| ND  | 45 EUGENIA AVE. ... |

| Description                                                                        | Total                    |
|------------------------------------------------------------------------------------|--------------------------|
| *****<br>DONNIX CONSTRUCTION WILL HONOR A 5 YEAR WARRANTY ON LABOR<br>*****        | 0.00                     |
| PLEASE FEEL FREE TO CALL NICK DORIA FOR ANY QUESTIONS AT<br>843-200-0245 THANK YOU | <b>Total</b> \$96,570.00 |

**SUBCONTRACT AGREEMENT**

THIS SUBCONTRACT, made this 09 day of March, 2016 by and between **DCTCL, L.P. dba Buffington Homes, L.P.** (hereinafter "**Contractor**", with an office and principal place of business at 3690 Betsy Kerrison Pkwy., Suite 2-D, Johns Island, SC 29455 and **DONNIX Construction, LLC** (hereinafter "**Subcontractor**") with an office and principal place of business at 1202 Catbird Ct. Hanahan, SC 29410 (hereinafter collectively "**Parties**").

**Terms and Conditions:**

This agreement and its attached Exhibits:

- A. Plans and Specifications
- B. Scope of the work
- C. Draw Request form
- D. Certificate of Insurance

shall govern the relationship of the Parties with respect to all of their joint Work. The following are general terms and conditions which are agreed to between the Parties.

**WITNESSETH:**

**WHEREAS**, Contractor and Denise Petersen (hereinafter "**Owner**") have entered into a contract dated \_\_\_\_\_ for the construction of a single family home located at 45 Eugenia Kiawah Island, SC 29455 (hereinafter "**Project**"), according to the plans, drawings and specifications listed in **Exhibit A** attached hereto (hereinafter "**Contract Documents**") which are made a part of this Subcontract insofar as they apply; and

**WHEREAS**, Contractor desires to subcontract certain work specified in the Contract Documents, and Subcontractor desires to perform said work at the prices and upon the terms and conditions hereinafter expressed;

**WHEREAS**, all documents comprising the Contract Documents are available for examination by Subcontractor, and Subcontractor represents that it has read and examined the Contract Documents and fully and completely understands them, or that it has had the full and complete opportunity to do so;

**NOW, THEREFORE**, in consideration of the mutual agreements herein expressed, the Parties contract, covenant and agree as follows:

**1. Subcontractor's Work**

a. Subcontractor shall perform all work and shall furnish all supervision, labor, materials, plant, hoisting, scaffolding, tools, equipment, supplies and all other things necessary for the construction and completion of the work described in Scope of Work attached as **Exhibit B** and work incidental thereto and reasonably inferable therefrom, in strict accordance and full compliance with the terms of this Subcontract, and to the satisfaction of Contractor and Owner (hereinafter "**Work**").

b. All Work is to be performed by employees of the Subcontractor.

c. Subcontractor will warrant all items of work furnished and installed for (1) year, in addition to manufacturer's standard warranties. Subcontract work and all labor will be warrantied for (2) years from completion date. All warranties start on the date a Certificate of Occupancy is issued by the building department. With respect to the Work covered by this Subcontract, and except as expressly modified herein, Subcontractor shall have all rights that Contractor has under the Contract Documents, and Subcontractor shall assume all obligations, risks, and responsibilities that Contractor has assumed towards Owner, and third parties as applicable, in the Contract Documents. Subcontractor shall be bound to Contractor in the same manner and to the same extent that Contractor is bound to Owner or said third parties. In case of a conflict between this Subcontract Agreement and the Contract Documents as incorporated herein, the terms of this Subcontract Agreement shall prevail. To the extent relevant to their respective scopes of work, Subcontractor shall ensure that each of its subcontractors and suppliers are bound to the terms of this Subcontract Agreement and the Contract Documents.

d. All work must meet or exceed, national, state, and local codes and ordinances. Subcontractor shall assume sole responsibility for and shall perform, or cause to be performed, all special inspections and testing required by any applicable building code, regulations, or the Contract Documents relative to the Subcontractor's Scope of Work. To the fullest extent permitted by law, Subcontractor shall be liable to Contractor for all liability, costs, expenses, fines, penalties, and attorney's fees resulting from its failure to perform such duties.

**2. Payment**

a. For performance of the Work, Contractor shall pay Subcontractor the total sum of EXACTLY NINETY-SIX THOUSAND FIVE HUNDRED SEVENTY DOLLARS (\$ 96,570. ), subject to additions and deductions delineated by written change order(s).

b. All payments to Subcontractor shall be subject to a ten percent (10%) **retainage** to be held by Contractor. The retainage shall be released to Subcontractor after all of the Subcontractor's work has been completed to the satisfaction of the Contractor. No retainage will be held for payments for material.

c. No payment by Contractor to Subcontractor shall be made without Subcontractor supplying the proper Certificates of Insurance for General Liability Insurance and Worker's Compensation Insurance as designated in Section 4.

d. No payment by Contractor to Subcontractor shall be made until Subcontractor obtains the proper trade building permits from the Building Department and provides proof of said permit to the Contractor.

e. Requests for partial payment for work performed shall be made on a completed copy of the Subcontractor Draw Request form attached as **Exhibit C**

f. Contractor shall pay Subcontractor for work performed the prior week by 12:00 noon on Friday. In order for payment to be considered, an invoice for work performed during the prior week must be presented to

Contractor by 12:00 noon on the Monday following the week that the work was performed. Final payment of a contract must be submitted within two weeks of completion of the work.

g. Partial payment shall be due Subcontractor for value of the Work completed or in place. However, if Contractor does not receive payment from the Owner for Work performed by Subcontractor without the fault of Subcontractor then within a reasonable time, which is agreed to be no less than ninety (90) days after the date payment was due to Contractor by Owner, Contractor shall pay Subcontractor for Work performed in accordance with the Subcontract. If the Contract Documents allow Contractor partial payments for stored materials, partial payments shall also be due Subcontractor of stored materials for which payment has been made to Contractor by Owner.

h. No partial payment made under this Subcontract shall be considered an acceptance of the Work in whole or in part. All material and Work covered by partial payments shall become the property of Contractor, or, if the Contract Documents so provide, the property of Owner immediately upon approval of payment; however, this provision shall not relieve Subcontractor from its responsibility for all Work as provided in Article 4.

i. Subcontractor shall not apply for payment of any sums because of Work performed by any sub-subcontractor or vendor unless it intends to immediately pay such sums to them. The Subcontractor shall pay any amounts to its sub-contractors or vendors whether for labor performed or materials furnished within thirty (30) days after the Subcontractor receives payment from Contractor which encompasses labor or material furnished by such sub-contractor or vendor. After the first partial payment hereunder, Contractor shall have the right to withhold any subsequent partial payments until Subcontractor submits evidence satisfactory to Contractor that all previous amounts owed in connection with performance of this Subcontract have been paid. In addition to the requirements for payment in the Contract Documents, as requested by Contractor, Subcontractor may be required to furnish with any payment application (a) an affidavit stating that all obligations directly or indirectly related to any payment have been paid, (b) a waiver of lien rights and claim rights under any payment provided by Contractor, for all work performed on and material provided to the Project through the date of said payment application, all in a form acceptable to Contractor, or, (c) certified copies of payrolls of Subcontractor and its subcontractors.

j. Final payment, including any retainage withheld under Paragraph 2.b., shall be made after (i) Subcontractor's Work has been accepted by Owner and Contractor, (ii) execution and delivery of a complete and final release of Contractor, Owner and Contractor's surety, if any, and a waiver of lien rights, or a release of any filed liens, in a form acceptable to Contractor from all persons or entities furnishing labor and/or materials in the performance of the Subcontract, (iii) satisfactory proof of payment of all amounts owed by Subcontractor in connection with this Subcontract has been provided, (iv) written consent of Subcontractor's surety has been received, (v) the Subcontractor's Work is complete, (vi) Subcontractor has provided warranties required by the Contract Documents, (vii) submission of such other documents or instruments as Contractor may reasonably require or which are required by the Contract Documents, (viii) production of proof that the insurance coverage required by this Contract and Exhibit D has been procured and is in force and (ix)

Contractor has been paid in full by Owner for the Subcontractor's Work. Final payment shall constitute a waiver of all claims by Subcontractor arising out of the Work or Subcontract.

k. Subcontractor accepts sole and exclusive liability for all taxes and contributions required of Subcontractor by federal, state or local laws or regulations, including, without limitation, the Federal Social Security Act and the Unemployment Compensation Law or similar laws in any state with respect to the employees of Subcontractor and the performance of the Work.

l. Contractor may withhold from any payment, including final payment, such amount as Contractor deems reasonably necessary to protect itself against any actual or potential liability (including attorney's fees and costs) or damage directly or indirectly relating to the Subcontract arising from, or alleged to arise from, any act or omission by Subcontractor, regardless of whether or not the Owner has actually withheld payment from the Contractor.

### 3. Subcontractor's Liability

a. Subcontractor hereby assumes the entire responsibility and liability for all Work, supervision, labor, and materials provided hereunder, whether or not erected in place and for all plant, scaffolding, tools, equipment, supplies, and other things provided by Subcontractor until final acceptance of the entirety of the Work by Owner. In the event of any loss, damage or destruction thereof from any cause, Subcontractor shall be liable therefore, and shall repair, rebuild and make good said loss, damage or destruction at Subcontractor's cost, subject only to the extent that any net proceeds are payable under any builder's risk property insurance that may be maintained by Owner or Contractor, if any.

b. Subcontractor shall be liable to Contractor for all costs Contractor incurs as a result of any failure of Subcontractor, or any of its suppliers or subcontractors of any tier, to perform.

c. To the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless the Contractor, Owner and their respective officers, directors, employees and agents ("Indemnified Parties") from and against all claims, damages, demands, losses, expenses, fines, causes of action, suits or other liabilities, (including all costs reasonable attorneys' fees, consequential damages, and punitive damages), arising out of or resulting from, or alleged to arise out of or arise from, the performance of Subcontractor's Work under the Subcontract, whether such claim, damage, demand, loss or expense is attributable to bodily injury, personal injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom; but only to the extent attributable to the negligence of the Subcontractor or any entity for which it is legally responsible and; regardless whether the claim is presented by an employee of Subcontractor. Such indemnity obligation shall not be in derogation or limitation of any other obligation or liability of the Subcontractor or the rights of the Contractor contained in this Subcontract or otherwise. This indemnification shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Subcontractor under any workers' compensation acts, disability benefits acts, or other employee benefits acts. This indemnification shall be in addition to any indemnity liability imposed by the

Contract Documents, and shall survive the completion of the Work or the termination of the Subcontract.

d. All work time restrictions, noise abatement requirements, parking, etc shall be observed. Any fines imposed due to Subcontractor/employees violations shall be the responsibility of the Subcontractor.

e. Subcontractor will staff the job at all times with at least one individual that understands and speaks English.

f. Subcontractor's assumption of liability is independent from, and not limited in any manner by, the Subcontractor's insurance coverage obtained pursuant to Article 4, or otherwise.

#### 4. Subcontractor's Insurance

a. Prior to commencing the Work, Subcontractor shall procure, and thereafter maintain, at its own expense, until final acceptance of the Work or later as required by the terms of the Subcontract, insurance coverage required by the Contract Documents and this Subcontract. At a minimum, the types of insurance and minimum policy limits specified in this agreement shall be maintained in a form and from insurers acceptable to Contractor. All insurers shall have at least an A- (excellent) rating by A.M. Best and be qualified to do business in the jurisdiction where the Project is located.

b. Proof of this insurance shall be provided to the Contractor before the Work commences, as set forth below. To the extent that the Subcontractor subcontracts with any other entity or individual to perform all or part of the Subcontractor's Work, the Subcontractor shall require the other Sub-Subcontractor to furnish evidence of equivalent insurance coverage, in all respects, terms and conditions as set forth herein, prior to the commencement of the Work, be deemed a waiver by the Contractor of Subcontractor's or the Sub-Subcontractor's insurance obligations set forth herein.

c. In the event that the insurance company(ies) issuing the policy (ies) required by this exhibit deny coverage to the Contractor, the Subcontractor or the Sub-Subcontractor will, upon demand by the Contractor, defend and indemnify the Contractor at the Subcontractor's or Sub-Subcontractor's expense.

#### **Commercial General Liability Insurance**

\$1,000,000 Each Occurrence Limit (Bodily Injury and Property Damage)

\$2,000,000 General Aggregate per Project

\$2,000,000 Products & Completed Operations Aggregate

\$1,000,000 Personal and Advertising Injury Limit

#### **Worker's Compensation and Employees' Liability Insurance**

\$100,000 Each Accident

\$100,000 Each Employee for Injury by Disease

\$500,000 Aggregate for Injury by Disease

**The Contractor and Owner, along with their respective officers, agents, employees, shall be named as additional insureds for Ongoing Operations and Products/Completed Operations on the Subcontractor's and any Sub-Subcontractor's Commercial General Liability Policy, which must be primary and noncontributory** with respect to the additional insureds. The Subcontractor shall continue to carry Completed Operations Liability Insurance for at least (3) years after either ninety (90) days following Substantial Completion of the Work or final payment to the Contractor on any individual Projects, whichever is later.

It is expressly understood by the Parties to the Subcontract that it is the intent of the Parties that any insurance obtained by the Contractor is deemed excess, non-contributory and not co-primary in relation to the coverage(s) procured by the Subcontractor, the Sub-Subcontractor or any of their respective consultants, officers, agents, subcontractors, employees, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of the aforementioned may be liable by operation of statute, government regulation or applicable case law.

To the fullest extent permitted by applicable state law, a Waiver of Subrogation Clause shall be added to the General Liability and Workers' Compensation policies in favor of Contractor and Owner, and this clause shall apply to the Contractor's and Owner's officers, agents, and employees, with respect to all Projects during the policy term.

Prior to commencement of Work on any individual Project, Subcontractor shall submit a Certificate of Insurance in favor of Contractor and an Additional Insured Endorsement (in a form acceptable to the Contractor) as required hereunder. The Certificate shall provide for thirty (30) days' notice to Contractor for cancellation or any change in coverage. Copies of insurance policies shall promptly be made available to the Contractor upon request.

#### 5. Time of Performance

a. Subcontractor will commence Work when directed by Contractor and Subcontractor will proceed with the Work in a prompt and diligent manner in accordance with the Project Schedule, which may be amended from time to time by Contractor. **TIME IS OF THE ESSENCE.** Subcontractor shall be entitled to additional compensation for compliance with schedule amendments only to the extent, if any, that Contractor receives reimbursement from the Owner. Conversely, if Subcontractor causes a delay in the Work not related to a properly executed Change Order Subcontractor will be responsible for any penalties due to Owner for delay of the completion date.

b. **Subcontractor shall submit a detailed schedule for performance of the Subcontract upon acceptance of the proposal,** which shall comply with all scheduling requirements of the Contract Documents and with Paragraph 5.a. above. Contractor may, at its sole discretion, direct Subcontractor to make reasonable modifications and revisions in said schedule.

c. Subcontractor will coordinate its Work with the work of Contractor, other subcontractors, and Owners' other builders, if any, so no delays or interference will occur in the completion of any part or the entire Project.

## **6. Changes and Claims**

a. Contractor may, at any time, unilaterally or by agreement with Subcontractor make changes in the Work. Any unilateral order, or agreement, under this Paragraph 6.a. shall be in writing, unless an emergency requires Subcontractor to proceed without a written order. Subcontractor shall immediately perform the Work as changed without delay.

b. Subcontractor shall submit in writing to Contractor, along with substantiating evidence deemed satisfactory by Contractor, any claims for adjustment in the Subcontract Price, schedule or other provisions of the Subcontract claimed by Subcontractor for changes directed by Owner, or for damages for which the Owner is liable, or as a result of deficiencies or discrepancies in the Contract Documents ("Owner Claims") prior to the start of the work, otherwise such claims are waived. Contractor shall process said Owner Claims according to the provisions of the Contract Documents so as to protect the interests of Subcontractor and others including Contractor. Subcontract adjustments shall be made only to the extent that Contractor receives relief from or must grant relief to Owner and then only based on Subcontractor's allocable share of such relief. Subcontractor's allocable share shall be determined by Contractor, after allowance of Contractor's normal overhead, profit and other interest in any recovery, by making a reasonable apportionment, if applicable, among Subcontractor, Contractor and other subcontractors or persons with interests in the adjustment. In no event shall the Contractor become or be liable to the Subcontractor because of any such Owner Claims in excess of the amount actually received by Contractor from Owner because of such claim. It is expressly acknowledged that receipt of payment by Contractor from Owner because of any such Subcontractor's Owner Claims is an express condition precedent to any obligation of Contractor to pay such claims. This paragraph will also cover other equitable adjustments or other relief allowed by the Contract Documents.

c. For changes ordered by Contractor independent of Owner or the Contract Documents, Subcontractor shall be entitled to an equitable adjustment of the Subcontract Price or Project Schedule, or both, to the extent that impact can be substantiated to the Contractor's satisfaction.

d. Pending resolution of any claim, dispute, or other controversy, nothing shall excuse Subcontractor from proceeding with prosecution of the Work.

e. No payments for change orders will be made unless Contractor has issued a signed change order before the work has started.

## **7. Failure to Perform**

a. If, in the opinion of Contractor, Subcontractor shall at any time (1) refuse or fail to provide sufficient properly skilled workmen or materials of the proper quality, (2) fail in any respect to prosecute the Work according to the Project Schedule, (3) stop, delay, or interfere with the

work of Contractor or any other builder or subcontractor, (4) fail to comply with all provisions of this Subcontract or the Contract Documents as incorporated herein, (5) be adjudged a bankrupt, or make a general assignment for the benefit of its creditors, (6) have a receiver appointed, or (7) become insolvent or a debtor in reorganization proceedings, then, after serving three (3) days written notice, unless the condition specified in such notice shall have been eliminated with such three (3) days, the Contractor may at its option (i) without voiding the other provisions of the Subcontract and without notice to the sureties, take such steps as are necessary to overcome the condition, in which case the Subcontractor shall be liable to Contractor for the cost thereof; (ii) terminate for default the Subcontractor's right to proceed under the Subcontract, or (iii) seek specific performance of Subcontractor's obligations hereunder, it being agreed by Subcontractor that specific performance may be necessary to avoid irreparable harm to Contractor and/or Owner.

b. In the event of termination for default, Contractor may, at its option, (1) enter on the premises and take possession, for the purpose of completing the Work, of all materials and equipment of Subcontractor, (2) require Subcontractor to assign to Contractor any or all of its subcontracts or purchase orders involving the Project; or (3) complete the Work either by itself, or through others, by whatever method Contractor may deem expedient. In case of termination for default, Subcontractor shall not be entitled to receive any further payment until the Work shall be fully completed and accepted by Owner.

c. If the Owner terminates any portion of the prime agreement with Contractor which includes the Work, then the Subcontract shall be similarly terminated and Subcontractor shall be entitled to such relief as may be granted to Contractor on Subcontractor's behalf consistent with Articles 1, 7 and 8 of the Subcontract.

d. In the event of termination for default or any other reason, the provisions of this Subcontract concerning the subcontractor's liability, indemnity, and insurance obligations shall remain in full force and effect in conformance with and for the period(s) specified in those provisions.

## **8. Settlement of Disputes**

a. In case of any dispute between Contractor and Subcontractor, due to any Owner Claims, any act or omission of Owner or any entity for which the Owner is responsible, or involving the Contract Documents, Subcontractor agrees, to the same extent that Contractor is bound to Owner, to be bound by the terms of the Contract Documents, and by any and all preliminary and final decisions or determinations made thereunder by the party, board or court so authorized in the Contract Documents or by law, whether or not Subcontractor is a party to such proceedings. In case of such dispute, Subcontractor will comply with all provisions of the Contract Documents allowing a reasonable time for Contractor to analyze and forward to Owner any required communications or documentation. Contractor will, at its sole option (1) present to Owner, in Contractor's name, or (2) authorize Subcontractor to present to Owner, in Contractor's name, all of Subcontractor's claims and answer Owner's claims involving Subcontractor's Work, whenever Contractor is permitted to do so by the terms of the Contract Documents. If such dispute is prosecuted or defended by Contractor, Subcontractor agrees to furnish all documents, statements, witnesses, and other information required, and to pay for all costs, including attorneys' fees, incurred in connection therewith. The

Subcontract Price shall be adjusted by Subcontractor's allocable share determined in accordance with Article 7 hereof.

b. With respect to any controversy between Contractor and Subcontractor not involving the Owner, the Contract Documents or an Owner Claim, Contractor shall issue a decision which shall be final and binding unless, within five (5) days of receipt, the Subcontractor files a notification in writing of its intent to litigate the controversy in accordance with this agreement. Notification of any such claim under this agreement must be submitted in writing within ten (10) days of Subcontractor's awareness of the facts underlying the claim. Failure of Subcontractor to submit timely its notice of claim or notice of intent to litigate shall constitute an absolute bar and complete waiver of Subcontractor's right to recover on account of such claim.

c. Subject to Subcontractor's compliance with such notice requirements, either party may request non-binding mediation of non-Owner Claims with a mediator to be agreed upon by the Parties, and shall pursue resolution of their dispute in good faith through such mediation. If the Parties cannot agree upon a mediator, they shall submit the dispute to the American Arbitration Association for non-binding mediation pursuant to its rules. Any such mediation shall take place in the place where the Project is located. Any mediation costs shall be equally borne by the parties.

d. Anything to the contrary in the Contract Documents notwithstanding, any controversy between Contractor and Subcontractor not involving Owner, the Contract Documents, or an Owner Claim and which is not amicably resolved by the Parties will be submitted to arbitration pursuant to the Construction Industry Rules of the American Arbitration Association to be conducted at the place where the Project is located. The prevailing party in arbitration shall be entitled to recover reasonable attorney's fees, costs, and expenses incurred in connection with the litigation.

#### 9. Termination for Convenience

Contractor shall have the right to terminate this Subcontract, in whole or part, for its own convenience and regardless whether there is a termination of Contractor's contract with Owner, by providing Subcontractor with a written notice of termination, to be effective upon receipt by Subcontractor. If the Subcontract is terminated for convenience, the Subcontractor shall be paid the amount representing costs that are due from the Owner for its Work, as provided in the Contract Documents, after payment therefore by the Owner to Contractor. This remedy shall be exclusive and in no event will Subcontractor be entitled to recovery of any anticipatory profits or damages.

#### 10. Assignment

a. Subcontractor shall not subcontract any portion of the Work or the Subcontract and shall not assign or transfer this Subcontract, or funds due hereunder, without the prior, written consent of Contractor and Subcontractor's surety.

b. Contractor may assign the Subcontract without prejudice to its rights under the Subcontract or any surety bond issued with respect thereto.

#### 11. Safety

The Contractor makes no representation with respect to the physical conditions or safety of the Project Site. The Subcontractor shall, at its own expense, preserve and protect from injury its employees engaged in the performance of the Work and all property and persons that may be affected by its operations in performing the Work. The prevention of accidents to workers engaged in the Work and others affected by the Work is the responsibility of the Subcontractor. Subcontractor shall comply with all federal, state, labor and local laws, regulations, and codes concerning safety as shall be applicable to the Work and to the safety standards established by Contractor during the progress of the Work. Subcontractor shall indemnify, defend and hold harmless Contractor, Owner and their respective officers, directors, agents and employees from any costs, expenses or liability (including attorneys' fees, fines or penalties) resulting from failure of Subcontractor to comply with the aforesaid laws, regulations and codes. Violation of safety rules will not be tolerated and is grounds for removal of individual and/or Subcontractor from the job.

#### 12. Clean-up

Subcontractor shall clean areas used by Subcontractor for its Work on a daily basis. All debris, rubbish, waste material, excess material from Subcontractors Work shall be removed from the Project site, or to a specified location on the Project site as directed by Contractor, and in a manner that will not impede either the progress of the Project or of other trades. Negligence in the cleaning the jobsite each day will result in a back charge of \$200 per day without limitation.

#### Conduct:

Smoking and/or other tobacco products are banned within the building structure or its appurtenant structures. Subcontractor shall not consume alcohol or illegal drugs. Subcontractor shall not cause damage to the job. An example would be extension cords over window sills causing tension and subsequent damage to the sill.

It is expected that Subcontractor's be mindful and respect others' work, use appropriate non-profane language; wear clean booties to protect flooring (\$200) fine; as well as taking reasonable steps to protect and prevent damage or disturbance on the job site in all respects.

All Subcontractors must cooperate with Contractor and work concurrently with other Subcontractors.

No Subcontractor shall alter, or operate any mechanical equipment or materials he does not supply to prevent damage to said products.

We Build It As If It Were Our Own.

**14. Governing Law**

This Subcontract shall be governed by and construed in accordance with the laws of the State of South Carolina without regard to conflict of law principles.

**15. Presumption Arising From Authorship**

Both Parties have had the opportunity to review this Subcontract with counsel and negotiate before signing this Subcontract. Therefore, there will be no presumption for or against either of the Parties arising out of the drafting of the Subcontract.

IN WITNESSETH WHEREOF, the Parties, by their duly authorized representatives, have hereunto executed this Subcontract, on the day and year first above written.

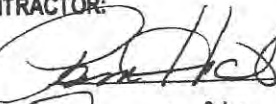
**Exhibits:**

- A - Plans & Specifications
- B- Scope of the Work
- C- Draw Request form
- D- Certificate of Insurance

SUBCONTRACTOR: DONNIX Construction

By:   
 Name: Nicola J. Doria  
 Title: Owner  
 Date: 3/10/16

CONTRACTOR:

By:   
 Name: Pamela Hicks  
 Title: Controller  
 Date: 3/9/2016

WITNESS: \_\_\_\_\_

## Scope of Work - Roofing & Waterproofing

### Attachment "B"

This document sets forth the scope of work for **THIS PROJECT** designated 45 Eugenia- Petersen and located at 45 Eugenia Kiawah Island, SC 29455.

This document along with all drawings and specifications as provided by the Architect or the Owner, will comprise the entire scope of work for this Division of work to be bid and performed by the Subcontractor.

The provisions of this document are incorporated into all Requests for Proposal, Proposal and Subcontracts related to this project and **no deviations shall be allowed without express written qualification of the bid, proposal or subcontract.**

#### General Requirements Highlights

All work to be performed per the plans and specifications for the described property and made available to subcontractor.

**All work to be performed by employees of this subcontractor, none of this scope of work shall be performed by other subcontractors without the prior approval of Buffington Homes, LP.**

All work must meet national, state, and local codes and ordinances. Any discrepancies between plans and specifications and national, state, and/or local codes and ordinances recognized by subcontractor must be disclosed to Buffington Homes.

All materials and products must be installed per manufacturer's specifications.

All subcontractors must cooperate with Buffington Homes and work concurrently with other subcontractors.

No subcontractor shall alter, turn on or operate any mechanical equipment or materials they do not supply or work with at sites to prevent damage to said products.

**Site Cleaning** – Subcontractor is responsible for cleaning the jobsite at the end of each day with all debris removed to job site dumpster (provided by others). Not cleaning the jobsite at the end of each day will result in a back charge of \$200 per incident without limitation.

**Draw Requests** – All draw requests must be submitted on a completed Buffington Homes' Draw Request Form on Monday by noon in order to be approved for payment by Friday of the same week. This does not guarantee that payment will be made on Friday. Draw requests can only be submitted for work performed the week before the request. Final payment of a contract must be submitted within two weeks of completion of work.

**Change Orders** – No payments for change orders will be made unless a signed change order has been issued to the subcontractor before the work is started.

No alcohol or drugs are permitted on Buffington Homes' jobsites at any time. Any user of alcohol and/or drugs will be asked to leave the job site immediately and will not be allowed back on a Buffington Homes' jobsite at any time. Any Buffington Homes representative has the authority to determine and report if an individual is or has been using alcohol or drugs.

Smoking and/or other tobacco products are not allowed within the building structure or its appurtenant structures.

No radios or "horseplay" on jobsites.

Subcontractors are responsible to pay for any damage caused by the subcontractor or their suppliers to city streets and roads.

Violation of safety rules will not be tolerated and will be grounds for removal of individual and/or subcontractor from jobsite.

All work time restrictions, noise abatement requirements, parking, etc. of the specific area of construction shall be observed. Any fines imposed due to subcontractor employee violations shall be the responsibility of the subcontractor.

Subcontractor will staff the job at all times with at least one individual that understands and speaks English.

Subcontractor will warrant all items of work furnished and installed for (1) one year, in addition to manufacturer's standard warranties and subcontract work and all labor for (2) two years from completion date. All warranties are to start on the date that the Certificate of Occupancy is issued from the building department.

**An estimated time frame for completion of this scope of work must be submitted with proposal or proposal will not be accepted.**

**Requests for retention must be made within two weeks of final payment on contract.**

**This scope of work must be signed by subcontractor and returned with proposal or proposal will not be accepted**

### **Roofing & Waterproofing Requirements**

Scope of Work: Subcontractor agrees to furnish all labor, equipment, tools, apparatus, scaffolding, material handling equipment, etc. to construct and complete in a good and workmanlike manner, the scope of which shall include but not be limited to:

1. Before ordering materials, subcontractor responsible for checking with Project Manager for approval of all roofing material, including ridge venting if appropriate.
2. Contractor may elect to pay suppliers directly for material ordered by subcontractor. In this instance, subcontractor will supply contractor with invoice and contact information for supplier so that payment can be made. Subcontractor will assume all responsibility for the material that is ordered. The subcontract agreement will be adjusted to reflect the direct payment to supplier.
3. The Subcontractor is responsible for his ordering instructions. Specification errors excess material on orders or anything which causes a negative dollar impact are to be paid by the subcontractor once he has accepted and approved the material order. Excess which cannot be refunded will become the property of the subcontractor and appropriate deductions will be made to his contract price.
4. Subcontractor is responsible for supplying and installing all roofing materials with proper flashing as specified.
5. Subcontractor responsible for supplying all metal flashing material required for project. This includes, but is not limited to, brick flashing, window and door flashing, door pans, water table flashing, deck flashing, column caps, and chimney cap and stack flashing.

6. Ice and water shield type materials to be installed where necessary as soon as exterior framing has been completed.
7. Deck waterproofing will be adhered according to industry standards and have minimum joints at newel posts. Material is to be run up at least eight (8) inches at newel posts.
8. Use 16 oz. Copper flashing where copper is specified.
9. Provide and install chimney chase covers and caps as required.
10. Install all boots, flanges, and covers for all roof penetrations and coordinate installation with other trades.

Subcontractor Signature



Date

3/10/16



REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

IMPORTANT: SELLER MAKES NO WARRANTIES: SEE REVERSE SIDE OR ELECTRONIC ATTACHMENT FOR IMPORTANT TERMS AND CONDITIONS. IF THERE IS NO REVERSE SIDE OR ELECTRONIC ATTACHMENT, SELLER WILL FURNISH THE TERMS AND CONDITIONS UPON REQUEST. This order is subject to the terms and conditions set forth on the reverse side or electronic attachment, and by accepting the below materials, you agree to those terms and conditions.

Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with section 12(A) of the Fair Labor Standards Act of 1938, as amended.

T/D symbols are described on the reverse side or electronic attachment.

Returns must be made in accordance with ABC's Return Policy. A copy of this policy is available upon request.

LATE PAYMENT CHARGE: All accounts past due will be subject to a monthly late payment charge, not to exceed the maximum allowable by state or federal law.

When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call the number provided.

SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAN SC 29410 4762

SHIP TO:

45 EUGINA 00000- 0000

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|                     |                                     |          |                  |                  | INVOICE DATE     | SHIP DATE  | PAGE           |
|                     |                                     |          |                  |                  | 08/16/16         | 08/16/16   | 1 of 1         |
| INVOICE NO.         | CUSTOMER ORDER NO.                  | SHIP VIA | MAIN ACCOUNT NO. | CUSTOMER NO.     | TERMS            |            | SALES REP      |
| 52062460            | 45 EUGINA                           | CPU      | 75012900         | 19378400         | END OF MONTH     |            | JS317          |
| ITEM NUMBER         | ITEM DESCRIPTION                    | U/M      | T/D              | QUANTITY SHIPPED | QUANTITY BACKORD | UNIT PRICE | EXTENDED PRICE |
| ABC #054 CHARLESTON | CUSTOMER PICK UP                    |          |                  |                  |                  |            |                |
| 1264300815          | QUALCRAFT SAFETY KIT 50' #00815QC50 | EA       |                  | 1                | 0                | 111.99     | 111.99         |
| 11TKTWMTTL          | TAMKO TW METAL & TILE UNDLAYMNT 2SQ | RL       |                  | 5                | 0                | 75.10      | 375.50         |
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REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

IMPORTANT: SELLER MAKES NO WARRANTIES: SEE REVERSE SIDE OR ELECTRONIC ATTACHMENT FOR IMPORTANT TERMS AND CONDITIONS. IF THERE IS NO REVERSE SIDE OR ELECTRONIC ATTACHMENT, SELLER WILL FURNISH THE TERMS AND CONDITIONS UPON REQUEST. This order is subject to the terms and conditions set forth on the reverse side or electronic attachment, and by accepting the below materials, you agree to those terms and conditions.

Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with section 12(A) of the Fair Labor Standards Act of 1938, as amended.

T/D symbols are described on the reverse side or electronic attachment.  
Returns must be made in accordance with ABC's Return Policy. A copy of this policy is available upon request.

LATE PAYMENT CHARGE: All accounts past due will be subject to a monthly late payment charge, not to exceed the maximum allowable by state or federal law.

When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call the number provided.

SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAHAN SC 29410 4762

SHIP TO:

ABSOLUTELY NO PICK UP  
WITHOUT NICK'S 200-0245  
APPROVAL, THIS INCLUDES  
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| INVOICE DATE | SHIP DATE | PAGE   |
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| INVOICE NO.<br>52072321 | CUSTOMER ORDER NO.<br>BROUGHTON/CRESENT | SHIP VIA<br>CPU | MAIN ACCOUNT NO.<br>75012900 | CUSTOMER NO.<br>19378400 | TERMS<br>END OF MONTH | SALES REP<br>JS3117 |                |
| ITEM NUMBER             | ITEM DESCRIPTION                        |                 | U/M T/D                      | QUANTITY SHIPPED         | QUANTITY BACKORD      | UNIT PRICE          | EXTENDED PRICE |
| ABC #054 CHARLESTON     | CUSTOMER PICK UP                        |                 |                              |                          |                       |                     |                |
| 4844400055              | STRIP VYCOP PLUS 4"X75'                 |                 | EA                           | 4                        | 0                     | 24.83               | 99.32          |

CHARLESTON COMMON PLEAS - CASE#2021CP1001973

THANKS FOR YOUR HARDWORK!

We will be closed September 5th for Labor Day

★★★★★



SUBTOTAL 99.32

SUBTOTAL AMOUNT +  
99.32

FREIGHT +  
0.00

SALES TAX  
SC CH 8.44

TOTAL  
PAYABLE IN  
U.S. DOLLARS

107.76

**PURCHASE AGREEMENT TERMS  
AND CONDITIONS OF SALE  
AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC.**

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ELECTRONICALLY FILED - 2022 Jun 17 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001973

1. Any purchase made on credit requires that Buyer have on file with American Builders & Contractors Supply Co., Inc. ("Seller") an approved Credit Application. Buyer further confirms Buyer's consent to Seller's Credit Agreement, the terms and conditions of which have been read by Buyer and are incorporated by reference herein. All accounts past due are subject to a monthly late payment charge, not to exceed the maximum allowed by applicable state and federal law.
2. Seller acknowledges and accepts Buyer's order; however, Seller's acknowledgment and acceptance is expressly conditioned upon Buyer's acceptance of the terms and conditions herein. No terms or conditions other than those stated herein, whether contained in Buyer's purchase order, shipping release, or elsewhere, and no written or oral agreement that purports to vary these terms and conditions is binding upon Seller unless set forth in writing, signed by Seller's authorized representative. All negotiations, proposals and representations are merged herein, and this writing constitutes the complete and exclusive statement of the terms and conditions of this Purchase Agreement between Buyer and Seller. In the event Buyer fails to accept this Purchase Agreement in writing, Buyer's consent to the terms and conditions herein is conclusively presumed, either from Buyer's failure to object within ten days in writing or from Buyer's acceptance or use of the material delivered hereunder. Unless Buyer notifies Seller in writing to the contrary prior to making a purchase, Buyer hereby represents and warrants that any employee or agent action on Buyer's behalf is authorized by Buyer and Seller may rely upon such representation.
3. In any case in which Seller makes delivery, Buyer will pay Seller's customary shipping charges. Delivery will be made at the project site or other place of delivery adjacent to the closest public right of way. Title and risk of loss passes to Buyer upon delivery of the goods. Should Buyer not be present to accept delivery, Buyer authorizes Seller to unload the goods and leave them at the delivery destination. Buyer releases Seller and will indemnify and hold harmless Seller from and against any and all claims demands, actions, causes of action, cost, expenses, and attorneys' fees arising out of or in connection with any and all injury including death, to any person or persons (whether third parties or agents, servants, or employees of Buyer), any and all damages to or loss of any property (whether belonging to Buyer or a third party), and any and all other damages recognized at law or in equity caused in whole or in part by or in any way related to the delivery of goods onto the project site by Seller, whenever such delivery is made in accordance with or pursuant to Buyer's instruction or authorization.
4. Buyer has the right to inspect the goods upon arrival. Buyer's inspection rights expire 24 hours after the arrival of the goods at the delivery destination. A failure to make inspection within that time waives notice of any defect that a reasonable inspection would have revealed. A rejection of the goods by Buyer is not effective unless written notice of rejection is given to Seller within three (3) calendar days of delivery.
5. Without prejudice to any other rights, Seller may suspend further deliveries of any items purchased if Buyer defaults in payment of any amounts due, or whenever Seller may deem itself insecure as to Buyer's performance, until Buyer remedies such default or provides assurance that satisfies Seller in its sole discretion, of Buyer's ability to perform. Seller may cancel any order at any time prior to payment by Buyer.
6. Unless otherwise provided by law, Seller may require Buyer to pay or to reimburse Seller for any tax (except income tax) which now or hereafter is imposed by any taxing authority with respect to the items purchased or the sale, purchase, manufacture, delivery or use thereof.
7. Seller reserves the right to discontinue, without liability hereunder, deliveries of any merchandise, the manufacture, use and/or sale of which in the opinion of Seller would infringe any patent now or hereafter issued, or other intellectual property right under which Seller is not licensed.
8. Where Buyer requires tests or inspection not regularly provided by Seller, Seller may charge Buyer for the actual cost of such test or inspections.
9. Buyer's wrongful nonacceptance of goods, or cancellation or repudiation of an agreement to purchase goods or services entitles Seller to recover, in addition to any incidental damages caused by Buyer's wrongful nonacceptance, cancellation or repudiation, either (i) in the case of goods, the risk of loss of which has passed to Buyer at the time of nonacceptance, cancellation or repudiation, or goods which cannot reasonably be resold by Seller to a third party, or service which have already been performed by Seller, the price of such goods or services; or (ii) in the case of goods for which other buyers exist or services not yet performed, or where an action for the price is not otherwise permitted by law; damages equal to the profit (including reasonable overhead) which Seller would have realized had Buyer fully performed or, at Seller's option, twenty percent (20%) of the contract price as liquidated damages (which constitute a reasonable estimate of Seller's loss and not a penalty), plus, in the case of special orders, Seller's expenses, if any, incurred prior to receipt by Seller of notice of cancellation by Buyer, in connection with providing special services, developing special tooling, purchase special supplies and the like.
10. Seller is not responsible for any delay caused in whole or in part by circumstances beyond Seller's reasonable control, including but not limited to, force majeure, fires or accidents; strikes or other differences with workers; war (whether declared or undeclared), riots or embargoes; delays by carriers; delays in shipment or receipt of materials from suppliers; or any legislative, administrative or executive law, order or requisition of the federal or any state or local government or any subdivision, department, agency, officer or official thereof. Seller is not liable in any event for any damages (whether direct, general, special, incidental, consequential or other) caused by Seller's failure or delay in performance or delivery, if Seller is unable, due to any cause beyond Seller's control, to supply Buyer's total demand for products. Seller may allocate its available supply among Seller's customers, including Seller's branches and affiliates, in any manner Seller deems reasonable.
11. In the case of goods manufactured and sold by Seller with a separate written warranty, that warranty will apply. Otherwise, in the case of goods manufactured and sold by Seller, Seller warrants only that such goods have been manufactured in accordance with Seller's specifications and are free from defects in material and workmanship at the time of sale. For all other goods, upon request, Seller make no warranties, but will assign or transfer to Buyer any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied. **EXCEPT AS EXPRESSLY PROVIDED HEREIN, SELLER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTIES INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THERE IS NO WARRANTY THAT EXTENDS BEYOND THE DESCRIPTION ON THE FACE OF THIS PURCHASE AGREEMENT. BUYER ACKNOWLEDGES THAT BUYER'S PURCHASE DECISION IS BASED UPON BUYER'S DUE DILIGENCE AND INSTRUCTION TO SELLER OF THE GOODS REQUIRED BY BUYER AND NOT BY REASON OF ANY STATEMENT MADE BY OR ON BEHALF OF SELLER AS TO THE MERCHANTABILITY, SPECIFIC ATTRIBUTES OR OTHER INFORMATION REGARDING THE GOODS.** Buyer acknowledges that lumber and other product dimension descriptions are made consistent with industry standards and do not necessarily represent exact or accurate dimensions. For example, lumber commonly called "2x4" is actually 1.5 inches deep by 3.5 inches wide.
12. Buyer's Remedies/Limitation of Liability: (a) Buyer's sole and exclusive remedy and the limit of Seller's liability for goods or services proven to be other than warranted, whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other legal theory, shall be, at Seller's option, (a) replacement of the goods or services, without charge, carriage paid to Buyer's facility; or (b) refund of the purchase price paid in respect of such goods or services, plus commercially reasonable charges in connection with the return or disposition of goods. To effect this sole and exclusive remedy, Buyer must make its claim for breach of warranty within 12 months of the date of shipment of the goods or performance of the services, and any such claim not made within such 12-month period is irrevocably waived.
- (b) Seller's sole liability with respect to the goods and services, for any and all loss or damage to Buyer, or any other loss, damage, expense or claim, resulting from any cause whatsoever (whether based on damaged or defective goods, irrespective of whether such damages or defects are discoverable or latent, or Seller's limited warranty shall fail of its essential purpose, or any other reason), and whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other theory, will not exceed the aggregate purchase price of the particular goods and services with respect to which losses, damages, expenses or costs are claimed. Seller has no liability to any person other than Buyer by virtue of the sale of the goods, provision or services, or any other matters contemplated by this Agreement and Buyer will add Seller as a party protected by Buyer's warranty and limit of liability provisions in Buyer's terms of sale. The limitation of liability set forth in this paragraph shall survive termination or cancellation of this Agreement. For the avoidance of doubt, Seller is not liable for any damages whatsoever whether direct or indirect resulting from any delay in delivery of the goods or failure to deliver the goods in a reasonable time - whether or not such delay or failure is caused by Seller.
- (c) THE FOREGOING IS THE ENTIRE OBLIGATION OF SELLER. SELLER IS NOT LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES TO ANY PERSON, WHETHER BASED UPON BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF CONTRACT OR ANY OTHER THEORY, REGARDLESS OF WHETHER THE REPLACEMENT OR REFUND REMEDY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE OR FOR ANY OTHER REASON WHATSOEVER. Seller shall not be liable for any damages attributable to product abuse, misuse, neglect or any other cause, which is not the fault of Seller.
13. (a) Buyer agrees to indemnify and hold harmless Seller from and against any and all claims, demands, actions, causes of action, costs and expenses arising out of or in connection with, in whole or in part, any act(s) or omission(s), negligent or otherwise, of Buyer, or any of Buyer's agents, servants, employees, subcontractors or customers, including but not limited to: (i) claims of personal injury, including death, to any person or persons (whether third parties or agents, servants or employees of Buyer or Seller); (ii) claims of loss of any property, real or personal (whether belonging to Seller, Buyer or to a third party); and (iii) any and all other damages recognized at law or in equity under any theory whatsoever.
- (b) This indemnity includes, but is not limited to, any reasonable attorney's fees or other reasonable legal fees incurred by Seller and associated with the foregoing.
- (c) This indemnity provision is a material term to the Agreement. Buyer's duty to indemnify is a condition to the sale of any goods from Seller to Buyer. Buyer has read the indemnity provision in its entirety, understands each and every part of the provision and acknowledges that there is no ambiguity concerning Buyer's duty to indemnify.
- (d) In the event that the applicable law prohibits enforcement of this clause as written, then and only then, this clause will be modified to provide the maximum indemnification to Seller, as indemnitee, allowable under that applicable law.
14. Export Sales. Buyer represents and warrants that it has complied and will comply with all applicable laws, rules and regulations pertaining to the export, import and movement of the goods sold hereunder. All drawbacks of duties paid on items used in the manufacture of the goods delivered hereunder will accrue to the Seller, and Buyer agrees to furnish the Seller with all documents and cooperation necessary to obtain payment of such drawbacks.
15. This Agreement shall be governed by and construed according to the laws of the state wherein the Seller branch supplying the goods hereunder is situated. Any action brought upon, or by reason of, this Agreement shall be brought, in Seller's sole discretion, either in a court with jurisdiction over the county in which the Seller branch is located, in a court with jurisdiction over the county in which the project for which the goods are to be used is located, or in a Court or before an arbitration panel where an action between Seller and a third party is pending which concerns the subject matter of this Agreement. Buyer agrees that, in the event any action is brought upon, or due to, this Agreement by either Buyer or Seller, and Seller prevails, Buyer shall pay Seller's reasonable attorney's fees and other costs incurred because of or in connection with such action, in the maximum amount permitted by law.
16. Waiver by Seller of any terms or conditions of this contract or waiver of any breach hereof shall not be construed as a waiver of any other term, condition, or breach. Determination that any provision of this Agreement is illegal or invalid shall not affect the validity or enforceability of the remaining provisions of this Agreement.
17. Returns must be made in accordance with Seller's return policy. A copy of this policy is available upon request.
18. The purchase of goods or services shall not entitle Buyer to use, or otherwise identify Buyer or its business with the name, trademark or other identity of the Seller. Should Buyer violate this provision, Seller reserves all remedies provided for by law or in equity, including, without limitation, injunctive relief. Except with respect to goods manufactured by Seller, Buyer shall indemnify and hold harmless Seller against all loss, damages, costs and expenses awarded against or incurred by Seller in connection with or paid or agreed to be paid, by Seller in settlement of any claim for infringement of any patents, copyright, design, trademark or any other industrial or intellectual property rights of any other person or entity with respect to the goods sold by Seller to Buyer hereunder.
19. T/D symbols printed on the front of any Seller warehouse picking/delivery ticket, invoice, or statement represents the tax and discount status of individual items. The following is a description of each symbol or combination of symbols:
- / = Taxable regardless of the order's tax status
  - \ = Nontaxable regardless of the order's tax status
  - = Non-discountable regardless of the order's terms
  - + = Taxable and non-discountable regardless of the order's tax status and terms
  - +/- = Nontaxable and non-discountable regardless of the order's tax status and terms
- If the item is taxable, and discountable based on the order's tax status and terms, no symbol will print.



REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

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SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAN SC 29410 4762

SHIP TO:

ABSOLUTELY NO PICK UP  
WITHOUT NICK'S 200-0245  
APPROVAL, THIS INCLUDES  
ADD-ONS 00000- 0000

|                     |                                     |          |                  |                  |                  | INVOICE DATE | SHIP DATE      | PAGE   |
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|                     |                                     |          |                  |                  |                  | 08/11/16     | 08/11/16       | 1 of 1 |
| INVOICE NO.         | CUSTOMER ORDER NO.                  | SHIP VIA | MAIN ACCOUNT NO. | CUSTOMER NO.     | TERMS            | SALES REP    |                |        |
| 51973240            | 45 UGINA 245 EAGLE                  | CPU      | 75012900         | 19378400         | END OF MONTH     | JS311        |                |        |
| ITEM NUMBER         | ITEM DESCRIPTION                    | U/M      | T/D              | QUANTITY SHIPPED | QUANTITY BACKORD | UNIT PRICE   | EXTENDED PRICE |        |
| ABC #054 CHARLESTON | CUSTOMER PICK UP                    |          |                  |                  |                  |              |                |        |
| 81BBHR516C          | BB 5" HALF RND COPPER GUT 16OZ 10'  | EA       |                  | 2                | 0                | 70.68        | 141.36         |        |
| 11TKTWMTTL          | TAMKO TW METAL & TILE UNDLAYMNT 2SQ | RL       |                  | 30               | 0                | 75.10        | 2,253.00       |        |

VISUALIZE the project | CREATE an estimate | PLACE an order

learn more at: [abcsupply.com/abc-connect](http://abcsupply.com/abc-connect)



|                 |  |   |         |   |                 |                               |  |  |
|-----------------|--|---|---------|---|-----------------|-------------------------------|--|--|
| SUBTOTAL        |  |   |         |   |                 | 2,394.36                      |  |  |
| SUBTOTAL AMOUNT |  | + | FREIGHT | + | SALES TAX SC CH | TOTAL PAYABLE IN U.S. DOLLARS |  |  |
| 2,394.36        |  |   | 0.00    |   | 203.52          | 2,597.88                      |  |  |

**PURCHASE AGREEMENT TERMS  
AND CONDITIONS OF SALE  
AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC.**

249

ELECTRONICALLY FILED - 2022 Jun 17 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001973

1. Any purchase made on credit requires that Buyer have on file with American Builders & Contractors Supply Co., Inc. ("Seller") an approved Credit Application. Buyer further confirms Buyer's consent to Seller's Credit Agreement, the terms and conditions of which have been read by Buyer and are incorporated by reference herein. All accounts past due are subject to a monthly late payment charge, not to exceed the maximum allowed by applicable state and federal law.
2. Seller acknowledges and accepts Buyer's order; however, Seller's acknowledgment and acceptance is expressly conditioned upon Buyer's acceptance of the terms and conditions herein. No terms or conditions other than those stated herein, whether contained in Buyer's purchase order, shipping release, or elsewhere, and no written or oral agreement that purports to vary these terms and conditions is binding upon Seller unless set forth in writing, signed by Seller's authorized representative. All negotiations, proposals and representations are merged herein, and this writing constitutes the complete and exclusive statement of the terms and conditions of this Purchase Agreement between Buyer and Seller. In the event Buyer fails to accept this Purchase Agreement in writing, Buyer's consent to the terms and conditions herein is conclusively presumed, either from Buyer's failure to object within ten days in writing or from Buyer's acceptance or use of the material delivered hereunder. Unless Buyer notifies Seller in writing to the contrary prior to making a purchase, Buyer hereby represents and warrants that any employee or agent action on Buyer's behalf is authorized by Buyer and Seller may rely upon such representation.
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6. Unless otherwise provided by law, Seller may require Buyer to pay or to reimburse Seller for any tax (except income tax) which now or hereafter is imposed by any taxing authority with respect to the items purchased or the sale, purchase, manufacture, delivery or use thereof.
7. Seller reserves the right to discontinue, without liability hereunder, deliveries of any merchandise, the manufacture, use and/or sale of which in the opinion of Seller would infringe any patent now or hereafter issued, or other intellectual property right under which Seller is not licensed.
8. Where Buyer requires tests or inspection not regularly provided by Seller, Seller may charge Buyer for the actual cost of such test or inspections.
9. Buyer's wrongful nonacceptance of goods, or cancellation or repudiation of an agreement to purchase goods or services entitles Seller to recover, in addition to any incidental damages caused by Buyer's wrongful nonacceptance, cancellation or repudiation, either (i) in the case of goods, the risk of loss of which has passed to Buyer at the time of nonacceptance, cancellation or repudiation, or goods which cannot reasonably be resold by Seller to a third party, or service which have already been performed by Seller, the price of such goods or services; or (ii) in the case of goods for which other buyers exist or services not yet performed, or where an action for the price is not otherwise permitted by law; damages equal to the profit (including reasonable overhead) which Seller would have realized had Buyer fully performed or, at Seller's option, twenty percent (20%) of the contract price as liquidated damages (which constitute a reasonable estimate of Seller's loss and not a penalty), plus, in the case of special orders, Seller's expenses, if any, incurred prior to receipt by Seller of notice of cancellation by Buyer, in connection with providing special services, developing special tooling, purchase special supplies and the like.
10. Seller is not responsible for any delay caused in whole or in part by circumstances beyond Seller's reasonable control, including but not limited to, force majeure, fires or accidents; strikes or other differences with workers; war (whether declared or undeclared), riots or embargoes; delays by carriers; delays in shipment or receipt of materials from suppliers; or any legislative, administrative or executive law, order or requisition of the federal or any state or local government or any subdivision, department, agency, officer or official thereof. Seller is not liable in any event for any damages (whether direct, general, special, incidental, consequential or other) caused by Seller's failure or delay in performance or delivery, if Seller is unable, due to any cause beyond Seller's control, to supply Buyer's total demand for products. Seller may allocate its available supply among Seller's customers, including Seller's branches and affiliates, in any manner Seller deems reasonable.
11. In the case of goods manufactured and sold by Seller with a separate written warranty, that warranty will apply. Otherwise, in the case of goods manufactured and sold by Seller, Seller warrants only that such goods have been manufactured in accordance with Seller's specifications and are free from defects in material and workmanship at the time of sale. For all other goods, upon request, Seller make no warranties, but will assign or transfer to Buyer any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied. **EXCEPT AS EXPRESSLY PROVIDED HEREIN, SELLER MAKES NO WARRANTIES, EITHER EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTIES INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THERE IS NO WARRANTY THAT EXTENDS BEYOND THE DESCRIPTION ON THE FACE OF THIS PURCHASE AGREEMENT. BUYER ACKNOWLEDGES THAT BUYER'S PURCHASE DECISION IS BASED UPON BUYER'S DUE DILIGENCE AND INSTRUCTION TO SELLER OF THE GOODS REQUIRED BY BUYER AND NOT BY REASON OF ANY STATEMENT MADE BY OR ON BEHALF OF SELLER AS TO THE MERCHANTABILITY, SPECIFIC ATTRIBUTES OR OTHER INFORMATION REGARDING THE GOODS.** Buyer acknowledges that lumber and other product dimension descriptions are made consistent with industry standards and do not necessarily represent exact or accurate dimensions. For example, lumber commonly called "2x4" is actually 1.5 inches deep by 3.5 inches wide.
12. Buyer's Remedies/Limitation of Liability: (a) Buyer's sole and exclusive remedy and the limit of Seller's liability for goods or services proven to be other than warranted, whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other legal theory, shall be, at Seller's option, (a) replacement of the goods or services, without charge, carriage paid to Buyer's facility; or (b) refund of the purchase price paid in respect of such goods or services, plus commercially reasonable charges in connection with the return or disposition of goods. To effect this sole and exclusive remedy, Buyer must make its claim for breach of warranty within 12 months of the date of shipment of the goods or performance of the services, and any such claim not made within such 12-month period is irrevocably waived.
- (b) Seller's sole liability with respect to the goods and services, for any and all loss or damage to Buyer, or any other loss, damage, expense or claim, resulting from any cause whatsoever (whether based on damaged or defective goods, irrespective of whether such damages or defects are discoverable or latent, or Seller's limited warranty shall fail of its essential purpose, or any other reason), and whether based upon breach of warranty, negligence, strict liability, tort, breach of contract or any other theory, will not exceed the aggregate purchase price of the particular goods and services with respect to which losses, damages, expenses or costs are claimed. Seller has no liability to any person other than Buyer by virtue of the sale of the goods, provision or services, or any other matters contemplated by this Agreement and Buyer will add Seller as a party protected by Buyer's warranty and limit of liability provisions in Buyer's terms of sale. The limitation of liability set forth in this paragraph shall survive termination or cancellation of this Agreement. For the avoidance of doubt, Seller is not liable for any damages whatsoever whether direct or indirect resulting from any delay in delivery of the goods or failure to deliver the goods in a reasonable time - whether or not such delay or failure is caused by Seller.
- (c) THE FOREGOING IS THE ENTIRE OBLIGATION OF SELLER. SELLER IS NOT LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES TO ANY PERSON, WHETHER BASED UPON BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF CONTRACT OR ANY OTHER THEORY, REGARDLESS OF WHETHER THE REPLACEMENT OR REFUND REMEDY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE OR FOR ANY OTHER REASON WHATSOEVER. Seller shall not be liable for any damages attributable to product abuse, misuse, neglect or any other cause, which is not the fault of Seller.
13. (a) Buyer agrees to indemnify and hold harmless Seller from and against any and all claims, demands, actions, causes of action, costs and expenses arising out of or in connection with, in whole or in part, any act(s) or omission(s), negligent or otherwise, of Buyer, or any of Buyer's agents, servants, employees, subcontractors or customers, including but not limited to: (i) claims of personal injury, including death, to any person or persons (whether third parties or agents, servants or employees of Buyer or Seller); (ii) claims of loss of any property, real or personal (whether belonging to Seller, Buyer or to a third party); and (iii) any and all other damages recognized at law or in equity under any theory whatsoever.
- (b) This indemnity includes, but is not limited to, any reasonable attorney's fees or other reasonable legal fees incurred by Seller and associated with the foregoing.
- (c) This indemnity provision is a material term to the Agreement. Buyer's duty to indemnify is a condition to the sale of any goods from Seller to Buyer. Buyer has read the indemnity provision in its entirety, understands each and every part of the provision and acknowledges that there is no ambiguity concerning Buyer's duty to indemnify.
- (d) In the event that the applicable law prohibits enforcement of this clause as written, then and only then, this clause will be modified to provide the maximum indemnification to Seller, as indemnitee, allowable under that applicable law.
14. Export Sales. Buyer represents and warrants that it has complied and will comply with all applicable laws, rules and regulations pertaining to the export, import and movement of the goods sold hereunder. All drawbacks of duties paid on items used in the manufacture of the goods delivered hereunder will accrue to the Seller, and Buyer agrees to furnish the Seller with all documents and cooperation necessary to obtain payment of such drawbacks.
15. This Agreement shall be governed by and construed according to the laws of the state wherein the Seller branch supplying the goods hereunder is situated. Any action brought upon, or by reason of, this Agreement shall be brought, in Seller's sole discretion, either in a court with jurisdiction over the county in which the Seller branch is located, in a court with jurisdiction over the county in which the project for which the goods are to be used is located, or in a Court or before an arbitration panel where an action between Seller and a third party is pending which concerns the subject matter of this Agreement. Buyer agrees that, in the event any action is brought upon, or due to, this Agreement by either Buyer or Seller, and Seller prevails, Buyer shall pay Seller's reasonable attorney's fees and other costs incurred because of or in connection with such action, in the maximum amount permitted by law.
16. Waiver by Seller of any terms or conditions of this contract or waiver of any breach hereof shall not be construed as a waiver of any other term, condition, or breach. Determination that any provision of this Agreement is illegal or invalid shall not affect the validity or enforceability of the remaining provisions of this Agreement.
17. Returns must be made in accordance with Seller's return policy. A copy of this policy is available upon request.
18. The purchase of goods or services shall not entitle Buyer to use, or otherwise identify Buyer or its business with the name, trademark or other identity of the Seller. Should Buyer violate this provision, Seller reserves all remedies provided for by law or in equity, including, without limitation, injunctive relief. Except with respect to goods manufactured by Seller, Buyer shall indemnify and hold harmless Seller against all loss, damages, costs and expenses awarded against or incurred by Seller in connection with or paid or agreed to be paid, by Seller in settlement of any claim for infringement of any patents, copyright, design, trademark or any other industrial or intellectual property rights of any other person or entity with respect to the goods sold by Seller to Buyer hereunder.
19. T/D symbols printed on the front of any Seller warehouse picking/delivery ticket, invoice, or statement represents the tax and discount status of individual items. The following is a description of each symbol or combination of symbols:
  - / = Taxable regardless of the order's tax status
  - \ = Nontaxable regardless of the order's tax status
  - = Non-discountable regardless of the order's terms
  - + = Taxable and non-discountable regardless of the order's tax status and terms
  - +/- = Nontaxable and non-discountable regardless of the order's tax status and terms

If the item is taxable, and discountable based on the order's tax status and terms, no symbol will print.



REMIT TO:  
ABC SUPPLY CO - MBA #745  
855 BROOKWOOD DRIVE  
COLUMBIA SC 29201- 4607

(803)733-9560

REGULAR  
INVOICE

IMPORTANT: SELLER MAKES NO WARRANTIES: SEE REVERSE SIDE OR ELECTRONIC ATTACHMENT FOR IMPORTANT TERMS AND CONDITIONS. IF THERE IS NO REVERSE SIDE OR ELECTRONIC ATTACHMENT, SELLER WILL FURNISH THE TERMS AND CONDITIONS UPON REQUEST. This order is subject to the terms and conditions set forth on the reverse side or electronic attachment, and by accepting the below materials, you agree to those terms and conditions.

Seller represents that with respect to the production of the articles and/or the performance of the services covered by this invoice, it has fully complied with section 12(A) of the Fair Labor Standards Act of 1938, as amended.

T/D symbols are described on the reverse side or electronic attachment.

Returns must be made in accordance with ABC's Return Policy. A copy of this policy is available upon request.

LATE PAYMENT CHARGE: All accounts past due will be subject to a monthly late payment charge, not to exceed the maximum allowable by state or federal law.

When you provide a check as payment, you authorize us either to use the information from your check to make a one-time electronic fund transfer from your account or to process the payment as a check transaction. For inquiries, please call the number provided.

SOLD TO:

DONNIX CONSTRUCTION LLC  
1202 CATBIRD COURT  
HANAHAN SC 29410 4762

SHIP TO:

ABSOLUTELY NO PICK UP  
WITHOUT NICK'S 200-0245  
APPROVAL, THIS INCLUDES  
ADD-ONS 00000- 0000

| INVOICE DATE | SHIP DATE | PAGE   |
|--------------|-----------|--------|
| 08/17/16     | 08/17/16  | 1 of 1 |

|                         |                                     |                 |                              |                          |                       |                     |
|-------------------------|-------------------------------------|-----------------|------------------------------|--------------------------|-----------------------|---------------------|
| INVOICE NO.<br>52102388 | CUSTOMER ORDER NO.<br>EUGENE        | SHIP VIA<br>CPU | MAIN ACCOUNT NO.<br>75012900 | CUSTOMER NO.<br>19378400 | TERMS<br>END OF MONTH | SALES REP<br>JS3172 |
| ITEM NUMBER             | ITEM DESCRIPTION                    | U/M T/D         | QUANTITY SHIPPED             | QUANTITY BACKORD         | UNIT PRICE            | EXTENDED PRICE      |
| ABC #054 CHARLESTON     | CUSTOMER PICK UP                    |                 |                              |                          |                       |                     |
| 11TKTWMTTL              | TAMKO TW METAL & TILE UNDLAYMNT 2SQ | RL              | 6                            | 0                        | 75.10                 | 450.60              |

CHARLESTON COMMON PLEAS - CASE#2021CP1001973

THANKS FOR YOUR HARDWORK!

We will be closed September 5th for Labor Day

★★★★★



SUBTOTAL 450.60

|                 |   |         |   |                 |                               |
|-----------------|---|---------|---|-----------------|-------------------------------|
| SUBTOTAL AMOUNT | + | FREIGHT | + | SALES TAX SC CH | TOTAL PAYABLE IN U.S. DOLLARS |
| 450.60          |   | 0.00    |   | 38.31           | 488.91                        |

**PURCHASE AGREEMENT TERMS  
AND CONDITIONS OF SALE  
AMERICAN BUILDERS & CONTRACTORS SUPPLY CO., INC.**

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ELECTRONICALLY FILED - 2022 Jun 17 2:36 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1001973

1. Any purchase made on credit requires that Buyer have on file with American Builders & Contractors Supply Co., Inc. ("Seller") an approved Credit Application. Buyer further confirms Buyer's consent to Seller's Credit Agreement, the terms and conditions of which have been read by Buyer and are incorporated by reference herein. All accounts past due are subject to a monthly late payment charge, not to exceed the maximum allowed by applicable state and federal law.
2. Seller acknowledges and accepts Buyer's order; however, Seller's acknowledgment and acceptance is expressly conditioned upon Buyer's acceptance of the terms and conditions herein. No terms or conditions other than those stated herein, whether contained in Buyer's purchase order, shipping release, or elsewhere, and no written or oral agreement that purports to vary these terms and conditions is binding upon Seller unless set forth in writing, signed by Seller's authorized representative. All negotiations, proposals and representations are merged herein, and this writing constitutes the complete and exclusive statement of the terms and conditions of this Purchase Agreement between Buyer and Seller. In the event Buyer fails to accept this Purchase Agreement in writing, Buyer's consent to the terms and conditions herein is conclusively presumed, either from Buyer's failure to object within ten days in writing or from Buyer's acceptance or use of the material delivered hereunder. Unless Buyer notifies Seller in writing to the contrary prior to making a purchase, Buyer hereby represents and warrants that any employee or agent action on Buyer's behalf is authorized by Buyer and Seller may rely upon such representation.
3. In any case in which Seller makes delivery, Buyer will pay Seller's customary shipping charges. Delivery will be made at the project site or other place of delivery adjacent to the closest public right of way. Title and risk of loss passes to Buyer upon delivery of the goods. Should Buyer not be present to accept delivery, Buyer authorizes Seller to unload the goods and leave them at the delivery destination. Buyer releases Seller and will indemnify and hold harmless Seller from and against any and all claims demands, actions, causes of action, cost, expenses, and attorneys' fees arising out of or in connection with any and all injury including death, to any person or persons (whether third parties or agents, servants, or employees of Buyer), any and all damages to or loss of any property (whether belonging to Buyer or a third party), and any and all other damages recognized at law or in equity caused in whole or in part by or in any way related to the delivery of goods onto the project site by Seller, whenever such delivery is made in accordance with or pursuant to Buyer's instruction or authorization.
4. Buyer has the right to inspect the goods upon arrival. Buyer's inspection rights expire 24 hours after the arrival of the goods at the delivery destination. A failure to make inspection within that time waives notice of any defect that a reasonable inspection would have revealed. A rejection of the goods by Buyer is not effective unless written notice of rejection is given to Seller within three (3) calendar days of delivery.
5. Without prejudice to any other rights, Seller may suspend further deliveries of any items purchased if Buyer defaults in payment of any amounts due, or whenever Seller may deem itself insecure as to Buyer's performance, until Buyer remedies such default or provides assurance that satisfies Seller in its sole discretion, of Buyer's ability to perform. Seller may cancel any order at any time prior to payment by Buyer.
6. Unless otherwise provided by law, Seller may require Buyer to pay or to reimburse Seller for any tax (except income tax) which now or hereafter is imposed by any taxing authority with respect to the items purchased or the sale, purchase, manufacture, delivery or use thereof.
7. Seller reserves the right to discontinue, without liability hereunder, deliveries of any merchandise, the manufacture, use and/or sale of which in the opinion of Seller would infringe any patent now or hereafter issued, or other intellectual property right under which Seller is not licensed.
8. Where Buyer requires tests or inspection not regularly provided by Seller, Seller may charge Buyer for the actual cost of such test or inspections.
9. Buyer's wrongful nonacceptance of goods, or cancellation or repudiation of an agreement to purchase goods or services entitles Seller to recover, in addition to any incidental damages caused by Buyer's wrongful nonacceptance, cancellation or repudiation, either (i) in the case of goods, the risk of loss of which has passed to Buyer at the time of nonacceptance, cancellation or repudiation, or goods which cannot reasonably be resold by Seller to a third party, or service which have already been performed by Seller, the price of such goods or services; or (ii) in the case of goods for which other buyers exist or services not yet performed, or where an action for the price is not otherwise permitted by law; damages equal to the profit (including reasonable overhead) which Seller would have realized had Buyer fully performed or, at Seller's option, twenty percent (20%) of the contract price as liquidated damages (which constitute a reasonable estimate of Seller's loss and not a penalty), plus, in the case of special orders, Seller's expenses, if any, incurred prior to receipt by Seller of notice of cancellation by Buyer, in connection with providing special services, developing special tooling, purchase special supplies and the like.
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- (c) THE FOREGOING IS THE ENTIRE OBLIGATION OF SELLER. SELLER IS NOT LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES TO ANY PERSON, WHETHER BASED UPON BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, TORT, BREACH OF CONTRACT OR ANY OTHER THEORY, REGARDLESS OF WHETHER THE REPLACEMENT OR REFUND REMEDY SET FORTH ABOVE FAILS OF ITS ESSENTIAL PURPOSE OR FOR ANY OTHER REASON WHATSOEVER. Seller shall not be liable for any damages attributable to product abuse, misuse, neglect or any other cause, which is not the fault of Seller.
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**CERTIFICATE OF COUNSEL**

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

**RECEIVED**  
**Jul 11 2023**  
**SC Court of Appeals**

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July 11, 2023