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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appeal No. 2023-001401

Natalie Zitek, individually, and on behalf of others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50,

Defendants,

And

Dr. Horton, Inc.,

Third-Party Plaintiff,

v.

A&J Framing, Inc.; A-Z, Inc., AJ Landscaping & Grading, LLC; AJ Landscaping & Grading, LLC A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC; Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American Concrete And precast, Inc., A/K/A ACP Concrete, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; BFK Builders, Inc.; BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn Lumber Co, Inc.; Bravo Carpenters, Inc.; Builders Designhouse, LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.; Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II; GBS Building Supply – US LBM, LLC F/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Get Floored, LLC; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, LLC; Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; L&M Electric, Inc.; Lade-Danlar, Inc.; Landshapers, LLC; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development,

LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc. A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc. A/K/A Gale Contractors Service; Tucker Materials, Inc. A/K/A Gypsum; UTM Enterprises, Inc.; and Willow Tree Landscaping, Inc.,

Third-Party Defendants.

And

Aaron D. Peris; Harrelson Painting, LLC; Huttig Building Products; et al,
Fourth and Fifth-Party Defendants and Plaintiffs.

Of Whom,

D.R. Horton, Inc., is the Appellant,

And

Natalie Zitek, individually, and on behalf of others similarly situated;

Jane Doe #1-10; and John Doe #1-50;

A&J Framing, Inc.; A-Z, Inc.; AJ Landscaping & Grading, LLC A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC; Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American Concrete And precast, Inc., A/K/A ACP Concrete, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; BFK Builders, Inc.; BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn Lumber Co, Inc.; Bravo Carpenters, Inc.; Builders Designhouse, LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.; Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II; GBS Building Supply – US LBM, LLC, F/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Get Floored, LLC; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, LLC; Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; L&M Electric, Inc.; Lade-Danlar, Inc.; Landshapers, LLC; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc. A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A

Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc. A/K/A Gale Contractors Service; Tucker Materials, Inc. A/K/A Gypsum; UTM Enterprises, Inc.; and Willow Tree Landscaping, Inc.,

Aaron D. Peris; Harrelson Painting, LLC; Huttig Building Products; and Therma-Tru, Ltd;

Arcides Garcia; Brandon Chaves; C&H Wood Flooring, Inc.; Dora Maria Pina; Felix Tile; Filadelfo Avila Carrillo; Francisco Sanchez; J&K Floor Corp.; JCT Flooring; Jose Javier Marin; Lemus Tile; Leos Flooring, LLC; Martin Garcia; Nora Canales; Othon Delgado Ramas; Resendiz Flooring; Richard Bumbalough; Richard Gerardo Loreda Gomez; Robert Gillespie; Roberto Morales Ferretiz; Roberto Tile, Inc.; Scorpio Tile Glass Work; and Urias Flooring, Co., LLC;

Zenon Gutierrez Antunez; Jesus Perez; Fredy Perez and Venustiano Perez, Individually and D/B/A Fredy's HVAC; Nicholas Sota A/K/A Nicholas Soto, Individually and D/B/A Soto HVAC; Jason Weaver, Individually and D/B/A Tiger Mechanical; and Panuncio Victoriano Martinez, Individually and D/B/A Victoriano HVAC, LLC;

Brothers Contractors, Inc.; Brothers Contractors, LLC; Nataren Contractors, LLC; Jimenez Contractors, LLC; Jimenez Contractors, Inc.; Henry Construction, LLC; SL Commercial Construction, Inc.; Rogelio Basilio-Vazquez; Geovany Leiva; Geovany Leiva D/B/A GSF Renovations, LLC; GSF Renovations, LLC; RJ Quality Construction, Inc.; Rafael Bonzalez-Colazo, Individually and D/B/A RJ Commercial Construction, Inc.; Santos Metal Works, LLC; AHR Construction, Inc.; Denny Concepcion; RJ Commercial Construction, Inc.; Safeway Roofing; Torres Quality Construction; JJS Commercial Construction, Inc.; Jose Hernandez; Bonilla Construction, Inc.; and Jose P. Jimenez, Individually and D/B/A Bonilla Construction, Inc.;

Carlos Humberto Landaverry; Ngan My Giang; Landaverry Flooring, LLC; Hector Flooring; Scorpio Tile & Glassworks, Inc.; Jose Javier Marin; O&E Flooring; Othon Ramos; Saguay Flooring; and Cruz Flooring;

AJ&I Flooring, LLC; Antonio's Flooring, LLC; Bryan's Flooring Services, LLC; Enriquez Floors, LLC; Garcia's Carpet, Inc.; Hector Flooring, Inc.; Carolina Hernandez D/B/A Josue's Flooring, LLC; NM Alex Carpet, Inc.; Promesa Flooring; and Vinny's Perfection Flooring, LLC;

Jesus Jimenez; and Jesus Robles Montez A/K/A Robles Construction;

Toribio Islas; and Alejandro Soto,

are the Respondents,

PETITION FOR WRIT OF SUPERSEDEAS

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Attorneys for Third-Party Defendant MJ Cowboys, LLC

Petitioners M&L Reyna Construction, LLC (“M&L Reyna”) and MJ Cowboys, LLC (“MJ Cowboys”) (jointly “Petitioners”), Third-Party Defendants below, hereby petition this Court pursuant to Rules 205 and 241, SCACR, for a Writ of Supersedeas staying Phase II of the trial pending before the circuit court. Phase I of this trial solely involves Plaintiff Natalie Zitek’s direct claims against Defendant D.R. Horton, Inc. (“Horton”). Phase II, set to commence before the same jury after it renders a verdict in Phase I, (Horton Pet. Appx. pp. 24, 26-27), will involve Horton’s Third-Party claims against a number of its subcontractors for, among other things, contractual and equitable indemnification.¹

Phase II of the trial in the circuit court must be stayed pending this Court’s resolution of Horton’s appeal of the circuit court’s orders granting summary judgment to another Third-Party Defendant, IBP Asset, LLC d/b/a Blue Ridge Building (“Blue Ridge”), on Horton’s contractual indemnification claims. Allowing Horton to proceed on its contractual indemnity claims against Petitioners while this Court considers Horton’s appeal of the grant of summary judgment to Blue Ridge creates the possibility of inconsistent decisions, and risks needlessly wasting the circuit court’s time and resources in deciding issues that would be subject to reversal once this Court decides Horton’s appeal. Rules 205 and 241 of the SCACR were promulgated to prevent precisely this result.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

¹ The vast majority of Third-, Fourth- and Fifth-Party Defendants either have settled the claims against them or have been dismissed on other grounds. However, pursuant to Rule 241, “[t]he petition shall be captioned the same as the appeal.” Rule 241(d)(3), SCACR. Accordingly, Petitioners are utilizing both Horton’s caption and certificate of service, with minor corrections, even though both contain parties no longer involved in this case.

On September 25, 2019, Plaintiff Natalie Zitek sued Horton individually and on behalf of some 219 other homeowners in a development located in Anderson County, South Carolina, called Rose Hill. Plaintiff alleges that Horton, the developer and builder, was negligent in its construction of the homes in Rose Hill, and that Horton breached implied warranties.² (Exh. A). In turn, Horton sued a number of its subcontractors who worked on the construction of Rose Hill, including M&L Reyna and Blue Ridge, for contractual indemnity, equitable indemnity, breach of contract, and breach of express and implied warranties, and negligence/gross negligence and recklessness. (Exh. B). While many of Horton's subcontractors have settled or been dismissed pursuant to summary judgment, Petitioners remain in the case as Third-Party Defendants.

Petitioners moved for summary judgment against Horton, arguing that Horton's contractual indemnification clause was unenforceable and, with regard to Horton's own negligence, the indemnification language was not clear and unequivocal. (Exh. C).³ On July 28, 2023, the circuit court denied Petitioners' Motions, along with motions for summary judgment by other subcontractors involved in the masonry work at Rose Hill ("the Masonry Subcontractors").⁴ (Exh D). Petitioners sought reconsideration, (Exh E), which was denied. (Exh F).

² Plaintiff also alleged a SCUTPA cause of action which has since been dismissed.

³ Petitioners also argued, as did Blue Ridge, that Horton's negligence, breach of contract and breach of express and implied warranty claims were simply restated claims for indemnification, and should be dismissed pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015), and *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders First Source-SE Grp., LLC*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015), because those claims are entirely dependent on and only arose in light of Plaintiff's claims against Horton. While the circuit court did not reach this issue with respect to Blue Ridge, this Court also should stay Horton's negligence, breach of contract and breach of express and implied warranty claims against Petitioners, as they are subject to dismissal, as a matter of law pursuant to *Stoneledge*, 413 S.C. 615, 776 S.E.2d 426, and *Stoneledge*, 413 S.C. 630, 776 S.E.2d 434.

⁴ JLS Masonry, Inc. also was a masonry subcontractor at Rose Hill.

Other parties, including Blue Ridge, also moved for summary judgment. Among other things, Blue Ridge argued, as had Petitioners, that it was entitled to summary judgment because Horton's contractual indemnification clause was unenforceable. (Exh G).

On August 23, 2023, the circuit court granted Blue Ridge's motion for summary judgment, dismissing it from the case with prejudice. (Horton Pet. Appx. pp. 30-38). Among other things, the Order granting summary judgment to Blue Ridge found that the indemnification clause in the Blue Ridge contract "is unenforceable as a matter of law." This is because, "[i]n South Carolina, contracts purporting to relieve an indemnitee from the consequences of its own negligence must be stated in 'clear and unequivocal terms,'" pursuant to *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018), citing *Federal Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). (Horton Pet. Appx. p. 35). In particular, the circuit court held that, "nowhere does the provision expressly state that Blue Ridge is responsible to indemnify Horton for its concurrent liability to a homeowner. Rather, it uses exception clauses to avoid the broad form indemnity that is statutorily prohibited. The Subcontract requires indemnity for losses 'regardless of whether or not caused in part by [Horton].' But, then inserts a vague exception for 'losses caused solely by fault of negligence of [Horton].' This structure is not unequivocal." (Horton Pet. Appx. p. 36). Moreover, the circuit court found that "[t]his confusion is amplified by the extremely complicated grammatical structure of the provision itself. The indemnification requirement is described within a single sentence containing 260 words, 48 commas and 34 conjunctions/disjunctions. The sentence includes multiple serial lists, definitions, sub-parts, sub-ordinate clauses, parenthetical notes and propositional phrases. As a result, the indemnity provision of this contract is manifestly unclear." (Horton Pet. Appx. pp. 36-37).

The circuit court also found that the indemnification clause was unenforceable because the subcontract between Horton and Blue Ridge failed to “clearly set forth the material term of the ‘scope of work’ that triggers the obligations for indemnity.” Consequently, because the subcontract did not set out the scope of work to be performed, “it cannot be said that the work that was performed was part of the bargain at the time the indemnification provision was offered.” (Horton Pet. Appx. p. 37).

The trial below has been bifurcated into two phases, with Phase I of the trial addressing only Plaintiff’s direct claims for negligence and breach of warranties against Horton, and Phase II set to consider Horton’s Third-Party claims against its remaining subcontractors, including Petitioners. (Horton Pet. Appx. pp. 20-29). The parties participated in a lengthy Pre-Trial Hearing on September 1, 2023, with jury selection and opening statements taking place on September 5, 2023, and Plaintiff’s case being presented the rest of that week and continuing. (*See* Pet. Appx. pp. 24, 26-27; Plaintiff’s Opp. to Pet. pp. 7-8).

Just after 8:00 a.m. on September 1, 2023, Horton appealed the order granting summary judgment to Blue Ridge, along with other orders issued by the circuit court. The order granting summary judgment to Blue Ridge is a final order subject to immediate appeal.

Horton subsequently petitioned this Court for a Writ of Supersedeas. In its Petition, Horton stated and conceded, among other things, that indemnification clauses contained in its contracts with other subcontractors are “identical or virtually identical” to the indemnification provision on appeal. (Pet. p. 9).

The indemnification clause in the Blue Ridge contract that the circuit court found to be unenforceable provides, in pertinent part, that “to the fullest extent permitted by law,” Blue Ridge agreed to hold Horton harmless and indemnify it against “any and all demands, claims, actions,”

etc., “including attorneys fees, litigation costs, interest, and expenses of any kind ... for damages from ... the destruction or loss of property (including loss of use), or any other kind of damages or harm, **arising out of, or resulting from, or related in any way to the work performed** and/or the materials supplied under this contract, **regardless of whether or not caused in part by indemnitee**, such losses specifically include, but are in no way limited to losses arising out of or attributable to,” a breach of warranties, the work performed by the subcontractor, and “any negligent, grossly negligent, and/or intentional act and/or omission of” Blue Ridge and/or its agents, and “(4) **any negligent, grossly negligent, and/or intentional act and/or omission of the indemnitee related in any way to the work, notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee** The indemnity provisions contained herein are intended to be as broad and inclusive as permitted by law.” (Exh. G, p. 11, ¶ 10.1) (emphases added).

The M&L Reyna indemnification clause is virtually identical with respect to the provisions in the Blue Ridge indemnification clause that the circuit court found unenforceable. Like the Blue Ridge indemnification provision, the M&L Reyna contract provides, in pertinent part, that “to the fullest extent permitted by law,” M&L Reyna agrees to hold Horton harmless and indemnify it against “any and all demands, claims, actions,” etc., and “including all costs thereof, attorneys’ fees and interest,” “for damage to or loss of tangible or intangible property including the loss of use thereof **in any way occurring, incident to, arising out of, or in connection with**” a breach of warranties; “the work, as defined in Section 1,” performed by M&L Reyna; and “any negligent or intentional act or omission” of M&L Reyna; and, “(4) **any negligent or intentional act or omission of the indemnitee related in any way to the work,**” but later attempts to disclaim that, “**notwithstanding the foregoing, nothing herein shall require [subcontractor] to indemnify**

indemnatee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnatee.” (Exh. C, p. 32, ¶ 10.1) (emphases added).

Similarly, the MJ Cowboys indemnification clause provides, in pertinent part, that, the M&L Reyna contract provides, in pertinent part, that, “to the fullest extent permitted by law,” the subcontractor agrees to hold Horton harmless and indemnify it against “any and all claims, demands, lawsuits,” etc., and “including all costs thereof and attorneys’ fees ... on account of ... damage to or loss of tangible or intangible property including the loss of use thereof in any way occurring, incident to, arising out of, or in connection with” a breach of warranties, the work performed by the subcontractor, and “any negligent or intentional act or omission” of the subcontractor, and “(4) **any negligent or intentional act or omission of indemnatee, related in any way to the work, excepting only liability or claims arising out of bodily injury to persons, death, or damage or damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnatee.**” The JM Cowboys indemnification clause repeats that “**nothing herein shall require contractor to indemnify indemnatee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnatee.**” (Exh. I, ¶ 10.1) (emphases added).

During the Pre-Trial Hearing, Horton sought a stay of the trial based, in part, on the grant of summary judgment to Blue Ridge. That request was denied. (Horton Pet. Appx. pp. 42, 45-46). In addition, the Masonry Subcontractors, including M&L Reyna, requested a stay before the circuit court, based on Horton’s appeal of the grant of summary judgment to other subcontractors on the indemnification issue, (Exh. H), but that relief has been unjustifiably denied.

ARGUMENT

I. RULES 205 & 241, SCACR

Upon service of a notice of appeal, the appellate court has exclusive jurisdiction over the appeal. The South Carolina Appellate Court Rules permit the lower court to proceed only “with matters not affected by the appeal.” Rule 205, SCACR. Correspondingly, under Rule 241, SCACR, “[a]s a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” A lower court only “retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.” Rule 241(a), SCACR.

“Under Rule 205 and the last sentence of” what is now Rule 241, “the lower court may not act or issue orders that affect an issue on appeal,” but can “act only to enforce matters not stayed by the appeal.” *Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007). A matter or issue should be stayed where it “depend[s] upon the success of the [party’s] appeal of the trial court’s order ...” *Wayne Smith Constr. Co. v. Wolman, Duberstein, & Thompson*, 294 S.C. 140, 149, 363 S.E.2d 115, 120 (Ct. App. 1987). To determine whether a matter is “affected” by an appeal, a court must closely examine the issues on appeal, asking whether there is any “action the appellate courts could take resolving th[e] appeal that would affect the” proceedings initiated by a party during a pending appeal. *Tillman v. Oakes*, 398 S.C. 245, 256, 728 S.E.2d 45, 51 (Ct. App. 2012); *see also Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (quoting *Black’s Law Dictionary* 68 (10th ed. 2014) defining “‘affect’ as ‘to produce an effect on; to influence in some way’”).

Rule 241(d)(1) requires a party seeking a writ of supersedeas to first apply to the lower

court for relief, which both Horton, (Horton Pet. Appx. pp. 42, 45-46),⁵ and the Masonry Subcontractors have done. (Exh. H). “After the lower court ... has ruled, any party may petition the appellate court where the appeal is pending ... for review of this order.”⁴esz Rule 241(d)(2) & (d)(7), SCACR; *see also State v. Smith (In re Decker)*, 322 S.C. 212, 213, 471 S.E.2d 459, 460-461 (1995) (where a party’s request for a stay of proceedings during an appeal is denied by the circuit court, it may petition this Court for a writ of supersedeas).

II. THIS COURT SHOULD GRANT A WRIT OF SUPERSEDEAS AND STAY PHASE II OF THE TRIAL IN THIS CASE.

As noted above, the operative provisions of the Blue Ridge indemnification clause and the Petitioners’ indemnification clauses are substantively and meaningfully similar. The reasons the circuit court found the Blue Ridge indemnification clause unenforceable apply equally—if not more so—to the Petitioners’ indemnification provisions. As the circuit court explained, “[i]n South Carolina, contracts purporting to relieve an indemnitee from the consequences of its own negligence must be stated in ‘clear and unequivocal terms,’” pursuant to *Concord & Cumberland*, 424 S.C. at 647, 819 S.E.2d at 171, citing *Federal Pac. Elec.*, 298 S.C. at 26, 378 S.E.2d at 57. (Horton Pet. Appx. p. 35). In particular, the circuit court held that, “nowhere does the provision expressly state that Blue Ridge is responsible to indemnify Horton for its concurrent liability to a homeowner.” (Horton Pet. Appx. p. 36). The same is true of Petitioners’ indemnification provisions. Nowhere in Petitioners’ indemnification provisions does it expressly state that Petitioners are responsible to indemnify Horton for Horton’s concurrent liability to a homeowner.

⁵ The basis on which the circuit court distinguished Blue Ridge from other subcontractors at the Pre-Trial Hearing, including Petitioners, was that there was no evidence of any negligence on the part of Blue Ridge. (Horton Pet. Appx. pp. 45-46). While that consideration may be pertinent in an equitable indemnification analysis, it in no way affects the analysis of the legal enforceability of Horton’s contractual indemnification clauses—in either its subcontract with Blue Ridge or its subcontracts with Petitioners. (Horton Pet. Appx. pp. 34-37).

See Concord & Cumberland, 424 S.C. at 654, 819 S.E.2d at 174 (finding language stating “regardless of whether it is caused in part by a party indemnified hereunder” was not clear and unequivocal).

The circuit court found that, instead of clearly stating that Blue Ridge must indemnify Horton for Horton’s own concurrent liability, the indemnity clause uses “exception clauses to avoid the broad form indemnity that is statutorily prohibited. The Subcontract requires indemnity for losses ‘regardless of whether or not caused in part by [Horton].’ But, then inserts a vague exception for ‘losses caused solely by fault of negligence of [Horton].’ This structure is not unequivocal.” (Horton Pet. Appx. p. 36). The same is true of Petitioners’ indemnification clauses, which first state Petitioners must indemnify Horton for “(4) **any negligent or intentional act or omission of [Horton] related in any way to the work,**” but later attempts to disclaim that, “**notwithstanding the foregoing, nothing herein shall require [M&L Reyna] to indemnify [Horton] against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of [Horton].**” (Exh. C, p. 32, ¶ 10.1) (Exh. I, ¶ 10.1) (emphases added). This structure is neither clear nor unequivocal.

Moreover, the circuit court found that the confusion in the Blue Ridge indemnification clause “is amplified by the extremely complicated grammatical structure of the provision itself. The indemnification requirement is described within a single sentence containing 260 words, 48 commas and 34 conjunctions/disjunctions. The sentence includes multiple serial lists, definitions, sub-parts, sub-ordinate clauses, parenthetical notes and propositional phrases. As a result, the indemnity provision of this contract is manifestly unclear.” (Horton Pet. Appx. pp. 36-37). The same is true of Petitioners’ indemnification clauses. One does not need to count the precise number

of words, commas and conjunctions/disjunctions to arrive at the same conclusion, *i.e.*, that the indemnity provision of the Petitioners' contracts are manifestly unclear. (Horton Pet. Appx. p. 37). In fact, Marcus Cannon, one of Horton's Rule 30(b)(6) witnesses, was unable to explain what the indemnification provision meant. (Exh. C, pp. 37-40).

Finally, the circuit court found that the Blue Ridge indemnification clause was unenforceable because the subcontract failed to "clearly set forth the material term of the 'scope of work' that triggers the obligations for indemnity." Consequently, because the subcontract did not set out the scope of work to be performed, "it cannot be said that the work that was performed was part of the bargain at the time the indemnification provision was offered." (Horton Pet. Appx. p. 37). Similarly, the Petitioners' subcontracts do not set out a clear scope of work to be performed. (Exh. C, pp. 29-36) (Exh. I). Accordingly, it is equally true with respect to Petitioners that, "it cannot be said that the work that was performed was part of the bargain at the time the indemnification provision was offered."

Any determination of whether Horton is entitled to indemnification from Petitioners will depend on the success of Horton's appeal of the trial court's order granting summary judgment to Blue Ridge on the indemnification issue. In other words, Phase II of the trial below must be stayed because this Court's resolution of Horton's appeal of the grant of summary judgment to Blue Ridge will affect the proceedings below. *See Wayne Smith Constr.*, 294 S.C. at 149, 363 S.E.2d at 120; *Arnal*, 371 SC at 519, 641 S.E.2d at 422; *Tillman*, 398 S.C. at 256, 728 S.E.2d at 51; *Stokes-Craven*, 416 S.C. at 534, 787 S.E.2d at 494. Because the Petitioners' indemnification provisions are substantively similar to the Blue Ridge indemnification provision, continued litigation of Phase II of this case before the circuit court during the pendency of Horton's appeal runs the risk of inconsistent judgments regarding the enforceability of the contractual indemnification provision

in Horton's subcontracts with Petitioners. Both indemnification provisions suffer from the same fatal flaws, and both should be deemed, as a matter of law, unenforceable, unclear and equivocal. Allowing Phase II of the trial to proceed against Petitioners and other subcontractors with indemnification provisions that Horton has acknowledged are "identical or virtually identical" to the Blue Ridge contract, would be unjust, a potential waste of judicial resources, and runs the risk of inconsistent resolution of these indemnification clauses between this Court and the circuit court.

CONCLUSION

For all of the reasons set forth above, Petitioners respectfully request that this Court issue a writ of supersedeas staying Phase II of the trial in the underlying matter. Petitioners also request expedited review of this Petition, as the trial below continues to move forward.

September 14, 2023

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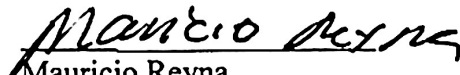
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Attorneys for Third-Party Defendant MJ Cowboys, LLC

**VERIFICATION FOR
PETITION FOR WRIT OF SUPERSEDEAS**

I, Mauricio Reyna, verify that I am the owner of M&L Reyna Construction, LLC and authorized to sign this Verification on its behalf. I have read the Petition for Writ of Supersedeas, and verify that the facts as stated therein are accurate to the best of my knowledge.


Mauricio Reyna

SWORN TO AND SUBSCRIBED BEFORE ME

This 1st day of September 2023.


Notary Public for South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NO.: 2019-CP-04-_____

Natalie Zitek, individually, and on behalf of all)
 others similarly situated,)

Plaintiff,

v.

D.R. Horton, Inc.; Jane Doe #1-10; and, John)
 Doe #1-50,)

Defendants.

SUMMONS
(Defective Construction)
(Class Action)
(Jury Trial Demanded)

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers, at their offices at 415 Mill Street, Mount Pleasant, South Carolina 29464, within thirty (30) days after the service thereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint, plus interest and costs.

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

Justin O'Toole Lucey
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 Sohayla R. Townes, Esq.
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Attorneys for Plaintiff

September 25, 2019
 Mount Pleasant, South Carolina

EXHIBIT**A**

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

) FOR THE TENTH JUDICIAL CIRCUIT

) CASE NO.: 2019-CP-04-_____

Natalie Zitek, individually, and on behalf of all
others similarly situated,)
)

Plaintiff,

)

v.

)

D.R. Horton, Inc.; Jane Doe #1-10; and, John
Doe #1-50,)
)

Defendants.

)

COMPLAINT
(Defective Construction)
(Class Action)
(Jury Trial Demanded)

Plaintiff, Natalie Zitek, individually, and on behalf of all others similarly situated, complaining of the above-named Defendants, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. The Rose Hill subdivision ("Rose Hill") is a neighborhood of approximately 270 single-family homes located off State Highway 74 in Anderson County, South Carolina.

2. Plaintiff Natalie Zitek ("Plaintiff Zitek") is a citizen and resident of Anderson County, South Carolina.

3. Plaintiff Zitek owns a home within Rose Hill that is located at 104 Sturbridge Court, Easley, South Carolina, 29462.

4. Plaintiff Zitek purchased her home on or about February 17, 2013.

5. Plaintiff Zitek brings this action on behalf of herself and a proposed Class of other similarly situated Rose Hill homeowners (collectively "Plaintiff" or "Plaintiff Zitek and the Class").

Developer Defendant

6. Defendant D.R. Horton, Inc. (“D.R. Horton”) is a corporation organized under the laws of the State of Delaware. At all times relevant to this action, D.R. Horton conducted business in Anderson County, South Carolina.

7. D.R. Horton is the developer, builder, and seller of the Plaintiff’s and Class’ homes and properties in Rose Hill (“the Residences”). At all times relevant to this action, D.R. Horton coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale, and/or repair of the Residences.

Jane Doe Defendants

8. Defendants Jane Doe #1-10, whose true names are unknown (“Jane Doe Defendants”), are other entities or individuals which are actual or *de facto* joint venturers and/or partners, control persons, and/or agents of D.R. Horton and/or each other in connection with the design, construction, and repair of the Residences.

9. The address and identity of each Jane Doe Defendant is unknown at this time.

10. All at times relevant hereto, Jane Doe Defendants were conducting business in Anderson County, South Carolina.

11. Upon information and belief, D.R. Horton, Jane Doe Defendants, and their officers, members, managers, directors, and/or shareholders (collectively “Developers”), operated a joint enterprise for the common, for-profit purpose of selling the Residences to Plaintiff Zitek and the Class.

12. Upon information and belief, Developers collectively developed the Residences, marketed the Residences to the public, placed the Residences into the stream of commerce, sold the Residences, and/or repaired the Residences.

13. Upon information and belief, Developers failed to observe corporate formalities; acted as agents of each other; and/or, comingled and combined their resources in developing, constructing, marketing, selling, and/or repairing the Residences.

14. Upon information and belief, the legal distinctions between Developers are blurred and they are, in effect, one and the same and their interests are amalgamated such that the actions of one should apply to the others.

15. Developers' collective conduct, blurring of corporate lines, and other abuses of the corporate form have resulted in fundamental unfairnesses to Plaintiff Zitek and the Class.

John Doe Defendants

16. Defendants John Doe #1-50 ("John Doe Defendants") are persons or entities who participated in the design, development, marketing, construction, repair, and/or sale of the Residences as contractors, subcontractors, manufacturers, material suppliers, consultants, architects, engineers, real estate agents, managers, marketers, laborers, or otherwise.

17. The address and identity of the John Doe Defendants are unknown at this time.

18. All at times relevant hereto, John Doe Defendants were conducting business in Anderson County, South Carolina.

19. This Honorable Court has jurisdiction over all parties hereto and over all subject matter alleged herein.

20. Venue is proper in Anderson County as the most substantial part of Plaintiff's and the Class' alleged injuries and Defendants' alleged acts or omissions took place in Anderson County.

21. Plaintiff Zitek is informed and believes that well over two-thirds of the Class are citizens of Anderson County, South Carolina.

22. Plaintiff Zitek is informed and believes that all or nearly all of the Class are citizens of South Carolina.

FACTUAL ALLEGATIONS

23. This matter arises out of the design, development, construction, sale and/or repair of the Residences.

24. At the time their Certificates of Occupancy were issued, the Residences contained latent and undisclosed defects. The latent and undisclosed defects, in combination with fortuitous weather, repeated water intrusion and/or other events, have resulted in consequential damage to non-defective portions of the Residences and other property.

25. Defendants should have known of the existence of the latent defects for many reasons, including their post-construction repair efforts.

26. Plaintiff Zitek and members of the Class have previously put D.R. Horton on notice of one or more of the deficiencies. In turn, D.R. Horton has put one or more of the other Defendants on notice. However, the Defendants have not rectified the problems and their various and sundry repair attempts have been inadequate, are failing, or have failed.

27. A preliminary inspection of the Residences evidences failure in load-bearing components; failure in exterior cladding systems; water intrusion into and through windows, doors, and the exterior building envelope; and, resulting consequential damage to non-defective building components and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting therefrom.

28. Defendants had a duty to design, develop, and construct the Residences in a workmanlike manner with suitable materials, free from all defects, and in accordance with the

applicable building code, permitted building plans, good workmanship, and construction industry and engineering standards.

29. Plaintiff Zitek is informed and believes that various building components of the Residences, including those listed above, are not in compliance with applicable building codes, proper workmanship, and industry standards and must be corrected or replaced.

30. Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

31. The aforementioned deficiencies and resulting damages show that Defendants breached their duties to Plaintiff Zitek and the Class.

32. Remedying the above wrongs will result in additional consequential damages and loss of use.

33. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiff Zitek and the Class have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur reasonable attorneys' fees and costs for the retention of experts to determine the damage and scope of work for repair.

34. Upon information and belief, the water intrusion and resulting consequential damages commenced shortly after completion of the Residences and have occurred and have been occurring in each and every year since commencement and constitute "occurrences" and "property damage" under the standard and/or typical commercial general liability policies.

CLASS ACTION ALLEGATIONS

35. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Zitek brings this action, both individually, and on behalf of a Class of similarly situated claimants. The Class is more particularly defined as follows:

All persons and entities that own a single-family house developed by Defendants within the Rose Hill subdivision in the City of Easley, Anderson County, South Carolina.

Plaintiff proposes that the class be divided into subclasses if, and as necessary, to align class interest.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns and successors of Defendants and Defendants' current or former employees, investors, members, or officers; (c) any Rose Hill residence owned by any of the Defendants or an entity related to any of the Defendants; (d) any Rose Hill residence developed by persons other than Defendants; (e) any former Rose Hill homeowner; (f) any current Rose Hill homeowner that has previously released all the claims set forth herein; and, (g) all persons who properly execute and file a timely request for exclusion from the Class.

36. *Numerosity*: The Class concerns approximately two hundred and fifty (250) properties, owned by people geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of four hundred members (400) members.

37. *Commonality*: Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- a. Whether Defendants negligently designed, constructed and/or repaired the Residences;
- b. Whether Defendants breached their implied warranties in connection with the Residences;
- c. Whether Defendants knew or should have known of the latent defects;
- d. Whether Defendants failed to disclose defects and/or unsuccessful repairs;

- e. Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- f. Whether Plaintiff Zitek and the Class are entitled to recover the estimated cost to repair and (i) compensation for all out-of-pocket monies expended for repair of their homes, as well as repair/replacement of other property damage; (ii) temporary repairs; and, (iii) compensation for loss of use; and,
- g. Whether Defendants' conduct was reckless, willful, wanton, or the like, entitling Plaintiff Zitek and the Class to punitive damages.

38. *Typicality*: Plaintiff Zitek's claims are typical of the claims of the Class, as all such claims arise out of Defendants' wrongful conduct in developing, building, repairing, and/or selling the Residences and Plaintiff Zitek's and Class' ownership of these Residences that contain latent defects.

39. *Adequate Representation*: Plaintiff Zitek will fairly and adequately protect the interests of the Class and has no interests antagonistic to those of the Class. Plaintiff Zitek has retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

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

41. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class members have the same legal right to and interest in redress for damages associated with the defective conditions existing within their Residences.

42. Plaintiff Zitek and the Class envision no unusual difficulty in the management of this action as a class action.

43. Each Class member has an interest of more than \$100.00.

44. The amount of money at stake for each Class member is not sufficient for each member to hire their own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

45. Defendants are estopped from relying on any statutes of limitations or repose by virtue of their acts. Upon information and belief, Defendants should have known the Residences were defectively constructed and failed to alert Plaintiff Zitek and the Class of the Residences' defective condition.

46. Defendants had a duty to inform Plaintiff Zitek and the Class of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiff Zitek or the Class.

47. Despite exercising reasonable diligence, Plaintiff Zitek and the Class could not have discovered the defective condition of Residences.

48. Given Defendants' failure to disclose this non-public information about the defective nature of the Residences – information over which they had exclusive control – and because Plaintiff Zitek and the Class could not reasonably have known of the Residences' defective nature, Defendants are estopped from relying on any statutes of limitations or repose that

might otherwise be applicable to the claims asserted herein.

49. Defendants are further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiff Zitek and the Class that they had or were correcting the work.

50. The equitable tolling doctrine further precludes Defendants from relying on a statute of limitations defense.

ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISION AND WARRANTY DISCLAIMERS CONTAINED IN D.R. HORTON'S PURCHASE CONTRACTS

51. Defendants are estopped/barred from asserting the Arbitration Provision and Warranty Disclaimer Provisions contained in D.R. Horton's purchase contracts because these Provisions are unconscionable and unenforceable.

52. Plaintiff Zitek's purchase contract contains the same or similar "Warranties and Disclaimers" and "Arbitration" Provisions that the South Carolina Supreme Court has already deemed are "clearly one sided and oppressive". *Smith v. D.R. Horton*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

53. Plaintiff Zitek's purchase contract attempts to disclaim implied warranty claims and prohibits any monetary damage by providing that "D.R. Horton shall not be liable for any reason under any circumstance to Purchaser or anyone claiming through Purchaser for monetary damages of any kind. . .".

54. Any such provisions purporting to waive all implied warranties and all relief are void pursuant to public policy and South Carolina law.

55. As a result, Defendants cannot rely on their warranty disclaimers, and cannot compel Plaintiff Zitek or the Class into arbitration, based on D.R. Horton's purchase contracts. *Id.* ("We. . .hold the arbitration provision is unconscionable, and thus, unenforceable").

**ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISIONS AND
WARRANTY LIMITATIONS IN EXPRESS WARRANTIES**

56. Defendants are estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in their express warranties because Plaintiff Zitek and the Class do not currently allege a breach of express warranty claim.

57. Defendants are also estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in their express warranties or the like because these provisions and limitations are conflicting, procedurally burdensome, unconscionable, and/or not geared towards an unbiased decision by a neutral decision-maker.

58. Defendants are further estopped/barred from relying on Warranty Limitations contained in their express warranties or the like by virtue of their conduct and such warranties' failure to serve its essential purpose.

59. By virtue of Defendants' acts, the work performed at the Residences have not lived up to Defendants' warranties. Given the Residences' defective condition, their building components have not proven to be of reasonable or acceptable quality.

60. Defendants, in the exercise of required diligence, which failed to occur, should have known the Residences were defective, uninhabitable, unfit, and unmerchantable.

61. Defendants' warranties are woefully inadequate to repair and replace failed building components in the Residences, let alone to reimburse for any damage suffered to the underlying components and other property. The remedies available in Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy and fail their essential purpose.

62. As such, Defendants are precluded from relying on the Arbitration Provisions and Warranty Limitations contained in their express warranties or the like as a defense to the claims asserted herein.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to Defendants)

63. Plaintiff repeats and re-alleges the above paragraphs as if fully set forth verbatim.

64. Defendants, either on their own or through their agents, servants, and employees undertook and owed duties to Plaintiff in connection with the work they performed at the Residences.

65. Defendants had a duty to perform their work at the Residences in accordance with applicable codes, approved plans and specifications, industry standards, and in a careful, diligent, and workmanlike manner, free from defects.

66. Defendants also had a duty to provide accurate information about the Residences' condition and to disclose defective conditions.

67. Defendants breached their duties to Plaintiff in a manner that was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to use due care in developing the Residences;
- b. In failing to provide adequate load-bearing systems, exterior claddings, windows, doors, structural components and/or other building components for the Residences;
- c. In failing to develop the Residences in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices;
- d. In failing to properly supervise the work performed at the Residences;
- e. In failing to properly coordinate the subcontractors and trades;

- f. In failing to act as a reasonable person would in the circumstances then and there prevailing;
- g. In failing to provide accurate information about the Residences;
- h. In failing to make proper repairs; and,
- i. Other deficiencies or failures as will be proven at trial.

68. Plaintiff has been damaged as a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of the Defendants.

69. The violation of applicable building codes constitutes negligence *per se* and may constitute evidence of gross negligence.

70. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, Plaintiffs are entitled to an award of punitive damages against the Defendants.

71. As a result of Defendants' negligence and/or gross negligence, Plaintiff is entitled to a judgment against Defendants for all actual, direct, indirect, resulting, consequential, and punitive damages in an amount to be determined at the trial of this case.

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranties as to Defendants)

72. Plaintiff repeats and re-alleges the above paragraphs as if fully set forth verbatim.

73. Defendants implicitly warranted that the Residences would be developed in a careful, diligent, and workmanlike manner, with suitable materials and components that complied with applicable building codes, industry standards, and industry practice.

74. Defendants implicitly warranted that the Residences would be merchantable, free from latent defects, and fit for the particular purpose.

75. D.R. Horton impliedly warranted that the Residences would be habitable.

76. Defendants breached their implied warranties by developing the Residences in a defective manner as set forth above.

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

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices as to D.R. Horton)

78. Plaintiff repeats and re-alleges the above paragraphs as if fully set forth verbatim.

79. D.R. Horton is a person within the meaning of the South Carolina Unfair Trade Practices Act (the "Act").

80. D.R. Horton developed and sold the Residences and, therefore, engaged in commerce as defined by the Act.

81. D.R. Horton's above-described actions, including placing defective Residences into the stream of commerce; failing to oversee and control the workmanship and material quality of the Residences; failing to properly repair defective conditions; failing to comply with the building codes, industry standards, and industry practice; attempting to disclaim and eviscerate any and all relief to the owners of the Residences; and, other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices within the meaning of the Act.

82. D.R. Horton knew or should have known that its conduct was in violation of the Act.

83. D.R. Horton's conduct is capable of repetition and, upon information and belief and in accord with the allegations herein, has been repeated.

84. D.R. Horton's conduct adversely affects the public interest as well as many South Carolina citizens.

85. As a direct, foreseeable, and proximate result of D.R. Horton's unfair and deceptive practices, the individual owners of the Residences, including Plaintiff Zitek, have been damaged and are entitled to a judgment against D.R. Horton in amount to be proven at trial.

WHEREFORE, Plaintiff demands a trial by jury and prays for actual and consequential damages expected to exceed five million dollars, statutory and punitive damages, reasonable attorneys' fees, costs of suit, prejudgment interest, and granting of such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

Justin O'Toole Lucey
Dabny Lynn, Esq.
Sohayla R. Townes, Esq.
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Attorneys for Plaintiff

September 25, 2019
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Natalie Zitek, individually, and on behalf of
all others similarly situated,

Plaintiff

vs

D.R. Horton, Inc., Jane Doe #1-10; and, John
Doe #1-50,

Defendant

D.R. HORTON, INC.

Third-Party Plaintiff

vs

AJ LANDSCAPING & GRADING, LLC,
A/K/A AJ LANDSCAPING & GRADING,
LLC; ALLPRO TEXTURES, LLC; ALPHA
OMEGA CONSTRUCTION GROUP, INC.;
AMERICAN CONCRETE AND PRECAST,
INC.; A/K/A ACP CONCRETE, INC.; A&J
FRAMING, INC; ALPHA E.M.C.; A-Z,
INC.; ATLANTA FLOOR DESIGNS
CENTER; A GRADE ABOVE OTHERS,
LLC; BRAND-VAUGHAN LUMBER CO,
INC.; BKF BUILDERS, INC.; BUILDERS
DESIGNHOUSE, LLC; BMC EAST LLC
D/B/A COLEMAN FLOOR, LLC;
BUILDERS FIRSTSOURCE SOUTHEAST
GROUP, LLC, A/K/A BUILDERS
FIRSTSOURCE, INC; BRAVO
CARPENTERS, INC.; CARYL
MECHANICS II, INC., A/K/A CARYL
MECHANICALS, INC.; CANNADAY
SIDING & GUTTER, INC.; CORTES
PAINTING, LLC; CBU ENTERPRISES,
INC.; CPI SECURITY SYSTEMS, INC.;
DOM GROUP, LLC; FERGUSON
ENTERPRISES, INC.; FIVE STAR

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-04-1942

SECOND AMENDED SUMMONS

EXHIBIT

B

CONSTRUCTION INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC. A/K/A GALLOWAY-BELL,)
 INC. II; GET FLOORED, LLC; GBS)
 BUILDING SUPPLY – US LBM, LLC,)
 F/K/A GBS BUILDING SUPPLY, INC.;)
 GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC. A/K/A)
 GREENER PASTURES OF AIKEN, LLC;)
 IBP ASSET, LLC D/B/A BLUE RIDGE)
 BUILDING PRODUCTS; JLS MASONRY,)
 INC.; KINGS LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-DANLAR,)
 INC.; LANSING BUILDING PRODUCTS,)
 INC.; LONG HEATING & AIR)
 CONDITIONING, INC.; L&M ELECTRIC,)
 INC; MANALE LANDSCAPING, LLC; MJ)
 COWBOYS, LLC; M&L GENERAL)
 CONSTRUCTION, LLC, A/K/A M&L)
 GENERAL CONSTRUCTION, INC.; M&L)
 REYNA CONSTRUCTION, LLC; M&M)
 FOUNDATIONS, LLC; NAZARETH)
 BUILDERS, LLC; NB CONTRACTORS,)
 LLC; POINSETT DEVELOPMENT, LLC;)
 POINSETT HOMES, LLC; P&T)
 CONSTRUCTION, INC., A/K/A P&T)
 CONSTRUCTION, INC.; P&L)
 ENTERPRISES, LLC; PROBUILD)
 COMPANY, LLC A/K/A PROBUILD)
 HOLDINGS, INC.; RITE RUG CO.;)
 RODNEY HOWARD GRADING, INC.)
 A/K/A RODNEY HOWARD GRADING)
 CO.; SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC., LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; DUPREE)
 PLUMBING COMPANY, INC., WILLOW)
 TREE LANDSCAPING, INC; AND)
 SILVER LINE BUILDING PRODUCTS)
 CORPORATION)
)

Third-Party Defendants

TO: NAMED THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Third-Party Complaint contained in the Second Amended Answer of D.R. Horton, Inc., to Plaintiff's Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Third-Party Complaint on the subscriber hereto at this office at 704 East McBee Avenue, Greenville, South Carolina, 29601, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Third-Party Complaint.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

John T. Crawford Jr. (SC Bar # 69682)

Jason Imhoff (S.C. Bar # 69355)

704 E. McBee Ave.

Greenville, SC 29601

(864) 242-4899

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Crawford@conlaw.com

Imhoff@conlaw.com

Attorneys for D.R. Horton

February 23, 2022

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Natalie Zitek, individually, and on behalf of
all others similarly situated,

Plaintiff

vs

D.R. Horton, Inc., Jane Doe #1-10; and, John
Doe #1-50,

Defendant

D.R. HORTON, INC.

Third-Party Plaintiff

vs

AJ LANDSCAPING & GRADING, LLC,
A/K/A AJ LANDSCAPING & GRADING,
LLC; ALLPRO TEXTURES, LLC; ALPHA
OMEGA CONSTRUCTION GROUP, INC.;
AMERICAN CONCRETE AND PRECAST,
INC.; A/K/A ACP CONCRETE, INC.; A&J
FRAMING, INC; ALPHA E.M.C.; A-Z,
INC.; ATLANTA FLOOR DESIGNS
CENTER; A GRADE ABOVE OTHERS,
LLC; BRAND-VAUGHAN LUMBER CO,
INC.; BKF BUILDERS, INC.; BUILDERS
DESIGNHOUSE, LLC; BMC EAST LLC
D/B/A COLEMAN FLOOR, LLC;
BUILDERS FIRSTSOURCE SOUTHEAST
GROUP, LLC, A/K/A BUILDERS
FIRSTSOURCE, INC; BRAVO
CARPENTERS, INC.; CARYL
MECHANICS II, INC., A/K/A CARYL
MECHANICALS, INC.; CANNADAY
SIDING & GUTTER, INC.; CORTES
PAINTING, LLC; CBU ENTERPRISES,
INC.; CPI SECURITY SYSTEMS, INC.;
DOM GROUP, LLC; FERGUSON
ENTERPRISES, INC.; FIVE STAR

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-04-1942

**SECOND AMENDED ANSWER AND
THIRD-PARTY COMPLAINT OF
DEFENDANT D.R. HORTON, INC.**

CONSTRUCTION INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC. A/K/A GALLOWAY-BELL,)
 INC. II; GET FLOORED, LLC; GBS)
 BUILDING SUPPLY – US LBM, LLC,)
 F/K/A GBS BUILDING SUPPLY, INC.;)
 GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC. A/K/A)
 GREENER PASTURES OF AIKEN, LLC;)
 IBP ASSET, LLC D/B/A BLUE RIDGE)
 BUILDING PRODUCTS; JLS MASONRY,)
 INC.; KINGS LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-DANLAR,)
 INC.; LANSING BUILDING PRODUCTS,)
 INC.; LONG HEATING & AIR)
 CONDITIONING, INC.; L&M ELECTRIC,)
 INC; MANALE LANDSCAPING, LLC; MJ)
 COWBOYS, LLC; M&L GENERAL)
 CONSTRUCTION, LLC, A/K/A M&L)
 GENERAL CONSTRUCTION, INC.; M&L)
 REYNA CONSTRUCTION, LLC; M&M)
 FOUNDATIONS, LLC; NAZARETH)
 BUILDERS, LLC; NB CONTRACTORS,)
 LLC; POINSETT DEVELOPMENT, LLC;)
 POINSETT HOMES, LLC; P&T)
 CONSTRUCTION, INC., A/K/A P&T)
 CONSTRUCTION, INC.; P&L)
 ENTERPRISES, LLC; PROBUILD)
 COMPANY, LLC A/K/A PROBUILD)
 HOLDINGS, INC.; RITE RUG CO.;)
 RODNEY HOWARD GRADING, INC.)
 A/K/A RODNEY HOWARD GRADING)
 CO.; SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC., LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; DUPREE)
 PLUMBING COMPANY, INC. AND)
 WILLOW TREE LANDSCAPING, INC;)
 AND SILVER LINE BUILDING)
 PRODUCTS CORPORATION)
)

Third-Party Defendants

**TO: JUSTIN O'TOOLE LUCEY, ESQUIRE, AND DABNY LYNN, ESQUIRE,
ATTORNEYS FOR PLAINTIFF:**

Pursuant to Rule 15, SCRCP, Defendant D.R. Horton, Inc. ("D.R. Horton" or "Defendant"), hereby amends its answer and asserts a third-party complaint and answers the Complaint of Natalie Zitek, individually, and on behalf of all others similarly situated ("Plaintiff"), as set forth below, by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further responds as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained within Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained is denied.

2. Upon information and belief, D.R. Horton admits the allegations contained within Paragraphs 1, 2, 3, and 4 of the Complaint.

3. D.R. Horton denies that this matter is a proper matter for a class action lawsuit as alleged in Paragraph 5 of the Complaint and therefore denies the same.

4. D.R. Horton admits the allegations of Paragraph 6 of the Complaint.

5. D.R. Horton admits so much of the allegations contained in Paragraph 7 of the Complaint in that D.R. Horton constructed various residences and developed certain portions of Rose Hill. All remaining allegations contained in Paragraph 7 are denied.

6. D.R. Horton denies the allegations of Paragraphs 8, 9, 10, 11, 12, 13, 14, 15 of the Complaint.

7. D.R. Horton lacks sufficient information to admit or deny the allegations contained in Paragraphs 16, 17 and 18 of the Complaint and therefore denies the same.

8. Paragraphs 19 and 20 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

9. D.R. Horton lacks sufficient information to admit or deny Paragraphs 21 and 22 of the Complaint and therefore denies the same.

10. D.R. Horton admits so much of the allegations contained in Paragraph 23 of the Complaint that Plaintiff claims arises out of construction of the Zitek residence. All remaining allegations contained in Paragraph 23 are denied.

11. D.R. Horton denies the allegations of Paragraph 24 of the Complaint.

12. D.R. Horton denies the allegations of Paragraph 25 of the Complaint.

13. D.R. Horton denies the allegations of Paragraph 26 and 27 of the Complaint.

14. Paragraph 28 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

15. D.R. Horton denies the allegations of Paragraph 29 of the Complaint.

16. D.R. Horton denies the allegations of Paragraphs 30 and 31 of the Complaint.

17. D.R. Horton denies the allegations of Paragraph 32 of the Complaint.

18. D.R. Horton denies the allegations of Paragraphs 33 and 34 of the Complaint.

19. D.R. Horton denies any and all allegations in Paragraphs 35, 36, 37, 38, 39 and 40 and denies that this matter is proper as a class action lawsuit as alleged in Paragraphs 35, 36, 37, 38, 39 and 40 of the Complaint and therefore denies the same.

20. Paragraph 41 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

21. D.R. Horton denies that this matter is proper as a class action lawsuit as alleged in Paragraph 42 of the Complaint and therefore denies the same.

22. D.R. Horton denies the allegations of Paragraph 43 of the Complaint.

23. D.R. Horton lacks sufficient information to admit or deny Paragraph 44 of the Complaint and therefore denies the same.

24. D.R. Horton denies the allegations of Paragraph 45 of the Complaint.

25. D.R. Horton denies knowledge of the existence of any defects, as alleged in Paragraphs 46 and 47 of the Complaint. Further, Paragraphs 46 and 47 of the Complaint call for a legal conclusion which can neither be admitted or denied. To the extent a response is required, it is denied and strict proof of demanded.

26. Paragraphs 48, 49, 50 and 51 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to these paragraphs they are denied, and strict proof is demanded.

27. D.R. Horton denies the allegations of Paragraph 52 of the Complaint.

28. Dr. Horton craves reference to the documents referenced in Paragraphs 53 and 54 of the Complaint and denies any allegations inconsistent thereof. Further, Paragraphs 53 and 54 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

29. D.R. Horton denies the allegations of Paragraphs 55, 56, 57, 58 and 59 of the Complaint.

30. D.R. Horton denies the knowledge of the existence of any defects and denies that D.R. Horton's warranties are inadequate, as alleged in Paragraphs 60 and 61 of the Complaint, and therefore denies the same.

31. D.R. Horton denies the allegations of Paragraph 62 of the Complaint.

32. Paragraph 63 of Plaintiff's Complaint is an administrative paragraph to which no response is required. To the extent a response is required, D.R. Horton realleges and reasserts its answers and defenses to the prior allegations of the Complaint.

33. Paragraphs 64, 65, and 66 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph, it is denied, and strict proof is demanded.

34. D.R. Horton denies the allegations of Paragraph 67 and 68 of the Complaint.

35. Paragraph 69 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

36. D.R. Horton denies the allegations of Paragraph 70 of the Complaint.

37. D.R. Horton denies that Plaintiff is entitled to any relief as sought in Paragraph 71 of the Complaint.

38. Paragraph 72 of Plaintiff's Complaint is an administrative paragraph to which no response is required. To the extent a response is required, D.R. Horton realleges and reasserts its answers and defenses to the prior allegations of the Complaint.

39. Paragraphs 73, 74, and 75 of the Complaint calls for a legal conclusion to which can neither be admitted nor denied. To the extent a response is required to this paragraph, it is denied, and strict proof is demanded.

40. D.R. Horton denies the allegations of Paragraph 76 of the Complaint.

41. D.R. Horton denies that Plaintiff is entitled to any relief as sought in Paragraph 77 of the Complaint.

42. Paragraph 78 of Plaintiff's Complaint is an administrative paragraph to which no response is required. To the extent a response is required, D.R. Horton realleges and reasserts its answers and defenses to the prior allegations of the Complaint.

43. Paragraphs 79 and 80 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

44. D.R. Horton denies the allegations of Paragraphs 81, 82, 83, and 84 of the Complaint, including the existence of any alleged defects.

45. Denies that Plaintiff is entitled to any relief as sought in Paragraph 85 of the Complaint.

46. Denies all remaining allegations of the Complaint, including Plaintiff's Prayer for Relief as set forth in the Paragraph beginning "WHEREFORE" which claims entitlement to actual damages, attorneys' fees, costs, and any other relief and prays that this action against D.R. Horton be dismissed.

FOR A SECOND DEFENSE
(Motion to Dismiss, Alternatively to Stay and Compel Arbitration)

47. D.R. Horton moves to dismiss this action pursuant to Rule 12(b)(6), SCRPC, or, alternatively, stay this action as Plaintiff entered into a contract with D.R. Horton regarding the construction of a home, which is the subject of this suit ("Contract"). The contract contains a binding and enforceable arbitration agreement. Therefore, this Court does not have jurisdiction to hear this matter and/or should stay the case and transfer it for arbitration.

48. D.R. Horton asserts that Defendants John Doe #1-50 and Jane Doe #1-10 have not been served pursuant to the South Carolina Rules of Civil Procedure. Therefore, D.R. Horton moves to dismiss Co-Defendants John Doe #1-50 and Jane Doe #1-10 pursuant to Rule 12(b)(4)

and (5) of the South Carolina Rules of Civil Procedure for insufficiency of process and insufficiency of service of process. D.R. Horton further alleges lack of service as a defense in this matter as to Defendant John Doe #1-50 and Jane Doe #1-10.

FOR A THIRD DEFENSE
(Lack of standing)

49. Plaintiff lacks standing to make the claims asserted against D.R. Horton in this action.

50. D.R. Horton asserts that Defendants John Doe #1-50 and Jane Doe #1-10 have not been served pursuant to the South Carolina Rules of Civil Procedure. Therefore, D.R. Horton moves to dismiss Co-Defendants John Doe #1-50 and Jane Doe #1-10 pursuant to Rule 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure for insufficiency of process and insufficiency of service of process. D.R. Horton further alleges lack of service as a defense in this matter as to Defendant John Doe #1-50 and Jane Doe #1-10.

FOR A FOURTH DEFENSE
(Failure to State a claim or cause of action)

51. Plaintiff fails to state a claim upon which relief may be granted.

52. Plaintiff fails to state a cause of action against D.R. Horton.

53. D.R. Horton asserts that Defendants John Doe #1-50 and Jane Doe #1-10 have not been served pursuant to the South Carolina Rules of Civil Procedure. Therefore, D.R. Horton moves to dismiss Co-Defendants John Doe #1-50 and Jane Doe #1-10 pursuant to Rule 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure for insufficiency of process and insufficiency of service of process. D.R. Horton further alleges lack of service as a defense in this matter as to Defendant John Doe #1-50 and Jane Doe #1-10.

FOR A FIFTH DEFENSE
(Laches, Estoppel, Waiver)

54. That all claims asserted against D.R. Horton are barred by the equitable doctrines of laches, waiver, and/or estoppel.

FOR A SIXTH DEFENSE
(Spoliation)

55. Plaintiff's claims are barred by the doctrine of spoliation of evidence.

FOR A SEVENTH DEFENSE
(Unclean Hands)

56. Plaintiff's claims against D.R. Horton are barred by the Doctrine of Unclean Hands.

FOR AN EIGHTH DEFENSE
(Negligence of Others)

57. D.R. Horton alleges that the direct and proximate cause of Plaintiff's damages, if any, was the negligence, gross negligence, wanton and reckless conduct of some other person or corporation and, accordingly, D.R. Horton is not liable to Plaintiff.

FOR A NINTH DEFENSE
(Comparative Negligence)

58. Plaintiff's claims and damages, if any, are barred, or should be reduced, by Plaintiff's own contributory and comparative negligence and recklessness which combined, contributed and concurred with any alleged negligence on the part of the D.R. Horton, if any, and which is expressly denied.

FOR A TENTH DEFENSE
(Offset)

59. D.R. Horton is entitled to offset in the amount of any and all damages recovered by the Plaintiff from other for the same injuries and/or damages claimed in this suit.

FOR AN ELEVENTH DEFENSE
(Mitigate Damages)

60. D.R. Horton allege that Plaintiff had an obligation to mitigate damages but failed to do so.

FOR A TWELVETH DEFENSE
(Compliance with Industry Standards)

61. Any and all materials, work or services provided by D.R. Horton met all relevant industry customs, practices and standards.

FOR A THIRTEENTH DEFENSE
(Acceptance of Work)

62. That the final completion and acceptance of the work undertaken by D.R. Horton constitutes a complete defense to all claims asserted by Plaintiff.

FOR A FOURTEENTH DEFENSE
(Proximate Cause)

63. Even if D.R. Horton were negligent or in breach, D.R. Horton alleges that Plaintiff's claims are barred due to the lack of proximate cause between Plaintiff's alleged damages and the alleged actions/inactions of D.R. Horton.

FOR A FIFTEENTH DEFENSE
(Scope of Work)

64. D.R. Horton's obligations to Plaintiff are limited to the services provided pursuant to D.R. Horton's scope of work; therefore, to the extent that any of Plaintiff's claims include

allegations against D.R. Horton that are outside the scope of services and work performed by D.R. Horton, those claims are barred.

FOR A SIXTEENTH DEFENSE
(Limitation of Warranty)

65. Plaintiff's claims are, upon information and belief, barred as they failed to make a claim against D.R. Horton within the applicable, implied and express warranty period and would be reduced to the extent that D.R. Horton provided a warranty which was in lieu of all other warranties.

FOR A SEVENTEENTH DEFENSE
(Intervening/Superseding Cause)

66. D.R. Horton asserts that even if it was negligent or reckless any respect, which is expressly denied, it is not liable to Plaintiff for any resulting damages, if any, because of the intervening negligent, grossly negligent, reckless, willful, and wanton acts of third parties, including those parties whose identities are unknown at the present time, which negligent and reckless acts on their part were not reasonably foreseeable, and intervened and acted as the direct and proximate cause of the damages, if any, sustained by Plaintiff.

67. D.R. Horton asserts that the intervening acts of a third party or parties were the sole and proximate cause of injuries to Plaintiff and the action should be dismissed.

FOR AN EIGHTEENTH DEFENSE
(Legal Duty)

68. D.R. Horton owed no legal duty as a matter of law to the Plaintiff.

FOR A NINETEENTH DEFENSE
(Statute of Limitations/Repose)

69. D.R. Horton allege that the Plaintiff's claims are barred by the applicable Statute of Limitations and Statute of Repose.

FOR A TWENTIETH DEFENSE
(Punitive Damages)

70. D.R. Horton would show that if the Plaintiff is making any claim for punitive damages, which are inappropriate, such violates the due process and equal protection laws of the United States Constitution and the Constitution of the State of South Carolina.

71. Punitive damages are inappropriate in this case, as a matter of law and also because the D.R. Horton did not engage in any malicious, reckless, wrongful, or intentional conduct upon which an award of punitive damages would be based.

72. D.R. Horton would show that any award of punitive damages, which D.R. Horton deny is appropriate, is subject to the limitations set forth in South Carolina Code §15-32-530.

FOR A TWENTY- FIRST DEFENSE
(Workmanlike Manner)

73. D.R. Horton asserts that all work performed was done in a workmanlike manner and therefore no breach of warranty may exist.

FOR A TWENTY- SECOND DEFENSE
(Disclaimer of Warranty)

74. The Contract disclaims any implied warranties made by D.R. Horton. Therefore, Plaintiff may not maintain any claims relating and/or referring to an implied warranty.

FOR A TWENTY-THIRD DEFENSE
(Failure to comply with conditions precedent)

75. D.R. Horton asserts that Plaintiff failed and refused to comply with the contractual conditions precedent to this action.

FOR A TWENTY-FOURTH DEFENSE
(Economic loss rule)

76. D.R. Horton asserts the Economic Loss Rule as a complete and total bar to all of Plaintiff's causes of action outside Breach of Contract.

FOR A TWENTY-FIFTH DEFENSE
(Additional Affirmative Defenses)

77. D.R. Horton hereby gives notice that it intends to rely on such other affirmative defenses pled by other defendants in this matter and as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert such defenses.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF THIRD-PARTY COMPLAINT AGAINST AJ LANDSCAPING & GRADING, LLC, A/K/A A J LANDSCAPING & GRADING, LLC; ALLPRO TEXTURES, LLC; ALPHA OMEGA CONSTRUCTION GROUP, INC.; AMERICAN CONCRETE AND PRECAST, INC.; A/K/A ACP CONCRETE, INC.; A & J FRAMING, INC; ALPHA E.M.C.; A-Z, INC.; ATLANTA FLOOR DESIGNS CENTER; A GRADE ABOVE OTHERS, LLC; BRAND-VAUGHAN LUMBER CO, INC.; BKF BUILDERS, INC.; IBP ASSET, LLC D/B/A BLUE RIDGE BUILDING PRODUCTS; BUILDERS DESIGNHOUSE, LLC; BMC EAST LLC; BUILDERS FIRSTSOURCE SOUTHEAST GROUP, LLC, A/K/A BUILDERS FIRSTSOURCE, INC.; BRAVO CARPENTERS, INC.; CARYL MECHANICS II, INC., A/K/A CARYL MECHANICALS, INC.; CANNADAY SIDING & GUTTER, INC.; COLEMAN FLOOR, LLC; CORTES PAINTING, LLC; CBU ENTERPRISES, INC.; CPI SECURITY SYSTEMS, INC.; DOM GROUP, LLC FERGUSON ENTERPRISES, INC.; FIVE STAR CONSTRUCTION INC.; FIVE STAR FOUNDATIONS, LLC; GALLOWAY-BELL, INC., A/K/A GALLOWAY-BELL, INC. II; GET FLOORED, LLC; GBS BUILDING SUPPLY – US LBM, LLC, F/K/A GBS BUILDING SUPPLY, INC.; GENERAL SHALE BRICK INC.; GREENER PASTURES, INC., A/K/A GREENER PASTURES OF AIKEN, LLC; INSTALLED BUILDING PRODUCTS, LLC, A/K/A INSTALLED BUILDING PRODUCTS II, LLC; JLS MASONRY, INC.; KINGS LANDSCAPING, LLC; LANDSHAPERS, LLC; LADE-DANLAR, INC.; LANSING BUILDING PRODUCTS, INC.; LONG HEATING & AIR CONDITIONING, INC.; L & M ELECTRIC, INC; MANALE LANDSCAPING, LLC; MJ COWBOYS, LLC; M & L GENERAL CONSTRUCTION, LLC, A/K/A M & L GENERAL CONSTRUCTION, INC.; M&L REYNA CONSTRUCTION, LLC; M&M FOUNDATIONS, LLC; NAZARETH BUILDERS, LLC; NB CONTRACTORS, LLC; POINSETT DEVELOPMENT, LLC; POINSETT HOMES, LLC; P&T CONSTRUCTION, INC., A/K/A P & T CONSTRUCTION, INC.; P & L ENTERPRISES, LLC; PROBUILD COMPANY, LLC A/K/A PROBUILD HOLDINGS, INC.; RITE RUG CO.; RODNEY HOWARD GRADING INC., A/K/A RODNEY HOWARD GRADING CO.; SANDLAPPER CONCRETE, LLC; SODFATHER INC., LANDSCAPE CONTRACTORS; STOCK BUILDING SUPPLY, LLC; TOPBUILD HOME SERVICES, INC. A/K/A GALE

CONTRACTORS SERVICE; TUCKER MATERIALS, INC., A/K/A GYPSUM; UTM ENTERPRISES, INC; WILLOW TREE LANDSCAPING, INC.; DUPREE PLUMBING COMOPANY, INC. AND SILVER LINE BUILDING PRODUCTS CORPORATION

78. D.R Horton herein realleges its answers and defenses to the above complaint in the preceding paragraphs as if fully set forth herein.

79. D.R. Horton individually contracted with and paid AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC; AllPro Textures, LLC; Alpha Omega Construction Group, Inc.; American Concrete And Precast, Inc.; A/K/A ACP Concrete, Inc.; A & J Framing, Inc; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co, Inc.; BKF Builders, Inc.; Blue Ridge Building Products, LLC; Builders Designhouse, LLC; BMC East LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; Cannaday Siding & Gutter, Inc.; Coleman Floor, LLC; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc., a/k/a Galloway-Bell, Inc. II; Get Floored, LLC; GBS Building Supply – US LBM, LLC, f/k/a GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc., a/k/a Greener Pastures of Aiken, LLC; IBP Asset, LLC d/b/a Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; P&T Construction, Inc., a/k/a P&T Construction, Inc.; P&L Enterprises, LLC; ProBuild Company, LLC a/k/a ProBuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape

Contractors; Stock Building Supply, LLC; TopBuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc., a/k/a Gypsum; UTM Enterprises, Inc; Willow Tree Landscaping, Inc.; Dupree Plumbing Company, Inc. and Silver Line Building Products Corporation (collectively referred to as “Subcontractors”) for Subcontractors to provide certain labor and/or supply certain materials (collectively and individually the “Work”) concerning homes (the “Homes”) located in the Rose Hill subdivision (“Rose Hill”) located off State Highway 74 in Anderson County, South Carolina.

80. Subcontractors each entered into individual and respective contracts with D.R. Horton, as referred to directly above, to perform the Work. These respective contracts shall be collectively referred to as the “Agreements.”

81. Certain Homes located within Rose Hill were developed and constructed, at least in part, by Poinsett Development, LLC and Poinsett Homes, LLC (collectively “Poinsett”).

82. Poinsett and Subcontractors shall be collectively referred to as “Third-Party Defendants.”

83. The Homes located in Rose Hill are the subject of Plaintiff’s lawsuit.

84. This Court has jurisdiction over the claims asserted in this Third-Party Complaint because the claims asserted herein are so related to the claims in the action within the Court’s original jurisdiction that they form part of the same case or controversy.

85. Subcontractors agreed to perform their work on the Homes in a good and workmanlike manner and indemnify and defend D.R. Horton for any improper work.

86. Subcontractors were aware of the need and the importance of constructing the Homes and lots in Rose Hill in accordance with construction and engineering plans, contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.

87. D.R. Horton contracted with subcontractors to perform their Work on the project. Subcontractors' Work on the project for D.R. Horton gave rise to a special relationship and contractual and common law duties in tort and/or warranty. D.R. Horton was recently made aware that subcontractors' Work on the project may be defective. If subcontractors' work was defective, subcontractors breached their contractual and common law duties to D.R. Horton and caused it damages at the time it preformed its work. Subcontractors' allegedly deficient work gave rise to causes of action in favor of D.R. Horton against subcontractors at the time the work was performed and caused D.R. Horton damages, which would not become apparent for years. Those damages include extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors.

88. Plaintiff, and others similarly situated, sent D.R. Horton a Notice and Opportunity to Cure letter, and, in the underlying action, have filed a Complaint against D.R. Horton seeking damages related to the construction and workmanship (a/k/a the "Work") of the Homes in Rose Hill, alleging that the Homes and/or subdivision has been constructed defectively.

89. Upon information and belief, Plaintiff's Notice and Opportunity to Cure letter and Complaint implicates each respective Subcontractors' Work.

90. Plaintiff's allegations contend that Subcontractors were grossly negligent, have failed to meet the requirements of the Agreements, including failing to construct the Homes in Rose Hill in accordance with construction documents, contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.

91. Upon information and belief, each individual Agreement contains an indemnification clause, wherein Subcontractors agreed to defend and indemnify D.R. Horton for any Work.

92. D.R. Horton has fully satisfied and performed all requirements associated with each respective Agreement.

93. D.R. Horton purchased partially developed lots and undeveloped lots within Rose Hill from Poinsett's successor in interest.

94. D.R. Horton purchased the partially completed lots with the understanding that these properties were built in accordance with construction plans, contract requirements, industry standards, and/or building code requirements so as to avoid construction defects. This understanding was a material fact in the purchase of the units.

95. Plaintiff has sued D.R. Horton claiming damages related to the and lots that were partially completed by Poinsett and such claims include allegations based upon the work performed by Poinsett.

96. Although D.R. Horton is without fault, by virtue of the alleged acts and omissions of the Subcontractors, D.R. Horton has been subjected to damages including, but not limited to, extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors.

FOR A FIRST CAUSE OF ACTION
(Contractual Indemnification as to Subcontractors)

97. D.R. Horton re-alleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

98. Plaintiff, individually, and on behalf of all others similarly situated, sent D.R. Horton a Notice and Opportunity to Cure letter and has sued D.R. Horton claiming damages related to construction work alleged to have been performed by Subcontractors in Rose Hill.

99. Subcontractors contracted with D.R. Horton to perform certain construction services on the Homes in Rose Hill.

100. Plaintiff has alleged that certain deficiencies in the work of Subcontractors have caused the damage to the Plaintiff.

101. D.R. Horton is informed and believes that if, in fact, Plaintiff, individually, and on behalf of all others similarly situated, is correct regarding the allegations of the Complaint, that the defects, if any, are the result of the wrongful acts, breach of warranties, omissions, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.

102. As D.R. Horton has suffered damages, including but not limited to, any future adjudication of liability to Plaintiff, individually, and on behalf of all others similarly situated, in this action, such liability would be the direct and proximate result of the wrongful acts, errors, and/or omissions, negligence and/or gross negligence of Subcontractors, which have damaged D.R. Horton as set forth more fully above.

103. Pursuant to each Agreement with D.R. Horton, Subcontractors agreed to indemnify D.R. Horton from damages arising out of Subcontractors' Work on the Homes in Rose Hill.

104. D.R. Horton is entitled to a judgment for full contractual indemnification from subcontractors, and D.R. Horton would be entitled to damages for the acts, errors, and/or omissions, breach of warranties, breach of contract, negligence and/or gross negligence of Subcontractors, as described hereinabove, entitling D.R. Horton to recover from Subcontractor its damages as set forth above.

105. The alleged acts or omissions of Subcontractors are the independent, active, primary, superseding, and/or intervening cause of damages allegedly suffered by Plaintiff, and the cause of D.R. Horton's separate and distinct damages set forth above and any wrongful acts or omissions by D.R. Horton, which are expressly denied, were passive and secondary only.

FOR A SECOND CAUSE OF ACTION
(Equitable Indemnification as to all Third-Party Defendants)

106. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

107. Plaintiff, individually, and on behalf of all others similarly situated, sent D.R. Horton a Notice and Opportunity to Cure letter and has sued D.R. Horton claiming damages related to the Homes in Rose Hill and such claims include allegations based upon each respective Subcontractors' Work and Poinsett's Work.

108. D.R. Horton has denied all substantive allegations against it that were made by Plaintiff.

109. A sufficient special relationship exists between D.R. Horton and Subcontractors and Poinsett, such that D.R. Horton could be held liable for subcontractors' and Poinsett's work and/or errors without any error by it.

110. D.R. Horton is informed and believes that if, in fact, Plaintiff is correct about her allegations, that the allegations are the result of the wrongful acts, omissions, breach of contract,

breach of warranty, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.

111. As D.R. Horton has suffered damages, including but not limited to, any future adjudication of liability to Plaintiff, individually, and on behalf of all others similarly situated, in this action, such liability would be the direct and proximate result of the wrongful acts, errors, and/or omissions, negligence and/or gross negligence of Subcontractors, which have damaged D.R. Horton as set forth more fully above. To the extent, if any, that D.R. Horton is held liable to Plaintiff in this action, the alleged acts or omissions of Subcontractors and Poinsett are the independent, active, primary, superseding, and/or intervening cause of damages allegedly suffered by Plaintiff, and any wrongful acts or omissions by D.R. Horton, which are expressly denied, were passive and secondary only.

112. D.R. Horton is entitled to a judgment for full common law indemnification from Subcontractors and Poinsett for all damages, as set forth above, including any liability D.R. Horton could be found to have to Plaintiff in this action, and D.R. Horton would be entitled to damages for the acts, errors, and/or omissions, negligence and/or gross negligence of Subcontractors as described above, entitling D.R. Horton to recover from Subcontractors and Poinsett damages including, but not limited to, extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract as to Subcontractors)

113. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

114. Subcontractors were contractually responsible for executing the requirements in the Agreements correctly.

115. To the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements in failing to construct the Homes in Rose Hill in accordance with contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.

116. D.R. Horton is entitled to judgment against Subcontractors for breach of contract plus costs, expenses, attorneys' fees, and other damages associated therewith.

FOR A FOURTH CAUSE OF ACTION
(Breach of Express Warranties as to all Subcontractors)

117. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

118. Subcontractors made express warranties that any materials, installation, and workmanship they performed at the Homes in Rose Hill were proper as required by the Agreements, applicable building codes, and industry standards.

119. If the materials, installation, and/or workmanship were not in accordance with contract requirements, industry standards, and/or building code requirements, then Subcontractors have materially breached their express warranties.

120. D.R. Horton is entitled to judgment against Subcontractors for breach of express warranties, along with costs, expenses, attorneys' fees, and other damages associated therewith.

FOR A FIFTH CAUSE OF ACTION
(Breach of Implied Warranties as to all Third-Party Defendants)

121. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

122. Subcontractors and Poinsett implicitly warranted that any materials, installation, and workmanship they performed at the Homes in Rose Hill were proper as required by the Agreements, applicable building codes, common law, warranty of workmanlike service, and industry standards.

123. If the materials, installation, and/or workmanship were not in accordance with contract requirements, construction plans, industry standards, and/or building code requirements, then Subcontractors and Poinsett have materially breached their express warranties.

124. D.R. Horton is entitled to judgment against Subcontractors and Poinsett for breach of express warranties, along with costs, expenses, attorneys' fees, and other damages set forth above.

FOR A SIXTH CAUSE OF ACTION
(Negligence/Gross Negligence/Recklessness as to all Third-Party Defendants)

125. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraphs as if fully set forth herein.

126. Upon information and belief, Subcontractors owed a duty to use due care in ensuring that proper levels of workmanship were achieved under the terms of the Agreements.

127. If due care was not used in ensuring proper levels of workmanship were achieved, then Subcontractors breached that duty of care by failing to ensure that proper levels of workmanship were achieved pursuant to the requirements under the Agreements.

128. D.R. Horton has been damaged as a direct and foreseeable and proximate result of Subcontractors and Poinsett's negligence/gross negligence/recklessness, and D.R. Horton is

entitled to judgment against Subcontractors for their damages, including costs, expense, attorneys' fees, and other damages set forth above.

WHEREFORE, D.R. Horton has been damaged as a direct and foreseeable and proximate result of Third-Party Defendants' acts, in that, among other damages, D.R. Horton was deprived of the benefit of the bargain, has and will suffer substantial damages including, but not limited to, extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors and D.R. Horton is entitled to judgment against Third-Party Defendants for its damages, including costs, expense, attorneys' fees, and other damages associated therewith. WHEREFORE, D.R. Horton prays for:

(a) Having fully answered the allegations of the Third Amended Complaint, dismissal of the Third Amended Complaint and all causes of action contained therein, with prejudice, and an award to D.R. Horton, Inc of its attorney fees, costs, and other expenses incurred in defending this action;

(b) On D.R. Horton's First Cause of Action, judgment in favor of D.R. Horton and against the Subcontractors in the amount of any liability D.R. Horton is found to have to the Plaintiff in this action and requiring the D.R. Horton Subcontractors to defend and indemnify D.R. Horton against any liability which D.R. Horton may be liable for and for any costs, losses, or damages D.R. Horton may incur as it relates to the Plaintiff in this action, to include D.R. Horton's attorneys' fees, costs, and any and all other expenses incurred in defending this action;

(c) On D.R. Horton's Second Cause of Action, judgment in favor of D.R. Horton and against Third-Party Defendants in the amount of any liability D.R. Horton is found to have to the Plaintiff in this action and requiring the Third-Party Defendants to defend and indemnify D.R. Horton against any liability which D.R. Horton may be liable for and for any costs, losses, or damages D.R. Horton may incur as it relates to the Plaintiff in this action, to include D.R. Horton's attorneys' fees, costs, and any and all other expenses incurred in defending this action;

(d) On D.R. Horton's Third and Fourth Causes of Action, judgment for D.R. Horton and against the Subcontractors in an amount to be determined at trial;

(e) On D.R. Horton's Fifth Cause of Action, judgment for D.R. Horton and against the Third-Party Defendants in an amount to be determined at trial;

(f) On D.R. Horton's Sixth Cause of Action, judgment for D.R. Horton and against Third-Party Defendants awarding actual, special, consequential and punitive damages in an amount to be determined at trial;

(g) Attorneys' fees;

(h) Costs of this action; and

(i) Such other and further relief that this Court deems just and proper.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

John T. Crawford Jr. (SC Bar # 69682)

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Attorneys for D.R. Horton

February 23, 2022
Greenville, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF ANDERSON) TENTH JUDICIAL CIRCUIT

Natalie Zitek, individually, and on behalf of) CASE NO. 2019-CP-04-01942
 all others similarly situated,)

Plaintiffs,)
 v.)

DR Horton, Inc.; Jane Doe #1-10; and John)
 Doe #1-50,)
 Defendants.)

DR Horton, Inc.,)
 Third-Party Plaintiff,)

v.)

AJ Landscaping & Grading, LLC a/k/a AJ)
 Landscaping; Allpro Textures, LLC; Alpha)
 Omega Construction Group, Inc.; American)
 Concrete and Precast, Inc. a/k/a ACP Concrete,)
 Inc.; A&J Framing, Inc.; Alpha EMC; A-Z,)
 Inc.; Atlanta Floor Designs Center; A Grade)
 Above Others, LLC; Brand-Vaughan Lumber)
 Co., Inc.; BFK Builders, Inc; Builders Design-)
 house, LLC; BMC East, LLC d/b/a Coleman)
 Floor, LLC; Builders FirstSource-Southeast)
 Group, LLC a/k/a Builders FirstSource, Inc.;)
 Bravo Carpenters, Inc.; Caryl Mechanics II,)
 Inc. a/k/a Caryl Mechanicals, Inc.; Cannaday)
 Siding & Gutter, Inc.; Cortes Painting, LLC;)
 Security Systems, Inc.; DOM Group, LLC;)
 Ferguson Enterprises, Inc.; Five Star Con-)
 struction, Inc.; Five Star Foundations, LLC;)
 Galloway-Bell, Inc. a/k/a Galloway-Bell, Inc.)
 II; Get Floored, LLC; GBS Building Supply)
 - US LBM, LLC f/k/a GBS Building Supply,)
 Inc.; General Shale Brick, Inc.; Greener)
 Pastures, Inc. a/k/a Greener Pastures of Aiken,)
 LLC; IBP Asset, LLC d/b/a Blue Ridge)
 Building Products; JLS Masonry, Inc.; Kings)
 Landscaping, LLC; Landshapers, LLC; Lade-)
 Danlar, Inc.; Lansing Building Products, Inc;)
 Long Heating & Air Conditioning, Inc.; L&M)
 Electric, Inc.; Manale Landscaping, LLC; MJ)

THIRD-PARTY DEFENDANT
M&L REYNA CONSTRUCTION, LLC'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT

EXHIBIT

C

Cowboys, LLC; M&L General Construction,)
 LLC a/k/a M&L General Construction, Inc.;)
 M&L Reyna Construction, LLC; M&M)
 Foundations, LLC; Nazareth Builders, LLC;)
 NB Contractors, LLC; P&T Construction, Inc.)
 a/k/a P&T Construction, Inc; P&L Enterprises,)
 Probuild Co., LLC a/k/a Probuild Holdings,)
 Inc.; Rite Rug Co.; Rodney Howard Grading,)
 Inc. a/k/a Rodney Howard Grading Co;)
 Sandlapper Concrete, LLC; Sodfather, Inc.;)
 Landscape Contractors; Stock Building)
 Supply, LLC; Topbuild Home Services, Inc.)
 a/k/a Gale Contractors Service; Dupree)
 Plumbing Co., Inc.; Tucker Materials, Inc.)
 a/k/a Gypsum; UTM Enterprises, Inc; Willow)
 Tree Landscaping, Inc.; and Silver Line)
 Building Products Corp.,)
 Third-Party Defendants.)

Builders FirstSource-Southeast Group, LLC,)
 Fourth-Party Plaintiff,)
 v.)
 Harrelson Painting, LLC; Aaron D. Peris,)
 Therma-True, LTD; and Huttig Building)
 Products,)
 Fourth-Party Defendants.)

Long Heating & Air Conditioning, Inc.,)
 Fourth-Party Plaintiff,)
 v.)
 Zenon Gutierrez Antunez; Jesus Perez; Fredy)
 Perez and Venustiano Perez, individually and)
 d/b/a Fredy's HVAC; Nicholas Soto a/k/a)
 Nicolas Soto, individually and d/b/a Soto)
 HVAC; Jason Weaver, individually and d/b/a)
 Tiger Mechanical; Panuncio Victoraiano)
 Martinez, individually and d/b/a Victoriano)
 HVAC, LLC,)
 Fourth-Party Defendants.)

Alpha Omega Construction Group, Inc.,)
 Fourth-Party Plaintiff,)
 v.)

Denny Concepcion; Jimenez Contractors,)
 LLC; Jimenez Contractors, Inc.; Brothers)
 Contractors, Inc.; Brothers Contractors, LLC;)
 SL Commercial Construction, Inc.; JJS)
 Commercial Construction, Inc; Santos Metal)
 Works, LLC; Safeway Roofing; Maila Lopez)
 d/b/a Safeway Roofing; Jose Hernandez a/k/a)
 Jose Aristides Hernandez; GSF Renovations,)
 LLC; Edwin Barahona a/k/a Edwin Edgardo)
 Barahona; Henry Construction, LLC; Latinos)
 Roofing, LLC and Nataren Contractors, LLC,)

Fourth-Party Defendants.)

Rite Rug Company, Inc. a/k/a Rite Rug Co.,)
 Fourth-Party Plaintiff,)

v.)

Scorpio Tile & Glassworks; Richie Michael)
 Scruggs; Maricruz Isabell Toor; Carols)
 Humberto Landaverry d/b/a Landaverry)
 Flooring; Lila Flooring, LLC, Hector's)
 Flooring, Inc.; Maria R. Ascension Granados;)
 Javier Flores-Martin; Amanda Padilla; Areli)
 Lara Garcia; Martin Alcanter; Mark Allen)
 Cunningham; Victoria Hildago-Rodriguez;)
 Ngan My Giang d/b/a Landaverry Flooring;)
 BEI, LLC; Saguay Flooring, LLC; Flores)
 Flooring, LLC; Flores Flooring, Inc.; O&E)
 Flooring, LLC; Rafael Rodriguez Ontiveros;)
 Clear Lake Construction; Cesar Avalos;)
 Feliciano Cruz Martinez d/b/a Cruz Flooring;)
 LLC; KW Hardwood Floors, Inc.; Caliber)
 Contractors, LLC; Upstate Custom Tile, LLC,)
 Jamie Chastain d/b/a The App Phase Group;)
 Alexander G. Koenig; Luis Solis Machado;)
 J. Rene Padilla d/b/a Padilla Flooring, LLC;)
 Dias Flooring, LLC; Rene Galarza; Jose)
 Javier Marin; and Ramon Rodriguez d/b/a)
 King Empire,)

Fourth-Party Defendants.)

Atlanta Floor Designs Center,)
 Fourth-Party Plaintiff,)

v.)

AJ&I Flooring, LLC; Antonio's Flooring,)
 LLC; Arturo Proa; Bacilio Cisnero Nunez;)
 Baltazar Duran Garcia; Bryan's Flooring)
 Services, LLC; Edgar Rodriguez; Enriquez)
 Floors, LLC; Francisco De Jesus Duarte;)
 Garcia's Carpet, Inc.; Hector Flooring, Inc.;)
 Jose de Jesus Gomez; Jose Pedroza-Martinez,))
 Carolina Hernandez d/b/a Josue's Flooring,)
 LLC; NM Alex Carpet, Inc.; Rogelio Ortiz)
 Pino; Vasquez Flooring, Inc.; and Vinny's)
 Perfection Flooring, LLC,)
 Fourth-Party Defendants.)

M&L Reyna Construction, LLC,)
 Fourth-Party Plaintiff,)

v.)

Jesus Jimenez and Jesus Robles Montes a/k/a)
 Robles Construction; Castillo's Concrete,)
 LLC,)
 Fourth-Party Defendants.)

Nicholas Soto a/k/a Nicolas Soto, individually)
 and d/b/a Soto HVAC,)
 Fifth-Party Plaintiff,)

v.)

Toribio Islas and Alejandro Soto,)
 Fifth-Party Defendants.)

Third-Party Defendant M&L Reyna Construction, LLC (hereinafter, "M&L Reyna"), by and through its undersigned counsel, hereby submits this memorandum in support of its motion for summary judgment seeking an Order dismissing the claims of Third-Party Plaintiff D.R. Horton, Inc. (hereinafter, "DR Horton") against M&L Reyna pursuant to Rule 56, SCRCP.

PROCEDURAL BACKGROUND

The instant matter is a construction-defect lawsuit involving Rose Hill, a single-family residential subdivision developed and constructed by DR Horton in Easley, South Carolina from 2011 - 2017. The lawsuit was filed on September 25, 2019, by homeowner Natalie Zitek, on behalf

of herself and a class made up of owners of the 221 residences built by DR Horton at Rose Hill. The plaintiff-class alleges various damages arising out of multiple alleged deficiencies in the original construction by DR Horton. This Court certified the plaintiff-class as to DR Horton on January 27, 2021.

Thereafter, DR Horton brought third-party claims against various subcontractors, including M&L Reyna, by way an Amended Answer and Third-Party Complaint filed March 11, 2021, in which DR Horton asserted causes of action against M&L Reyna for (1) breach of contract; (2) contractual indemnity; (3) equitable indemnity; (4) negligence/gross negligence; and (5) breach of warranty. M&L Reyna filed a timely Answer denying all allegations and claims against it by DR Horton.

SUMMARY OF RELEVANT FACTS

M&L Reyna was a masonry subcontractor of DR Horton for the installation of certain brick and stone veneer, concrete slabs, and flatwork during the original construction of Rose Hill. The M&L Reyna Construction, LLC is a limited liability company with Mauricio Reyna (“Mr. Reyna”) as its sole member. Mr. Reyna was born and raised in Mexico, where he attended school until age 11 and learned to read and write in his native language of Spanish. (See Deposition Transcript of Mauricio Reyna dated February 23, 2023, attached hereto as **EXHIBIT B**, at pp. 14-19 generally.) Mr. Reyna moved to the United States at age 15 and started working as a farm hand in California. He did not attend school or pursue any further education otherwise in the United States. (Reyna Depo. pp.14:7 – 15:18, Exhibit B). Mr. Reyna cannot read or write English. (Reyna Depo. p. 54:12-15, Exhibit B). He relies on his wife or daughter for Spanish-language translation of any written or spoken English. (Reyna Depo. pp. 131:16-25, Exhibit B).

An executed Independent Contractor Agreement between M&L Reyna and DR Horton dated October 8, 2015 (hereafter, the “Contract”) was produced by DR Horton during the course

of the parties' discovery. This Contract, attached as **EXHIBIT A**, is the only purported agreement found to date appearing to govern the work by M&L Reyna at Rose Hill.

Mr. Reyna testified as to his recollection of how the alleged Contract between the parties came to be back in October 2015. Specifically, Mr. Reyna recalled meeting with a DR Horton representative, who presented the Contract – a standard-form document entitled “South Carolina Independent Contractor Agreement” featuring the DR Horton logo at the top -- and instructed Mr. Reyna to sign and complete the signature block. (Reyna Depo. pp. 169, Exhibit B). The 7-page document was written entirely in English. Mr. Reyna testified he was given 2-3 minutes to review the Contract, with no offer or option given by DR Horton to have the document translated into his native language (Reyna Depo. pp. 168, 178-179, Exhibit B), or any opportunity otherwise for further consideration before signing on to the agreement (Reyna Depo. pp 173, Exhibit B). Mr. Reyna admitted that he signed the Contract without a substantive understanding of its contents - beyond the basic premise that his signature was required in order for M&L Reyna to receive payment for its completed work and any future work on any of the five residential developments DR Horton was building in the Greenville area at that time, including Rose Hill. (Reyna Depo. pp. 29:5-18, 168-79, Exhibit B). In fact, DR Horton was M&L Reyna's only client at that time, and further, it was DR Horton that had transferred Mr. Reyna from Charlotte, NC to Greenville, SC specifically to do masonry work on its newer projects going on in that area at the time. (Reyna Depo. pp. 25:5-12, 26:17-27:15, 29:5 – 30:6, Exhibit B). Accordingly, Mr. Reyna believed he had no choice but to sign the document presented by DR Horton if he wanted to earn a living. (Reyna Depo. p. 169, Exhibit B).

Tucked away on page 4 of the Contract document is a section titled “Contractor's Indemnity,” (See Exhibit A, § 10.) In one long, continuous paragraph, subsection 1 of the

indemnity provision purports to require M&L Reyna as Contractor to defend and indemnify DR Horton as Owner, as follows:

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS . . . FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS, OR OTHER LITIGATION, ACTIONS, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THID PARTY . . . ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH . . . ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS, OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. . . . NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE . . .

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

(See Exhibit A at p.4, § 10.1.)

LEGAL STANDARD

Summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC, No. 2016-001789, 2020 WL 2182252, at *2 (S.C. Ct. App. May 6, 2020). Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(c), SCRCP; SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999).

ARGUMENTS

I. DR HORTON HAS NO COGNIZABLE CLAIM FOR CONTRACTUAL INDEMNITY AGAINST M&L REYNA.

DR Horton's claims for contractual indemnity are barred by the Anti-Indemnity Statute, S.C. Code § 32-2-10 et seq. and D.R. Horton, Inc. v. Builders FirstSource-Southeast Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). Additionally, DR Horton's contractual indemnity provision violates the requirements set forth in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

a. DR HORTON'S CONTRACTUAL INDEMNITY PROVISIONS ARE INVALID, VIOLATE PUBLIC POLICY, AND ARE THUS UNENFORCEABLE.

DR Horton's contractual indemnity claim is without merit because the Contract's indemnification language is contrary to South Carolina law and public policy. Our Anti-Indemnity

Statute clearly addresses the issue of impermissible indemnification terms and obligations in construction contracts:

[A] promise or agreement in connection with the . . . construction . . . of a building . . . purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable.

S.C. Code Ann. § 32-2-10.

Our Court of Appeals previously addressed the validity of a similar indemnity provision set forth in a standard-form agreement between DR Horton and a subcontractor in D.R. Horton, Inc. v. Builders FirstSource-Southeast Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). In that case, the court held that a construction contract attempting to require a subcontractor to indemnify a general contractor for the general contractor's *own* negligence - even if expressed "in clear and unequivocal terms" - is illegal and unenforceable. Id. at 152. (emphasis added). The court explained that while the subcontract agreement can provide for the subcontractor to indemnify DR Horton for damages caused by the subcontractor itself (and/or its downstream subcontractors), such a provision requiring the subcontractor to indemnify DR Horton for damages caused by DR Horton's own negligence is void as against public policy. Id. Accordingly, the court ruled that the indemnification clause in the subcontract agreement was fatal to DR Horton's indemnification claims against the subcontractor. Id. at 153.

Here, DR Horton has produced a written contract between M&L Reyna and DR Horton ("Contract") attached hereto and incorporated by reference as **Exhibit A**. The Contract contains the following indemnification language in pertinent part (abridged for clarity):

10.1 GENERALLY. **TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES,**

AFFILIATES, SUCCESSORS AND ASSIGNS . . . FREE AND HARMLESS FROM AND AGAINST **ANY AND ALL CLAIMS, DEMANDS, LAWSUITS, OR OTHER LITIGATION, ACTIONS, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER** (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THID PARTY . . . ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH . . . ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS, OR SUBCONTRACTORS, **REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. . .** NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE . . .

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. **ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.**

See **Exhibit A** at Page 4, § 10. Contractor's Indemnity, ¶ 10.1 & ¶ 10.2 (emphasis added).

DR Horton is attempting to require M&L Reyna to indemnify DR Horton for damages *caused by DR Horton* and not M&L Reyna. DR Horton purports to limit M&L Reyna's indemnity obligations with the following language in ¶ 10.1 of the Contract:

. . . NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING

FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR
OMISSION OF INDEMNITEE . . .

However, this language does nothing to limit or modify the broad obligations set forth in ¶ 10.2. Paragraph 10.2 completely circumvents any purported limitation imposed by the language in ¶ 10.1 and would, as written, allow DR Horton to essentially defend any claim, regardless of whether it arises from the sole negligence or intentional acts of DR Horton, allege it relates to the work of M&L Reyna, and then in turn allow DR Horton to seek attorney's fees or "all expenditures" from M&L Reyna regardless of who is at fault. This language in paragraph 10.2 as set forth above is illegal and as a result the provision fails as a matter of law.

The Contract's language aims to achieve the same goal as the subcontract in D.R. Horton, Inc. v. Builders FirstSource, i.e., by requiring DR Horton's subcontractor to indemnify DR Horton for damages caused by DR Horton. DR Horton is purporting to require M&L Reyna to indemnify DR Horton for its own negligence in violation of S.C. Code Ann. § 32-2-12. Therefore, the Contract's indemnity provisions are unenforceable, and M&L Reyna is entitled to summary judgment as to DR Horton's claim for contractual indemnity.

More recently, in Shafi v. D.R. Horton, C.A. No. 2018-CP-07-00911, Beaufort County Court of Common Pleas ("Shafi"), Judge Price issued a trial order from the bench on November 16, 2021, p. 52 ("Price Order"), attached hereto as **Exhibit C**. In Shafi, DR Horton contracted with its subcontractors, as in this case, and asserted claims for contractual indemnity against its subcontractors. Judge Price ruled that the contract between DR Horton and its subcontractors was an adhesion contract, a take-it-or-leave it contract. Judge Price further ruled "it's similar and likened to a non-compete in the sense that if the opposing party doesn't have a whole of negotiating power, then it can be deemed unenforceable and violates public policy." (Judge Price Order, **Exhibit C**). Judge Price granted all three subcontractors' motions for summary judgment against

DR Horton on contractual indemnity. (Id., **Exhibit C**). M&L Reyna's alleged contract with DR Horton in this case is almost identical to the contracts between DR Horton and its subcontractors in Shafi. (See Hutton Landscapes Inc's Contract with DR Horton, attached hereto as **Exhibit D**). Judge Price found as follows in Shafi:

"I will find that the contract indemnification and Subsection 10 is unenforceable. I think it's an adhesion contract. I think it's a take-it-or-leave-it. I think its similar and likened to a non-compete in the sense that if the opposing party doesn't have a whole lot of negotiating power, then it can be deemed unenforceable. I don't think it's enforceable. I think it violates public policy. So I am going to grant the motion[.]"

(Judge Price Order, p. 52, **Exhibit C**). Accordingly, in this case, because M&L Reyna lacked any negotiating power, the Contract's indemnity provisions should be deemed unenforceable, in violation of public policy, and therefore M&L Reyna is entitled to summary judgment as to DR Horton's claim for contractual indemnity. Further, DR Horton should be collaterally estopped from seeking the enforcement of this contractual indemnity provision as the issue has been previously litigated and decided in a final order. To quote from the attached orders finding similar contractual indemnity clauses enforceable in other matters, the contract terms were "actually litigated, directly determined the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply." (See Order of the Honorable Jennifer McCoy, filed July 7, 2021, in the Charleston County Court of Common Pleas, C.A. No., 2016-CP-10-03783, The Retreat at Charleston Nat'l Country HOA et al v. Winston Carlyle Charleston Nat'l LLC et al ("The Retreat Order"), p. 7, **Exhibit H**).

b. DR HORTON'S CONTRACTUAL INDEMNITY PROVISIONS ARE NOT CLEAR AND UNEQUIVOCAL.

In South Carolina, contracts purporting to relieve an indemnitee from the consequences of its own negligence must be stated in "clear and unequivocal terms." Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166,

171 (Ct. App. 2018) (citing Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)) (“Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.”). The Court of Appeals in Federal Pacific Electric v. Carolina Prod. Enterprises addressed the issue of contracts attempting to seek indemnification of damages arising from the indemnitee’s concurrent negligence:

A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee’s own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed.

Fed. Pac. Elec., 298 S.C. at 26 (internal citations omitted). “[B]road, comprehensive, and general terms” are inadequate to show the parties intended the indemnitor to indemnify the indemnitee for the indemnitee’s own concurrent negligence. See Concord & Cumberland, 424 S.C. at 656–57, 819 S.E.2d at 176. The Court of Appeals in Concord & Cumberland explains that in Federal Pacific, the same Court found the use of general terms such as ‘indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the leased premises during the term of the lease’ did not disclose an intention to indemnify for consequences arising from the indemnitee’s own negligence.” Id. at 651, 819 S.E.2d at 173 (citing Fed. Pac. Elec. 298 S.C. at 29, 378 S.E.2d at 58-59) (brackets removed). “Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in the indemnity clause that **clearly shows** the parties intent to absolve the indemnitee of the consequences of its own concurrent negligent.” Concord & Cumberland, 424 S.C. at 657, 819 S.E.2d at 176 (emphasis added). Our Court of Appeals noted the challenges that this standard presents to attorneys as quoted by the Texas Supreme Court:

As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, “yet be just ambiguous enough to conceal that intent from the indemnitor.” Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707-08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties’ intent was camouflaged or “clear and unequivocal.”

Concord & Cumberland, 424 S.C. at 658 n.6, 819 S.E.2d at 176 (Ct. App. 2018).

This is precisely what DR Horton has attempted to do here. DR Horton has called for the subcontractor to indemnify DR Horton for everything, with an “exception” for the sole negligence of DR Horton in ¶ 10.1 set forth above. However, in the very next paragraph, DR Horton requires the subcontractor to “defend” (a.k.a. indemnify DR Horton for its legal fees) without any exception. This, by definition, is neither clear nor unequivocal. In fact, our Court of Appeals in Concord & Cumberland noted that **none** of South Carolina appellate courts have **ever** upheld an indemnity clause as “clear and unequivocal.” Concord & Cumberland, 424 S.C. at 658 n.6, 819 S.E.2d at 176 (emphasis added). DR Horton’s provisions are subject to multiple interpretations by their conflicting terms. Thus, DR Horton’s claims for Contractual Indemnity fail as a matter of law.

In this case, the Contract’s indemnity language does not meet the clear and unequivocal standard set forth in Concord & Cumberland. The provisions attempt to require M&L Reyna to indemnify DR Horton for its own negligence. Like the contract in Contract & Cumberland, ¶ 10.1 of M&L Reyna’s Contract contains general, broad and comprehensive language that purports to require M&L Reyna to indemnify DR Horton for “**ANY AND ALL CLAIMS, DEMANDS, LAWSUITS, OR OTHER LITIGATION, ACTIONS, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER . . .**” (emphases added) arising out of the work performed by M&L Reyna. **Exhibit A** at p. 4, ¶ 10.1, “Contractor’s Indemnity, Generally.” Likewise, the subsequent

language of the Contract's same indemnity provision "**REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK.**" is substantially the same as the that at issue in Concord & Cumberland." Id. This language does not show a clear and unequivocal intent by the parties for M&L Reyna to indemnify DR Horton for DR Horton's own concurrent negligence.

Testimony by DR Horton's 30(b)(6) Marcus Cannon as well as the DR Horton representative and 30(b)(6) designee, Shawn Kruglewicz who signed the alleged Contract between M&L Reyna and DR Horton further substantiate the conclusion that the language of the alleged Contract does not show a clear and unequivocal intent by the parties for M&L Reyna to indemnify DR Horton for DR Horton's own concurrent negligence. Marcus Cannon was selected as a 30(b)(6) designee of DR Horton to testify on behalf of DR Horton and gave the following testimony:

Q. Have you read all of section 10.1?

A. I have.

Q. Did you read section 10.2?

A. I did not. Okay.

Q. All right. Does DR Horton know or can DR Horton tell me what the difference between this indemnity provision is and the one that we already looked at in Section 6?

A. I cannot.

Q. Does DR Horton know what this indemnity provision applies to?

A. I do not.

Q. Does DR Horton know if this indemnity provision applies to this litigation?

A. I do not know.

Q. On behalf of DR Horton, can you explain to me what this indemnity provision is requiring Manale to do?

A. I have so many documents I did not fully read this and get any kind of backup so that I can explain this, so I cannot today.

Q. I mean you've read the whole thing in this deposition, right?

A. I have, yes. I have.

Q. And having read the entire provision, DR Horton cannot explain to me what it requires Manale to do.

A. Not specifically, no.

(Cannon Depo. pp. 263:13 – 264:15, attached hereto as **Exhibit E**). Similar to M&L Reyna, Manale Landscaping, LLC was also hired by DR Horton as a subcontractor to perform work at the Rose Hill project. The alleged Contract between M&L Reyna and DR Horton is substantially similar to Manale's contract with DR Horton, attached hereto as **Exhibit F**. DR Horton sued M&L Reyna for contractual indemnity and yet the binding 30(b)(6) Testimony of DR Horton is that it does not know which indemnity provision applies to this litigation or what the indemnity provision obligates the subcontractors to do. Additionally, Mr. Reyna testified multiple times "I don't know what it means" when asked questions regarding terms of the alleged Contract, including the indemnity provisions. (Reyna Depo. pp. 169:6-12; 172:11 – 173:2, Exhibit B). This testimony clearly shows Mr. Reyna's lack of understanding of the indemnity provisions of the alleged Contract.

Second, DR Horton's 30(b)(6) designee and representative who signed the alleged Contract between M&L Reyna and DR Horton testified that his signature on the Contract is merely his authority on behalf of DR Horton to sign a contract of which he was not involved in any of the negotiations whatsoever with M&L Reyna and its scope of work as it relates to the Rose Hill project. (Kruglewicz Depo. pp. 291:3-19, attached hereto as **Exhibit G**) ("I don't recall being a part of the negotiations. So based on my memory, when I saw that ICA, I would come to the conclusion that I signed it based on my signing rights and my authority."). As such, there is simply no way that this can constitute a meeting of the minds, much less the strict construction requirements of Concord & Cumberland.

As South Carolina precedent requires the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified

for its own negligence, the Court should find the specific language from the purported Contract is “confusing, conflicting, and neither clear nor unequivocal” just as Judge Newman in Subsection C of the attached Order in BFS v. MI Windows. (See Amended Order of the Honorable Clifton Newman, filed February 3, 2021, in the Berkeley County Court of Common Pleas, C.A. No., 2018-CP-08-02547, BFS v. MI Windows & Doors et al (“The Newman Order”), **Exhibit H**).

Accordingly, the indemnification provision in M&L Reyna’s alleged Contract does not clearly and unequivocally mandate M&L Reyna to indemnify DR Horton for its own negligence. Therefore, because the Contract fails to express the alleged intent to require M&L Reyna to indemnify DR Horton for DR Horton’s own and/or concurrent negligence in clear and unequivocal terms, DR Horton’s claims for contractual indemnity must fail as a matter of law.

II. THE CONTRACT BETWEEN DR HORTON AND M&L REYNA IS UNENFORCEABLE AS A MATTER OF LAW.

DR Horton third-party claims against M&L Reyna are based in primary part on purported obligations expressly set forth in the parties’ Contract dated October 21, 2015. However, a contract is not enforceable under South Carolina law “if a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made.” S.C. Code Ann. § 36-2-302(1). To remedy any such defect, the law provides that the court in its discretion “may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.” S.C. Code Ann. § 36-2-302(1).

The doctrine of unconscionability as applied to contracts is intended to protect against unfair bargains and unfair bargaining practices. See 17A Am.Jur.2d Contracts § 271. Unconscionability is defined as “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person

would make them and no fair and honest person would accept them.” Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). This definition serves as the basis of a two-prong test used by South Carolina courts in an unconscionability analysis, see Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 49, 644 S.E.2d 664, 669 (2007), generally applicable to all terms within a contract. Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 611, 879 S.E.2d 746, 754 (2022).

The Contract between DR Horton and M&L Reyna is an adhesion contract, defined as a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. Lackey v. Green Tree Finance Corp., 498 S.E.2d 898 (Ct. App. 1998). While adhesion contracts are not per se unconscionable under South Carolina law, Fanning v. Fritz's Pontiac- Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996), one party’s absence of meaningful choice is nevertheless relevant to the court’s inquiry because it speaks to the fundamental unfairness of the bargaining process. Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir. 1989).

The court’s consideration of whether a contract was “tainted by an absence of meaningful choice” in this regard depends on all the facts and circumstances of the case. S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 398 S.C. 604,614, 730 S.E.2d 862, 867 (2012). To this end, our courts take into account the nature of the injuries suffered by the party; whether the party is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. See Simpson, 373 S.C. at 25, 644 S.E.2d at 669. In their fact-specific analysis, our courts have also acknowledged that when the contract at issue deals with a “necessity,” the disparity in bargaining positions of the parties is “subject to considerable skepticism upon review.” Id

Here, it is undisputed that Mr. Reyna received a limited formal education in Mexico and he is unable to fluently speak or read English. Mr. Reyna testified he relies primarily on his wife or daughter for assistance in translating the English language into his native tongue. (See Reyna Depo. pp. 54 and 131, Exhibit B.) This was plainly evident even at his deposition in this case, where the transcript is replete with examples of Mr. Reyna requesting that questions be repeated, re-stated, and/or seeking further explanation. (Reyna Depo. pp. 168-179, Exhibit B). Even in matters presented in his native Spanish, Mr. Reyna did not attend formal school past age 11 and cannot be considered nearly as sophisticated as the experienced corporate minds and lawyers employed by DR Horton self-proclaimed to be “America’s Builder” and “America’s #1 Homebuilder” to draft the Contract. (See D.R. Horton, www.drhorton.com (2023)).

Understanding the well-established rule of contract law that a person who signs a contract or other written agreement cannot avoid the effect of the document by claiming he did not read it, our courts nevertheless have long-recognized an exception to the rule in circumstances under which one party is found to be “ignorant and unwary.” Regions Bank v. Schmauch, 354 S.C. 648, 662–63, 582 S.E.2d 432, 440 (Ct. App. 2003) (noting that where “the party is ignorant and unwary, his failure to read the document may be excused”). Naturally, our courts very strictly construe this exception, taking into account an individual’s education, business experience and intelligence in determining whether a party may be classified as “ignorant and unwary” to the point of invoking this exception to the general rule. Id. To this end, we respectfully argue that an uneducated, self-employed laborer like Mr. Reyna, entering into a contractual relationship with a national homebuilder, that was his only client and source of income at the time, is precisely the type of “ignorant and unwary” party this exception was created to protect.

For these reasons, the adhesion contract between M&L Reyna and DR Horton at issue in this case embodies the very notion of unconscionability at the heart of § 36-2-302. Moreover, under the circumstances specific to the bargaining process between Mr. Reyna and DR Horton, the unconscionability so pervades the Contract's material terms that this Court should find the entire contract void and unenforceable as a matter of law. Accordingly, DR Horton's claims against M&L Reyna founded on any purported contractual obligation for indemnity or otherwise must be dismissed.

III. DR HORTON'S CLAIMS FOR NEGLIGENCE, BREACH OF EXPRESS AND IMPLIED WARRANTIES, AND BREACH OF CONTRACT ARE ALL MERE CLAIMS FOR INDEMNITY IN DISGUISE AND THEREFORE SHOULD BE DISMISSED.

DR Horton has asserted third-party claims for negligence, beach of warranties, and breach of contract against M&L Reyna. The Court of Appeals of South Carolina held that where a general contractor's claims arise only when it is faced with potential liability for a Plaintiff's damages and has incurred fees and costs defending against the Plaintiff's lawsuit, the general contractor's claims for negligence, breach of contract, and breach of warranty are nothing more than claims for equitable indemnity and should be dismissed. See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (upholding dismissal of general contractor's negligence claims as duplicative of its indemnity claim) and Stoneledge at Lake Keowee Owners' Ass'n. Inc. v. Builders First Source-SE Grp., LLC, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (upholding dismissal of general contractor's breach of warranty and breach of contract claims as duplicative of its indemnity claim). The Court of Appeals recognized that contractor claims for negligence, breach of contract, and breach of warranty against its subcontractors arising out of work performed under the general contractor and resulting in alleged

damages to the contractor derivative of an action against it by the owner of the property are not independent causes of action from a contractor's indemnity claim. See id.

Accordingly, South Carolina courts have followed suit since this ruling, granting subcontractor defendants' "Stoneledge" motions against contractors that have asserted claims for negligence, breach of contract, and breach of warranty against its downstream subcontractors. For example, in **five** recently decided cases – Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., C.A. No. 2018-CP-08-02547, Berkeley County Court of Common Pleas (BFS v. MI Windows"); Pavic v. Carolina Cottage Homes, LLC, et al., C.A. No. 2019-CP-10-00772, Charleston County Court of Common Pleas ("Pavic"); The Retreat at Charleston Nat'l County Club HOA v. Winston Carlyle Charleston Nat'l, LLC, C.A. No. 2016-CP-10-03783, Charleston County of Common Pleas ("Retreat"); Six Fifty-Six Owners' Assoc., Inc. v. Windsor South, LLC, C.A. No. 2016-CP-10-3455, Charleston County Court of Common Pleas ("Six Fifty-Six"); and Wedgewood Condominium Assoc. v. Centex Homes, C.A. No. 2018-CP-26-00307, Horry County of Common Pleas ("Wedgewood") – these courts evaluated similar summary judgment motions brought by BFS's subcontractors regarding cross-claims asserted by BFS nearly identical to those asserted by DR Horton in this case. (Orders granting Stoneledge and Concord and Cumberland Motions, attached hereto as **Exhibit H**). In Six Fifty-Six, Judge Young ruled that not only were BFS's cross-claims for contractual indemnity barred by the Newman Order in BFS v. MI Windows, but also BFS's claim for contractual indemnity was based on contractual provisions that are "neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law." (Order of the Honorable Roger M. Young, Sr., filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six, p. 3, **Exhibit H**). Similarly, in Pavic, Judge McCoy ruled that BFS's master subcontractor agreement

is an adhesion contract; that BFS's master subcontractor agreement contains multiple indemnity provisions that are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007); and that the indemnification provisions of Section 5 in BFS's contract are unclear, conflict with each other, and the provisions in Section 3 do not meet the clear and unequivocal standard of Concord & Cumberland and violate South Carolina Public Policy and S.C. Code § 32-2-10. (Order of the Honorable Jennifer B. McCoy, filed January 25, 2021, in the Charleston Court of Common Pleas, in the case of Pavic, p. 4-8, **Exhibit H**).

In this case, DR Horton alleges M&L Reyna was a subcontractor to DR Horton on the Rose Hill Project. The subject of Plaintiff's lawsuit arises from alleged construction deficiencies associated with the homes built by DR Horton at Rose Hill. The third-party claims of DR Horton against M&L Reyna are all solely conditioned on its potential liability for damages to Plaintiff, including potential attorneys' fees and litigation and investigation costs due to the alleged construction deficiencies associated with the subcontractors' scope of work performed at Rose Hill, making them disguised claims for indemnity. (See Second Amended Answer and Third-Party Complaint of Defendant DR Horton, filed February 23, 2022.) Accordingly, DR Horton's claims for negligence, breach of express and implied warranties, and breach of contract are all mere claims for indemnity and therefore should be dismissed pursuant to Stoneledge.

IV. DR HORTON HAS UNCLEAN HANDS AND THEREFORE CANNOT RECOVER IN EQUITY.

"The doctrine of unclean hands precludes a plaintiff from recovering in *equity* if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." Inglese v. Beal, 403 S.C. 290, 307, 742 S.E.2d 687, 696 (Ct. App. 2013) (emphasis added). The principle of equitable indemnification has long been recognized in South Carolina. Fountain v. Fred's, Inc., 436 S.C. 40, 53, 871 S.E.2d 166, 173 (2022) (citing Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999)). Equitable indemnity arises

when the first party is at fault, but the second party is not. Vermeer Carolina's, 336 S.C. at 63, 518 S.E.2d at 307. "A party is **not entitled** to equitable indemnification **if any 'negligence of his own has joined in causing the injury.'**" Fountain, 436 S.C. at 47, 871 S.E.2d at 170 (emphasis added). Moreover, there is generally no right to indemnity between joint tortfeasors in South Carolina. Vermeer Carolina's, 336 S.C. at 64, 518 S.E.2d at 307. 'Joint tortfeasors' has been defined as "two or more persons jointly or severally liable in tort for the same injury to person or property." Id.

The party seeking equitable indemnification must show "(1) the indemnity defendant [] is at fault in causing the damages of the third party []; (2) the plaintiff has **no fault** for those damages; and (3) the plaintiff incurred expenses that were necessary to protect his interest in defending the third party's claim." Fountain, 436 S.C. at 53, 871 S.E.2d at 173 (2022) (emphasis added) (citing Inglese v. Beal, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013)). In Fountain v. Fred's, Inc., our state's Supreme Court found an equitable indemnity claimant was "required to demonstrate that they had not breached any duty they owed" to the third-party. Fountain, 436 S.C. at 49, 871 S.E.2d at 171. "The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault[.]" Vermeer Carolina's, 336 S.C. at 63, 518 S.E.2d at 307. See also Fowler v. Hunter, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010) ("A plaintiff asserting an equitable indemnification cause of action may recover damages if he proves: (1) the indemnitor was liable for causing the plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor.").

Here, DR Horton cannot establish that it is without fault in causing the damages alleged in this lawsuit. DR Horton was the developer/owner, designer, and general contractor for the

respective homes. DR Horton was sued by Plaintiff Zitek for defective construction, and design, and then this Court certified a class. The Class Certification Order clearly states that a basis for certification was that multiple claims of the class “center on Horton’s conduct.” (Class Certification Order, January 27, 2021, p. 1, attached hereto as **Exhibit I**). This Court has found as a matter of law that it is the conduct of DR Horton that subjected it to the liability of the 221 homes including that of Plaintiff Zitek.

Additionally, DR Horton was responsible for the work performed by M&L Reyna on the Rose Hill project. (Deposition Testimony of Derek Hodgin (June 2, 2023), pp. 206:12-25 – 207:12-25, attached hereto as **Exhibit J**). M&L Reyna was hired by DR Horton to perform its scope of work at Rose Hill, under the supervision of DR Horton. DR Horton, by way of its managers and superintendents, bore responsibility, oversight, supervision, and coordination of construction as owner, designer, developer, and general contractor of Rose Hill on all homes on which M&L Reyna is alleged to have performed work. (Hodgin Depo. pp. 207:12-25 – 208:1-9, Exhibit J). DR Horton admitted it did manage and supervise its subcontractors in its Responses to M&L Reyna’s Requests for Admission, attached hereto as **Exhibit K**. (See also Reyna Depo. 66:20-25 – 67:1-16, attached hereto as **Exhibit L**). As general contractor, DR Horton’s duty is to observe the work and accept it before inviting the next trade to perform its scope if the work is satisfactory according to the plans, which is exactly what DR Horton did here. (Hodgin Depo pp. 207:12-25 – 208:1-9, **Exhibit J**). Moreover, as general contractor, DR Horton determined that the homes on which M&L Reyna performed its work were built according to DR Horton’s plans and specifications and in compliance with the applicable building codes and industry standards, and DR Horton facilitated the sale of those homes, which conveys the warranty of habitability. (See Zitek Home Purchase Agreement, attached here to as **Exhibit O**). Additionally, a number of improper conditions as it

relates to stone and brick installation observed and documented by Plaintiff's expert, Rhett Whitlock, at Rose Hill were installed in accordance with the plans published by DR Horton. (Hodgin Depo, pp. 236:20-24; 237:1-4; 237:14-22; 238:5-25, Exhibit J).

Accordingly, if it is determined that M&L Reyna's scope of work was improper and contributed to Plaintiffs' damages, then DR Horton, as the owner, designer, developer, general contractor, and manager and supervisor of the subcontractors and subcontractors' scope of work, would at least share responsibility for those damages in addition to its sole responsibility for the design and providing of certain allegedly inappropriate materials for construction. As such, DR Horton and M&L Reyna would at best be considered joint tortfeasors, and under South Carolina law, a joint tortfeasor cannot maintain an action for equitable indemnity.¹ Additionally, based on DR Horton's role as the owner, designer, developer, and general contractor, DR Horton maintains legal and statutory responsibility for its involvement in the Rose Hill Project including its overall supervision and management of its subcontractors. Thus, DR Horton bears some sole liability to at least some extent in this action if and to the extent any liability exists as to any party involved

¹ DR Horton and its expert Steve Moore of ABS have both admitted to various code violations, which exist with DR Hortons plans and specifications provided to its subcontractors. See e.g., Excerpts from DR Horton 30(b)(6) Deposition Transcripts, attached hereto as **Exhibit M**: If the code says something is a requirement, then it must be followed. (Martin Depo. pp. 133:11-16-20); If there is no expansion joint between the wood-supported brick and the ground-supporting brick, that would be a code violation. (Martin Depo. pp. 156:13-22); DR Horton does not update their scopes of work when the code changes. (Kruglewicz Depo. pp. 72:21-73:2; 73:4-11); Everyone who is building in Anderson County must comply with the building code. (Young Depo. pp. 87:18-24; 88:1).

See also, Excerpts from DR Horton's expert Steve Moore Deposition Transcripts, attached hereto as **Exhibit N**, discussing the building code requiring a joint or separation between the foundation-supported brick and the wood-framed supported brick: "I guess in the strictest sense, they are a building code violation." (Moore Depo. Vol. I. pp. 67:20-25 to 68:1-19); Stone veneer sitting on the apron above the roof is a building code violation (Moore Depo. Vol. I. pp. 189:23-25 to 190:1-8); Stone applied to brick is a code violation. (Moore Depo. pp. 924:13-25; 934:8-25 – 935:1-4.

To the extent code violations exist relative to the masonry, they exist within DR Horton plans and specifications, as DR Horton plans failed to adequately instruct and guide the masonry subcontractors as it relates to details associated with the requirement of an expansion joint between the wood-supported brick and the ground-supporting brick in addition to failing to adequately distinguish between shelf angles and lintels. Additionally, DR Horton plans failed to adequately provide instruction as to application of stone directly over brick. (Hodgin Depo. pp. 55:1-25 – 56:1-12; 160:22-25; 195:2-7, **Exhibit. J**).

in the construction in addition to this Court's January 21, 2021 Class Certification Order finding as a matter of law that it is the conduct of *DR Horton* that subjected it to the liability of the 221 homes at Rose Hill. Therefore, DR Horton's claim for equitable indemnification fails as a matter of law.

V. M&L REYNA ADOPTS ANY OTHER APPLICABLE GROUNDS FOR SUMMARY JUDGMENT RAISED BY OTHER DEFENDANTS PURSUANT TO RULE 10(C) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Parties against whom DR Horton has asserted similar claims have or may file analogous summary judgment motions before this Court. To the extent any other grounds for summary judgment raised in such motions and/or their supporting memoranda and corresponding exhibits are likewise applicable to the facts particular to M&L Reyna, this defendant adopts and incorporates any and all such applicable grounds and supporting arguments verbatim herein pursuant to Rule 10(c), SCRPC.

CONCLUSION

For the reasons set forth herein, M&L Reyna respectfully requests this Court grant its motion for summary judgment and dismiss DR Horton's third-party claims for (1) contractual indemnification; (2) equitable indemnification; (3) negligence/gross negligence/recklessness; (4) breach of warranties; and (5) breach of contract against M&L Reyna, with prejudice.

[SIGNATURE PAGE AS FOLLOWS]

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Attorneys for M&L Reyna Construction, LLC

Charleston, South Carolina

July 11, 2023

Exhibit A



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR M/L Reyna Construction, LLC ("Contractor")
Sole Proprietorship ☐ Partnership ☐ Corporation ☒ L.L.C ☐ Other (ATTACH W-9)
Social Security No. or Tax ID No.: 46-3736671
Name of Owner(s)/Officer(s): Mauricio Reyna
Division Name: _____ Area Name: _____ Assigned Vendor No.: _____
Address for All Notices: 7740 Augusta Rd Suite 1-A #139
City: Piedmont State: S.C. Zip Code: 29673
Telephone: 864 991-8790 Fax: (864) 451-7084 E-Mail Address: mureyconstruction@gmail.com
Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
This agreement (the "Agreement") is entered into on this 28 day of October, 2015, between DR Horton Inc. and DR Horton - Regent LLC ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 29-6-30 AND 29-6-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 28 day of October, 2015.

Owner:
By: [Signature]
Name: Steven Kramarz
Title: Division President

Contractor:
By: [Signature]
Name: Mauricio Reyna
Title: Owner

INITIALS: OWNER [Signature] CONTRACTOR [Signature]

AGREES THAT OWNER DOES, AND WILL, NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Orders, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Contractor shall immediately notify Owner in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractor's Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, **INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS** from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which

INITIALS: OWNER  CONTRACTOR 

the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

INITIALS: OWNER , CONTRACTOR 

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such liens, affidavits of claim, stop payment notices, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits of claim, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge any and all liens, affidavits of claim, stop payment notices, or lis pendens, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the liens, affidavits of claim, stop payment notices, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits of claim, stop payment notices, or lis pendens.

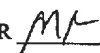
10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF, ATTORNEYS' FEES AND INTEREST), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY ITS SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, SUPPLIERS OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE RELATED IN ANY WAY TO THE WORK. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR AGREES THAT ITS OBLIGATIONS SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

INITIALS: OWNER  CONTRACTOR 

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type, nature, or volume of the Work or limit the type of structure or number of units on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00, and shall allow the satisfaction of any and all deductible or self-insured retention through payments made by any third party, including but not limited to Owner or any additional insured, co-insureds, co-insurers, or insureds other than the primary or first named insured. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner, D.R. Horton, Inc., and all affiliates and subsidiaries of D.R. Horton, Inc., (collectively "Horton") as named, Additional Insureds, specifically identifying Horton, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Horton as an additional insured shall be primary, with any insurance of Horton being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement. In the event that Contractor obtains insurance coverage that is broader than the minimums required by this Agreement, this Agreement shall be deemed to require the broader coverage, including but not limited to any greater limits.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, portions of policies (including but not limited to declarations pages and endorsements), or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

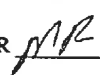
11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Horton as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs to complete, repair, or replace, plus any related costs or damage including re-inspection fees, with any excess to be paid to Contractor. If such costs exceed the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens

INITIALS: OWNER  CONTRACTOR 

are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

INITIALS: OWNER AW, CONTRACTOR MR

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

SOUTH CAROLINA VERSION (REV. 22 JUNE 2015)

INITIALS: OWNER EO, CONTRACTOR MR



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
02/12/2021

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER JEFFREY M PUGLIESE PUGLIESE & COMPANY INC 10021 PARK CEDAR DR # 200 CHARLOTTE, NC 28210		CONTACT NAME: JEFFREY M PUGLIESE PHONE (A/C, No, Ext): 704-544-9867 E-MAIL: PUGLIESE22@CS.COM ADDRESS:		FAX (A/C, No): 704-543-7569	
INSURED M & L REYNA CONSTRUCTION LLC 7740 AUGUSTA RD SUITE 1A PIEDMONT, SC 29376		INSURER(S) AFFORDING COVERAGE		NAIC #	
		INSURER A: BUILDERS MUTUAL INS CO		10844	
		INSURER B: MAIN STREET AMERICA		29939	
		INSURER C: BUILDERS MUTUAL INS CO		10844	
		INSURER D: BUILDERS MUTUAL INS CO		10844	
		INSURER E:			
		INSURER F:			

COVERAGES **CERTIFICATE NUMBER:** **REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	☒ COMMERCIAL GENERAL LIABILITY CLAIMS-MADE ☒ OCCUR GEN'L AGGREGATE LIMIT APPLIES PER POLICY ☒ PROJECT ☐ LOC OTHER:	Y	Y	CPA0008393	2/12/2021	2/12/2022	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 500,000 MED EXP (Any one person) \$ 10,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COM/OP AGG \$ 2,000,000
B	AUTOMOBILE LIABILITY ☒ ANY AUTO ☒ ALL OWNED AUTOS ☒ HIRED AUTOS ☒ SCHEDULED AUTOS ☒ NON-OWNED AUTOS	Y		B1G5762L	2/12/2021	2/12/2022	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$ \$
C	☒ UMBRELLA LIAB ☒ EXCESS LIAB DED RETENTION \$	Y		CU0008393	2/12/2021	2/12/2022	EACH OCCURRENCE \$ 1,000,000 AGGREGATE \$ 1,000,000 \$
D	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y	N/A	WCP1057318	2/12/2021	2/12/2022	☒ PER STATUTE ☐ OTHER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

ADDITIONAL INSURED ENDORSEMENT FORM CG2010 11/85 MUST BE PROVIDED IN ADDITION TO THE CERTIFICATE OF INSURANCE NAMING: DR HORTON, INC. ITS AFFILIATES AND SUBSIDIARIES AS ADDITIONAL INSURED FOR GENERAL LIABILITY
 ALL ENDORSEMENTS MUST BE LISTED ON THE CERTIFICATE
 WAIVER OF SUBROGATION FORM MUST BE PROVIDED IN ADDITION TO THE CERTIFICATE OF INSURANCE IN FAVOR OF D.R. HORTON, INC. ITS AFFILIATES AND SUBSIDIARIES FOR GENERAL LIABILITY
 30 DAYS NOTICE OF CANCELLATION TO CERTIFICATE HOLDER

CERTIFICATE HOLDER D.R. HORTON, INC. ITS AFFILIATES AND SUBSIDIARIES INSURANCE COMPLIANCE PO BOX 100085- DR DULUTH, GA 30096	CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. AUTHORIZED REPRESENTATIVE JEFFREY M PUGLIESE
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Exhibit E

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 ANDERSON COUNTY

4 DEPOSITION OF MARCUS CANNON
5 VOLUME 2
6 RULE 30(b)(6) DR HORTON

7 JUNE 13, 2022

8 NATALIE ZITEK, Individually and on behalf of all
9 others similarly situated,

10 Plaintiff,

11 vs. CASE NO. 2019-CP-04-01942

12 DR HORTON, INC., et al.,

13 Defendants,

14 DR HORTON, INC.,

15 Third-Party Plaintiff,

16 vs.

17 AJ LANDSCAPING & GRADING, LLC a/k/a AJ
18 LANDSCAPING & GRADING, LLC, et al.,

19 Third-Party Defendants,

20 PROBUILD COMPANY, LLC, et al.,

21 Fourth-Party Plaintiffs,

22 vs.

23 HARRELSON PAINTING, LLC, et al.,

24 Fourth-Party Defendants,

25 NICHOLAS SOTO a/k/a NICOLAS SOTO, Individually
and d/b/a SOTO HVAC,

 Fifth-Party Plaintiff,

 vs.

 TORIBIO ISLAS AND ALEJANDRO SOTO,

1 caps. Can you read the thing on the share
2 screen? Mr. Cannon, I was asking if you were
3 able to read it.

4 A. Oh, I'm sorry. Yes, I can read it.

5 Q. It looks like you actually are reading
6 it.

7 A. Yes.

8 Q. And why don't you go ahead and finish
9 reading it --

10 A. Okay.

11 Q. -- since you already started.

12 A. Okay.

13 Q. Have you read all of section 10.1?

14 A. I have.

15 Q. Did you read section 10.2?

16 A. I did not. Okay.

17 Q. All right. Does DR Horton know or can
18 DR Horton tell me what the difference between
19 this indemnity provision is and the one that we
20 already looked at in section 6?

21 A. I cannot.

22 Q. Does DR Horton know what this indemnity
23 provision applies to?

24 A. I do not.

25 Q. Does DR Horton know if this indemnity

1 provision applies to this litigation?

2 A. I do not know.

3 Q. On behalf of DR Horton, can you explain
4 to me what this indemnity provision is requiring
5 Manale to do?

6 A. I have so many documents I did not fully
7 read this and get any kind of backup so that I
8 can explain this, so I cannot today.

9 Q. I mean you've read the whole thing in
10 this deposition, right?

11 A. I have, yes. I have.

12 Q. And having read the entire provision,
13 DR Horton cannot explain to me what it requires
14 Manale to do.

15 A. Not specifically, no.

16 Q. So I'm turning to the DR Horton scope of
17 work for landscape companies that's included with
18 the document that was sent to me as a part of
19 Manale's ICA. And I've got a couple of questions
20 for you about it.

21 Number one, have you seen these
22 landscape -- this landscape scope of work before?

23 A. I have seen it. I'm not very familiar
24 with it, but I have seen this, yes.

25 Q. I'll limit my -- sorry, Mr. Cannon.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT
CASE NO.: 2019-CP-04-01942

Natalie Zitek, individually, and on
behalf of all others similarly situated,

Plaintiffs,

v.

D.R. Horton, Inc.,

Defendant.

D.R. Horton, Inc.,

Third Party Plaintiff,

v.

MJ Masonry, Inc.; MJ Cowboys; M&L Reyna
Construction, LLC; et. al.

Third Party Defendants.

MJ Masonry, Inc..

Fourth Party Plaintiff,

v.

Jesus Jimenez; and Jesus Robles Montes a/k/a
Robles Construction,

Fourth Party Defendants.

**MJ COWBOYS, LLC'S
MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

MJ Cowboys, LLC,

Fourth Party Plaintiff,

v.

Jesus Jimenez; and Jesus Robles Montes a/k/a
Robles Construction,

Fourth Party Defendants.

M&L Reyna Construction, LLC,

Fourth Party Plaintiff,

v.

Jesus Jimenez; and Jesus Robles Montes a/k/a
Robles Construction,

Fourth Party Defendants.

NOW COMES MJ Cowboys, LLC, (hereinafter “MJ”) pursuant to Rule 56, SCRCP, submits this Memorandum in Support of its Motion for Summary Judgment (filed May 1, 2023), and states:

I. INTRODUCTION

MJ moves for summary judgment against Defendant/Third-Party Plaintiff D.R. Horton, Inc. (“DRH”) on three bases:

1. DRH’s claims for Breach of Contract, Breach of Express Warranties, Breach of Implied Warranties, and Negligence/Gross Negligence/Recklessness derive entirely from the prospective damages that DRH faces vis-à-vis Plaintiff’s claims against DRH, and are therefore veiled claims for indemnity which are duplicative of DRH’s existing Equitable Indemnity claim. Accordingly, pursuant to the Court of Appeals’ holdings in *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Clear View Constr., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015), and *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders FirstSource-S.E. Grp.*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015), MJ is entitled to summary judgment in its favor on DRH’s claims for Breach of Contract, Breach of Express

Warranties, Breach of Implied Warranties, and Negligence/Gross Negligence/Recklessness.

2. Sections 10.1 and 6.4 of DRH's South Carolina Independent Contractor Agreement with MJ (hereinafter the "Agreement," and attached as Exhibit A), specifically, the contractual indemnity provisions of the Agreement, are unenforceable as a matter of law pursuant to the Court of Appeals' holding in *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639 (S.C. Ct. App. 2018). Sections 10.1. and 6.4 seek to hold MJ responsible for damages caused by DRH's concurrent negligence. The language of Sections 10.1 and 6.4 fails to satisfy the clear and unequivocal standard required in the construction and expression of such indemnity provisions, and is thus, unenforceable. As such, MJ is entitled to summary judgment in its favor on DRH's claim for Contractual Indemnity.
3. Sections 10.1 and 6.4 of the Agreement are invalid, violate public policy, and are unenforceable pursuant to S.C. Code Ann. § 32-2-10 and *D.R. Horton, Inc. v. Builders FirstSource-Southeast Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

II. RELEVANT FACTS

MJ is a masonry contractor. Established by Jose Luis Sanchez and Mauricio Reyna in 2014, MJ performed masonry work for general contractors in the Greenville, SC area. Mauricio Reyna was the principal official at MJ, while Jose Sanchez was an arm's length interest holder.

On or about May 6, 2014, DRH presented a pre-drafted, non-negotiable, form, adhesion contract to Mr. Reyna, who does not read English, did not understand what he was signing. DRH misrepresented the nature of document by informing Mr. Reyna that he needed to sign it so that he could be paid. The contract (also referred to as the Agreement, above) contains two contractual provisions that would seek to impose upon MJ an obligation to indemnify DRH for, not only the sole negligence of MJ, but DRH's concurrent negligence as well. These two contractual provisions are found in Sections 6.4 and 10.1 of the Agreement/Exhibit A. For convenience, these two sections have been copied and pasted in their original form, below.

Section 6.4:

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

Section 10.1:

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF AND ATTORNEYS' FEES), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE, RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

Section 10.1 contains such an egregious amount of surplus legalese, that it makes understanding the actual substance of this section practically impossible. When one removes the surplus language (by blacking out the superfluous language) and distills the substance into digestible form, it becomes obvious that this indemnity provision purports to relieve DRH from the consequences of its own negligence, and shift those consequences onto MJ.

MJ was hired DRH to perform the following construction tasks at the Rose Hill subdivision:

1. Brick Installation Labor;
2. Manufactured Stone Veneer (hereinafter “MSV”) Installation Labor and Supply of Materials;¹
3. Concrete Monolithic Slab Foundation Installation; and
4. Concrete Flatwork Installation.²

MJ performed its work from 2014 to 2015 and performed one or more of the above tasks on roughly 81 houses. DRH was responsible for performing all of the architectural design and engineering work, for providing all of the architectural and engineering drawings necessary for each house, for selecting and providing all materials needed for the installation of the brick veneer, for the management of the subcontractors as it relates to timing and sequencing, and for any direction and/or instruction it gave to MJ.

III. LEGAL STANDARD

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56(b), SCRCP. “Rule 56(e), SCRCP, states, a party ‘may not rest upon the mere allegations or denials of his pleading[s].’” *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382 (Ct. App. 2010) “Summary judgment is appropriate in those cases where plain, palpable, and undisputable facts exist on which reasonable minds cannot differ.” *Main v. Corley*, 281 S.C. 525, 526 (1984). When the non-moving party bears the burden of proof as to an issue, a party seeking summary judgment may meet this standard by pointing out to the trial court “that there is an absence of evidence to support the nonmoving party’s case.” *Richards v. The State Record Co., Inc.*, 330 S.C. 562 (Ct. App. 1998). “[I]n cases applying a preponderance of the evidence burden of proof, the non-moving party is

¹ In reality, D.R. Horton selected the MSV characteristics, the local MSV supplier, and coordinated the availability of the MSV, whereas MJ and other masons simply picked up the MSV from the supplier, paid for it, and brought it to the job site.

² Flatwork is industry jargon for driveways, walkways and patios.

only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330 (2009). A scintilla of evidence is material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror. *Gibson v. Epting*, Op. No. 5612 (Ct. App. Jan. 9, 2019). “[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows.” *Id.*

The Court must view the facts and inferences in the light most favorable to the nonmoving party. *See Thomas v. Waters*, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). However, a nonmoving party cannot evade summary judgment by creating and relying on “an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477 (2013). Moreover, if a motion has been properly made and supported in accordance with Rule 56, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580 (2004). This showing must be based on evidence that would be admissible at trial. *Hall v. Fedor*, 349 S.C. 169, 175 (Ct. App. 2002).

IV. ARGUMENT

I. DRH’S CLAIMS FOR BREACH OF CONTRACT, BREACH OF EXPRESS WARRANTIES, BREACH OF IMPLIED WARRANTIES, AND NEGLIGENCE/GROSS NEGLIGENCE/RECKLESSNESS ARE VEILED AND DUPLICATIVE INDEMNITY CLAIMS.

DRH has alleged the following third-party claims against MJ: (1) contractual indemnity; (2) equitable indemnity; (3) breach of contract; (4) breach of express warranties; (5) breach of implied warranties; and (6) negligence/gross negligence/recklessness. *See generally* DRH’s Second Amended Answer and Third-Party Complaint (“Third-Party Complaint”) pp. 16-27 (filed Feb. 23, 2022). Counts two (2) through six (6) fail as a matter of law.

In its Third-Party Complaint, DRH alleges the following:

- “If subcontractors’ work was defective, subcontractors breached their contractual and common law duties to D.R. Horton and caused it damages at the time it preformed [sic] its work.” *Id.* ¶ 87 (general allegations).
- “D.R. Horton is informed and believes that if, in fact, Plaintiff, individually, and on behalf of all others similarly situated, is correct regarding the allegations of the Complaint, that the defects, if any, are the result of the wrongful acts, breach of warranties, omissions, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.” *Id.* ¶ 101 (contractual indemnity claim).
- “D.R. Horton is informed and believes that if, in fact, Plaintiff is correct about her allegations, that the allegations are the result of the wrongful acts, omissions, breach of contract, breach of warranty, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.” *Id.* ¶ 110 (equitable indemnity claim).
- “To the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements in failing to construct the Homes in Rose Hill in accordance with contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.” *Id.* ¶ 115 (breach of contract claim).
- “If the materials, installation, and/or workmanship were not in accordance with contract requirements, industry standards, and/or building code requirements, then Subcontractors have materially breached their express warranties.” *Id.* ¶ 119 (breach of express warranties claim)
- “If the materials, installation, and/or workmanship were not in accordance with contract requirements, construction plans, industry standards, and/or building code requirements, then Subcontractors . . . have materially breached their [implied] warranties.” *Id.* ¶ 123 (breach of implied warranties claim).
- “If due care was not used in ensuring proper levels of workmanship were achieved, then Subcontractors breached that duty of care by failing to ensure that proper levels of workmanship were achieved

pursuant to the requirements under the Agreements.” *Id.* ¶ 127 (negligence/gross negligence/recklessness claim).

In its prayer for relief, DRH alleges:

(b) On D.R. Horton’s First Cause of Action [Contractual Indemnity], judgment in favor of D.R. Horton and against the Subcontractors in the amount of any liability D.R. Horton is found to have to the Plaintiff in this action and requiring the D.R. Horton Subcontractors to defend and indemnify D.R. Horton against any liability which D.R. Horton may be liable for and for any costs, losses, or damages D.R. Horton may incur as it relates to the Plaintiff in this action, to include D.R. Horton’s attorneys’ fees, costs, and any and all other expenses incurred in defending this action;

(c) On D.R. Horton’s Second Cause of Action [Equitable Indemnity], judgment in favor of D.R. Horton and against Third-Party Defendants in the amount of any liability D.R. Horton is found to have to the Plaintiff in this action and requiring the Third-Party Defendants to defend and indemnify D.R. Horton against any liability which D.R. Horton may be liable for and for any costs, losses, or damages D.R. Horton may incur as it relates to the Plaintiff in this action, to include D.R. Horton’s attorneys’ fees, costs, and any and all other expenses incurred in defending this action.

(d) On D.R. Horton’s Third and Fourth Causes of Action [Breach of Contract and Breach of Express Warranties, respectively], judgment for D.R. Horton and against the Subcontractors in an amount to be determined at trial;

(e) On D.R. Horton’s Fifth Cause of Action [Breach of Implied Warranties], judgment for D.R. Horton and against the Third-Party Defendants in an amount to be determined at trial;

(f) On D.R. Horton’s Sixth Cause of Action [Negligence/Gross Negligence/Recklessness], judgment for D.R. Horton and against Third-Party Defendants awarding actual, special, consequential and punitive damages in an amount to be determined at trial;

Id. pp. 26-27.

DRH’s alleged damages arise only if DRH is found to have liability to Plaintiff. Further, DRH claims that it is entitled to judgment against MJ for the costs DRH must expend to defend itself. DRH’s claims against MJ are nothing more than claims for equitable indemnity and should

be dismissed. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) [hereinafter *Stoneledge I*]; *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-S.E. Grp.*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) [hereinafter *Stoneledge II*]. Quoting from these seminal cases on the issue of “disguised” or “veiled” indemnity claims, (S.C. App. 2015) and inserting the parties’ from the instant case:

“Under [DRH’s] own allegations, its negligence [third-party] claim arose only when it faced potential liability for [Plaintiff’s] damages and incurred fees and costs defending against [Plaintiff’s] lawsuit. [DRH’s] negligence [third-party] claim is nothing more than a claim for equitable indemnity. *Stoneledge I* at 622, 776 S.E.2d at 430. Accordingly, “[w]e find the circuit court properly granted summary judgment on [DRH’s] negligence [third-party] claim because it is not an independent cause of action from [DRH’s] equitable indemnity claim. The court correctly ruled that the only potential claim for the damages [DRH] incurred defending against [Plaintiff’s] lawsuit is for equitable indemnity.” *Stoneledge I* at 624, 776 S.E.2d at 431.

“Under [DRH’s] own allegations, its [third-party] claims arose only when it faced potential liability for [Plaintiff’s] damages and incurred fees and costs defending against [Plaintiff’s] lawsuit. [DRH’s] breach of contract and breach of warranty [third-party] claims are nothing more than claims for equitable indemnity.” *Stoneledge II* at 637, 776 S.E.2d at 438. Accordingly, “[w]e find the circuit court properly granted summary judgment on [DRH’s] breach of contract and breach of warranty [third-party] claims because they are not independent causes of action from [DRH’s] equitable indemnity claim.” *Stoneledge II* at 639, 776 S.E.2d at 439.

As *Stoneledge I* and *Stoneledge II* are precisely on point and controlling, the Court should grant summary judgment to MJ on DRH’s claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims.

See also Bei-Beach, LLC v. Christman, 2023 S.C. App. LEXIS 45 (Ct. App. Apr. 26, 2023) (“Under South Carolina law, a claimant cannot maintain derivative tort or breach of warranty claims arising only from the claimant’s potential liability for another party’s damages and the claimant’s need to defend itself in litigation; such contingent claims properly lie in indemnity.”) (citing *Stoneledge I* and *Stoneledge II*).

II. DRH’S CONTRACTUAL INDEMNITY PROVISIONS ARE UNENFORCEABLE AS A MATTER OF LAW AND MJ IS THEREFORE ENTITLED TO SUMMARY JUDGMENT ON DRH’S CONTRACTUAL INDEMNITY CLAIM.

DRH’s contractual indemnity provisions seek to shift the consequences and the responsibility for its own negligent acts onto MJ, in a form of writing that is nearly impossible to follow and understand. The contractual indemnity provisions are woefully inadequate and insufficient and fail to meet the heightened standard of clear and unequivocal that is required for such an indemnity provision to be enforceable. Because the language is not clear and unequivocal, it is, by law, unenforceable and the Court should grant summary judgment in favor of MJ on DRH’s Contractual Indemnity claim.

South Carolina courts "have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003) (quoting *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 454, 438 S.E.2d 271, 272 (Ct. App. 1993)). "A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (quoting *Town of Winnsboro v. Wiedeman-Singleton, Inc.* (*Winnsboro I*), 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (*Winnsboro II*)).

"Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). Typically, courts will construe an indemnification contract "in accordance with the rules for the construction of contracts generally." *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports "to relieve an indemnitee from the consequences of its own negligence," our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378-79. "Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)(emphasis added).

The clear and unequivocal standard applies any time a purported indemnitee (such as DRH) is seeking indemnification for its own negligence, whether sole or concurrent. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 649, 819 S.E. 2d 166, 172 (Ct. App. 2018). The analysis hinges on whether the language of the indemnification provision meets or fails to meet the clear and unequivocal standard. If it does meet the standard, then the provision is enforceable. If it does not meet the standard, then the provision must be disregarded. In this case, the language contained in DRH's section 10.1 and 6.4 fail to meet this clear and unequivocal standard.

The issue is determining what constitutes clear and unequivocal language. As the Court of Appeals stated in *Concord & Cumberland*, as it evaluated a previous decision it had made in *Federal Pacific Electric*, "'general terms' although broad and comprehensive, [are] inadequate to satisfy the clear and unequivocal standard. *Concord & Cumberland* at 651 (citing *Federal Pacific*

Electric at 29). The indemnification language in *Federal Pacific Electric* contained a general, broadly worded indemnification provision that the Indemnitor would indemnify the Indemnitee for “any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with [the subject of the parties’ transaction].” *Id.* The Court in *Concord & Cumberland*, also evaluated the provision at issue in *Laurens*, which read “The [Indemnitor] will indemnify and hold [Indemnitee] . . . harmless from and against any and all claims, actions, liability or expenses . . . caused by or resulting from allegations or wrongful acts or omissions of [Indemnitor’s employees and agents].” *Laurens* at 110. This language was found to have been broad and comprehensive. *Id.* In *Laurens*, the Supreme Court found that “this ‘standard language’ did not ‘disclose an intention by the parties to relieve [Indemnitee] of the consequences of its own negligence.’” *Concord and Cumberland* at 651 (citing *Laurens* at 112).

In this case, DRH’s indemnification provisions would have MJ indemnify DRH for any negligence caused by MJ, and any negligence concurrently caused by DRH. The indemnification provision in Section 10.1 of the Agreement expressly excludes an obligation of MJ to indemnify DRH for DRH’s sole negligence. If you remove the voluminous surplus language of Section 10.1 of the Agreement, it reads:

TO THE FULLEST EXTENT PERMITTED BY LAW, [MJ]
HEREBY AGREES TO [. . .] INDEMNIFY [. . .] [DRH] [. . .]
FROM AND AGAINST ANY [. . .] LAWSUITS [. . .] FOR
DAMAGES FROM [. . .] THE DESTRUCTION OR LOSS OF
PROPERTY [. . .] RESULTING FROM OR RELATED IN ANY
WAY TO THE WORK PERFORMED [. . .] REGARDLESS OF
WHETHER OR NOT CAUSED IN PART BY INDEMNITEE . . .

Agreement, Section 10.1. Section 10.1 then continues, in general terms, to describe that the instances invoking indemnification will be instances of MJ’s negligence, and other elements of the

work over which MJ possessed and/or exercised control. In this case, the Work Performed is defined in Section 1 of the Agreement and entitled “Scope of Work.”

Concord and Cumberland rests on the issue of whether an indemnification provision allowing an Indemnitee to recover from an Indemnitor the damages resulting from the Indemnitee’s negligence can be enforced. The Court in *Concord and Cumberland* dedicates a significant amount of analysis to whether a specific clause in the indemnification provision renders the entire indemnification provision insufficient in light of the clear and unequivocal standard. In *Concord and Cumberland*, the essence of the ruling was whether the clause “to the extent caused . . . by any negligent act or omission of the [Indemnitor]” contained within the indemnification provision scuppered the remaining portion that did otherwise allow the indemnitee to seek indemnification for its own negligence. The conflicting clauses of the indemnification provision essentially rendered the entire indemnification provision as inadequate in view of the clear and unequivocal standard. *Concord and Cumberland* at 654.

The facts in this case are essentially analogous to the facts in *Concord and Cumberland*. While the operative language in the *Concord and Cumberland* agreement does not have an identical counterpart in the language in the Agreement here, the wording in the Agreement engenders substantially the same effect as the language in *Concord and Cumberland*. By stating that it may seek indemnification “FOR DAMAGES FROM [. . .] THE DESTRUCTION OR LOSS OF PROPERTY [. . .] RESULTING FROM OR RELATED IN ANY WAY TO THE WORK PERFORMED” and as Work Performed is defined in the Agreement, and then by stating in the Agreement that it is entitled to indemnification for “ANY NEGLIGENT, GROSSLY NEGLIGENT AND/OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK,” DRH has created a conflict in contract construction

that is identical to the conflict that the Court identified in *Concord and Cumberland*. This conflict pulls the construction of this provision below the threshold of the clear and unequivocal standard that DRH's indemnification provision MUST surpass in order to be enforceable. Because DRH's indemnification provisions in Sections 10.1 and 6.4 of the Agreement do not satisfy the clear and unequivocal standard, they are unenforceable, and MJ is entitled to summary judgment on DRH's claim for Contractual Indemnity.

III.DRH'S CONTRACTUAL INDEMNITY PROVISIONS ARE INVALID AND, VIOLATE PUBLIC POLICY, AND ARE THEREFORE UNENFORCEABLE.

Sections 10.1 and 6.4 of the Agreement are invalid, violate public policy, and are unenforceable pursuant to S.C. Code Ann. § 32-2-10 and *D.R. Horton, Inc. v. Builders FirstSource-Southeast Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). Pursuant to Rule 10(c), SCRPC, MJ incorporates in full the arguments (and referenced exhibits) on this point as set forth in Third-Party Defendant M&L Reyna Construction, LLC's Memorandum in Support of its Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment (filed July 11, 2023). *See id.* pp. 8-12 (Section I.a.).

DRH's Agreement between DRH and MJ should be avoided, because DRH had been made aware that MJ's owner, Mauricio Reyna did not read English and when DRH presented the Agreement to Mr. Reyna, DRH's representatives mischaracterized the document as simply something that needed to be signed in order for them to pay MJ Cowboys for its work at Rose Hill. *See Depo. of Mauricio Reyna* at p. 43, attached as Exhibit B.

While there is no controlling case law in South Carolina, courts in other states have held that a contract may be avoided if (1) the person to whom a contract is presented does not read or understand the language of the contract and (2) the person presenting the contract mischaracterizes or misrepresents the nature of the contract. If the signer is illiterate, or blind, or ignorant of the

alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger, unless the signer be negligent, the writing is void. *Pimpinello v. Swift & Co.*, 253 N.Y. 159 (1930).

This argument may be supplemented at the hearing on this matter.

V. CONCLUSION

Based on the arguments set forth herein, as well as MJ's Motion for Summary Judgment, the common and statutory law of South Carolina, and forthcoming oral argument, MJ respectfully asks this Court to grant summary judgment to MJ and against DRH.

Respectfully submitted,

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0401942

Natalie Zitek et al
PLAINTIFF(S)

D R Horton Inc 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), 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:

Motions for Summary Judgment by 3rd Party Defendants JLS Masonry, Inc., MJ Cowboys, LLC and M&L Reyna Construction LLC against Defendant D.R. Horton.

The Court considered the filings of the of the parties, arguments of counsel and applicable law. The Court considered the evidence in a light most favorable to the non-moving parties and finds that a genuine issue of material fact exists. Accordingly, these 3rd Party Defendants' Motions for Summary Judgment are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

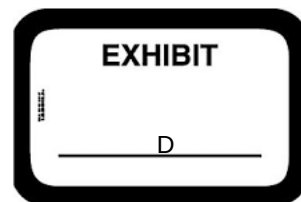
☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/28/2023 .

M&L General Construction Inc
M&L General Construction LLC
Lansing Building Products Inc
A-Z Inc
Kings Landscaping LLC
A&J Framing Inc
Allpro Textures LLC
A3 Landscaping & Grading LLC
Dupree Plumbing Company, Inc.
Blue Ridge Building Products
IBP Asset LLC
Greener Pastures Of Aiken LLC
Greener Pastures Inc
GBS Building Supply - US LBM LLC
Get Floored LLC
Five Star Construction Inc
Ferguson Enterprises Inc
DOM Group LLC
Caryl Mechanicals Inc
Latinos Roofing LLC
Edwin Edgardo Barahona
Edwin Barahona
GSF Renovations LLC
Jose Aristides Hernandez
Jose Hernandez
JJS Commercial Construction Inc
Brothers Contractors Inc
Brothers Contractors LLC
The App Phase Group
Alexander G. Koenig
Luis Solis Machado
J. Rene Padilla
Padilla Flooring LLC

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.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Electronic Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2019-CP-04-01942

NATALIE ZITEK, INDIVIDUALLY, AND)
ON BEHALF OF ALL OTHERS)
SIMILARLY SITUATED,)

Plaintiff,)

vs.)

D.R. HORTON, INC., JANE DOE #1-10;)
AND JOHN DOE #1-50,)

Defendant.)

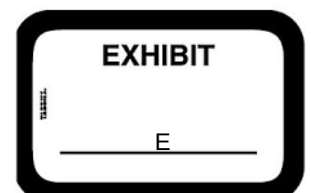
**M&L REYNA CONSTRUCTION,
LLC'S NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION
AND/OR TO ALTER OR AMEND
PURSUANT TO RULE 59(e), SCRCF**

D.R. HORTON, INC.,)

Third-Party Plaintiff,)

vs.)

AJ LANDSCAPING & GRADING, LLC)
A/K/A A J LANDSCAPING & GRADING,)
LLC; ALLPRO TEXTURES, LLC; ALPHA)
OMEGA CONSTRUCTION GROUP,)
INC.; AMERICAN CONCRETE AND)
PRECAST, INC.; A/K/A ACP)
CONCRETE, INC.; A-Z, INC.; ATLANTA)
FLOOR DESIGNS CENTER; A GRADE)
ABOVE OTHERS, LLC; BRAND-)
VAUGH LUMBER CO, INC.; BKF)
BUILDERS, INC.; BLUE RIDGE)
BUILDING PRODUCTS, LLC;)
BUILDERS DESIGNHOUSE, LLC; BMC)
EAST LLC; BUILDERS FIRSTSOURCE)
SOUTHEAST GROUP, LLC A/K/A)
BUILDERS FIRSTSOURCE, INC.;)
BRAVO CARPENTERS, INC.; CARYLE)
MECHANICS II, INC., A/K/A CARYLE)
MECHANICALS, INC.; CANNADAY)
SIDING & GUTTER, INC.; COLEMAN)
FLOOR, LLC; CORTES PAINTING, LLC;)



CBU ENTERPRISES, INC.; CPI)
 SECURITY SYSTEMS, INC.; DOM)
 GROUP, LLC; FERGUSON)
 ENTERPRISES, INC.; FIVE STAR)
 CONSTRUCTION, INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC., A/K/A GALLOWAY-BELL,)
 INC. II; GET FLOORED, LLC; GBS)
 BUILDING SUPPLY-US LBM, LLC)
 F/K/A GBS BUILDING SUPPLY, INC.;)
 GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC., A/K/A)
 GREENER PASTURES OF AIKEN, LLC;)
 INSTALLED BUILDING PRODUCTS,)
 LLC A/K/A INSTALLED BUILDING)
 PRODUCTS II, LLC; JLS MASONRY,)
 INC.; KINGS LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-DANLAR,)
 INC.; LANSING BUILDING PRODUCTS,)
 INC.; LONG HEATING & AIR)
 CONDITIONING, INC.; L & M)
 ELECTRIC, INC.; MANALE)
 LANDSCAPING, LLC; MJ COWBOYS,)
 LLC; M & L GENERAL)
 CONSTRUCTION, LLC A/K/A M & L)
 GENERAL CONSTRUCTION, INC.; M&L)
 REYNA CONSTRUCTION, LLC; M&M)
 FOUNDATIONS, LLC; NAZARETH)
 BUILDERS, LLC; NB CONTRACTORS,)
 LLC; POINSETT DEVELOPMENT, LLC;)
 POINSETT HOMES, LLC; P&T)
 CONSTRUCTION, INC., A/K/A P & T)
 CONSTRUCTION, INC.; P & L)
 ENTERPRISES, LLC; PROBUILD)
 COMPANY, LLC A/K/A PROBUILD)
 HOLDINGS, INC.; RITE RUG)
 COMPANY, INC., A/K/A RITE RUG CO.;)
 RODNEY HOWARD GRADING INC.,)
 A/K/A RODNEY HOWARD GRADING)
 CO.; SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC.; LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC. A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
MATERIALS, INC., A/K/A GYPSUM;)

UTM ENTERPRISES, INC.; AND	)
WILLOW TREE LANDSCAPING, INC.,	)
	)
Third-Party Defendants.	)
	)
LONG HEATING & AIR	)
CONDITIONING, INC.,	)
	)
Fourth-Party Plaintiff,	)
	)
vs.	)
	)
ZENON GUTIERREZ ANTUNEZ, JESUS	)
PEREZ, FREDY PEREZ AND	)
VENUSTIANO PEREZ, INDIVIDUALLY	)
AND D/B/A FREDY'S HVAC,	)
NICHOLAS SOTO A/K/A NICOLAS	)
SOTO, INDIVIDUALLY AND D/B/A	)
SOTO HVAC, JASON WEAVER,	)
INDIVIDUALLY AND D/B/A TIGER	)
MECHANICAL AND PANUNCIO	)
VICTORIANO MARTINEZ,	)
INDIVIDUALLY AND D/B/A	)
VICTORIANO HVAC, LLC,	)
	)
Fourth-Party Defendants.	)

TO: THE PARTIES ABOVE NAMED AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE that M&L Reyna Construction, LLC ("M&L Reyna"), by and through the undersigned counsel, hereby moves this Honorable Court to reconsider and/or to alter or amend the Court's July 28, 2023 Order Denying Third Party Defendant M&L Reyna's Motion for Summary Judgment as to the third-party claims asserted by D.R. Horton, Inc.'s ("DR Horton"), pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. M&L Reyna's Motion to Reconsider and/or Alter or Amend is based on the following grounds:

I. BECAUSE THE INDEMNITY PROVISION IN M&L REYNA’S PURPORTED CONTRACT WITH DR HORTON IS NOT CLEAR OR UNEQUIVOCAL ANALOGOUS TO THE INDEMNITY PROVISIONS IN THIRD-PARTY DEFENDANT’S IBP ASSET, LLC D/B/A BLUE RIDGE BUILDING PRODUCTS (“IBP”)’S CONTRACT WITH DR HORTON PURSUANT TO THIS COURT’S ORDER DATED JULY 26, 2023.

M&L Reyna moved for summary judgment as to DR Horton’s third-party claim for contractual indemnification. The contractual indemnity provisions contained within the purported contract with M&L Reyna are barred by the requirements set forth in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). The contractual indemnity provisions also run afoul of the Anti-Indemnity Statute, S.C. Code § 32-2-10 et seq., are invalid, violate public policy, and are thus unenforceable. See D.R. Horton, Inc. v. Builders FirstSource-Southeast Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

With respect to DR Horton’s third-party claim for contractual indemnity against IBP, this Court applied Concord & Cumberland’s requirements to IBP’s contract in the July 26, 2023 Order granting IBP’s Motion for Summary Judgment, finding that the indemnity provisions in the contract between IBP and DR Horton are not clear and unequivocal. IBP’s contract with DR Horton is substantially similar to DR Horton’s purported contract with M&L Reyna. For example, analogous to IBP’s contract, in addition to the failure of the language itself, the contract proffered by DR Horton is facially defective because it does not include the materials terms of the contract. Specifically, M&L Reyna’s Contract does not contain an agreed-to scope of work provision, just as IBP’s contract did not. There are no specifications for the contract or reference to the Rose Hill Project at all. Within the four corners of the contract, a reader would be unable to determine what project the contract references, what scope of work is being performed by M&L Reyna, and therefore, would have no indication for what M&L Reyna is required to indemnify DR Horton.

DR Horton has previously responded through a Request to Admit that this is a complete, true, and accurate copy of the purported contract with M&L Reyna. (See DR Horton's Responses to Requests to Admit of M&L Reyna, attached hereto as **Exhibit A**). Thus, because the contractual indemnification provision specifically relates to "the work" performed under the contract, the failure to identify the work at the time of the contract as well as the failure to identify the project, the contractual indemnity provisions is therefore manifestly not "clear and unequivocal," in violation of Concord & Cumberland. Thus, M&L Reyna seeks reconsideration of its Motion for Summary Judgment as to DR Horton's claim for contractual indemnification as there is no genuine issue of material as to this claim.

II. BECAUSE DR HORTON'S CLAIMS FOR BREACH OF CONTRACT, NEGLIGENCE/GROSS NEGLIGENCE, BREACH OF EXPRESS WARRANTY, AND BREACH OF IMPLIED WARRANTY ARE DERIVATIVE OF PLAINTIFF'S CLAIMS, THESE CLAIMS THEREFORE COLLAPSE INTO EQUITABLE INDEMNIFICATION.

M&L Reyna moved for summary judgment as to DR Horton's third-party claims for breach of contract, negligence/gross negligence, and breach of express and implied warranties as these claims are all derivative of Plaintiff's claims and are merely disguised claims for equitable indemnification because DR Horton has no damages separate and apart from its potential liability to the Plaintiff. Therefore, because DR Horton's claims are simply derivative and seek nothing more than indemnity from M&L Reyna, DR Horton's claims for breach of contract, negligence/gross negligence, and breach of express and implied warranties must collapse into claims for equitable indemnity. See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC ("Stoneledge I"), 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (upholding dismissal of general contractor's negligence claims as duplicative of its indemnity claim) and Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders First Source-SE Grp., LLC ("Stoneledge II"), 413

S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (upholding dismissal of general contractor’s breach of warranty and breach of contract claims as duplicative of its indemnity claim).

DR Horton’s Second Amended Third-Party Complaint filed February 23, 2022 is controlling. In this pleading, DR Horton’s breach of contract claim, for example, specifically relies on its liability to the plaintiffs. (See DR Horton’s Second Amended Third-Party Complaint ¶ 115, Breach of Contract). DR Horton alleges “[t]o the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements in failing to construct the Homes in Rose Hill[.]” The remaining third-party claims asserted by DR Horton also contain the conditional “if/then” language, or similar language with the same conditional meaning, and begin with the Plaintiff’s allegations against DR Horton. Thus, because DR Horton has not made *separate or different* claims for defective construction against M&L Reyna and because DR Horton has not and cannot demonstrate any damages other than its own liability to the Plaintiffs; these claims are derivative. Accordingly, M&L Reyna respectfully requests this Court reconsider its Order denying M&L Reyna’s Motion for Summary Judgment and grant the requested relief: summary judgment as to DR Horton’s claims for breach of contract, negligence/gross negligence, and breach of express and implied warranties because they are nothing more than disguised claims for indemnity and therefore collapse into equitable indemnity.

III. M&L REYNA ADOPTS ANY OTHER APPLICABLE GROUNDS FOR SUMMARY JUDGMENT RAISED BY OTHER DEFENDANTS PURSUANT TO RULE 10(C) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Parties against whom DR Horton has asserted similar claims have or filed analogous summary judgment motions before this Court as well as Motions to Reconsider and/or Alter or Amend this Court’s denial of such motions. To the extent any other grounds for reconsideration and/or alteration or amendment raised in such motions and/or their supporting memoranda and corresponding exhibits are likewise applicable to the facts particular to M&L Reyna, this

Defendant adopts and incorporates any and all such applicable grounds and supporting arguments verbatim herein pursuant to Rule 10(c), SCRCP.

In support of this Motion, M&L Reyna relies and reserves the right to rely on its Memorandum in Support of its Motion for Summary Judgment and corresponding exhibits, its Motion to Reconsider and/or Alter or Amend this Court's Denial of Summary Judgment as to DR Horton, and exhibits thereto, DR Horton's responses to said motions, the pleadings, the applicable law, the arguments of counsel, any additional memorandum of law that may be submitted, and any other material which this Court may see fit to consider.

CONCLUSION

For the reasons set forth herein, M&L Reyna respectfully requests this Court Reconsider and/or Alter or Amend its July 28, 2023 Order and issue an Amended Order **granting** M&L Reyna Construction, LLC's Motion for Summary Judgment as to DR Horton's third-party claims for (1) contractual indemnification; (2) equitable indemnification; (3) negligence/gross negligence; (4) breach of warranties; and (5) breach of contract against M&L Reyna, with prejudice.

In the alternative, M&L Reyna respectfully requests this Court Reconsider and/or Alter or Amend its July 28, 2023 Order and issue an Amended Order **granting** M&L Reyna Construction, LLC's Motion for Partial Summary Judgment as to one or more of DR Horton's third-party claims for (1) contractual indemnification; (2) negligence/gross negligence; (3) breach of warranties; and (4) breach of contract against M&L Reyna, with prejudice, collapsing negligence/gross negligence, breach of contract, and breach of warranties into equitable indemnification.

[SIGNATURE ON FOLLOWING PAGE]

LUZURIAGA MIMS, LLP

By: s/Kevin W. Mims

Kevin W. Mims, SC Bar #69418

Whidbee S. Perrin, SC Bar #100396

Rachel N. Stewart, SC Bar #105184

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rstewart@lmlawllp.com

***Attorneys for Third-Party Defendant M&L Reyna
Construction, LLC***

Charleston, South Carolina

August _7_, 2023

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Natalie Zitek, individually, and on behalf of
all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and, John
Doe #1-50,

Defendants.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J
Landscaping & Grading, LLC; AllPro
Textures, LLC; Alpha Omega Construction
Group, Inc.; American Concrete and Precast,
Inc.; a/k/a ACP Concrete, Inc.; A&J Framing,
Inc.; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor
Designs Center; A Grade Above Others,
LLC; Brand-Vaughan Lumber Co, Inc.; BKF
Builders, Inc.; Builders Designhouse, LLC;
BMC East LLC d/b/a Coleman Floor, LLC;
Builders Firstsource Southeast Group, LLC,
a/k/a Builders Firstsource, Inc.; Bravo
Carpenters, Inc.; Caryl Mechanics II, Inc.,
a/k/a Caryl Mechanicals, Inc.; Cannaday
Siding & Gutter, Inc.; Cortes Painting, LLC;
CBU Enterprises, Inc.; CPI Security Systems,
Inc.; DOM Group, LLC; Ferguson
Enterprises, Inc.; Five Star Construction Inc.;
Five Star Foundations, LLC; Galloway-Bell,
Inc., a/k/a Galloway-Bell, Inc. II; Get
Floored, LLC; GBS Building Supply – US
LBM, LLC, f/k/a GBS Building Supply, Inc.;
General Shale Brick Inc.; Greener Pastures,
Inc., a/k/a Green Pastures of Aiken, LLC;
IBS Asset, LLC d/b/a Blue Ridge Building
Products; Installed Building Products, LLC,

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

**MJ COWBOYS, LLC'S NOTICE OF
MOTION AND RULE 59(e) MOTION TO
RECONSIDER AND/OR TO ALTER OR
AMEND THE ORDER DENYING MJ
COWBOYS, LLC'S MOTION FOR
SUMMARY JUDGMENT**

a/k/a Installed Building Products II LLC; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC a/k/a Probuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a, Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc, a/k/a Gypsum; Silver Line Building Products Corp.; Dupree Plumbing Co., Inc.; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., and Silver Line Building Products Corporation

Third-Party Defendants.

PLEASE TAKE NOTICE that MJ Cowboys, LLC (“MJ”), by and through its undersigned counsel, moves pursuant to Rule 59(e), SCRCP, for this Court to reconsider and/or Alter or Amend its Order denying MJ’s motion for summary judgment filed July 28, 2023.

STANDARD

Rule 59(e), SCRCP, provides that “[a] motion to alter or amend the judgment shall be served no later than 10 days after receipt of written notice of the entry of the order.” A Rule 59(e), SCRCP, motion is appropriate where a party believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party desires for the court to

reconsider its ruling or rule on the issue. See *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9 (Ct. App. 2004) 602 S.E.2d 772 (2004).

ARGUMENT

I. DR Horton failed to provide evidence for its damages related to breach of contract, negligence, express warranty, and implied warranty causes of action, and MJ is entitled to partial summary judgment as to these causes of action.

In *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., LLC*, 413 S.C. 615, 639, 776 S.E.2d 426, 439 (Ct. App. 2015), the Court of Appeals held a contractor cannot sue its subcontractor for a cause of action that is merely a disguised indemnification claim. This Court must examine whether DR Horton's claims hinged on its liability to Plaintiff *and* whether DR Horton could demonstrate damages other than its potential liability to Plaintiff or costs associated with defending itself in the litigation. *Id.* at 635–36, 776 S.E.2d at 437–38; *see also Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC*, 413 S.C. 615, 624, 776 S.E.2d 426, 431 (Ct. App. 2015) (dismissing a negligence claim as a disguised indemnity claim).

DR Horton failed to show that its claims hinged on anything other than its liability to Plaintiff, and also failed to provide any evidence that it has suffered damages outside of its liability to Plaintiff or costs associated with defending itself in this litigation. For example, DR Horton failed to provide any evidence of the “reputational damage” it claims it suffered. MJ believes it is entitled to reconsideration of its motion for summary judgment as to DR Horton's claims for breach of contract, negligence, and breach of express or implied warranties, leaving only equitable and contractual indemnity claims.¹

¹ Furthermore, this Court has issued at least one Order finding that there was no evidence to support the negligence, express warranty, and implied warranty causes of action, collapsing DR Horton's claims into Indemnity. *See* July 26, 2023, Order Granting Installed Building Products' motion for summary judgment.

II. MJ is entitled to partial summary judgment as to DR Horton's claim for contractual indemnity.

Pursuant to *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), indemnity provisions in contracts purporting to indemnify the indemnitee for its sole or concurrent negligence *must be clear and unequivocal*. The language contained in DR Horton's contract with MJ ("the Contract") is not clear and unequivocal.² *See id.* The indemnity provision takes two completely incompatible positions: MJ must indemnify DR Horton against *any and all claims of every kind or character in any way occurring, arising out of, or in connection with* any negligent or intentional act of DR Horton related to the work at Rose Hill; and the second is that MJ shall not indemnify DR Horton relating to its sole negligence. Furthermore, the extent that concurrent negligence must be indemnified is unclear. *See id.* Therefore, MJ believes it is entitled to reconsideration of its motion for summary judgment as to DR Horton's claims for breach of contract, negligence, and breach of express or implied warranties, leaving only equitable and contractual indemnity claims.³

III. MJ is entitled to partial summary judgment as to DR Horton's claim for equitable indemnity.

The doctrine of unclean hands bars a party from recovering in equity if they acted unfairly in the matter that is the subject of litigation. *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687 (Ct. App. 2013). DR Horton does not have clean hands and is at least partially at fault for causing the damage. *See Fountain v. Fred's, Inc.*, 436 S.C. 40, 47–48, 871 S.E.2d 166, 170 (2022) (setting forth the requirements to recover under equitable indemnity).

² The full contractual indemnity language at issue is set forth in the Contract, attached as an exhibit to MJ's memorandum in support of its motion for summary judgment, at ¶¶ 10.1-10.2 and ¶ 6.4.

³ Furthermore, this Court has issued at least one Order finding that the contractual indemnity language was not clear and unequivocal. *See* July 26, 2023, Order Granting Installed Building Products' motion for summary judgment.

CONCLUSION

Therefore, MJ respectfully requests this Honorable Court issue an Order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Altering or Amending its prior decision and enter an Order granting MJ's motion for summary judgment, dismissing D.R. Horton's claims against MJ as a matter of law. In support of this Motion, MJ intends to rely upon prior and current pleadings, its Motion for Summary Judgment filed with the Court on May 1, 2023, its Memorandum in Support of Summary Judgment, all exhibits filed with the Court, any additional memorandum of law, and all other materials before the Court for consideration in accordance with the South Carolina Rules of Civil Procedure. MJ joins in the arguments and Motions of others that may be forthcoming and are not inconsistent with MJ's arguments and Motion.

Respectfully submitted,

MARTINEAU KING PLLC

/s/ Lee M. Thomas

Elizabeth A. Martineau (Bar: 78732)

Lee M. Thomas (Bar: 103034)

Blinn L. Cushman (Bar: 104486)

P.O. Box 241268

Charlotte, NC 28224

Tel: 704-247-8520

emartineau@martineauking.com

lthomas@martineauking.com

bcushman@martineauking.com

Counsel for MJ Cowboys, LLC

Charlotte, North Carolina

August 7, 2023

FORM 4

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

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al
PLAINTIFF(S)

DR Horton, et al
DEFENDANT(S)

Submitted By: Address:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant
---------------------------	---

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. ☐ See Page 2 for additional information.
- ☐ **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
- ☐ **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:

Motions to Reconsider:

All of DR Horton's motions

BKF Builders, Inc.

Nazareth Builders

Jesus Robles Montes

Bravo Carpenters

MJ Cowboys

ML Reyna

JLS Masonry

Jesus Jiminez

Therma-Tru

Rite-Rug

Cannaday

Builder's First Source

NM Alex Carpet

Harrelson Painting

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the parties' Motions to Reconsider, pursuant to Rule 59, SCRPC*, are DENIED.

*The Court decides these Motions to Reconsider based upon the briefs filed by the parties and without oral argument.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

EXHIBIT

F

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

R. SCOTT SPROUSE
Circuit Court Judge

2752
Judge Code

8/18/2023
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

CIVIL ACTION NO: 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of all
others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John
Doe #1-50,

Defendants.

D.R. Horton, Inc.

Third-Party Plaintiff

v.

IBP Asset, LLC d/b/a Blue Ridge Building
Products, et al.,

Third-Party Defendants.

**IBP ASSET, LLC d/b/a BLUE RIDGE
BUILDING PRODUCTS' MEMORANDUM IN
SUPPORT OF ITS SUPPLEMENTAL
MOTION FOR SUMMARY JUDGMENT AS
TO D.R. HORTON, INC.'S THIRD-PARTY
COMPLAINT**

Third-Party Defendant IBP Asset, LLC d/b/a Blue Ridge Building Products ("Blue Ridge") submits this Memorandum of Law in support of its Supplemental Motion for Summary Judgment, filed on May 1, 2023, as to Third-Party Plaintiff D.R. Horton, Inc.'s ("Horton") Third-Party Complaint against Blue Ridge.

Blue Ridge's initial Motion for Summary Judgment was argued in full on April 21, 2023. During the hearing, Plaintiff's counsel and counsel for Horton agreed that claims related to the installation of gutters and attic insulation were not part of the class claims. At that time, those

EXHIBIT

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were the only potential issues within Blue Ridge's scope of work known to counsel. However, during the hearing, Plaintiff's counsel stated that there was a potential issue related to a leak that was discovered through a doorknob on one of the patio doors tested by Plaintiff's expert. Based on that, undersigned counsel requested an opportunity to review that allegation and supplement its previous Motion.

For brevity, the factual basis and legal standards that were included in the previous filings by Blue Ridge are incorporated herein:

- Motion for Summary Judgment, filed August 1, 2022
- Memorandum in Support of Motion for Summary Judgment, filed September 2, 2022
- Supplemental Memorandum in Support of Motion for Summary Judgment filed April 19, 2023
- Supplemental Motion for Summary Judgment, filed May 1, 2023

SUMMARY OF ARGUMENT

- Blue Ridge was a subcontractor to DR Horton and installed a variety of products on some but not all of the houses in the class.
- Blue Ridge did not perform any work on the Zitek residence.
- The work performed by Blue Ridge is not part of the class claims.
- Therefore, D.R. Horton has no claim against Blue Ridge that is derivative of the Plaintiff's claims, and therefore the Third-Party Complaint fails to meet the threshold requirements of Rule 14.

SUPPLEMENTAL STATEMENT OF FACTS

In her November 11, 2019, letter to Horton entitled "Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages," Plaintiff included a very general

description of problems with patio doors.¹ On October 20, 2020, Plaintiff Zitek moved for an Order certifying the Class under SCRCF Rule 23, wherein she re-alleged that her claims are “typical of the Class members’ claims.”² These claims included leaky patio doors. On November 23, 2020, Plaintiff Zitek filed a memorandum in support of her motion for class certification³ along with a letter and three affidavits from her engineering expert, Dr. Rhett Whitlock⁴ that described damaged patio doors and trim with insufficient water resistance. Ultimately, On January 27, 2021, this Court certified the Class.

On March 11, 2021, Horton filed an Amended Answer and Third-Party Complaint, naming Blue Ridge as a Third-Party Defendant.⁵ On February 23, 2022, Horton filed a Second Amended Answer and Third-Party Complaint.⁶ In its Third-Party Complaint, Horton demands that Blue Ridge defend Horton in this lawsuit and indemnify Horton for the damages it has and will sustain as a result of Blue Ridge’s work in the Rose Hill subdivision.

At the time Horton filed its original Third-Party Complaint on March 11, 2011, the only class-wide defect, as alleged by Plaintiff Zitek and her experts, that could remotely be attributed to Blue Ridge was the installation of doorknobs and deadbolts. However, as explained below, Plaintiff Zitek and her experts have not alleged a class-wide defect relating to the installation or provision of doorknobs and deadbolts and thus, Horton cannot demand that Blue Ridge defend and indemnify Horton in this case.

¹ Exhibit 1, Zitek Notice and Opportunity to Cure.

² Exhibit 2, Zitek Motion for Class Certification.

³ Exhibit 3, Zitek Memorandum in Support of Motion for Class Certification.

⁴ Exhibit 4, Whitlock Letter; Exhibit 5, Whitlock Affidavits: April 30, 2020 Affidavit; May 28, 2020 Reply Affidavit; November 20, 2020 Supplemental Affidavit.

⁵ Exhibit 6, Horton Amended Answer and Third-Party Complaint. Blue Ridge was improperly identified as Installed Building Products, LLC a/k/a Installed Building Products II, LLC.

⁶ Exhibit 7, Horton Second Amended Answer and Third-Party Complaint.

On September 1, 2021, Dr. Whitlock issued a PowerPoint Report that provides more detailed opinions on the alleged class-wide defects.⁷ According to the PowerPoint, Dr. Whitlock spray tested two patio doors in the Rose Hill subdivision – 206 Buxton and 8 Duxbury – to test for leaks and the doorknob at 8 Duxbury leaked during the spray test.⁸

Dr. Whitlock was deposed for eight (8) days by Horton and the third-, fourth-, and fifth-party defendants. Not once during Dr. Whitlock's countless hours of deposition testimony were doorknobs identified as a class-wide defect. Dr. Whitlock did, however, make various comments about the doorknobs in the neighborhood. During his November 18, 2022 and January 17, 2023 depositions, with the questioning led by Horton's counsel, Dr. Whitlock testified that he only spray tested two (2) doors,⁹ that one doorknob leaked,¹⁰ that he did not investigate whether the leaky doorknob was due to an installation or a product defect,¹¹ and, when asked how the single leaky doorknob fits into the grand scheme of the case, that: "Well, it was just something I noticed, and I thought I should report it."¹²

During his April 12, 2023 deposition, with the questioning led by the door and window subcontractors, Dr. Whitlock was questioned for approximately twenty (20) pages about the exterior patio doors in the Rose Hill neighborhood and not once did he mention doorknobs.¹³

⁷ Exhibit 8, Whitlock PowerPoint.

⁸ *Id.*, p. 173.

⁹ Exhibit 9, Whitlock Deposition Transcript excerpts, November 18, 2022.

¹⁰ Exhibit 10, Whitlock Deposition Transcript excerpts, January 17, 2023.

¹¹ *Id.*

¹² *Id.*

¹³ Exhibit 11, Whitlock Deposition Transcript (rough), April 12, 2023.

SUPPLEMENTAL ARGUMENT

A. D.R. Horton has no claim against Blue Ridge that *derives* from the Class Claims brought by Zitek.

Granting this Motion does not require this Court to determine that Horton has no contractual indemnity claim against Blue Ridge. That is not the question. The question is whether Horton has a contractual indemnity claim that is derivative of the claim asserted by this Plaintiff in this lawsuit. Because there is no such derivative claim, the Third-Party Complaint fails and should be dismissed.

Plaintiff Zitek's experts have performed numerous inspections, issued numerous affidavits and reports identifying the defects common to the class of plaintiff homeowners in the Rose Hill subdivision, and sat for numerous days of depositions. None of Plaintiff Zitek's experts have identified a defect common to the class that implicates Blue Ridge's work. Specifically, none of Plaintiff Zitek's experts have identified any class-wide defect related to gutters; attic, wall, or crawl space insulation; pre-fabricated fireplaces or fireplace mantles; doorknobs or deadbolts; door numbers; closet shelves; bathroom mirrors; or shower doors. The only defect identified by Plaintiff Zitek's experts that remotely touches on Blue Ridge's scope of work is Dr. Whitlock's testimony that one doorknob at 8 Duxbury leaked during spray testing. Importantly, however, none of Plaintiff Zitek's experts have identified leaky doorknobs as a class-wide defect, even after observing the leaky doorknob at 8 Duxbury.

Blue Ridge did not install the doorknob at 8 Duxbury.¹⁴

¹⁴ See Exhibit 1, Excerpt of Horton's Vendor Spend showing all work performed by Blue Ridge on the subject project, attached to Blue Ridge's September 2, 2023 Memorandum in Support of its Motion for Summary Judgment. At the Court's request, Blue Ridge will provide the entire Vendor Spend in Excel format so the Court can search for the installer of the particular doorknob at 8 Duxbury.

Horton cannot expand Plaintiff's claim beyond what the Plaintiff is pursuing in order to create an indemnity obligation.

Plaintiff Zitek brought a class action lawsuit against Horton alleging class-wide defects in the construction of the Rose Hill subdivision. Plaintiff Zitek, in her pleadings, affidavits, and expert reports, has identified those class-wide defects. This Court granted class certification based upon those class-wide defects. Those specific class-wide defects are the defects that Horton is defending itself against in this lawsuit. Blue Ridge's work is not implicated in those specific class-wide defects. As such, Horton is not facing liability or damages for Blue Ridge's work in this lawsuit and cannot compel Blue Ridge to defend and indemnify it in this lawsuit.

B. The Contractual Indemnity clause in the contract is unenforceable as a matter of law.

If the Court finds that there is a derivative claim for which Horton may be able to seek indemnity, the claim for contractual indemnity should be dismissed because the contractual provision is unenforceable. Horton cannot satisfy the "clear and unequivocal" standard set forth by the South Carolina Court of Appeals in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 642, 819 S.E.2d 166, 168 (Ct. App. 2018) and thus cannot demand that Blue Ridge defend and indemnify Horton in this case.

In addition to the failure of the language itself, the contract proffered by Horton is facially defective because it does not include the material terms of the contract. Specifically, it does not contain an agreed-to scope of work.¹⁵

¹⁵ Exhibit 12, Blue Ridge Contract.

Since the contractual indemnification provision specifically relates to the “scope of work performed . . . under this contract,” the failure to identify the work at the time of the contract is manifestly not “clear and unequivocal.”

CONCLUSION

WHEREFORE, for the reasons stated above, Third-Party Defendant IBP Asset, LLC d/b/a Blue Ridge Building Products prays that the Court grant its Supplemental Motion for Summary Judgment as to Third-Party Plaintiff D.R. Horton, Inc.’s Third-Party Complaint and dismiss all claims and causes of action against Third-Party Defendant IBP Asset, LLC d/b/a Blue Ridge Building Products.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

/s/ Scott W. Giblin

Everett A. Kendall, II, SC Bar No. 8450

Scott W. Giblin, SC Bar No. 105368

Murphy & Grantland, P.A.

Post Office Box 6648

Columbia, SC 29260

(803) 782-4100

***Attorneys for IBP Asset, LLC d/b/a Blue Ridge
Building Products***

Columbia, South Carolina
July 11, 2023

D.R. HORTON
America's Builder

SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR IBP Asset, LLC dba: Blue Ridge Building Products (Contractor)
 Sole Proprietorship ☐ Partnership ☐ Corporation ☒ LLC ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No. 31-1795875
 Name of Owner(s)/Officer(s) SCC Attached List
 Division Name _____ Area Name _____ Assigned Vendor No. _____
 Address for All Notices P.O. Box 587
 City Greenville State S.C. Zip Code 29652
 Telephone 864-895-9138 864-877-7449 E-Mail Address 120.bates@installed.net
 Insurance Carriers ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This Agreement (the "Agreement") is entered into on this 12 day of January, 2010, between D.R. Horton, Inc. its affiliates & subsidiaries ("Owner") and Contractor

1. **SCOPE OF WORK.** This Agreement is entered on a blanket basis. The terms of the Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement (the "Work") shall include all work performed and materials supplied by Contractor to Owner including but not limited to the labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described in Exhibit A. The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing will not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to or in place of Contractor. Contractor will be awarded Work on a lot by lot basis. To the extent Exhibit A contains more than one type of construction-related activity, Contractor must clarify with Owner before the Work commences as to which construction-related activity it has been awarded for the lot in question.

2. **INDEPENDENT CONTRACTOR STATUS.** Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, method and performance of the Work. Contractor shall not be considered an agent or employee of Owner for any purpose, nor shall any employees or permitted subcontractors of Contractor. Contractor shall not represent itself as the agent of Owner unless owner has specifically permitted Contractor to do so in writing. The results achieved shall satisfy the requirements of this Agreement. Contractor shall be responsible for the performance of its employees and permitted subcontractors, and all personnel used by Contractor in the performance of Work shall be qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further agrees to provide written notification to all of its present and future employees of Contractor's provision for Worker's Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work herein covered or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. **CONTRACT PRICE.**

3.1 **Pricing Schedule.** The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 **Taxes.** Contractor shall pay and shall be solely responsible for all tax withholding, Social Security, state unemployment and all other withholding as required by law Contractor's employees, agents or permitted subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 **Price Increases.** NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNLESS CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule, the superseded Pricing Schedule shall remain in effect for Purchase Orders issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. **PAYMENT.**

4.1 **Invoices.** Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing of the house incorporating the Work from Owner to a purchaser. Contractor hereby agrees that timely invoicing is an important and material term to this agreement, and timely invoicing is a part of Contractor's performance of all material terms of this contract. Contractor hereby waives payment for any Work where Contractor fails to invoice Owner in a timely manner in conformity to this agreement. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 29-6-30 AND 29-6-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR

Executed this 12 day of January, 2010

Owner:
By D.R. Horton, Inc.
Name ED JENNIFER JR.
Title PURCHASING
Division President

Contractor:
By IBP Asset, LLC dba: Blue Ridge Building Products
Name Don Albers
Title Regional Manager

INITIALS: OWNER [Signature] CONTRACTOR DA

ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO SUBCONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN AND THAT OWNER DOES NOT AGREE TO PAY TO SUBCONTRACTOR INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF DELAYED PAYMENTS.

4.2 Payment to Subcontractors. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed from Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties, and these joint payments shall satisfy amounts owed by Owner to Contractor, notwithstanding the fact that the third parties may not endorse the checks. In any instance where Owner receives written notice from one of Contractor's sub-contractors, whereby the subcontractor claims a failure to be paid for the Work, Owner reserves the right to pay the subcontractor directly or to make payment payable to both the Contractor and its subcontractor.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the Contract Price shall waive and release all claims against Owner and the property under this Agreement, but shall not waive any claims of Owner arising out of Work later found to be defective and shall not release Contractor from liability for warranties and warranty service and/or defective Work. Contractor shall remedy any defects and pay for any damage resulting from any defects in or caused by the Work or as required by any other contracts between Owner and Contractor or by law or customary practice. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or assigns is an acceptance of the Work or materials not in compliance with this Agreement.

5. SCHEDULE OF WORK.

5.1 Time Is of the Essence. Contractor acknowledges that TIME IS OF THE ESSENCE in the performance of all Work.

5.2 Construction Schedule. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.3 Commencement of the Work. Owner shall issue an authorization (either pursuant to a written purchase order, payment schedule, or work invoice ("Purchase Order") or verbal instructions from an authorized Owner representative) to commence the Work and Contractor shall not commence the Work at a job location until Contractor has received instructions to begin Work at a specific job location. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.4 Changes in Construction Schedule. Contractor agrees that Owner shall have the right to make changes to the schedule of Work at Owner's discretion and agrees to comply with such changes.

6. PERFORMANCE STANDARDS.

6.1 Applicable Standards. Contractor shall perform all Work in a good and workmanlike manner, in accordance with the plans and specifications of Owner, according to industry standard practices, and warrants that the Work will meet or exceed FHA minimum property standards, VA requirements, all laws (statutory or common) and regulations, and any applicable building code requirements.

6.2 Contractors' Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized Owner's employee and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications as the plans and specifications affect the Work and materials incorporated in the Work, and that the plans and specifications are clear and unambiguous, and has accepted and agreed to be bound by all such requirements.

6.3 Government Requirements. Contractor will comply with all applicable federal, state, local, and county statutes, ordinances, regulations, codes, licensing requirements and standards, and the requirements of the Williams-Steiger Occupational Safety and Health Act of 1970 as amended, as well as the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., or similar laws or regulations, and the rules, regulations, or orders of all public authorities relating to performance of the Work, including without limitation, the procurement and posting of all required permits and notices. In addition, Contractor will not discriminate in its hiring or employment and will follow all state and federal employment laws or regulations. Contractor shall perform background checks and use only appropriate employees to perform warranty or repair work after a house is occupied.

6.4 Indemnity. To the fullest extent allowed by law, Contractor will agree to indemnify, defend, and hold Owner harmless from all actions, claims, investigations or other acts to enforce such laws or regulations, and further agrees to indemnify Owner from the payment of any fine, penalty or damages imposed, levied, assessed, or found as a result of the Contractor's failure to comply with or adhere to the applicable laws and regulations, or from Contractor's failure to cause its employees or subcontractors to comply with such laws and regulations.

6.5 Observation and Testing by Owner and Repair by Contractor. Owner shall have the right to observe or test the Work at any time during or after construction, but that observation or testing is solely for the benefit of Owner's and is not for Contractor's benefit. Owner's failure to note defects in the Work during an inspection will not waive any of Contractor's obligations, representations or warranties related to the Work. Notwithstanding anything contained in this Agreement to the contrary, all Work shall be performed and any defects shall be corrected timely and in accordance with this Agreement to the satisfaction of Owner.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work, and shall report in writing to Owner any defects prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractor's work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses and approvals necessary for or applicable to the performance of the Work.

6.8 Change Orders. The Contractor shall furnish the materials for and to make all changes requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed.

INITIALS: OWNER EA, CONTRACTOR CA

(ii) governing storage of materials on the job location, (iii) regulating trash pick-up and waste collection at the job location, and (iv) work site safety requirements

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste materials or rubbish caused by its operations and shall remove all of Contractor's materials, and if materials are furnished by Owner, Contractor shall move all usable materials provided by Owner to a location designated by Owner. Contractor shall sweep out any waste material from inside the home under construction upon completion of its operation. All refuse shall be placed in receptacles provided or at locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up activities and collect a one hundred dollar (\$100.00) fine from Contractor for each incident. The cost of such clean-up and the aforementioned fine shall be deducted from any sums owed by Owner to Contractor, or shall be immediately payable by Contractor upon demand therefore by Owner.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Owner reserves the right to set minimum standards or rules relating to Work on its site. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OWNER'S MINIMUM REQUIREMENTS. THE OWNER ASSUMES NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner of any accidents or injuries on the Work Site. Contractor shall have an ongoing safety program and conduct inspections to determine that safe working conditions and equipment exist and safe practices are observed. Contractor shall prohibit and prevent the presence of children under age eighteen (18) from the Work Site.

7.1 Safety Laws and Indemnity Agreement. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards, statutes, and industry best practices concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations. Contractor shall provide Owner with written verification of its compliance with all applicable safety and health standards and regulations, including but not limited to OSHA's Hazard Communication Standard for the Construction Industry, 29 C.F.R. §1926.59 et seq., and provide written notice to Owner of the contact person responsible for Contractor's compliance with all safety and health standards and regulations. To the fullest extent allowed by law, Contractor agrees to indemnify, defend, and hold Owner harmless from all actions prosecuted to enforce and the payment of any fine or penalty imposed under such safety laws and regulations and shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work.

7.2 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, permitted subcontractors or suppliers at a job location or performance of the Work by any person under the influence of alcohol or drugs.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate corporations, and successors and assigns, that all labor performed and materials furnished by Contractor shall conform to the specifications of this Agreement, shall be free from any defects or deficiencies in workmanship or materials, and will comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, will meet or exceed the FHA/VA minimum property standards, and will comply with the Residential Warranty Corporation ("RWC") Program and the applicable limited warranty standards, which Contractor has read and understands and to which Contractor agrees to be bound. All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects for purposes of Contractor's obligations under this Contract. Contractor shall make good and promptly repair all Work not complying with the standards set forth in this section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Paragraph 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, the initial homeowner of the property on that is the subject of the Work: (i) for a period of ten (10) years all structural elements, including, but not limited to, roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; (d) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (i) any statutory warranty or (ii) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner (a "Homeowners Warranty"). Contractor expressly agrees to be bound by any such Homeowners Warranty and to the extension of warranty period hereunder. Furthermore, notwithstanding the foregoing, Contractor agrees that all express and implied warranties shall remain in full force and effect for so long as Owner is obligated to warrant the Work pursuant to applicable law. Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Homeowners Warranty that is longer than the Warranty Periods stated above; provided, however, failure to give that notice will not affect the extension of the Warranty Period to the applicable warranty period under the Homeowner's Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty obligations, Contractor's indemnity obligations, or the ability of Owner to request Contractor to perform warranty services in the future.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish all warranties and/or guarantees by manufacturers on appliances and equipment, and shall furnish all certificates required by any municipality and/or VA and/or FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and are not in limitation of periods of applicable statutes of limitation.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSENT LIENS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Project is located.

9.3 Lien Chain Indemnity. If any liens are filed against Owner relating to portions of the Work for which Owner has paid Contractor, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such lien or affidavit to be removed.

INITIALS: OWNER HA, CONTRACTOR EL

and released of record. Contractor agrees to INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any liens relating to portions of the Work for which Owner has paid Contractor, and further agrees at Owner's request to any or all of the following: (i) procure a bond to indemnify Owner and any home purchaser from Owner, in an amount sufficient to discharge that lien, or (ii) refund to Owner all monies, including any additional amount necessary to cover all of Owner's or home purchaser's attorneys' fees and court costs paid in discharging the lien, whichever remedy Owner elects in its sole and absolute discretion, or (iii) provide sworn testimony that payment has already been made to Contractor for the work for which the alleged lien applies.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSUREES (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALTIES, LOSSES, ATTORNEYS FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAY LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR SET FORTH HEREIN; (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"); (3) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF CONTRACTOR AND/OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK, NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE INDEMNITY FOR LOSSES CAUSED SOLELY BY FAULT OR NEGLIGENCE OF THE INDEMNITEE. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS, OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR'S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ANY AND ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. IT IS THE EXPRESS INTENTION OF THE PARTIES THAT CONTRACTOR'S INDEMNITY OBLIGATIONS HEREIN WILL SURVIVE THE TERMINATION OF CONTRACTOR OR THIS AGREEMENT. INDEMNITEE SHALL HAVE THE RIGHT, AT ITS DISCRETION AND CHOOSING, TO DEFEND ANY AND ALL CLAIMS WHICH MAY BE ASSERTED AGAINST IT, AND CONTRACTOR AGREES TO REIMBURSE INDEMNITEE FOR ANY AND ALL EXPENDITURES WHICH INDEMNITEE MAY MAKE OR INCUR ON ACCOUNT OF ANY SUCH CLAIM.

10.3 CONTRACTOR AND CONTRACTOR'S AGENTS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS OR EQUIPMENT.

10.4 Subcontractor's and Supplier's Indemnity Obligations. Contractor shall require each of its subcontractor to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required in this section and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms as Section 13. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the actions of any subcontractor engaged by Contractor, whether in written agreement or otherwise, or who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligations of the subcontractors to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with completed operations coverage which contains a per occurrence limit of no less than one million dollars (\$1,000,000.00), and an aggregate limit of no less than two million dollars (\$2,000,000.00) protecting against liability for bodily injury, broad form property damage, and personal injury claims arising from the exposures of (i) premises-operations, (ii) products and completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors, (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement, and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type of, or nature of, the Work or limit the type of structure on which the Work is to be performed. The CGL Policy shall not contain a deductible or self insured retention of more than \$25,000.00. Contractor shall continuously maintain a CGL Policy covering completed operations for any applicable statute of repose for commencing lawsuits associated with the Work.

11.2 Other Insurance. Contractor agrees to carry (i) Worker's Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Worker's Compensation obligations imposed by law; (ii) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than one million dollars (\$1,000,000.00) and an aggregate of no less than one million dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (iii) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person (Bodily Injury) and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as an Additional Insured on the CGL Policy or policies required above covering both on-going operations and completed operations (equivalent to form CG20101185 or form CG2037). Coverage obtained by Contractor naming Owner as an Additional Insured shall be primary with any insurance of Owner being excess coverage. That insurance coverage will be carried continuously during the term of this Agreement and thereafter as required by this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion. That insurance shall provide for a waiver of subrogation. All insurance shall be with

INITIALS: OWNER EA, CONTRACTOR CA

a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the required policies. Each Certificate of Insurance or policy shall contain an unqualified clause to the effect that the policy shall (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days' prior written notice to Owner, (ii) be carried continuously from the date of commencement of the Work until expiration of the period of the Contractor's warranty provided in this Agreement, (iii) specifically identify Owner as an Additional Insured, and (iv) indicate that coverage applies in the state where the Work is being performed. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself and the Work required to be performed under this Agreement

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER IN ITS SOLE AND ABSOLUTE DISCRETION) IN EFFECT AT THE TIME WORK IS PERFORMED TO COMPENSATE OWNER FOR ANY ADDITIONAL COSTS OF ITS WORKER'S COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS CONTRACT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work to the extent permitted under this Agreement, Contractor guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Owner as an Additional Insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or another contractor's work is damaged by an act for which Contractor, or its employees, agents or subcontractors, are responsible, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct such Work, replace or repair any defective material, or repair any damage. Contractor shall make all repairs and correct such within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours notice on a non-emergency basis; or (ii) retain a third party or undertake to perform those duties, and retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld resulting in a deficiency, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and reasonable attorneys' fees, incurred by Owner, and shall pay to Owner this amount within thirty (30) days of demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Paragraph 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or permitted subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties, (ii) claims or liens are filed against the job location as a result of Contractor's actions or omissions, (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement, Exhibit A of this Agreement, or the specifications; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order that is Contractor's obligation under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary tools, material, or equipment for, or cleaned up after, the Work; (viii) Contractor fails to comply with any other provision of this Agreement

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement and rights and remedies available under this Agreement shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. Owner shall have a right to collect from Contractor its reasonable attorneys' fees and expenses incurred in enforcing Contractor's obligations

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These Disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking equitable relief from and arbitrator or a court of appropriate jurisdiction.

13.3 Arbitration. If mediation fails, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. regardless of any other choice of law provision in any underlying contract or this Agreement. All demands for arbitration shall be made before the expiration of the applicable statutes of limitations and repose. The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in any court of competent jurisdiction.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrators mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes, is over \$200,000, but only one arbitrator shall be appointed if the Dispute is 200,000 or less. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of a mediator or arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint a mediator or arbitrator. The AAA's Code of Arbitrator Ethics (revised March 1, 2004) is applicable to all arbitrations.

INITIALS: OWNER CONTRACTOR

13.5 Rules. To the extent not in conflict with the Federal Arbitration Act, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner may join Contractor in any litigation, mediation, or arbitration initiated against Owner by a third person so that the rights of all parties (Owner, Contractor, Subcontractor, or any third person) shall be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner where necessary to facilitate resolution in a single forum. If multiple lawsuits or arbitrations are commenced, they shall all be consolidated into a single proceeding. Notwithstanding any other provision of this section, if a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect to unilaterally waive mediation or arbitration and litigate the Dispute with Contractor.

14. TERMINATION.

14.1 Termination by Owner for Cause or Convenience. This Agreement shall remain in full force and effect until terminated in writing by mailing notice to the other Party. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) Days' written notice before the effective date of termination, and shall perform fully under this Agreement during that notice period. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.3 Survival. All obligations, duties and warranties for Work performed under this Agreement shall survive termination.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement, (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement, (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms, (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority, (v) Contractor has, and each Contractor's employees, agents or permitted subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement, (vi) Contractor is in compliance with all governmental requirements to which it is subject, and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement, and with respect to prices and quantities only, the Price Schedule and all written Purchase Orders shall be the entire agreement between Owner and Contractor related to the Work, and there are no other agreements, oral or written, made by or relied upon by Owner and Contractor. Except as otherwise provided in this Agreement, no provision of this Agreement may be amended or supplemented except in writing signed by both Owner and Contractor.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights and obligations are not assignable or transferable without the express written consent of Owner, who may consent can be withheld in Owner's sole and absolute discretion. Subject to the restrictions and prohibitions on assignments set forth in this section, the terms of the Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Contractor shall provide and transfer ownership to any and all samples and/or shop drawings requested by Owner.

18. NOTICES. All notices required pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of Owner and Contractor. However, Contractor's business address shall be as noted on page one (1) of this Agreement. Notices shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by overnight delivery service, and upon confirmation if sent by facsimile transmission.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or articles.

SOUTH CAROLINA REVISED 7/23/2007

INITIALS: OWNER PA, CONTRACTOR MA



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
11/06/2019

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Willis Towers Watson Southeast, Inc. fka Willis of Tennessee, Inc. c/o 26 Century Blvd P.O. Box 305191 Nashville, TN 372305191 USA	CONTACT NAME: PHONE (A/C, No, Ext): 1-877-945-7378 FAX (A/C, No): 1-888-467-2378 E-MAIL ADDRESS: certificates@willis.com														
INSURED IBP Asset, LLC dba Blue Ridge Building Products Prime Energy Group 605 Apple Valley Road Duncan, SC 29334-0000	<table><tr><th>INSURER(S) AFFORDING COVERAGE</th><th>NAIC #</th></tr><tr><td>INSURER A: Old Republic Insurance Company</td><td>24147</td></tr><tr><td>INSURER B: American Guarantee and Liability Insurance</td><td>26247</td></tr><tr><td>INSURER C:</td><td></td></tr><tr><td>INSURER D:</td><td></td></tr><tr><td>INSURER E:</td><td></td></tr><tr><td>INSURER F:</td><td></td></tr></table>	INSURER(S) AFFORDING COVERAGE	NAIC #	INSURER A: Old Republic Insurance Company	24147	INSURER B: American Guarantee and Liability Insurance	26247	INSURER C:		INSURER D:		INSURER E:		INSURER F:	
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INSURER D:															
INSURER E:															
INSURER F:															

COVERAGES		CERTIFICATE NUMBER: W13767720		REVISION NUMBER:			
THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.							
INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	☒ COMMERCIAL GENERAL LIABILITY ☐ CLAIMS-MADE ☒ OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: ☐ POLICY ☒ PRO-JECT ☒ LOC OTHER:	Y	Y	MMZY 314253 19	10/01/2019	10/01/2020	EACH OCCURRENCE \$ 2,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 1,000,000 MED EXP (Any one person) \$ 10,000 PERSONAL & ADV INJURY \$ 2,000,000 GENERAL AGGREGATE \$ 4,000,000 PRODUCTS - COMP/OP AGG \$ 4,000,000 COMBINED SINGLE LIMIT (Ea accident) \$ 5,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
A	☒ AUTOMOBILE LIABILITY ☒ ANY AUTO ☒ OWNED AUTOS ONLY ☒ HIRED AUTOS ONLY ☐ SCHEDULED AUTOS ☒ NON-OWNED AUTOS ONLY	Y	Y	MMTB 314252 19	10/01/2019	10/01/2020	EACH OCCURRENCE \$ 10,000,000 AGGREGATE \$ 10,000,000 DED ☒ RETENTION \$ 0
B	☒ UMBRELLA LIAB ☒ OCCUR ☐ EXCESS LIAB ☐ CLAIMS-MADE DED ☒ RETENTION \$ 0	Y	Y	AUC 9314206-08	10/01/2019	10/01/2020	☒ PER STATUTE ☐ OTH-ER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000
A	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below	Y/N No	N/A	MWC 314250 19	10/01/2019	10/01/2020	
DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required) This Voids and Replaces Previously Issued Certificate Dated 10/02/2019 WITH ID: W13269178. D.R. Horton, Inc., its affiliates and subsidiaries is named as an Additional Insured as respects to General Liability coverage as required by written contract. General Liability coverage includes a Waiver of Subrogation in favor of D.R. Horton, Inc., its affiliates and							

CERTIFICATE HOLDER	CANCELLATION
DR HORTON INC. ITS AFFILIATES AND SUBSIDIARIES INSURANCE Attn: INSURANCE COMPLIANCE PO BOX 100085 -DR DULUTH, GA 30096	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS. AUTHORIZED REPRESENTATIVE

ACORD 25 (2016/03)

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SR ID: 18783267

BATCH: 1443413

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ELECTRONICALLY FILED - 2023 Jul 11 11:06 AM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

KDC 00034032

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
CASE NO: 2019-CP-04-1942

Natalie Zitek, individually,
and on behalf of all others
similarly situated,

PLAINTIFF

-vs-

TRANSCRIPT OF RECORD

D.R. Horton, Inc., Jane Doe
#1-10; and, John Doe #1-50

DEFENDANTS

DR Horton, Inc.,

THIRD-PARTY PLAINTIFF

vs

AJ Landscaping & Grading, LLC
a/k/a AJ Landscaping &
Grading, Inc; AllPro Textures,
LCC; Alpha Omega Construction
Group, Inc; American Concrete
And Precast, Inc., a/k/a ACP
Concrete, Inc.; A&J Framing,
Inc; Alpha EMC; A-Z, Inc;
Atlanta Floor Designs Center;
A Grade Above Others, LLC;
Brand-Vaughan Lumber Co., Inc.
BKF Builders, Inc.; Builders
Designhouse, LLC; BMC East,
LLC D/B/A Coleman Floor, LLC;
Builders Firstsource
Southeast Group, LLC, a/k/a
Builders Firstsource, Inc;
Bravo Carpenters, Inc.; Caryl
Mechanics II, Inc.; Caryl
Mechanicals, Inc.; Cannaday
Siding and Gutter, Inc.; Cores
Painting, LLC; CBU Enterprises
Inc.; CPI Security Systems,
Inc.; DOM Group, LLC; Ferguson
Enterprises, Inc.; Five Star
Construction, Inc.; Five Star

September 1, 2023
ANDERSON, SC

EXHIBIT

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Foundations, LLC; Galloway Bell Inc.; a/k/a Galloway-Bell, Inc. II; BGET Floored, LLC; GBS Building Supply-US LBM, LLC, a/k/a GBS Building Supply, Inc. General Shale Brick, Inc.; Greener Pastures, Inc., a/k/a Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landscapers, LLC; Lade-Danler, Inc.; Lansing Building Products Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, a/k/a Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc., a/k/a Gypsum UTM Enterprises, Inc.; Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc.

THIRD-PARTY DEFENDANTS

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE

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

Carl Muller, Esquire
Attorney for DR Horton

N. Keith Emge, Jr., Esquire
Attorney for Topbuild Home Services, Inc.

Stephen P. Hughes, Esquire
Attorney for Builders Firstsource Southeast Group, LLC and
Probuild Company, LLC

Jason Michael Imhoff, Esquire
Attorney for DR Horton, Inc.

Justin O'Toole Lucey, Esquire
Attorney for Natalie Zitek

Thomas Bacot Pritchard, Esquire
Attorney for Huttig Building Products

Kimila L. Wooten, Esquire
Attorney for DR Horton

Kirby Dar Shealy, III, Esquire
Attorney for Silver Line Building Products Corporation

Brandon Paul Jones, Esquire
Attorney for Therma-Tru, Ltd.

Stacey Canaday, Esquire
Attorney for Jesus Jiminez, Jiminez Contractors, and
RJ Quality Construction

Russell Racine, Esquire
Attorney for Robles Construction

James Bryson, Esquire
Attorney for ACP Concrete

Jeffrey A. Ross, Esquire
Attorney for Galloway-Bell, Inc., Sodfather, and
Willow Tree

Hugh Gallagher, Esquire
Attorney for BKF Builders, Inc.

Alexander Mende, Esquire
Attorney for Aaron Peris

Jonathan Clark, Esquire
Attorney for Harrelson Painting, NM Alex, Caryl
Mechanics II, Inc., and Alpha Omega

John Crawford, Esquire
Attorney for DR Horton

Whidbee Perrin, Esquire
Attorney for M & L Reyna

Elizabeth Martineau, Esquire
Attorney for JLS Masonry

1 MR. LUCEY: JLS, MJ Cowboys have identical motions in
2 limines.

3 MRS. MARTINEAU: That's correct.

4 THE COURT: Okay. I was going to ask you that, if you
5 had anything else to add.

6 MRS. MARTINEAU: No, Your Honor.

7 THE COURT: I think he covered it pretty ---

8 MRS. MARTINEAU: I guess the only -- I would like to ask
9 a question about the notice of appeal on the motions for
10 summary judgment for the, I guess, the two -- I guess there's
11 two or three third-party defendants that received summary
12 judgment that you all appealed. And I've had this issue come
13 up before where you had a motion for summary judgment and a
14 final order as to one defendant but not all, and the question
15 is whether it just -- it stays the case as to the other
16 defendants.

17 But I heard what Your Honor said, but I didn't hear what
18 DR Horton's position was. I mean, I believe that they are
19 moving to stay -- let's see, they are moving to appeal the
20 grant of the motion for summary judgment as to the other
21 defendants. Part of those claims against those defendants for
22 breach of contract and contractual indemnity are similar and
23 the same types of claims they have against the other
24 defendants. And, of course, you can't have more than one
25 damage. It is the same issue.

1 And I believe the -- that the Court -- the jurisdiction
2 of the Court for those issues, basically Phase 2, should be
3 stayed pending the appeal. But I didn't know what DR Horton's
4 position was as to that.

5 MRS. WOOTEN: Our notice of appeal was our position on
6 that.

7 THE COURT: We argued -- had arguments on that this
8 morning, and I ruled we're going forward.

9 MRS. MARTINEAU: Thank you, Your Honor.

10 THE COURT: Okay. All right, where's Mr. Pritchard?

11 MR. JONES: Your Honor, I think he's on the phone again.
12 I'm happy to go on behalf of Therma-Tru and I've got a couple
13 that I've gone in with Huttig and ---

14 THE COURT: All right, let me hear -- yeah, let me hear
15 from Huttig and Therma-Tru.

16 MR. JONES: And Mr. Pritchard ---

17 THE COURT: Mr. Pritchard has ---

18 MR. JONES: If you want, I can go out in the hallway and
19 try to find him.

20 THE COURT: Well, talk to me about your -- if you have
21 any that are separate from Huttig's.

22 MR. JONES: Well, first, Your Honor, for the record,
23 Brandon Jones for Therma-Tru. My first one, I think was
24 already ruled upon. It was a 615, sequester the witness, so I
25 think that can be disposed of. The next one, Your Honor, is



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR MJ Cowhays LLC ("Contractor")
 Sole Proprietorship ☐ Partnership ☒ Corporation ☐ L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 46-4331473
 Name of Owner(s)/Officer(s): Mauricio Reyna
 Division Name: Greenville Area Name: 70960 Assigned Vendor No.: 1756708
 Address for All Notices: 7740 Augusta Rd Ste 1A #129
 City: Riedmont State: SC Zip Code: 29673
 Telephone: 806-850 Fax: 882-7582 E-Mail Address: MJCowhaysLLC@gmail.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND REDUCTIONS.
 This agreement (the "Agreement") is entered into on this 16 day of MAY, 2014, between
D-R Horton Inc ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless so amended in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not included in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 25-6-20 AND 25-6-21 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR AGREES THAT OWNER DOES AND WILL NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 16 day of MAY, 2014.

By: Mauricio Reyna
 Name: Mauricio Reyna
 Title: Owner

INITIALS: OWNER MR CONTRACTOR MR

EXHIBIT

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PLAINTIFF'S
EXHIBIT

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4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Subcontractor shall immediately notify Contractor in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractors' Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such

INITIALS: OWNER , CONTRACTOR MR

rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon

INITIALS: OWNER  ; CONTRACTOR 

receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such lien, affidavit, stop payment notice, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavit, stop payment notice, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge that lien, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the lien, affidavit, stop payment notice, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, and HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF AND ATTORNEYS' FEES), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE, RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or

INITIALS: OWNER  CONTRACTOR 

modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type of, or nature of, the Work or limit the type of structure on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all auto" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as a named, Additional Insured, specifically identifying Owner, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Owner as an additional insured shall be primary, with any insurance of Owner being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Owner as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations,

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rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Dispute") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statute of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by

INITIALS: OWNER  CONTRACTOR 

law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

48026 Foundation Concrete
43040 Masonry
43060 Stone
45530 Flatwork Labor

SOUTH CAROLINA VERSION (REV. 12 APRIL 2013)

INITIALS: OWNER  CONTRACTOR 

Sep 14 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appeal No. 2023-001401

Natalie Zitek, individually, and on behalf of others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50,

Defendants,

And

Dr. Horton, Inc.,

Third-Party Plaintiff,

v.

A&J Framing, Inc.; A-Z, Inc., AJ Landscaping & Grading, LLC; AJ Landscaping & Grading, LLC A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC; Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American Concrete And precast, Inc., A/K/A ACP Concrete, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; BFK Builders, Inc.; BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn Lumber Co, Inc.; Bravo Carpenters, Inc.; Builders Designhouse, LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.; Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II; GBS Building Supply – US LBM, LLC F/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Get Floored, LLC; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, LLC; Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; L&M Electric, Inc.; Lade-Danlar, Inc.; Landshapers, LLC; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc. A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building

Supply, LLC; Topbuild Home Services, Inc. A/K/A Gale Contractors Service; Tucker Materials, Inc. A/K/A Gypsum; UTM Enterprises, Inc.; and Willow Tree Landscaping, Inc.,

Third-Party Defendants.

And

Aaron D. Peris; Harrelson Painting, LLC; Huttig Building Products; et al,
Fourth and Fifth-Party Defendants and Plaintiffs.

Of Whom,

D.R. Horton, Inc., is the Appellant,

And

Natalie Zitek, individually, and on behalf of others similarly situated;

Jane Doe #1-10; and John Doe #1-50;

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I certify that I have served M&L Reyna Construction, LLC and MJ Cowboys, LLC's **Petition for Writ of Supersedeas** on the parties of record by emailing a copy to the attorneys of record as follows:

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September 14, 2023

s/Helen F. Hiser
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September 14, 2023

Via S.C. Courts E-Filing & U.S. Mail

The Honorable Jenny Abbott Kitchings

South Carolina Court of Appeals

1220 Senate Street

Columbia, South Carolina 29201

mgc

RECEIVED

Sep 14 2023

SC Court of Appeals

RE: Natalie Zitek, individually, and on behalf of all others similarly situated, v. D.R. Horton, Inc., Jane Doe #1-10; and, John Doe #1-50; v. D.R. Horton, Inc., v. A J Landscaping & Grading, LLC, a/k/a A J Landscaping & Grading, LLC; AllPro Textures, LLC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc.; a/k/a ACP Concrete, Inc.; A & J Framing, Inc.; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co, Inc.; BKF Builders, Inc.; Blue Ridge Building Products, LLC; Builders DesignHouse, LLC; BMC East, LLC; Builders FirstSource Southeast Group, LLC, a/k/a Builders FirstSource, Inc.; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc., a/k/a Caryl Mechanicals, Inc.; Cannaday Siding & Gutter, Inc.; Coleman Floor, LLC; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway- Bell, Inc., a/k/a Galloway-Bell, Inc. II; Get Floored, LLC; GBS Building Supply - Us LBM, LLC, f/k/a GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc., a/k/a Greener Pastures of Aiken, LLC; Installed Building Products, LLC, a/k/a Installed Building Products II, LLC; JLS Masonry, Inc.; Kings Landscaping, LLC; LandShapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L & M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M & L General Construction, LLC, a/k/a M & L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; ProBuild Company, LLC a/k/a ProBuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC
Civil Action No.: 2019CP0401942 (Anderson)
MGC File No.: 22224.23008
Appeal No.: 2023-001401

Dear Ms. Kitchings:

The Honorable Jenny Abbott Kitchings
September 14, 2023
Page 2

Enclosed please find Respondent M&L Reyna Construction, LLC and MJ Cowboys, LLC's Petition for Writ of Supersedeas, and the Proof of Service in the above-referenced matter. We are serving counsel of record via email.

Pursuant to the Supreme Court's August 25, 2021 Order No. 2021-08-25-03 regarding Reduced Number of Copies Required in Appellate Matters, we are sending an unbound copy of the original of the Petition, along with our firm's check in the amount of \$50 for the filing fee, via U.S. Mail. If the Court needs additional copies, please let us know.

If you have any questions, please do not hesitate to contact me.

Sincerely,
McAngus Goudelock & Courie, LLC

A handwritten signature in black ink, appearing to read 'H. Hiser', with a long horizontal flourish extending to the right.

Helen F. Hiser

Enclosures

Cc: Counsel of Record (via Email only)